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Eau Claire County, WI
2022CV000347

STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY
BRANCH 3

TOWN OF WASHINGTON,
5750 Old Town Hall Road
Eau Claire, Wisconsin 54701

Plaintiff,

vs. Case No. 22cv347

CITY OF EAU CLAIRE,
203 S. Farwell Street
Eau Claire, Wisconsin 54701

Defendant,

and

CDPG Developers, LLC,

Intervening Defendant.

PLAINTIFF TOWN OF WASHINGTON'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE BRIEF TO CITY OF EAU CLAIRE'S MOTION TO DISMISS

INTRODUCTION

The City filed a motion to dismiss, citing Wis. Stat. § 802.06(3). (Dkt. 16). That statute addresses motions for judgment on the pleadings. The City's brief only references the statutes and standards applicable to a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Wis. Stat. § 802.06(2)(a)6. (Dkt. 17 at 4-6). Because the City included evidence not present in the pleadings with its motion, and because its brief relies heavily on that evidence, as described in more detail below, the

City's motion should be converted into a motion for summary judgment under Wis. Stat. §§ 802.06(2)(b) or (3).

Therefore, the Town responds to the City's motion with a cross-motion for summary judgment. This brief provides support for the Town's motion and, in case the Court decides to exclude the City's proffered additional evidence and treat the City's motion as a motion to dismiss, explains why the City's motion should be denied.

STATEMENT OF THE CASE

The City processed an annexation petition incorrectly characterized as a "direct annexation by unanimous approval" under to Wis. Stat. § 66.0217(2). That type of annexation petition must be "signed by all of the electors residing in the territory and the owners of all of the real property in the territory." *Id.* However, Eau Claire County owns a significant portion of the property within the area described by the petition—indeed, the County owns the ***only*** property within the area proposed to be annexed that touches the City's border—but the County did not sign the petition. Simply put, the annexation petition was not unanimous, and therefore the City's attempted annexation is void as a matter of law.

The City's motion is meritless. Rather than analyzing the relevant statutory provisions or addressing cases dispositive to this matter, the City urges the Court to rewrite Wisconsin law in four significant ways.

First, the City's motion is premised on the argument that the Court should create new law that an annexation is "unanimous" even when the petition does not include "the approval of governments which own non-developable land with no assessed value."

(Dkt. 17 at 10). But the statute plainly requires a unanimous annexation petition to be "signed by all of the electors residing in the territory ***and the owners of all of the real property*[.]**" Wis. Stat. § 66.0217(2) (emphasis added). The statute does not distinguish between public and private land; between developable and non-developable land; or between land with and without assessed value. Wis. Stat. § 66.0217(2). Two Wisconsin Supreme Court cases have further confirmed that exclusion of the County's approval renders the petition void, as explained in more detail below.

Second, the City argues that the Town was required to seek review from the Department of Administration ("DOA") prior to filing this action. (Dkt. 17 at 6-8). However, the Wisconsin Supreme Court has held that courts do not blindly accept that annexation petitions are unanimous and "instead must look to their substance." *Town of Lincoln v. City of Whitehall*, 2019 WI 37, ¶3, 386 Wis. 2d 354, 925 N.W.2d 520. Because the requirement for DOA review "pertain[s] to petitions for direct annexation by unanimous approval only, such limitation[] do[es] not apply" where the petition is falsely labeled as unanimous. *Id.* ¶37.

Third, the City argues that the Town was required to file a certiorari action, rather than a complaint seeking declaratory relief. (Dkt. 17 at 10-13). But the declaratory judgment statute expressly provides that a declaratory action is an appropriate remedy for challenging the validity of an ordinance. Wis. Stat. § 806.04(2). And the Wisconsin Supreme Court—including cases cited by the City itself—has repeatedly resolved annexation challenges brought as declaratory judgment claims.

