ANNEXATION AND THE ETJ: EXPANDING AND DEFENDING MUNICIPAL ANNEXATIONS

2011 Land Use Planning Conference
The University of Texas at Austin
AT&T Conference Center
March 31, 2011

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Rarely do landowners living outside a municipality petition city hall for annexation, requesting both the blessings and many benefits of living inside a city rather than skirting its edge. Indeed, after having sat through literally hundreds of public hearings mandated prior to the passage of an ordinance annexing territory into a city, I cannot think of an instance where landowners about to be annexed have responded in any fashion other than to protest the annexation (always termed a “land grab”) and to threaten (and often follow through with) litigation if the annexation ultimately is approved by the city council. Not surprisingly, notwithstanding landowner frustration and anger at being annexed, cities usually will win in court if a lawsuit is filed. The purpose of this paper is to address (i) why cities annex territory, particularly during tough economic times; (ii) methods by which cities may aggressively annex territory; and (iii) how cities may aggressively defend annexations of territory. Last, the paper concludes with practical annexation tips from the municipal perspective. This paper will not address the basics of Texas annexation law.¹

I. Trust Me, Annexation is Good for You!

Texas cities are some of the fastest growing in the United States, as reflected in the preliminary 2010 census data. Evidence of the importance of unilateral annexation is apparent when compared to other states where cities do not have such power. The broad power of Texas home-rule cities to annex unilaterally 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. One highly respected authority has noted that if San Antonio, for example, had the same boundaries today it had in 1945, it would contain more poverty and unemployment than Newark, New Jersey.²

The importance of annexation authority in Texas is reinforced by a review of the most basic elements of municipal finance, land use/development patterns and intergovernmental relations³:

¹ For an in-depth discussion of Texas annexation law, the author will be happy to provide you, upon request, with a copy of a detailed paper entitled “Annexation in Texas,” written by Robert F. Brown and Edwin P. Voss, Jr., of Brown & Hofmeister in Richardson, Texas.


³ This section is taken in part from a paper by Scott Houston, Director of Legal Services for the Texas Municipal League, entitled “Municipal Annexation in Texas—Is It Really
Cities (and city taxpayers) pay for a wide array of services and facilities that benefit both entire regions and the entire state. For example, basic activities such as mail delivery could not take place if cities did not construct and maintain streets. The economy of Texas would crumble without municipal investment in basic municipal infrastructure upon which businesses and industry must rely. Cities are centers of employment, transportation, health care, entertainment and merchandising and are often used by non-city residents in the region. This means that cities must support public safety services and physical infrastructure sufficient to serve a daily influx of visitors from throughout the region.

Most states recognize that cities should be assisted in making expenditures that benefit entire regions and the whole state. Virtually every state, in recognition of city taxpayers making expenditures that benefit all residents within the state, transfers state-generated revenue to cities to assist in the provision of services and public facilities. For example, all populous states contribute 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.

In Texas, there is virtually no state aid to cities. A review of any municipal budget will reveal that there is no revenue line item called “Transfer from State” or “State Financial Assistance.” While such line items may be common in other states, they will not be found in any municipal budget in Texas.

Texas, however, has allowed cities to unilaterally annex territory. Cities have used such annexation authority to bring adjacent areas into the city and into the system through which cities finance the services and public facilities that benefit both the region and the state.

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 eliminated, Texas would become the only state in the nation that denies both state financial assistance and

that Complicated?” (January 2008) and is based upon an article authored by Frank Sturzl, the former Executive Director of the Texas Municipal League.
annexation authority to its cities. Opponents of annexation cannot point to a single state that has restricted annexation authority without implementing fiscal assistance programs through which the state helps cities pay for the infrastructure on which the entire state depends.

(6) Annexation is often seen as a method by which land uses in the city are protected from adjoining inconsistent land uses and development patterns in the extraterritorial jurisdiction (ETJ). On the date of annexation those inconsistent land uses and developments may be “grandfathered” for a period of time, but future development must be in conformity with municipal land use regulations and comprehensive plans, thus preventing the expansion of repugnant or inappropriate land uses.

(7) Annexation of territory expands the municipal tax base. This is often seen as desirable since it is not unusual that many residents in a city’s ETJ receive similar services as do those in the city limits—and often without paying for those services. Consequently, municipal property taxpayers subsidize services and infrastructure that benefit those residents just across the city limits line.

In brief, most cities annex territory because residents in the ETJ often receive similar municipal services at a lower cost than city residents (often because of interlocal agreements with neighboring cities or the county, such as police and fire protection, EMS services and library services) because those residents in the ETJ are not paying municipal property taxes for such services.

II. Aggressive Annexation and ETJ Expansion Methods

While what one city may consider an aggressive annexation method, another city may view as entirely permissible under state law and hence acceptable. Below is a listing of annexation methods or procedures (including ETJ expansion) that a municipality may pursue in annexing territory, some of which may be considered either aggressive or “out of the ordinary” and not part of your “plain vanilla” annexation process.

