

Municipal Boundaries in Tennessee:

Annexation and Growth Planning Policies after Public Chapter 707

A Report by the Tennessee Advisory Commission on Intergovernmental Relations

Contents

| | |
|--|----|
| Refining Policies for Growth Planning and Municipal Boundary Changes | 1 |
| The Annexation Process Going Forward: consent and referendums | 1 |
| Defining Agricultural Land for Annexation Purposes May Pose Challenges..... | 2 |
| The Referendum Process Remains Unchanged but Excludes Non-resident Landowners... | 2 |
| Referendum by Petition: adding a way to make annexation decisions more inclusive | 3 |
| Corridor and Non-Contiguous Annexation: supporting economic development | 4 |
| More Informative Plans of Services: making annexation attractive | 5 |
| Deannexation: initiation by residents and landowners under limited circumstances..... | 5 |
| Mutual Boundary Adjustment: informing residents and landowners | 6 |
| Implementing the Statutory Allocation of Tax Revenue After Annexation..... | 6 |
| Updating Growth Plans: the next 20 years..... | 6 |
| Unilateral Retraction of Cities' Urban Growth Boundaries | 7 |
| Joint Economic Community Development Boards: making them more effective | 7 |
| Clarifying Statutory Language | 8 |
| Annexation and Municipal Boundary Changes after Public Chapter 707 | 9 |
| Annexation by Resolution | 10 |
| Annexation by Owner Consent..... | 10 |
| Defining Agricultural Land for Annexation with Written Consent | 11 |
| The Process for Annexation by Referendum..... | 12 |
| Difficulties With Referendums..... | 12 |
| Difficulties With Expanding Non-Resident Voting In Referendums | 13 |
| Petitions: a more efficient and inclusive method of annexation | 14 |
| Corridor Annexation: managing conflict and avoiding confusion | 17 |

| | |
|---|----|
| Non-Contiguous Annexation: supporting economic development..... | 18 |
| More Informative Plans of Services: making annexation attractive | 19 |
| Deannexation: initiation by residents and landowners under limited circumstances..... | 20 |
| Mutual Boundary Adjustment: informing residents and landowners | 21 |
| Implementing Statutory Allocations of Tax Revenue After Annexation | 22 |
| Comprehensive Growth Policies | 23 |
| Updating Growth Plans: the next 20 years..... | 24 |
| Unilateral Retraction of Cities’ Urban Growth Boundaries | 25 |
| Making the Joint Economic Community Development Board more Effective | 26 |
| References | 28 |
| Interviews and Persons Contacted | 29 |
| Appendix A: Public Chapter 707..... | 31 |
| Appendix B: Clarifying Statutory Language..... | 34 |
| Inapplicable sections, references to deleted sections or “ordinance”, and clarification in general: | 34 |
| Statutes Applying to Plans of Services: | 37 |
| Changes to Annexation by Resolution with Written Consent:..... | 39 |
| Annexation by Ordinance in another County:..... | 39 |
| Same Territory Annexed by Multiple Municipalities: | 41 |
| Appendix C: Annexation Methods in the 50 States..... | 43 |
| Appendix D: County Populations and Projections..... | 44 |
| Table 1. 2010 Population Difference from Projected..... | 44 |
| Table 2. 2010 Population Difference from Projected by Percentage | 47 |

Refining Policies for Growth Planning and Municipal Boundary Changes

The 108th General Assembly eliminated unilateral, nonconsensual annexation with the enactment of Public Chapter 707, Acts of 2014, and strengthened the annexation moratorium established by Public Chapter 441, Acts of 2013. The 2014 Act extended the review of state policies governing comprehensive growth plans and changes in municipal boundaries begun by Public Chapter 441 on which the Commission released an interim report in December 2013.

Until May 15, 2015, cities may annex by ordinance only those formally initiated before passage of Public Chapter 707 and approved by the county or with the written consent of the owners. After that date, cities can annex property only with the written consent of the owner or by referendum. Cities can annex agricultural land only with written consent of the owner.

