STATE OF WISCONSIN CIRCUIT COURT BRANCH 16 DANE COUNTY

In the Matter of the INCORPORATION OF THE TOWN OF MIDDLETON, Dane County, Wisconsin, as a Village Pursuant to the Provisions of Chapter 66 of the Wisconsin Statutes.

Case No.: 2025CV2453

Case Code: 30703

PETITIONER'S RESPONSE TO THE OPPOSITION BY THE CITY OF MIDDLETON TO THE PETITION TO INCORPORATE BY THE TOWN OF MIDDLETON

I. INTRODUCTION.

The opposition by the City of Middleton ("City") to the Petition for Incorporation by the Town of Middleton ("Town") assumes that greater pleading particularity is required beyond what the law supports. Wis. Stat. §802.03(2) requires that allegations of fraud or mistake must be alleged with particularity, including the circumstances constituting fraud or mistake. See *Ferris v. Location 3 Corp*, 2011 WI App 134, ¶ 10, 337 Wis.2d 155, 804 N.W.2d 822 (particularity means "who, what, when, where and how"). This particularity, however, is not applicable to the Town's Petition for Incorporation in this case. The City, however, seemingly demands such particularity as the premise to its objection to the Town's Petition.

The City misapprehends the distinction between fact and law in its argument. As a result, the City incorrectly dismisses factual allegations in the Petition as mere legal conclusions. Such allegations of fact, however, are to be accepted as true for purposes of pleading.

The Town's Petition apprises the City of the issues pertinent to incorporation. The incorporation procedure, moreover, ultimately vests merits decisional authority in a state administrative agency, the Incorporation Review Board, upon referral from the circuit court. See

Wis. Stat. § 66.0203(8)(b). Here, the Town's Petition meets the pleading threshold for such referral for merits consideration.

II. APPLICABLE PLEADING STANDARD.

A petition for incorporation is a special proceeding to which the Wisconsin Rules of Civil Procedure are generally applicable. *In re Incorporation of Town of Fitchburg*, 98 Wis. 2d 635, 653-54, 299 N.W. 2d 199 (1980). Those rules set forth a liberal pleading standard, recognized in *Strid v. Converse*, 111 Wis. 2d 418, 331 N.W. 2d 350 (1983). (In *Cattau v. National Insurance Services of Wisconsin, Inc.*, 2019 WI 46, ¶ 7-8, 386 Wis. 2d 51, 926 N.W. 2d 756, the Wisconsin Supreme Court acknowledged that the pleading standard articulated in *Strid* was unchanged by the Court's decision in *Data Key Partners v. Permira Advisors, LLC*, 2014 WI 86, 356 Wis. 2d 665, 849 N.W. 2d 693.) All that is required by that pleading standard is a "short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief" together with a "demand for judgment for the relief" sought. Wis. Stat. § 802.02(1)(a)-(b). *Wildwood Estate, LLC v. Village of Summit*, 2025 WI App 47, ¶ 17, 418 Wis. 2d 22, 25 N.W. 3d 581. Pleadings, moreover, are to be "liberally construed as to do substantial justice." *Id*., quoting Wis. Stat. § 802.02(6). Litigation is a serious exercise in the pursuit of truth and justice, not "a game of skill in which one misstep by counsel may be decisive of the outcome." *Id*, quoting *Tews v. NHI, LLC*, 2010 WI 137, ¶ 62, 330 Wis. 2d 389, 793 N.W. 2d 860.

