STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CITY OF MENASHA, WISCONSIN,

Plaintiff-Appellant,

v.

Appeal No. 2016AP000702
Circuit Court No. 2015CV000017

VILLAGE OF HARRISON, WISCONSIN,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT, VILLAGE OF HARRISON

Appeal of a Final Order of the Calumet County Circuit Court
The Honorable Angela W. Sutkiewicz, presiding

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August 15, 2016

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ISSUES PRESENTED

1. When a village annexes land from a town using the direct annexation by unanimous approval method (Wis. Stat. §66.0217(2)), does a neighboring city who would have preferred to annex the land itself have standing to challenge the village's annexation?

Answered by the Circuit Court: No.

2. Did the Village of Harrison's annexation of territory violate the rule of reason, violate an agreement between the City of Menasha and the Town of Harrison, or create illegal Town islands?

Answered by the Circuit Court: The circuit court did not answer this question because the City's claims were dismissed for lack of standing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is believed that the briefs will fully present the issues on appeal and fully develop the theories and legal authorities.

Publication is not requested. This case involves the application of settled law to facts.

INTRODUCTION AND STATEMENT OF THE CASE

A. Description of the Nature of the Case.

The City of Menasha (hereinafter the "City") complains that four parcels (hereinafter the "Subject Territory") formerly located within the Town of Harrison (hereinafter the "Town") were improperly annexed by the Village of Harrison (hereinafter the "Village"). Said parcels were annexed into the Village after all of the electors residing in the Subject Territory unanimously petitioned for annexation pursuant to Wis. Stat. §66.0217(2). The City does not allege any substantive or procedural defects occurred during the annexation process.

The circuit court dismissed the City's annexation challenge for lack of standing. The circuit court also held that the Village could not breach an agreement that it was not a party to.

B. Procedural History.

In February 2015 the City initiated a lawsuit challenging the Village's annexation of the Subject Territory. (R. 1; R-App. 1-3.) On August 27, 2015, the City moved for summary judgment (R. 1-3; R. 7; R-App. 1-3, 30-47.) On September 28, 2015, the Village moved for summary judgment, arguing that the City lacks standing to challenge the annexations, and, in the alternative, that the Village was entitled to summary judgment on the merits. (R. 15; R-App 48-61.)

This is an appeal from the circuit court's entry of summary judgment on February 18, 2016, wherein the circuit court dismissed the City's challenge to the Village's annexation of the Subject Territory due to the City's lack of standing. (R. 24; A-App. 101-107.)

C. Statement of Additional Facts.

The Village generally agrees with the facts presented by the City. However, the Village wishes to clarify and add the following points.

At page 12 of its appellate brief, the City states, "[a]lthough they are 'technically' two entities, for all practical purposes they act as if they are one." (Appellant's Br. 12.) This could not be further from the truth. The Town has a Town board and is governed in all respects by Chapter 60, Wisconsin Statutes. The Village has a separate independent Village board and is governed in all respects by Chapter 61, Wisconsin Statutes. Most importantly, the City cites no authority and cites nothing in the Record in support of its position that the Town and the Village act as if they are one.

A 1999 Intermunicipal Agreement between the Town and the City (hereinafter the "Agreement") simply allowed the City to use any legal means to annex into a designated "growth area" and the Town agreed not to challenge any annexation within said "growth area." (R. 1-6, 7; A-App. 111-112.) The Agreement also prohibited the City from annexing outside of the designated "growth area." *Id.* The Agreement does not and could not

prohibit a neighboring non-party municipality (such as the Village) from Annexing into the City's "growth area." *Id.*

The four contested annexations (hereinafter the "Annexations") arose from four separate unanimous petitions filed by residents of the Town pursuant to 66.0217(2). (R. 1-16, Ex. B; R. 1-22, Ex. C; R. 1-28, Ex. D; R. 1-34, Ex. E.; R-App. 4-29.) The petitions were received by the Village without solicitation by any official or employee of the Village. (R. 16-1, 2; R. 17-1, 2; R. 18-2; R-App. 62-65, 67.) Coincidentally, at or about the time that the petitions were received, the Village was in need of 60 acres of parkland in the immediate vicinity of the Annexations. (R. 16-1, 2; R-App. 62-63.)

