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DISTRICT IV

March 14, 2006

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You are hereby notified that the Court has entered the following order:

2006XX205

Coalition for a Better Jefferson, et al. v. City of Jefferson, et al.
(L.C. # 2005CV582)

Before Dykman, Vergeront, and Deininger, JJ.

Roger Sherman, Beverly A. Sherman Joint Revocable Trust, William & Alice Pinnow,
and Wal-Mart Real Estate Business Trust move to intervene in this matter pursuant to Wis.
STAT. RULES 809.13 and 803.09 (2003-04).¹ They explain that they are the owners of the parcels

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

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of land which the City of Jefferson is attempting to annex, and that it is their joint annexation petition which has been enjoined by the temporary *ex parte* stay recently granted by this court. The Coalition for a Better Jefferson and Patti Lorbecki (collectively, the Coalition) object to the intervention motion.

We issued the temporary stay to preserve the status quo while we reviewed the materials submitted by all of the parties. We agree that the property owners are entitled to participate in our consideration of whether to grant continued relief pending appeal. The intervention motion was promptly filed with respect to this court's consideration of the stay request; the property owners have a distinct interest in a pending annexation; the stay impairs their interests; and no other parties adequately represent their interests. *See generally State ex rel Bilder v. Town of Delevan*, 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983). We will therefore accept their accompanying memorandum in opposition to the stay requested by Coalition, and will consider it along with the City of Jefferson and Common Council's response.

In the event its motion opposing the intervention is denied, the Coalition requests permission to file a reply to the Intervenor's memorandum. The appellate rules do not provide for such replies on motions, however, and we see no compelling need for one here. We are satisfied that the issues have been sufficiently delineated by the materials already filed.

The criteria for relief pending appeal are whether: (1) the moving party is likely to succeed on the merits; (2) the moving party will suffer irreparable harm if the requested relief is not granted; (3) no substantial harm will come to the other interested parties if the requested relief is granted; and (4) the requested relief would not harm the public interest. *Faust v. Faust*, 178 Wis. 2d 599, 602, 501 N.W.2d 810 (Ct. App. 1993). These factors are interrelated and must

be balanced on a case-by-case basis. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). We generally review trial court determinations regarding relief pending appeal under the erroneous exercise of discretion standard, although we may consider the issue *de novo* if it would be impractical to first seek relief in the trial court. *Id.* at 439-440; WIS. STAT. RULE 809.12. Here, we are satisfied that it became impractical to seek additional relief in the trial court after the court entered only a temporary stay scheduled to expire March 1, 2006.

Having fully reviewed the parties' submissions, we now conclude that the injunctive relief requested here is not warranted. First, the irreparable harm cited by the Coalition is speculative at best. Even assuming the proposed legislation were placed on a referendum and passed, the Council still could have determined that the pending annexation satisfied the new requirements. And, as the Coalition itself points out, the annexation itself does not guarantee that other necessary permits will be issued and the proposed Wal-Mart center will actually be built.

More importantly, even if the Coalition were to prevail on the merits of its action, the remedy would not include the stay requested. The issue to be appealed is whether the Common Council had a plain duty to either directly approve the proposed direct action legislation or schedule it for a referendum. Thus, if a writ of mandamus were to issue, it would be limited to compelling the Common Council to approve the proposed legislation or schedule it for referendum. The Coalition has provided no authority showing that the Council would have had a plain duty to hold all pending annexation petitions in abeyance while the direct action legislation was pending. Moreover, the requirements of the proposed legislation could not have been imposed retroactively, even if the referendum had passed. *See* WIS. STAT. §§ 9.20(7) and 62.11(4)(a). Therefore, the requested stay lies outside the scope of the appeal. *See Frangesch v.*

Kamp, 262 Wis. 2d 446, 450, 55 N.W.2d 372 (1952) (A temporary injunction may issue only to prevent acts which could be enjoined by the final judgment.).

Therefore,

IT IS ORDERED that Roger Sherman, Beverly A. Sherman Joint Revocable Trust, William & Alice Pinnow, and Wal-Mart Real Estate Business Trust are granted intervenor status on the Coalition for A Better Jefferson and Patti Lorbeck's motion for relief pending appeal.

IT IS FURTHER ORDERED that the motion for relief pending appeal in the form of an injunction barring the City of Jefferson or its Common Council from acting on annexation petition involving more than 15 acres of land is denied, and the temporary stay issued by this court is hereby lifted.

Cornelia G. Clark
Clerk of Court of Appeals