While Public Chapter 707 settled many important issues surrounding annexation, its passage raised a few new questions and left others unresolved:

- Issues that Public Chapter 707 did not resolve
 - non-resident participation in annexation decisions
 - annexing non-contiguous areas
 - deadlines and standards for implementing plans of services and inclusion of financial information
 - participation in deannexation decisions and deannexing agricultural property
 - informing the public before adjusting cities' shared boundaries
 - implementing statutory allocation of tax revenue after annexation
 - reviewing and updating growth plans
 - retracting cities' urban growth boundaries
 - duties and responsibilities of joint economic and community development boards
- Issues that Public Chapter 707 created
 - references to annexation by ordinance that were not removed
 - apparent ambiguities created in sections that were not amended

The Annexation Process Going Forward: consent and referendums

Public Chapter 707 established consent as the basis for all annexations in Tennessee. While it left the existing referendum method unchanged, it added a more formal method for individual owner consent, one that requires consent in writing, something that was not necessary in the past. With the written consent of all of the landowners affected, cities can easily annex any

area adjacent to the existing city limits, including land used primarily for agricultural purposes, which now can be annexed only with written consent of the owner. Anything else requires a referendum.

With repeal of the annexation by ordinance method, Public Chapter 707 left resolution as the only method for effecting annexations. The critical difference between the two is that ordinances have the force and effect of law while resolutions only express the opinion or will of legislative bodies. Giving annexation resolutions the effect of laws and ensuring that they are not subject to legal challenge on a procedural basis will require that cities follow their ordinance processes. Allowing cities to use ordinances for this narrow purpose—only for annexations with unanimous written consent—would be less confusing.

Defining Agricultural Land for Annexation Purposes May Pose Challenges

The larger issue for annexation with written consent, however, is the meaning of the phrase *used primarily for agricultural purposes*. While agriculture is well defined in Tennessee Code Annotated, Title 1, the word *primarily* is not defined anywhere in Tennessee law. It is, however, used frequently in statutes, and the standard dictionary definition of *indicating the main purpose of something or for the most part* would most likely be applied but would still be open to interpretation. Greenbelt status for property tax purposes has been discussed as a standard for requiring written consent but may not cover everything the legislature had in mind when it wrote “property used primarily for agricultural purposes.” One option would be to apply the Greenbelt criteria but include parcels that do not meet the acreage criteria for special tax treatment.

The Referendum Process Remains Unchanged but Excludes Non-resident Landowners

Public Chapter 707 did not change anything about the referendum process itself, which has been available to municipalities since 1955. Because annexation by ordinance was simpler, timelier, and cheaper, cities rarely used the referendum process. Referendums can be a cumbersome process unless aligned with a regular election and do not give non-resident landowners a voice. Moreover, referendums require consent from only half of the voters plus one. This simple majority vote requirement means that it is possible for a substantial number of residents and all non-resident property owners to be annexed without their consent and even despite their objection.

One proposal to extend participation to non-resident landowners, including corporations, is to allow them to vote in annexation referendums. Although some Tennessee cities’ charters allow non-resident landowners—no more than two per parcel—to register and vote in municipal elections, this privilege is granted only to natural persons who are otherwise qualified to vote in Tennessee elections, not to non-resident landowners organized as corporations. Corporate landowners could be allowed to vote in annexation referendums—there is no constitutional impediment to doing so—but only a tiny handful of states extend that right to them (Colorado, Delaware, Maryland, and West Virginia). Nearly all states that allow non-resident landowners to participate in annexation decisions do so through a petition

process, although those petitions generally do not decide annexations but rather request them.

But allowing non-resident landowners to participate in annexation referendums may pose logistical problems for election officials and poll workers. Identifying those eligible to vote as non-residents would be a novel process in most areas. Safeguards would need to be developed to ensure that only those eligible by virtue of owning property in areas proposed for annexation were allowed to vote on those questions, and some process for determining who could vote—which owners of properties with multiple owners as well as which individual on behalf of corporations—on the basis of land ownership. Ballots presented at polling places in areas proposed for annexation would have to be programmed to exclude non-residents from all but the annexation question.

Voters themselves might face logistical problems as well when they are eligible to vote in the regular election in one place based on residence and on annexation questions in other places based on land ownership. The same individual might also be eligible to vote on behalf of a corporation at one or more polling places. Getting to all of these places could be as difficult for voters as ensuring that only those who are qualified actually vote on each question would be for election officials and poll workers. Separating annexation referendums that allow non-residents to participate from other elections would be much simpler, but cities may find holding them on different dates too costly.

