COURT OF APPEALS
DECISION
DATED AND RELEASED

April 11, 1996

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

NOTICE

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

No. 95-2013

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

JEROME HOEPKER
AND JANE HOEPKER,

Plaintiffs-Appellants,

v.

CITY OF MADISON PLAN COMMISSION
AND CITY OF MADISON, A MUNICIPAL
CORPORATION,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed in part and reversed in part*.

Before Dykman, Sundby, and Vergeront, JJ.

VERGERONT, J. Jerome and Jane Hoepker appeal from an order affirming the City of Madison's conditional approval of their preliminary plat of "Hoepker Heights", a proposed residential subdivision. The issues are: (1) whether the City exceeded its jurisdiction in conditioning preliminary plat

approval on annexation of the property to the City; and (2) whether the City exceeded its jurisdiction in conditioning preliminary plat approval on reconfiguration of the plat to provide an open space corridor for a future recreational trail. We resolve the first issue in favor of the Hoepkers and the second issue in favor of the City. Accordingly, we affirm the trial court's order in part and reverse in part.

BACKGROUND

The Hoepkers own approximately forty-nine acres of land in the Town of Burke which they seek to develop as a residential subdivision. The property is located within the City of Madison's extraterritorial plat approval jurisdiction.[1] The Hoepkers' preliminary plat consists of sixty-two single-family residential lots with on-site septic systems and private individual wells, and three outlots. The lands within the preliminary plat are zoned A-1 Agriculture (Non-Exclusive) by Dane County, and the property is currently used primarily as a livestock farm. The proposed subdivision development is permitted by this zoning.

The Hoepkers submitted their preliminary plat[2] of Hoepker Heights to the City on October 11, 1993.[3] The City of Madison's Department of

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[1] "Extraterritorial plat approval jurisdiction" is defined as "the unincorporated area within 3 miles of the corporate limits of a first, second or third class city, or 1 1/2 miles of a fourth class city or a village." Section 236.02(5), STATS. The Hoepkers' property lies within three miles of the corporate limits of the City of Madison. For plat approval purposes, the City of Madison is a second class city. ***Gordie Boucher Lincoln-Mercury v. City of Madison Plan Comm'n***, 178 Wis.2d 74, 79 n.1, 503 N.W.2d 265, 265 (Ct. App. 1993).

[2] A preliminary plat is a map showing the salient features of a proposed subdivision submitted to an approving authority for preliminary consideration. Section 236.02(9), STATS.

[3] Section 236.03(1), STATS., requires that any subdivision, as defined in § 236.02(12), STATS., shall be surveyed and a plat thereof approved and recorded as required by ch. 236, STATS. Because the Hoepkers' property is within the City of Madison's extraterritorial plat approval jurisdiction, *see* n.1, the City, as well as the Town of Burke and Dane County, must approve the final plat of the subdivision before it can be recorded. Section 236.10(1)(b), STATS. The Hoepkers' preliminary plat has been conditionally approved by the Town of Burke and the Dane County Zoning and Natural Resources Committee.

Planning and Development reviewed the preliminary plat and recommended, alternatively, that it be rejected or that it be approved with a number of conditions. The two conditions at issue in this appeal are as follows:

1. Annexation of the lands encompassed by the preliminary plat to the City of Madison, so that the full range of urban services, including public sanitary sewer and public water service, may be provided to the proposed development area in a timely manner by the City of Madison, according to established regulations, practices, policies, and procedures of the City.

2. Reconfiguration of the plat to provide an adequate open space corridor along the south frontage of Hoepker Road for a future recreational trail location.

Regarding the first condition, the department reported that the preliminary plat did not comply with the City's subdivision ordinance, § 16.23, MADISON GENERAL ORDINANCES, the Peripheral Area Development Plan and the Rattman Neighborhood Development Plan[4] because it did not provide for public sanitary sewer and water service to the subdivision. The department's planning unit report explained:

> The full range of urban services will not be available to the proposed plat. Instead of public sanitary sewer and public water service, the homes in this plat will be served by private on-site septic systems and private individual wells. Without public sewer or public water, it is reasonable to expect that water quality problems may develop in the future here, as

[4] The Peripheral Area Development Plan and the Rattman Neighborhood Development Plan are components of the City of Madison's master plan. *See* § 62.23(3), STATS. The Rattman Neighborhood Development Plan was adopted by the City of Madison Common Council on January 21, 1992, and further details the conceptual recommendations in the Peripheral Area Development Plan for the area bounded by Interstate Highway 90-94, U.S. Highway 151 and Hoepker Road, which encompasses the majority of Hoepker Heights.

> they have elsewhere, due to nitrate concentrations in the private wells.

....

> Urban services and public facilities, including public sewer and water service, could most efficiently be provided to the area of this proposed plat by extension of City of Madison services available on adjacent lands to the south. By enabling urban residential development in the township, at this time, without public sewer and water, the proposed plat would result either in the necessary urban services never becoming available to these homes, or in the services being extended to them at a later date after the area is fully developed, at much greater cost.

The department's planning unit report also stated that without annexation, adequate public services and improvements could not be provided to the subdivision. The report explained that the Town of Burke does not provide public sewer and water, the property is not in an urban service area, and public sewer and water cannot be extended unless the Central Urban Service Area is amended to include the Hoepkers' property (which would occur only upon annexation). According to the report:

> City annexation in order to provide full urban services in the event that the area is developed rather than continuing in the recommended rural uses is an option recommended in both the *Peripheral Area Development Plan* and the *Rattman Neighborhood Development Plan*; and requiring an annexation agreement "to insure future provision of required public facilities and services" is authorized by Section 16.23(3)(a)6., Madison General Ordinances.

Regarding the open space corridor condition, the department's planning unit report stated that the preliminary plat was not consistent with the open space corridor recommendations in either the Peripheral Area Development Plan or the Rattman Neighborhood Development Plan. In

particular, the Rattman Neighborhood Development Plan specifically recommends that, if subdivision development is permitted in the area of the proposed subdivision, an open space corridor be maintained along the north and south frontages of Hoepker Road[5] for a future recreational trail, connecting the proposed 250-acre open space preservation area south of Hoepker Road with Token Creek County Park and Cherokee Park to the north and west. The report did not specify the dimensions of the open space corridor and did not require dedication of any land to the City.

Following a public hearing, the City of Madison Plan Commission agreed with the second alternative recommendation of the Department of Planning and Development's planning unit report and recommended that the City of Madison Common Council conditionally approve the preliminary plat. Following a public hearing, the common council conditionally approved the preliminary plat on July 21, 1994, relying in large part on the Department of Planning and Development's planning unit report.[6] The Hoepkers sought certiorari review of the City's conditional preliminary plat approval under § 236.13(5), STATS. The trial court affirmed and this appeal followed.

STANDARD OF REVIEW

A person aggrieved by a municipality's failure to approve a plat may appeal to the trial court pursuant to § 236.13(5), STATS., which provides in relevant part: "The court shall direct that the plat be approved if it finds that the action of the approving authority or objecting agency is arbitrary, unreasonable or discriminatory." This review procedure is referred to as statutory certiorari. ***Busse v. City of Madison***, 177 Wis.2d 808, 811, 503 N.W.2d 340, 341 (Ct. App. 1993).

We review the decision of the approving authority, not the decision of the trial court. ***Klinger v. Oneida County***, 149 Wis.2d 838, 845 n.6,

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[5] Hoepker Road runs in an east-west direction and splits the Hoepkers' plat into two main parcels.

[6] An approving authority may approve a preliminary plat subject to conditions. Section 236.11(1)(a), STATS.; ***Gordie Boucher Lincoln-Mercury v. City of Madison Plan Comm'n***, 178 Wis.2d 74, 79 n.2, 503 N.W.2d 265, 265 (Ct. App. 1993).

440 N.W.2d 348, 351 (1989). Our review is limited to: (1) whether the City kept within its jurisdiction; (2) whether the City proceeded on a correct theory of law; (3) whether the City's action was arbitrary, capricious or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the decision in question. ***Snyder v. Waukesha County Zoning Bd.***, 74 Wis.2d 468, 475, 247 N.W.2d 98, 102 (1976).

