



Office of the Mayor

Paul R. Soglin, Mayor

City-County Building, Room 403
210 Martin Luther King, Jr. Boulevard
Madison, Wisconsin 53703
Phone: (608) 266-4611
Fax: (608) 267-8671
mayor@cityofmadison.com
www.cityofmadison.com

SENT VIA E-MAIL (NO HARD COPY TO FOLLOW)

November 5, 2018

Brad Czebotar, Village President
Village of McFarland
5915 Milwaukee St.
McFarland, WI 53558-0110

Re: Peterson Annexation Petition

Mr. Czebotar,

On October 3, 2018, Maurie and Ianne Peterson (the "Petitioners") filed a revised petition for direct annexation by unanimous approval pursuant to Wis. Stat. Sec. 66.0217(2) with the Village, seeking to annex 147.83 acres lying north of Siggelkow Road from the Town of Blooming Grove (the "Town"). On October 23, 2018, the Department of Administration (the "Department") made its finding, under Sec. 66.0217(6), that that annexation is in the public interest—although, the Department certainly expressed some reservations about the petition as will be noted below.

The City of Madison (the "City") believes that this annexation petition will be before the Village Board for reconsideration in the near future, possibly as soon as the Board's meeting on November 12.

The purpose of this letter is to inform the Village that if the Village approves the Petitioners annexation petition and enacts an annexation ordinance for this property, that the City will be forced to sue the Village under Sec. 66.0217(11). It is the City's position that this annexation is unlawful, that the Petitioners may not avail themselves of this statutory process, and that the Village lacks the capacity to consider this matter. The City has a strong interest in protecting the terms and final boundary of the Cooperative Plan, and therefore would not view this annexation as minor. I hope that the Village Board considers the City's position in this matter before proceeding.

All annexations, including a direct annexation by unanimous approval under Sec. 66.0217(2), are expressly “subject to ss. ... 66.0307(7)”.¹ While the Village Attorney, in his response to the Department of Administration, ignored this subsection, the Village Board, in acting on this petition, should not.

Section 66.0307(7) reads, in part, as follows:

(7) OTHER BOUNDARY PROCEDURES.

(b) *Other boundary procedures during the planning period.* During the planning period specified under sub. (3) (f), no other procedure for altering a municipality's boundaries may be used to alter a boundary that is included in the cooperative plan under sub. (3) (d) 1., except if an annexation is conducted under s. 281.43 (1m), regardless of whether the boundary is proposed to be maintained or changed or is allowed to be changed under the plan. After the planning period has expired, the boundary may be altered. (Emphasis added)

As the Village is aware, the City of Madison and the Town of Blooming Grove entered into a cooperative plan under Sec. 66.0307 in 2006. Under the terms of the Cooperative Plan, the Town will continue to exist through November 1, 2027, but will gradually wind down activities before being absorbed by the City. The City and the Town continue to work cooperatively together to responsibly address the present and future needs of the Town’s residents, with the Cooperative Plan ensuring the continued viability of the Town through final attachment.

The Cooperative Plan itself does not allow for any annexations of Town territory lying north of Siggelkow Road to the Village of McFarland.² Under the Cooperative Plan, Town property owners, such as the Petitioners, may either stay in the Town through 2027, or attach to the City as allowed for under the Plan. As such, Sec. 66.0307(7) can be read as stating that, prior to Nov. 1, 2027, no other procedure may be used to alter the Town’s boundaries north of Siggelkow Road other than attachment to the City. Accordingly, because any annexation of lands north of Siggelkow Road to the Village is expressly subject to Sec. 66.0307(7), Town property owners may not avail themselves of the direct annexation by unanimous consent procedure under Sec. 66.0217(2). Therefore, the petition to be considered by the Village Board is void as a matter of law and the Village should not recognize it. Moreover, should the Village proceed anyway and not only recognize the petition as valid but enact an annexation ordinance, such an action would be unlawful.

¹ In his September 14, 2018 letter to the Department of Administration, the Village Attorney overlooks this clear statutory reference to subsection (7) of Section 66.0307, preferring instead to talk in generalities about the entire cooperative plan statute, 66.0307. This oversight is problematic since the subsection in question speaks much more directly on the preclusion issue and courts would have no reason to look beyond the language in subsection (7) as the Village Attorney has done. Indeed, the Village Attorney never even mentioned or addressed this subsection in his letter to the Department of Administration.

² The Plan did speak to annexation of Town territory by the Village south of Siggelkow Road under the now expired intergovernmental agreement between the City and the Village. These annexations have already occurred.

Since the approval of the Cooperative Plan, the City and the Town have been working effectively together towards ensuring the orderly development and urbanization of the Town. The City has long included the Petitioners lands within its comprehensive plans, and the City has made infrastructure investments in the Siggelkow Road area with the assumption that these lands will, no later than 2027, be within the City. This annexation, if left to stand, will upset those efforts and investments of the City and the Town. It will also set a bad precedent for other Town property owners who, for whatever reason, may be dissatisfied with the Cooperative Plan. Moreover, annexation of these lands would create an oddly shaped Village peninsula north of Siggelkow Road. The City already has urban services available to these lands—hence, if these property owners are serious about redevelopment, they can already exercise those options by attaching to the City. If this annexation is approved contrary to all of the City’s efforts and investments in the area, the Petitioners and the Village should not expect any cooperation with the City in the provision of services to these lands. These lands are better served by the City.

While the Department of Administration noted in its letter that the annexation was in the public’s interest, it did so with the recognition that the Department’s review authority was limited by statute to determining if the property was contiguous and whether the annexing municipality can provide municipal services. However, the Department took what appears to be a rare step when it “urge[d] the Village to carefully consider [ss. 66.0217(2) and 66.0307(7)(b)] before adopting an annexation ordinance.” The Department further noted that the interface with the City-Village boundary agreement and the City-Town Cooperative plan would set a more compact and rational boundary at Siggelkow Road.