Referendum by Petition: adding a way to make annexation decisions more inclusive

The addition of a formal petition process patterned on Tennessee's referendum process *so that it is the equivalent of a vote* could allow non-resident landowners to participate in annexation decisions with less trouble and at less expense without diminishing the ability of annexation opponents to affect the outcome. A petition process structured in this way, as a decisive vote if it fails but as a request for action by the city if it passes, would not be entirely novel. A few states authorize petitions that decide annexation questions, though in a more cumbersome manner than suggested here, by allowing opponents to block annexations in a petition process that occurs after the city has decided the issue.

A formal petition process to stand in the place of a referendum election could be structured in a number of ways. One proposal is to offer two petitions—one for those who favor annexation and one for those who oppose it. A simpler option would be a single ballot that could be marked yes or no. All of the usual safeguards for voting could be provided, including anonymity, which could be protected by offering individual ballots instead of petitions with multiple signatures. If non-residents were authorized to participate, eligibility could be determined based on voter registration rolls and property tax records. Businesses, including corporations, could be allowed to participate in the petition process without changing the election law that restricts the right to vote to natural persons but would need a process for declaring who would cast the ballots on their behalf. And unlike the referendum process, which requires only a simple majority to approve annexation, a petition process could be

structured to require a higher threshold, affording more protection to those opposed to annexation, if the legislature so chose.

Corridor and Non-Contiguous Annexation: supporting economic development

Accommodating willing landowners' requests for annexation of areas not adjacent to the city limits will be more difficult under the new law because landowners and residents in between can stop them. But these areas may be well-suited for commercial or industrial development. In the past, cities could easily annex corridors to reach these non-contiguous properties, taking in roads and other rights-of-way, which in many cases created conflict between cities and counties over responsibility for maintaining infrastructure and providing services and confusion for residents and landowners about whether the city or the county is responsible for road maintenance and emergency services. With the passage of Public Chapter 707, cities can no longer do this without the consent of voters by referendum or all owners in writing who live along those roads and rights-of-way and own the land under them. This should not, however, inhibit their ability to annex corridors that are not privately owned, but they will need permission from the government that owns them.

Where cities continue to use corridor annexation to support economic development, cities and counties need to work together to agree on the most effective way to serve developments in outlying areas. Cities should not be permitted to annex a substantial majority of properties on both sides of a county road or bridge without either accepting responsibility for that infrastructure or negotiating a service agreement with the county. Counties would be able to petition a chancery court to direct cities to either accept responsibility for the road or deannex the property along it.

Seven states allow cities to annex non-contiguous territory in order to avoid the conflict and confusion created by corridor annexation. Three of them allow non-contiguous annexation only of government-owned property and three permit cities to annex privately held non-contiguous property within a certain distance of the city limits but only with the owners' consent. None of these states allow the non-contiguous territory to be used to establish contiguity for further annexations. Indiana limits non-contiguous annexation to commercial or industrial development, which avoids problems associated with providing public services to patchwork residential development. Indiana also requires the city to get county approval for the annexation. So does Kansas, which does not limit non-contiguous annexation to certain types of property. Georgia also does not limit non-contiguous annexation to certain types of property, but only allows it when effected either by the state legislature or by agreement between the city and county.

Allowing non-contiguous annexation in Tennessee would help cities and counties alleviate the problems created by corridor annexation when the most appropriate area for development has a landowner willing to be annexed but is not adjacent to the city without affecting residents or landowners who don't want to be annexed. Tennessee could follow the model of Kansas and Indiana and require county approval for non-contiguous annexation or use its urban growth boundaries to establish county consent for non-contiguous annexations. Whether county

approval is required or not, non-contiguous annexation should be limited to commercial or industrial development and government-owned property to avoid the problems created by patchwork residential development. Because counties would remain responsible for infrastructure such as roads and for emergency or other services between the city and the unincorporated island created by non-contiguous annexation, cities and counties should be required to agree on a coordinated plan of services and infrastructure maintenance for both the non-contiguous property and the route connecting it to the city.

More Informative Plans of Services: making annexation attractive

Before a city can annex any territory, it must propose and adopt a plan of services that explains to residents what services they will receive and provides a reasonable schedule for when they will receive them. Current law does not require plans of services to include information about cities' financial ability to implement them. As originally written, the bills that became Public Chapter 462, Acts of 2013 (Senate Bill 1054 by Kelsey, House Bill 1263 by Carr, D.) would have required this information, but the provisions were removed before the bill passed. Residents in areas proposed for annexation often believe cities will not implement their plans of services and, therefore, oppose annexation, which may make it difficult or impossible to pass a referendum. In order to demonstrate their ability to serve residents of the area proposed for annexation, cities should provide sufficient information to demonstrate their financial ability to implement the plan of services proposed. Current notice and public hearing requirements are adequate.

