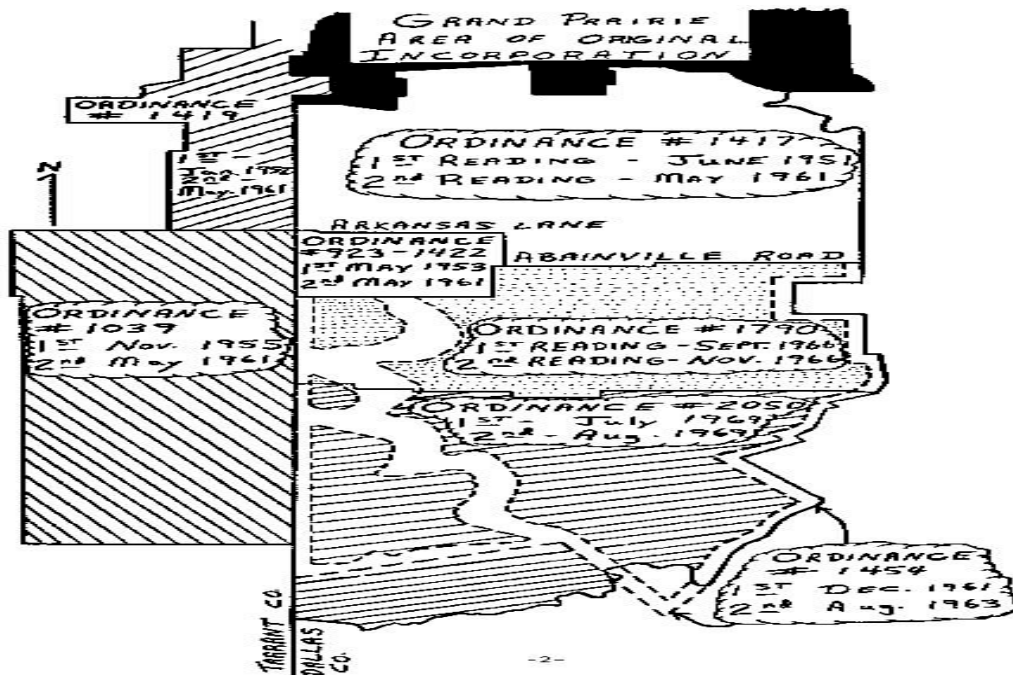


# **MUNICIPAL ANNEXATION IN TEXAS**

**"IS IT REALLY THAT COMPLICATED?"**



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## **I. INTRODUCTION**

Annexation, specifically unilateral annexation, is one of the most debated issues of municipal authority. Rarely a week goes by that annexation battles do not show up in newspaper headlines across the state. Interesting, however, is the fact that from the enactment of the Municipal Annexation Act in 1963<sup>1</sup> until fairly recently, the legislature rarely acted to broadly proscribe city authority in this area.

The legislative outlook for annexation changed dramatically in the 1990s. In 1996, the City of Houston annexed an upscale subdivision called Kingwood, bringing in almost 50,000 new residents. At the time, Kingwood was a twenty-year-old subdivision that was fully built-out with large, expensive homes. When the developer first approached Houston for water and sewer extensions, the city and the developer agreed that when the City of Houston got closer to the subdivision, the subdivision would consent to annexation. It took Houston close to twenty years to get there. Upon the city's arrival, the citizens of Kingwood organized and showed up literally in busloads at the Seventy-Fifth Legislative Session in 1997 with banners that read "Free Kingwood."

The protests of Kingwood residents and others ultimately resulted in the passage of Senate Bill 89 in 1999, the provisions of which are still being debated (and often litigated) over 15 years later. S.B. 89 did not prohibit cities from annexing. The bill merely made the process much more complex, expensive, and time consuming in certain circumstances. However, the changes made by S.B. 89 do not have much significance for general law cities and home rule cities that annex smaller, sparsely-occupied areas or annex only by petition. The greatest impact is on home rule cities that wish to exercise unilateral annexation authority to bring in large, existing residential subdivisions.

In response to several annexations over the past years, several state legislators have stated that they believe that residents of an area should have the right to vote on whether or not to be annexed. The annexation policies of one Texas city succinctly and clearly summarize the arguments against voter permission:

Cities annex territory to provide urbanizing areas with municipal services and to exercise regulatory authority necessary to protect public health, safety and welfare. *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 may also be used as a technique to manage growth.

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<sup>1</sup> Act of April 29, 1963, Municipal Annexation Act, 58th Leg., R.S., ch. 160, 1963 Tex. Gen. Laws 447.

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## **II. A (NOT SO) BRIEF LEGISLATIVE BACKGROUND OF ANNEXATION**

The original method of incorporation of cities under the Republic of Texas, and later the State of Texas, was by special law. In other words, the Congress of Texas or the State Legislature passed a bill, very similar in appearance to a modern home rule charter, that incorporated a city and delineated its powers and duties. For the most part, special law cities had no annexation authority. To expand the city's boundaries, the congress or legislature had to amend the law that created the city.

In 1858, the first statute allowing incorporation of a city under the general laws was passed. An 1858 amendment allowed for annexation by petition, and this law, along with others passed over the next several years, became the basis for general law annexation by petition as it is known today.

In 1912, the voters of Texas passed the Home Rule Amendment to the Texas Constitution. TEX. CONST. Art. XI, §5. This amendment and its accompanying legislation in 1913 gives cities over 5,000 population that adopt a home rule charter by election the full power of local self government, including the ability to unilaterally annex property. Except for the Home Rule Amendment, relatively few substantial changes were made to annexation laws from 1858 through 1963.

In 1963, the Legislature enacted the Municipal Annexation Act (Act). The Act provided procedures for annexation and created the concept of extraterritorial jurisdiction (ETJ). The Act is now codified in Chapters 42 and 43 of the Texas Local Government Code. As mentioned previously, from the enactment of the Act until the passage of S.B. 89 in 1999, the Legislature rarely acted on a broad scale to restrict or modify city annexation authority.<sup>2</sup>

Nonetheless, annexation powers have given rise to complaints and have routinely come under attack in the legislature. The residents of unincorporated areas rarely favor being brought into a city involuntarily, and any city that has gone through a major annexation is well aware of how controversial the process can become. Rural landowners and others have regularly turned to their legislators for relief from city expansions, with the result that bills to curb unilateral annexations have surfaced in every session for the past fifty years. The battle heated up substantially in 1987, and the legislature passed a bill (S.B. 962, now codified in Local Government Code Sections 43.054 and 43.056) that, among other things, prohibited strip annexations of less than 1,000 feet (as

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<sup>2</sup> Most of the previous information in this introduction is summarized from D. Brooks, *Municipal Law and Practice*, 22 Texas Practice Ch. 1 and T. O'Quinn, *History, Status, and Function*, Introduction to Title 28 of the TEX. REV. CIV. STAT. (Vernon 1963).

opposed to the previous standard of 500 feet) and changed the requirement that the construction of capital improvements necessary for providing services to newly annexed areas be initiated within 2 ½ years to a new requirement that construction begin within 2 ½ years and be substantially complete within 4 ½ years.

In 1989, the onslaught continued. That year's major piece of legislation (H.B. 3187, now codified in Local Government Code Section 43.056) provided, in addition to other requirements, that cities provide full municipal services to annexed areas within 4 ½ years, but the provision that capital improvements must only be "substantially completed" within that 4 ½ years remained intact. "Full municipal services" are defined as "services provided by the annexing municipality within its full purpose boundaries," but cities retained the right to provide varying levels of service for reasons related to topography, land use, and population density (and they still do).

Very few bills related to annexation were considered by the 1991 legislature. The 1993 legislature didn't seriously consider any bills that would have restricted the annexation powers of home rule cities, but the House Urban Affairs Committee was charged with the task of examining the subject of annexation during the 1994 interim leading up to the 1995 legislative session. The committee held several public hearings around the state. Many cities and TML staff testified at those hearings. Landowners who had been annexed or who feared annexation also testified before the committee.

During the 1995 session, only one annexation bill passed, but the 1997 legislative session turned out to be the "Mother of All Annexation Battles." Opponents of municipal annexation authority began to organize early with the goal of substantially amending annexation laws. The highest priority of those groups was to seek legislation that would allow the residents in an area proposed for annexation to vote on approval or rejection of the annexation. Scores of annexation bills were filed, and legislative committees held numerous hearings on these bills in front of raucous, standing-room-only crowds. City officials from all over the state testified before these committees and contacted their legislators on this issue. In the end, all efforts to erode municipal annexation authority were defeated.

The Lieutenant Governor and the Speaker of the House each appointed legislative committees to study this issue during the 1998 interim. These committees held hearings throughout the state – again hearing from numerous "annexation reformers" and city officials.

The 1999 legislative session turned out to be the "Mother of All Annexation Battles – Part II." Cities were committed to finding some workable solution that addressed the needs of all parties. TML met with annexation reformers throughout the legislative session because the League was convinced there was a very real risk of losing significant authority to annex if a compromise could not be reached. S.B. 89 was pre-filed early in December 1998 and was a massive rewrite of Texas annexation laws. TML and city officials testified numerous times, offered amendments, and worked to eliminate or modify the more onerous provisions. The same process occurred in the

House. Although the bill dramatically changed annexation laws, it contained several key provisions that mitigated the more onerous requirements. It appeared that there was little doubt that the bill would pass, and most of the major concerns of cities had been addressed. One of the key components for cities was that the bill did not apply its more complicated procedures to areas that are not densely populated. A major blow occurred when this provision was deleted by an amendment that was actively supported by rural unincorporated interests. Several other very detrimental amendments were added to the bill. The senate requested a conference committee to work out the differences. A conference committee was appointed, and that committee held a rare public hearing. Detrimental amendments added on the house floor were deleted, and the conference committee report was adopted on the last day that conference committee reports could be adopted.

It was difficult to predict what would occur on the annexation front during the 2001 legislative session. The Senate Committee on Intergovernmental Relations had been charged during the 2000 interim to monitor the implementation of S.B. 89. The committee sent out a survey to cities and held several public hearings. TML and city officials urged legislators to allow S.B. 89 to take full effect and to exercise extreme caution with regard to any further major modifications to the annexation statute.

In the end, that is exactly what the legislature did. Only a handful of annexation bills were filed or passed during the 2001 legislative session. H.B. 2200, a very detrimental bill for cities, did not pass. H.B. 958, H.B. 1264, and H.B. 1265 were the only bills directly relating to annexation that passed.

The most detrimental annexation bill introduced during the 2001 Legislative Session was H.B. 2200. H.B. 2200 would have, among other things: (1) removed the annexation plan exemption for an area containing fewer than 100 tracts of land on which one or more residential dwellings are located on each tract; (2) required a city to include in its annexation plan a map of areas proposed for annexation, including each county road and right-of-way that is exempt from property tax and within or contiguous to the boundaries of the area; (3) required complex notice procedures, along with public hearings, in an area proposed for annexation when a city amends its annexation plan to include that area; (4) reduced from 90 days to 20 days the time required for notice after an amendment to an annexation plan; (5) required, in most annexations, a city to obtain a petition signed by the owners of at least one-half of the appraised value of property located in the area and by the owners of property that would be subject to taxation by the city after annexation prior to the annexation; (6) required a city, for most annexations, to adopt zoning classifications that permit densities and uses that are no more restrictive than those permitted in the area prior to the annexation; and (7) required a city to obtain a petition from property owners prior to annexing a municipal utility district. H.B. 2200 never made it to the House floor.

H.B. 958, which passed, amended Chapter 43 of the Texas Local Government Code by adding §43.106, which provides that a city that proposes to annex a portion of a county road must annex the entire width of the county road and the adjacent right-of-way. H.B.



1264 also passed and amended §43.901 of the Local Government Code to provide that after two years have passed without an objection, an annexation is conclusively presumed to have been adopted with the consent of all appropriate persons, except another city. This bill was filed in response to the Texas Supreme Court decision in *City of Murphy v. City of Parker*, 932 SW.2d 479 (Tex. 1996). Finally, H.B. 1265 amended §43.906(a) of the Local Government Code to require a city to apply for preclearance under Section 5 of the Voting Rights Act of 1965 on the earliest date permitted under federal law. This change was made because the United States Department of Justice will not preclear an action that is not final. Thus, the bill required a city to adopt its annexation ordinance and submit it for preclearance well in advance of its next municipal election. The preclearance requirement was held later found to be unconstitutional by the U.S. Supreme Court in *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

In response to annexations by different cities during the 2002 interim, many state lawmakers vowed to further restrict annexation authority. In cities like New Braunfels, San Antonio, Wichita Falls, Santa Fe, and others, landowners protested annexations as “taxation without representation.”

In a 1999 article for the Houston Review, the argument was stated as this:

*Of course, the cities consider any bill requiring a vote to be punitive. When American colonists wanted the right to vote on British tax increases, you can bet many of the British aristocrats also felt such a proposal was punitive! It is amazing that the democratic right to vote on becoming part of a city could be considered punitive.*<sup>3</sup>

This argument appears flawed because, upon annexation and after preclearance, residents of an annexed area are granted the power to vote in all matters relating to the city. Thus, annexation does not impose taxation without representation. A handful of Texas cities were accused of abusing the power to annex, but cities actually use this power as a tool to manage growth and support infrastructure that benefits the entire region.

Texas cities are some of the fastest growing in the United States. Evidence of the importance of unilateral annexation exists in other states where cities do not have that power. The broad power of Texas home rule cities to annex has permitted cities in Texas to share the benefits of growth in the surrounding areas. According to many national authorities, this annexation power is the primary difference between the flourishing cities of Texas and the declining urban areas in other parts of the nation. If San Antonio, for example, had the same boundaries it had in 1945, it would contain more poverty and unemployment than Newark, New Jersey.<sup>4</sup> With a vote requirement,

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<sup>3</sup> *Proposal for Vote on Annexation Stimulates Debate in Texas Legislature*, Friday, April 30, 1999 by Phil Arnold.

<sup>4</sup> TEXAS HOME RULE CHARTERS, Terrell Blodgett (Texas Municipal League 2010)(citing an unpublished study from the Urban Policy Group, the White House (Washington, D.C. 1978).

Texas cities might languish economically as do northern cities with no annexation power at all.

A massive assault on annexation authority took place during the Seventy-Eighth Legislative Session. House Bill 568, which did not pass, would have required voter approval of all annexations in Texas, including voluntary annexations. TML, to stave off the assault, commissioned a study on the effects of annexation, not only on cities, but on the state as a whole. A report issued by The Perryman Group on April 14, 2003, shows that overly restrictive annexation policies would harm the Texas economy by reducing gross state product, personal income, sales, employment, and population. The study identified H.B. 568 as a bill that would have drastically reduced or eliminated annexations and thus damaged the state's economy.

The Perryman report (available from TML) concludes that the H.B. 568 restrictions on annexation would have meant that "the entire character of the Texas economy will be changed in a way which notably limits its capacity to support future growth and prosperity." Restricting annexation would result in a loss of more than \$300 billion in gross state product over the next 30 years, according to the report. In addition, the state would lose 1.2 million jobs and 2.3 million in population. Without annexation authority, the report says, core urban areas would deteriorate, thus eroding the viability of central cities, diminishing support networks, and imposing future costs on the entire metropolitan region. As a result, prospects for business locations, expansions, and retentions would be negatively affected.

H.B. 1541 dealt with the general powers of water districts. In addition, the bill made some changes to annexation laws dealing with strategic partnership agreements, which are used by an increasing number of cities as a tool to manage growth on their outskirts that is financed through special districts.

The 2005 legislative session saw the return of annexation reform legislation in the form of H.B. 323. The bill was voted out of the House Land and Resource Management Committee early in the session, but was never sent to the House floor. A new twist proposed by agricultural interests was H.B. 1772. H.B. 1772, at one point in the process, would have required a city to first offer a development agreement in lieu of annexation to a landowner to allow the landowner to keep farming. Due to a procedural mistake, those provisions were removed, and the bill only applied to the rare case when general law cities annex unilaterally under Local Government Code Section 43.033. H.B. 1772 also allows certain general law cities to annex areas that they surround without the consent of property owners.

The 2007 legislation session saw numerous detrimental bills filed that did not pass, including H.B. 328 (would have made it easier for a property owner to petition for disannexation for failure to provide services), and H.B. 2869 (also dealing with disannexation for failure to provide services).

H.B. 610, which passed, largely makes technical modifications to provisions dealing with provision of services by: (1) providing that a city's annexation service plan, which must be completed in the time period provided by law, must include a program under which the city will provide full municipal services in the annexed area, and must include a list of all services required by law to be provided under the plan; (2) allowing a city, under a contract for provision of services in lieu of annexation, to annex an area for full or limited purposes at any time in response to a petition of the owner of the area if the area is in the city's annexation plan, or was previously in the city's annexation plan but was removed from the plan; and (3) allowing the governing body of a city with a population of less than 1.6 million to negotiate and enter into a written agreement for the provision of services and the funding of the services in an area to be annexed with: (a) representatives of the area appointed by the county commissioners court, if the area is included in the city's annexation plan; or (b) an owner of an area within the extraterritorial jurisdiction of the city if the area is not included in the city's annexation plan.

The big news of the 2007 session was the return of a mandatory offer of a development agreement in lieu of annexation for agricultural and other rural land. H.B. 1472 applies to land that is either: (1) eligible to be the subject of a development agreement under Subchapter G of Chapter 212 of the Local Government Code; or (2) appraised as agricultural, wildlife management, or timber land. The bill provides that: (1) a city may not annex an area described above unless: (a) the city offers to make a development agreement with the landowner that would guarantee the continuation of the extraterritorial status of the area and authorize the enforcement of all regulations and planning authority of the city that do not interfere with the use of the area for agriculture, wildlife management, or timber; and (b) the landowner declines to make the agreement; (2) an area adjacent or contiguous to an area that is the subject of a development agreement is considered adjacent or contiguous to the city; (3) a provision of a development agreement that restricts or otherwise limits the annexation of all or part of the area is void if the landowner files any type of subdivision plat or related development document for the area with a governmental entity that has jurisdiction over the area, regardless of how the area is appraised for ad valorem tax purposes; and (4) a development agreement under the bill does not create vested rights. While many city officials argued that farming operations already had sufficient protections from city regulations, the Texas Farm Bureau and others strongly supported H.B. 1472. The bill adds an additional layer of bureaucracy to the process, but amendments to the bill throughout the process sought to ensure that it would not limit annexations of land that is truly poised for development rather than for farming.

The 2009 session was relatively quiet on the annexation front. H.B. 98 would have attempted to overturn the Waco appeals court decision in *Karen Hall v. City of Bryan*, which dealt with disannexation for failure to provide services. Another bill, H.B. 1424, would have “flip-flopped” the burden in disannexation for failure to provide services, and would have required a city to bear the burden of proof if it received a petition. Neither bill passed.

