

MUNICIPAL ANNEXATION IN TEXAS



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I. INTRODUCTION

On May 24, 2019, municipal annexation as it existed for over a century was over. On that date, House Bill 347 became effective. The bill requires landowner or voter approval of most annexations by any city in Texas.

History has shown that the state's grant of broad annexation power to Texas' home rule cities has always been one of our least understood and most contentious governance issues. It is also one of the most important from the perspective of how the state dealt with its massive population growth. Interesting is the fact that the legislature rarely acted to broadly limit municipal annexation. Even when major reforms passed, the core authority remained largely intact. Why is that? It was because key legislators understood that cities support the state's economy through the services and growth management they provide.

Texas is now one of the only states in the nation that denies both state financial assistance *and* annexation authority to its cities. Restricting annexation authority without implementing fiscal assistance programs under which the state helps cities pay for the infrastructure on which the entire state depends wasn't well-thought-out.

Prior to H.B. 347, state leaders realized that annexation was 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.

The current legislature lost sight of the reasons behind annexation. In the process, it may deal a punishing blow to Texas. In a state that adds 1,400 people each day to its population, H.B. 347 will curtail the ability of cities to manage that incredible growth. That being said, and in spite of the legislature's confusing, continued efforts to harm the state's economic engines, city officials in Texas are resilient and will find innovative ways to keep the Texas miracle alive.

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II. 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 was known until 2019.

In 1912, the voters of Texas passed the Home Rule Amendment to the Texas Constitution.¹ This amendment and its accompanying legislation in 1913 gave 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. Of course, the legislature retains control over home rule cities through the language of that section.² Except for the Home Rule Amendment, only piecemeal changes were made to annexation laws from 1858 through 1963.

In 1963, the legislature enacted the Municipal Annexation Act.³ 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 2017 with S.B. 6, the Legislature rarely acted on a broad scale to restrict or modify city annexation authority.⁴

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 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.

During the 1995 session, only one annexation bill passed, but the 1997 legislative session turned out to be a major battle. 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

¹ TEX. CONST. Art. XI, §5.

² “The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.”

³ Act of April 29, 1963, Municipal Annexation Act, 58th Leg., R.S., ch. 160, 1963 Tex. Gen. Laws 447.

⁴ 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).

throughout the state – again hearing from numerous “annexation reformers” and city officials.

The 1999 legislative session turned out to be the continuation of the 1997 onslaught. 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.

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.⁵

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

⁵ *Proposal for Vote on Annexation Stimulates Debate in Texas Legislature*, Friday, April 30, 1999 by Phil Arnold.

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 that Texas home rule cities had 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 was 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.⁶ With a vote requirement, the argued, 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, showed 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 concluded 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. Thanks in part to the report, the bill died.

The big news of the 2007 session was the 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

⁶ 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).

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 or bureaucracy to the process, but amendments to 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. With the elimination of most unilateral annexations, the point is probably moot now.

More than 15 years after the passage of S.B. 89, 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” wasn’t entirely clear, but appeared 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. 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 compromise that ensured appropriate services to highly-populated areas. But it didn't require an election prior to a city annexing.

Representative Huberty was not alone among state legislators who believe residents of an area should have the right to vote on whether they are annexed. But 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.

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.

On the heels of those charges, vote legislation was once again filed in the 2017 regular session. Senate Bill 715 (and its companion H.B. 424) made it to the last day that bill could be passed in the House and was killed by a point of order.

However, the bills were back during the 2017 special session in the form of S.B. 6 (Campbell) and H.B. 6 (Huberty) during a special session that turned out to be an all out assault on municipal authority. Senate Bill 6 passed and became effective on December 1, 2017. On final passage in the House, Representative Huberty proclaimed that, “Citizens have rights, cities don’t.” With that, municipal annexation as it existed for over a century was over. The bill required landowner or voter approval of annexations in the state’s largest counties (those with 500,000 population or more) and in counties that opt-in to the bill through a petition and election process. Those were called “Tier 2” annexations. Other “Tier 1” annexations were those in the remaining counties and those essentially followed the law before S.B. 6.

In 2019, H.B. 347 completely closed the book on all unilateral annexations. The bill ends most unilateral annexations by any city, regardless of population or location. Specifically, the bill: (1) eliminates the distinction between Tier 1 and Tier 2 cities and counties created by S.B. 6; (2) eliminates existing annexation authority that applied to Tier 1 cities and makes most annexations subject to the three consent annexation procedures that allow for annexation: (a) on request of the each owner of the land; (b) of an area with a population of less than 200 by petition of voters and, if required, owners in the area; and (c) of an area with a population of at least 200 by election of voters and, if required, petition of landowners; and (3) authorizes certain narrowly-defined types of annexation (e.g., city-owned airports, navigable streams, strategic partnership areas, industrial district areas, etc.) to continue using a service plan, notice, and hearing annexation procedure.

H.B. 4257 also passed. It applies only to Subchapter C-4 (election-approved annexations – discussed below) and that: (1) the disapproval of the proposed annexation of an area does not affect any existing legal obligation of the city proposing the annexation to continue to provide governmental services in the area, including water or wastewater services, regardless of whether the municipality holds a certificate of convenience and necessity to serve the area; and (2) a city that makes a wholesale sale of water to a special district may not charge rates for the water that are higher than rates charged in other similarly situated areas solely because the district is wholly or partly located in an area that disapproved of a proposed annexation.

Two more bills passed in 2019. Senate Bill 1024 applies only to “consent exempt” annexations (discussed below) and provides that: (1) a city with a population of 350,000 or less shall provide access to services provided to an annexed area under a service plan that is identical or substantially similar to access to those services in the city; (2) a person residing in an annexed area subject to a service plan may apply for a writ of mandamus against a city that fails to provide access to services in accordance with (1); (3) in the action for the writ: (a) the court may order the parties to participate in mediation; (b) the city has the burden of proving that it complied with (1); (c) the person may provide evidence that the costs for the person to access the services are disproportionate to the costs incurred by a municipal resident to access those services; and (d) if the person prevails, the city shall disannex the property that is the subject of the suit within a reasonable period specified by the court or comply with (1); and (e) the

court shall award the person's attorney's fees and costs incurred in bringing the action for the writ; and (4) a city's governmental immunity to suit and from liability is waived and abolished to the extent of liability created under the bill.

Finally, S.B. 1303 provides that: (1) every city must maintain a copy of the map of city's boundaries and extraterritorial jurisdiction in a location that is easily accessible to the public, including: (a) the city secretary's office and the city engineer's office, if the city has an engineer; and (b) if the city maintains a website, on the city's website; (2) a city shall make a copy of the map under (1), above, available without charge; (3) not later than January 1, 2020, a home rule city shall: (a) create, or contract for the creation of, and make publicly available a digital map that must be made available without charge and in a format widely used by common geographic information system software; (b) if it maintains an website, make the digital map available on that website; and (c) if it does not have common geographic information system software, make the digital map available in any other widely used electronic format; and (4) if a city plans to annex under the "consent exempt" provisions that remain in the Municipal Annexation Act after the passage of H.B. 347 (discussed below), a home rule city must: (a) provide notice to any area that would be newly included in the city's ETJ by the expansion of the city's ETJ resulting from the proposed annexation; and (b) include in the notice for each hearing a statement that the completed annexation of the area will expand the ETJ, a description of the area that would be newly included in the ETJ, a statement of the purpose of ETJ designation as provided by state law, and a brief description of each municipal ordinance that would be applicable, as authorized by state law relating to subdivision ordinances, in the area that would be newly included in the ETJ; and (c) before the city may institute annexation proceedings, create, or contract for the creation of, and make publicly available, without charge and in a widely used electronic format, a digital map that identifies the area proposed for annexation and any area that would be newly included in the ETJ as a result of the proposed annexation. (Note: Many of the remaining provisions of the bill modified sections in Chapter 43 of the Local Government Code, relating to municipal annexation, which were eliminated by H.B. 347.)

