TOWN OF PLEASANT PRAIRIE and others, Appellants, v. JOHNSON, Director of Planning Function, Department of Resource Development, Respondent.

*January 9—February 3, 1967.*

1. **Municipal corporations—Proposed incorporation of town as a village—Judicial review—Statutory standards.**
Review of the instant determination of the director of the planning function in the department of resource development who rejected a town's proposal to incorporate as a village pursuant to sec. 66.014, Stats., was in accordance with the criteria set by the legislature in sec. 227.20 (1), limited to whether the director's determination was either unsupported by substantial evidence or arbitrary or capricious in light of the standards prescribed in sec. 66.016 (1) (a). p. 11.

2. **Municipal corporations—Proposed incorporation of town as a village—Natural drainage as a significant factor—Propriety of rejection where two sewer systems necessitated.**
Finding by the director that the proposed incorporation did not meet the statutory standard of homogeneity could not be successfully challenged as being arbitrary or capricious, where uncontradicted proof revealed that the proposed area was divided by nature into two drainage basins necessitating two separate sewer systems, the construction of one entailing considerable expense—natural drainage being a significant factor to be weighed pursuant to sec. 66.016 (1) (a), Stats. pp. 12, 13.

3. **Municipal corporations—Proposed incorporation of town as a village—Propriety of rejection where other significant factors show neither homogeneity nor compactness.**
Other findings, *i.e.*, (a) that the town's transportation system did not add to its compactness but instead facilitated the functioning of the neighboring city; (b) that there was no uniform school system in the proposed territory whereas the city's school system was uniform, and (c) that shopping and social customs in the area were likewise not conducive to homogeneity (supported by substantial evidence in the record as a whole), considered with the preceding finding, dispelled petitioners' claim that the director's determination rejecting the town's proposal was the result of unconsidered, wilful, or irrational choice of conduct. p. 13.



APPEAL from a judgment of the circuit court for Dane county: RICHARD W. BARDWELL, Circuit Judge. *Affirmed.*

The appellants commenced these proceedings by filing a petition with the circuit court for Kenosha county for incorporation of the town of Pleasant Prairie into a village, pursuant to sec. 66.014, Stats. That court applied the standards set forth in sec. 66.015 to the incorporation petition and determined that the petition met the formal and signature requirements, as well as the minimum requirements for a village located near a first, second or third class city.

As required by sec. 66.014 (8) (b), Stats., the circuit court then referred the petition to the director of the planning function in the department of resource development for his determination on whether the proposed incorporation met the requirements and standards set forth in sec. 66.016. On September 9, 1965, the director determined that the proposed incorporation did not meet these standards and requirements.

The appellants filed a petition for judicial review of the director's determination with the circuit court for Dane county, which entered a judgment affirming the director's determination on April 19, 1966. The appellants appeal to this court pursuant to sec. 227.21, Stats.

Further facts are set forth in the opinion.

*Statutes Involved.*

"66.013 **Incorporation of villages and cities; purpose and definitions.** (1) PURPOSE. It is declared to be the policy of this state that the development of territory from town to incorporated status proceed in an orderly and uniform manner and that toward this end each proposed incorporation of territory as a village or city be reviewed as provided in ss. 66.013 to 66.019 to assure compliance with certain minimum standards which take into account the needs of both urban and rural areas."

"66.014 **Procedure for incorporation of villages and cities.**

". . .

"(8) FUNCTION OF THE CIRCUIT COURT. (a) After the filing of the petition and proof of notice, the circuit court shall conduct a hearing at the time and place specified in the notice, or at a time and place to which the hearing is duly adjourned.

"(b) On the basis of the hearing the circuit court shall find if the standards under s. 66.015 are met. If the court finds that the standards are not met, the court shall dismiss the petition. If the court finds that the standards are met the court shall refer the petition to the director and thereupon the latter shall determine whether or not the standards under s. 66.016 are met.

"(9) FUNCTION OF THE DIRECTOR. (a) Upon receipt of the petition from the circuit court the director shall make such investigation as may be necessary to apply the standards under s. 66.016.

". . .

"(d) Unless the court sets a different time limit, the director shall prepare his findings and determination citing the evidence in support thereof within 90 days after receipt of the reference from the court. . . .

