THE WISCONSIN EXPERIENCE WITH STATE-LEVEL REVIEW OF MUNICIPAL INCORPORATIONS, CONSOLIDATIONS, AND ANNEXATIONS

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In 1959 the Wisconsin Legislature initiated a new program of state-level administrative review of changes in municipal boundaries. The review process was intended to provide an expert determination of whether proposed boundary changes are consistent with the public interest. The review responsibility was assigned to a state agency, in order that the review might be detached from the often highly charged emotional context in which such changes are typically decided. This Article, written by the state officer who has administered the review process almost from its inception, reports on how this unique multilevel governmental program has operated during its first five years. The Article will be of interest to local officials and others immediately concerned with alterations in city or village boundaries, as well as to those interested in the many problems of intergovernmental relationships in urban areas.

I. BACKGROUND

Litigation involving either the organizing or expanding of municipalities has dotted court records since Wisconsin became a state. During the earlier part of the twentieth century, Milwaukee County communities were the source of most of the conflicts that had to be settled in court.[1] However, after mid-century other communities in the state began to experience the same problems that had proved troublesome in the Milwaukee area.[2] An array

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1 Village of St. Francis v. City of Milwaukee, 209 Wis. 645, 245 N.W. 840 (1933); Village of St. Francis v. City of Milwaukee, 208 Wis. 431, 243 N.W. 315 (1932); Behling v. City of Milwaukee, 190 Wis. 643, 209 N.W. 762 (1926); Zweifel v. City of Milwaukee, 185 Wis. 625, 201 N.W. 385 (1925); City of Wauwatosa v. City of Milwaukee, 180 Wis. 310, 192 N.W. 892 (1923); *In re* Village of North Milwaukee, 93 Wis. 616, 67 N.W. 1093 (1896); Town of Milwaukee v. City of Milwaukee, 12 Wis. 103 (1860); Weeks v. City of Milwaukee, 10 Wis. 186 (1860).

2 Harley v. Town Bd. of Town of Delafield, 7 Wis.2d 303, 96 N.W.2d 511 (1959); Fish Creek Park Co. v. Village of Bayside, 273 Wis. 89, 76 N.W. 2d 557 (1956); Village of Oconomowoc Lake v. Town of Summit, 270 Wis. 530, 72 N.W.2d 544 (1955); Town of Madison v. City of Madison, 269 Wis. 609, 70 N.W.2d 249 (1955); Toman v. Town of Lake, 268 Wis. 239, 67 N.W. 2d 356 (1955); Incorporation of Village of Oconomowoc Lake v. Town of Summit, 264 Wis. 540, 59 N.W.2d 662 (1953); Town of Preble v. City of Green Bay, 261 Wis. 459, 53 N.W.2d 187 (1952); State *ex rel.* Tegt v. Circuit Court, 255 Wis. 501, 39 N.W.2d 450 (1949); Town of Blooming Grove v. City of Madison, 253 Wis. 215, 33 N.W.2d 312 (1948).

of court decisions had by then left more questions unanswered than answered, and the orderly processes of government in rapidly expanding urban areas were becoming bogged down by numerous and seemingly interminable court actions.[3]

Representatives of urban areas were a minority in the Wisconsin Legislature during most of the state's first century, but by 1950, with a solid majority (57 per cent) of the state's population residing in urban areas and the rural population declining in numbers, this situation changed. A long-delayed reapportionment of both houses of the legislature was adopted in 1951, and became effective in 1954 (the last previous one was in 1931). Coincident with this change was a new interest in the annexation and incorporation laws which established the framework for government in urban areas. Though urban constituencies were deeply divided on questions concerning the end objectives of such laws, it was clear that some clarification of the procedures involved in establishing and expanding municipal boundaries was fast becoming an absolute necessity.[4]

The 1955 legislature reacted to this need by directing its legislative council to study and make recommendations concerning Wisconsin annexation, consolidation, and incorporation statutes.[5] A special Urban Development Committee was appointed by the council to undertake this assignment. In its report in 1957,[6] the committee noted that because of ambiguities and inconsistencies in the statutes, courts had been forced to answer a series of questions involving the procedures governing municipal boundary changes. Issues had been raised in these areas: (1) the priority of proceedings in cases of conflicts between annexations, incorporations, or consolidations affecting the same territory,[7] (2) the effective date of proceedings,[8] (3) the effect of statutory limits on the time period in which an annexation or incorporation could be attacked,[9] (4) the permissibility of overlooking minor deviations

[3] Cutler, *Characteristics of Land Required for Incorporation or Expansion of a Municipality,* 1958 WIS. L. REV. 6, 7-9.

[4] See Cutler, *supra* note 3; Maruszewski, *Legal Aspects of Annexation as It Relates to the City of Milwaukee,* 1952 WIS. L. REV. 622; Comment, *Annexations Under 62.07 Statutes,* 40 MARQ. L. REV. 199 (1956).

[5] S.J. Res. 15, 1955 Wis. Legislature.

[6] 2 WISCONSIN LEGISLATIVE COUNCIL, 1957 GENERAL REPORT 220 (1957) [hereinafter cited as GENERAL REPORT].

[7] See Village of Brown Deer v. City of Milwaukee, 274 Wis. 50, 79 N.W.2d 340 (1956); City of Milwaukee v. Sewerage Comm'n, 268 Wis. 342, 67 N.W.2d 624 (1954); Town of Greenfield v. City of Milwaukee, 259 Wis. 77, 47 N.W.2d 292 (1951); Village of St. Francis v. City of Milwaukee, 208 Wis. 431, 243 N.W. 315 (1932).

[8] The committee noted that a person wishing to determine if a boundary change proceeding had been completed would have to find documents which might be located in offices of several different local and state agencies. 2 GENERAL REPORT 225.