The current legislature lost sight of the reasons behind annexation. In the process, it may deal a punishing blow to Texas. In a state that adds 1,400 people each day to its population, their work will curtail the ability of cities to manage that incredible growth. That being said, city officials in Texas are resilient and will find innovative ways to keep the Texas miracle alive.

III. An Overview of How Annexation Works

A. The Three Questions of Annexation

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

city officials should understand the reasons behind an annexation to explain it to current city residents and those proposed to be annexed. Most cities annex for two basic reasons: (1) to plan for development; and/or (2) to allow existing residents and those in the area to be annexed to benefit economically from surrounding growth. 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.

2. **Does the city have authority to annex?** Both general law and home rule cities now look to Chapter 43 to determine their authority to annex. Any home rule charter provision that authorized unilateral annexation is now preempted by state law, although more restrictive charter provisions may control. Home rule charter authority is read in conjunction with Section 43.003⁷ to make it so. General law cities, for most annexations, were always required to receive a request from landowners or voters prior to annexing. The bottom line for all cities now is that the legislature has seen fit to severely limit when they can annex. If a city doesn't have consent, it can't annex. The only exceptions are the very narrow "consent exempt" annexations discussed below.

Requirement to offer development agreement. Section 43.016 of the Texas Local Government Code was originally 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 (whether it is subject to S.B. 6 or not) 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

⁷ Sec. 43.003. AUTHORITY OF HOME-RULE MUNICIPALITY TO ANNEX AREA AND TAKE OTHER ACTIONS REGARDING BOUNDARIES. 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 requirements 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; and
- (3) exchange area with other municipalities.

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. Of course, without the authority to annex unilaterally, a city may never get to the development agreement step. See more details on this requirement in Section IV.A., below.

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.

3. **What annexation procedures must a city follow?** The procedures that a city must follow for an annexation are codified in:

- H.B. 347 consent annexations require landowner and/or voter approval of annexations in one of three processes:
 1. Subchapter C-3 (annexation on request of each landowner).
 2. Subchapter C-4 (annexation of area with population less than 200 - petition).
 3. Subchapter C-5 (annexation of area with population of 200 or more – election/petition).
- Consent exempt annexation procedures are found in Subchapters C⁸ and C-1 (service plan, notice, and hearing process) of the Local Government Code.

C. Procedures

1. All Cities – Consent Annexations

House Bill 347 requires landowner and/or voter approval of annexations. The procedures are found in Subchapters C-3 (annexation on request of each landowner), C-4 (annexation of area with population less than 200 - petition), and C-5 (annexation of area with population of 200 or more – election/petition).

2. All Cities – Consent Exempt Annexations

House Bill 347 allows certain, very-specific annexations to take place outside of the consent process. It authorizes annexations of items listed in subchapter A-1 to be annexed without consent using a notice and hearing process. Those annexations include:

⁸The annexation plan requirement and three-year process was eliminated by H.B. 347. The provisions in subchapter C are now simply limiting provisions for the subchapters C-1 and E consent exempt annexations.

- (1) Section 43.0115 (Enclave);
- (2) Section 43.0116 (Industrial District);
- (3) Section 43.012 (Area Owned by Type-A Municipality);
- (4) Section 43.013 (Navigable Stream);
- (5) Section 43.0751(h) (Strategic Partnership);
- (6) Section 43.101 (Municipally Owned Reservoir);
- (7) Section 43.102 (Municipally Owned Airport); and
- (8) Section 43.1055 (Road and Right-of-Way).

The procedures are in subchapter C-1, with the limiting provisions in subchapter C being applicable.

IV. CONSENT ANNEXATIONS

House Bill 347, passed in 2019, requires landowner or voter approval of most annexations. It also prescribes the procedures that must be followed by those cities. Here is the process for those.

A. Requirement to Offer Development Agreement

Section 43.016 of the Local Government Code 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 § 43.016(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.

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 are typically 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.⁹

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 2007, H.B. 1472 passed to codify that practice. (It was originally included in Section 43.035, but was recodified by S.B. 6 in 2017 as Section 43.016.)

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 43.016 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.

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. The fact that Section 43.016 is

⁹ 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)

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 43.016, 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 §§ 43.016(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.* § 43.016(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 election, notice, and/or hearing procedures in 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.

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 43.016(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 43.016 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 43.016(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 43.016(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. An example agreement is available on the Texas Municipal League's Web site at www.tml.org by clicking on "Policy" and then "Legal Research." Of course, the requirements of H.B. 347 will limit a city's ability to annex many areas in the first place, which should reduce the use of these agreements considerably. As of now, the agreements should control what happens upon breach or expiration. 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 and Map/Notice

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 43.014. In addition, under §§42.022 and 43.014, 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.”¹⁰ The geographical extent of any city’s ETJ is contingent upon the number of inhabitants of the city:

<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 ¹¹

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.¹²

¹⁰ Tex. Local Gov’t Code § 42.021.

¹¹ *Id.* at § 42.021.

¹² *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

Provisions requiring a city to maintain a map of the city limits and ETJ are contained in Chapter 41 of the Local Government Code. S.B. 1303, passed in 2019, modifies those provisions and provides that: (1) every city must maintain a copy of the map of city's boundaries and extraterritorial jurisdiction in a location that is easily accessible to the public, including: (a) the city secretary's office and the city engineer's office, if the city has an engineer; and (b) if the city maintains a website, on the city's website; and (2) a city shall make a copy of the map under (1), above, available without charge.

Moreover, the bill requires that: (1) not later than January 1, 2020, a home rule city shall: (a) create, or contract for the creation of, and make publicly available a digital map that must be made available without charge and in a format widely used by common geographic information system software; (b) if it maintains an website, make the digital map available on that website; and (c) if it does not have common geographic information system software, make the digital map available in any other widely used electronic format (most agree that a PDF map would satisfy this requirement); and (2) if a city plans to annex under the "consent exempt" provisions that remain in the Municipal Annexation Act after the passage of H.B. 347 (discussed below), a home rule city must: (a) provide notice to any area that would be newly included in the city's ETJ by the expansion of the city's ETJ resulting from the proposed annexation; and (b) include in the notice for each hearing a statement that the completed annexation of the area will expand the ETJ, a description of the area that would be newly included in the ETJ, a statement of the purpose of ETJ designation as provided by state law, and a brief description of each municipal ordinance that would be applicable, as authorized by state law relating to subdivision ordinances, in the area that would be newly included in the ETJ; and (c) before the city may institute annexation proceedings, create, or contract for the creation of, and make publicly available, without charge and in a widely used electronic format, a digital map that identifies the area proposed for annexation and any area that would be newly included in the ETJ as a result of the proposed annexation. (Note: Many of the remaining provisions of this bill modified sections in Chapter 43 of the Local Government Code, relating to municipal annexation, which were eliminated by H.B. 347.)

