

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

RECEIVED

09-26-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CITY OF MENASHA, WISCONSIN

Plaintiff-Appellant,

Appeal No. 2016AP000702
Circuit Court No. 2015CV000017

v.

VILLAGE OF HARRISON, WISCONSIN,

Defendant-Respondent.

LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF

On Appeal from the Circuit Court for Calumet County,
The Honorable Angela W. Sutkiewicz

Claire Silverman
State Bar No. 1018898
LEAGUE OF WISCONSIN MUNICIPALITIES
131 W. Wilson (Suite 505)
Madison, WI 53703
608-267-2380
(fax) 608-267-0645

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION	1-2
ARGUMENT.....	2
NEIGHBORING MUNICIPALITIES ASSERTING INJURY OR DAMAGE SHOULD HAVE STANDING TO CHALLENGE ANNEXATIONS BASED ON RULE OF REASON BECAUSE SUCH STANDING PROTECTS IMPORTANT MUNICIPAL INTERESTS AND FURTHERS THE LEGISLATIVE POLICIES UNDERLYING WISCONSIN'S INCORPORATION AND ANNEXATION LAWS.	2
CONCLUSION.....	8

TABLE OF AUTHORITIES

Wisconsin Case

<i>Village of Elmwood Park v. City of Racine</i> , 29 Wis.2d 400, 139 N.W.2d 66, (1966).....	7
--	---

Wisconsin Statutes

Wis. Stat. §66.0201

Wis. Stat. §66.0203

Wis. Stat. §66.0207

Wis. Stat. §66.0217

Other Authority

Robert D. Zeinemann, *Overlooked Linkages Between Municipal Incorporation and Annexation Laws: An In-Depth Look at Wisconsin's Experience*, *The Urban Lawyer*, Vol. 39, No. 2 (spring 2007) at pp. 257-317.

INTRODUCTION

The League of Wisconsin Municipalities (League) is a non-profit, voluntary association of 588 Wisconsin cities and villages cooperating to improve and aid the performance of local government. Established in 1898, the League is recognized as the principal voice for Wisconsin cities and villages in both the legislative and executive branches of state government. As part of its service to its members, the League monitors legislative and legal developments that affect municipal interests. We seek permission to participate as *amicus curiae* in appellate cases that we believe present significant legal issues of concern to our members. This is such a case.

The circuit court held that the City of Menasha has no standing to challenge the Village of Harrison's annexations as violating the Rule of Reason. We believe this holding is legally incorrect for the reasons stated in the City of Menasha's brief, and that such a holding is particularly worrisome for municipalities in general given recent history in which towns have used multiple-step processes to do an end run around statutory requirements for incorporation. These end runs undermine the legislative policies underlying the incorporation and annexation laws and threaten the reasonable expectations and planning efforts of nearby municipalities. A neighboring municipality's ability for input at the incorporation stage is limited to the proposed incorporation, but it is the subsequent bringing in the remainder or most of the remainder of the town that was ineligible for incorporation once the

incorporation can no longer be challenged that is such a threat to the interests of neighboring municipalities. With so much at stake, the League believes it is important that neighboring municipalities have access to the courts and the ability to challenge annexations that they believe violate the Rule of Reason.

As the League weighs in on the standing issue, it is mindful that the City of Menasha and the Village of Harrison are both members of the League of Wisconsin Municipalities and have opposing interests in this case. We emphasize that we are not choosing sides or speaking to the merits of the City of Menasha's challenge. Instead, we focus our *amicus* efforts on the legal issue of standing.

ARGUMENT

For the reasons asserted by the City of Menasha in its brief and those below, we believe it is important that a neighboring municipality asserting interests like those asserted by Menasha have standing to bring an action for declaratory judgment challenging annexations that it believes violate the Rule of Reason.

I. NEIGHBORING MUNICIPALITIES ASSERTING INJURY OR DAMAGE SHOULD HAVE STANDING TO CHALLENGE ANNEXATIONS BASED ON RULE OF REASON BECAUSE SUCH STANDING PROTECTS IMPORTANT MUNICIPAL INTERESTS AND FURTHERS THE LEGISLATIVE POLICIES UNDERLYING WISCONSIN'S INCORPORATION AND ANNEXATION LAWS.

Wisconsin's annexation and incorporation laws were overhauled in the late 1950s following studies and reports requested by the legislature. The

overhaul of these laws is summarized in great detail in an article by Robert D. Zeinemann, *Overlooked Linkages Between Municipal Incorporation and Annexation Laws: An In-Depth Look at Wisconsin's Experience*, *The Urban Lawyer*, Vol. 39, No. 2 (spring 2007) pp. 257-317. Zeinemann is a former Planning Analyst with the Wisconsin Department of Administration's Municipal Boundary Review.

Zeinemann details that in 1955, the legislature directed the Legislative Council to study annexation, incorporation and consolidation and make recommendations. The Legislative Council appointed a special Urban Development Committee which issued a report in 1957. In response to that report, the legislature enacted a measure that repealed separate statutory provisions for annexations to cities and village and created a new uniform annexation process in Chapter 66 of the Wisconsin Statutes. Zeinemann, at 294-295 citing 1957 Wis. Sess. Laws 1005.

