The Municipal Annexation Process in Wisconsin

Eric Mueller

senior legislative attorney

LRB REPORTS • July 2020, Volume 4, Number 12

One East Main Street, Suite 200, Madison, Wisconsin 53703
http://legis.wisconsin.gov/lrb • 608-504-5801

Introduction

Annexation is the principal method by which Wisconsin's incorporated municipalities (cities and villages) grow in physical size and, not incidentally, by which Wisconsin's unincorporated municipalities (towns) shrink. In Wisconsin, the procedure for annexation is statutorily prescribed. If properly followed, the procedure allows a city or village to detach territory from a town and attach the territory to itself. Ideally, this is a process of thoughtful and controlled growth, a measured extension of urbanization limited to those areas suited and necessary for the growing population and economy of the annexing city or village, and a consolidation of uniform government over areas of uniform conditions.

Annexation, of course, presents problems as well as opportunities. Often the areas that cities and villages are interested in annexing are areas that are important for a town's financial health. Areas especially at risk for annexation include areas that are near a city or village and that have good potential for, or already have, an economically valuable use. Properties, in other words, that currently, or would in the future, contribute positively to a town's property tax base. Given the rural and nonintensive use of most town property, properties that are at risk for annexation often make up a disproportionate share of the town's property tax base. Additionally, repeated annexations can lead to towns having haphazard boundaries, including disconnected territory. These conditions may make the provision of town services more complicated and expensive. The very existence of the threat of annexation can diminish a town's ability to regulate or negotiate with industries operating within the town. Asking too much or refusing to meet industry demands can lead to industries leaving the town and taking town territory with them. Given the important interests, it is no wonder the statutes provide substantial specification regarding the conduct of annexation.

This publication is divided into three parts. The first outlines the statutory procedures available for annexation. Next, the publication briefly surveys the fairly substantial case law surrounding annexation. Among the material addressed will be the court-created "rule of reason," which provides substantive protection to a town's interests. Finally, the publication discusses two recent Wisconsin Supreme Court decisions providing the latest word on annexation law in Wisconsin and, perhaps, previewing coming controversies.

Part I. Statutory process

Case law has been clear: "municipalities must strictly comply with annexation statutes . . . substantial compliance will not save an annexation that is not accomplished in 'strict conformity' with statutory mandates."[1] The statutes provide several methods of annex-

1. Town of Baraboo v. Village of West Baraboo, 2005 WI App 96, ¶ 7, 283 Wis. 2d 479, 699 N.W.2d 610.

ation, all of which can be categorized as either (1) elector-initiated or property owner–initiated annexations or (2) city-initiated or village-initiated annexations.

Elector-initiated or property owner–initiated annexation[2]

There are three methods of elector-initiated or property owner–initiated annexation: annexation by unanimous approval, annexation by one-half approval, and annexation by referendum. These methods all follow a roughly similar procedure consisting of several stages through which an annexation proceeding must progress: petition and notice, petition circulation, filing of the petition, referendum, and enactment of an annexation ordinance. Not all of the stages, however, apply to all of the methods of annexation.

Petition and notice. Each elector-initiated or property owner–initiated annexation begins with a petition for annexation.[3] The statutes provide several items that must be included in such a petition. Specifically, a petition must include (1) a statement of the purpose of the petition, (2) a legal description of the territory proposed to be annexed, (3) a scale map of the territory proposed to be annexed, and (4) the population of the territory proposed to be annexed.[4]

If the annexation is either by one-half approval or by referendum, the statutes also require that a notice of intent to circulate the petition be published as a class 1 notice in the territory proposed to be annexed.[5] The statutes specify that the following must be included in this notice:[6]

- A statement of intention to circulate an annexation petition
- A legal description of the territory proposed to be annexed
- A copy of a scale map of the territory proposed to be annexed
- The name of the city or village to which the annexation territory is proposed to be annexed
- The name of the town or towns from which the territory is proposed to be detached
- The name and address of the person publishing the notice
- A statement that a copy of the scale map may be inspected at the office of the town clerk for the territory proposed to be annexed and the office of the city or village clerk for the city or village to which the territory is proposed to be annexed

In addition to publishing this notice, the petitioner must also, by service of process

2. Throughout the annexation statutes an "owner" is defined as "the holder of record of an estate in possession in fee simple, or for life, in land or real property, or a vendee of record under a land contract for the sale of an estate in possession in fee simple or for life." See, for example, Wis. Stat. § 66.0217 (1) (d).

3. Wis. Stat. § 66.0217 (2) and (3) (a) (intro.) and (b).

4. Wis. Stat. § 66.0217 (5).

5. Wis. Stat. § 66.0217 (4) (a) (intro.). A class 1 notice requires, essentially, one "insertion" or instance of publication. See Wis. Stat. §§ 985.01 (1m) and 985.07.

6. Wis. Stat. § 66.0217 (4) (a).

or certified mail, serve copies of the notice on the clerk of each municipality and of each school district potentially affected by the annexation and each owner of land in a town that will be in a city or village after the annexation.[7] Publication and service of a notice of intent to circulate a petition for annexation by unanimous approval is not required.[8]

Petition circulation. Once the petition is prepared and, if necessary, notice of intent to circulate the petition has been published, the petition may be circulated for signatures. For annexations by one-half approval or by referendum, specific timelines are provided for this stage. Circulation of the petition must begin between 10 and 20 days after the publication of the notice.[9] The completed petition must be filed within six months of the date of publication.[10] The statutes do not provide a timeline for circulation or filing of a petition for annexation by unanimous approval.

The type of annexation sought governs the requirements related to the number signatures required for the petition. For annexation by unanimous approval, perhaps obviously, the petition must be signed by all of the electors residing in the territory to be annexed and the owners of all of the real property in the territory to be annexed.[11] For annexation by one-half approval, the petition must be signed by a majority of the electors residing in the territory to be annexed[12] and either the owners of half of the land measured in area within the territory or the owners of half of the real property in terms of assessed value within the territory.[13] For annexation by referendum, the petition must be signed by 20 percent of the electors residing in the territory[14] and the owners of at least half of the real property either in area or assessed value.[15] In general, a person signing as an elector must personally sign the petition, but a person signing as a property owner may delegate the authority to sign.[16]

In some cases, notice of a proposed annexation must be provided to the state Department of Administration (DOA) during the circulation period. In particular, when

---

7. Wis. Stat. § 66.0217 (4) (b).

8. Town of Baraboo v. Village of West Baraboo, 2005 WI App 96, ¶ 11, 283 Wis. 2d 479, 699 N.W.2d 610.

9. Wis. Stat. § 66.0217 (5) (c).

10. *Id.*

11. Wis. Stat. § 66.0217 (2).

12. More specifically, the number of signatory electors required is determined by the number of votes cast for governor in the territory in the last gubernatorial election.

13. Wis. Stat. § 66.0217 (3) (a). In determining the ownership of land for purposes of this provision, public streets are excluded. See International Paper Co. v. City of Fond du Lac, 50 Wis. 2d 529, 533, 184 N.W.2d 834 (1971).

14. See footnote 12.

15. Wis. Stat. § 66.0217 (3) (b).

16. See Town of Fond du Lac v. City of Fond du Lac, 22 Wis. 2d 533, 539, 126 N.W.2d 201, 204 (1964) ("The right of an elector to participate in an annexation proceeding partakes of the nature of a political right 'analogous to voting upon the question' and therefore must be the elector's 'individual act discharging his duty in shaping and influencing this particular affair of government.'") and Town of Medary v. City of La Crosse, 88 Wis. 2d 101, 108, 277 N.W.2d 310, 314 (Wis. Ct. App. 1979) ("Ownership itself, detached from the personal benefits or detriments that accompany residency in a municipality, is more of a private right than the political right a resident may have in annexation. A distinction is made . . . between those who own property and those who use property. The two types of interests are treated differently because they are different. Thus, the political nature of annexation petitions recognized as applicable to electors . . . is not applicable to property owners.").

an annexation by one-half approval or by referendum is proposed within a county with a population of 50,000 or more, the person publishing a notice of intent to circulate an annexation petition must mail a copy of the notice to the DOA within five days of the publication of the notice.[17] The DOA then has 20 days to provide the affected municipalities with its opinion as to whether the annexation is in the public interest or not and the reasons for that opinion.[18] The statutes provide specific criteria that the DOA must use in providing its opinion as to the public interest regarding the proposed annexation. The criteria that must be considered are, in brief, (1) whether the town could better supply governmental services to the territory, (2) the shape of the proposed annexation, and (3) the homogeneity of the territory with the annexing municipality.[19] The annexing municipality is required to review the advice before taking final action on the annexation.[20] A finding that the annexation is not in the public interest, however, does not preclude the annexation.[21]

The DOA procedure does not apply to annexations by unanimous approval. There is, however, a somewhat different review procedure involving the DOA that does apply.[22] This procedure occurs at the ordinance stage.

