Comment

CHANGES IN WISCONSIN ANNEXATION PROCEEDINGS AND REMEDIES

INTRODUCTION

After World War II rapid population growth and other factors created many problems for local government in Wisconsin and elsewhere. As rural areas became more urban, there was an increased demand for services which the rural form of local government could not efficiently provide. As cities and villages grew more congested, expansion became necessary to increase their tax base and plan their growth. In Wisconsin, these pressures resulted in increased municipal annexations and incorporations.

Wisconsin's annexations and incorporation statutes proved inadequate under this increased use. The statutes required that the majority of the residents in an area to be annexed or incorporated consent to such action, but they had no provisions to protect the interests of the other residents of the same metropolitan area. Also, they were not well drafted and left several important questions unanswered. This sometimes caused difficulties in the proceedings. These factors often led to bitter contests between neighboring municipalities or citizen groups and to long and costly litigation. To relieve this situation, the legislature recently made significant changes in both the annexation and incorporation statutes.[1]

This Comment describes the present Wisconsin annexation proceedings in light of the changes made in the annexation statutes, and makes several judgments concerning these proceedings. It also describes the present remedies available against annexation proceedings, remaining problems in the area, and a current proposal to change the annexation statutes further. The incorporation statutes are not discussed because they are reasonably complex and require separate examination. Several articles have examined annexation proceedings prior to the recent changes.[2] Therefore, greater empha-

[1] For a description of the problem in Wisconsin see *Report of the Interim Urban Problems Committee to the 1959 Wisconsin Legislature*, ch. 1 (Jan. 1959).

[2] Cutler, *Characteristics of Land Required for Incorporation or Expansion of a Municipality*, 1958 WIS. L. REV. 6; Meldman, *Annexation Under 62.07 Statutes*, 40 MARQ. L. REV. 199 (1956); Maruszewski, *Legal Aspects of Annexation as It Relates to the City of Milwaukee*, 1952 WIS. L. REV. 622.

sis is devoted to the new statutory provisions and areas which have not been treated previously.

NATURE OF THE ANNEXATION POWER

Before examining Wisconsin's annexation proceedings and the remedies against such proceedings, it is helpful to examine the nature of the annexation power. The power of a state to control the addition of territory to municipal corporations is relatively broad and unrestrained. It is part of the state's inherent power to create, divide, and abolish municipal corporations within constitutional restrictions.[3] The Wisconsin court has recognized the state's broad power in this area since 1860.

> [T]he power of the legislature to enlarge, restrict, change, modify, control and repeal all merely public corporations is undoubted. They are established as part of the police [power] of the State and to meet the object of their creation must be subject to such changes as the exigencies of the times require.[4]

Generally, this power is not possessed by municipalities themselves, unless delegated to them by the state. In some states, home rule cities may annex territory on the basis of constitutional authority,[5] but in Wisconsin, as in most states, municipalities can only act according to legislative enactment.[6] Wisconsin has also followed the majority rule that exercise of the annexation power is a legislative function. This means that only the legislature can determine municipal boundaries or the conditions under which they may be altered.[7]

The only limitations on the exercise of this broad power are state constitutional restrictions. The United States Supreme Court has made it clear that there are no federal questions involved in the use of the annexation power.[8] The Court declared that the amount of territory under the control of municipal corporations was "in the absolute discretion of the State" and that the State's actions in this regard were "unrestrained by any provision of the Constitution of the United States."[9] In Wisconsin, the constitution does not place many serious restrictions on the exercise of the annexation power. The only significant provision is the prohibition

[3] RHYNE, MUNICIPAL LAW 27 (1957).
[4] Town of Milwaukee v. City of Milwaukee, 12 Wis. 103 [93], 111 [100] (1860).
[5] ANTIEAU, MUNICIPAL CORPORATION LAW 29 (1958).
[6] Town of Wauwatosa v. City of Milwaukee, 266 Wis. 59, 62, N.W.2d 718 (1954).
[7] City of Milwaukee v. Sewerage Comm'n, 268 Wis. 342, 67 N.W.2d 624 (1954); *In re* Village of North Milwaukee, 93 Wis. 616, 67 N.W. 1033 (1896).
[8] Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).
[9] *Id.* at 178-79.

on special legislation amending municipal charters.[10] This provision has been held to prohibit the legislature from passing special annexation laws affecting particular municipalities.[11]

The nature of the annexation power explains the right of the legislature to prescribe the type of proceedings. It also explains how the legislature may change the annexation proceedings when this is deemed advisable. Note that the nature of the power does not prevent a state from placing restrictions on its exercise or permitting a wide scope of attacks on annexations.

