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Annexation and the Jurisdictional Attack in Indiana: The City Comes to Visit

Within the near future Indiana's courts will be called upon to make decisions which might either cripple the ability of municipalities to expand their borders or virtually remove any geographical restraint on their annexation powers. Pursuant to an authorizing statute, a municipality may annex "contiguous territory" by passing a special annexation ordinance. Once passed, such an ordinance can be challenged in two ways. The first is through recourse to a statutory appeal process which determines whether certain factual preconditions to successful annexation have been met. Under this process, the majority of landowners in the annexed territory or the owners of more than 75 percent in assessed valuation of the real estate in the territory are permitted to remonstrate against the annexation on the grounds that the statutory preconditions, known as determinants, have not been satisfied. Under this scheme, however, a municipality may annex territory for which the determinants are not satisfied yet avoid the consequences of a successful remonstrance by gerrymandering the boundaries of the annexed territory so as to exclude the number of dissidents necessary to invoke the statutory appeal process.

1 Westinghouse Electric Corp. v. City of Bloomington, Civil No. C73-C171 (Monroe County, Ind. Cir. Ct. Jan. 27, 1975). This case was consolidated under the name Otis Elevator Co. v. City of Bloomington; however, that case did not involve the jurisdictional question at issue here. Appeal has not yet been docketed.

2 Ind. Ann. Stat. § 18-5-10-20 (Code ed. 1974) (cities); id. § 18-5-10-30 (towns). This is not the only means of annexation: a city or town may annex by means of redefinition of boundaries. The "redefinition" statutes will not be dealt with in this note. Landowners may also petition for annexation pursuant to id. § 18-5-10-23 (cities); id. § 18-5-10-30 (towns). There are also provisions for annexation of noncontiguous territory for specific uses. Id. § 18-5-10-20.1 (cities); id. § 18-5-10-30.1 (towns).

3 In Indiana, annexations may only be reviewed by judicial proceedings. For a general discussion of modes of review utilized elsewhere, see Woodroof, Systems and Standards of Municipal Annexation Review: A Comparative Analysis, 58 Geo. L.J. 743 (1970).


5 Id. § 18-5-10-24.


7 By "appeal process" is meant the process described in the following statutes for cities: Ind. Ann. Stat. § 18-5-10-24 (Code ed. 1974) (remonstrance petition); id. § 18-5-10-25 (hearing); id. § 18-5-10-26 (judgment); and for towns: id. § 18-5-10-30.
The second method of challenging annexation is an attack on the municipality's jurisdiction to annex the territory in question. Usually taking the form of a suit for declaratory judgment, such a jurisdictional attack, unlike a remonstrance proceeding, may be initiated by a single individual. Because it can be initiated by a single individual rather than an entire class, the jurisdictional attack is obviously more difficult for a municipality to avoid by gerrymandering than is the appeal process.

The sole question in a jurisdictional attack is whether the city council (or town board) lacks statutory jurisdiction to annex the territory. While there are several situations in which the municipality might lack jurisdiction, of principal concern here is the situation in which the annexed territory is not "contiguous" to existing boundaries as is required by the statute authorizing annexation.

The problem raised by the availability of both the jurisdictional attack and the appeal process is in structuring the former to prevent municipalities from circumventing the factual determinants by manipulating territorial boundaries without fostering excessive litigation based on frivolous claims of individual complainants. To resolve the issues of when and by whom such an attack should be allowed, an understanding of the need for the jurisdictional attack and its impact on the appeal structure is crucial. Should Indiana's courts adopt an overly permissive attitude toward jurisdictional attacks, the power of municipalities to expand would be crippled; if, on the other hand, the courts unduly limit such attacks, municipalities will, in effect, be able to circumvent the appeal process by gerrymandering the boundaries of territories they wish to annex. This note will explore the nature, role and necessity of the jurisdictional attack and its relationship to the appeal process.

**The Appeal Process**

*Appeal Determinants*

The term "determinant" refers to the factual issues that must be

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10 Forsythe v. City of Hammond, 142 Ind. 505, 40 N.E. 267 (1895).

established by the municipality at a hearing after a remonstrance has been filed. There are three determinants enumerated in the remonstrance provisions. They relate to the urban character or population density of the annexed area, its geographical configuration, and the municipality’s ability to provide services to the area. There is also a fourth provision which allows annexation of undeveloped areas in certain circumstances. If, at the remonstrance hearing, the municipality cannot establish that the factual conditions demanded by the determinants are present, the court must set the annexation attempt aside.

Prior to the 1970 legislative revision of the determinants, courts frequently made policy decisions in the guise of factual determinations. Because of this, the pre-1970 determinants came under heavy fire on the grounds that they violated the separation of powers clause of the Indiana constitution by delegating legislative powers to the judiciary, or by calling upon the judiciary to make administrative decisions. The 1970 legislative changes did not add any new policies, but rather established factual determinants.

