STATE OF WISCONSIN CIRCUIT COURT WASHINGTON COUNTY

TOWN OF HARTFORD,
Plaintiff,

vs.

CITY OF HARTFORD,
Defendant,

AFFIDAVIT OF MAILING

CASE NO. 01-CV-797

I, ~~Evelyn Zimpelman~~ Barbara Extence, hereby certify that on 12-3-, 2001, a true and correct copy of the Decision was mailed to:

Attorney H. Stanley Riffle, P. O. Box 1348, Waukesha, WI 53187-348;

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Courtesy copy to:

Attorney Michael Herbrand, P. O. Box 104, Grafton, WI 53024-0104

Attorney Michael Whitcomb, 633 W. Wisconsin Avenue, Suite 510, Milwaukee, WI 53203-1918.

Dated this 3rd day of ~~November~~ December, 2001.

BY:

Barbara Extence

~~Evelyn Zimpelman~~
Judicial Assistant, ~~Branch I~~

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DECISION

CASE NO. 01-CV-797

The matter before the court is an action filed by the Town of Hartford against the City of Hartford with regard to an intergovernmental agreement entered into between the parties on or about November 23, 1999. This will be referred to as the 2020 agreement. Although the complaint asks for a declaration of the parties' rights under the agreement, it essentially requests that the agreement be declared void. The City of Hartford has interposed an answer generally denying the complaint and raising a number of affirmative defenses, including defenses under the terms of the contract itself, estoppel, latches, statute of limitations, waiver and other affirmative defenses. This case has a very unusual procedural history from which the court has inferred that the City is not pursuing its affirmative defenses, except as included in motions and briefs previously filed.

The issue raised in this case was initially raised in another case before the court (currently on appeal), that is, Village of Slinger, et al. vs. City of Hartford and Town of Hartford, 01-CV-147, hereinafter referred to as Village of Slinger. That case involved numerous issues among the parties, including especially the Village of Slinger and City of Hartford. Those parties attempted to raise the 2020 agreement contractual issues which are the subject of this decision. The court determined that those issues were not properly before it. Primarily, the 2020 agreement was between the Town of Hartford and City of Hartford. Neither the Town nor the City, in their respective pleadings, stated any claim with regard to

the contract, nor did either ask for its construction. The court also determined that the Village was not a party to the agreement, and lacked standing to challenge it. The lack of standing of the Village and other parties will not be restated or reconsidered as part of this decision. This is for the simple reason that only the Town of Hartford and City of Hartford are parties to this particular case.

In Village of Slinger, the Town of Hartford and City of Hartford filed extensive briefs on the issue currently before the court. In addition, the other parties, especially the Village of Slinger, filed well developed arguments for the court's consideration.

Town of Hartford v. City of Hartford, 01-CV-797, was assigned to the Honorable David C. Resheske. Because of my involvement in the former case and familiarity with the briefs, the Town of Hartford requested consolidation of 01-CV-797 with Village of Slinger. The court was reluctant to grant consolidation because Village of Slinger had just been appealed. Consolidation would delay any decision on the 2020 agreement issue. Rather, the court proposed to request assignment of the case in the interest of judicial economy. This case was assigned to this court by Chief Judge Kathryn W. Foster on November 20, 2001.

All parties in both cases were present for the motion for consolidation and therefore the court took the occasion to discuss scheduling and other issues. All parties, were given the opportunity for additional briefing.

The court needs to consider how it will approach those briefs and arguments filed by parties to Village of Slinger other than the Town of Hartford and City of Hartford. In deciding the Village of Slinger case, the court thoroughly reviewed all arguments of all parties. It is substantially because of this that the court determined that it should request

assignment of the Town of Hartford and City of Hartford in the interest of judicial economy. In deciding the case before the court, the court will primarily rely on briefs filed by the Town of Hartford and City of Hartford. Nevertheless, it would be impossible for the court to disregard and ignore those arguments and authorities provided by the Village of Slinger and other plaintiffs in the former case, nor is it necessary to do so. These other briefs will be received by the court as having been received by an amicus. The court considers this particular case and the issue it presents to be of substantial public concern. All briefs submitted have been helpful to the court and it is in the interest of the public that they be considered.

FACTS

Only a brief factual history is necessary because of the contractual nature of the litigation. This case involves an agreement commonly known as the 2020 agreement. It is an intergovernmental cooperative agreement under former Sec. 66.30, Wis. Stats. (now Sec. 66.0301 and hereinafter referred to as Sec. 66.30). The 2020 agreement was finalized in late 1999. This agreement was heralded as a substantial landmark in planning and zoning in Washington County. Parties to this agreement received a Planning Award from Washington County for this achievement.

In October of 2000, Rubicon Associates, L.L.C., by Kevin S. Dittmar, provided a notice of intent to circulate petition for direct annexation. The petition was subsequently filed on October 17, 2000, requesting annexation of 67.70 acres being next to the City of Hartford. This proposed annexation is subject to the provisions of the 2020 agreement. Pursuant to the agreement, the Town of Hartford could not oppose this annexation. It is this

particular annexation which lead to the Village of Slinger case currently on appeal and the filing of the action currently before the court because of the court's decision in the Village of Slinger case.