[9] State *ex rel.* City of Madison v. Walsh, 247 Wis. 317, 19 N.W.2d 299 (1944).

from statutory procedures under the doctrine of substantial compliance,[10] (5) the interpretation of various incorporation statutes which allowed different procedures and had different requirements,[11] (6) the annexation of noncontiguous, municipally owned land,[12] and (7) the interpretation of various procedural terms in the annexation statutes.[13] The committee noted that judicial decisions involving such questions had not proved an adequate substitute for better statutory law on the subject.[14]

The committee recommended legislation dealing with the questions it had identified in its report to the 1957 legislature.[15] Though the legislature was not prepared to accept a measure as broad as that recommended, it did enact legislation which repealed the separate annexation provisions for cities and villages and replaced those provisions with new uniform annexation laws located in Chapter 66 of the statutes (municipal law).[16]

The new legislation provided two methods of annexing territory to municipalities, direct petition and referendum. The direct petition method is begun by petition of a majority of the electors and property owners in the area to be annexed. Annexation takes effect upon the acceptance of the petition by the annexing municipality. The alternative referendum method allows twenty per cent of the area's electors and the owners of half of the real property to petition the municipality for a referendum. If the referendum passes by a majority vote, the annexation takes effect.[17]

In addition to revising and simplifying the annexation procedures, the 1957 legislature created an Urban Problems Committee

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[10] See Town of Madison v. City of Madison, 269 Wis. 609, 70 N.W.2d 249 (1955); Town of Wauwatosa v. City of Milwaukee, 266 Wis. 59, 62 N.W.2d 718 (1954).

[11] Separate procedures were available for incorporation of villages, incorporation of cities where the area contained an unincorporated village, incorporation of cities where the area contained an incorporated village (two alternative procedures for this change alone), and incorporation of cities from towns. Each separate procedure had a different notice requirement. 2 GENERAL REPORT 226-27.

[12] Under prior law it was possible for a municipality to annex noncontiguous land which it owned. It was then conceivable that the annexing municipality could annex further land which was now contiguous to the annexed island of land which it owned. 2 GENERAL REPORT 228.

[13] The committee noted that the statutory language was vague in defining who is an "owner" or "elector" for purposes of signing annexation petitions, what is a "public place" for posting of such petitions, when signatures could be withdrawn from a petition, and in defining how much time could elapse from start to finish of an annexation proceeding. 2 GENERAL REPORT 227-28.

[14] 2 GENERAL REPORT 224.

[15] S. 5, 1957 Wis. Legislature.

[16] Wis. Laws 1957, ch. 676, at 1005.

[17] WIS. STAT. § 66.021 (1963). See Comment, 1961 WIS. L. REV. 123, which discusses the uniform annexation procedures enacted in 1957.

to investigate further the need for better controls over the character of land that could be incorporated, consolidated, or annexed.[18] After thorough study, the committee reported that it "felt strongly that legislation was needed to provide a more systematic and stable legal framework for the orderly development of land and government within an urban area."[19] The committee drafted a bill providing "clear standards . . . which recognize not only specific population, area and density requirements, but also spell-out some more flexible characteristics which should be possessed by an area contemplating incorporation."[20] The committee bill provided that these "public interest" standards, by which proposed incorporations, consolidations, and annexations were to be tested, would be administered by both the courts and a state-level administrative agency.[21]

The committee's proposal was eventually adopted by the 1959 legislature,[22] and the dual review process has been in operation since. The purpose of this Article is to discuss how this relatively unique admixture of legislative, administrative, and judicial control of municipal boundary changes has fared in meeting the challenge of urban expansion. Part II contains a brief discussion of the standards and procedures enacted by the 1959 legislature. It includes the background material necessary for a full understanding of the experience report contained in the rest of the Article.

II. THE 1959 INCORPORATION—CONSOLIDATION—ANNEXATION LAW

A. Incorporation

Chapter 261 of the Laws of 1959 made far-reaching changes in the state's municipal incorporation statutes. First it repealed the

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[18] Wis. Laws 1957, ch. 544, at 729. The 1957 legislature also created a special study group to concentrate on intergovernmental problems in the Milwaukee area. Wis. Laws 1957, ch. 421, at 563 (creating the Milwaukee Metropolitan Study Commission).

[19] INTERIM URBAN PROBLEMS COMMITTEE, REPORT TO THE 1959 LEGISLATURE 12 (1959) [hereinafter cited as URBAN PROBLEMS COMMITTEE].

[20] *Ibid.*

[21] While the 1959 legislature provided a state-level review procedure for annexations under WIS. STAT. § 66.021 (1959), it also enacted a new method of annexation which was not made subject to state-level review, Wis. Laws 1959, ch. 418, at 490, which authorized a municipality to petition the circuit court for a referendum in an area proposed to be annexed. A referendum can be prevented by a petition against the annexation signed by a majority of the electors in the area or owners of more than one half of the real estate (in assessed value), filed with the court. This new annexation procedure is found in WIS. STAT. § 66.024 (1963). Recent studies of municipal boundary adjustment problems have generally supported the recommendations of the Urban Problems Committee. See articles cited in *An Act to Establish Standards and Procedures for Municipal Boundary Adjustment*, 2 HARVARD J. OF LEGISLATION 239, 242 (1965).

[22] Wis. Laws 1959, ch. 261, at 316.

different requirements for incorporation of villages and cities contained in Chapters 61 and 62, respectively. In their place the 1959 law provided a set of uniform incorporation provisions applicable to both cities and villages, all within Chapter 66 of the statutes.

Statements in the bill's notes provide some insight into its purposes and the legislature's intent in enacting it. These notes emphasize (1) that the intent of the bill was to provide more comprehensive state-level control over the development of new municipalities to assure that the creation of such units is in the public interest, (2) that particular attention was given in the bill to establishing different standards for review of proposed incorporations in metropolitan areas than in rural or isolated areas, (3) that the intention was to provide a "public interest" test for incorporations which would be separate from the judicial review to which they were subjected, (4) that the state-level review officer must make an express finding that an incorporation will not substantially hinder solution of governmental problems in a metropolitan area before he may approve it, and (5) that the clear intent of the bill was to prevent use of annexation and consolidation statutes to avoid the state review requirements applicable to incorporations.[23] These notes are helpful guides in evaluating the manner in which Wisconsin's new municipal boundary laws have functioned, with only minor changes, since they were enacted in 1959.