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12 IND. ANN. STAT. § 18-5-10-25 (Code ed. 1974).
13 Id.
14 Id.
15 Id.
16 One may well query whether a determination that the annexation was “in the best interests of the city and of the territory sought to be annexed” was a factual determinant. See note 19 infra. But see City of Aurora v. Bryant, 240 Ind. 492, 165 N.E.2d 141 (1960), construing Act of Mar. 11, 1955, ch. 269, § 2, [1955] Ind. Acts 723, repealed by City and Town Act of 1969, ch. 239, § 8, [1969] Ind. Acts 922.
17 Art. 3, § 1.
18 The [annexation] decision is not based upon certain specific facts which make the law operative, but upon the implanting of a general feeling of public welfare in the mind of the judge. Accordingly, the 1949 Indiana Annexation Act, insofar as it makes annexation turn upon an exercise of legislative discretion by the circuit court, violates the separation of powers doctrine of the state as specified in Article III, Section I of the Indiana Constitution.
25 L.J. 377, 382 (1950). The Indiana Supreme Court, however, framed the test of constitutionality in terms of whether the judiciary was being called upon to determine factual issues or conditions. City of Aurora v. Bryant, 240 Ind. 192, 497-500, 165 N.E.2d 141, 144-46 (1960).

The courts have stressed the fact that the judiciary has not been delegated the initiative in annexation; i.e., the city council still has the original choice of annexing. See In re City of Mishawaka, supra, at 289 N.E.2d 510 (1972), and City of Aurora, supra.

Even conceding the legislative delegation issue, one still might question whether, under the prior determinants, the annexation proceeding constituted an administrative function, which would also be unconstitutional under IND. CONST. art. 3, § 1. Perhaps the most lucid overview of the constitutional wranglings is provided in Justice DeBruler’s opinion in In re City of Mishawaka, supra, at 289 N.E.2d at 513-14.

The geographical determinant, determinant (b), is central to the relationship between the statutory appeal and the jurisdictional attack. Prior to 1970, this determinant required that the annexed territory be "a compact area abutting the municipality." Unlike the other pre-1970 determinants, this was never labelled a policy question because of its factual demonstrability. As such it was the mainstay of the monstrator's case. In 1970 the legislature gave the old prescription a degree of mathematical exactness, which the courts had theretofore not supplied, by demanding coincidence of "one-eighth of the aggregate external boundaries of the territory sought to be annexed" with the boundaries of the annexing city.

What effect the quantification of the determinant will have is unknown. However, it is reasonable to speculate that municipalities desiring to annex noncompact areas will meet only the minimal contact required by the new determinant or will engage in gerrymandering.

There are many reasons why a municipality might be reluctant to comply with the geographical determinant demanding coincidence of "one-eighth of the aggregate external boundaries." For example, it might not be able to encompass the territory desired by drawing boundary lines to provide the needed coincidence of boundaries and still meet the density or use qualifications in determinant (a). Another example might be the municipality's lack of funds to provide the services re-

"factual" is to reach the outer limits of what may legitimately be termed a "fact." This factor was not included in the 1969 revision. Old determinant (b) read: "The area is urban in character, being an economic and social part of the annexing city." Id. It is now contained in determinant (a) of the new law:

The resident population of the area sought to be annexed is equal to at least three (3) persons for each acre of land included within its boundaries or that the land is zoned for commercial, business or industrial uses or that sixty percent (60%) of the land therein is subdivided . . . .

IND. ANN. STAT. § 18-5-10-25 (Code ed. 1974). Old determinant (d) required: "The city is financially able to provide municipal services to the annexed area within the reasonably near future." Act of Mar. 11, 1955, supra. It is now contained in new determinant (c):

The annexing city has developed a fiscal plan and has established a definite policy to furnish the territory to be annexed within a period of three (3) years, governmental and proprietary services substantially equivalent in standard and scope to the governmental and proprietary services furnished by the annexing city to other areas of the city which have characteristics of topography, patterns of land utilization and population density similar to the territory to be annexed . . . .

IND. ANN. STAT. § 18-5-10-25 (Code ed. 1974).


21 In re City of Mishawaka, --- Ind. ---, 289 N.E.2d 510, 513 (1972).

22 IND. ANN. STAT. § 18-5-10-25(b) (Code ed. 1974).

23 Id. § 18-5-10-25(a).
required by determinant (c) if the boundaries are drawn to provide the necessary one-eighth coincidence. Yet, these determinants are designed to protect the interests of the community by “provid[ing] a fair structure in which to resolve the conflict between the competing interests of the city on the one hand, and that of the inhabitants of the annexed area on the other.”