A. When is a Strip Annexation Not a Strip Annexation?

Section 43.054 of the Texas Local Government Code provides, in part, that strip annexations of less than 1,000 feet in width are prohibited:

(a) A municipality with a population of less than 1.6 million may not annex a publicly or privately owned area, including a strip of area
following the course of a road, highway, river, stream, or creek, unless the width of the area at its narrowest point is at least 1,000 feet.

(b) The prohibition established by Subsection (a) does not apply if:

(1) the boundaries of the municipality are contiguous to the area on at least two sides;

(2) the annexation is initiated on the written petition of the owners or a majority of the qualified voters of the area; or

(3) the area abuts or is contiguous to another jurisdictional boundary.

Exemptions in the Texas Local Government Code to the 1000 foot width requirements include Section 43.101 (Annexation of Municipally Owned Reservoir by General-Law Municipality), Section 43.102 (Annexation of Municipally Owned Airport), Section 43.103 (Annexation of Streets, Highways, and Other Ways by General-Law Municipality), and Section 43.105 (Annexation of Streets by General-Law Municipality with Certain Populations).

There are at least two methods by which a city may avoid the strip annexation prohibition under Section 43.054. First, if a city wishes to annex an area along a state highway, for example, simply annex along the state highway to the extent of the ETJ, making certain that the width of the strip at its narrowest point is at least 1,000 feet. Thus, a 1,001 foot wide strip is permissible under Section 43.054 and is not a prohibited strip annexation. Second, if for some reason a 1,000 foot width is not possible, before annexing a strip, a city should consider the annexation of a parcel of property that will provide the city with municipal territory on “two sides” of the proposed strip annexation. Although no case law has defined the parameters of what Section 43.054(b)(1) (“the boundaries of the municipality are contiguous to the area on at least two sides”) means, in Attorney General Opinion No. GA-0478 (2006), Attorney General Abbott wrote that “the exception in section 43.054(b)(1) applies only when the narrow territory otherwise prohibited from being annexed is physically next to, or touching, the municipal boundaries on at least two sides.”

B. Consider Use of the “Fewer Than 100 Separate Tracts of Land” Exemption When Annexing

While Chapter 43 of the Texas Local Government Code goes into great detail about the annexation of territory included in an annexation plan, many cities rely upon statutory exemptions from the annexation plan requirements of that chapter. The most

4 Id. at 3.
common exemption from the annexation plan requirement is found in Section 43.052(h)(1) of the Texas Local Government Code: “[T]he area [to be annexed] contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract.” This provision is sometimes referred to as the “small subdivision” exception; however, its language certainly is not a model of clarity.

Texas city attorneys have interpreted the provision to mean that an area is exempt from an annexation plan if it contains any number of tracts so long as no more than 99 of the tracts contain residential dwellings. The changes made to Section 43.052(h)(1) were made after the committee hearings on the legislative bill were held and as a consequence, there is no testimony regarding the interpretation of this provision. Subsequent to its enactment, the City of Denton requested an opinion from State Representative Bosse to clarify the scope of Section 43.052(h)(1). In response to the City of Denton’s question, Representative Bosse stated that Section 43.052(h)(1) should be “interpreted broadly so as to give advance warning to rather populous areas being annexed to allow them to negotiate the services being provided.” The provision was enacted to curb perceived abuses of unilateral annexation authority by a few cities, and is designed to prevent cities from annexing very large residential subdivisions without providing adequate notice. In Attorney General Opinion No. GA-0737 (2009), Attorney General Abbott concluded that “[b]ased upon the ordinary meaning of the word ‘contains,’ the object sought to be attained, the circumstances of enactment, the legislative history, and the characterization of this exception by the courts, we conclude that the (h)(1) exception may be utilized even though there is not a residence on each tract of the area proposed for annexation. Thus, the single vacant lot at issue here is irrelevant in determining whether the area contains fewer than one hundred tracts upon which a residential dwelling is located.”

Based on the foregoing interpretation of Section 43.052(h)(1) by the Attorney General, most cities find it advisable to commence immediate annexation proceedings, foregoing an annexation plan and the time involved in annexing territory subject to such an annexation plan. While the “fewer than 100 separate tracts of land” exemption has certain limitations—most notably, circumventing that requirement by separate, piecemeal annexations, each of which involves fewer than 100 separate tracts, in violation of Section 43.052(i)—it is often the basis upon which many municipalities annex property.