SUBDIVISION REGULATION

Chapter 236, STATS., sets out the minimum requirements imposed on subdividers throughout the state. ***Town of Sun Prairie v. Storms***, 110 Wis.2d 58, 61, 327 N.W.2d 642, 643 (1983). The requirements are designed to accomplish the purposes set forth in § 236.01, STATS.,[7] and are enforced through the power to approve or disapprove subdivision plats. ***Town of Sun Prairie***, 110 Wis.2d at 61, 327 N.W.2d at 643. The legislature has delegated the power to approve or disapprove subdivision plats to local governments that have established planning agencies. Section 236.45, STATS. This delegation allows local governments to regulate subdivisions more intensely than provided by the state by permitting them to adopt ordinances that are more restrictive than the provisions of ch. 236. ***Town of Sun Prairie***, 110 Wis.2d at 61-64, 327 N.W.2d at 643-44. Section 236.45(1) provides in part:

> DECLARATION OF LEGISLATIVE INTENT. The purpose of this section is to promote the public health, safety and general welfare of the community and the regulations

[7] Section 236.01, STATS., provides:

> The purpose of this chapter is to regulate the subdivision of land to promote public health, safety and general welfare; to further the orderly layout and use of land; to prevent the overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage and other public requirements; to provide for proper ingress and egress; and to promote proper monumenting of land subdivided and conveyancing by accurate legal description. The approvals to be obtained by the subdivider as required in this chapter shall be based on requirements designed to accomplish the aforesaid purposes.

> authorized to be made are designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from fire, panic and other dangers; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land.

An ordinance adopted by a municipality pursuant to § 236.45, STATS., must be liberally construed in favor of the municipality, provided it is in accord with the general declaration of legislative intent. ***Town of Sun Prairie***, 110 Wis.2d at 64, 327 N.W.2d at 644-45. Such an ordinance may be applied to subdivisions within the municipality's extraterritorial plat approval jurisdiction. Section 236.45(2).

The City of Madison has enacted a subdivision ordinance pursuant to § 236.45, STATS. This ordinance, § 16.23, MADISON GENERAL ORDINANCES, is more restrictive than the provisions of ch. 236, and it applies to subdivisions within the City's extraterritorial plat approval jurisdiction. Section 16.23(3)(a)6.c and d, MGO, provides that a preliminary plat shall not be approved unless the plan commission and the common council determine that adequate public sewerage facilities and public water service are available to support and service the area of the proposed subdivision. With respect to annexation, § 16.23(3)(a)6.g, MGO, provides:

> Where the Plan Commission and Common Council determine that one or more public facilities or public services are not adequate for the full development proposed, but that a portion of the area could be served adequately, or careful phasing of the development could result in all public facilities or public services being adequate, conditional approval may include only such portions, may specify phasing of the development, or *may require a development or annexation agreement to*

> *insure future provision of required public facilities and services.*

(Emphasis added.)

Section 16.23(3)(c), MGO, which applies specifically to land divisions and subdivisions in the City's extraterritorial plat approval jurisdiction, contains a similar provision. *See* § 16.23(3)(c)2.c, MGO.

With respect to open space preservation, § 16.23(3)(a)2.c.ii, MGO, provides that where a public ground or park shown on the City's master plan or official map is located in whole or in part within a proposed subdivision, "such proposed public ground or park may be dedicated to the public, or reserved for a period of five (5) years from the date of approval of the final plat for acquisition by the City of Madison, Dane County, the township in which it is located, or any other appropriate agency having the authority to purchase said property." Section 16.23(8)(f), MGO, contains the same provision regarding subdivisions in the City's extraterritorial plat approval jurisdiction.

ANNEXATION

The Hoepkers contend that the City cannot condition preliminary plat approval on annexation because such a condition is actually a requirement for public sewer and water, which, under ***Rice v. City of Oshkosh***, 148 Wis.2d 78, 435 N.W.2d 252 (1989), the City has no authority to require of plats within its extraterritorial plat approval jurisdiction. According to the Hoepkers, "the City cannot do through the backdoor what it cannot do through the front door."

In ***Rice***, our supreme court held that § 236.13(2)(a), STATS.,[8] permits only the governing body of the town or municipality within which the subdivision lies to condition plat approval on the installation of public improvements. ***Rice***, 148 Wis.2d at 84-85, 435 N.W.2d at 255. The court stated

[8] Section 236.13(2)(a), STATS., provides in part: "As a further condition of approval, the governing body of the town or municipality within which the subdivision lies may require that the subdivider make and install any public improvements reasonably necessary."

that while municipalities have broad authority under § 236.45, STATS., to regulate subdivisions, that power is restricted when the legislature has granted specific authority to establish public improvement requirements for plat approval to the governmental unit within which the plat lies. ***Id.*** at 86-87, 435 N.W.2d at 255. The court added:

> The policy choice which we conclude was made by the legislature is not void of reason and logic. Public improvements are subject to the political and financial base of the area directly involved. In the case before us, the City is not financially responsible for the public improvements they require. The City's ordinance specifically rejects the payment of funds for extraterritorial public improvements. The legislature left this decision of public improvements to the governmental unit most accountable for such decisions where such an ordinance exists. This policy conforms to the legislative granting of specific power over such responsibilities to the "town or municipality within which the subdivision lies."

Id. at 91-92, 435 N.W.2d at 257 (footnote omitted).

The City concedes that its purpose in requiring annexation is to ensure the provision of public sewer and water to the Hoepkers' plat. It implicitly acknowledges that these are public improvements. The City maintains, however, that the condition of annexation is not prohibited by ***Rice*** because annexation guarantees that "the ongoing cost of providing required public improvements will be born[e] by the City of Madison, *not* the township." (Emphasis in original.)

We agree with the City that ***Rice*** does not prohibit requiring annexation as a condition of preliminary plat approval. However, the question remains whether the City has the authority under § 236.45, STATS., to condition preliminary plat approval on annexation. Neither ***Rice*** nor any other Wisconsin case addresses this issue. The construction of a statute presents a question of law, which we review de novo. *See* ***In re Curtis W.***, 192 Wis.2d 719, 724, 531 N.W.2d 633, 634 (Ct. App. 1995).

While a municipality has wide discretion in implementing subdivision control, an ordinance adopted pursuant to § 236.45(2), STATS., must be in accord with the general declaration of legislative intent. ***City of Mequon v. Lake Estates Co.***, 52 Wis.2d 765, 774, 190 N.W.2d 912, 916-17 (1971). The declaration of legislative intent in § 236.45(1) indicates that the public health, safety and welfare of the community are to be promoted by regulations designed to further the quality of the subdivision and its integration into the community, e.g., "to further the orderly layout and use of land"; "to provide adequate light and air"; "to prevent the overcrowding of land"; "to avoid undue concentration of population"; and "to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements." ***Gordie Boucher***, 178 Wis.2d at 96, 503 N.W.2d at 272-73. The regulations must govern the manner in which the subdivision is developed. ***Town of Sun Prairie***, 110 Wis.2d at 68, 327 N.W.2d at 646 (emphasis added).

Annexation of the Hoepkers' property might ultimately further the purposes of § 236.45(1), STATS., because if the property were annexed, the proposed subdivision would be thoroughly subject to the City's restrictive subdivision ordinance. However, annexation, in and of itself, is not a regulation designed to promote the quality of the subdivision and its integration into the community. In ***Town of Sun Prairie***, for example, the supreme court held that a minimum lot size is a regulation that furthers several of the purposes of § 236.45, including "to further the orderly layout and use of land," "to prevent the overcrowding of land," "to avoid undue concentration of population," and "to provide adequate light and air." ***Town of Sun Prairie***, 110 Wis.2d at 65, 327 N.W.2d at 645. *See also* ***Jordan v. Village of Menomonee Falls***, 28 Wis.2d 608, 137 N.W.2d 442 (1965) (land-dedication regulation furthers a purpose of ch. 236, "to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements"), *appeal dismissed*, 385 U.S. 4 (1966).

Rather, annexation is a procedure by which unincorporated territory becomes part of an existing incorporated municipality. When unincorporated territory is annexed, it becomes part of the municipality, subject to municipal jurisdiction. This affects not only the delivery of municipal services, but also voting rights, zoning authority and taxation. There is no indication in § 236.45, STATS., that the legislature intended to give such authority to municipalities under their subdivision plat approval powers.

Moreover, permitting a municipality to condition plat approval on annexation would add to the specifically-defined procedures for annexation set forth in §§ 66.021, 66.024 and 66.025, STATS. Presently, unincorporated territory may be annexed to a city or village in two primary ways: (1) annexation at the initiative of residents or property owners of the territory to be annexed; or (2) annexation at the initiative of the annexing city or village by a court-ordered referendum. Under each procedure, consent of those to be annexed is required.

