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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.

REPLY TO AMICUS CURIAE 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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October 5, 2016

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INTRODUCTION

The City of Menasha (hereinafter "City") filed a Complaint seeking a determination that the Village of Harrison's (hereinafter "Village") "unanimous consent" annexations in the Town of Harrison (hereinafter "Town") are invalid. A "unanimous consent" annexation is a particular type of annexation wherein all of the residents and owners of land ask a municipality to annex their land. Wis. Stat. § 66.0217(2).

The circuit court dismissed the City's Complaint, holding 1) that City did not have standing to challenge the Village's annexations and 2) that the Village could not possibly breach an agreement that it was not a party to. The City appealed the circuit court's decision on standing only – that is, the City did not address the circuit court's holding that the Village could not breach an agreement that it was not a party to.

The League of Wisconsin Municipalities (hereinafter "League") filed an Amicus Curiae Brief in support of the City. The League asks this Court to disregard the nearly 100-year-old standing doctrine as it relates to annexation cases. Effectively, the League asks the Court to greatly expand the scope of potential challengers in "unanimous consent" annexations to all neighboring municipalities that might want to annex the subject territory at some unidentified time in the future.

The Legislature, on the other hand, sought to do the opposite. Although Wis. Stat. §§ 60.06 and 66.0233 generally afford towns standing

to challenge any annexation of town land, in its recent enactment of Wis. Stat. § 66.0217(11)(c), the Legislature prohibited towns from challenging "unanimous consent" annexations. The Legislature has made it clear that it does not want third-party municipalities to have a say in "unanimous consent" annexations.

ARGUMENT

I. THE LEAGUE ASKS THE COURT TO ADDRESS A PERCEIVED PROBLEM THAT DOES NOT EXIST IN THIS CASE.

The League argues, "[w]ith increasing frequency, towns are using a multi-step process to do an end around Wis. Stat. § 66.0607's[1] statutory requirements." The League cites three examples, involving the Village of Kronenwetter, the Village of Harrison, and the Village of Fox Crossing. (League Br. 5, 6.)[2]

In each case, the attaching municipalities incorporated a small portion of their respective towns, and then used various statutory authorities to reattach <u>most</u> of the rest of the town. None of said attachments involved "unanimous consent" annexations.

The League argues that neighboring Cities and Villages should be afforded standing to prevent this type of perceived "end run."

---

[1] The League later clarified by letter to the Court that this reference was to Wis. Stat. § 66.0207, not Wis. Stat. § 66.0607.

[2] It is not clear whether the League is referring to Harrison's efforts in the present matter or Harrison's efforts that were addressed in *City of Kaukauna, et al. v. Village of Harrison, et al.*, 2015 WI App 73, 365 Wis.2d 181, 870 N.W.2d 680. From context, the Village assumes the latter.

The perceived "end run" that the League fears is not present in this matter. There is no evidence that the annexations were initiated by the Village in an attempt to circumvent the incorporation statutes. All of the subject annexations were initiated by property owners – not by any municipality. All were initiated by unanimous consent of property owners and residents pursuant to Wis. Stat. § 66.0217(2). The annexations were relatively small and barely moved the needle with respect to the total land area of the Town or Village. There is no allegation that the statutory process was not followed.

It would not be good public policy to turn the nearly 100-year-old standing doctrine on its head to address a problem that does not exist. Even though the Village should win on the merits (for reasons stated in the Brief of Defendant-Respondent), the Village strongly discourages the Court from doing anything to upset the well-settled standing doctrine.

II. THIS COURT HAS ALREADY REJECTED THE LEAGUE'S "END RUN" ARGUMENT.

In *City of Kaukauna, et al. v. Village of Harrison, et al.,* 2015 WI App 73, 365 Wis. 2d 181, 870 N.W.2d 680, this Court was asked to consider whether a municipality who first incorporates a small area and then uses Wis. Stat. § 66.0301 to effectuate a subsequent major boundary change is prohibited from doing so. This Court declined to "read into the statute language that the legislature did not put in." *Id.* at ¶ 7. This Court

held that Wis. Stat. § 66.0301(6) allowed contracting municipalities to enter into agreements affecting "all or a portion of the common boundary line[s]." *Id.* at ¶ 8. The Court rejected Kaukauna's implicit "end run" argument. *See id.*