C. ETJ Expansion Issues—and Pitfalls

“Inhabitants” versus “Population.” As a general rule, the geographical extent of a city’s extraterritorial jurisdiction is contingent upon the number of inhabitants in a municipality:

5  Id. at 4.
<table>
<thead>
<tr>
<th>Number of Inhabitants</th>
<th>Extent of Extraterritorial Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 5,000</td>
<td>One-half Mile</td>
</tr>
<tr>
<td>5,000—24,999</td>
<td>One Mile</td>
</tr>
<tr>
<td>25,000—49,999</td>
<td>Two Miles</td>
</tr>
<tr>
<td>50,000—99,999</td>
<td>Three and one-half Miles</td>
</tr>
<tr>
<td>100,000 and over</td>
<td>Five Miles</td>
</tr>
</tbody>
</table>

Tex. Local Gov’t Code § 42.021. The operative language in Section 42.021 is “number of inhabitants” rather than “population”—a distinction of significance in Texas state law when viewed with reference to Chapter 311 of the Texas Government Code, the Code Construction Act. According to Section 311.002 of the Government Code, the Code Construction Act applies to any code enacted by the 60th or subsequent Legislature. The Local Government Code was enacted by the 71st Legislature in 1989. According to Section 311.005(3) of the Government Code, “population” means “the population shown by the most recent federal decennial census.” Therefore, when any state statute employs the term “population,” that refers to the population as of the most recent decennial census—currently, the 2010 federal decennial census. In contrast, the extent of a city’s extraterritorial jurisdiction is based upon the number of inhabitants (as determined by the city), not the city’s population according to the most recent decennial census. Additionally, the Attorney General’s Office determined in Letter Opinion No. LO94-033 (1994) that “a municipality may choose the method by which it will ascertain the boundaries of its extraterritorial jurisdiction. . . .” That opinion was in response to the question whether a city “may measure its extraterritorial jurisdiction by drawing a radius around the municipality on a map, or whether the municipality must ‘go into the field, . . . physically [measuring] the . . . radius.’” Id. Thus, a municipality by ordinance or resolution may determine the number of inhabitants within its corporate limits and determine how it will measure the extent of its ETJ.6

Expanding ETJ Upon Request and the “Boerne Wall.” Section 42.022(b) of the Texas Local Government Code provides that a municipality’s ETJ may expand beyond the distances set out in Section 42.021 “to include an area contiguous to the otherwise existing extraterritorial jurisdiction of the municipality if the owners of the area request the expansion.” Thus, it has been the practice of some smaller cities to suggest to nearby landowners that they request inclusion in the smaller city’s ETJ rather than risk future annexation by a nearby larger city. In such instance, inclusion in a city’s ETJ is a “blocking move” that will prohibit annexation by a larger city.

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6 For rapidly growing municipalities, a determination of the number of inhabitants in a city during any year subsequent to 2010 could be based upon 2010 census data coupled with the number of residential building permits issued by the city on an annual basis since the date of the decennial census, factoring into each building permit a calculation about the number of persons who reside in a typical residence in that city.
There is one key issue that must not be overlooked when an ETJ expansion is requested: are there bordering roadways involved and if so, who owns the roadway right-of-way? This was a key issue in *City of San Antonio v. City of Boerne.*

The underlying facts in that case are instructive. On November 5, 1987, San Antonio’s City Council passed an ordinance (the “San Antonio Ordinance”) annexing certain property located in San Antonio’s extraterritorial jurisdiction. On the December 31, 1987, effective date of this annexation, San Antonio's extraterritorial jurisdiction thereby expanded to include property that was previously unincorporated by any city. After San Antonio passed its annexation ordinance, but before it became effective, a number of property owners in Kendall and Comal Counties petitioned the City of Boerne to include their property within Boerne's extraterritorial jurisdiction; however, the property of those petitioning owners was too dispersed to satisfy section 42.022(b)’s contiguity requirement. To overcome that obstacle, Boerne—which had agreed to coordinate the annexation process—accepted petitions from Kendall and Comal County commissioners courts to include various sections of their counties' roads within Boerne's extraterritorial jurisdiction. Boerne then passed a number of ordinances (the “Boerne Ordinances”) extending its extraterritorial jurisdiction accordingly.

In the court, Boerne conceded that, without including county roads, much of the area was insufficiently contiguous to satisfy Section 42.022(b); however, by including these county roads, Boerne believed it properly acquired jurisdiction over an area that, absent the Boerne Ordinances, would be within the extraterritorial jurisdiction created by the San Antonio Ordinance. As a consequence, both San Antonio and Boerne effectively claimed authority over the same area.

The Texas Supreme Court resolved the issues in favor of San Antonio, concluding that (i) the Texas Legislature’s grant to a county commissioners court of general control over county roads does not include the power to petition a municipality to annex (or to petition for inclusion in a city’s ETJ) certain portions of a county road, and (ii) a county commissioners court is not authorized, as an agent of the State of Texas, to petition a city for annexation or for inclusion in a city’s extraterritorial jurisdiction. As a consequence, it is imperative that whenever landowners attempt to

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7 111 S.W.3d 22 (Tex. 2003).


9 *Id.* at 24-25.

10 *Id.* at 30 (“[W]e reject Boerne’s broad construction of the phrase “general control,” and hold that a county’s commissioners court is without authority to petition for annexation of its county roads. . . .”).

