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STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY

TOWN OF WASHINGTON,

Plaintiff,

v.

CITY OF EAU CLAIRE,

Defendant,

and

CDPG DEVELOPERS, LLC,

Intervening Defendant.

RESPONSE BRIEF AND MEMORANDUM OF LAW IN SUPPORT OF CITY OF EAU CLAIRE'S MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Case No. 22 CV 347

The Intervening Defendant, CDPG Developers LLC ("CDPG"), by and through its attorneys, Bakke Norman, S.C., by William E. Wallo and Lindsey K. Kohls, submits the following *Response Brief and Memorandum of Law (i) in Support of the City of Eau Claire's Motion to Dismiss and (ii) in Opposition to Plaintiff's Motion of Summary Judgment* and states as follows:

INTRODUCTION

By adopting the Annexation Ordinance[1], the City detached the Annexed Territory from the Town. The Annexed Territory was owned by Laverne Stewart, Todd Hauge, and Eau Claire County (which is the owner of Lowes Creek County Park, a portion of which is located in the Annexed Territory). In its Complaint, the Town contends: (i) the annexation petition filed by LaVerne Stewart and Todd Hauge (the "Petition") was not a unanimous petition because it lacked the signature of a representative of Eau Claire County; (ii) required notice and publication requirements were not followed; (iii) the annexation violates the rule of reason; (iv) the City has

[1] All capitalized terms in this brief shall mean the same as identified and defined in Plaintiff's Complaint.

no demonstrable future need for the Annexed Territory; and (v) adoption of the Annexation Ordinance was an abuse of discretion. Both the City and CDPG have denied these allegations.

The City filed a Motion to Dismiss the Plaintiff's Complaint. In the Motion to Dismiss, the City highlighted the Town's failure to obtain review of the Annexation Ordinance by the Wisconsin Department of Administration *prior* to filing suit as required under Wis. Stat. § 66.0217(6)(d)(2). As a matter of law, this fact alone precludes pursuit of the claims asserted in the Complaint. The City's Motion also demonstrated why the annexation petition was, under applicable Wisconsin law, a "unanimous" petition because the signature of Eau Claire County was not required. Accordingly, the Town is precluded from judicially opposing the annexation under Wis. Stat. § 66.0217(11)(c).

The Town has responded to the City's Motion to Dismiss, which it contends should (at least initially) be regarded as a motion for judgment on the pleadings. Because the City had ostensibly introduced "evidence" in support of its Motion, the Town contends the City's Motion should ultimately be treated as a motion for summary judgment under Wis. Stat. §§ 802.06(2)(b) or (3). The Town also filed its own competing motion for summary judgment. In it, the Town argues (i) the Town did not need DOA review and (ii) the Petition submitted to the City was not unanimous.[2]

The Town is wrong on both points.

As a result, its Motion for Summary Judgment should be denied. The City's Motion should be granted, and the Complaint dismissed.

[2] In its Brief in support of its Motion for Summary Judgment, the Town also responded to the City's arguments that (i) certiorari review was the appropriate vehicle for review of the City's action rather than a declaratory judgment action and (ii) the "rule of reason" should be abolished. CDPG supports, adopts, and incorporates the City's arguments on these points. However, there is no basis for the entry of judgment in the Town's favor on the "rule of reason" issue at this stage, even if the Town were to request it, and this Memorandum addresses only the issues of DOA review and unanimity as they are dispositive.