Stated in its most basic terms, the current supervisors of the Hartford Town Board have not directly challenged the annexation pursuant to their 2020 agreement, but are asking to be relieved from that agreement.

SUMMARY JUDGMENT

The parties to this action and the parties to Village of Slinger, have represented that this matter is ripe for determination. In relying on briefs filed in the previous action, the parties are implicitly restating their motions for summary judgment and affidavits attached thereto. The court, therefore, construes this representation by both the City of Hartford and Town of Hartford as a motion for summary judgment. In Greenspring Farms v. Kirsten, 136 Wis. 2d 304, 314, 401 N.W.2d 816 (1985), the Supreme Court sets out the summary judgment methodology. The court is to begin by examining the pleadings to determine whether a claim for relief has been stated. Here the Town of Hartford has clearly requested the court declare its rights and obligations under the 2020 agreement.

Greenspring Farms at pg. 215, cites Sec. 802.08(2), Wis. Stats., that summary judgment must be granted "if the pleadings, depositions, answers to derogatories, 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 judgment as a matter of law". In the case before the court, examination of this contract is not fact dependent. Those affidavits provided in the parties' motions in Village of Slinger merely introduce the contract to the

court and add facts and circumstances surrounding its creation which have little or no materiality as to its construction. Although the court must go beyond the pleadings to interpret the contract, going beyond the pleadings involves little more than an understanding of the ordinances and procedures of the Town and City, of which the court does take judicial notice and which are referenced in the affidavits and argments of the parties. More importantly, construction of a contract ordinarily presents a question of law for the court. See Weimer v. County Mutual Insurance Company, 216 Wis. 2d 705, 575 N.W.2d 466 (1998). Specifically then, reviewing the pleadings, admissions and affidavits, and considering that the issue relates to construction of a contract, it is clear that there is no genuine issue as to any material fact and that this matter is ripe for determination.

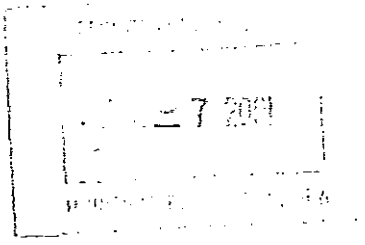
ISSUE

Is the 2020 agreement a valid intergovernmental agreement pursuant to former Sec. 66.30, Wis. Stats.?

DISCUSSION

Section 66.30(2), authorizes municipalities, as defined, to contract with each other "for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law". In this particular case we are dealing with the joint exercise of power and duty. The statutes specifically contemplate a situation where the particular municipalities may not have identical powers. Immediately following the sentence just quoted subsection (2) states "if municipal or tribal parties to a contract have varying or duties under the law, each may act under the contract to the extent of its lawful powers and duties".

In the parties briefs and in the amicus briefs filed, there is substantial discussion of a



municipality's authority to contract for proprietary as opposed to governmental services. The line of cases, including Adamczyk v. Caledonia, 52 Wis. 2d 270, 275, 190 N.W.2d 137 (1971) and Village of Butler v. Renner Manufacturing Company, 70 Wis. 2d 1, 233 N.W.2d 380 (1975), deal primarily with contracts between a municipality and a private entity. It is self-apparent that there are unique considerations when the court is viewing a government's attempt to contract its governmental power to a private concern. In this particular case, we are dealing with a contract between two municipalities, which is explicitly authorized by the legislature. Former Sec. 66.30 recognizes a distinction between the contracting of proprietary functions and governmental functions. The legislature explicitly contemplates that both may be done by allowing contracts for "the receipt or furnishing of services" and contracts for "the joint exercise of any power or duty required or authorized by law". To an extent, the Town of Hartford has argued a reading of the cases which would render Sec. 66.30 meaningless, where governmental powers are the subject of the agreement.

The Town cites, Adamczyk, at page 275 citing 2 *McQuillin, Municipal Corporations Third Edition*, pg. 839, Sec. 10.38:

> "Unless authorized by statute or charter, a municipal corporation, in its public character as an agent of the State, can not surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender of such powers."

Section 66.30 is a statute clearly authorizing a bargain or surrender of a portion of the Town's sovereignty, but within limits. The legislature requires that this section be interpreted liberally "in favor of cooperative action between municipalities...." For this reason, the Adamczyk case cannot stand for such a broad proposition as applied to the 2020 agreement. It nevertheless, does apply to this case.

The City of Hartford urges the court to ignore Adamczyk and apply a modern test proposed by the League of Wisconsin Municipalities. The court agrees that this is a better reasoned approach, but a circuit court is bound by precedent and may not disregard case law in favor of a "better test".

