COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1701

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN EX REL.
TOWN OF PORT WASHINGTON,

PLAINTIFF-APPELLANT,

V.

CITY OF PORT WASHINGTON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. The Town of Port Washington (the Town) has appealed from a summary judgment dismissing its complaint against the respondent, the City of Port Washington (the City). In its complaint, the Town

sought a declaration that an annexation ordinance adopted by the City on May 4, 1999, was void. We affirm the judgment.

¶2 The proceedings underlying this litigation commenced on March 26, 1999, when Fountainhead Development, LLC, filed a petition for direct annexation by the City of three parcels of land located in the Town. One of the parcels totaled 5.857 acres and was owned by Fountainhead, which intends to build a hotel and conference center on the site. The other two combined parcels are adjacent to the Fountainhead parcel. They totaled 5.833 acres and were owned by Ozaukee County when the petition was filed. One of the county parcels constituted a stretch of County Highway LL, and the other was operated by the county as a park-and-ride lot.

¶3 On May 4, 1999, the common council of the City accepted Fountainhead's petition, adopting an ordinance providing for the annexation of the property. The Town commenced this litigation challenging the annexation ordinance on July 28, 1999. By written notice dated July 29, 1999, the City informed the Town that the common council had accepted Fountainhead's annexation petition by adoption of the annexation ordinance.

¶4 Our review of the trial court's grant of summary judgment is de novo. *See* ***Millen v. Thomas***, 201 Wis. 2d 675, 682, 550 N.W.2d 134 (Ct. App. 1996). Summary judgment is warranted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***id.*** When, as here, both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues, although always subject to the rule that summary judgment

may be granted only if no material issue of fact is presented by the parties' respective evidentiary facts. *See* ***id.*** at 682-83 & n.2.

¶5 The Town's first argument is that the petition for direct annexation filed by Fountainhead did not constitute a unanimous petition under WIS. STAT. § 66.021(12) (1997-98),[1] which provides in material part:

> If a petition for direct annexation 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 or village clerk, and with the town clerk of the town or towns in which the territory is located, together with a scale map and a legal description of the property to be annexed, an annexation ordinance for the annexation of the territory may be enacted by a two-thirds vote of the elected members of the governing body of the city or village without compliance with the notice requirements of sub. (3).

¶6 It is undisputed that there were no electors residing in the annexed property. However, the Town contends that the annexation petition was not signed by all of the owners of real property in the annexed territory because it was signed only by agents for Fountainhead, and not by a representative of Ozaukee County, which owned two of the three parcels of property.

¶7 It is well-established that the areas constituting public streets and alleys are not to be taken into account in considering whether all owners of real property have signed a petition for direct annexation. *See* ***Int'l Paper Co. v. City of Fond du Lac***, 50 Wis. 2d 529, 533, 184 N.W.2d 834 (1971). Based upon

[1] WISCONSIN STAT. § 66.021(12) (1997-98) has been renumbered as WIS. STAT. § 66.0217(2) (1999-2000). We will refer to the 1997-98 version of the Wisconsin Statutes throughout this opinion because that is the version cited by the parties and the trial court. The 1999-2000 versions of the statutes cited herein contain no substantive changes of significance to this appeal.

International Paper, it is clear that Ozaukee County was not required to sign the petition for direct annexation based upon its ownership of the parcel used as County Highway LL. While not disputing this fact, the Town contends that the park-and-ride lot is not a public highway or alley, and that the signature of a representative of Ozaukee County was therefore required to render the annexation petition unanimous.

¶8 Like the trial court, we reject this contention. In ***International Paper***, the supreme court distinguished public streets from "useable acreage" and other land which a municipality might treat like a private owner. *See* ***id.*** at 532-33. The court held that this distinction applied regardless of whether the public roadway was owned or held by the municipality in fee simple, by right of way, or by easement. ***Id.*** at 533. The court stated:

> We consider the legislature did not intend to place the burden on the ownership of usable land to compete with public streets and highways whether the highways and streets are used for or against the annexation. Consequently, we hold the area constituting public streets and alleys are not to be taken into account in determining the sufficiency of a petition for annexation, no matter how owned. 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.

