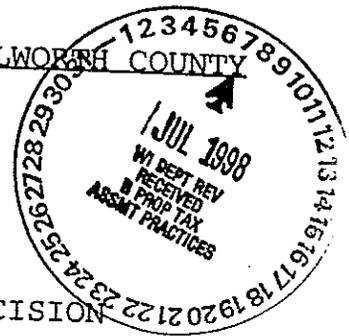


STATE OF WISCONSIN CIRCUIT COURT

WALWORTH COUNTY



TOWN OF SUGAR CREEK,

Plaintiff,

vs.

CITY OF ELKHORN,

Defendant,

MANN BROTHERS, INC.,

Intervening Defendant.

FILED
CIRCUIT COURT

DECISION

JUL 1 1998

Case No. 96CV645

Clerk of Courts Walworth Co.
By: Claudia J. Last

FACTS:

The Town of Sugar Creek (hereinafter referred to as Town), is an agriculturally and recreationally based township located in southeastern Wisconsin. Largely due to its rural nature, the Town does not provide sewer services to residents, who must rely on septic systems to dispose of waste. The Town does not presently have a sanitary district, and does not have any plans to create one in the near future.

Mann Brothers, Inc. is a business located in the Town, and is approximately one and one half miles north of the City of Elkhorn (hereinafter referred to as City). Mann Brothers employs 275-300 people, and due to the progressive growth of the company, expansion will be necessary in the near future. However, Mann Brothers, fearing that it would be impossible to enlarge its facilities without convenient access to sewer services, sought annexation into the City.

In 1995 the same area sought annexation into the City, but was unable to do so due to a technicality. On July 12, 1996, Mr.

Richard Mann, of Mann Brothers, sent notice of his intention to circulate a Petition for Annexation to the City. This notice was sent in compliance with Sec. 66.021. Wis. Stats. The City Clerk thereafter received the signed petition and maps of the area to be included in the proposed annexation on August 29, 1996.

Territory from both the Towns of Sugar Creek and Lafayette are included in the annexation proposal. On October 7, 1996 the Common Council for the City passed Ordinance No. 990, annexing approximately 371 acres of land.

On December 4, 1996, the Town filed a claim against the City alleging that the annexation ordinance was void, illegal, and contrary to public policy. The issue before the Court is whether Ordinance No. 990 was a lawful annexation. This Court finds that the City lawfully annexed property from the Town, and Ordinance No. 990 should be upheld and given effect.

DISCUSSION:

I. Standard of Law

In reviewing an annexation ordinance a court is constrained in the scope of its judicial review. "The courts may not inquire into the wisdom of the annexation ordinance or determine whether it is in the best interest of the parties to the proceeding, or of the public." Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 249 N.W. 2d 581, 585, (1977). A court may not scrutinize whether the annexation is desirable or beneficial; such an act would be tantamount to an exercise of legislative power. Therefore, the scope of judicial review in this case is

limited to an examination of the facts.

In deciding the validity of an annexation ordinance, it must be given the same deference as would be given to any municipal ordinance. "An annexation ordinance, like any ordinance passed by a municipality is presumed to be valid and the presumption remains until overcome by proof produced by the party attacking it." Town of Lyons v. Lake Geneva, 56 Wis. 2d 331, 339, 202 N.W. 2d 228 (1972). "Those parties challenging the validity of an annexation ordinance must overcome this common-law presumption of validity. Town of Waukesha v. City of Waukesha, 58 Wis. 2d 525, 533, 206 N.W. 2d 585 (1973). In the case at bar, the burden to refute the validity of Ordinance No. 990 rests upon the Town.

The Town has attempted to demonstrate that its burden was satisfied in the following ways; (1) the City's motion for summary judgement was denied, (2) the City violated state statutes, (3) the City violated its own ordinances, and (4) the rule of reason was violated by the City. In each of the above listed instances the Town failed to overcome the presumption of validity and prove that the annexation was invalid. Therefore, the annexation is presumed by this Court to be valid.