Filing and acceptance or rejection of the petition. Once sufficient signatures are obtained, the petition must be filed with the city or village clerk of the annexing municipality.[23] If the annexation is by unanimous approval, the petition must also be filed with the clerk of the towns in which the territory proposed to be annexed is located and must be accompanied by a scale map and a legal description of the property to be annexed.[24] Within five days of filing, for an annexation by one-half approval or by referendum, the petitioner must also provide a copy of the scale map and legal description to the DOA.[25]

At this point, for annexations by one-half approval or by referendum, the common

---

17. Wis. Stat. § 66.0217 (6) (a).

18. *Id*. DOA maintains a database that includes its determinations of the public interest under Wis. Stat. § 66.0217 (6) (a). See "Municipal Data System," Wisconsin Department of Administration, Division of Intergovernmental Relations, https://mds.wi.gov/Home.

19. Wis. Stat. § 66.0217 (6) (c).

20. Wis. Stat. § 66.0217 (6) (a). See Town of Campbell v. City of La Crosse, 2003 WI App 247, ¶ 39, 268 Wis. 2d 253, 673 N.W.2d 696.

21. See *Town of Campbell*, 2003 WI App 247, ¶ 39; Town of Medary v. City of La Crosse, 88 Wis.2d 101, 112, 277 N.W.2d 310, 316 (Wis. Ct. App. 1979).

22. Wis. Stat. § 66.0217 (6) (d).

23. Wis. Stat. § 66.0217 (2) and (3) (a) (intro.) and (b). Under current law, once a person has signed the petition for annexation, he or she may not withdraw his or her name from the petition. See Wis. Stat. § 66.0217 (5) (b). Before this statutory language was in place, a person was entitled to remove or add his or her signature at any time before the common council or village board acted on the petition. See Town of Blooming Grove v. City of Madison, 253 Wis. 215, 221, 33 N.W.2d 312, 315 (1948). Under this former regime, a city or village must have been able to demonstrate sufficient signatures at the introduction of the petition and at the enactment of the annexation ordinance. See Town of Brookfield v. City of Brookfield, 274 Wis. 638, 643, 80 N.W.2d 800, 803 (1957).

24. Wis. Stat. § 66.0217 (2).

25. *Id*.

council or village board has 60 days to accept or reject the petition.[26] No time limits are provided for annexations by unanimous approval.[27] If the governing body of the annexing municipality rejects the petition, the petition is dead.[28] There does not appear to be any remedy for a person aggrieved by the refusal of a city or village to complete a proposed annexation.

The immediate consequence of the common council or village board's acceptance of a petition for referendum depends on the annexation method being used. For an annexation by unanimous approval, acceptance is accomplished by enacting an annexation ordinance completing the annexation process.[29]

For annexations by one-half approval, the clerk of the city or village must give written notice by service of process or registered mail to the clerk of any affected town and to any other person who may have filed a written request for such notice with the city or village clerk.[30] The annexation process may be complete at this point.[31] However, if within 30 days of providing the notice to the town clerk of approval of the annexation petition, a petition for referendum signed by at least 20 percent of the electors residing in the area proposed to be annexed is filed with the town clerk, a referendum on the annexation must be held.[32]

For an annexation by referendum, the clerk of the city or village must provide the written notice described for annexations by one-half approval.[33] A referendum on the annexation must then be held.

The statutes provide little guidance regarding the substantive standards that apply to a determination of whether or not to annex. Contiguity is specifically required for any type of elector-initiated or property owner–initiated annexation.[34] Annexation of territory located in a county in which no part of the annexing city or village is currently located is prohibited unless the town from which territory is being detached consents.[35] Creation of town islands, town areas that are entirely surrounded by the annexing city or village, is generally prohibited.[36] The common council or village board is directed to

---

26. Wis. Stat. § 66.0217 (7) (a) 1.

27. Town of Baraboo v. Village of West Baraboo, 2005 WI App 96, ¶ 11, 283 Wis. 2d 479, 699 N.W.2d 610. It may be, however, that a petition for annexation by unanimous consent is required to be pursued with "reasonable dispatch and completed within a reasonable time." Village of Brown Deer v. City of Milwaukee, 16 Wis. 2d 206, 219, 114 N.W.2d 493, 500 (1962).

28. Wis. Stat. § 66.0217 (7) (a) 1.

29. Wis. Stat. § 66.0217 (2).

30. Wis. Stat. § 66.0217 (7) (a) 3.

31. Wis. Stat. § 66.0217 (7) (a). ("Acceptance may consist of adoption of an annexation ordinance.")

32. Wis. Stat. § 66.0217 (7) (a) 2. and 3. For formal elements required in the petition, see Wis. Stat. § 8.40.

33. Wis. Stat. § 66.0217 (7) (a) 3.

34. Wis. Stat. § 66.0217 (2) and (3) (intro.).

35. Wis. Stat. § 66.0217 (15).

36. Wis. Stat. § 66.0221 (1). See, however, Wagner Mobil v. City of Madison, 190 Wis. 2d 585, 595, 527 N.W.2d 301, 305 (1995) (Statutes prohibit only completely surrounding the town by the annexing municipality.).

consider advice provided by the DOA.[37] Beyond these requirements, however, the statutes are silent.[38]

Wisconsin's courts have found that somewhat more consideration of the substance of an annexation is required. While an extended discussion of the "rule of reason" is deferred to part II, it is important to note that under the rule of reason, the substantive annexation decision is examined in at least several aspects—the "shape" of the annexation, the annexing municipality's need for the territory, and other equitable considerations. It is not clear, though, how an annexing municipality may demonstrate the quality of its consideration of these substantive standards. In any event, it appears that some consideration of the appropriateness of the annexation must be undertaken by the common council or the village board.

Referendum. The statutes prescribe several procedural steps with regard to an annexation referendum. First, between 70 and 100 days before the referendum is to be held, notice must be provided to the official or agency responsible for preparing ballots for the election in the town. This notice must be provided by the annexing city or village for an annexation by referendum or by the petitioners for an annexation by one-half approval in which a petition requesting a referendum has been filed.[39] Second, the town clerk must publish two notices of the referendum in a newspaper of general circulation in the area proposed to be annexed on the publication—one on the publication date immediately before the referendum and the other the week before that.[40] The statutes also specify that if the referendum is due to a petition for referendum that was filed to contest an annexation by one-half approval, the town clerk must provide a copy of the notice of referendum to the annexing municipality.[41]

The referendum is conducted by town election officials, generally as other town elections are conducted.[42] The statutes, though, specify that the ballots must contain the words "For annexation" and "Against annexation."[43] After voting occurs, the election inspectors

---

37. Wis. Stat. § 66.0217 (2) and (3) (intro.). See, however, Town of Baraboo v. Village of West Baraboo, 2005 WI App 96, ¶ 11, 283 Wis. 2d 479, 699 N.W.2d 610.

38. "The legislature conditioned annexations on contiguity, procedural requirements, and nothing more." Town of Wilson v. City of Sheboygan, 2020 WI 16, ¶ 51, 390 Wis. 2d 266, 938 N.W.2d 493 (Bradley, Rebecca J., concurring). The Bradley concurrence would also disregard the extrastatutory "rule of reason," which will be discussed in part III. While the majority in *Town of Wilson* did not agree to eliminate the rule of reason, it does acknowledge that the requirement does not come from the text of the annexation statutes. *Town of Wilson*, 2020 WI 16, ¶ 24. ("The rule of reason is a 'judicially-created doctrine courts have applied to assess the validity of annexations,' in addition to statutory requirements.").