Background and Summary of the Changes in the Statutes

Wisconsin passed its first general annexation statute in 1889.[12] Prior to that time annexations were accomplished by the passage of special acts which applied only to particular municipalities. The general annexation statute provided for annexation of a territory on the petition of three-fourths of the electors, or if there were no electors, of the owners of the taxable property in the territory. Then, the governing body of the annexing municipality had to approve the annexation by the passage of an annexation ordinance. This statutory proceeding was later changed as to the number of electors and property owners required to sign the petition, and it became section 62.07 of the statutes.[13] Most annexation case law arose under this statute, which was the general method of annexation until 1957.[14]

Because of the postwar pressures already described, the 1955 legislature ordered a study of the annexation and incorporation statutes by the Legislative Council. The Council recommended substantive changes in these statutes to the 1957 legislature.[15] This legislature failed to pass the major part of these recommendations; but it renumbered the annexation statute from section 62.07 to section 66.021, eliminated most of the statute's ambiguities, and added a new method of annexation by referendum.[16] Under the new method, only 20 percent of the electors and the owners of 50 percent of the real property in the area to be annexed need petition the neighboring municipality for annexation. Then a referendum

[10] Wis. Const. art. IV, § 31, ¶ 9th.
[11] State *ex rel.* City of Shawano v. Engel, 171 Wis. 299, 177 N.W. 33 (1920); Smith v. Sherry, 50 Wis. 210, 6 N.W. 561 (1880).
[12] Wis. Laws 1889, ch. 326.
[13] Wis. Stat. § 62.07 (1955).
[14] For a detailed analysis of the old annexation statutes see Meldman, *supra* note 2.
[15] II *Report of the Wisconsin Legislative Council* 224 (1957).
[16] Wis. Laws 1957, ch. 676.

is held, and if the results are favorable to annexation, the territory may be annexed by the municipality.[17]

However, these 1957 changes were not sufficient to satisfy the demands for revision. Consequently, the 1959 legislative completely revised the incorporation and consolidation statutes and provided for administrative and judicial review of certain annexations.[18] The legislature also added a third method of annexation by the creation of section 66.024.[19] This statute allows the annexing municipality to start the proceedings, rather than the residents of the territory to be annexed. These changes left the annexation statutes in their present complex state.

STATUTORY PROCEEDINGS FOR ANNEXATION

The statutory proceedings for annexation are found in chapter 66 of the statutes along with the proceedings for incorporation and consolidation. There are now three methods of annexation in Wisconsin: (1) direct annexation by petition under section 66.021, in which the proceedings are initiated by the residents of the territory to be annexed (which essentially is the old method under section 62.07); (2) annexation by referendum under section 66.021, in which the proceedings also are initiated by the residents of the territory to be annexed; and (3) annexation by referendum under section 66.024, in which the proceedings are initiated by the annexing municipality. In Wisconsin, a majority of the residents of the territory being annexed must consent to the annexation. All of the above methods require such consent, either by signing an annexation petition or voting for annexation in a referendum.

Proceedings Under Section 66.021

Initiation of Proceedings

Both types of proceedings under section 66.021 are initiated by the publication of a notice of intention to circulate a petition for annexation by an elector or property owner in the area to be annexed. The notice must also contain a description of the territory to be annexed, the name of the city or village to which annexation is proposed, the name of the town or towns from which the territory will be detached, and the name of the person causing the petition to be circulated. That person must serve a copy of the notice and

[17] WIS. STAT. § 66.021 (2) (b) (1959).
[18] Wis. Laws 1959, ch. 261 §8.
[19] Wis. Laws 1959, ch. 418.

a copy of a scale map of the territory on the clerks of each municipality[20] to be affected within five days of the publication of the notice. For annexations within a metropolitan community,[21] a copy of the notice and the scale map must also be mailed to the Director of the Planning Function in the Department of Resource Development.[22]

Petition for Annexation

Not less than 10, nor more than 20 days after the publication of the notice, circulation of the petition must be begun. The petition for direct annexation must be signed by a majority of the electors and the owners of one-half the real property in the area to be annexed, or if no electors reside in the territory, just the owners of one-half the real property.[23] A petition for annexation by referendum requires the signatures of only 20 percent of the electors, but still requires the signatures of the owners of one-half the real property. Signatures cannot be withdrawn from these petitions. The petitions must be filed with the clerk of the annexing city or village within six months of the publication date of the notice, or they will be void.