The City's position, in effect, changes the statutory annexation procedure set forth in ch. 66, STATS., and permits a municipality to annex the territory of any subdivider seeking plat approval within the municipality's extraterritorial plat approval jurisdiction against the subdivider's wishes. A municipal corporation has no power to extend its boundaries otherwise than as provided for by legislative enactment or constitutional provision. ***Town of Madison v. City of Madison***, 269 Wis. 609, 615, 70 N.W.2d 249, 252 (1955). Such power may be validly delegated to a municipal corporation by the legislature, but when so conferred must be exercised in strict accord with the statute conferring it. ***Id.***

The City's reliance on ***Town of Hallie v. City of Eau Claire***, 471 U.S. 34 (1985) is inapposite. There, the City of Eau Claire had refused to supply sewage treatment services to several towns, but had agreed to supply such services to individual landowners in the area of the towns if a majority of the individuals in the area voted by referendum election to have their homes annexed by the city and to use the city's sewage collection and transportation services, rather than the towns' sewage collection and transportation services. ***Id.*** at 37. Several towns sued the city alleging a violation of the Sherman Act by acquiring a monopoly over the provision of sewage treatment services in the area and by tying the provisions of such services to the provision of sewage collection and transportation services. ***Id.*** The Court concluded that the Wisconsin Statutes showed a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of municipal provision of sewage services. Therefore, the actions of the city were exempt from the Sherman Act.

In ***Hallie***, the individuals in the annexed area *wanted* to receive public sanitary sewage service from the city. In a related case, ***Town of Hallie v. City of Chippewa Falls***, 105 Wis.2d 533, 314 N.W.2d 321 (1982), our supreme

court stated that when the inhabitants of an unincorporated area desire sewer services from the city, annexation is a reasonable quid pro quo that the city can require before extending sewage treatment services to the unincorporated area. ***Town of Hallie***, 105 Wis.2d at 540-41, 314 N.W.2d at 325. The court explained that, "If an area is to have the benefit of such services, it may be appropriate for it to be annexed in order to add to the city's tax base and help pay for the cost of providing such services." ***Id.*** at 542, 314 N.W.2d at 326. The Hoepkers, in contrast, do not want public sewer and water service from the City of Madison. Since the Hoepkers do not want the benefit of such services, the quid pro quo rationale in the ***Town of Hallie*** cases is not persuasive.

We recognize that there may be sound public policy reasons for permitting a municipality to condition plat approval on annexation.[9] It may

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[9] The benefits of giving municipalities broad annexation powers have been explained as follows:

> Those who live on the fringe of a municipality have ... chosen to live in and be a part of an urban area. Having made that choice, the municipality's exercise of its annexation power would merely confirm the reality that this land is already urban. The nonresidents on the fringe should no more have the power to opt out of the responsibilities of urban life than should city residents be able to claim an exemption from taxes to support services they do not use. In many instances, then, the self-determination principle merely provides nonresidents a way to protect themselves from assuming the burdens, while letting them enjoy the benefits, of being part of a municipality.
>
> ....
>
> If the development is residential, its residents work, shop, entertain themselves, and use medical and other professional services in the city. The majority of those individuals will spend most of their day within the city limits, yet they will contribute nothing to the city's cost of providing infrastructure to the wide range of in-city activities of which they partake. Moreover, these nonresidents do not share in the cost of providing municipal services to the poor residents of the city, who live in higher concentrations in urban areas. That cost is, however, imposed on city landowners.

also be good public policy to permit a city to require public sewer and water in its extraterritorial plat approval jurisdiction. However, these are matters for the legislature to resolve. Our role is to interpret the statutes enacted by the legislature. Our interpretation of § 236.45, STATS., and the annexation statutes compels the conclusion that the City of Madison was not authorized to require annexation as a condition of preliminary plat approval.

OPEN SPACE CORRIDOR

We next address the condition that the Hoepkers reconfigure their preliminary plat to provide an open space corridor along the south frontage of Hoepker Road for a future recreational trail. Whether the City exceeded its jurisdiction in imposing an unreasonable condition pursuant to a valid ordinance is a question of law, which we review de novo. *See* ***Gordie Boucher***, 178 Wis.2d at 84, 503 N.W.2d at 268; ***Pederson v. Town Bd.***, 191 Wis.2d 663, 669 n.2, 530 N.W.2d 427, 430 (Ct. App. 1995).

I. ***Gordie Boucher Lincoln-Mercury v. City of Madison Plan Comm'n***

The Hoepkers contend that the open space corridor condition is prohibited by our holding in ***Gordie Boucher***.[10] We disagree. In ***Gordie Boucher***, Gordie Boucher Lincoln-Mercury sought to establish an automobile dealership on a land division in the City of Madison's extraterritorial plat approval jurisdiction. The City of Madison Plan Commission rejected Gordie Boucher's certified survey map because the proposed use was inconsistent with the Permanent Open Space District created for the area in the City of Madison's Peripheral Area Development Plan.[11]

(..continued)

Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 THE URB. LAW. 247, 253-54, 266 (1992) (footnotes omitted).

[10] The Hoepkers do not argue that § 236.13(2)(a), STATS., as interpreted by ***Rice v. City of Oshkosh***, 148 Wis.2d 78, 435 N.W.2d 252 (1989), prevents the City from conditioning preliminary plat approval on the reconfiguration of their preliminary plat to provide an open space corridor.

[11] The Peripheral Area Development Plan defines the boundaries of thirty-eight

We concluded that the plan commission improperly engaged in zoning when it used its extraterritorial plat approval authority to enforce the Permanent Open Space District.[12] By refusing to approve subdivision plats or certified survey maps of land which the owner intended to use or develop for purposes inconsistent with the Peripheral Area Development Plan, the City of Madison was attempting to control the use of land, a zoning function, without passing a zoning ordinance.

In this case, the City is not attempting to use its extraterritorial plat approval powers to prohibit certain uses of property as was the case in ***Gordie Boucher***. In ***Gordie Boucher***, the City sought to prevent all development inconsistent with the permanent open space classification assigned to the area by the Peripheral Area Development Plan. This obviously included the proposed use of the property as an automobile dealership. Here, the City does not seek to prohibit the intended residential subdivision. Even with the open space corridor, the Hoepkers may proceed with subdividing their property into sixty-two single-family residential lots, and three outlots. In ***Gordie Boucher***, we specifically stated that a municipality may condition plat approval on the provision of open space:

> Certainly the provision of open space or greenspace is a quality requirement which an approving authority may impose as a condition of approval of a subdivision or other division of land. A residential development requires parks, playgrounds and greenspace to provide residents with amenities which contribute to the quality of residential living. A developer may be required to provide such amenities or to contribute to their cost. ***Jordan v. Village of Menomonee Falls***, 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

(..continued)
districts located in the City and its extraterritorial planning jurisdiction, to which the plan commission has assigned one of six district classifications, ranging from Urban Expansion to Permanent Open Space. *See* ***Gordie Boucher Lincoln-Mercury v. City of Madison Plan Comm'n***, 178 Wis.2d 74, 93, 503 N.W.2d 265, 271 (Ct. App. 1993). The Plan outlines the City's objectives as to the use of land in each case. ***Id.***

[12] While the City of Madison had zoning authority over this land, it had not exercised this authority.

> An approving authority may condition approval of a subdivision or other division of land upon preservation of natural features, natural resources and environmentally sensitive lands. The creation and preservation of open space, occasioned by the layout of a subdivision or other land division, is the legitimate object of an approving authority's concern.

Gordie Boucher, 178 Wis.2d at 97-98, 503 N.W.2d at 273 (footnote omitted).

The Hoepkers take the position that an open space corridor for a future recreational trail is significantly different from the parks, playgrounds and greenspace discussed in ***Gordie Boucher***. According to the Hoepkers, parks, playgrounds and greenspace are designed to increase the enjoyment of the citizens of the local neighborhood in which they lie. A recreational trail, by contrast, "is designed for travel," not for the benefit of the residents of the development. We do not agree. Residents of the subdivision will be able to use the trail for walking, nature observation and relaxation. The fact that other people, in addition to subdivision residents, will also be able to enjoy the trail does not invalidate the condition. *See* ***Jordan***, 28 Wis.2d at 619, 137 N.W.2d at 448 (not material that persons other than subdivision residents will use public site dedicated by subdivider).

