

**FILED**  
**01-06-2023**  
**Clerk of Circuit Court**  
**Eau Claire County, WI**  
**2022CV000347**

**STATE OF WISCONSIN**

**CIRCUIT COURT**  
**BRANCH 3**

**EAU CLAIRE COUNTY**

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

**Case No. 2022CV347**  
**Case Code: 30701**

Plaintiffs,

v.

**CITY OF EAU CLAIRE**  
203 South Farwell Street  
Eau Claire, WI 54701

Defendant,

**CDPG DEVELOPERS, LLC,**

Intervening  
Defendant.

**CITY OF EAU CLAIRE’S BRIEF**  
**REPLYING TO INTEREVENING DEFENDANT’S BRIEF**

**INTRODUCTION**

The City of Eau Claire writes this brief replying to the Intervening Defendant’s (“Intervenors”) brief supporting the City of Eau Claire’s Motion to Dismiss. The Intervenors’ brief provides further support demonstrating this case should be dismissed. The standard of review for this case is certiorari, and the Court’s rulings should be made with a deference to the legislative determinations made by the Eau Claire City Council. Binding case law and persuasive circuit court precedent demonstrate the annexation is unanimous. The failure to request DOA review prior to filing this lawsuit deprives the court of competency to entertain this action, and this court cannot retroactively confer competency by ruling that the proposed annexation is not unanimous.

**1. The failure to request DOA review deprives this Court of competency to proceed, and this Court cannot retroactively confer competency by ruling the proposed annexation is not unanimous.**

The failure to request DOA review deprives this Court of competency to proceed, and this Court cannot retroactively confer competency by ruling the proposed annexation is not unanimous. As the both the City of Eau Claire and the Intervenors point out in prior briefs, annexation ordinances have long enjoyed a presumption of validity. *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶ 11, 390 Wis.2d 266, 938 N.W.2d 493, *Town of Pleasant Prairie v. City of Kenosha*, 75 Wis. 2d 322, 329, 249 N.W. 2d 581 (Wis. 1977), 75 Wis.2d at 327 (“annexation ordinances, like legislative enactments in general, enjoy a presumption of validity”). Consequently, at the time this action was filed the annexation constituted a valid unanimous annexation as a matter of law, and the Town of Washington needed to request DOA review to invoke the authority of this Court to hear this action. The Town of Washington concedes it neglected to request DOA review, but argues that a determination by this Court that the annexation is not in fact unanimous will cure this defect and retroactively confer competency to the time this action was filed. The Town of Washington’s argument contradicts the language found in *Lincoln* which properly considered Wisconsin’s court competency jurisprudence.

The Court should apply *Village of Elm Grove v. Brefka*, 2013 WI 54, 348 Wis. 2d 282, 832 N.W.2d 121 in dismissing this case. In *Brefka*, an OWI defendant failed to request a refusal hearing within 10 days as required by Wis. Stat. § 343.305(9)(a)4 and (10)(a). The defendant in *Brefka* conceded he missed this statutory deadline, but argued that the Court could confer competency by applying Wis. Stat. § 806.07 which allows courts extend time limits if they determine excusable neglect exists. *Brefka* concluded that courts cannot apply separate legal grounds as a means of retroactively conferring competency. *Id.* Even if the defendant could

demonstrate excusable neglect the Court could not hear the case because the failure to meet the statutory deadline already deprived the Court of competency. *Id.* The same reasoning applies in this case. Even if the Town of Washington can demonstrate that the annexation was not unanimous that does not excuse the failure to request DOA review which was necessary to invoke the Court's authority to hear this action at the time it was filed. A loss of competency due to the failure to follow a mandatory statutory requirement cannot be cured by a later determination that grounds exist to excuse the failure. *Id; see also City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738; Douglas J. Hoffer, *Keep Your Case Afloat: Wisconsin's Court Competency Doctrine*, 87 Wis. Law. 26 (June 2014). That is why ¶¶ 10-15 of *Lincoln* discusses the need of a town to request DOA review to invoke circuit court authority to hear the annexation despite later in the decision finding that the proposed annexation was not in fact unanimous.

**2. The Court should apply the Ozaukee County circuit court decision provided by the Intervenor in dismissing this case.**

The Court should apply the Ozaukee County circuit court decision provided by the Intervenor in dismissing this case. The City of Eau Claire provided a summary of the Port Washington decision in its last brief, and the circuit court transcript provided by the Intervenor further demonstrates that the issue before this Court is not unique.<sup>1</sup> Both binding precedent and persuasive circuit court precedent support the decision reached by the Eau Claire City Council to approve the proposed annexation as unanimous.

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<sup>1</sup> In footnote number 2 of its reply brief The Town of Washington implies that in *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993) the Court of Appeals sanctioned a litigant for taking similar action to the City of Eau Claire in this case. That implication mischaracterizes *Kuhn* which involved a litigant which expressly invited the Court to examine the unpublished decision. The City of Eau Claire explicitly stated the sole purpose of its previously filed exhibit was to cite the circuit court decision which the Town of Washington does not dispute may properly be cited for persuasive authority. At no time has the City of Eau Claire cited to or invited the Court to examine the unpublished decision, and the City of Eau Claire trusts this Court will not use its previously filed exhibit for an improper or unintended purpose.

**3. The Court should apply a deferential certiorari standard of review in examining the Eau Claire City Council's legislative determination in this case.**

The Court should apply a deferential certiorari standard of review in examining the Eau Claire City Council's legislative determination in this case. The Intervenors provided additional support demonstrating the validity of the Eau Claire City Council legislative action approving the proposed unanimous annexation. The Town of Washington's arguments are not sufficient to demonstrate that the Eau Claire city council's legislative act approving the proposed annexation was clearly in error. It is not sufficient for the Town of Washington to assert that the Eau Claire city council's legislative determination is mistaken. The Town of Washington must demonstrate the legislative determination was clearly in error. *Town of Waukesha v. City of Waukesha*, 206 N.W.2d 585, 58 Wis. 2d 525 (1973); *See also Voters With Facts*, 2018 WI 63, ¶¶ 71, 382 Wis. 2d 1, 913 N.W.2d 131 (It is well established that legislative determinations require deference from courts).

**CONCLUSION**

For all the foregoing reasons the Plaintiff's complaint should be dismissed.

Dated: January 6, 2023

/s/Douglas J. Hoffer  
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