Finally, the City declares that "the Rule of Reason should be abolished." (Dkt. 17 at 13).[1] Here, the City at least acknowledges that it seeks to rewrite Wisconsin law. The Rule of Reason has been established precedent in Wisconsin law for over 140 years, and the Court cannot be the first to strike it down. Even if the Court did so, the annexation would still be void for failure to comply with the procedural requirements set forth in the statutes.

The Court must reject the City's invitation to create new law contradictory to long-standing precedent and statutes. When applicable law is applied to this case, the annexation petition at issue must be invalidated. Consequently, the Court should deny the City's motion, and grant the Town's motion for summary judgment.

STATUTORY BACKGROUND

This case centers on the statutory requirements applicable to a unanimous annexation.

Annexation by unanimous approval, governed by Wis. Stat. § 66.0217(2), is one method a city may utilize to annex territory. If an annexation petition "signed by all of the electors residing in the territory ***and the owners of all of the real property*** in the territory is filed with the city … clerk, and with the town clerk of the town or towns in which the territory is located" then a city, by a 2/3 vote of its governing body, may annex that territory

[1] The Rule of Reason is a judicially-created test to evaluate the validity of certain types of annexations. *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶24, 390 Wis. 2d 266, 938 N.W.2d 493. The test analyzes three separate elements. "First, exclusions and irregularities in boundaries must not be the result of arbitrariness. Second, some reasonable present or demonstrable future need for the annexed property must be shown. Finally, no other factors must exist which would constitute an abuse of discretion." *Id.*, ¶25.

if it is contiguous to the city. Wis. Stat. § 66.0217(2) (emphasis added). If the annexation petition satisfies these requirements, then the territory may be annexed using a streamlined process. Namely, the petitioners are not required to provide any notice within the territory regarding the potential annexation and a town has limited grounds for challenging the annexation (Wis. Stat. §§ 66.0217(2) and (11)(c)).

Another statutory process that a city may use to annex territory is "direct annexation by one-half approval," pursuant to Wis. Stat. § 66.0217(3)(a). This type of annexation has less stringent landowner approval requirements, but more stringent notice and process requirements that the City and petitioners must abide by. A petition for annexation by one-half approval must include signatures from at least one-half of the electors in the territory, and signatures from "[t]he owners of one-half of the land in area within the territory" or "[t]he owners of one-half of the real property in assessed value within the territory." Wis. Stat. § 66.0217(3)1.a. and b. Unlike a direct annexation by unanimous approval, this annexation method is initiated by the petitioner by publishing a notice within the territory that includes all of the following information:

> 1. A statement of intention to circulate an annexation petition.
> 2. A legal description of the territory proposed to be annexed and a copy of a scale map.
> 3. The name of the city or village to which the annexation is proposed.
> 4. The name of the town or towns from which the territory is proposed to be detached.
> 5. The name and post-office address of the person causing the notice to be published who shall be an elector or owner in the area proposed to be annexed.
> 6. A statement that a copy of the scale map may be inspected at the office of the town clerk for the territory proposed to be annexed and the office of the city or village clerk for the city or village to which the territory is proposed to be annexed.

Wis. Stat. § 66.0217(4)(a).

After publishing the required notice for this type of annexation, the petitioner must "serve a copy of the notice, within 5 days after its publication, upon the clerk of each municipality affected, upon the clerk of each school district affected and upon each owner of land in a town if that land will be in a city or village after the annexation." Wis. Stat. § 66.0217(4)(b). Only after satisfying these requirements, may a city approve the annexation petition. Wis. Stat. § 66.0217(8)(a).

FACTUAL BACKGROUND

Laverne Stewart ("Stewart") and Todd Hauge ("Hauge") sought to annex their land into the City of Eau Claire, and filed an annexation petition with the City to that effect. (Henning Aff., Exhibit C; Dkt. 2, ¶3). Neither Stewart's nor Hauge's land is contiguous to the City. (Henning Aff. Ex. C; Dkt. 2, ¶7). Stewart and Hauge included land owned by Eau Claire County ("County land") in their annexation petition to establish that contiguity. The County land includes 122.68 acres—more than one-quarter of the total 421.712 acres included in the annexation petition. (Henning Aff., Ex. C at 7; Dkt. 2, ¶6). However, neither the petitioners nor the City obtained the County's approval of the annexation petition. (Henning Aff., Ex. C; Dkt. 2, ¶¶10-13).