Deannexation: initiation by residents and landowners under limited circumstances

When a city has failed to fully implement a plan of services adopted for an annexed area, residents and landowners' only recourse under current law is to sue the city to provide the services. Although deannexation may seem to be a reasonable alternative and one that might be acceptable to the city, residents and owners have no way to initiate or even participate in the deannexation process except by petitioning to force a vote in hopes of stopping a deannexation. One way to enable greater resident and landowner participation, including by those who own agricultural land, would be to allow them to petition for deannexation using the same formal dual-petition process proposed for annexation when a city has not fully implemented the plan of services adopted for the area.

Of the 36 states with deannexation laws, Tennessee is one of only ten that do not allow residents or owners to initiate deannexation proceedings. Local officials in Tennessee have expressed concern that allowing residents to initiate deannexations could lead to donut holes and irregular boundaries that create confusion over provision of services. In order to prevent these problems, eight states prohibit deannexations that would create donut holes by limiting them to areas on the city borders.

Tennessee, like many other states, allows cities to continue taxing deannexed property to repay debt incurred in order to meet the needs of those areas and requires them to charge sufficient rates for utilities to pay for services provided to those areas. Because of this,

allowing residents and landowners to petition for deannexation is unlikely to cause issues with provision of services as long as those deannexations are limited to areas on the city border in order to avoid creating islands, donut holes, or non-contiguous areas. However, because counties may be obligated to assume responsibility for infrastructure such as roads or for emergency or other services, their approval for deannexation should be required. Moreover, deannexations should be allowed only when the proposal is to remove the entire area as it had been annexed, not scattered individual parcels, unless the city and county agree otherwise.

Mutual Boundary Adjustment: informing residents and landowners

Currently, Tennessee allows adjacent cities to adjust their mutually shared boundaries by contract without giving notice or holding a public hearing. These boundary adjustments are permitted to avoid boundary lines that do not align with streets, lot lines, or rights-of-way but may have important consequences for those being shifted from one city to another, for example, a change in tax regime, change in school district, or a change in level of services provided.

Ten other states allow mutual adjustments outside the normal annexation and deannexation processes. Four, like Tennessee, have no notice or hearing requirements. Six require notice; four of those also require a hearing. Because these boundary adjustments may have significant consequences for residents and landowners, cities should be required to give notice and hold a public hearing before finalizing them.

Implementing the Statutory Allocation of Tax Revenue After Annexation

As discussed in the Commission's interim report on Public Chapter 441, the Growth Policy Act (Public Chapter 1101, Acts of 1998) allows any increase in revenue from local option sales taxes and beer wholesale taxes collected in newly annexed areas to go the annexing city, but requires the amount already being collected to continue to go to the county for 15 years. This has not happened with the wholesale beer tax revenue; all of it has gone to the annexing cities. It may not be possible to calculate the amount improperly paid to cities in the past, but this error can now be avoided using information available to local governments and the Department of Revenue and it should be.

Updating Growth Plans: the next 20 years

The stated purpose of Tennessee's Growth Policy Act was to establish a comprehensive growth policy for the state, part of which was a requirement to designate urban growth boundaries, planned growth areas, and rural areas based on projections of growth over a 20-year period that is soon coming to an end. These growth plans do not expire, but there is also no requirement to update them.

While one of the primary reasons for cities and counties to establish growth plans—to define where cities could annex by ordinance without consent—has been eliminated, there are still several ways growth plans determine where annexation and incorporation can occur. No city

can annex territory in another's urban growth boundary, and new cities can only incorporate in planned growth areas. Growth boundaries also delineate cities' planning and zoning authority outside city limits in counties where cities have been granted that authority.

Growth plans were first adopted 15 years ago and were based on 20-year projections that have since become outdated. Not only are they old, but the economic recession has fundamentally changed growth patterns in many areas. Actual growth and development in some counties has lagged projections and in other places far exceeded them. This is certain to happen again.

Consequently, any plan not revisited in the last few years is likely to be outdated. The legislature should require all counties to reconvene their coordinating committees and review their growth plans before a certain date and revise or readopt them and repeat this process at regular intervals or as circumstances require. To ensure that the plans are at least readopted, if not revised, the legislature could allow current plans to remain in place but reinstate the prohibition against receiving state grants until the local governments can agree on a plan. To better ensure that development within growth boundaries is consistent with city standards, approval by the county legislative body of the newly adopted growth plan could be deemed approval of extension of cities' planning authority within their urban growth boundaries where counties have not adopted planning requirements of their own.