II. Motion for Summary Judgement

The Town maintains that the denial of the City's motion for summary judgement is demonstrative of the fact that it satisfied its burden of proof, and/or shifted the burden of proof to the City. "The well known purpose of summary judgement is to determine whether there are any disputed issues for trial, and to

avoid trial when there is nothing to try." Transportation Inc. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, 289, 507 N.W. 2d 136 (Ct. App. 1993). "The party seeking summary judgement must establish ... there is no triable issue of material fact on any issue." Swatek v. County of Dane, 192 Wis. 2d 47, 62, 53 N.W. 2d 45 (1995).

When the Court denied the City's motion for summary judgement, it was simply an affirmation that genuine issues of material fact were still pending. Therefore, the Court had to allow the case to proceed through the litigation process. However, this denial was in no way an affirmation by the Court that the Town had fulfilled its burden of proof. In addition, the denial of summary judgement does not in any way shift the burden to the City. The burden to contest the validity of the ordinance remained upon the Town throughout the trial process. Ultimately the Court finds, the motion for summary judgement was dispositive of nothing in terms of the ability of the Town to meet its burden of proof or shift the burden of proof to the City.

III. Statutory Challenge

In a further attempt to attack the validity of the annexation, the Town states the City violated Sec. 66.021 Wis. Stats. Generally, Sec. 66.021 Wis. Stats. governs the ability of municipalities to annex property. The Town specifically alleges, that the annexation ordinance is void for failure to comply with sections 66.021(3), 66.021(4), and 66.021(11). However, based on

the facts it appears that the City complied with every applicable section of the statute.

Section 66.021(3) deals with the proper form of notice required for initiating annexation. As the petitioner seeking annexation, Mann Brothers was responsible for ensuring that the State Statutes and the City Municipal Codes were complied with fully. Mann Brothers was required under Sec. 66.021(3)(a) Wis. Stats., to publish its intent to circulate an annexation petition. That publication must include a statement of intent to circulate the annexation petition, an accurate description of the annexation property, the place to which annexation is proposed must be named, the places of detachment must be specified, and the address of the person prompting the notice must be given. Section 66.021(3)(b) requires a copy of such notice and a scale map to be properly served upon the clerk of each municipality affected. The Town has failed to raise any arguments or show any facts which demonstrate that either of the defendants did not fully comply with Sec. 66.021(3) Wis. Stats. Thus, the Court finds that both defendants fully complied with Section 66.021(3).

The Town also alleges that Sec. 66.021(4) Wis. Stats. was violated, but again never specifies how either of the defendants breached its requirements. The purpose of Sec. 66.021(4) Wis. Stats. is to delineate the guidelines for an annexation petition. The Mann Petition, in accordance with Section 66.021(4)(a), included a statement of purpose for the annexation, gave an accurate description of the territory to be annexed, attached a

scale map, and specified the population under Section 66.013(2)(b). In addition, no person was allowed to withdraw or add his/her name after the petition was filed, thus satisfying Section 66.021(4)(b). The petition was circulated ten days after the publication of the notice of intention to circulate, and was filed within two months of the date of publication. Again, in this instance the Town alleges statutory violations without any factual support for those allegations.

Finally, the Town challenges the validity of Ordinance No. 990 under Sec. 66.021(11) Wis. Stats., stating the annexation lacks homogeneity, thus violating public interest. Sec. 66.021(11) Wis. Stats. requires a county having a population of 50,000 or more to have a proposed annexation reviewed by the Department of Development (currently the Department of Commerce) to ascertain whether it violates public interest. Homogeneity, is one of the many guidelines used under the statute for the department to consider when deciding if it violates public interest. However, the context of the statute lacks a definition of what constitutes homogeneity. "When this occurs Wisconsin courts may infer the agency is competent to interpret that statute and is entitled to a degree of judicial deference in that regard. Wisconsin Central Ltd. v. Public Service Commission, 170 Wis. 2d 558, 567, 490 N.W. 2d 27 (Ct. App. 1992). This Court duly notes, "when a legal question is intertwined with a factual determination or with value or policy determinations the courts will defer to the agency which has the primary responsibility for

determining fact and policy." Lifedata Medical Services v. Labor & Industry Review Commission, 192 Wis. 2d 663, 670, 531 N.W. 2d 451 (Ct. App. 1995).