Despite not obtaining the County's signature approving the petition, Stewart and Hauge characterized the annexation petition as a direct annexation by unanimous approval. (Henning Aff., Ex. C; Dkt. 2, ¶14). The annexation petition, signed only by Stewart and Hauge, asserted that "[t]he petition has been signed by the owners of all of the land within the territory proposed to be annexed…." (Henning Aff., Ex. C at 4-5; Dkt. 2 at 19-20). They did not publish any notice of their intent to circulate an annexation petition. (Henning

Aff., ¶7; Dkt. 2, ¶20). Nor did they file any notice, or even the annexation petition, with the Town. (*Id.*, ¶¶5-6; Dkt. 2, ¶21-22).

The City then proceeded to approve the annexation. Before the City did so, the Wisconsin Department of Administration ("DOA") reviewed the annexation to determine if it was in the public interest. The DOA determined it was not. (Henning Aff., Ex. D; Dkt. 2, ¶26). The DOA determined that the Town was in a better position to continue providing fire and emergency medical services to the territory. (*Id.*) After receiving the DOA opinion, the City's Plan Commission narrowly voted 5-4 to recommend approval of the annexation petition. (Henning Aff., Ex. E; Dkt. 2, ¶29). The City's Common Council approved City Ordinance Number 7467 (the "Annexation Ordinance") to annex the territory described in the Stewart/Hauge petition on June 14, 2022. (Henning Aff. Ex. A; Dkt. 2, ¶33).

PROCEDURAL POSTURE

Before turning to the standard of review, the Court must address the posture of the motions before it. The City's motion cites to the statute providing for judgment on the pleadings (Dkt. 16), but its brief alleges that this matter should be dismissed because the Town's complaint fails to state a claim upon which relief may be granted. (Dkt. 17 at 4-6). Regardless, the City's motion should be treated as a motion for summary judgment because the City included proposed evidence not present in the pleadings with its motion (the deed to the County property that is included in this proposed annexation area) and the substance of its motion relies heavily on that information. If this evidence is included in

the Court's analysis of these motions, the City's motion must be converted into a motion for summary judgment. Wis. Stat. §§ 802.06(2)(b) or (3).

Assuming that the City's motion will be converted to a motion for summary judgment, the Town has filed its motion for cross summary judgment and supports its motion with this brief and accompanying affidavit.

If the Court does not accept the City's proffer of additional evidence not in the pleadings, and treats the City's motion as a motion to dismiss (or for judgment on the pleadings), this brief also provides explanation as to why such a motion fails.

STANDARD OF REVIEW

Summary Judgment. The purpose of summary judgment procedure is to avoid a trial when nothing needs to be tried. *Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton*, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981). "In determining whether to grant summary judgment, 'the court decides whether there is a genuine issue of material fact; the court does not decide the fact.'" *Midwest Neurosciences Assocs., LLC v. Great Lakes Neurosurgical Assocs., LLC*, 2018 WI 112, ¶80, 384 Wis. 2d 669, 920 N.W.2d 767 (citing *Racine Cnty. v. Oracular Milwaukee, Inc.,* 2010 WI 25, ¶25, 323 Wis. 2d 682, 781 N.W.2d 88)). "The moving party bears the burden of establishing the absence of a genuine, that is, disputed, issue of material fact." *Id*. (citing *AccuWeb, Inc. v. Foley & Lardner*, 2008 WI 24, ¶21, 308 Wis. 2d 258, 746 N.W.2d 447.