For 2010, the Senate Committee on Intergovernmental Relations was charged to *“Review state and local policies related to development and growth in rural and unincorporated regions of the state with regard to annexation and zoning authority. Focus on impacts to private property rights. Determine the appropriateness of existing extraterritorial jurisdiction authority. Make recommendations regarding possible changes to this authority.”* A hearing was held that year, and the Texas Farm Bureau raised several issues with regard to the development agreement requirement in current law. TML staff testified, and stated that over 1,000 people are added to the Texas population each day. Growth in both urban and rural areas of the state is inevitable. Cities should retain their current authority to deal with that growth inside city limits, in the ETJ, and through subsequent annexation. Balancing the need for sustainable development with private property rights is the goal. Specifically, the League testified that:

- **Current Extraterritorial Authority is Vital to Preparing for Future Annexation:** One of the few powers that a city may exercise to regulate in its ETJ is the ability to approve subdivision plats. A subdivision ordinance simply sets standards for infrastructure and shows lot lines, streets, alleys, parks, or other parts of the tract intended to be dedicated to public use. With the exception of border counties and Harris County and surrounding counties, each city must enter into an agreement with its county to streamline the process for plat approval in the city’s ETJ. ETJ subdivision authority provides minimum standards for areas that will be annexed in the future and prevents cities from having to spend taxpayer funds to support substandard infrastructure and development after annexation.
- **Annexation is Vital to the Texas Economy:** Texas cities, unlike the cities of other states, don’t receive state financial assistance or state revenue-sharing. They don’t ask the state to help fund the facilities and services on which the city, region, and state rely. But cities do ask that their authority to take care of themselves not be eroded. The power to annex is one of those key authorities, and to lose it would be very detrimental to the state. A 2003 report of The Perryman Group, a well-respected economic and financial analysis firm, shows that overly restrictive annexation policies would harm the Texas economy by reducing gross state product, personal income, sales, employment, and population. It is important to note that a law passed in 2007 provides that a city may not annex property that is used for agricultural purposes. Instead, the city must offer a non-annexation agreement to the property owner. So long as the property is not developed, it may not be annexed. That law, along with other laws, protects truly rural land from being annexed or unreasonably regulated.

In 2011, H.B. 1643 – which related to the term of a development agreement – provides that the governing body of a city may make a written contract, for which the total duration and any successive renewals or extensions may not exceed 45 years, with an owner of land that is located in the ETJ of the city to guarantee the continuation of the extraterritorial status of the land and its immunity from annexation by the city. Also, S.B. 1082 created some additional authority for strategic partnership agreements with certain

special districts, but also prohibited a city from regulating the sale, use, storage, or transportation of fireworks outside the city's boundaries pursuant to an SPA. (S.B. 1593, passed in 2015, would further limit fireworks regulation by providing that a home rule city may not define and prohibit as a nuisance the sale of fireworks or similar materials within the 5,000 foot nuisance zone outside the city limits.)

A new twist came about in legislators' attempts to thwart local annexations, and it made a local annexation have statewide ramifications. The City of College Station was in the process of annexing an area in its ETJ for some time. The citizens of the area unsuccessfully attempted a charter-based referendum and sued the city to stop it from annexing. (The courts concluded that the lawsuit had no merit and that the city could move forward.)

But that's not the end of the story. State Representative Fred Brown (R – Bryan) introduced legislation that would stop the city in its tracks. His bill, H.B. 107, did not pass but would have prohibited the cities of Bryan and College Station from annexing an area with 50 or more inhabitants unless the persons to be annexed approve the annexation through a popular vote. The bill would, in effect, end the ability of those cities to annex populated areas.

While the bill was bracketed to two cities, the League strongly opposed it. That's because, rather than applying the consistent and reasonable annexation process in current law, the bill sets a dangerous precedent. State legislators routinely inserting themselves into the local annexation process could lead to a slippery slope on which annexations may eventually become impossible.

That's why the League testified on H.B. 107, a "bracketed bill." Limiting annexation authority is bad for the economy of individual cities, entire regions, and the state as a whole. To view the League's brief testimony in the House Committee on Land and Resource Management on March 22, go to <http://www.wwwebinars.com/LUVideo3-22/LUVideo2.swf>.

According to Rep. Brown, "The Texas Municipal League is very powerful in the state and they fight hard to make sure that cities can go out and annex whoever they want to without the permission of the local residents...this is why we made it only for Brazos County...so that we would have a much better chance of getting it passed in the legislation [sic]."

If legislators believe that the League will always leave bracketed bills relating to annexation alone, they are incorrect. The fact that the City of College Station has provided for ample public input and has followed the law relating to annexation is important, but not the main issue. The main issue is that broad limitations on annexation have failed to pass, and Texas cities must stand together to oppose bracketed bills because they may become the preferred method of challenging annexations.

Another bill, H.B. 2902, did pass. It was another bracketed bill that required one city to release a portion of its ETJ. Once again, the bill was bracketed, but the League opposed it due to the fear that these “targeted” attacks on municipal authority become as routine and harmful as attempts at general reform.

Similar legislation was filed in 2013 in the form of H.B. 3551, which would have prohibited a city in a county that contains an international border from annexing area other than an unincorporated area that is entirely surrounded by the incorporated territory of the city until all of the unincorporated areas that are entirely surrounded by the incorporated territory have been annexed. The complex language was meant to stop one city in the Rio Grande Valley from annexation, but it did not pass.

Also in 2013, H.B. 1477 once again attempted to overturn the Waco appeals court decision in *Karen Hall v. City of Bryan*. League staff met with Ms. Hall (the bill’s proponent) and the author’s staff to craft a compromise. Ultimately, an agreement was reached on language, but the bill was never set on the House calendar.

More than 15 years after the passage of S.B. 89, only a handful of cities have annexed under the three-year annexation plan procedures. As time goes on, it is likely that more cities will do so, and revisions to the process will be proposed. Thus, despite the conclusions of the Perryman report and despite cities’ continued success at staving off broad annexation reform, municipal annexation came under its worst attack yet in 2015.

The House Committee on Land and Resource Management issued its interim report in January 2015 on the following charge:

*Examine population growth in Texas cities and the impact the growth has had on housing, available land resources, city centers, businesses, and the state’s economy. Evaluate Texas’ preparedness to respond to future growth and ensure economic stability. (Joint charge with the House Committee on Urban Affairs) In reviewing this charge, the committee focused on the annexation, zoning, and other regulation of land use to ensure Texas’ ability to sustain the population growth and ensure economic stability.*

In an unusual recommendation, the report stated that “the majority of the committee remains silent on recommendations due to the complaints being isolated to certain areas of the state and unintended consequences [of changes based on that].” Another section of the report titled “other recommendations” isn’t entirely clear, but appears to require a vote prior to annexation, and to erode municipal authority in the ETJ. Specifically, “a majority vote from the citizens of an ETJ area must take place to decide annexation between the ETJ and city. The area must be as wide as it is away from the current city limits, unless it is an ETJ within city limits. Prior to annexing outside the existing city limits, cities must annex areas within city limits that may not be already a part of the city.” In addition, the report stated that “ETJ’s need to be reduced to ½ mile for all cities. Currently larger cities have a massive advantage over smaller cities that

are having their growth stifled. This measure would only apply if a vote of the citizens of the 'to be' annexed area is not required.”

Legislation to limit municipal authority in this area was a certainty in 2015, and it came in the form of H.B. 2221 by Representative Dan Huberty (R – Kingwood). The bill would have done many things, but the most harmful provisions in the bill would have required strict voter approval of an annexation of an area with more than 200 residents. (Under the bill, other annexations required a vote if triggered by a petition.)

League staff, along with several city officials, testified against the bill in the House Land and Resource Management Committee on March 23. In spite of that testimony, it was voted out of committee. According to Representative Huberty's staff:

Back in the 1990's Kingwood was forcefully annexed by the City of Houston...No one living in Kingwood wanted to be annexed at all, but they had no choice in the matter. To this day, the people of Kingwood still despise the relationship that they have with the City of Houston. My boss was in Kingwood throughout the annexation process and saw how invasive the annexation was to his community. This bill is an attempt to ensure that this does not happen to any other group of property owners.

Of course, legislation was passed more than 15 years ago to address the complaints of the residents of Kingwood. That legislation, Senate Bill 89 in 1999, was a hard-fought compromise that ensures appropriate services to highly-populated areas. But it doesn't require an election prior to a city annexing. So why hasn't an election requirement been put in place over the more than a century of unilateral annexations? Hopefully, it is because key legislators understand that cities support the state's economy through the services they provide.

Texas ranks very low (45th) among the states in total per capita tax burden. Telling, however, is the fact that it ranks much higher (27th) in local taxes per capita. The reason is that, compared to those in other states, Texas cities and other local governments pay for more services that benefit the entire state, and unlike other states, Texas cities receive little state-generated revenue.

If annexation authority were to be severely curtailed or eliminated, Texas would become the only state in the nation that denies both state financial assistance and annexation authority to its cities. Opponents of annexation would be hard-pressed to point to a single state that has restricted annexation authority without implementing fiscal assistance programs under which the state helps cities pay for the infrastructure on which the entire state depends.

Further, the annexation “property rights fallacy” is one issue that should be quickly dispatched. In cities across the state, landowners protest annexations as “taxation without representation.” But annexation simply does not impose taxation without representation – those annexed become full citizens of the city with the right to vote for

or against anything. Another way to analyze the fallacy is to consider school district property taxes. Every person in Texas who owns taxable property pays his or her local school tax. Even a property owner who has no children and will never have children must do so. The reason for this is simple: For the state to succeed, it needs educated citizens. Because every property owner benefits from a prosperous state, it makes sense that every property owner should bear a portion of that tax burden. The same is true for cities and the services they provide.

Representative Huberty is not alone among state legislators who believe residents of an area should have the right to vote on whether they are annexed. But they should be aware of other states where cities are similarly handcuffed. The failure to annex surrounding areas was partially responsible for the unprecedented bankruptcy of Detroit. With annexation limitations, such as a popular vote requirement, Texas cities could languish economically as so many northern cities do.

Under the system of intergovernmental finance in Texas, state leaders have thus far recognized that – while property rights are a core issue for Texans – keeping the “Texas Miracle” alive and the economy afloat is preeminent. Legislators and city officials should always give due consideration to fairness, but legislators should also recognize that the economy, not property rights, is the key annexation issue.

Fortunately, after a long and spirited debate and a number of amendments on the House floor, the bill was killed by a procedural issue. The Senate companion bill, S.B. 1639 by Senator Donna Campbell (R – New Braunfels), passed the Senate, but did so too late to make it over to the House for consideration.

Make no mistake, annexation “reform” will return next session (as it has every session in recent memory).

The House Land and Resource Management Committee was issued the following 2016 interim charge:

*Examine current regulatory authority available to municipalities in their extraterritorial jurisdiction. Study current annexation policies in Texas. Make necessary legislative recommendations to ensure a proper balance between development, municipal regulations, and the needs of citizens in Texas.*

And the Senate Intergovernmental Relations Committee was given a similar charge:

*Identify areas of concern in regards to statutory extraterritorial jurisdiction expansion and the processes used by municipalities for annexation, specifically reviewing whether existing statutes strike the appropriate balance between safeguarding private property rights and encouraging orderly growth and economic development. Make recommendations for legislative action, if necessary.*



The efforts of city officials were key in stopping these bills, and they will be needed again in 2017.

One other issue has arisen from a bill passed in 2015. H.B. 1949 is a mostly good bill that allows a city to voluntarily annex noncontiguous property in its ETJ by using a road to connect it to the city limits. However, the bill also contained a provision relating to the annexation of county roads. The bill provides that a city that proposes to annex any portion of a county road or territory that abuts a county road must also annex the entire width of the county road and the adjacent right-of-way on both sides of the county road; and (4) if a road annexed under (3), above, is a gravel road, the county retains control of granting access to the road and its right-of-way from property that: (a) is not located in the boundaries of the annexing city; and (b) is adjacent to the road and right-of-way.

That requirement may interfere with existing boundary agreements between contiguous cities.

### **III. THE IMPORTANCE OF MUNICIPAL ANNEXATION AUTHORITY TO THE LIFE AND PROSPERITY OF TEXAS CITIES<sup>5</sup>**

Why is annexation authority so critical to Texas cities?

To understand the answer to those questions, one must look to the most basic elements of municipal finance and intergovernmental relations.

**1. Cities (city taxpayers) pay for a wide array of services and facilities that benefit entire regions and the entire state.** For example, it goes without saying that such basic activities as mail delivery couldn't take place if cities don't construct and maintain streets. The economy of Texas would crumble without city investments in the basic infrastructure upon which business and industry rely. Cities are centers of employment, health care, entertainment, transportation, and merchandising used by non-city-residents throughout the region. This means that cities must support public safety services and a physical infrastructure sufficient to serve a daily influx of visitors from throughout the metropolitan region.

**2. Most states recognize that cities should be assisted in making these expenditures that benefit entire regions and the whole state.** Virtually every state transfers state-generated revenue to cities to assist in the provision of services and facilities. They do this in recognition of the fact that cities (city taxpayers) are making expenditures that benefit all residents of the state. For example, all populous states give a portion of state gasoline tax revenue to cities to assist in street construction and repair. Many states share vehicle registration revenue or motor vehicle sales tax revenue with cities. A survey conducted by the National League of Cities found that cities across the nation receive 13 percent of their revenue from state aid.

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<sup>5</sup> This section is taken from an article authored by Frank Sturzl, TML's former Executive Director.

3. **In Texas, there is virtually no state aid to cities.** Take a look at a municipal budget and try to find a revenue line item called “Transfer from State” or “State Financial Assistance.” While such line items are common in other states, they’re simply not present in Texas. In fact, in a process called reverse intergovernmental aid, Texas cities are actually net contributors to the state.<sup>6</sup>

4. **But Texas has allowed cities to annex.** Cities have used that authority to bring adjacent areas into the city and into the system through which cities finance the services and facilities that benefit the region and state.

5. **To erode or eliminate municipal annexation authority without considering the issues of municipal revenue and intergovernmental relations would cripple cities and city taxpayers.** If annexation authority were to be eliminated, Texas would become the only state in the nation that denies both state financial assistance and annexation authority to its cities. Opponents of annexation cannot point to a single state that has restricted annexation authority without implementing fiscal assistance programs under which the state helps cities pay for the infrastructure on which the entire state depends.

## IV. An Overview of How Annexation Works

### A. The Three Questions of Annexation

Is annexation really that complicated? It depends. A better word for it might be tedious. The Municipal Annexation Act of 1963 (now found in Chapters 42 and 43 of the Texas Local Government Code) has been amended so many times over the years to address specific situations, it is sometimes hard to understand. That being said, there are essentially three questions to ask when considering the annexation of any piece of property.

1. **Why does the city want to annex?** The TML Legal Department largely advises on the annexation process from a legal rather than a policy standpoint, but it is critical for a city to understand the reasons behind an annexation to explain it to current city residents and those targeted for annexation. Most cities annex for two basic reasons: (1) to control development; and/or (2) to expand the city’s tax base. Each city should carefully consider the pros and cons of annexation, and also have an understanding of why or whether it is necessary, prior to annexing. There are numerous city officials and planning and law firms in Texas with expertise in this area, and cities should take advantage of their expertise. Imposing appropriate planning and land use controls in an area is a complex proposition, but the financial aspects of why cities annex may be even more complicated.

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<sup>6</sup> Scott Houston, *Municipal Annexation: A Key Remedy for "Reverse Intergovernmental Aid"*, 15 Tex. Tech Admin. L.J. 329, 330 (2014).

2. **Does the city have authority to annex?** Once a city has decided that it wants to annex property, the first step is to determine whether it has the *authority* to annex. To determine a city's authority, it is important to understand the fundamental difference between a general law city and a home rule city. Volumes have been written on the differences between the two. For purposes of brevity, and as a basic rule of thumb, the following statement will suffice:

*A home rule city (usually over 5,000 population) may do what is authorized by its charter and not specifically prohibited or preempted by the Texas Constitution or state or federal law; A general law city (usually under 5,000 population) has no charter and may exercise only those powers that are expressly granted or implied by statute.*

The previous statement is very generalized, but it serves to illustrate the fundamental difference between the two types of cities for all purposes, including annexation. Annexation authority is discussed in detail later, but as a general rule the authority to annex is found in Subchapter B of Chapter 43 of the Local Government Code. For example, Section 43.021 authorizes a home rule city to annex according to its charter, and most home rule charters authorize unilateral annexation. On the other hand, general law cities, for most annexations, must receive a request from landowners or voters prior to annexing. Some exceptions allow general law cities to annex without consent, but those are very limited. The bottom line for general law cities is that the legislature has seen fit to severely limit when they can annex.

**Requirement to offer development agreement.** Section 43.035 of the Texas Local Government Code was enacted in 2007. The provision should be the first place a city looks when it decides to annex because it prohibits a city from annexing an area that is appraised for ad valorem tax purposes as agricultural, wildlife management, or timber management, unless the city offers a development agreement to the landowner that would:

- guarantee the continuation of the extraterritorial status of the area; and
- authorize the enforcement of all regulations and planning authority of the city that do not interfere with the use of the area for agriculture, wildlife management, or timber.

A landowner may either: (1) accept the agreement; or (2) decline to make the agreement and be subject to annexation. An annexation without offering an agreement is void. The intent is to allow a landowner who truly intends to continue using his land for agriculture, wildlife management, or timber management to remain outside of a city's limits, but not to allow unscrupulous developers to subvert municipal regulations.

**Requirement that area be in the city's ETJ.** An area to be annexed must be within the city's extraterritorial jurisdiction (ETJ), and the area to be annexed cannot be located within the ETJ of another city.

**Authority to annex unilaterally (without consent).** Most home rule charters in Texas, read in conjunction with Chapter 43 of the Local Government Code, provide for unilateral (non-consent) annexation by home rule cities. Chapter 43 provides the statutory authority for general law cities to annex, and Section 43.033 of the Texas Local Government Code is the only major exception to the rule that general law cities may only annex by petition (with consent). That section allows for unilateral annexation by a city with a population between 1,000 and 5,000 if the city: (1) is providing the area with water or sewer service; and (2) the area: (A) does not include unoccupied territory in excess of one acre for each service address for water and sewer service; or (B) is entirely surrounded by the city and the city is a type A general-law city. (Section 43.033 also has a stand-alone development agreement offer requirement that is similar to section 43.035.) Other specific provisions may allow a general law city to annex without consent, but they are very limited.

**Authority to annex by petition (with consent).** All cities are authorized to annex a sparsely occupied area on petition of the area's landowners, if the area meets certain requirements. In addition, general law cities may annex inhabited areas if the majority of the qualified voters of the area are in favor of becoming part of the city.

- 3. What annexation procedures must a city follow?** The provisions that give a city the power or *authority* to annex are generally codified in Subchapter B of the Texas Local Government Code and in the charter of a home rule city. However, the *procedures* that a city must follow for an annexation are codified in Subchapters C (plan annexations – three-year process) or C-1 (exempt annexations – much shorter process) of the Local Government Code. What subchapter to follow is based on whether or not the area must be included in an annexation plan. The procedures prescribed by Subchapters C or C-1 must be followed for every annexation of any type.<sup>7</sup>

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<sup>7</sup> The Municipal Annexation Act of 1963 (the Act that imposed the procedural requirements for annexation) provided that the provisions of the Act do not repeal any other law or part of law unless they are expressly inconsistent with other laws. In *Sitton v. City of Lindale*, 455 S.W.2d 939 (Tex. 1970), the Texas Supreme Court held that there is no inconsistency between the source of a city's power to annex (i.e., its authority to annex without consent or on petition), and the procedural requirements of the Act (i.e., the notice and hearing requirements). Because there was no inconsistency, the procedural requirements of the Act had to be followed.

There are at least two other cases involving voluntary annexations in which the courts state that the notice and hearing procedures apply to the voluntary annexations of those territories. In the first case, *Universal City v. City of Selma*, 514 S.W. 2d 64 (Tex. Civ. App. – Waco 1974) writ ref. n.r.e., Mr. R.L. Ham petitioned Universal City to annex his 65 acres. Seven days later, Universal City annexed the Ham tract. With regard to the annexation, the court stated: "The record fails to show that Universal City complied with the notice provisions of Sec. 6, Article 970a [now codified at Tex. Local Gov't Code §

**Annexation Plan.** Every city in Texas was required to adopt an annexation plan on or before December 1, 1999. The term “annexation plan” is a legal term of art, and is adopted for the purposes of deciding which procedures apply to the annexation of a particular area. Certain types of area are exempt from the plan requirement. For example, if an area contains fewer than 100 residential dwellings, the area is not required to be placed in an annexation plan. Also, if the land is annexed by petition of area landowners or voters, the area is not required to be in a plan. Because of these exemptions, it is probably fair to say that many annexations will not be required to be in an annexation plan. Thus, some cities will have a one page plan stating that they do not intend to annex any area for which an annexation plan is required.

