

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, ex rel.,)	
THE CITY OF VALLEY PARK,)	
MISSOURI,)	
)	
Respondent,)	SC No.: SC89186
)	
v.)	Appeal No.: ED89230
)	
MATTHEW ARMSTRONG, CHRISTINE)	
BREDENKOETTER, MARVIN GELBER,)	St. Louis County
BOB FORD, BETTY MARVER, MARY)	Circuit Court
SCHUMAN, JOHNNIE SPEARS, GREG)	Cause No. 05CC-002211
KLOEPPPEL, EDWARD THIBEAULT,)	
DONALD WOJTKOWSKI and TED)	
ARMSTRONG as constituting the St.)	
Louis County Boundary Commission)	
And)	
THE ST. LOUIS COUNTY BOUNDARY)	
COMMISSION,)	
)	
Appellants.)	

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellants, the Boundary Commission, St. Louis County, and its commissioners (collectively the “Commission”), appeal from the final judgment of the Circuit Court of St. Louis County, the Honorable Patrick Clifford. This appeal involves a final judgment disposing of all claims and all parties, and does not involve the validity of a treaty or statute of the United States, a statute or provision of the Missouri Constitution, title to any state office, construction of revenue laws, or the death penalty. The Missouri Court of Appeals upheld the Trial Court’s review as a non-contested case, and the Trial Court’s finding that the Commission’s denial of the City’s annexation proposal was arbitrary, capricious and unreasonable. See City of Valley Park v. Matthew Armstrong et al., 2008 WL 169787 (Mo. App. E.D. 2008). By Order dated March 18, 2008, the Eastern District Court of Appeals sustained the Commission’s Motion for Transfer and ordered this appeal transferred to this Honorable Court.

This appeal falls within the jurisdiction of the Missouri Supreme Court pursuant to Article V, Section 10 of the Constitution of the State of Missouri, the Eastern District Court of Appeal ordered transferred to this Court after opinion by the Court of Appeals due to the general interest or importance of a question involved in this appeal and because this Court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

STATEMENT OF FACTS

A. FACTUAL BACKGROUND

The Commission is an entity that by state statute may be formed in certain counties upon enactment of an ordinance by the governing body of the county. The Commission is charged with the responsibility to review and adjudicate proposed Boundary Changes within St. Louis County, Missouri (the “County”). MO.REV.STAT. § 72.400 et seq. (2000) (the “Statute”); App. A8.

In conducting its review and adjudication, the Statute directs that the Commission evaluate and approve or disapprove all Boundary Changes within the County. The procedure set forth by the Statute is the *exclusive means* by which a Boundary Change may proceed in the County¹. MO.REV.STAT. § 72.400. App. A8. The procedure pursuant to which the Commission reviews Boundary Change proposals supplants procedures under the Sawyers Act, which is applicable in other Missouri counties.

The statute requires the Commission to consider whether proposals are in the *best interest* of (1) the proposing entity, (2) the area to be annexed and (3) the remainder of unincorporated St. Louis County in reviewing proposed Boundary Changes. The Statute

¹ "Boundary change" is defined in the statute as any annexation, consolidation, incorporation, transfer of jurisdiction between municipalities or between a municipality and the county, or combination thereof, which, if approved, would result in a municipality composed of contiguous territory. MO.REV.STAT. § 72.400(2) App. A8 (hereinafter “Boundary Change”).

sets forth eleven factors the Commission must evaluate in arriving at its decision regarding the “best interest” factor.² A Boundary Change shall be approved *if and only if*

² Those factors are: (1) the impact, including but not limited to the impact on the tax base or on the ability to raise revenue, of such proposal on:

- (a) the area subject to the proposed boundary change and its residents;
 - (b) the existing municipality or municipalities, if any, proposing the boundary change and the residents thereof;
 - (c) adjoining areas not involved in the boundary change and the residents thereof;
- and
- (d) the entire geographic area of the county and its residents;
- (2) legal description of the area to be annexed; (3) creation of logical and reasonable municipal boundaries; (4) a comparison of the level of services presently provided to the area with the level of services to be provided by the incorporating municipality; (5) a proposed time schedule whereby the municipality plans to provide such services; (6) current tax rates of the areas subject to the proposal; (7) what sources of revenue other than property tax are collected or are proposed to be collected by the municipality; (8) the extraordinary effect the boundary change will have on the distribution of tax resources in the county; (9) how the municipality proposes to zone any area not presently incorporated; (10) the compactness of the area subject to such proposal; (11) the effective date of the proposed change. MO.REV.STAT. § 72.403.3, App. A15-16.

the Commission determines, after considering all eleven factors, that the best interest standard is met. MO.REV.STAT. § 72.403. App. A14-16.

The City submitted a proposal for annexation of an area commonly known as Peerless Park.³ Ex. K, pp. VP41-74. After receipt of the proposal, the Commission conducted a hearing pursuant to the Statute and the Commission's Rules. Ex. K, pp. VP245-77. At the first of two public hearings, the City presented evidence and witnesses in support of its proposal and the Commission received additional evidence both in favor of and against the City's proposal from landowners in the area, County representatives and interested citizens.⁴ *Id.* The City then submitted an amended proposal (the original

³ References to the Legal File shall be to "L.F.____"; references to page and line numbers of the Transcript shall be to "T. [page]: [line]"; references to the Appendix shall be to "App.____"; references to Exhibits submitted to the Trial Court and to this Court separately shall be to "Ex. _____, p. [page if necessary]." All page numbers of the documents included in the record of proceedings before the Boundary Commission are preceded by the abbreviation "VP", which refers to "Valley Park".

