

ANNEXATION AND THE ETJ

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Annexation is the process by which a city extends its municipal services, regulations, voting privileges and taxing authority to new territory. Cities annex territory to provide urbanizing areas with municipal services and to exercise regulatory authority necessary to protect public health and safety. Annexation is also a means of ensuring that residents and businesses outside a city's corporate limits who benefit from access to the city's facilities and services share the tax burden associated with constructing and maintaining those facilities and services. Annexation and the imposition of land use controls may also be used as a growth management technique to implement a comprehensive plan.

Recognizing that annexation is essential to the efficient extension of urban services and to the general well being of cities, Texas annexation law (codified in Chapter 43 of the Texas Local Government Code) allows home rule cities to annex territory on a non-consensual basis. In 1999, the Texas Legislature passed S.B. 89 which amended Chapter 43 of the Texas Local Government Code to require cities to develop three-year annexation plans and to give property owners and residents of areas proposed for annexation greater input into the development of annexation service plans. The S.B. 89 amendments lengthened the process but did not eliminate non-consensual annexation. The S.B. 89 amendments make careful planning an essential element in the successful implementation of an annexation program.

Chapter 43 contains a number of special provisions that go beyond a simple differentiation between home rule and general law cities or between exempt and three-year plan areas. These provisions include brackets, usually based on population, that grant certain cities special authority, exempt other cities from one or more requirements, or impose conditions for annexation not required of other cities. In addition many requirements are not applicable in cases of consensual annexation. For these reasons, officials of cities considering annexation should carefully review the appropriate sections of the Local Government Code and closely monitor proposed amendments.

Because cities can only annex land within their extraterritorial jurisdiction (ETJ), discussion of annexation must begin with consideration of the ETJ.

Extraterritorial Jurisdiction (ETJ)

The ETJ of a city is the contiguous unincorporated land adjacent to its corporate limits that is not within another city's ETJ. The size of a city's ETJ varies according to its population, ranging from one-half mile for communities with less than 5,000 persons, to five miles for cities greater than 100,000 in population. A city's ETJ may exceed these distance limitations if the owners of the additional area request to be included in the ETJ. Annexation of city owned land does not extend the ETJ. ETJ-related statutes can be found in Chapter 42 of the Local Government Code.

From an annexation perspective, a city's ETJ serves two functions. First, there is a statutory prohibition against a municipality annexing into another's ETJ, which provides a city with land that it alone can annex. Second, cities are authorized to enforce their subdivision regulations within their ETJ, which is a means of ensuring that cities will not have to assume maintenance responsibilities for substandard infrastructure upon annexation.

Because of the direct relationship between the ETJ and a city's ability to annex land, proposals regarding the creation of special districts in the ETJ, requests for incorporation, and ETJ adjustments with other cities should be evaluated in terms of their potential impacts on future annexation.

Annexation

As noted previously, annexation is the process by which a city extends its municipal services, regulations, voting privileges, and taxing authority to new territory. Texas law differentiates between home rule and general law cities in terms of their authority to annex territory. A home rule city is a municipality with a population of 5,000 or more which has adopted a home rule charter. A home rule city may annex territory on a non-consensual basis. Some home rule charters, however, may require voter approval prior to annexation.

A general law city is a municipality with a population of less than 5000 persons or a city with a population greater than 5000 which has not adopted a home rule charter. A general law city can only annex property on a non-consensual basis under certain conditions:

- The municipality has a population between 1000 and 5000 persons;
- The municipality is providing the *area* with to be annexed with water or wastewater service; and
- The area to be annexed does not include unoccupied territory in excess of one acre for each service address for water and wastewater service.