"(e) The determination of the director made in accordance with the standards under ss. 66.015, 66.016 and 66.021 (11) (c) shall be either:

"1. The petition as submitted shall be dismissed;

"2. The petition as submitted shall be granted and an incorporation referendum held;

"3. The petition as submitted shall be dismissed with a recommendation that a new petition be submitted to include more or less territory as specified in the director's findings and determination.

"(f) If the director determines that the petition shall be dismissed, the circuit court shall issue an order dismissing the petition. If the director grants the petition the circuit court shall order an incorporation referendum as provided in s. 66.018.

"(g) The findings of both the court and the director shall be based upon facts as they existed at the time of the filing of the petition."



"66.016 **Standards to be applied by the director.** (1) The director may approve for referendum only those proposed incorporations which meet the following requirements:

"(a) *Characteristics of territory.* The entire territory of the proposed village or city shall be reasonably homogeneous and compact, taking into consideration natural boundaries, natural drainage basin, soil conditions, present and potential transportation facilities, previous political boundaries, boundaries of school districts, shopping and social customs. An isolated municipality shall have a reasonably developed community center, including some or all of such features as retail stores, churches, post office, telephone exchange and similar centers of community activity."

For the appellants there was a brief by *Robert Mortensen,* and oral argument by *James C. Boll,* both of Madison.

For the respondent the cause was argued by *James D. Jeffries,* assistant attorney general, with whom on the brief was *Bronson C. La Follette,* attorney general.

GORDON, J. The problem posed by this appeal is a narrow one: We must decide whether the director's rejection of the town's proposal to incorporate as a village is either "unsupported by substantial evidence" or "arbitrary or capricious," which are standards set by the legislature in sec. 227.20 (1), Stats., to guide courts in reviewing appeals from the director's findings. The issues are primarily factual. Indeed, the appellants' brief does not cite a single case or other authority except the statutes and Black's Law Dictionary.

In *Scharping v. Johnson* (1966), 32 Wis. (2d) 383, 145 N. W. (2d) 691, we noted that the director's decision under sec. 66.016, Stats., is an exercise of a legislative function. See also *Hixon v. Public Service Comm.* (1966), 32 Wis. (2d) 608, 146 N. W. (2d) 577; *Ashwaubenon*

*v. State Highway Comm.* (1962), 17 Wis. (2d) 120, 115 N. W. (2d) 498. An arbitrary or capricious decision is one which is either so unreasonable as to be without a rational basis or the result of an unconsidered, wilful and irrational choice of conduct. *Olson v. Rothwell* (1965), 28 Wis. (2d) 233, 239, 137 N. W. (2d) 86. Substantial evidence in view of the entire record is evidence upon which reasonable minds could arrive at the same conclusion reached by the director. *Pire v. State Aeronautics Comm.* (1964), 25 Wis. (2d) 265, 270, 130 N. W. (2d) 812.

The director wrote a detailed analysis of the various requirements set forth in the statute in deciding whether the town's proposal should be dismissed or submitted to a referendum. The circuit court in reviewing that decision also filed a sound and thorough opinion.

Sec. 66.016 (1) (a), Stats., specifies a number of factors to be weighed in determining whether the territory of the proposed village is reasonably homogeneous and compact. The first factor relates to the natural boundaries of the area. The appellants object to the director's reliance on the irregularity of the boundary between the town and the city of Kenosha because such irregularity was partly caused by annexations which were previously approved by the director. We are sympathetic with this contention. If it is not arbitrariness for the director to find a lack of compactness because of a condition which in a sense he helped cause, it is at least a case in which the director is lifting himself by his own bootstraps.

However, there is ample other evidence to sustain the director's findings on homogeneity and compactness. The record supports his views regarding the natural drainage basin. The director found that the proposed area is divided by nature into two such basins and that this would require two separate sewer systems. One of the two systems, involving drainage into the Des



Plaines river, would "be a comparatively expensive undertaking because of the low flow rate of the river." The latter finding of the director has not been contradicted, and it supports the director's view that the natural drainage of this territory is not conducive to homogeneity.

