



# TACIR

The Tennessee Advisory Commission  
on Intergovernmental Relations



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## ***MEMORANDUM***

**TO:** Commission Members

**FROM:** Lynnisse Roehrich-Patrick  
Executive Director

**DATE:** 12 June 2014

**SUBJECT:** Municipal Boundary Changes and Comprehensive Growth Plans, Public Chapter 707, Public Acts of 2014

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With the passage of Public Chapter 707, Acts of 2014, the General Assembly dramatically changed annexation law in Tennessee. The act eliminated annexation without consent and strengthened the annexation moratorium established by Public Chapter 441, Acts of 2013, which became effective on May 16, 2013. Public Chapter 707 also extends the comprehensive review and evaluation of the efficacy of state policies set forth in Tennessee Code Annotated Title 6, Chapter 51 (Change of Municipal Boundaries) and 58 (Comprehensive Growth Plan) initiated by Public Chapter 441. A draft report on the study will be presented to the Commission for review and comment in late 2014 and for approval in January 2015 in order to meet the General Assembly deadline of February 15, 2015.

The second report on Title 6, Chapters 51 and 58, will include issues raised by passage of Public Chapter 707 and during the discussion of it, as well as issues that existed before its passage and remain. It will not include issues that Public Chapter 707 and other legislation resolved.

1. Issues that Public Chapter 707 and other legislation resolved:
  - annexation methods
  - annexation of agricultural land
  - vesting of rights to develop according to standards in place when permit or plan approved
  - extending utilities beyond municipal boundaries

2. Issues that existed before the passage of Public Chapter 707 and remain:
  - plans of services
    - deadlines for implementing plans of services
    - inclusion in the plans of standards for delivering services and information about cities' financial ability to provide services
    - whether all plan of service provisions apply to annexations by referendum
  - informational meetings before annexations
  - who is eligible to vote in referendums
  - annexation of non-contiguous areas
  - allocation of tax revenue after annexation
  - deannexation
    - authority of owners to initiate deannexation
    - deannexation of agricultural property
  - public hearings before mutual adjustment of cities' corporate boundaries
  - periodic review and update or readoption of growth plans
  - unilateral retraction of cities' urban growth boundaries
  - joint economic and community development boards
    - meeting requirements
    - transfer of responsibilities to coordinating committees
    - addition of responsibilities of industrial development corporation
3. Issues that Public Chapter 707 created:
  - references to ordinances that were not removed
  - apparent ambiguities created in sections not amended

Four issues discussed in the interim report require no further study:

- voting by mail
- annexation approval by petition rather than referendum
- requiring consent for annexation of state and federally owned open lands
- allowing individual property owners to be removed from within urban growth boundaries by petition to the city

## Issues that Public Chapter 707 and other legislation resolved

Several issues discussed in the Public Chapter 441 interim report were resolved by legislation passed during the 2014 legislative session and require no further study: annexation methods, annexation of agricultural land, the vesting of pre-annexation development rights, and the extension of utilities beyond municipal boundaries.

### ***Annexation Methods***

Public Chapter 707 eliminates cities' authority to annex by ordinance. Beginning May 16, 2015, all annexations in Tennessee will require some form of consent from owners or residents, but this will not necessarily mean that all annexations will require a referendum. The act does not change the current process for annexing by referendum.<sup>1</sup> It does, however, allow annexations without a referendum when all property owners consent. Annexations with less than 100% owner consent require a referendum.

Public Chapter 707 extended the moratorium established by Public Chapter 441 through May 15, 2015, and expanded it to include all types of land, not just land used for residential or agricultural purposes. If a city initiated annexation of residential or agricultural property before April 15, 2013, a city can get a waiver from the county legislative body if the city would suffer substantial and demonstrable financial injury if the annexation ordinance or resolution does not become operative. Cities cannot annex residential or agricultural property without the owner's consent from that date forward. If a city initiated annexation of commercial or industrial property before April 15, 2014, a city can get a waiver from the county legislative body if the city would suffer substantial and demonstrable financial injury if the annexation ordinance or resolution does not become operative. Under this moratorium, cities cannot annex commercial or industrial property without the owner's consent. During the current moratorium period, there can be no new annexation by ordinance or referendum unless the owners give written consent.

After May 15, 2015, there are only two ways to annex: by written consent of the owner or by referendum. Cities can annex property by resolution if the owner or owners have consented in writing. Cities cannot annex agricultural land any other way. Without written consent, cities can annex any other land only by referendum—either of their own initiative or when petitioned by "interested persons," which is not defined in the law.