⁴ MO.REV.STAT. § 72.403 sets forth the procedure the Commission shall follow when reviewing a proposed annexation. Pursuant to authority conferred by § 72.402, the Commission adopted detailed rules that set forth the procedure adopted by the Commission for public hearings on boundary adjustments. App. A8 and A37. The City did not request any variation from the statutorily prescribed procedure before or after the hearings.

and amended proposals are hereinafter collectively referred to as the “Proposal”) that significantly changed the Plan of Intent by incorporating additional services to be provided by the City to the area sought to be annexed and providing that the City accepted obligations pursuant to a previously adopted TIF proposal in an Annexation Agreement with Drury Development Corporation. T. 25:13-18; Ex. K, pp. VP1-40. Due to the significant changes in the Plan, the Commission conducted a second public hearing. Ex. K, pp. VP304-28.

The Commission conducted the hearings, which are statutorily required, in accordance with the procedural requirements of its duly adopted Rules. The validity of the Rules is not challenged in this proceeding. Notice of the hearing was given directly to St. Louis County, the City, Valley Park School District, Special School District, Valley Park Fire Protection District, Metropolitan Sewer District, Lafayette Industries, St. Louis County Library and St. Louis Community College. Ex. K, pp. VP221-42. Notice was given to the public, adjoining municipalities, taxing entities and the County through publication in a newspaper of general circulation. Id.

The City and County were parties to the hearings and presented evidence at the hearings. Ex. K, pp. VP245-77 (first hearing), VP304-20 (second hearing); Mo.Rev.Stat. § 72.403, App. A14-17⁵. Other interested individuals also presented evidence at the hearings. Id. Neither the City nor the County requested either the format or procedure

⁵ “At such public hearing, the county, the proposing agent and affected municipalities shall be parties ...” MO.REV.STAT. § 72.403.2

for conducting the hearing be altered from what is required by the Statute or the Commission's duly adopted Rules. Id. The hearings were conducted as required by the Statute and the Commission's Rules.

Subsequent to the second public hearing, and after evaluation of the factors set forth by the Statute, the Commission determined that the City's proposed annexation was not in the best interest of the City, the area to be annexed, and the area adjacent to the area sought to be annexed. Ex. K, pp. VP437-44. The Commission issued its "Summary of Decision," as required by the Statute, detailing the reasons and factual support for its decision to deny the proposed Boundary Change. Ex. K, p. VP451; MO.REV.STAT. § 72.405. App. A17-19. The City then filed this action seeking judicial review of the Commission's determination. L.F. 5.

B. PROCEDURAL HISTORY

1. PLEADINGS AND MOTIONS

The City filed this action as a Petition for Writ of Certiorari on May 24, 2005. Count I sought review under § 536.150 as a non-contested case and Count II, alternatively, sought review under § 536.140 as a contested case. L.F. 5. The Petition set forth the facts regarding submission of the City's Proposal, the hearings held and the substantive decision of the Commission. L.F. 5-15. The City filed its First Amended Petition amending Count II to more specifically identify the bases for contested case review. L.F. 16-18. The Commission filed with the Court the entire record of the proceedings on the Proposal. The Record is a two volume, 456 page compilation that includes the Proposal, transcripts of the hearings, St. Louis County's objections to the

Proposal, written comments submitted to the Commission pursuant to the Rules, and the Commission's Summary of Decision. Ex. K.

The Commission filed its Motion to Dismiss Count I and its Memorandum in Support on or about December 20, 2005 on the ground that Count I failed to state a claim in that the matter was a contested case and was properly reviewed as a contested case. L.F. 23 and 26. The City filed its Response and the Motion was argued before the Trial Court on May 30, 2006. The Court denied the Commission's Motion to Dismiss. L.F. 69. The matter proceeded to trial on September 20, 2006. The morning of trial the City voluntarily dismissed Count II without prejudice. L.F. 70. The Commission again raised its objection to non-contested case review. T. 4:10-25, 5:1-3, 6:7-17.

The City presented testimonial evidence of the City Clerk, Margarette Wilburn, Charles Wilkin, Chief of the Valley Park Fire Protection District⁶, and John Brancaglione, an urban planner. The City proffered documentary evidence including the original and amended Plan of Intent and the Commission's Summary Decision. The Commission requested that the Court take judicial notice of the Record of the Commission, which had been previously filed with the Court and the Court did so, without objection from the City. T. 2:23-25, 3:9.

2. JUDGMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW

⁶ The Fire Protection District is an independent entity neither associated nor connected with the City of Valley Park. T. 38:11-16.

On December 12, 2006, the Court entered its Findings of Fact, Conclusions of Law and Judgment, wherein it determined that the Commission's decision to deny the Proposal was arbitrary, capricious, and unreasonable and finding that the Proposal should have been approved. L.F. 82.

In rendering its decision, the Trial Court made the following conclusions of law based on the proposed findings submitted by the City: the Proposal as in the best interest of the City, the area, the unincorporated areas affected by the Proposal and of those areas of St. Louis County next to the area; the Proposal would not have a substantial impact on the tax base or the ability to raise revenue on the annexation area, the City, and the adjoining areas of St. Louis County; the Proposal will enhance or provide new desirable services to the area to be annexed at a minimal cost to the residents of the annexed area; the Proposal represents a logical progression of the boundaries of the City; the proposed boundaries do not create pockets of unincorporated areas and is legally contiguous with the City; a 1% increase in sales tax is not an unreasonable burden on the area; the Meremac River is not impediment to City providing services to area; the proposed zoning is in harmony with existing zoning; and, the City's Plan of Intent satisfies § 72.400 et seq. L.F. 82.

POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN DENYING THE BOUNDARY COMMISSION, ST. LOUIS COUNTY’S MOTION TO DISMISS COUNT I BECAUSE COUNT I FAILED TO STATE A CLAIM FOR NON-CONTESTED CASE REVIEW IN THAT THE PROCEDURE GOVERNING BOUNDARY CHANGES UNDER THE JURISDICTION OF THE BOUNDARY COMMISSION, ST. LOUIS COUNTY PURSUANT TO MO.REV.STAT. § 72.400 ET SEQ. WAS A PROCEEDING BEFORE AN AGENCY, WHICH REQUIRED A HEARING AND WHICH DETERMINED THE LEGAL RIGHTS OF SPECIFIC PARTIES.**

Cases:

Battlefield Fire Prot. District v. City of Springfield, 941 S.W.2d 491 (Mo. 1997)

Cade v. State Dept. of Social Services, Division of Family Services, 990 S.W.2d 2 (Mo. App. W.D. 1999)

McCoy v. Caldwell County, 145 S.W.3d 427 (Mo. 2004)

Weber v. The Fireman’s Retirement System, 872 S.W. 2d 477 (Mo. 1994)

II. THE TRIAL COURT ERRED IN REVERSING THE COMMISSION'S DECISION DENYING THE ANNEXATION PROPOSAL BECAUSE THE JUDGMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE THAT THE COMMISSION'S DECISION WAS ARBITRARY AND CAPRICIOUS IN THAT THE WEIGHT OF THE EVIDENCE SUPPORTS THE COMMISSION'S DETERMINATION THAT THE PROPOSAL WAS NOT IN THE BEST INTEREST OF THE CITY, THE COUNTY, AND THE AREA TO BE ANNEXED BECAUSE THE ANNEXATION WOULD RESULT IN AN ELONGATED PROTRUSION INTO ST. LOUIS COUNTY, THE AREA TO BE ANNEXED WOULD SUFFER FROM AN INCREASE IN TAXES WITHOUT A SIGNIFICANT INCREASE IN SERVICES, AND ST. LOUIS COUNTY WOULD LOSE \$122,292 IN REVENUE.

Cases:

Hundley v. Wenzel, 59 S.W.3d 1 (Mo. App. W.D. 2001)

Missouri Nat. Educ. Ass'n v. Missouri Bd. of Educ.,

34 S.W.3d 266 (Mo. App. W.D. 2000)

Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE BOUNDARY COMMISSION, ST. LOUIS COUNTY’S MOTION TO DISMISS COUNT I BECAUSE COUNT I FAILED TO STATE A CLAIM FOR NON-CONTESTED CASE REVIEW IN THAT THE PROCEDURE GOVERNING BOUNDARY CHANGES UNDER THE JURISDICTION OF THE BOUNDARY COMMISSION, ST. LOUIS COUNTY PURSUANT TO MO.REV.STAT. § 72.400 ET SEQ. WAS A PROCEEDING BEFORE AN AGENCY, WHICH REQUIRED A HEARING AND WHICH DETERMINED THE LEGAL RIGHTS OF SPECIFIC PARTIES.

The question presented is whether decisions by the Commission are properly reviewed as a contested case or a non-contested case. MO.REV.STAT. § 536.010 et seq. The Trial Court erroneously denied the Commission’s Motion to Dismiss Count I, which sought dismissal of Count I and requested review of the Commission’s decision to deny the annexation proposal solely as a contested matter pursuant to Count II of the City’s petition.

A. STANDARD OF REVIEW

Whether a case is classified as “contested” or “non-contested” is a legal issue to be determined by the court. Cade v. State Dept. of Social Services, Division of Family Services, 990 S.W.2d 32, 36 (Mo. App. W.D. 1999). Determination of whether the matter is reviewed as a non-contested case or contested case determines the parameters of judicial review, not only at the trial court level but also at the appellate level. Benton-

Hecht Moving & Storage, Inc. v. Call, 782 S.W.2d 668, 669 (Mo. App. W.D. 1989). Review of a contested case is limited to the record created before the administrative body. Cade, 990 S.W.2d at 37. Substantial deference is given to the agency's decision. Reed v. Missouri Dept. of Social Services, Family Support Div., 193 S.W.3d 839, 841 (Mo. App. E.D. 2006). Where there is evidence both in favor of and against the agency's determination, the trial court must uphold the agency's decision. Id.

B. ARGUMENT

In Missouri, the Commission is *sui generis*. Adopted in 1991, the Statute alters the procedure to effect Boundary Changes in counties in which a boundary commission has been created. The Commission was formed by adoption of an ordinance by the governing body of the County to oversee all Boundary Changes in the County. A proceeding pursuant to the Statute and the Commission Rules is the exclusive means by which municipalities in St. Louis County effect Boundary Changes. MO.REV.STAT. § 72.401. App. A10-12. The Commission is charged with the power, after conducting a hearing and making factual findings, to exercise oversight and control of Boundary Changes within the County.

The Statute under which the Commission was created contains two provisions for judicial review of Commission decisions. MO.REV.STAT. §§ 72.416, 72.430. App. A26, A36.⁷ Section 72.416 authorizes civil actions challenging the Commission's decisions

⁷ The Commission does not argue that all actions against the Commission should be reviewed as contested cases. For example, judicial review the Commission's actions as

and provides that if the Commission prevails the court may require the initiating party pay the Commission's legal fees. MO.REV.STAT. § 72.416. App. A26. Section 72.430 grants standing to "[a] county or any other interested municipality or person [to] bring an action against the [C]ommission established pursuant to section 72.400 contesting a proposed boundary change or other commission action." MO.REV.STAT. § 72.430. App. A36.

While Chapter 72 provides general statutory authority for interested persons or municipalities to challenge Commission decisions, the Statute does not explicitly delineate the scope of review. Where there is no specific statute concerning an aspect of judicial review of administrative agency decisions—example, the scope of review in this case—Chapter 536 operates to fill in gaps in the administrative procedures. Grace v. Missouri Gaming Comm'n, 51 S.W.3d 891, 896 (Mo. App. E.D. 2001).

A contested case under Chapter 536, the Missouri Administrative Procedure Act (MAPA), is defined as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after a hearing." MO.REV.STAT. § 536.010(2). However, the "key to the classification of a case as contested or non-contested is the requirement of a hearing." Cade, 990 S.W.2d at 36.