STATEMENT OF UNCONTESTED FACTS

1. Lavern Stewart ("Stewart") and Todd Hauge ("Hauge") are private landowners whose property was, until recently, located in the Town of Washington. Complaint, Doc. No. 2, ¶ 3; Affidavit of Janine Henning, Doc. No. 23, Ex. C. In the spring of 2022, they filed a petition for direct annexation by unanimous approval to the City of Eau Claire. The Petition requested that the City annex the Annexed Territory. *Id.*
2. All private property owners within the Annexed Territory signed the Petition. Complaint, Doc. No. 2, ¶ 10. Stewart and Hauge collectively own approximately three hundred acres of the Annexed Territory (or about 71% of the total territory). *Id.*, ¶¶ 4-5.
3. Approximately 122 acres of public parkland was also included in the Annexed Territory. *Id.*, ¶ 8. Eau Claire County, which owns the portion of Lowes Creek County Park that is part of the Annexed Territory, did not sign the Petition. *Id.*, ¶ 11-12.
4. The Petition was presented to and reviewed by the City and the Wisconsin Department of Administration as a unanimous petition for direct annexation. *Id.*, ¶ 14.
5. The DOA received and reviewed the Petition. *Id.*, ¶¶ 23-26. The DOA notified the City and the Town of its non-binding determination that the proposed annexation was not in the public interest. *Id.,* ¶ 26; Henning Aff., Ex. D.[3]

[3] The Town cites to the DOA determination on a number of occasions, specifically the statement that "it appears the Town can better provide fire and EMS services because it is currently providing these services." Henning Aff., Ex. D. Submission of the DOA letter to illustrate that the review *occurred* is certainly acceptable. However, the DOA determination is non-binding and not preclusive. To the extent it is being offered for the truth of the matter asserted (for example, that the Town is, *in fact*, in better position to deliver fire and EMS services), it is hearsay and not admissible for that purpose. Summary judgment affidavits must be based upon testimony by a person *with knowledge* of the underlying facts, not knowledge of what they were *told*, and must set forth "evidentiary facts as would be admissible in evidence." *See* Wis. Stat. § 802.08(3); *Bank of America v. Neis*, 2013 WI App 89, 349 Wis. 2d 461, 475, 835 N.W. 2d 527 (once the admissibility of evidence in affidavit is challenged, the court must determine whether the evidence would be admissible at trial).

6. During the City's review of the Petition, the Town notified the City of its objections to the annexation and its contention that the Petition was not unanimous. Complaint, Doc. No. 2, ¶¶ 30-31.

7. The City approved the Petition and adopted the Annexation Ordinance on June 14, 2022. Id. at ¶ 33; Henning Aff., Ex. B.[4]

APPLICABLE LEGAL STANDARDS

Boiled to their essence, the arguments presented to the Court by both the City and the Town in their respective motions are based on an uncontested set of facts about the process that led to the adoption of the Annexation Ordinance. The question is whether those facts warrant entry of judgment, and for whom. CDPG submits that regardless of the procedural mechanism through which the City's motion is viewed, the Court should enter judgment as a matter of law dismissing the Town's Complaint.

The City presented its Motion as a motion to dismiss. A motion to dismiss "tests the legal sufficiency of the complaint." *Data Key Partners v. Permia Advisers LLC*, 2014 WI 86, ¶ 17, 356 Wis. 2d 665, 849 N.W. 2d 693. When reviewing a motion to dismiss, the factual allegations in the complaint are accepted as true. *Id.* at ¶ 18; *Kaloti Enterprises, Inc v. Kellogg Sales Co.*, 2005 WI 111, ¶ 11, 283 Wis.2d 555, 699 N.W.2d 205. Presuming the facts alleged in the complaint are true, the Court must then determine whether those facts would entitle the plaintiff to relief. *Data Key,* 2014 WI 86 at ¶ 19-21.

[4] There are a number of other "uncontested" facts presented by the Town, most of which relate to the lack of notice necessary for a petition by one half of the owners in a particular territory. They are therefore not germane to the outcome. The essential facts necessary to decide the motions are that (i) the Petition included the signatures of all owners except the County, (ii) the only County-owned land in the Annexed Territory consists of a portion of a public park, (iii) the Petition was designated and reviewed as a unanimous petition for direct annexation, and (iv) the Town did not request DOA review prior to filing suit.