**Limited Standing**

Access to the appeal process is strictly limited to landowners in the annexed territory, and then a majority of such landowners or the owners of 75 percent in assessed valuation of the territory’s real estate must act in concert before a remonstrance hearing will be set. This provision restricting standing is clearly a screening device to limit the number of annexation contests. It may also suggest that the legislature intended to hold the municipality to the rigors of the appeal determinants only when the aforementioned classes oppose annexation. This intent may also be inferred from the statutory exception to the two-year prohibition on reannexation attempts, which arises when target area landowners subsequently petition for annexation during the two-year period.

The existence of the provision limiting standing in the appeal process is a factor that courts should consider in resolving issues which

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24 *Id.* § 18-5-10-25(c).
27 This limitation on standing for appeal was construed by the appellate court sitting en banc in *Daubenspeck v. City of Ligonier,* 135 Ind. App. 565, 183 N.E.2d 95 (1962), *transfer denied,* 245 Ind. 20, 191 N.E.2d 100 (1963).
It seems to us the legislature believed that an appeal of an annexation ordinance should not be permitted by only one or more persons who believed they were aggrieved or injuriously affected by such ordinance. It therefore provided such an appeal could be only taken by a majority of the owners of land in the territory. It also added a new class which could initiate such an appeal, namely, the owners of more than seventy-five (75) percent in assessed valuation of the real estate in the territory.
*Id.* at 572, 183 N.E.2d at 98. This ruling is somewhat vitiated by the Indiana Supreme Court's denial of transfer: “The petition to transfer is denied. By denying transfer herein we do not thereby approve of all the language of the Appellate Court opinion.” 245 Ind. at 21, 191 N.E.2d at 100 (entire opinion).
29 One may also at least query whether the legislature was toying with a form of an election process when it devised the standing requirement. There has been considerable debate over whether such standing provisions constitute voting rights, which would call into play fourteenth amendment guarantees. Indiana's courts, however, have held this not to be an election. See *Forks v. City of Warsaw,* 257 Ind. 237, 241, 273 N.E.2d 856, 859 (1971).
arise by jurisdictional attack. This is especially true considering the similarity of the jurisdictional requirement of contiguity\(^{30}\) and the appeal determinant of one-eighth coincidence.\(^{31}\) To the extent "contiguity" and coincidence of "one-eighth of the aggregate external boundaries" are equated, the remonstrance provisions limiting standing to appeal and the policies behind that limitation may be circumvented. Dissidents could ignore the cumbersome features of the appeal process and challenge every annexation lacking the necessary one-eighth coincidence of boundaries through a jurisdictional attack brought by a single individual.

**THE JURISDICTIONAL ATTACK**

The jurisdictional attack arose separately from the remonstrance structure.\(^{32}\) Since it is not an appeal, the statutory determinants do not apply. Rather, as indicated above, the sole question is whether the city council had jurisdiction to annex.\(^{33}\) Lack of jurisdiction most likely arises from the council's failure to comply with the statutory requirement that the territory it annexes be contiguous to the municipality. Absence of contiguity is the most important basis of a jurisdictional attack since the other jurisdictional requirements can usually be satisfied by competent counsel and since the requirement of contiguity is closely related to the determinant of one-eighth coincidence of the aggregate external boundaries.

A lone dissident may contest the annexation on jurisdictional grounds without the support of his neighbors since a remonstrance peti-
tion is not necessary to bring a jurisdictional attack. Thus, where the circulation of a remonstrance petition would be too costly, or where it would be impossible to obtain the required number of signatures, this form of attack may still be open to the dissident. Instead of statutory standing, his standing is based on his right as a citizen to enforce public rights. In order to understand the nature of the jurisdictional attack and its impact on the statutory appeal structure, the remainder of this note will focus on the two crucial elements of the jurisdictional attack: the statutory requirements of contiguity and the requirements that courts have formulated for defining the standing requisite to initiate a challenge.

Contiguity

“Contiguity” and “contiguous territory” are terms of art in annexation law. Whatever meaning is ascribed to the language in the authorization statute must be derived from viewing annexation law as a whole, not by concentrating on the authorization statute alone.

Given the more frequent use of the jurisdictional attack and the 1970 revision of the appeal determinants, Indiana courts are presently

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34 There are other characteristics of the jurisdictional attack which will not be pursued at great length in this note, but which deserve mentioning here. In a jurisdictional attack the complainant has the burden of proof, whereas in the statutory appeal it rests with the municipality. See Montagana v. City of Elkhart, 149 Ind. App. 283, 292 n.2, 271 N.E.2d 475, 480 n.2 (1971). Also, the jurisdictional attack does not have to be filed within the sixty-day period as required in the case of a remonstrance. See Windman v. City of Vincennes, 58 Ind. 480, 485 (1877). See also Forsythe v. City of Hammond, 142 Ind. 505, 515, 40 N.E. 267, 270 (1895), to the effect that a “void” annexation may always be attacked.