Because of the caution suggested by the Department of Administration, and the Village Attorney’s failure to directly address Sec. 66.0307(7)(b) in his letter to the Department, and for the reasons set forth in this letter and the City’s September 13, 2018 letter to the Department, the City asks the Village Board to reject the Petitioner’s annexation petition and not enact an ordinance annexing these lands. If the Village does so anyway, as noted above, the City will pursue an action in Circuit Court contesting the annexation.³ The City feels confident that the Court will rule in favor of the City, thereby upholding the Cooperative Plan. Should things go this direction, I am concerned that future planning and intergovernmental relations between the City and the Village will be significantly strained. The City finds that working cooperatively with our neighbors is mutually beneficial, and would prefer that avenue instead. As our communities grow towards each other, areas of mutual interest are sure to arise—and we would prefer to address these issues together, instead of in opposition.

I am authorized to tell the Village that the Town agrees with the arguments made in this letter.

³ While the Town of Blooming Grove may be prohibited from challenging this annexation, the City of Madison is not.

November 5, 2018

Page 4

If Village staff would like to discuss this matter further, please contact Assistant City Attorney Doran Viste at dviste@cityofmadison.com or 266-4511.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul R. Soglin". The signature is fluid and cursive, with a small flourish at the end.

Paul R. Soglin
Mayor, City of Madison

Encl.

cc. Al Reuter, Village Attorney
Matt Schuenke, Village Administrator
Cassandra Suettinger, Village Clerk
Chris Hughes, Attorney for the Town of Blooming Grove
Mike Wolf, Town Administrator, Town of Blooming Grove
Heather Stouder, Director, Planning Division, City of Madison
Doran Viste, Assistant City Attorney

(d) “Owner” means the holder of record of an estate in possession in fee simple, or for life, in land or real property, or a vendee of record under a land contract for the sale of an estate in possession in fee simple or for life but does not include the vendor under a land contract. A tenant in common or joint tenant is an owner to the extent of his or her interest.

(e) “Petition” includes the original petition and any counterpart of the original petition.

(f) “Real property” means land and the improvements to the land.

(g) “Scale map” means a map that accurately reflects the legal description of the property to be annexed and the boundary of the annexing city or village, and that includes a graphic scale on the face of the map.

(2) DIRECT ANNEXATION BY UNANIMOUS APPROVAL. Except as provided in this subsection and sub. (14), and subject to ss. 66.0301 (6) (d) and 66.0307 (7), if a petition for direct annexation signed by all of the electors residing in the territory and the owners of all of the real property in the territory is filed with the city or village clerk, and with the town clerk of the town or towns in which the territory is located, together with a scale map and a legal description of the property to be annexed, an annexation ordinance for the annexation of the territory may be enacted by a two-thirds vote of the elected members of the governing body of the city or village without compliance with the notice requirements of sub. (4). In an annexation under this subsection, subject to sub. (6), the person filing the petition with the city or village clerk and the town clerk shall, within 5 days of the filing, mail a copy of the scale map and a legal description of the territory to be annexed to the department and the governing body shall review the advice of the department, if any, before enacting the annexation ordinance. No territory may be annexed by a city or village under this subsection unless the territory to be annexed is contiguous to the annexing city or village.

(3) OTHER METHODS OF ANNEXATION. Subject to ss. 66.0301 (6) (d) and 66.0307 (7), and except as provided in sub. (14), territory contiguous to a city or village may be annexed to the city or village in the following ways:

(a) *Direct annexation by one-half approval.* A petition for direct annexation may be filed with the city or village clerk if it has been signed by either of the following:

1. A number of qualified electors residing in the territory subject to the proposed annexation equal to at least the majority of votes cast for governor in the territory at the last gubernatorial election, and either of the following:

a. The owners of one-half of the land in area within the territory.

b. The owners of one-half of the real property in assessed value within the territory.

2. If no electors reside in the territory subject to the proposed annexation, by either of the following:

a. The owners of one-half of the land in area within the territory.

b. The owners of one-half of the real property in assessed value within the territory.

(b) *Annexation by referendum.* A petition for a referendum on the question of annexation may be filed with the city or village clerk signed by a number of qualified electors residing in the territory equal to at least 20 percent of the votes cast for governor in the territory at the last gubernatorial election, and the owners of at least 50 percent of the real property either in area or assessed value. The petition shall conform to the requirements of s. 8.40.

(4) NOTICE OF PROPOSED ANNEXATION. (a) An annexation under sub. (3) shall be initiated by publishing in the territory proposed for annexation a class 1 notice, under ch. 985, of intention to circulate an annexation petition. The notice shall contain:

1. A statement of intention to circulate an annexation petition.

2. A legal description of the territory proposed to be annexed and a copy of a scale map.

3. The name of the city or village to which the annexation is proposed.

4. The name of the town or towns from which the territory is proposed to be detached.

5. The name and post-office address of the person causing the notice to be published who shall be an elector or owner in the area proposed to be annexed.

6. A statement that a copy of the scale map may be inspected at the office of the town clerk for the territory proposed to be annexed and the office of the city or village clerk for the city or village to which the territory is proposed to be annexed.

(b) The person who has the notice published shall serve a copy of the notice, within 5 days after its publication, upon the clerk of each municipality affected, upon the clerk of each school district affected and upon each owner of land in a town if that land will be in a city or village after the annexation. Service may be either by personal service or by certified mail with return receipt requested. If required under sub. (6) (a), a copy of the notice shall be mailed to the department as provided in that paragraph.

