tices. We pointed out in *Park Bldg. Corp. v. Industrial Comm.* (1960), 9 Wis. 2d 78, 85, 86, 100 N. W. 2d 571, that orders of an agency must be issued by the commission and not by a subordinate.

The letter of Morris Slavney did not constitute a decision of the commission and, hence, was not reviewable under the provisions of sec. 227.15, Stats.

Our determination in this respect affirms that of the trial court. We conclude, and in that respect we differ with the trial court, that, having made that determination, a court is bereft of all jurisdiction save to dismiss the petition.

In *Wisconsin Telephone Co. v. Wisconsin Employment Relations Board* (1948), 253 Wis. 584, 589, 34 N. W. 2d 844, we said (citing cases):

". . . 'the right of review is entirely statutory, and . . . orders of the board are not reviewable unless made so by the statutes.' When an attempt is made to appeal from a nonappealable order, the . . . court does not have jurisdiction for any purpose, except to dismiss the appeal."

We should point out that the petitioner herein is not necessarily without a remedy. The trial court pointed out that petitioner would better have proceeded by extraordinary writ to compel a ruling that would reach the status of justiciability. We also note that sec. 227.06, Stats., sets forth procedures for securing a reviewable declaratory judgment to determine the "applicability to any person, property or state of facts of any rule or statute . . . ."

We, however, are not unmindful of the confusion that the letter of Commissioner Slavney might well have created in the mind of a layman. Without resort to the practices of the commission and the precedents of this court, that letter could easily be construed as a final decision of the commission. While, in the instant case, the

petitioner was represented by experienced counsel, who should not have mistaken his remedy, not all persons who write to or deal with the state commissions are represented by lawyers. We believe that it would have been the better practice to make it clear that the letter was not in itself a decision on the merits of the particular problem posed. We suggest that, when letters of inquiry are answered by letters of individual commissioners, such letters contain a disclaimer of official commission action so that it is clear to all, particularly laymen, that no "decision" is involved.

By the Court.—That portion of the judgment which purports to confirm the decision of the Wisconsin Employment Relations Commission made April 19, 1967, is stricken from the judgment, and the judgment dismissing the petition for review, as so modified, is affirmed.

IN RE PETITION FOR FOND DU LAC METROPOLITAN SEWERAGE DISTRICT: CITY OF FOND DU LAC, Appellant, v. MILLER and others, ELECTORS OF THE CITY AND TOWN OF FOND DU LAC, and another, Respondents.*

No. 202. Argued March 7, 1969.—Decided April 1, 1969.
(Also reported in 166 N. W. 2d 225.)

1. **Constitutional law—Distribution of governmental powers and functions—Legislative powers—Delegation thereof—Statutes—Applicable standards of construction.**
Applicable established standards of statutory construction of legislation, challenged as an unconstitutional delegation of legislative power to the judiciary (offending the constitutional scheme of distribution of governmental powers and functions), are set forth with approval in the opinion herein. pp. 328, 329.

* Motion for rehearing denied, with costs, on June 3, 1969.

2. **Constitutional law—When legislative and judicial functions improperly fused.**
There is a thin line between a proper and improper delegation of legislative authority which is crossed when the judiciary is in effect empowered to determine what political and economic expediency constitute public interest, gauged by criteria such as what is "desirable," "advisable," "ought to be," or "is in the best interest." p. 329.

3. **Constitutional law—Distribution of governmental powers and functions—Test as to propriety of legislative delegation of authority to judiciary.**
If a statute goes into operation on the happening of a certain state of facts to be determined by the court, which is either authorized or recognized to pass its judgment on questions of legislative discretion, the statute constitutes an unconstitutional delegation of legislative functions to the judiciary. pp. 329, 330.

4. **Municipal corporations—Metropolitan sewerage districts—Constitutional law—Improper delegation of legislative authority to county courts.**
Sections 66.20 to 66.209, Stats., evidence a clear legislative intention to provide a metropolitan sewerage commission when it is in the "best" interest of the entire district to do so; hence so much of sec. 66.202 as confers on county courts authority to determine whether the purposes of the act in the given case are "best served by the creation of a district" constitutes an unconstitutional delegation of legislative power by purporting to delegate to the court a question which is not factual, but clearly of political nature. pp. 330, 332.

5. **Municipal corporations—Metropolitan sewerage districts—Constitutional law—Improper delegation of legislative authority to county courts.**
That portion of sec. 66.202, Stats., which requires the county court to "establish the boundaries" of the sewerage district, likewise offends the constitutional scheme of distribution of governmental powers, for it involves a question to be decided by the legislative branch of the government alone. pp. 330, 331.