11 *Id.* at 30-31.
be included in another city’s ETJ, the right-of-way of any county roadways must be analyzed to determine if the necessary contiguity exists with the current city boundaries.\textsuperscript{12}

D. ETJ “Blocking” of Future Annexations

While municipalities may increase the area of its ETJ through annexation or voluntary landowner inclusion of territory in a city’s ETJ, a municipality may also reduce its ETJ by ordinance or resolution, pursuant to Section 42.023 of the Texas Local Government Code.\textsuperscript{13} There is no requirement, however, that ETJ be released by tract or platted lots. Moreover, ETJ may be released in such a manner that small “ETJ strips” remain that could block another municipality from increasing its ETJ. Thus, a partial release of ETJ could be undertaken for no other reason than to prohibit another neighboring city from expanding its ETJ.

An example of this occurred in the mid-1970s with the creation of the Town of Trophy Club, Texas. In 1973 Houston developers approached the Town Council of the Town of Westlake about the possibility of constructing a housing development around a country club; thereafter, the Town of Westlake disannexed some of its northern area, which ultimately became the Town of Trophy Club.\textsuperscript{14} What was interesting to note is that when Westlake disannexed a portion of its corporate limits, it retained a small strip of land that completely surrounded Trophy Club, thus blocking any potential expansion of Trophy Club’s corporate limits and also giving Trophy Club no ETJ area. Whether that “strip” around Trophy Club consisted of Westlake’s corporate limits or ETJ, it effectively “blocked” or “boxed in” Trophy Club in such a manner as to prohibit any future annexations by Trophy Club. Consequently, ETJ “strips” can be creatively retained by one municipality as a method by which to prohibit the annexation of territory or the expansion of the ETJ of a nearby municipality.

\textsuperscript{12} It has been the author’s experience that many county roadways are by prescriptive easement, usually meaning that adjoining landowners own the property underlying the roadway to the center of the roadway—in such instance, the necessary contiguity exists. In those situations, however, where the roadway is located in county-owned right-of-way, the necessary contiguity would not exist.

\textsuperscript{13} Section 42.023 of the Local Government Code provides, in pertinent part, that “[t]he extraterritorial jurisdiction of a municipality may not be reduced unless the governing body of the municipality gives its written consent by ordinance or resolution. . . .”

\textsuperscript{14} For a brief history of both The Town of Westlake, Texas, and the Town of Trophy Club, Texas, please refer to http://www.trophyclub.org/community/history.asp and http://www.tshaonline.org/handbook/online/articles/hlw56 (last visited on March 4, 2011).
III.

Aggressively Defending Municipal Annexations

While there are various defenses and jurisdictional challenges available to cities when residents (or other municipalities) contest a municipal annexation,\(^\text{15}\) there also are several strategies that may be utilized in buttressing a municipal annexation.

A. Section 41.003 of the Texas Local Government Code

Section 41.003 of the Texas Local Government Code, originally enacted in 1983, provides that a city council may adopt an ordinance declaring that an area adjacent to the city and that meets the following requirements to be a part of the city:

1. the records of the municipality indicate that the area has been a part of the municipality for at least the preceding 20 years;
2. the municipality has provided municipal services, including police protection, to the area and has otherwise treated the area as a part of the municipality 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 municipality; and
4. there is no pending lawsuit that challenges the inclusion of the area as part of the municipality.

Tex. Local Gov’t Code § 41.003(b). The adoption of such an ordinance creates an irrebuttable presumption that the area is a part of the municipality for all purposes retroactive to the date the area began receiving treatment as part of the municipality. The presumption may not be contested for any reason after the effective date of the ordinance. One commentator has referred to Section 41.003 as a “quasi-validation statute.”\(^\text{16}\) While many annexed areas may not meet the mandatory 20-year period referenced in Section 41.003(b), it nevertheless is a shield that may be used in defending a prior municipal annexation.

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\(^{15}\) As noted above in footnote 1, for a detailed analysis of various litigation strategies in defending “traditional” municipal annexation cases, please contact the author for a copy of “Annexation in Texas,” written by Robert F. Brown and Edwin P. Voss, Jr., of Brown & Hofmeister in Richardson, Texas.

\(^{16}\) David Brooks, 22 Tex. Prac. § 1.12 at 63 (1999).
B. Bond Validation Declaratory Judgment Actions

One procedure by which a municipality may secure its boundaries (and previous annexations of property) is through an expedited declaratory judgment pursuant to Chapter 1205 of the Texas Government Code. This is an expedited process and the trial court, upon the filing and presentation of a petition, is required to immediately issue an order setting this matter for hearing and trial at 10:00 a.m. on the first Monday after the expiration of twenty (20) days from the date of the order.\footnote{Specifically, § 1205.041 of the Texas Government Code provides:}

Chapter 1205 specifically is intended to provide political subdivisions, such as municipalities, with an efficient method of adjudicating the validity of public securities and contracts. Section 1205.021 of the Texas Government Code provides, in pertinent part, that an issuer of public securities may:

