STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

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Case No. 2016AP001068

In re the Commitment of Michael L. McGee:

STATE OF WISCONSIN,

Petitioner-Respondent,

TOWN OF WHEATLAND

Intervenor-Appellant,

v.

MICHAEL L. McGEE,

Respondent-Respondent.

Appeal from an Order Denying the Town of Wheatland's Motion to Intervene Entered in Racine County Circuit Court, Judge Allan B. Torhorst, Presiding

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BRIEF AND APPENDIX OF RESPONDENT-RESPONDENT

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ISSUE PRESENTED

Was the Town of Wheatland entitled to intervene in the proceedings regarding the placement of Michael McGee on supervised release under ch. 980?

The circuit court denied the Town's motion to intervene under Wis. Stat. § 803.09. (58; 81:33; A-App. 149, 156-57).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented can be fully addressed by the parties' briefs, so oral argument is not necessary. Publication may be warranted to establish that a political subdivision does not have the right to intervene in a ch. 980 supervised release proceeding based on the effect newly-enacted Wis. Stat. § 980.135 has on a local ordinance restricting sex offender residency.

STATEMENT OF THE CASE AND FACTS

As respondent, McGee elects not to provide a full statement of the case and facts. Wis. Stat. § (Rule) 809.19(3)(a)2. (2013-14). McGee will refer to the facts as necessary in his argument.

ARGUMENT

I. Wheatland Does Not Have a Right to Intervene Under Wis. Stat. § 809.03(1) Because it Does Not Have Any Interest in the Proceedings That is not Already Adequately Represented by the State of Wisconsin.

A. Relevant legal standards.

Intervention is "[t]he entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome." ***City of Madison v. WERC***, 200 WI 39, ¶11 n.7, 234 Wis. 2d 550, 610 N.W.2d 94 (quoted source omitted). To establish a right to intervene under Wis. Stat. § 803.09(1), the person moving to intervene must show that: (1) the motion to intervene is timely; (2) the movant has an interest sufficiently related to the subject of the action; (3) disposition of the action may impair the movant's ability to protect its interest; and (4) the existing parties do not adequately represent the movant's interest. Wis. Stat. § 803.09(1); ***Helgeland v. Wisconsin Municipalities***, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1.

The four requirements for intervention under § 803.09(1) are not viewed in isolation from each other. Instead, "there is interplay between the requirements; the requirements must be blended and balanced to determine whether [there is a] right to intervene." ***Helgeland***, 307 Wis. 2d 1, ¶39.

> "Courts have no precise formula for determining whether a potential intervenor meets the requirements of § 803.09(1)…." The analysis is holistic, flexible, and highly fact-specific. A court must look at the facts and circumstances of each case "against the background of

> the policies underlying the intervention rule." A court is mindful that Wis. Stat. § 803.03(1) "attempts to strike a balance between two conflicting public policies." On the one hand, "[t]he original parties to a lawsuit should be allowed to conduct and conclude their own lawsuit...." On the other hand, "persons should be allowed to join a lawsuit in the interest of the speedy and economical resolution of controversies."

Id., ¶40 (footnotes and quoted sources omitted).

The party seeking to intervene has the burden to show that all four factors are met, and failure to establish one element means the motion must be denied. ***Olivarez v. Unitrin Property & Casualty Co.***, 2006 WI App 189, ¶12, 296 Wis. 2d 337, 723 N.W.2d 131. Whether a person is entitled to intervene under § 803.09(1) is a question of law that this court decides independently of the circuit court. ***Helgeland***, 307 Wis. 2d 1, ¶41.

B. Wheatland satisfies only one of the four requirements for intervention under § 803.09(1).

As he did in the circuit court (81:8; R-App. 124), McGee concedes here that the Town's motion to intervene was timely. Therefore, McGee agrees with the Town (brief at 9) that it has satisfied the first requirement.

That is the only requirement the Town satisfies.