The Wisconsin Rules of Civil Procedure, effective January 1,1976, "are intended to facilitate the orderly adjudication of disputes." *CED Properties, LLC v. City of Oshkosh*, 2014 WI 10, ¶ 20, 352 Wis. 2d 613, 843 N.W. 2d 382, quoting *Krakow v. General Casualty of Wisconsin*, 117 Wis. 2d 187, 193, 344 N.W. 2d 108 (1984). The Wisconsin Supreme Court further explained this operative rationale:

> We have explained that "this functional approach to pleading reflects a determination that the resolution of legal disputes should be made on the merits of the case rather than on the technical niceties of pleading." *Id* at 193, 344 N.W. 2d 108. "A complaint that might have failed under the old procedure for failure to state sufficient facts now will be sustained if reasonable notice is given to the Defendant in respect to the nature of the claim." *Anderson v. Continental Insurance Company*, 85 Wis. 2d 675, 684, 271 N.W. 2d 368 (1978).

CED Properties, 2014 WI 10 at ¶ 21.

III. APPLICABLE INCORPORATION PROCEDURE.

The procedure for incorporation of villages and cities is detailed in Wis. Stat. § 66.0203. (A true and correct copy of the applicable incorporation statutes are attached for convenience as **Exhibit A**.)

The incorporation procedure begins with publication of a Notice of Intention before the circulation of an incorporation petition. Section 66.0203(1). The requirements for the petition are stated in § 66.0203(2), specifying the number of persons who must sign a petition as well as the substance of the petition. Section 66.0203(2)(c) states:

> The petition shall designate a representative of the petitioners, and an alternate, who shall be an elector or freeholder in the territory, and state that person's address; describe the territory to be incorporated with sufficient accuracy to determine its location and have attached to the petition a scale map reasonably showing the boundaries of the territory; specify the current resident population of the territory by number in accordance with the definition given in s. 66.0201(2)(dm); set forth facts substantially establishing the required standards for incorporation; and request the circuit court to order a referendum and to certify the incorporation of the village or city when it is found that all requirements have been met.

After the petition has been circulated and signed, the petition needs to be filed with the circuit court in a county in which all or a major part of the territory to be incorporated is located. Section 66.0203(2)(b). The circuit court then schedules a hearing to consider whether the standards under § 66.0205 are met. If the court finds that the standards are met, the court then

refers the petition to the Incorporation Review Board. Section 66.0203(8)(b). Section 66.0205 defines the standards to be applied by the circuit court at the hearing to consider the sufficiency of the petition.

Section 66.0205, entitled "Standards to be applied by the circuit court," states that "before referring the incorporation petition as provided in s. 66.0203(2) to the board, the court shall determine whether the petition meets the formal and signature requirements and shall further find that the following minimum [area] requirements are met."

After the court refers an incorporation petition to the Incorporation Review Board, the Board considers on the merits whether the petition should be granted or dismissed. Section 66.0203(9). As part of this process, the Board conducts any necessary investigation to apply the standards of § 66.0207. Any party in interest, moreover, may request a hearing before the Board to address relevant issues. Section 66.0203(9)(b).

After the Board's own investigation, or hearing conducted upon request, the Board prepares findings and determinations based upon supporting evidence, and the Board either dismisses the petition, grants the petition, or dismisses the petition with a recommendation that a new petition be submitted in accordance with the Board's findings and determination. Section 66.0203(9)(d) and (e).

The standards to be applied by the Board in reaching its merits decision are stated in § 66.0702(1)(a) and (b). These standards include the requirement that (a) a proposed village or city be reasonably homogeneous and compact, and that (b) the territory beyond the most densely populated square mile have the potential for residential or other urban land use development on a substantial scale within the next three years. Section 66.07(2) further provides that "in addition, to complying with each of the applicable standards set forth in sub. (1) and s. 66.0205" a

proposed incorporation must be "in the public interest," as determined by the Board upon consideration of tax revenue, level of services, impact on the remainder of the town, and impact on the metropolitan community.

After consideration of the standards to be applied by the Board in Wis. Stat. § 66.0207, the Board's findings and determination are to be forwarded to the circuit court. Section 66.0203(9)(d). If the Board decides to grant the incorporation petition, moreover, the circuit court then shall order an incorporation referendum. Section 66.0203(9)(f). The referendum procedure is described in § 66.0211, and if a majority of the votes in such a referendum are cast in favor of incorporation, then the clerk of the circuit court shall certify that fact to the Wisconsin Secretary of Administration, which shall issue a certificate of incorporation and record the certificate. Section 66.0211(5).