In this case the Court defers to the opinion of Mr. George Hall, Director of the Department of Development. In his official capacity on behalf of the State, Mr. Hall stated in a letter dated September 12, 1996, that the annexation did not violate public interest. Mr. Hall, a credible and persuasive witness, testified that homogeneity largely depended upon the economic uses proposed for the annexed land. The Town relied on the definition of its expert, who believed that homogeneity would be more strictly characterized in terms of geographic make up. "The opinion of the director [of the department] is evidence to be considered by the court in analyzing the proposed annexation in terms of challenges made against it." Town of Mount Pleasant v. Racine, 28 Wis. 2d 519, 527, 137 N. W. 2d 656 (1965). The Court relies upon the definition and opinion of Mr. Hall in concluding that Sec. 66.021(11) Wis. Stats. has been satisfied.

Although both defendants have fully demonstrated compliance with the State Statutes at issue, neither was under a duty to show such proof. The Court finds that the Town failed to establish any facts which demonstrate that Secs. 66.021(3), (4), or (11) Wis. Stats. were violated. Thus, the Town has not hindered the validity of Ordinance No. 990 by its statutory challenge.

IV. City Municipal Code

In the complaint the Town alleges, "that the City of Elkhorn, ... has failed to comply with its own ordinances and regulations in passing the annexation ordinances, and therefore, the same are void." (Plaintiff's Complaint at p.3). In an interrogatory, the Town was specifically questioned as to how the City violated its own ordinances. The Town responded that, "the City of Elkhorn failed to comply with Chapter 11, 'Nuisances', which relate to the requirement that the City be supplied with an annexation study." (Plaintiff's Brief in Support of Motion for Summary Judgement at p.9). Chapter 11 of the Elkhorn Municipal Code is generally entitled Public Health and Welfare. Section 11.08 is the only aspect of the code that mentions nuisances, and does so regarding nuisance type businesses. However, this section does not require a study to be conducted prior to an annexation. Therefore, Section 11.08 of the Elkhorn Municipal Code is not applicable to this case.

Annexations to the City of Elkhorn are governed under Section 11.11 of the Municipal Code. Section 11.11(1) states that the petitioner must give the City Clerk notice of the annexation, with which Mann complied. The Plan Commission and the Finance/Judicial Committee must each render reports under Section 11.11(5), on the "advantages and disadvantages of each proposed annexation ..." Although this guideline was complied with, it does not call for a nuisance study to be conducted. Finally, Section 11.11(6) requires that petitioners conduct and file a cost-benefit analysis of the annexation. This analysis

was completed, however, a study of nuisances is not specifically required under this section. The Court finds the Town failed to establish that the City violated any of its own ordinances. Therefore, the presumption that the annexation ordinance is valid is not overcome by the efforts of the Town.

V. Rule of Reason

The final contention of the Town is that the annexation violates the rule of reason and, therefore, can not lawfully be put into effect.

[T]he rule of reason, which has as its essential purpose the ascertainment of whether the power delegated to the cities and villages has been abused in a given case in the following terms: (1) exclusions and irregularities in boundary lines must not be the result of arbitrariness, (2) some reasonable and present or demonstratable future need for the annexed property must be shown, and (3) no other factors must exist which would constitute an abuse of discretion. Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 249 N.W. 2d 581 (1977).

However, "when challenged under the rule of reason, an annexation, like all legislative enactments enjoy a presumption of validity, and the burden of proving the ordinance is arbitrary and capricious and, therefore, an abuse of municipal discretion rests with the party so claiming." Town of Menasha v. City of Menasha, 170 Wis. 2d 181, 488 N.W. 2d 104, 108 (Ct. App. 1992).

