STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY
BRANCH 3

TOWN OF WASHINGTON,

Plaintiff,

vs. Case No. 22cv347

CITY OF EAU CLAIRE,

Defendant,

and

CDPG Developers, LLC,

Intervening Defendant.

PLAINTIFF TOWN OF WASHINGTON'S REPLY BRIEF IN SUPPORT OF THE TOWN'S MOTION FOR SUMMARY JUDGMENT

The City of Eau Claire's ("City") ordinance annexing land owned by Laverne Stewart, Todd Hauge, and Eau Claire County ("Annexation Ordinance") is invalid. The annexation petition did not comply with quintessential and rudimentary requirements, namely, that all property owners sign the annexation petition and that the petitioners provide statutorily prescribed notice. Those defects mandate invalidation of the City's Annexation Ordinance.

ARGUMENT

I. THE ANNEXATION WAS NOT UNANIMOUS.

A. The Applicable Statute And Binding Precedent Unambiguously Compel A Finding That The Annexation Was Not Unanimous.

The threshold matter here is that the County did not sign the annexation petition despite a statutory requirement that it do so. That defect mandates denial of the City's motion and judgment in favor of the Town.

This is a case of statutory interpretation. The express statutory language in Wis. Stat. §§ 66.0217(1)(d) and (2) establishes that all landowners must sign a unanimous annexation petition to create the required unanimity, as explained in the Town's summary judgment brief.[1] *See*, Doc. 22 at 11.

The Wisconsin Supreme Court has repeatedly interpreted the meaning of the phrase "owner" in the annexation context. **First**, the Supreme Court unequivocally concluded that a county, specifically with respect to *parkland*, is an "owner" for purposes of annexation requirements. *Mueller v. City of Milwaukee*, 254 Wis. 625, 627-29, 37 N.W.2d 464, 465-66 (1949) ("[t]here is nothing in the statute regarding annexation of lands to a city that treats county-owned lands differently from privately-owned lands."); s*ee also*, Doc. 22 at 12. Later, the Supreme Court affirmed that premise. *Town of Madison v. City of Madison*, 12 Wis. 2d 100, 105, 106 N.W.2d 264, 266 (1960) ("We have held under these prior section that land owned by one municipality could be included within the territory annexed to another municipality *and such municipality counted as an owner*.") (Emphasis added.) The Supreme Court again re-affirmed this interpretation in *International Paper Company v. City of Fond du Lac*, 50 Wis. 2d 529, 532, 184 N.W.2d 834, 836 (1971), specifically determining that "the legislature intended a municipality should be counted as an owner like a private owner of land…." for annexation purposes.

Second, in the same case in which the Supreme Court affirmed political subdivisions are owners for annexation purposes, the Court created a narrow exception to that requirement. Specifically, the Court concluded that owners of "public streets and alleys," regardless of whether the land underlying the public street or alley is privately or publically owned, need not be included

[1] Neither the City nor the Developer addressed the Town's arguments regarding the express statutory language. As a result, Defendants concede that the text of Wis. Stat. § 66.0217 is unambiguous and all property owners must sign a unanimous annexation petition. *State v. Bergquist*, 2002 WI App 39, ¶14, 250 Wis. 2d 792, 641 N.W.2d 179 ("Arguments that are not refuted are deemed admitted.").

as owners for annexation purposes. 50 Wis. 2d at 532-33. The Court reasoned that "the legislature did not intend to place the burden on the ownership of usable land to compete with public streets and highways" when proposing annexation and sought to avoid "[m]uch litigation and problems." *Id.* at 533. Even the circuit court case cited by the Defendants (Docs. 27 at 5; 28 at 16-17)[2] recognized—and did not expand upon—the limited nature of the "public streets and alleys" exception, finding "public streets and alleys" includes a park and ride facility because it is part of the vehicular "right-of-way" and the "public transportation system." Doc. 29 at 4.[3] That narrow exception does not apply in the present case because the County parkland included in the annexation petition is not a street, alley, part of the vehicular right-of-way, or a part of the public transportation system.

