STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2017AP684

Town of Lincoln,
Plaintiff-Appellant-Petitioner,

v.

City of Whitehall,
Defendant-Respondent.

Appeal From a Final Judgment of the Circuit Court of Trempealeau County, the Honorable Charles V. Feltes, Presiding
Case No. 15-CV-112
Affirmed by Court of Appeals, District III

AMICUS CURIAE BRIEF OF THE WISCONSIN REALTORS® ASSOCIATION, LEAGUE OF WISCONSIN MUNICIPALITIES, WISCONSIN BUILDERS ASSOCIATION AND NAIOP-WI

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OVERVIEW

Annexation conflicts are often characterized as "turf battles" between cities or villages and towns. However, in most cases, the annexation is initiated by property owners who want to change the jurisdiction of their property from a town to an adjacent city or village. Contrary to popular belief, the city or village generally does not seize land against the wishes of a property owner to bring the land within the municipality's borders. If certain property owners do not want to be included in the annexation, those property owners are generally excluded from the annexation petition and allowed to remain part of the unincorporated area.

Because Wisconsin's annexation laws are designed to protect the rights of all property owners with respect to their desire to be annexed, irregular annexation configurations often result. Attempts have been made to require annexation boundaries to follow more defined boundaries, but the Wisconsin Legislature has rejected such proposals in favor of allowing property owners to freely decide which land is to be annexed. *See e.g.,* 2003 Senate Bill 87 (proposing that annexation lines follow natural

boundaries (rivers, lakes, etc.), man-made boundaries (railroad right-of-ways, center of highways, etc.), or quarter-quarter section lines).

While towns often file legal challenges trying to stop annexations from occurring, the legislature placed significant limitations on such legal challenges in cases where all of the property owners within a territory want to be annexed into a city or village. *See* 2003 WI Act 317; *see also*, 2011 WI Act 128. The legislature recognized the special nature of these annexations, known as direct annexations by unanimous approval, and wanted to prohibit legal challenges from towns except in very limited circumstances.

This case presents this Court with an opportunity to clarify the scope of the limitations the legislature placed on the ability of towns to legally challenge direct annexations by unanimous approval. Specifically, the issue before the court is whether a town may challenge a direct annexation by unanimous approval on the basis of a reason other than those explicitly set forth in Wis. Stat. § 66.0217(6)(d).

LAW AND ARGUMENT

This case involves the interpretation of Wisconsin law related to direct annexations by unanimous approval, outlined in Wis. Stat. § 66.0217. The interpretation and application of a state statute is a question of law that this Court reviews *de novo*. *See State v. Harrison*, 2015 WI 5, ¶37, 360 Wis. 2d 246, 858 N.W.2d 372. In doing so, courts are to "assume that the legislature's intent is expressed in the statutory language." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. If the language is clear, the statute must be applied as it is written. *Id.* at ¶45.

I. THE WISCONSIN STATUTES EXPLICITLY LIMIT THE AUTHORITY OF TOWNS TO CHALLENGE DIRECT ANNEXATIONS BY UNANIMOUS APPROVAL.

In Wisconsin, the annexation of land is governed by the Wisconsin Statutes. *See* Wis. Stat. § 66.0217; *see also, Town of Windsor v. Village of DeForest*, 2003 WI App 114, ¶ 8, 265 Wis. 2d 591, 666 N.W.2d 31 (providing that "[a]nnexation proceedings are purely statutory").

While the Wisconsin Statutes provide for five different types of annexations, a direct annexation by unanimous approval is one of only two types of annexations initiated by the property owners within the territory to

be annexed. *See* Wis. Stat. § 66.0217(6)(d); *see also*, *Annexation Methods*, Wisconsin Department of Administration website, https://doa.wi.gov/Pages/LocalGovtsGrants/AnnexationMethods.aspx. A direct annexation by unanimous approval requires all real property owners and all electors in the territory of the proposed annexation to sign the annexation petition. Wis. Stat. § 66.0217(2). Such annexations reflect the rights of property owners to freely choose where to live and to take advantage of the municipal services they believe to be most beneficial. *See Town of Blooming Grove v. City of Madison*, 253 Wis. 215, 218, 33 N.W.2d 312 (1948).