1. Wheatland does not have an interest in the proceeding.

The second requirement for intervention is that the movant have an interest sufficiently related to the subject of the proceedings. The interest must be "'of such direct and

immediate character that the movant will gain or lose by the direct operation of the judgment'"–for instance, when the movant needs "'to protect a right that would not otherwise be protected.'" ***Helgeland***, 307 Wis. 2d 1, ¶45 (footnotes and quoted sources omitted). Whether a movant has such an interest is gauged using a broad, pragmatic approach, viewing the interest element "'practically rather than technically.'" ***Id.***, ¶43 (footnotes and quoted sources omitted). This approach considers the facts and circumstances of the particular case along with the movant's stated interest in intervention, and views them in light of the need to balance between allowing the original parties to conduct and conclude the lawsuit and allowing persons to join a lawsuit in the interest of the speedy and economical resolution of controversies "without rendering the lawsuit fruitlessly complex or unending." ***Id.***, ¶44.

Wheatland asserts it has an interest in McGee's supervised release proceeding because an order granting supervised release means it will "lose the protection of its Ordinance," which will be "abrogated" under Wis. Stat. § 980.135 if McGee is placed at the residence in the township. (Brief at 9-10). This misstates the effect of Wis. Stat. § 980.135. The statute does not "abrogate" local residency restrictions just because a person is placed on supervised release under § 980.08. Rather, as the title of the statute makes clear, it provides a limited exemption from local ordinances for persons on supervised release.

As pertinent here, the statute provides that:

> No county, city, town, or village may enforce an ordinance or resolution that restricts or prohibits a sex offender from residing at a certain location … against an individual who is released under s. 980.08 … so long as the individual is subject to supervised release under this

> chapter, the individual is residing where he or she is ordered to reside under s. 980.08, and the individual is in compliance with all court orders issued under this chapter.

Wis. Stat. § 980.135.[1] This language is clear on its face, so there is no need to look any further than the statutory text to determine the statute's meaning. ***State v. Peters***, 2003 WI 88, ¶14, 263 Wis. 2d 475, 665 N.W.2d 171. When a statute is clear on its face, a court gives effect to that language. ***Wagner v. Dissing***, 141 Wis. 2d 931, 942, 416 N.W.2d 655 (Ct. App. 1987). Under § 980.135's plain language, Wheatland's ordinance is not "abrogated." It "stands" despite McGee's order, and is enforceable against any sex offender *not* subject to a § 980.08 supervised release order. It is also enforceable against McGee himself should he fail to comply with the supervised release order and once he is discharged from supervision under ch. 980.

Moreover, Wheatland's interest in enforcing or protecting its ordinance is a strictly limited one. "[T]owns have no home rule powers[,] but only those powers specifically delegated to them by the legislature or necessarily implied therefrom." ***Wisconsin Dolls, LLC v. Town of Dell Prairie***, 2012 WI 76, ¶44, 342 Wis. 2d 350, 815 N.W.2d 690, *quoting* ***Danielson v. City of Sun Prairie***, 2000 WI App 227, ¶13, 239 Wis. 2d 178, 619 N.W.2d 108. Wheatland says it has the power to enact its sex offender residency ordinance because its town board has been authorized under Wis. Stat. § 60.10(2)(c) to exercise the powers of villages, which in turn allows it to enact ordinances to protect public safety of the public as provided by §§ 60.22(3) and 61.34(1). (Brief at 10).

[1] The statute was created by 2015 Wisconsin Act 156, a copy of which is included in the Appendix to this brief. (R-App. 101-02).

But as the Town has acknowledged (81:10-11; A-App. 126-27), even though a political subdivision may enact ordinances, its enactments are subject to preemption by the state legislature under certain circumstances. In particular, in matters of both statewide and local concern, like public safety, a state statute will preempt local rules when the political subdivision's actions logically conflict with the state legislation; when the political subdivision's actions defeat the purpose of the state legislation; or when the political subdivision's actions are contrary to the spirit of the state legislation. ***Adams v. State Livestock Facilities Siting Review Bd.***, 2012 WI 85, ¶¶29-32, 342 Wis. 2d 444, 820 N.W.2d 404.