General Annexation Requirements and Procedures- Chapter 43 establishes a number of general requirements and procedures for annexations. These requirements and procedures include:

- Annexations must be contiguous to the City's corporate limits and strip annexations less than 1,000 feet in width are prohibited unless initiated by the owner of the land.
- With some exceptions, cities may not annex additional land from strips less than 1000 feet in width or from areas that are in the ETJ only because of the previous annexation of strips less 1000 feet in width.
- The total amount of land annexed in any calendar year cannot be more than 10 percent of the city's total area as of January 1 of that year. If a city does not annex the full 10 percent, it may carry over the unused allocation for use in subsequent years. Including acreage carried over, the area annexed in a given calendar year cannot exceed 30 percent of the city's total area as of January 1 of that year. There are a number of exceptions to this rule. Government property is not included in the total nor is land which is being annexed at the request of a majority of its owners or residents.
- Two annexation public hearings are required with public notice published in a local newspaper. The notice must be published at least eleven (11) days, but not more than twenty (20) days, before the hearing(s). It is possible for one notice to include both hearings.
- Notice of each hearing must posted on the city's website at least eleven (11) days but not more than 20 days before the hearing(s).
- If more than twenty (20) permanent adult residents of the area proposed for annexation protest the annexation within 10 days after publication of the notice

(10 percent of residents in the case of exempt areas), one of the public hearings must be conducted in the area proposed for annexation or in the nearest suitable public facility if the annexation area does not have a suitable site.

- Following annexation, a city can not prohibit the continuation of a legal land use if the use was in existence on the date annexation proceedings were instituted (first reading of the annexation ordinance) or prohibit a landowner from beginning to use land if the use was planned 90 days before the effective date of the annexation and a complete application for any required government permit was submitted before the date annexation proceedings were instituted.
- Cities must notify all school districts within the annexation area of the hearings. The notice must include an estimate of any financial impact to the districts and proposals to mitigate the impacts on the districts.
- Cities must reimburse Emergency Service Districts to cover debt issued and facilities and equipment purchased to serve the annexation area (Sec. 775.022 Health and Safety Code).
- Cities are required to submit applications to the U.S. Department of Justice for preclearance at the earliest date permitted by federal law and after receiving preclearance must permit residents to vote in the next municipal annexation.

The Three Year Annexation Plan - S.B. 89 amendments to Chapter 43 included a requirement that all cities adopt a three-year annexation plan by December 31, 1999. The three-year annexation plan can be more aptly described as a three-year annexation process. Areas included in a plan can only be annexed at the end of the third year of the process. Special districts (MUDs, WCIDs etc.) have some restrictions placed on them during the three-year process to prevent "poison pill" strategies designed to thwart annexation.

Currently, the law provides for three types of annexations:

- annexations of areas required to be included in a three year annexation plan;
- annexations of areas exempt from the requirement to be included in a plan; and

- interim period annexations which may be carried out until December 31, 2002 under the old law but which are subject to the non-plan related provisions of the new law Areas exempt from the requirement to be included in a three year annexation plan include:
- Areas that contain fewer than 100 tracts on which one or more residential dwellings are located on each tract (there are limitations on dividing areas into separate areas of less than 100 tracts);
- Areas where more than 50% of the real property owners have petitioned for annexation, or by a vote or petition of the qualified voters or real property owners;
- Areas that are the subject of, an industrial district contract or a strategic partnership agreement;
- Colonias;
- Areas included in boundary adjustments less than a 1000 feet wide that are part of agreements between cities;
- Areas enclosed within a military installation;
- An annexation to protect the area or municipality from imminent destruction of property or injury to persons; or a condition or use that constitutes a public or private nuisance; and
- . The annexation of adjacent navigable streams by general law cities

The Exempt Area Process - The annexation process for exempt areas is very similar to the annexation process in place prior to adoption of S.B. 89. The most significant change is the requirement to notify each property owner, each service provider and each railway company in "fewer than 100 tracts" exemption areas of the intent to annex thirty days prior to the first annexation hearing. In addition to the 30 day notice requirement the following procedure is also required:

- Two annexation public hearings are required with public notice published in a local newspaper. The notice must be published at least eleven (11) days, but not more than twenty (20) days, before the bearing(s). It is possible for one notice to include both hearings;

- Notice of each hearing(s) must be posted on the city's website at least eleven (11) days but not more than 20 days before the hearing(s);
- If more than 10 percent of the residents protest the annexation , one of the public hearings must be conducted in the area proposed for annexation or in the nearest suitable public facility if the annexation area does not have a suitable site; and
- First reading of the annexation ordinance cannot be more than forty (40) days from the first public hearing or more than twenty (20) days from the second hearing. Final adoption of the annexation ordinance must be within ninety (90) days of its first reading.