A party opposing summary judgment "may not rest upon the mere allegations or denials of the pleadings[.]" Wis. Stat. § 802.08(3); *see also Jensen v. Sch. Dist. of Rhinelander*, 2002 WI App 78, ¶12, 251 Wis. 2d 676, 642 N.W.2d 638 ("Mere allegations

of factual dispute cannot defeat the motion for summary judgment."). "[U]nsworn allegations are not evidence[.]" *Reed v. Allied Waste Transp., Inc.*, 621 F. App'x 345, 347 (7th Cir. 2015); *see also Horak v. Bldg. Servs. Indus. Sales Co.*, 2012 WI App 54, ¶3, n.2, 341 Wis. 2d 403, 815 N.W.2d 400 ("As we have repeatedly stated, attorneys' arguments are not evidence.")

Motion to Dismiss. The standard for review for a motion to dismiss is included in case the Court excludes the City's submitted evidence that was not in the pleadings and processes the City's motion as one for dismissal. A motion brought under Wis. Stat. § 802.06(2)(a)6 to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693 (internal citation omitted). In adjudicating such a motion, "all facts alleged in the complaint, as well as all reasonable inferences from those facts, are accepted as true." *Kaloti Enters. v. Kellogg Sales Co.*, 2005 WI 111, ¶11, 283 Wis. 2d 555, 699 N.W.2d 205. Dismissal is proper only if "it appears certain that no relief can be granted under any set of facts that plaintiff[] might prove in support of [its] allegations." *Northridge Co. v. W.R. Grace Co.*, 162 Wis. 2d 918, 923, 471 N.W.2d 179 (1991); *accord, e.g.*, *Ramsden v. Farm Credit Servs.*, 223 Wis. 2d 704, 711, 590 N.W.2d 1 (Ct. App. 1998).

Judgment on the Pleadings. Since the City's motion cites to the judgment on the pleadings statute, the following is included in the event the court treats the City's motion as one for judgment on the pleadings. "A judgment on the pleadings is essentially a summary judgment decision without affidavits and other supporting documents." *McNally v. Capital Cartage, Inc.*, 2018 WI 46, ¶23, 381 Wis. 2d 349, 912 N.W.2d 35. "If the

complaint is sufficient to state a claim and the responsive pleadings raise no material issues of fact, judgment on the pleadings is appropriate." *New Richmond News v. City of New Richmond*, 2016 WI App 43, ¶28, 370 Wis. 2d 75, 881 N.W.2d 339 (quoting *Freedom from Religion Found., Inc. v. Thompson,* 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Wis. Ct. App. 1991)).

ARGUMENT

The Annexation Ordinance is invalid because the annexation petitioners and City improperly treated it as a unanimous petition approved by all property owners within the annexation area. The City erroneously asserts that the County should not be treated as a property owner for purposes of this attempted annexation**.** There is no basis in fact or law for that assertion. That alone invalidates the City's attempted annexation.

Additionally, even if the petitioners had sought to propose a "direct annexation by one-half approval," which they did not, the petitioners did not comply with the legal requirements applicable to that type of annexation.

As a matter of law, the annexation must be invalidated. As a result, the Court should grant the Town's motion for summary judgment and deny the City's motion.

I. THE ANNEXATION IS NOT UNANIMOUS AND MUST BE INVALIDATED.

A. The Annexation Is Invalid Because The County Did Not Approve The Annexation Petition.

Failure to obtain the County's approval dooms the annexation. The missing County approval makes the annexation petition and Annexation Ordinance defective.

This is a case of statutory interpretation. "Statutory interpretation begins with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (internal quotation omitted). If the meaning of the statute is plain, the inquiry ends. *Id.*

For purposes of a unanimous annexation petition, Wis. Stat. § 66.0217(2) requires public bodies—like the County—to approve an annexation if it owns property within the area proposed to be annexed. Unanimous annexation petitions are only valid if "signed by all of the electors residing in the territory and the owners of all of the real property in the territory…." Wis. Stat. § 66.0217(2). That language includes two expressly defined terms: "owner" and "real property." The term "owner" "means the holder of record of an estate in possession in fee simple, or for life, in land or real property…." Wis. Stat. § 66.0217(1)(d). The term "real property" is defined as "land and the improvements to the land."