Unilateral Retraction of Cities' Urban Growth Boundaries

Making even small amendments to growth plans can be cumbersome. If a single city wants to retract its urban growth boundary for whatever reason, the entire coordinating committee has to be convened and two public hearings must be held. To simplify the process where only a single city is affected, cities should be allowed to retract their growth boundaries without approval from other members of their coordinating committees, but only where the boundary abuts a rural or planned growth area and only after giving notice to the county and to residents of the area and holding a public hearing. The affected county should then decide whether to include the removed area in the adjoining rural or planned growth area or to designate a new planned growth area, and the proposed change should be presented to the state's Local Government Planning Advisory Committee for approval.

Joint Economic Community Development Boards: making them more effective

The Growth Policy Act also required each non-metropolitan county to establish a joint economic community development board (JECDB) to "foster communication relative to economic and community development between and among governmental entities, industry, and private citizens."¹ Other than this, JECDBs have no statutory powers or authority. Any other functions they may have are determined by interlocal agreement among the municipalities and county. JECDBs, at a minimum, include all city and county mayors plus one

¹ Tennessee Code Annotated, Section 6-58-114(b).

person with land in Tennessee's Greenbelt program. Representation must also include citizens, present industries, and businesses. JECDBs are required to meet four times annually.

These boards have been useful in many counties, but others question the need for required meetings and wish to have more flexibility. Giving them additional authority may address concerns about their effectiveness and make them more useful, for instance by allowing local governments to decide whether to consolidate the functions of their JECDBs in their coordinating committees or grant them the economic development powers of a joint industrial development corporation. Consolidating the functions of JECDBs in county growth plan coordinating committees would expand them to include representatives of the largest municipal and non-municipal utilities, the largest school system, the largest chamber of commerce, the soil conservation district, and four members representing environmental, construction, and homeowner interests.

Many cities and counties have formed industrial development corporations—commonly known as industrial development boards or IDBs—to support economic development. IDBs are non-profit corporations with broad powers to acquire and develop buildings and sites for economic development and can sell industrial revenue bonds to pay for them. Nine joint IDBs have been formed by cities and counties, and many county IDBs serve cities as well. Although city and county officers, city managers, and other comparable chief administrative officers can serve as directors of joint IDBs, no local government officer or employee may serve on an IDB formed by a single city or county. In counties where IDBs have not yet been formed, granting those powers to JECDBs could make them more useful.

Clarifying Statutory Language

Public Chapter 707 left a number of obsolete references to annexation by ordinance in other sections of the code that need to be removed. Some of these are simple corrections, where the words "by ordinance" or reference to annexations under Section 6-51-102 can be deleted without changing the meaning of the statute. Others include

- removing notice and hearing requirements for annexations with all owners' written consent,
- removing obsolete prohibitions of annexation by ordinance across certain county lines, and
- clarifying priority for annexation when multiple cities attempt to annex the same area by referendum outside their urban growth boundaries.

A complete list and analysis, including suggestions for correcting the statutory language in each section, follows the report in appendix B.

Annexation and Municipal Boundary Changes after Public Chapter 707

As the 108th General Assembly convened in 2013, concerns from citizen groups prompted debate over whether changes should be made to the state's municipal annexation laws, which date back to 1955. To allow adequate time for proper consideration of the complex issues raised in the debate, the legislature established a moratorium on non-consensual annexations of agricultural and residential property and called for a comprehensive review of state policies related to growth planning and municipal boundary changes. This Commission released its interim report to the legislature in January 2014, comparing and contrasting current and proposed laws in Tennessee with those in other states and recommending extension of the moratorium for another year to allow for further consideration of options presented in the report. That April, the General Assembly enacted Public Chapter 707, repealing cities' authority for unilateral, nonconsensual annexation, strengthening the annexation moratorium established by Public Chapter 441, and instructing the Commission to continue its review of state policies.