C. Authority and Process to Annex

1. Petition of Landowner¹³

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.

¹³Cases related to petitions submitted under prior law may or may not still be relevant to petitions after H.b. 347. For example, *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*

A city may annex an area if each owner of land in the area requests the annexation. TEX. LOC. GOV'T CODE § 43.0671. This annexation is governed by subchapter C-3 of Chapter 43.

a. Written Service Agreement

The governing body of a city that elects to annex an area by petition of landowner must first negotiate and enter into a written agreement with the owners of land in the area for the provision of services in the area. The agreement must include: (1) a list of each service the city will provide on the effective date of the annexation; and (2) a schedule that includes the period within which the city will provide each service that is not provided on the effective date of the annexation. The city is not required to provide a service that is not included in the agreement. §43.0672.

b. Notice of Proposed Annexation, Public Hearing, and Ordinance Adoption

Before a city may adopt an ordinance annexing an area by petition of landowners, the governing body must conduct a public hearing. The governing body must provide persons interested in the annexation the opportunity to be heard. After the public hearing, the governing body may immediately adopt an ordinance annexing the area.

The city must post notice of the hearing on its website if it has one and publish notice of the hearing in a newspaper of general circulation in the city and in the area proposed for annexation. The notice for the hearing must be published at least once on or after the 20th day but before the 10th day before the date of the hearing. The notice must be

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. Following the opinion, in 2015, the legislature added Section 43.0235, which was deleted by H.B. 347 in 2019, but grants business owners a "veto" and can be seen as overruling the *Salado* opinion. That section provides that 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...obtains the written consent of the owners of a majority of the property in the area to be annexed. 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.

posted on the city's website on or after the 20th day but before the 10th day before the date of the hearing and must remain posted until the date of the hearing. §43.0673.

In sum, the sequence for annexation of this type could be as follows:

- 1) Receive petition from each landowner;
- 2) Determine applicability of Section 43.016 and act accordingly;
- 3) Negotiate and execute written service agreement;
- 4) city council calls public hearing;
- 5) provide written notice to school districts¹⁴ and public entities before the publication requirement in (6), below¹⁵;
- 6) publish notice in the newspaper for the hearing at least once on or after the 20th day but before the 10th day before the date of the hearing and also post on city's website at same time and leave up until date of hearing;
- 7) Conduct first public hearing and adopt annexation ordinance; and
- 8) Complete post-annexation procedures.

A chart showing the process is included at the end of this paper.

2. Area with Population Less than 200 by Petition¹⁶

A city may annex an area with a population of less than 200 only if the following conditions are met, as applicable: (1) the city obtains consent to annex the area through a petition signed by more than 50 percent of the registered voters of the area; and (2) if the registered voters of the area do not own more than 50 percent of the land in the area, the petition described by (1) is signed by more than 50 percent of the owners of land in the area. TEX. LOC. GOV'T CODE § 43.0681.¹⁷ This annexation procedure is governed by subchapter C-4 of chapter 43.

a. Adoption of Resolution

The governing body of the municipality that proposes to annex an area under this subchapter must adopt a resolution that includes:

1. a statement of the city's intent to annex the area;
2. a detailed description and map of the area;
3. a description of each service to be provided by the city in the area on or after the effective date of the annexation, including, as applicable: (A) police protection;

¹⁴ See Section 43.905 for the requirements that must be included in the notice.

¹⁵ The notice for the hearing must be published at least once on or after the 20th day but before the 10th day before the date of the hearing and Section 43.9051 provides that "A municipality that proposes to annex an area shall provide written notice of the proposed annexation within the period prescribed for providing the notice of the first hearing under Section ...43.0673... to each public entity that is located in or provides services to the area proposed for annexation.

¹⁶ See footnote 13, above.

¹⁷ Note that this provision gives *landowners* a veto over voters.

(B) fire protection; (C) emergency medical services; (D) solid waste collection;¹⁸ (E) operation and maintenance of water and wastewater facilities in the annexed area; (F) operation and maintenance of roads and streets, including road and street lighting; (G) operation and maintenance of parks, playgrounds, and swimming pools; and (H) operation and maintenance of any other publicly owned facility, building, or service;

4. a list of each service the city will provide on the effective date of the annexation; and
5. a schedule that includes the period within which the city will provide each service that is not provided on the effective date of the annexation.

TEX. LOC. GOV'T CODE §43.0682.

b. Notice of Proposed Annexation and Public Hearing

Not later than the seventh day after the date the governing body of the city adopts the resolution under Section 43.0682, the city must mail to each resident and property owner in the area proposed to be annexed notification of the proposed annexation that includes: (1) notice of the public hearing required by Section 43.0684; (2) an explanation of the 180-day petition period described by Section 43.0685; and (3) a description, list, and schedule of services to be provided by the city in the area on or after annexation as provided by Section 43.0682. TEX. LOC. GOV'T CODE §43.0683.

The governing body of a city must conduct at least one public hearing not earlier than the 21st day and not later than the 30th day after the date the governing body adopts the resolution under Section 43.0682. TEX. LOC. GOV'T CODE §43.0684.

c. Petition, Results, Election in City, and Retaliation

The petition required by Section 43.0681 may be signed only by a registered voter of the area proposed to be annexed, except if the registered voters of the area proposed to be annexed do not own more than 50 percent of the land in the area, the petition required by Section 43.0681 may also be signed by the owners of land in the area that are not registered voters. §43.0685.

The requirements for the petition are as follows:

1. The city may provide for an owner of land in the area that is not a resident of the area to sign the petition electronically.
2. The petition must clearly indicate that the person is signing as a registered voter of the area, an owner of land in the area, or both.
3. The city may collect signatures on the petition only during the period beginning on the 31st day after the date the governing body of the municipality adopts the

¹⁸ A new provision in new subchapter C was added by S.B. 6 (2017) relating to solid waste services in an annexation. Section 43.0661 prohibits a city from mandating the use of its solid waste provider for two years in the area.

resolution under Section 43.0682 and ending on the 180th day after the date the resolution is adopted.

4. The petition must clearly state that a person signing the petition is consenting to the proposed annexation.
5. The petition must include a map of and describe the area proposed to be annexed. Signatures collected on the petition must be in writing (or electronically).
6. Chapter 277, Election Code, applies to a petition.

When the petition period described by (3), above, ends, the petition shall be verified by the city secretary or other person responsible for verifying signatures. §43.0686.

The city must notify the residents and property owners of the area proposed to be annexed of the results of the petition. If the city does not obtain the number of signatures on the petition required to annex the area, the city may not annex the area and may not adopt another resolution to annex the area until the first anniversary of the date the petition period ended. §43.0686.