Annexation by consent is a simple process, but each municipality may have different requirements. Many ask for a signed letter from the owners, along with a map of the property. Once a city gets written consent, then the city must pass a resolution to annex the property. This resolution may be vulnerable to legal challenge if proper procedures are not followed

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<sup>1</sup> Tennessee Code Annotated, Sections 6-51-104 and 6-51-105.

when adopting it. A resolution is considered to be an expression of the city council's opinion while a city ordinance is a local law.<sup>2</sup> But Tennessee courts have held that a resolution that is passed with all the formalities required for passing ordinances may operate as an ordinance.<sup>3</sup>

Annexation by referendum is a lengthier and costlier process. This may be part of the reason why there have been so few. The US Census Bureau's 2013 Boundary and Annexation Survey shows that there have been just 35 annexations by referendum recorded in Tennessee since 1990. This is out of more than 6,200 total annexations since 1990. There is little information available on who initiates them. The staff asked several planning officials who initiated annexations in their communities. These planners said that in their communities many annexations are requested by owners because all or part of the territory in question was outside the city's urban growth boundary. Even in cases where the owner is seeking annexation, if the city does not want to go through the process of convening the coordinating committee to approve an amendment to the growth plan, it can annex the territory only by referendum.

Once petitioned or on its own initiative, a city must pass a resolution proposing annexation by referendum if it cannot get written consent of all the owners. A copy of the resolution is mailed to the address of each property owner in the territory. Copies of the resolution must also be posted in six places—three in the city and three in the territory. The notice, including a map of the territory, must also be published in a newspaper at least seven days before the hearing and published online.<sup>4</sup>

The county election commission must hold the election at least 30 days later but no more than 60 days after the last published notice. The county election commission is required to publish notice of elections between 20 and 30 days before election day and another notice between 3 and 10 days before the election.<sup>5</sup>

Qualified voters who reside in the territory proposed for annexation may vote in the referendum. A qualified voter is a US citizen, age 18 or older, who is not a convicted felon, and a Tennessee resident.<sup>6</sup> The annexation must be approved by majority of the qualified voters voting in the territory proposed to be annexed. Cities may opt to put the question to a vote of city residents. If city residents are allowed to vote, a majority in each area—both the area to be annexed and the city—must approve the referendum in order for it to pass.

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<sup>2</sup> *Joe Cooper's Cafe, Inc. v. Memphis*, Tenn. App. LEXIS 180, (1993).

<sup>3</sup> *Clapp v. Knox County*, 197 Tenn. 422, 273 S.W.2d 694 (1954)

<sup>4</sup> Tennessee Code Annotated, Sections 6-51-101 and 1-3-120.

<sup>5</sup> Tennessee Code Annotated, Section 2-12-111.

<sup>6</sup> Tennessee Code Annotated, Section 2-2-102.

## ***Annexation of Agricultural Land***

Public Chapter 707 will require cities to get an owner's written consent to annex property used primarily for agricultural purposes. The new law reflects the consensus of the Commission in the interim report that further consideration should be given to requiring consent for annexation of land used primarily for agricultural purposes.

### ***Vesting of rights to develop according to standards in place when permit or plan approved***

As explained in the interim report on Public Chapter 441, developers were concerned that annexation of their property into a city often changed the rules and standards that had been in place when their project was approved. It has always been and remains the case that anyone whose right to develop property according to county standards vests before annexation is not subject to the city's development standards even though the land-use regulations of cities otherwise extend to newly annexed areas as soon as the annexation becomes final.<sup>7</sup> With the passage of Public Chapter 686, Acts of 2014, which will take effect on January 1, 2015, development rights will vest much earlier in the development process.<sup>8</sup> Public Chapter 686 supersedes the common law rule that development rights vest when substantial expenditures have been made in reliance on a permit or plan by specifying that development rights vest at the time of the approval of a building permit or either a preliminary development plan or a final development plan when no preliminary plan is required.

The new law protects for a definite amount of time the right to develop according to standards in place when the permit or plan was approved. Before the passage of the new law, these development rights were protected once they had vested until the project was completed. For construction projects, the vesting period is the time period authorized by the approved building permit. For all plans, the vesting period is three years. For preliminary plans, an additional vesting period of two years will be given if the final development plan is approved. If construction starts during the vesting period, the rights will be protected until the local government has certified final completion of the project but the total vesting period cannot exceed ten years. For multiphase developments, the development standards in effect on the date of approval of the preliminary development plan for the first phase remain the standards for all subsequent phases of the development, but the total vesting period for all phases of a multiphase project cannot exceed fifteen years.