[B]ring an action under this chapter to obtain a declaratory judgment as to:

\begin{itemize}
  \item The court in which an action under this chapter is brought shall, on receipt of the petition, immediately issue an order, in the form of a notice, directed to all persons who:
    \begin{itemize}
      \item reside in the territory of the issuer:
      \item own property located within the boundaries of the issuer;
      \item are taxpayers of the issuer; or
      \item have or claim a right, title, or interest in any property or money to be affected by a public security authorization or the issuance of the public securities.
    \end{itemize}
  \item The order must, in general terms and without naming them, advise the persons described by Subsection (a) and the attorney general of their right to:
    \begin{itemize}
      \item appear for a trial at 10 a.m. on the first Monday after the 20th day after the order; and
      \item show cause why the petition should not be granted and the public securities or the public security authorization validated and confirmed.
    \end{itemize}
  \item The order must give a general description of the petition but it is not required to contain the entire petition or any exhibit attached to the petition.
\end{itemize}

\footnote{Specifically, § 1205.041 of the Texas Government Code provides:}
(1) the authority of the issuer to issue the public securities;

(2) the legality and validity of each public security authorization relating to the public securities, including if appropriate:

(A) the election at which the public securities were authorized;

(B) the organization or boundaries of the issuer;

(C) the imposition of an assessment, a tax, or a tax lien;

(D) the execution or proposed execution of a contract;

(E) the imposition of a rate, fee, charge, or toll or the enforcement of a remedy relating to the imposition of that rate, fee, charge, or toll; and

(F) the pledge or encumbrance of a tax, revenue, receipts, or property to secure the public securities;

(3) the legality and validity of each expenditure or proposed expenditure of money relating to the public securities; and

(4) the legality and validity of the public securities.

(Emphasis added). The Texas Supreme Court has recognized that the Legislature intended for courts to quickly resolve any proceedings brought under Chapter 1205.18

Thus, a municipality may seek a declaratory judgment (i) validating the current boundaries of a municipality, (ii) finding that the municipality is providing services to each area within the municipality pursuant to the terms of the annexation service plan for each and every area that was and has been annexed by the municipality since its incorporation, and as required by all applicable laws, and (iii) determining the legality and validity of the bonds and other evidences of indebtedness issued by the municipality and the ability to levy and collect notes and charges for capital improvements undertaken by the municipality, including streets and roadways, water and wastewater services provided to all areas of the municipality that have been

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18 See Buckholts Indep. Sch. Dist. v. Glaser, 632 S.W.2d 146, 150-51 (Tex. 1982); Rio Grande Valley Sugar Growers, Inc. v. Attorney General, 670 S.W.2d 399, 401 (Tex. App.–Austin 1984, writ ref’d n.r.e.) (“The total thrust of [article 717m-1, predecessor statute to Chapter 1205] is to dispose of public securities validation litigation with dispatch.”).
annexed and/or subject to a boundary agreement since the municipality’s incorporation. The effect of a bond validation lawsuit is to put to rest any current or future legal challenges concerning the current boundaries of the municipality, from the date of incorporation to the present time, as a result of any annexation, disannexation or boundary adjustment; the compliance with the annexation service plans, and any other applicable legal requirements, for each area now within the municipality’s corporate limits; the validity of any bonds and the levy and collection of rates and charges to provide for the payment of said bond obligations. The judgment in a bond validation lawsuit is a permanent injunction against the filing by any person of any proceeding contesting the validity of the bonds in question “and any adjudicated matter and any matter that could have been raised in the action.”19 Thus, a decree is forever binding and conclusive against the municipality, the Texas Attorney General, and any interested parties, irrespective of whether such parties filed an answer or otherwise appeared. Needless to say, this is a powerful tool by which to eliminate any future boundary challenges, whether from disgruntled landowners or neighboring municipalities.

IV.

Practical Pointers for the Municipal Practitioner

Under the current Texas annexation scheme, the careful municipal official has many issues to confront and decide before embarking on annexation. With myriad statutes and regulations that accompany the annexation process, it is easy to err in some aspect of enacting an annexation ordinance. Moreover, even before initiating an annexation or disannexation proceeding, the prudent official should weigh certain “big picture” considerations to arrive at the best strategy for the municipality. To aid in making decisions affecting annexation and to assist in enacting an annexation or disannexation ordinance, the following practical pointers are offered as a helpful guide in this process.

A. Never underestimate the resolve of rural landowners and property owners with a differing philosophical view of municipal benefits.

It is always shocking to the new councilmember who witnesses his first annexation hearing and hears for the first time how “unconstitutional,” “un-American,” and “downright unfair” it is to annex property into a city—which annexation is always viewed by landowners as a “land grab” by the city. Most lifelong urban residents do not encounter these viewpoints nor can they appreciate the differing aspects of rural life which are still prevalent in Texas. Even near the largest of Texas’ urban centers are landowners who will fight to remain outside the control, and property taxation, of a municipality. Many of those who espouse these views do not believe that having municipal services is a benefit to their way of life—separate and apart from the taxation and costs of services.