39. Wis. Stat. § 66.0217 (7) (a) 2. and 3.

40. Wis. Stat. § 66.0217 (7) (a) 3. and (c).

41. Wis. Stat. § 66.0217 (7) (a) 3.

42. Wis. Stat. § 66.0217 (7) (b) and (d).

43. Wis. Stat. § 66.0217 (7) (d). This language has been held as directory rather than mandatory. Town of Nasewaupee v. City of Sturgeon Bay, 146 Wis. 2d 492, 497, 431 N.W.2d 699, 701 (Wis. Ct. App. 1988) ("In the absence of a clear legislative directive to the contrary, we refuse to read sec. 66.021(5) (d) [a predecessor statute,] so as to defeat this clear expression of the will of the electors by invalidating the referendum.").

certify and file the results with the clerks of all affected municipalities.[44] If votes in favor exceed those against, the annexing municipality may proceed with the annexation.[45]

Enactment of annexation ordinance. An ordinance for the annexation of a territory must be enacted by a two-thirds vote of the elected members of the governing body of the annexing municipality.[46] For an annexation by one-half approval or by referendum, the ordinance can be enacted as soon as 20 days after the publication of the notice of intention to circulate the petition for annexation, but no later than 120 days after the date of filing with the city or village clerk of the petition for annexation or of the referendum.[47] No time limits are provided for annexations by unanimous approval.[48] An annexation takes effect upon enactment of the annexation ordinance, presumably subject to any referendum requirements.[49]

Once the annexation ordinance takes effect, the clerk of the annexing city or village is required to notify the following parties of the changed municipal boundaries: (1) the DOA, (2) each company that provides utility service in the area that has been annexed, (3) the county clerk or board of election commissioners, (4) the register of deeds, and (5) the clerk of any affected school district.[50] Failure to provide any of these notifications, however, does not affect the validity of the annexation.[51]

One important statutory item has not yet been addressed because it does not fall neatly in the rough annexation timeline. As previously mentioned, the DOA has been assigned the role of advisor regarding the substantive desirability of an annexation. This public interest review does not appear applicable to annexations by unanimous approval; however, a separate procedure involving DOA review is specifically provided for those cases. Under this procedure, a town affected by a proposed annexation by unanimous approval may submit a request for DOA review of the annexation within 30 days of enactment of the annexation ordinance.[52] Under this type of request, the DOA is directed to provide its opinion solely on whether the annexation (1) violates the requirement that the territory in the town be contiguous to the annexing municipality or (2) violates the prohibition on annexing territory from a county in which no part of the city or village was previously located.[53] The DOA has 20 days to make its determination and send a copy of

---

44. Wis. Stat. § 66.0217 (7) (e).

45. Wis. Stat. § 66.0217 (7) (g). A tie vote means the annexation has failed. *Town of Nasewaupee*, 146 Wis. 2d at 497.

46. Wis. Stat. § 66.0217 (2) and (8) (a). Multiple petitions may be acted upon in a single ordinance. Town of Baraboo v. Village of West Baraboo, 2005 WI App 96, ¶ 7, 283 Wis. 2d 479, 699 N.W.2d 610.

47. Wis. Stat. § 66.0217 (8) (a).

48. See footnote 27.

49. Wis. Stat. § 66.0217 (8) (c). See Wis. Stat. § 66.0217 (7) (a) 1. ("Acceptance may consist of adoption of an annexation ordinance.")

50. Wis. Stat. § 66.0217 (9) (a).

51. *Id.*

52. Wis. Stat. § 66.0217 (6) (d) 1 (intro.).

53. Wis. Stat. § 66.0217 (6) (d) 1. (intro.), a., and b.

its findings to the requesting town, the annexing municipality, and any affected landowner.[54] A failure to meet this deadline is tantamount to a finding of no violation.[55] Given the statutory timeline, in many cases the annexing municipality will have no opportunity to take into consideration the DOA's findings.[56] A DOA finding of a violation, however, has concrete legal effect. Towns are generally statutorily precluded from challenging an annexation by unanimous approval.[57] If DOA finds a violation via this procedure, though, the affected town is authorized to bring a lawsuit, which would otherwise be precluded, challenging the annexation.[58]

Municipality-initiated annexation

An annexation may be initiated by the annexing municipality itself. The procedure for this method of annexation travels a somewhat different path from elector-initiated or property owner–initiated annexations. Municipality-initiated annexations move through the following stages: adoption of a resolution, circuit court proceeding, and referendum.

Resolution. The process for a municipality-initiated annexation begins with the adoption of a resolution by the common council or village board. The resolution must contain all of the following:[59]

- A declaration of the intention of the common council or village board to apply to the circuit court for an order for an annexation referendum
- A description of the territory proposed to be annexed
- The name of the municipalities directly affected by the annexation
- The name and address of the municipal official responsible for the publication of the resolution

In addition, the governing body must prepare a scale map of the town territory to be annexed, showing that territory in relation to the annexing city or village.[60] The resolution must be approved by two-thirds of the members-elect of the common council or village board.[61] After adoption, the resolution must be published as a class 1 notice in a

54. Wis. Stat. § 66.0217 (6) (d) 2.

55. *Id.*

56. "[T]he legislature . . . purposefully enacted a comprehensive statutory scheme for annexation that does not authorize the repeal and reenactment of annexations by ordinance." Town of Windsor v. Village of DeForest, 2003 WI App 114, ¶ 19, 265 Wis. 2d 591, 666 N.W.2d 31.

57. See, however, Town of Lincoln v. City of Whitehall, 2019 WI 37, ¶ 33, 386 Wis. 2d 354, 925 N.W.2d 520 (mislabeled petitions are not provided immunity from town lawsuits).

58. Wis. Stat. § 66.0217 (6) (d) 2. and (11) (c).

59. Wis. Stat. § 66.0219 (1) (a).

60. *Id.*

61. *Id.*

newspaper having general circulation in the area proposed to be annexed.[62] Within five days of the date of publication, a copy of the resolution together with the scale map must be personally served or served by registered mail upon the clerk of any affected town.[63]

The substantive standards applicable to municipality-initiated annexations are nearly the same as for elector-initiated or property owner–initiated annexations. The statutes provide that the annexed territory must be contiguous, town islands are generally forbidden, and, unless approved by the town from which the territory is being annexed, an annexation may not include territory located in a county in which no part of the annexing municipality is currently located.[64] The "rule of reason" also applies to municipality-initiated annexations.[65] In addition to these shared requirements, there must be electors residing in the territory to be annexed.[66]

Circuit court proceeding. Between 30 and 45 days after publication of the notice of intent to annex, the municipality must apply to the circuit court for an order for an annexation referendum.[67] The application consists of a petition, the scale map, a certified copy of the resolution, and an affidavit of the publication of notice and service of process on the town clerk.[68]

Upon receiving a petition for an annexation referendum, the circuit court sets a date for a hearing on the petition.[69] Prior to this date, persons opposed to the annexation may file with the court a petition protesting the annexation.[70] A valid petition must be signed by a majority of the electors residing in the territory proposed to be annexed[71] or the owners of more than half of the real property in terms of assessed value in the territory.[72] If a petition protesting the annexation satisfying these requirements is filed, the court must deny the annexing municipality's petition for an annexation referendum.[73]

If no qualifying petition protesting the annexation is filed, the court will hold a hearing on the municipality's petition for an annexation referendum. At the hearing, the court may hear from any interested party, including any town affected by the annexation, for or against the application.[74] Though the statutes provide broad authority to hear from interested parties, the court has little discretion in its decision-making. Specifically, if,

---

62. *Id.* See also footnote 5.

63. *Id.*

64. Wis. Stat. §§ 66.0219 (intro.) and (10) (b) and 66.0221 (1).

65. City of Beloit v. Towns of Beloit, Turtle & Rock, 47 Wis. 2d 377, 391, 177 N.W.2d 361, 370 (1970).

66. Wis. Stat. § 66.0219 (intro.).

67. Wis. Stat. § 66.0219 (1) (b).

68. *Id.*

69. See Wis. Stat. § 66.0219 (2).

70. Wis. Stat. § 66.0219 (2) (a).

71. See footnote 12.

72. Wis. Stat. § 66.0219 (2) (a).

73. *Id.*

74. *Id.*

after the hearing, the court is satisfied that the description of the territory included in the municipality's petition is accurate and that no procedural errors have occurred, the court must order that a referendum be held in the territory proposed to be annexed.[75]

A circuit court order related to a municipality-initiated annexation may be appealed.[76] Issues that may be considered on appeal, however, are limited to those that were contested before the circuit court.[77] In addition, the filing of an appeal does not stay a pending referendum.[78]

Referendum. The requirements related to the referendum are very similar to those discussed for elector-initiated and property owner–initiated annexations. If the court orders a referendum the court must, between 70 and 100 days before the referendum is to be held, provide notice to the official or agency responsible for preparing ballots for elections and must direct three electors named in the order residing in the town in which the territory proposed to be annexed lies to perform the duties of inspectors of election.[79] The referendum is conducted by town election officials, generally, as other town elections are conducted. The statutes, though, specify that the ballots must contain the words "For annexation" and "Against annexation."[80] After the election, the election inspectors certify and file the results with the clerks of all affected municipalities.[81] If the referendum fails, the municipality may not attempt to annex the same territory for six months.[82] If the referendum succeeds, the annexing municipality may proceed with the annexation.[83]

Once an annexation is approved by the electors, the clerk of the annexing city or village is required to notify the following parties of the changed municipal boundaries: (1) the DOA, (2) each company that provides utility service in the area that has been annexed, (3) the county clerk or board of election commissioners, (4) the register of deeds, and (5) the clerk of any affected school district.[84] Just as for elector-initiated or property owner–initiated annexation, failure to provide any of these notifications does not render an annexation invalid.[85]

Simplified procedures

A couple of statutes provide simplified procedures for annexation under specific limited circumstances. One allows a city or village to annex certain town islands upon enactment