The matters raised by the City are clearly matters to be dealt with in the Board proceedings, not in court pleadings.

IV. THE CITY OF MIDDLETON MISCONSTRUES THE DATA KEY PARTNERS DECISION.

The statutory procedures for incorporation do not warrant the heightened pleading requirements urged by the City. On the contrary, in *In re The Incorporation of the Town of Port Washington*, 2001 WI App 277, ¶ 6, 248 Wis. 2d 893, 637 N.W.2d 442, the Wisconsin Court of Appeals recognized that the Legislature "purposefully imposed more stringent standards of accuracy in scale maps and legal descriptions associated with annexation petitions [in comparison to incorporation petitions]." The Court concluded that this distinction is reasonable considering the statutory procedure for incorporation, including during merits consideration by the Wisconsin Department of Administration (now by the Incorporation Review Board). The Court stated:

> The petition in an incorporation action is merely the first step in a long and arduous campaign to change the legal entity of the area under consideration. The complexities inherent in the incorporation process are realized during review by the Department of Administration. See e.g. Wis. Stat. § 66.016(1)(a). On the other hand, the complexities in the annexation process are brought to bear by the petition process itself. See e.g. Wis. Stat. § 66.021(5)(a).

Id. The Court of Appeals then concluded that if the description and map included with a petition for incorporation, when viewed together, "fairly apprise the public of the territory to by incorporated, the statute will be satisfied not withstanding certain errors or omissions." *Id* at ¶ 8.

The Wisconsin Legislature adopted the precursor to the current statutory incorporation procedure in 1959 whereby the merits consideration of a petition is made by a neutral state agency, presently the Incorporation review Board. 1959 Act 261. This procedure is described in *The Wisconsin Experience With State-Level Review of Municipal Incorporations, Consolidations, and Annexations*, 1965 Wisconsin Law Review 462, Walter K. Johnson:

> In 1959 the Wisconsin Legislature initiated a new program of state-level administrative review of changes in municipal boundaries. The review process was intended to provide an expert determination of whether proposed boundary changes are consistent with the public interest. The review responsibility was assigned to a state agency, in order that the review might be detached from the often highly charged emotional context in which such changes are typically decided. [A copy of this article is attached hereto for the convenience of the Court as **Exhibit B**.]

A 2007 article further provides useful historical and contemporary consideration of Wisconsin's incorporation procedure. *Overlooked Linkages Between Municipal Incorporation and Annexation Laws*: *An In-depth Look at Wisconsin's Experience*, The Urban Lawyer, Vol. 39, No. 2 Spring 2007, at 257, Robert D. Zeinemann. This article notes that in 1959, the Wisconsin Legislature "provided standards to be applied by a state agency (now board) that determines

whether proffered territory may incorporate." *Id* at 283. The article further describes the current incorporation procedure as follows:

> The incorporation statute spells out two sets of standards. The first gives the circuit courts review of nondiscretionary requirements pertaining to minimum population and area and sufficiency of the incorporation petition, and the second set contains more flexible standards applied by a state agency (now a review board). An incorporation petition is first submitted to the circuit court which conducts a hearing and submits the petition to the state if it meets the standards within Wis. Stat. § 66.0205. Those standards are relatively simple to meet. It is the requirements applied by the review board in Wis. Stat. § 66.0207 that are more difficult to surmount. The review board's decision is sent back to the circuit court which is required to issue an order coinciding with the board's findings. [A copy of this article is also attached hereto for the convenience of the Court as **Exhibit C**.]

Id at 298-299. *See* also *Westering v. James*, 71 Wis. 2d 462, 238 N.W. 2d 695 (1976), (discussing in detail the role and authority for administrative determinations of incorporation petitions).