As McGee noted below (81:31-32; A-App. 147-48), the changes made to § 980.08 by Act 156 show the legislature intended to establish a statewide standard for restricting the place of residency of sex offenders placed on supervised release. The record in this case demonstrates that before Act 156 took effect, the Department of Health Services had difficulty finding placements for persons on supervised release in large part because of a patchwork of local sex offender residency restrictions. (74:3; 76:2-5; 77:2; 78:2-3; 79:2; 82:69-70, 77, 94-96, 102). Wheatland's ordinance, for instance, prohibits a sex offender not placed under Department of Corrections guidelines from residing within 2,500 feet of: any school, licensed day care center, unlicensed care facility where three or more children may be related by heredity; any park, trail, playground, place of worship; "or any other place designated by the Town as a place where children are known to congregate." Wheatland Ord. § 47.01(B)(6) and (C)(1)(a). (35:5-6; A-App. 105-06). In fact, DHS had identified the Wheatland residence as a possible placement for McGee before Act 156, but rejected it because of Wheatland's ordinance. (82:107-08).

With Act 156 the legislature imposed uniformity on the restrictions for placements under § 980.08. In conjunction with creating the limited exemption to local ordinances in § 980.135, Act 156 created a restriction of 1,500 feet from schools, child care facilities, parks, places of worship, youth centers, *see* § 980.08(4)(f)2., as well as two restrictions listing additional places that cover placement of persons convicted of sexual assault of certain vulnerable adults or of children, *see* § 980.08(4)(f)3. and 4. (R-App. 102).[2] Having created a limited exemption to local ordinances and a new statewide residency standard, the act also amended § 980.08(4)(cm) to make it clear that a local residency restriction in the offender's county of residence is not good cause to place the person in a different county.

There can be no dispute that Wheatland's ordinance, with its larger zone of restriction and longer list of covered places, both logically conflicts with and defeats the purpose of the changes made by Act 156 generally, and the restriction in § 980.08(4)(f)2. specifically. Therefore, the ordinance must yield to the legislature's judgment about the appropriate statewide residency standard for persons placed on supervised release under § 980.08. It is true, as the Town says (brief at 9-10), that it has authority to enact its residency ordinance. But because the legislature may limit or preempt the Town's enactments, the authority to enact an ordinance does not create a legally protected right or interest in the ordinance's effectiveness or enforceability. And because the Town's authority to enact the ordinance does not give it a legally protected right or interest in the ordinance's effectiveness or enforceability, it follows that the Town's authority to enact

[2] McGee has not been convicted of a sexual assault of a vulnerable adult or a child, so the restrictions in § 980.08(4)(f)3. and 4. do not apply to him. (82:72-73).

the ordinance does not support granting intervention in order to give the Town the opportunity to protect the applicability of its ordinance.

In fact, if the authority to enact a sex offender registry ordinance gives a political subdivision sufficient interest to intervene in § 980.08 proceedings, those proceedings could be subject to frequent petitions to intervene from multiple local governments. DHS searches widely for residential placements, considering more than one at a time given that, for various reasons, potential sites will be ruled out. (82:55, 68, 78, 95-97, 101-02, 108). If the Town's argument is accepted, whenever a residence being considered for a supervised release placement is in a political subdivision with a residency ordinance subject to § 980.135, the political subdivision would have the right to intervene.

As ***Helgeland*** explains, whether the movant has a sufficient interest to intervene in a proceeding is considered in light of the need to balance between, on the one hand, allowing the original parties to a lawsuit to conduct and conclude their own lawsuit, and, on the other hand, disposing of lawsuits by involving as many apparently concerned persons, so long as that is compatible with efficiency and due process and does not render the lawsuit "fruitlessly complex or unending." 307 Wis. 2d 1, ¶44.