The Three-Year Annexation Plan Process - The three-year annexation plan process begins on the effective date of plan adoption. Within 89 days of the effective date of plan adoption, the city must notify each property owner in the proposed annexation area and each of the public or private entities that provide municipal-type services to the proposed annexation area. In addition, the plan must be posted on the City's internet website if the City has one.

Following notification, the city must prepare an inventory of services provided to the proposed annexation area. The city's notification to area service providers must include a request for information regarding the types and levels of services and facilities they were providing in the year preceding adoption of the three-year plan. If a service provider fails to submit the required information within 90 days of receiving notification, the City is not obligated to include that information in its inventory. The city may monitor the services provided in an area proposed for annexation and verify the inventory information provided by the service provider.

The following types of information are required for infrastructure (utilities, roads, drainage etc):

- An engineering report that describes the physical condition of all infrastructure elements in the area
- A summary of expenditures for that infrastructure

The following information is required for fire, police and emergency medical services:

- Average dispatch and delivery times.

- Equipment schedules.
- Staffing schedules including certification and/or training levels.
- A summary of operating and capital expenditures.

Within 60 days of receiving the requested information, the City must complete the inventory and make it public. Only those services and facilities provided in the year preceding the date of plan adoption are to be included in the inventory. The inventory becomes a standard by which the city's service plan will be measured and a basis for negotiations during the annexation process.

Within 90 days of making the inventory available for public review, the city must hold two annexation public hearings. A preliminary service plan must be presented and explained at each of the hearings. After completing the hearings, the city negotiates the terms of the final service plan, or services in lieu of annexation, with five representatives from the area who are appointed by the County Commissioners Court. In the case of special districts (MUDs, WCIDs etc.), the city negotiates with the district's board. The final service plan must be completed prior to the first day of the tenth month following completion of the inventory of services, or approximately 17 months after plan adoption. If an agreement cannot be reached between the City and the area's representatives, the law provides for a binding arbitration process. The authority of the arbitrator is, however, limited to issues relating only to the service plan. Including arbitration, the negotiation phase of the process can be completed within 21 months of plan adoption.

As noted above, the city and the area's representatives may also negotiate terms of a contract for the provision of services in lieu of annexation. The terms of this contract can be fairly broad and include permissible land uses, compliance with ordinances, the funding of services and any other term to which the parties agree will resolve the dispute including the creation of any special district allowed by law.

The annexation itself can not take place until the third anniversary of the effective date of plan adoption and must be completed before the 31st day following the third anniversary of adoption of the plan. If the process is not completed within that time frame, the city may not annex the area for five years. In the context of these timing considerations, planners need to be aware that for property to be on the tax rolls for the following year, it must be

annexed by December 31. The plan's effective date needs to be early enough to allow for a December 31 annexation date.

A plan may be amended to include new annexation areas, however, similar timing requirements would apply to each added area. Areas may also be removed from the plan. If an area is removed within the first 18 months following its inclusion in the plan, the area may not be amended again to re-include the area until the one-year anniversary of its removal. Any area removed after the first 18 months would be subject to a two-year moratorium before it could be re-included in a plan. Notification is required if an area is removed from the plan after the first 18 months.

The law is unclear as to what is supposed to transpire in the period between the end of the negotiation and arbitration period and the date of annexation. An annexing city could use this period to ramp up services to meet the levels set by the service plan or to update the city's CIF to include facilities required by the service plan.