In *Ries v. Village of Bristol*, 2014 WI App 63, No. 2012 Ap 1942, an unpublished decision, this Court rejected another "end run" argument.[3] The Town of Bristol unsuccessfully petitioned to incorporate a majority of the town as a village. *Id.* at ¶ 1. Then, the town successfully petitioned to incorporate a smaller portion of the town as a village. *Id.* The new village immediately annexed the entire remaining town. *Id.* No part of the town remained after the annexation. *Id.* Ries argued that the village annexed the entire town as a means of circumventing the requirements of the incorporation statutes. *Id.* at ¶ 14. In rejecting this argument, this Court noted the complete lack of statutory language in the incorporation or the annexation statutes limiting the scope of a municipality's annexation authority to land that would otherwise be suitable for incorporation. *Id.* at ¶ 15. This Court cited mandatory authority in its decision: "[this Court] will not read into the annexation or incorporation statutes, a limitation that the plain language does not provide." *Id.* at ¶ 16 (citing *Dawson v. Town of*

[3] As *Ries* is an unpublished decision, it is cited for persuasive value only. It is not binding precedent. A copy of said decision is attached to this Brief in accordance with Wis. Stat. § 809.23(3)(c).

Jackson, 2011 WI 77, ¶ 42, 336 Wis.2d 318, 801 N.W.2d 316 ("We decline to read into the statute words the legislature did not see fit to write.")).

It would defy logic to expand the well-settled standing doctrine to allow parties lacking a legally-protected interest to challenge annexations on a theory that has already been rejected by this Court.

III. AN EXPANSION OF THE STANDING DOCTRINE IN ANNEXATION CASES WOULD TURN THE DOCTRINE ON ITS HEAD.

This is not a matter of first impression. This Court has applied the standing doctrine in annexation cases for nearly 100 years. The Court has consistently held that only a narrow group of specific persons and entities have standing to challenge annexations. *See e.g., Darboy Joint Sanitary Dist. No. 1 v. City of Kaukauna*, 2013 WI App 113 at ¶¶ 21-22, 350 Wis.2d 435, 838 N.W.2d 103; *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 13, 256 Wis. 2d 859, 867, 650 N.W.2d 81; *Town of Madison v. City of Madison*, 269 Wis. 609, 614, 70 N.W.2d 249 (1955); *In re Village of Chenequa*, 197 Wis. 163, 167, 221 N.W. 856 (1928). This narrow group does not include neighboring cities.

Traditionally, the only parties that had standing to challenge an annexation were 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 Village of Mosinee: Appeal of Town of Kronenwetter*, 177 Wis. 74, 74, 187 N.W. 688, 688 (1922).

Subsequently, the Legislature extended standing to towns. Wis. Stat. § 66.029 (later recodified as Wis. Stat. § 66.0233 by 1999 Wis. Act 150). Later, standing was extended to town boards. Wis. Stat. § 60.06.

The League summarizes the evolution of the current annexation scheme, focusing on a comprehensive redraft occurring in the 1950s. The League does not mention that Wis. Stat. § 66.0217 – the statute at issue – was created long after the comprehensive redraft. The League also does not mention that the Legislature, through 2003 Wisconsin Act 317, considerably narrowed the scope of those who may challenge a "unanimous consent" annexation.

Towns have the most to lose in an annexation. Not surprisingly, towns are the most-frequent challengers. Although towns previously had standing to challenge any annexation, 2003 Wisconsin Act 317 (codified as Wis. Stat. § 66.0217(11)(c)) prohibited towns from challenging annexations where all electors and property owners want to be annexed. In other words, through Wis. Stat. § 66.0217(11)(c), the Legislature substantially eliminated challenges to "unanimous consent" annexations. And that makes sense – if all electors and property owners want to become part of a municipality, why should a neighboring municipality be permitted to stand in their way?

Despite the Legislature's apparent attempt to eliminate challenges to "unanimous consent" annexations, the League asks the Court to do the opposite.

The League argues, "[i]t is important that a neighboring municipality asserting interests like those asserted by Menasha have standing to bring an action for declaratory judgment . . . ." (League's Br. 2.) (emphasis added). But the only "interest" identified by the City is "that the territory will be permanently unavailable for the City to annex." (App. Br. 11.) In essence, the League is asking the Court to open the door to challenges by any municipality in the vicinity of the annexed territory. This is a very dangerous proposition.