B. This Court Cannot Expand the *International Paper* Exception.

The law could not be clearer—for purposes of annexation, the owners of any lands, other than those underlying a public street or alley, are "owners" for annexation requirements.[4] The

[2] While citations to circuit court decisions are permissible, inclusion of unpublished, per curiam opinions, and unpublished court of appeals opinions decided prior to 2009 are not citable. Wis. Stat. § 809.23(3). The City argues that it relies on the appellate opinion only because it "summarizes the conclusions of the Ozaukee circuit court strictly to cite the circuit court decision as persuasive authority." Doc. 27 at 3, n. 1. However, the Court of Appeals has already sanctioned a litigant precisely for "cit[ing] a decision of a Wisconsin circuit court in another case, [and then referring] to the unpublished decision of [the Court of Appeals] affirming the circuit court." *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993) (Determining that an "invitation to this court to consider its unpublished decision, or even the naked reference to it, violates both the letter and the spirit of sec. 809.23(3), Stats." and warranted sanctions).

[3] The Developer and the City rely extensively on *Town of Port Washington v. City of Port Washington*, Ozaukee County Case No. 99-CV-232. Docs. 27 at 5; 28 at 14-15. The case is not precedent. Even if this case stood for what the Defendants argue and it were binding, it cannot overrule *International Paper*, *Mueller*, and *Town of Madison*, as only the Supreme Court "may overrrule, modify or withdraw language from a previous state supreme court case." *State v. Jennings*, 2002 WI 44, ¶ 17, 252 Wis. 2d 228, 237, 647 N.W.2d 142, 146.

[4] *Mueller*, *Town of Madison*, and *International Paper* interpret annexation statues that refer to the word "owner," including predecessor statutes to current annexation statutes. Statutory construction requirements provide: "Construction of revised statutes. A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction." Wis. Stat. § 990.001(7); *see also*, *Town of Madison*, 12 Wis. 2d at 105 (in which the Supreme Court specifically relied upon its interpretation of a predecessor annexation statute of the exact term at issue here, the term "owner"). Therefore, the City incorrectly argues that a court's previous interpretation of a predecessor statute is irrelevant. Doc. 27 at 4.

City and Developer argue that this "public street and alley" exception from *International Paper* should be expanded to essentially include all public land or land that they arbitrarily deem undevelopable. Docs. 27 at 4-6; 28 at 13-17. The very case that created the narrow exception in which they attempt to expand specifically rejected that argument. As noted above, the Court in *International Paper* specifically held that "the legislature intended a municipality should be counted as an owner like a private owner of land…." for purposes of annexation. 50 Wis. 2d at 532. The Defendants cannot rely on one part of the holding of that case (the narrow "streets and alleys" exception), and seek its expansion, while ignoring the other holding of this same case, re-affirming that public property owners are "owners" for purposes of annexation requirements. In addition, adopting the Defendant's request would abrogate the Supreme Court's specific holdings in both *Mueller* and *Town of Madison*.

The Developer also creates a new argument from whole cloth that the *International Paper* exception should turn not on whether land is a "public street or alley" but on whether the land's "status cannot be easily altered" such that it is "usable land for purposes of development." Doc. 28 at 13 (internal quotations omitted); *see also id.* at 17 (arguing that the owners of parks should be excluded from annexation processes because parks are "non-usable for development purposes"). The Developer's limitless expansion of the narrow *International Paper* exception is wholly arbitrary. The Developer even concedes that the County "could *theoretically* decide that it is in the public interest to sell public parkland" at which point the property could be used for whatever purpose allowed under local regulation. Doc. 26 at 15 (emphasis in the original). And conversely, plenty of privately-owned land may not be well-suited for development for a variety of reasons. The property may be contaminated and unfit for human habitation; it could contain a conservation easement; it may be difficult terrain not suitable for development. Or, perhaps it is simply owned by someone who does not wish to sell their property for development. Those lands—like the

County park—could not be "easily altered" into a development. How difficult must a potential development be before a developer could simply write it off as not "easily altered" and therefore the owner of such lands would not be required to sign a unanimous annexation petition? The Developer does not say. The Developer's proposed new expanded—and boundless—exception is wholly contrary to the plain text of the statute and the narrow exception created in *International Paper.* Accordingly the Court should find that the petition is not unanimous.