6. **Municipal corporations—Metropolitan sewerage districts—Constitutional law—Improper establishment of district where political considerations not resolved.**
In an action on behalf of a town by minority electors residing outside of a populous city to establish, pursuant to sec. 66.20, Stats., a metropolitan sewerage district to include the entire territory of both municipalities bordering on a lake, which petitioners charged was mainly polluted by city waste (in turn allegedly polluting the town area), the trial court erred when it granted such relief, concerning itself solely with and determining that the jurisdictional requirements of the act had been met and the allegations of the petition established—thereby bypassing the political question of the "best interests" of the municipalities, a matter reserved for legislative determination. pp. 331, 332.

7. **Municipal corporations—Metropolitan sewerage districts—Constitutional law—Improper establishment of district where political considerations not resolved.**
Violation of the constitutional prohibition against delegation of the legislative function was not obviated (a) by the trial court's recourse as guidelines to sec. 66.20 (1), Stats., which authorizes creation of a district when conducive to preservation of public health, etc., of the contiguous territories concerned, or (b) by its inquiry limited to the good faith or reasonableness of the petition, for this left still undetermined the question as to the best interests of the municipalities, which could not be resolved judicially. pp. 331, 332.

8. **Municipal corporations—Metropolitan sewerage districts—Constitutional law—Limitation of decision to issue raised.**
Request by municipalities appearing *amicus curiae* that aside from the method by which legislative power under the statute be exercised the supreme court declare prospectively the entire statute invalid because of consequent inequities which would result from creation of sewerage districts embracing municipalities and surrounding fringe areas not a part thereof—which areas although densely populated would obtain desired municipal services without sharing in the tax burden, and growth of municipalities would also be stifled as a consequence thereof—is not subject to judicial determination, the legislature having already stated that a metropolitan sewerage district is a legitimate solution to an areawide pollution problem, thereby foreclosing the supreme court from making any judgment as to how the formation of the sewerage district will affect the expansion of municipalities in the future. p. 333.

9. **Municipal corporations—Metropolitan sewerage districts—Constitutional law—Limitation of decision to issue raised.** Since the challenge to constitutionality in the within case was not claimed because of lack of legislative authority to provide for creation of metropolitan sewerage districts (the establishment of several of which the supreme court takes judicial notice), but rather to the method by which legislative power has been exercised, the instant holding in this case is limited to the facts herein presented. pp. 333, 334.

APPEAL from a judgment of the county court of Fond du Lac county: JOSEPH W. WILKUS, County Judge of Sheboygan county, Presiding. *Reversed.*

The action in the county court was upon certain petitions filed pursuant to secs. 66.20 through 66.209, Stats. The petitions sought the establishment of a metropolitan sewerage district which would include the entire territory of the city of Fond du Lac and certain limited territory of the town of Fond du Lac. The population of the city of Fond du Lac which would be included was about 35,000 people; the area in the town of Fond du Lac which would be included in the proposed district had a population of about 2,000 people.

Sec. 66.201 (2), Stats., requires that the petitions be signed by five percent of the electors voting for governor at the last general election. There were 12,497 votes in the 1966 gubernatorial election for the area involved. The petitions were supported by over 1,000 signatures.

The hearing was set on the petitions. The requisite notice was given and evidence was presented over a period of time from December 18, 1967, to May 24, 1968. The evidentiary hearing on the petition conclusively pointed out that the southern tip of Lake Winnebago is badly polluted. Nobody denied that the pollution existed although there were differences of opinion as to where the ultimate responsibility for the pollution lay. The city sought to show that its sewerage gathering and treatment facilities met current state standards and that every effort was being made to upgrade the facilities to

an even higher standard. The petitioners sought to establish that the city sewerage facilities were the largest single contributor to the area's pollution problem. It is not the function of this court on this appeal to determine who was responsible for the pollution.

When certain residents of the town of Fond du Lac requested that the city extend its sewer facilities to them, the city declined to do so and suggested that the areas in question begin formal annexation proceedings. The town residents apparently decided against such a course of action.[1] A certain urgency developed in the sewerage problem when the town of Fond du Lac was ordered by the department of resource development to submit a plan for abatement of their pollution problem by January 1, 1968. At the same time the department of resource development refused to exercise its authority under sec. 144.07 (1), Stats.,[2] to force the city to accept the sewage of all or any part of the town of Fond du Lac.[3]

The judgment and order of the county court organized and established a metropolitan sewerage district under the corporate name of Fond du Lac Metropolitan Sewerage District for the purposes of carrying out the provisions of secs. 66.20 to 66.209, Stats. The city of Fond du Lac appeals from the judgment.

