

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0923

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TOWN OF WAUKESHA,

PLAINTIFF-APPELLANT,

V.

CITY OF WAUKESHA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

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

¶1 PER CURIAM. The Town of Waukesha appeals from an order granting summary judgment to the City of Waukesha. The order dismissed an action brought by the Town against the City, seeking a declaration that certain

annexation ordinances adopted by the City on May 5, 1999, are null and void. We affirm the trial court's order.

¶2 The material events giving rise to this action are uncontroverted. On January 25, 1999, at 11:30 a.m., Philip Gasser, a resident and elector of the Town, caused a Notice of Intent to Circulate a Petition to Incorporate the Town of Waukesha to be published in the official town newspaper. Shortly before the publication of Gasser's Notice of Intent, petitions for direct annexation of two parcels of property located in the Town were filed with the clerk of the City. A few hours after publication of Gasser's Notice of Intent, petitions for direct annexation of two additional properties were filed with the City clerk. Copies of the four petitions were served on the Town clerk in the late afternoon of January 25, 1999. A fifth petition for direct annexation of a parcel of land located in the Town was filed with the City clerk on February 11, 1999, and was served on the Town clerk on February 15, 1999.

¶3 On May 5, 1999, the City adopted ordinances annexing all five properties described in the annexation petitions. The Town then commenced this action to set aside the annexation ordinances. It moved for summary judgment, as did the City. The trial court determined that the incorporation proceedings initiated by Gasser were not initiated in good faith because the sole purpose for seeking incorporation was to stop the City from annexing property in the Town. For purposes of this lawsuit and after considering the requirements for incorporation, the trial court further determined that the petition for incorporation of the Town had very little likelihood of success. It concluded that the rule of prior precedence therefore did not bar the City from annexing the properties. It denied the Town's motion for summary judgment, and granted summary judgment to the City.

¶4 Our review of the trial court's grant of summary judgment is de novo. *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. *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 On appeal, the Town argues that the record does not support the trial court's determination that Gasser failed to act in good faith when he caused the Notice of Intent to be published. The Town contends that application of the rule of prior precedence therefore invalidates all of the annexation ordinances. The Town relies on *Popenfus v. City of Milwaukee*, 208 Wis. 431, 436, 243 N.W.2d 315 (1932), where the court stated: "Where the two proceedings are begun about the same time and in good faith, ... the proceedings first instituted have precedence. The logic of this is that the later proceedings are of no effect."

¶6 In concluding that the proceedings to incorporate the Town were not commenced in good faith, the trial court found that the sole purpose for filing of the incorporation proceeding was to stop the City from annexing property of the Town. The Town argues that this finding is not supported by the record. It also argues that even if the trial court's findings as to Gasser's motivation are supported by the record, as a matter of law the motivation attributed to him does not constitute a lack of good faith.

¶7 The Town further contends that if the trial court’s finding regarding lack of good faith is reversed, then the annexation ordinances must be declared void under the rule of prior precedence. It relies on case law holding that annexation and incorporation proceedings are “instituted” when the first procedural step required by statute is undertaken. *See Village of Brown Deer v. City of Milwaukee*, 274 Wis. 50, 58, 79 N.W.2d 340 (1956); *Town of Greenfield v. City of Milwaukee*, 259 Wis. 77, 82, 47 N.W.2d 292 (1951). Because three of the five petitions for annexation were not filed with the City clerk until after the Notice of Intent to Incorporate was published, the Town contends that its incorporation proceeding clearly preceded them. Although the remaining two annexation petitions were filed with the City clerk before the Notice of Intent was published, the Town contends that the incorporation proceedings preceded them because the annexation petitions were not served on the Town clerk until after publication of the Notice of Intent.

¶8 We conclude that regardless of whether all of the annexation proceedings were commenced prior to initiation of the incorporation proceedings, the annexation ordinances are not void under the rule of prior precedence. Whether the annexation proceedings are void under the rule of prior precedence presents a question of law for this court’s independent review. *Town of Delavan v. City of Delavan*, 176 Wis. 2d 516, 527, 500 N.W.2d 268 (1993).

¶9 The rule of prior precedence is of common law origin. *Id.* at 532. In *Town of Delavan*, the Wisconsin Supreme Court addressed whether the rule required final resolution of a pending incorporation proceeding before annexation proceedings could be initiated. *Id.* The annexation proceedings in that case had been commenced before formal dismissal of the incorporation proceedings, but after referral of the incorporation proceeding to the Wisconsin Department of

Development (DOD) and the DOD's determination that the land in question did not meet the requirements for incorporation under WIS. STAT. § 66.016 (1997-98).¹ *Town of Delavan*, 176 Wis. 2d at 524-26.