1. THE COMMISSION IS AN AGENCY FOR PURPOSES OF MAPA

to a specific Map Plan, under Article III of its Rules, would not be a contested case because there is no requirement for a hearing at which the specific rights or interests of a party are determined.

MAPA defines an agency as an “administrative body existing under the constitution or by law, authorized by law to make rules or to adjudicate contested cases, except those in legislative or judicial branches.” MO.REV.STAT § 536.010(2). The Commission is created and exists under law, specifically MO.REV.STAT. § 72.400 et seq. App. A8-36. The Commission is charged with adjudication of all proposed Boundary Changes. The Commission is statutorily empowered to make rules. Id. Thus, the Commission is an “agency” within MAPA and no contention or argument is made in this case that the Commission is not an “agency” for purposes of MAPA.

2. THE CITY IS “AGGRIEVED”

Standing to challenge an administrative decision, as non-contested or contested, requires that the legal rights or interests of a party be adversely impacted by the agency’s decision. MO.REV.STAT. §§ 536.010(2) and 536.150; see generally Columbia Sussex Corp. v. Missouri Gaming Comm’n, 197 S.W.3d 137 (Mo. App. E.D. 2006) (detailing standing requirements in non-contested and contested cases). In the context of contested cases, section 536.100 requires that a party be “aggrieved” by the agency’s decision. Mo.Rev.Stat. § 536.100. An aggrieved party is one who has a specific and legally cognizable interest in the subject matter of the administrative decision. City of Eureka v. Litz, 658 S.W.2d 519, 522 (Mo. App. E.D. 1983). The decision must operate prejudicially and directly upon plaintiff’s personal or property rights or interests and such must be immediate and not merely a possible remote consequence. Id. “The question is one of law and depends upon a variety of considerations, including the nature and extent of the interest of the person who asserts status to contest the administrative action, the

character of the administrative action, and the terms of the statute which enable the agency action.” Id.

In the context of annexations under the Sawyers Act, this Court holds that a legally protected interest sufficient to confer standing to challenge a annexation arises where it is conferred by statute or where plaintiff can demonstrate that the annexation will directly and adversely affect it. Battlefield Fire Prot. District v. City of Springfield, 941 S.W.2d 491 (Mo. 1997).

In Horseshoe Bend Property Owners Ass’n v. Camden County Comm’n, residents who lived within an area incorporated into a new village petitioned the Circuit Court, pursuant to MO. REV. STAT. § 536.100, for review of the County’s decision. 748 S.W.2d 848 (Mo. App. S.D. 1988). The trial court determined that the residents did not have standing to challenge the incorporation because the residents were not “aggrieved” under section 536.100. Id. The Court of Appeals reversed, agreeing with the residents that they had personal and property rights that would be directly and substantially affected by the newly created village. Id. at 850. The Court held that those residing in or owning realty in the newly incorporated village were “aggrieved” by its incorporation, and thus were entitled to obtain judicial review of that decision. Id. at 854.

In this case the City is “aggrieved” and standing is conferred upon it for two reasons. First, the Statute creates the City’s legal interest in the Commission’s decision in sections 72.416 and 72.430. Section 72.416 states “[t]he county, an interested municipality, or any other interested party may bring an appropriate civil action against the commission regarding a proposed boundary change, unincorporated area proposal, or

other commission action or failure to act.” Section 72.430 further states that “[a] county or any other interested municipality or person may bring an action against the commission established pursuant to section 72.400 contesting a proposed boundary change or other commission action.” The plain language of the statute is clear the City, as an interested municipality, has standing to challenge the Commission’s decision regarding a proposed boundary change and thus is an “aggrieved party.”

Second, the Commission’s decision affects the legal rights and interests of the City. The City’s interest in this case is dramatically different from the public at large. Proceeding through the Commission is the sole means in which the City can achieve Boundary Changes. Furthermore, there is potential for receipt of additional tax revenue if the boundary is changed.

The City argues that no legal rights, duties or privileges of specific parties were determined by the Commission. In support of this argument, the City cites Midland Township v. State Boundary Commission, 259 N.W.2d 326, 341 (Mich. 1977). In that case, the Michigan Supreme Court addressed whether decisions of the Michigan Boundary Commission were reviewable under the Michigan Administrative Procedures Act. Midland Township v. State Boundary Commission, 259 N.W.2d 326, 341 (Mich. 1977). Under Michigan law, to qualify as a contested case the agency must determine the “legal rights, duties, or privileges of a named party.” Id. at 340. The Court stated that in the context of annexation proceedings “[n]o city, village, township or person has any vested interest in the boundaries of such governmental units” and therefore the issue

could not be reviewed as a contested case under the Michigan Administrative Procedures Act. Id. at 341.

The City's argument and Midland's statement that no city, village or person has legal interests in the boundaries of governmental units is contrary Missouri law. As stated above, in annexation proceedings Missouri recognizes a legally protected interest in those who are directly and adversely affected by the annexation and those whose interest is created by statute. Battlefield Fire Protection District v. City of Springfield, 941 S.W.2d 491 (Mo. 1997); Horseshoe Bend Property Owners Ass'n v. Camden County Comm'n, 748 S.W.2d 848 (Mo. App. S.D. 1988). Based on Midland, it appears Michigan does not share Missouri's view of the legally protected interests of municipalities.

Moreover, the City's argument is fatal to its desire to have the Court review the Commission's decision as a non-contested case. A non-contested matter requires the "legal rights, duties or privileges of specific parties" be determined by the agency's decision. MO.REV.STAT. § 536.150; Missouri Nat'l Educ. Ass'n v. Missouri Bd. of Educ., 34 S.W.3d 266, 275 (Mo. App. W.D. 2000)(to have standing for review under section 536.150 the agency must affect the private rights of the person seeking judicial review). If, as the City contends, it has no legal right, duty or privileges in regard to the annexation proceeding, the City may not appeal the Commission's decision under MAPA either as a contested or non-contested case and would have to fashion some other basis for relief from the right to challenge Commission's action that is granted by § 72.416 and § 72.430.