75. Wis. Stat. § 66.0219 (4) (a).
76. Wis. Stat. § 66.0219 (7).
77. *Id.*
78. *Id.*
79. Wis. Stat. § 66.0219 (4) (a).
80. Wis. Stat. § 66.0219 (4) (b), but see footnote 43.
81. *Id.*
82. Wis. Stat. § 66.0219 (5) (a). See also, footnote 45.
83. Wis. Stat. § 66.0219 (5) (b).
84. Wis. Stat. § 66.0217 (9) (a).
85. *Id.*

of an ordinance by a two-thirds vote of the entire membership of its governing body.[86] This provision applies only to certain town islands that were completely surrounded by territory of the city or village on December 2, 1973, and generally requires that the ordinance provide for annexation of all covered town islands in a single ordinance.[87]

The other allows a city or village to annex territory owned by the village or city by simple enactment of an ordinance.[88] A few limits apply, including the following: (1) the territory must be near, though not necessarily, contiguous to the city or village, (2) unless approved by the town from which the territory is being annexed, an annexation may not include territory located in a county in which no part of the annexing city or village is currently located, (3) the city's or village's use of the territory may not be contrary to town or county zoning, and (4) presumably, the annexation may not create a new town island.[89]

Judicial review

The various theories under which judicial review has generally been sought will be discussed more extensively in parts II and III; however, several items related to the availability of judicial review are worth noting at this point. First, the statutes provide limited periods of time in which a lawsuit may be filed. With certain exceptions, a 90-day statute of limitations applies to actions challenging an annexation.[90] The statute of limitations begins to run upon adoption of an annexation ordinance by the common council or village board.[91]

Second, town lawsuits seeking judicial review of an annexation by unanimous approval are barred absent a finding by the DOA that the annexation failed to meet one of several specific requirements.[92] If a town does receive a favorable DOA determination, the town's lawsuit must be brought within 45 days of the town's receipt of the DOA's determination.[93]

Third, there are limitations on who may seek judicial review of an annexation. A town itself from which territory is being detached, acting through its elected town board, has statutory authorization to contest an annexation.[94] Persons residing in the portion of the town being detached in an annexation proceeding have long been recognized to

86. Wis. Stat. § 66.0221 (1).

87. *Id.*; Town of Blooming Grove v. City of Madison, 70 Wis. 2d 770, 235 N.W.2d 493 (1975).

88. Wis. Stat. § 66.0223 (1).

89. Wis. Stat. §§ 66.0221 (1) and 66.0223 (1).

90. Wis. Stat. §§ 66.0217 (11) and 893.73 (2) (b). Note that many actions contesting a municipality-initiated annexation will happen via appeal of the circuit court's order to authorize a referendum. For these appeals, timelines for appeals rather than the statute of limitations will apply.

91. Town of Burnside v. City of Independence, 2016 WI App 94, ¶ 11, 372 Wis. 2d 802, 889 N.W.2d 186 ("The term 'adoption' refers to the legislative body's act of voting to approve the ordinance, not to the approval of the ordinance by the mayor, the publication date of the ordinance, or the ordinance's effective date.").

92. Wis. Stat. § 66.0217 (11) (c).

93. Wis. Stat. § 66.0217 (6) (d) 2.

94. Wis. Stat. § 60.06.

have an interest on their own behalf in such proceedings.[95] Except for actions that will be discussed under the "rule of prior precedence," persons who are not a member of either of these two groups have not been permitted to bring lawsuits contesting the validity of annexations.[96]

Finally, Wisconsin's courts have long accorded municipal annexations a presumption of validity.[97] In practice, this means that the person challenging an annexation will bear the burden of establishing that the annexation should be invalidated.[98] The discussion now turns to these grounds that could invalidate an annexation.

Part II. Past case law

It is likely that judicial review of municipal annexations in Wisconsin began only shortly after the first municipal annexation in Wisconsin. In any event our case law extends back at least 140 years.[99] Since that time, numerous grounds have been argued for and against particular annexations. Of these arguments, the principal ones for purposes of modern practice are claims of procedural error, alleged violations of the contiguity requirement, and claims related to the "rule of reason." This part will briefly review the state of case law for each of these principal categories of argument. A number of cases also provide guidance when competing actions are purportedly being taken with respect to the same territory; this is described as the "rule of prior precedence."

Rule of prior precedence

The "rule of prior precedence" arises out of the need to deal with concurrent actions affecting the same territory. A town, for example, may border on two incorporated municipalities, each with an interest in annexing a particular territory. More commonly, town residents may respond to an anticipated annexation by moving to incorporate all or part of the territory likely to be affected by an annexation.

The rule of prior precedence is the doctrine Wisconsin's courts have developed to deal with such situations.[100] "The rule provides that 'in case of conflict between competing annexations, or between an annexation and a proceeding for the incorporation of

95. Town of Madison v. City of Madison, 269 Wis. 609, 614, 70 N.W.2d 249, 252 (1955).

96. Village of Slinger v. City of Hartford, 2002 WI App 187, 256 Wis. 2d 859, 650 N.W.2d 81 (Persons owning property adjoining the territory being annexed do not have standing.); Darboy Joint Sanitary Dist. No. 1 v. City of Kaukauna, 2013 WI App 113, ¶ 26, 350 Wis. 2d 435, 838 N.W.2d 103 (Town sanitary district lacks standing to challenge annexation of part of territory in which it operates.); City of Menasha v. Village of Harrison, 2017 Wisc. App. LEXIS 654 at *4 ("[T]he legislature has not expanded the right to challenge an annexation to neighboring non-party cities").

97. Town of Wilson v. City of Sheboygan, 2020 WI 16, ¶ 11, 390 Wis. 2d 266, 938 N.W.2d 493.

98. Town of Lafayette v. City of Chippewa Falls, 70 Wis. 2d 610, 618, 235 N.W.2d 435, 440 (1975); Town of Greenfield v. City of Milwaukee, 272 Wis. 388, 395, 75 N.W.2d 434, 438 (1956) ("It must be emphasized that the validity of the annexation ordinance is presumed until overcome by the appellant.").

99. Smith v. Sherry, 50 Wis. 210, 216–17, 6 N.W. 561, 564–65 (1880).

100. Town of Delavan v. City of Delavan, 176 Wis. 2d 516, 532, 500 N.W.2d 268, 273 (1993).

a city or village, the proceeding first instituted has precedence, and the later one must yield.'"[101] The doctrine is, thus, relatively simple: first come, first served.

There are a few clarifications and wrinkles though. First, determining when an annexation has been initiated is in some cases a difficult task. There are several points at which a court could reasonably determine that an annexation proceeding has commenced—for example, filing a petition for annexation with the common council or village board or, perhaps, the acceptance of a petition by the common council or village board. Wisconsin's courts have opted for an even earlier point, setting commencement at the "date on which the earliest statutory requirement is undertaken."[102] In many cases, an annexation proceeding will commence, then, upon the filing of a notice of intent to circulate a petition.

Second, there is the issue of what exactly is the effect of giving precedence to the prior action. Clearly, two actions leading to inconsistent conclusions cannot both proceed to a conclusion. However, there are a range of ways in which priority could be effectuated. For example, both actions could proceed to all but finality, with the second stepping into the place of the first should the first be invalidated. Wisconsin's courts have decided otherwise. The existence of a previously commenced proceeding bars the initiation of a competing proceeding. There is no, as they say, "standing in line," and a new proceeding involving the territory must await completion of the prior proceeding before it may commence.[103]

Finally, determining when a prior proceeding has terminated can be just as difficult as determining when a proceeding has commenced. For example, has an annexation proceeding terminated upon a ruling by a circuit court that the annexation ordinance is invalid? Does it matter whether the affected city or village could pursue an appeal? On this issue, Wisconsin's courts have chosen a less precise measure, to wit, a set of considerations. Specifically, a court should consider the following: (1) the likelihood of success of the prior proceeding, (2) the level of deference that will be given the prior determination by the succeeding stage, and (3) the presumption of validity that is accorded a petition for direct annexation (elector-initiated or property owner–initiated annexation by unanimous or one-half approval).[104] If these considerations indicate that a proceeding has essentially terminated, that proceeding's priority also terminates, allowing the potential commencement of a new proceeding involving the same land.[105] Note that this functional termination is not the same as actual termination. It is possible that success on appeal, however unlikely, could result in two concurrent land actions affecting the same land. One court has opined that the first action will retain its precedence in this event.[106]

---

101. Town of Campbell v. City of La Crosse, 2003 WI App 139, ¶ 9, 266 Wis. 2d 107, 667 N.W.2d 356.

102. *Town of Delavan*, 176 Wis. 2d at 532.

103. *Id*.

104. *Town of Campbell*, 2003 WI App 139, ¶ 12.

105. *Id*.