Again, the burden rests upon the Town to prove that the annexation was arbitrary and capricious. In each instance under the rule of reason, the Town fails to bring forth any factual evidence to support the allegations it makes against the City. The Court finds that the Town failed to satisfy its burden,

therefore, the annexation ordinance is lawful.

a. First Prong

The first prong of the rule of reason is that no arbitrary exclusions or irregularities appear in the boundary lines. Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 249 N.W. 2d 581 (1977). "To survive judicial scrutiny under the arbitrary boundary/prong of the rule of reason, the annexed area must meet two conditions: it must be an unexceptional shape, and the city must not be a petitioner." Town of Menasha v. City of Menasha, 170 Wis. 2d 192, 488 N.W. 2d at 109. The burden rests upon the Town to prove that the City acted in violation of the two conditions. The Town alleges the City was the petitioner in this case, rather than the landowners in the annexed area. The Town states in its Post Trial Brief that the, "City promised preferable zoning classifications to those that would sign the annexation petition." (Plaintiff's Post Trial Brief at p.8). The insinuation made by the Town, is that the City functioned for all intents and purposes as a petitioner, because it was allegedly in complete control of the annexation.

This allegation is countered by the testimony of two reliable witnesses, Mr. Richard Mann and Mr. Warren Hansen. Mr. Mann, on behalf of Mann Brothers, testified that he was the catalyst for the annexation process. His testimony made it clear that he approached the City seeking annexation, and the City did not approach any of the petitioners regarding annexation.

Mr. Hansen, an engineer with Faris, Hansen, & Associates,

gave testimony at trial that corroborated Mr. Mann's statements. It was confirmed by Mr. Hansen, that Mann Brothers and their attorneys initiated the annexation process. He verified that the City did not play a role in determining the boundaries of the proposed annexation. The testimony of both of these witnesses discredits the Towns' allegation that preferential zoning classifications were utilized by the City to entice those within the area to seek annexation. The Court finds that the City was not the functional equivalent of a petitioner, nor were they in actuality a petitioner.

"[W]here an annexed area is an unexceptional shape, and the City is not a petitioner, the boundaries of an annexed area will not be scrutinized for arbitrariness." Town of Lyons v. Lake Geneva, 56 Wis. 2d 331, 202 N.W. 2d 228 (1972). The Town contends that the proposed boundary lines are irregular, thus creating an exceptional shape. The Town objects to the boundary lines because there are substantial land area exclusions which hinder the compactness of the community. However, these arguments are challenged by two witnesses the Court finds to be persuasive and credible, Mr. George Hall and Professor Lawrence P. Witzling.

Mr. Hall, as Director the Department of Development, is charged with the duty to review all proposed annexations in the State of Wisconsin. He testified in his official capacity, that the annexation parcel was not irregularly shaped; a statement in direct opposition to the findings of the Town's expert witness.

Mr. Hall stated homogeneity in shape depends upon the economic uses proposed for the annexed land as to the adjoining city lands. Therefore, when considering irregularity in shape, a Court must look beyond mere physical boundaries and examine whether the annexation appears uniform in all respects.

Further support that the annexation was of an unexceptional shape can be found in the reports and testimony of Professor Witzling. Professor Witzling, former Associate Dean of the School of Architecture and Urban Planning at the University of Wisconsin-Milwaukee, reported that a spoke-like pattern, radiating outward from incorporated areas along the lines of the principal transportation, is a normal, customary and usual shape for annexations. The annexation boundaries at issue follow closely along the principal transportation route of Highway 12/67, and follow a spoke-like pattern. In addition, he testified that the preference of those land owners who desire inclusion or exclusion in the annexation play a fundamental role in determining the shape of the territory. This notion was supported by the Wisconsin Supreme Court when it ruled that when the petitioners are landowners, "we see no reason why the petitioners may not determine the boundaries so as to insure the annexations success." Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 342, 249 N.W. 2d 581 (1977). Based upon the evidence presented the Court finds the shape of the proposed annexation unexceptional.