Extending standing to all neighboring municipalities would potentially open a floodgate of litigation. For example, the area commonly known as the "Fox Cities" is made up of the incorporated communities of Appleton, Kaukauna, Menasha, Neenah, Combined Locks, Fox Crossing, Harrison, Hortonville, Kimberly, Little Chute, and Sherwood. *See* Fox Cities, Wikipedia, (September 29, 2016) https:\\en.wikipedia.org\wiki\Fox_Cities. The Fox Cities also contains the unincorporated towns of Buchanan, Clayton, Freedom, Grand Chute, Greenville, Harrison, Kaukauna, and Menasha. *Id.*

If the Court extends standing to all nearby incorporated municipalities, an annexation occurring anywhere in the Fox Cities could

be challenged by any one of the eleven other incorporated municipalities. Yet under Wis. Stat. § 66.0217(11)(c), a town from which territory is annexed – undeniably the most-interested party – would not be able to initiate a challenge. It would defy logic to allow unaffected parties to maintain a challenge while prohibiting the most-affected party from maintaining a challenge.

For nearly 100 years, the standing doctrine fairly and predictably limited the scope of would-be challengers in annexation cases. In fact, the scope of would-be challengers was recently narrowed in the case of "unanimous consent" annexations. To suddenly change course and greatly expand the doctrine would be unfair, set a dangerous precedent, and be contrary to the Legislature's intent.

IV. *VILLAGE OF ELMWOOD PARK V. CITY OF RACINE* DOES NOT ADDRESS STANDING.

No Wisconsin case has ever held that an incorporated municipality has standing to challenge another incorporated municipality's annexation of territory from a town.

The League cites *Village of Elmwood Park v. City of Racine*, 29 Wis. 2d 400, 139 N.W.2d 66, 66-67 (1966). The League notes, in *Village of Elmwood*, "[t]he [neighboring] municipalities were allowed to intervene." (League Br. 8.) Accordingly, the League argues, the City should be afforded standing in the present matter (and other similarly-situated

municipalities should be afforded standing in the future). (League Br. 8.) However, *Village of Elmwood* is not relevant on the issue of standing because the concept of standing was neither raised nor addressed therein.

A similar argument was raised in *Darboy*, 2013 WI App 113 at ¶ 26. This Court summarily rejected the argument. *Id.* at ¶ 26, n.9.

> "The Sanitary District also argues that we permitted a sanitary district to challenge an annexation in *Sanitary District No. 4-Town of Brookfield v. City of Brookfield*, 2009 WI App 47, 317 Wis.2d 532, 767 N.W.2d 316. However, the parties did not raise the issue of standing in that case, and therefore, we did not consider the issue on appeal. As such, the case is not instructive here."

Id.

Just as *Brookfield* wasn't instructive in *Darboy, Village of Elmwood* isn't instructive here.

Moreover, unlike the current statute, the controlling annexation statute then in effect allowed any interested party to be heard. *See* Wis. Stat. § 66.024 (1966), *Village of Elmwood*, 29 Wis.2d at 408-409. There is no indication that anybody contested the Village's right to intervene in *Village of Elmwood. Id.* More importantly, "intervention" and "standing" are separate and distinct concepts. The standard for "intervention" is addressed in Wis. Stat. § 803.09. Wis. Stat. § 803.09 allows any non-party claiming an interest that may be affected by the underlying action to intervene. The standing analysis – as it applies to annexation disputes – is far more restrictive. One must have a "legally-protected" interest to have standing in annexation disputes.

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 2,084 words.

Dated this 10th day of October, 2016.

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Before a court may reach the question of intervention, there must be an underlying action. In other words, at least one party must have standing. If no party has standing, there is not a case within which a non-party can intervene. *See Fox v. Wisconsin Dept. of Health and Social Services,* 112 Wis.2d 514, 519, 334 N.W.2d 532, 535 (1983).

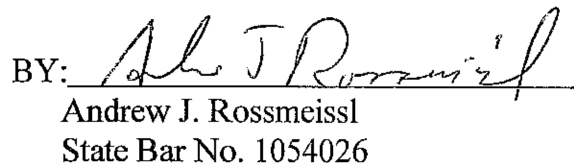
In summary, *Village of Elmwood* is not relevant to the issue of standing.

CONCLUSION

For the aforementioned reasons, this Court should decline the League's request to extend standing in annexation cases to neighboring municipalities who would prefer to annex subject territory themselves.