The Town argues that the City's Motion to Dismiss should actually be regarded as a motion for judgment on the pleadings because the City referenced Wis. Stat. § 802.06(3). Under Wis. Stat. § 802.06(3), a party may move for judgment on the pleadings. A motion for judgment on the pleadings is effectively a summary judgment motion minus any affidavits or other supporting documents. *Schuster v. Altenberg*, 144 Wis. 2d 223, 424 N.W.2d 159, 161 (1988). Thus, a motion for judgment on the pleadings contemplates the first *two* steps of summary judgment methodology. *Commercial Mortg. & Finance Co. v. Clerk of Circuit Court*, 2004 WI App 204, ¶ 12, 276 Wis. 2d 846, 689 N.W.2d 74. The Court must first examine the complaint to determine if a claim has been stated. If so, the Court then turns to the responsive pleading to determine whether material factual issues exist. *Id.*

In determining the legal sufficiency of the complaint and whether a claim for relief has been stated, "the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true." *Schuster*, 144 Wis. 2d at 228 (citing *Prah v. Maretti*, 108 Wis. 2d 223, 229, 321 N.W.2d 182 (1982)). The complaint should be found legally insufficient only if "it is quite clear that under no circumstances can the plaintiff recover." *Id.* If a claim for relief has been stated, the Court must then turn to the responsive pleadings to determine whether a material factual issue exists. Finally, if no genuine issue of material fact exists, the Court may determine that the moving party is entitled to judgment as a matter of law. *Id*.

Whether a claim is capable of surviving a judgment on the pleadings is a question of law. *DeBraska v. Quad Graphics, Inc.*, 2009 WI App 23, ¶ 12, 316 Wis. 2d 386, 763 N.W.2d 219. Judgment on the pleadings is proper if there are no genuine issues of material fact. *Southport Commons, LLC v. Wisconsin Dept. of Transportation*, 2021 WI 52, ¶ 43, 397 Wis. 2d 362, 960 N.W.2d 17. A factual issue is genuine if the evidence is such that a reasonable jury could return a

verdict for the nonmoving party. *Id.* However, because the facts *pled* by the Plaintiff are accepted as true, the pleadings themselves must illustrate there are genuine and material factual disputes to avoid judgment at this stage. *Schuster*, 144 Wis. 2d at 228 ("facts pleaded by the plaintiff . . . are accepted as true"); *Southport Commons*, 2021 WI 52, ¶ 46 (judgment on the pleadings was properly granted as there was no genuine issue of material fact because the plaintiff "did not *allege* such a factual dispute").

If, on a motion for judgment on the pleadings, matters *outside the pleadings* are presented to and not excluded by the court, the motion is to be treated as one for summary judgment, and parties shall be given reasonable opportunity to present all material "made pertinent to the motion." *See* Wis. Stat. § 802.06(3). The Town asserts that the City included "evidence not present in the pleadings" with its motion when it filed a copy of the deeds to the County park as an exhibit. Presuming that the Court does not "exclude" the exhibit, the Town believes the City's Motion should ultimately be reviewed as a motion for summary judgment, and the Town filed a cross-motion for summary judgment of its own.

Summary judgment may be granted where there is no factual dispute or where no competing inferences arise from undisputed facts and the law resolving the issues is clear. *Tomlin v. State Farm Mut. Auto. Liability Ins. Co.*, 95 Wis. 2d 215, 290 N.W.2d 285 (1980). Wis. Stat. § 802.08(2) specifies that summary judgment shall be entered only *if* the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Likewise, opposition to a motion for a summary judgment may not rest upon the mere allegations or denials of the pleadings but must, "by affidavits or as otherwise provided in this section," instead set forth specific facts showing there is a genuine issue for trial.

Importantly, on summary judgment the Court does not *decide* any issues of fact; rather, it decides whether there *is* an issue of fact. *Tews v. NHI, LLC*, 2010 WI 137, 330 Wis. 2d 389, 793 N.W.2d 860; *see also Gillund v. Meridian Mut. Ins. Co.,* 2010 WI App 4, 323 Wis. 2d 1, 27, 778 N.W.2d 662; *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis. 2d 183, 190, 260 N.W.2d 241 (Wis. 1977).