These broad definitions include ***all*** owners of property. The language does not make any exceptions for municipal—or county—owned land. The Legislature clearly required that unanimous annexation petitions must include ***all*** real property owners, like the County, and the petitioners and the City must to comply with that mandate. *Int. of A.L.*, 2019 WI 20, ¶20, 385 Wis. 2d 612, 923 N.W.2d 827 ("we will not read limiting language into the statute"); *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶14, 316 Wis. 2d 47, 762 N.W.2d 652 ("To interpret the statute consistent with Markel's argument would require us to insert words into the statute […]we will not insert those words into the statute to create such a result.").

Case law confirms the Town's interpretation. In *Mueller v. City of Milwaukee*, 254 Wis. 625, 627-628, 37 N.W.2d 464, 465 (1949), the court interpreted a predecessor annexation statute, and found that Milwaukee County—as an owner of parkland—must be treated an "owner" of property for annexation purposes. The Court specified that "[t]here is nothing in the statute regarding annexation of lands to a city that treats county-owned lands differently from privately-owned lands." *Mueller*, 254 Wis. at 628–29. Consequently, the County is required to approve a unanimous annexation petition if the County owns lands within the proposed area to be annexed.

After *Mueller,* the Wisconsin Supreme Court reaffirmed the statutory signature requirement does not contain any "limitation or exclusion of a municipality. None of the prior sections of the annexation statutes defining owner included any such limitation. We have held under these prior sections that land owned by one municipality could be included within the territory annexed to another municipality and such municipality counted as an owner." *Town of Madison v. City of Madison*, 12 Wis. 2d 100, 105, 106 N.W.2d 264, 266 (1960). These cases, in conjunction with the statutory text, establish that a unanimous annexation proposal that includes county land must be approved by the county.

Here, the County did not approve the annexation petition. "Such a defect in the petition is not de minimis…." *Town of Lincoln v. City of Whitehall*, 2019 WI 37, ¶32, 386 Wis. 2d 354, 925 N.W.2d 520. Yet, the petitioners and City treated the annexation as unanimous. That alone invalidates the annexation. Wisconsin's Supreme Court, in no uncertain terms, expressed that even if a single property owner in the annexed territory does not sign the petition, then it "is not a petition for direct annexation by unanimous

approval." *Town of Lincoln*, 2019 WI 37, ¶37. Since the annexation proceeded without a required signature, the annexation must be declared void. If the Court treats the City's motion as a motion to dismiss or a motion for judgment on the pleadings, this same reasoning requires that the City's motion must fail.

B. No Basis Exists To Exclude The County From The Requirement That It Approve This Annexation Petition.

1. Summary Judgment.

The City misconstrues the holding of *International Paper Company v. City of Fond du Lac*, 50 Wis. 2d 529, 184 N.W.2d 834 (1971), and ignores other cases directly contrary to the City's position in an attempt to subvert the actual text of the annexation statutes. The case law and statutory text lead to one result: the County is an owner of real property and must approve any unanimous annexation that includes property it owns.

In *International Paper*, the Wisconsin Supreme Court specified that "the legislature intended a municipality should be counted as an owner like a private owner of land" for purposes of annexation approval requirements. *Id.* at 532. It then created a very narrow exception that provides that the owners of *land underlying streets and alleys* need not be counted as owners for purposes of annexation approval. *Id.* at 533. In doing so, the Supreme Court acknowledged its holding was of judicial policy: "Much litigation and problems will be avoided in these cases by the exclusion of the ownership of roads and public highways in determining the validity of the petition." *Id.*

International Paper did not overrule *Mueller*. The only way to harmonize these two cases is to strictly follow the narrow exception in *International Paper* exempting only the

owners of lands underlying roads and alleys from the requirement that all owners approve a unanimous annexation petition. The City's interpretation destroys that harmony and overrules *Mueller*. No basis exists for that result.