Dated this 5th day of October, 2016.

HERRLING CLARK LAW FIRM LTD.
Attorneys for Defendant

BY: 
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354 Wis.2d 322
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.
Court of Appeals of Wisconsin.

Michael H. RIES, M.D. and Ries Partners Limited Partnership, Plaintiffs–Appellants,
v.
VILLAGE OF BRISTOL, Defendant–Respondent.

No. 2012AP1942.
|
April 17, 2014.

Appeal from an order of the circuit court for Kenosha County: Bruce E. Schroeder, Judge. Affirmed.

Before BLANCHARD, P.J., HIGGINBOTHAM and SHERMAN, JJ.

Opinion

¶ 1 HIGGINBOTHAM, J.

*1 Michael H. Ries, M.D., and Ries Partners, Limited Partnership (Ries) challenge an annexation by referendum of the former Town of Bristol into the Village of Bristol. The Village petitioned the circuit court for an annexation referendum on whether to annex the Town to the Village. Prior to this petition, the Town unsuccessfully petitioned to incorporate a majority of the Town as the Village and then successfully petitioned to incorporate a smaller portion of the Town as the Village. The circuit court granted the Village's petition for an annexation referendum, and the referendum passed. The Village enacted an ordinance annexing the Town to the Village.

¶ 2 Ries subsequently filed a complaint seeking a declaration that the annexation by referendum was invalid because it violated the rule of reason, a judicially created doctrine used to determine whether an annexation is valid. The parties filed cross motions for summary judgment, which the circuit court denied. A trial was held to the court, after which the court determined that the annexation satisfied the rule of reason and dismissed the complaint.

¶ 3 On appeal, Ries renews his argument that the annexation did not satisfy the rule of reason for the same reasons as argued in the circuit court. Ries also argues that the circuit court erroneously excluded testimony regarding what, if anything, Village board members discussed in deciding to initiate the annexation process. For the reasons that follow, we conclude that the annexation satisfies the rule of reason and that the court's evidentiary ruling was not an erroneous exercise of discretion. Accordingly, we affirm.

BACKGROUND

¶ 4 In 2008, the Town petitioned the circuit court to incorporate approximately eighteen square miles, over half of the territory in the Town, as the Village. The circuit court determined that the petition met the standards to be applied by the court under WIS. STAT. § 66.0205 (2011–12), [1] and referred the petition to the incorporation review board of the Wisconsin Department of Administration for its consideration. The board determined that the required standards for incorporation under WIS. STAT. § 66.0207 were not met because the territory of the proposed village was not reasonably homogeneous and compact, as required under § 66.0207(1)(a), and because the territory beyond the most densely populated square mile lacked the potential for land use development on a substantial scale within the next three years, as required under § 66.0207(1)(b). The board dismissed the petition "with a recommendation that a new petition be submitted to include less territory."

¶ 5 The Town subsequently filed a new petition for incorporation, seeking to incorporate only 9.2 square miles as a village. The board determined that the standards for incorporation were met and approved the proposed incorporation for a referendum. An incorporation referendum was held and passed by a small margin.

¶ 6 Soon after, the Village petitioned the circuit court for a referendum on whether to annex the remainder of

the Town to the Village. The circuit court dismissed that petition due to defects in the petition. The Village filed a revised petition, which the court granted. An annexation referendum was held and passed by a wide margin. The Village subsequently enacted an ordinance annexing the remainder of the Town to the Village.

*2 ¶ 7 Ries filed a complaint against the Village in the circuit court, seeking a declaration that the annexation of the Town to the Village was invalid because it did not satisfy the rule of reason. After the circuit court denied cross-motions for summary judgment, a trial was held to the court. During the trial, Ries sought to elicit testimony from the Village board president regarding what, if anything, the Village board members discussed before initiating the process to annex the Town. The circuit court excluded testimony on this topic. Following the trial to the court, the court concluded that the annexation satisfied the rule of reason. The court entered an order dismissing the complaint.

DISCUSSION

¶ 8 In his appellate brief, Ries makes numerous arguments, which include several subparts. However, the arguments may be grouped into two main issues: (1) whether the annexation fails to satisfy the rule of reason because the Village abused its discretion by initiating the annexation process and because there is no reasonable present or future demonstrable need for annexation; and (2) whether the circuit court erred in excluding testimony regarding discussions by village board members about whether to initiate the annexation process. We address each issue in turn.