I. STANDARD OF REVIEW AND BURDEN OF PROOF

Although an appellant must properly raise issues in circuit court to be considered on appeal, *Shadley v. Lloyds of London,* 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838, a respondent may advance any argument that will sustain the circuit court's ruling. *State v. Darcy N.K.*, 218 Wis. 2d 640, 651, 581 N.W.2d 567, 572 (Ct. App. 1998). Accordingly, a reviewing court may affirm a summary judgment on the same or on different grounds than the circuit court. *Int'l Flavors & Fragrances, Inc. v. Valley Forge Ins. Co.,* 2007 WI App 187, ¶ 23, 304 Wis. 2d 732, 738 N.W.2d 159.

II. THE CITY DOES NOT HAVE STANDING.

In its Complaint, the City requests a declaratory ruling that the Village's Annexations are invalid. To maintain an action for declaratory judgment, there must be a justiciable controversy. *Chenequa Land Conservancy, Inc. vs. Village of Heartland*, 2004 WI App. 144, ¶ 11, 275 Wis. 2d 533, 685 N.W.2d 573. A justiciable controversy exists when all of the following requirements are met:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> (2) The controversy must be between persons whose interests are adverse.
>
> **(3) The party seeking declaratory relief must have a legal interest in the controversy – that is to say, a legally protectable interest.**
>
> (4) The issue involved in the controversy must be ripe for judicial determination.

Id. (emphasis added).

The third element is often expressed in terms of "standing." *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶9, 256 Wis.2d 859, 84,650 N.W.2d 81, 84. "To have standing, a party must 'have suffered or be threatened with an injury to an interest that is legally protectable, meaning that the interest is arguably within the zone of interests' that a statute or constitutional provision, under which the claim is brought, seeks to protect." *Zehner v. Village of Marshall*, 2006 WI App. 6, ¶ 11, 288 Wis. 2d 660, 709 N.W.2d 64 (citation omitted) (emphasis added). To have

standing, a party must also be directly affected by the issues in controversy – that is, the party must have sustained or will sustain some pecuniary loss. *Id.*

In its Brief, the City does not address the first prong of the standing analysis. The City does not identify any legally protectable interest that it has in a neighboring municipality's annexation under Wis. Stat. § 66.0217(2).

Instead, the City skips to the second prong, and argues that it has or will be injured. Because the City doesn't have a legally protectable interest in the controversy, it doesn't matter if the City has or will be injured by the Annexations. In the alternative, the City's injuries are purely speculative.

A. A City Does Not Have a Legally Protectable Interest in a Neighboring Village's Annexation of Territory Under Wis. Stat. § 66.0217(2).

Whether a party has standing to challenge an annexation is not an issue of first impression. *See, e.g., Village of Slinger*, 2002 WI App 187 at ¶¶ 13-14.

In 1922, the only parties that had standing to challenge an annexation were the residents and taxpayers of an attaching municipality and the petitioners and owners of land located within the area to be attached or detached. *Application to Alter Boundary of Application to Alter Boundary of Village of Mosinee: Appeal of Town of Kronenwetter*, 177

Wis. 74, 74, 187 N.W. 688, 688 (1922). At that time, not even a town from which land was annexed had standing to challenge an annexation. *Id.*

Two subsequent legislative enactments extended standing to towns and town boards, respectively. In 1933, Wis. Stat. § 66.029 was enacted providing standing to towns to challenge boundary changes. (Wis. Stat. § 66.029 was re-codified as § 66.0233 by 1999 Wis. Act 150). 1983 Wis. Act 532 clarified that both towns and town boards had standing to challenge boundary changes. A town board's authority to challenge a boundary change is codified in Wis. Stat. § 60.06.