19 Tex. Gov’t Code § 1205.151(c)(3).
Practical Tip: Review your property owner lists well in advance of your decision to initiate annexation, especially under an annexation plan. Even in exempt annexations under Section 43.052(h)(1) (the “fewer than 100 separate tracts of land” exemption) the chances of encountering an “anti-city” property owner are high. Prepare understandable, factual literature for opinion-makers in the affected areas to relate to their neighbors. Most rural residents are interested in improving water service and tying into sanitary sewer lines; however, the details of how, when, and who pays must be known and explained to avoid major opposition at the annexation hearings. Be open and honest about the city’s degree or level of participation in utility extensions. A series of informational meetings conducted by city staff in the areas affected can aid in the process; however, in most cases, expect the council meetings to be well-attended and the speakers to be passionately opposed to annexation. If your city council is philosophically split on property rights/annexation issues, the chances of a successful annexation process are greatly diminished. In short, plan ahead for opposition to even the most logical of annexations. This process is not about logic, it is about a person’s property.

B. When Annexing Under an Annexation Plan, Assign One Person to Oversee the Project and Prepare a Full Calendar of the Proceedings.

The statutory requirements for annexing under an annexation plan in Chapter 43, Subchapter C of the Texas Local Government Code, are extremely comprehensive and tedious. The process actually begins during the three-year “waiting period” with the compilation of an inventory of all services to the areas affected. The inclusion of landowner negotiations, notices to the school districts and other related governmental entities and service providers, and the multiple publication and hearings requirements demand a constant watch for complete compliance. If challenged in litigation, each procedural step in the process will be reviewed and subject to challenge. Since the process covers several years, the chances of misplacing files, newspaper notices, and map exhibits can be increased. Many well-intentioned annexation ordinances have been struck down for simple human errors which could have been avoided. Frankly, close oversight is necessary even in annexations exempted from the annexation plan requirement of Chapter 43 of the Local Government Code.

Practical Tip: Place a very high priority on the project. Assign a senior staff member to oversee the entire project (start to finish). Use tested calendaring methods to constantly monitor dates, mailings, public notices and affected parties. Develop checklists and periodic public reviews of the timelines to insure that the process stays on course. In larger municipalities, it is often difficult to preserve continuity of personnel in annexing under an annexation plan. To counteract this problem, assign multiple persons to create redundancy in the review and preparation of documents so that someone will always be able to take the project forward. At the outset, identify which employees will be responsible for each task especially those tasks which may involve special expertise, such as reporting to the United States Department of Justice on
federal Voting Rights Act “pre-clearance.” Serious error will typically mean starting the process over as well as significant institutional embarrassment.

C. Concentrate on the Details Since a Flawed Annexation Can Haunt You on Election Night, Ruin Your Bond Sale, Affect Your Sales Tax Receipts, and Irritate Your Municipal Neighbors.

Several of the related statutes affecting annexations must be followed to legally complete the process. Annexations can affect voting rights under the Voting Rights Act of 1965, found in 42 U.S.C. §1973c. The areas annexed into a municipality must be consistent with the protections afforded to all voters under federal law. To insure these protections, the United States Attorney General must review the potential changes to voting rights and “preclear” the actions of the municipality. Under Section 43.906 of Texas Local Government Code, a city must apply for preclearance under the federal law on the earliest date permitted under the statute. In larger annexations, the supporting materials for establishing the racial neutrality of the annexation may be voluminous. A specialist in this process is advisable.

The Texas Secretary of State also must receive notice to certify the annexation to the U.S. Census Bureau. Moreover, the Texas Comptroller must be notified to receive sales tax for the areas affected, including the receipt of a map. The county clerk must receive a copy of the annexation ordinance within thirty (30) days of the receipt of preclearance. Finally, the city must prepare a detailed map of its boundaries and ETJ, and the map must be kept in the office of the city secretary.

Practical Tip: Failure to obtain federal preclearance can be devastating to a municipality’s elections. This step is crucial in finalizing the validity of an annexation. Adding to the problem is the requirement that single-member districts must also be reviewed through the “redistricting process.” If an annexation’s effects on voting rights are not properly precleared, the municipality’s elections are subject to challenge and invalidity. It is advisable to submit a newly-adopted annexation ordinance at least ninety (90) days prior to the next municipal election. This part of the process should not be an after-thought; it should be one of the most important steps. Make sure that there are checks and balances in the system to insure this function is covered. Election coordinators and city secretaries are traditionally the interface with federal and state agencies and departments. They must be involved in the entire annexation process to insure compliance. Require staff members to prepare close-out reports to city management and city council. Possible bad effects: void election, election contest, irregular bond sale, higher bond rates, lower bond ratings, ineligibility for federal CDBG funds, ineligibility for other federal and state grants, litigation between neighboring cities.

20 See Tex. Tax Code § 321.102(c).

21 See Tex. Local Gov’t Code § 41.0015(a).

22 See Tex. Local Gov’t Code § 41.001.
over municipal and ETJ boundaries, loss of sales tax revenue, loss of property tax revenues, and taxpayer litigation.