I. Rule of Reason

¶ 9 Under WIS. STAT. ch. 66, villages have broad powers to annex unincorporated territory. *Town of Pleasant Prairie v. City of Kenosha,* 75 Wis.2d 322, 326, 249 N.W.2d 581 (1977). Judicial review of an annexation is limited to determining whether the annexation statutory procedures were followed and whether the annexation comports with the rule of reason. *Town of Brockway v. City of Black River Falls,* 2005 WI App 174, ¶ 17, 285 Wis.2d 708, 702 N.W.2d 418. The issue here is whether the annexation comports with the rule of reason.

¶ 10 The rule of reason is a judicially created doctrine that "is applied by the courts to ascertain whether the power delegated to the cities and villages has been abused in a given case." *Town of Campbell v. City of La Crosse,* 2003 WI App 247, ¶ 19, 268 Wis.2d 253, 673 N.W.2d 696. An annexation satisfies the rule of reason when three requirements are met: (1) exclusions and irregularities in boundary lines are not the result of arbitrariness; (2) there is a reasonable present or demonstrable future need for the annexed territory; and (3) no other factors exist that constitute an abuse of discretion on the part of the annexing municipality. *Town of Baraboo v. Village of W. Baraboo,* 2005 WI App 96, ¶ 20, 283 Wis.2d 479, 699 N.W.2d 610 (quoting another source). Failure to satisfy any of these requirements renders the annexation invalid. *Town of Lafayette v. City of Chippewa Falls,* 70 Wis.2d 610, 625, 235 N.W.2d 435 (1975). Whether the second and third requirements have been met is at issue in this case.

¶ 11 We note that annexation ordinances challenged under the rule of reason enjoy a presumption of validity. *Town of Pleasant Prairie,* 75 Wis.2d at 327, 249 N.W.2d 581. The challenger to an annexation bears the burden of showing that the annexation violates the rule of reason. *Town of Brockway,* 285 Wis.2d 708, ¶ 19, 702 N.W.2d 418.

*3 ¶ 12 In this case, we review the circuit court's findings of fact in support of its determination that the annexation complied with the rule of reason. We accept the circuit court's findings unless they are clearly erroneous. *Town of Campbell,* 268 Wis.2d 253, ¶ 20, 673 N.W.2d 696. Whether those findings meet the legal standards of the rule of reason are questions of law, which we review de novo, although we "bear[ ] in mind the deferential standard we apply to the [Village's] decision to annex." *Id.*

¶ 13 Ries first contends that the third requirement under the rule of reason is not met because the Village abused its discretion for reasons not addressed under the other two requirements. Ries then contends that the second requirement is not met because there is not a reasonable present or demonstrable future need for annexation. We address Ries' arguments in the order in which he presents them.

A. Abuse of Discretion

¶ 14 Ries contends that the circuit court erred in determining that the annexation at issue here satisfied the rule of reason because the Village abused its

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discretion. Ries argues that: (1) the Village annexed the Town as a means of circumventing the requirements of the incorporation statutes; (2) the annexation included territory that lacked the essential characteristics of a village and therefore the annexation violated article XI, section 3, and article IV, section 23 of the Wisconsin Constitution; and (3) the annexation is contrary to public policy. We address and reject each argument in turn.

1. Circumventing the Incorporation Statutory Requirements by Annexing

¶ 15 Ries argues that the Village abused its discretion "by using the annexation process as a manipulative technique to circumvent the requirements" for incorporation. He maintains that the Village made an "end run" around the incorporation procedures by incorporating a small portion of the Town as a village and then annexing the remainder of the Town after efforts failed at incorporating a majority of the Town. Ries argues that by making this "end run" around incorporation, the Village accomplished through annexation what it could not accomplish through incorporation and thus abused its discretion. We understand Ries to be arguing that the Village cannot annex the same territory that did not meet the requirements for incorporation. We reject this argument.