As the Wisconsin Supreme Court has noted on numerous occasions, summary judgment is a drastic remedy, and the moving party must therefore be *clearly* entitled to judgment as a matter of law. *CED Properties, LLC v. City of Oshkosh*, 2018 WI 24, ¶ 19, 380 Wis. 2d 399, 909 N.W.2d 136. Courts are to utilize a two-step process in making this determination. First, the court is to ask if the plaintiff has stated a claim for relief. Second, the court is to apply Wis. Stat. § 802.08(2) and ask if any factual issues exist which preclude a grant of summary judgment. *Id.* at ¶ 18.

While the standards vary to a certain extent, two fundamental legal questions determine the outcome of this case at this stage. The first question is whether the Town was required to obtain DOA review before filing suit. The Town admits it did not do so. Only if the Town is legally excused from compliance with § 66.0217(6)(d) can it proceed with this action. If there is no legal excuse for the Town's failure, the action must be dismissed. The second question is whether the County's signature – as the owner of a county park – was required to make the Petition "unanimous." The parties agree the County did not sign the Petition, and that it was presented to and reviewed by the City as a "unanimous" petition. If the County's signature was not required, then the Town is legally precluded from filing suit under § 66.0217(11)(c), and the action must be summarily dismissed. As a matter of law, given the undisputed facts, dismissal of the Complaint is the only appropriate outcome.

ARGUMENT

The Wisconsin annexation statutes set forth a number of specific steps that must be taken before a city council can annex territory. These provisions are in the nature of safeguards against "hasty, arbitrary, or minority action." *Town of Blooming Grove v. City of Madison*, 4 Wis. 2d 447, 453, 90 N.W. 573 (Wis. 1958). Wisconsin courts have long acknowledged that landowner wishes are an important consideration when reviewing annexations, insofar as the right to live in a particular municipal unit is an important right. *Id.*; *see also Town of Waukesha v. City of Waukesha*, 58 Wis. 2d 525, 533, 206 N.W.2d 585 (Wis. 1973). At the same time, when property is "detached" from a town, the legislature has recognized that the town is an interested party and may test the validity of the annexation – provided the town does so in accordance with the statute. *See Town of Blooming Grove*, at 453 (noting *statutory* authority for town to "institute and maintain an action").

The purpose to develop one's land is legitimate, and property owners may seek annexation in pursuit of their own perceived best interests. *See Town of Pleasant Prairie v. City of Kenosha*, 75 Wis. 2d 322, 329, 249 N.W. 2d 581 (Wis. 1977) (court found no basis to invalidate annexation where landowners wished to develop their land in ways which "required zoning and municipal services not available in the Town"); *see also Town of Waukesha,* 58 Wis.2d at 530 (petitioners "acted in light of their desires and their best interests as they saw them and their right to do so, statutorily provided, is not to be disregarded"). By its complaint, the Town seeks to invalidate the Annexation Ordinance and thwart the landowners' wishes by arguing that strict compliance with § 66.0217 is required – but *only when it suits the Town*. As the City has illustrated in its Motion to Dismiss, the Petition *does* comply with Wisconsin law regarding "unanimous" petitions. Just as importantly, the Town cannot disregard statutory prerequisites to filing suit simply because *it* believes them to be immaterial or inconsequential.

I. THE TOWN'S ADMITTED FAILURE TO OBTAIN REVIEW BY THE DEPARTMENT OF ADMINISTRATION PRIOR TO FILING SUIT REQUIRES DISMISSAL OF THE COMPLAINT.

The structure of the Town's summary judgment brief is telling. The Town utterly discounts the issue of DOA review, even though it is the first point – and critical threshold problem – identified by the City in its Motion to Dismiss. Throughout its brief, the Town attempts to focus the Court's attention on the purported lack of "unanimity" in the Petition and tries to minimize its own lack of compliance with Wis. Stat. § § 66.0217(6)(d). This issue, however, must be resolved *before* the Court considers any other matter raised by the Town. If the Town was required to seek review of the ordinance by the Department of Administration before filing suit, its clear failure to do so is fatal to this action.[5]

Wis. Stat. Wis. Stat. § 66.0217(6)(d) provides for DOA review of direct annexations by unanimous approval. The statute states:

> Upon the request of the town affected by the annexation, the department shall review an annexation under sub. (2) to determine whether the annexation violates any of the following, *provided that the town submits its request to the department within 30 days of the enactment of the annexation ordinance*:
>
> a. The requirement under sub. (2) regarding the contiguity of the territory to be annexed with the annexing city or village.
>
> b. The requirement under sub. (14)(b).