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<sup>7</sup> For purposes of a local government adopting a vested property rights ordinance or resolution that identifies the type of development plans within the government's jurisdiction that will cause property rights to vest, the law will take effect immediately.

<sup>8</sup> Under the old law, for multiphase projects, only those phases of the project currently under construction at the time of annexation would be protected. Future phases of the project not under construction would not be protected.

## ***Extending Utilities beyond Corporate Boundaries***

One of the central arguments cities made for unilateral annexation by ordinance was that it allowed them to plan for and extend utilities beyond their city limits. City officials also asserted that they needed assurance of being able to annex property they extended utilities to in order to capture tax revenue necessary to fully cover the costs associated with extending the service. This issue has been settled this year with the passage of Public Chapters 707 and 628. Public Chapter 707 eliminated the authority of cities to unilaterally annex by ordinance, while Public Chapter 628 made a technical correction at the request of the Office of the Comptroller to Tennessee's revenue bond law. Public Chapter 628 specifically removed language in Tennessee Code Annotated Section 7-34-115 that said that cities could subsidize a public works system with tax revenue. This language was inconsistent with language in that same statute and others elsewhere stating that utilities are supposed to operate as self-sufficient entities.

## **Issues that existed before passage of Public Chapter 707 and remain**

Public Chapter 707 resolved some issues, but there are others it did not resolve. This includes a number of issues ranging from who gets to vote in a referendum to joint economic and community development boards.

### ***Plans of Services***

#### **Deadlines for Implementing Plans of Services**

Tennessee's current law requires annexing cities to develop plans of services for newly annexed areas.<sup>9</sup> The law does not provide a clear deadline for when services must be provided, but the plans must include a "reasonable implementation schedule" for the services. One alternative is to establish a timeline in the statute for implementation of plans of services based on the types of services offered. In the interim report, the Commission recommended further consideration of establishing a deadline of five years for provision of services.

#### **Inclusion in the Plans of Standards for Delivering Services and Information about Cities' Financial Ability to Provide Services**

The original version of Senate Bill 1054 by Kelsey (House Bill 1263 by Carr, D.) which became Public Chapter 462, Acts of 2013, included sections that would have added some requirements to the plans. These sections would have required cities to adopt plans that establish standards for delivering services and provide information on the financial ability of the cities to provide services. In the interim report, the Commission recommended further consideration of these provisions that were amended out of Senate Bill 1054.

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<sup>9</sup> Tennessee Code Annotated, Section 6-51-102.

## **Whether All Plan of Service Provisions Apply to Annexations by Referendum**

The Municipal Technical Advisory Service (MTAS) says in *Annexation Handbook for Cities and Towns in Tennessee II* that it is not clear whether the language in Tennessee Code Annotated, Section 6-51-104(b), requires a plan for an annexation by referendum to meet all the conditions that apply to plans for annexations by ordinance. That section requires a city to prepare a plan of service for an annexation by referendum and says the plan “must address the same services and timing of services as required in § 6-51-102.” According to the report, it is “not clear whether that language embraces statutes governing annexation by ordinance that deal with a broad range of plan of services issues, including the effect of the failure of cities to fulfill prior plans of services, progress reports on plans of services, amending plans of services, and challenging and enforcing plans.” However, Tennessee Code Annotated, Section 6-51-108, which contains those provisions, is not restricted to annexation by ordinance except in a subsection related to court orders.

It is likely that a court would interpret Tennessee Code Annotated, Section 6-51-104(b), in a less restrictive way than that proposed by MTAS. The primary objective of courts when interpreting statutes is to ascertain and give effect to the intent of the legislature. Statutes relating to the same subject matter are generally read together and construed to operate in harmony. Applying these “rules of statutory construction,” a court could conclude that all of the plan of services provisions except the one specific to court orders related to annexations by ordinance apply to annexation by referendum.

## ***Informational Meetings before Annexations***

Current law does not require cities to hold an informational meeting before annexing property, but it does require a public hearing before an annexation as well as a public hearing before adoption of a plan of services.<sup>10</sup> A bill introduced in 2013, Senate Bill 1381 by Bowling, House Bill 1319 by Huss, would have required three informational meetings before annexing by ordinance. In the interim report, the Commission recommended further consideration of holding an informational meeting before annexing property, noting that informational meeting requirements similar to those in North Carolina could be combined with the existing requirement for a public hearing on the plans of services adopted by cities for newly annexed areas instead of requiring an additional meeting.

## ***Who Gets To Vote in Referendums***

As in Tennessee, in all other states where annexation is done by referendum, only residents in the territory to be annexed get to vote. Some states have a different process, where property owners—resident and non-resident—get to decide on annexation through a petition process rather than an in-person election.