¶ 16 The problem with Ries' argument is that, as Ries noted in his appellate brief, annexation and incorporation are "purely statutory." *See Town of Windsor v. Village of DeForest,* 2003 WI App 114, ¶ 8, 265 Wis.2d 591, 666 N.W.2d 31 ("[a]nnexation proceedings are purely statutory"); *Gotfredson v. Town of Summit,* 270 Wis. 530, 540, 72 N.W.2d 544 (1955) (Currie, J., dissenting) (incorporation proceedings are "purely statutory"), *superseded in part on other grounds.* Ries does not direct our attention to any provision in either the annexation or incorporation statutory scheme that supports Ries' contention that the Village may not annex territory that did not meet the requirements for incorporation. If the legislature wanted to include a provision in the annexation statutes precluding the method of annexation taken by the Village here, it could have done so. The fact that no such requirement is included in the annexation statutes lends strong support to the position that it is permissible for a village to annex territory by referendum that the village was precluded from incorporating because of failure to meet the statutory requirements for incorporation. We will not read into the annexation or incorporation statutes a limitation that the plain language does not provide. *See Dawson v. Town of Jackson,* 2011 WI 77, ¶ 42, 336 Wis.2d 318, 801 N.W.2d 316 ("We decline to read into the statute words the legislature did not see fit to write.").

¶ 17 In an overlapping argument, Ries contends that a statutory prohibition on annexing territory that does not meet the statutory requirements for incorporation emerges when the incorporation and annexation statutes are read *in pari materia,* that is, the incorporation and annexation statutes are read together, to give both statutory schemes full force and effect. We understand Ries to be arguing that a village may not annex territory that does not meet the requirements for incorporation because it violates the principle of statutory interpretation that statutes must be read in context and in relation to surrounding or closely-related statutes. *See State ex rel. Kalal v. Circuit Court for Dane Cnty.,* 2004 WI 58, ¶¶ 45–46, 271 Wis.2d 633, 681 N.W.2d 110. This argument lacks merit.

*4 ¶ 18 Although reading a statute in context and in relation to surrounding or closely-related statutes may help to ascertain its plain meaning, there is no principle of statutory interpretation under which a provision may be added to a statutory scheme that simply does not exist. And, as we have explained, there is no provision in the annexation or incorporation statutory scheme that makes it unlawful to annex territory that does not meet the requirements for incorporation. Thus, even if we were to read the two statutory schemes together, we find no language in either statute reflecting an intent by the legislature to engraft the standards for incorporation onto the standards for annexation by referendum.

2. Wisconsin Constitution

¶ 19 Ries contends that article XI, section 3, and article IV, section 23 of the Wisconsin Constitution [2] prohibit the annexation of town territory by a village where the to-be-annexed territory lacks the essential characteristics of a village, as defined in *State ex rel. Town of Holland v. Lammers,* 113 Wis. 398, 89 N.W. 501 (1902). We disagree.

¶ 20 In *Lammers,* the supreme court established what became known as the "village-in-fact" test, which required that a village exist in fact prior to its incorporation. *Walag v. DOA,* 2001 WI App 217, ¶ 9, 247 Wis.2d 850,

634 N.W.2d 906. Under that test, "the territory seeking incorporation as a village must be harmonious with the idea of what a village actually is. It may not include large areas of rural or agricultural lands, sparsely settled, or widely distributed." *Lammers,* 113 Wis. at 414–15. Applying the village-in-fact test to the town territory that was annexed, Ries contends that the territory that was annexed to the Village is rural, and therefore lacks the essential characteristics of a village. Thus, Ries reasons, because the Village annexed territory that lacked the essential characteristics of a village, the annexation of the town constituted an abuse of discretion. This argument lacks merit.

¶ 21 As we have indicated, the village-in-fact test established in *Lammers* has been used to determine whether a village may be incorporated and thus has no application to the annexation process and procedures. Significantly, the village-in-fact test has been codified at WIS. STAT. § 66.0207, which sets forth the standards the incorporation review board must apply when considering for approval a proposed petition for *incorporation. See Walag,* 247 Wis.2d 850, ¶¶ 9–11, 634 N.W.2d 906.[3] The codification of the *Lammers* village-in-fact test in the incorporation statutes demonstrates that whether the proposed village has the essential characteristics of a village does not matter in annexation proceedings.[4]

3. Public Policy

***5** ¶ 22 Ries also argues that the Village abused its discretion because the annexation is contrary to public policy. Ries asserts that the annexation is in essence a "whole-town" incorporation, and according to the testimony of Ries' expert witness, John Stockham, "whole-town" incorporations are viewed as contrary to public policy. According to Stockham's testimony, a "whole-town" incorporation occurs when an effort is made to incorporate the entire town "at one time or in one act of incorporation." We reject this argument for two reasons.