Public Chapter 707 left the existing referendum method unchanged but added a more formal method for individual owner consent, one that requires consent in writing, something that was not necessary in the past. The act ensured that after May 15, 2015, cities can annex property only with written owner consent or by referendum and can now annex certain agricultural land only with written owner consent. Tennessee will be one of six states (Alabama, Delaware, Florida, New York, and North Carolina being the others)² where the only annexation methods available to cities are 100% owner consent or by referendum (see appendix C for annexation methods used in other states). Prior law allowed Tennessee cities to annex without consent any area within their urban growth boundary and adjacent to the city limits.

While Public Chapter 707 settled the issue of non-consensual annexation, establishing consent as the basis for all annexations in Tennessee, its passage raised some new questions and left others unresolved. Among the new questions is how to determine which agricultural properties now require written consent for annexation. Other changes made by the act require further revision to remove references to deleted sections and clarify statutes made ambiguous by the changes. These statutes are discussed in appendix B, which includes suggested revisions. Unresolved issues related to annexation include: non-resident owners' ability to participate in annexation decisions, accommodating requests for annexation of non-contiguous properties, requirements for plans of services, initiating deannexation, informing residents of mutual boundary adjustments, and proper allocation of tax revenue after annexation. Also unresolved is the status of counties' growth plans, including the need to review and update them periodically, allowing cities to unilaterally retract their urban growth boundaries (UGBs), and the duties and responsibilities of joint economic and community development boards.

² Alabama's constitution also permits annexation by legislative act. Annexation in Florida requires referendum of residents when there is less than 100% owner consent, but it also provides alternatives for when land has no resident voters or is owned by corporations.

Annexation by Resolution

Not only did Public Chapter 707 repeal unilateral annexation by ordinance, it completely removed the ordinance method of annexation, even to effect annexation by willing landowners. The law continues to allow interested persons—whether owners, residents, or otherwise—who wish to have an area annexed into a city to request it, and the governing body of the city still determines whether it will act upon that request. All annexations must now be accomplished by resolution but must follow the ordinance process laid out in a city’s charter in order to have the force and effect of law. Tennessee courts have held that a resolution passed with all the formalities required for passing ordinances may operate as an ordinance. If the ordinance process is not followed, annexation resolutions may be vulnerable to legal challenge.

The terms resolution and ordinance have distinct meanings. A resolution is “a mere expression of the opinion of the mind of the City Council concerning some matter of administration” and is temporary in nature. An ordinance, on the other hand, is a permanent local law adopted by a city.³ Although they are similar, adopting a resolution instead of an ordinance may leave the action open to legal challenge.⁴

City charters generally govern procedures for adopting ordinances and resolutions. Although aspects of the adoption process vary from charter to charter, all ordinances require one to three readings and the governing body’s majority approval. Some cities also require the mayor’s approval or impose publication requirements before passing an ordinance.⁵ Resolutions are usually passed in much the same way but do not require more than one reading.

Annexation by Owner Consent

With the written consent of all of the landowners affected, cities can easily annex any area adjacent to the existing city limits, including land used primarily for agricultural purposes, which now can be annexed only with written consent of the owner. Anything else requires a referendum.

If all property owners consent in writing to a proposed annexation, the city can forgo the referendum process and easily annex any area adjacent to the existing city limits, including land used primarily for agricultural purposes, which now can be annexed only with written consent of the owner. The city need only adopt a resolution to annex the territory, but it must follow its process for adopting an ordinance. Written consent is also required to annex government-owned land, including public roads, except when a referendum is held. And if

³ Joe Cooper's Cafe, Inc. v. Memphis, 1993 Tenn. App. LEXIS 180 (Tenn. Ct. App. 1993).

⁴ City of Johnson City v. Campbell, 2001 Tenn. App. LEXIS 86 (Tenn. Ct. App. 2001).

⁵ Lobertini, 2007.

there are no eligible voters residing in the area proposed for annexation, there can be no referendum and the territory can only be annexed with the consent of all owners.

Defining Agricultural Land for Annexation with Written Consent

Public Chapter 707 has given agricultural property a new level of protection from annexation. The act states that “no [extension of a city’s corporate limits by] resolution shall propose annexation of any property being used primarily for agricultural purposes . . . [; such property] shall be annexed only with the written consent of the property owner or owners.” Property being used primarily for agricultural purposes cannot be annexed without consent as part of a larger annexation referendum. Property “used primarily for agricultural purposes” is not defined anywhere in the law, in Public Chapter 707 or elsewhere. Therefore it is unclear what property is actually protected.