If the city obtains the number of signatures on the petition required to annex the area, the city may annex the area after: (1) notifying the residents and property owners of the area proposed to be annexed of the results of the petition; (2) holding a public hearing at which members of the public are given an opportunity to be heard; and (3) holding a final public hearing not earlier than the 10th day after the date of the first public hearing at which the ordinance annexing the area may be adopted. §43.0686.

If a petition protesting the annexation of an area is signed by a number of registered voters of the city proposing the annexation equal to at least 50 percent of the number of voters who voted in the most recent municipal election and is received by the secretary of the city before the date the petition period above ends, the city may not complete the annexation of the area without approval of a majority of the voters of the city voting at an election called and held for that purpose. §43.0687.

A city may not retaliate for the disapproval of the proposed annexation of an area¹⁹ and disapproval does not affect any existing legal obligation of the city proposing the annexation to continue to provide governmental services in the area, including water or wastewater services. A city may not initiate a rate proceeding solely because of the disapproval of a proposed annexation of an area. §43.0688.

In sum, the sequence for annexation of this type could be as follows (this example does not include the possible in-city election option under §43.0687):

¹⁹ This is true regardless of whether the city holds a CCN to serve the area. In addition, a city that makes a wholesale sale of water to a special district operating under Chapter 36 or Title 4, Water Code, may not charge rates for the water that are higher than rates charged in other similarly situated areas solely because the district is wholly or partly located in an area that disapproved of a proposed annexation under this subchapter.

- 1) Determine applicability of Section 43.016 and act accordingly;
- 2) Adoption of resolution of intent to annex area, including services to be provided;
- 3) Not later than seventh day after adopting the resolution of intent, mail notice of resolution adoption to residents and property owners in area providing: (1) notice of public hearing; (2) explanation of petition timing requirements; and (3) description of services to be provided;
- 4) provide written notice to school districts²⁰ and public entities not later than the seventh day after adopting resolution in 4, above²¹;
- 5) conduct at least one public hearing not earlier than the 21st day and not later than the 30th day after the date the governing body adopts the resolution of intent;
- 6) City obtains and verifies consent to annex the area by petition;
- 7) Notify residents and owners and hold another public hearing;
- 8) hold final public hearing not earlier than the 10th day after the date of the first public hearing and adopt annexation ordinance;
- 9) Complete post-annexation procedures.

3. Area with Population of 200 or More by Election

A city may annex an area with a population of 200 or more only if the following conditions are met, as applicable: (1) the city holds an election in the area proposed to be annexed at which the qualified voters of the area may vote on the question of the annexation and a majority of the votes received at the election approve the annexation; and (2) if the registered voters of the area do not own more than 50 percent of the land in the area, the city obtains consent to annex the area through a petition signed by more than 50 percent of the owners of land in the area. TEX. LOC. GOV'T CODE § 43.0691.²²

This annexation procedure is governed by subchapter C-5 of chapter 43.

1. Adoption of Resolution

The governing body of the municipality that proposes to annex an area under this subchapter must adopt a resolution that includes:

1. a statement of the city's intent to annex the area;
2. a detailed description and map of the area;
3. a description of each service to be provided by the city in the area on or after the effective date of the annexation, including, as applicable: (A) police protection;

²⁰ See Section 43.905 for the requirements that must be included in the notice.

²¹ Not later than the seventh day after the date the governing body of the municipality adopts the resolution, it must provide notice because Section 43.9051 provides that "A municipality that proposes to annex an area shall provide written notice of the proposed annexation within the period prescribed for providing the notice of the first hearing under Section ...43.0683... to each public entity that is located in or provides services to the area proposed for annexation.

²² Note that this provision also gives *landowners* a veto over voters.

(B) fire protection; (C) emergency medical services; (D) solid waste collection;²³ (E) operation and maintenance of water and wastewater facilities in the annexed area; (F) operation and maintenance of roads and streets, including road and street lighting; (G) operation and maintenance of parks, playgrounds, and swimming pools; and (H) operation and maintenance of any other publicly owned facility, building, or service;

4. a list of each service the city will provide on the effective date of the annexation; and
5. a schedule that includes the period within which the city will provide each service that is not provided on the effective date of the annexation.

TEX. LOC. GOV'T CODE §43.0692.

2. Notice of Proposed Annexation and Public Hearing

Not later than the seventh day after the date the governing body of the city adopts the resolution under Section 43.0692, the city must mail to each property owner in the area proposed to be annexed notification of the proposed annexation that includes: (1) notice of the public hearing required by Section 43.0694; (2) notice that an election on the question of annexing the area will be held; and (3) a description, list, and schedule of services to be provided by the city in the area on or after annexation as provided by Section 43.0692. TEX. LOC. GOV'T CODE §43.0693.

The governing body of a city must conduct an initial public hearing not earlier than the 21st day and not later than the 30th day after the date the governing body adopts the resolution. The governing body must conduct at least one additional public hearing not earlier than the 31st day and not later than the 90th day after the date the governing body adopts a resolution. TEX. LOC. GOV'T CODE §43.0694.

3. Election, Petition, Election in City, and Retaliation

If the registered voters in the area proposed to be annexed do not own more than 50 percent of the land in the area, the city must obtain consent to the annexation through a petition signed by more than 50 percent of the owners of land in the area in addition to the election described below. (The petition process is the same as the petition for an area with less than 200 population, discussed in a previous section.) TEX. LOC. GOV'T CODE §43.0695.

A city shall order an election on the question of annexing an area to be held on the first uniform election date that falls on or after: (1) the 90th day after the date the governing body of the city adopts the resolution under Section 43.0692; or (2) if the consent of the owners of land in the area is required under Section 43.0695, the 78th day after the date the petition period to obtain that consent ends.

²³ A new provision in new subchapter C was added by S.B. 6 (2017) relating to solid waste services in an annexation. Section 43.0661 prohibits a city from mandating the use of its solid waste provider for two years in the area.

The election shall be held in the same manner as general elections of the city. The city shall pay for the costs of holding the election. A city that holds an election may not hold another election on the question of annexation before the corresponding uniform election date of the following year. TEX. LOC. GOV'T CODE §43.0696.

Following the election, the city must notify the residents of the area proposed to be annexed of the results of the election and, if applicable, of the petition required by Section 43.0695.

If a majority of qualified voters do not approve the proposed annexation, or if the city is required to petition owners of land in the area under Section 43.0695 and does not obtain the required number of signatures, the city may not annex the area and may not adopt another resolution to annex the area until the first anniversary of the date of the adoption of the resolution.

If a majority of qualified voters approve the proposed annexation, and if the city, as applicable, obtains the required number of petition signatures under Section 43.0695, the city may annex the area after: (1) providing notice to the residents of the area to be annexed; (2) holding a public hearing at which members of the public are given an opportunity to be heard; and (3) holding a final public hearing not earlier than the 10th day after the date of the first public hearing at which the ordinance annexing the area may be adopted. TEX. LOC. GOV'T CODE §43.0697.

If a petition protesting the annexation of an area is signed by a number of registered voters of the city proposing the annexation equal to at least 50 percent of the number of voters who voted in the most recent municipal election and is received by the secretary of the city before the date the petition period above ends, the city may not complete the annexation of the area without approval of a majority of the voters of the city voting at an election called and held for that purpose. §43.0698.