The procedure provided by the 1959 law for establishing a new municipality involves the following essential steps:

1. A notice of intent to circulate a petition to incorporate a municipality is published.[24]

2. A petition is signed by at least fifty electors and freeholders (twenty-five if the proposed municipality has a population of fewer than three hundred persons) and filed with the local circuit court.[25]

3. The circuit court fixes a time and a place for a hearing.[26]

4. The circuit court, on the basis of the hearing, determines whether certain "minimum requirements" relating to population, area, and density are met.[27]

5. If these requirements are not met, the petition is denied. If they are met, the court must refer the petition to a state ad-

[23] Notes to Bill 226, A., in URBAN PROBLEMS COMMITTEE REPORT. Only one intended result listed in the notes was not included in the law which was adopted—that was the intent to give the state-level review officer authority, under certain conditions, to direct that a referendum be held to annex a petitioning area to a municipality rather than to organize it as a separate unit of government.

[24] WIS. STAT. § 66.014(1) (1963).

[25] WIS. STAT. § 66.014(2) (1963).

[26] WIS. STAT. § 66.014(3) (1963).

[27] WIS. STAT. § 66.015 (1963).

ministrative officer, the Director of the Planning Function in the Department of Resource Development, for a further determination of whether the proposed incorporation is in the "public interest."[28]

6. The state officer is directed to make an investigation[29] and prepare findings based on the standards contained in Wis. Stat. sec. 66.016:

(1) . . .

(a) *Characteristics of territory.* The entire territory of the proposed village or city shall be reasonably homogeneous and compact, taking into consideration natural boundaries, natural drainage basin, soil conditions, present and potential transportation facilities, previous political boundaries, boundaries of school districts, shopping and social customs. An isolated municipality shall have a reasonably developed community center, including some or all of such features as retail stores, churches, post office, telephone exchange and similar centers of community activity.

(b) *Territory beyond the core.* The territory beyond the most densely populated square mile . . . shall have in an isolated municipality an average of more than 30 housing units per quarter section or an assessed value . . . more than 25 per cent of which is attributable to existing or potential mercantile, manufacturing or public utility uses; but the director may waive these requirements to the extent that water, terrain or geography prevents such development. Such territory in a metropolitan municipality shall have the potential for residential or other land use development on a substantial scale within the next 3 years.

(2) In addition . . . any proposed incorporation . . . must be in the public interest as determined by the director upon consideration of the following:

(a) *Tax revenue.* The present and potential sources of tax revenue appear sufficient to defray the anticipated cost of governmental services at a local tax rate which compares favorably with the tax rate in a similar area for the same level of services.

(b) *Level of services.* The level of governmental services desired or needed by the residents of the territory compared to the level of services offered by the proposed village or city and the level available from [any other contiguous municipality which has indicated an interest in annexing the territory] . . . .

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[28] WIS. STAT. § 66.014(8)(b) (1963).

[29] A hearing may be requested by any party in interest within twenty days of the time the director receives the petition. The director has a total of ninety days in which to make his determination, unless a different time is set by the court. WIS. STAT. §§ 66.014(9)(a),(d) (1963). Prior to 1963, a different procedure was followed: The director made proposed findings within ninety days and a hearing could be requested within twenty days after the proposed findings were announced.

(c) *Impact on the remainder of the town.* The impact, financial and otherwise, upon the remainder of the town from which the territory is to be incorporated.

(d) *Impact on the metropolitan community.* The effect upon the future rendering of governmental services both inside the territory proposed for incorporation and elsewhere within the metropolitan community. There shall be an express finding that the proposed incorporation will not substantially hinder the solution of governmental problems affecting the metropolitan community.[30]

The findings of the director are then transmitted to the petitioners, the circuit court, and the local municipal officials. If the director finds that the proposed incorporation is contrary to the public interest, the petition is returned to the circuit court and dismissed. The director may couple a determination that the petition is not in the public interest with a recommendation that a new petition be submitted including more or less territory. If the director's findings are favorable to the incorporation, the circuit court must order a referendum. The incorporation takes effect if approved by a majority in the referendum.[31]

B. Consolidation

The procedure for review of municipal consolidation proposals is similar to that for incorporations as far as review at the state level is concerned.[32] It differs at the local level in that the circuit court receives consolidation ordinances adopted by both municipalities instead of a petition, and reviews the proposal for compliance with the formal requirements of the consolidation rather than the incorporation statute. The director in reviewing the proposal applies the same standards used for incorporations, and his findings have the same force and effect as they have in the case of incorporations.

C. Annexation

The 1959 law also amended the 1957 annexation procedures[33] to provide for state-level review of annexations involving an area of more than one square mile or an area which lies within a metropolitan community.[34]

In the case of annexations within metropolitan communities, the person causing the notice of annexation to be published is re-

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30 The terms "isolated municipality" and "metropolitan municipality" are defined in WIS. STAT. § 66.013 (1963).

31 WIS. STAT. §§ 66.014(8)(e)-(g) (1963).

32 WIS. STAT. § 66.02 (1963).

33 P. 464 *supra.*

34 The definition of metropolitan communities was clarified by Wis. Laws 1961, ch. 78, at 62, to mean any county of more than 50,000 population. See Comment, *supra* note 17, at 130, for the prior interpretation.

quired to mail a copy of it, along with a scale map of the area proposed to be annexed, to the state reviewing officer, who then has twenty days in which to report a finding to the local governing body as to whether or not the annexation is in the public interest.[35] The annexing municipality is required to review the director's findings before action is taken on the annexation proposal. It is not obliged, however, to concur with the recommendation.[36] Annexations of one square mile or more, not within metropolitan communities, are initiated in the same manner as other annexations, but an annexation ordinance adopted by the annexing municipality cannot take effect until a determination is obtained from the circuit court that the proposed annexation is in the public interest. The public interest determination by the court is based on an advisory report from the director[37] and is final in these cases.