The interests of judicial efficiency and of avoiding complex and lengthy litigation would not be served by the frequent and multiple interventions that could result if having a residency ordinance gives a political subdivision the right to intervene. Indeed, allowing intervention by any local government with an ordinance that is subject to restriction under the limited scope of § 980.135 would undermine the legislature's adoption of a uniform statewide standard in

Act 156 by injecting the issue of local regulation back into the supervised release process.

Moreover, such a broad right of intervention may create due process problems. The fact that ch. 980 is intended and actually does provide treatment to persons committed under the law is important because that is part of what assures ch. 980 satisfies the demands of substantive due process. *See* ***State v. West***, 2011 WI 83, ¶¶27-47, 336 Wis. 2d 578, 800 N.W.2d 929; ***State v. Rachel***, 2002 WI 81, ¶¶61-68, 254 Wis. 2d 215, 647 N.W.2d 762. Supervised release is a necessary component of treatment under ch. 980. (82:92-94). Intervention will likely cause delay in finalizing supervised release plans, and inordinate delay in placement will violate the due process rights of the person if the delay effectively deprives the person of further treatment. The broader the right of intervention, the more likely there will be more delays in more cases.

There is another reason why the Town's ordinance is not sufficient to establish an interest supporting intervention. The ordinance is not important to the Town in and of itself; rather, it is important because it is an instrument employed to protect the Town's residents. Thus, Wheatland's overarching interest is not really in enforcement of its ordinance, but in the public protection the ordinance is intended to provide. (81:11; A-App. 127). But this interest is not unique or special to the Town. All political subdivisions have that interest. So does the State. The very purpose of ch. 980 is to protect the public as a whole from sexually violent persons, and the provisions of ch. 980—including the recent amendments to § 980.08 made by Act 156—codify the legislature's judgments about how best to do that. *See, e.g.*, ***State v. Post***, 197 Wis. 2d 279, 302-03, 541 N.W.2d 115 (1995) (ch. 980 advances legitimate and compelling interests of protecting the

community from, and providing care and treatment to, sexually violent persons); ***State v. Ransdell***, 2001 WI App 202, ¶8, 247 Wis. 2d 613, 634 N.W.2d 871 (referring to the legislature's determination that "the safety of innocent persons in society warrants the finely tuned procedures" in ch. 980).

For instance, the criteria for supervised release require the circuit court to conclude that "[i]t is substantially probable that the person will not engage in an act of sexual violence while on supervised release"; that the person "can be reasonably expected to comply … with all of his or her conditions or rules of supervised release that are imposed by the court or by the department"; and that there are sufficient resources to provide for "the safe management of the person while on supervised release." Wis. Stat. § 980.08(4)(cg)2., 4., and 5.

Further, a person released to the community under § 980.08 is not free from restraint; instead, he is subject to the stringent rules and conditions of the supervised release plan. In McGee's case, that includes, among other features, "intensive" supervision by a Department of Corrections agent, GPS monitoring, and the requirement that he be escorted if he leaves the residence any time during the first year of release. (31:3-4, 8-10).

Finally, the new statewide residency restriction in § 980.08(4)(f)2. applies to McGee, so he cannot be placed within 1,500 feet of a school, child care facility, park, place of worship, or youth center. While not as stringent as Wheatland's ordinance, in the judgment of the legislature that restriction is appropriate in conjunction with the rules and conditions of supervised release to further § 980.08's goal of public protection.

In short, considered pragmatically, in light of all the facts of this case, the Town's real interest—public protection—is not special or unique to the Town, and even if the Town cannot intervene that interest is protected because the requirements that must be met before supervised release may be ordered under § 980.08 are designed to protect the public as a whole.

Wheatland makes two other arguments in support of its right to intervene, both of which assert that it has an interest in McGee's proceeding because it has "statutory authority to take action." (Brief at 10). Neither argument is persuasive.