Agriculture is defined in Title 1, which applies to every section of the Tennessee Code Annotated that does not have a more specific definition. The definition of agriculture in Title 1, includes land and buildings “used in the commercial production of farm products and nursery stock.” Farm products and nursery stock are further defined, and recreational, educational and entertainment activities are also included.⁶ It seems clear that land used primarily for these purposes is protected, but *primarily* is not defined anywhere in Tennessee law, even in the statutes governing greenbelt classification for property taxation purposes. It is, however, used frequently in other statutes. Tennessee’s greenbelt law, which protects certain agricultural, forest, and open lands from being taxed at their highest and best use, adopts the definition in Title 1 and sets minimum acreage requirements but does not use the word *primarily*.⁷ These lands, as well lands that meet the following definition are assessed at the same 25% of fair market value as residential property: “all real property that is used, or held for use, in agriculture, including, but not limited to, growing crops, pastures, orchards, nurseries, plants, trees, timber, raising livestock or poultry, or the production of raw dairy products, and acreage used for recreational purposes by clubs, including golf course playing hole improvements.”⁸ It seems clear that land used primarily for these purposes is protected from annexation without written consent. Again, the interpretation of the word *primarily* is the issue. Courts often look to dictionary definitions of words that aren’t defined when interpreting statutes.⁹ The dictionary definition of “primarily” is “used to indicate the main purpose of something; for the most part.”¹⁰ Nine other states limit the ability of cities to annex agricultural land, but a review of their statutes did not produce any examples that might resolve this issue.¹¹

⁶ Tennessee Code Annotated, Section 1-3-105(2)(A).

⁷ Tennessee Code Annotated, Section 67-5-1004. As an alternative to the definition of agriculture in Title 1, land that has been consistently lived on and farmed by the owner’s family for 25 years also qualifies for greenbelt status if it meets the minimum acreage requirements.

⁸ Tennessee Code Annotated, Section 67-5-501.

⁹ *Norandal USA, Inc. v. Johnson*, 2004 Tenn. App. LEXIS 539 (Tenn. Ct. App. 2004).

¹⁰ Merriam-Webster Online Dictionary copyright © 2015 by Merriam-Webster, Incorporated.

¹¹ Arkansas, Colorado, Florida, Kansas, Nebraska, North Carolina, Oregon, South Carolina, and Virginia.

The Process for Annexation by Referendum

Public Chapter 707 did not change anything about the referendum process itself, which has been available to municipalities since 1955. Annexation can be initiated by request or by a city itself, but cities control whether it proceeds. Neither residents nor landowners can force an annexation. The process begins when the governing body of a city adopts a resolution that defines the area to be annexed and sets a date for a required public hearing on the proposed annexation. The city must also prepare a plan of services for the annexed area. The resolution describing the annexation, along with the proposed plan of services, must be mailed to each property owner in the annexation area. The notice is mailed only to the address of record for the property owner, not necessarily to residents living on property owned by someone else. It must also be posted in public places, both in the city and the territory being annexed, and published online and in a newspaper.

After public hearings for the plan of services and for the annexation itself, the city legislative body may approve the plan of services and adopt a resolution to submit the question of annexation to a referendum of voters in the annexation area.¹² The referendum must be held 30–60 days after the last publication of public notices.¹³ If a city wants to time an annexation referendum to coincide with a regular election, it may have to delay when it publishes notice and adopts the resolution. County and statewide offices are decided only in even-numbered years.¹⁴ There is no uniform date for municipal elections as there is for county elections.¹⁵

Cities can also submit annexation questions to a vote of city residents. Both a majority of votes cast in the annexed territory and a separate majority of votes cast in the city would be required to pass the referendum. Eleven other states give city voters the opportunity to vote in an election.¹⁶ When there is no petition from owners, Arkansas, Iowa, and Montana require a combined vote from city residents and those being annexed. Voters in South Dakota may petition for a referendum, in which case the votes of the municipality are combined with those from the area being annexed. The other seven states keep votes from the area being annexed separate from votes by city residents. Florida is the only state, like Tennessee, that gives cities the discretion to allow city residents to vote or not.

Difficulties With Referendums

Because annexation by ordinance was simpler, timelier, and cheaper, cities rarely used the referendum process. Fiscal notes on two annexation-related bills introduced in 2013 said that election costs depend on the size of the municipality holding the referendum, ranging

¹² Tennessee Code Annotated, Section 6-51-104.

¹³ Tennessee Code Annotated, Section 6-51-105.

¹⁴ University of Tennessee County Technical Assistance Service (CTAS) Reference Number: CTAS-867.