## B. Annexation Plan

Every city in Texas was required to adopt an annexation plan on or before December 1, 1999.<sup>8</sup> TEX. LOC. GOV'T CODE §43.052(c), *Statutory note (b)*. The plan must identify annexations that will occur beginning three years after the date the plan is adopted. *Id.* at §43.052(c). The term “annexation plan” is a legal term of art, and is adopted for the purposes of deciding which procedures apply to the annexation of a particular area.

Certain types of area are exempt from the plan requirement. For example, if an area contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract, the area is not required to be placed in an annexation plan. *Id.* at §43.052(h)(1). In other words, an area with any number of tracts so long as no more than 99 of the tracts contain residential dwellings is not required to be in a plan (that includes vacant land or land with only business uses).<sup>9</sup> Also, if the land is annexed by petition of area landowners or voters, the area is not required to be in a plan. *Id.* at §43.052(h)(2). Because of these exemptions, it is probably fair to say that many annexations will not be required to be in an annexation

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43.063] when it enacted the Ham Tract annexation ordinance. Indeed the proof on the question supports an implied finding that these notice requirements were not met. Noncompliance with these provisions would render the ordinance void when enacted.” In *City of Bells v. Greater Texoma Utility Authority*, 790 S.W. 2d 6 (Tex. Ct. App. – Dallas 1990), writ den., found that the ordinance purporting to annex land at the request of the property owners, which was passed without complying with any of the notice requirements, was not valid when enacted. (In that case, the invalidity was cured by the legislature's subsequent enactment of a statute granting blanket approval to all annexations conducted three years prior.)

<sup>8</sup> If a city has an Internet Web site, the plan and any amendments must be posted on the Web site. TEX. LOC. GOV'T CODE §43.052(j).

<sup>9</sup> Op. Tex. Att'y Gen No. GA-0737 (2009). In addition, §43.052(h) contains several other examples of exempt areas, including area that is or was the subject of an industrial district contract under §42.022 or a strategic partnership agreement under §43.0751, area that is located in a colonia, area that is annexed under §§ 43.026, 43.027, 43.029, or 43.031, area that is within a closed military base, or the city determines that the annexation is necessary to protect the area from imminent destruction of property or injury to persons or a public or private nuisance.

plan. Thus, some cities will have a one page plan stating that they do not intend to annex any area for which an annexation plan is required.<sup>10</sup>

If land is required to be in a plan, nothing prohibits a city from amending the plan to include new areas, but the city may not annex such areas until three years after the area is included in the plan. *Id.* at §43.052(c). If an area is removed from the plan within 18 months of being placed in the plan, the area cannot be placed back in the plan for one year. *Id.* at §43.052(e). Similarly, if an area is removed from the plan after 18 months of being placed in the plan, the area cannot be placed back in the plan for two years. *Id.* If an area is placed in, and stays in, the plan, its annexation must be completed 31 days after the three-year “procedures/negotiation” period, or the city must wait five more years to annex the area. *Id.* at §43.052(g).

In addition, §43.052(f) requires that, before the 90<sup>th</sup> day after the city adopts or amends an annexation plan, the city is required to give written notice to:

1. each property owner in the affected area, as indicated by the appraisal records furnished by the appraisal district for each county in which the affected area is located;
2. each public entity, as defined by §43.053<sup>11</sup>, or private entity that provides services in the area proposed for annexation; and
3. each railroad company that serves the municipality and is on the city’s tax roll if the company’s right-of-way is in the area proposed for annexation.

One issue in particular has arisen with at least one city. That question is whether land that is included by a city in an annexation plan, but that is not technically required to be in the plan, may be removed without incurring the time penalties in §43.052. At least one district court has held that the answer to that question is “yes,” the area may be removed without incurring penalties. In *Lago Santa Fe Property Owners’ Association v. City of Santa Fe, Texas* (Cause No. 01-CV-0981), the city’s motion for summary

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<sup>10</sup> In *City of San Antonio v. Hardee*, 70 S.W.3d 207 (Tex. App.—San Antonio 2001, no pet.), the plaintiff landowners challenged an annexation of their property by the City of San Antonio based on the fact that the city acted outside its authority by failing to adopt a required annexation plan under §43.052 (the landowners also argued that the city failed to request an inventory of services and facilities for an annexation service plan and to compile a comprehensive inventory of services for the annexation service plan under §43.052). The court rejected the argument, noting that Section 17 of S.B. 89 clearly states that “a municipality may continue to annex any area during the period beginning December 31, 1999, and ending December 31, 2002, under Chapter 43, Local Government Code, as it existed immediately before September 1, 1999, if the area is not included in the annexation plan, and the former law is continued in effect for that purpose.” This case appears to stand for the proposition that, even if a city has never adopted an annexation plan, it may nonetheless conduct “grandfathered annexations” under the old law before December 31, 2002 or perhaps even exempt annexations under §43.052(h). However, annexing any property without a plan could leave the annexation open to a procedural challenge through a *quo warranto* action. See *City of Balch Springs v. Lucas*, 101 S.W.3d 116 (Tex. App.—Dallas 2002).

<sup>11</sup> A “public entity” includes a municipality, county, fire protection service provider, including a volunteer fire department, emergency medical services provider, including a volunteer emergency medical services provider, or a special district, as that term is defined by Section 43.052. *Id.* at §43.053(a).

judgment in the District Court, 212<sup>th</sup> Judicial District, Galveston County, was granted in April of 2002, and the landowners did not appeal.

This suit was one of the first to involve a claim under the amended annexation provisions of §43.052. The City of Santa Fe's annexation plan, which was passed and adopted on December 9, 1999, included the Lago Santa Fe subdivision. The city subsequently realized that the subdivision was exempt from the annexation plan requirement under §43.052(h)(1) and that it was authorized to annex the area immediately. The city notified the landowners that they had been removed from the plan and that the city would annex them immediately.

The landowners petitioned the city to be placed back in the annexation plan and argued unsuccessfully that, while the city was authorized to remove them from the plan, the city would be bound by the waiting periods under §43.052. The court rejected the landowners' argument and granted summary judgment in favor of the city. Thus, the question of whether land that was included by a city in an annexation plan, but that was not technically required to be in the plan, may be removed without incurring the time penalties in §43.052, is answered in the affirmative by at least one district court.<sup>12</sup>

Section 43.052(i) provides a remedy to a landowner who believes that his property should be in an annexation plan. That provision provides that:

A municipality may not circumvent the requirements of this section by proposing to separately annex two or more areas described by Subsection (h)(1) if no reason exists under generally accepted municipal planning principles and practices for separately annexing the areas. If a municipality proposes to separately annex areas in violation of this section, a person residing or owning land in the area may petition the municipality to include the area in the municipality's annexation plan. If the municipality fails to take action on the petition, the petitioner may request arbitration of the dispute.

In *Hughes v. City of Rockwall*, 153 S.W.3d 709 (Tex. App.-Dallas 2005, pet. filed February 23, 2005), the principal issue before the court was whether Texas Local Government Code Section 43.052(i) is procedural or substantive in nature. In that case, the city denied a private landowner's petition to include its land in the city's three-year

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<sup>12</sup> See also, *Town of Fairview v. H. Roger Lawler*, No. 05-07-01617-CV (Tex. App.—Dallas May 2, 2008). Lawler sued the city after it annexed his property under Section 43.033 of the Local Government Code. Lawler argued that the annexation was void under Section 43.141 because the city had re-annexed the land after the property had been disannexed, and that it was not within the city's three-year plan. The city argued that the land was properly annexed, that the annexation could only be disputed by a quo warranto proceeding, and that Section 43.141 did not apply because the land was not disannexed for failure to provide services under Section 43.141, but was disannexed under section 43.033. The city filed a plea to the jurisdiction on these issues, which the trial court denied. In the interlocutory appeal, the court of appeals held that Lawler did not have standing to sue because a quo warranto proceeding was the only proper procedure to dispute the annexation, and that the ten year waiting period for re-annexation does not apply in every disannexation (rather, it applies only when property is disannexed under Section 43.141).

annexation plan, and the landowner sued to enforce its right to arbitration provided by §43.052(i) after the city rejected – through a resolution of the city council – the request to arbitrate the dispute. The Dallas Court of Appeals acknowledged the general rule that procedural defects must be raised in a *quo warranto* proceeding, but held that §43.052(i) provides specific legislative authorization for a private person to initiate and sue to compel arbitration when a city takes no action or denies the petition for inclusion of land. *Hughes*, 153 S.W.3d at 713-14. The city appealed the decision to the Texas Supreme Court in early 2005, and a decision was issued in January of 2007. The Supreme Court concluded that the plain language of the statute controls, and that so long as a city considers and rejects a request for arbitration, the city has done its part. The available remedy for the landowner in that case is a *quo warranto* proceeding (a suit brought by the district or county attorney on behalf of the state to challenge alleged procedural irregularities in an annexation).<sup>13</sup> The last line of the opinion is one that will surely continue the legislative debate on annexation: “If the Legislature desires to amend the statute to add words so that the statute will then say what is contended for by the Estate, we are confident it will do so.”

### C. Procedures

Senate Bill 89, the comprehensive 1999 rewrite of Texas annexation statutes, was enacted to restrict perceived abuses of the annexation process by certain cities. The bill was effective over 15 years ago, but it is still frequently referred to by name rather than where it is codified (throughout Chapter 43 of the Local Government Code). The end result of S.B. 89 is a complex, sometimes difficult to understand, rewrite of the procedures required to annex.

Under S.B. 89, there are two basic procedural schemes, both of which are based on the inclusion or exclusion of an area in a city’s annexation plan (discussed above):

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<sup>13</sup> *City of Rockwall v. Hughes*, 246 S.W.3d 621 (Tex.2008). The dissent seemed to misunderstand the basic foundation of state law governing municipal annexation. According to footnote 11: “The record suggests that few cities enact three-year municipal annexation plans. In fact, amicus curiae The Texas Municipal League (“TML”), an association of more than 1,070 incorporated cities that advocates municipal interests, notes that many of its member “cities will have a one page plan stating that they do not intend to annex any area for which an annexation plan is required.” See Scott N. Houston, Tex. Mun. League, *Municipal Annexation in Texas: “Is It Really That Complicated?”* 13 (2003)...The City of Rockwall’s annexation “plan” is a near carbon copy: “[t]he City does not intend to annex any territory that in order to be annexed, is required to be in an annexation plan.” City of Rockwall, Tex., Ordinance 99-49 (Dec. 20, 1999). Hughes argues that such “plans” clash with a key objective underlying the Legislature’s 1999 rewrite, that annexation decisions should be driven not by circumvention of the three-year planning process but by order, thoughtfulness, and predictability. Judging by the myriad amicus briefs filed by Texas cities, expedited annexations under (h)(1) are so common that (h)(1) is actually the rule. TML’s brief admits as much, saying the (h)(1) exception “is routinely used by most home rule cities. Only a handful of cities annex under an annexation plan” at all.” Author’s note: the purpose of S.B. 89 was to ensure provision of adequate services to highly-populated areas, and most annexations aren’t of that type of area. See also *Round Rock Life Connection Church, Inc. v. City of Round Rock*, 2011 WL 589832.



1. annexation of area that is **exempt** from the annexation plan requirement, and
2. annexation of area **included in** an annexation plan.

First, city officials must decide whether an area the city wishes to annex falls under one of the exemptions from the annexation plan requirement found in Local Government Code §43.052(h). According to that subsection, an area does not have to be included in an annexation plan if:

- (1) the area contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract;
- (2) the area will be annexed by petition of more than 50 percent of the real property owners in the area proposed for annexation or by vote or petition of the qualified voters or real property owners as provided by Subchapter B;
- (3) the area is or was the subject of:
  - (A) an industrial district contract under Section 42.044; or
  - (B) a strategic partnership agreement under Section 43.0751;
- (4) the area is located in a colonia, as that term is defined by Section 2306.581, Government Code;
- (5) the area is annexed under Section 43.026 [area a general law city owns], 43.027 [general law authority to annex navigable stream], 43.029 [certain school land by petition], or 43.031 [by boundary agreement];
- (6) the area is located completely within the boundaries of a closed military installation; or
- (7) the municipality determines that the annexation of the area is necessary to protect the area proposed for annexation or the municipality from:
  - (A) imminent destruction of property or injury to persons; or
  - (B) a condition or use that constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state.

If an area is exempt from the plan requirement, a city should use Local Government Code Chapter 43, Subchapter C-1 procedures. The Subchapter C-1 procedures are almost identical to the pre-S.B. 89 procedures (see “Procedures for Areas Exempt from the Annexation Plan Requirement”), with the exception of certain more stringent notice requirements.<sup>14</sup>

If an area is not exempt, a city must place it in an annexation plan and wait three years to annex the area under Chapter 43, Subchapter C procedures. Note: “three-year waiting period” is actually a misnomer, because a city must begin notice, inventory, service plan, hearing, and negotiation procedures almost immediately after placing an area in an annexation plan (see “Unilateral Annexation for Area Included in Annexation Plan”).

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<sup>14</sup> For example, §43.063(c) requires the notice of hearings to be published in the city's Internet Web site, if the city has one, and, for annexations that are exempt from the plan requirement under §43.052(h)(1)(100 tracts exemption), additional written notice must be sent to property owners, service providers, and railroads in the area to be annexed.

## **V. ANNEXATION AUTHORITY**

By way of a very brief introduction, it is important to understand the fundamental difference between a general law city and a home rule city. Volumes have been written on the differences between the two. For purposes of brevity, and as a basic rule of thumb, the following statement will suffice:

*A home rule city (usually over 5,000 population) may do what is authorized by its charter and not specifically prohibited or preempted by the Texas Constitution or state or federal law; A general law city (usually under 5,000 population) has no charter and may exercise only those powers that are expressly granted or implied by statute.*

The previous statement is very generalized, but it serves to illustrate the fundamental difference between the two types of cities for all purposes, including annexation. For more information on the differences or a more detailed evolution of the history and powers of Texas cities, please contact the TML Legal Services Department at 512-231-7400.<sup>15</sup>

### **A. Requirement to Offer Development Agreement**

House Bill 1472, which became effective on May 25, 2007, enacted Section 43.035 of the Texas Local Government Code. The bill provides that a city may not annex an area that is appraised for ad valorem tax purposes as agricultural, wildlife management, or timber management unless the city offers a development agreement to the landowner that would:

- guarantee the continuation of the extraterritorial status of the area; and
- authorize the enforcement of all regulations and planning authority of the city that do not interfere with the use of the area for agriculture, wildlife management, or timber.

TEX. LOC. GOV'T CODE § 43.035(b). Under the bill, the landowner may either: (1) accept the agreement; or (2) decline to make the agreement and be subject to annexation. An annexation that is completed without offering an agreement is void. As such, a city should document the offer and its acceptance or rejection. Even if an annexation is voluntary, a city should document the fact that the owner has rejected the offer of an agreement.

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<sup>15</sup> See also D. Brooks, *Municipal Law and Practice*, 22 Texas Practice Ch. 1 & T. O'Quinn, *History, Status, and Function*, Introduction to Title 28 of the TEX. REV. CIV. STAT. (Vernon 1963).

Subchapter G of Chapter 212 of the Texas Local Government Code, which was enacted in 2003 and slightly amended in 2011, allows any city (other than the City of Houston) to enter into a written contract with an owner of land in the city's extraterritorial jurisdiction to: (1) guarantee the land's immunity from annexation for a period of up to 45 years; (2) extend certain aspects of the city's land use and environmental authority over the land; (3) authorize enforcement of land use regulations other than those that apply within the city; (4) provide for infrastructure for the land; and (5) provide for the annexation of the land as a whole or in parts and to provide for the terms of annexation, if annexation is agreed to by the parties. TEX. LOC. GOV'T CODE § 212.172.

Development agreements under §212.172 have most frequently been used by cities as an alternative to annexing land on which new residential development is planned. The agreements allow a city to provide for sustainable residential development by controlling lot size and density, infrastructure quality, and other matters. They are often used when the new development is created as a special district. The district imposes ad valorem taxes to pay for infrastructure, and it is sometimes not in the best financial interests of current city residents or the residents of the new development to include them in the city until some future date.<sup>16</sup>

After the legislative authorization of development agreements in 2003, some cities used the agreements in a somewhat novel way. While the intent of the development agreement statute was arguably to allow a city to regulate development in the city's extraterritorial jurisdiction in lieu of annexing, the broad authority granted by the statute allows for what some have termed "non-development" or "non-annexation" agreements.

In 2003, as certain cities began annexations of farmland in an attempt to regulate future development, rural landowners who claimed to have no intention of developing their property became increasingly concerned that their chosen lifestyle was in jeopardy. Influential legislators, as well as the Texas and Southwestern Cattle Raisers Association and Texas Farm Bureau, became involved in the issue. As a compromise, the cities and landowners ultimately used the authority of Section 212.172 to enter into "non-development" agreements, under which a city agrees to not annex the land for a period of time in exchange for the landowner's promise to not develop the land. Legislators and others believed that the compromise agreements were the right tool to protect farms and ranches from what they believed was unnecessary municipal annexation.

In 2005, H.B. 2305 contained provisions that were very similar to those found in H.B. 1472. Texas Municipal League staff testified on H.B. 2305 in the House Land and Resource Management Committee at that time, pointing out various concerns and unintended consequences that might result from the bill's passage. H.B. 2305 was

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<sup>16</sup> Of note, at least one court has concluded that a development agreement, depending on its terms, may be subject to the immunity waiver provided in Local Government Code Section 271.152. *JNC Land Co., Inc. v. City of El Paso*, 479 S.W.3d 903 (Tex. App. 2015), *review denied* (Sept. 11, 2015)

voted from committee and placed on the House calendar for consideration, but the bill had little chance of passage due to the late date of the session.

H.B. 1772 was another bill in 2005 that slightly modified the authority of certain general law cities to annex, and was much further along in the process. As often happens near the end of a legislative session, the provisions of H.B. 2305 were added to H.B. 1772 as a Senate committee amendment. H.B. 1772 passed both the House and the Senate unanimously, but ran into trouble due to the bill's caption. A bill's "caption" describes the subject matter of the bill, and the subject matter of the bill must be germane (i.e., relevant) to the caption. H.B. 1772's caption referenced only general law cities. As such, the annexation provision relating to all cities was not germane.

A conference committee was appointed to work out the issue, and the final version of the bill added Section 43.033(a)(7) to the Local Government Code. That section contained the requirement to offer a development agreement, but it only applies to the very limited authority of certain general law cities to annex without consent. Currently, both Sections 43.033(a)(7) and 43.035, as applicable, must be complied with prior to annexing property.

Other than providing that a city may not annex an area that is appraised for ad valorem tax purposes as agricultural, wildlife management, or timber management unless the city offers to make a development agreement, Section 43.035 is silent regarding when the offer must be made. Each city should decide when it is appropriate to offer the agreement. In most cases, the offer of the agreement would be made prior to expending time and resources on the required prerequisites to annexation (e.g., service plan, notice, hearings, etc.).

A more important question is: how long does the landowner have to accept or decline the agreement? The law is also silent on this question. Section 43.033 (the general law statute that was amended in 2005) provides that a city may annex the property if "the landowner fails to accept...[the offer]...within 30 days after the date the offer is made." The fact that the new statute is silent as to time indicates that the decision of how long a city gives a landowner to accept or decline an agreement is up to each individual city. Of course, analogizing to contract law and pursuant to the Code Construction Act, the time period should be reasonable based on the circumstances. TEX. GOV'T CODE § 311.021. In addition, a city should retain documentation that an agreement was offered, whether the agreement was accepted or refused.