The court finds discussion by both parties with regard to the delegation or surrender of powers not to be helpful. No contract under former Sec. 66.30 would ever be possible if the court were to determine that it did not permit the delegation or even surrender of a portion of municipal power to another municipality under appropriate circumstances. Whether proprietary or governmental, any sharing of decision making involves at least a partial surrender or partial delegation. It would be impossible to imagine a cooperative agreement where both sides do all things at all times, so as to avoid any delegation. Joint decision making, therefore, cannot imply that both parties will make all decisions at all levels, at all times.

The 2020 agreement survives application of the rule in Adamczyk. However, it suffers from a fatal defect which an Adamczyk analysis helps disclose. This fatal defect lies in the Town's attempt to delegate a particular authority to the City which the Town does not possess, and the City can not lawfully exercise. On the second page of the agreement in the provision marked Article II(a), the Town binds itself not to approve certified survey maps, plats, or condominium plats "unless the City consents". Similarly, in item (c), the Town is to refuse building permits unless the City consents. There is an exception not material here.

If the Town ordinance reserved the right to use "consent" as the basis to deny

building permits and approve certified survey maps, plats and condo plats, this basis would be arbitrary in the absence of specific standards for the exercise of that discretion including an appeals process. For example, a town resident or developer could come to the Town, file an application in proper form and fully in compliance with all applicable laws and regulations only be turned down because the Town did not consent. The Town obviously cannot do this directly, and lacks the authority to delegate this power to the City.

The court need not split hairs and determine whether this grant of consent is incompatible with the joint exercise of powers contemplated in former Sec. 66.30. The fact is, whether exercised jointly or delegated, a single municipality or a cooperative group of municipalities may not deny issuance of a permit or condition approval of a certified survey map or plat based simply upon the lack of consent of any of them. The court agrees with the Village of Slinger in its amicus brief that "it is a fundamental rule of law that arbitrary administration of an ordinance contravenes the provisions of the 14th Amendment to the United States Constitution relating to due process and equal protection of the laws. The Village cites State ex rel. Humbel Oil and Refining Company v. Wahner, 25 Wis. 2d 1, 130 N.W.2d 304 (1964). At pg. 10 Humbel Oil cites a Michigan case (citation omitted) wherein the court determined an ordinance invalid finding "the Zoning Board of Appeals is simply given authority to permit, and obviously to refuse to permit, the erection of gasoline stations after public hearings. But what standards prescribe the grant to rejection of the permission? We find none. The ordinance is silent as to size, capacity, traffic control, number of curb cuts, location or any other of the myriad considerations applicable to such business".

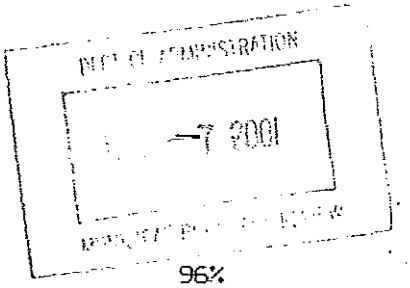
In the situation involving the administration of its ordinances under this 2020

agreement, the Town would apply its ordinances but would add an additional factor, that is the City's consent. Again the City's consent is without any of the standards and factors required by fundamental notions of due process. As such the administration of any ordinance by the Town, subject to the 2020 agreement, would be done in an unconstitutional manner.

It is clear that the provisions permitting unilateral consent by the City without any standards are void as a matter of law. Can the balance of the 2020 agreement be severed? In determining whether or not a improper provision could be severed from a contract and the balance enforced, the court has relied on Save Elkhart Lake v. Elkhart Village, 181 Wis. 2d 778, 789-791, 512 N.W.2d 202 (Ct. App. 1993). Eklhart Lake primarily deals with a determination of whether an attempt to contract with a private entity involves a governmental or proprietary matter. That issue is not relevant here. However, the case is very useful because it determines what occurs after the court is forced to void a provision in an agreement.

In Elkhart Lake at pg. 791, the court indicates that "when interpreting a contract, you must ascertain the parties' intentions as expressed by the contractual language". In Elkhart Lake the contract contained a severability clause providing that "any provision of this agreement which shall prove to be invalid, void or illegal shall in no way effect, impair or invalidate any other provision hereof and the remaining provisions hereof shall nevertheless remain in full force and effect".

The 2020 agreement contains no severability clause. In looking at the contract as whole, it does not appear that severability was contemplated. On the contrary, severability appears to be incompatible with the agreement. The 2020 agreement demonstrates a careful



negotiation and trade off between adjoining governments. There are particular provisions which are directly linked. The Town's delegation of consent was done in exchange for the City's promise to limit its annexation efforts to certain mutually agreed areas. Even apparently unrelated provisions, for example those involving establishing a north corridor for a future state or county highway, are part of the bargaining give and take which lead to the agreement. It could not have been the parties' intent to permit severability. This intergovernmental agreement is wholly void and unenforceable as a matter of law. Summary judgment is therefore granted to the Town of Hartford declaring the 2020 intergovernmental agreement void. The Town is directed to prepare an appropriate order effectuating this decision.

Dated this 30 day of November, 2001.

BY THE COURT:

Hon. Patrick J. Faragher
Circuit Court Judge, Branch I
Washington County Courthouse