State review of annexations is intended to determine the "public interest" based on the following considerations:

1. Whether the governmental services, including zoning, to be supplied to the territory could clearly be better supplied by the town or by some other village or city whose boundaries are contiguous to the territory proposed for annexation which files with the circuit court a certified copy of a resolution adopted by a two-thirds vote of the elected members of the governing body indicating a willingness to annex the territory upon receiving an otherwise valid petition for the annexation of the territory.

2. 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.[38]

All state-level determinations of public interest in reference to annexations are advisory only.[39]

III. EXPERIENCE WITH THE 1959 INCORPORATION AND CONSOLIDATION REVIEW PROCEDURES

Prior to 1959 the Wisconsin incorporation statutes contained only minimal standards relating to the type of territory that could be incorporated as a city or village.[40] Similarly, the con-

[35] WIS. STAT. § 66.021(11)(a) (1963). The statute provides that the director "may" make such a determination. The director is, thus, apparently not required to respond to every annexation notice sent to him.

[36] WIS. STAT. § 66.021(11)(a) (1963).

[37] WIS. STAT. § 66.021(11)(b) (1963). The court may accept or reject the director's advice, based on its review of any other relevant information obtained from its own hearings.

[38] WIS. STAT. § 66.021(11)(c) (1963).

[39] Annexations in metropolitan communities of those involving more than one square mile in territory can escape even advisory state-level review if they proceed under WIS. STAT. § 66.024 (1963). See note 21 *supra*.

[40] Cutler, *supra* note 3, at 9-10.

solidation statute required only that the joining municipalities be contiguous.[41] The Wisconsin Supreme Court added a further qualification to the incorporation statutes in *State ex rel. Town of Holland v. Lammers*,[42] which held that there must be some semblance, in fact, of a city or village before such an entity could be incorporated. This doctrine was gradually weakened by successive court decisions.[43] The courts also limited their power to review incorporations by the doctrine that the issue of whether an incorporation was in the public interest was a legislative and not a judicial matter.[44]

This gap in effective control over municipal incorporations and consolidations was filled by the dual administrative and judicial review provisions of the 1959 law. Under this law courts are restricted to applying minimum standards relating to population, area, and density.[45] These standards may conveniently be applied by the courts since the necessary information must be stated in the incorporation petition. In the case of consolidations, the court review is only for the purpose of determining that requirements relating to the form of the ordinances are met.

The more complex issue of whether the proposed incorporation or consolidation is in the public interest is decided by the director, a state-level administrative official. The resolution of this issue requires a detailed and comprehensive planning study, the type of inquiry which a court is not equipped to make. As one court has noted: "The planning director is not a judge and it was never intended that he would function as one. He was selected for the position presumably because of his knowledge and demonstrated ability in the field of urban planning."[46] The director's analysis deals very largely with the types of information that are normally collected and analyzed in connection with a comprehensive planning study of a community. The purpose of the analysis is to determine whether the area is homogeneous, what future development potential it has, and whether organization of the new unit of government is in the public interest—standards which may sound very subjective. The criteria to be used in arriving at these determinations are spelled out in detail in the statutes,[47]

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41 WIS. STAT. § 66.02 (1955).

42 113 Wis. 398, 86 N.W. 677, 89 N.W. 501 (1902).

43 Cutler, *supra* note 3; Village of Oconomowoc Lake v. Town of Summit, 7 Wis.2d 400, 97 N.W.2d 189 (1959).

44 *In re* Incorporation of Village of North Milwaukee, 93 Wis. 616, 67 N.W. 1033 (1896). See also URBAN PROBLEMS COMMITTEE REPORT 12-13.

45 While the 1959 law restricted the content of judicial review over incorporations, it also expanded judicial power in one respect. Since 1849 there had been statutory provision for judicial review of incorporations of villages but never similar provision for review of incorporations of cities. Cutler, *supra* note 3, at 10.

46 Carey v. Director of the Planning Function, Case No. 112-037, Dane County Cir. Ct., April 17, 1964, at 10.

47 WIS. STAT. § 66.016 (1963).

however, and experience in the use of them has demonstrated their applicability. Each proposal reviewed has resulted in definitive answers to the questions involved and a determination that is highly objective.

The 1959 legislature thus drew a fine line between the aspects of the problem that required administrative review on the one hand and judicial review on the other. Since 1959 a total of fifteen incorporation or consolidation proposals have been subjected to this dual review. Nine of these were to create isolated villages, four to create metropolitan villages or cities, and two to consolidate a town with an existing municipality. Of the total, state review resulted in approval of nine as submitted, approval of one with a modification of proposed boundaries, and rejection of five. Of those approved by the state review agency, all but two were subsequently approved by referendum and resulted in establishment of new, or combined, municipalities. Table 1 lists the proposals reviewed and the ultimate disposition of them.

Only a few court contests have resulted from proposals to create new municipalities since 1959. A summary of those which involved the manner of preparing state-level determinations, or reviewing final determinations, follows.

Carey v. Director of the Planning Function.[48] This court action was a proceeding under Chapter 227 of the statutes to review the director's decision that the petition to incorporate as a third-class city the Town of Preble, Brown County, should be dismissed. Questions involved were:

1. Was the hearing conducted by the director a legislative or a judicial hearing? If a judicial hearing, the director's determination would have had to be based on the information included in the hearing record. If a legislative hearing, the decision could be based on other relevant evidence as well as the hearing record. The court determined that the hearing conducted by the director was a legislative, not an adjudicative, hearing.