The burden was upon the Town to demonstrate that the first

prong of the rule of reason has been violated by the City. The Court holds that the Town failed to show any reasonable or reliable proof to satisfy its burden. Therefore, the boundaries will not be scrutinized for arbitrariness.

b. Second Prong

The rule of reason requires that some reasonable present or demonstratable future need for the annexed property must be shown. Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 249 N.W. 2d 581 (1977). Essentially this prong requires an examination by the Court of "whether the city has shown any reasonable need for annexation; if such a need is shown, the annexation will be upheld, without regard to what the court might think is in the best interests of the parties." City of Beloit v. Town of Beloit, 47 Wis. 2d 377, 385 N.W. 2d 361 (1970). The assessment of the Court is that the City has demonstrated a need for the annexed land.

Expert opinions were utilized to demonstrate the City's need for the land, and the land's need for City services. The Wisconsin Supreme Court held that "a showing of benefits to the annexed land can be considered in the overall question of need under the rule of reason." Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 336, 249 N.W. 2d 581 (1977). Professor Witzling testified that the annexed land has a need for the sewer and water services, because the Town is unable to provide such services. The land's need is supported by the testimony of Mr. Jeffrey Selgren and Mr. Loren Waite.

Mr. Selgren is the sanitation manager for Walworth County, and an expert on soils and septic systems. He testified that generally the annexed land has poorly draining soils and, thus, could not support a conventional in-ground system. What the Court concludes from his comments is that the soils in the annexed territory generally are not well suited for the use of septic systems. Consequently, it is clear that sewers in the near future will be a necessity for that area.

Mr. Waite, Town Chairperson, stated the Town has no current nor any future plans for the creation of a sanitary district. (It should be noted that even at this point in the trial process the Town still has not attempted to plan a sanitary district.) He stated that the Town was completely aware that it would take many years to develop a sanitary district. However, he further testified, that it would not consider creating one until those septic systems in place begin to fail. Such inaction by the Town creates a hazardous situation for all landowners in that area. If the Town idly waits until septic systems fail, landowners would be left with an urgent need for sewer services, the survival of businesses in that area would be jeopardized, economic growth may be stunted, and environmental pollution would likely result. Mr. Waite's statements demonstrate the Town's unwillingness to recognize the magnitude of the problem facing landowners within the confines of the Town. Accordingly, the City has clearly demonstrated that annexation would serve to substantially benefit the land area in dispute. This Court

considers this a relevant factor to the overall reasonable need for annexation.

The reasonable need the City has for annexing the property is to maintain the economic and social well-being of the community. This view was supported by the expert witness for the City, Professor Witzling. The basis of this need comes from the current and future employment opportunities offered by that land area. For example, Mann Brothers, Inc. employs 275-300 people, many of whom live in the City. Those employees contribute significantly through tax dollars as well participation in the community experience. The purpose and need for the annexation is ultimately to protect the well-being of the City for today and tomorrow. If sewer services are not extended it would diminish the economic base of the City, hinder economic activity due to loss of existing businesses, and detrimentally affect the ability of the City to entice new businesses to the area. The Town argues that this is not a reasonable need for annexation.

The Town alleges that the Professor's comments are "broad stroke conclusions and statements that would apply to any annexation," hence, they do not establish a demonstratable need. (Plaintiff's Post Trial Brief at p.11). The Town relies upon Town of Menasha v. City of Menasha, which held demonstratable need, "is not satisfied by showing that the territory sought for annexation is merely desirable, better than that already controlled, or that a particular city would best be able to provide service to the territory." 170 Wis. 2d 181, 48

N.W. 110 (1992). The Professor has shown that the economic livelihood and social vitality of the City hang in the balance. His testimony demonstrates that the City's need for this annexation goes beyond "mere desire" or because it is "best able to provide a service." The City has shown not only that they have a reasonable need, but also, a responsibility to secure the economic and social base of the community.