[1] A further explanation stated that certain areas which desired sewer service could not be annexed because they were not contiguous to the city.

[2] "**Joint sewerage systems.** (1) The department of resource development may require the sewerage system, or sewage or refuse disposal plant of any town, village or city, to be so planned and constructed that it may be connected with that of any other town, village or city, and may, after hearing, upon due notice to the municipalities order the proper connections to be made."

[3] It appears that the department refused to order the city to accept the town's sewage because of the underlying political problem of a possible foreclosure of annexation. By refusing to order the city to accept the sewage, the town was driven that much closer to annexation as the only solution to its pollution problem.

For the appellant there was a brief and oral argument by *Henry B. Buslee,* city attorney.

For the respondents there was a brief by *St. Peter & Hauer,* attorneys, and *George M. St. Peter* and *Albert J. Hauer* of counsel, all of Fond du Lac, and oral argument by *George M. St. Peter.*

A brief *amicus curiae* was filed by *Jerry A. Edgar,* legal counsel, and *Jean G. Setterholm,* staff attorney, both of Madison, for the League of Wisconsin Municipalities.

HANLEY, J. The following issues are presented on this appeal:

(1) Is the legislative authority contained in secs. 66.20 to 66.209, Stats., a lawful delegation of authority;

(2) Is the court's finding of necessity for the proposed work and the general outline of the proposed improvements supported by substantial evidence; and

(3) Did the trial court dispose of all objections to the formation of a district as justice and equity require?

Is There a Lawful Delegation of Authority?

The applicable standards for statutory construction in this area were recently enumerated in *In re City of Beloit* (1968), 37 Wis. 2d 637, 643, 155 N. W. 2d 633:

". . . in this day of restless technical and social change this court is alert to the necessity of guarding against a well-meaning fusion of judicial and legislative power. We start with the basic principles of constitutional law and statutory construction: (1) That the statute must be presumed to be valid and constitutional, 2 Sutherland, *Statutory Construction* (3d ed.), pp. 326, 327, sec. 4509; *A B C Auto Sales, Inc. v. Marcus* (1949), 255 Wis. 325, 38 N. W. 2d 708; *White House Milk Co. v. Reynolds* (1960), 12 Wis. 2d 143, 106 N. W. 2d 441; and (2) if a statute is open to more than one reasonable construction, the construction which will accomplish the legislative purpose and avoid unconstitutionality must be adopted. *Attorney General v. Eau Claire* (1875), 37 Wis. 400;

State ex rel. Harvey v. Morgan (1966), 30 Wis. 2d 1, 139 N. W. 2d 585; *Gelencser v. Industrial Comm.* (1966), 31 Wis. 2d 62, 141 N. W. 2d 898. Of course, the court cannot give a construction which is unreasonable or overlook language in order to sustain legislation, but likewise the construction need not be the most natural or obvious. *See State ex rel. Reynolds v. Sande* (1931), 205 Wis. 495, 238 N. W. 504."

In the *Beloit Case* this court held that sec. 66.021 (the annexation statute), Stats. 1965, was unconstitutional as an unauthorized delegation of legislative power to the judiciary. The problem in that case was that, under the annexation statute, the circuit court had the duty of determining whether a particular annexation was "in the public interest." This court held that such a determination was not a judicial question, but a question of public policy and statecraft.

"There is no question that if we consider public interest as an unrestricted term or concept, as did the trial court, the determination of what political and economic expediency constitute public interest is a legislative function. What is 'desirable,' or 'advisable' or 'ought to be' is a question of policy, not a question of fact. What is 'necessary,' or what is 'in the best interest' is not a fact and its determination by the judiciary is an exercise of legislative power when each involves political considerations and reasons why there should or should not be an annexation. This is the general and universal rule which sharply draws the differentiating line between legislative power and judicial power and by which the validity of the delegation of functions to the judiciary by the legislature is determined. . . ." *In re City of Beloit, supra,* at page 644.

This court has discussed the thin line between a proper and improper delegation of legislative authority on other occasions.