What provisions should be in the agreement? Local Government Code Section 212.172, read in conjunction with Section 43.035, indicates broad authority for a city to offer an agreement on the city's terms. Most cities' proposed agreement would include provisions such as:

- A guarantee by the city of "the continuation of the extraterritorial status of the area." In other words, a guarantee that the city won't annex the property for a

definite term unless the terms of the agreement are violated. And a term not to exceed 45 years. TEX. LOC. GOV'T CODE §§ 43.035(b)(1); 212.172(b)(1) and (d).

- A promise by the owner not to use the property for any purpose other than for agriculture, wildlife management, and/or timber management, and related incidental activities. *Id.* § 212.172(b)(9).
- A promise by the owner that no person will file any type of subdivision plat or related development document for the property with any entity. *Id.* § 43.035(d).
- A provision that a violation of the agreement by the landowner by commencing development or by any other manner will constitute a petition for voluntary annexation in addition to other remedies available to the city, and that the owner waives any and all claims to a vested right of any kind. *Id.* § 212.172(b)(9).
- A provision authorizing the city to enforce all of the city's regulations and planning authority that do not interfere with the use of the property for agriculture, wildlife management, or timber, in the same manner that the regulations are enforced within the city's boundaries (or in a different manner, as authorized by Section 212.172). *Id.* § 212.172(b)(4); (b)(6); (b)(8).
- Recordation of the agreement in the real property records of the county, so that the agreement will run with the land. *Id.* § 212.172(f).
- Perhaps a provision providing that, upon the expiration of the agreement, the agreement constitutes a petition for annexation by the property owner and perhaps waiving some of the notice and hearing procedures in Subchapter C of Chapter 43 (which is arguably authorized). *Id.* § 212.172(b)(7).

When drafting an agreement, city officials should consider the legislative intent behind the requirement to offer an agreement. The intent is to allow a landowner who truly intends to continue using his land for agriculture, wildlife management, or timber management to remain outside of a city's limits for a certain period of time. The provisions of a proffered agreement should reflect that intent. Drafting and offering a completely unreasonable agreement to an eligible landowner does not carry out the intent of the statute, and could lead legislators to seek more restrictive provisions in the future.

On the other hand, the purpose of the requirement is to protect farmers and ranchers, and not to allow unscrupulous developers to subvert municipal regulations. To that end, according to Section 43.035(d), a provision of a development agreement entered into under that section is void if the landowner files any type of subdivision plat or related development document for the area with a governmental entity that has jurisdiction over the area, regardless of how the area is appraised for ad valorem tax purposes. If a landowner tries to develop in violation of an agreement, the city can annex immediately.

There are several other issues relating to Section 43.035 that a city should be aware of:

- **Contiguity:** In most cases, a city may annex only an area that is contiguous to the current city limits. Section 43.035(c) provides that, for purposes of any law, including a municipal charter or ordinance, relating to municipal authority to annex an area adjacent to the city, an area adjacent or contiguous to an area

that is the subject of a development agreement is considered adjacent or contiguous to the city. In other words, a city is not prohibited from annexing land beyond the area that is the subject of the agreement solely because that land is not contiguous to the city limits, so long as the area touches the area that is subject to the development agreement. A question that follows is whether it is also reasonable to conclude that the area that is the subject of the agreement acts to expand the city's extraterritorial jurisdiction? That expansion is not expressly provided for in the statute and has not been tested in court.

- Vesting: Section 43.035(e) provides that a development agreement under that provision is not a permit for purposes of the "vesting statute," Chapter 245 of the Local Government Code.

Many cities have entered into agreements with landowners. Examples of those agreements are available on the Texas Municipal League's Web site at [www.tml.org](http://www.tml.org) by clicking on "Legal Research." Those cities have expressed concern with some of the statute's provisions, but no legislative changes have been enacted since 2007. In any case, each city should consult with local legal counsel regarding the appropriate terms of its agreement.

### **B. Requirement that Area be in the City's ETJ**

In addition to regulating annexation authority and procedures, the Municipal Annexation Act created the concept of extraterritorial jurisdiction (ETJ) in 1963. An area to be annexed must be within the city's ETJ under Section 43.051. In addition, under §§42.022 and 43.051, the area to be annexed cannot be located within the ETJ of another city. The policy purpose underlying ETJ is described in Section 42.001 of the Texas Local Government Code:

The legislature declares it the policy of the state to designate certain areas as the extraterritorial jurisdiction of municipalities to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities.

ETJ is defined as "the unincorporated area that is contiguous to the corporate boundaries of the municipality."<sup>17</sup> The geographical extent of any city's ETJ is contingent upon the number of inhabitants of the city:

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<sup>17</sup> Tex. Local Gov't Code § 42.021.

<u>Number of Inhabitants</u>	<u>Extent of Extraterritorial Jurisdiction</u>
Fewer than 5,000	One-half Mile
5,000—24,999	One Mile
25,000—49,999	Two Miles
50,000—99,999	Three and one-half Miles
100,000 and over	Five Miles <sup>18</sup>

Section 42.021 uses the phrase “number of inhabitants” rather than “population.” That distinction is significant because of Chapter 311 of the Texas Government Code (the Code Construction Act). According to Section 311.005(3) of the Government Code, the term “population” in a state statute means “the population shown by the most recent federal decennial census.” But the extent of a city’s ETJ is based upon the number of “inhabitants.” The attorney general’s office concluded in Letter Opinion No. LO-94-033 (1994) that “a municipality may choose the method by which it will ascertain the boundaries of its extraterritorial jurisdiction.” Thus, a city may by ordinance or resolution determine the number of inhabitants within its corporate limits, and that determination if reasonable will define the extent of its ETJ.<sup>19</sup>

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<sup>18</sup> *Id.* at § 42.021.

<sup>19</sup> *State ex rel. Rose v. City of La Porte*, 386 S.W.2d 782, 785 (Tex.1965); *City of Burleson v. Bartula*, 110 S.W.3d 561 (Tex.App.—Waco 2003, no pet.). A more recent case is also instructive. In *City of Granite Shoals v. Winder*, 280 S.W.3d 550 (Tex.App.—Austin, 2009), the general law city of Granite Shoals annexed two islands on Lake LBJ. The islands consisted of a handful of high-value homes and were annexed pursuant to Local Government Code Section 43.033. That section allows unilateral annexation by a general law city if certain elements are met. Another provision in Section 43.033 allows a majority of property owners in the annexed area to petition for disannexation, and the island property owners took advantage of that provision and were disannexed. In the meantime, the voters of the city adopted a home rule charter. The city then re-annexed the islands pursuant to its home rule authority. The property owners then filed for a declaratory judgment that, among many other things, the city did not have 5,000 inhabitants and was thus not eligible for home rule status, and that the city acted in bad faith in making the determination of the number of inhabitants. The city answered, arguing lack of subject matter jurisdiction and standing issues. The city argued that the court lacked subject matter jurisdiction because the only way to challenge the election was pursuant to an election contest. The city further argued that the only way to challenge the “bad faith” aspect of conversion to home rule is by a quo warranto suit. Citing incongruent precedent relating to previous election law provisions, the court concluded that the challenge regarding the number of inhabitants falls outside of the scope of the current election contest provision (and is thus not an “election contest”). The court held that the property owners could continue their declaratory judgment action. With regard to the city’s *quo warranto* argument, the court held that the city’s determination of inhabitants could be set aside upon a showing of bad faith. If the property owners can show that the determination was made in bad faith, the conversion to home rule becomes void ab initio, which allows a collateral attack on the conversion. Because the property owners raised more than a scintilla of evidence that the city acted in bad faith, the court examined the methods by which the city made the determination of inhabitants. City witnesses testified that they counted the number of utility connections and multiplied by 3. The city did not use demographics or census data to determine that multiplier. Those facts were enough to establish the possibility of bad faith. The court affirmed the denial of the trial court’s plea to the jurisdiction.

## C. Authority to Annex Unilaterally

### 1. Charter Provisions (Home Rule Cities)

Most home rule charters in Texas, read in conjunction with Chapter 43 of the Local Government Code, provide for unilateral (non-consensual) annexation by home rule cities. Unilateral annexation authority is not necessarily uniform in all charters, and procedures prescribed in the charters may also vary. Whatever the procedures may be in a particular charter, they must be strictly followed, except when the procedures conflict with state law, in which case the state law governs. If the procedures can be reconciled, then both must be followed.<sup>20</sup> Section 43.021 of the Texas Local Government Code provides the general authority for a home rule city to annex area. That section states that:

A home-rule municipality may take the following actions according to rules as may be provided by the charter of the municipality and not inconsistent with the procedural rules prescribed by this chapter:

- (1) fix the boundaries of the municipality;
- (2) extend the boundaries of the municipality and annex area adjacent to the municipality<sup>21</sup>; and
- (3) exchange area with other municipalities.

While a home rule city wouldn't usually need "enabling" legislation like the above to take action, it is meant to make clear that home rule cities are annexing pursuant to their

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<sup>20</sup> Particular attention should be paid to §43.022 of the Local Government Code, which expressly requires separate voter approval by voters in the city and in the area to be annexed in certain circumstances, among other requirements. For example, the charter in the City of Burkburnett provides that the citizens of the city vote on the annexation of new territory. The charter of the City of George West authorizes the city council to put the question of annexation to the voters in both the city and area proposed for annexation (with a combined result governing). The charter of the City of Georgetown allows unilateral or pursuant to an election, although it is not clear as to who votes in the election. It appears that §43.022 would mandate voter approval in both the city and area to be annexed in all three of those cities, regardless of charter language.

<sup>21</sup> This provision requires the area proposed for annexation to lie adjacent to the city. "Adjacent" means "contiguous." *State ex rel. Pan American Production Co. v. Texas City*, 303 S.W.2d 780, 786 (Tex. 1957)(holding that "the usual meaning of the word 'adjacent' must be applied to the words of the statute and that the Legislature used the term in the sense of being 'contiguous' and 'in the neighborhood of or in the vicinity of,' without reference to the character of the land or the use to which it is put"). See also *City of Irving v. Dallas Flood Control District*, 383 S.W.2d 571 (Tex. 1964)(citing many cases that were mostly decided before the provisions prohibiting strip annexations were enacted). At any rate, most would agree that a city may not annex "islands" that are not attached in any way to the city itself without the specific statutory authority to do so. *City of Willow Park v. Bryant*, 763 S.W.2d 506 (Tex. App. Fort Worth 1988, no writ); *But C.f.* Tex. Loc. Gov't Code § 42.0225 (providing that the annexation of an area that is not contiguous to a city does not expand the city's extraterritorial jurisdiction around that area) and Op. Tex. Att'y Gen No. GA-0014 (concluding that a city's ETJ does not expand when it annexes an "island", but not addressing the authority to do so).



charters, but that the legislature has the final word on what they can and can't do, and how they must do so.

## **2. Local Government Code Provisions (General Law Cities)**

Chapter 43 provides the statutory authority for general law cities to annex. Section 43.033 of the Texas Local Government Code<sup>22</sup> is the only major exception (see section D.3. for other minor exceptions) to the rule that general law cities may only annex by petition (with consent). That section allows for unilateral annexation and states that:

(a) A general-law municipality may annex adjacent territory without the consent of any of the residents or voters of the area and without the consent of any of the owners of land in the area provided that the following conditions are met:

- (1) the municipality has a population of 1,000 or more and is not eligible to adopt a home-rule charter;
- (2) the procedural rules prescribed by this chapter are met;
- (3) the municipality must be providing the area with water or sewer service;
- (4) the area:
  - (A) does not include unoccupied territory in excess of one acre for each service address for water and sewer service; or
  - (B) is entirely surrounded by the municipality and the municipality is a Type A general-law municipality;
- (5) the service plan requires that police and fire protection at a level consistent with protection provided within the municipality must be provided to the area within 10 days after the effective date of the annexation;
- (6) the municipality and the affected landowners have not entered an agreement to not annex the area for a certain time period; and
- (7) if the area is appraised for ad valorem tax purposes as land for agricultural or wildlife management use under Subchapter C or D, Chapter 23, Tax Code:
  - (A) the municipality offers to make a development agreement with the landowner in the manner provided by Section 212.172 that would:
    - (i) guarantee the continuation of the extraterritorial status of the area; and
    - (ii) authorize the enforcement of all regulations and planning authority of the municipality that do not interfere with the agricultural or wildlife management use of the area; and

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<sup>22</sup> Note that Section 43.033 was modified by H.B. 1772 during the 2005 regular session to require a development agreement offer (see also Section 43.055, added by H.B. 1472 in 2007).

- (B) the landowner fails to accept an offer described by Paragraph (A) within 30 days after the date the offer is made.
- (b) If, after one year but before three years from the passage of an ordinance annexing an area under this section, a majority of the landowners or registered voters in the area vote by petition submitted to the municipality for disannexation, the municipality shall immediately disannex the area. If the municipality disannexes the area under this subsection, the municipality may discontinue providing the area with water and sewer service.

## **D. Other Annexation Authority**

### **1. Annexation by Petition of Area Voters (General Law Cities)**

Section 43.024 of the Local Government Code authorizes a type A general law city to annex an area if the majority of the qualified voters of the area vote in favor of becoming part of the city. *Id.* at §43.024(b). The approval of the majority of voters may be shown by any three of those voters preparing an affidavit to the fact of the vote and filing the affidavit with the mayor of the city. *Id.* The vote is not required to be done by ballot or at any type of formal election. The voter's intentions may be expressed by any method that is satisfactory to themselves and the city council.<sup>23</sup> Upon receipt of the affidavit, the mayor must certify the filed affidavit to the city council. The city council then may, after all of the procedural requirements of Chapter 43 are met, annex the area by ordinance. *Id.* at §43.024(c). This section only allows the annexation of an area that is one-half mile or less in width and is contiguous to the city limits. *Id.* at §43.024(a).

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<sup>23</sup>*Universal City v. City of Selma*, 514 S.W.2d 64, 72 (Tex. App.--Waco 1974, writ ref'd n.r.e.). See also *State v. City of Waxahachie*, 17 S.W. 348, 349-350 (Tex. 1891)(holding that lack of notice to some voters in the area does not render annexation void). In addition, *Village of Salado v. Lone Star Storage Trailer, II Ltd.*, Not Reported in S.W.3d, 2009 WL 961570 (Tex.App.—Austin,2009) is a case that confirmed the broad authority of resident voters to draw the area for annexation. In that case, the Village of Salado annexed property along its eastern boundary, including property owned by Lone Star, pursuant to the voluntary annexation provision of Section 43.025 of the Local Government Code. In this annexation, the area had multiple qualified voters, but Lone Star's property was the only property that was actually contiguous to the city. After the annexation, Lone Star filed a declaratory judgment action asking the court to declare the annexation void. The village and Lone Star filed competing motions for summary judgment, and the district court granted Lone Star's motion, declaring the annexation void. The village appealed. Lone Star argued that Section 43.025 requires that Lone Star consent to the annexation because Lone Star is the only "contiguous" landowner. Lone Star argued that non-contiguous voters cannot consent to an annexation, even if their property is part of a larger total area to be annexed. The village argued that the annexation was proper because the requirements of Section 43.025 were followed. The court of appeals held that Section 43.025 does not distinguish between "voters" who are on the border of the city and those who are not. The statute does not require unanimous consent and also does not provide an exception for cases where one landowner owns all of the contiguous property and does not consent. The court of appeals held that the entire area is used to determine whether the area is contiguous, not just one tract. The court of appeals reversed the district court's judgment and rendered judgment that the annexation was valid and enforceable. See also *Waterway Ranch, LLC v. City of Annetta*, 411 S.W.3d 667, 679 (Tex. App.—Fort Worth 2013). The cases were essentially overruled by H.B. 1277 in 2015.

Section 43.025 authorizes a type B general law city to annex an area if a majority of the qualified voters of an area contiguous to the city vote in favor of becoming a part of the city. *Id.* at §43.025(a). Any three of those voters may prepare an affidavit to the fact of the vote and file the affidavit with the mayor of the city. *Id.* The vote is not required to be done by ballot or at any type of formal election. The voter's intentions may be expressed by any method that is satisfactory to themselves and the city council.<sup>24</sup> The mayor must certify the filed affidavit to the governing body of the city. On receipt of the certified affidavit, and after the procedural requirements of Chapter 43 have been met, the governing body by ordinance may annex the area. A type B city may not be enlarged under §43.025 to exceed the area requirements established by §5.901, which sets square mileage requirements at the time of incorporation for cities of different populations - for a city with less than 2,000 inhabitants, the area limitation is two square miles.<sup>25</sup>

Section 43.0255, added by H.B. 1277 in 2015, limits the authority of voters to petition for annexation of commercial property into a general law city. It provides that: (1) a general law city may annex an area in which 50 percent or more of the property in the area to be annexed is primarily used for a commercial or industrial purpose only if the city: (a) is otherwise authorized to annex the area and complies with the requirements prescribed under that authority; and (b) obtains the written consent of the owners of a majority of the property in the area to be annexed; and (2) the consent required (1)(b), above, must be signed by the owners of the property and must include a description of the area to be annexed.

## **2. Annexation by Petition of Area Landowners (Any City)**

Local Government Code §43.028 authorizes any city to annex a sparsely occupied area on petition of the area's landowners.<sup>26</sup>

Section 43.028<sup>27</sup> applies only to the annexation of an area:

- 1) that is one-half mile or less in width;<sup>28</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> See *City of Northlake v. East Justin Joint Venture*, 873 S.W.2d 413 (Tex. App.--Fort Worth 1994, writ denied). The *Northlake* case held that the size limitation for type B cities was equally applicable to type A cities, but the Texas Supreme Court limited this holding to type B cities in *Laidlaw Waste Systems v. City of Wilmer*, 904 S.W.2d 656 (Tex. 1995).

<sup>26</sup> *Underground Water Conserv. Dist. v. Pruitt*, 915 S.W.2d 577, 583 (Tex.App.-El Paso 1996, no writ) concluded that, at least for purposes of Water Code annexation provisions relating to the district, surface owners' petitions had the effect of annexing into a special district only so much of the surface and mineral estates as the petitioner owned and no more.

<sup>27</sup> Note that §43.028(d) states that "after the 5th day but on or before the 30th day after the date the petition is filed, the governing body shall hear the petition and the arguments for and against the annexation and shall grant or refuse the petition as the governing body considers appropriate." The hearing and acceptance of the petition must be completed within the 25 day time period, and prior to conducting the other procedural requirements (e.g., service plan, notice, and hearings) of Chapter 43. *Town of Fairview v. Stover*, 2002 WL 1981371 (Tex.App.--Dallas 2002)(Unpublished opinion). Also, the petitioner arguably has the right to withdraw the petition up to the adoption of the annexation ordinance. *Karm v. City of Castroville*, 219 S.W.3d 61 (Tex.App.-San Antonio 2006)

- 2) that is contiguous (abuts or touches) to the annexing municipality; and
- 3) that is vacant and without residents or on which fewer than three qualified voters reside.

While a home rule city may utilize Section 43.028, most attorneys agree that Section 43.021 (general home rule authority to annex in accordance with charter) grants a home rule city the authority to annex by petition pursuant to its charter. (The significance of the distinction is that a home rule charter-based petition annexation wouldn't include the additional procedural requirements in Section 43.028(d) as addressed in footnote 25 below.) On the other hand, H.B. 1949 added two new subsections to Section 43.028:

(g) An area of land that would be eligible for annexation under this section except that the area does not meet the contiguity requirement of Subsection (a)(2) may be annexed under this section if a public right-of-way of a road or highway designated by the municipality exists that:

- (1) is located entirely in the extraterritorial jurisdiction of the municipality;

and

(2) when added to the area would cause the area to be contiguous to the municipality.