The City has a legally protected interest in this proceeding and is “aggrieved” by the Commission’s decision to deny the annexation; this legal interest does not, however, require reversal of the Commission’s decision as discussed in Point II, *infra*.

3. MO.REV.STAT. § 72.403 REQUIRES A “HEARING”

Section 72.403 and the Rules require a hearing prior to making a decision on a Boundary Change. It is the requirement of a hearing imposed by statute or law that determines whether a matter is contested or non-contested. State ex. rel. Yarber v. McHenry, 915 S.W.2d 325, 328 (Mo. 1995).

This Court in McCoy v. Caldwell County clarified the type of hearing necessary to trigger contested case review. 145 S.W.3d 427, 428 (Mo. 2004). A gratuitous reference to a “hearing” within a statute does not convert an informal proceeding into a contested case. Id. at 429. In McCoy, the Sheriff of Caldwell County terminated two deputies. Id. The statute governing dismissals of deputies provided for a “closed hearing” when requested by the deputy. Id. However, under the statute the hearing and findings made in the hearing were advisory only and the sheriff had final decision making authority. Id. This Court held that because the sheriff could wholly disregard the procedure governing conduct of the hearing as well as the conclusions of hearings the proceeding was not a contested case hearing. Id. In other words, for a hearing to qualify as contested case hearing, the agency’s decision must be formulated on and as a result of the hearing. Id.

Whether the agency actually held a contested case hearing with all of the procedural formalities outlined in Chapter 536 is not determinative. Weber v. The Fireman’s Retirement System, 872 S.W. 2d 477, 481 fn3 (Mo. 1994); see also Yarber,

915 S.W.2d at 328. Instead, the determinative factor is whether a hearing was required. Id.

In Weber, the Court addressed the issue of waiver of procedural formalities and the proper review of an agency decision where the agency procedures did not provide for the examination of witnesses or testimony under oath. Id. Weber was provided a limited hearing, in which he presented his argument and evidence that he was disabled. Id. However, neither he nor his attorney was permitted to ask questions of the Board. Id. This Court noted that although Weber could have demanded all the procedural rights provided under MAPA, he failed to object to the nature or form of the hearing provided. Id. at 478. “Procedural requirements that would otherwise be necessary before a final decision in a contested case may be waived.” Id. at 479; MO.REV.STAT. § 536.060(3). The Court found that Weber was entitled to and was provided with a contested case hearing, even though the hearing itself did not comply with MAPA requirements. Id. at 479-80.

This Court’s reasoning is instructive: “an agency and the contestant . . . may forgo rights accorded to them by law in the interest of saving time and expense. The ability to pursue a less formal and less expensive method of decision making in appropriate cases may serve the interests of both the agency and the contestant.” Id. The Court recognized that “[w]e may have painted with too broad of a brush in Hagely v. Board of Education when we said ‘[a] hearing that is not held pursuant to the procedural format necessary under MAPA does not qualify as a contested case, even though a hearing is required by

law.)’ Procedure does not generally change the substantive nature of the dispute.” Id. at n.3 (internal citations omitted).

Under the Statute and Rules, the Commission’s decision regarding a Boundary Change proposal must be formulated after and as a result of the hearing; as such, the proceeding before the Commission is a contested case.

There is no dispute as to what the Statute requires: the Statute requires a hearing. Mo.Rev.Stat. § 72.403; App. A14-16. The Statute identifies the parties to the hearing, and requires that notice be provided to the parties, certain specifically identified interested individuals and the public in general. Id. The Statute and Rules allows for the parties and other interested individuals to submit evidence regarding the proposed Boundary Change. Id. The Commission is required to create a record of the proceeding. The Rules require that the Commission base its decision solely on that record. The Statute and Rules require that the Commission provide findings supporting its decision—specifically denominated a Summary of Decision—and where the Commission denies a proposal it must also issue a document indicating the reasons this proposal was disapproved. MO.REV.STAT. § 72.405 App. A17.

The City was entitled to, and was in fact afforded, two full and fair opportunities to present the facts supporting of its Proposal at a statutorily required hearing. In connection with the hearings conducted on the City’s Proposal, notice was provided to the general public through notice published in a newspaper of general circulation, and notice was given directly to St. Louis County, the City, the Valley Park School District, the Special School District, the Valley Park Fire Protection District, the Metropolitan

Sewer District, Lafayette Industries, the St. Louis County Library, and St. Louis Community College. Ex. K, pp. VP221-42. A 456-page record was created by the Commission, which includes a transcript of the audio recording of each hearing, the documentary evidence submitted to the Commission and comments received during the statutorily required twenty-one (21) day comment period. Ex. K. The City presented evidence to support its Proposal during both hearings (Ex. K, pp. VP245-58, VP304-19). During the hearings, the City was represented by counsel, Eric Martin, and it presented testimony not only of Mr. Martin, but also of Dan Michel, Mayor of Valley Park (Ex. K, pp. VP247-48) and Marguerite Wilburn, City Collector (Ex. K, pp. VP248-30). The City made no objections to the form of the hearing or procedures provided to it. Ex. K, pp. VP245-58, VP304-19. As in Weber, the City could have requested all of the procedural formalities afforded under MAPA, but the City did not object and therefore waived those formalities.

The City argues that the procedural formalities actually provided by the Commission and outlined in the Statutes and the Rules do not comply with sections 536.063 through 536.090 and therefore the matter is not a contested case.⁸ Under the

⁸ Specifically, the City complains that testimony was not taken under oath, there was no cross-examination of witnesses and that evidence was received without adherence to the formal rules of evidence. Although the City emphasizes these alleged procedural deficiencies, it does not demonstrate any practical effect of the alleged procedural deficiencies on its ability to present the facts to The Commission.