A city may not retaliate for the disapproval of the proposed annexation of an area²⁴ and disapproval does not affect any existing legal obligation of the city proposing the annexation to continue to provide governmental services in the area, including water or wastewater services. A city may not initiate a rate proceeding solely because of the disapproval of a proposed annexation of an area. §43.0699.

In sum, the sequence for annexation of this type could be as follows (this example does not include the possible in-city election option under §43.0698)::

²⁴ This is true regardless of whether the city holds a CCN to serve the area. In addition, a city that makes a wholesale sale of water to a special district operating under Chapter 36 or Title 4, Water Code, may not charge rates for the water that are higher than rates charged in other similarly situated areas solely because the district is wholly or partly located in an area that disapproved of a proposed annexation under this subchapter.

- 1) Adoption of resolution of intent to annex area, including services to be provided;
- 2) Determine applicability of Section 43.016 and act accordingly;
- 3) Not later than the seventh day after the date the governing body of the city adopts the resolution of intent, mail to each resident and property owner in the area proposed to be annexed notification of the proposed annexation that includes: (1) notice of the initial public hearing; (2) notice that an election on the question of annexing the area will be held; and (3) a description, list, and schedule of services to be provided;
- 4) provide written notice to school districts²⁵ and public entities not later than the seventh day after adopting resolution in 4, above²⁶;
- 5) conduct an initial public hearing not earlier than the 21st day and not later than the 30th day after the date the governing body adopts the resolution of intent;
- 6) conduct at least one additional public hearing not earlier than the 31st day and not later than the 90th day after the date the governing body adopts a resolution of intent;
- 7) City obtains consent through election and, if needed, petition;
- 8) annex the area after: (1) providing notice to the residents of the area to be annexed; (2) holding a public hearing at which members of the public are given an opportunity to be heard; and (3) holding a final public hearing not earlier than the 10th day after the date of the first public hearing at which the ordinance annexing the area may be adopted; and
- 9) Complete post-annexation procedures.

V. CONSENT EXEMPT ANNEXATIONS

A. Requirement to Offer Development Agreement

This requirement is exactly the same as that discussed in Section IV.A.

B. Requirement that Area be in the City's ETJ and Map/Notice

This requirement is exactly the same as that discussed in Section IV.B.

C. Authority to Annex

Chapter 43, subchapters A-1 and E contain a handful of "consent exempt" annexation provisions. They are very specific to certain situations, and include:

²⁵ See Section 43.905.

²⁶ Not later than the seventh day after the date the governing body of the municipality adopts the resolution, it must provide notice because Section 43.9051 provides that "A municipality that proposes to annex an area shall provide written notice of the proposed annexation within the period prescribed for providing the notice of the first hearing under Section ...43.0693... to each public entity that is located in or provides services to the area proposed for annexation."

- (1) Section 43.0115 (Enclave);
- (2) Section 43.0116 (Industrial District);
- (3) Section 43.012 (Area Owned by Type-A Municipality);
- (4) Section 43.013 (Navigable Stream);
- (5) Section 43.0751(h) (Strategic Partnership);
- (6) Section 43.101 (Municipally Owned Reservoir);
- (7) Section 43.102 (Municipally Owned Airport); and
- (8) Section 43.1055 (Road and Right-of-Way).

The applicable procedures are found in subchapter C-1, with the limiting provisions in subchapter C being applicable.²⁷

Beyond the above provisions, the only authority to annex is by consent, discussed above. “Too bad, so sad,” one once said.

D. Procedures to Annex an Area

Prior to any other action, the city must determine whether an area is subject to the requirements of Section 43.016²⁸ – required offer of development agreement (see IV.A. above) – and must comply with those requirements if so. To begin the annexation process, the city council must direct its planning department or other 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).²⁹

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 20th day, but before the 10th day before the date of each hearing.³⁰ *Id.* at 43.063(c). The city may wish to obtain a notarized affidavit stating that the hearing notice was published. The city must also give written notice to any school district in the area and public entity that provides service in the area³¹ at this time. *Id.* at §43.905³² &

²⁷ See Section 43.0505, which provides that the provisions in subchapter C apply only to an annexation under subchapter C-1. Weird, right? Why not just combine them into one subchapter?

²⁸ And Section 43.033(a)(7) for general law cities annexing without consent.

²⁹ Section 43.056 relating to provision of services continue to apply to a consent exempt annexation. The detailed sections on how those provision function has been removed because these will be used so infrequently.

³⁰ When counting the ten day interval, do NOT include either the day the notice was published, nor the day of the hearing.

³¹ “Public entity” includes a county, fire protection service provider, including a volunteer fire department, emergency medical services provider, including a volunteer emergency medical services provider, or special district. The notice shall contain a description of: (1) the area proposed for annexation; (2) any financial impact on the public entity or political subdivision resulting from the annexation, including any changes in the public entity’s or political subdivision’s revenues or maintenance and operation costs; and

43.9051. 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 40th day and before the 20th day before the date of the institution of the proceedings. *Id.* at §43.063(a).³³ 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.³⁴

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.³⁵

Subchapter C-1 now applies only to an annexation of an area that contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract (which should include all of the annexations authorized in V.C., above). Written notice must be sent before the 30th day before the date of the first hearing to each:

- 1) property owner in the area to be annexed;
- 2) public entity, including any: (A) municipality, county, fire protection service provider, including a volunteer fire department, and emergency medical services provider, including a volunteer

(3) any proposal the city has to abate, reduce, or limit any financial impact on the public entity or political subdivision. The city MAY NOT ANNEX unless it has provided this notice.

³² 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.”

³³ 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.).

³⁴ *Jimenez v. City of Aransas Pass*, No. 13-17-00514-CV, 2018 WL 6565090, at *3 (Tex. App. Dec. 13, 2018)(Also standing for the proposition that the failure to place an area in a three-year plan under the old law was a procedural defect).

³⁵ *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.”

emergency medical services provider; and (B) municipal utility district, water control and improvement district, or other district created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution;

- 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).³⁶

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 separated by the appropriate time period 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 43.016 and act accordingly;
- 2) preparation of the service plan;
- 3) provide written notice to property owners, railroads, and public and private entities;
- 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) provide written notice to public entities within the period for noticing the hearings in (6), below;³⁷

³⁶ 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.

³⁷ This was added by S.B. 6 in 2017. A city must provide notice because Section 43.9051 provides that "A municipality that proposes to annex an area shall provide written notice of the proposed annexation within the period prescribed for providing the notice of the first hearing under Section ...43.063... to each public entity that is located in or provides services to the area proposed for annexation." "Public entity" includes a county, fire protection service provider, including a volunteer fire department, emergency medical services provider, including a volunteer emergency medical services provider, or special district. The notice shall contain a description of: (1) the area proposed for annexation; (2) any financial impact on

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

E. Other Applicable Provisions

Procedures for consent exempt annexations are located in Chapter 43, Subchapter C-1, of the Local Government Code. However, §43.062 and subchapter C 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 in some instances, or discharge of firearms on most parcels). Made applicable by subchapter A.
2. §43.014, *Restricting annexations to the ETJ unless the city owns the property*. Made applicable by subchapter C.
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 Section 43.062(a).
4. §43.0545, *Annexation of Certain Adjacent Areas*.³⁸ Made applicable by Section §43.062(a).

the public entity or political subdivision resulting from the annexation, including any changes in the public entity's or political subdivision's revenues or maintenance and operation costs; and (3) any proposal the city has to abate, reduce, or limit any financial impact on the public entity or political subdivision. The city MAY NOT ANNEX unless it has provided this notice.