In *Darboy Joint Sanitary Dist. No. 1 v. City of Kaukauna*, 2013 WI App 113, ¶¶ 21-22, 350 Wis.2d 435, 838 NW2d 103, the Court of Appeals clarified that only the above-referenced persons and entities have standing to challenge an annexation:

> We indirectly addressed the "zone of interests" of Wis. Stat. § 66.0217 in *Village of Slinger v. City of Hartford,* 2002 WI App 187, 256 Wis.2d 859, 650 N.W.2d 81, where abutting property owners challenged annexation. *See id.,* ¶¶ 1, 3 & 14. In rejecting their challenge we stressed that the legislature did not include in the annexation statutory scheme a right for abutting landowners to challenge annexation. *Id.,* ¶ 14.
>
> Traditionally, that is, "[p]rior to the enactment of the annexation statute in 1933, neither a town in which the annexed territory was located, nor its citizens, other than those residing or owning property within the limits of the territory being annexed, had a legal interest in the annexation." *Id.,* ¶ 13. As such, "the law essentially excluded any individuals other than those residing within the annexed township from objecting; indeed, the law even prohibited townships whose territory was being annexed from being heard." *Id.* As we noted in *Village of Slinger,* while the legislature has since decided to extend standing to challenge annexations to affected towns, *see* Wis. Stat. § 66.0233, **it has not chosen to extend standing to other potentially affected parties** like landowners of abutting property. *See Village of Slinger,* 256 Wis.2d 859, ¶ 14, 650 N.W.2d 81 ("[I]f the legislature had intended to expand [the right to challenge an annexation]

> to [other] individuals ... who do not ... live in any of the territory affected, it would have so provided in the legislation."). **We similarly conclude here that the legislature has not expanded the right to challenge an annexation to sanitary districts** and therefore the Sanitary District does not have standing to bring its claim.

Id. (**emphasis added)**.

Today, the City finds itself in the same position that the Sanitary District was in in *Darboy.* The City is also in the same position that towns were in prior to the enactment of the annexation statute in 1933. No legislative enactment has extended standing to allow neighboring non-party municipalities to challenge annexations. As the Court of Appeals reasoned in *Slinger* and *Darboy*, had the legislature intended to extend standing to neighboring cities when it extended standing to towns, it may be assumed that the legislature would have done so.

B. In the Alternative, Any Damages Alleged by the City Are Purely Speculative.

The City lists a litany of harm that it alleges that it will suffer as a result of the Annexations. But said harm is speculative at best, because there is no guarantee that the City ever would be able to annex all or any part of the remaining "growth area" designated in the Agreement.

The Agreement merely states that the Town will not contest annexations within the designated "growth area." That doesn't mean that the City can unilaterally annex into the "growth area" anytime it wants to. The City would have to comply with the annexation procedures included in

Chapter 66, Wisconsin statutes, and landowners would have standing to object in the event that the City failed to comply.

Because future annexations are far from certain, the City's damages are far from certain. Harm that is hypothetical or based on future speculative occurrences is not enough to confer standing. *Village of Slinger*, 2002 WI App 187 at ¶ 10 ("[a] declaratory judgment will not determine hypothetical or future rights.").

C. *Madison v. Town of Fitchburg* is Not an Annexation Case and is Not Relevant.

As a threshold matter, although the City cites *City of Madison v. Town of Fitchburg*, 112 Wis.2d 224, 230, 332 N.W.2d 782, 785 (Wis. 1983), for the proposition that the rule of standing has recently been liberalized, *Madison* was decided in 1983 while *Slinger* was decided in 2002 and *Darboy* was decided in 2013. Despite the apparent liberalization of the rule of standing, neither the legislature nor the courts have extended the right to challenge an annexation beyond residents and taxpayers of an attaching municipality, petitioners and owners of land to be attached, towns and town boards.

More importantly, *Madison* is not an annexation case – it is an incorporation case. The City of Madison challenged Fitchburg's attempts to incorporate and Fitchburg challenged Madison's standing. *Id.* at 228-29, 332 N.W.2d at 784. Fitchburg's incorporation attempt utilized a procedure

that was only applicable to areas adjacent to "cities of the first class," and Madison was not a city of the first class. *Id.* at 231, 332 N.W.2d at 786. Based upon that and other identified "interests," the Wisconsin Supreme Court held that Madison had standing to challenge Fitchburg's incorporation. *Id.*

It is perfectly logical that a municipality would have standing to challenge a neighboring municipality's incorporation but not have standing to challenge a neighboring municipality's annexation.

