COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1007

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

STATE OF WISCONSIN EX REL. TOWN OF VERNON,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF BIG BEND,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. The Town of Vernon appeals from a judgment dismissing its challenge to the annexation of property to the Village of Big Bend. We affirm.

¶2 Utilizing the procedures of WIS. STAT. § 66.021 (1997-98),[1] Paul Fickau, a private citizen, sought to annex Town of Vernon property to Big Bend. He published a Notice of Intent to Circulate Petition for Annexation (annexation notice) in August 1998. After circulating petitions and notifying affected property owners, Fickau filed the annexation petition with Big Bend. Big Bend enacted an ordinance annexing the property in December 1998.

¶3 Vernon brought an action against Big Bend challenging the annexation ordinance on several grounds: (1) the scale map and legal description accompanying the annexation notice varied from those accompanying the annexation petition and the ordinance in violation of the requirements of WIS. STAT. § 66.021; (2) the legal description of the annexed property contained errors and the annexation encroached on properties whose owners were not served with the annexation notice; (3) the exclusion of certain property from the annexation created an irregular shape and boundary which was arbitrary and capricious and violated the "rule of reason"; and (4) Big Bend misused its discretion in annexing the property because Big Bend cannot provide the level of municipal services to the property currently provided by Vernon. The court rejected Vernon's challenges after a court trial.

¶4 Vernon argues on appeal that the annexation is invalid because the requirements of WIS. STAT. § 66.021 were not met: (1) different legal descriptions were used during the annexation process which violated the statutory requirement to use a complete and accurate legal description; and (2) all affected property owners did not receive the annexation notice.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶5 The use of different legal descriptions in the annexation notice and the petition arose because the annexation notice included a legal description which extended across the roadways involved rather than ending at their center lines. For the purpose of the annexation petition and the ordinance, Fickau asked the surveyor to modify the description to show the roadways to their center lines. Fickau stated that he intended to annex specific, whole parcels of real estate and did not intend to annex properties on the other side of roadways which formed the boundaries of the annexed property. The modified legal description was used in the annexation petition and the ordinance. The modification resulted in a deletion of 11.5 acres from the more than 700-acre annexation area, or 1½% of the original annexation acreage.

¶6 The court found that the description discrepancy did not affect any private property and that the properties Fickau intended to annex did not vary between the annexation notice and the petition and the ordinance. There was no confusion and the intent of the ordinance was not affected by the discrepancy relating to the roadways. The court also found that all property owners who were affected by the proposed annexation received notice. The court deemed the difference in the descriptions de minimis.

¶7 In effect, Vernon complains that the description in the annexation notice contained more property than was ultimately annexed. This is not a situation where the annexation notice was deficient because it did not describe all of the property to be annexed. Rather, the notice contained a surplusage in the legal description relating to roadways. However, roadways do not play a role in determining the sufficiency of an annexation petition. *See* ***Int'l Paper Co. v. City of Fond du Lac***, 50 Wis. 2d 529, 533, 184 N.W.2d 834 (1971). Therefore, the

roadway-related description discrepancy was not material to the annexation proceeding.

¶8 Vernon argues that the statute must be strictly followed when it comes to the legal description and scale map accompanying the annexation notice as required by WIS. STAT. § 66.021(3)(a)2. However, in ***Town of Delavan v. City of Delavan,*** 176 Wis. 2d 516, 532, 500 N.W.2d 268 (1993), the court acknowledged that a de minimis analysis[2] can apply in annexation disputes.

¶9 Vernon next argues that certain property owners did not receive the annexation notice because the legal description inaccurately described the property to be annexed. The circuit court addressed the three inaccuracies in the legal description and found each of them to be de minimis and correctable post-annexation because the property was identifiable and the intentions of the annexation could still be ascertained.

¶10 The premise of Vernon's appellate argument relating to the three description errors is that the requirements of the annexation statute are strict. We reject that premise in favor of the de minimis analysis. We will not discuss the inaccuracies in depth[3] except to say that we agree with the circuit court that the errors were de minimis.

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[2] "[T]he law does not concern itself with trifles." ***Town of Delavan v. City of Delavan***, 168 Wis. 2d 566, 570 n.4, 484 N.W.2d 343 (Ct. App. 1992), *rev'd on other grounds*, 176 Wis. 2d 516, 500 N.W.2d 268 (1993).

[3] One inaccuracy relates to the western boundary of the Sunrise Terrace West subdivision and a failure to describe an angle point which had a maximum width of 2.39 feet (even though the map showed the angle point). Another relates to an encroachment of zero to seven inches on four lots due to a scrivener's error in the legal description. The final error relates to a parcel which Fickau intended to exclude in its entirety from the annexation but which has 1.9 to 6.9 feet included in the annexation description.