Indeed, as noted above, the circuit court reasoning in *Town of Port Washington* in which the City and Developer rely actually supports the Town's position and actual holding of *International Paper*. The Ozaukee circuit court analyzed whether the park and ride was "part of the transportation system," and ultimately determined that the park and ride was actually "part of the right-of-way." Doc. 29 at 4:11-13. Here, there is no contention that the County park is a street, alley, or a right-of-way of any kind, nor could there be.

II. NON-UNANIMOUS ANNEXATIONS DO NOT REQUIRE DOA REVIEW.

Town of Lincoln v. City of Whitehall, 2019 WI 37, ¶ 37, 386 Wis. 2d 354, 925 N.W.2d 520, decisively held that "the limitations on annexation challenges set forth in Wis. Stat. § 66.0217(11)(c) pertain to petitions for direct annexation by unanimous approval only" and do not apply to falsely-classified annexation petitions. Thus, the Town was not required to seek a second[5] Department of Administration ("DOA") review to challenge an incorrectly labeled annexation.

Wis. Stat. § 66.0217(11) governs challenges to annexations. In a non-unanimous annexation, a town may file suit challenging the annexation on any grounds, whether procedural or jurisdictional, without seeking DOA approval. Wis. Stat. § 66.0217(11)(a). Conversely, towns

[5] The DOA previously reviewed the annexation pursuant to Wis. Stat. § 66.0217(6)(a), and found the annexation was not in the public interest because the Town was better positioned to provide municipal services to the territory. Doc. 23 at 12-13.

are precluded from contesting a unanimous annexation "[e]xcept as provided in [Wis. Stat. § 66.0217](6)(d)2.]." Wis. Stat. § 66.0217(11)(c). Where section 66.0217(6)(d)2. applies, unlike this this case, a town may *only* contest a unanimous annexation if the DOA has determined that the annexed area is not contiguous to the annexing city or village.[6]

The City and Developer argue that the Town cannot raise this challenge to the proposed annexation unless it first asks the DOA to review whether the annexed area is contiguous to the City. Docs. 27 at 6-7; 28 at 9-12. This argument fundamentally misinterprets *Town of Lincoln*. The Supreme Court determined that when an annexation petition is mis-labeled as "unanimous" "[w]e are not bound by the labels placed on documents and instead must look to their substance." *Town of Lincoln*, 2019 WI 37, ¶33. The Court further clarified that "if a petition for annexation does not have unanimous approval, then the petition does not fall under [Wis. Stat. § 66.0217]sub. (2), which applies to unanimous petitions only." *Id.*, ¶30. Reiterating that point, the Court held that a "petition that lacks the signature of an owner of real property in the territory proposed for annexation is not 'unanimous' for purposes of Wis. Stat. § 66.0217(2)." *Id.* ¶31. The Court thus concluded that "[a]s the limitations on annexation challenges 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." *Id.*, ¶37. If a unanimous annexation petition does not include the signature of a property owner, then the Supreme Court has declared that it is not unanimous, and the requirements specifically applicable to unanimous annexations under Wis. Stat. §§ 66.0217(6)(d)2 and (11)(c). do not apply.

Moreover, the City's and the Developer's arguments lead to an absurd result. As explained above, the DOA only reviews whether the annexed territory is contiguous to the annexing

[6] This statute also includes another criteria for DOA review of an annexation that is not relevant to a town's authority to contest a *unanimous* annexation. *See*, Wis. Stat. § 66.0217(14)(b)1.b.

municipality, and a town can only challenge an annexation if the DOA finds that the territory is *not* contiguous. Wis. Stat. § 66.0217(6)(d)1. and 2. The DOA does not review whether the petition is actually "unanimous," nor does the statute permit the DOA to do so. Thus, under the interpretation offered by the City and the Developer, if a petition was not truly unanimous, but contiguous, a town could *never* challenge a falsely labelled "unanimous" annexation. *Town of Lincoln* specifically warned against that result: "allowing a petition for annexation to proceed as a petition for direct annexation by unanimous approval despite a facial deficiency in the unanimity of the petition would potentially encourage the mislabeling of annexation petitions." *Id.* ¶32. That warning applies with equal force here, as, under the City and Developer interpretation, the same incentives would exist that the Supreme Court sought to prevent.