[Emphasis added]. After receipt of a town request, the DOA must conduct a review and send a copy of its findings to the parties "within 20 days of receiving the town's request." Wis. Stat. §

[5] The Town argues that absence of the County's signature is fatal to the annexation. It also argues that even as a petition for annexation by one half, the petition fails for a lack of statutory notice. The reality is that both the Town and the County *had* notice of the annexation proceedings, and the Town *participated* in the City's annexation review and opposed the annexation. The County chose not to participate. While CDPG disputes the Town's characterization of the Petition, there is also little reason to suggest the *ultimate outcome* would change had the alternative procedure been used. DOA review likewise may not have had a meaningful impact on the Town's decision to pursue litigation. However, it remains a statutory requirement, and the Town is not entitled to ignore it. If the Town is going to demand strict compliance from others, it must be held to the same standard.

66.0217(6)(d)(2). If the DOA finds that an annexation violates these requirements, the town has 45 days from receipt of the department's findings to challenge the annexation in circuit court. *Id.*

The Town contends it was entitled to ignore these requirements because the Petition was "falsely" labeled as unanimous. As support, it cites the Wisconsin Supreme Court's decision in *Town of Lincoln v. City of Whitehall*, 2019 WI 37, ¶ 3, 386 Wis.2d 354, 925 N.W.2d 520, for the proposition that *courts* are not required to "blindly accept" that annexation petitions are unanimous and "instead must look to their substance." The ability of *courts* to look beyond labels, however, is inherent in the power of judicial review. That does not answer the more fundamental question of how *a litigant* properly invokes that review.

Annexation ordinances have long enjoyed a *presumption of validity*. *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶ 11, 390 Wis.2d 266, 938 N.W.2d 493. *See also Town of Pleasant Prairie*, 75 Wis.2d at 327 ("annexation ordinances, like legislative enactments in general, enjoy a presumption of validity"). The burden of overcoming this presumption with proof that the ordinance is invalid rests on the party challenging the ordinance. *Id.* If the Annexation Ordinance is presumed valid *until* the proven otherwise, the Town remained obligated to follow the statutory process and cannot simply disregard those provisions it considers immaterial.

The parties all recognize the Supreme Court's recent decision in *Town of Lincoln* delineates the Town's obligations in this regard. It is true that the Supreme Court observed, at the conclusion of its review, that the annexation petition in that case was not a petition for direct annexation by unanimous approval. In doing so, the Court made the observation that "as the limitations set forth in Wis. Stat. § 66.0217(11)(c) pertain to petitions for direct annexation by unanimous approval only, such limitations do not apply here." 2019 WI 37 at ¶ 37. In its brief, the Town contends that § 66.0217(11)(c) is "the source" of *the DOA review requirement* itself. The Town argues that it

could ignore the DOA review requirement in this case because the Petition is likewise not a petition for direct annexation by "unanimous" approval.

The linchpin of the Town's argument is a mischaracterization of the "source" of the mandate for DOA review, which is compounded by its failure to recognize that it is obligated to respect the presumption that the Annexation Ordinance is valid *until a court rules otherwise*. To begin with, the "requirement" for DOA review as a precursor to filing suit is found in § 66.0217(6)(d), not in § 66.0217(11)(c). The latter provision delineates *the consequences* of a failure to obtain the review, but it does not *impose* the requirement itself. The Town of Lincoln properly sought DOA review *under 66.0217(6)(d)* before filing suit because at that moment the annexation ordinance was presumptively *valid*.