Proceedings After Filing Petition

Direct annexation. When a petition is one for direct annexation, the governing body of the municipality may accept the petition by passage of a resolution or an annexation ordinance. If the petition is accepted, the clerk of the annexing municipality must give notice of that fact to the clerk of the town from which territory will be detached, and to any other person who files a request for such notice. The annexing municipality's governing board must adopt an ordinance for annexation no sooner than 20 days after the publication of the notice of intention to circulate the petition and no later than 60 days after the petition is filed with the clerk. If the

[20] Municipality, in this context, means both the annexing city or village and the town losing the territory. However, as used throughout the rest of this Comment, the term usually means just an incorporated body, *i.e.*, a city or village.

[21] For the definition of a metropolitan community see WIS. STAT. § 66.013 (c) (1959), and the text at note 29 *infra*.

[22] Hereinafter this official will be referred to as the "Director." The present statutes are inconsistent as to his title. Sections 66.021 (11) (a) and (b) of the annexation statutes refer to him as the State Director of Regional Planning. However, the incorporation and consolidation statutes and § 66.021 (11) (c) of the annexation statutes refer to him as in the text. Legislation is currently proposed which will make his title in the annexation statutes the same as in the other statutes. For the sake of consistency this proposed title is used here.

[23] Real property as used in the annexation statutes can usually be measured either in area or in assessed value. WIS. STAT. §§ 66.021 (2) (a), (b) (1959).

proposed annexation is within a metropolitan community, and the Director has determined that the annexation would be against the public interest, the governing board of the municipality must review the reasons for this determination before passing the annexation ordinance. And if the proposed annexation is greater than one square mile in area, the municipality, after passing the ordinance, must immediately petition the circuit court for a determination that the annexation is in the public interest.[24]

Passage of the ordinance makes the direct annexation effective unless 20 percent of the electors of the territory being annexed file a petition with the clerk of the town from which the territory is being detached requesting a referendum on the annexation. This counterpetition must be filed within 30 days of the notice of the acceptance of the annexation petition. If such a petition is filed, the town must give notice of the referendum, and the town board must conduct it. If the vote is favorable to the annexation, the annexing municipality must pay the costs. But, if the vote is unfavorable, the town in which the territory is located must pay the costs, and all previous proceedings are void.

Annexation by referendum. If the petition filed with the clerk of the annexing municipality is one for annexation by referendum, the governing board of the municipality may accept or reject the petition within 60 days.[25] If the petition is not expressly rejected, the clerk must notify the clerk of the town from which the territory will be detached and other persons requesting such notice. As in the case of the counterpetition described above, the town clerk must then give notice of the referendum and the town board must conduct it. The annexing municipality is required to pay the costs of a favorable referendum. If the referendum is favorable to annexation, the governing board must enact an annexation ordinance within 60 days of the receipt of the results of such a referendum. The annexation ordinance in both types of proceedings under section 66.021 must be enacted by a two-thirds vote of the elected members of the annexing municipality's governing body. The re-

[24] The standard applied by the court is the same as that used by the Director. See the text at p. 131 *infra*.

[25] The use of the permissive "may" is confusing. A literal reading of § 66.021 (5) (a) indicates that even if no action is taken by the board, a referendum can be held. Also, § 66.021 (5) (a) provides that passage of an annexation ordinance can constitute acceptance of a petition for annexation. Therefore, the annexation ordinance can be passed before the referendum. In that case, the annexation would probably be effective upon the certification of the results of the referendum under § 66.021 (5) (d). There are no court decisions on this last point, however.

quirements for review by the governing body and the circuit court, before certain annexations are effective in the annexation by referendum proceeding, are the same as those in the direct annexation proceeding.

Proceedings Under Section 66.024

Initiation of Proceedings

Under this newly created section the proceedings are initiated by the annexing municipality, not by the residents of the territory to be annexed. The governing board of the municipality must first pass a resolution declaring its intention to petition the circuit court for an order for an annexation referendum. This resolution must be adopted by a two-thirds vote of the elected members[26] of the governing board. The resolution must contain a description of the territory to be affected, and the name of the municipal official causing it to be published. Then, within five days of the publication of the resolution, this official must serve a copy of the resolution and a scale map of the territory to be annexed on the clerk of the town from which the territory will be detached.

Petition for Annexation

No sooner than 30 nor later than 45 days after publication, petition for annexation must be made to the circuit court. This petition must contain a certified copy of the resolution, the scale map, and an affidavit of the publication of the resolution. If the owners of more than one-half of the real property in the territory to be annexed sign a petition protesting the annexation,[27] and this petition is filed with the court before the hearing on the municipality's petition, the court must deny the petition for a referendum.