2. Did the director properly apply the statutory standards to the facts as he found them? The court determined that the standards were properly applied to the facts, clearly in accordance with the legislative mandate.

3. Did the record support the director's factual findings, which formed the basis of his determination? The court reviewed the director's determination in detail and concluded that the findings were adequately supported by facts, and that a contrary determination might indeed have constituted an abuse of discretion.

The court affirmed the decision of the director that the petition be dismissed.

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[48] Carey v. Director of the Planning Function, Case No. 112-037, Dane County Cir. Ct., April 17, 1964.

TABLE 1.

Proposal to Incorporate	Location	Determination	Result
A Village of Rudolph	Wood	Granted	Approved by referendum
A Village of Forestville	Door	Granted	Approved by referendum
A Village of Francis Creek	Manitowoc	Granted	Approved by referendum
A Village of Cushing	Polk	Not approved	Petition dismissed
A Town of Preble as a city	Brown	Not approved	Petition dismissed
A Village of Lake Como	Walworth	Adjusted and granted	Defeated by referendum
A Village of Mount Calvary	Fond du Lac	Granted	Approved by referendum
A Village of Maribel	Manitowoc	Granted	Approved by referendum
A Village of Genesee Depot	Waukesha	Granted	Defeated by referendum
A Village of Egg Harbor	Door	Granted	Approved by referendum
A Village of Rockfield	Washington	Not approved	Petition dismissed
A Town of Muskego as a city	Waukesha	Granted	Approved by referendum
A Town of Merton as Village of Moraine Lakes	Waukesha	Not approved	Petition dismissed
Proposal to Consolidate			
Town of Preble and City of Green Bay	Brown	Granted	Approved by referendum
Town and Village of Pewaukee	Waukesha	Not approved	Petition dismissed

In re Village of Lake Como.[49] The director filed a determination with the Circuit Court of Walworth County that a petition to incorporate a village of Lake Como from portions of the town of Geneva should be adjusted as to areas to be included and then approved. The court then ordered a referendum on the question of incorporating the proposed village. An attempt was made to stay the referendum pending disposition of an appeal of the director's findings. The statutes provide that a referendum order can be stayed pending an appeal only if the supreme court finds that "a strong probability exists that the order [of the circuit court based upon the director's determination] . . . will be set aside."[50] The supreme court held that no such strong probability existed on the record of the case. It further rejected an argument that the circuit court had jurisdiction to review, reverse, or modify the director's determination. The court, therefore, refused to stay the referendum. The proposed incorporation was subsequently rejected in a referendum on March 12, 1963.

The fact that very few judicial cases have developed from the first five years of state review of proposals to incorporate or consolidate municipalities could be due to the possibility that a larger than usual number of incorporations were consummated in the years prior to adoption of the 1959 law, in order to avoid its stringent new standards. The lack of court actions could also be the result of a smoother working process for organization of municipalities, which is certainly the result intended by the 1959 legislature when it approved major changes in municipal incorporation and consolidation procedures.

The 1959 law established a clear division of responsibility between the courts and the director in reviewing municipal incorporations and consolidation proposals. This division has proved highly workable and has been continuously affirmed and strengthened by both court decisions and legislative actions since 1959.

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[49] WIS. SUP. CT., Feb. 12, 1963 (Unreported order).

[50] WIS. STAT. § 66.017(4) (1963). Another question arose in connection with this case, namely, whether the appeal from the director's findings should be taken to the local circuit court which already had before it the petition and records pertaining to a proposed incorporation, or to the Circuit Court for Dane County, to which appeals from state administrative decisions are taken in accordance with the provisions of WIS. STAT. § 227.16 (1963). This question did not require a decision by the courts because the proposal to establish the Village of Lake Como was defeated by a referendum and because the legislature enacted Wis. Laws 1963, ch. 395, at 733, which specified that such appeals be taken to the Circuit Court for Dane County. The legislature evidently thought that the circuit court which applies standards prescribed by WIS. STAT. § 66.015 (1963), should not also review the application of standards prescribed in WIS. STAT. § 66.016 (1963), by the director.

IV. EXPERIENCE WITH THE ANNEXATION REVIEW PROCESS

Prior to 1959, any land which was adjacent to a municipality could, under annexation statutes, be annexed to that municipality. The statutes contained no standards on the quality, shape, or size of parcels that might be annexed.[51] Courts early rejected the possibility of formulating judicial standards for annexations similar to those announced in *State ex rel. Town of Holland v. Lammers* for incorporations.[52] The absence of annexation standards resulted in the use of the annexation device to frustrate the attempted control over incorporations. Municipalities would be incorporated to include a small area having the requisite population density and "municipal characteristics." Then surrounding low density areas would be annexed to the newly formed city or village to form the larger municipality originally contemplated by the incorporators.[53]

The *Town of Brookfield v. City of Brookfield* case[54] in 1957 announced the first judicial limitations on annexations. In that case, the supreme court held that courts had power to review the suitability of land for annexation under a "rule of reason." This judicial control of annexations was, as the court explained, only concerned with extreme misuse of annexation powers:

> In annexation proceedings the city council in the first instance determines the suitability or adaptability of the area proposed to be annexed and the necessity of annexing the same for the proper growth and development of the city. Upon a review the courts cannot disturb the council's determination unless it appears that it is arbitrary and capricious or is an abuse of discretion.[55]

The judicially created "rule of reason" was primarily concerned with the quality of land proposed for annexation and the need of the annexing municipality for the land. The court had reservations, at least initially, about applying the same test to control the *shape* of parcels being attached to municipalities.[56]

The 1959 municipal boundary legislation changed this review procedure considerably, at least for two categories of annexations. The Urban Problems Committee Report noted the reasons for recommending state-level review of annexations:

> The consolidation and annexation statutes were revised by the committee to provide for state level review of both these

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[51] Cutler, *supra* note 3, at 10.

