STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

TOWN OF VERONA

Plaintiff,

vs.

Case No. 04 CV 3139

CITY OF VERONA

Defendant.

DECISION AND ORDER GRANTING TOWN OF VERONA'S MOTION FOR SUMMARY JUDGMENT AND DENYING CITY OF VERONA'S MOTION FOR SUMMARY JUDGMENT

On February 22, 2005, the defendant, City of Verona (City), moved this court for summary judgment. The plaintiff, Town of Verona (Town), moved for summary judgment on April 8, 2005. The primary issue in both motions is whether the City complied with Wis. Stat. §66.0217(14)(a)1 when it annexed approximately 34 acres of land from the Town.

FACTUAL BACKGROUND

The following facts, taken from the complaint, are undisputed by the parties. "On July 12, 2004, the City enacted an ordinance entitled 'Ordinance No. 04-673, An Ordinance Annexing the Herein Described Property to the City of Verona, Dane County, Wisconsin.'" (Complaint, ¶3.) The Ordinance stated, in part, "From and after the date of this Ordinance, the territory described in Section 1 shall be a part of the City of Verona, Dane County, Wisconsin for any and all purposes provided by law..." (Complaint, ¶3, Exhibit A, pg. 1.) The purpose of the City's ordinance was the annexation of 34 acres of land from the Town of Verona. (Id. at ¶4.)

Hometown Village, a facility for the care of elderly residents, is located on the 34 acres of property in question. (Id. at ¶5.) Hometown Holdings, LLC is the sole owner of the property. (Id. at ¶6.) In 2004, the property was valued at $2,200,000. (Id.)

On October 8, 2004, the Town commenced this lawsuit against the City, alleging that the City did not have the authority to annex the property pursuant to Wis. Stat. §66.0217(14)(a)1. (Id. at ¶8(a).) In addition, the Town argued that the annexation violated the rule of reason and adversely affected the Town. (Id. at ¶¶8-9.) After the City answered, the parties filed the present cross motions for summary judgment.

DECISION

"Summary judgment is granted when there is no issue of material fact, and the moving party is entitled to judgment as a matter of law." State Farm Mut. Auto. Ins. v. Langridge, 2004 WI 113, ¶12, 275 Wis.2d 35, 45-46, 683 N.W.2d 75, 80. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." City of Elkhorn v. 211 Centralia Street Corp., 2004 WI App 139, ¶ 18, 275 Wis.2d 584, 597, 685 N.W.2d 874, 881 (citing Baxter v. DNR, 165 Wis.2d 298, 312 (Ct. App. 1991)).

This court is required to follow a specific procedure when deciding a motion for summary judgment. First,

> the court [must] examine the pleadings to determine whether a claim for relief has been stated. Kanack v. Kremski, 96 Wis.2d 426, 430, 291 N.W.2d 864 (1980). If a claim for relief has been stated, the inquiry then shifts to whether any factual issues exist. Under section 802.08(2), Stats., summary judgment must be entered '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.'

Green Spring Farms v. Kersten, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

In the present dispute, both parties have moved for summary judgment regarding the application of Wis. Stat. §66.0217(14)(a)1 to the facts of this case. Based on the following

analysis, this court holds that the City's annexation ordinance is invalid because the City failed to comply with Wis. Stat. §66.0217(14)(a)1. Summary judgment is granted to the Town.

Wis. Stat. §66.0217(14)(a)1

In 2003, the Wisconsin legislature enacted Wis. Stat. §66.0217(14)(a)1. Wis. Stat. §66.0217(14)(a)1 states, in part,

> Except as provided in subd. 2., no territory may be annexed by a city or village under this section ***unless the city or village agrees*** to pay annually to the town, for 5 years, an amount equal to the amount of property taxes that the town levied on the annexed territory, as shown by the tax roll under s. 70.65, in the year in which the annexation is final.

(Emphasis added.) The present dispute centers on the use of the word "agrees" and the effect Wis. Stat. §66.0217(14)(a)1 has on a city's power to annex land. Specifically, the Town alleges in its complaint that the City's annexation of the property is void because the City failed to agree to pay tax revenues to the Town pursuant to Wis. Stat. §66.0217(14)(a)1.

Thus, the issue before this court is the interpretation of Wis. Stat. §66.0217(14)(a)1 and its application to the facts of this case. "The interpretation of a statute is a question of law and is appropriate for summary judgment." Geiger v. Wisconsin Health Care Liability Ins. Plan, 196 Wis.2d 474, 479, 538 N.W.2d 830, 832 (Wis. App. 1995).

> [The] main objective in statutory interpretation 'is to determine what the statute means so that it may be given its full, proper, and intended effect.' State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110. As a result, the court's analysis should begin with the plain language of the statutory text. Id., ¶ 45. If the language of the statute is clear on its face, then we should apply the statute using the common and generally accepted meanings of the terms. Meriter, ¶ 13, --- Wis.2d ----, 689 N.W.2d 627. Thus, with an unambiguous statute, we need not consult any extrinsic sources. Id. (citing Kalal, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110).