¶9 The principles espoused in ***International Paper*** are directly applicable here. Based upon ***International Paper***, it is irrelevant whether the land on which the park-and-ride lot is located is held or owned as a right of way, in fee simple, or in some other form. *See* ***id.*** Like the parcel of land which constitutes County Highway LL, the parcel of land where the park-and-ride lot is located was acquired and exists as part of the road transportation system. It is designed to

accommodate and facilitate traffic and public transportation, and thus serves the same function as roads and alleys. It is not useable acreage whose annexation would require the signature of a representative of Ozaukee County.

¶10 The Town contends that the park-and-ride lot could be discontinued at any time and the parcel could be sold for commercial property. While this might be true, the issue is whether the parcel of real estate constituted "useable acreage" at the time the annexation petition was signed and filed. Because it was equivalent to a public street rather than useable acreage when the petition was filed, Ozaukee County was not required to sign the petition for direct annexation.[2] Because Fountainhead was the only other owner of real property in the annexed territory, the signature of the authorized representative of Fountainhead constituted the only signature required for a unanimous petition under WIS. STAT. § 66.021(12).

¶11 The Town's next argument is that the annexation ordinance is invalid because the City did not provide notice of its acceptance of the petition to the Town within sixty days of the filing of the petition. The Town contends that notice within sixty days is required under WIS. STAT. § 66.021(5)(a).[3] We disagree.

[2] The Town additionally contends that the park-and-ride lot should be deemed useable acreage because it was located in an area which had been zoned by the Town as agricultural land. This argument fails because regardless of how the Town chose to zone the area, the parcel was held and maintained by Ozaukee County as part of the public road transportation system. It thus was not useable acreage under ***International Paper***.

[3] WISCONSIN STAT. § 66.021(5) (1997-98) has been renumbered as WIS. STAT. § 66.0217(7) (1999-2000).

¶12 WISCONSIN STAT. § 66.021(5)(a) provides in material part:

> Within 60 days after the filing of the petition, the common council … may accept or reject the petition and if rejected no further action shall be taken thereon. Acceptance may consist of adoption of an annexation ordinance.… If the petition is not rejected the clerk of the city … with whom the annexation petition is filed shall give written notice thereof by personal service or registered mail with return receipt requested to the clerk of any town from which territory is proposed to be detached ….

¶13 The sixty-day time limit set forth in WIS. STAT. § 66.021(5)(a) clearly refers to the time permitted the common council for accepting or rejecting the annexation petition. Acceptance may be evinced by adoption of an annexation ordinance, which occurred here within sixty days of the filing of the petition.

¶14 After setting forth the deadline for the city's acceptance or rejection of the petition, WIS. STAT. § 66.021(5)(a) states that if the petition is not rejected, the city clerk must give written notice of this fact to the clerk of the town in which the annexed property is located. However, the sixty-day time limit for accepting or rejecting the petition does not, either expressly or by implication in the statute, apply to giving notice of acceptance of the petition to the town, nor is a time limit for giving notice set forth anywhere else in the statute. The omission of a time limit for giving notice of acceptance of an annexation petition, in conjunction with the legislature's enactment of a deadline for accepting or rejecting the petition and for numerous other actions required under WIS. STAT. ch. 66, leads this court to conclude that a sixty-day time limit for giving notice of acceptance does not exist. *See* ***Responsible Use of Rural and Agric. Land v. PSC***, 2000 WI 129, ¶39, 239 Wis. 2d 660, 619 N.W.2d 888; ***Oney v. Schrauth***, 197 Wis. 2d 891, 901-02, 541 N.W.2d 229 (Ct. App. 1995).

¶15 The Town objects that failure to construe WIS. STAT. § 66.021(5)(a) to include a sixty-day time limit for providing notice of acceptance of an annexation petition would be unreasonable. Specifically, it complains that objecting electors are deprived of a meaningful opportunity to request a referendum on annexation if notice of acceptance of the annexation petition is given only after the annexation ordinance is adopted. However, nothing would prevent the annexing authority from adopting an annexation ordinance before giving notice of acceptance even if a sixty-day time limit for giving notice existed. In any event, the possibility of prejudice to a town from receiving notice after an annexation ordinance is adopted is addressed by § 66.021(5)(g), which provides that if a referendum results in a vote against annexation, all previous proceedings are nullified.