The Town's notion that the Supreme Court authorized towns to *ignore* the DOA review requirement is inconsistent with the balance of the decision in *Town of Lincoln.* For example, the Court emphasized that the town "timely sought review" by the DOA. *See* 2019 WI 37 at ¶ 12. At no point in the decision did the Court state that DOA review was *inconsequential* to the process.[6] Instead, the Court observed that the Town of Lincoln had invoked "its right to challenge the annexation in circuit court." Id. at ¶ 14. That right to sue arose as a direct result of the DOA review. While *the court* certainly has the ability to *determine* whether an annexation petition is unanimous or not, *a litigant* cannot simply ignore the statutory process. The Petition was handled as a direct petition by unanimous consent, the Annexation Ordinance as adopted is entitled to a presumption of validity, and the Town was obligated to seek DOA review under § 66.0217(6)(d) before filing suit *even if* it contemplated challenging unanimity.

[6] As the Supreme Court noted, DOA review is *advisory* in nature. 2019 WI 37 at ¶ 13. Nonetheless, it is a required element of the process, and a necessary step for a litigant who wants to invoke its right to challenge the annexation.

Statutory noncompliance and a failure to abide by a statutory mandate that is central to the statutory scheme results in a lack of circuit court "competency to enter judgment in a particular case." *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 21, 370 Wis.2d 59, 882 N.W.2d 738. The requirement for DOA review found in Wis. Stat. § 66.0217(6)(d) is clearly central to the statutory structure. The statutory language reflects that the legislature expected that DOA review, even if only advisory, is *required* at various stages of the annexation process. *See* Wis. Stat. § 66.0217(2) ("the person filing the petition with the city or village clerk and the town clerk *shall*, within 5 days of the filing, mail a copy of the scale map and a legal description of the territory to be annexed to the department and the governing body *shall* review the advice of the department, if any, before enacting the annexation ordinance"); Wis. Stat § 66.0217(6)(d)(1) ("[u]pon request of the town affected by the annexation, the department *shall* review an annexation . . . *provided* that the town submits its request to the department within 30 days of the enactment of the annexation ordinance").

The Town opted to disregard the statutory requirement. It was not entitled to do so. Given that failure, this Court does not have the authority to grant the Town's requested relief, and the case should be dismissed.

II. THE ANNEXATION PETITION WAS A UNANIMOUS PETITION WITHIN THE MEANING OF WIS. STAT. § 66.0217(2) BECAUSE THE SIGNATURE OF EAU CLAIRE COUNTY AS THE OWNER OF A PUBLIC PARK WAS NOT REQUIRED.

All of the private landowners located within the Annexed Territory signed the Petition. The Town nonetheless contends that the Petition was not "unanimous" because the County did not sign it. The Town's argument against unanimity is essentially a variation on the concept that "all" means "all." *See Pfister v. Milwaukee Economic Development Corp.*, 216 Wis.2d 243, 270, 576 N.W.2d 554 (Wis. App. 1998). At least *facially*, the Town advances a colorable argument in that

the County owns Lowes Creek County Park and a portion of the park is located within the Annexed Territory. The County-owned park, however, does not count "for or against" the annexation, and the County's signature was consequently not required for unanimity.

The fundamental problem with the Town's argument is this: the Wisconsin Supreme Court has already held that, in the context of annexations, certain property is effectively *excluded from the calculus*. "All" therefore simply cannot mean "all." Instead, Wisconsin courts have concluded that in certain annexation circumstances something *less* than "all" of the property ostensibly affected by an annexation petition will count "for or against" the petition. In *International Paper Company v. City of Fond Du Lac*, 50 Wis.2d 529, 532, 184 N.W.2d 834 (1971), the Court held that while the legislature clearly intended that a municipality should be counted as an owner like a private owner of land, ownership of public streets and alleys "stand in a different category in respect to annexation."

International Paper unequivocally reflects that not *all property* is to be "taken into account in determining the sufficiency of a petition for annexation." *Id.*at 533. There, the Court held that notwithstanding the statutory language, the area representing highways, streets, and alleys, "no matter how owned," would not be "used for or against" the annexation petition. *Id.* The public park property included in the Annexed Territory in this case resembles public streets or roadways in that it is part of the county system of parks, its status cannot be easily altered, and it is not "usable land" for purposes of development. Therefore, like the streets and alleys at issue in *International Paper*, the County-owned park at issue here should not be taken into account in determining the sufficiency of the Petition. *Id*.