(h) Notwithstanding Section [43.054](#), on annexation of an area described by Subsection (g), the public right-of-way that makes the area eligible for annexation under Subsection (g) is included in the annexation to the municipality without regard to whether the owners of the public right-of-way sought annexation under this section. The ordinance providing for annexation must provide a metes and bounds description of the public right-of-way annexed under this subsection.

These new provisions broadly expand the authority of a city (general law or home rule) that is using Section 43.028 to bring in sparsely populated land. They essentially allow a the owner of an "island" in the ETJ to petition the city for annexation. If there is a road or other public right-of-way connecting the island to the city, the city can annex that "connector," thus making the property contiguous to the city limits.

### 3. Miscellaneous Provisions

Other examples of provisions that provide annexation authority include, but are not limited to: §43.026 (Type A city may annex area it owns), §43.027 (General law city may annex adjacent navigable stream), §43.032 (Certain general law cities may annex certain areas that are surrounded by the city); §43.101 (General law city may annex municipally-owned reservoir that supplies water to the city), §43.102 (City may annex municipally-owned airport and right-of-way leading to airport), §43.023 (General law city

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<sup>28</sup> The area to be annexed must be within the city's ETJ. See Local Government Code §42.021 for extent of ETJ for cities of different sizes. In addition, under §§42.022 and 43.051, the area to be annexed cannot be located within the ETJ of another city.

over 5,000 population may annex on petition and election), and §43.103 (General law city may annex adjacent road<sup>29</sup>).

## **VI. PROCEDURES FOR AREAS EXEMPT FROM THE ANNEXATION PLAN REQUIREMENT**

### **A. Introduction**

Section 17 of S.B. 89, which is codified as statutory notes that follow various sections of Chapter 43 of the Local Government Code, provides that most of the changes made by the bill apply only to an annexation included in a city's annexation plan.<sup>30</sup> Annexations are now either under a plan (Subchapter C procedures) or exempt from a plan (Subchapter C-1 procedures).

### **B. Annexation of Area Exempt from the Annexation Plan Requirement**

#### **1. 100 Tracts Exemption and Other Exemptions**

The most common exemption from the annexation plan requirement is<sup>31</sup>:

[T]he area contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract.

TEX. LOC. GOV'T CODE §43.052(h)(1). City attorneys have interpreted the provision to mean that an area is exempt if it contains any number of tracts so long as no more than 99 of the tracts contain residential dwellings. The changes made to §43.052(h)(1) were made after the committee hearings on S.B. 89 were held and there is no testimony regarding the provision, but a 2009 attorney general opinion – GA-0737 – confirmed that interpretation.<sup>32</sup> S.B. 89 was enacted to curb perceived abuses of unilateral

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<sup>29</sup> TEX. LOC. GOV'T CODE §43.106 requires a city that proposed to annex any portion of a paved county road to also annex the entire width of the county road and the adjacent right-of-way. H.B. 1949 (2015) amended the section to provide that a city that proposes to annex any portion of a county road or territory that abuts a county road must also annex the entire width of the county road and the adjacent right-of-way on both sides of the county road; and (4) if a road annexed under (3), above, is a gravel road, the county retains control of granting access to the road and its right-of-way from property that: (a) is not located in the boundaries of the annexing city; and (b) is adjacent to the road and right-of-way.

<sup>30</sup> A city was authorized to annex any nonexempt area that was not included in its plan until December 31, 2002, under the former law. TEX. LOC. GOV'T CODE §43.052, *Statutory note (c)*. These so-called "old law" annexations are no longer authorized, as the grandfathering period has long ago expired.

<sup>31</sup> §43.052(h) contains several other examples (listed above in Section IV.B. "Annexation Plan"), but this provision seems to be the most commonly used in home rule unilateral annexations.

<sup>32</sup> "While the statute would benefit from legislative clarification, we conclude that section 43.052(h)(1) of the Local Government Code does not require that a residence be located on each tract of the area proposed for annexation. An annexation undertaken pursuant to section 43.052(h) is not void if the municipality fails to adopt a three-year annexation plan."

annexation authority by a few cities, and was designed to prevent cities from annexing very large residential subdivisions without providing adequate notice. At any rate, the decision is up to the city council in the first instance, subject to the arbitration provisions of Section 43.052(i)<sup>33</sup> or a *quo warranto* proceeding.<sup>34</sup>

Another common exemption occurs when the area will be annexed by petition of more than fifty percent of the real property owners in the area proposed for annexation or by vote or petition of the qualified voters or real property owners. *Id.* at §43.052(h)(2). In addition, §43.052(h) contains several other exemptions from the plan requirement. Examples include an area located in a colonia, an area owned by a type A general law city, or an area for which the city determines that the annexation of the area is necessary to protect the area proposed for annexation or the municipality from imminent destruction of property or injury to persons.

## 2. Applicable Provisions

Procedures for annexations that are exempt from the annexation plan requirement are located in Chapter 43, Subchapter C-1, of the Local Government Code. However, §43.052, *Statutory note (e)* and §43.062 make the following provisions from Subchapter C applicable to exempt Subchapter C-1 annexations:

1. §43.002, *Continuation of Land Use*: prevents a city, with certain exceptions, from prohibiting a person from continuing to use land in the manner in which it was being used prior to annexation (cities can still impose regulations relating to: location of sexually oriented businesses, colonias, preventing imminent destruction of property or injury to persons, public nuisances, flood control, storage and use of hazardous substances, sale and use of fireworks, or discharge of firearms on most parcels). Made applicable by S.B. 89, Section 17(e).
2. §43.051, *Restricting annexations to the ETJ unless the city owns the property*. Made applicable by TEX. LOC. GOV'T CODE §43.062(a).
3. §43.054, *Width Requirements*: area must generally be at least 1,000 feet wide unless the boundaries of the city are contiguous to the area on at least two sides, with certain exceptions. Made applicable by S.B. 89, Section 17(e) & TEX. LOC. GOV'T CODE §43.062(a).

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<sup>33</sup> In *Hughes v. City of Rockwall*, 153 S.W.3d 709 (Tex.App.-Dallas 2005, pet. filed February 23, 2005), the principal issue before the Court was whether Texas Local Government Code Section 43.052(i) is procedural or substantive in nature, and the Texas Supreme Court later said that the issue is procedural (No. 05-0126, January 25, 2008, *City of Rockwall v. Hughes*, 246 S.W.3d 621 (Tex.2008).). See also *JNC Partners Denton LLC v. City of Denton*, 190 S.W.3d 790, 792 (Tex.App.-Fort Worth 2006, pet. filed).

<sup>34</sup> *Werthmann v. City of Fort Worth*, 121 S.W.3d 803, 807 (Tex. App.--Fort Worth 2003)(holding that the requirements of Section 43.052 are procedural); See also *City of Balch Springs v. Lucas*, 101 S.W.3d 116 (Tex. App.--Dallas 2002).

4. §43.0545, *Annexation of Certain Adjacent Areas*.<sup>35</sup> Made applicable by S.B. 89, Section 17(e) & TEX. LOC. GOV'T CODE §43.062(a).
5. §43.055, *Maximum Amount Per Year*: limiting the maximum amount of annexation each year to ten percent of the incorporated area of the municipality with certain exceptions. Made applicable by TEX. LOC. GOV'T CODE §43.062(a).<sup>36</sup>
6. §43.056(b)-(o), but not (d) or (h)-(k)<sup>37</sup>, *Provision of Services to Annexed Area*: cities must provide full municipal services to annexed areas within 2 ½ years, unless certain services cannot be reasonably provided within that time and a city proposes a schedule to provide services within 4 ½ years. However, capital improvements must only be substantially completed within that 4 ½ year period. TEX. LOC. GOV'T CODE §43.056(b) & (e). "Full municipal services" means services provided by the annexing city within its full-purpose boundaries, including water and wastewater services and excluding gas or electrical service. *Id.* at §43.056(c). Also, a city is not required to provide a uniform level of services to each area of the city if different characteristics of topography, land use, and population density constitute a sufficient basis for providing different levels of service.<sup>38</sup> *Id.* at §43.056(m). Made applicable by S.B. 89, Section 17(e) & TEX. LOC. GOV'T CODE §43.065(b).
7. §43.0565, *Arbitration Regarding Enforcement of Service Plan*: allows person in area to request arbitration in writing, if arbitrator finds that the municipality has not complied with the service plan requirements, the city may disannex the area or the arbitrator may require the city to comply with

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<sup>35</sup> *City of Missouri City v. State ex rel. City of Alvin*, 123 S.W.3d 606, 616 (Tex. App.-Houston [14<sup>th</sup> dist.] 2003)(holding that §43.0545 prohibits the annexation of land that lies within a city's extraterritorial jurisdiction solely by virtue of the fact the land is "contiguous to municipal territory that is less than 1,000 feet in width at its narrowest point."); §43.0546 also deals with annexation of certain adjacent areas, but that section applies only to the City of Houston.

<sup>36</sup> The maximum of ten percent per year may be carried over up to thirty percent if not used. TEX. LOC. GOV'T CODE §43.055(b), (c). In addition, certain types of annexations do not apply to the percentage requirement, including most petition-based annexations and annexation of an area owned by the city, county, state, or federal government and used for a public purpose. *Id.* at §43.055(a)(1), (2), (3), & (4).

<sup>37</sup> Section 43.065(b) provides that "[s]ections 43.056(b)-(o) apply to the annexation of an area to which this subchapter applies." However, Section 17(e) of S.B. 89 provides that neither (b) nor (h)-(k) apply. This conflict can largely be resolved by reviewing the relevant provisions of Section 43.056. Subsections (d) and (h) are Houston-only under current population – 1.5 million or more or 1.6 million or more, respectively, so generally don't apply. Subsection (i) directs a city to prepare a revised service plan for an area if the annexed area is smaller than that originally proposed, and can easily be complied with. Subsections (j) and (k) are somewhat more troubling, and may not be able to be completely complied with. Why? Those sections reference negotiations and other procedures that are unique to plan annexations, and were probably made applicable due to a drafting error.

<sup>38</sup> Under *City of Heath v. King*, 665 S.W.2d 133, 136 (Tex. App.--Dallas 1983, no writ), whether a city provides services substantially equivalent to those furnished other areas with similar characteristics involves two considerations: (1) are there two separate areas of the city with similar characteristics; and if so, (2) are services being furnished to one area disparate from those being furnished to the other?

service plan or refund money collected for those services that were not provided (Houston only - See §43.056(l)). Made applicable by S.B. 89, Section 17(e) & TEX. LOC. GOV'T CODE §43.062(a).

8. §43.0567, *Water or Sewer Service (City of Houston only)*. Made applicable by TEX. LOC. GOV'T CODE §43.062(a).
9. §43.057, *Annexation That Surrounds an Area*. Made applicable by TEX. LOC. GOV'T CODE §43.062(a).
10. §43.0712, *Invalidation of Annexation of Special District; Reimbursement of Developer*. Made applicable by S.B. 89, Section 17(e).
11. §43.121(a), *Authority of Populous Home-Rule Municipalities (More than 225,000) to Annex for Limited Purposes; Other Authority not Affected*. Made applicable by S.B. 89, Section 17(e).
12. §43.141(c), *Disannexation for Failure to Provide Service*: if an area is disannexed for failure to provide services, it may not be annexed again within 10 years after the date of the disannexation. Made applicable by S.B. 89, Section 17(e).
13. §43.148, *Refund of Taxes and Fees For Disannexed Area*. Made applicable by S.B. 89, Section 17(e).
14. §43.905, *Effect of Annexation on Operation of School District*: requires a city to give notice to any school district in the area to be annexed between the 20<sup>th</sup> and 11<sup>th</sup> day before the first public hearing. Made applicable by S.B. 89, Section 17(e).
15. §43.906, *Voting Rights After Annexation*: requires a city to apply for preclearance under Section 5 of the Voting Rights Act of 1965 from the United States Department of Justice on the earliest date permitted under federal law.<sup>39</sup> Made applicable by S.B. 89, Section 17(e). Note that the preclearance requirement was held later to be unconstitutional by the U.S. Supreme Court in *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). Thus, it is no longer required.

### 3. Procedure

Prior to any other action, the city must determine whether an area is subject to the requirements of Section 43.035<sup>40</sup> – required offer of development agreement (see detailed discussion above) – and must comply with those requirements if so. To begin the annexation process, the city council must direct its planning department or other

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<sup>39</sup> See H.B. 1265 effective September 1, 2001.

<sup>40</sup> And Section 43.033(a)(7) for general law cities annexing without consent.



appropriate city department to prepare a service plan that details the specific municipal services that will be provided to the area after it has been annexed. *Id.* at 43.065(a).<sup>41</sup>

Before a city may institute annexation proceedings, the city council must give notice of, and conduct, two public hearings at which persons interested in the annexation are given an opportunity to be heard. *Id.* at §43.063(a). The city council must call the first public hearing on the proposed annexation and cause a copy of the notice of the hearing to be published. The notice of each hearing must be published in a newspaper of general circulation in the city and the area proposed for annexation at least once on or after the 20<sup>th</sup> day, but before the 10<sup>th</sup> day before the date of each hearing.<sup>42</sup> *Id.* at 43.063(c). The newspaper should execute a notarized affidavit stating that the hearing notice was published. The city must also give written notice to any school district in the area at this time. *Id.* at §43.905<sup>43</sup>. This procedure is repeated for the second hearing. Nothing prohibits a city from expediting the process by publishing the notice of the hearings and/or holding the hearings close together (or perhaps even in one notice and as separate agenda items at the same meeting) so long as the appropriate timeframe is followed.

All persons attending the hearings must be given an opportunity to express their views regarding the proposed annexation and the service plan. The hearings must be conducted on or after the 40<sup>th</sup> day and before the 20<sup>th</sup> day before the date of the institution of the proceedings. *Id.* at §43.063(a).<sup>44</sup> The date of the “institution of proceedings” is the date the annexation ordinance is introduced on first reading. If a city requires only one reading (as in the case of a general law city that has not imposed the requirement of additional readings on itself), the proceedings are instituted and completed at the same time.

In addition, the annexation of an area must be completed within 90 days after the date the city council institutes the annexation proceedings or the proceedings are void. *Id.* at 43.064(a). The charters of some home rule cities require that an annexation ordinance must be introduced at one meeting before it can be passed at a subsequent meeting, or that the ordinance be read and voted on at two, sometimes three, separate meetings before finally being passed. Thus, the ordinance in a city requiring multiple readings must be finally passed within 90 days of the first reading.<sup>45</sup>

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<sup>41</sup> Under §43.065(b), it is important to remember that §§43.056(b)-(o), but not (d) or (h)-(k), also apply.

<sup>42</sup> When counting the ten day interval, do NOT include either the day the notice was published, nor the day of the hearing.

<sup>43</sup> The City MAY NOT ANNEX unless it has provided this notice: “The municipality may not proceed with the annexation unless the municipality provides the required notice.”

<sup>44</sup> Note that a city is required to hold the two public hearings in the specified time frame. Nothing prohibits a city from holding more than two hearings, and so long as at least two of the hearings are within the prescribed time frame, the statutory requirements have been met. *Woodruff v. City of Laredo*, 686 S.W.2d 692, 696 (Tex. App. San Antonio 1985, writ ref’d n.r.e.).

<sup>45</sup> *Knapp v. City of El Paso*, 586 S.W.2d 216, 218 (Tex. App. - El Paso 1979, writ ref’d n.r.e.); One recent case, *City of Cresson v. City of Granbury*, 245 S.W.3d 61, 66 (Tex. App.—Fort Worth 2008), erroneously analyzed this issue. In a commonly-made mistake, the court seemed to read the provision as meaning that the whole annexation process must be completed in 90 days, which is incorrect: “Under the current statutory scheme, municipalities have ninety days to complete the annexation process.”

If the annexation is exempt by virtue of §43.052(h)(1)(100 tracts exemption), written notice must be sent before the 30<sup>th</sup> day before the date of the first hearing to each:

- 1) property owner in the area to be annexed;
- 2) public entity as defined in §43.053<sup>46</sup> or private entity that provides services in the area; and
- 3) each railroad company that serves the municipality and is on the municipality's tax roll if the company's right-of-way is in the area proposed for annexation.

*Id.* at §43.062(b). All annexations under Subchapter C-1 require written notice by certified mail to each railroad company with right-of-way on the area proposed for annexation. *Id.* at §43.063(c).

In addition, the city must post notice of the hearings on the city's website, if the city has a website. *Id.* at §43.063(c).<sup>47</sup>

If a written protest is filed by more than ten percent of the adult residents of the area proposed for annexation within ten days after publication of notice, at least one of the public hearings must be held in the area proposed for annexation if a suitable site is reasonably available. *Id.* at §43.063(b).

Finally, the city council, acting at a meeting that is separate from the two required hearings, adopts an ordinance annexing the tract and approving the service plan for the tract. When the annexation ordinance is passed, a copy of the service plan is attached to the ordinance, and the plan becomes a contractual obligation of the city.

In sum, the sequence for annexation of an area exempt from an annexation plan could be as follows:

- 1) Determine applicability of Section 43.035 (and/or 43.033(a)(7)) and act accordingly;
- 2) preparation of the service plan;
- 3) provide written notice to property owners, railroads, and public and private entities if required;
- 4) city council calls two public hearings to be held at some time which is not less than 10, nor more than 20, days from the day of publication of the notice of the hearings;
- 5) notice of the hearings is published in a newspaper of general circulation in the city and the area to be annexed and on the city's

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<sup>46</sup> "public entity" includes a municipality, county, fire protection service provider, including a volunteer fire department, emergency medical services provider, including a volunteer emergency medical services provider, or a special district, as that term is defined by §43.052. *Id.* at §43.053(a).

<sup>47</sup> The time requirements for posting are the same for the website, except the notice must remain on the site until the date of the hearing.

- Internet website, if the city has one, and written notice is sent to school districts in the area;
- 6) a 10 to 20 day interval between the publication and each of the hearings;
  - 7) public hearings on the proposed annexation at which all interested persons are heard;
  - 8) a 20 to 40 day interval between the hearings and the date that the annexation ordinance is passed;
  - 9) city council meets and passes the annexation ordinance; and
  - 10) proper post-annexation preclearance and notice is completed.

## **VII. UNILATERAL ANNEXATION OF AREA INCLUDED IN ANNEXATION PLAN**

Procedures for annexations that are required to be in an annexation plan are located in Chapter 43, Subchapter C, of the Local Government Code. Prior to any other action, the city must determine whether an area is subject to the requirements of Section 43.035 – required offer of development agreement (see detailed discussion above), and must comply with those requirements if so.

### **A. Inventory**

Section 43.053 requires a city to compile a comprehensive inventory of all services and facilities provided by public and private entities, directly or by contract, in each area proposed for annexation.<sup>48</sup> The purpose of the inventory is to determine the quality of existing services in the area. Some communities already have services that are superior to those provided in the annexing city, and the new law is designed to protect those communities from a reduction in the quality of services. The city must request the information necessary to compile the inventory in the notice required by §43.052(f) when an area is placed in an annexation plan, and the entity must provide the information not later than 90 days after the information is requested, unless the entity and the city agree to an extension. *Id.* at §43.053(c).

The information provided must include the type of service provided, the method of service delivery, and other information as provided by §43.053(e) & (f).<sup>49</sup> If a service provider fails to provide the information within the 90-day period, the city is not required to include the information in an inventory prepared under this section. The inventory is required only for areas that are included in an annexation plan.

### **B. Applicable Provisions**

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<sup>48</sup> A "public entity" includes a municipality, county, fire protection service provider, including a volunteer fire department, emergency medical services provider, including a volunteer emergency medical services provider, or a special district, as that term is defined by §43.052. *Id.* at §43.053(a).

<sup>49</sup> The information required in the inventory shall be based on the services and facilities provided during the year preceding the date the municipality adopted the annexation plan or amended the annexation plan to include additional areas. *Id.* at §43.053(d).