Following the revision of the annexation laws, the 1957 legislature created The Urban Problems Committee (Committee). The Committee was tasked with studying problems confronting municipalities resulting from urban expansion, evaluating the appropriate roles of the state and local governments in solving those problems, recommending necessary statutory revisions to help solve the urban expansion problem, and reporting its findings and recommendations to the 1959 legislature. *Id.* at 295. The Urban Problems Study Committee Report (UPSCR), issued in January 1959, thoroughly

examined urbanization and local governance in Wisconsin, municipal incorporation law, the regional planning commission law, and cooperation among governmental units. *Id.* at 296. The report contained five chapters and three recommended bills for the legislature. The UPSCR found that in 1952, Wisconsin ranked fourth among states in its number of local government units and concluded the primary problem in urban areas was the multiplicity of governments and fragmentation of regulatory authority. *Id.* The UPSCR concluded that the incorporation statutes needed to be revamped “to provide a more systematic and stable legal framework for the orderly development of land and government within an urban area.” *Id.*

In addition to other reasons cited, the UPSCR noted the incorporation laws should be revamped to statutorily define the type of land which could reasonably be considered municipal in character and eligible for incorporation, noting that without such requirements, some areas had been incorporated which lacked the characteristics normally associated with village or city government. The UPSCR also stated that perhaps the most serious shortcoming of the incorporation law was its failure to consider the impact of separate incorporations on the entire metropolitan area within which they occur. *Id.* at 296-297. The new incorporation laws provided standards for incorporation and provided neighboring municipalities a legal means for providing input in the process. The consolidation and annexation laws were also revised as part of the reform.

To incorporate, towns must meet minimum standards set forth in Wis. Stat. sec. 66.0207. These standards look at homogeneity and compactness of the territory, set requirements for territory beyond the core (which Zeinemann says at p. 304 is most comparable to the Rule of Reason's "need" requirement in annexation cases), examine tax revenue, level of services, impact on the remainder of the town, and impact on the metropolitan community. The incorporation standards and the Rule of Reason's "needs" requirement in annexation cases all work to "foster a policy of allowing only territory that is urban or urbanizing to be in cities and villages and keeping rural territory in towns." Zeinemann at 304 [footnote 307 at end of sentence omitted which notes that in practice there are other factors which allow towns to urbanize].

With increasing frequency, towns are using a multi-step process to do an end run around Wis. Stat. § 66.0607's statutory requirements. Through this multi-step process, towns are able to achieve what they cannot achieve through the incorporation process. The multi-step process begins with incorporation of a small urban core that meets the standards for incorporation in Wis. Stat. sec. 66.0607, followed by annexation and/or cooperative boundary agreements and annexation to bring all or most of the remainder of the town, ineligible for incorporation, into the newly incorporated municipality.

The first town to do this was Kronenwetter in 2002. The facts pertaining to Kronenwetter's incorporation are detailed in Zeinemann's article at pp. 312-314. Kronenwetter, located on the southern end of the Wausau

metropolitan area, was an unusually large town with over 52 square miles in size. The town moved to incorporate its urbanized northwest corner, which contained several residential subdivisions and scattered commercial establishments on either side of the Interstate. It did not include in its petition the remainder of the town which was sparsely populated with forest preserves and farmlands. In 2002, the Wisconsin Department of Administration (DOA) granted the incorporation of eleven square miles of the town as a village, finding that it met all statutory requirements for annexation. The Village of Kronenwetter then sent a petition to DOA under sec. 66.0216(6) proposing to annex the remainder of the town. Although DOA advised that the proposed annexation was against the public interest, its advice was not binding on the Village which enacted an ordinance annexing the remaining 41 square miles of the town. No citizen or neighboring municipality challenged the annexation. Zeinemann at 312-313.

The Village of Harrison is another example of a town using this multi-step process to incorporate and bring in most of the remaining town. Yet another recent example is the Town of Menasha's incorporation as the Village of Fox Crossing. In an update posted on its web site dated September 22, 2016, the Village of Fox Crossing exclaims: "The Village of Fox Crossing and the Town of Menasha have been reunified!" The web page, viewed at <http://www.town-menasha.com/town-of-menasha-incorporation-update/> on

Sept. 24, 2016, and reproduced at the back of the League's brief, provides the following information to the public:

On Thursday, September 22, 2016, the Village of Fox Crossing Board of Trustees unanimously approved an ordinance adjusting the municipal boundary line between the Village of Fox Crossing and the Town of Menasha, attaching most of the Town of Menasha to the Village. The boundary change came as a result of the Intergovernmental Cooperation Agreement approved by both the Village of Fox Crossing and the Town of Menasha in August. A small Town of Menasha remnant consisting of three parcels will be annexed into the City of Menasha or the Village of Fox Crossing at a later date.