This case is similar to *Town of Port Washington v. City of Port Washington*, Ozaukee County Case No. 99-CV-232.[7] In that case, the annexation petition included not only property owned by a private owner but also a stretch of county highway and a parcel of county-owned land operated as a "park-and-ride" lot. *See* Transcript of Decision on Motions for Summary Judgment (the "Port Washington Decision"), Ex. 1 to the Wallo Aff., at 2. Only the private owner signed the petition, which was reviewed by the City of Port Washington and approved as a direct petition by unanimous consent. The Town of Port Washington subsequently challenged the unanimity of the petition "on the theory that all of the interested parties were not petitioners on the annexation petition." *Id.* at 1.

In granting summary judgment to the City of Port Washington, the Ozaukee County Court concluded that under *International Paper*, the county was not "a necessary petitioner." As the court elaborated:

> *International Paper* goes on to indicate that streets and alleyways, parts of a right-of-way, really parts of the public transportation system, are excluded in these kinds of petitions. And I am satisfied that these park and rides are part of the right-of-way. They are part of what the Legislature intended in that case as parts of the public transportation system. They are akin to streets and alleyways. *They are there for the public use*, and therefore I am satisfied that they fall within that exception, are not required to be included in the petition, and therefore this is a petition by unanimous consent filed appropriately, and ultimately approved by the City by resolution granting the annexation.

Id. at 3 [Emphasis added].

Like the public transportation system, public parks are likewise "there for the public use." Indeed, Wisconsin law specifically contemplates that counties will acquire land for both roads *and* parks, and a public park is far more "akin" to the public transportation system than it is to the

[7] Certified copies of the Ozaukee County Court's decision and judgment have been filed as Exhibits to the Affidavit of William E. Wallo in support of this Brief and Memorandum of Law (the "Wallo Aff."). Unpublished circuit court decisions can be cited "for any persuasiveness that might be found in their reasoning and logic." *Brandt v. Labor and Industry Review Com'n*, 160 N.W. 2d 353, 363, 466 N.W. 2d 673 (Wis. App. 1991).

"ownership of usable land." *See International Paper*, 50 Wis. 2d at 533. The commonality of purpose behind county roads and parks is illustrated by Wis. Stat. § 27.065(1)(a), which provides that the county board of any county "which shall have adopted a county system of parks *or* a county system of streets and parkways" is authorized to acquire the lands "necessary for carrying out all or part of such plan." Counties acquire land for both of these systems so they are thereafter accessible and available *for general public use*.[8]

The City correctly outlines why the county system of public parks is *akin* to the county transportation system and should be treated similarly in the annexation context – i.e., parkland simply should not be taken into account in determining the sufficiency of an annexation petition. In response, the Town argues that a 1949 decision interpreting a predecessor annexation statute and decided long before *International Paper* somehow trumps the Supreme Court's subsequent decision in that case. A complete reading of the history of these cases compels the contrary conclusion.

The Town does correctly observe that in *Mueller v. City of Milwaukee*, 254 Wis. 625, 627-28, 37 N.W. 464 (Wis. 1949), the Wisconsin Supreme Court stated there was nothing in the annexation statute which expressly treated "county-owned lands differently from privately-owned lands." In *International Paper*, however, the Court *acknowledged* the potential breadth of its prior

[8] While a county board could *theoretically* decide that it is in the public interest to sell public parkland, this is typically accompanied by a finding there is no longer a public need for the park. *See* Wis. Stat. § 59.52(6)(c) (county board may direct the county clerk to sell or convey any county property not donated and required to be held for a specific purpose); *Newell v. City of Kenosha*, 7 Wis.2d 516, 524, 96 N.W.2d 845 (Wis. 1959) (sale of city park was pursuant to a resolution finding the property was not necessary or required for park purposes). As the City notes, any alternate use of Lowes Creek County Park would be complicated by both zoning and deed restrictions. The similarity between roads and parks under Wisconsin law is also illustrated by Wis. Stat. § 236.43, which deals with the "vacation or alteration" of areas dedicated to the public. Under that statute, parts of a plat dedicated to and accepted by the public for public use may be vacated or altered only if certain conditions are met. These provisions affect both "streets, roads or other public ways" *and* land platted "as a public park or playground."

pronouncements on the topic of "ownership" for annexation purposes, and then expressly moved to *limit* them.