First, the Town asserts it has an interest in the case because of its statutory authority under § 61.34(1) to create and enforce ordinances. It cites ***State ex rel. Bilder v. Township of Delavan***, 112 Wis. 2d 539, 334 N.W.2d 252 (1983), which allowed a newspaper to intervene in a lawsuit a police chief brought against a township. The court file had been sealed, and the newspaper sought access to the file, citing a statute (Wis. Stat. § 59.14(1) (1979-80)) permitting court files to be inspected. ***Id.*** at 543-44, 546. The Town claims that, like the newspaper in ***Bilder***, it has a statutory authorization to act that gives it an interest in McGee's proceedings. (Brief at 10). Not so.

The statute in ***Bilder*** contained an express directive that court files be open for public examination, and newspapers could enforce that right because they qualified as a persons authorized to secure access to public records under Wisconsin statutes. 112 Wis. 2d at 546. Since the newspaper had a legal interest in being able to seek the opening the file to public inspection and could have initiated a separate

mandamus action to assert that interest, intervention was appropriate to avoid multiple suits. ***Id.*** at 549-50.

The statute giving the Town authority to enact ordinances is nothing like the statute giving the newspaper an interest in the suit in ***Bilder***. As explained above, the Town's authority to act on general matters of public safety is not unfettered and is subordinate to the authority of the legislature. The Town therefore does not have a right to enforce its enactments against a conflicting state statute. Nor is there anything in either § 61.34 or ch. 980 that, like § 59.14(1) in ***Bilder***, gives a political subdivision a legally enforceable right to enforce the standards under § 980.08. The Town's reliance on ***Bilder*** fails.

Second, the Town argues that the statute requiring DHS to give notice to local law enforcement agencies about the release of a person under § 980.08 provides authority for intervention. (Brief at 11). The statute Wheatland cites is Wis. Stat. § 301.46(2m)(am), which requires various agencies who have certain sex offenders in custody to provide notice to designated local law enforcement agencies that an offender is going to be released.

The subject of the statute is notice about the imminent release of a broad category of sex offenders, not just those being placed on supervised release under § 980.08. The statute says nothing explicit on the topic of the authority of law enforcement agency receiving notice (or the political subdivision in which the agency is based) to intervene in whatever process may have resulted in the release decision. Further, the statute refers to notice about where the person "will be residing," a clear indication that the release decision has already been made. That shows the statute does not

contemplate that those receiving notice should now have a right to seek intervention to revisit that decision.

For all the above reasons, Wheatland has failed to show it has a sufficient interest relating to McGee's supervised release proceeding to justify intervention.

2. The disposition of the proceedings will not impair or impede Wheatland's ability to protect any interest it has in the proceeding.

The next requirement for intervention asks whether the disposition of the proceeding may, as a practical matter, impair or impede the movant's ability to protect interests related to the subject of the proceeding. ***Helgeland***, 307 Wis. 2d 1, ¶75. Although the ability of a movant to protect its interests is analyzed separately, it is part and parcel of analyzing the interest involved and determining whether an existing party adequately represents the movant's interest; thus, as with the interest requirement, a court must take a pragmatic approach and focus on the facts of each case and the policies underlying the intervention statute. ***Id.***, ¶79.

The Town does not separately analyze this requirement, but instead subsumes it into the argument about its interest in its ordinance. (Brief at 9). The Town's implicit claim appears to be that the disposition of McGee's supervised release proceeding will impair or impede its ability to defend or protect its ordinance from abrogation. For the reasons given in the previous section of this brief explaining why Wheatland does not have sufficient interest to intervene, the Town fails to show it will be impaired or impeded in protecting the public safety interest it does have.

First, as explained in the previous section, Wheatland's ordinance is not abrogated, but only rendered unenforceable against McGee and others released under § 980.08, and then only for so long as he is on supervised release and complying with the supervised release order. Wis. Stat. § 980.135.