Proceedings After Filing Petition

The court must hold a hearing on the annexing municipality's petition. If no sufficient counterpetition is filed and the court determines that the petition complies with the statute, the court must order an annexation referendum.[28] The territory is annexed if the

[26] The statute states that the resolution must be adopted by "two-thirds of the members-elect." WIS. STAT. § 66.024 (1) (a) (1959). This is understood to mean two-thirds of all the elected members of the governing board, not just those at the meeting. Interview with Mr. Lloyd Rooney, Department of Resource Development of Wisconsin, in Madison, Wisconsin, Nov. 23, 1960.

[27] Note that here the real property can only be measured in assessed value. WIS. STAT. § 66.024 (2) (a) (1959).

[28] Section 66.024 (2) (b) provides that the court shall hear all parties interested in the annexation, including the town losing the territory, and that these parties

referendum is favorable to annexation, and the annexation becomes effective on compliance with the filing and survey requirements under section 66.021 (8).

As the statutes now stand, no provision is made in the proceedings under section 66.024 for the administrative and judicial review required of certain annexations under section 66.021.

STATUTORY PROVISIONS FOR ADMINISTRATIVE AND JUDICIAL REVIEW OF ANNEXATIONS

Section 66.021 (11), created by the 1959 legislature, requires administrative and judicial review of certain annexations. However, these review provisions do not apply to annexations under section 66.024. Also, these review proceedings are separate from the legal remedies against annexation which have been established by case law.

Annexations Within a Metropolitan Community

Section 66.021 (11) (a) requires that a proposed annexation of territory within a metropolitan community be submitted to the Director of the Planning Function of the Department of Resource Development for a determination on whether the annexation is against the public interest.[29] The annexation statutes do not define a metropolitan community, but the new incorporation statutes do. Section 66.013 (c) provides:

> 'Metropolitan community' means the territory consisting of any city having a population of 25,000 or more, or any 2 incorporated municipalities whose boundaries are within 5 miles of each other whose populations aggregate 25,000, plus all the contiguous area which has a population density of 100 persons or more per square mile, or which the director has determined on the basis of population trends and other pertinent facts will have a minimum density of 100 persons per square mile within 3 years.

This definition was probably meant to apply to annexation as well as incorporation proceedings because the annexation review proceedings were enacted in the same bill that was intended to provide

must be heard on any matter pertaining to the annexation. This seems to indicate that questions concerning the reasonableness of the annexation, as well as statutory compliance, can be raised at this hearing. Such an interpretation, however, would conflict with § 66.024 (4) (a), which states that the court must order a referendum if the description of the territory is correct and the provisions of § 66.024 are complied with. This ambiguity in the annexation statutes also has not been resolved.

[29] Note that the language in the statute is permissive. Thus, if the Director so chooses, he does not have to make a determination.

similar standards for all proceedings affecting municipal boundaries.[30]

The factors which the Director is to consider in making the public interest test are given in section 66.021 (11) (c). They are: (1) whether the governmental services for the area proposed to be annexed can be better furnished by the annexing municipality or some other contiguous municipality which has indicated a willingness to annex that territory; (2) the shape of the territory to be annexed; and (3) the homogeneity of the territory with the annexing municipality and other contiguous municipalities.[31] However, the determination of the Director before the annexation ordinance is passed is only advisory, and the municipality may annex the territory even if the determination is adverse.[32]

Annexations of One Square Mile or More

For annexations of one square mile or more of territory, the circuit court of the same county as the annexing municipality must determine that the annexation is in the public interest. The court does not make this determination until all other necessary proceedings have been completed, but it is required before the annexation becomes effective.

Immediately after the adoption of the annexation ordinance, the municipality must petition the circuit court for such a determination and give notice of such a petition to the clerk of the town from which the territory is being detached. In making its determination, the court obtains an advisory report on this question from the Director based on the factors prescribed in the statute. The statute does not specify what weight the court must give to the Director's determination, but in practice the courts may treat it with great respect as an expert opinion. The statute allows the town from which the territory is being detached and electors or property owners in the territory to intervene in the review proceedings by the trial court.

REQUIREMENTS OF ANNEXABLE TERRITORY

Territory which is being annexed must meet certain requirements.

[30] Wis. Laws 1959, ch. 261.

[31] Homogeneity is not defined in the statute. Apparently, the Director is free to consider the similarities of land use, population density, and topography between the areas in making his determination.