³⁸*City of Missouri City v. State ex rel. City of Alvin*, 123 S.W.3d 606, 616 (Tex. App.-Houston [14th 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.").

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 Section 43.062(a).³⁹
6. §43.056(b)-(o), but not (d) or (h)-(k)⁴⁰, *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.⁴¹ *Id.* at §43.056(m). Made applicable by subchapter C.
7. §43.057, *Annexation That Surrounds an Area*. Made applicable by TEX. LOC. GOV'T CODE §43.062(a).

VI. OTHER MATTERS AFFECTING ALL ANNEXATIONS

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.⁴²

³⁹ 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).

⁴⁰ 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 (1999) 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 didn't apply. S.B. 6 (2017) repealed them so now we know. 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.

⁴¹ 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?

⁴² 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.

A. Preclearance

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.

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:

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.

Even though Section 5 preclearance submissions are no longer required, 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 annexations.

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

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: Miranda 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, and the Census Bureau's is 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.

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

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 city 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 and Notice of ETJ Expansion

Cities are required to prepare a map that shows the boundaries of the city and its extraterritorial jurisdiction. 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.

S.B. 1303, enacted in 2019, provides that: (1) every city must maintain a copy of the map of city's boundaries and extraterritorial jurisdiction in a location that is easily accessible to the public, including: (a) the city secretary's office and the city engineer's office, if the city has an engineer; and (b) if the city maintains a website, on the city's website; (2) a city shall make a copy of the map under (1), above, available without charge; (3) not later than January 1, 2020, a home rule city shall: (a) create, or contract for the creation of, and make publicly available a digital map that must be made available without charge and in a format widely used by common geographic

information system software; (b) if it maintains an website, make the digital map available on that website; and (c) if it does not have common geographic information system software, make the digital map available in any other widely used electronic format; and (4) if a city plans to annex under the “consent exempt” provisions that remain in the Municipal Annexation Act after the passage of H.B. 347 (summarized elsewhere in this edition), a home rule city must: (a) provide notice to any area that would be newly included in the city’s ETJ by the expansion of the city’s ETJ resulting from the proposed annexation; and (b) include in the notice for each hearing a statement that the completed annexation of the area will expand the ETJ, a description of the area that would be newly included in the ETJ, a statement of the purpose of ETJ designation as provided by state law, and a brief description of each municipal ordinance that would be applicable, as authorized by state law relating to subdivision ordinances, in the area that would be newly included in the ETJ; and (c) before the city may institute annexation proceedings, create, or contract for the creation of, and make publicly available, without charge and in a widely used electronic format, a digital map that identifies the area proposed for annexation and any area that would be newly included in the ETJ as a result of the proposed annexation.

F. 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, 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) 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.

G. 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...

- (1) if the area was annexed under Subchapter C-1, within the period specified by Section 43.056 or by the service plan prepared for the area under that section; or
- (2) if the area was annexed under Subchapter C-3, C-4, or C-5, within the period specified by the written agreement under Section 43.0672 or the resolution under Section 43.0682 or 43.0692, as applicable...

A majority of the qualified voters of the area⁴³ may petition⁴⁴ the governing body to disannex the area.⁴⁵

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, written agreement, or resolution, or failed to perform in good faith.

If the area is disannexed it may not be annexed again within 10 years after the date of the disannexation,.

⁴³ *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.

⁴⁴ 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).

⁴⁵ 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).

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.⁴⁶

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.⁴⁷ *Id.* at §43.143(c).

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

⁴⁶ 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).

⁴⁷ 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 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.

(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

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.

VII. MISCELLANEOUS ANNEXATION ISSUES

A. Extraterritorial Jurisdiction Expansion and Release

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 extended in this manner.

Another issue relating to ETJ expansion was decided by the Texas Supreme Court in *City of San Antonio v. City of Boerne*,⁴⁸ 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

⁴⁸ 111 S.W.3d 22 (Tex. 2003).

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. The case was presumably overturned by Section 43.1055, added in 2017, which provides that any city may by ordinance annex a road or the right-of-way of a road on request of the owner of the road or right-of-way or the governing body of the political subdivision that maintains the road or right-of-way under subchapter C-1 procedures.

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 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.⁴⁹ 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*).

⁴⁹ 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).

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 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

1. Post-S.B. 6 Challenges

In 2017, Senate Bill 6 added a new section to chapter 43. Section 43.908, which is essentially the same as the enforcement provision in chapter 245 (the “permit vesting” statute), provides in full:

ENFORCEMENT OF CHAPTER.

- (a) This chapter may be enforced only through mandamus or declaratory or injunctive relief.
- (b) A political subdivision’s immunity from suit is waived in regard to an action under this chapter.
- (c) A court may award court costs and reasonable and necessary attorney’s fees to the prevailing party in an action under this chapter.

It appears that the section above merely clarifies the remedies available under chapter 43. It shouldn’t affect the standing issue discussed in the next section.

2. Procedural v. Substantive Challenges

Historically, there have been four basic remedies: (1) *quo warranto* actions; (2) direct 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 attorney⁵⁰ 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 (6th 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 the state can challenge an annexation for procedural irregularities because such irregularities merely result in voidable ordinances.⁵¹

However, where an ordinance is claimed to be void, and not merely voidable, a direct attack, rather than *quo warranto* proceeding, is proper. *City of Willow Park v. Bryant*,

⁵⁰ 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. Although he has with respect to the incorporation of the Town of Double Horn in 2018.

⁵¹ *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).

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 438-39.⁵² 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 1999, 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 Falls v. Pearce*, 33 S.W.3d 415, 417 (Tex. App.—Fort Worth 2000, no pet.). Since then, §43.056(l) provides that a writ of mandamus is also available.

D. City's Motives for Annexation Irrelevant

Courts generally have no authority to judicially review the reasons a city annexes property.⁵³ 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

⁵² 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).

⁵³ *State ex rel. Pan American Production Co. v. Texas City*, 303 S.W.2d 780, 782 (Tex. 1957).

boundaries. Thus, a Constitutional challenge should not succeed.⁵⁴ For home rule cities, the constitution grants to the city council the authority to set city boundaries.⁵⁵ Of course, that authority is now severely limited by Chapter 43.

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.

F. Agreement in Lieu of Annexation

House Bill 1197, which became effective in June 2003, added 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

⁵⁴ *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).

⁵⁵ *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.”)

by the parties.⁵⁶ 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 Section 43.016, which requires 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 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;

⁵⁶ 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)

(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.

(e) Notwithstanding Subsection (c) and until the 20th anniversary of the date of the annexation of an area that includes a permanent retail structure, a municipality may not prohibit a person from continuing to use the structure for the indoor seasonal sale of retail goods if the structure: (1) is more than 5,000 square feet; and (2) was authorized under the laws of this state to be used for the indoor seasonal sale of retail goods on the effective date of the annexation.