D. When using exemptions for city-initiated annexations, make sure your ordinance definitions do not conflict.

Section 43.052(h)(1) of the Texas Local Government Code provides a handy method of annexing property into a municipality under the more streamlined process of the prior law. This exemption has been the subject of much debate, as noted above. It reads:

(h) This section does not apply to an area proposed for annexation if:

(1) An area contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract.

(Emphasis added).

The term “tract” is not defined in the annexation statute, as noted above in this paper. Most municipal attorneys have interpreted this provision to allow annexation of larger areas of land as long as the total number of residential dwellings annexed does not exceed 99. Even if the properties are undeveloped, platted lots or portions of unplatted, rural parcels, the creative official can use a definition of “tract” to his or her advantage.

**Practical Tip:** Carefully examine your city’s codes and ordinances for contrary definitions or use of the term “tract.” Make any necessary amendments, if feasible. If your city’s subdivision ordinance, zoning ordinance, or land development code has contrary provisions or defines “tract” otherwise, it is likely that your creative interpretation for annexation will be ineffective upon challenge. Many municipal subdivision ordinances define “tract” as “lot” which will limit flexibility for areas which have been previously approved in a plat or development plat. Other ordinances use the term “tract” in the context of a “development tract”; an area which will satisfy certain required development standards thus limiting the possibilities for more expansive definition.

**Caveat:** Section 43.052(i) of the Texas Local Government Code provides a safeguard for separate annexations under the (h)(1) exemption which act to circumvent the purpose of the exemption. The separate annexations must be initiated under reasons which are acceptable under “generally accepted municipal principals or practices.”

E. Avoid Unnecessary Specificity in Service Plans Whenever Possible.
Whether prepared for annexations under an annexation plan or otherwise, a service plan under Section 43.056 of the Texas Local Government Code becomes a contractual obligation of the city. Under the statute, the service plan cannot be amended unless changed circumstances are present, and in most cases, the services must be increased with any subsequent amendment of a service plan.

**Practical Tip:** The key to surviving a challenge is to highlight the operation of your city’s ordinances on the extension of utilities and infrastructure to undeveloped areas. General references to ordinances governing water and sewer line extensions are sufficient. More detailed discussion of particular projects, streets, or subdivisions will likely result in a fact question regarding the city’s contractual obligation to complete improvements and provide “services” within the 2½ and 4½ year statutory time frames.

**F. Do Not Forget the School District Notice.**

The 1999 amendments to Chapter 43 of the Texas Local Government Code require cities to notify school districts of annexations between the 20th and 11th day prior to the first public hearing on annexation. The notice must show the area within the district proposed for annexation, any financial impact on the district resulting from the annexation, including any changes in utility costs, and any proposal the city has to abate, reduce, or limit the financial impact on the district.

**Practical Tip:** Obtain updated school district boundary maps on a regular basis. School finance issues have increased the number of boundary adjustments between school districts. Add school district personnel to your staff’s annexation “team” to avoid any errors. Annexations may involve multiple school districts requiring more complicated mapping. If your city has a policy of reducing or waiving fees, impact fees, or inspections for school districts, these should be outlined in the notices. Failure to provide the notice may invalidate the annexation.

**G. Obtain Annexation Maps and Ordinances of Adjacent Cities Regularly.**

Countless lawsuits have been filed after discovering that an adjacent city inadvertently annexed property in newly annexed territory or in newly-created ETJ. In the suburban areas of the Metroplex, cities are abutting or nearing the point of common boundaries. This unavoidable fact has created much animosity—sometimes without justification. Complicating the situation further, rural property owners are using creative methods to avoid annexation. To avoid being annexed by large cities, landowners and smaller, suburban cities are entering into agreements to include properties into the smaller cities’ ETJ under Section 42.022(b) of the Texas Local Government Code. The land around cities in the growth corridors of North Texas should be carefully monitored, and cities should have contingency plans in place.

**Practical Tip:** Require your municipal Engineering, Planning or GIS departments to obtain mapping and ordinance information on a quarterly basis.
Consider a mutual boundary agreement (interlocal agreement or court-approved settlement agreement) with adjacent cities setting the ultimate city limits of each city. It is a good practice to schedule periodic meetings with neighboring cities to discuss annexation plans. When discussing the apportionment of ETJ with an adjacent city, strive to analyze annexation from a “delivery of services” standpoint rather than by sheer land area considerations.

H. Disannexation Is Not Always Undesirable.

This proposition is aimed primarily at annexations which occurred prior to September 1, 1999. For those annexations occurring after September 1, 1999, a city could be subject to refunding taxes and fees generated from an area disannexed to the extent that expenditures in the area did not offset the amounts generated. If the annexation was prior to this date, however, a city can often benefit from disannexing areas which are difficult to serve with full municipal services. Police and fire protection can be stretched by geographic distances which alter service zones, create the need for additional personnel, and lengthen response time averages. This occurs more frequently when pockets of residential development are annexed.