Other important requirements and restrictions include, but are not limited to:

1. §43.054, *Width Requirements*: generally area must be at least 1,000 feet wide unless the boundaries of the city are contiguous to the area on at least two sides.
2. §43.0545, *Annexation of Certain Adjacent Areas*.<sup>50</sup>
3. §43.0546, *Annexation of Certain Adjacent Areas by the City of Houston*.
4. §43.055, *Maximum Amount of Annexation Each Year*: with certain exceptions, a city may not annex a total area greater than ten percent of its existing incorporated area.
5. §43.056, *Provision of Services to Annexed Area*: cities must provide full municipal services to annexed areas within 2 ½ years, unless certain services cannot be reasonably provided within that time and a city proposes a schedule to provide services within 4 ½ years. However, capital improvements must only be substantially completed within that 4 ½ year period. TEX. LOC. GOV'T CODE §43.056(b). "Full municipal services" means services provided by the annexing municipality within its full-purpose boundaries, including water and wastewater services and excluding gas or electrical service. *Id.* at §43.056(c). Also, a city is not required to provide a uniform level of services to each area of the city if different characteristics of topography, land use, and population density constitute a sufficient basis for providing different levels of service. *Id.* at §43.056(m).
6. §43.0565, *Arbitration Regarding Enforcement of Service Plan*: allows person in area to request arbitration in writing, if arbitrator finds that the city has not complied with the service plan requirements, the city may disannex the area or the arbitrator may require the city to comply with service plan or refund money collected for those services that were not provided (Houston only - See §43.056(l)).
7. §43.0712, *Invalidation of Annexation of Special District; Reimbursement of Developer*.
8. §43.0751, *Strategic Partnerships for Continuation of Certain Districts*.
9. §43.121, *Authority of Populous Home-Rule Municipalities (More than 225,000) to Annex for Limited Purposes; Other Authority not Affected*.

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<sup>50</sup> *City of Missouri City v. State ex rel. City of Alvin*, 123 S.W.3d 606, 616 (Tex. App.-Houston [14<sup>th</sup> dist.] 2003)(holding that §43.0545 prohibits the annexation of land that lies within a city's extraterritorial jurisdiction solely by virtue of the fact the land is "contiguous to municipal territory that is less than 1,000 feet in width at its narrowest point.").

10. §43.141, *Disannexation for Failure to Provide Service*: if an area is disannexed for failure to provide services, it may not be annexed again within 10 years after the date of the disannexation.
11. §43.148, *Refund of Taxes and Fees for Disannexed Area*.
12. §43.905, *Effect of Annexation on Operation of School District*: requires a city to give notice to any school district in the area to be annexed between the 20<sup>th</sup> and 11<sup>th</sup> day before the first public hearing.
13. §43.906, *Voting Rights After Annexation*: requires a city to apply for preclearance under Section 5 of the Voting Rights Act of 1965 from the United States Department of Justice on the earliest date permitted under federal law. Note that the preclearance requirement was held later to be unconstitutional by the U.S. Supreme Court in *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). Thus, it is no longer required.

### **C. Service Plan**

After the inventory of services for the annexation plan has been prepared, and before the publication of notice of the first public hearing, the city council must direct its planning department or other appropriate municipal department to prepare a preliminary service plan that details the specific municipal services that will be provided to the area after it has been annexed. The final service plan must be completed before the tenth month after the inventory is prepared. *Id.* at 43.056(a).<sup>51</sup>

### **D. Procedure**

During the three-year “waiting period,” and prior to the adoption of the annexation ordinance after the expiration of the third year, a city must go through several procedural steps. A city must solicit information for, and compile, an inventory of services and prepare a service plan. See *Id.* at §43.056(a) & (j). Before a city may institute annexation proceedings, the city council must give notice of, and conduct, two public hearings at which persons interested in the annexation are given an opportunity to be heard. *Id.* at §43.0561(a). The city council must call the first public hearing on the proposed annexation and cause a copy of the notice of the hearing to be published. The notice of each hearing must be published in a newspaper of general circulation in

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<sup>51</sup> While one part of the Chapter 43, §43.056(j) states that the service plan must be available at the public hearings, another part, §43.056(a) states that the service plan must be completed before the first day of the tenth month after the month in which the inventory is prepared. Thus, it appears that a city should prepare a “preliminary service plan” that is available at the public hearings, and then prepare a “final service plan” before the tenth month after the month in which the inventory is prepared.

the city and the area proposed for annexation at least once on or after the 20<sup>th</sup> day, but before the 10<sup>th</sup> day before the date of each hearing.<sup>52</sup> *Id.* at 43.0561(c). The newspaper should execute a notarized affidavit stating that the hearing notice was published. The city must also give written notice to any school district in the area at this time. *Id.* at §43.905.<sup>53</sup> This procedure is repeated for the second hearing. The hearings must be conducted before 90 days after the inventory is available for inspection. *Id.* at §43.0561(a).

Written notice must be sent by *certified mail* to each:

1. public entity as defined in §43.053<sup>54</sup>, and utility services provider that provides service in the area, and
2. railroad that serves the city and is on the city's tax roll if the railroad has right-of-way in the area to be annexed.

*Id.* at §43.0561(c). In addition, the city must post notice of the hearings on the city's website, if the city has one. *Id.* at §43.0561(c).<sup>55</sup>

If a written protest is filed by more than twenty adult residents of the area proposed for annexation within ten days after publication of notice, at least one of the public hearings must be held in the area proposed for annexation or in the nearest suitable public facility outside of the area. *Id.* at §43.0561(b).

In sum, the sequence for annexation of an area included in an annexation plan could be as follows:

- 1) Determine applicability of Section 43.035 (and/or 43.033(a)(7)) and act accordingly;
- 2) place area in the plan and provide written notice to landowners, service providers, and railroads in the area. Request in the notice information from service providers for inventory;
- 3) compile and make available an inventory of services and service plan;
- 4) city council calls two public hearings to be held at some time which is not less than 10, nor more than 20, days from the day of publication of the notice of the hearings;
- 5) notice of the hearings is published in a newspaper of general circulation in the city and the area to be annexed and on the city's internet website, if

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<sup>52</sup> When counting the ten day interval, do NOT include either the day the notice was published or the day of the hearing.

<sup>53</sup> The City MAY NOT ANNEX unless it has provided this notice: "The municipality may not proceed with the annexation unless the municipality provides the required notice."

<sup>54</sup> A "public entity" includes a municipality, county, fire protection service provider, including a volunteer fire department, emergency medical services provider, including a volunteer emergency medical services provider, or a special district, as that term is defined by Section 43.052. *Id.* at §43.053(a).

<sup>55</sup> The time requirements for posting are the same for the website, except the notice must remain on the site until the date of the hearing.

- the city has a website, and written notice is sent to school districts in the area, service providers, and railroads in the area;
- 6) a 10 to 20 day interval between the publication and each of the hearings;
  - 7) public hearings on the proposed annexation at which all interested persons are heard;
  - 8) hold negotiations with property owners for provision of services to area - see Section "E" below<sup>56</sup>;
  - 9) after expiration of three years, city council meets and passes the annexation ordinance including the final service plan within 30 days; and
  - 10) proper post-annexation preclearance and notice is completed.

### **E. Negotiations/Arbitration**

After a city other than the City of Houston completes the required hearings, the city must negotiate with the property owners or the board of any special district in the area concerning the service plan for provision of services after, or in lieu of, annexation. *Id.* at §43.0562. If the city is not annexing a special district, the commissioners court of the county where the area is located appoints five landowners to negotiate with the city. *Id.* at §43.0562(b). In addition, in lieu of annexation, a city is authorized to enter into a contract with the landowners for the provision of services, the funding of the services, the creation of any necessary special district, governing permissible land uses and compliance with municipal ordinances, and any other terms. *Id.* at §43.0563. If negotiations fail, an arbitrator will be appointed to resolve the dispute. *Id.* at §43.0564.<sup>57</sup> Only a handful of cities have conducted plan annexations, and even fewer have reached the arbitration stage. Of those that have, arbitrator decisions have generally been favorable to cities.<sup>58</sup> In one case, the landowner representatives sought excessive services from the city, and the arbitrator ended up deciding on a service plan that the city proposed at the very beginning of the process.

After the arbitrator's decision and the passage of the required waiting period, the city council adopts an ordinance annexing the tract and approving the final service plan for the tract. When the annexation ordinance is passed, a copy of the service plan is attached to the ordinance, and the plan becomes a contractual obligation of the city. Otherwise, the city and the landowners and/or special districts may enter into a contract for services in lieu of annexation.

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<sup>56</sup> At this point, the process may come to a halt because the city may enter into contract in lieu of annexation with landowners and/or special districts. If neither a contract nor annexation is agreed upon, an arbitrator will be appointed to resolve the dispute. *Id.* at §43.0564. If the annexation is agreed upon, the process continues normally.

<sup>57</sup> See §43.0564 for full details of arbitration and appeal, §43.0565 for details regarding arbitration concerning enforcement of service plan, and §43.0567 for provisions governing the City of Houston's provision of water and wastewater services. Also, note that the failure of the city to submit to arbitration has been held to be a procedural matter that can be challenged only by quo warranto proceedings. *City of San Antonio v. Summerghlen Prop. Owners Ass'n Inc.*, 185 S.W.3d 74, 81 (Tex. App.—San Antonio 2005)

<sup>58</sup> Both Austin and Midlothian have experienced favorable decisions.

## **VIII. OTHER MATTERS AFFECTING ALL ANNEXATIONS**

Preclearance is no longer required for annexations or other voting changes. The section on it has been left in this paper because it is possible that it could be reinstated in the future and because a city is still prohibited from annexation in a way that would dilute minority voter participation.

Other annexation matters that must be addressed include notifying the Texas Secretary of State, state comptroller, county clerk, telecommunications utilities, and others, and preparing an updated map of the city. Keep in mind that other entities may be notified, as appropriate, for each individual city.<sup>59</sup>

### **A. Preclearance**

In 2013, the U.S. Supreme Court held that federal “preclearance” under the Voting Rights Act is no longer required for voting-related changes, including annexations. The federal Voting Rights Act of 1965 codifies the Fifteenth Amendment’s permanent guarantee that no person shall be denied the right to vote on account of race or color. Section 5 is a special provision of the Act that required state and local governments in certain parts of the country to get federal approval, known as “preclearance,” before implementing any changes in their voting procedures. See 42 U.S.C. §1973c. Under §5, a covered local government entity had to demonstrate to federal authorities that a voting change did not have a racially discriminatory purpose. For example, a city’s annexation of all-white neighborhoods, while simultaneously failing to annex African-American neighborhoods, served as evidence that the city is in violation of §5. See, e.g., *City of Pleasant Grove v. U.S.*, 479 U.S. 462 (1987). Any change affecting voting, even though it appeared to be minor or indirect, had to be approved through §5 preclearance.

On June 25, 2013, the U.S. Supreme Court issued its opinion in *Shelby County v. Holder*. In the case, Shelby County, Alabama, alleged that the basis for applying the federal Voting Rights Act to certain states is unconstitutional. The Court agreed. It concluded that Section 4 of the Act is unconstitutional, but the holding also affected other portions of the law, including the Section 5 preclearance requirement.

In response to the opinion, the U.S. Department of Justice posted the following on its website:

With respect to administrative submissions under Section 5 of the Voting Rights Act, that were pending as of June 25, 2013, or received after that date, the Attorney General is providing a written response to jurisdictions that advises:

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<sup>59</sup> For example, a city may want to notify the Texas Department of Transportation to move the city limits sign on a state highway, and/or the Texas Commission on Fire Protection regarding insurance ratings for the newly-annexed area.



### Section 5 preclearance

On June 25, 2013, the United States Supreme Court held that the coverage formula in Section 4(b) of the Voting Rights Act, 42 U.S.C. 1973b(b), as reauthorized by the Voting Rights Act Reauthorization and Amendments Act of 2006, is unconstitutional and can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. *Shelby County v. Holder*, 570 U.S. \_\_\_, 2013 WL 3184629 (U.S. June 25, 2013) (No. 12-96). Accordingly, no determination will be made under Section 5 by the Attorney General on the specified change. *Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. 51.35. We further note that this is not a determination on the merits and, therefore, should not be construed as a finding regarding whether the specified change complies with any federal voting rights law.

### Section 3(c) preclearance

*Shelby County* does not affect Section 3(c) of the Voting Rights Act, 42 U.S.C. 1973a(c). Jurisdictions covered by a preclearance requirement pursuant to court orders under Section 3(c), remain subject to the terms of those court orders.

It seems reasonable to say at this point that Section 5 preclearance submissions are no longer required. (That is probably true even though some state laws – including the Municipal Annexation Act in Section 43.906 of the Local Government Code – make reference to federal preclearance submissions.)

However, Section 3 of the Voting Rights Act allows a court to add a state or local government to the preclearance requirement if it is found to have enacted intentionally discriminatory voting measures. In other words, a court can make a governmental entity *judicially* subject to the preclearance requirement. There doesn't appear to be any pending request to make cities and other local governments subject to the judicial preclearance requirement for their voting changes.

Preclearance was obtained by submitting a voting change to the United States Attorney General. While it is currently not required, it may make sense for a city to document annexation information relevant to voting rights, such as having a description of the reason for the annexation and the different parts of the city that would be affected by the annexation, and how they would be affected, particularly in relation to any population changes or shifts that will occur as a result of the annexation.

## **B. Secretary of State Notification**

At one time, cities were supposed to notify the Texas secretary of state's office so that it could correctly certify the legal validity of the annexation to the United States Department of Census. That is no longer required because the Census suspended the program requiring it:

[http://www2.census.gov/geo/pdfs/partnerships/bas/bas\\_suspension.pdf](http://www2.census.gov/geo/pdfs/partnerships/bas/bas_suspension.pdf)

That program was called the Boundary and Annexation Survey. Additional details are available from:

Office of the Texas Secretary of State  
Government Filings Section  
ATTN: Mirand Zepeda  
P.O. Box 13375  
Austin, Texas 78711-3375

512.463.6182  
mzepeda@sos.texas.gov

The Texas Secretary of State's website is [www.sos.state.tx.us](http://www.sos.state.tx.us), and the Census Bureau's is [www.census.gov](http://www.census.gov).

### **C. Comptroller and Appraisal District Notification**

Notice must also be provided to the Texas comptroller's office. This ensures that the city will receive any sales taxes generated in the newly annexed area. The city secretary must submit by certified mail a certified copy of the annexation ordinance and a map of the entire city that shows the change in boundaries, with the annexed portion clearly distinguished, resulting from the annexation. TEX. TAX CODE §321.102. The Sales Tax Division of the Comptroller's office may be reached at 800-252-5555 or [www.window.state.tx.us](http://www.window.state.tx.us).

Also, Texas Tax Code Section 6.07 provides that if "an existing taxing unit's boundaries are altered, the unit shall notify the appraisal office of the new boundaries within 30 days after the date...its boundaries are altered."

### **D. Filing with County Clerk**

In addition, after the annexation ordinance is adopted, a certified copy of the ordinance should be filed in the office of the county clerk of the county in which the municipality is located. See TEX. LOC. GOV'T CODE §41.0015 (requiring certified copy of documents be filed within 30 days of preclearance – because preclearance is no longer required, the documents should be filed within 30 days of the annexation ordinance adoption).

### **E. Map of Municipal Boundaries and Extraterritorial Jurisdiction**

Cities are required to prepare a map that shows the boundaries of the city and its extraterritorial jurisdiction (ETJ). A copy of the map must be kept in the office of the city secretary and the city engineer if the city has one.

When a city expands its ETJ by petition or annexes territory, the map must be immediately updated to include the annexed territory, including an annotation that states: (1) the date of ordinance; (2) the number of the ordinance, if any; and (3) a reference to the minutes or ordinance records in which the ordinance is recorded in full. TEX. LOC. GOV'T CODE §41.001.

## **E-1. Right-of-Way Fees**

**Telecommunications:** Chapter 283 of the Texas Local Government Code, enacted in 1999, significantly altered the procedures under which cities collect compensation from certificated telecommunications providers (CTPs) that use city rights-of-way. Under Chapter 283, payments to cities are no longer based on a percentage of gross receipts. Rather, CTPs pay cities quarterly based on the number of “access lines” located in the city. The access lines are multiplied by an access line fee that is calculated under the statute.

When a city annexes territory, the newly-included area may have access lines. However, neither Chapter 283 nor the rules adopted by the Texas Public Utility Commission (PUC) directly address this situation. In order for a city to be properly compensated for the inclusion of the access lines, the city should notify any CTPs that may be providing service in the current city limits that, if the CTP also has access lines in the newly-annexed area, it must begin compensating the city accordingly. In addition, if a city is aware of other CTPs that may be operating in the area, it should notify those as well. Finally, the city should also notify the PUC ([www.puc.state.tx.us](http://www.puc.state.tx.us)) so that the information can be posted on the PUC’s website.

**Electric:** Electric franchise fees are provided for in Section 33.008 of the Texas Utilities Code. After annexing, a city should contact the electric provider in the area to determine whether adjustment to the existing, or a new, franchise agreement is necessary.

**Cable/Video:** Cable and video providers pay fees pursuant to Chapter 66 of the Texas Utilities Code. Those providers, and the PUC, should be notified of an annexation to ensure proper reporting.

**Gas/Water:** Retail gas and water companies often pay franchise fees to cities, and should be notified as well.

## **F. Disannexation**

### **1. Disannexation for Failure to Provide Services**

Section 43.141 of the Local Government Code provides that, if a city fails or refuses to provide services or to cause services to be provided to an annexed area within the

period specified by Section 43.056<sup>60</sup> and according to the service plan prepared for the area under that section, a majority of the qualified voters of the area<sup>61</sup> may petition<sup>62</sup> the governing body to disannex the area.<sup>63</sup>

If the governing body fails or refuses to disannex the area within 60 days after the date of the receipt of the petition, any of the petitioners may bring a cause of action in district court to request that the area be disannexed. TEX. LOC. GOV'T CODE §43.141(b). The district court must enter an order disannexing the area if the court finds that a valid petition was filed with the city and that the city failed to perform its obligations in accordance with the service plan or failed to perform in good faith. Essentially, the court can review only whether the services stated in the plan are being provided, not whether the plan includes every service required by Section 43.056.<sup>64</sup>

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<sup>60</sup> Prior to S.B. 89, a city had to provide full municipal services to annexed areas within 4 ½ years. TEX. LOC. GOV'T CODE §43.056(b)(old law). Under current law, services must be provided within 2 ½ years, unless certain services cannot be reasonably provided within that time and a city proposes a schedule to provide services within 4 ½ years. *Id.* at §43.056(b).

<sup>61</sup> *Freeman v. Town of Flower Mound*, 173 S.W.3d 839 (Tex.App.-Fort Worth 2005) and *Smith v. City of Brownwood*, 161 S.W.3d 675, 680 (Tex.App.-Eastland 2005, no pet.) stand for the proposition that only a majority of voters within an *entire annexed area* may petition for disannexation.

<sup>62</sup> The petition for disannexation must: (1) be written; (2) request the disannexation; (3) be signed in ink or indelible pencil by the appropriate voters; (4) be signed by each voter as that person's name appears on the most recent official list of registered voters; (5) contain a note made by each voter stating the person's residence address and the precinct number and voter registration number that appear on the person's voter registration certificate; (6) describe the area to be disannexed and have a plat or other likeness of the area attached; and (7) be presented to the secretary of the municipality. Also, the signatures to the petition need not be appended to one paper. Before the petition is circulated among the voters, notice of the petition must be given by posting a copy of the petition for 10 days in three public places in the annexed area and by publishing a copy of the petition once in a newspaper of general circulation serving the area before the 15th day before the date the petition is first circulated. Proof of the posting and publication must be made by attaching to the petition presented to the secretary: (1) the sworn affidavit of any voter who signed the petition, stating the places and dates of the posting; and (2) the sworn affidavit of the publisher of the newspaper in which the notice was published, stating the name of the newspaper and the issue and date of publication. *Id.* at §§43.141(d), (e) & (f).