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. H.B. 347 should have no effect on strategic partnerships executed under the subchapter. Those agreements remain in force and subsequent annexations will be governed by the agreement's terms.

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.⁵⁷

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.

J. Industrial Districts

Senate Bill 6 (2017) added the following provision that governs any annexation of an area subject to an industrial district agreement under Local Government Code Section 42.044:

Sec. 43.0116. AUTHORITY OF MUNICIPALITY TO ANNEX INDUSTRIAL DISTRICTS.

(a) Notwithstanding any other law and subject to Subsection (b), a municipality may annex all or part of the area located in an industrial district designated by the governing body of the municipality under Section 42.044 under the requirements applicable to a tier 1 municipality.

(b) A municipality that proposes to annex an area located in an industrial district subject to a contract described by Section 42.044(c) may initiate the annexation only: (1) on or after the date the contract expires, including any period renewing or extending the contract; or (2) as provided by the contract.

That provision was left untouched by H.B. 347 in 2019.

K. Military Bases

Senate Bill 6 (2017) added the following provision that governs any annexation of an area near a military base:

Sec. 43.0117. AUTHORITY OF MUNICIPALITY TO ANNEX AREA NEAR MILITARY BASE.

(a) In this section, "military base" means a presently functioning federally owned or operated military installation or facility.

⁵⁷ 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."

(b) A municipality may annex for full or limited purposes, under the annexation provisions applicable to that municipality under this chapter, any part of the area located within five miles of the boundary of a military base in which an active training program is conducted. The annexation proposition shall be stated to allow the voters of the area to be annexed to choose between either annexation or providing the municipality with the authority to adopt and enforce an ordinance regulating the land use in the area in the manner recommended by the most recent joint land use study.

San Antonio used this provision in 2018 to seek to apply land use regulations in the areas around its bases.⁵⁸

L. Strategic Partnership Agreements

Senate Bill 6 (2017) added the following subsection to Section 43.0751 governing strategic partnership agreements and that allows annexation of an area subject to an SPA:

(s) Notwithstanding any other law, the procedures prescribed by Subchapters C-3, C-4, and C-5 do not apply to the annexation of an area under this section. Except as provided by Subsection (h), a municipality shall follow the procedures established under the strategic partnership agreement for full-purpose annexation of an area under this section.

The bill also included a “gotcha” in the form of Section 43.9051(c), which provides that a city “that proposes to enter into a strategic partnership agreement under Section 43.0751 shall provide written notice of the proposed agreement within the period prescribed for providing the notice of the first hearing under Section 43.0751 to each political subdivision that is located in or provides services to the area subject to the proposed agreement.”

VIII. CONCLUSION

Well, it’s mostly over now. The changes made by Senate Bill 6 and H.B. 347 will certainly change the landscape of how annexation is used, and they will lead to new and innovative ideas from city officials to continue to grow the Texas economy. Keep in mind that a “grandfathering” provision was added to H.B. 347 before it passed. That provision states that:

Section 4.01(n): The changes in law made by this Act do not apply to the annexation of an area for which the governing body of a municipality has adopted a resolution to direct the municipality’s city manager to prepare a service plan for the area on or before the effective date of this Act. An annexation of an area for which the governing body adopted a resolution to

⁵⁸ See Tex. Att’y Gen. Op. KP-0221 (2018).

direct the municipality 's city manager to prepare a service plan for the area before the effective date of this Act is governed by Chapter 43, Local Government Code, as it existed on January 1, 2019.

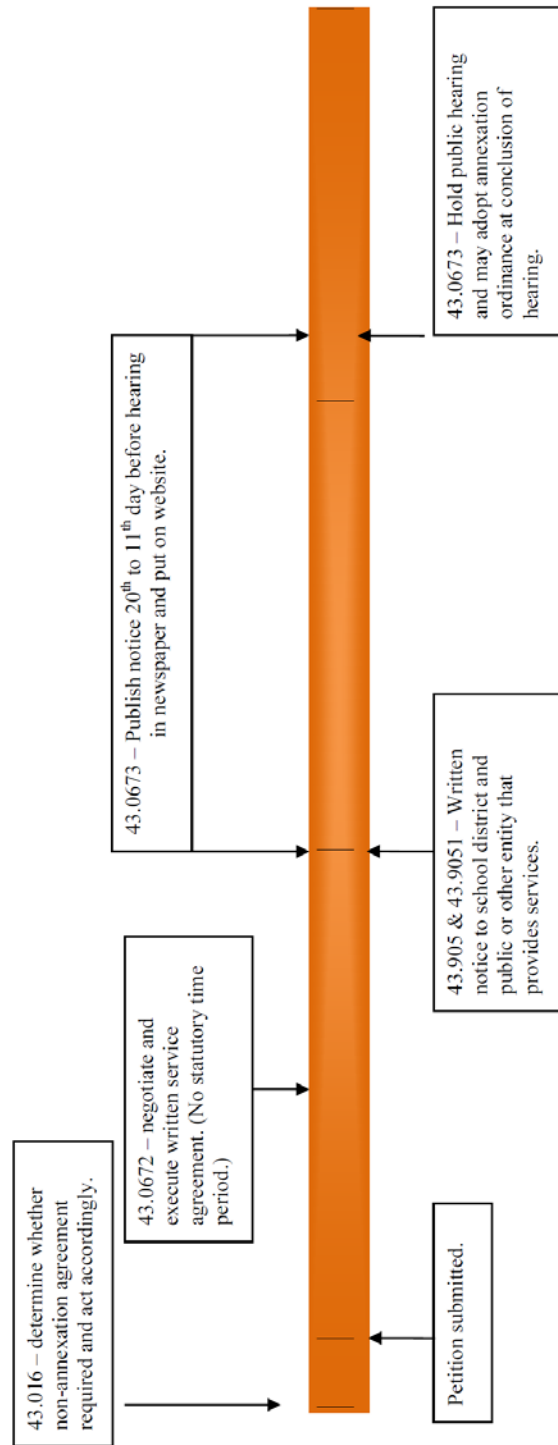
If you city adopted such a resolution, a past version of this paper may be useful. Please contact Scott Houston for more information.