Under Wis. Stat. § 66.0203 (the incorporation statute), neighboring municipalities have a statutory right to participate in the incorporation process. Notice must be served on each municipality within the metropolitan community (sub. (4)), any governmental unit entitled to notice has a right to participate in the incorporation hearings (sub. (5)), and any governmental unit entitled to notice may submit a competing annexation resolution (sub. (6)). Under Wis. Stat. § 66.0207, the Incorporation Review Board is to consider the level of services needed and the level of services that can be provided by the incorporating municipality verses other neighboring municipalities. The Incorporation Review Board is also to consider the impact of a prospective incorporation on the remainder of the metropolitan community. *Id.* The incorporation statute was written to protect neighboring municipalities' various interests.

Conversely, under Wis. Stat. § 66.0217(2) (the subject annexation statute), the only municipality who has a right to participate is the annexing municipality and a town from which land is annexed.

III. IN THE ALTERNATIVE, THE COURT SHOULD DISMISS THE CITY'S CLAIMS ON THE MERITS.

If the Court reaches the merits, it should find that the Annexations did not violate the Rule of Reason, were not contrary to the Agreement, and did not create town islands, as alleged in the City's Complaint.

A. The Annexations Did Not Violate the Rule of Reason.

"In Wis. Stat. ch. 66, the legislature has conferred upon cities and villages broad powers to annex unincorporated territory." *Town of Campbell v. City of LaCrosse*, 2003 WI App. 247, ¶ 19, 268 Wis. 2d 253, 271, 673 N.W.2d 696. "The doctrine known as the 'rule of reason' is applied by the courts to ascertain whether the power delegated to the cities and villages has been abused in a given case." *Id.* "When a challenge is made to an annexation ordinance based upon the rule of reason, the ordinance enjoys a presumption of validity and the challenger has the burden of showing that the annexation violates the rule of reason." *Id.*

> "The rule of reason does not authorize a court to inquire into the wisdom of the annexation before it or to determine whether the annexation is in the best interest of the parties to the proceeding or of the public. These matters are inherently legislative and not judicial in character."

Id.

"For this reason, the circuit court is directed to be highly deferential to the actions taken by the [Village] in annexing the property." *Id.*

The "rule of reason" has three components:

1) Exclusions and irregularities in boundary lines must not be the result of arbitrariness;

2) There must be some present or demonstrable future need for the annexation;

3) There must be no other factors that constitute an abuse of discretion on the part of the municipality.

Town of Menasha v. City of Menasha, 170 Wis. 2d 181, 189, 488, N.W.2d 104 (Ct. App. 1992).

1. The First Prong Doesn't Apply in the Present Matter.

When direct annexation proceedings are initiated by property owners, the annexing municipality may not be charged with arbitrary action in drawing the boundary lines. *Town of Campbell,* 2003 WI App. 247 at ¶ 21. "In such cases the choice of boundaries is a matter of discretion by the petitioners." *Id.* "They have the right under the statute to act in light of their desires and their best interests as they see them when they initiate a direct annexation proceeding." *Id.* "They may also determine the boundaries so as to insure the annexation's success. *Id.*

There is one recognized exception that applies when a municipality is the "real controlling influence" in selecting the boundaries even though

the property owners are the petitioners. *Id.* at ¶ 22. However, there are is no evidence in the record that the Village was "the real controlling influence" in this case.

To the contrary, the Affidavits of Travis Parish and Mark Mommaerts indicate that the subject petitions were received by the electors with no solicitation from Village staff or Village officials whatsoever. (R. 16-1, 2; R. 17-1, 2; R-App. 62-65.)

Accordingly, the first prong does not apply.