¶ 23 First, this argument rests on Ries' argument, which we reject above, that the incorporation and annexation statutes are to be read together in this context. Second, the Village contends that Ries has forfeited judicial review of this argument because Ries did not first raise it in the circuit court. Ries does not respond to the Village's contention, and we take Ries' silence as a concession that Ries failed to raise the argument in the circuit court and thus forfeits judicial review on appeal. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.,* 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979) (unrefuted arguments are deemed conceded).

B. Reasonable Present or Demonstrable Future Need

¶ 24 Ries contends that the circuit court erred in determining that there is a reasonable present or demonstrable future need for the annexation because the "needs" identified by the circuit court are not actually "needs" as that term is understood under the rule of reason. The circuit court identified two primary "needs," namely, that annexation would result in cost savings to taxpayers and that the town required certain fundamental municipal services that only the Village could provide. We focus our analysis on whether annexation was "needed" because certain services to the Town could only be provided by the Village.

¶ 25 As the challenger of the annexation, Ries has the burden to prove that there was *no* reasonable need for the annexation and that the circuit court's findings are clearly erroneous. *Town of Sugar Creek v. City of Elkhorn,* 231 Wis.2d 473, 482, 605 N.W.2d 274 (Ct.App.1999); *Town of Campbell,* 268 Wis.2d 253, ¶ 20, 673 N.W.2d 696. Thus, as long as the "annexing authority shows *any* reasonable need for the annexation, the courts must respect the legislative decision to annex." *Town of Menasha v. City of Menasha,* 170 Wis.2d 181, 194, 488 N.W.2d 104 (Ct.App.1992) (emphasis added).

¶ 26 In determining whether the need element is met, we may consider the needs of the annexing municipality and the needs of the annexed property owners. *Town of Campbell,* 268 Wis.2d 253, ¶ 31, 673 N.W.2d 696. The need factor is met if the annexed property owners "are in need of services the Town cannot provide but the [Village] can." *Id.* The need factor may also be met if the annexation is necessary to extend "police, fire, sewer and other services to a substantial number of residents of adjacent areas." *Town of Pleasant Prairie,* 75 Wis.2d at 335–36, 249 N.W.2d 581.

***6** ¶ 27 Regarding the need factor, the circuit court found the following facts:

> As of January 2010, the Town of Bristol had no employees and did

> not own any equipment to provide municipal services. The Town of Bristol and its residents received ... municipal services, including administrative services, from the Village of Bristol. The Town did not have the ability to extend services to its residents. The Town and Village entered into a contract whereby the Village agreed to provide municipal services within the Town Territory and for town residents. It was not a dollar-for-dollar recoupment. The Village was under no obligation to provide services to the Town. [5]

(Citations omitted.) According to the record, the Village provided the Town the following services: fire and emergency, public works, and administrative services.

¶ 28 Ries contends that the circuit court erred in determining that the annexation of the Town was "needed" to supply municipal services to that territory. Ries contends that certain services in the Bristol area-such as library services, sewer services, and police services-are provided on a "regional basis," and that "[a]nnexation was not necessary for residents of either the Village or the Town to continue to receive those regional ... services."

¶ 29 Although Ries concedes that the Village provided some services to the Town, Ries contends that there was not a reasonable "need" for annexation because the Village provided services to the Town before the Town was annexed to the Village. Thus, Ries argues, "the annexation was not necessary to extend services from the Village to the Town" because "[e]ven without the [a]nnexation, residents of the Town ... were receiving all of the same services as residents of the Village." We reject this argument.

¶ 30 There are two problems with Ries' argument. First, the record clearly supports the circuit court's findings quoted above and Ries does not seriously challenge these findings. In addition, Ries makes two concessions that undermine his arguments. Ries acknowledges that the "need" requirement under the rule of reason is met where a village is able to provide services to a town that the town is unable to provide to its residents. *See Town of Campbell,* 268 Wis.2d 253, ¶ 31, 673 N.W.2d 696; *see also Town of Lafayette,* 70 Wis.2d at 627, 235 N.W.2d 435. Ries also acknowledges that the Town currently lacks the employees and equipment that it would need to provide its own services because they were absorbed by the Village after incorporation.