(5) ANNEXATION PETITION. (a) An annexation petition under this section shall state the purpose of the petition, contain a legal description of the territory proposed to be annexed and have attached a scale map. The petition shall also specify the population of the territory. In this paragraph, “population” means the population of the territory as shown by the last federal census, by any subsequent population estimate certified as acceptable by the department or by an actual count certified as acceptable by the department.

(b) No person who has signed a petition may withdraw his or her name from the petition. No additional signatures may be added after a petition is filed.

(c) The circulation of the petition shall commence not less than 10 days nor more than 20 days after the date of publication of the notice of intention to circulate. The annexation petition is void unless filed within 6 months of the date of publication of the notice.

(6) DEPARTMENT REVIEW OF ANNEXATIONS. (a) *Annexations within populous counties.* No annexation proceeding within a county having a population of 50,000 or more is valid unless the person publishing a notice of annexation under sub. (4) mails a copy of the notice to the clerk of each municipality affected and the department, together with any fee imposed under s. 16.53 (14), within 5 days of the publication. The department shall within 20 days after receipt of the notice mail to the clerk of the town within which the territory lies and to the clerk of the proposed annexing village or city a notice that states whether in its opinion the annexation is in the public interest or is against the public interest and that advises the clerks of the reasons the annexation is in or against the public interest as defined in par. (c). The annexing municipality shall review the advice before final action is taken.

(b) *Alternative dispute resolution.* The department shall make available on its public website a list of persons who identify themselves to the department as professionals qualified to facilitate alternative dispute resolution of annexation, boundary, and land use disputes. Persons identifying themselves to the department as qualified professionals shall submit to the department a brief description of their qualifications, including membership in relevant professional associations and certifications in areas such as planning and alternative dispute resolution. The department may edit the descriptions for inclusion on the list using any criteria that, in the department’s determination, is appropriate. The department may include with the list a disclaimer that the department is not responsible for the accuracy of the descriptions, and that inclusion of a person on the list does not represent endorsement by the department. The department may include links from the list to

(b) *Hearing.* Any person may request a public hearing before the department on a cooperative plan submitted to the department for approval. A request for a public hearing shall be in writing and shall be submitted to the department within 10 days after the cooperative plan is received by the department. If requested, the department shall, and on its own motion the department may, hold a public hearing on the cooperative plan. If requested to hold a public hearing, the department is required to hold only one hearing, regardless of the number of requests for a hearing. Any public hearing under this paragraph shall be held in a municipality that is a party to the cooperative plan.

(c) *Approval of cooperative plan.* A cooperative plan shall be approved by the department if the department determines that all of the following apply:

1. The content of the plan under sub. (3) (c) to (e) is sufficient to enable the department to make the determinations under subsds. 2. to 5.

2. The cooperative plan is consistent with each participating municipality's comprehensive plan and with current state laws, municipal regulations, and administrative rules that apply to the territory affected by the plan.

3. Adequate provision is made in the cooperative plan for the delivery of necessary municipal services to the territory covered by the plan.

5. The shape of any boundary maintained or any boundary change under the cooperative plan is not the result of arbitrariness and reflects due consideration for compactness of area. Considerations relevant to the criteria under this subdivision include quantity of land affected by the boundary maintenance or boundary change and compatibility of the proposed boundary maintenance or boundary change with natural terrain including general topography, major watersheds, soil conditions and such features as rivers, lakes and major bluffs.

6. Any proposed planning period exceeding 10 years is consistent with the plan.

(d) *Return and resubmittal of plan.* The department may return a cooperative plan, with comments, if the department determines that the cooperative plan, if revised, may constitute a plan that can be approved by the department. If a cooperative plan is returned under this paragraph, each participating municipality may revise the plan, as directed by the department, adopt the revised plan by resolution and resubmit the plan to the department within 90 days after the plan is returned. After receiving a resubmitted cooperative plan, the department shall make a determination on approval within 30 days.

(6) **BINDING ELEMENTS OF COOPERATIVE PLAN.** If a cooperative plan is approved by the department under sub. (5) or an amended plan is approved under sub. (8), provisions in the plan to maintain existing boundaries, the boundary changes in the plan, the schedule for those changes, the plan for delivery of services, including road maintenance, and the schedule for those services are binding on the parties to the plan and have the force and effect of a contract.

(7) **OTHER BOUNDARY PROCEDURES.** (a) *Other procedures after hearing.* After the joint hearing under sub. (4) (b) is held, no other procedure, except the procedure under s. 281.43 (1m), for altering a municipality's boundaries may be used to alter a boundary included in the proposed cooperative plan under sub. (3) (d) 1. until the boundary is no longer included in the proposed cooperative plan, the municipality withdraws from the proposed cooperative plan or the proposed cooperative plan fails to receive approval from the department, whichever occurs first.

(b) *Other boundary procedures during the planning period.* During the planning period specified under sub. (3) (f), no other procedure for altering a municipality's boundaries may be used to alter a boundary that is included in the cooperative plan under sub. (3) (d) 1., except if an annexation is conducted under s. 281.43 (1m), regardless of whether the boundary is proposed to be maintained or changed or is allowed to be changed under the plan.

After the planning period has expired, the boundary may be altered.

(7m) **ZONING IN TOWN TERRITORY.** If a town is a party to a cooperative plan with a city or village, the town and city or village may agree, as part of the cooperative plan, to authorize the town, city or village to adopt a zoning ordinance under s. 60.61, 61.35 or 62.23 for all or a portion of the town territory covered by the plan. The exercise of zoning authority by a town under this subsection is not subject to s. 60.61 (3) or 60.62 (3). If a county zoning ordinance applies to the town territory covered by the plan, that ordinance and amendments to it continue until a zoning ordinance is adopted under this subsection. If a zoning ordinance is adopted under this subsection, that zoning ordinance continues in effect after the planning period ceases until a different zoning ordinance for the territory is adopted under other applicable law. This subsection does not affect zoning ordinances adopted under s. 59.692 or 87.30 or ch. 91.