Next, as also explained in the previous section, the Town has no legal right or interest in asserting its ordinance's effectiveness or enforceability in the face of a controlling state statute. Thus, Wheatland does not have an interest in defending or enforcing its ordinance that needs protecting by intervention of right.

Finally, and again as explained in the previous section, the interest the Town has in protecting its residents is not impaired in light of the standards and conditions that must be met before supervised release can be ordered. Further, as will be discussed in the next section of this brief, in a § 980.08 proceeding the State has the responsibility to represent and advocate for the protection of the public by assuring the standards for release are met. Thus, the State will necessarily also represent and advance the Town's interest in public protection.

Accordingly, the Town has not shown that its ability to protect its interest will be impaired or impeded if it is not allowed to intervene.

3. The State will fully represent the Town's interest.

The last requirement for intervention is whether Wheatland's interest can be adequately represented by one or more of the original parties. While it has been said the showing required for proving inadequate representation is treated as "minimal," it "cannot be treated as so minimal as to

write the requirement completely out of the rule." ***Helgeland***, 307 Wis. 2d 1, ¶85. In addition, this requirement is also "blended and balanced" with the other requirements:

> If a movant's interest is identical to that of one of the parties, or if a party is charged by law with representing the movant's interest, a compelling showing should be required to demonstrate that the representation is not adequate. When the potential intervenor's interests are substantially similar to interests already represented by an existing party, such similarity will weigh against the potential intervenor.

Id., ¶86.

The Town asserts that no other party has an interest in, or may be delegated the power to enforce, its sex offender residency ordinance, and therefore its interest is not represented by another party. (Brief at 11-12). Again, as explained above, the Town's interest is not in the enforcement of its ordinance *per se*, but in the protection of its residents. The State fully represents that interest, as that is its role in every ch. 980 proceeding.

It is the State, represented by the attorney general's office or a district attorney, that petitions for commitment in the first instance based on its belief that the person meets the criteria for commitment—namely, that he is dangerous to others because he has a mental disorder that makes it likely he will engage in acts of sexual violence. Wis. Stat. § 980.02(1) and (2)(b) and (c). The State remains a party throughout any subsequent proceedings for supervised release under § 980.08 or discharge under § 980.09.

In this case, the State contested McGee's 2013 petition for discharge from the commitment under § 980.09. (3;4:1-2). By doing so the state has maintained its position that McGee

still meets the criteria for commitment. *See* Wis. Stat. § 980.09(3). While the State subsequently agreed that McGee met the criteria for supervised release (74:2-3), that agreement is far from a concession that McGee is no longer dangerous. Instead, it is a recognition that McGee has progressed sufficiently in treatment that the risk he will reoffend can be managed in a community placement subject to the stringent rules and conditions of supervised release, including the new uniform residency requirement. Wis. Stat. §§ 980.08(4)(cg) and (f)2.

Given the State's interest in using ch. 980 to assure the protection of all Wisconsin residents, including those in the Town of Wheatland, its interest is identical to the interest of the Town. Therefore the Town must make "a compelling showing" to demonstrate that the State's representation is not adequate. ***Helgeland***, 307 Wis. 2d 1, ¶86. The fact McGee will be exempted from Wheatland's ordinance only so long as he is on supervised release and complying with terms of the order that are specifically designed achieve the same goal as the ordinance is not such a showing. And even if it were possible to conclude that the Town's more stringent ordinance means its interests and the State's are not identical, the overarching interest of both § 980.08 and the Town's ordinance is public protection. That makes the Town's interest substantially similar to interests already represented by the State, and that weighs against the Town. ***Id.***

Further, two interrelated, rebuttable presumptions refute the Town's claim that the State will not represent the Town's interest in public protection. First, adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action. ***Helgeland***, 307 Wis. 2d 1, ¶90. Second, when the party is a state governmental body or officer charged by law with

representing the state's interests, there is a presumption the state will adequately represent the interests of its citizens. ***Id.***, ¶91 n.81. These presumptions apply here because the ultimate objective, even for the Town, is assuring that the supervised release placement complies with § 980.08 and, thus, is consistent with public protection. The Town makes no suggestion, and certainly no showing, that these presumptions should not apply to the question of whether the State will adequately advocate compliance with § 980.08.