¶16 As additional support for its argument, the Town contends that WIS. STAT. § 66.021(5)(a) must be deemed to include a sixty-day time limit in order to render meaningful the time limit for filing a circuit court action challenging the validity of an annexation. Pursuant to § 66.021(10)(a)[4] and WIS. STAT. § 893.73(2), an action contesting the validity of an annexation must be commenced within ninety days after the adoption of an annexation ordinance. The Town contends that § 66.021(5)(a) must be construed to include a time limit in order to prevent a situation where the statute of limitations for commencing a circuit court action expires before the time limit for filing a petition for a referendum, which in the case of a petition for direct annexation is thirty days after notice of acceptance of an annexation petition is given. *See* ***id.***

[4] WISCONSIN STAT. § 66.021(10) (1997-98) has been renumbered as WIS. STAT. § 66.0217(11) (1999-2000).

¶17 In ***Town of Madison v. City of Madison***, 12 Wis. 2d 100, 108-09, 106 N.W.2d 264 (1960), the supreme court indicated that the time for giving notice of acceptance of an annexation petition was not affected by the statute of limitations for commencing an action challenging an annexation ordinance, and that the party objecting to an annexation is adequately protected by WIS. STAT. § 66.021(5)(g). Although various time limits in WIS. STAT. ch. 66 have been amended since ***Town of Madison*** was decided, a time limit for providing notice of acceptance of an annexation petition has not been added to § 66.021(5)(a), and ***Town of Madison*** remains good law.

¶18 In rejecting the Town's argument that a sixty-day time limit for giving notice of acceptance of an annexation petition is necessary, we also note that its arguments concerning prejudice are purely hypothetical in this case. As previously noted, no electors resided in the annexed area, and thus no electors could seek a referendum on annexation pursuant to WIS. STAT. § 66.021(5)(a). Moreover, the City gave notice of its acceptance of the annexation petition within a reasonable time, and the Town has shown no prejudice from the City's failure to give notice earlier, as evidenced by the fact that the Town was aware of the annexation proceedings and commenced this action in the trial court before receiving notice of acceptance of the petition from the City. Under these circumstances, the Town's contention that it will be prejudiced unless § 66.021(5)(a) is construed to include a sixty-day time limit for giving notice of acceptance must fail.

¶19 The Town's final argument is that the annexation ordinance fails under the rule of reason. To satisfy the rule of reason, the following standards must be satisfied: (1) exclusions and irregularities in boundary lines of the annexed area must not be the result of arbitrariness; (2) some reasonable present or

demonstrable future need for the annexed property must be shown; and (3) no other factors must exist which would constitute an abuse of discretion by the annexing municipality. ***Town of Pleasant Prairie v. City of Kenosha***, 75 Wis. 2d 322, 327, 249 N.W.2d 581 (1977).

¶20 "When attacked under the rule of reason, annexation ordinances, like legislative enactments in general, enjoy a presumption of validity, and the burden of overcoming this presumption with proof that the ordinance is invalid rests on the party so claiming." ***Id.*** It is for the city council to make the initial determination as to the suitability or adaptability of the area proposed to be annexed and the necessity of annexing the area for the proper growth and development of the city. ***Id.*** at 327-28. "Upon review the courts cannot disturb the council's determination unless it appears that it is arbitrary and capricious or an abuse of discretion." ***Id.*** at 328 (citation omitted).

¶21 The Town contends that the annexation ordinance violated the rule of reason because the City failed to present any evidence establishing that it has a reasonable present or demonstrable future need for the annexation. To succeed on this argument, the Town bears the burden of convincing this court that the trial court's finding that the City has a need for the property is clearly erroneous. *See* ***Town of Delavan v. City of Delavan***, 176 Wis. 2d 516, 538-39, 500 N.W.2d 268 (1993).

¶22 We conclude that the trial court finding that the City has a need for the annexed property is amply supported by the evidence. Factors to be considered in determining whether a municipality has shown a need for annexation include: (1) the need for reasonable and orderly plans for municipal development; (2) a substantial increase in population; (3) a need for additional

area for construction of homes, mercantile, manufacturing or industrial establishments; (4) a need for additional land area to accommodate the present or reasonably anticipated future growth of the municipality; and (5) the extension of police, fire, sanitary protection or other municipal services to substantial numbers of residents of adjacent areas. *See* ***Town of Pleasant Prairie***, 75 Wis. 2d at 335-36. A showing of benefits to the annexed land is also a substantial factor in determining need, *see* ***Town of Lafayette v. City of Chippewa Falls***, 70 Wis. 2d 610, 629-30, 235 N.W.2d 435 (1975), as is the petitioning property owner's wish for annexation, *see* ***Town of Delavan***, 176 Wis. 2d at 539.