(8) **AMENDMENTS TO COOPERATIVE PLAN.** (a) *Authority to amend plan.* A cooperative plan may be amended during the planning period if all the parties to the plan agree to the amendment and if the amendment is approved by the department.

(b) *When full procedure required.* An amendment to a cooperative plan that proposes to change a municipality's boundary or to change the approved planning period shall follow the same procedure as that required for an original plan.

(c) *When expedited procedure may occur.* An amendment to a cooperative plan that does not propose to change a boundary or the planning period shall follow the same procedure as that required for an original plan except that the hearing under sub. (4) (b) is not required unless objection to the amendment is made in writing by any person to the clerk of a participating municipality. An amendment under this paragraph shall be adopted by resolution of each of the participating municipalities. Notice of the amendment and adopting resolution shall follow the procedures specified in sub. (4) (a). Notice that the amendment will be submitted directly to the department unless objection is made in writing shall be given by each participating municipality by a class 3 notice under ch. 985. If no written objection to the amendment is received within 7 days after the last required notice is published, the amendment may be submitted directly to the department for approval. If written objection is timely made, the public hearing and other requirements under sub. (4) (b) and (c) apply.

(9) **COURT REVIEW OF DEPARTMENT DECISION.** The decision of the department under sub. (5) (c) or (d) or (8) to approve or not to approve a cooperative plan or an amendment to a plan is subject to judicial review under ch. 227.

(10) **BOUNDARY CHANGE ORDINANCE; FILING AND RECORDING REQUIREMENTS.** A boundary change under a cooperative plan shall be accomplished by the enactment of an ordinance by the governing body designated to do so in the plan. The filing and recording requirements under s. 66.0217 (9) (a), as they apply to cities and villages under s. 66.0217 (9) (a), apply to municipalities under this subsection. The requirements for the secretary of administration are the same as those required in s. 66.0217 (9) (b).

(11) **TIME FOR BRINGING ACTION.** No action to contest the validity of a cooperative plan under this section or an amendment to a cooperative plan, regardless of the grounds for the action, may be commenced after 60 days from the date on which the department approves the cooperative plan under sub. (5) or the amendment under sub. (8), respectively. No action relating to compliance with a binding element of a cooperative plan may be commenced later than 180 days after the failure to comply.

History: 1991 a. 269; 1993 a. 213, 301, 329, 399; 1995 a. 35, 201, 216, 227; 1997 a. 27, 35; 1999 a. 150 s. 67; Stats. 1999 s. 66.0307; 1999 a. 182 s. 199; 2001 a. 30; 2007 a. 43; 2009 a. 28; 2011 a. 75; 2015 a. 55; 2017 a. 59.

66.0309 Creation, organization, powers and duties of regional planning commissions. (1) **DEFINITIONS.** In this section:



SCOTT WALKER
GOVERNOR
ELLEN E. NOWAK
SECRETARY

Municipal Boundary Review
PO Box 1645, Madison WI 53701
Voice (608) 264-6102 Fax (608) 264-6104
Email: wimunicipalboundaryreview@wi.gov
Web: <http://doa.wi.gov/municipalboundaryreview>

REVISED
October 23, 2018

PETITION FILE NO. 14145

CASSANDRA SUETTINGER, CLERK
VILLAGE OF MCFARLAND
5915 MILWAUKEE ST
MC FARLAND, WI 53558-8962

MIKE WOLF, CLERK
TOWN OF BLOOMING GROVE
1880 S STOUGHTON RD
MADISON, WI 53716-2258

Subject: MAURICE PETERSON ANNEXATION

The proposed annexation submitted to our office on September 04, 2018, and as revised and re-submitted on October 9, 2018 has been reviewed and found to be in the public interest. The subject petition is for territory that is contiguous to the Village of McFarland (Village), which can provide needed municipal services. The shape of the territory, while irregular, is not arbitrary; the annexation boundary follows existing parcel boundaries and is a consequence of what Town land remains.

This annexation would extend the Village's boundaries north of Siggelkow Road. Siggelkow Road was the agreed upon boundary line between the Village and City of Madison (City) pursuant to an intergovernmental agreement, the *Intermunicipal Cooperation Agreement between the City of Madison and the Village of McFarland Relating to Lands Easterly of Marsh Road, Northerly of Eighthmy Road and Southerly of Siggelkow Road (1997)* (City-Village Agreement). However, that agreement has recently expired so the Village believes that it may now annex territory north of Siggelkow Road.

This annexation territory also falls within another intergovernmental agreement, the *Town of Blooming Grove and City of Madison Cooperative Plan under s. 66.0307 (2006)* (City-Town Cooperative Plan), which remains in effect until 2027, and calls for Town lands north of Siggelkow Road to eventually attach to the City.

In its returned questionnaire, the Town contends that because the territory is subject to the City-Town Cooperative Plan, it cannot be annexed. The City also submitted a letter to the Department elaborating on this contention. Specifically, the Town and City point to s. 66.0307(7)(b), Wis. Stats., which provides that, while an approved cooperative plan is in effect, no other procedure for altering a municipality's boundaries may be used to alter the boundaries that are included within that plan. The Town and City further rely on a provision in s. 66.0217(2), Wis. Stats., which explicitly provides that a municipality's authority to annex territory is "subject to" the prohibitions in s. 66.0307(7).

