COURT OF APPEALS
DECISION
DATED AND RELEASED

June 19, 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. 95-2344

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

CHESTER A. BAHR and LU ANN BAHR, husband and wife, DALE A. BAHR and VICKY BAHR, husband and wife, TOWN OF SHEBOYGAN, TOWN OF SHEBOYGAN SANITARY DISTRICT NO. 2 and TOWN OF SHEBOYGAN SANITARY DISTRICT NO. 3 (WATER),

Plaintiffs-Appellants,

v.

CITY OF SHEBOYGAN,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

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

PER CURIAM. This is an appeal from a judgment affirming the validity of an annexation ordinance adopted by the City of Sheboygan. We affirm the judgment that the annexation complies with the "rule of reason."

The City filed the annexation petition. Annexation was opposed by the appellants, Chester, LuAnn, Dale and Vicky Bahr, owners of twenty acres of property annexed; the Town of Sheboygan and the Town of Sheboygan Sanitary Districts No. 2 and 3. The annexation splits the Bahrs' property between City and Town authority. The Town and the Sanitary Districts constructed and operate a water supply system adjacent to the annexed property.

The parties agree that ***Town of Menasha v. City of Menasha***, 170 Wis.2d 181, 188-90, 488 N.W.2d 104, 107-08 (Ct. App. 1992), sets forth the applicable considerations for reviewing an annexation ordinance and our standard of review of the circuit court's decision regarding annexation. We need not repeat these tests verbatim. It is sufficient to note that the three pronged "rule of reason" doctrine is utilized in assessing whether annexation is invalid because it is arbitrary and capricious or an abuse of the municipality's discretion. *See* ***id.*** at 189, 488 N.W.2d at 108.

All three prongs require factual inquiries to be made by the circuit court. ***Id.*** at 189-90, 488 N.W.2d at 108. We will not reverse factual findings unless clearly erroneous. ***Id.*** at 190, 488 N.W.2d at 108. For purposes of appellate review, the evidence supporting the court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979).

The first requirement under the rule of reason is that exclusions and irregularities in boundary lines must not be the result of arbitrariness. ***Town of Menasha,*** 170 Wis.2d at 189, 488 N.W.2d at 108. The issue of arbitrary boundaries generally arises when landowners or electors opposed to annexation are excluded to ensure the success of the annexation. ***Id.*** at 190-91, 488 N.W.2d at 108-09. That is exactly what the appellants contend happened here by the City's exclusion from the annexation of four parcels of property.

The circuit court found that the annexation was for the purpose of bringing to the City suitable vacant land for future residential development. As to each of the four parcels, the circuit court found that the City had logical reasons for excluding them from the boundaries of the annexation. The City-owned parcel was not suitable for supporting residential development because it contained high-quality wetlands. The remainder of the Bahr property and the two Dhein parcels were already devoted to particular uses not consistent with the desire for vacant land for residential development. The circuit court also found that the City had divided the Bahr property by using the tax parcel line for ease of administration. These findings are not clearly erroneous and support a determination that the City did not act arbitrarily in setting the boundaries of the annexation.

The rule of reason secondarily requires the City to show some reasonable present or demonstrable future need for the annexed property. ***Id.*** at 189, 488 N.W.2d at 108. "This requirement is not satisfied by showing that the territory sought for annexation is merely desirable, better than that already controlled, or that a particular city will best be able to provide service to the territory." ***Id.*** at 194, 488 N.W.2d at 110.

To demonstrate a need for the annexed property, the City advanced the need to maintain and increase its tax base, the need for area to accommodate residential development and the need to service city properties north of the annexed property. The circuit court found that the City had demonstrated how an increased tax basis was important for the City. It also found a need for the City to have property suitable for future residential development to the north of the City. Inclusion of the Bahr property was found to be necessary to facilitate good planning for providing services to annexed property north of the Bahr property. The circuit court's findings are supported by the evidence.

We conclude that the City showed a need for the annexation. We reject the appellants' contention that the Bahrs' desire to have their property remain within the township negates the City's need. The sensitivity to a property owner's desire to be located in a particular municipality is most appropriate in assessing needs where property owners themselves petition for annexation. *See* ***Town of Delavan v. City of Delavan***, 176 Wis.2d 516, 539, 500 N.W.2d 268, 276 (1993). The appellants argue that because the Bahrs have

disavowed any intent to develop their property, the City's need for their property for residential development is fiction. However, the determination of whether the annexation is in the best interest of a city's future development is not a judicial determination. *See* ***id.*** at 540, 500 N.W.2d at 277. Once the annexing authority shows any reasonable need for the annexation, the courts must respect the legislative decision to annex. ***Town of Menasha***, 170 Wis.2d at 194, 488 N.W.2d at 110.

The final prong of the rule of reason doctrine is that no other factors exist which constitute an abuse of discretion on the part of the municipality. ***Id.*** at 189, 488 N.W.2d at 108. The appellants argue that the City has abused its discretion by acting in a deliberate manner which attempts to thwart Town development. The Town points to the City's quick purchase of land over which the Town sought a water easement and the City's subsequent refusal to grant the easement as evidencing the City's goal to hinder Town development.

The circuit court found that early on the City had long-range plans to service the annexed area with water and sewer and that the Town was aware of such plans. The City's purchase of the other property and refusal to grant the easement were consistent with development plans. Indeed, it was found that the Town had configured its water system to a new subdivision not for engineering reasons but to stop city development. These findings are not clearly erroneous. The circuit court correctly concluded that there was no unfairness in the City's annexation.

The appellants also contend that an abuse of discretion exists because the City annexed property that it is legally prohibited from serving with the municipal water supply system. The injunction imposed in the companion case of ***Town of Sheboygan, Town of Sheboygan Sanitary District No. 3 (Water), et al. v. City of Sheboygan***, No. 95-1839, (Wis. Ct. App. June 19, 1996), has been reversed on appeal. This argument is moot and will not be considered.

Finally, the appellants argue that the City abused its discretion by adopting the annexation ordinance before reviewing the advice of the Department of Administration. It appears that this argument is raised for the

first time on appeal. We generally will not review an issue which is raised for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983).

The issue is without merit. In response to the City's notice of the proposed annexation, the Department of Administration issued an opinion on June 7, 1994, that the annexation was not against the public interest. Although the letter indicated that a separate letter would follow discussing some of the issues relating to the annexation, nothing required the City to wait for the additional letter before acting. Section 66.021(11)(a), STATS., requires a municipality to review the advice of the Department of Administration before taking final action if an opinion is issued that the annexation is against the public interest. The City was not legally prohibited from adopting the annexation ordinance on July 18, 1994.

We conclude that there are no other factors suggesting that the City abused its discretion in annexing the property. The rule of reason is satisfied.

By the Court.—Judgment affirmed.

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