". . . Does the law before us go into operation upon the happening of a certain state of facts to be determined by the circuit court, or does it authorize and require the

court to go further, and not only determine facts, but pass its judgment upon questions of legislative discretion? If the first branch of this question can be answered in the affirmative and the latter branch in the negative, then the law must be sustained, because the ascertainment and determination of questions of fact is clearly an exercise of purely judicial power. If, on the other hand, the latter branch of the question must be answered in the affirmative, then the law cannot be sustained, because such power cannot be delegated to the circuit court under our constitution." *In re Incorporation of Village of North Milwaukee* (1896), 93 Wis. 616, 622, 67 N. W. 1033. *See also, Scharping v. Johnson* (1966), 32 Wis. 2d 383, 145 N. W. 2d 691.

Now the statute involved in this case can be considered.

"66.202 **Sewerage district; judgment.** (1) Upon the hearing if it shall appear that the purposes of sections 66.20 to 66.209 will be *best* served by the creation of a district, the court shall, after disposing of all objections as justice and equity require, by its findings, duly entered of record, adjudicate all questions of jurisdiction, *establish the boundaries* and declare the district organized and give it a corporate name, . . .

"(2) If the court finds that the territory set out in the petition *should not be* incorporated into a district, it shall dismiss said proceedings and tax the cost against the signers of the petition. . . ." (Emphasis supplied.)

Clearly the statute involved here purports to delegate to the county court a question which is not factual. What is "best" or "should not be" are political questions and not questions of fact.

Another apparent problem with the statute in question involves the delegation of final authority to set the boundary lines for the sewerage district. In discussing a similar problem with an incorporation statute this court said:

"That part of the section, also, which places the whole question of the boundaries of the proposed village under the control of the court is equally objectionable. . . . Here, again, the court must decide the question of political expediency, which is very plainly a question to be decided by the legislative branch of the government alone." *In re Incorporation of Village of North Milwaukee, supra,* at page 624.

The trial court realized that sec. 66.202, Stats., appeared to violate the constitutional prohibition against the delegation of the legislative function, and he sought to interpret the statute so that only factual questions would be decided. Thus he concerned himself solely with determining whether the jurisdictional requirements of sec. 66.201,[4] were met, and whether the allegations of the petition were established.

The trial court determined that all procedural jurisdictional requirements had been satisfied. He realized that he would be deciding a political question if he determined the "necessity" of the proposed district without any guidelines so he looked to sec. 66.20 (1), Stats.:

"(1) AUTHORIZED. Metropolitan sewerage districts may be created, governed and maintained as is in sections 66.20 to 66.209 provided, in contiguous territory containing two or more of any of the following municipalities: Any city or village in its entirety or any township or part thereof, located in one or more counties, when so situated that common outlet sewers or disposal plants will be conducive to the preservation of the public health, safety, comfort, convenience or welfare."

The trial court determined that the establishment of a sewerage commission would be beneficial to the public health, safety, comfort, convenience or welfare.

[4] To acquire jurisdiction under sec. 66.201 (2), Stats., the county court must be presented with a petition signed by the requisite number of voters, and the petition must set forth:

(a) The proposed name of the metropolitan sewerage district;

(b) The necessity for the proposed work;

(c) A general description of territory to be included in the proposed work; and

(d) A general outline of the proposed improvements.

Likewise the trial court felt he could not constitutionally determine whether a sewerage commission was the "best" solution to the problem. So he limited his inquiry to a determination of the good faith or reasonableness of the petition.

"When, as here, the court finds the allegations of the petition are established, *the petitioners* having selected a metropolitan sewerage district as a solution going to 'preservation of public health, safety, comfort, convenience or welfare' over other possible alternatives, the court cannot interject his opinion or judgment; the metropolitan district is one of a class of legislative creations for relief of the given situation. The judgment must follow as a matter of right. . . ." (Emphasis supplied.)

The trial court's attempt to sustain the constitutionality of the legislation is admirable, but his approach to the problem has resulted in the creation of a metropolitan sewerage commission even though no independent and unprejudiced party has passed on whether it is in the "best" interest of the area. We think this is a "nonjudicial" question and therefore must decline the opportunity to pass upon it.

The ultimate result of the trial court's approach to this problem would be that whenever an area is suffering from pollution five percent of the residents could impose a sewerage commission on the remainder of the area residents. Surely, this result is beyond legislative intent. Secs. 66.20 to 66.209, Stats., evidence a clear legislative intention to provide a metropolitan sewerage commission when it is in the "best" interest of the entire district to do so. Unfortunately, this is not a question which should have been delegated to a judicial body. For a proper method of resolving a similar problem, *see Schmidt v. Local Affairs & Development Dept.* (1968), 39 Wis. 2d 46, 158 N. W. 2d 306.

Having concluded that secs. 66.20 to 66.209, Stats., constitutes an unlawful delegation of legislative authority to the judiciary, it is not necessary to consider the remaining issues.

