COURT OF APPEALS DECISION DATED AND FILED

March 27, 2014

Diane M. Fremgen
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. 2012AP919

Cir. Ct. No. 2011CV4071

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE PETITION TO INCORPORATE AS A METROPOLITAN VILLAGE, UNINCORPORATED LANDS LOCATED IN THE TOWN OF BROOKFIELD AND TOWN OF WAUKESHA, WAUKESHA COUNTY, WISCONSIN:

JAMES J. WALT,

PETITIONER-RESPONDENT,

V.

CITY OF BROOKFIELD, TOWN OF BROOKFIELD, CITY OF WAUKESHA AND VILLAGE OF SUSSEX,

INTERVENORS,

TOWN OF WAUKESHA,

INTERVENOR-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County: DONALD J. HASSIN JR., Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. The Town of Waukesha appeals an order denying its motion to dismiss a petition for the incorporation of a village comprised of portions of two towns and an order dismissing the Town from this case. The Town argues: (1) the circuit court erred in dismissing the Town from this case; (2) the incorporation petition fails to meet the minimum signature requirement under WIS. STAT. § 66.0203(2)(a) (2011-12)[1] because fifty signatures were not collected at least ten days and not more than twenty days after publication of the notice of intent to circulate the petition, pursuant to WIS. STAT. § 66.0203(1); (3) the petition fails to set forth facts substantially establishing the required standards for incorporation as required by § 66.0203(2)(c); and (4) the four-square-mile minimum area requirement under WIS. STAT. § 66.0205(5) is not satisfied.

¶2 We conclude that whether the circuit court erred in dismissing the Town is moot. A holding in favor of the Town on this issue would have no practical effect on this case because the Town does not prevail on any of its arguments that the circuit court erred in denying the Town's motion to dismiss the petition. The Town has forfeited judicial review of whether the petition meets the minimum signature requirement and whether the petition sets forth facts substantially establishing the requirements for incorporation because the Town failed to first raise these arguments in the circuit court. On the only remaining topic of whether the minimum area requirement has been met, the Town contends

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

that where an incorporation involves parts of territory from two towns, each town must consent to the incorporation. The Town maintains that it did not give consent to incorporation of a portion of its territory, and therefore, because the minimum area requirement cannot be met without the portion of its territory designated in the petition for incorporation, the circuit court erred in concluding that the incorporation petition in this case met this requirement. We reject this argument. Because incorporation proceedings are governed by statute and because no statute requires consent from each town before portions of unincorporated territory from two different towns may be incorporated, we conclude that the circuit court did not err in determining that the minimum area requirement was met and in denying the Town's motion to dismiss the petition. Accordingly, we affirm.

BACKGROUND

¶3 James J. Walt, a resident of the Town of Brookfield, commenced an incorporation proceeding, pursuant to WIS. STAT. § 66.0203, for the incorporation of 4.075[2] square miles of parts of the Town of Brookfield and the Town of Waukesha, to create a municipal village. Walt obtained sixty-eight signatures on a petition for incorporation. Walt filed the petition in the Waukesha County Circuit

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[2] The incorporation petition states that the territory proposed to be incorporated consists of approximately 4.2 square miles. However, the notice of intent to circulate provides that the territory proposed to be incorporated consists of 280 acres in the Town of Waukesha and 2328 acres in the Town of Brookfield, which, when added together, equals 4.075 square miles. The Town relies on the 4.075 square mile figure from the notice of intent in making its argument that the minimum area requirement is not satisfied, and Walt does not dispute that figure. Thus, for purposes of this appeal, we also use the 4.075 square mile figure as provided in the notice of intent to circulate.

Court and subsequently gave notice of the filing of the petition to various municipalities in the area, including the Town of Waukesha.

¶4 The Town of Waukesha and the City of Waukesha each filed a motion to intervene and a motion to dismiss the petition. The only argument raised in the Town's motion to dismiss the petition was that the minimum area requirement had not been met. The City of Brookfield, Town of Brookfield, and Village of Sussex also filed motions to intervene.