[32] According to the statute, this determination will be necessary again in those annexations of one or more square miles. Therefore, since the circuit court will probably place great reliance on the Director's determination, there seems to be little sense in continuing such proceedings if the Director determines in the first instance that the annexation is against the public interest.

The annexation statutes, in addition to prescribing the proceedings, state some of these requirements expressly, and the courts have inferred other requirements from the statutes. Unless the territory being annexed meets these requirements, the annexation may be attacked just as if the statutory proceedings were not being followed.

In the past the physical characteristics required of annexable territory were not too limiting. The new review provisions may change that; in determining whether the annexation is in the public interest, the Director is supposed to consider "the shape of the proposed annexation and the homogeneity of the territory with the annexing village or city and any other contiguous village or city."[33] Therefore, physical characteristics will probably be more important in future determinations of the validity of annexations.

The Wisconsin annexation statutes are worded so that only unincorporated territory under a town government can be annexed by a city or village. Territory in another municipality cannot be annexed unless it is first detached.[34] The annexation statute refers to "territory"; and, although no case has ever ruled on the point, this has been taken to mean that the territory being annexed must be only one tract of land, not several.[35]

A basic requirement specified in section 66.021 is that the territory be "contiguous" to the annexing municipality. The previous statute required only that the territory be "adjacent to" the municipality, and this term had been construed to mean that the two had to at least come in physical contact, if only at the corners.[36] One writer has stated that the new requirement of contiguity demands something more,[37] *i.e.*, a continuous border, and the change in the wording of the statute lends support to this position.

Annexations are not affected by local governmental boundaries, except those of another city or village. In *Zwiefel v. City of Milwaukee*,[38] the court held that a city could annex territory lying in two or more towns. Another recent case held that an annexation could split a town into two separate parts.[39] Also, an annexation can

[33] WIS. STAT. § 66.021 (11) (c) (1959).

[34] City of Wauwatosa v. City of Milwaukee, 180 Wis. 310, 192 N.W.2d 982 (1923). See WIS. STAT. § 66.022 (1959).

[35] Maruszewski, *supra* note 2, at 628.

[36] State *ex rel.* Badtke v. School Bd., 1 Wis.2d 208, 83 N.W.2d 724 (1957).

[37] Cutler, *supra* note 2, at 31.

[38] 188 Wis. 358, 206 N.W. 215 (1925).

[39] Town of Blooming Grove v. City of Madison, 275 Wis. 328, 81 N.W.2d 713 (1957).

cross county lines.[40] It should be noted, however, that annexations cannot change county lines or legislative district boundaries because this is solely a prerogative of the legislature.[41]

The statutes do not prescribe any particular size or shape for annexable territory. Recent annexations indicated that there was no practical limit on the size of annexations under the old statutes.[42] And in a recent case, the court said that the reasonableness of the shape of an annexation was still an open question.[43] The new review provisions seem particularly adapted to apply some restrictions in this area, and they probably will prevent "shoestring" annexations in which the municipality reaches out to the desired territory by an irregularly shaped, narrow strip of land.

The annexation statutes do not contain a specific population requirement as do those on incorporation and consolidation. However, the test of "homogeneity" prescribed by the new statute seems to require similarity in population density, as well as other physical characteristics, between the territory being annexed and the annexing municipality.

Remedies Against Annexation Proceedings

From the previous description of the broad nature of the annexation power it might seem that an individual would have great difficulty in attacking an exercise of the power. In some states that is true. In Wisconsin, however, because of the way the legislature has exercised the power by enacting statutes and the way the courts have interpreted the statutes, there are numerous ways in which annexation proceedings may be attacked.

Statutory Provisions

Unlike the old statute, the new statutes contain several remedies against annexation proceedings which can be used before the proceedings are completed. Section 66.021 provides for a referendum in direct annexation proceedings if a petition, signed by 20 percent of the electors of the territory being annexed, requesting such a referendum is filed with the town clerk. Section 66.024 provides that if a counterpetition to the annexation proceedings under that statute is signed by a majority of the property owners and filed with

[40] Fish Creek Park Co. v. Village of Bayside, 274 Wis. 533, 80 N.W.2d 437 (1957).
[41] *Ibid.*
[42] The Village of Brown Deer in Milwaukee County, with a population of less than 5000, in 1956 annexed one tract of 10.5 square miles. Cutler, *supra* note 2, at 31.
[43] Town of Wauwatosa v. City of Milwaukee, 259 Wis. 56, 47 N.W.2d 442 (1951).

the court, the proceedings are defeated. That statute also requires the court to determine the validity of the municipality's annexation petition before ordering the annexation referendum. Under section 66.021 (11) (b), proceedings for an annexation of one square mile or more, the municipality must obtain a court determination that the annexation is in the public interest immediately after passing the annexation ordinance. The statutes expressly provide that residents of the area being annexed and the towns losing the area can intervene in both these court proceedings.