II. Takings Claim

The Hoepkers also argue that requiring them to reconfigure their plat to provide an open space corridor for a future recreational trail constitutes an uncompensated taking for public use prohibited by the Fifth Amendment to the United States Constitution. In support of their argument, the Hoepkers rely on ***Dolan v. City of Tigard***, 512 U.S. ___, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994).

The Hoepkers' reliance on ***Dolan*** is incorrect. In ***Dolan***, the United States Supreme Court held that where a municipality conditions land use approval on an applicant's dedication of property for public use, the municipality must demonstrate a rough proportionality between the dedication and the projected impact of the proposed development. Here, the City did not condition approval of the Hoepkers' preliminary plat on a dedication for public use. Rather, it required the Hoepkers to reserve a small portion of their plat as

open space for possible future acquisition by the City, Dane County or the State of Wisconsin to establish a recreational trail.[13] The condition essentially places prospective plot purchasers along the south frontage of Hoepker Road on notice that a portion of their plots may be subject to condemnation in the future. The City acknowledges that any governmental entity that ultimately constructs the recreational trail will need to acquire the necessary land from the individual plot owners with full compensation.[14]

The Hoepkers contend that, while the open space corridor condition does not require a dedication, it is nonetheless a taking because it "deprives [them] of all use of the property required to be set aside ... while the City decides whether it wants to condemn it." *See* ***Lucas v. South Carolina Coastal Council***, 505 U.S. 1003, 1016 (1992) (a regulation that deprives an owner of all economically beneficial use of his or her property effects a taking in the same sense as physical occupation). The flaw in the Hoepkers' analysis is their focus on the portion of land required to be reserved as open space. In addressing the economically beneficial use test in ***Dolan***, the Court made clear that the test must be viewed in light of the developer's entire property, not just the portion affected by the condition. ***Dolan***, 512 U.S. at ___ n.6, 114 S. Ct. at 2316, 129 L.Ed.2d at 316. *See also* ***Clajon Prod. Corp. v. Petera***, 70 F.3d 1566, 1577 n.18 (10th Cir. 1995) (under beneficial use test, the litigant's entire property must be considered). The Hoepkers do not contend that the open space corridor condition deprives them of all beneficial use of their entire property. We conclude no taking has occurred.

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[13] Section 16.23(3)(a)2.c.ii, MADISON GENERAL ORDINANCES, provides that where a public ground shown in the City's master plan is located in whole or in part within the proposed subdivision, the public ground may be dedicated to the public or reserved for a period of five years for acquisition by the City, Dane County, the township in which it is located, or any other appropriate agency having authority to purchase said property. Section 16.23(8)(f), MGO, provides that outside the corporate limits, but within the extraterritorial plat limits, the developer may be required to reserve an area for open space for a period not to exceed five years, after which the City, County or township within which the land is located shall either acquire the property or release the reservation.

[14] We assume that until a governmental entity condemns any of the land in the subdivision for a recreational trail, the Hoepkers (or plot purchasers) will maintain their right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." ***Dolan v. City of Tigard***, 512 U.S. ___, ___, 114 S. Ct. 2309, 2316, 129 L.Ed.2d 304, 316 (1994) (quoting ***Kaiser Aetna v. United States***, 444 U.S. 164, 176 (1979)).

By the Court.—Order affirmed in part and reversed in part.

Recommended for publication in the official reports.

No. 95-2013(CD)

DYKMAN, J. (*concurring in part; dissenting in part*). With the benefit that hindsight often confers, I conclude that we should have certified this case to the Wisconsin Supreme Court. Whether one accepts the view of either of the two opinions reversing the trial court in part or in whole, or the view of this concurrence/dissent, we can hardly claim that we are fulfilling this court's error-correcting mission. ***State ex rel. Swan v. Elections Bd.***, 133 Wis.2d 87, 94, 394 N.W.2d 732, 735 (1986). The future political makeup of residential areas surrounding Wisconsin cities, and their size and welfare is a subject more consistent with the institutional functions of the supreme court than the error-correcting function of this court.

The City of Madison's Common Council was faced with a problem when it was deciding whether to approve the Hoepkers' plat which is surrounded on three sides by the City but located within the City's extraterritorial jurisdiction. The City had received a planning unit report from its Department of Planning and Development which raised a number of problems with the proposed plat. These included:

1. The sixty-two homes in the plat would be served by private on-site septic systems and private individual wells. Nitrate contamination in the wells was expected. Nitrate levels found in Town of Burke wells are consistently high. In an unsewered subdivision located just to the north of this proposed plat, sixty-three percent of sixty sample wells exceed 10 mg. of nitrates per liter, the safety standard established by the federal government for public water supplies.

2. Though this is an urban development, the Dane County Sheriff's Department, rather than a city police department, will provide police services. Fire services will be provided by the Sun Prairie Volunteer Fire Department from a station in the City of Sun Prairie. On a scale of one to ten, with ten being no fire services, the Sun Prairie Volunteer Fire Department ranks seven for areas within five miles of the station, and nine for areas beyond five miles. The plat is four miles from the fire station. The City of Madison Fire Department has a rating of three. There will be no public water available in the plat for fire-fighting purposes.

3. Only one-half of the lots are suitable for conventional on-site septic systems. The other one-half would require mound septic systems. Three

outlots have unsuitable soil conditions for either conventional or mound septic systems, and a note on the plat states that they are not to be developed until sanitary sewer service is available.

4. Plat approval will result in an inefficient and uneconomical provision for urban services. Development without annexation will result either in necessary urban services never becoming available to the residents of the plat or in services being extended at a later date and at a much greater cost.

The City approved the Hoepkers' plat, contingent upon the plat being annexed to the City and an open space corridor being supplied. To offset some of the additional costs, the City approved an increase in the number of lots in the subdivision from sixty-two to ninety, the latter number made possible because the lots would then be sewered.

The Hoepkers appealed to the trial court, which affirmed the City's action, and the Hoepkers appealed to this court. The lead opinion affirms the trial court as to the City's requirement of an open space corridor along a road within which no structures will be built. I agree with that part of the lead opinion. The lead opinion and the other concurrence/dissent, however, reverse the court's decision affirming the City's annexation requirement, though for different reasons. In that respect, I disagree, and therefore dissent to that part of both opinions.

Before analyzing the parties' positions, I believe that we should determine the standard of review we are to use. Often, this is determinative of the issues we face, and it always helps in staying focussed on the real issues. We discussed our standard of review in plat approval cases in ***Pederson v. Town Bd.***, 191 Wis.2d 663, 669 n.2, 530 N.W.2d 427, 430 (Ct. App. 1995). Though the City argues that this case really involves a challenge to its ordinances, I conclude that here, as in ***Pederson***, the developers are asserting

that the conditions imposed upon them exceed the City's statutory authority. Accordingly, our standard of review is *de novo*. ***Id.*** at 669, 530 N.W.2d at 430.

When a case involves statutory interpretation, our goal is to determine the intent of the legislature. ***Bell v. Employers Mut. Casualty Co.***, 198 Wis.2d 347, 364, 541 N.W.2d 824, 831 (Ct. App. 1995). To determine legislative intent, we first examine the language of the statute. ***Id.*** at 365, 541 N.W.2d at 831. If the language unambiguously sets forth the legislative intent, that ends our inquiry and we simply apply the language to the case at hand. ***Id.***

Neither the lead opinion nor the other concurrence/dissent take this initial step. By first considering ambiguity, I believe that the ultimate conclusion I reach is easier to understand. As the lead opinion explains, the first issue in this case is whether the legislature gave authority to the City to enact an ordinance conditioning extraterritorial plat approval on annexation. I agree with the lead opinion's conclusion that annexation of the Hoepkers' property furthers the purposes of § 236.45(1), STATS. From this, I conclude that the legislature intended that a city could use methods not then envisioned by the legislature to achieve the beneficial purposes of that statute. As I explain later, this would certainly seem to be the legislature's intent, because it also directed courts to interpret § 236.45 liberally in favor of municipalities. Section 236.45(2)(b).