The actions of these municipalities, while creative, undermine the legislative and common law policies underlying Wisconsin's current incorporation and annexation laws. They also undermine the value of the notice and participation opportunities that sec. 66.0203(4) and (5) afford as part of the incorporation process to "metropolitan municipalities" in the "metropolitan community," as those terms are defined by sec. 66.0201(2)(c) and (d).

In light of the multiple-step process towns are using to do an end run around the incorporation law's statutory requirements, it is important that neighboring municipalities have access to the courts and the ability to challenge annexations that pose harm to them as violating the Rule of Reason. In *Village of Elmwood Park v. City of Racine*, 29 Wis.2d 400, 139 N.W.2d 66, 66-67 (1966), Elmwood Park, a tiny village, published a notice of a resolution declaring its intention to apply to the circuit court for an order for an

annexation referendum of a territory consisting of substantially all of the town of Mt. Pleasant. The city of Racine, whose territory is adjacent or contiguous to both Elmwood Park and Mt. Pleasant and which owned land in Mt. Pleasant, petitioned to intervene as did Sturtevant. The municipalities were allowed to intervene. The Wisconsin Supreme Court found that the Village's attempt to annex the property was more properly an attempt to consolidate the two municipalities using an annexation statute. The Wisconsin Supreme Court held that the Village had failed to demonstrate any need to annex the property of the town and that it was, without a showing of some reasonable need, arbitrary and capricious and contrary to the Rule of Reason.

Although the annexation process in *Elmwood Park* was pursuant to an annexation referendum ordered by a court, similar factors are at play here. Just like annexation was being used in Elmwood Park to accomplish a consolidation, newly incorporated municipalities are using boundary shifting agreements and annexation to accomplish what can't be accomplished under the incorporation requirements. The Rule of Reason was applicable in *Elmwood Park* and should be applicable here. The City of Racine was the one challenging the proposed annexation as unreasonable and, in all likelihood, a neighboring municipality whose interests will be injured by an annexation that doesn't comply with the Rule of Reason affected is the one most likely to raise the challenge and should be able to do so.

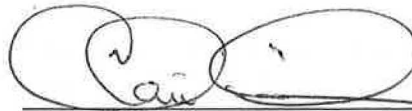
CONCLUSION

For the reasons stated in the City of Menasha's brief and the League's brief, we believe that this court should reverse the circuit court's decision.

Respectfully submitted this 26th day of September, 2016.

League of Wisconsin Municipalities

By:

A handwritten signature in dark ink, appearing to read 'Claire Silverman', written over a horizontal line.

Claire Silverman (State Bar #1018898)


CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1932 words.

I further certify that I have submitted an electronic copy of this brief which complies with the requirements of sec. 809.19(12) and that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and mailed this day to all parties.

Dated: September 26, 2016.



Claire Silverman

Incorporation Information - Town of Menasha

Village *of* Fox Crossing

Home Government •
 Departments •
 Calendar Resources •
 Online Services •
 Contact •

News & Events

Incorporation Information UPDATED 09-22-2016

Electronics Recycling

Nov. 8, 2016 General Election Dates to Remember

Town of Menasha Fire Department is Awarded International Reaccreditation Status

Election Workers Needed for Presidential Election

WISDOT Related Road Closures

441 / 10 DOT Project

Current Job Opportunities

Incorporation Information UPDATED 09-22-2016

Town of Menasha Incorporation Update - September 22, 2016

The Village of Fox Crossing and the Town of Menasha have been reunified!

On Thursday, September 22, 2016, the Village of Fox Crossing Board of Trustees unanimously approved an ordinance adjusting the municipal boundary line between the Village of Fox Crossing and the Town of Menasha, attaching most of the Town of Menasha to the Village. The boundary change came as a result of the Intergovernmental Cooperation Agreement approved by both the Village of Fox Crossing and the Town of Menasha in August. A small Town of Menasha remnant consisting of three parcels will be annexed into the City of Menasha or the Village of Fox Crossing at a later date.

The Public Hearing for the Intergovernmental Cooperation Agreement that authorized the boundary change was held on August 17, 2016, and the agreement was then unanimously approved by both the Village of Fox Crossing Board of Trustees and the Town of Menasha Board of Supervisors that same evening. The agreement was published in the Post-Crescent on August 22, 2016.

The electors of the Town of Menasha had a thirty (30) day window in which to circulate a petition to require a referendum on the agreement. The deadline for submission of a valid petition to the Village and Town Clerk was on September 21, 2016 at 4:30 p.m. No petition was submitted by the electors; hence, the agreement automatically went into effect on September 22, 2016.

A copy of the boundary change ordinance, along with the revised map of the Village of Fox Crossing.

Any questions or comments regarding the incorporation effort can be directed to the following:



Website comment
 (920) 720-7135

This line is available 24 hours a day. Please leave a message.

Contact Information

Town of Menasha
 2000 Municipal Drive
 Neenah, WI 54956
 920-720-7100

Town of Menasha Incorporation Update - August 19, 2016

The Intergovernmental Cooperation Agreement was approved unanimously by the village of Fox Crossing board of trustees and town of Menasha board of supervisors on August 17th, 2016.

Exhibits:

Intergovernmental Cooperation Agreement