One statutory provision controls all attacks on annexations after the proceedings are completed and the annexation is effective.

> No action may be commenced after 60 days from the effective date of any annexation to contest the validity thereof upon any grounds whatsoever, whether denominated procedural or jurisdictional. The validity of any annexation shall, 60 days after the effective date thereof, be conclusively established and may not be attacked collaterally or otherwise questioned.[44]

This statute of limitations on attacks on annexations applies to the proceedings under section 66.024 as well as those under section 66.021.

Grounds for Attacking Annexations

There are three possible grounds upon which an annexation may be attacked: (1) constitutionality, (2) compliance with statutory requirements, and (3) reasonableness. These objections may be raised in an action brought after the annexation is effective, or if the annexation is one which requires judicial review, the objections may be raised in the required judicial proceedings.[45]

There is some general authority that an attack on an annexation should be based on the violation of a constitutional provision to be successful.[46] In Wisconsin, however, very few successful attacks have been made on this basis,[47] and the most recent attack of this type failed.[48] Probable reasons for this are the lack of consti-

[44] WIS. STAT. § 66.021 (10) (a) (1959).

[45] As to the judicial review under § 66.024, see note 28 *supra*. Section 66.021 (11) (b) provides that residents of territory being annexed and the town from which it is being detached may intervene in the judicial review of annexations under § 66.021. There is no reason why all possible objections to the annexation could not be raised at that time.

[46] 62 C.J.S. *Mun. Corp.* § 65 (1949).

[47] *In re* Village of North Milwaukee, *supra* note 7; Smith v. Sherry, *supra* note 11.

[48] In Fish Creek Park Co. v. Village of Bayside, *supra* note 40, an annexation crossing county lines was held not to change them. Therefore, it was not unconstitutional.

tutional provisions specifically dealing with annexation and the general trend of decisions giving the legislature wide discretion in this area. One possible constitutional basis of attack is that the judicial review provisions of the new statutes require a court to make a determination which is one for legislative discretion. In the case of *In re Village of North Milwaukee,*[49] the Wisconsin court held an annexation statute invalid on that basis. Under the new statute, however, the court does not make a de novo determination of the merits of the annexation as it did in the *North Milwaukee* case, but reviews the determination of the Director. Also, the statute provides specific criteria to apply in determining whether annexation is in the public interest. These provisions seem to preserve the judicial fact finding nature of the court proceedings.[50]

The rule is well established that the parties initiating annexation proceedings and the annexing municipality must strictly comply with the annexation statutes.[51] Failure to so comply allows the annexation to be invalidated when it is attacked. A provision of section 66.021 makes it clear, however, that failure by the town officials to comply with the statute in the performance of their duties in annexation proceedings, such as conducting a referendum, will not invalidate the annexation.[52]

In reviewing proceedings up to this time, the Wisconsin court has distinguished between "procedural" and "jurisdictional" errors in complying with the statute and held that the statute of limitations on attacks only operated to bar attacks based on the "procedural" type of error after the period had run.[53] This distinction was based on the concept of proceedings void *ab initio* because jurisdiction had never been validly acquired, and those in which the errors were made after jurisdiction was validly acquired. This fine distinction will be disregarded in future cases, however, for the new statute of limitations provides that no attack can be made on an annexation after 60 days based "upon any grounds whatsoever, whether denominated procedural or jurisdictional."[54] This may seem quite harsh; but since the general rule is against private attacks on annexations,[55] the legislature has the power to limit the time in which these attacks may be taken. Other states have held

[49] 93 Wis. 616, 67 N.W. 1033 (1896).
[50] See *Report, supra* note 1, at 13.
[51] See, *e.g.*, Donohue v. Village of Fox Point, 275 Wis. 182, 81 N.W.2d 521 (1957); Town of Wauwatosa v. City of Milwaukee, *supra* note 43.
[52] Wis. STAT. § 66.021 (5) (g) (1959).
[53] Town of Brookfield v. City of Brookfield, 274 Wis. 638, 80 N.W.2d 800 (1957).
[54] Wis. STAT. § 66.021 (10) (a) (1959).
[55] Annot., 18 A.L.R.2d 1255, 1258 (1951); Annot., 13 A.L.R.2d 1279, 1281 (1950).