City’s reasoning, unless the statute or agency rules requiring a hearing expressly provide for each and every formality identified in sections 536.063 through 536.090, judicial review of the agency decision will be as a non-contested case.

The City’s argument is premised on Hagely v. Board of Education. The holding of Hagely was overruled in Weber and Yarber. The City’s argument also ignores the General Assembly’s determination that an agency or party to a proceeding may waive pre-decisional procedural formalities as provided by sections 536.060 and 536.063.3. “Where issues are tried without objection or by consent, such issues shall be deemed to have been properly before the agency. Any formality of procedure may be waived by mutual consent.” MO.REV.STAT. § 536.063.3. Weber, 872 S.W. 2d at 481 (Mo. 1994). In fact, if the City’s argument was correct, sections 536.063.3 and 536.060 would be rendered superfluous.

It is not the procedures afforded which determine whether a matter is a contested case or non-contested case; it is whether the statute or substantive law require a hearing that determines a party’s legal right, duties or privileges. The Statute and Rules require a hearing—and the City was provided two hearings—at which a level of procedural formality is required. Each requirement of a contested case was present and the Trial Court erred in reviewing the matter as a non-contested case.

**4. REVIEW OF THE COMMISSION’S DECISION AS A “CONTESTED CASE” IS
CONSISTENT WITH THE HISTORICAL AND STATUTORY FRAMEWORK FOR
ANNEXATIONS**

Judicial review of the Commission's decisions as a contested case is consistent with the historical and statutory framework of annexations under the Sawyers Act, which likely informed the Legislature's decision with regard to how to structure the role of the Commission.

Under the Sawyers Act, involuntary annexations proceed in several stages. MO.REV.STAT. § 71.015. The municipality must adopt a resolution of intent to annex wherein it determines that the area to be annexed is contiguous to the existing municipal limits. Id. Upon adoption of the resolution, the municipality prepares a Plan of Intent. Id. The municipality must also prepare and introduce a bill to be considered and ultimately adopted as an annexation ordinance. Id. The ordinance must recite facts supporting the conclusion that the annexation is reasonable and necessary to the proper development of the city. Id. Prior to adoption of the annexation ordinance, the municipality must hold a public hearing on the annexation. Id. The purpose of the hearing is to present evidence in support of the Plan of Intent. Id. Although the county lacks standing to file an objection to the annexation, it may present evidence at the hearing. St. Louis County v. Village of Peerless Park, 726 S.W.2d 405 (Mo. App. E.D. 1987). Statutory notice must be provided to all fee owners in the area to be annexed. MO.REV.STAT. § 71.015. Following the hearing and adoption of the ordinance, the voters of the municipality and the area to be annexed are then free to approve or reject the

proposed annexation. Id. If the annexation is approved, the municipality must file a declaratory judgment action before the annexation is complete.⁹ Id.

In the Declaratory Judgment action, the municipality has the burden of proceeding with the evidence, rather than a burden of proof. City of St. Peters v. Winterhoff Living Trust, 77 S.W.3d 17, 20-21 (Mo. App. E.D. 2002). The Court reviews the decision under a fairly debatable standard. Id. at 20. Where the municipality presents substantial evidence that the annexation is both reasonable and necessary, it renders the decision fairly debatable and it will be upheld. City of St. Peters v. Winterhoff Living Trust, 117 S.W.3d 698, 700-01 (Mo. App. E.D. 2003).

The three notable differences between the Sawyers Act, and the Statute and Rules governing the Commission are (1) the standard by which the decision to permit the annexation is governed¹⁰, (2) omission of the requirement for a declaratory judgment action to review the governing body's legislature decision approving the annexation, and (3) creation of an independent decision making authority to rule on all annexations in the County.

In counties that operate under the Sawyers Act, the annexation proposal is initially adopted by the legislative act of the municipality proposing the annexation. That

⁹ The city may proceed with the Declaratory Judgment action and then hold the election. Mo.Rev.Stat. § 71.015.1(5).

¹⁰ The standard under the Sawyers Act is reasonable and necessary as opposed to the best interest of the City, County and area to be annexed under § 72.400, et seq.

legislative process requires that the elected governing body of the municipality hear evidence on the annexation proposal and make a decision on the proposal that is then subject to limited judicial review by the circuit court in the statutorily required declaratory judgment action. Under the Commission framework, the Commission is vested with the obligation to hear evidence from all interested parties and to make its decision based upon that evidence. In St. Louis County, operating under the control of the Commission, the municipality is placed in a unique position of being the petitioner before an independent commission. The Commission's decision is analogous to the municipal governing body's determination in a Sawyers Act proceeding, that the annexation is or is not reasonable and necessary, although the Commission has no independent interest in whether the annexation proceeds apart from its statutory duties.

While review of a Sawyers Act annexation is conducted *de novo* before the trial court, the trial court's discretion to "second guess" the elected official's decision is limited. Similarly, after the Commission has engaged in the process of seeking comment and evidence from all interested parties and holding one or more public hearings at which all parties are permitted to present evidence, the Commission then issues its Summary of Decision. To permit a second, full blown evidentiary hearing before a trial court in each and every case in which a municipality is dissatisfied with the Commission's decision would undermine the purpose and intent of the statutory framework established by the legislature. Unless the Commission's discretion to hear the facts and determine the evidence on the basis of the record created before it is acknowledged, the Commission's

role is nothing more than a rubber stamp for the municipality's statement of intent to proceed with an annexation.

Unless the Commission's position in this case is applied by this Court, the procedures contained in the statute to streamline and simplify Boundary Changes in complex counties would be a meaningless delay en route to the Circuit Court for a re-determination as to whether the annexation was in the best interest of the municipality, the County and the area to be annexed. This cannot have been the legislature's intention in providing for creation of the Commission. As is the case in traditional annexations, the Commission's decisions are properly subject to a substantial evidence standard of judicial review as a contested case where substantial deference is given to the agency's decision. If there is substantial evidence on both sides of the question, deference should be given to the Commission's decision.

