COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3421 **Cir. Ct. No. 99-CV-1425**

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

TOWN OF WINDSOR, A BODY CORPORATE AND POLITIC,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF DEFOREST, A WISCONSIN MUNICIPAL CORPORATION, AND ACATT HOLDING CORP. F/K/A ABS GLOBAL, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. The Town of Windsor appeals orders dismissing its challenge to annexation of 234 acres of its land by the Village of DeForest. The land is part of 723 acres owned by ACATT Holding Corporation, formerly

ABS Global, Inc. (ABS). The parties had previously agreed that DeForest would limit its annexation to the other 489 acres of ABS's land. However, ABS subsequently petitioned DeForest to annex the remaining 234 acres as well, and DeForest did so. The issues are whether the trial court misapplied the rule of reason on summary judgment and whether the court should have voided the 234-acre annexation on grounds of estoppel. We affirm on both issues.

¶2 In 1997, ABS was working to begin developing its land for residential and commercial purposes. Negotiations among ABS, Windsor and DeForest resulted in a "points of agreement" memorandum in which DeForest would annex 489 acres, with the other 234 acres of ABS land to remain in Windsor. DeForest subsequently annexed the 489-acre parcel in 1998. After ABS developed differences with Windsor, DeForest annexed the remaining 234 acres in June 1999.

¶3 In this action, Windsor alleged that annexation of the 234 acres violated the rule of reason because DeForest had no present or future need for it. Windsor also brought breach of contract and estoppel claims against DeForest and ABS. The trial court dismissed all claims in a series of decisions on motions to dismiss or for summary judgment.

¶4 Judicial review of an annexation decision applies the rule of reason test. ***Town of Sugar Creek v. City of Elkhorn***, 231 Wis. 2d 473, 477, 605 N.W.2d 274 (Ct. App. 1999). Under that test, an annexation is valid if there are no arbitrary exclusions or irregularities in the boundary lines, there is some reasonable present or demonstrable future need for the annexed property and no other factors exist which would constitute an abuse of discretion. ***Id.*** at 477-78. An annexation ordinance is presumed valid, and the party challenging annexation

has a heavy burden under the test. ***Id.*** at 477. Any reasonable need for the property is sufficient. ***Id.*** at 482. The need does not have to be pressing or imperative. ***Town of Pleasant Prairie v. City of Kenosha***, 75 Wis. 2d 322, 335, 249 N.W.2d 581 (1977). On review, we do not consider whether the annexation is in a party's or the public's best interest. ***Sugar Creek***, 231 Wis. 2d at 477.

¶5 We review summary judgment decisions *de novo* using the same methodology as the trial court. ***Cemetery Servs., Inc. v. Department of Regulation & Licensing***, 221 Wis. 2d 817, 823, 586 N.W.2d 191 (Ct. App. 1998). If, as here, the pleadings join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** If they do, we examine whether the opposing party's affidavits place material facts in dispute such that the opposing party is entitled to trial. ***Id.***

¶6 DeForest is entitled to summary judgment under the rule of reason test. Windsor's challenge under the test is limited to whether DeForest has a reasonable present or future need for the 234 acres. DeForest's submissions provide evidence that: (1) it had an express policy, since 1994, to increase its tax base through industrial and commercial development; (2) that it had tried to acquire other land for this purpose in recent years; (3) that residential development was nevertheless outstripping commercial development; (4) that the 234 acres included 76 acres available for commercial development; (5) that the annexation would substantially improve the balance between residential and commercial development, even though DeForest would be annexing additional residentially zoned land; (6) that DeForest had reviewed two economic impact statements before annexation; and (7) that it believed it had few other opportunities to annex commercial land. This evidence set forth a *prima facie* case that DeForest showed some reasonable need for the annexation.

¶7 In opposition to summary judgment, Windsor presented evidence that DeForest was also annexing unneeded residential land, that the economic benefit was questionable and that DeForest had not adequately researched the annexation. However, these assertions do not create disputes of material fact. Review under the rule of reason does not encompass whether the annexing municipality is pursuing reasonable growth policies or has adequately researched its decision. *See* ***Sugar Creek***, 231 Wis. 2d at 477. Consequently, DeForest is free to pursue the policy of balanced development, whether economically wise or not. Its *prima facie* evidence that it had some need for the additional 234 acres in pursuit of that policy remains undisputed. Additionally, municipalities may not "annex only that portion of territory described in an annexation petition for which it has a need. It must annex all of the territory or none of it." ***Town of Medary v. City of La Crosse***, 88 Wis. 2d 101, 122-23, 277 N.W.2d 310 (Ct. App. 1979). The fact that DeForest must accept land it does not need also comports with the rule of reason.

¶8 Windsor next contends that the trial court should have voided the annexation under an estoppel theory. It contends that it relied to its substantial detriment on prior agreements to limit DeForest's annexation to the 489-acre parcel. However, of the four prior agreements it cites, two had expired before the annexation, and DeForest was a party to neither of those expired agreements. As for the remaining two, the parties to the "points of agreement" expressly disavowed the existence of a boundary agreement, and, in the ABS/DeForest development agreement, DeForest expressly reserved its governmental powers. Additionally, even if DeForest had agreed not to annex the 234 acres, municipalities may not contract away their governmental functions or powers without statutory authority. *See* ***State ex rel. Hammermill Paper Co. v.***

La Plante, 58 Wis. 2d 32, 80, 205 N.W.2d 784 (1973). Any contract to restrict DeForest's annexation powers was therefore void. A party may not rely on estoppel to enforce a contract which is void because it has attempted to avoid the effect of a statute. *See* ***Greenlee v. Rainbow Auction/Realty Co.***, 202 Wis. 2d 653, 670, 553 N.W.2d 257 (Ct. App. 1996).

By the Court.—Orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).