To avoid the disruption caused by invalidating a long-established annexation, the courts in the past have at times resorted to the doctrine of laches. See Huff v. City of Lafayette, 108 Ind. 14, 8 N.E. 701 (1886). Whether laches could cure an annexation devoid of contiguity is open to speculation.


36 1 E. McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 294 (rev. 2d ed. 1940) (footnote omitted): “Laws usually require in express terms, that, to authorize annexation the territory must be contiguous or adjacent to the municipal corporation that desires to include it.” See generally Annot., 49 A.L.R.3d 589 (1973).


38 It should be realized that use of the declaratory judgment procedure in Reafsnyder v. City of Warsaw, —— Ind. App. ——, 293 N.E.2d 540 (1973), will increase the number of contested annexations. Reafsnyder was the latest jurisdictional attack to have reached the appellate courts. However, the annexation under attack in Reafsnyder was one enacted under the old appeal structure. Hence the exact relationship of “contiguous territory” to coincidence of one-eighth of the aggregate external boundaries has yet to be determined in the appellate courts. However, the question was considered in a lower court decision. Westinghouse Electric Corp. v. City of Bloomington, Civil No. C73-C171 (Monroe County, Ind., Cir. Ct. Jan. 27, 1975). In that case “contiguous territory” and “one-eighth coincidence” were considered synonymous.
in a position to redefine the concept of "contiguous territory." This redefinition should consider not only the fact situation before the court, but also the effect the definition will have on the behavior of municipalities and landowners in the future.

Of necessity, the amount of contact between the municipality and the annexed territory demanded by the jurisdictional requirement of contiguity must fall somewhere on the spectrum of contact ranging from "mere touching" to the full coincidence of "one-eighth of the aggregate external boundaries of the territory sought to be annexed" with the boundaries of the annexing city. The basic issue is whether or not the jurisdictional standard should differ from the appeal determinant. If a dual standard is adopted, the jurisdictional definition can require neither a greater amount of contact than the appeal determinant, nor an equivalent amount, without rendering the appeal determinant superfluous.

Assuming arguendo that there should be a dual standard, the question becomes whether the jurisdictional test should be "mere touching" or something more. Arizona courts felt compelled by their state constitution to wash their hands of annexation disputes.39 This was effectively accomplished by the adoption of the "mere touching" standard.40 Under that standard, a municipality was allowed to annex a road which travelled out from the city, turned left, travelled a considerable distance and then turned left again, returning to the city.41 Only the road itself was annexed. None of the circumscribed area was affected. With "touching" as the standard, there is no jurisdictional limitation as a practical matter.

In contrast, the Michigan appellate court concocted a definition of "contiguity" demanding more than regularity of borders and reasonable

40 See City of Safford v. Town of Thatcher, 17 Ariz. App. 25, 28, 495 P.2d 150, 153 (1972):

Thus, in Arizona, where the courts are not concerned with the motive, wisdom, or reasonableness of the annexation, it is sufficient if the land sought to be annexed touches the land to which it is to be annexed. The legislative purpose—to extend the corporate limits—is clearly served by any increase thereof.

The proposition urged by the Arizona court is highly questionable, yet common. While it may be correct to grant the same deference to the municipal council as to the state legislature for many purposes, in this situation higher allegiance is due to the state legislature's purpose. At least one court has gone even further, stating that even if the state enacted a statute purporting to give the municipality unbounded discretion in annexation, the authorization would have to be considered "cum grano salis." City of Denver v. Coulehan, 20 Colo. 471, 477, 39 P. 425, 427 (1894).

compactness of the annexed territory. Such a standard would play havoc with Indiana's remonstrance structure because it seemingly expands the jurisdictional requirement of contiguity to include all the appeal determinants.

Ohio and, at least to some extent, Illinois have adopted a proscriptive standard. This standard is not easily explained in positive terms. Rather, it is a negative test aimed at preventing abuse. Perhaps the test employed by one Illinois appellate court comes as close as possible to a definition:

The intent of the legislature, as determined by courts is that the word "contiguous" means that the territory to be annexed must have "a substantial common boundary" . . . , or must have a "common border of reasonable length or width" . . . , or must "touch or adjoin one another in a reasonable substantial physical sense". . . .