C. CONCLUSION

Chapter 72 authorizes judicial review of the Commission's decisions, but it does not provide a procedural framework. MAPA fills in the gaps. Grace v. Missouri Gaming Comm'n, 51 S.W.3d at 896. Contested case review is proper where an agency after a hearing, determines the legal rights, duties or privileges of specific parties. MO.REV.STAT. §§ 536.010, 536.100.

The Commission is clearly within the definition of an "agency" under MAPA, in that it was created by statute from which it derives its adjudicatory authority. MO.REV.STAT. § 72.401. App. A10-12. The Commission is vested with exclusive authority to grant or deny Boundary Changes in St. Louis County. This authority affects

the specific rights and interests of parties—in this case the City and the residents and property owners in the area to be annexed. MO.REV.STAT. § 72.403. App. A14-16. A hearing, which is required by the Statute to provide a level of procedural formality, is mandated when a Boundary Change is proposed. MO.REV.STAT. §§ 72.403, 72.405. App. A14-16, A17-19.

There is no challenge in this case that the Commission’s Rules are in any way deficient or that the Rules do not provide adequate procedural safeguards to proposing agents. That the City failed two times to request all of the procedural formalities provided under MAPA demonstrates its implicit acceptance of the Rules and its waiver of any argument that it was entitled to any different procedure than that offered by the Commission.

Therefore, the Trial Court erred in denying the Commission’s Motion to Dismiss Count I and further erred in reviewing this matter as a non-contested case under MO.REV.STAT. § 536.140.

II. THE TRIAL COURT ERRED IN REVERSING THE COMMISSION’S DECISION DENYING THE ANNEXATION PROPOSAL BECAUSE THE JUDGMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE THAT THE COMMISSION’S DECISION WAS ARBITRARY AND CAPRICIOUS IN THAT THE WEIGHT OF THE EVIDENCE SUPPORTS THE COMMISSION’S DETERMINATION THAT THE PROPOSAL WAS NOT IN THE BEST INTEREST OF THE CITY, THE COUNTY, AND THE AREA TO BE ANNEXED BECAUSE THE ANNEXATION WOULD RESULT IN AN ELONGATED PROTRUSION INTO ST. LOUIS COUNTY, THE AREA TO BE ANNEXED WOULD SUFFER FROM AN INCREASE IN TAXES WITHOUT A SIGNIFICANT INCREASE IN SERVICES, AND ST. LOUIS COUNTY WOULD LOSE \$122,292 IN REVENUE.

A. STANDARD OF REVIEW

Section 536.150.1, which applies to non-contested cases, permits judicial review of an agency decision when the agency determines “the legal rights, duties or privileges of any person...”. Under § 536.150.1, the circuit court may hear evidence regarding the legal rights, duties or privileges of the parties and “may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion.” MO.REV.STAT. § 536.150.1.¹¹ App. A96. Review of a non-contested case, requires that the trial court

¹¹ This point is asserted without prejudice to the Commission’s position that contested case review was the proper method of review. Without waiving that argument, the

review not only the administrative record, but hear evidence, determine facts, and adjudge the validity of the agency decision. Cade, 990 S.W.2d at 37. No deference to agency determinations is given by the trial court. Id.

“In a non-contested case, the [appellate court] reviews the judgment of the trial court and not the agency, and thus the standard of review is the same as in any other court-tried case.” Hundley v. Wenzel, 59 S.W.3d 1, 5 (Mo. App. 2001). “Thus, the scope of appellate review is governed by Rule 73.01 as construed in Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976).” Missouri Nat. Educ. Ass’n v. Missouri Bd. of Educ., 34 S.W.3d 266, 274-75 (Mo. App. 2000). The trial court's judgment will be affirmed, “unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law.” Legal Communications Corp., 24 S.W.3d at 750. “Accordingly, the appellate court reviews the circuit court's judgment to determine whether its findings that the agency decision was or was not unconstitutional, unlawful, unreasonable, arbitrary, capricious, or the product of an abuse of discretion rests on substantial evidence and correctly declares and applies the law.” Missouri Nat'l Educ. Ass'n, 34 S.W.3d at 275.

B. Argument

The Trial Court holding that the Commission's decision was arbitrary capricious and unreasonable is against the weight of the evidence because based upon the facts

Commission also believes even if non-contested case review is the standard the Commission's decision should have been affirmed.

presented at trial the Commission's decision to deny the Proposal was based upon substantial evidence and was neither whimsical, impulsive nor unpredictable.

An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence. Missouri Nat. Educ. Ass'n, 34 S.W.3d at 281. Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. Id. Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable. Id. An agency must base its decision on objective data and facts rather than mere surmise, guesswork, or "gut feeling." Id. Further, the agency must act within the confines of guidelines and criteria. Id.

As authorized by § 536.150, but over the Commission's objection, the Trial Court took additional evidence, heard witnesses, and entered its Findings of Fact and Conclusions of Law. The overwhelming weight of the evidence in the record before the Trial Court establishes that the Commission did not act unreasonably, arbitrarily or capriciously when it disapproved the City's Proposal. In fact, it is clear from the transcript that the Trial Court recognized that there was opposing evidence both in favor of and in opposition to the Proposal. T. 81:12-16.

The evidence before the Trial Court revealed that the Commission did not act arbitrarily or capriciously in denying the Proposal. First, evidence was offered that the Commission followed a specific procedure in reviewing and determining whether the Proposal was in the best interest of the City, the County and the area to be annexed. Ex. K. See, Missouri Nat. Educ. Ass'n v. Missouri Bd. of Educ., 34 S.W.3d at 281 (evidence of the methodology and procedure used to make decision militates against a finding of

arbitrariness). The City submitted two written Plans of Intent. Ex. K, pp. VP1-40, 41-73. The Commission in turn, reviewed the Proposal and held hearings on each Plan of Intent to determine if the Proposal was in the best interest of all parties. Ex. K. Based on the Proposal, and the record of the hearing, the Commission deliberated and determined that the Proposal was not in the best interest of the City, County and area to be annexed. Ex. K, pp. VP437-44. It then issued a Summary of Decision specifically setting forth the summary reasons for its denial and also incorporating all the evidence produced at the hearings. Ex. K, pp. VP451-56.