¶5 The circuit court held a hearing on the motions to intervene and the motions to dismiss the incorporation petition. With respect to the motions to intervene, the circuit court asked Walt whether he objected to the participation of any of the parties present at the hearing. Walt stated that he had no objections but asked the circuit court to require the Town of Waukesha and the City of Waukesha to file documentation with the court establishing that the attorneys representing those municipalities were authorized to do so by the respective municipalities. The court stated that it "would be prepared to allow" the attorneys for the Town of Waukesha and the City of Waukesha to fully participate at the hearing with the understanding that the attorneys would file the requested documentation within fourteen days of the hearing. The Town and City of Waukesha did not object to providing the court with the requested documentation and the court allowed the attorneys for each municipality to fully participate at the hearing. Following the hearing, the court denied the motions to dismiss the incorporation petition and referred the petition to the incorporation review board of the Wisconsin

Department of Administration to consider whether the standards for incorporation under WIS. STAT. § 66.0207 were met.[3]

¶6 Walt subsequently filed a motion to dismiss the Town of Waukesha as a party on the ground that the attorneys who represented the Town at the hearing were not authorized by the Town board to represent the Town at any time prior to the hearing on the petition. Following a hearing on that topic, the circuit court granted Walt's motion and dismissed the Town from the proceedings.[4]

¶7 The Town of Waukesha appeals.

DISCUSSION

I. Dismissal of Town

¶8 The Town argues that the circuit court erred in dismissing the Town from the incorporation proceedings. The Town acknowledges that there is no documentation from *before* the hearing establishing that the Town board provided *written* authorization to the attorneys to represent the Town in these proceedings. However, the Town argues that the court did not order the Town to provide documentation reflecting that the Town board's authorization came before the hearing and in writing. Rather, the Town maintains, the court more generally ordered the attorneys to provide documentation that the Town authorized the

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[3] Under WIS. STAT. § 66.0207, the incorporation review board "may approve for referendum only those proposed incorporations which meet" the requirements set forth in § 66.0207(1) and (2).

[4] The parties stipulated to a stay of the proceedings so that the parties could participate in alternative dispute resolution, provided under WIS. STAT. § 66.0203(9)(dm). Thus, as far as we can tell, the incorporation review board has not reviewed the petition under WIS. STAT. § 66.0207.

attorneys to represent it in this matter, without specifically stating when and in what form the authorization should have been given. The Town contends that it complied with what it understood was the court's order by providing the court with affidavits signed and dated after the hearing, reflecting that the Town board by oral motion at a meeting prior to the hearing unanimously authorized the attorneys to represent the Town in these proceedings. The Town also argues that there is no law requiring the Town to make a showing that the Town authorized the attorneys to represent the Town prior to the hearing and in writing.

¶9 We do not reach the issue of whether the circuit court erred in dismissing the Town from these proceedings because the issue is moot. An issue is moot when it has no practical effect on the controversy. ***Warren v. Link Farms, Inc.***, 123 Wis. 2d 485, 487, 368 N.W.2d 688 (Ct. App. 1985). A holding in favor of the Town that the circuit court erred in dismissing the Town would have no practical effect on the controversy here because the only argument that the Town raised in the circuit court, which it renews on appeal, lacks merit. Accordingly, we do not consider the issue on appeal. *See* ***id.***

II. Forfeiture

¶10 As we have indicated, the Town argues that the circuit court erred in denying the motion to dismiss the petition because the petition fails to meet the signature requirement and does not set forth facts substantially establishing the requirements for incorporation. *See* WIS. STAT. §§ 66.0203(2)(a) (signature requirement), 66.0203(2)(c) (factual requirement). In his response brief, Walt correctly observes that the Town did not make these arguments in the circuit court.

¶11 In general, courts will not address "issues raised for the first time on appeal since the [circuit] court has had no opportunity to pass upon them."

Hopper v. City of Madison, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). There are certain exceptions to this general rule. However, the Town does not persuade us that we should exercise our discretion under one of the exceptions and consider the above arguments.

¶12 In footnote four of its reply brief, the Town asserts that the rule of forfeiture does not apply here because "the circuit court is charged with the duty of making a finding that the petition to incorporate establishes the statutory condition precedents before it can refer the petition to the Incorporation Review Board." However, we do not consider this argument because it is undeveloped and the Town does not cite to any supporting legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

III. Minimum Area Requirement

¶13 As we have indicated, the Town's only preserved argument on the topic of whether the circuit court erred in denying the Town's motion to dismiss the petition is that the court erroneously concluded that the four-square-mile minimum area requirement was met, as set forth in WIS. STAT. § 66.0205(5).[5] As to this issue, the Town's only contention is that the minimum area requirement

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[5] WISCONSIN STAT. § 66.0205 provides in relevant part:

> Before referring the incorporation petition … to the board, the court shall determine whether the petition meets the formal and signature requirements and shall further find that the following minimum requirements are met:
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> **(5)** STANDARDS WHEN NEAR 1ST, 2ND OR 3RD CLASS CITY. If the proposed boundary of a metropolitan village … is within 10 miles of the boundary of a 1st class city or 5 miles of a 2nd or 3rd class city, the minimum area requirements are 4 … square miles for villages ….

was not met here because the petition combined territory from the two towns, and the area sought to be incorporated from each town, standing alone, could not satisfy the requirement. The Town argues that there is no statutory authority permitting the incorporation of territory from two towns without consent from each town to the incorporation, and here, the Town did not consent to the incorporation of parts of its territory. We reject this argument.