¶10 The supreme court held that in determining whether an incorporation proceeding's priority status terminated so as to permit the commencement of an annexation proceeding, a functional interpretation of the rule of prior precedence was warranted. *See id.* at 533. In adopting a functional, or flexible, interpretation of the rule, the court considered the underlying purpose of the rule, which was "intended to protect the integrity of the prior proceeding, not to paralyze the legal process so as to delay subsequent actions years into the future." *Id.* at 535. It held that this court should have focused on the ultimate likelihood of success of the underlying incorporation proceeding. *Id.* It also considered the curative effect of WIS. STAT. § 66.03(13),² legislation enacted after the court's decision in *Popenfus*, which ameliorates and eventually cures the deleterious effects of dual conflicting proceedings. *See Town of Delavan*, 176 Wis. 2d at 534. It held that the incorporation proceeding no longer warranted judicial protection against competing proceedings once the DOD issued its negative recommendation, opening the door for the commencement of annexation proceedings. *Id.* at 536-37.

¹ WISCONSIN STAT. § 66.016 (1997-98) has been renumbered as WIS. STAT. § 66.0207 (1999-2000). Unless otherwise noted, 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.

² WISCONSIN STAT. § 66.03(13) (1997-98) has been renumbered as WIS. STAT. § 66.0235(13) (1999-2000).

¶11 We recognize that when the annexation proceeding was commenced in *Town of Delavan*, the incorporation proceeding had already been referred by the trial court to the DOD, which had determined that the land did not satisfy the requirements for incorporation. All that remained was for the trial court to enter a formal order dismissing the incorporation proceeding, followed by highly deferential proceedings to review the DOD determination under WIS. STAT. ch. 227. See *Town of Delavan*, 176 Wis. 2d at 535-36. Here, no administrative ruling had been made on the merits of these incorporation proceedings when the trial court rejected the Town's claim that the annexation proceedings were void under the rule of prior precedence. Nevertheless, a functional and flexible application of the rule, interpreted in conjunction with the requirement that the incorporation proceeding be brought in good faith, leads us to conclude that the trial court properly granted summary judgment to the City.

¶12 To qualify for incorporation, the area sought to be incorporated must satisfy all of the requirements of WIS. STAT. § 66.016. See *Redford v. DOD*, 186 Wis. 2d 515, 521, 521 N.W.2d 453 (Ct. App. 1994). Nothing in this record provides any basis for concluding that the incorporation proceeding commenced by Gasser is likely to succeed under those requirements.

¶13 Not only is the record devoid of any basis to conclude that the incorporation proceeding is likely to succeed, it is also devoid of any basis to conclude that the proceeding was commenced because incorporation was believed to be meritorious. In adopting the rule of prior precedence, the *Popenfus* court reasoned that "[o]ne proceeding ought not to be used to defeat the other," *Popenfus*, 208 Wis. at 435, implying that the sole purpose of commencing incorporation proceedings should not be to defeat annexation proceedings. In his deposition, Gasser indicated that he published the Notice of Intent because he was

concerned about the continued annexation of Town properties and, in the case of one property, was concerned about the use that was going to be made of it if annexation occurred. He testified that he filed the Notice of Intent so that the Town would “have a chance to remain as an entity because we saw it being devoured,” and that he wanted to “at least give the Town an opportunity to control their losses of property.” Nothing in Gasser’s deposition testimony indicates that he caused the Notice of Intent to be published because he reasonably believed incorporation was warranted or likely to succeed under WIS. STAT. § 66.016. In contrast, the only reasonable inference that can be drawn from his testimony is that he commenced the incorporation proceedings to halt or delay the annexation of Town property, and that he thus engaged in the kind of tactical maneuvering that the rule of prior precedence was created to avoid. *See Town of Delavan*, 176 Wis. 2d at 534.

¶14 In granting summary judgment to the City, the trial court considered the requirements for incorporation set forth in WIS. STAT. § 66.016 and concluded that there was very little likelihood of success on the petition for incorporation of the Town. It also considered that petitions for direct annexation are accorded strong presumptions of validity. *See Town of Delavan*, 176 Wis. 2d at 535. In addition, it correctly noted that a person who objects to an attempted annexation may pursue remedies available through WIS. STAT. § 66.021.³

¶15 The rule of prior precedence was not intended to permit an objector to circumvent other remedies for challenging an annexation in order to commence an unmeritorious incorporation proceeding. *See Popenfus*, 208 Wis. at 435-36.

³ WISCONSIN STAT. § 66.021 (1997-98) has been revised and recreated as WIS. STAT. §§ 66.0217 through 66.0223 (1999-2000).

Because neither Gasser's deposition testimony nor anything else in the record provides a basis to believe that the incorporation proceeding is likely to succeed, and because the rule of prior precedence was not intended to give priority to an incorporation proceeding commenced solely to stymie an annexation proceeding, we conclude that, under a flexible or functional construction of the rule of prior precedence, the trial court properly refused to declare that the annexation ordinances were void. In upholding the trial court, we also note that if the annexation proceedings are ultimately invalidated, both municipalities are adequately protected by WIS. STAT. § 66.03(13)(bb).

By the Court.—Order affirmed.

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