Finally, in determining whether an existing party adequately represents a movant's interest, a court must look to see if there is a showing of collusion between the representative and the opposing party; if the representative fails in the fulfillment of his duty; or if the representative's interest is adverse to that of the proposed intervenor. ***Helgeland***, 307 Wis. 2d 1, ¶87.

Wheatland does not allege any collusion between McGee and the State, nor is there any basis in the record to support such a claim. The initial agreement for supervised release is not evidence of such collusion because, as noted, supervised release is governed by strict standards intended and designed to serve the same purpose as the Town's ordinance. Further, the State changed its position after learning of the same facts about the placement that caused the Town concern (brief at 4-5) and thereafter advocated that the supervised release plan not be approved. (43; 59; 82:123).

While the State did not present its own evidence regarding the issues Wheatland raised about the supervised release plan (82:87), that is not surprising given that the circuit court had allowed Kenosha County to intervene and present evidence. Thus, the fact the State did not try to present what would have been cumulative evidence does not

suggest that, absent the County's intervention, the State would have done nothing to advocate and argue for its change of position regarding the appropriateness of the plan. In addition, in this case the State has been represented by the same prosecutor's office since the petition was filed in 2003 frequently by the same lawyer who filed the petition. (1:7; 43; 59; 74:2). This illustrates the reality that the State is represented by lawyers from district attorneys' offices (and the Attorney General's office) who have experience and expertise in ch. 980 proceedings. Accordingly, there is no basis in the record to support a claim of collusion, a claim that the State's interest is adverse to Wheatland's, or a claim that the State has failed or will fail in the fulfillment of its duty.

For these reasons, the Town of Wheatland has failed to make even the "minimal showing" necessary on the adequate representation requirement. Because the Town has failed to meet three of the four requirements of the § 809.03(1) balancing test, it has not established that it has a stake in McGee's case that will not be protected by the State. Thus, the Town is not entitled to intervene as a matter of right.

II. Wheatland Forfeited its Argument that it Should Have Been Granted Permissive Intervention Under Wis. Stat. § 803.09(2), and in Any Event There is No Basis for Permissive Intervention.

Wheatland also argues that the circuit court erroneously exercised its discretion when it denied permissive intervention under Wis. Stat. § 803.09(2). Specifically, the Town argues the circuit court denied permissive intervention based on an erroneous understanding of the law and failed to exercise its discretion at all because the record shows no consideration of the standard for permissive intervention. (Brief at 12-15). The circuit court did not consider permissive

intervention because the Town never asked the circuit court to consider it. The Town has therefore forfeited its permissive intervention argument in this court.

Arguments raised for the first time on appeal are generally deemed forfeited. ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n. 16, 328 Wis. 2d 320, 786 N.W.2d 810. The forfeiture rule "is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." ***State v. Huebner***, 2000 WI 59, ¶11, 235 Wis. 2d 486, 611 N.W.2d 727. A main purpose of the rule "is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. The forfeiture rule gives both the circuit court and the parties notice of the issues and a fair opportunity to address them. ***Id.*** Accordingly, "the 'fundamental' forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would 'blindside' the circuit court." ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155.

The circuit court did not have a fair opportunity to consider permissive intervention in this case because the Town did not specifically make an argument under § 803.09(2). While Wheatland's petition to intervene cited § 803.09 generally as the legal basis for its request (35:1; A-Ap. 101), it does not refer to either subsection (1) or (2). Further, it set out almost no legal argument in support of its request. The petition said only that Wheatland was "an interested party" and "has an interest in this matter…." (35:4; A-Ap. 104). Because the "interest" language is one element of the four-part standard under § 803.09(1), the petition managed to raise a claim under that subsection. Nowhere,

however, does the petition use language referring to the *different* standard for permissive intervention under § 803.09(2), under which a person "may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common."