Note that the court refrained from mentioning irregularities in the borders and compactness of the territory, stressing instead some aggregate amount of contact. Illinois has been able to differentiate an annexation involving pretext contiguity from one involving an area which is not compact:

"[C]ontiguous" does not implicitly require that the area must also be "compact" . . . . The territory sought to be annexed has a common boundary with the village of almost one-quarter of a mile. There are no areas which merely corner on another area nor are there mere strips of land used as a subterfuge to reach outlying areas of land to be annexed which are found in the cases relied

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42 Township of Owosso v. City of Owosso, 385 Mich 587, 591, 189 N.W.2d 421, 422 (1971). The standard was apparently derived from language such as that set forth in E. McQuillen, supra note 36, § 294 (footnote omitted):

Contiguous lands are such as are not separated from the corporation by outside land; such as are so situated with reference to the corporation that it may reasonably be expected that after annexation they will unite with the corporation in making a homogeneous city, which will afford to its several parts the ordinary benefits of local government. But however near they are to the petitioning corporation, if the circumstances are such that it could not reasonably be expected that the parts would amalgamate and form a municipal unit which would afford to each the ordinary benefits of local government it would not be proper to annex them. "When actual unity is impracticable, legal unity should not be attempted."


upon by appellants. Therefore, we believe that the territory is contiguous to the village. . . .

As the Illinois court demonstrates, use of the proscriptive approach can prevent abusive annexations without confining the municipalities to inflexible standards.

To maintain a dual standard, the jurisdictional definition of "contiguity" cannot encompass, as the Michigan test does, all of the factors included in the appeal determinants. On the other hand, the need to deter gerrymandering is not met by the Arizona standard of "mere touching." Hence, an intermediate standard, such as the proscriptive approach, would be required.

The Indiana Court of Appeals, in Reafsnyder v. City of Warsaw, appears to have adopted the proscriptive approach. That case involved an annexation which connected the bulk of the annexed territory to the city by means of a narrow strip of land. The court, without defining "contiguity," simply held that the territory was not contiguous. The court clearly indicated that pretext contiguity would not satisfy the jurisdictional standard.

Although the proscriptive approach is somewhat vague, its vagueness tends to evaporate when applied to the facts of a given case. The following is a good statement of the test: where it is self-evident from the description of the annexation that the annexed territory, viewed as a whole, merely touches or corners on the municipality in such a way as to deny that the "contiguity" supplied is anything other than a pretext, there is no jurisdiction.

Having argued that a proscriptive approach is better than either of the extreme definitional approaches illustrated by the Arizona and Michigan standards, the discussion must turn to whether a proscriptive approach is more desirable than an approach which quantifies "contiguity" as one-eighth coincidence of boundaries. In other words, is a dual standard desirable?

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47 Id. at ——, 293 N.E.2d at 545 (1973).

The Ohio courts have also taken a dim view of following roads out to developed tracts.

We find that the area surrounding the Ohio Turnpike, composed of approximately two-thirds of the territory sought to be annexed, is an area not adjacent to, nor is it contiguous or adjoining to, the village of Pioneer. The proposed annexation of this Turnpike Area by means of a long narrow connecting strip fails to fulfill the requirements of the annexation statutes with references to territory being "adjacent, contiguous, or adjoining."

The effect of adopting a single standard would be to enable a lone dissident to hold the municipality to the high geographical standard of one-eighth coincidence, despite the lack of the signed remonstrance demanded by the appeal process. In contrast, a prescriptive approach would curb the more blatant gerrymandering operations without undermining the remonstrance provisions limiting standing. In most instances, a prescriptive standard would tend to force municipalities to comply with guidelines set forth by the appeal determinants while still allowing for a reasonable amount of flexibility where the landowners desire annexation.

**Standing**

The standing requirements for a jurisdictional attack may be gleaned from comments in *Montagana v. City of Elkhart*, although the court's analysis there is anything but clear. In *Montagana* a taxpayer of the annexing municipality brought a suit challenging the annexation. The court said that an action for waste of public funds would lie where the city council's acts were patently illegal and an abuse of discretion. The court cited, as an example of waste, expenditures for an annexation encompassing territory over which the council did not have jurisdiction, *i.e.*, where annexation is illegal. The test is circuitous in that the taxpayer has standing if there is waste, and there is waste if the annexation is illegal. Thus, the court must reach the merits to know whether the taxpayer has standing.

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46 There is language in *In re Annexation of Certain Territory to City of Princeton v. City of Princeton*, 128 Ind. App. 104, 114-15, 146 N.E.2d 422, 427 (1957), to the effect that the old determinant of "compact area" was meant as a device to prevent gerrymandering. The court quotes an Illinois case which considered the compactness requirement as distinct from contiguity. The Indiana case, if read literally, could be said to adopt "touching" as the definition of "contiguity," and leaves the appeal determinant as the sole control for gerrymandering. Relying solely on an appeal determinant to curb gerrymandering is an extremely inefficient means of prohibiting that evil.


48 See id. at 289-90, 271 N.E.2d at 479.

49 Id. at 290, 271 N.E.2d at 479.

50 If in a given situation these or other illegal acts taint the annexation, wastage under the ordinance would be present or certain to occur. Wastage in the same sense would occur where the annexation decision constitutes a patent abuse of discretion.