For example, the Court in *International Paper* noted that the trial court had relied upon the ruling in *Town of Menasha v. City of Menasha*, 42 Wis. 2d 719, 168 N.W.2d 161 (Wis. 1969), in finding that public streets needed to be counted in a petition. In *Town of Menasha*, the court found that neither the state, the county, nor any other public body is excluded as an owner whose land can be voted for or against an annexation petition. *Id.* at 166. Consequently, it found "there is no reason to exclude a public highway from the total area." *Id.* When revisiting the issue two years later in *International Paper*, the Court noted that *Town of Menasha* relied upon *Town of Madison v. City of Madison*, 12 Wis.2d 100, 105, 106 N.W.2d 264 (Wis. 1960) for the proposition that the statute did not "limit or exclude" a municipality from being an "owner" to sign an annexation petition.

Town of Madison in turn cited *Mueller* in support of the proposition that the annexation statute "contains no limitation or exclusion of a municipality," and an "owner" for annexation purposes *may* be a municipality. 12 Wis.2d at 105. Notwithstanding *all* of these precedents, in *International Paper*, the Wisconsin Supreme Court began by observing that in *Town of Madison*, the municipality's ownership was of "useable acreage." 50 Wis.2d at 532. The Court followed by observing that the Wisconsin legislature did not intend to "place the burden on the ownership of useable land" to compete with public streets and highways. *Id*. at 533. The decision in *International Paper* effectively abrogated *Town of Menasha.*

In *Town of Port Washington*, the Ozaukee County Court properly recognized the impact of *International Paper* when it focused on the nature of the county transportation system and concluded that the county's ownership of a "park and ride" facility located within the annexed area

did not mandate the county's signature on an otherwise "unanimous" petition. As that court observed, the park and ride facility was "there for the public use." *See* Port Washington Decision at 3. While not directly before the court in either case, a similar analysis is justified in the context of county park land. Like the "park and ride" in *Town of Port Washington*, the county parkland at issue here is "there for the public use," is part of the county system of parks and parkways, and is otherwise non-usable for development purposes. The Town's reliance on *Mueller* is simply misplaced.

Because the Petition *was* properly denominated as "unanimous" under Wis. Stat. § 66.0217(2) in accordance with the decisions in both *International Paper* and *Town of Port Washington*, the Town is precluded from initiating litigation over the annexation pursuant to Wis. Stat. § 66.0217(11)(c). As noted above, the Town failed to obtain DOA review, and absent a DOA finding, "no action on any grounds, whether procedural or jurisdictional, to contest the validity of an annexation under sub. (2) may be brought by any town." The Complaint should be dismissed.

CONCLUSION

The facts in this matter are undisputed. There is no genuine issue of fact and the law is clear. The two owners of all the private land in the Annexed Territory filed a direct annexation by unanimous consent. The Annexed Territory included county park land which, under the principles established by the Wisconsin Supreme Court in *International Paper*, does not count "for or against" the annexation. The County's signature was not required, and the absence of that signature does not affect the unanimity of the Petition. Moreover, the Town failed to satisfy the statutory prerequisite to filing suit when it chose not to seek DOA review of the annexation under Wis. Stat. § 66.0217(6)(d). For either or both of these reasons, the City's Motion should be granted and this case dismissed.

WHEREFORE, CDPG Developers LLC, requests that the Court enter an order denying the Town's Motion for Summary Judgment, granting the City's Motion to Dismiss, entering judgment against the Town, and for such other relief as may be appropriate.

Dated: December 16, 2022.

BAKKE NORMAN, S.C.

By: *Electronically signed by William E. Wallo*

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