Hess v. Fernandez, 278 Wis.2d 283, 307, 692 N.W.2d 655, 667, 2005 WI 19, ¶37. A statute is considered ambiguous if it can be reasonably interpreted in more than one way. Tomaszewski v. Giera, 260 Wis.2d 569, 578, 659 N.W.2d 882, 886, 2003 WI App 65, ¶15. Furthermore,

> 'All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it, ... they are therefore to be construed in connection with and in harmony with the existing law, and as a part of the general and uniform system of jurisprudence, that is, they are to be construed with a reference to the whole system of law of which they form a part. So, the meaning and effect of statutes are to be determined in connection, not only with the common law, ...and the constitution, but also with reference to other statutes ... and the *decisions of the courts*.'

Town of Madison v. City of Madison, 269 Wis. 609, 614, 70 N.W.2d 249, 252 (1955) (emphasis in original).

In its motion for summary judgment, the City contends that Wis. Stat. §66.0217(14)(a)1 is not a prerequisite for annexation and does not require the City to express intent to make the payments specified in Wis. Stat. §66.0217(14)(a)1. Rather, according to the City, "the statute does not require any formal contractual agreement between an annexing municipality and a town, but merely requires the specified payments to be made whenever territory is annexed." (City's Initial Brief, pg. 4.) Furthermore, the City argues that even if an agreement is required under the statute, it need not, and in fact could not, have been made until after the annexation took place. In contrast, the Town maintains that, in order to have annexation authority, the City was required to affirmatively agree to make the payments under Wis. Stat. §66.0217(14)(a)1 prior to annexation.

Thus, the interpretation of Wis. Stat. §66.0217(14)(a)1 boils down to three main issues: (1) what is the meaning of "agree," (2) when must the agreement take place, and (3) does failure to timely agree invalidate the annexation. The court will address each question in turn.

The Meaning of the Term "Agree"

Wis. Stat. §66.0217(14)(a)1 centers around the phrase, "the city...agrees to pay." The City argues that "agrees to pay" means simply that "the specified payments [are] to be made whenever territory is annexed." (City's Initial Brief, page 4.) In contrast, the Town contends "the City was required to give assent in some way." (Town's Brief, page 4.) Although both parties have presented reasonable but differing interpretations of this phrase and the court must engage in statutory construction, it is clear that the language of Wis. Stat. §66.0217(14)(a)1 is unambiguous.

"In the construction of Wisconsin laws...[a]ll words and phrases shall be construed according to the common and approved usage." Wis. Stat. §990.01(1). Both parties have provided dictionary definitions of "agree" which illustrate the common understanding of the word. For example, according to the American Heritage College Dictionary, "agree" means "1. To grant consent; accede. 2. To come into or be in accord. 3. To be of one opinion; concur...4. To come to an understanding. 5. To be compatible or in correspondence...6. To be suitable, pleasing, or healthful..." *American Heritage College Dictionary* 27 (3rd ed. 1997).

However, not all of these definitions are applicable to the use of the word "agree" in the present case. The meaning to be applied must be determined from the statute's context. *See* State ex. rel Kalal v. Circuit Court for Dane County, 271 Wis.2d 633, 663, 681 N.W.2d 110, 124, 2004 WI 58 ¶46. In the context of Wis. Stat. §66.0217(14)(a)1, the logical and reasonable conclusion is that a city must agree, (ie) *consent, accede, or concur,* in the payment of tax revenue to the town for five years.

Furthermore, it is unreasonable to conclude that Wis. Stat. §66.0217(14)(a)1 requires a city to make payments without acknowledging its intent to do so. "Statutory language is read

where possible to give reasonable effect to every word, in order to avoid surplusage." State ex rel. Kalal at ¶46. To conclude that the statute simply requires payments without some display of consent makes the word "agree" extraneous. To give effect to the word "agree" is not the "impos[ition] of a meaningless formality." (City's Initial Brief, page 12.)

As the City notes in its briefs, the statute does not necessarily require the City to enter into a negotiated contract with the Town. In fact, nothing in the language of the statute implies that an agreement must be a formalized *between the city and the town.* Simply, the City must unilaterally agree that it will pay to the Town tax revenues for five years in order to annex land.[1]

The City has raised several objections to the conclusion that a city must consent, accede, or concur in the payment of tax revenues to a town. First, the City contends that no affirmative action is required for it to agree to the payments, but that its acquiescence may be inferred. It notes, "[t]he City has never refused to make said payments," thereby arguing its agreement was implied. (City's Initial Brief, pg. 4.) However, a city is not an individual entity, but rather it is a municipality with corporate powers. *See* Wis. Stat. §§59.0001(3) and 62.09(7)(a). Therefore, a city's authority to "agree" to an act or acquiesce to a financial obligation necessarily requires action by the officials charged with acting on the city's behalf – the common council. Wis. Stat. §62.09(7)(a).