Moreover, the evidence presented to the Trial Court revealed that the Commission's decision was based upon substantial evidence. The Commission did not base its decisions on mere surmise or guesswork but on objective evaluation of the evidence applied to the eleven statutory factors.

Approval of the Proposal would create an elongated boundary and decrease the City's compactness. T. 33:18-25, 34:1; Ex. 13. The area to be annexed extends south of the Meremac River in a thin fingerlike projection. Id. The Meremac River forms a natural boundary to the City. Id. The City's own expert stated that some could argue that the River formed a natural boundary. T. 98:19-23. The testimony at trial established that the annexation, if approved, would result in the split of subdivisions. T. 68:23-25, 69:1-8. Further, the elongated projection and the splitting of the subdivisions was admittedly an attempt by the City to avoid including some residents in order to secure a favorable vote. T. 33:18-25, 34:1-8. Thus, the Commission's determination that the annexation did not represent a logical extension of the City is based in fact and is rational.

Although Highway 141 grants access to the Area, the Area to be annexed is otherwise isolated from the remainder of the City. Ex. 13. Highway 141 is the only point of access between the City and the area to be annexed. T. 11:16-18; Ex. 13. Upon annexation, taxes in the area to be annexed would increase on residential property approximately \$0.54 per \$100.00 in addition to the taxes already imposed by St. Louis County. T. 31:5-19; Ex. K, p. VP259. Sales tax would increase by 1% on each dollar spent as the City levies a storm water improvement tax and capital improvement tax to pay for the one additional service (sewer service) provided to a limited number of commercial entities in the area to be annexed. T. 29:23-25, 30:1-21; Ex. K, p. VP346. St. Louis County would have a direct annual loss of \$122,292. T. 96:17-24; Ex. K, pp. VP346-48. Although the Trial Court found that this loss of revenue would be offset by the reduction in services provided to the area by the County, there was no testimony or documentary evidence to that effect. The County presented a five-page analysis as to why the County found a negative financial impact of the annexation to the County, the area to be annexed and the City. Ex. K, pp. VP345-50.

Police services would remain with the County, although subsequent to the proposed annexation, those services would be provided under contract between the City and the County, which does not have its own police force. T. 37:16-25, 38:1-9. Presently there is no problem with the response time of the St. Louis County Police to emergencies. T. 47:22-24. Provision of fire protection services would remain the responsibility of the Valley Park Fire Protection District, not associated with the City. T. 38:11-19. Plumbing, electrical and mechanical code enforcement would remain with the County. T. 38:23-25,

39:1. The annexation would result in little change to the services provided to the area, while the area would be burdened by increase and taxes.

The County opposed the annexation. Ex. K, pp. VP341-56. Evidence presented to the Trial Court confirmed that there was substantial opposition to the annexation specifically from major businesses in the area to be annexed. T. 35:24-25, 36:1-9. However, if the annexation was approved and the proposal went to a vote of the residents in the area, the businesses would have no opportunity to oppose the annexation. T. 36:9-23.

The Commission, which is charged with the management and oversight of boundary adjustments and changes in the County, properly determined the Proposal was not in the best interest of the City, County and area to be annexed. The standard mandated by the legislature is that the Commission approves the Proposal only if it determines that the Boundary Change is in the best interest of the St. Louis County, the proposing agent and the area to be annexed, not whether the proposal is reasonable solely from the perspective of the proposing agent.

The Commission's decision that the Proposal was not in the best interest of the parties was neither impulsive nor based upon a "gut feeling." The Commission reviewed two proposals, held two hearings and compiled a 456 page record in connection with rendering its decision. The City's own expert testified that when viewed from the City's standpoint the Proposal merely was not "unreasonable" and that he simply disagreed with

the Commission's decision.¹² T. 101:14-16. The Circuit Court erred in finding that the Commission's decision was arbitrary, capricious and unreasonable, because the evidence adduced at trial established a reasonable basis for the denial.

The Trial Court's determination that the Commission acted arbitrarily, capriciously and unreasonably in denying the Proposal is not supported by substantial evidence.

¹² Mr. Brancaglione formed his opinion as to the reasonableness prior to reviewing the whole record before the Commission. T. 99:8-17.

CONCLUSION

For the foregoing reasons, Appellants Commission, St. Louis County and its members respectfully request this Honorable Court reverse and enter judgment in favor of the Commission, and for such other relief as is just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirements of Supreme Court Rule 84.06 and. Appellants' Substitute Brief contains 8907 words as determined by Microsoft Word. The diskette filed herewith contains a copy of Appellants' Substitute Brief and has been scanned for viruses and is virus free.

A copy of the foregoing brief and diskette were sent by first class mail on April 10, 2008, to the following attorneys of record:

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IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

NO. ED89230

THE CITY OF VALLEY PARK, MISSOURI
Plaintiffs/Respondents

v.

MATTHEW ARMSTRONG, CHRISTINE BREDENKOETTER,
MARVIN GELBER, BOB FORD, BETTY MARVER, MARY SCHUMAN,
JOHNNIE SPEARS, GREG KLOEPEL, EDWARD THIBEAULT,
DONALD WOJTKOWSKI and TED ARMSTRONG as constituting the Boundary
Commission, St. Louis County
And BOUNDARY COMMISSION, ST. LOUIS COUNTY,
Defendants/Appellants

Appeal from the Circuit Court of St. Louis County
The Honorable Patrick Clifford

APPENDIX TO APPELLANTS' BRIEF

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