However, the Village takes the opposite view. In a follow-up letter dated September 14, 2018, the Village contends that, because it was not a party to the City-Town Cooperative Plan, it is not bound by the Plan's terms. The Village contends that the prohibition in s. 66.0307(7)(b), Wis. Stats., applies only to the City and Town, not neighboring municipalities who are not parties to the City-Town Cooperative Plan.

The Department's authority to review whether an annexation petition is in the public interest is set forth in s. 66.0217(6)(a) and (c), Wis. Stats. This statutory language is narrow in scope, limiting the Department's public interest review to two criteria:

- the shape of the proposed annexation and the homogeneity of the territory with the annexing village or city, and
- whether the annexing city or village can provide needed municipal services.

The statutes do not empower the Department to adjudicate disputes about s. 66.0307(7)(b), Wis. Stats, as a prerequisite to its public interest review. The Department's public interest review under s. 66.0217(6)(a) and (c), Wis. Stats., serves an advisory function only, and therefore it is not the proper avenue for the City and Town to resolve their dispute with the Village. As the Court of Appeals has explained, "'threshold' requirements regarding the sufficiency of the petition . . . are to be considered by the annexing authority when deciding to adopt an ordinance. If the petition is in some way lacking—because, for example, it is missing a required signature—the annexing authority lacks the power to adopt the annexation ordinance." *Town of Lincoln v. City of Whitehall*, 2018 WI App 33, ¶22, 382 Wis. 2d 112, 912 N.W.2d 403.

For these reasons, although the Department is not in a position to adjudicate the applicability of the disputed provisions of ss. 66.0217(2) and 66.0307(7)(b), Wis. Stats, the Department urges the Village to carefully consider these statutes before adopting an annexation ordinance. To avoid any possibility that a court might declare the annexation invalid, the Village might consider cooperating with the City to renew and update the communities' expired City-Village Agreement. Alternatively, the City and Town might consider amending their Cooperative Plan by including the Village as a party.

The municipal boundary interface between the communities that was negotiated as part of the City-Village Agreement and the City-Town Cooperative Plan would result in more compact and rational municipal boundaries. By utilizing the straight-line configuration of Siggelkow Road, the communities achieved an easily-understood municipal boundary interface for residents, municipal officials and staff, businesses, and others.

Finally, as with all proposed annexations, the Department reminds clerks of annexing municipalities of the requirements of s. 66.0217(9)(a), Wis. Stats., which states:

"The clerk of a city or village which has annexed shall file immediately with the secretary of administration a certified copy of the ordinance, certificate and plat, and shall send one copy to each company that provides any utility service in the area that is annexed. The clerk shall record the ordinance with the register of deeds and file a signed copy of the ordinance with the clerk of any affected school district..."

State and federal aids based on population and equalized value may be significantly affected through failure to file with the Department of Administration. Please file a copy of your annexing ordinance, including a statement certifying the population of the annexed territory. **Please include your MBR number 14145 with your ordinance.** Ordinance filing checklist available at <http://mds.wi.gov/>, click on "Help on How to Submit Municipal Records". Email scanned copy of required materials (color scan maps with color) to mds@wi.gov or mail to: Wisconsin Department of Administration, Municipal Boundary Review, PO Box 1645, Madison WI 53701-1645.

REVISED
Page 3
October 23, 2018

PETITION FILE NO. 14145
MAURICE PETERSON ANNEXATION

The petition file is available for viewing at: <http://mds.wi.gov/View/Petition?ID=2218>
Please call me at (608) 264-6102, should you have any questions concerning this annexation review.

Sincerely,

A handwritten signature in black ink, appearing to read "Erich Schmidtke". The signature is written in a cursive style with some loops and flourishes.

Erich Schmidtke, Municipal Boundary Review
Cc: Petitioner



Office of the City Attorney

Michael P. May, City Attorney

Patricia A. Lauten, Deputy City Attorney

ASSISTANT CITY ATTORNEYS

Roger A. Allen
Steven C. Brist
Lana J. Mades
Lara M. Mainella
Amber R. McReynolds
Marci A. Paulsen
Adriana M. Peguero

Kevin B. Ramakrishna
Kate M. Smith
Jaime L. Staffaroni
John W. Strange
Doran E. Viste
Brittany A. Wilson
Jennifer A. Zilavy

Room 401, City-County Building
210 Martin Luther King, Jr. Blvd.
Madison, Wisconsin 53703-3345
(Phone) 608-266-4511
(Fax) 608-267-8715
attorney @cityofmadison.com

LITIGATION ASSISTANT
Patricia V. Gehler

SENT VIA E-MAIL (NO HARD COPY TO FOLLOW)

September 13, 2018

Christopher Green
Chief Legal Counsel
Wisconsin Department of Administration
101 E. Wilson St., 10th Floor
PO Box 7864
Madison, WI 53707-7864

Re: Maurice Peterson Annexation Petition (File No. 14145) and the City of Madison and Town of Blooming Grove Cooperative Plan

Atty. Green,

On or around August 22, 2018, the Department of Administration was presented with a petition for direct annexation by unanimous consent filed by Maurice and Ianne Peterson (the "Petitioners") seeking to annex five parcels from the Town of Blooming Grove, in Dane County, to the Village of McFarland. A copy of this petition is attached. The City of Madison (the "City") and the Town of Blooming Grove (the "Town") are asking the Department to find that the petition is void on its face and that it should not be processed by the Department because the land in question is to eventually attach to the City under a State approved cooperative plan.