The City asks this Court to greatly expand the narrowly-tailored exception in *International Paper* to include any publicly owned, non-developable land. (Dkt. 17 at 9-10). Tellingly, the City does not rely on the actual definitions of "owner" (Wis. Stat. § 66.0217(1)(d)) or "real property" (Wis. Stat. § 66.0217(1)(f)) to reach its conclusion. That is because the terms "publicly owned" and "non-developable" do not exist in the annexation statutes. Indeed, the City does not perform any statutory analysis of section 66.0217 to reach its conclusion. Nor does *International Paper* use the term "non-developable." Given that *International Paper* itself acknowledges that the holding is in tension with the express statutory language in the annexation statutes, extending its holding to "publicly owned, non-developable land" would judicially eliminate the actual statutory definitions created by the Legislature.

Furthermore, the City's "no assessed value" limitation is created out of thin air and conflicts with Wis. Stat. § 66.0217(3). The requirements of section 66.0217(2) must be interpreted "in relation to the language of surrounding or closely-related statutes." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46. Under section 66.0217**(3)**, the Legislature specially defined which types of property should be included for purposes of direct annexations by one-half approval. If "the owners of one-half the land in area within the territory" or the owners "of one-half of the real property ***in assessed value*** within the territory" sign the annexation petition, it is valid. Wis. Stat. § 66.0217(3)(a)1.a and b.

(Emphasis added.) Municipal and state-owned land has no assessed value. Wis. Stat. § 70.11(2); *see also Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶43, 390 Wis. 2d 266, 938 N.W.2d 493 (land owned by cities and the state does not count towards the assessed value determination in annexations by one-half approval). Thus, municipal land with no assessed value is *specifically excluded* for annexation by one-half approval under section 66.0217(3). No such exclusion exists in section 66.0217(2) for annexations by unanimous approval. The Legislature demonstrated that it knew how to exclude municipal land from annexation requirements based on its lack of assessed value, and it chose not to do so for unanimous annexations. The only appropriate interpretation giving effect to both sections 66.0217(2) and (3) is to require the County's signature for unanimous annexations that include County-owned land.

The Town also struggles to follow the City's argument that somehow the County Land included in this attempted annexation is not "usable," or why that would be relevant to the Court's analysis. The County Land is currently a park and is clearly usable. Parks are a legitimate, recognized land use. The City's own zoning code delineates "parks" as a regulated zoning use.[2] *See* City of Eau Claire Code of Ordinances § 18.04.030. The same is true of Eau Claire County's zoning ordinance. *See, e.g.*, Eau Claire County Code of Ordinances §§ 18.04.035, 18.05.010, 18.07.010, 18.08.010.[3] Additionally, the City can

[2] Pursuant to Wis. Stat. § 902.03(1)(a), the Court must take judicial notice of municipal ordinances. The City's zoning code is available at https://www.eauclairewi.gov/home/showpublisheddocument/30577/637123426740400000.

[3] The County's zoning code is available at https://www.co.eau-claire.wi.us/home/showpublisheddocument/10846/637241896433570000.

point to no cases or statutes that require an analysis of deed restrictions to determine if an owner qualifies for purposes of annexation. None exist. Even assuming deed restrictions were relevant, educational uses are still a land use. Again, the City's own zoning code specifies that this is a regulated land use. *See* City of Eau Claire Code of Ordinances § 18.05.020.D. In addition, deed restrictions are not necessarily permanent – they can be modified or eliminated by the relevant parties.

2. Motion to Dismiss.

If the Court does not convert the City's motion to one for summary judgment, the City's proffered additional evidence cannot be included in the Court's review and, therefore, the City's motion has no support in the pleadings regarding whether the County Land is not "developable." (Dkt. 17 at 9-10). The County deed, and its restrictions, are not included in the pleadings. Thus, the Court could not even consider the factual basis underpinning this City's argument if the Court treats the City's motion as one to dismiss or for judgment on the pleadings.

C. The Annexation Would Be Invalid Even If It Was Brought As A Direct Annexation By One-Half Approval For Non-Compliance With Wis. Stat. § 66.0217(4).