106. *Town of Delavan*, 176 Wis. 2d at 538 ("Annexation petitions filed prior to the final resolution of the prior incorporation

Procedure

Wisconsin's courts have been consistent in holding that annexation is solely a creation of the statutes. In the words of one court, a "municipal corporation has no power to extend its boundaries otherwise than as provided for by legislative enactment or constitutional provision."[107] Courts have also been consistent in holding that, given the exclusivity of this statutory authority, substantial compliance with statutory requirements is not sufficient, rather the statutes must be strictly followed.[108]

Part I of this publication outlined many of the current statutory requirements related to annexation. These requirements have changed a good deal over the years. Many of the current requirements, however, bear at least some similarity to prior versions. The statutes, for example, have consistently required petitions with qualifying signatures, proper notices, and specific actions by annexing municipalities. Whatever the specific text of the governing statutes, courts have in almost all cases required careful compliance with the requirements. One early case considered an annexation statute that required the posting of notice of circulation of an annexation petition in eight public places within the annexing municipality.[109] The court carefully considered whether the notices were posted in "such remote places and so inaccessible that they did not constitute public places."[110] Signature requirements are ubiquitous in Wisconsin's annexation statutes. Courts have considered not merely whether sufficient numbers of signatures have been acquired, but whether the signatures actually collected provide sufficient indicia of the subject's consent so as to be counted toward the statutory requirement.[111] In another case, a village, in an attempt to correct earlier possible mistakes, enacted an annexation ordinance purporting, in part, to annex a territory that was already within the village.[112] Since the ordinance improperly described the territory to be annexed, the court invalidated the ordinance and overturned the village's attempt to annex otherwise clearly identified territories.[113]

In sum, it is clearly prudent to hew closely to the text of the statutes. Wisconsin's courts have not, particularly with regard to requirements imposed on the annexing municipality, allowed much leeway in terms of meeting clear textual commands. Failure to meet such requirements even when no harm apparently results may lead to invalidation of an annexation ordinance.

---

proceeding are undertaken solely at the petitioner's risk.").

107. Town of Greenfield v. City of Milwaukee, 272 Wis. 388, 391, 75 N.W.2d 434, 436 (1956); See also Town of Windsor v. Village of DeForest, 2003 WI App 114, ¶ 8, 265 Wis. 2d 591, 666 N.W.2d 31.

108. Town of Baraboo v. Village of West Baraboo, 2005 WI App 96, ¶ 7, 283 Wis. 2d 479, 699 N.W.2d 610.

109. Town of Wilson v. City of Sheboygan, 230 Wis. 483, 489, 283 N.W. 312, 315 (1939).

110. *Id*.

111. Village of Brown Deer v. City of Milwaukee, 16 Wis. 2d 206, 214–15, 114 N.W.2d 493, 498 (1962); Sanitary Dist. No. 4 v. City of Brookfield, 2009 WI App 47, ¶ 39, 317 Wis. 2d 532, 767 N.W.2d 316.

112. *Town of Windsor*, 2003 WI App 114, ¶ 11.

113. *Id*. ¶ 13.

Contiguity

As noted earlier, the current annexation statutes require, in almost all instances, that an annexed territory be contiguous to the municipality that is seeking annexation.[114] The contiguity requirement is a long-standing one.[115] However, the statutes do not provide a definition of contiguity. While common usage may favor adjacency or physical contact, one Wisconsin court has noted that standard definitions for contiguous include simply being "near" and explicitly "not in contact."[116]

Wisconsin's courts have addressed the contiguity issue many times. In this line of cases, it turns out that the issue cuts two ways. For one, can contiguity occur when properties are physically separated? For the other, can contiguity fail when properties are physically adjacent? Perhaps unexpectedly, the answer to both is currently yes.

As to the first question, while it is unclear how much physical separation may exist between the annexing municipality and the annexed territory, at least some minor separation is permissible. In *Town of Lyons v. City of Lake Geneva*, the court considered whether an annexed territory separated by a public road from the annexing municipality violated the contiguity requirement. The *Town of Lyons* court found it did not. At least to the extent that the territories are separated by only a "gap of some 23 feet," the annexed territory "is close enough to the city limits to be contiguous."[117] Other than this case, however, "one may discern a trend in Wisconsin's courts to require at minimum some significant degree of physical contact between the properties in question."[118] For example, in *Town of Delavan v. City of Delavan*, the court found that separation of an annexed territory from the annexing municipality by a lake bed, albeit about 400 feet of lake bed, rendered the territory noncontiguous.[119] Somewhat incongruously, though, the *Town of Delavan* court found the "trivial lack of contiguity" in the case "insufficient to void the annexation."[120]

As to the second question, it is rare for the courts to discuss physically contacting territories as noncontiguous. However, in at least one case, a court had held as much. In *Town of Mount Pleasant v. City of Racine*, the court considered an annexation attaching to the city of Racine a "145-acre tract . . . touch[ing] upon the Racine city limits only by a 1,705-foot long corridor, varying in width from approximately 152 feet to approximately

114. Wis. Stat. §§ 66.0217 (2) and (3) and 66.0219 (intro.).

115. See, e.g., Town of Wilson v. City of Sheboygan, 230 Wis. 483, 494–95, 283 N.W. 312, 318 (1939) (territory required to be adjacent).

116. Town of Lyons v. City of Lake Geneva, 56 Wis. 2d 331, 336, 202 N.W.2d 228, 231 (1972) (internal citation omitted).

117. *Id*.

118. Town of Delavan v. City of Delavan, 176 Wis. 2d 516, 528, 500 N.W.2d 268, 272 (1993).

119. *Town of Delavan* at 529. Note, however, that parcels that "physically contact" via submerged lands are "plainly" contiguous. Town of Campbell v. City of La Crosse, 2001 WI App 201, 247 Wis. 2d 946, 634 N.W.2d 840.

120. *Town of Delavan* at 530.

306 feet."[121] In this case, the court determined that the properties were not contiguous. However, it is worth noting that while the *Town of Mount Pleasant* court identified the issue as one of contiguity, it appeared to analyze the annexation under a standard that would later be incorporated into the "rule of reason."[122] Though the *Town of Mount Pleasant* case appears something of an outlier, Wisconsin's courts continue to identify the standard for contiguity as "requir[ing] at minimum some *significant* degree of physical contact."[123] It appears at least plausible, then, at least in an unusual situation, that a court could invalidate an annexation of a territory physically in contact with the annexing municipality as noncontiguous.

"Rule of reason"

As discussed in part I, Wisconsin's annexation statutes provide little in the way of substantive limitations on annexations. Wisconsin's courts, however, have long held that such limitations do exist. As early as 1880, the Wisconsin Supreme Court in *Smith v. Sherry* expressed that there are limits on what territories may be included in an incorporated municipality.[124] The *Smith* case suggests that this is a constitutional limitation.[125] More recent cases have not relied upon this particular interpretation of the constitution, but upon a doctrine that has developed from a line of cases assessing the substantive appropriateness of particular annexations. This doctrine, known as the "rule of reason," is a series of inquiries undertaken by the court to ascertain whether the annexation power delegated to the cities and villages has been abused in a particular case.

Under the rule of reason doctrine, courts are expressly deferential to the annexing municipality's decision.[126] A court begins by presuming that an annexation ordinance is reasonable.[127] The party contesting the validity of the ordinance bears the burden of demonstrating an abuse of annexation powers.[128] Also, the court does not, at least nominally, "inquire into the wisdom of the annexation before it or to determine whether the annexation is in the best interest of the parties to the proceeding or of the public."[129]

---

121. Town of Mount Pleasant v. City of Racine, 24 Wis. 2d 41, 45, 127 N.W.2d 757, 759 (1964).

122. *Id*. at 45–46.

123. See Town of Wilson v. City of Sheboygan, 2020 WI 16, ¶18, 390 Wis. 2d 266, 938 N.W.2d 493 (emphasis added).

124. Smith v. Sherry, 50 Wis. 210, 6 N.W. 561 (1880).

125. "And we hold that where the territory so attempted to be included in a village is not adjacent or contiguous thereto, and the village has no interest therein as a village, its annexation for the mere purpose of increasing the corporate revenues by the exaction of taxes is an abuse and violation of that provision of section 3, art. XI of the constitution, which provides that 'it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages. . . . If by an act of the legislature a tract of country not inhabited, and not adjoining a village, can be made a part of such village, then it would seem to follow that by another act of the legislature the inhabited part of such village might be separated therefrom, and we should have the anomalous thing of a village without inhabitants, and composed simply of a tract of territory, which would be an absurdity.'" Id. at 216–17.

126. Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 327, 249 N.W.2d 581, 585 (1977).

127. *Id*.

128. Town of Campbell v. City of La Crosse, 2003 WI App 247, ¶ 19, 268 Wis. 2d 253, 673 N.W.2d 696.

129. *Town of Pleasant Prairie*, 75 Wis. 2d at 327.