Nothing in *Town of Lincoln* says otherwise. The City and the Developer point out that the Town of Lincoln sought DOA review prior to filing a challenge, a fact only referenced in the Court's recital of the procedural history of the case. Docs. 27 at 6; 28 at 11. But nowhere in *Town of Lincoln* did the Court conclude that this was a necessary step for falsely labeled annexation petitions. The Defendant's arguments directly contradict *Town of Lincoln*'s express determination that "unanimous means unanimous." 2019 WI 37, ¶32

Therefore, the requirements that a unanimous annexation petition be reviewed by the DOA, and that a town may only challenge the annexation if the DOA concludes that the annexation area is not contiguous to the annexing municipality, are simply not applicable if the annexation is not truly unanimous. As a result, DOA review was not required here, and the Court should grant the Town's motion.

III. THE PETITION DEFECTS ARE NOT DE MINIMIS.

The City and the Developer suggest that the failure of the City and annexation petitioners to follow statutory approval and notice requirements are de minimis defects and should be excused.

E.g., Doc. 27 at 4; Doc. 28 at 8. Not so. Again, *Town of Lincoln* precludes that conclusion. The Court made clear that if an annexation petition is erroneously labeled as "unanimous," "[s]uch a defect in the petition is not de minimis." 2019 WI 37, ¶32. Additionally, the Court impressed that statutory notice requirements for non-unanimous annexations cannot be ignored. *Id.* ¶34. Therefore, neither an annexation petition that is deficient because it was not approved by all required parties nor the failure to provide statutory notices is de minimis.[7]

IV. THIS CASE WAS PROPERLY BROUGHT AS A DECLARATORY JUDGMENT ACTION.

In this action the Town has challenged the validity of the Annexation Ordinance because it does not comply with state statutes. The declaratory judgment statute permits that exact type of challenge. The declaratory judgment statute authorizes parties to seek a declaration regarding the validity of ordinances:

> Power to construe, etc. Any person . . .whose rights, status or other legal relations are affected by a statute, **municipal ordinance**, contract or franchise, may have determined any question of construction or **validity** arising under the instrument, statute, **ordinance**, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Wis. Stat. § 806.04(2) (Emphasis added.) This case follows that avenue of judicial relief.

The City asserts that *Voters with Facts v. City of Eau Claire*, 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131, mandates certiorari review. Doc. 27 at 7-8. That is incorrect. Rather, *Voters with Facts* left open declaratory judgment challenges to ordinances based on their unconstitutionality or non-compliance with state statutes. 2018 WI 63, ¶69, n. 31. Indeed, in that very case the Supreme Court affirmed that use of declaratory judgment in a previously-decided annexation case was appropriate because the "judicial question was limited to whether the boundary lines were

[7] Defendants arguments that notice requirements are de minimis or that other forms of notice were provided (Docs. 27 at 4; 28 at 9, n. 5) are also not supported by any affidavits or other evidence and should be disregarded. The Court of Appeals has "repeatedly stated, attorneys' arguments are not evidence." *Horak v. Bldg. Servs. Indus. Sales Co.*, 2012 WI App 54, 341 Wis. 2d 403, 406, 815 N.W.2d 400, 402; *see also David Christensen Trucking & Excavating, Inc. v. Mehdian*, 2006 WI App 254, 297 Wis. 2d 765, 775, 726 N.W.2d 689, 694 ("Argument is not evidence.")

'reasonable in the sense that they were not fixed arbitrarily, capriciously, or in the abuse of discretion.'" *Id.* (quoting *Town of Mt. Pleasant, Racine Cnty. v. City of Racine, Racine Cnty*., 24 Wis. 2d 41, 46, 127 N.W.2d 757, 760 (1964)). The Court also made clear that declaratory judgment actions challenging the "validity of an ordinance under a statute" was a valid use of declaratory judgment. *Id.* This case falls squarely within those confines.

Additionally, *Voters with Facts* involved a challenge to whether the City of Eau Claire had made a correct factual determination that an area was blighted for purposes of creating a tax increment district—not a challenge to the validity of an ordinance for non-compliance with state statutes. *Id*., ¶11. Since this case is a request for a declaration that an ordinance is invalid for non-compliance with state statutes, declaratory judgment is the correct vehicle for challenging the City's annexation ordinance.

CONCLUSION

For the reasons stated above, and in the Town's brief in support of its motion for summary judgment, the Court should grant the Town's motion and deny the City's motion.

DATED this 6th day of January, 2023.

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