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<sup>10</sup> Tennessee Code Annotated, Sections 5-51-102 and 6-51-104.

Some municipal charters allow non-resident land owners to vote in municipal elections, but the prospect of amending the law to allow non-resident owners to vote in annexation referendums raises a number of issues. One issue is a concern about voting rights when land is owned by a corporate entity and no one resides there, for example church properties.<sup>11</sup> Is there anyone who can vote if the owner is a corporation, trust, nonprofit association or other entity? Tennessee law does not address this issue. In other states, for example West Virginia, corporations are not allowed to vote in referendums, but the law does allow legal representatives of corporations to sign a petition for annexation. Finally, an issue raised during Senate debate on the act is the concern that where there are multiple qualified voters living on a single parcel, the voters from that parcel could have more influence on the results of a referendum than a parcel with fewer voters. Of course, this is true for nearly all elections.

### ***Annexation of Non-Contiguous Areas***

Some cities make it a practice to annex only those owners who wish to be annexed. In some cases, this can lead to corridor annexations to reach properties that are not contiguous to cities' boundaries. County highway officials have expressed concern about this practice. Annexing roads but not the adjoining property can lead to confusion over who is responsible for maintenance and emergency services. In the interim report, the Commission supported further consideration of allowing cities to annex non-contiguous areas, including government-owned property and property for property for commercial or industrial development, with the owner's consent.

### ***Allocation of Tax Revenue after Annexation***

As discussed in the interim report on Public Chapter 441, the Growth Policy Act required local option sales tax and beer wholesale tax revenue collected in annexed areas to continue to go to the county for 15 years and for collections above this "hold harmless" amount to go to the annexing city. This has not happened with the wholesale beer tax revenue; all of that revenue collected since the Growth Policy Act went into place has continued to go to the annexing cities. While it is not clear that it would be possible to calculate past hold harmless amounts, this oversight can be avoided going forward using information available to local governments and the Department of Revenue.

First, when the impacted city and county governments notify the Department of Revenue of the name and location of businesses in the annexed area, which they report so that the department can correctly track local sales tax collections, they could also report if any of these businesses hold a retail beer license. Retailers in county areas that sell beer are required to have a county beer tax license, and when they are annexed into a city, they must obtain a new license from the city.

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<sup>11</sup> Church properties are often owned by a nonprofit corporation or held in trust.



Next, the department also has a way of identifying likely or possible beer retailers from the list of businesses that were furnished to it by local governments. Every sales tax account has a four-digit business activity code. The department can use the code to determine if any of the businesses identified as involved in annexations were likely or possible beer retailers, for example, grocery stores, eating places, drinking places, drug stores, and gas stations. The Department could then check with local governments to determine if any of these businesses hold a retail beer license. Once identified, the department, with authority given to it under Tennessee Code Annotated Section 57-5-206, could request beer wholesalers to provide the appropriate data needed to calculate the hold harmless amount for wholesale beer tax collections.

Finally, since the passage of Public Chapter 657, Acts of 2012, the department now receives detailed data from beer wholesalers that identifies all retailers to whom they sell beer. This information includes the sales tax account number of each retailer. Crosschecking this information with the information they already have on businesses they are tracking for purposes of the hold harmless requirements on local sales taxes would identify those that sell beer and paid wholesale beer taxes. The Department could then request wholesalers to provide the necessary data with which to calculate the annexation date revenue wholesale beer tax hold-harmless amount.

## ***Deannexation***

### **Authority of Owners to Initiate Deannexation**

Tennessee's law does not allow owners or residents to initiate deannexation from a city. In the interim report, the Commission recommended further consideration of giving property owners the right to initiate deannexation if it does not create non-contiguity or unincorporated islands and that the city is compensated for its investment in municipal infrastructure other than those associated with rate-paid services.

### **Deannexation of Agricultural Property**

Owners of agricultural property cannot request deannexation of their property. It was the consensus of the commission that further consideration should be given to requiring deannexation upon petition by the owner of any such lands currently inside cities' corporate limits, especially given the possibility that deannexation could create noncontiguity or unincorporated islands, or a loss of cities' investment in municipal infrastructure other than those associated with rate-paid services.

## ***Public Hearings before Mutual Adjustment of Cities' Corporate Boundaries***

Cities can adjust their mutual boundaries by contract to align them with easements, rights-of-way and lot lines.<sup>12</sup> There is no requirement in the law that cities give notice to residents and owners or hold a public hearing before adjusting their boundaries. The Commission, in the interim report, recommended giving further consideration of requiring a public hearing before adjusting boundaries.