These procedures are a mess, rife with pitfalls. As such, local counsel should always be consulted prior to annexing. **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.**

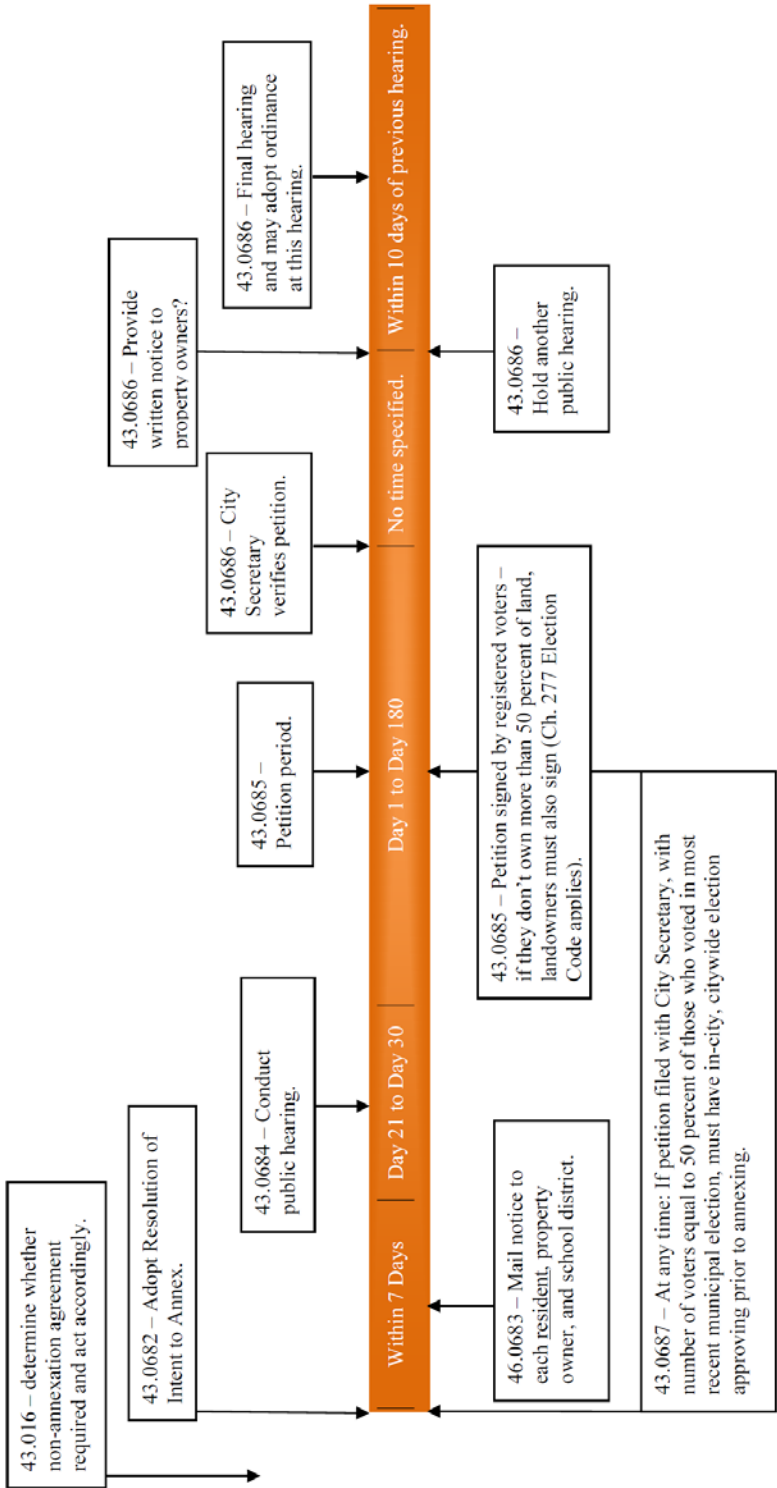
IX. Example Documents

Examples of some of the necessary documents are available in Word format on the TML Web site at <https://www.tml.org/304/Annexation-Documents>. Some documents related to the newer consent annexation provisions haven't been created, but examples will be added if any city moves forward with such an annexation.

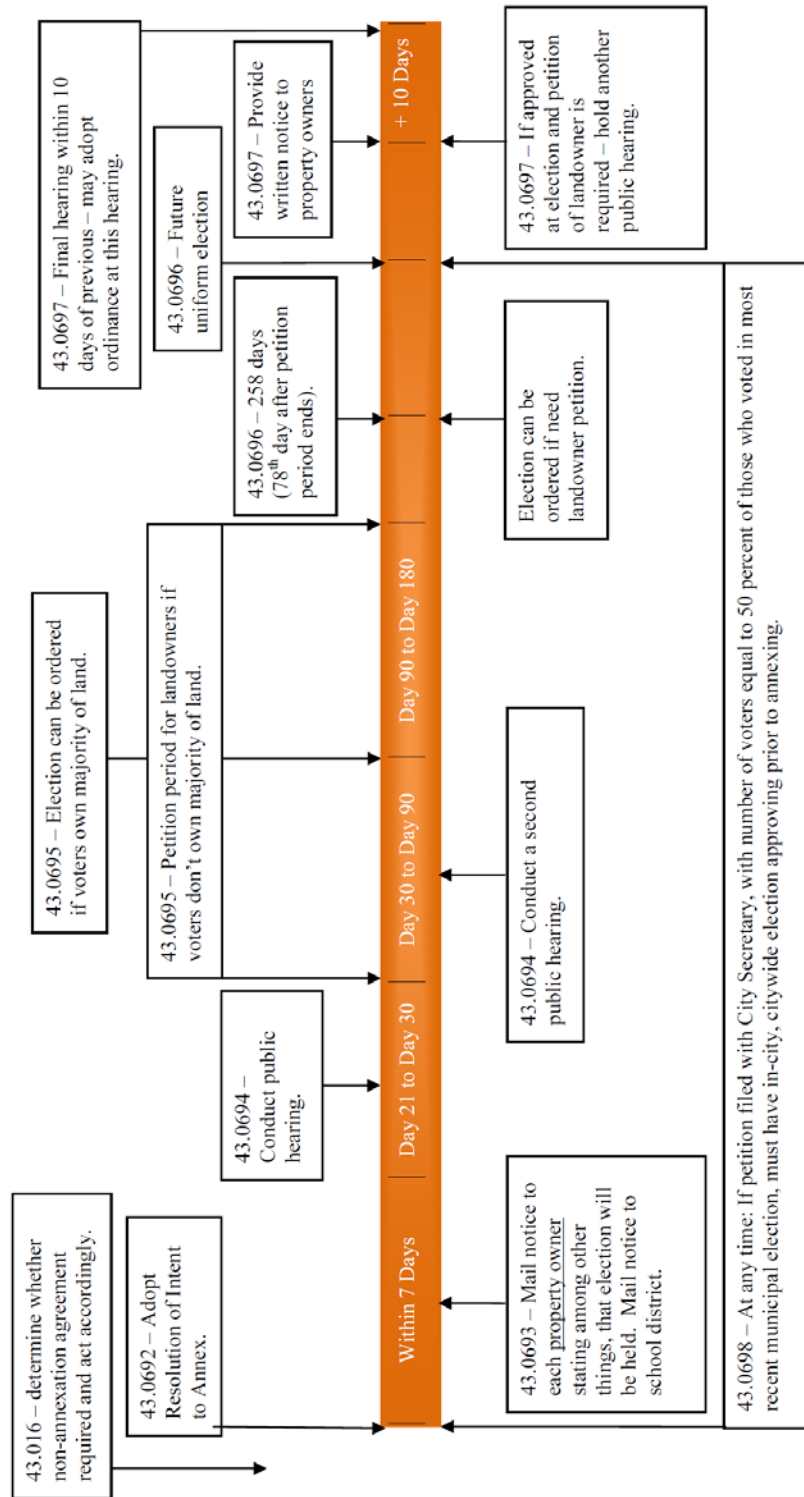
Subchapter C-3: Individual Landowner Petition



Subchapter C-4: Less than 200 Population



Subchapter C-5: 200 or More Population



Subchapters C & C-1: Consent Exempt Process