To assist in assessing whether the annexing municipality has "abused its powers of annexation,"[130] the courts have broken the inquiry into three requirements that must be satisfied: "(1) exclusions and irregularities in boundary lines must not be the result of arbitrariness, (2) some reasonable present or demonstrable future need for the annexed property must be shown, and (3) no other factors must exist which would constitute an abuse of discretion."[131] A failure in regards to any of these items indicates that the municipality has abused its authority.[132]

The first item of the standard tests the reasonableness of the municipal boundaries created by the annexation. Among the irregularities in boundary lines that have been found unacceptable are the creation of a small island of town property within the city, perhaps particularly when such an island is created so as to avoid opposition to the annexation.[133] Also, Wisconsin's courts have frequently opined that "shoestring or gerrymander annexation," "isolated areas connected by means of a technical strip a few feet wide," and "crazy-quilt boundaries" are violations of the requirement.[134] The *Town of Mount Pleasant* case, discussed earlier in regards to contiguity, is generally cited as an example of an annexation involving improperly arbitrary boundaries.

There is an exception to the boundary inquiry. "Where direct annexation proceedings are initiated by property owners, the general rule is that the annexing municipality is not to be charged with arbitrary action in the drawing of boundary lines."[135] This is so even if the boundaries are selected with the purpose of ensuring the success of the annexation proceeding.[136] There are, however, two further qualifications to this exception. First, the exception for direct annexations does not apply when the electors or property owners are acting essentially as agents for the annexing municipality.[137] Second, even in the case of a direct annexation, boundaries may be impermissibly arbitrary if "the territory subject to the proposed annexation is an 'exceptional' shape."[138]

The second test of the rule of reason is that the annexing municipality must have some present or demonstrable future need for a substantial portion of the territory being annexed.[139] According to the case law, the need of the annexing municipality for the annexed territory must be something more than a desire, but it need not be a "pressing

130. Town of Wilson v. City of Sheboygan, 2020 WI 16, ¶ 24, 390 Wis. 2d 266, 938 N.W.2d 493.

131. Town of Sugar Creek v. City of Elkhorn, 231 Wis. 2d 473, 478, 605 N.W.2d 274, 277 (Wis. Ct. App. 1999).

132. *Town of Wilson*, 2020 WI 16, ¶ 13.

133. Town of Fond du Lac, v. City of Fond du Lac, 22 Wis. 2d 533, 542, 126 N.W.2d 201, 205 (1964).

134. Town of Mount Pleasant v. City of Racine, 24 Wis. 2d 41, 46, 127 N.W.2d 757, 760 (1964).

135. Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 339, 249 N.W.2d 581, 591 (1977).

136. Town of Campbell v. City of La Crosse, 2003 WI App 247, ¶ 21, 268 Wis. 2d 253, 673 N.W.2d 696.

137. *Town of Wilson*, 2020 WI 16, ¶ 28.

138. *Id*. ¶¶ 28–29.

139. *Id*. ¶ 33; see also Town of Medary v. City of La Crosse, 88 Wis. 2d 101, 123, 277 N.W.2d 310, 321 (Wis. Ct. App. 1979).

imperative."[140] Because the territory must meet some municipal need, the annexed territory should be "reasonably suitable or adaptable to city or village uses or needs."[141] The inquiry here is a factual one, focused on the need for the territory from the perspective of the annexing municipality.[142] Courts have considered facts like planning for municipal development, actual or expected economic or population growth, and the provision of municipal services.

As may be apparent from the standards, this portion of the rule of reason is somewhat vague. Perhaps unsurprisingly, therefore, Wisconsin's courts have shown some inconsistency in applying this portion of the "rule of reason." In some cases, courts have demonstrated a great deal of deference to the annexing municipality, in others they have scrutinized local economic conditions and municipal assertions of need. In one instance of the former, a court stated that "[i]t is for the Common Council . . . to weigh competing data and theories bearing on what zoning is best for the area in which this annexation is located."[143] In another, despite a factual showing that the annexing city had ample existing land for expansion, a declining population, and plans for only a fraction of the annexed territory, the court found adequate "need" was demonstrated.[144] Quite in contrast, several decisions involved a thorough and, indeed, skeptical consideration of an annexing municipality's asserted reasons for annexing and the economic realities underlying those reasons. For example, in *City of Beloit v. Towns of Beloit, Turtle & Rock*, the court of appeals affirmed a circuit court's findings assessing the City of Beloit's likely rate of growth, need of land for future development, and feasible use of existing city land—all to the contrary of the city's opinion.[145] While the manner of application of the test may not be entirely clear, it does appear clear that courts have in many cases allowed significant factual development of this issue.[146]

Rather more clear is that in the case of an elector-initiated or property owner–initiated annexation, the motivation of the petitioner is entitled to great weight. "It cannot be doubted that a purpose to develop one's land is legitimate, and . . . that property owners may seek annexation in pursuit of their own perceived best interests."[147] Moreover, a property owner's desire to be located in a particular municipality is, itself, an important consideration.[148] The ability to identify specific needs of property owners that will be met

140. *Town of Medary*, 88 Wis. 2d at 117–18.

141. *Town of Pleasant Prairie*, 75 Wis. 2d at 334.

142. *Id*. at 334–35.

143. *Id*. at 333.

144. *Town of Medary*, 88 Wis. 2d at 123.

145. City of Beloit v. Towns of Beloit, Turtle & Rock, 47 Wis. 2d 377, 391, 177 N.W.2d 361, 370 (1970).

146. See Town of Wilson v. City of Sheboygan, 2020 WI 16, ¶ 36, 390 Wis. 2d 266, 938 N.W.2d 493 (noting the circuit court's "detailed findings" on this issue).

147. Town of Pleasant Prairie v. City of Kenosha, 75 Wis. 2d 322, 329, 249 N.W.2d 581, 586 (1977).

148. Town of Sugar Creek v. City of Elkhorn, 231 Wis. 2d 473, 483, 605 N.W.2d 274, 279 (Wis. Ct. App. 1999).

by the annexing municipality after the annexation will, thus, often conclusively satisfy this portion of the test.

Under the third test of the rule of reason, an annexation may be nullified if other factors demonstrate an abuse of discretion. It is not entirely clear from the case law what sorts of action may fall under this category beyond "reasons other than those considered under the first two components."[149] Parties challenging annexation have at times made arguments under this category alleging annexing municipality actions similar to exercising undue influence or improper inducement. These claims have been largely without success.[150] In general, courts have held that a municipality is authorized to condition provision of services on annexation.[151] It is worth noting, however, that in several cases, though none directly applying the third portion of the "rule of reason" test, courts have made clear that not all municipal actions taken in furtherance of an annexation are permissible.[152]

Part III. Recent Wisconsin Supreme Court cases

After many years without taking up an annexation challenge, Wisconsin's Supreme Court accepted two cases involving annexation issues in 2018 and 2019. In *Town of Lincoln v. City of Whitehall*, the court focused on an issue raised by fairly recent annexation legislation.[153] In *Town of Wilson v. City of Sheboygan*, the court revisited long-standing case law.[154]

Town of Lincoln v. City of Whitehall

The dispute in *Town of Lincoln* centered on an attempt by a group of landowners to annex a portion of the town of Lincoln to the city of Whitehall. Specifically, a company, Whitehall Sand and Rail (Whitehall Sand), intended to open a sand mine on a portion of the annexed territory and wanted the territory under the jurisdiction of the City of Whitehall.[155] With some assistance from the city, Whitehall Sand drafted an annexation petition and gathered signatures.[156] The petition was filed with the city labeled as a petition for direct (elector-initiated or property owner–initiated) annexation by unanimous approval.[157] As it turns out, however, the approval of one property owner was not included. Fox

149. Town of Campbell v. City of La Crosse, 2003 WI App 247, ¶ 37, 268 Wis. 2d 253, 673 N.W.2d 696.

150. See, e.g., *Town of Sugar Creek*, 231 Wis. 2d at 485.

151. *Id.*

152. See, e.g., Town of Fond du Lac, v. City of Fond du Lac, 22 Wis. 2d 533, 540, 126 N.W.2d 201, 204 (1964); Hoepker v. City of Madison Plan Commission, 209 Wis. 2d 633, 649, 563 N.W.2d 145, 151 (1997).

153. Town of Lincoln v. City of Whitehall, 2019 WI 37, 386 Wis. 2d 354, 925 N.W.2d 520.

154. Town of Wilson v. City of Sheboygan, 2020 WI 16, 390 Wis. 2d 266, 938 N.W.2d 493.

155. *Town of Lincoln*, 2019 WI 37, ¶ 5.

156. *Id.* ¶ 8.

157. *Id.* ¶ 10.