Pursuant to Wis. Stat. §62.11(5), the common council makes financial decisions on behalf of a city.[2] Specifically, "[o]n confirmation and on the adoption of any measure assessing or levying taxes, **appropriating or disbursing money, or creating any liability or charge**

[1] Because the statute does not require a negotiated agreement between the City and the Town, there is no merit to the City's argument that the Town will be able to prevent an annexation by refusing to enter into the payment agreement.

[2] Wis. Stat. §62.11(5) states, in part, "**Powers**. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, navigable waters, and the public service, and shall have the power to act for the government and good order of the city..."(Emphasis in the original.)

against the city or any fund thereof, the vote shall be by ayes and noes." Wis. Stat. §62.11(3)(d) (emphasis added). Thus, the only way a city can assent or acquiesce to make payments pursuant to Wis. Stat. §66.0217(14)(a)1 is through an affirmative vote by the city's common council.

Both the City and the Town acknowledge that Wis. Stat. §66.0217(14)(a)1 does not explicitly state that a city must express its agreement in a particular manner. However, the legislature is presumed to have enacted Wis. Stat. §66. 217(14)(a)1 with knowledge of and in keeping with other statutory provisions. *See* Peters v. Menard, Inc., 224 Wis.2d 174, 187, 589 N.W.2d 395, 402 (1999). As such, the legislature knew that the only way for a city to "agree" to make financial payments was through a vote by the common council. Therefore, the City Council of the City of Verona must affirmatively vote to authorize payments to the Town to satisfy Wis. Stat. §66.0217(14)(a)1.

When Must the City Agree

The second issue is whether a city must agree to the payments before territory can be annexed. As the City points out, Wis. Stat. §66.0217(14)(a)1 does not explicitly require a city to agree at a specific time. The City notes,

> the statute fails to provide any direction as to when this 'agreement' must be accomplished...Can the agreement be executed at the same meeting just before the adoption of the ordinance? Must it be made at a meeting prior to the adoption of the ordinance? Or, can the agreement come at the same time as the adoption of the ordinance?

(City's Initial Brief, pg. 6.) Rather, the City contends, "[T]he agreement must come at some time after the annexation ordinance is adopted." (Id. at 7, emphasis in the original.) The City reasons that because the amount of tax revenue owed to the town cannot be determined until the end of

the first year of annexation, the agreement to pay cannot be made until that time as well. (*See* City's Initial Brief, page 7.)

In contrast, the Town argues that the language of the statute, along with the title of the statute ("Limitations on Annexation Authority"), requires the agreement to be made prior to annexation, as "[t]his affirmative act by the City is necessary in order for it to overcome the prohibition that ***'no territory may be annexed by a city'*** in sec. 66.0217(14)(a)1., Stats." (Plaintiff's Brief, pg. 4, emphasis in the original.)

For several reasons, this court agrees with the Town that the City must agree to the payments prior to the annexation. Wis. Stat. §66.0217(14)(a)1 clearly states that "no territory may be annexed by a city…unless the city…agrees to pay annually to the town, for five years, an amount equal to the amount of property taxes that the town levied on the annexed territory…" Compliance with Wis. Stat. §66.0217(14)(a)1 is a procedural prerequisite to annexation, as territory *may not* be annexed if the city *does not* agree to pay the tax revenue to a town. Since, under §66.0217(8)(c), "annexation[s are] effective upon enactment of the annexation ordinance," logic and the statute's plain language dictate that a city must agree to the payments before an annexation ordinance is enacted.

Other language in Wis. Stat. §66.0217 supports this conclusion, as well. For example, Wis. Stat. §66.0217(3), which is entitled "Other Methods of Annexation," is the statute that the City of Verona used to annex territory from the Town. This section states, in part, "Except as provided in sub. 14, territory contiguous to a city or village may be annexed to the city or village in the following ways…"[3] Under the plain language of this section, land may be annexed by a

[3] Subsection 14 includes section (a)1, the provision in question in this lawsuit.

city *if* the city has agreed to pay tax revenues to the town pursuant to subsection 14;[4] a city does not have statutory authority to annex land under Wis. Stat. § 66.0217(3) if it has not agreed to the payments. Thus, it is clear that a city must agree to make tax payments pursuant to Wis. Stat. §66.0217(14)(a)1 prior to annexation.