Consequently, I conclude that, at least in the context before us, § 236.45, STATS., is unambiguous. This means that we do not look at the legislative history to search for other meanings. ***Bell***, 198 Wis.2d at 365, 541 N.W.2d at 831. In ***Town of Hallie v. City of Eau Claire***, 176 Wis.2d 391, 396-97, 501 N.W.2d 49, 51 (Ct. App. 1993), *overruled on other grounds by* ***Wagner Mobil, Inc. v. City of Madison***, 190 Wis.2d 585, 527 N.W.2d 301 (1995), we commented that the greatest defect of legislative history is its illegitimacy and that we are governed by laws, not by the intentions of legislators. We noted: "Judge Harold Leventhal used to describe the use of legislative history as the

equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." ***Id.*** at 397, 501 N.W.2d at 51 (quoted source omitted). This is even more of a problem when we use comments by legislative staff, bureau employees, lobbyists and commentators to determine what the legislators who enacted the bill believed the bill provided. That is why, when we conclude that the plain language of a statute adequately explains what the legislature intended, we search no further. I therefore limit my consideration to the language found in § 236.45, STATS., and the cases interpreting that statute.

To begin with, I agree with several of the lead opinion's conclusions. First, ***Rice v. City of Oshkosh***, 148 Wis.2d 78, 435 N.W.2d 252 (1989), does not invalidate the City's ordinance permitting it to require annexation as a condition of preliminary plat approval. Second, as I have noted, annexation of the Hoepkers' property would further the quality of the subdivision and, therefore, is in accord with the declaration of legislative intent found in § 236.45(1), STATS. Third, ***Town of Hallie v. City of Eau Claire***, 471 U.S. 34 (1985), did not, as the City contends, uphold the authority of Wisconsin cities to require annexation of unincorporated areas as a condition of receiving public sanitary sewage services from a city. Still, I agree with the ***Town of Hallie***'s conclusions as to Wisconsin law.

That said, I nonetheless come to a different conclusion than that reached by the other opinions. The legislature has directed that we give an expansive reading to city platting ordinances. Section 236.45(2)(b), STATS., provides: "This section and any ordinance adopted pursuant thereto shall be liberally construed in favor of the municipality, town or county and shall not be deemed a limitation or repeal of any requirement or power granted or appearing in this chapter or elsewhere, relating to the subdivision of lands."

The supreme court has discussed § 236.45(2)(b), STATS.:

> This reserves to the city a broad area of discretion in implementing subdivision control provided that the ordinances it adopts are in accord with the general declaration of legislative intent and are not contrary, expressly or by implication, to the standards set up by the legislature. This is a grant of wide discretion which a municipality may exercise by ordinance or appropriate resolution.

City of Mequon v. Lake Estates Co., 52 Wis.2d 765, 774, 190 N.W.2d 912, 916-17 (1971). The supreme court repeated this section of ***City of Mequon*** in ***Town of Sun Prairie v. Storms***, 110 Wis.2d 58, 64, 327 N.W.2d 642, 644-45 (1983), and we did so in ***Pederson***, 191 Wis.2d at 669 n.2, 530 N.W.2d at 430.

Liberal construction of city platting ordinances in favor of the City is neither new nor disputed. From my reading of § 236.45(2)(b), STATS., and ***City of Mequon, Town of Sun Prairie*** and ***Pederson***, I conclude that we are required to presume the validity of the City's annexation ordinance, and to require the Hoepkers to show that the City's action was arbitrary, unreasonable or discriminatory. That is the test for judicial interference in a legislative decision and it is set out in § 236.13(5), STATS.[15] Neither of the other opinions use this test but instead conclude that the City was not authorized, presumably by statute, to condition the acceptance of a plat upon annexation. The Hoepkers assert that the City's annexation condition was arbitrary, unreasonable and discriminatory. They base this on their assertion that ***Rice*** prohibits the City from requiring public sewers and water. The lead opinion rejects this reasoning, and for the same reasons, so do I.

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[15] Section 236.13(5), STATS., provides in pertinent part: "Any person aggrieved by an objection to a plat or a failure to prove a plat may appeal therefrom .... The court shall direct that the plat be approved if it finds that the action of the approving authority or objecting agency is arbitrary, unreasonable or discriminatory."

The Hoepkers also contend that annexation itself does not directly serve the purposes set out in § 236.01, STATS. The lead opinion agrees with this contention. Initially, this argument seems persuasive. But § 236.01 provides:

> The purpose of this chapter is to regulate the subdivision of land to promote public health, safety and general welfare; to further the orderly layout and use of land; to prevent the overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage and other public requirements; to provide for proper ingress and egress; and to promote proper monumenting of land subdivided and conveyancing by accurate legal description. The approvals to be obtained by the subdivider as required in this chapter shall be based on requirements designed to accomplish the aforesaid purposes.

I agree that annexation, *per se*, does not directly serve the purposes found in § 236.01. But limiting an interpretation of this statute to permitting conditions with results which directly serve the purposes set forth in § 236.01 and not those which necessarily flow from the annexation is a restrictive interpretation of the statute.

I believe that the results in this case which naturally flow from annexation are dramatic, and indirectly impact on the purposes set forth in § 236.01, STATS. Water supply would be free of nitrate contamination, a problem which can adversely affect people's health, especially that of young children. Public sewers would become available which would free the subdivision from the effects of failing septic systems. Fire protection would be enhanced because water for fire fighting would be at hand rather than being

transported to the site when a fire occurs. Police protection would be enhanced because the area would now be patrolled by city police officers instead of the limited police protection provided by Dane County. The indirect effects of annexation directly implicate the purposes found in § 236.01.

A second reason given by the lead opinion for its conclusion is that § 236.45, STATS., does not indicate that municipalities have the power to affect voting rights, zoning authority and taxation through plat approval conditions. Section 236.45(1) provides:

> The purpose of this section is to promote the public health, safety and general welfare of the community and the regulations authorized to be made are designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from fire, panic and other dangers; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land. The regulations provided for by this section shall be made with reasonable consideration, among other things, of the character of the municipality, town or county with a view of conserving the value of the buildings placed upon land, providing the best possible environment for human habitation, and for encouraging the most appropriate use of land throughout the municipality, town or county.

I agree that the statute does not address those issues, but neither ch. 236 nor any statute specifically addresses all possible fact situations which may involve the statute. Platting affects many aspects of community development which are not specifically listed in ch. 236. Schools will be needed if a residential community is planned. School board elections will be held which will involve the voting rights of persons purchasing lots. Lot purchasers will become interested in zoning matters which will affect how their community is developed and maintained. Taxation will be affected by lot size, building requirements and amenities governed by the plat. Therefore, any annexation, no matter how accomplished, affects voting rights, zoning authority and taxation.

Platting land involves far more than splitting large pieces of land into smaller ones. The legislature necessarily considered that land division carries with it far more of society's concerns than are revealed by using a transit and a measuring tape. I cannot conclude that because § 236.45(1), STATS., fails to mention all of the possible consequences of land division, that those consequences were not anticipated, particularly in light of the legislative directive that courts liberally interpret § 236.45(1) in favor of municipalities' interests.

The other concurrence/dissent concludes that ***Town of Fond du Lac v. City of Fond du Lac***, 22 Wis.2d 533, 126 N.W.2d 201 (1964), is dispositive. I disagree, though I find that case to be an interesting example of the limits the supreme court has put on municipalities' annexation powers. There, a city used economic pressure to force its tenants to sign an annexation petition. It offered one tenant one year of free rent to do so, and threatened another with eviction if the tenant did not sign the petition. ***Id.*** at 536-37, 126 N.W.2d at 202-03. The court concluded that this was a "shocking disregard of the political process of government," and described the action as "the equivalent of buying votes and improper." ***Id.*** at 540, 126 N.W.2d at 204. Though no statute prohibited the City's actions, the court concluded that the tenants' signatures were invalid. ***Id.***

But, in ***Town of Scott v. City of Merrill***, 16 Wis.2d 91, 92-93, 113 N.W.2d 846-87 (1962), a city employed two separate annexation petitions to avoid the statutory requirement that it apply to the trial court for a determination that the annexation was in the public interest. The court considered the assertion that this was an evasion of the statute and a proscribed subterfuge, and approved the city's method of avoiding the statute. ***Id.*** at 93-94, 113 N.W.2d at 847-48.

A city or village may coerce electors to sign annexation petitions by voiding Department of Natural Resource orders requiring connection of unincorporated areas to the city of village sewage system. ***City of Beloit v. Kallas***, 76 Wis.2d 61, 70, 250 N.W.2d 342, 347 (1977). Electors who wish sewer service may be forced to sign an annexation petition to receive that service. ***Id.***

The supreme court reviewed the issue of coerciveness in ***Town of Lafayette v. City of Chippewa Falls***, 70 Wis.2d 610, 629-30, 235 N.W.2d 435, 445 (1975). Citing ***Town of Fond du Lac***, the court concluded that a test for invalidity was "unfair inducement or pressures." I will, therefore, use this alternative test to determine whether the City's requirement that the Hoepkers agree to annexation as a condition of plat approval constitutes unfair inducement.

Something is "unfair" if it is marked by injustice, partiality, or deception. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2494 (1993). The lead opinion does not suggest that it would be unfair to the Hoepkers to require annexation. Indeed, I believe that the City offered the Hoepkers a *quid pro quo.* The City offered to increase by twenty-eight the number of lots the Hoepkers could sell. They would be required to provide sewers and water, but lots with sewers and water usually bring a higher price than lots without these amenities. This is also a matter of common sense. Lot purchasers will not have to incur the expense of a well or a septic system if the municipality provides

sewers and water. Police and fire protection will be enhanced, and fire insurance premiums will be reduced. Taxes will be higher to cover the increased level of services provided, but there is nothing unjust, partial or deceptive about that or any of the other factors involved in selling lots with improvements. I conclude that the City's conditions are nothing like evicting a tenant who will not sign an annexation petition, or paying one who will.

Many aspects of annexation are political and subject to the reasonable political pressures of conflicting interests. ***Town of Fond du Lac***, 22 Wis.2d at 539, 126 N.W.2d at 204. Once one accepts that annexations may properly be the subject of political pressures, it becomes apparent that annexation as a condition of plat approval it is just another example of annexation at the initiative of the property owner. If a city can refuse to extend sewers and water service without annexation, it coerces those wanting that service to sign an annexation petition they would rather not sign. Both the Hoepkers and persons living in an unincorporated area but wanting sewers and water service are in the same boat. Each one wants the benefits of urban or suburban living but neither one wants to pay the price. But neither is forced to sign an annexation petition. The City's trade-off is not the shocking disregard of the political process condemned in ***Town of Fond du Lac***. There is no reason to reject the City's conditional approval of the Hoepkers' plat, and I would affirm the trial court in this respect. I, therefore, respectfully dissent from this part of the other two decisions in this case.

SUNDBY, J. (*concurring in part; dissenting in part*). The resurgence of the City of Madison's efforts to plan for and control land development beyond its corporate limits has spawned expensive but inconclusive litigation. *See, e.g.,* ***Gordie Boucher Lincoln-Mercury v. Madison Plan Comm'n***, 178 Wis.2d 74, 503 N.W.2d 265 (Ct. App. 1993); ***Busse v. City of Madison***, 177 Wis.2d 808, 503 N.W.2d 340 (Ct. App. 1993). In this action, the City seeks to establish two major adjuncts to its delegated authority to approve plats of subdivisions within its extraterritorial plat approval jurisdiction. Section 236.10(1)(b)2, STATS. First, it asks us to approve its use of that authority to compel the owner of a proposed subdivision to annex the subdivision to the City. A majority of this court concludes that the legislature has not delegated that authority to the City. Second, the City asks that we approve its use of that authority to compel the Town of Burke to accept a plat on which the City has imposed a "broad corridor" open space[16] or greenway reservation. A different majority approves that use of the City's extraterritorial plat approval authority.

I write separately to urge the City to use the proper channel--the legislature--to achieve its objectives. In the debate on approval of the Hoepker Heights subdivision, Mayor Paul Soglin condemned the myopia of the courts and the legislature for failing to recognize and respect the cities' need to plan for future growth.[17] The Mayor understands that courts may not legislate. We are

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[16] The trial court described the "broad corridor" open space as follows: "Pursuant to the master plan, the lands south of Hoepker Road remain primarily an open space area within the urban expansion district, a buffer zone, so to speak, as part of a *broad corridor* between Cherokee Marsh and Token Creek." (Emphasis added.) However, the City did not inform the subdivider how broad the "broad corridor" is to be. Theoretically, the corridor could include all of Hoepker Heights.

[17] At the July 21, 1994 hearing before the Common Council, Mayor Soglin said:

> [O]nce the Town of Burke said that they would support ... unsewered development, our choice was no longer greenspace vs. development, our choice was Town of Burke unsewered development vs. sewered properly designed development under the municipality of Sun Prairie. What all of this amounts to is that there is not one state legislator who can in any way hold their head up high and claim that they have any regard whatsoever for the environment if they allow this to continue under present state law. *The only way this is going to be stopped*, particularly because of the recent decisions of the courts, *is through amendment to existing state law* and dealing with these towns who don't conform on the

not faithful to our oaths if we allow our own view of a perfect, or better, world to intrude upon our duty to construe legislation as it is written. If that legislation is not clear, it is our duty to find the intent of the legislature and apply it. It is evident from the uncertainty of our decisions that our court does not find clear the extent of the authority the legislature intended to delegate to cities when it gave them extraterritorial plat approval authority. In ***Gordie Boucher***, we concluded unanimously that the City could not use its extraterritorial plat approval authority to control land use. I agree with the City that that decision does not control the result in this case, although it certainly casts great doubt upon the City's authority to use its plat approval authority to

(..continued)

> Ag zoning who are running rampant.... [A]fter they've completed their rape of the landscape and the urbanization of their township, or I should more accurately say suburbanization, they then have the nerve to come to county government to purchase urban services so that they are then able to avoid any responsibility for dealing with the problems of a larger urbanized community but in fact can then simply pick the ones that they think are cheapest and are most affordable to their constituencies.... Anyone who doesn't get the connection between land use and the environment, levels of service and what is happening in terms of poverty and urbanized communities doesn't deserve to be in public office. And the choices that you are faced with today are a result of a series of court decisions and failures by the state legislature, both parties, in dealing with these issues. Unfortunately, you're left with choices which are not ideal. We are not able to stage the development nor control the development in both the most environmentally sound manner and the most cost effective manner. This is the best that we can do under the circumstances.

(Emphasis added.)

control the development of land to the exclusion of the town in which the land is located, and the county planning agency.

The City finds in ***Gordie Boucher*** and my dissenting opinion in ***Busse***, 177 Wis.2d at 819-21, 503 N.W.2d at 345-46, support for the Plan Commission's and the Common Council's approval of a preliminary plat subject to the conditions it seeks to impose. The City reads more into my opinions than I expressed, or intended to express.

I have studied the legislative history of ch. 236, STATS., closely and am convinced that the plat approval authority delegated to the cities by that legislation was limited to improving the quality of subdivisions. *See* Report of Wisconsin Legislative Council, Conclusions and Recommendations of the Judiciary Committee on the Subdivision and Platting of Land, *Objective I*, at 11-15 (1955). As we emphasized in ***Gordie Boucher***, plat approval is an administrative power, not a planning tool. While the City has extraterritorial planning authority, it may not use the administrative tool of plat approval to override or supersede the planning of the Town in which a subdivision is located, especially when the City's conditions for its approval of a plat would impose unwanted responsibilities and costs upon the Town.

The Mayor unfairly condemns the legislature for failing to give the cities the administrative tools it needs to implement its planning authority. In 1955, the legislature extended the cities' power to approve plats of subdivisions to subdivisions located in their extraterritorial planning jurisdictions. *See* § 236.45(3), STATS.; ch. 570, Laws of 1955; § 236.143, STATS., 1953. The legislative history of ch. 236 shows, however, that the legislature did not give the City the kind of unilateral authority it seeks to exercise in this case.

The City recognizes that ***Rice v. City of Oshkosh***, 148 Wis.2d 78, 435 N.W.2d 252 (1989), prevents it from requiring public sewer and water in an extraterritorial subdivision. In ***Rice***, the court said that only the municipality in which the subdivision lies may require public improvements because installing such improvements implicates the political and financial base of the area directly involved. ***Id***. at 91, 435 N.W.2d at 257. The City says it will remove that impediment by taking the area out of the town and putting it in the City through annexation. In view of the long history of bitter legislative and judicial battles between the cities and towns over the extension and preservation of boundaries,[18] the City's suggestion that the legislature intended by the enactment of § 236.45, STATS., to give the central city the power to compel a subdivider to annex his or her subdivision in order to obtain plat approval is pure whimsy.

The right to select where one will live is a political right which, under Wisconsin law, may only be settled through the political process of annexation. In ***Town of Fond du Lac v. City of Fond du Lac***, 22 Wis.2d 533, 126 N.W.2d 201 (1964), the court held that the right of a person to vote to annex to a city is a political right and must be the elector's "individual act ... discharging his duty in shaping and influencing this particular affair of government." ***Id***. at 539, 126 N.W.2d at 204 (quoting ***DeBauche v. City of Green Bay***, 227 Wis. 148, 154, 277 N.W. 147, 149 (1938)).

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[18] *See* Joel J. Rabin, *Changes In Wisconsin Annexation Proceedings and Remedies*, 1961 WIS. L. REV. 123 (Inadequate laws "often led to bitter contests between neighboring municipalities or citizen groups and to long and costly litigation."). The 1955 legislature directed the Legislative Council to study the problems created by these inadequate laws. ***Id***. at 125. In the 1957 session the State Senate resolved itself into a Committee of the Whole to hear this writer and the legislative representative of the Wisconsin Towns Association debate the merits of the Legislative Council's recommended Bill No. 5, S. (1957), revising the annexation and incorporation laws. It is difficult to appreciate almost forty years later how vexing the annexation and incorporation problems were.

The pages of the WISCONSIN REPORTS are liberally sprinkled with cases describing contests between the central cities and the adjacent towns as to the validity of annexations. For years, the legislature was the forum for titanic struggles between the towns and the cities to gain or oppose legislation easing or making annexation more difficult. The so-called Oak Creek Bill[19] resulted in banding the City of Milwaukee with an iron ring of incorporated "towns" which settled forever the question of annexation to the City. That law was used by the Town of Fitchburg to seal its boundaries against encroachment by the City of Madison. *See* ***City of Madison v. Town of Fitchburg***, 112 Wis.2d 224, 332 N.W.2d 782 (1983). It is impossible for me to accept that the legislature in 1955 (ch. 570, Laws of 1955), in the heat of the annexation strife, gave to the cities the power to avoid the political process of annexation through exercise of plat approval authority.[20]

The City's view of § 236.45, STATS., as a dramatic expansion of the authority of cities over extraterritorial development has no basis in history. The Note to § 236.45 in Bill No. 20, S. (1955) states: "This section is very similar to the present s. 236.143." True, the legislature gave cities extraterritorial plat approval authority, but the nature of that authority--quality control--remained unchanged. Further, the legislature made very clear that the central city's plat approval authority did not extend to placing restrictions on plats that the town would have to administer or enforce. In § 236.45(3), the legislature required that a final plat dedicating land must be approved by the governing body of the

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[19] *See* ***City of Milwaukee v. Town of Oak Creek***, 8 Wis.2d 102, 98 N.W.2d 469 (1959).

[20] My dissenting colleague states that "many annexations are coerced" but he does not cite any authority for this proposition. Perhaps he refers to the process by which an annexation is proposed by some other property owner. However, in such a case or when the central city itself initiates an annexation proposal, a majority of the electors or landowners or both must vote to annex. That is not coercion; it is part the democratic process.

town or municipality in which the land is located. The Plan Commission's condition that Hoepker "reserve" a recreational trail imposes on the Town of Burke the duty to enforce the restriction. Section 236.29(1), STATS., provides that "the land intended for the streets, alleys, ways, commons or other public uses as designated on said plat shall be held by the town, city or village *in which such plat is situated* in trust to and for such uses and purposes." (Emphasis added.)

The Plan Commission's requirement that Hoepker "reserve" a "broad corridor" for a recreational trail makes it difficult, if not impossible, for the Town of Burke to require Hoepker to dedicate streets, school sites, playgrounds, tot-lots and other open spaces required to serve the subdivision. There is a limit to how much of an owner's land municipalities may take in the exercise of the police power. It is unreasonable to construe § 236.45, STATS., to permit the city in which the subdivision is not located to impose onerous requirements as a condition for its approval which make the town's exercise of its approval authority illusory.

The cities' need for expanded plat approval authority did not generate the revision of ch. 236, STATS., by ch. 570, Laws of 1955. In fact, the legislature was primarily concerned with decreasing the incentive for evading the subdivision law by easing the burdens upon the subdivider "with particular regard to the individual's rights to the use of his land." Report of Wisconsin Legislative Council, *Objective V*, at 18 (1955). "Both the judiciary committee and its advisory committee devoted most of their time to this problem." ***Id***. One of the committees' approaches was to protect the subdivider from arbitrary government regulation which the committees found to exist "because the [existing] statute does not contain many of the traditional safeguards accorded an individual who must comply with governmental regulation." ***Id***. at 19. It is hard to imagine requirements more likely to encourage evasion of the subdivision law than being compelled to annex to the city as a condition of plat

approval and being required to "reserve" a substantial part of a subdivision for the city's eventual and uncompensated use.

The City justifies its annexation condition on the grounds that the subdivision will not be served with adequate public facilities and services, including public sewer and water and fire protection. However, the legislative history of ch. 236, STATS., shows that the legislature did not intend by its revision of the subdivision laws to interfere with the autonomy of local governments. The condition which the City is primarily concerned with is lack of public sewer. Hoepker Heights will presumably be served by private on-site septic systems. However, the legislature anticipated that subdivisions would be served with private systems. It provided:

> If the subdivision is not served by a public sewer and provision for such service has not been made, the department [of agriculture, trade and consumer protection] shall transmit 2 copies [of the plat] to the department of industry, labor and human relations so that agency may determine whether it has any objection to the plat on the basis of its rules as provided in s. 236.13.

Section 236.12(2)(a), STATS.

Any subdivision approved and developed in a town in Dane County must comply with the county's and the state's regulations as to the provision of sewer and water. The City's position, however, is that no development shall occur except "within the framework of the City of Madison's high development standards." But the City fails to show that it is ready to provide Hoepker Heights with urban services.

The Plan Commission's conditional approval (in reality a rejection) of the Hoepker Heights plat is based primarily on the failure of the plat to conform to the Rattman Neighborhood Development Plan which recommends that the lands included in the proposed Hoepker Heights subdivision be continued for low-density open space and rural uses. The Plan states that "additional residential subdivision and development (similar to the existing single-lot uses along Portage and Hoepker Roads) and commercial development of any kind are not recommended."

The resolution approving conditionally the preliminary plat of Hoepker Heights further states as to the Rattman Neighborhood Development Plan: "The neighborhood plan also recommends, *in the event that, at some future time, full urban services are provided* and some additional residential and subdivision and development is permitted in the area, that a substantial open space corridor be maintained along both the north and south frontages of Hoepker Road." (Emphasis added.) The Planning Unit Report of the Department of Planning and Development states:

> The City of Madison has constructed sewer lines serving portions of the American Center development to the south of this proposed plat. However, at this time, serving the proposed plat by these existing lines would require building a lift station and force main. The most efficient way to provide sanitary sewer service to the proposed plat would be by gravity flow to additional sewer lines that will *eventually* be constructed to serve future development in the upper part of [t]he American Center. *The proposed plat is not within the Central Urban Service Area (CUSA) and sewer service could not be extended, in any case, unless the CUSA were amended to include these lands.*

(Emphasis added.) Thus, what the City offers the Hoepkers is merely the hope that some day they may be able to make a profitable use of their land. Until such time as the City is able and willing to provide full urban services, it will then (presumably) approve platting of Hoepker Heights, provided, of course, that the Hoepkers are willing to donate to the City a substantial open space corridor.

The impetus for the study of Wisconsin's subdivision laws came from complaints of land developers that cities and other approving authorities were imposing arbitrary and burdensome conditions upon the development of land. The Judiciary Committee of the Legislative Council and its Advisory Committee, describing the background of the study of the subdivision laws, stated:

> Subdividers, attempting to meet state and local requirements for their proposed subdivisions, are equally concerned with the operation of the subdivision law. They complain that, sometimes, in the interest of safeguarding the community from undesirable development and unnecessary expense, community officials request concessions which are prohibitively expensive or make decisions which are little short of arbitrary.

Report of Wisconsin Legislative Council Report at 8.

To review possible arbitrary action, the legislature adopted an appeal procedure by which any person aggrieved by a failure to approve a plat may appeal by statutory *certiorari*. Section 236.13(5), STATS. The Note to this

subsection states that its purpose is "to safeguard the rights of the subdivider." Bill No. 20, S. at 16.