[52] Zweifel v. Milwaukee, 188 Wis. 358, 206 N.W. 215 (1925).

[53] Cutler, *supra* note 3, at 12-13.

[54] 274 Wis. 638, 80 N.W.2d 800 (1957). The "rule of reason" doctrine is sometimes credited to the early case of Smith v. Sherry, 50 Wis. 210, 6 N.W. 561 (1880).

[55] 274 Wis. at 646, 80 N.W.2d at 804 (1957).

[56] Town of Wauwatosa v. City of Milwaukee, 259 Wis. 56, 61, 47 N.W.2d 442, 445 (1951).

procedures, similar to the review established for proposed incorporations. It was agreed that the interrelationship of the different methods of altering territorial boundary lines required that all be subject to review. Otherwise, it would be possible to circumvent the purpose of the new incorporation statutes.[57]

State-level administrative review is limited to two special types of annexations: those involving an area of more than one square mile[58] and those within metropolitan communities.[59] In both cases, the director gives an advisory opinion on whether the annexation is in the public interest. In the case of annexations within metropolitan communities, the director submits his recommendations to the annexing municipality. This body must consider the director's report before taking final action, but it need not concur in his opinion. In the case of annexations involving an area of more than one square mile, the annexing municipality cannot give final approval to the annexation without a determination of the circuit court that the annexation is in the public interest. The court, in turn, is required to secure an advisory opinion on the public interest issue from the director.

State-level review of proposed annexations is to identify the public interest, based upon any two major considerations: (1) the level of "governmental services, including zoning," which can be supplied to the territory to be annexed, and (2) the shape of the proposed annexation and the homogeneity of the territory with other contiguous municipalities.[60]

What is the specific review process at the state level? When the state agency receives a notice of an annexation to which a public interest review must be applied, questionnaires eliciting relevant information from affected units of government are mailed to their clerks. (If other recent annexations affected the same units, it is noted that additional questionnaires need not be completed unless the information called for needs to be updated.) Each proposed annexation is subjected to a review, based on the mapped boundaries, replies from questionnaires, and any other available and relevant information. An attempt has been made to frame the questionnaires in a manner satisfactory to the principal interests involved, *i.e.*, towns and municipalities. Considerable information is obtained and analyzed in connection with each proposal reviewed.

The statute, it should be noted, does not indicate the relative weight to be given to the need for "governmental services" on the one hand and "shape and homogeneity" on the other. The "mix"

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57 URBAN PROBLEMS COMMITTEE REPORT 16.
58 WIS. STAT. § 66.02(11)(b) (1963).
59 WIS. STAT. § 66.021(11)(a) (1963).
60 WIS. STAT. § 66.021(11)(c) (1963).

of these values where they conflict with each other, which is not uncommon, is left to the judgment of the state reviewing officer. In most instances annexation conflicts are generated by a need on the part of residents of the annexation area for vital public services, such as sewer and water, on the one hand, and the problems encountered by governmental units in extending services to areas that have gerrymandered boundaries on the other. It seems clear that the legislature, in establishing this review procedure, did not intend to outlaw gerrymandered annexations; rather it intended that shape disadvantages be weighed against other needs in determining whether the annexation is in the public interest.

The state agency began its review process in the last months of 1959. In the first five years of the statute's application over 700 annexations were reviewed. The great bulk of them were annexations within metropolitan communities. Only three were annexations of more than one square mile, requiring review by the state agency and a "public interest" finding by the circuit court. Since the circuit court and state review procedure in these latter cases constitutes an additional impediment to achieving an annexation, and since the supreme court ruled in *Town of Scott v. City of Merrill*[61] that a city could divide a large annexation into two smaller ones to avoid this requirement, no annexations larger than a square mile in area have been processed since the date of that decision, March 2, 1962.

Of those annexation proposals reviewed, twenty-nine were determined to be against the public interest, a relatively small number. When the review procedure was written into the law, it was evidently expected that relatively few annexations would be "against" the public interest because a report from the state agency was not even required if it was determined that the annexation was in the public interest.[62] The state review agency, however, has been placed somewhat on the horns of a dilemma by the language of this law. When reports are not made, inquiries stream in because local groups fear some factor may have been overlooked in the director's determination. On the other hand, a preponderance of determinations that annexations are not against the public interest has led local groups which oppose particular annexations to charge that the determinations are made without full consideration of their point of view. The fact is, however, that the law does not contemplate the weighing of points of view. It specifies only that the shape of annexations and the need for services should be evaluated. This is done and reports of findings are now regularly transmitted to local officials regarding all annexations which are reviewed by the state agency. Furthermore, regarding the preponderance of favorable decisions, it is

[61] 16 Wis.2d 91, 113 N.W.2d 846 (1962).
[62] *Cf.* WIS. STAT. § 66.021(11)(a) (1963).

also possible that the state review process has discouraged local groups from initiating annexations which are questionable, and that the statute may, therefore, be "self-policing," at least to some extent.

A breakdown of the number of annexations reviewed, by county, appears in Table 2.

TABLE 2.