One of the City's objections to this interpretation of Wis. Stat. §66.0217(14)(a)1 is the statute's lack of explicit procedural specifications, while elsewhere the legislature has provided detailed and specific procedural steps to be followed in order to annex land. Thus, the City argues, it is incorrect to presume that the City's agreement must take a specific form or be made at a certain time. (*See* City's Initial Brief, page 14.) This court disagrees with the City's reasoning. It is true that the legislature has not *explicitly* laid out the steps a city must take to comply with Wis. Stat. §66.0217(14)(a)1. However, the unambiguous, plain language of the statute, along with its relation to other statutory provisions, is clear: an agreement pursuant to Wis. Stat. §66.0217(14)(a)1 is a prerequisite to annexation.

Failure to Agree Invalidates Annexation

The City Council of Verona was required to affirmatively vote to authorize payments to the Town prior to enacting ordinance 04-673. According to documents submitted with the motions for summary judgment, including Saeger Affidavit Exhibit D and Evans Affidavit Exhibit A, the Common Council of the City of Verona approved Administrative Policy 40 on February 28, 2005 – over seven months after ordinance 04-673 was adopted. Administrative Policy 40 stated,

> All City Ordinances annexing lands from a surrounding town(s) shall contain the following statement: 'The City of Verona agrees to pay annually to the town, for 5 years, an amount equal to the amount of

[4] Of course, subsection 14 contains a provision that is an alternative to payments under (a)1. However, for the purpose of this decision, the court's analysis is solely of subsection (a)1.

> property taxes that the town levied on the annexed territory, as shown on the tax roll under s. 70.65, in the year in which the annexation is final.'

Saeger Affidavit, Exhibit D. There is no evidence in the record that the city council voted to authorize such payments to the Town at any earlier time.

Were the facts limited to the above statements, it would be clear that the City failed to agree to the payments prior to the annexation. However, on February 28, 2005, the City also voted to make Administrative Policy 40 retroactive to May 7, 2004, which was 66 days prior to the enactment of Ordinance 04-673. The Town argues, "The City cannot correct its lack of authority to annex by retroactively agreeing to pay the tax revenues." (Town's Brief, page 11.) The Town supports its argument in large part with Town of Windsor v. Village of DeForest, 265 Wis.2d 591, 666 N.W.2d 31, 2003 WI App 114. In contrast, the City contends, "Failure to 'agree' is not a procedural defect that automatically invalidates an annexation ordinance." (City's Reply Brief, page 13.)

In Town of Windsor, the Village of DeForest enacted an ordinance annexing land from two towns, including the Town of Windsor. Approximately two weeks later, DeForest enacted another annexation ordinance in an attempt to repeal the first annexation and re-annex the same piece of land, plus an additional parcel. The Court of Appeals found the second annexation ordinance to be invalid because "repeal of an ordinance already in effect by enacting a correcting ordinance conflicts with the annexation procedures set out in Wis. Stat. § 66.0217." Id. at ¶20. The Court went on to note, "[C]h. 66 is silent with regard to a municipality's authority to 'seasonably correct' a mistake in an annexation ordinance by enacting a correcting ordinance." Id. at ¶12. Furthermore, the Court took into account that "because annexation is purely statutory, the statute grants the right to enforce strict compliance with the required annexation procedures." Id. at ¶14.

In the present case, the City has attempted to circumvent its procedural mistake, not by enacting a second ordinance, but by enacting a retroactive administrative policy affecting the original ordinance. However, 66.0217 does not grant the City the authority to make any retroactive changes to annexation ordinances. Although the City's error in failing to agree to make payments prior to annexation may appear harmless, strict compliance with the annexation statutes is required of annexing authorities. *See* Town of Windsor at ¶14. As a result, this court is constrained to conclude that the City failed to agree to the payments under Wis. Stat. §66.0217(14)(a)1 prior to enacting ordinance 04-673. Furthermore, in keeping with the strict construction of the annexation statutes, the City's failure to timely agree to the payments necessitates the invalidation of annexation ordinance 04-673, as it was enacted without compliance with the procedural requirements of Wis. Stat. §66.0217(14)(a)1.

The Town has raised additional arguments for the invalidation of the City's annexation ordinance. Because this court's analysis of Wis. Stat. §66.0217(14)(a)1 invalidates the ordinance as a matter of law, the Town's additional arguments need not be addressed.

ORDER

The City of Verona failed to comply with Wis. Stat. §66.0217(14)(a)1. Therefore, the annexation of territory from the Town of Verona, pursuant to Ordinance 04-673, is void. The Town of Verona's motion for summary judgment is **GRANTED** and the City of Verona's motion for summary judgment is **DENIED.**

THE FOREGOING ORDER IS THE FINAL ORDER OR JUDGMENT FOR PURPOSES OF APPEAL. NO SUBSEQUESNT DOCUMENT IS CONTEMPLATED BY THE COURT.

Dated: June 28, 2005

By the Court:

The Honorable Angela B. Bartell
Circuit Court Judge – Branch 10

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