51 Id. at 291, 271 N.E.2d at 480.

52 It cannot be seriously questioned that taxpayers of an annexing city who do not qualify as remonstrators can maintain a declaratory judgment suit to challenge an annexation ordinance. Such suit, however, may only be allowed to proceed where the actions of the city common council in annexing specific territory are clearly or patently illegal, or where the council acts without jurisdiction over the subject matter, or where there is an unmistakable abuse of discretion in the council's decision to annex, or where wastage of public funds is pres-
This test is used to distinguish a public suit from the normal private suit where standing stems from property rights or some other interest beyond the interests of taxpayers or citizens generally. The test has two components: an allegation that the annexation was illegal, and the individual's special stake or toehold in the public right against illegal annexations. For example, where a taxpayer attacks annexation of noncontiguous territory, standing would be analyzed as follows: Lack of jurisdiction would supply the first component, and the taxpayer's status or stake in the public funds would supply the toehold. Since ipso facto every jurisdictional attack involves an alleged lack of jurisdiction, what is of real importance is the nature of the "toehold" required.\textsuperscript{4}

The "public right" formulation in \textit{Montagana} was seized upon in a declaratory judgment action brought by annexed landowners in \textit{Reafsnyder}.\textsuperscript{5} There the court referred to the statements in \textit{Montagana} with respect to the public right and concluded that since the annexation was illegal, the landowners had the requisite standing to bring the action.\textsuperscript{6} The court did not define the necessary "toehold" of the individual, presumably attributing it to the mere status of being an annexed landowner, or a subject of the future tax levies.

It could be argued that \textit{Montagana} does not directly support \textit{Reafsnyder}. In \textit{Montagana}, had the annexation been illegal, the only possible remedy for the municipality's taxpayers would have been a jurisdictional attack since the remonstrance provisions are available only to annexed landowners.\textsuperscript{57} In \textit{Reafsnyder}, however, annexed landowners

\begin{itemize}
\item \textsuperscript{4} Id. at 292, 271 N.E.2d at 480–81 (footnote omitted).
\item \textsuperscript{5} The concept of a two-component standing is drawn from a comment in \textit{Zoercher v. Agler}, 202 Ind. 214, 222, 172 N.E. 186, 189 (1930):
\begin{itemize}
\item In the case at bar, the appellees are suing for a determination or establishment of public rights, and, at the same time, it is apparent that, as taxpayers of South Bend, their personal and property rights are also involved and will be injured if a tax is illegally levied. There is an actual controversy here relative to some right and status of appellees, and they are entitled to maintain this action.
\end{itemize}
\item \textsuperscript{5} Id. at 293, 293 N.E.2d at 540, 543 (1973).
\item \textsuperscript{57} \textsuperscript{59} Id. at 542–43. Note that \textit{Reafsnyder} does not refer to any specific toehold such as the taxpayer's right to prevent "wastage" of public funds. Since a landowner does not pay taxes until after the annexation, he has no stake in the public funds being wasted. However, the stake may be implicit in his status as a potential annexed landowner since he will then become subject to illegal tax levies.
\end{itemize}
brought the suit. Thus in order for *Montagana* to apply, the court must have recognized a jurisdictional standard for annexed landowners distinct from the remonstrance provisions.

The right of a landowner to bring a jurisdictional attack is implicit in the appeal structure. Without it, the municipality could manipulate the boundaries of the area to be annexed so as to encompass only a minority of dissidents owning less than 75 percent of the assessed valuation. This is the problem which *Reafsnyder* addresses in defining the requisite standing, but it should be recognized that this result is not a panacea. Recognizing standing for an annexed landowner will affect pretext contiguity only where at least one dissident is included in the annexation. This inherent limitation may foster gerrymandering of a slightly different form.

The problem is illustrated by the practice of "leapfrog" annexation. This term refers to a municipality's attempt to encompass dissidents through a series of separate annexations. For example, a city council annexes territory which lacks the necessary amount of border contact with the municipality, but the annexation goes unchallenged because the territory contains no dissidents. This initial annexation then provides the necessary amount of border contact with a territory which does contain dissidents. Thereafter, the annexation of this territory is invulnerable to attack on the ground that the geographical determinant has not been satisfied.

While the issue has never been decided in Indiana, courts in other states have generally refused standing to landowners who are only the potential targets of leapfrog annexation. In *Smith v. City of Aurora*, an often cited Colorado case, the plaintiff, an owner of land adjacent to the annexed territory, was denied standing to challenge the annexation because he was not directly affected. The setting appears to have been part of a leapfrog scheme. The annexation challenged by Smith would have provided sufficient contiguity for a second annexation encompassing

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58 The argument contra to *Reafsnyder* would be that the remonstrance and appeal is the exclusive remedy available to annexed landowners. It would be more accurate, however, to consider the landowner's right to remonstrate as a protection similar to the municipal taxpayer's protection inherent in the representative nature of the city council. Hence, the availability of a remonstrance and appeal should not preclude the ability to attack the jurisdiction of the municipality.