With reference to transportation, the director made the following conclusion:

"The quality of the Town's transportation facilities does not add to its compactness or homogeneity, however. Instead, they facilitate the functioning of the area as a part of the City of Kenosha."

The appellants challenge this finding by pointing out that two of the three railroads in the vicinity completely bypass the city of Kenosha. The town also claims that the city is not the "hub of transportation." However, we are convinced from our review of the record that the director's finding with respect to transportation must be upheld.

Kenosha has an integrated school system which includes the town of Pleasant Prairie. The record supports the director's assertion as follows:

"While the existence of a uniform school system is a characteristic of homogeneity, that homogeneity is, in this case, with the City of Kenosha. From the standpoint of schools the Town, therefore, is not a homogeneous area."

The appellants have also challenged certain of the findings of the director regarding the statutory requirement as to "shopping and social customs." We do not believe that any useful purpose would be served by discussing these challenges except to note that here again the conclusions of the director are supported by substantial evidence in the record as a whole.

We conclude that under the standards of secs. 66.016 and 66.017, Stats., as interpreted in *Scharping v. Johnson,*

*supra*, the circuit court was correct in upholding the director's decision as being supported by substantial evidence and as not being arbitrary or capricious.

*By the Court.*—Judgment affirmed.

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KWATERSKI and another, Appellants, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and another, Respondents.

*January 11—February 8, 1967.*

1. **Death—Action for causing death of viable infant stillborn—Wrongful-death statute construed.**
A viable infant who receives an injury and by reason thereof is stillborn is a person within the meaning of the wrongful-death statute, sec. 895.03, Stats. p. 22.

2. **Death—Action for causing death of viable infant stillborn—Wrongful-death statute construed.**
Where plaintiff driver of one of two vehicles involved in a collision commenced suit for the injuries she sustained, and as a separate cause of action (in which her husband joined) alleged that they were expectant parents of a then unborn child in his eighth month of life who suffered death in the accident due to the negligence of the other driver—it was error for the trial court to sustain a demurrer to the cause of action for wrongful death, for as a viable child capable of independent existence, the infant was a separate entity and thus a person within the intendment of sec. 895.03, Stats.—and as parents they were entitled to seek recovery for damages resulting from the defendant's alleged wrongful act. p. 22.

3. **Death—Wrongful-death statute—No determination made as to application of statute to nonviable infant.**
[No determination is made in the opinion herein as to whether a nonviable infant which receives an injury and is stillborn by reason thereof is a person within the meaning of the wrongful-death statute.]

APPEAL from an order of the circuit court for Milwaukee county: RONOLD A. DRECHSLER, Circuit Judge. *Reversed.*



On July 19, 1963, an automobile accident occurred at the intersection of West Fairview and North Sixty-seventh street between a westbound vehicle operated by the plaintiff, Karen Kwaterski, and the defendant Herman Lember. On June 28, 1965, plaintiff and her husband, Richard A. Kwaterski, commenced suit against defendant, she for injuries sustained as a result of the collision, and he for property damage, medical expenses, and loss of consortium. As part of a separate cause of action for wrongful death, plaintiffs alleged the following facts:

1. The plaintiffs were parents of an unborn male infant in his eighth month of life and still undelivered.

2. That this infant suffered a wrongful death due to the negligence of the defendant.

3. That plaintiffs suffered $3,056 damages from the loss of society and companionship of the child, and the burial expenses of the child.

Defendants demurred to this cause of action on the ground that this portion of plaintiffs' complaint failed to state a cause of action. The trial judge sustained the demurrer and plaintiffs appeal.

For the appellants there was a brief and oral argument by *Edward P. Rudolph* of Milwaukee.

For the respondents there was a brief by *Kivett & Kasdorf*, attorneys, and *Nonald J. Lewis* of counsel, all of Milwaukee, and oral argument by *Mr. Lewis*.

WILKIE, J. The narrow issue presented on this appeal is whether an eighth-month, viable unborn child, whose later stillbirth is caused by the wrongful act of another, is "a person" within the meaning of sec. 331.03, Stats. 1963, so as to give rise to a wrongful-death action by the parents of the stillborn infant.

The wrongful-death statute provides that:

"Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect