STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 MARATHON COUNTY

STATE OF WISCONSIN ex rel.
CITY OF WAUSAU and JAMES E. TIPPLE,
Plaintiff,
and

PATRICK SCHMITT, DUANE CALMES,
JAMES KOEHLER, GWTW, LLC,
and WITTER'S DAIRY FARM, INC.,
Intervening Plaintiffs,
vs.

VILLAGE OF MAINE,
BOARD OF SUPERVISORS OF THE TOWN OF MAINE,
BETTY HOENISCH, TAD SCHULT, and KEITH RUSCH,
Defendants/Third-Party Plaintiffs,
vs.

CITY OF WAUSAU,
Third-Party Defendant.

Case No. 16-CV-74

DECISION ON MOTION FOR SUMMARY JUDGMENT

The City of Wausau and its mayor, James E. Tipple, brought this action on behalf of the State, acting as private attorneys general as provided under the Open Meetings Law. They were subsequently joined by five landowners in the former Town of Maine. The relators and the intervenors all contend that the defendants violated the Open Meetings Law at seventeen meetings held between January and October 2015, all of which concerned the Town of Maine's plan to incorporate into a village as part of a cooperative plan to deal with the financial collapse of the Village of Brokaw. They further contend that, as a result of those violations, there was not enough time for the City to annex property from the Town of Maine, including but not limited to the property owned by the intervenors. The City passed annexation ordinances anyway, even though they were not approved until after the citizens of the Town of Maine had voted to approve the incorporation referendum.

Last fall, the Court decided the defendants' motion to dismiss, declaring that the town's votes approving the cooperative plan and the incorporation referendum cannot be invalidated because those votes were taken at meetings which have not been alleged to have violated the Open Meetings Law. What the Court left unsaid was that invalidating the incorporation referendum was the only way that the City's

subsequent annexation ordinances could possibly be upheld, since only township property can be annexed. But now that issue needs to be specifically addressed.

That need arises in the context of the motion filed by the defendants/third-party plaintiffs for summary judgment on their third-party complaint seeking a declaration that the City's annexation ordinances are invalid.[1] The defendants argued that summary judgment on the third-party claim is a logical extension of the Court's earlier decision on their motion to dismiss, while the City asserted that the Court could still uphold the validity of the annexation ordinances even without invalidating the Village's incorporation. But what the City wants the Court to do has no basis in law.

ANALYSIS

In the Decision on Motion to Dismiss, the Court held that the Open Meetings Law does not permit courts to invalidate actions taken at meetings that did not violate the Open Meetings Law.

> Under Wis. Stat. §19.97(3), "[a]ny action taken at a meeting of a governmental body held in violation of this subchapter is voidable." Voidable actions may be declared void if "the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken." *Id.* Thus, the only actions that can be declared void are those which are voidable, and the only actions which are voidable are those taken at a meeting held in violation of the Open Meetings Law. *State ex rel. Herro v. Village of McFarland*, 2007 WI App 172, ¶22, 303 Wis. 2d 749, 737 N.W.2d 55; *State ex rel. Epping v. City of Neillsville*, 218 Wis. 2d 516, 524 n.4, 581 N.W.2d 548 (Ct. App. 1998).

(Decision on Motion to Dismiss, pp. 3–4.) And, because the two resolutions that led to the incorporation referendum were taken at meetings that were not alleged to have violated the Open Meetings Law, those resolutions could not be invalidated — and, therefore, neither could the Village's incorporation. (*Id.* at pp. 4–6.)

In reaching that conclusion, the Court specifically rejected the idea that another provision in the Open Meetings Law, §19.97(2), contained the power to invalidate proceedings that could not be invalidated under sub. (3). Under §19.97(2), courts can grant "such other legal and equitable relief . . . as may be appropriate under the circumstances." But if sub. (2) could be used in that manner, it would entirely swallow sub. (3):

> [The] grant of authority [under sub. (2)] cannot include the power granted under sub. (3) to invalidate governmental actions. If the same power could be found under sub. (2), then sub. (3) would be entirely superfluous, which

---

[1] For the sake of brevity, the Court will simply refer to the moving parties as "the defendants," even though it is really in their capacity as third-party plaintiffs that they have brought the pending motion.

> is a result that courts must avoid. *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). Thus, the power to invalidate governmental actions flows only from sub. (3) and extends only to those "actions taken at a meeting of a governmental body held in violation" of the Open Meetings Law. Wis. Stat. §19.97(3).

(*Id.* at p. 6.)

The City is not arguing that any of the foregoing rulings should be reconsidered or changed. It is not arguing that the Village of Maine's incorporation should be undone. But it is still relying on §19.97(2), arguing that the relief appropriate under the circumstances would be to allow the City to annex portions of the Village of Maine — even though village property is not otherwise subject to annexation.

This appears to be an entirely novel concept. By statute, annexation can only affect property in a township. That lesson is apparent in Wis. Stat. §66.0217(2), which says that a petition for annexation must be filed with the town clerk "of the town or towns in which the territory is located" — thus, the territory to be annexed must be in a township. No statutory authority exists for a city to annex part of a village.

In fact, until now, the City was not making such a novel argument. The original complaint in this action, filed by the City and its mayor, acknowledged that "[a]nnexation and incorporation are statutory methods by which unincorporated territory transfers ***from the jurisdiction of a town*** to a city or village." (Complaint, ¶20) (emphasis added). But in the course of writing its briefs in opposition to the pending summary judgment motion, the City gradually developed this new argument. In its first opposition brief, the City argued simply that the Court could uphold the validity of the annexation ordinances as part of the remedial relief authorized by Wis. Stat. §19.97(2). (Plaintiffs' and Third-Party Defendant's Brief in Opposition, pp. 2–3, 7–10.) The City offered no precedent for such an action, but argued that if the Court cannot order annexation under §19.97(2), "the available remedies [will be] toothless." (*Id.* at p. 9.) Then, in its rebuttal brief, the argument developed further, adding reliance on the doctrine of estoppel. What the Court should do, the City argued, is find that the defendants are equitably estopped from disputing the validity of the annexation ordinances. (Plaintiffs' and Third-Party Defendant's Rebuttal Brief, pp. 5-8.)

But the City's argument overlooks a fundamental fact: village territory is not subject to annexation. That was the import of the defendants' citation to Wis. Stat. §66.0217(2): that the only territory subject to annexation is territory that is located in a "town or towns" — not merely that the petition needs to be filed with the town clerk. The requirement that the property to be annexed be town property is a barrier that cannot be overcome by estoppel. This is not simply a matter of preventing the defendants from asserting a defense like statute of limitations or lack of proper

notice, as the City had argued; it is a matter of trying to use estoppel to accomplish a result that the law simply does not allow.

Thus, regardless of what else happens with the underlying Open Meetings claims, the remedy here cannot and will not involve upholding the validity of the City's annexation ordinances. Consequently, the defendants are entitled to summary judgment on their third-party complaint declaring those annexation ordinances invalid.

CONCLUSION

The relators initially brought this action in order to invalidate the two resolutions of the former Town of Maine that led to the Town's incorporation, but last fall, the Court declared that those two resolutions cannot be voided in this action. Now that undoing Maine's incorporation is off the table, the City is attempting to uphold the validity of its subsequent annexation ordinances by arguing that the Open Meetings Law would allow the Court to estop the Village from disputing the validity of those ordinances. But the City cannot escape the fact that only township territory can be annexed, and because the ordinances are an attempt to annex village property, they are invalid.

THEREFORE, IT IS HEREBY ORDERED that the defendants'/third-party plaintiffs' motion for summary judgment is granted. The Court hereby declares that any existing or future ordinances purporting to annex property from the Village of Maine to the City of Wausau are void and unenforceable.

Because this decision does not fully dispose of the case as to any party, it is not final for purposes of appeal.[2]

Dated this 18 day of May, 2017.

BY THE COURT:

Jill N Falstad

HON. JILL N. FALSTAD
Circuit Court Judge

[2] "A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more parties. . ." Wis. Stat. §808.03(1). While this decision disposes of the third-party claim, all of the parties to the third-party claim remain in this lawsuit as parties to the underlying Open Meetings claims.