¶23 In this case, Fountainhead initiated the discussion of annexation by the City, filed the petition for annexation, and will benefit from the extension of city services to its property, including water, sewer, and police and fire protection. Its desire for annexation, and the benefit to its property, are thus clearly established.

¶24 The City's need for annexation, and the benefit to it, are also established. In support of its motion for summary judgment, the City filed an affidavit of Mary Kay Buratto, its director of planning and development. Buratto attested that the City currently has a need for additional land suitable for development for business, commercial or light industrial purposes. She further attested that undeveloped land within the City which was suitable for any type of business, commercial or light industrial use was extremely rare, that only fifty-three undeveloped acres were zoned for such use, and that none of those parcels would accommodate a project of the nature and size proposed by Fountainhead.

¶25 The record establishes that the City has also taken several steps that reflect its need for access to land outside its present borders, including the

Fountainhead parcel and the adjacent rights of way. In 1993, the City adopted a master land use plan which specifically contemplated that the Fountainhead parcel and the lands surrounding it would be used for business, commercial or light industrial development. In 1998, the City also adopted an Extraterritorial Zoning Jurisdiction Resolution, declaring its intent to exercise its statutory authority to monitor and direct the use and development of land contiguous to its borders, including the Fountainhead parcel, via the creation of a comprehensive zoning ordinance for these lands. Finally, the City itself was interested in purchasing the Fountainhead parcel and participated as a bidder at the public auction where the land was sold by the State of Wisconsin to Fountainhead.

¶26 The Town contends that neither the City nor Fountainhead had any need for the park-and-ride parcel. However, the affidavits of Buratto and Steve Barber, a representative of Fountainhead, indicate that one of Fountainhead's goals in initiating the annexation proceedings was to obtain city police and fire protection for its land and development, and that both the City and Fountainhead concluded that such service could best be provided by annexation of the adjacent stretch of County Highway LL and the park-and-ride lot. Buratto's affidavit indicated that annexation of the park-and-ride lot and the highway parcel would permit police and fire personnel access to a public area abutting the hotel and conference center, thus providing access to Fountainhead's property and providing for police monitoring of the highway and lot.

¶27 Contrary to the Town's contention, the affidavits submitted in support of the City's motion for summary judgment were sufficient to establish its need for the Fountainhead property and the adjoining areas. The City was not required to submit additional empirical evidence, nor was it required to determine that its interest in providing safe and efficient police and fire protection to the

Fountainhead property could be satisfied by annexation of the highway parcel alone, rendering annexation of the park-and-ride lot unnecessary.

¶28 The Town's final argument is that the City abused its discretion when it encouraged Fountainhead to include the park-and-ride lot in its petition. Where the annexing municipality is shown to be the real controlling influence in the annexation proceedings, it effectively assumes the role of a petitioner. ***Town of Menasha v. City of Menasha***, 170 Wis. 2d 181, 192, 488 N.W.2d 104 (Ct. App. 1992). However, influencing the proceedings requires more than providing mere technical assistance or recommendations to the signers of the petition. *See* ***id.*** It requires conduct by which the annexing authority dominates the petitioners so as to have effectively selected the boundaries. *See* ***id.***

¶29 The record indicates that although the City suggested to Fountainhead that it include the park-and-ride lot in its annexation petition, it did so only after Fountainhead initiated discussions about the annexation of its property and its intended use for that property. The City's suggestion that Fountainhead include the park-and-ride lot and County Highway LL was a reasonable response to Fountainhead's concerns about the provision of fire and police protection. Moreover, the affidavits of both Buratto and Barber are undisputed, and indicate that the final decision as to what properties to include in the petition was made by Fountainhead. Under these circumstances, no basis exists to conclude that the City dominated and controlled the annexation process. Because none of the Town's remaining arguments provide a basis to invalidate the annexation ordinance, the trial court's award of summary judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.