The five parcels in question lie generally in a triangular area north of Siggelkow Road, west of Interstate 90/94 and east of two City of Madison plats (Secret Places at Siggelkow Preserve and Tradesman Commerce Park). More importantly, these lands lie entirely within the boundary adjustment area established by the "Town of Blooming Grove and City of Madison Cooperative Plan under Section 66.0307, Wisconsin Statutes" (the "Cooperative Plan"), which Cooperative Plan was approved by the Department of Administration on October 3, 2006. A copy of the Department's approval is attached to this

letter. The full Cooperative Plan is available at the Department's website at <ftp://doafpt1380.wi.gov/doadocs/MunicipalData/PROD/BDA10638.pdf>.

The Petitioners have filed their annexation petition under Wis. Stat. Sec. 66.0217(2). However, this process is not available to them. As a result, the petition is void by operation of law.

Sec. 66.0217(2) reads as follows:

DIRECT ANNEXATION BY UNANIMOUS APPROVAL. Except as provided in this subsection and sub. (14), and subject to ss. 66.0301 (6) (d) and 66.0307 (7), if a petition for direct annexation signed by all of the electors residing in the territory and the owners of all of the real property in the territory is filed with the city or village clerk, and with the town clerk of the town or towns in which the territory is located, together with a scale map and a legal description of the property to be annexed, an annexation ordinance for the annexation of the territory may be enacted by a two-thirds vote of the elected members of the governing body of the city or village without compliance with the notice requirements of sub. (4). In an annexation under this subsection, subject to sub. (6), the person filing the petition with the city or village clerk and the town clerk shall, within 5 days of the filing, mail a copy of the scale map and a legal description of the territory to be annexed to the department and the governing body shall review the advice of the department, if any, before enacting the annexation ordinance. No territory may be annexed by a city or village under this subsection unless the territory to be annexed is contiguous to the annexing city or village. (Emphasis added)

Of critical importance to this annexation petition is that any annexation under this subsection is expressly "subject to" Section 66.0307(7)¹. Section 66.0307(7)(b) reads as follows:

(7) OTHER BOUNDARY PROCEDURES.

(b) *Other boundary procedures during the planning period.* During the planning period specified under sub. (3) (f), no other procedure for altering a municipality's boundaries may be used to alter a boundary that is included in the cooperative plan under sub. (3) (d) 1., except if an annexation is conducted under s. 281.43 (1m), regardless of whether the boundary is proposed to be maintained or changed or is allowed to be changed under the plan. After the planning period has expired, the boundary may be altered. (Emphasis added)

¹ Indeed, all forms of annexation are subject to Sec. 66.0307(7). See Secs. 66.217(3)(intro) (direct annexation by one-half approval and annexation by referendum), 66.0219 (annexation by referendum initiated by city or village), 66.0221 (annexation of and creation of town islands), and 66.0223 (annexation of territory owned by a city or village). In addition, detachment of territory from a city or village under Sec. 66.0227 is also subject to Sec. 66.0307(7), as is consolidation under Secs. 66.0229 or 66.0230.

The Cooperative Plan was entered into by the City and the Town on June 21, 2006, and approved by the Department on October 3, 2006, pursuant to the requirements of Section 66.0307².

Under the terms of the Cooperative Plan, the Town will continue to exist through November 1, 2027, but will gradually wind down activities before being taken over entirely by the City. The City and the Town continue to work cooperatively together to responsibly address the present and future needs of the Town's residents, with the Cooperative Plan ensuring the continued viability of the Town through final attachment.

Section 9 of the Cooperative Plan details the procedures available for altering the Town's boundaries during the planning period (from October 3, 2006 through November 2027). In addition to attachments that were effective immediately upon approval of the Cooperative Plan, the Cooperative Plan allows for Intermediate Attachments, establishment of Protected Areas and a Cooperative Development Area, two large Phased Attachments, and a Final Attachment of the remaining Town territory.

Under Subsection 9.I., annexation of lands to the Village of McFarland is specifically addressed. This subsection reads as follows:

The City and the Village of McFarland, Wisconsin ("Village"), have entered into an agreement entitled "Intermunicipal Cooperation Agreement Between the City of Madison and the Village of McFarland relating to Lands Easterly of Marsh Road, Northerly of Eighth Road, and Southerly of Siggelkow Road" dated November 26, 1997 (the "McFarland Agreement"). The McFarland Agreement has a term of 20 years, which expires on or about April 1, 2018. The McFarland Agreement provides in relevant part that no property south of Siggelkow Road and between School Street and County Highway AB (the "Southern Siggelkow Area") shall be annexed to the City during the term of the McFarland Agreement. The Town acknowledges that the City and the Village may make arrangements prior to or after the expiration of the McFarland Agreement that would allow any property in the Southern Siggelkow Area that becomes a part of the City on the Transition Date pursuant to this Plan under subsection H. above, to be detached from the City and attached to the Village after the Transition Date.

The McFarland Agreement mentioned in the Cooperative Plan generally prohibited the City from annexing lands south of Siggelkow Road, and prohibited the Village of McFarland from annexing lands north of Siggelkow Road. Moreover, that agreement has since expired, with those Town lands lying south of Siggelkow Road being recently annexed into the Village. A copy of the McFarland Agreement is attached hereto.

² Among these requirements was that the Village of McFarland was notified of the intent of the City and the Town to enter into a Cooperative Plan. The Village did not make any attempt to intervene in this process, nor did it file any comments with the City or Town, nor the Department.