Annexation Service Requirements — Chapter 43 places stringent service delivery requirements on cities proposing to annex territory. As part of the public hearing process, the city must present a service plan for the area proposed for annexation. The service plan is essentially a contract between the city and the people being annexed and is valid for a period of ten years. Any person residing or owning property may enforce a service plan by applying for a writ of mandamus in which case the city has the burden of proving that the services were provided in accordance with the service plan. Failure to fulfill the service plan can result in disannexation, refunding of taxes paid for services not received, and a civil penalty. The service plan must provide for the extension of the following services immediately upon annexation:

- Police protection;
- Fire protection;
- Solid waste collection (residents of annexation areas have the option of continuing to use private service providers) ;
- Maintenance of (public) water and wastewater facilities that are not in the service area of another water or wastewater utility;
- Maintenance of (public) roads and streets, including road and street lighting;
- Maintenance of (public) parks, playgrounds, and swimming pools; and,

- Maintenance of any other publicly owned facility, building, or service.

The service plan may not provide services in a manner that would result in more than a negligible reduction in the level of fire, police or emergency services provided to areas in the existing city. If an annexation area is receiving a lower level of service, infrastructure, and infrastructure maintenance than is available in the city, the service plan must provide the area with a level of service, infrastructure, and infrastructure maintenance comparable to areas inside the city with topography, land use and population density similar to those reasonably contemplated or projected in the annexation area. If an area is receiving an equal level of service, infrastructure, and infrastructure maintenance than is available in the city, the service plan must maintain the existing levels. If an annexation area is receiving a higher level of service, infrastructure, and infrastructure maintenance than is available in the city, the service plan must provide the area with a level of service comparable to areas inside the city with topography, land use and population density similar to those reasonably contemplated or projected in the annexation area. The city, however, must continue to operate and maintain the existing infrastructure and facilities at the higher preannexation level.

The service plan must include a capital improvements program element for capital projects necessary to provide full municipal services. Full municipal services include water and wastewater service if the city owns a water and wastewater utility and the annexation area is not in the service area of another utility. The service plan must provide for the construction of capital facilities within 2 1/2 years unless the plan includes a schedule for providing full services in which case the city has 4 1/2 years. Capital projects must be substantially complete within the period specified in the service plan. The period may be extended by amending the service plan if construction is proceeding with all deliberate speed. Capital facility construction deadlines do not apply if the annexation was consensual and the landowners agreed that the facilities are not needed within the specified period

The water and wastewater component of the annexation service plan may not:

- Require the creation of another political subdivision (such as a water district); or,
- Require a landowner in the area to fund the required capital improvements in a manner inconsistent with state impact fee legislation unless otherwise agreed to by the land owner.

Annexation of Water Districts - There are a number of considerations unique to the annexation of water districts. Unless a given district is located in two or more ETJs, the city must annex the entire district. Following its annexation, the district must be dissolved and the city must assume all of the district's debts and assets. If a district is located in two or more ETJs, it can be annexed piecemeal and not be dissolved.

With the exception of annexations carried out by cities with populations in excess of 1,000,000, the developer of a district who is prevented from being reimbursed through bonds issued by the district must be paid by the annexing city all the actual costs and expenses incurred in connection with developing the district that are eligible for reimbursement from bond proceeds under the rules of the Texas Water Commission.

If requested by a district included in the plan, cities must negotiate and enter into an Strategic Partnership Agreement. Districts must submit their request for an SPA between the date of the second annexation hearing and 61 days after that hearing. The statute provides for an arbitration process if the city and the MUD can not agree on the terms of the SPA.

If a city annexes a portion of a MUD for limited purposes under an SPA, the city may impose its sales tax in that portion of the MUD. If the parties fail to agree on the terms of an SPA, either party may seek binding arbitration.

Limited Purpose Annexation

The statute permits cities with populations in excess of 225,000 to annex territory for the limited purposes of applying planning, zoning, health, and safety ordinances to the area. Areas annexed for limited purposes must be annexed for full purposes within three years unless this condition is waived by the land owner. Residents in a city's limited purpose jurisdiction may vote in municipal elections but do not pay city taxes.