¶ 31 Nevertheless, Ries argues that "need" is not demonstrated in this case because the Village is the reason why the Town no longer has the employees and equipment needed to provide its own services. We do not address this argument because it is insufficiently developed. *See State v. Pettit,* 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct.App.1992). In addition, Ries has not brought to our attention any case that holds that the "need" requirement is not met under the rule of reason when the territory proposed to be annexed can no longer provide its own services because the actions of the annexing municipality have created the conditions preventing the territory from being able to do so.

II. Evidentiary Ruling

*7 ¶ 32 Ries argues that the circuit court erred when it precluded Ries from examining former Village board president Richard Gossling regarding the factors that the board discussed in deciding to pass a resolution to petition for the annexation of the Town. Ries observes that, in an offer of proof to the court, Gossling testified that the board did not discuss the need for annexation at the meeting where the board passed the resolution to initiate the annexation. Ries argues in his brief-in-chief that his proposed line of questioning was likely to lead to evidence that was relevant to whether the Village abused its discretion by initiating the process to annex the Town. In response, the Village argues that the court properly exercised its discretion in excluding testimony on this topic on separation of powers grounds. The Village cites authority on the topic of "inherently legislative" matters. Ries does not reply to the Village's response in his reply brief.

¶ 33 Because Ries does not respond to the argument in the reply brief, we conclude that Ries has conceded that the court did not abuse its discretion in excluding testimony regarding what, if anything, the Village board discussed in deciding to initiate the process to annex the Town. *See Charolais Breeding Ranches,* 90 Wis.2d at 109, 279 N.W.2d 493 (unrefuted arguments are conceded). We therefore do not address this argument.

CONCLUSION

¶ 34 For all of the above reasons, we affirm the circuit court's order dismissing Ries' complaint with prejudice.

Order affirmed.

Not recommended for publication in the official reports.

All Citations

354 Wis.2d 322, 847 N.W.2d 425 (Table), 2014 WL 1499471, 2014 WI App 63

Footnotes

1 All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted. We refer to the most recent version of the statutes because the parties have not asserted that there has been a pertinent change to the statutes since the time of the underlying events.

2 Article XI, section 3 of the Wisconsin Constitution states in relevant part:

> Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village....

We note that article XI, section 3 of the Wisconsin Constitution, "as originally adopted, ... empowered the legislature to provide for the organization of cities and incorporated villages. By an amendment adopted in November, 1924, this language was eliminated" and the section now reads as provided above. *Dremel v. L.L. Freeman, Inc.,* 9 Wis.2d 592, 596, 101 N.W.2d 659 (1960). However,"[t]he legislature still has the authority to provide for the incorporation of villages by general state law." *Id.*

Article IV, section 23 provides in relevant part:

> The legislature shall establish but one system of town government, which shall be as nearly uniform as practicable....

3 In *Walag v. DOA,* 2001 WI App 217, 247 Wis.2d 850, 634 N.W.2d 906, we addressed whether the incorporation review board properly determined that the proposed village failed to meet the requirements for incorporation under WIS. STAT. § 66.016(1)(a) (1997–98). WISCONSIN STAT. § 66.016(1)(a) (1997–98) preceded what is now WIS. STAT. § 66.0207(1)(a) (2011–12). *See id.,* ¶ 1 n. 1. Our analysis is not affected by the fact that *Walag* addressed WIS. STAT. § 66.016(1)(a) (1997–98) because there are no significant differences between that statute and WIS. STAT. § 66.0207 (2011–12). *Id.*

4 Ries' reliance on *Smith v. Sherry,* 50 Wis. 210, 6 N.W. 561 (1880), for the proposition that rural territory may not be annexed to a village is also misplaced. *Sherry* is considered to be the case that first established the rule of reason. *Town of Lyons v. City of Lake Geneva,* 56 Wis.2d 331, 337, 202 N.W.2d 228 (1972). The rule of reason does not provide that territory may not be annexed to an incorporated village if it lacks the characteristics of a village. *See Town of Brookfield v. City of Brookfield,* 274 Wis. 638, 644, 80 N.W.2d 800 (1957) ("The mere fact that a large percentage of the tract proposed to be annexed consists of agricultural land is not of itself a basis for holding the ordinance annexing the area to be null and void.").

5 We note that in its written decision the circuit court stated that it was adopting the factual findings set forth in the Village's closing trial brief under the heading "[u]ndisputed facts," regardless "whether any or more of them is disputed or not." The above quote is taken from that section of the Village's brief.

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