Valley and Western Ltd. owned a strip of railroad land in the territory to be annexed but had not signed the petition.[158]

Notwithstanding the potential issue, the City of Whitehall enacted the necessary ordinances to complete the annexation process.[159] After passage of the ordinances, the Town of Lincoln sought DOA review under Wis. Stat. § 66.0217 (6) (d) of the purported direct annexation by unanimous approval.[160] As previously discussed, DOA review of a direct annexation by unanimous approval is a limited one. The only issues that may be considered are (1) whether the annexed territory is contiguous with the annexing municipality and (2) whether the annexing municipality is attempting to annex a territory in a county in which no part of the municipality is currently located.[161] In its review, the DOA found that the territory annexed by the City of Whitehall was not contiguous.[162] Perhaps out of step with the trend in recent contiguity cases, the DOA examined the shape of the annexation, rather than the simple fact of adjacency.[163] The DOA found that the annexation of "a long and narrow corridor of territory which primarily serves to connect the much larger territory," sometimes described as a balloon-on-a-string annexation, violated the statutory requirement of contiguity.[164] The DOA determination was, of course, only advisory and, indeed, came after the city's final action on the annexation.

The DOA decision did, however, provide apparent statutory authority for the Town of Lincoln to file a lawsuit challenging the annexation.[165] The town filed such a lawsuit, seeking declaratory judgment that the annexation was invalid.[166] The town initially pursued several arguments, including that the annexation was improperly labeled as a direct annexation by unanimous approval when it did not meet the requirements for such an annexation, that the annexed territory was not contiguous to the annexing municipality, and that the annexation violated the rule of reason.[167] The circuit court determined that only the contiguity issue identified by the DOA could be raised by the town.[168] Later in the same proceeding, the circuit court also granted summary judgment to the city on the contiguity issue, finding that contiguity existed as a matter of law.[169] On appeal, the court of appeals affirmed the circuit court on each of the issues. As to the question of what issues were properly before the court, the court of appeals held that the plain language

158. *Id*.

159. *Id*. ¶ 11.

160. *Id*. ¶ 12.

161. Wis. Stat. § 66.0217 (6) (d).

162. Town of Lincoln v. City of Whitehall, 2019 WI 37, ¶ 13, 386 Wis. 2d 354, 925 N.W.2d 520.

163. *Id*.

164. *Id*.

165. Wis. Stat. § 66.0217 (6) (d) 2. and (11) (c).

166. *Town of Lincoln*, 2019 WI 37, ¶ 14.

167. *Id*. ¶15.

168. *Id*.¶ 16.

169. *Id*. ¶ 17.

of the statutes barred any argument made by the town other than the contiguity issue.[170] On the contiguity issue, the court of appeals held that, because the annexed territory was described by private petitioners, not the city, and because the annexed territory was not improperly irregular, the statutory contiguity requirement was satisfied.[171]

The town sought review of each of these holdings. Of particular interest seemed to be the issue of the proper interpretation of Wis. Stat. § 66.0217 (6) (d) and (11) (c): statutes limiting judicial review of direct annexations by unanimous approval. In 2003, Wis. Stat. § 66.0217 (11) (c) was added to the statutes.[172] At that time, the provision read "No action on any grounds, whether procedural or jurisdictional, to contest the validity of . . . [a direct] annexation [by unanimous approval] . . . may be brought by any town."[173] Several decisions of Wisconsin courts of appeals considered the provision and found that the plain language of the statute precluded most any action by a town challenging a direct annexation by unanimous approval, regardless of what sort of statutory violation could be demonstrated.[174] In 2011, perhaps responding to these rulings, the legislature modified the limitation in Wis. Stat. § 66.0217 (11) (c) to the current language.[175] The current statute eases the restriction on town actions challenging direct annexations by unanimous approval, allowing such actions, but only if the DOA concludes that there has been a violation of the statutory contiguity or "same county" requirement.[176] The language of the statute, however, does not expressly provide what sorts of challenges could be made to the annexation once it is challengeable. It may be a reasonable inference, as the court of appeals held in *Town of Lincoln*, that towns are limited to the particular grounds identified by the DOA. Perhaps, though, the legislature's omission of a specific limitation is intentional and meaningful.

As it turns out, however, the Wisconsin Supreme Court did not address the issue. Instead, the case was decided on a "threshold question."[177] The *Town of Lincoln* court held that the initial question in resolving the case was whether the annexation petition challenged here was indeed a petition for direct annexation by unanimous approval.[178] In the words of the court, "if we determine that the petition was erroneously denominated as one by unanimous approval, then the grounds on which the Town can challenge the an-

170. Town of Lincoln v. City of Whitehall, 2018 WI App 33, ¶ 17, 382 Wis. 2d 112, 912 N.W.2d 403 (rev'd on other grounds, *Town of Lincoln*, 2019 WI 37).

171. *Town of Lincoln*, 2018 WI App 33, ¶¶ 45–46 (rev'd on other grounds, *Town of Lincoln*, 2019 WI 37.).

172. 2003 Wisconsin Act 317.

173. *Id*.

174. See Darboy Joint Sanitary v. City of Kaukauna, 2013 WI App 113, ¶ 11, 350 Wis. 2d 435, 838 N.W.2d 103; Town of Merrimac v. Village of Merrimac, 2008 WI App 98, ¶ 13, 312 Wis. 2d 754, 753 N.W.2d 552.

175. 2011 Wis. Act 128.

176. Wis. Stat. § 66.0217 (6) (d) 2.

177. Town of Lincoln v. City of Whitehall, 2019 WI 37, ¶ 24, 386 Wis. 2d 354, 925 N.W.2d 520.

178. *Id*.

nexation include unanimity."[179] The court looked to Wis. Stat. § 66.0217 (2) for definition of what sorts of actions constitute a direct annexation by unanimous approval.[180] Importantly, in the court's opinion, the provision requires that such a petition "must be 'signed by all of the electors residing in the territory and the owners of all of the real property in the territory.'"[181] This requirement, the court found, corresponds with the ordinary meaning of the word "unanimous."[182]

Given this standard, application of the facts to the rule was straightforward. At oral argument, the city had conceded that no approval was received in regards to the Fox Valley and Western Ltd. property that was included within the annexation territory.[183] The court concluded, therefore, that the annexation did not qualify as a direct annexation by unanimous approval.[184] Since it did not qualify as a direct annexation by unanimous approval, the limitation on town actions under Wis. Stat. § 66.0217 (11) (c) did not apply.[185] Upon this determination, the court remanded the case to the circuit court for additional proceedings, presumably allowing the town to raise additional, likely dispositive, issues related to the validity of the annexation.[186]

The principal concern the court raised in deciding this case was that "allowing a petition for annexation to proceed as a petition for direct annexation by unanimous approval despite a facial deficiency in the unanimity of the petition would potentially encourage the mislabeling of annexation petitions."[187] Undoubtedly, a contrary holding would allow at least some annexations not meeting statutory standards to take place, perhaps including cases where petitions are knowingly misfiled. However, the *Town of Lincoln* holding creates a different ambiguity. Section 66.0217 (6) (d) 2. and (11) (c) of the Wisconsin Statutes appears to express an intent to limit town challenges to certain annexations. Under the *Town of Lincoln* holding, in addition to the specific statutory review, a town may challenge whether a direct annexation by unanimous approval petition is "properly labeled" or misclassified. That challenge includes at least the ability to assess whether all electors and property owners have purportedly signed the petition. Whether or not additional procedural requirements under Wis. Stat. § 66.0217 (2) could be examined remains for later cases to reveal.

179. *Id.*
180. *Id.* ¶ 29.
181. *Id.*
182. *Id.*
183. *Id.* ¶ 31.
184. *Id.* ¶ 38.
185. *Id.* ¶ 37.
186. *Id.* ¶ 39.
187. *Id.*¶ 33.

Town of Wilson v. City of Sheboygan

In *Town of Wilson v. City of Sheboygan*, Wisconsin's Supreme Court turned its consideration to issues of contiguity and the rule of reason while assessing the validity of a City of Sheboygan annexation of territory, including territory owned by J. Kohler Company (Kohler), formerly contained within the town of Wilson.[188] Kohler is perhaps best known as a manufacturer of plumbing products. However, among other activities, Kohler operates two well-known golf resorts in the Sheboygan area. Kohler was interested in developing another golf course, this one on and around Kohler-owned property located in the town of Wilson.[189]

Kohler had come to believe that the Wilson Town Board would not allow the property to be developed as Kohler wished.[190] In light of this belief, Kohler contacted the City of Sheboygan regarding the possibility of annexing the Kohler property to the city of Sheboygan.[191] The city's response was favorable and Kohler set about, with some assistance from the city, seeking a direct annexation by one-half approval.[192] The Kohler property was about a mile southeast of the nearest city of Sheboygan border. To connect its property, Kohler added to its petition several properties constituting a roughly northwesterly corridor attaching the Kohler lands to the city.[193] Also included in the petition was a relatively large amount of state-owned land adjacent to the Kohler property.[194] Though constituting over 550 acres, the territory proposed to be annexed contained only about nine residents, only six of them adults.[195] Kohler obtained the signatures of five of these adults and the signatures of owners of half of the real property by assessed value.[196] Shortly after receiving the petition, the Sheboygan Common Council enacted an ordinance annexing the territory.[197]

The town filed suit in the Sheboygan County Circuit Court alleging annexation procedure violations, a lack of contiguity between the city of Sheboygan and the annexed territory, and that the annexation failed to satisfy the rule of reason.[198] The circuit court dismissed a portion of the town's claims on summary judgment and found for the city

---

188. Town of Wilson v. City of Sheboygan, 2020 WI 16, ¶ 1, 390 Wis. 2d 266, 938 N.W.2d 493.

189. *Id*.