## ***Periodic Review and Update or Readoption of Growth Plans***

A lot has changed since the first growth plans were adopted. Plans based on outdated information may not be as useful today. There is no requirement that the plans be reviewed or amended. In the interim report, it was the consensus of the Commission that further consideration be given to requiring all growth plans be reviewed and either amended or readopted within two years and every five years thereafter.<sup>13</sup>

## ***Unilateral Retraction of Cities' Urban Growth Boundaries***

Cities must amend their growth plans if they want to revise their urban growth boundaries. There is no provision in the law authorizing cities to unilaterally retract their boundaries. In the interim report, the Commission recommended further consideration of allowing cities on their initiative to unilaterally retract their urban growth boundaries so long as removal does not create non-contiguity or unincorporated islands or cause problems with delivering urban services.

## ***Joint Economic and Community Development Boards***

### **Meeting Requirements**

Joint economic and community development boards (JECDBs) are required to meet four times each year.<sup>14</sup> The executive committee of the JECDB must meet four times per year. The Commission recommended further consideration of allowing local governments to decide how often the JECDBs and their executive committees should meet.

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<sup>12</sup> Tennessee Code Annotated Section, 6-51-302.

<sup>13</sup> The current law only has one method for amending growth plans. A bill that was introduced this past session which TACIR studied, Senate Bill 613 by Yager, House Bill 135 by Keisling, would have created two different processes for changing plans. A proposal to change an urban growth boundary or planned growth area without affecting another urban growth area or planned growth area would be an amendment, and the process would have been similar to the amendment process in current law. Anything else would be considered a revision, and the process would be much complicated than that for amending plans.

<sup>14</sup> Tennessee Code Annotated, Section 6-58-114.

## **Functions Transferred to Coordinating Committee**

It has been suggested that transferring functions of a JECDB to the coordinating committee could streamline the growth planning process and the process for amending growth plans. The Commission recommended further consideration of allowing local governments to decide whether to move the functions of the JECDB to the coordinating committee.

## **Taking On Functions of Industrial Development Corporation**

In the interim report, the Commission recommended further consideration of allowing JECDBs to serve as industrial development corporations at the option of the local community. An industrial development corporation is a corporation formed by cities or counties to promote industry, trade, and commerce. When two or more cities or counties form a corporation, it is known as a joint industrial development corporation. Though industrial development corporations and joint industrial development corporations have the same purpose, powers, and funding sources, they differ in their membership requirements. Joint corporations permit city and county officials to serve on their boards, while corporations formed by a single city or county do not. See attachment A for a comparison of the funding, powers, and purpose of JECDBs, industrial development corporations and joint industrial development corporations. See attachment B for a comparison of the membership requirements for JECDBs, industrial development corporations, and joint industrial development corporations.

## **Issues that Public Chapter 707 created**

### ***Remaining References to Ordinances Should Be Removed and Ambiguities Created By Things Left Behind When the Statutes Were Amended***

Some annexation statutes may need to be amended to make certain that plan of service provisions that applied to annexations by ordinance apply to annexations by referendum. First, Public Chapter 707 strips most of the language out of Tennessee Code Annotated Section 6-51-102, effective May 2015, relating to annexation by ordinance. It leaves in language that outlines the requirements for plans of services. The language begins with the phrase "Before any territory may be annexed under this section." The provisions governing annexations by referendum are in other statute sections. If the phrase "Before any territory may be annexed under this section" is left in the statute, it may be unclear whether all the requirements for plans in Section 6-51-102 apply to plans for annexations by referendum. Removing this language from the statute will help ensure that the plan of service requirements in Section 6-51-102 also apply to annexations by referendum.

Another statute, Tennessee Code Annotated Section 6-51-119, requires that a copy of the annexation ordinance, the plan of services section that deals with emergency services, and a map of the annexed area be sent to any affected emergency communications district when annexing by ordinance. It may be advisable to amend the law to make this statute applicable

to annexations by referendum so that the districts have the information essential to properly identify areas served.

In Tennessee Code Annotated Section 6-51-108(e), it says that an owner can file a lawsuit against the city to force them to fulfill the plan of services "one hundred eighty (180) days after an annexation by ordinance takes effect and until the plan of services is fulfilled." It does not say that owners of property annexed by referendum have this right. The statute may need to be amended to ensure that an owner can enforce a plan of services when their property is annexed by referendum.

These may not be all of the ambiguities left in the statutes. The staff will continue to look for other potential problems.