The heightened pleading standard demanded by the City in this case blurs the role of the court and the Incorporation Review Board when considering incorporation petitions. The City demands allegations in the Petition on issues that are not in the province of the court to substantively determine. In effect, the City is attempting to draw the court into a merits determination that the Legislature did not delegate to the Courts to make.

The City's reliance on the Wisconsin Supreme Court decision in *In re Village of Oconomowoc Lake*, 270 Wis. 530, 72 N.W. 2d 544 (1955), is misplaced as well. In the first place, the *Oconomowoc Lake* decision long preceded Wisconsin's adoption of the notice pleading standard adopted in 1976. The *Oconomowoc Lake* decision also preceded the substantial legislative change to Wisconsin's incorporation procedure in 1959 whereby merits authority is delegated to an administrative body. Finally, the *Oconomowoc Lake* decision does not require the degree of particularity urged by the City. The Supreme Court held in that case

that a village seeking incorporation must be a "village in fact," which then needed to be specifically alleged as such, or otherwise include "allegations of such facts as would show the existence of village." *Id* at 537-538. Because the petition in that case did not include any such allegation, the Court sustained the demurrer to the petition, with leave to amend the petition to include such an allegation(s). *Id* at 538.

V. THE TOWN OF MIDDLETON'S INCORPORATION PETITION IS SUFFICIENTLY PLEADED.

The City incorrectly argues that the allegations of the Town's Petition constitute mere legal conclusions. The City relies on the Wisconsin Supreme Court's decision in *Data Key Partners*, 2014 WI 86, at ¶ 25, for the proposition that a "plaintiff's pleading obligation requires 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action,'" quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007). The City misreads both the *Data Key* and *Twombly* decisions as imposing a heightened particularity pleading requirement. The pleading deficiency in both *Data Key* and *Twombly* was the absence of factual allegations that distinguished between the possibility and plausibility of wrongful conduct. *See Data Key*, 2014 WI 86 at ¶ 21-27. *Data Key* involved a complex case involving a shareholder dispute and fiduciary duties in a publicly traded company. *Twombly* was a complex federal anti-trust case. In both cases, the pleading deficiencies related to factual allegations that were equivocal rather than definitive.

In the present case, the City mistakes the distinction between matters of fact and law and improperly conflates the two. The City treats the formal requirements of an incorporation petition as articulations of a cause of action, thereby constituting legal conclusions. *Data Key* and *Twombly*, however, do not support this transformative argument.

A question of fact typically involves matters susceptible to historical or other forms of objective proof. *Megel v. Green Bay Area Visitor & Convention Bureau, Inc.*, 2003 WI App. 230, ¶ 13 and fn. 4, 267 Wis. 2d 800, 672 N.W. 2d 105 ("To use Morris's language, these are descriptive questions-the history, the happening of events. That is why they are questions of fact."). Thus, even ultimate conclusions, may be treated as matters of fact. *Ceplina v. South Milwaukee School Board*, 73 Wis. 2d 338, 342, 243 N.W. 2d 183 (1976). And the drawing of a conclusion from otherwise undisputed facts, therefore, may also "constitute a finding of an ultimate fact and not a conclusion of law." *Gant v. Industrial Commission*, 263 Wis. 64, 69, 56 N.W. 2d 525 (1953).

Here, the substance of the Town's Petition to which the City objects constitutes matters of fact rather than law. Similar issues also are treated as matters of fact when decided by the Incorporation Review Board when making determinations of the merits of incorporation petitions. *Cf. Town of Pleasant Prairie, Kenosha County v. Department of Local Affairs and Development*, 108 Wis. 2d 465, 476, 322 N.W. 2d 486 (1982) (reviewing merits determinations of homogeneity and compactness as matters of fact). The facts included in the Town of Middleton's Petition, moreover, are not stated equivocally, contingently, or alternatively. *See In re Incorporation as a Village of Certain Territory the Town of Campbell*, 2003 WI App. 139, ¶ 23, 266 Wis. 2d 107, 667 N.W. 2d 356 (contingent description in an incorporation petition deemed insufficient).