that statutes limiting such attacks are valid as matters of legislative discretion.[56]

The requirement that an annexation in Wisconsin must be "reasonable" is a new one. Before 1957, the court had upheld the annexation of agricultural lands at least twice without discussing the problem.[57] Then, in *Town of Brookfield v. City of Brookfield*,[58] the court established a "rule of reason." The court said:

> [Q]uestions involving the reasonable suitability, and adaptability and the reasonable necessity for the proper growth, development, and welfare of a city are material and relevant in reviewing annexation proceedings.[59]

The court noted here that the lands involved were selling at prices which were uneconomical if they were to be used for farming purposes, and it recognized the need for developing urban areas to be properly zoned and platted before they were completely built up. The test provided by the court was not as detailed as that used in some other states,[60] but the court made it clear that some test was to be applied. There is a possibility in those annexations in which there is no prior administrative or judicial review that the courts may apply the public interest test on their own initiative. They could do this on the theory that the statutes declare public policy in the matter, and, therefore, should be followed by the courts. It might be argued, however, that by expressly providing for the application of this test to major annexations, the legislature showed an intent that the test not be applied to minor ones. In the *Brookfield* case the court cautioned judicial self-restraint in invalidating annexations on the grounds of "unreasonableness." It stated that the determination of the merits of the annexations was to be made first by the municipality and only overruled by the courts if it proved "arbitrary and capricious" or an "abuse of discretion."[61]

Methods of Attacking Completed Annexation Proceedings

The majority rule in American jurisdictions is that when annexation proceedings have been completed, the annexation can only be

[56] Sacramento Municipal Util. Dist. v. All Parties and Persons, 6 Cal. 2d 197, 57 P.2d 506 (1936); People *ex rel.* Swindell v. City of Los Angeles, 93 Cal. App. 532, 269 Pac. 934 (1928); Edwards v. Town of Ponchatoula, 213 La. 116, 34 So. 2d 394 (1948).

[57] Town of Greenfield v. City of Milwaukee, 273 Wis. 484, 78 N.W.2d 909 (1956); Town of Wilson v. City of Sheboygan, 230 Wis. 483, 283 N.W. 312 (1939).

[58] 274 Wis. 638, 80 N.W.2d 800 (1957).

[59] *Id.* at 646.

[60] RHYNE, MUNICIPAL LAW 35 (1957).

[61] See note 53 *supra*, at 646, 80 N.W.2d at 804.

attacked directly by a quo warranto action brought in the name of the state.[62] This rule bars direct and collateral attacks on the validity of the annexation by private individuals. The theory on which this rule is based is that of *de facto* municipal existence—that the alteration of the boundaries of a municipal corporation is a corporate reorganization of the state. Under this view, only the state has standing to question the validity of such an act by one of its corporate parts.

Wisconsin, however, never considered this theory in relation to annexation proceedings; and thus, rejected the rule based upon it. In the 1910 case of *Lutien v. City of Kewaunee*,[63] suit was brought in equity to enjoin the levy of taxes under an annexation by a resident of the territory that had been annexed. In regard to whether the remedy used was proper, the court said:

> [T]his suit is to restrain unauthorized action of municipal officers especially injurious to the plaintiff and his class and there is no other adequate remedy. *Certiorari* would not reach the question of the number of electors and landowners in the annexed district. *Quo warranto* is manifestly inappropriate, and, in short, the remedy is in equity, as amply shown by the foregoing authorities.[64]

Recently, another type of remedy was declared proper to attack annexation proceedings in Wisconsin. In *Town of Blooming Grove v. City of Madison*,[65] an annexation was attacked by means of an action for a declaratory judgment. The petitioners contended that the annexation ordinance was invalid and sought to enjoin its use. The court upheld the use of declaratory relief. Therefore, declaratory judgment actions are also proper methods for attacking annexation proceedings.

Who May Attack Completed Annexation Proceedings

The Wisconsin rule regarding parties who may attack completed annexation proceedings is liberal in comparison with those states following the theory of *de facto* municipal existence. The rule was established in the *Lutien* case that an annexation could be attacked in equity by the electors or property owners of the territory being annexed. There also is some authority for the view that a resident of the annexing municipality, or an officer thereof, can bring such

[62] RHYNE, MUNICIPAL LAW 38 (1957).
[63] 143 Wis. 242, 126 N.W. 662 (1910).
[64] *Id.* at 245, 126 N.W. at 663-64.
[65] 275 Wis. 328, 81 N.W.2d 713 (1957).

an action,[66] but no case has ever ruled specifically on that point. Presumably, no private person other than a member of one of these groups would have sufficient interest in an annexation to be able to attack it.