To be clear, the proposed annexation was filed as an annexation by unanimous approval. For the reasons explained above, the proposed annexation is insufficient and must be invalidated as a matter of law. However, even if this proposed annexation had been characterized as a direct annexation by one-half approval under 66.0217(3)(a), it would still fail because the process followed by the petitioners and the City did not comply with clear statutory prerequisites.

As explained above, annexations by one-half approval require petitioners to publish detailed notice within the annexed territory, and with the annexing authority and the Town from which property is proposed to be annexed. Such notice must be filed prior to proceeding with the petition. Wis. Stat. § 66.0217(4)(a). Petitioner must have served a copy of the notice upon the clerk of the Town, the school district affected, and each owner of land in the Town that will be annexed. Wis. Stat. § 66.0217(4)(b).

The City does not contend that the proposed annexation satisfies the standards for an annexation by one-half approval (*See* Dkt. 17, *generally*), nor could it, as the petitioners did not comply with those requirements. (*See* Henning Aff., ¶¶5-7) Consequently, the Annexation Ordinance would fail as a matter of law even if it had been brought under this alternative method, whether this City's motion is treated as a motion to dismiss, a motion for judgment on the pleadings, or a motion for summary judgment.

II. DEPARTMENT OF ADMINISTRATION REVIEW OF THE ANNEXATION PETITION WAS NOT REQUIRED BEFORE THE TOWN WAS AUTHORIZED TO BRING THIS ACTION.

The Town was not obligated to seek DOA review prior to initiating this lawsuit. The express holding of *Town of Lincoln* establishes that DOA review was not required for the Town to petition for declaratory relief invalidating this attempted annexation.

Wis. Stat. § 66.0217(11)(c) generally prohibits a challenge by a town of a truly unanimous annexation except under limited circumstances and after DOA review. However, these restrictions do not apply if an annexation petition is characterized as a unanimous annexation but does not actually have unanimous landowner approval.

Like the present case, *Town of Lincoln* involved an annexation in which annexation petitioners labeled the petition as unanimous, even though one property owner within the area to be annexed did not sign the annexation petition. 2019 WI 37, ¶10. The Supreme Court declared that annexation to be defective because "unanimous" meant that all property owners had to sign the annexation petition, and that a missing signature was not a de minimis defect. *Id.* ¶¶29, 32. The Supreme Court further explained that allowing the annexation to proceed as unanimous would "encourage the mislabeling of annexation petitions. This would prevent towns from raising challenges that would otherwise be available under the law if the petition had been labeled accurately. We are not bound by the labels placed on documents and instead must look to their substance." *Id.*, ¶33. The Supreme Court specifically 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, *such limitations do not apply here*." *Id.* ¶37. (emphasis added). Section 66.0217(11)(c) is the source of the DOA review requirement, so that requirement simply does not apply in this case.

In its motion, the City[4] makes the exact argument that failed the City of Whitehall in *Town of Lincoln*. Like the City of Whitehall, the City of Eau Claire asserts that the Town cannot seek review of whether the annexation petition was truly unanimous unless it first meets the requirements under section 66.0217(11)(c). (Dkt. 17 at 6-9). As explained

[4] Notably, the City does not cite to the actual holding of *Town of Lincoln*. Rather, the City relies on the Supreme Court restating the procedural history. The Supreme Court's holding is what controls, not its reciting of facts.

above, the Supreme Court specifically rejected that argument. Since the County did not approve the annexation petition, the petition is not unanimous, and the review requirements for unanimous annexations do not apply. The same result follows regardless of whether the City's motion is treated as a motion to dismiss, a motion for judgment on the pleadings, or a motion for summary judgment.