County	1959	1960	1961	1962	1963	1964	Total
Brown	2	3	2	—	—	2	9
Calumet	—	—	—	1	1	—	2
Dane	12	48	30	25	16	17	148
Dodge	—	—	1	—	1	3	5
Eau Claire	—	6	1	2	6	10	25
Fond du Lac	—	5	5	4	2	4	20
Iowa	—	—	1	—	—	—	1
Jefferson	—	—	1	3	3	2	9
Kenosha	—	17	9	10	23	39	98
La Crosse	—	1	2	1	—	4	8
Manitowoc	1	1	3	3	—	4	12
Marathon	—	2	5	3	—	13	23
Milwaukee (from Washington Co.)	—	—	—	—	1	—	1
Monroe	—	—	—	—	1	—	1
Outagamie	1	3	9	8	2	6	29
Ozaukee	—	—	1	—	—	—	1
Portage	—	—	—	—	—	1	1
Price	—	—	—	—	—	2	2
Racine	—	11	3	9	12	14	49
Richland	—	—	—	—	—	1	1
Rock	—	7	11	18	13	10	59
St. Croix	—	—	—	—	—	1	1
Sheboygan	—	3	3	5	11	18	40
Trempealeau	—	—	1	—	1	1	3
Walworth	—	—	—	4	—	4	8
Washington	2	6	4	—	2	2	16
Waukesha	6	19	12	5	15	23	80
Waupaca	—	—	—	—	—	2	2
Waushara	—	—	—	1	—	—	1
Winnebago	2	9	13	8	6	15	53
Wood	—	—	1	6	1	1	9
Total annexations reviewed	26	141	118	116	117	199	717

Enactment of new municipal annexation legislation has not had the quieting effect of the new incorporation processes, insofar as court actions are concerned, possibly because the director's annexation findings are only advisory. Court reviews of annexations since enactment of the new procedures in 1957 and 1959 have resulted in a number of decisions holding that sections of the new laws should be strictly interpreted. In *Town of Madison v. City*

of Madison[63] the court held that the time period within which an annexation ordinance must be enacted must be strictly adhered to. In *Town of Burke v. City of Madison*[64] the court held that the time period within which a referendum may be contested will also be strictly interpreted. In the same case, the requirement that election officials certify a favorable referendum vote before an annexation ordinance is adopted was also strictly construed. In *Town of Mount Pleasant v. City of Racine*[65] the court held that contiguity requirements must be strictly adhered to.

Other requirements have been interpreted less rigidly. *City of Madison v. Village of Monona*[66] held that a minor error in a publication notice was not fatal to an annexation and that the detail of the map required under the new law need not be precise. As noted earlier, the court has also chosen not to interpret strictly the requirement that all annexations of more than one square mile in area be subjected to a public interest evaluation.[67] This holding, which permits an annexation of more than one square mile to be divided into two parts, has apparently rendered that section of the statute useless.[68]

The role of the court upon appeal of an annexation attempt has received further attention since enactment of the 1959 legislation. In two cases decided in 1964, the Wisconsin Supreme Court held that courts continue to have the power to dismiss annexations, including those which have been approved by the director, by application of the "rule of reason." Furthermore, in both cases the "rule of reason" was applied to test the shape of the parcel being annexed. In *Town of Fond du Lac v. City of Fond du Lac*[69] the court invalidated an approved annexation which excluded an island of land 300 feet by 130 feet bounded on three sides by the annexed territory and on the fourth side by the city's existing boundary. The exclusion was allegedly made to preclude the two electors residing in the island from participating in the annexation.

In *Town of Mt. Pleasant v. City of Racine*[70] the court voided the annexation of a 145 acre parcel which constituted a corridor approximately 1, 705 feet long, and varying in width from 306 feet

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[63] 12 Wis.2d 100, 106 N.W.2d 264 (1960); City of Madison v. Town of Blooming Grove, 14 Wis.2d 143, 109 N.W.2d 682 (1960).

[64] 17 Wis.2d 623, 117 N.W.2d 580 (1962).

[65] 24 Wis.2d 41, 127 N.W.2d 757 (1964).

[66] 10 Wis.2d 32, 102 N.W.2d 206 (1960).

[67] Town of Scott v. City of Merrill, 16 Wis.2d 91, 113 N.W.2d 846 (1962).

[68] Concerning priorities of competing annexations, the rule that the one first instituted has precedence was supported in City of Madison v. Village of Monona, 10 Wis.2d 32, 102 N.W.2d 206 (1960), and in State *ex rel.* City of Madison v. Village of Monona, 11 Wis.2d 93, 104 N.W.2d 158 (1960).

[69] 22 Wis.2d 533, 126 N.W.2d 201 (1964). Justices Fairchild and Wilkie concurred in the decision, but on a different ground.

[70] 24 Wis.2d 41, 127 N.W.2d 757 (1964). Justices Fairchild and Wilkie dissented.

to 152 feet. This particular annexation had been approved by the Racine Common Council after receipt of a report from the director, who reported that the annexation was in the public interest. In addition, the annexation had been approved by the trial court.

Both decisions are justifiable if the court was applying the "rule of reason" as a limitation upon annexations which are clearly arbitrary, capricious, or which constitute an abuse of discretion. However, in neither case did the court demonstrate a lack of reason for the annexation shape. In *Town of Fond du Lac* the court appeared to place the burden of proof upon the party supporting the annexation: "The exclusion of land by the creation of an island . . . must be as reasonably justified as the inclusion of the land around the island for city needs and purposes. A hole in a doughnut is natural but it must be proved so in a city."[71] In *Town of Mt. Pleasant* the court stated that:

> Shoestring or gerrymander annexation is not a rare phenomenon. The tendency of subdividers to reach far out into the countryside for vacant land, and their desire to attach it to the city of [sic] services, is natural; however, this can lead to annexations which in reality are no more than isolated areas connected by means of a technical strip a few feet wide. Such a result does not coincide with legislative intent, and tends to create crazy-quilt boundaries which are difficult for both city and town to administer.[72]

This reasoning appears to put the court in the position of substituting its judgment of what is a reasonable or workable annexation for the judgments of the director and the city council on the same issue.[73] It is at least arguable that this court action conflicts with the intent of the 1959 legislation. This legislation identified those annexations which had been of particular concern—those in metropolitan areas and those of a square mile or more in area—and provided that they should be subject to a public interest review. The legislature indicated that municipal services available and the shape of the annexation were to be the relevant factors in identifying the public interest. It further provided that the review should be undertaken by a state agency with expertise and experience in analyzing problems of local government. This expert administrative review, coupled with acceptance of its results by the local legislative body or court, might well have been

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[71] 22 Wis.2d at 541, 126 N.W.2d at 205.