Hence, as summarized in Sec. 4.A. of the Cooperative Plan, the only procedures available to alter the Town of Blooming Grove's boundaries from 2006 through 2027 are as follows:

During the term of this Plan, unless otherwise provided, attachment to the City of Town parcels located north of Siggelkow Road and outside of designated Protected Areas will occur under a summary interim attachment procedure available only to willing owners. The Village of McFarland may annex Town lands south of Siggelkow Road in accordance with state law. Additionally, two Phased Attachments to the City of Town territory east of Interstate 39/90 and outside of Rustic Acres and the designated Protected Areas may occur without the consent of property owners in December, 2015 and December, 2020, respectively. On October 31, 2027, a final attachment to the City of all remaining Town lands, including any Town Protected Areas, islands and any other remaining Town territory, will occur and the Town will be permanently dissolved. (Emphasis added)

The Cooperative Plan thus does not allow for any annexations of Town territory lying north of Siggelkow Road to the Village of McFarland. Town property owners may either stay in the Town through 2027, or attach to the City as allowed for under the Plan. As such, efforts by Town property owners to annex lands north of Siggelkow Road to the Village of McFarland are clearly contrary to Sec. 66.0307(7), meaning that direct annexation by unanimous approval under Sec. 66.0217(2) is not available for the Petitioners. Accordingly, the petition is void as a matter of law and should not be acted upon by the Department.

It warrants noting that while the Petitioners may not avail themselves of annexation to the Village of McFarland, under Section 9.B. of the Cooperative Plan, there "may be an unlimited number of Intermediate Attachments of Town territory north of Siggelkow Road, except lands in Protected Areas or as expressly provided in this Plan, to the City prior to either of the two Phased Attachments or the Final Attachment hereinafter provided." The properties that are the subject of the annexation petition do not fall under any of the exceptions noted in the Cooperative Plan and therefore may be attached to the City at any time under Section 9.B. and Section 10.A. of the Cooperative Plan. In fact, the City has included these lands in adopted neighborhood plans and our comprehensive plan since at least 1999, and City sewer, water and even local roads are available to these parcels today.

The City and the Town are concerned that the Village of McFarland is looking to disregard the Cooperative Plan under a mistaken notion that the Cooperative Plan is not binding upon the Village. We are also concerned that the Department may not view the protection of the Cooperative Plan to be its prerogative, or perhaps that this attempted annexation is not a threat to the Cooperative Plan. However, we do not think that the Department can divulge itself of its responsibilities in this matter. If the Department allows this unlawful petition to proceed, and a Town property owner to seek annexation contrary to the Cooperative Plan, it is very likely that the Village will adopt an annexation ordinance. The City will then have no choice but to sue the Village to protect the Cooperative Plan and the interests of the City and the Town. If non-participating municipalities or Town property owners dissatisfied with their options under the Cooperative Plan are allowed to ignore the State approved Cooperative Plan and its terms, then ultimately the 40 Department approved cooperative

plans will have no meaning. The City and the Town have responsibly negotiated and agreed to a process to wind down the Town and transition the Town territory to the City. If that process is upended without the City and the Town's consent, not only would that constitute an unlawful and unauthorized amendment to the Cooperative Plan³, but it has the potential to undermine the entire Cooperative Plan. The City and the Town are certainly not the only municipalities with a state approved cooperative plan who also border other municipalities. It is not inconceivable that if this annexation is allowed to proceed that cooperative plans across the State will come under attack. Efforts to encourage intergovernmental cooperation and avoid costly border disputes, and developers or land owners pitting one jurisdiction against another, will be undone. Certainly that was not the legislative intent when annexations were expressly made subject to cooperative plans.

Based upon the foregoing, the City and the Town are asking the Department of Administration to reject the Petitioner's petition to annex lands north of Siggelkow Road from the Town of Blooming Grove to the Village of McFarland as the statutory process set forth in Sec. 66.0217 is not available to the Petitioners as a matter of law.

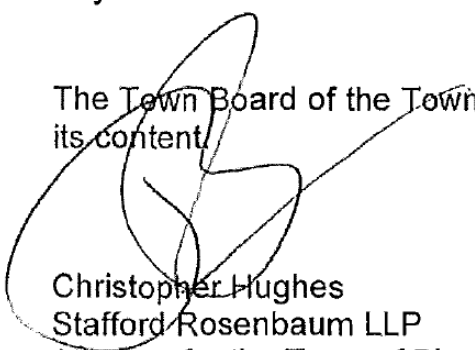
If you would like to discuss this matter further, please let me know.

Sincerely,



Doran Viste
Assistant City Attorney
City of Madison

The Town Board of the Town of Blooming Grove has reviewed this letter and approves of its content.



Christopher Hughes
Stafford Rosenbaum LLP
Attorney for the Town of Blooming Grove

Encl.

cc. Secretary Nowak, Department of Administration
Dawn Vick, Administrator, Division of Intergovernmental Relations
Erich Schmidtke, Department of Administration
Atty. Larry Bechler, Atty. for the Village of McFarland

³ Under Sec. 66.0307(8)(a), a cooperative plan may only be amended during the planning period if "all the parties to the plan agree to the amendment and if the amendment is approved by the department." If this annexation is allowed to occur, then the boundary of the Town will have been changed without the approval of either party to the Cooperative Plan, making it an unauthorized amendment to the Cooperative Plan.

REUTER, WHITISH & EVANS, S.C.

**ATTORNEYS AT LAW
44 EAST MIFFLIN ST., SUITE 306
MADISON, WISCONSIN 53703**

ALLEN D. REUTER
BARBARA O. WHITISH (1952-2013)
DANIEL J. EVANS
DAVID D. RELLES
KEVIN F. MILLIKEN (OF COUNSEL)
BLAYNE NICOLE STEINKRAUS

TELEPHONE
(608) 250-9053

FACSIMILE
(608) 250-9054

September 14, 2018

Attorney Christopher Green, Chief Legal Counsel
Wisconsin Department of Administration
101 East Wilson Street, 10th Floor
P.O. Box 7864
Madison, WI 53707-7864

Re: Maurice Peterson Annexation Petition (File No. 14145) and the City of Madison
and Town of Blooming Grove Cooperative Plan

Dear Attorney Green:

On behalf of the Village of McFarland, I have reviewed the letter sent to you by legal counsel for the City of Madison and the Town of Blooming Grove. At this point, the Village of McFarland Plan Commission has not considered a recommendation, and the Village Board has taken no action on the petition. I write at this time, however, to explain my opinion that the Village maintains the discretion to either approve or reject the petition in its legislative discretion.