Additionally, the Town alleges that because the City failed to conduct studies or explicitly follow its own Master Plan it could not ascertain how much property it reasonably needed. The Town presents no case law nor any persuasive evidence to convince the Court that such studies are required by law. Although land use master plans are helpful for determining future need, they are not mandatory nor do they have the force of the law. The Town fails to convince the Court that a failure to conduct studies or explicitly follow a Master Plan in any way frustrates the City's ability to demonstrate a reasonable need for the annexed land.

c. Third Prong

The last prong of the rule of reason requires that no other factors exist which would constitute an abuse of discretion. Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 249 N.W. 2d 581 (1977). The Town attempts to prove the City abused its discretion by using a Tax Incremental Financing (TIF) district as an annexation inducement. The Town alleges that the City offered 8.3 million dollars worth of improvements to the

residents of that area if they would agree to the annexation. It is claimed that such an inducement is unlawful because the TIF then becomes the integral purpose for annexation. The Town attempts to show that the City abused its power by making an offer the landowners could not refuse, just so it could create a TIF district. Although this is alleged, the Town does not offer any proof to back up this allegation.

It is also claimed by the Town that the TIF would directly compete with the established industrial park located in the southern portion of the City. The Town concedes that there has been significant growth in the northern portion of the City, closest to the proposed annexation, yet, it argues that the City does not need to annex that much territory. It is the conclusion of the Town, that the City is abusing its authority by seeking annexation and potentially establishing a TIF district. Although, these may be valid considerations they do not suggest to this Court an abuse of discretion by the City. In contrast the City offers credible and persuasive proof which demonstrates that it did not abuse its discretion.

First, the City offers Hoepker v. City of Madison Plan Commission, 209 Wis. 2d 633, 659, 563 N.W. 2d 145, 151 (1977), in which the Wisconsin Supreme Court held a "city could deny extension of sewer services to unincorporated territory unless such territory was annexed to the city." Id. at 542, n.17. At trial Mr. Joseph Cannestra, administrator of Walworth County Metropolitan and Sewage District (WALCOMET), testified that the

City owns the sewer lines below its streets. As such, it does have the right to control all uses of them. In further support, the Town's own expert agreed that Wisconsin law does allow use of sanitary sewers to be conditioned upon annexation.

"Municipalities are permitted to condition extension of sewer services upon annexation and this will not be deemed an abuse of discretion." Town of Hallie v. City of Eau Claire, 105 Wis. 2d 533, 314 N.W. 2d 321 (1982).

Compelling proof that the City did not abuse its discretion comes from the director of the department of development, Mr. Hall. In satisfaction of Sec. 66.021(11)(a) Wis. Stats. he sent a letter confirming the proposed annexation in his official capacity on behalf of the State of Wisconsin. "The position of the director, [of the department] is evidence to be considered in terms of the challenge made against it." Town of Mount Pleasant v. Racine, 28 Wis. 2d 519, 527, 137 N.W. 2d 656 (1965). The Court considers the position of the director of development and the other evidence offered by the City, credible and persuasive in demonstrating that the City did not abuse its discretion in annexing territory from the Town.

CONCLUSION:

Throughout this case the burden of proof has rested upon the party challenging the annexation, the Town. The Town asserted that the burden of proof shifted because the City's motion for summary judgement was denied. The motion for summary judgement is dispositive of nothing and does not relieve the Town of its

burden. Next, it alleged violations of Secs. 66.021(3), (11) Wis. Stats. by the City. Nonetheless, the Town was to illustrate any proof which evidenced that all applicable statutes were not complied with fully. The Town also claimed that the City violated its own municipal code in passing Ordinance No. 990. This allegation is ambiguous at best, City was able to demonstrate to the satisfaction of the Court that it complied with the applicable sections of its own municipal code. Finally, the Town argues that the City violated all three prongs of the rule of reason. Under each prong the Town is unable to demonstrate any infraction by the City. In contrast, under each prong the City is able to show how through case law, and credible expert testimony, they did not violate the rule of reason.

The Town has done little more than question the validity of the annexation ordinance, which is an insufficient means for the Town to fulfill its burden. The Town failed to meet its burden of proof, and, as such, it was unable to shift that burden to the City. It is the conclusion of this Court that even if the Town had shifted its burden, the City effectively satisfied that burden. The Court finds the City of Elkhorn's Ordinance No. 990 should be given effect forthwith.

Dated: June 30, 1998

BY THE COURT:



Judge Michael S. Gilman