Because all the property owners and electors within the annexed territory must consent to the annexation, the Wisconsin Statutes explicitly state that direct annexations by unanimous approval can be challenged by a town only under limited circumstances. Wis. Stat. § 66.0217. Specifically, towns are prohibited from challenging a direct annexation by unanimous approval "on any grounds, whether procedural or jurisdictional." Wis. Stat. § 66.0217(11)(c). The statutes provide for only one exception to this blanket prohibition. *See* Wis. Stat. § 66.0217(6)(d). Under this exception, if the town requests the Department of Administration (Department) to

review the annexation and the Department determines the annexation is not contiguous to the annexing authority or impermissibly crosses the county border (county parallelism), the town may challenge the annexation, but only on the basis of the Department's determination. *Id.*

Despite this explicit statutory language, the Petitioner in this case argues that the statute should be interpreted to provide towns with broad authority to challenge direct annexations by unanimous approval for any reason if the Department determines the annexation is not in compliance with the contiguity and county-parallelism requirements. *See* Pet. Br. at pp. 16-25. However, if the legislature had intended to allow towns to challenge any aspect of the annexation upon an unfavorable review from the Department, the legislature would have removed the blanket prohibition language in Wis. Stat. § 66.0217(11)(c)("no action on any grounds . . . may be brought by any town"), rather than simply adding the limited exception ("Except as provided in sub. (6)(d)2"). Maintaining the blanket prohibition language in Wis. Stat. § 66.0217(11)(c) signifies the legislature's intent to place strict limits on the ability of towns to challenge direct annexations by unanimous approval.

II. PROVIDING TOWNS WITH BROAD AUTHORITY TO CHALLENGE DIRECT ANNEXATIONS BY UNANIMOUS APPROVAL WOULD BE CONTRARY TO THE LEGISLATIVE HISTORY OF WIS. STAT. § 66.0217(6)(d) AND RELATED ANNEXATION STATUTES.

In addition to the plain language in Wis. Stat. § 66.0217(6)(d), the legislative history of Wis. Stat. § 66.0217(6)(d) and related annexation statutes demonstrates the legislature's intent to narrowly limit the authority of towns to challenge direct annexations by unanimous approval.

While reviewing the legislative history of a statute is not appropriate when the language of a statute is unambiguous, Wisconsin courts will often consider the legislative history of a statute to confirm or verify a plain-meaning interpretation of a statute. *See Kalal*, 2004 WI 58, ¶ 51.

In 1889, the Wisconsin Legislature authorized the annexation of land from unincorporated areas into incorporated areas. *See* 1889 Wis. Sess. Laws, ch. 326, §§ 1-2. When originally enacted, the Wisconsin Statutes did not authorize towns to challenge any type of annexation. *See Application to Alter Boundary of Village of Mosinee*, 177 Wis. 74, 74, 187 N.W. 688 (1922). In determining that towns did not have standing to challenge an annexation, the court held that the statutes did not authorize any party expect those directly involved in the proposed annexation to file a legal

challenge. *Id.* In *Town of Kronenwetter v. Knoedler*, 177 Wis. 74, 187 N.W. 688 (1922), the court concluded that the statutes gave standing to only residents and taxpayers of the annexing village, petitioners for the annexation and owners of land in the annexed territory, not to towns. *Id.* at 76.

In 1933, the legislature modified the statutes to provide towns with standing to challenge annexations. *See* 1993 Wis. Sess. Laws, ch. 97, § 1. Specifically, the statute declared:

> Town boundaries, action to test alteration. In proceedings whereby territory is attached or detached from any town, the town is an interested party, and the town board may institute, maintain or defend an action brought to test the validity of such proceedings, and may be interpleaded in any such action.

Wis. Stat § 66.029 (1935-36).[1] Even after its enactment, Wisconsin courts interpreted the statute narrowly, finding that the statute established only a town's right to challenge an annexation ordinance, but not the right of town residents owning adjoining property to do the same. *See Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶13, 256 Wis. 2d 859, 650 N.W.2d 81.

[1] The statute was later renumbered to Wis. Stat. § 66.0233.

In 2004, the Wisconsin Legislature modified the statutes to prohibit towns from challenging direct annexation by unanimous approval. *See* 2003 WI Act 317. Specifically, the statutory prohibition stated:

> No action on any grounds, whether procedural or jurisdictional, to contest the validity of an annexation under sub (2), may be bought by any town.