Practical Tip: Analyze the cost/benefit of service to remote areas. If the property owners are already unhappy with being taxed and residing within the city, it may be best to disannex.

Caveat: Be ready to distinguish any areas disannexed from the next request to disannex since one disannexation will often prompt another request.

I. Consider an Ordinance Under Section 51.003 of the Local Government Code to Correct Any Past Mistakes.

As referenced above, for cities with ordinances pre-dating the Municipal Annexation Act of 1963 it is not enough to rely on the operation of Section 51.003 of the Texas Local Government Code to cure any defects in prior proceedings or shield the city from suits challenging the authority “ab initio” to annex. Section 51.003 is an effective statute of limitations for procedural defects, but many cities have ordinances which were enacted with little, or no, procedural formality or which contain major errors in legal descriptions which may impact a careful scrutiny of contiguity/adjacency. Utilizing this statute should act to avoid difficult proof issues in litigation. The compiling and review of old records can be tedious and expensive; however the benefits can be large. A detailed historical record should be included in the ordinance to aid future reviews of the maps and ordinances as well as the courts.

Section 51.003 of the Texas Local Government Code contains the municipal validation act, which act generally validates municipal actions (and certain omissions that may have occurred) more than three (3) years subsequent to the act or proceeding.
J. Understand the CCN Status Before Annexing Territory.

Cities must still wrestle with complicated sections of the Texas Water Code when seeking to provide service to residents. This is exacerbated in areas which are sought in annexation for which another entity provides water or sewer service under a Certificate of Convenience and Necessity (CCN). The general rule allows for a city to serve newly-annexed areas upon the filing of notice with the Texas Commission on Environmental Quality (TCEQ) and after meeting certain other requirements. Section 13.255 of the Texas Water Code, however, requires a city to compensate the entity (a water supply corporation, special utility district, or fresh water supply district) for facilities transferred to the city or rendered valueless by the transfer of service provider. The valuation process is cumbersome and expensive. Rural water supply corporations are often reluctant to agree to smooth transitions after annexation, and the development of property in the newly-annexed territory can come to a quick halt. Complicating matters further, those entities which have loans from federal agencies will have the absolute protection from any transfer, regardless of the city’s desire to compensate. In this scenario, the TCEQ loses jurisdiction and the issues become pre-empted by federal law.

Practical Tip: Begin the dialogue with the CCN-holders early. Bring developers into the process if existing facilities need to serve customers as city customers after annexation. Hire outside water counsel to file the appropriate documents at TCEQ. Amending the CCN of a utility can be a very time-consuming process. Some expenses may be recouped subsequently through utility impact fees; however, there can be a significant cash flow problem due to the timing and requirements of immediate purchase. The TCEQ process is similar to that of condemnation, but the cases and TCEQ precedent are not well-developed to insure certainty.

V. Conclusion

Even in difficult economic times, while litigation is always a possibility, there are strong, valid and compelling reasons why municipalities should pursue the annexation of adjoining territory. Once annexation is contemplated by a municipality, there are various methods by which territory may be aggressively annexed, and once completed, there are several options by which municipalities may aggressively defend those annexations of territory.

Besides the defense strategies available in traditional annexation litigation (where the municipality is the defendant), an aggressive pre-litigation approach may be in the municipality’s best interests, confirming to potential plaintiffs that any challenge may be time-consuming and costly, with little likelihood of success, assuming errors have not been committed in following the statutory prerequisites mandated for municipal annexations.
About the Author

In 1981, Terry began his legal career in the Dallas City Attorney’s Office and he currently is one of the founding partners of Brown & Hofmeister, L.L.P. Since 1991, Terry has served as the Town Attorney for the Town of Flower Mound, Texas, one of the fastest growing communities in the State of Texas. He routinely represents and advises local governments on a variety of issues, including employment, land use, civil rights, police, election, condemnation and regulatory matters.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 200 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International, the National Business Institute and The University of Texas at Austin Continuing Legal Education Program. He has had four law review articles published in The Review of Litigation, Southern Illinois University Law Journal, Baylor Law Review and The Vermont Journal of Environmental Law. Terry also recently had published an article on urban sprawl in Texas in the June 2008 edition of the Zoning and Planning Law Report. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves on the Board of Visitors for the Political Science Department at the University of Illinois as well as on the Board of Trustees and Vice Chair of the Executive Committee of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas.

In his free time, while accepting the fact that knee replacement surgery is inevitable, Terry enjoys long distance running, having competed in twenty-seven half-marathons as well as many 20Ks, 25Ks and 30Ks. He completed his twenty-ninth marathon in Champaign-Urbana, Illinois, in May 2010. He has competed in the Chicago, New York, San Diego, White Rock, Cowtown, Illinois, Marine Corps, Canadian International (Toronto), St. Louis and Berlin Marathons, all of which he ran very slowly!