190. *Id* ¶¶ 3–4.

191. *Id*. ¶ 4.

192. *Id*. ¶ 6. See part I in this publication for further discussion of the process for an elector-initiated or property owner–initiated annexation by one-half approval.

193. *Id*. ¶ 5.

194. *Id*. See also *id*. app.

195. *Id*. ¶ 6. See also Corrinne Hess, "Sheboygan aldermen approve annexation of Kohler Co. golf course site," *BizTimes Milwaukee*, Aug. 8, 2017. https://biztimes.com/.

196. *Town of Wilson*, 2020 WI 16, ¶ 6.

197. *Id*. ¶ 8.

198. *Id*. ¶ 9.

on the balance of the claims after a bench trial.[199] The town petitioned the Wisconsin Supreme Court to bypass the court of appeals, and the supreme court granted the request.[200]

Before the Wisconsin Supreme Court, the Town of Wilson renewed the arguments it made before the circuit court, alleging that the annexation violated procedural requirements and contiguity and rule of reason standards.[201] As to procedural requirements, the town raised two issues: (1) whether because so much publicly owned property was included in the annexation special rules regarding qualifying signatures should apply and (2) whether the population of the annexed territory was properly certified by the DOA.[202] The supreme court gave both arguments short shrift. As to the first, the court held that the "Town's argument . . . is a policy argument and has no support in the statutory language."[203] As to the second, the court found no factual dispute that a satisfactory "certification" was provided.[204] Simply put, in the absence of a specific statutory requirement providing a certification process, the DOA was justified in providing a reasonable process of its own.[205]

Perhaps more intriguing was the town's contiguity argument—i.e., that the annexation here was essentially the same as the annexation invalidated in *Town of Mount Pleasant v. City of Racine*.[206] The annexation here, as in *Town of Mount Pleasant*, involved a large area some distance from the annexing city connected to the annexing city by a relatively narrow corridor. The analogy of a "balloon on a stick" or a "balloon on a string" has been used to describe annexations of such shapes. In *Town of Mount Pleasant*, the annexation was invalidated as "not meet[ing] the statutory requirement of contiguity."[207] The *Town of Wilson* court, however, disagreed that the annexation here was as objectionable as that in *Town of Mount Pleasant*. The *Town of Wilson* court found "no similarity between the cases" because the adjacency of the annexed territory with the city was more than a "technical strip" and involved a significant degree of physical contact.[208] Perhaps more to the point, the court also clarified that contiguity was a separate consideration from the boundary reasonableness inquiry under the rule of reason, a distinction apparently improperly blurred in *Town of Mount Pleasant*.[209] The *Town of Wilson* court, however, did not clarify the import of this observation. It appears that the *Town of Mount*

199. *Id*. ¶¶ 9–10.

200. *Id*. ¶ 10.

201. *Id*. ¶ 16.

202. *Id*. ¶¶ 41–46.

203. *Id*. ¶ 45.

204. *Id*. ¶ 49.

205. *Id*.

206. See Town of Mount Pleasant v. City of Racine, 24 Wis. 2d 41, 47, 127 N.W.2d 757, 760 (1964).

207. *Id*.

208. *Town of Wilson*, 2020 WI 16, ¶ 22. The touching boundary here was 650 feet wide, whereas the *Town of Mount Pleasant* corridor varied between 152 and 360 feet.

209. *Id*. ¶ 23.

Pleasant may no longer provide a useful guidepost for assessment of compliance with the statutory contiguity requirement, but neither is it clear that simple adjacency will satisfy the requirement in all cases.

The Town of Wilson also asserted that each of the prongs of the rule of reason was implicated by the City of Sheboygan's annexation. The court thoroughly considered each of these claims, providing in its effort a comprehensive restatement of the rule of reason case law. Unfortunately, for the Town of Wilson, little about the court's opinion indicates that the application of the rule of reason was, in this case, a close call.

As may be apparent from the discussion regarding contiguity, the physical shape of the annexed territory has the potential to raise eyebrows. However, because the annexation here was initiated by a property owner, the court provided only a limited review of the annexation's resulting boundaries.[210] Moreover, the facts of the case did not indicate that the city was heavily involved in selecting the boundaries, nor was the shape of the annexation, in the court's opinion, so unusual that it could be characterized as "gerrymandered" or a "crazy quilt."[211] As such, the court found that the boundaries created by the annexation were not "impermissibly arbitrary."[212]

In regards to the second prong of the rule of reason, it appears that the circuit court received a good deal of evidence related to the city's "need" for the territory.[213] Of particular importance, a portion of the annexed territory had long been tempting the city as a potential locale for residential growth.[214] Moreover, since the annexation was initiated by a private party, the private party's interests were significant. Kohler was clearly interested in developing its property as it wished, an interest it believed more likely to be realized in the city than in the town.[215] Also, the city provided access to useful services, services that could likely be provided at a higher standard by the city than the town.[216]

The town also made an argument under the third prong of the rule of reason test, suggesting that the city was "simply [out] to get more money."[217] The court found no violation of the rule of reason, but for somewhat unclear reasons. In any event, whether the town actually stated a potential abuse of discretion on the part of the city, the town was unable to provide sufficient factual support of any allegations that would result in invalidation of the annexation.[218]

Three things stand out about *Town of Wilson*—two related to the majority opinion,

210. *Id.* ¶ 26.
211. *Id.* ¶¶ 30–31.
212. *Id.* ¶ 32.
213. *Id.* ¶ 36.
214. *Id.*
215. *Id.* ¶ 37.
216. *Id.* ¶ 38.
217. *Id.* ¶ 40.
218. *Id.*

the other to the two concurring opinions. First, and particularly in light of the concurrences, the majority opinion can be understood as a full-throated endorsement of the rule of reason. Despite the invitation to discuss the validity of the rule of reason, the majority spends its effort rather in providing a thorough guide to the principal standards governing annexation, including a careful restatement of the rule of reason. Second, it appears relatively clear that *Town of Mount Pleasant* should no longer be relied upon as a precedent for statutory contiguity questions. Its role as a precedent for rule of reason questions appears more secure.

Even more intriguing are the concurring opinions. In particular, the concurring opinion authored by Justice Rebecca Bradley makes an argument for the elimination of the rule of reason. Justice R. Bradley castigates the rule of reason as a judicially created doctrine that is untethered from any statutory mooring.[219] "The rule of reason represents a relic of a by-gone era, reflecting the long-discredited notion that it was the duty of jurists to 'do justice.'"[220] As such, Justice R. Bradley would omit the rule of reason analysis and consider only the statutory contiguity requirement.[221] The other concurrence, this one authored by Justice Hagedorn, compliments Justice R. Bradley's opinion as a "tour de force."[222] Justice Hagedorn, however, declines to join the opinion because the parties to the litigation did not raise the issue.[223] Thus, while *Town of Wilson* does not exactly break new ground, it does present issues that may warrant continued watching.

Conclusion

Annexations will, no doubt, remain contentious. There will inevitably be at least two differing interests in most every case—the city or village that is adding land and the town that is losing land. The legislature has attempted to mitigate the forthcoming battles by setting forth a scheme that requires a fairly robust demonstration of support for an annexation and provides opportunities for affected towns to be involved in the process. The courts, moreover, have required that cities and villages establish a rough substantive reasonableness when they choose to annex. Given the challenges posed by these requirements and the costs entailed, cities and villages are well advised to be deliberative when considering expanding boundaries. ■

219. Town of Wilson v. City of Sheboygan, 2020 WI 16, ¶ 63, 390 Wis. 2d 266, 311–12, 938 N.W.2d 493, 516 (Bradley, Rebecca J., concurring).

220. *Id.* ¶ 60 (Bradley, Rebecca J., concurring).

221. *Id.* ¶ 63 (Bradley, Rebecca J., concurring).

222. *Id.* ¶ 77 (Hagedorn, J., concurring).

223. *Id.* ¶ 78 (Hagedorn, J., concurring).