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## **WISCONSIN LAW JOURNAL**

### **Monday, February 6, 2012**

### **Wisconsin group petitions high court for certiorari**

A Wisconsin-based citizens group is asking the U.S. Supreme Court to review a case challenging the annexation of a business park.

But the municipality in question says the group has no standing to make a federal constitutional challenge.

The parties might get word as early as next week if the federal justices will hear the case.

The dispute stems from the Nov. 20, 2008, unanimous vote by the village of Richfield Board of Trustees to annex the “Helsan property” located within the Town of Polk. The property is referred to as a “balloon on a string” because it doesn’t directly border the village of Richfield, but is connected by one road.

In 2009, Highway J Citizens Group, a nonprofit organization with approximately 15,000 members — many of whom are taxpayers, property owners and residents of both municipalities — filed a lawsuit seeking a declaration to void the annexation, or to reverse and remand the village’s decision.

Washington County Circuit Court Judge Andrew Gonring dismissed on standing grounds, citing Village of Slinger v. Town of Hartford, 256 Wis.2d 859 (Ct. App. 2002).

The trial court noted that none of the Highway J members owns property within the annexed land, and reasoned that Highway J members would suffer no unique “pecuniary loss or injury” and no injury different from that of other community members.

The District II Court of Appeals affirmed in a six-page, unpublished per curiam decision Feb. 16, 2011, and the Wisconsin Supreme Court declined review.

Highway J wrote in its petition for certiorari before the U.S. Supreme Court dated Nov. 30, 2011, that by letting the intermediate appellate court ruling stand, Wisconsin’s high court was under the belief it was following federal law and ruling according to precedent in the Seventh, Third and Fourth Circuits of the U.S. Court of Appeals. However, the First, Second, Sixth, Ninth and D.C. Circuits, as well as the U.S. Supreme Court, do not require a showing of actual pecuniary harm to establish municipal taxpayer standing.

That circuit split should compel the court to accept the case and settle the matter.

Two weeks later, Washington, D.C.-attorney Tom Goldstein selected the case as the “Petition of the Day” on SCOTUSblog, meaning he believes it raises one or more questions that the justices will deem worthy of review.

In its Jan. 4 reply, the Village of Richfield countered that Highway J abandoned its efforts to challenge the federal constitutionality question by failing to raise it as a question presented before the Wisconsin Supreme Court. In addition, the village wrote that up until this point Highway J had discussed standing solely in terms of the application of Wisconsin law and had accepted that federal law was similar, but never argued that it was specifically and solely applicable. The village also examined the legislative history and cases interpreting the annexation statute, sec. 66.0217, and concluded that the Court of Appeals had no need to apply federal law in the case.

On the same day that the Village of Richfield filed its response, a group of proposed amici, the National Tax Limitation Committee, the Reason Foundation and the Libertarian Law Council, moved the high court for leave to file a brief in support of Highway J’s position.

Highway J’s Jan. 17 reply brief states that the Village of Richfield mischaracterized its Wisconsin state court arguments as “fresh claims.”

The justices have scheduled a decision conference for Feb. 17 where it’s anticipated they’ll make their decision whether to take the case.

According to the federal high court’s website, approximately 10,000 cert petitions are filed every term, and of them the court accepts about 100 cases.

Considering just those numbers, Washington, D.C., lawyer Nancie Marzulla, who is representing Highway J at the federal appellate level, said the odds are long that the court will take the case.

She’s nonetheless optimistic because she thinks the case presents “a very discrete issue for the court to get its arms around.”

“The court generally has favored review of those discrete procedural issues because the ruling has broad application,” Marzulla said. “And when you have a clear split among the circuits, as we have in this case, it cues up that procedural issue very nicely.”

She added that Chief Justice John Roberts Jr. raised a question regarding the status of municipal taxpayer standing during the oral arguments in *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006).

“It signals to the legal community that this is an issue that’s on the court’s radar screen already,” she said.

Marzulla, of Marzulla Law, is a longtime U.S. Supreme Court practitioner, but if the high court takes the case, it will be her first oral argument before the justices. That’s an exciting prospect, she said.

“But what would be even more important,” she said, “would be to get some relief for this community group, who clearly has concerns and has made a strong showing. They should be allowed to have their day in court.”

Michele Ford of Crivello Carlson in Milwaukee has represented the Village of Richfield in state court and now before the federal justices. She did not immediately return calls seeking comment.