In addition to the real issue of law presented on this appeal there is an underlying problem called to our attention by the *amicus curiae* brief which has been filed by the League of Wisconsin Municipalities.

All of the major cities and most of the smaller cities and villages in Wisconsin are surrounded by fringe areas with population densities at or near the normal city level. Even though these fringe areas appear to be a part of the city, they are governed, taxed and provided services by the town. No populated fringe area may become part of the city until the majority of the electors and/or property owners in a particular area desire to annex. Cities and villages invariably offer a higher level of services to their citizens as compared to the surrounding town, and almost without exception it follows that costs of municipal services are correspondingly higher. The argument of the cities is that if the surrounding areas can attain the desired city services without becoming a part of the city, the growth of the cities is likely to be forever stifled, and the residents of metropolitan areas will be forever carrying an inequitable percentage of the tax load.

We can only acknowledge the hidden problem presented. It is not to be solved by judicial determination. The legislature has already stated that a metropolitan sewerage district is a legitimate solution to an areawide pollution problem. Thus the court is foreclosed from making any judgment as to how the formation of a sewerage district will affect the expansion of municipalities in the future.

We are aware that at least three metropolitan sewerage commissions have already been established. Since

the challenge to constitutionality raised here is not a claimed lack of legislative authority to provide for the creation of metropolitan sewerage districts, but rather to the method by which legislative power has been exercised, our mandate is limited to the facts of this case.

By the Court.—Judgment reversed.

HARDSCRABBLE SKI AREA, INC., and another, Respondents, v. FIRST NATIONAL BANK OF RICE LAKE, Appellant.

No. 160. Argued March 7, 1969.—Decided April 1, 1969.
(Also reported in 166 N. W. 2d 191.)

1. **Appeal—Orders appealable—Successive orders denying motion for summary judgment.**
Where after denial of a motion for summary judgment the trial judge in a supplementary ruling disqualified himself and another judge entertained a motion to reconsider, also denying summary judgment, it was proper to appeal only from the latter order of denial and not from both. p. 337.

2. **Summary judgment—Overuse of motion and consequent meritless appeals.**
With no intimation that in a proper case summary judgment should not be used, the supreme court reiterates its concern expressed repeatedly in the past with the possible overuse of that motion and the voluminous number of meritless appeals generated thereby. pp. 337, 338.

3. **Banks and banking—Contract to make loan—Borrower's cause of action for breach.**
A bank may sustain liability as a result of a failure to lend money in accordance with a contract, for it is possible for a change of financial condition to the borrower's disadvantage to constitute consideration for the contract (*i.e.*, detriment to the promisee) if this situation is fully known to the lender. p. 344.

4. **Banks and banking—Breach of contract to make loan—Nature of action.**
An action for damages based on breach of contract and negligence in failing to timely process and furnish plaintiffs the proceeds of the loan negotiated with defendant bank sounded in contract and not in tort. p. 344.

5. **Appeal—Summary judgment—Standard on review of denial of motion.**
Sec. 270.635 (the summary judgment statute), vests discretion in the trial court as to whether the case should be tried, from which it follows that an order denying a motion for summary judgment will not be reversed until it appears that the trial court has abused its legal discretion or has not exercised it. pp. 338, 339.

6. **Summary judgment—When summary disposition precluded.**
In restating with approval established rules governing summary judgment and the technique employed in evaluating the merits of such a motion, the supreme court reemphasizes that such disposition is precluded where material facts are in dispute or where weight and credibility of the parties with respect to such facts are in issue. pp. 340–342, 345.

7. **Contracts—Breach through negligence.**
A contract may be breached through negligence as well as in any other manner. p. 344.

8. **Summary judgment—Summary disposition precluded where material facts in dispute.**
Denial of defendant bank's motion for summary judgment dismissing the complaint in the instant action did not constitute abuse of discretion where proof in opposition disclosed that the individual plaintiff as owner and operator of a ski area sought a loan from the Small Business Administration and defendant bank, to purchase and install snow-making equipment in time for the skiing season, secured a commitment from the bank and approval of the SBA, ordered the equipment in reliance thereon, but could not obtain its release for timely installation because of alleged negligence of the bank in processing the loan—triable issues being presented by conflicting versions of the facts as to whether a time commitment to make the loan had been made, whether the loan was processed as expeditiously as the circumstances would require, or negligently and tardily, as alleged. pp. 341–345.

9. **Summary judgment—Summary disposition precluded where material facts in dispute.**
That the loan was finally processed by the bank some twenty-eight days after it received the necessary documents from