[72] 24 Wis.2d at 46, 127 N.W.2d at 760.

[73] The language quoted from Justice Dieterich's opinion in *Town of Mt. Pleasant* on the evils of shoestring annexations is a paraphrase of Cutler, *Characteristics of Land Required for Incorporation or Expansion of a Municipality*, 1958 WIS. L. REV. 6, 33. Cutler suggests later in the same article that "the shape of an annexation will have to be truly extreme before the court will hold it to be 'capricious' and thereby void the annexation." Cutler, *supra* at 38.

intended to constitute a "legislative" determination of reasonableness which is entitled to the same respect by courts as other legislative determinations. It would seem then that the 1959 legislation might eventually cause courts to differentiate, in application of the historical "rule of reason" judicial review powers, between those annexations which receive detailed administrative review and those which do not.

V. CONCLUSIONS

Enactment of new annexation, consolidation, and municipal incorporation laws by the 1957 and 1959 Wisconsin Legislatures established almost entirely new procedures and criteria for adjustment of municipal boundary lines in Wisconsin. Most of the requirements and procedures previously applicable to such actions were repealed and new ones consolidated into new sections of Chapter 66 of the Wisconsin Statutes.

Mandatory review by a state agency of all proposed municipal incorporations and consolidations was a cardinal feature of the new procedures. The state agency's finding that such a proposal is not in the public interest is conclusive, unless overturned by a court reviewing it as an administrative determination under the appeal procedures of Chapter 227 of the Wisconsin Statutes.

The administrative officer responsible for the review, the Director of the Planning Function of the Department of Resource Development, has reviewed fifteen incorporation and consolidation proposals advanced under the new law. Except for some minor questions which have been largely settled by remedial legislation, the new procedures have worked very well. The standards for review of incorporations and consolidations have been found to be readily applicable and seem to result in reasonable and generally acceptable findings. The findings have been upheld in the few court actions where they were questioned.

Experience with the review procedure involved in proposed incorporations and consolidations indicates that consideration should be given to establishing a procedure whereby remnants of towns might be more readily attached to another adjacent town in cases where they should not, in application of statutory standards, be included within a new municipality.[74] If the law is changed to allow such attachments, it is assumed that such a proposal, whether initiated locally or at the state level, would be subject to approval in a referendum. Under present limitations, the interests of town residents can, in some cases be protected only by rejecting otherwise reasonable incorporation proposals. At-

[74] The power to change town boundaries is presently lodged in the county board, which may "organize, name, vacate and change the boundaries and names of the towns . . . ." WIS. STAT. § 59.07(22) (1963).

tachment of remnants of towns to adjacent units might prove to be a more satisfactory solution to this problem as far as some town residents are concerned.

The new annexation procedures require that annexations in metropolitan areas and those involving areas of a square mile or more be reviewed by the state agency. The purpose of the review in these instances, however, is to obtain an advisory opinion as to whether the proposed annexation is in the public interest. The opinion is directed to either the local legislative body or the circuit court, and these bodies are free to accept or reject the opinion. The state agency has reviewed hundreds of annexations in the first five years of the law's application, and as was apparently anticipated in drafting the law, the bulk of the proposals were found to be "not contrary" to the public interest. While the factors to be considered in reviewing these annexations—that is, the relative ability of competing units of government to provide services and the shape and homogeneity of the area to be annexed—are readily evaluated, they tend on balance to favor the larger and better organized units of government. This result may well have been intended by the legislature.

Most of the court cases involving annexations under the new law have dealt with a series of minor statutory interpretation problems and were summarized above. But a few have resulted in some confusion, especially those attempting to substitute the old court-applied "rule of reason" to questions of shape and contiguity. These are questions which the legislature may have intended to be legislatively determined through state-level administrative review and recommendation, finalized after further review by a local governing body or court. Even if such determination of need for annexation of an area were beyond the reach of the court, annexations which were found by the courts to be clearly arbitrary and capricious could be held invalid. Since use of the "rule of reason" involves substituting a court application of facts and criteria which the state review agency and local governing bodies may be more familiar with, some confusion has resulted. It seems likely that additional cases will arise which will enable the courts to further examine the legislative intent in providing for state-level technical review and local legislative review of annexations, and to consider again the function of the courts in reviewing the cases involving such questions.

One anomaly appears in the present laws. The new annexation procedure authorized by the 1959 legislature, now section 66.024, does not provide for review by the director of annexation proposals initiated under it. This result seems clearly contrary to the intent of the 1959 legislature to subject certain annexations to an administrative review. Consideration might be given to an amendment to 66.024, making that procedure subject to the same review as other annexations.

The great bulk of municipal annexations in the state of Wisconsin are initiated by petitions by property owners or electors; consequently cities have little direct control over boundary proposals. Cities can, for the most part, only take them or leave them as they are presented. Experience shows that in cities active with annexations, the necessary result of such a process is a constantly changing and uneven set of municipal boundaries. It is almost inevitable that islands of properties under town jurisdiction will be left in such areas. This result obtains whether or not the courts frown on leaving such remnants, because in many instances a more badly gerrymandered boundary results from avoiding islands than from permitting them. One result of insisting upon even and uniform annexation boundaries is that residents who may greatly need services obtainable through annexation are pitted against neighbors who do not want such services. Experience has demonstrated that gradual and piecemeal annexations in such cases result in less conflict even though it leaves municipal boundaries temporarily jagged. In cases where piecemeal annexations have created islands, it would seem appropriate to permit municipalities, perhaps after a certain period of time, to unilaterally annex such lands. These annexations could be subjected to either court or administrative review to insure that they were in the public interest.

As a whole, Wisconsin's new municipal annexation, incorporation, and consolidation laws appear to have clarified many legal questions, and have established sound and workable guidelines for administrative review of such actions. Continued attention must be given, however, to the need for legislation dealing with a few questions which still remain unanswered.