III. DECLARATORY JUDGMENT IS THE APPROPRIATE REVIEW MECHANISM.

For over 80 years, annexation decisions have been challenged via declaratory judgment actions. *See Town of Wilson v. City of Sheboygan*, 230 Wis. 483, 283 N.W. 312, 314 (1939) (action to have annexation ordinance declared void); *Town of Greenfield v. City of Milwaukee*, 273 Wis. 484, 485, 78 N.W.2d 909, 909 (1956) (seeking annexation declared void); *Town of Fond du Lac v. City of Fond du Lac*, 22 Wis. 2d 533, 535, 126 N.W.2d 201, 202 (1964) (town brought suit using declaratory judgment); *Int'l Paper Co. v. City of Fond du Lac*, 50 Wis. 2d 529, 184 N.W.2d 834 (1971) (town initiated suit via declaratory judgment action); *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, 256 Wis. 2d 859, 650 N.W.2d 81 (adjacent landowners to annexation brought declaratory judgment action); *Town of Wilson v. City of Sheboygan*, 2020 WI 16, 390 Wis. 2d 266, 938 N.W.2d 493 (town brought declaratory judgment action). The declaratory judgment statute and annexation case law establishes that declaratory judgment remains the appropriate vehicle to challenge annexations.

The declaratory judgment statute specifically authorizes actions to invalidate municipal ordinances. Wis. Stat. § 806.04(2) provides that:

> Any person … whose rights, status or other legal relations are affected by a … municipal ordinance … may have determined any question of construction or ***validity*** arising under the … ordinance … and obtain a declaration of rights, status or other legal relations thereunder.

(emphasis added). Additionally, section 806.04(11) requires that "[i]n any proceeding which involves the validity of a municipal ordinance or franchise, the municipality shall be made a party, and shall be entitled to be heard." Accordingly, the statute specifically authorizes declaratory judgment challenges to the validity of an ordinance, and prescribes the procedure for doing so.

Tellingly, the City has not pointed to a single case applying certiorari review to annexation cases. Like its other arguments, it seeks to create law, rather than apply existing law to this case.

Furthermore, common law certiorari is not appropriate because the declaratory judgment statute provides an express method of review. Common law certiorari is only "available whenever there is no express statutory method of review." *Ottman v. Town of Primrose*, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411. Here, Wis. Stat. § 806.04 provides declaratory relief as an ***express*** method to challenge the validity of an ordinance. This is not like the cases cited by the City in which the municipal decisions involved issuance of an alcohol license (*Nowell v. City of Wausau*, 2013 WI 88, 351 Wis. 2d 1, 838 N.W.2d 852), issuance of a driveway permit (*Ottman v. Town of Primrose*, 2011 WI 18, 332 Wis. 2d 3, 796 N.W.2d 411), or a tax increment district finding (*Voters with Facts v. City of Eau Claire*, 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131). Rather, this case deals with the City adopting an ordinance, and the Town seeking a declaration that the ordinance

is invalid. That, combined with the decades of cases utilizing declaratory judgment as a manner of testing the validity of annexation ordinances, precludes certiorari review. For these reasons, the City's motion fails whether it is treated as a motion to dismiss, a motion for judgment on the pleadings, or a motion for summary judgment.

IV. THE RULE OF REASON REMAINS VALID.

In addition to asking this Court to rewrite the statutes governing unanimous annexations, the City also asks this Court to abolish the Rule of Reason. (Dkt. 17 at 13). The Court need not even apply the Rule of Reason here, because the annexation petition at issue was deficient as a matter of law and must be invalidated without any application of this doctrine.

If the Rule of Reason was relevant to these motions, this Court is precluded from ignoring it because only the Wisconsin Supreme Court can overturn binding precedent. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 256 (1997) (only the Supreme Court can modify its own precedent). In addition, the Rule of Reason has been a staple of Wisconsin law for over 140 years. *See Smith v. Sherry*, 50 Wis. 210, 6 N.W. 561, 564 (1880). Its continued relevance was just affirmed by the Wisconsin Supreme Court in *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶24. The Wisconsin Supreme Court definitively expressed that "[t]he analysis continues to play a role in Wisconsin annexation jurisprudence." The Wisconsin Legislature has never repealed this doctrine. Consequently, the Court should reject the City's request to overturn the Rule of Reason.

CONCLUSION

For the reasons explained above, the Court should deny the City's motion, and grant the Town's motion for summary judgment.

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