¶14 As we have indicated, it is undisputed that the entire territory sought to be incorporated consists of more than four square miles but that the area sought to be incorporated from each town, standing alone, is less than four square miles. Thus, in order to meet the requirement here, it was necessary to count the area sought to be incorporated from each town. Further, as stated above, the procedure for incorporating a village is governed by statute. *See* ***Whitten v. City of Milwaukee***, 267 Wis. 481, 482, 66 N.W.2d 333 (1954).

¶15 The problem with the Town's argument is that the Town concedes that no statute in the incorporation statutory scheme requires consent from each town to the incorporation. Our review of the incorporation statutes supports this concession.[6]

¶16 The Town tries to navigate around this problem by arguing that it makes no sense that territory may be taken from a town without the town's consent because the opposite is true with respect to cities and villages in other

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[6] To the extent the Town is arguing that the two towns must enter into a boundary agreement before the territory may be added together to meet the minimum area requirement, we reject that argument because there is no statute in the incorporation statutory scheme that supports the argument.

proceedings brought under WIS. STAT. ch. 66.[7] The Town points out that, in other proceedings brought under this chapter, territory from a town generally may not be taken by a city or village without the town's consent to the taking. The Town argues that the legislature could not have intended to give towns the ability to take land from another town without the other town's consent, when the legislature generally requires cities and villages to obtain consent from a town before taking territory from a town.

¶17 Aside from the fact that the Town provides no legal authority in support of its argument, the Town's argument presumes too much. The Town presumes that because the legislature included a consent requirement in other WIS. STAT. ch. 66 proceedings, the legislature must have also intended to impose a consent requirement where territory from two towns is sought to be incorporated. However, to the contrary, the legislature's inclusion of a consent requirement in other types of proceedings under ch. 66, and not in the incorporation proceeding at issue here, demonstrates that the legislature has knowledge of the consent requirement and thus strongly indicates that the legislature deliberately chose not to include a consent requirement where portions of two towns are sought to be incorporated.[8] We will not read a consent requirement into the incorporation

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[7] The Town refers to the following proceedings: annexation (WIS. STAT. §§ 66.0217-66.0223); contested boundary actions (WIS. STAT. § 66.0225); detachment (WIS. STAT. § 66.0227); and consolidation (WIS. STAT. §§ 66.0229, 66.0230).

[8] We observe that, since the time that the parties submitted their briefs on appeal, the legislature created WIS. STAT. § 66.0203(4m), which provides as follows:

> **(4m)** INCORPORATIONS INVOLVING PORTIONS OF 2 TOWNS. If the territory designated in the petition is comprised of portions of only 2 towns, the territory may not be incorporated unless the town board of each town adopts a resolution approving the incorporation.

(continued)

statutory scheme where none exists. *See* ***Dawson v. Town of Jackson***, 2011 WI 77, ¶42, 336 Wis. 2d 318, 801 N.W.2d 316 ("We decline to read into the statute words the legislature did not see fit to write.").

¶18 In sum, we conclude that whether the circuit court erred in dismissing the Town is moot. In addressing the only preserved issue as to whether the circuit court erred in denying the Town's motion to dismiss the petition, we conclude, based on the undisputed facts, that the circuit court correctly concluded that the four-square-mile minimum area requirement under WIS. STAT. § 66.0205(5) was met. Therefore the court properly denied the Town's motion to dismiss the incorporation petition. Accordingly, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

See 2013 Wis. Act 38, § 1. We presume that § 66.0203(4m) applies prospectively rather than retroactively. ***Local 321, Int'l Ass'n of Fire Fighters v. City of Racine***, 2013 WI App 149, ¶9, 352 Wis. 2d 163, 841 N.W.2d 830. Nothing in the statutory scheme indicates that the legislature intended for that statute to apply retroactively, and we see no reason why the statute should apply retroactively.