

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1162

Cir. Ct. No. 2009CV233

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

HIGHWAY J CITIZENS GROUP, U.A.,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF RICHFIELD,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

Before Neubauer , P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Highway J Citizens Group (HJCG) appeals from a judgment dismissing its complaint challenging the annexation of property in the Town of Polk by the Village of Richfield. The circuit court determined that HJCG lacked standing to challenge the annexation. HJCG argues it has standing because

the annexation causes its members pecuniary injury and some of its members are uniquely affected by the annexation. HJCG also challenges the taxation of costs. We affirm the judgment.

¶2 The annexation was accomplished in November 2008 by unanimous approval under WIS. STAT. § 66.0217(2) (2009-10).¹ HJCG has members that are residents of the Town of Polk and residents of the Village. None of its members reside on or own property that was the subject of the annexation. It commenced this action to reverse the Village’s annexation decision on the ground that it was contrary to law because the property annexed is a “balloon on a string” and does not meet the statutory requirement of contiguity, the annexation was done without proper amendment of the Village’s “Smart Growth Plan,” and the annexation is inconsistent with the “Smart Growth Plan” and the public interest. It also claimed that to the extent § 66.0217(11)(c) is applied to prohibit residents of a town from challenging annexation, the statutory provision is unconstitutional. The complaint alleged that as a result of the annexation, the Town of Polk will lose more than \$10,000 in property tax revenue, which comprises approximately 3% of its general property tax revenues. It alleged that the annexation causes its members who reside in the Town of Polk pecuniary damage because of the lost tax base in the town. It alleged the annexation causes its members who reside in the Village direct pecuniary loss because the Village must make substantial annual payments to the Town of Polk resulting in an increased tax burden to Village residents. It also alleged that the annexation causes substantial injury to its members who have health issues that make the availability of emergency response personnel more

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

important to them than members of the general public and those who have economic circumstances that make the burden of additional taxes more significant to them than members of the general public.

¶3 The circuit court dismissed the complaint concluding that HJCG lacked standing to challenge the annexation and the constitutionality of the statute. After entry of the circuit court’s written decision, the Village timely filed a bill of costs. No objection was made to the bill of costs. The final judgment included the taxation of costs in the amount of \$966.03.

¶4 We review de novo whether a party has standing to seek declaratory relief. *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶8, 256 Wis. 2d 859, 650 N.W.2d 81. “In order to have standing to sue, a party must have a personal stake in the outcome ... and must be directly affected by the issues in controversy.” *Id.*, ¶9 (citation omitted). A taxpayer cannot simply challenge an ordinance merely because he or she disagrees with the legislative body; rather the taxpayer “must have sustained, or will sustain, some pecuniary loss before he or she has standing.” *Id.*, ¶¶9, 10. When a party does not claim that the action affects property they own, or is not able to show a “risk of pecuniary loss or substantial injury” to themselves, then they do not have a personal stake in the outcome. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 23, 259 Wis. 2d 107, 655 N.W.2d 189.

¶5 The members of HJCG do not own property within the annexed territory and have no direct legal interest in the annexation. *See Village of Slinger*, 256 Wis. 2d 859, ¶13 (absent statutory authorization the law essentially excludes any individuals other than those residing within the annexed township from objecting). They assert standing because they are taxpayers and the tax base

or taxes will be affected by the annexation. These allegations of pecuniary harm are nothing more than what every taxpayer in the Town of Polk and Village faces. The same is true of the allegation of substantial harm due to health or financial circumstances. Every resident has the same concerns. In short, HJCG “is simply registering its disagreement with legislative decisions of the Village. Such disagreement is insufficient to confer standing.” *Lake Country Racquet & Athletic Club*, 259 Wis. 2d 107, ¶23.

¶6 We need not address HJCG’s claim of standing to challenge the constitutionality of WIS. STAT. § 66.0217(11)(c). That statute specifically prohibits a town from challenging a direct annexation by unanimous consent under § 66.0217(2). By its plain terms the statute does not define whether or not citizens have standing to challenge the annexation. Simply, application of that statute is not necessary to determine HJCG’s standing and there can be no claim that the statute is unconstitutional “as applied.”

¶7 Regarding the taxation of costs, HJCG argues that because it commenced the action in the interest of the public, costs should have been denied in the discretion of the court. *See* WIS. STAT. § 814.02(2). The court required to exercise discretion to deny costs is the circuit court. “The function of an appellate court is not to exercise discretion in the first place, but to review the circuit court’s exercise of discretion.” *Vlies v. Brookman*, 2005 WI App 158, ¶33, 285 Wis. 2d 411, 701 N.W.2d 642. HJCG never asked the circuit court to exercise its

discretion and deny costs or to reconsider the taxation of costs.² The suggestion that grounds exist to deny the taxation of costs is raised for the first time on appeal and we will not consider it. *Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154.

By the Court.—Judgment affirmed.

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

² HJCG alludes to “extenuating circumstances” that prevented it from objecting to the taxation of costs. In its statement of the case HJCG indicates that when the bill of costs was filed its trial attorney was dealing with the unexpected death of a spouse. This factual circumstance is not established in the record. HJCG never sought relief from the taxation of costs based on excusable neglect.