The Town's Petition is sufficient in this case to state a claim upon which relief may be granted. The unequivocal facts stated in the Petition are sufficient to "plausibly suggest that the town is entitled to the relief," as requested in the Petition. *Data Key*, 214 WI 86 at ¶ 31. The Petition, moreover, fully apprises the City of the relevant incorporation issues to which the City

can formulate any intended opposition. The City, for its part, does not allege any actual uncertainty but, instead, makes argument relying upon a heightened pleading standard that is inconsistent with applicable legal standards.

The City's particularity argument implicates a role for the Court that exceeds the statutory distinction made between the Court's function and that of the Incorporation Review Board. The City argues that the standards to be applied by the Board in Wis. Stat. § 66.0207(1) must be spelled out with particularity in the Town's Incorporation Petition. The Court's role under § 66.0205, however, is only to determine whether the petition "meets the formal and signature requirements," not to determine the merits of the Petition according to the standards applied by the Board, such as whether a proposed village is reasonably homogeneous and compact, or has the potential for future development. See §§ 66.0207(1)(a) and (b). These are matters for the Board.

The City further argues unpersuasively that the "additional considerations" referenced in § 66.0207(2), bearing on the Board's public interest determination, must be anticipated in the Incorporation Petition. The "additional considerations" in § 66.0207(2), are not formal standards, but relate to the policy determination made by the Board as to whether a proposed incorporation is in the public interest. But in any event, these issues are addressed unequivocally in the Town's Petition.

The Town's Incorporation Petition satisfies the formal requirements of Wis. Stat. § 66.0203(2)(c), including by setting forth facts "substantially establishing the required standards for incorporation." The City's contrary argument that the proposed village is not homogeneous and compact is not a pleading matter, but a substantive disagreement about an issue that is reserved for decision by the Board. Similarly, the City appears to dispute whether the Town has

the potential for further development. Again, however, this is an issue that is reserved for the Board rather than to be determined by the particularities of pleading, which are described in § 66.0205 as matters of formality.

The City also complains that the Town's Incorporation Petition does not state with particularly the effect upon the future rendering of government services within the proposed area for incorporation and elsewhere, which is a public interest consideration under Wis. Stat. § 66.0207(2)(d). The public interest considerations for the Board under subsection (2), however, are not described as formal incorporation standards, but are additional policy considerations by the Board. In any event, however, the Petition addresses these considerations, which the City can contest on the merits at a hearing conducted by the Board, if requested by the City.

The Town's Incorporation Petition includes all of the requirements of § 66.0205, defining the standards to be applied by the Circuit Court. The Town's Petition, moreover, satisfies the requirements of § 66.0203(2)(c), including by setting forth facts substantially establishing the required standards for incorporation. The City essentially is demanding that the Town's Petition include sufficient evidentiary support for the Court to consider that would satisfy the Board in its ultimate merits consideration. This is not a heightened level of pleading that is legally required, and it incorrectly assumes that the function of the Circuit Court is statutorily greater than the Wisconsin Legislature intended.

VI. CONCLUSION.

For all the above reasons, the Court should deny the City of Middleton's request to dismiss the Town of Middleton's Incorporation Petition.

Dated this 18th day of November, 2025

BOARDMAN & CLARK LLP

/s/ Electronically Signed By Richard L. Bolton
Michael J. Lawton, Wisconsin State Bar No. 1016419
Richard L. Bolton, Wisconsin State Bar No. 1012552
1 S. Pinckney St., Ste. 410
P.O. Box 927
Madison, WI 53701-0927
(608) 257-9521
mlawton@boardmanclark.com
rbolton@boardmanclark.com