60 153 Colo. 204, 385 P.2d 129 (1963).
his land, an annexation which he then could not have successfully contested. The majority of the court was not concerned by the consequences of such a narrow concept of who is "aggrieved" or "affected." The dissent, however, aptly pointed out the dangers of the leapfrog trap.

There is a series of Ohio cases on the subject of standing for non-annexed landowners who object because of the annexation's effects upon the organization of school districts. In Branson v. Cain the court pointed out that the plaintiff's status as an adjacent landowner did not differentiate him from other (nonannexed and nonadjacent) landowners who were protesting because of the restructuring of the school district. Therefore, standing was denied. However, since Branson did not involve the leapfrogging problem, these Ohio cases should be of minimal precedential value.

Two other jurisdictions have passed on the matter. Alabama relied almost totally upon the Colorado case. The other case, which was heard

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61 Id. at 206, 385 P.2d at 130.

It is urged that Smith has a grievance that is not common to other landowners outside the area to be annexed, in that following the annexation his own property becomes vulnerable to annexation to the city due to the fact that it will then be contiguous to the city and his chances of remaining outside its boundaries will be lessened by reason thereof.

62 Id.

However he will not suffer in property or in person by reason of the annexation proceedings to which he objects. No burden or obligation is imposed upon him or his property by the adoption of the annexation ordinance of which he complains.

63 Id. at 207, 385 P.2d at 130-31 (Frantz, C.J., dissenting):

The municipality need wait only until the expiration of the ninety-day period before it undertakes to annex Smith's property which becomes contiguous to the municipality by virtue of the alleged invalid annexation, but with which Smith then becomes trapped by the narrow construction of what constitutes "any person aggrieved." He is powerless to assert invalidity because he is by interpretation held to be a person not aggrieved and after the ninety days the annexation becomes incontestable.

Note here that what was involved was an interpretation of an appeal statute (Colo. Rev. Stat. Ann. § 139-10-6 (1963)). The statute of limitations trap discussed in the dissent may not be present in Indiana. It has been held that the 60-day limit does not apply where there is a jurisdictional defect. Windman v. City of Vincennes, 58 Ind. 480, 485 (1877).

It is at least arguable that a prior annexation cannot be attacked collaterally when the second annexation occurs. If it is so held, then the same type of trap would be present in Indiana.

64 See, e.g., Markos v. Cain, 78 Ohio L. Abs. 561, 563, 154 N.E.2d 196, 198 (C.P. Franklin County 1955).

65 Branson v. Cain, 76 Ohio L. Abs. 21, 23-24, 146 N.E.2d 892, 894 (C.P. Franklin County 1956).

by a federal district court, arose under Nebraska law. In the latter case, the municipality was trying to encompass a federal military base by way of leapfrog annexation. The court dismissed the United States' claim challenging the first annexation since the United States was not an affected property owner. However, the leapfrogging was foiled since the court concluded on two other grounds that the second annexation which encompassed the federal property was invalid.

In summary, the case law in other jurisdictions disfavors standing for the intended victim of leapfrog schemes. The question, however, remains open in Indiana.

Reafsnyder shifts the annexation battleground from the general problem of the requirements of contiguity to the problem of limiting the municipalities' ability to engage in leapfrog annexation. Recognition of this fact should help Indiana courts tackle the problem of whether to give standing to potential leapfrog victims and, if so, how that standing should be structured. First of all, gerrymandering of boundaries is encouraged only when standing is formulated in terms of the geographical classes of individuals affected rather than in terms of the problem to be solved. For example, the classes accorded standing under the remonstrance provisions set the stage for annexations designed to eliminate dissidents from those classes. Reafsnyder, in attempting to cure the pretext contiguity problem, granted standing in jurisdictional attacks to the class of annexed landowners; thus, in the future all dissidents will be excluded from this class.

The logical result of structuring standing in terms of geographical classes is that if the court allows adjacent landowners standing to bring suits for declaratory judgment, the process of annexation will be broken down further into three stages—ad infinitum. On the other hand, if the court refuses to grant standing to the adjacent landowner, the policy against pretext contiguity enunciated in Reafsnyder will be thwarted by leapfrog annexation schemes.

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However, this Court need not decide the validity of that particular ordinance, because it appears from the record that the United States owned none of the land involved in the annexation pursuant thereto. The United States therefore has no standing to question the validity thereof, and this Court presumes that the ordinance and annexation were valid.

334 F. Supp. at 886. On appeal the question as to the first annexation was not raised; only the grounds as to the invalidity of the second annexation were discussed.