<sup>63</sup> Under *Alexander Oil co. v. City of Seguin*, 825 S.W.2d 434, 437 (Tex. 1991), disannexation is the only express remedy for failure to provide services under a plan. *C.f.*, §43.056(l)(writ of mandamus).

<sup>64</sup> Legislation has been filed in every recent legislative session to modify the disannexation for failure to provide services provision. (H.B. 359 in 2015, H.B. 1477 in 2013, H.B. 524 in 2011, H.B. 98 in 2009, and H.B. 2860 in 2007). Some claim that the bills would overturn three appellate court opinions in favor of the City of Bryan (*Hall v. City of Bryan*, 2014 WL 3724069 (Tex. App. – Waco July 24, 2014), *Hall v. City of Bryan*, 2006 WL 3438537 (Tex. App. – Waco Nov. 29, 2006, pet. denied) and *Hall v. City of Bryan*, 2011 WL 4712243 (Tex. App. – Waco Oct 5, 2011) (mem.op.)). Proponents of the bills frame the issue as forcing a city provide certain services to an annexed area. In fact, at the Committee on Land and Resource Management hearing in 2011, that bill's author asked the author of this paper, "Don't you think it's fair that a city should do what they promise to do and what state law requires?" The answer to that, of course, is "yes." But the answer isn't that simple. Section 43.056, requires cities to provide various services, such as fire and police response, immediately upon annexation. That section allows cities a longer time to provide capital intensive services like water and wastewater. Even then, a city is required to provide services only as topography, population density, and land use necessitate. Thus, if an area is sparsely populated, or if no intense land use exists there, it doesn't make sense to spend taxpayer funds for huge capital projects to serve certain areas. Doing so would be akin to the federal government's "bridge to nowhere" project in Alaska. The proposed "fix" to "require" cities to provide unneeded services doesn't make sense. In fact, cities are already required to provide reasonable services. Passage of

The provisions of current law relating to disannexation are substantially the same as the prior law, with one important exception. Section 43.052, *Statutory notes (d) and (e)* make §43.141(c), which states that if the area is disannexed it may not be annexed again within 10 years<sup>65</sup> after the date of the disannexation, applicable to both plan and exempt annexations.

## 2. Home Rule Disannexation According to Charter

Under §43.142, a home rule city may disannex an area according to rules provided by its charter and not inconsistent with state law. The section is permissive, and does not mandate disannexation in most cases. The case of *City of Hitchcock v. Longmire*, 572 S.W.2d 122 (Tex. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) concluded that initiative and referendum under a home rule charter are not implicated by §43.142, and may not be used to disannex property from a city.<sup>66</sup>

## 3. General Law Disannexation

According to §43.143 of the Local Government Code, a general law city may disannex populated areas by petition and election.

To initiate the process, at least 50 qualified voters of an area located in a city sign and present a petition describing the area by metes and bounds to the mayor. If the petition requests that the area no longer be part of the city, the mayor must order an election on the question to be held on the first uniform election date that occurs after the date on which the petition is filed and that affords enough time to hold the election in the manner required by law. TEX. LOC. GOV'T CODE §43.143(a).

If the vote is for disannexation, the mayor must declare that the area is no longer a part of the city and enter an order to that effect in the minutes or records of the governing body. However, the area may not be discontinued as part of the city if the discontinuation would result in the city having less area than one square mile or one mile in diameter around the center of the original boundaries. *Id.* at §43.143(b). If an area withdraws from a city, the area is not released from its pro rata share of city indebtedness at the time of the withdrawal.<sup>67</sup> *Id.* at §43.143(c).

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legislation that has been recently filed would do nothing more than give those who don't want to be annexed another reason to sue a city, resulting in more litigation.

<sup>65</sup> Under the old law, the waiting period was 5 years.

<sup>66</sup> See also *Vara v. City of Houston*, 583 S.W.2d 935, 938 (Tex.Civ.App.1979, writ ref'd n.r.e.), appeal dismissed, 449 U.S. 807, 101 S.Ct. 54, 66 L.Ed.2d 11 (1980) (“We conclude that articles 1175 and 970a have withdrawn the subject matter of this ordinance, disannexation, from the field in which the initiatory process is operative.”); *Save Our Aquifer v. City of San Antonio*, 237 F.Supp.2d 721 (W.D.Tex. 2002) (“[T]here is no right existing in people to repeal annexation ordinance through referendum process; power to fix boundary limits was given to Texas municipalities pursuant to state annexation laws.”); *Ryan Services, Inc. v. Spenrath*, Not Reported in S.W.3d, 2008 WL 3971667 (Tex.App.—Corpus Christi 2008)(concluding after a long battle that referenda do not apply to annexations).

<sup>67</sup> In addition, the governing body shall continue to levy a property tax each year on the property in the area at the same rate that is levied on other property in the city until the taxes collected from the area

Section 43.144 allows the disannexation of sparsely populated area by a general law city by ordinance upon a vote of the governing body if:

- (1) the area consists of at least 10 acres contiguous to the city; and
- (2) the area:
  - (A) is uninhabited; or
  - (B) contains fewer than one occupied residence or business structure for every two acres and fewer than three occupied residences or business structures on any one acre.

On adoption of the ordinance, the mayor enters in the minutes or records of the governing body an order discontinuing the area, and the area ceases to be a part of the city.

If a requested or desired disannexation for a general law city does not fit within either of the above provisions, it is prohibited.

#### **4. Refund of Taxes and Fees**

Senate Bill 89 added yet another provision in 1999. According to §43.148, if an area is disannexed, the city must refund to the landowners the amount of money collected in property taxes and fees during the period that the area was a part of the city less the amount of money that the city spent for the direct benefit of the area during that period.

The city is required to proportionately refund the amount to the landowners according to a method to be developed by the city that identifies each landowner's approximate pro rata payment of the taxes and fees being refunded, and the money must be refunded not later than 180 days after the area is disannexed.

### **IX. MISCELLANEOUS ANNEXATION ISSUES**

#### **A. Extraterritorial Jurisdiction Expansion and Release**

Many medium-to-large home rule cities have several smaller cities on the outskirts of their extraterritorial jurisdiction (ETJ). The residents of the unincorporated areas on the outskirts of the home rule cities, fearing unilateral annexation, appear to have discovered an interesting method of preventing an annexation by the larger cities. Section 42.022(b) of the Local Government Code allows a citizen to petition a city to be included in the city's ETJ. There is no statutory limit to the size of an ETJ that is

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equal its pro rata share of the indebtedness. Those taxes may be charged only with the cost of levying and collecting the taxes, and the taxes shall be applied exclusively to the payment of the pro rata share of the indebtedness. This subsection does not prevent the inhabitants of the area from paying in full at any time their pro rata share of the indebtedness.

extended in this manner. A landowner simply petitions the smaller, general law, city to be a part of its ETJ and thus prohibits annexation by the larger city. This scenario has occurred in many locations. In one instance, a general law city with a population of less than 600 had an ETJ that extended up to twelve miles from the city limits and encompassed some 40,000 acres. (That expansion later fell apart because of contiguity issues.) Similarly, a small town Southwest of Fort Worth once told area residents that they can protect themselves from future annexations by a large neighboring city by petitioning to become part of the small town's ETJ. The mayor of the small town actually issued a cordial invitation in a newspaper article to landowners that they should petition to be part of the town's ETJ.

Another issue relating to ETJ expansion was decided by the Texas Supreme Court in *City of San Antonio v. City of Boerne*,<sup>68</sup> the so-called "Boerne Wall" case. Residents in the unincorporated area between the two cities petitioned the City of Boerne to be included in Boerne's ETJ, thereby avoiding annexation by San Antonio. Because some of the parcels were not contiguous, the county commissioners court petitioned the City of Boerne to include county roads to serve as "links" between the properties. San Antonio disputed the authority of the commissioners court to petition for inclusion of the roads. The San Antonio Court of appeals held that county commissioners, as agents for state, have the power to petition for inclusion of county roads. San Antonio appealed the decision to the Texas Supreme Court, which accepted the case. The Supreme Court reversed the court of appeals and held that: (1) the legislature's grant to a commissioner's court of general control over county roads does not include the power to petition a city to annex certain portions of a given county road, and (2) a county commissioners court is not entitled, as agent of the State, to petition a city for annexation.

One home rule city passed a resolution to begin five successive "leapfrog" annexations under which it would annex 1,000 foot long and 1,000 foot wide strips, thereby extending its ETJ with each annexation. To avoid being annexed by this process, several landowners petitioned a neighboring city to be included in its ETJ. After proper annexation procedures, but before the annexation ordinance adoption, the neighboring city accepted the ETJ petitions and expanded its ETJ by ordinance. The annexations all took place by vote on the same agenda, one after another. After the annexation ordinance was adopted, the neighboring city challenged it because the property was already in its ETJ.

Before passage of the Municipal Annexation Act in 1963, cities' competing claims to property were governed by the common law "first-in-time" rule. This rule provided that the first municipality to *begin* annexation procedures on unclaimed territory obtained exclusive jurisdiction over that property. The Texas Supreme Court has described the effect of annexation in accordance with the first-in-time rule as follows:

This virtually unbridled annexation authority enabled cities to claim territory without incurring any obligation to provide new services or to formally annex the designated

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<sup>68</sup> 111 S.W.3d 22 (Tex. 2003).

property. The result, as noted by one commentator, was that “cities were quick to engage in annexation wars and to stake [their] claim[s].”

The Court of Appeals clearly concluded that the statute abrogated the first-in-time rule. Because the statute provides that one city may not annex into another city’s ETJ, if the ETJ is expanded prior to the annexation taking place, the annex is void. *City of Cresson v. City of Granbury*, 245 S.W.3d 61, 69 (Tex. App.—Fort Worth 2008).

A city’s ETJ may be reduced if the governing body of the municipality gives its written consent by ordinance or resolution.<sup>69</sup> TEX. LOC. GOV’T CODE §42.023. Section 42.023, however, authorizes only the “release” of ETJ; it does not authorize a neighboring city to automatically “receive” the released area, thereby increasing its ETJ beyond the boundaries specified in Section 42.021. *City of Alton v. City of Mission*, 164 S.W.3d 861, 865-66 (Tex. App.—Corpus Christi 2005)(citing *City of Austin v. City of Cedar Park*, 953 S.W.2d 424, 430 (Tex. App.—Austin 1997, no writ).

## **B. Validation and Presumed Consent**

Beginning in 1935 and until 1995, the Texas Legislature passed “validation acts.” These acts were intended to promote stability in the law and cure defects in areas such as incorporation and annexation. See TEX. REV. CIV. STAT., Articles 974d-974d-44. As originally written, many of the acts validated annexations in all ways, whether the problems were procedural (e.g., no notice or hearing) or substantive (e.g., lack of authority to annex). See, e.g. *City of Grand Prairie v. Turner*, 515 S.W.2d 19, 23 (holding that article 974d-13 (1974) validated an annexation that was void *ab initio*).

In 1999, the validation act took on a different form. Rather than pass a validation act each legislative session, the legislature enacted Local Government Code §51.003. Section 51.003 is more of a permanent statute of limitations than a validation act. The section provides that, after three years have passed with no challenge, a city act is presumed valid. However, under §51.003(b)(1), the section does not apply to an act that was void at the time it occurred. Thus, while §51.003 may be used to cure procedural defects in an annexation, it arguably may not be used as a defense to an annexation that is void *ab initio*. In addition, §51.003 will not act to cure “an incorporation or attempted incorporation of a municipality, or an annexation or attempted annexation of territory by a municipality, within the incorporated boundaries or extraterritorial jurisdiction of another municipality that occurred without the consent of the other municipality in violation of Chapter 42 or 43.”

Similarly, Local Government Code §43.901 states that an “ordinance defining boundaries of or annexing area to a municipality is conclusively presumed to have been

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<sup>69</sup> An exception to this rule occurs in cases of judicial apportionment of ETJs that overlapped on August 23, 1963. See Tex. Loc. Gov’t Code Ann. § 42.901 (Vernon 1999). *City of Alton v. City of Mission*, 164 S.W.3d 861, 871 (Tex. App. – Corpus Christi 2005).



adopted with the consent of all appropriate persons, except another municipality, if” two years have passed and the ordinance has not been challenged in court.

In the case of *City of Murphy v. City of Parker*, 932 S.W.2d 479 (Tex. 1996), the City of Parker annexed a tract of land on petition of area landowners in 1989. Part of the annexed tract was actually in the ETJ of the City of Murphy. The City of Murphy sued in 1993, challenging the annexation based on the fact that a city cannot annex into another city’s ETJ. Section 43.901, at that time, did not exclude cities from its reach. Thus, the court held for the City of Parker, stating that 43.901 served as a statute of limitations that bound the City of Murphy to challenge within two years. The dissent reasoned that, because a city is prohibited from annexing into the ETJ of another city, the annexation was void *ab initio* (“from the beginning”) and could not be cured by the passage of time. H.B. 1264, passed in 2001, removed cities from the “presumed consent” category of §43.901.

However, the *City of Murphy* case may still have legal significance. Because the court validated the annexation into the City of Murphy’s ETJ, it was by definition also permitting the application of §43.901 to improper annexations outside of the City of Parker’s own ETJ. Such annexations have traditionally been considered a fundamentally void annexation as opposed to one that is voidable. Thus, it may still be possible to cite *City of Murphy* for the proposition that improper annexations outside the annexing city’s ETJ (though not within another city’s ETJ) are valid after the passage of two years without legal challenge. In addition, §43.901 appears to be curative of any type of annexation that would be void or voidable solely based on lack of consent of the residents of an area.

### **C. Types of Annexation Challenges**

There are four basic remedies for improper annexations in Texas: (1) *quo warranto* actions; (2) collateral attacks; (3) declaratory judgment; (3) petition for disannexation; and (4) writ of mandamus. A very basic discussion of each follows.

*Quo warranto* literally means “by what authority.” The term is based on old English common law and is an action by the state where the state acts to protect itself and the good of the public generally through its chosen agents. In modern times in Texas, the local district or county attorney<sup>70</sup> is the agent of the state who decides whether or not to institute this type of suit, and has full control of the proceedings. BLACK’S LAW DICTIONARY 1256 (6<sup>th</sup> ed. 1990); See *also* TEX. CIV. PRAC. & REM. CODE §66.001. The basis for requiring *quo warranto* proceedings is that a judgment in favor of or against a municipal corporation affecting the public interest binds all citizens and taxpayers even though they were not parties to the suit. *Alexander Oil Co. v. City of Seguin*, 825 S.W.2d 434, 437 (Tex.1991). If a city has the authority to annex, but fails to follow the proper annexation procedures, the annexation ordinance is merely voidable, and the only manner of challenging the annexation is through a *quo warranto* proceeding. Only

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<sup>70</sup> The Texas Attorney General is also authorized to bring *quo warranto* actions on behalf of the state but never has in the context of city annexations.

the state can challenge an annexation for procedural irregularities because such irregularities merely result in voidable ordinances.<sup>71</sup>

However, where an ordinance is claimed to be void, and not merely voidable, a direct or collateral attack, rather than quo warranto proceeding, is proper. *City of Willow Park v. Bryant*, 763 S.W.2d 506, 508 (Tex. App.--Forth Worth 1988, no writ)(holding annexation ordinance void). An annexation ordinance is void *ab initio* if the city had no authority to annex in the first place. This type of annexation can be attacked by a private party, but even if the municipal act is void, the private party must suffer some burden peculiar to himself to acquire standing to sue. *Alexander Oil Co.*, 825 S.W.2d at 438-39.<sup>72</sup> The Texas Supreme Court has ruled many times that annexation ordinances that contradict the express statutory limitations on a city's authority are void. See, e.g., *City of West Orange v. State ex rel. City of Orange*, 613 S.W.2d 236, 238 (Tex.1981) (finding ordinance invalid because it purported to annex land not adjacent to city); *City of Waco v. City of McGregor*, 523 S.W.2d 649, 652 (Tex.1975) (opining that ordinance was "void when it was passed" because it attempted to annex territory in contravention of statutory provision); *City of Roanoke v. Town of Westlake*, 111 S.W.3d 617, 638 (Tex. App.—Fort Worth 2003) (finding that annexation by one city into another city's ETJ was void because the first city was required to obtain the consent of the second); *City of West Lake Hills v. State ex rel. City of Austin*, 466 S.W.2d 722, 729-30 (Tex.1971) (holding that ordinances attempting to annex noncontiguous and nonadjacent land in violation of statute were invalid); *Deacon v. City of Euless*, 405 S.W.2d 59, 64 (Tex.1966) (declaring attempted annexation of territory "null and void" because it exceeded statutory size limitations).

An action for declaratory judgment may also be brought by a private party to challenge an annexation that is void *ab initio*. *Laidlaw Waste Systems (Dallas) v. Wilmer*, 904 S.W.2d 656, 660-61 (Tex.1995); See also *City of Bridge City v. State ex rel. City of Port Arthur*, 792 S.W.2d 217 (Tex. App.--Beaumont 1990, writ denied).

Finally, prior to the passage of S.B. 89, a petition for disannexation under Local Government Code §43.141 was the sole remedy for residents who complain that a city is not providing services in accordance with an annexation plan. See *City of Wichita*

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<sup>71</sup> *May v. City of McKinney*, 479 S.W.2d 114, 120 (Tex. App.--Dallas 1972, writ ref'd n.r.e.); *City of Houston v. Harris County Eastex Oaks Water & Sewer Dist.*, 438 S.W.2d 941, 944 (Tex. App.--Houston [1st Dist.] 1969, writ ref'd n.r.e.); *City of Irving v. Callaway*, 363 S.W.2d 832, 834-35 (Tex. App.--Dallas 1962, writ ref'd n.r.e.); *Lefler v. City of Dallas*, 177 S.W.2d 231, 233-34 (Tex. App.--Dallas 1943, no writ); *Werthmann v. City of Fort Worth*, 121 S.W.3d 803, 807 (Tex. App.--Fort Worth 2003)(holding that the annexation plan requirement of Section 43.052 is procedural).

<sup>72</sup> See also *City of Port Isabel v. Pinnell*, 161 S.W.3d 233, 239-40 (Tex.App.-Corpus Christi 2005, no pet.) (It is true that a private citizen has standing to challenge a void annexation ordinance if the private citizen shows a special burden under the ordinance. And the showing of the potential imposition of a tax on the plaintiff has been held to satisfy the special burden requirement.); *Sunchase Capital Group, Inc. v. City of Crandall*, 69 S.W.3d 594 (Tex.App.-Tyler 2001); *City of Richmond v. Pecan Grove Mun. Util. Dist.*, No. 01-14-00932-CV, 2015 WL 4966879, at \*1 (Tex. App. Aug. 20, 2015)(holding that a MUD did not have standing to challenge a city's strip annexation through that MUD).

*Falls v. Pearce*, 33 S.W.3d 415, 417 (Tex. App.—Fort Worth 2000, no pet.). Now, §43.056(l) provides that a writ of mandamus is also available.<sup>73</sup>

#### **D. City's Motives for Annexation Irrelevant**

Courts generally have no authority to judicially review the reasons a city annexes property.<sup>74</sup> Thus, the fact that a city annexes property solely for the purposes of raising tax revenue is immaterial to the validity of an annexation. Further, a property owner has no Fourteenth Amendment due process rights with respect to the location of city boundaries. Thus, a Constitutional challenge should not succeed.<sup>75</sup> For home rule cities, the constitution grants to the city council the authority to set city boundaries.<sup>76</sup>

#### **E. Area Receiving Longstanding Treatment as Part of a City**

Under the authority of Local Government Code §41.003, the city council may adopt an ordinance to declare an area that is adjacent to the city and that meets the following requirements to be a part of the city:

- (1) the records of the city indicate that the area has been a part of the city for at least the preceding 20 years;
- (2) the city has provided municipal services, including police protection, to the area and has otherwise treated the area as a part of the city during the preceding 20 years;
- (3) there has not been a final judicial determination during the preceding 20 years that the area is outside the boundaries of the city; and
- (4) there is no pending lawsuit that challenges the inclusion of the area as part of the city.