My dissenting colleague refuses to consider the legislative intent in revising the state's subdivision control laws in 1955. He decries, for example, comments by legislative staff. Apparently my colleague is unaware that the Joint Legislative Council is part of the legislative branch. SUBCHAPTER IV, LEGISLATIVE SERVICE AGENCIES. Section 13.82, STATS., provides in part: "For the purpose of providing information to the legislature, the joint legislative council may appoint committees consisting of members of the legislature and of citizens having special knowledge on the subject assigned by the council to be studied." A committee appointed by the legislative council "[s]hall make recommendations for legislative or administrative action on any subject or question it has considered ...." Section 13.82(1)(c). The revision of ch. 236, STATS., including the creation of § 236.45, resulted from a study made by the Judiciary Committee of the Legislative Council, and an Advisory Committee created by the Judiciary Committee. The study resulted from a direction by the legislature to the Legislative Council to study the need for revision of ch. 236. The Legislative Council prepares a biennial report of its activities for the Governor and the legislature. Section 13.81(3), STATS. The danger of the kind of legislative history to which my dissenting colleague refers is that statements of intent are frequently self-serving. That can hardly be said of the biennial report of the Legislative Council in which it reports to the legislature on matters which have been referred to the Council for study. It does not contribute to responsible debate as to the meaning of legislation to denigrate or, worse, ignore the report of the Legislative Council as to its recommendations for needed legislation on a subject referred to it by the legislature.

On its merits, the City's conditions for approval of the Hoepker Heights subdivision will not survive judicial scrutiny. It is unreasonable and arbitrary for the City to exercise, in the guise of plat approval, zoning-type controls. That was established in ***Gordie Boucher***. It is also unreasonable and

arbitrary for the City to refuse to allow a landowner to develop his or her land until the City is ready to provide the full range of urban services.

Finally, the following condition of approval constitutes a taking of Hoepker's land without just compensation: "Reconfiguration of the plat to provide an adequate open space corridor along the south frontage of Hoepker Road for a future recreational trail location." This condition is imposed pursuant to the Plan Commission's Peripheral Area Development Plan which recommends an open space area in Hoepker Heights "as buffer area separating the office area from the low density rural/exurban area to the north, and as a part of a broader corridor recommended to connect Cherokee Marsh Token Creek County Park and the proposed open space corridor between the Cities of Madison and Sun Prairie." The condition is also required under the Rattman Neighborhood Development Plan which recommends "in the event that, at some future time, full urban services are provided and some additional residential subdivision and development is permitted in the area, that a substantial open space corridor be maintained along both the north and south frontages of Hoepker Road."

The City argues that the open space restriction does not amount to a taking because: "The condition only requires the plat to state with a notation on the affected lots that a certain portion of each lot is reserved for future development of a recreational trail.... The City is not requiring a dedication of fee title, easement or any other kind."

Plainly, the City has overlooked § 236.29, STATS., which provides:

> (1) When any plat is ... recorded ..., every donation or grant to the public ... shall be deemed a sufficient conveyance to vest the fee simple of all parcels of

> land so marked or noted ...; and the land intended for ... public uses as designated on said plat shall be held by the town, city or village in which such plat is situated in trust to and for such uses and purposes.
>
> (2) When a final plat ... is recorded, that approval constitutes acceptance for the purpose designated on the plat of all lands shown on the plat as dedicated to the public including street dedications.

It is clear therefore that when the Hoepker Heights final plat is recorded, the open space area noted on the plat will be dedicated to the public, to be held in trust by the Town of Burke. The Judiciary Committee of the Legislative Council recommended that the law be clarified to make certain that the public body requiring a restriction have the right to enforce it. Report of Wisconsin Legislative Council at 14. This recommendation was implemented in § 236.10(3), STATS., which provides in part: "Final plats dedicating streets, highways or other lands shall be approved by the governing body of the town or municipality in which such are located." The City Plan Commission cannot compel the Town of Burke to accept a dedication or reservation required by the City Plan Commission. The Town Board could require as a condition of its approval that any restriction placed on the plat by the Plan Commission be deleted because the Town Board refuses to require such restriction or dedication. This is not a matter which is solely between the City and the Hoepkers; the Town of Burke is very much involved. Not only would it have the responsibility to enforce the restriction but it would have to take into account the open space corridor dedicated by the Plan Commission's restriction in imposing its own public site and open space requirements.

The majority finds authority for the City's reservation requirement in § 16.23(3)(a)2.c.ii, MGO. I applaud the majority's diligence in ferreting out this provision which was not relied on by the Plan Commission or the Common

Council in imposing the recreational trail restriction. One of the legitimate complaints of land developers addressed by the legislature in revising ch. 236, STATS., was the failure of cities and other approving authorities to state in writing their reasons for failing to approve a plat. The Committees stated that: "This is one of the areas in which the present statute appears to be the most deficient." Further, the City does not argue that it imposed its reservation requirement pursuant to this authority. Thus, the Hoepkers have not been given an opportunity to show why reliance on this ordinance provision is inappropriate. Section 16.23(3)(a)2.c.ii provides in part that where public ground shown on the City's master plan is located within a proposed subdivision, such ground may be dedicated to the public or reserved for five years for acquisition by the City, Dane County, the town in which it is located or any other appropriate agency. The City does not claim that its required reservation has a limited life. That condition is imposed solely by my colleagues. Plainly, it is inappropriate for this court to be imposing conditions upon the City's approval of a plat.

Further, if the open space restriction is authorized at all by the City's ordinance, it would be authorized under § 16.23(3)(a)2.c.i, MGO, which provides:

> Whenever a parcel to be subdivided embraces any part of a street, highway *or greenway* designated in said master plan or official map, such part of such proposed public way shall be platted and dedicated by the subdivider in the location and at a width indicated along with other streets in the subdivision.

(Emphasis added.)

It is undisputed that the area the City seeks to reserve lies within the open space greenway corridor between the Cities of Madison and Sun Prairie. Thus, the appropriate ordinance requires a dedication of the greenway, not merely a reservation for future acquisition.

The majority assumes that until the City, Dane County or the Town of Burke acquires the land, the Hoepkers or lot owners will be able to exclude others from using the dedicated area. Unfortunately, § 236.29, STATS., takes away that right because, upon recording of the final plat, every reservation or dedication shown on the plat becomes held by the Town in trust solely for public use.

In view of the City's lack of statutory authority to impose the open space corridor "reservation" little need be said as to whether the reservation or dedication constitutes a "taking" without just compensation. However, the striking similarity between the dedication required by the City and that required by the City of Tigard in ***Dolan v. City of Tigard***, 114 S. Ct. 2309 (1994), deserves note. As a condition for obtaining a building permit, the City of Tigard, Oregon, required Dolan to dedicate a fifteen-foot pedestrian/bicycle pathway to encourage alternatives to automobile transportation. ***Id***. at 2313. The Madison Plan Commission would require Hoepker to dedicate an undefined recreational trail to connect a proposed open space preservation area with Token Creek County Park and Cherokee Park. In each case, the owner of the land would lose the right to exclude others--"one of the most essential sticks in the bundle of rights that are commonly characterized as property." ***Id***. at 2316 (quoting ***Kaiser Aetna v. United States***, 444 U.S. 164, 176 (1979)).

The Madison Plan Commission's condition of dedication, if authorized by ch. 236, STATS., would not violate the Takings Clause of the Fifth Amendment if the Commission could demonstrate a "rough proportionality" between the condition and a need generated by Hoepker's proposed

subdivision. A sixty-two home development must be served by streets, sidewalks, parks, school sites, playgrounds, tot-lots, and other recreational areas, perhaps including hiking and recreational trails. However, the Plan Commission does not claim that the recreational trail is required to serve Hoepker's subdivision; the subdivision just happens to lie in the path of the master plan's greenway corridor intended to serve the needs of the public generally. One of the purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." ***Armstrong v. United States***, 364 U.S. 40, 49 (1960), *quoted in* **Dolan**, 114 S. Ct. at 2316.

I agree with Mayor Soglin that a city must plan for development beyond its boundaries which may someday become part of the city. However, planning is one thing; the taking of property is another. A city may exercise its police power for the common good; but when it takes property for that purpose, it must, in fairness and in law, compensate the landowner therefor.

For these reasons, I concur in part in our decision and dissent in part from the decision.