06/21/02 "See News Release 052 for any concurrences and/or dissents."

SUPREME COURT OF LOUISIANA

No. 01-C-2658

INGUS M. HOLLINGSWORTH AND DOROTHY ROBERSON HOLLINGSWORTH
versus

CITY OF MINDEN

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF WEBSTER

WEIMER, J., dissenting.

I respectfully dissent from the majority's interpretation of LSA-R.S. 33:174(C) and 33:175. I find the language of both statutes to be "emphatic and clear." See **Lind v. Village of Killian**, 2000-0375, 2000-0376, p. 2 of concurring opinion (La.App. 1 Cir. 5/11/01), 808 So.2d 590, 592. The two statutes are consecutive and obviously deal with the same subject matter: judicial challenges to a proposed or enacted ordinance for an annexation.

Louisiana Revised Statute 33:174, entitled "Suit to contest reasonableness of proposed extension of corporate limits," provides the procedure for contesting proposed annexations. Under the statute, any interested citizen of the municipality or territory proposed to be annexed may file suit to contest the proposed annexation within the 30-day period before the ordinance becomes effective. Section C of LSA-R.S. 33:174 provides that if the trial court determines that the extension of boundaries is reasonable,"the ordinance shall go into effect ten days after the judgment is rendered and signed unless a suspensive appeal therefrom has

been taken within the time and manner provided by law." (Emphasis supplied.) Louisiana Revised Statute 33:175, entitled "Prescription of right to attack ordinance," provides that "if no appeal is taken within the legal delays from a judgment of the district court sustaining the ordinance, same shall then become operative and cannot be contested or attacked for any reason or cause whatsoever." (Emphasis supplied.)

The City argues that under LSA-R.S. 33:175, the ordinance has already become "operative and cannot be contested or attacked for any reason or cause whatsoever" because plaintiffs did not timely file a suspensive appeal under LSA-R.S. 33:174. I agree.

Reading the two statutes together, I conclude that a party who wishes to challenge the district court's judgment holding that the annexation ordinance was reasonable must do so by filing a suspensive appeal within ten days of the judgment.[1] If no suspensive appeal has been perfected within that time limitation, then the mandatory language of LSA-R.S. 33:174(C)[2] results in a completed annexation. Thereafter, because of the mandatory language of LSA-R.S. 33:175,[3] plaintiffs are completely barred from contesting the annexation.

The fact that LSA-R.S. 33:175 does not use the word "suspensive" is immaterial to reconciling the two statutes. If the legislature intended to allow

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[1] I note the plaintiffs filed a motion for new trial which was denied by the trial court approximately three months after the rendition of the judgment dismissing their suit. In light of my analysis of the applicable statutes, such a procedural device may have been unavailable. However, because neither of the lower courts nor the parties have questioned this procedure, I pretermit discussion of the issue and confine my remarks to the availability of a devolutive appeal.

[2] The mandatory language is as follows: "[T]he ordinance shall go into effect ... unless a suspensive appeal therefrom has been taken ...." (Emphasis supplied.)

[3] The mandatory language is as follows: "If ... no appeal is taken within the legal delays from a judgment of the district court sustaining the ordinance, same shall then become operative and cannot be contested or attacked for any reason or cause whatsoever." (Emphasis supplied.)

devolutive appeals in annexation cases, then the language of LSA-R.S. 33:175, which declares the judgment that upheld the ordinance to be final, would be superfluous. All judgments become final if no appeal is taken. Lack of the word "suspensive" in LSA-R.S. 33:175 does not indicate that the legislature was providing a prescriptive period for any appellate challenge other than a suspensive appeal as required by LSA-R.S. 33:174(C). The two statutory provisions complement each other.

My dissent is based exclusively on the clear language of these statutes.[4] However, I note there are cogent reasons for limiting a party who contests an annexation to a suspensive appeal. If devolutive appeals are allowed, there is an unsatisfactory and problematic result that annexation activities, such as construction of waterlines and street improvements, will have commenced and then will have to be abandoned or removed. The expenditure of city funds in an area that would later be declared not annexed would be a questionable act on the part of city government. Thus, the practical effect of allowing a devolutive appeal in an annexation case will be to suspend the annexation of the area until the appeal is decided. Plaintiffs may then have a less expensive challenge to the annexation, but the city will be deprived of the safeguard inherent in the procedural requirements for taking a suspensive appeal, such as a shorter time period[5] and an

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[4] The majority's foray into other statutes providing for appeals in a variety of cases is interesting, but not compelling in an interpretation of the provisions of the two annexation statutes at issue here.

[5] LSA-R.S. 33:174(C) shortens the time period for taking a suspensive appeal to 10 days, which indicates a legislative intent of avoiding delay in the annexation process. It is incongruous to suggest that the legislature then thwarted the intended result by allowing the 60-day delay involved in perfecting a devolutive appeal.

appeal bond.[6] The majority expresses concern that interpreting the statutes to exclude devolutive appeals will be financially burdensome on "any citizen" who may wish to challenge an annexation. However, the jurisprudence has interpreted LSA-C.C.P. 2124[7] as requiring only security sufficient to cover costs in a case of a suspensive appeal from a judgment which does not decree payment of money or delivery of property. See **Succession of Moody**, 149 So.2d 719 (La.App. 1 Cir.), rev'd on other grounds, 245 La. 429, 158 So.2d 601 (1963). Thus, the number of citizens financially foreclosed from bringing a suspensive appeal will be limited. If the requirement of security for a suspensive appeal in annexation cases works a financial hardship on some parties, the remedy for this situation is with the legislature, not with the courts.

Given the language of the statutes, it is clear the legislature intended to cloak the annexation process with the advantages of requiring that the appeal be suspensive, which intent is violated if a devolutive appeal is allowed.

Finally, by the time this case reached the court of appeal, the mandatory language of the two statutes had caused the annexation in question to have taken effect and to have become unassailable. Thus, the issue of the reasonableness of the annexation was moot.[8] Appellate courts do not hear moot cases, and parties

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[6] One of the purposes of requiring security for a suspensive appeal is to assure the appellant will prosecute the appeal. LSA-C.C.P. art. 2124(E).

[7] LSA-C.C.P. art. 2124 provides that no security is required for devolutive appeals; for a suspensive appeal of a judgment for the payment of a sum of money, with specified exceptions, security equal to the amount of the judgment plus interest is required. When the judgment distributes a fund in *custodia legis*, only security sufficient to secure the payment of costs is required. In all other cases, the security shall be fixed by the trial court at an amount sufficient to assure the satisfaction of the judgment, together with damages for the delay resulting from the suspension of the execution. LSA-C.C.P. art. 2124(B)(3).

[8] It is also questionable whether the court of appeal had jurisdiction in this case. A citizen's time-barred challenge to the legality of an election for a bond issue and securities was dismissed on the grounds of both prescription and lack of appellate jurisdiction in **Miller v. Town of Bernice**, 186

cannot agree to litigate a moot issue. See **St. Charles Parish School Board v. GAF Corporation**, 512 So.2d 1165, 1172 (La. 1987) (settlement between the parties rendered the original demand or claim moot). All of the legal questions arising from the controversy between the parties in the present case became moot, abstract, or hypothetical on the date the ordinance became effective. The effectiveness of the ordinance extinguished the original demand or claim and prevented any further action or proceeding thereon. ***Id***. Because the action cannot be prosecuted further, any exception or means of defense sought to be used by the defendant to extinguish or bar the action, such as prescription or peremption, has been made abstract or purely academic. ***Id***.

La. 742, 173 So. 192 (1937).