¶11 Vernon next contends that the circuit court did not have authority to order Big Bend to correct the legal description in the annexation ordinance to rectify the three inaccuracies. We disagree. The standard to be applied is whether the area sought to be annexed is "susceptible of reasonable identification" even though the legal description is erroneous or incomplete. ***Town of Greenfield v. City of Milwaukee***, 272 Wis. 388, 392, 75 N.W.2d 434 (1956). This rule originates in the rules governing conveyances of land, ***id.***, and permits a court to correct a legal description in a recorded conveyance where the court is satisfied that the conveyance contains an unintentional erroneous description, WIS. STAT. § 847.07. The rules for the validity of conveyances have been applied to the sufficiency of a description in an annexation proceeding. *See* ***Greenfield***, 272 Wis. at 392. Applying that rule here, we conclude that the circuit court had authority to require Big Bend to correct the description of the annexed property to address the de minimis errors in the legal description.

¶12 Several of Vernon's challenges to Big Bend's annexation ordinance arise under the "rule of reason." This rule provides guideposts for analyzing a municipality's exercise of its annexation authority: "(1) exclusions and irregularities in boundary lines 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 [the municipality's] discretion." ***Town of Pleasant Prairie v. City of Kenosha***, 75 Wis. 2d 322, 326-27, 249 N.W.2d 581 (1977) (citation omitted). Annexation ordinances are presumed valid, and the challenger bears the burden of overcoming this presumption. ***Id***. at 327.

¶13 Vernon argues that the shape of the annexed property is arbitrary and irregularly shaped because it moves in a serpentine fashion along Highway 164

from Big Bend's boundaries, excluding existing subdivisions and parcels before expanding to include commercial properties at a highway interchange. Preliminarily, we note that in a direct annexation commenced by a property owner, the boundaries are fixed by the petitioning property owner and will be upheld unless there is evidence of undue influence or improper motive by the annexing municipality in drawing boundaries. ***Id.*** at 342. Vernon concedes that Fickau was not obligated to include property in the annexation that was of no concern to him. ***Town of Waukesha v. City of Waukesha***, 58 Wis. 2d 525, 531, 206 N.W.2d 585 (1973). The circuit court found that the annexed property was contiguous with Big Bend as required by WIS. STAT. § 66.021(2) and of an acceptable shape. The finding is not clearly erroneous. WIS. STAT. § 805.17(2).

¶14 Vernon also argues that Big Bend did not establish "some reasonable present or demonstrable future need for the annexed property." However, as the challenger, Vernon had the burden to establish that there was no reasonable need for the annexed parcel. ***Town of Pleasant Prairie***, 75 Wis. 2d at 327. Four property owners testified that they wanted to be part of Big Bend in order to obtain one level of zoning and police services. The minutes of Big Bend village board meetings indicate that Big Bend supported annexation because it was consistent with its long-range planning—to permit growth and to sustain business development. Big Bend's president testified at trial regarding the need for vacant land to accommodate expansion. He also noted inquiries he had received regarding available land in Big Bend.

¶15 The circuit court noted the evidence that Big Bend needs to expand and that the statutes permit expansion by annexation. The court also noted that while Big Bend does not have sewer and water service to the annexed parcels, this is not a barrier to annexation because many villages do not offer such services and

such services are not a statutory prerequisite for annexation. These findings are not clearly erroneous. WIS. STAT. § 805.17(2).

¶16 A municipality may annex in reasonable anticipation of future needs. ***Town of Pleasant Prairie***, 75 Wis. 2d at 330. The petitioning property owner's will or wish for annexation is a substantial and significant need as well. ***Town of Delavan***, 176 Wis. 2d at 539. The record reveals a demonstrable need for the annexed property.

¶17 Finally, Vernon argues that its petition to incorporate the town should prevail under the rule of prior precedence, a common law rule which ensures that "the proceedings first instituted have precedence." ***Id.*** at 532 (quoted source omitted).[4] Although the incorporation and annexation petitions were published on the same date, the court found in favor of Big Bend's annexation proceeding because an earlier annexation petition was dismissed three weeks before and there was testimony at trial that it was doubtful that the incorporation petition would succeed. Vernon officials testified that the purpose of the incorporation petition was to keep Vernon's borders intact and to stave off the annexation attempt. The court found that while the legislature has sanctioned annexation by villages, it has not established a procedure for locking in town boundaries in the face of an annexation proceeding. The circuit court rejected Vernon's rule of prior precedence claim and found that Vernon

[4] Although this issue was not properly raised in the circuit court, that court addressed it anyway.

commenced the incorporation proceeding in order to short-circuit the annexation process. This finding is not clearly erroneous based on the record. WIS. STAT. § 805.17(2).[5]

By the Court.—Judgment affirmed.

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

[5] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").