Limited purpose annexation may be a useful tool in implementing a city's comprehensive plan, but its use must be closely coordinated with capital improvements planning. As part of the process for limited purpose annexation, a city must prepare a planning study and a regulatory plan for the area proposed for annexation. With the exception of consensual limited purpose annexations in which the land owner waives or postpones full purpose annexation, the annexing city must take certain steps leading to full purpose annexation in each of the years preceding full purpose annexation. Failure to meet these milestones may result in a court order requiring either full purpose annexation or disannexation of the area.

Disannexation

A majority of the voters of an area annexed for full purposes by a home rule city may petition the city for disannexation if the city fails to provide the services called for in the annexation service plan or otherwise fails to meet the service requirements of the Local Government Code. If the city fails to disannex the area, any signer of the petition may seek disannexation in district court. If the area is disannexed by the city following receipt of the petition or by district court, it can not reannexed for ten years. Following disannexation, the city must refund the taxes and fees collected less the amount spent for the direct benefit of the area during the period in which it was in the city. A city cannot disannex a portion of an annexation area.

Disannexation procedures for general law cities permit fifty (50) or more voters of an area to request a disannexation election. If a majority of the voters in the election vote for disannexation, the area is disannexed. However, the area may not be disannexed if it would result in the city becoming less than one mile square or having less than one mile in diameter measured at the center of the original municipal boundaries. In addition, if the city has any debt, the area is not released from its pro rata share of that indebtedness.

The Local Government Code also provides for the disannexation of very low density or unimproved acreage by general law cities and of unimproved land by home rule cities of certain population in counties of certain population.

Fiscal Impact Analysis

Because of the fiscal implications of annexation, the costs of providing municipal services need to be estimated and weighed against the anticipated revenues of each annexation program. First year costs will almost always exceed revenues because of the lag time between annexation and the collection of taxes and fees. Annexations may also require one time only expenditures for capital facilities. To spread this initial cost over several years and provide a better picture of maintenance costs which typically only occur once every several years, the fiscal impact of annexations should be estimated over a multi-year time frame. Fiscal impact analyses for annexation are typically based on the time period used by the city's finance department in budgetary planning, or on the ten year period of the annexation service plan.

Many cities use fiscal impact analysis models to estimate the impacts of annexations on municipal revenues and expenditures. These models vary in their sophistication. It should be noted that complexity does not necessarily equate with accuracy. It is also important to update the model on a regular basis. Planners should work closely with the city's finance department to develop a model for fiscal impact analyses that best fits their city's needs.

Performing fiscal impact analyses does not mean that only areas with positive cash flow should be annexed. There will be instances when health, safety, environmental or other factors will override fiscal considerations and an area will be proposed for annexation despite its fiscal impact. An accurate fiscal impact analysis becomes especially critical in these instances.

Annexation Planning

Because annexation is so critical to the long term well being of cities, it needs to be carried out in accordance with established policies and not on an ad hoc basis. A city's annexation policies should be included in the comprehensive plan, be linked to the capital improvements plan (CIP) and be supported by the city's water and wastewater service extension policies. Annexation policies should include the *use* of criteria with which to select areas to be annexed from the range of potential annexation areas. The policies

must also be aligned with the requirements of Chapter 43, other applicable statutes and the city's charter.

In addition to the three-year annexation plan required by statute, cities should also develop longer mid-range annexation plans. The city departments that deliver the municipal services required by Chapter 43 need to be involved in developing these mid-range annexation plans. Facility and service requirements for mid-range areas should be reflected in the city's financial forecast and CIP. The mid-range plans should be based on the annexation policies of the comprehensive plan and be implemented through regular annexation programs that include the three-year plans required by Chapter 43.

A successful annexation plan must include attention to implementation. Implementation of the plan begins with meeting the procedural requirements of State law and includes monitoring the delivery of services and the timely construction of facilities. It can not be overemphasized that implementation extends through the life of the annexation service plan.