The adoption of an ordinance creates an irrebuttable presumption that the area is a part of the city for all purposes retroactive to the date the area began receiving treatment as part of the city. The presumption may not be contested for any reason after the effective date of the ordinance. It is not an annexation, but is appropriate to be included here.

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<sup>73</sup> §43.056(l) also provides that residents annexed by the City of Houston may request arbitration.

<sup>74</sup> *State ex rel. Pan American Production Co. v. Texas City*, 303 S.W.2d 780, 782 (Tex. 1957).

<sup>75</sup> *State ex rel. Danner v. City of Watauga*, 676 S.W.2d 721 (Tex. App.--Fort Worth 1984, writ ref'd n.r.e.); *Superior Oil Co. v. City of Port Arthur*, 628 S.W.2d 94 (Tex.App.-Beaumont 1981, writ ref'd n.r.e.), *appeal dismissed*, 459 U.S. 802, 103 S.Ct. 25, 74 L.Ed.2d 40 (1982).

<sup>76</sup> *Winship v. City of Corpus Christi*, 373 S.W.2d 844, 848 (Tex. Civ. App. – Corpus Christi 1963), *writ refused NRE* (Apr. 22, 1964) (“Appellants' contentions that the instant annexations amount to a taking of their properties without due process contrary to state and federal constitutional provisions are not supported by the record and are without merit. The questions as to what property shall be embraced within a municipal corporation and taxation of same for municipal purposes present questions essentially political and which by the Constitution are to be determined by the Legislature; and, particularly, as to extension of boundaries, by cities operating under the Home Rule Amendment. The constitutional inhibition against taking private property for public use without compensation has reference solely to the exercise of the right of eminent domain and not to taxation for public use.”)

## **F. Agreement in Lieu of Annexation**

House Bill 1197, which became effective in June 2003, adds a new Subchapter G to Chapter 212 of the Local Government Code. The law allows a city council to enter into a written contract with an owner of land in the city's extraterritorial jurisdiction to: (1) guarantee the land's immunity from annexation for a period of up to 45 years; (2) extend certain aspects of the city's land use and environmental authority over the land; (3) authorize enforcement of land use regulations other than those that apply within the city; (4) provide for infrastructure for the land; and (5) provide for the annexation of the land as a whole or in parts and to provide for the terms of annexation, if annexation is agreed to by the parties.<sup>77</sup> The bill also validates an agreement entered into prior to the effective date of the bill, so long as the agreement complies with the bill's requirements. (This is the statute referred to by Local Government Code Sections 43.033 and 43.035, which require that a "non-annexation" agreement be offered to certain agricultural property prior to annexing.)

## **G. Prior Uses**

Newly-annexed territory may contain an existing use that was legal prior to annexation. Section 43.002 of the Local Government Code provides as follows:

(a) A municipality may not, after annexing an area, prohibit a person from:

(1) continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time; or

(2) beginning to use land in the area in the manner that was planned for the land before the 90th day before the effective date of the annexation if:

(A) one or more licenses, certificates, permits, approvals, or other forms of authorization by a governmental entity were required by law for the planned land use; and

(B) a completed application for the initial authorization was filed with the governmental entity before the date the annexation proceedings were instituted.

(b) For purposes of this section, a completed application is filed if the application includes all documents and other information designated as

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<sup>77</sup> Of note, at least one court has concluded that a development agreement, depending on its terms, may be subject to the immunity waiver provided in Local Government Code Section 271.152. *JNC Land Co., Inc. v. City of El Paso*, 479 S.W.3d 903 (Tex. App. 2015), *review denied* (Sept. 11, 2015)

required by the governmental entity in a written notice to the applicant.

(c) This section does not prohibit a municipality from imposing:

- (1) a regulation relating to the location of sexually oriented businesses, as that term is defined by Section 243.002;
- (2) a municipal ordinance, regulation, or other requirement affecting colonias, as that term is defined by Section 2306.581, Government Code;
- (3) a regulation relating to preventing imminent destruction of property or injury to persons;
- (4) a regulation relating to public nuisances;
- (5) a regulation relating to flood control;
- (6) a regulation relating to the storage and use of hazardous substances; or
- (7) a regulation relating to the sale and use of fireworks.

(d) A regulation relating to the discharge of firearms or other weapons is subject to the restrictions in Section 229.002.

In addition, Section 245.002(a) of the Local Government Code provides as follows:

(a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time:

- (1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or
- (2) a plan for development of real property or plat application is filed with a regulatory agency.

In 2005, Section 245.004(2), which lists exemptions to Chapter 245's applicability, was amended to specify that "property classification" is not excluded from Chapter 245. As such, each city should carefully consider the initial zoning of property upon annexation. After the initial zoning, future attempts to rezone the property could draw an argument from the owner that Chapter 245 prevents such a change.

Finally, Chapter 251 of the Texas Agriculture Code (commonly referred to as the “Ag Protection Act”) prohibits a city from imposing certain regulations against an existing agricultural operation.

Each city should consult with local legal counsel regarding the ability to impose city regulations on existing uses in a newly-annexed area.

## **H. Special Districts/Water Supply Corporations**

The annexation of an area that lies within the boundaries of certain types of special districts or water supply corporations may have a unique set of rules that apply, especially regarding provision of services. The rules that govern the annexation of special districts are generally located in Subchapter D of Chapter 43 of the Local Government Code. Any city that seeks to annex area that lies in a special district should pay special attention to those provisions. Rural water supply corporations may have certificated service areas that are protected from encroachment by federal law. Any city that seeks to annex either type of area should consult with local legal counsel regarding the pitfalls associated with that type of annexation.

## **I. Emergency Services Districts**

As cities annex new land, questions arise about the application of local sales taxes in the newly annexed territory. If the land was previously part of an emergency service district (ESD) that imposed a sales tax and, upon annexation, will be served by city first responders, who should get the sales taxes when there isn’t enough room under the two-cent cap for both? The usual rule regarding priority of local sales taxes—first-come-first-served—tends not to work well in these circumstances. Some cities question, for example, why some other entity should get to provide emergency services on the citizens’ tax dollar when a city is perfectly situated to do so itself.

Legislation passed in 2007, S.B. 1502 by Zaffirini, allows an ESD to “carve out” portions of the district that are already at the two-cent cap, thus permitting the district to impose the tax in non-capped portions of the ESD. As a result of this bill, cities have experienced an increased number of new ESD sales taxes in their ETJ (prior to the bill, an ESD couldn’t pass a sales tax unless the entire district was eligible under the two-cent cap).

In 2013, legislation was filed and passed that represents a step in the right direction for cities on this issue. H.B. 3159 by Isaac authorizes a city that annexes territory served by an ESD (but does not provide emergency services in the newly-annexed area) to enter into an agreement with the ESD to divide the sales tax revenue in the newly-annexed area in an amount acceptable to both entities. The bill is not perfect, since an ESD could still refuse to negotiate such an agreement with the city and therefore limit the city sales taxes to be collected in the newly-annexed territory. However, some cities have already utilized this new authority to collect a higher percentage of sales taxes than it otherwise would have received without an agreement.

In any case, if a city removes territory from an ESD, it must provide notice to the ESD to complete the removal.<sup>78</sup>

Any city that seeks to annex either type of area should consult with local legal counsel regarding the pitfalls associated with that type of annexation.

## **X. Provision of Services**

The provision of services to an annexed area is arguably the most contentious part of the annexation process. Coupled with the fact that there are relatively few reported cases on the issue, provision of services often leads to disagreements between a city and landowners or residents in an annexed area. Senate Bill 89 (1999) was never designed to limit the ability of a city to annex. Rather, it was introduced, and ultimately passed, as a way to ensure that an annexed area received appropriate services after annexation. Section 43.056 of the Local Government Code governs provision of services. Certain sections apply only to annexation plan annexations, while certain apply only to exempt annexations. A brief review of the entire section follows.

**Subsection (a)(plan annexations only) – time for completion of service plan:** “Before the first day of the 10th month after the month in which the inventory is prepared as provided by Section 43.053, the municipality proposing the annexation shall complete a service plan that provides for the extension of full municipal services to the area to be annexed. The municipality shall provide the services by any of the methods by which it extends the services to any other area of the municipality.”

Section 43.056(j) states that the service plan must be available at the public hearings. But Subsection(a) states that the service plan must be completed before the first day of the tenth month after the month in which the inventory is prepared. Thus, it appears that a city should prepare a “preliminary service plan” that is available at the public hearings, and then prepare a “final service plan” before the tenth month after the month in which the inventory is prepared.

**Note:** *the service plan requirement for exempt annexations is found in similarly-worded Section 43.065: “Before the publication of the notice of the first hearing required under*

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<sup>78</sup> TEX. HEALTH AND SAFETY CODE Sec. 775.022(a) provides that “[i]f a municipality completes all other procedures necessary to annex territory in a district and if the municipality intends to remove the territory from the district and be the sole provider of emergency services to the territory by the use of municipal personnel or by some method other than by use of the district, the municipality shall send written notice of those facts to the board. The municipality must send the notice to the secretary of the board by certified mail, return receipt requested. The territory remains part of the district and does not become part of the municipality until the secretary of the board receives the notice. On receipt of the notice, the board shall immediately change its records to show that the territory has been disannexed from the district and shall cease to provide further services to the residents of that territory. This subsection does not require a municipality to remove from a district territory the municipality has annexed.”

Section 43.063, the governing body of the municipality proposing the annexation shall direct its planning department or other appropriate municipal department to prepare a service plan that provides for the extension of full municipal services to the area to be annexed. The municipality shall provide the services by any of the methods by which it extends the services to any other area of the municipality.” In addition, S.B. 89, Section 17(e) and Local Government Code Section 43.065(b) provide that 43.056(b)-(o), but not (d) or (h)-(k)<sup>79</sup>, apply to an exempt annexation.

**Subsection (b)(all annexations)<sup>80</sup> – general requirement to provide services:** A city must provide full municipal services to annexed areas within 2 ½ years, unless certain services cannot be reasonably provided within that time and a city proposes a schedule to provide services within 4 ½ years. However, capital improvements must only be substantially completed within that 4 ½ year period.<sup>81</sup>

If the city provides any of the following services within its corporate boundaries, it must provide them to the annexed area immediately:

- (1) police protection;
- (2) fire protection;
- (3) emergency medical services;

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<sup>79</sup> Section 43.065(b) provides that “[s]ections 43.056(b)-(o) apply to the annexation of an area to which this subchapter applies.” However, Section 17(e) of S.B. 89 provides that neither (d) nor (h)-(k) apply. This conflict can largely be resolved by reviewing the relevant provisions of Section 43.056. Subsections (d) and (h) are Houston-only under current population – 1.5 million or more or 1.6 million or more, respectively, so generally don’t apply. Subsection (i) directs a city to prepare a revised service plan for an area if the annexed area is smaller than that originally proposed, and can easily be complied with. Subsections (j) and (k) are somewhat more troubling, and may not be able to be completely complied with. Why? Those sections reference negotiations and other procedures that are unique to plan annexations, and are probably applicable due to a drafting error.

<sup>80</sup> Section 2 of H.B. 610 (2007) makes the following change to Texas Local Government Code Section 43.056(b): “The service plan, which must be completed in the period provided by Subsection (a) before the annexation, must include a program under which the municipality will provide full municipal services in the annexed area....” Section 2 provides that the service plan must “be completed in the period provided by Subsection (a) before the annexation”. The problem is that Subsection (a) **only applies to the annexation of an area that is in a city’s three-year annexation plan**. A drafter who is unfamiliar with S.B. 89 may not be aware of that fact because **it is not in the statute itself**. Rather, Section 17 of S.B. 89 (codified in statutory notes that follow Section 43.052 and others) provides a list of the Chapter 43 provisions that apply to an exempt annexation. Note that Section 43.056(b) applies, but **Section 43.056(a) does not**. As such, a reference in Subsection (b) to requirements in Subsection (a) cannot be applied to the annexation of an exempt area. A city must complete a service plan for an exempt annexation, but the requirement for that plan comes from a completely different section – 43.065(b): “**Sections 43.056(b)-(o) apply to the annexation of an area to which this subchapter applies.**” Again, note that Subsection (a) does not apply to an exempt annexation. Further, Subsection (a) references a timeline for the inventory that must be completed **for a plan annexation under Section 43.053**. Pursuant to S.B. 89, Section 17, Subsection (e), exempt annexations **do not require an inventory**. For the annexation of an area in a city’s annexation plan, the new language simply confirms the proper timeline for preparing the service plan after the inventory of services is prepared. For the annexation of an area that is exempt from the annexation plan requirement, the new language does not affect the service plan provisions whatsoever. Nor does it make any provisions relating to the preparation of an inventory applicable, as those are made **expressly inapplicable** by Section 17 of S.B. 89.

<sup>81</sup> TEX. LOC. GOV’T CODE §43.056(b) & (e).



- (4) solid waste collection, except as provided by Subsection (o);
- (5) operation and maintenance of water and wastewater facilities in the annexed area that are not within the service area of another water or wastewater utility;
- (6) operation and maintenance of roads and streets, including road and street lighting;
- (7) operation and maintenance of parks, playgrounds, and swimming pools; and
- (8) operation and maintenance of any other publicly owned facility, building, or service.

**Subsection (c)(all annexations) – definition of full municipal services:** “Full municipal services” means services provided by the annexing city within its full-purpose boundaries, including water and wastewater services and excluding gas or electrical service.<sup>82</sup>

**Subsection (d)(plan annexations): Houston-only.**

**Subsection (e)(all annexations) – method for completion of services:** “The service plan must also include a program under which the municipality will initiate after the effective date of the annexation the acquisition or construction of capital improvements necessary for providing municipal services adequate to serve the area.” This provision should be read in conjunction with the time periods in Subsection (b), and essentially provides that the city must have a plan for, and complete, capital improvements in a reasonable manner (and that improvements should proceed according to the city’s capital improvements plan). It also provides that “The requirement that construction of capital improvements must be substantially completed within the period provided in the service plan does not apply to a development project or proposed development project within an annexed area if the annexation of the area was initiated by petition or request of the owners of land in the annexed area and the municipality and the landowners have subsequently agreed in writing that the development project within that area, because of its size or projected manner of development by the developer, is not reasonably expected to be completed within that period.”

**Subsection (f)(all annexations) – financing the services:** Provides that a service plan may not:

- (1) require the creation of another political subdivision;
- (2) require a landowner in the area to fund the capital improvements necessary to provide municipal services in a manner inconsistent with Chapter 395 unless otherwise agreed to by the landowner; or
- (3) provide services in the area in a manner that would have the effect of reducing by more than a negligible amount the level of fire and police protection and emergency medical services provided within the corporate boundaries of the municipality before annexation.

**Subsection (g)(all annexations) – level of services:** This subsection essentially provides that the level of services in an area may not be reduced after annexation, and that the area should receive at least the same level of services after annexation.

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<sup>82</sup> *Id.* at §43.056(c).

**Subsection (h)(all annexations?): Houston-only.**

**Subsection (i)(all annexations?) – revision of service plan:** Directs a city to prepare a revised service plan for an area if the annexed area is smaller than that originally proposed.

**Subsection (j)(plan annexations?) – amendment of service plan:** Provides that the preliminary service plan must be made available for public inspection and explained to the inhabitants of the area at the public hearings held under Section 43.0561.<sup>83</sup> The plan may be amended through negotiation at the hearings, but the provision of any service may not be deleted.

**Subsection (k)(plan annexations?) – amendment of service plan:** Provides that, on approval by the governing body, the service plan is a contractual obligation that is not subject to amendment or repeal except that if the governing body determines at the public hearings [for plan annexations] that changed conditions or subsequent occurrences make the service plan unworkable or obsolete, the governing body may amend the service plan to conform to the changed conditions or subsequent occurrences. Amendments require a hearing.

**Subsection (l)(all annexations) – term of service plan:** Provides that a service plan is valid for 10 years, and contains numerous Houston-only provisions as well.

**Subsection (m)(all annexations) – level of services:** A city is not required to provide a uniform level of services to each area of the city if different characteristics of topography, land use, and population density constitute a sufficient basis for providing different levels of service.<sup>84</sup> This provision also provides that a dispute over service levels is resolved pursuant to the procedure in Subsection (l), but those procedures only apply to the City of Houston.

**Subsections (n) and (o)(all annexations) – solid waste:** These provisions govern how a city provides garbage collection in the area.

## **XI. CONCLUSION**

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<sup>83</sup> Note that this provision applies only to plan annexations, which leads to the conclusion that Subsection (j) does not apply to exempt annexations.

<sup>84</sup> Under *City of Heath v. King*, 665 S.W.2d 133, 136 (Tex App.--Dallas 1983, no writ), whether a city provides services substantially equivalent to those furnished other areas with similar characteristics involves two considerations: (1) are there two separate areas of the city with similar characteristics; and if so, (2) are services being furnished to one area disparate from those being furnished to the other? According to *Rio Bravo Subdivision Property Owners Ass'n v. City of Brownsville*, 2010 WL 3921185: Nothing in the plain language of the statute indicates that a municipality must provide new or additional services to an annexed area. (In addition, *Rio Bravo* tacitly approves the fact that a city can't encroach on a certificated water provider's service area.)

Is Annexation really that complicated? True to lawyer form, the answer is “it depends.” For general law and home rule cities performing agreeable annexations by petition, the answer is probably “no.” A city simply receives the petition, prepares a service plan, provides appropriate notice, conducts two hearings, adopts the ordinance, and completes the post-annexation notice to the appropriate agencies.

On the other hand, cities that annex large residential areas unilaterally have many issues to contend with, including negotiations and possible arbitration. For these cities, the answer to the above question is definitely “yes.” Local counsel should always be consulted prior to annexing, and this premise is doubly true when a city is considering contentious, unilateral, annexations. **In any case, neither this paper, nor any other secondary source, should serve as legal advice or a substitute for becoming extremely familiar with Chapter 43 of the Local Government Code prior to annexing property.** For more information on annexation or any other municipal issue, please contact the Texas Municipal League Legal Department at 512-231-7400 or [legalinfo@tml.org](mailto:legalinfo@tml.org).

## **XII. Example Documents**

Examples of many of the necessary documents are available in Word format on the TML Web site. Go to [www.tml.org](http://www.tml.org), Legal Research, Example Documents, and finally Annexation Documents. Those documents are intended as examples only, and local counsel should always be consulted prior to use. Examples include:

- Ordinances, Resolutions, Petitions, and Notices
- Calendars, including an Expedited Exempt Calendar
- Service Plan
- Annexation Plan for Exempt Annexations Only
- Development Agreement – Section 43.035

For excellent examples of three-year annexation plans, for forms and other documents used by specific cities, and for an example of comprehensive annexation Web pages, please visit:

- City of Denton (very cool): <http://www.cityofdenton.com/departments-services/departments-g-p/planning/2010-annexation-process>
- City of Austin: <http://www.austintexas.gov/department/annexation-extraterritorial-jurisdiction-planning>
- City of San Antonio: <http://www.sanantonio.gov/Planning/PlanningUrbanDesign/Annexation/AnnexationProgram.aspx>
- City of Midlothian: <http://www.midlothian.tx.us/index.aspx?nid=575>

In addition, most cities’ capital improvement plans and other documents are available on their Web sites.