Wis. Stat. § 66.0217(11)(c). As recognized by Wisconsin courts, the plain language of the statute prohibited towns from challenging a direct annexation by unanimous support on any basis. *See Town of Merrimac v. Village of Merrimac*, 2008 WI App 98, ¶¶ 13-14, 312 Wis. 2d 754, 753 N.W.2d 552. After a close examination of the statutory language and the statute's legislative history, the court in *Town of Merrimac* noted that "the legislature expressly and unequivocally barred towns from obtaining review." *Id.* at ¶ 17. This conclusion was confirmed by the court in *Darby Joint Sanitary District No. 1 v. City of Kaukauna*, 2013 WI App. 113, 350 Wis. 2d 435, 838 N.W.2d 103, which determined that the statutory language was "unambiguous" and barred towns from challenging direct annexations by unanimous approval on any grounds, including county parallelism. *See Darby*, 2013 WI App. 113, ¶¶ 11-13.

In 2012, the legislature further modified the direct annexation by unanimous approval statute to its modern-day version, which includes one exception to the complete ban on town challenges to such annexations. *See* 2011 Wis. Act 128; Wis. Stat. § 66.0217(6)(d). This exception, which the legislature drafted narrowly to allow town challenges only to the issues of contiguity and county parallelism, was aimed at addressing the specific issues raised in the *Town of Merrimac* and *Darby* cases. *See Town of Lincoln v. City of Whitehall*, 2018 WI App 33, ¶ 20, 382 Wis. 2d 112, 912 N.W.2d 402. Nothing in the legislative record pertaining to Act 128 or the legislature's subsequent acts suggests that the legislature intended to authorize towns to challenge direct annexations by unanimous support on grounds other than contiguity and county parallelism.

III. OTHER ANNEXATION STATUTES UNDERSCORE THE LEGISLATURE'S INTENT TO LIMIT THE AUTHORITY OF TOWNS TO CHALLENGE DIRECT ANNEXATIONS BY UNANIMOUS APPROVAL.

In addition to the plain language of Wis. Stat. § 66.0217(6)(d) and its legislative history, the legislature's intent to limit the authority of towns to challenge direct annexations by unanimous approval is reflected in other annexation statutes.

While the rules of statutory interpretation require the analysis to stop if the plain meaning of the statute is clear, the context of the language "in relation to the language of surrounding or closely-related statutes" can be instructive "to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶¶ 45-46.

A comparison of the consequences established in Wis. Stat. § 66.0217(6)(a) and Wis. Stat. § 66.0217(6)(d)(2)for the Department's failure to send out copies of its written findings in a timely manner demonstrates the legislature's desire to limit the authority of towns to challenge direct annexations by unanimous approval. For all annexations within a county of 50,000 or more, the legislature imposed no penalty if the Department fails to mail out its public interest opinion to affected municipalities within 20 days after receiving the notice. Wis. Stat. § 66.0217(6)(a). However, if the Department fails to mail out its written findings to all affected parties as to whether the annexation satisfies the contiguity and county parallelism requirements within 20 days after receiving a town's request, "the effect on the town . . . shall be the same as if the department found no violation of the requirements." Wis. Stat. § 66.0217(6)(d)(2). In other words, if the

Department fails to act in a timely manner, the town cannot file a legal challenge regardless of the Department's conclusion.

In addition, the Wisconsin Legislature limited the amount of time towns have to contest a direct annexation by unanimous approval. Generally, towns must contest an annexation within 90 days after the adoption of an annexation ordinance. *See* Wis. Stat. §§ 66.0217(11) and 893.73(2). However, with respect to direct annexations by unanimous approval, the Wisconsin Legislature reduced the filing time for towns to contest the annexation to only 45 days. *See* Wis. Stat. § 66.0217(6)(d)2. Thus, if the Department determines the annexation fails to satisfy the contiguity or the county-parallelism requirements, the town must file a legal challenge in circuit court within 45 days of receiving the Department's findings. *See id*. If the town fails to file the legal challenge within this time frame, the town is precluded from filing a legal challenge. *Id.*

Reducing the time-frame to 45 days for towns to file a legal challenge to direct annexations by unanimous approval further demonstrates the legislature's intent to limit the scope of towns' authority to legally challenge these types of annexations.

IV. PROVIDING TOWNS WITH BROAD AUTHORITY TO CHALLENGE DIRECT ANNEXATIONS BY UNANIMOUS APPROVAL WOULD NEGATIVELY IMPACT PROPERTY RIGHTS AND ECONOMIC DEVELOPMENT.