As regards the town from which territory is being detached, the Wisconsin court first held that the town did not have sufficient standing to attack the annexation.[67] The result of that case was changed, however, by the enactment of section 66.029, which provides that the town is an interested party in such proceedings with sufficient standing to test their validity. This statute has been upheld,[68] and towns now may bring actions to attack annexations both in equity and for declaratory relief.

Proposed New Method of Annexation Proceeding

The present annexation statutes require a Wisconsin municipality to obtain the consent of the residents of an area before annexing it. This requirement has allowed residents of an area to prevent annexation of the area even when the annexation was necessary to the orderly growth of the municipality and the whole metropolitan area. To solve this problem, the Legislative Council has drafted a new method of annexation[69] which will be proposed to the 1961 legislature.

Under this proposal, a municipality could annex an area without the prior consent of a majority of the residents. Such an annexation, however, would have to meet strict requirements to insure that it was in the public interest. The proposed annexation proceeding would be essentially this: The municipality would initiate the proceeding by passing a resolution indicating its intention to annex a particular area. Then, after publishing the resolution and notifying the town in which the area was located, the municipality would submit the resolution to the Director. The Director would apply certain specific tests to determine if the proposed annexation was in the public interest. These tests would be much more stringent than those under the present statutes and would consider the effect of the annexation on the metropolitan area. In making his determination, the Director could alter the boundaries of the proposed annexation if he thought that was in the public interest. If interested parties objected to the tentative determination, or if the

[66] *In re* Village of Mosinee, 177 Wis. 74, 187 N.W. 688 (1922).
[67] *Ibid.*
[68] Town of Madison v. City of Madison, 269 Wis. 609, 70 N.W.2d 249 (1955).
[69] Proposed Bill LRL 116 (Second Draft) Gen. Sess. 1961, on file at the Legislative Reference Library, State Capitol, Madison, Wisconsin.

Director altered the proposed boundaries, a hearing on the annexation would be held at which all interested parties could appear. After the hearing, the Director could make his final determination, and if it was favorable to the annexation, the municipality would make the annexation effective by passing an annexation ordinance. The present statute of limitations on attacks on annexations[70] would apply to those proceedings, but the determination of the Director would be final unless a court action contesting it was brought within 30 days of the time it was made. In such an action, the determination would have the same effect as that of an administrative agency and could not be overruled unless the court found that it was "unsupported by substantial evidence in view of the entire record as submitted. . . ."[71]

The bill drafted by the Legislative Council would also prevent municipalities from only annexing territory when such action is in their own self-interest. The bill would amend the present statutes to compel a municipality to annex an area if the residents of the area desired annexation and the Director determined that the annexation would be in the public interest. The proceedings in such an annexation would be the same as those just described, after a majority of the residents of the area had indicated a desire for the annexation.

CONCLUSION

The changes made in the Wisconsin annexation statutes have alleviated some of the problems caused by rapid population growth and the resulting pressures for municipal expansion. The general trend of these changes is to make it easier for municipalities to annex territory, but to insure that the annexation will benefit the territory being annexed and the neighboring area, as well as the annexing municipality. Individuals in the territory being annexed and towns having such territory detached are permitted wide scope in attacking annexations, but the time allowed for such attacks has been shortened.

However, several problems still remain. Sometimes residents of a territory have blocked annexation of the territory even when such annexation was in the public interest. Nothing can be done to prevent such action under the present statutes. The annexation statutes are very complex and inconsistent in certain areas. Such a condition has probably added unnecessarily to the difficulty in accomplishing

[70] WIS. STAT. § 66.021 (10) (1959).
[71] WIS. STAT. § 227.20 (1) (d) (1959).

annexations and made them more susceptible to attack. Another problem, which has not been discussed in this Comment, is that created by section 40.035 of the statutes.[72] That provision has caused great controversy because, unless amended, it will result in unincorporated areas being attached to cities for school purposes only. Cities strongly object to this on the ground that such attachments would increase present tax inequities.

Despite these problems, the situation in Wisconsin is a hopeful one. The basic issue in this area is whether the state will control the growth of metropolitan areas to insure their orderly development and thus benefit the majority of citizens. The recent actions of the legislature show that it is aware of this issue. Enactment of further legislation such as the proposed new method of annexation could solve the remaining problems and aid orderly metropolitan growth.

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[72] Created hy Wis. Laws 1959, ch. 563.