In addition, at the hearing on the intervention petition, McGee argued the Town did not sufficiently plead a basis for intervention under either subsection of § 803.09, and then—in light of the "interest" language in the Town's petition—specifically argued the Town did not meet the standard under § 803.09(1). (81:3-8, 13-15; A-Ap. 119-24, 129-31). The circuit court questioned the Town's counsel about the basis for its motion, also focusing on the "interest" claim the Town was making—which, again, is an element of the standard under § 803.09(1). (81:9-11, 21-25; A-Ap. 125-27, 137-41). Some of that questioning came *after* the circuit court said that Kenosha County met "the four criteria" for intervention and then asked the Town where it "fit into those criteria…." (81:21; A-Ap. 137). Despite the focus by McGee and the circuit court on § 803.09(1), at no point during the hearing did the Town argue to that if it did not meet the four requirements under subsection (1) it should be granted permissive intervention under subsection (2). Nor did the Town refer to § 803.09(2) or recite the standard under that subsection during the hearing.

While § 803.09 governs intervention, citing to the statute generally is not enough to raise claims under both of its two very different standards. True, both subsections are different routes to achieving the same goal, and there may in particular cases be overlap between arguments for intervention under the differing standards. But when addressing forfeiture it is not enough that "the [new argument] somehow relate[s] to an issue that was raised

before the circuit court." ***Townsend***, 338 Wis. 2d 114, ¶27. That is because "the forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." ***Id.***, ¶25.

The legal standard under sub. (2) is sufficiently different from the discretionary standard under sub. (1) that reversal based on the Town's sub. (2) argument would "blindside" the circuit court, contrary to the forfeiture rule. ***Townsend***, 338 Wis. 2d 114, ¶25. Further, unlike intervention as of right under sub. (1), which is a question of law, whether to grant intervention under sub. (2) is left to the circuit court's discretion. ***Helgeland***, 307 Wis. 2d 1, ¶¶41, 120. Thus, it would be especially inappropriate to reverse based on a failure to exercise discretion when the circuit court was not clearly asked to exercise its discretion.

Forfeiture aside, Wheatland's claim that it should be granted permissive intervention under sub. (2) fails on the merits.

The Town asserts that it should have been allowed to intervene because its ordinance—which it characterizes as both a claim *and* a defense—"can only be abrogated or stand if the placement complies with or violates Chapter 980." (Brief at 13). Once again, the issue in McGee's supervised release proceeding is not Wheatland's ordinance; whether its ordinance is "abrogated" or "stands" is neither a claim nor a defense in McGee's proceeding. To reiterate a point made several times already, "abrogation" is not an issue at all; the ordinance is not abrogated under § 980.135, but only unenforceable as to McGee while he is in compliance with a supervised release order.

Instead, the issue in a supervised release proceeding is whether the criteria under § 980.08 (including the uniform statewide residency restrictions in § 980.08(4)(f)) are satisfied. Contrary to the Town's conclusory claim, there is no "blending of facts and law" creating a "commonality" with another claim the Town otherwise has that justifies allowing intervention. Thus, had the Town actually raised a claim for permissive intervention, the record supports the circuit court's conclusion that Wheatland should not be allowed to intervene. *See* ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983) (even if trial court did not exercise discretion, reviewing court will uphold a decision "if it can conclude *ab initio* that there are facts of record which would support the trial judge's decision had discretion been exercised on the basis of those facts").

CONCLUSION

For the reasons given above, this court should affirm the circuit court's order denying the Town of Wheatland's petition to intervene in Michael McGee's supervised release proceeding.

Dated this 20th day of October, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,988 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of October, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of October, 2016.

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