2. The Annexations Were Needed.

When a city or village initiates an annexation, courts often address the "need" prong of the rule of reason in terms of whether the city or village needed the annexed land. *See Town of Campbell*, 2003 WI App. 247 at ¶¶ 29-31. When an elector or property owner initiates an annexation, the "need" prong is typically addressed in terms of whether the landowner had a need for subject annexation. *Id.* Notwithstanding, a showing of <u>any</u> need is sufficient to satisfy the second prong of the rule of reason. *Id.*

Some courts have suggested that the "need" prong of the rule of reason isn't relevant when an annexation is initiated by landowners:

> One author has suggested that the need element serves a useful purpose in furthering the public policy favoring orderly growth of urban areas by preventing irrational "gobbling up of territory." The factors deemed relevant to establishing need are best suited to avoiding this danger where the annexation proceeding is instituted by the annexing municipality…. Where

> the annexation ordinance is adopted at the request of the electors and landowners in the subject area, however, this danger may be avoided by assuring that the request was not the result of any undue influence or pressure from the annexing municipality.

Town of Campbell, 2003 WI App. 247 at ¶ *30, see also Town of Lafayette v. City of Chippewa Falls*, 70 Wis. 2d 610, 629-30, 235 N.W.2d 435 (1975).

The City failed to include any of the petitioners as parties. Jim Bodway nevertheless filed an affidavit explaining why he and others needed to annex his land into the Village. (R. 18-1, 2; R-App. 66-67.) Although the Village did not initiate the subject Annexations or influence the boundaries, the Annexations conveniently satisfied a need for regional parkland. (R. 16-1, 2; R. 17-1, 2; R-App. 62-65.)

3. There is No Evidence in the Record of Any Abuse of Discretion.

The City briefed its "abuse of discretion" argument in circuit court, arguing, "[t]he Village of Harrison should not be allowed to use the Intermunicipal Agreement to its advantage during the Incorporation Review Board proceedings and then disregard the growth area designations also to its advantage." (R. 7-12; R-App. 41.) This argument is flawed for several reasons.

First, the Village did not exist during the Incorporation Review Board proceedings. Second, the Village isn't a party to the Agreement.

Third, the City has never alleged that any party breached any provision of the Agreement. Finally, and most importantly, the City has not appealed the portion of the Circuit Court's holding wherein it held that the Village cannot be held to the terms of an agreement that it is not a party to:

> The Village is correct in its assertion. The Town of Harrison, which is still a legal entity, is the party that entered into the 1999 agreement. The Village of Harrison did not exist at the time of the agreement and the agreement was not amended to include the Village. As such, the Village cannot be held to the terms of the agreement.

(R. 24-7; A-App. 107.) "[A]n issue raised in the [circuit] court but not raised on appeal, is deemed abandoned." *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 492, 588 N.W.2d 285, 292 (Wis. 1998). There is no evidence anywhere in the record that the Village abused its discretion.

B. The Annexations Were Not Contrary to the Agreement and The City Waived Its Right to Make This Argument.

The Agreement simply prohibited the Town from challenging any annexation by the City into the "growth area." The City has not alleged that the Town did so, the City has not included Town as a party, and the City has not alleged that the Village did anything contrary to the Agreement. And again, the City has not appealed the portion of the Circuit Court's holding that the Village could not be held to an agreement that it is not a party to. "[A]n issue raised in the [circuit] court but not raised on appeal, is deemed abandoned." *A.O. Smith Corp.*, 222 Wis. 2d at 492.

There simply is no evidence in the Record that supports the City's contention that the Annexations were contrary to the Agreement.

C. The Annexations Did Not Create Town Islands.

Although the City pleaded that the Annexations created Town islands, the City abandoned its argument while briefing summary judgment. In fact, the City admitted that the Annexations actually eliminated Town islands. (R. 7-15, 16; R-App. 44-45.)

CONCLUSION

For the reasons stated above, the Court should affirm the Circuit Court's grant of summary judgment and the circuit court's dismissal of the City's Complaint with prejudice.

Dated this 15 day of August, 2016.

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ELECTRONIC BRIEF CERTIFICATION

As required by section 809.19(12)(f) of the Wisconsin Statutes, I certify that the text of the electronic copy of this Brief is identical to the text paper copy of the Brief.

Respectfully signed this 15th day of August, 2016.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this Brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8)(b) and 809.19(8)(c) for a brief produced using the following font:

Proportional font: double-spaced, 2-inch margin on left side, with 1-inch margins on the top and bottom. The length of this Petition is 3,671 words.

Dated this 15th day of August, 2016.

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