Before addressing the merits of the City's arguments, I note that the City has asked the Department to "find that the petition is void on its face and that it should not be processed by the Department." The Department's statutory duty, as defined by §66.0217(6)(a), Wis. Stats. is to "mail to the clerk of the town within which the territory lies and to the clerk of the proposed annexing village or city a notice that states whether in its opinion the annexation is in the public interest or is against the public interest and that advises the clerks of the reasons the annexation is in or against the public interest as defined in par. (c)." There is no statutory authority for the Department to rule on the validity of an annexation petition, nor to opt out of its obligation to make a public interest determination.

The public interest determination is made after consideration of:

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.

The preferences of another municipality are otherwise irrelevant. The city or village to which the annexation is proposed is obligated to consider the Department's determination before acting on the petition. §66.0217(6)(a), Wis. Stats. Nothing in the statutory scheme or language grants the power to the Department or any other non-judicial body to void an annexation petition.

With regard to the substantive arguments posited by the City, we disagree entirely with the conclusion that a contract between Madison and Blooming Grove binds the Village of McFarland and strips it of its statutory annexation powers. If McFarland were a party to the agreement, it would clearly be bound by its terms. But as the City correctly notes, the agreement at issue is solely between the City and the Town, and the Village is not a signatory to it.

Section 66.0307, Wis. Stats. does not allow the City and Town to control all boundaries. Rather, the statute provides that:

Any combination of municipalities may determine the boundary lines between themselves under a cooperative plan that is approved by the department under this section.

Similarly, the authority to enter into a cooperative plan is granted to "the municipalities that propose to set the boundary lines between themselves . . . ". §66.0307(3)(a), Wis. Stats.

The Madison-Blooming Grove agreement clearly controls boundary changes as between the City and Town. The City's position goes well beyond that statutory authority by contending that the parties to a cooperative plan may determine the boundary between one of them and third parties not participating in the plan.

The City's argument ignores the statutory provisions expressly addressing the binding nature of the plan. Section 66.0307(6), Wis. Stats. provides:

(6) BINDING ELEMENTS OF COOPERATIVE PLAN. If a cooperative plan is approved by the department under sub. (5) or an amended plan is approved under sub. (8), provisions in the plan to maintain existing boundaries, the boundary changes in the plan, the schedule for those changes, the plan for delivery of services, including road maintenance, and the schedule for those services are binding on the parties to the plan and have the force and effect of a contract.

By providing that the plan is binding "on the parties to the plan," the Legislature made abundantly clear that the plan is not binding on those who are not parties to the plan. Had the Legislature intended the plan to be binding on all municipalities in the state, it could easily have said so. The use of the phrase "parties to the plan" clearly demonstrates that was not the intent.

That limitation is emphasized by the provision that the cooperative plan has the effect of a contract. It is textbook law that contracts are binding on the parties to the contract, but not on third parties who are strangers to the agreement. The only purpose for the inclusion of sub. (6) in the cooperative plan statute is to preclude the argument being made now by Madison that two municipal entities can enter into a contract that controls every other municipality in the state.

The legislative choice to allow boundary agreements while limiting their binding effect to the participating municipalities does not, as Madison suggests, mean that “ultimately the 40 Department approved cooperative plans will have no meaning.” All of the existing agreements continue to serve their legitimate goals. The Madison-Blooming Grove agreement, for example, assures that Madison’s growth into Blooming Grove will proceed in an orderly manner, guarantees that at the end of the planning period all Blooming Grove properties will be absorbed into an incorporated municipality, provides that growth will be accompanied by the expansion of necessary municipal services, and avoids annexation disputes between Madison and Blooming Grove. Those goals are all consistent with the intent of the cooperative planning statute. None of those goals, however, is affected by a unanimous annexation petition seeking attachment to McFarland.

A determination that cooperative plans have binding effects on third parties would, however, affect the willingness of those third parties to enter into boundary agreements themselves. In the case at hand, Madison entered into an agreement with McFarland with a fixed 20-year term during which each party voluntarily limited its annexations into Blooming Grove. That agreement has now expired, but Madison contends that it made those restrictions permanent by entering into a separate agreement nine years later without McFarland’s approval. Intergovernmental cooperation would not be promoted by permitting such tactics. The Legislature presumably realized that in enacting §66.0307(6), Wis. Stats. and making clear that a cooperative plan is binding only on the parties to that plan. The term “cooperative plan” is intended to mean just that.

In summary, while the pending petition for unanimous annexation is “subject to” the provisions of §66.0307, Wis. Stats., that section restricts only actions of the parties to the agreement. Any annexation or detachment between Madison and Blooming Grove must be consistent with the agreed-upon plan, or the plan must be amended. Annexation of Blooming Grove lands to any other municipality are unaffected by the plan. McFarland did not agree to limit its annexation authority, received nothing in the bargain struck between Madison and Blooming Grove, and is not one of the parties bound to the agreement under §66.0307(6), Wis. Stats.

Thank you for your consideration.

Sincerely,

Allen D. Reuter, Village Attorney

cc: Matt Schuenke, Village Administrator
Hon. Ellen Nowak, Secretary WisDOA
Dawn Vick, Administrator, Division of Intergovernmental Relations
Erich Schmidtke, Municipal Boundary Review
Attorney Doran Viste
Attorney Christopher Hughes