Authorizing towns to challenge direct annexations by unanimous approval for reasons other than contiguity and county parallelism would be problematic for a variety of public policy reasons. Specifically, an expansion of the authority of towns to challenge direct annexations by unanimous approval would curtail private property rights and discourage economic development opportunities.

As Wisconsin courts have recognized for over a century, the rules related to the interpretation of state statutes and local ordinances are the same. *See e.g., Ashland Water Co. v. Ashland County*, 87 Wis. 209, 211, 58 N.W. 235 (1894); *State v. Ozaukee Bd. of Adjustment*, 152 Wis. 2d 552, 559, 449 N.W.2d 47 (1989). Like local ordinances, state statutes must be "strictly construed to favor unencumbered and free use of property." *Crowley v. Knapp*, 94 Wis. 2d 421, 434-35, 288 N.W.2d 815 (1980) (citation omitted).

As established in Wis. Stat § 66.0217(2), a direct annexation by unanimous approval is a property-owner-driven process. The property owner initiates the process because the property owner believes the city or

village can provide the most attractive menu of government services, taxes and fees. Only those property owners who want to be annexed into the city or village are included in the annexation petition. *Id.* Those property owners who do not want to be annexed are excluded from the annexation petition. *Id*. Cities and villages have the authority to approve or reject the petition, but towns have limited authority to stop them. Wis. Stat. § 66.0217(2).

Moreover, most property owners annex their property because property is generally more valuable if it is located within city or village boundaries since it can be developed at higher densities due to the availability of municipal sewer and water. Many rural property owners rely upon the increase in property values resulting from annexation to, among other things, increase their net worth and finance their retirement.

Thus, interpreting Wis. Stat § 66.0217(6)(d) to provide towns with authority to challenge direct annexations by unanimous approval for reasons other than contiguity or county parallelism would conflict with the rules of statutory construction and the intent of the legislature to provide property owners with the power to freely annex their property into neighboring cities and villages.

In addition, annexations are a vital and necessary part of urban and suburban development. Most property is annexed because of the availability of sewer and water in cities and villages. Sewer and water allows development to occur on smaller lots and at higher densities because the treatment of sewage takes place at an off-site facility rather than through on-site septic systems. Certain commercial and industrial uses also require municipal water and sewer treatment facilities and thus cannot be located in most towns. Furthermore, many large companies and employers locate in cities and villages because they have the services necessary to help produce the companies' goods and services and transport their workers between home and work.

Without the ability to annex land efficiently and cost effectively to meet the demands of prospective businesses and employers, Wisconsin cities and villages will be unable to expand their boundaries to compete nationally and internationally for new jobs and economic development.

CONCLUSION

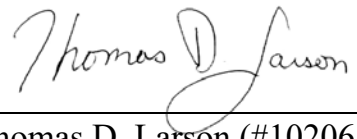
Like other laws, Wisconsin law relating to the ability of towns to challenge direct annexations by unanimous approval is to be applied according to the language set forth in the statutes, regardless of how towns

wish the statute was written. *See Columbus Park Housing Corp. v. City of Kenosha*, 2003 WI 143, ¶34, 267 Wis. 2d 59, 671 N.W.2d 633 (the legislature is responsible for making policy choices and statutes are to be applied as written, not how others think they should be written). The legislature has weighed the various policy considerations related to direct annexations by unanimous approval and has determined that limiting litigation related such annexations is in the public interest.

For the reasons stated above, we respectfully request this Court to clarify that the towns may challenge a direct annexation by unanimous approval only on the basis of contiguity and county parallelism, as set forth in Wis. Stat. § 66.0217(6)(d).

Dated this 14th day of December, 2018.

Respectfully submitted,

By: 

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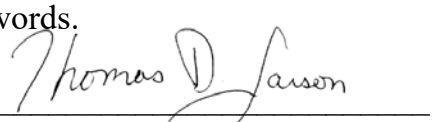
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2805 words.



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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

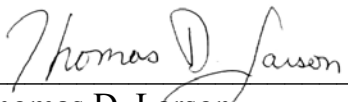
I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 14th day of December, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that:

I have sent three true and correct copies of this Joint *Amicus Curiae* Brief to counsel by placing the copies in U.S. mail, first class postage, on this date:

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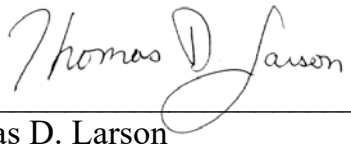

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