68 Id. at 887.

69 See text accompanying notes 58–61 supra.


71 Id. at —, 293 N.E.2d at 545.
By taking a problem-oriented approach to standing, the court could allow the adjacent landowner standing if he shows that he is the intended victim of leapfrogging. Such a limitation on standing would inhibit leapfrogging, place an added deterrent against pretext contiguity, and avoid the ad infinitum effect that would occur by conferring standing on the entire class of adjacent landowners.

Perhaps the best resolution of the problem involves a third approach: a collateral attack on the first annexation made during an action against the second annexation. If pretext contiguity is an insufficient basis for jurisdiction to annex, then any such annexation would be void and should not be allowed to supply contiguity, or one-eighth coincidence, for a subsequent annexation. When such a leapfrog scheme takes place, a jurisdictional attack could be launched, with the complainant claiming that since the first annexation was void ab initio, it cannot be included as part of the municipality's borders in calculating one-eighth coincidence for the second annexation. Such an approach is permissible given the opinion in Forsythe v. City of Hammond, which states that a void annexation can be attacked collaterally whenever its legality is brought into issue. When a municipality attempts to include illegal annexations in its boundaries to justify a subsequent annexation, the question of the legality of the prior annexation is properly raised.

Allowing collateral attacks would enable the court to avoid the anomalous result of Smith v. City of Aurora. There, the "contiguity" in question was an appeal determinant and not a jurisdictional requirement; hence, when the statute of limitations had run, the annexation was presumed valid. In Indiana, the 60-day limitation does not bar jurisdictional attacks, and since contiguity is a jurisdictional requirement, the limitation would be inapplicable.

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72 142 Ind. 505, 515, 40 N.E. 267, 270 (1895).
73 It should be realized that some reasonable time constraint must be placed upon the invalidation of a prior annexation by a collateral attack. The doctrine of laches or estopped cannot be applied in this situation, since the landowner does not have standing until the municipality attempts to encompass his property in the second annexation. Since most leapfrog schemes anticipate a fairly rapid sequence of annexations, the likelihood of such a collateral attack affecting a long-established annexation is remote. However, if such a dilemma ever occurs where the first annexation has been considered a part of the municipality for over a decade (to give an extreme example) the court may invoke the concept of de facto annexation to prevent an overly harsh result in this extreme situation. Applying the doctrine of de facto annexation would preserve the long-established annexation entered into in good faith where municipal funds have been spent on extensive improvements. For a recent explication of de facto annexation and its derivation from de facto incorporation, see Port Valdez Co. v. City of Valdez, 522 P.2d 1147, 1152-55 (Alas. 1974).
75 See note 63 supra.
Even under the above approaches, one problem remains: What if there is no second annexation or any leapfrog scheme? In such a situation an illegal annexation would go uncontested if the taxpayers and the landowners desired it. This situation raises the question of the purpose behind the annexation laws. If the state legislature set jurisdictional requirements pursuant to an overall notion of how and when annexations should occur, then, to the extent illegal annexations went uncontested, that purpose would be thwarted. But, if the only purpose of the requirements is to grant protection to potential victims of the municipality’s illegal actions, this last situation presents no problem because there are no real victims.

Thus it can be seen that a strictly geographical approach to the determination of standing would merely have the effect of encouraging municipalities to make piecemeal annexations. A problem-oriented approach would protect those persons in need of protection, yet might result in precipitous attacks by landowners, based on the suspicion that municipalities are engaged in leapfrog annexation. The collateral attack, coupled with the standing requirements provided by the Reafsnnyder and Montagana cases, provides adequate protection without burdening municipal expansion with premature challenges.

**Summary**

Indiana's remonstrance provisions need to be safeguarded by allowing jurisdictional attacks. With the rise of gerrymandering devices, the appeal determinants will be severely undermined unless the jurisdictional requirement that annexed territory be contiguous is construed as calling for more than "mere touching." On the other hand, if the contiguity requirement is construed as synonymous with the coincidence of "one-eighth of the aggregate external boundaries," the policy of the remonstrance provisions limiting the ability to bring appeals would be thwarted. A compromise, best referred to as a prescriptive approach to "pretext contiguity," is required.

As a necessary corollary to this ban, standing must be structured to permit jurisdictional attacks by appropriate plaintiffs. This can be accomplished by allowing collateral attacks on prior annexations by

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78 The remedy which is the most consistent with the notion that the state has an interest in how annexation should take place is an information in the nature of a writ quo warranto. The use of informations allows an agent of the state to intercede when local desires conflict with the state's annexation scheme. This method is used in Illinois. Ill. Ann. Stat. ch. 112, §§ 9, 10 (Smith-Hurd 1966). Indiana, however, does not allow this remedy. Stultz v. State ex rel. Steele, 65 Ind. 492 (1879).
those persons victimized by leapfrog annexations. With these measures, the jursidictional attack will provide a workable resolution of present inadequacies in the annexation laws.

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