¹⁵ University of Tennessee Municipal Technical Advisory Service (MTAS) Reference Number: MTAS-184.

¹⁶ Alaska, Arkansas, Florida, Iowa, Louisiana, Maryland, Michigan, Missouri, Montana, South Dakota, West Virginia.

anywhere from \$6,000 to \$500,000.¹⁷ One election administrator said that, even for a referendum with as few as four eligible voters, the cost would be approximately \$15,000 and that the greatest factors contributing to election costs are providing poll workers for early voting and costs related to programming voting machines.¹⁸

Referendums can be a cumbersome process unless aligned with a regular election. In most counties regular elections occur only every other year. Unless the city can afford a separate referendum election, annexations may have to wait up to two years and opportunities for economic development may be missed.

Referendums do not give non-resident landowners a voice. Only “qualified voters who reside in the territory proposed for annexation” may vote in an annexation referendum unless the city chooses to allow current city residents to participate in a separate election on the same referendum question. Landowners who do not live in the area proposed for annexation cannot participate in the referendum held in that area, although Tennessee has long allowed non-resident property owners—no more than two per parcel—to register and vote in other municipal elections where city charters permit it. While Tennessee grants this privilege only to natural persons who are otherwise qualified to vote, not to corporations, there is nothing in the federal or state constitution to prevent corporations from voting. Moreover, referendums require consent from only half of the voters plus one. This simple majority vote requirement means that it is possible for a substantial number of residents and all non-resident property owners to be annexed without their consent and even despite their objection.

Difficulties With Expanding Non-Resident Voting In Referendums

Allowing non-resident landowners to participate in annexation referendums may pose logistical problems for election officials and poll workers. Identifying those eligible to vote as non-residents would be a novel process in most areas. Safeguards would need to be developed to ensure that only those eligible by virtue of owning property in areas proposed for annexation were allowed to vote on those questions, and some process for determining who could vote—which owners of properties with multiple owners as well as which individual on behalf of corporations—on the basis of land ownership. Ballots presented at polling places in areas proposed for annexation would have to be programmed to exclude non-residents from all but the annexation question.

Voters themselves might face logistical problems as well when they are eligible to vote in the regular election in one place based on residence and on annexation questions in other places based on land ownership. The same individual might also be eligible to vote on behalf of a corporation at one or more polling places. Getting to all of these places could be as difficult for voters as ensuring that only those who are qualified actually vote on each question would be for election officials and poll workers. Separating annexation referendums that allow non-

¹⁷ Senate Bill 731 by Watson (House Bill 230 by Carter) and Senate Bill 279 by Watson (House Bill 475 by Carter).

¹⁸ E-mail correspondence with Phillip Warren, Wilson County Administrator of Elections, 11/12/2014.

residents to participate from other elections would be much simpler, but cities may find holding them on different dates too costly.

Five states—Colorado, Delaware, Kansas, Maryland, and West Virginia—allow non-resident landowners to vote in annexation referendums. All but Kansas allow corporations to vote in these elections. Laws in the other four states allow corporations to appoint one or more agents to vote on their behalf and explain how to designate an officer or agent to vote on their behalf. Delaware permits its cities to allow corporate leaseholders to vote.

Although Tennessee could allow all non-resident property owners, including corporations, to vote in all annexation referendums it could not restrict that right to them. According to the Tennessee Attorney General,

Such legislation may be constitutionally defensible if appropriately drafted. A provision extending the right to vote in annexation elections to nonresident property owners in the territory to be annexed should contain some minimum limits on property ownership to ensure that these owners have a substantial interest in the election. Extending the franchise to nonresident property owners is also subject to a challenge that, under particular facts and circumstances, the system unconstitutionally dilutes the votes of residents.¹⁹

Petitions: a more efficient and inclusive method of annexation

Twenty-five states avoid the problems associated with referendums by allowing petitions to effect annexations. In fact, petitions are the most common method used by other states to allow non-resident owners, including corporate owners, to participate in annexation decisions. In most of the 25 states, the petition process is merely to request annexation by a city or in a few cases to request a referendum on annexation. Three states—California, Nevada, and Wyoming—however, authorize petitions as a decisive vote rather than as a request for action by the city by allowing opponents to block annexations in a petition process that occurs after the city has decided the issue.

In California, even though there is no formal petition process to initiate annexation, residents and owners opposed to annexations can petition their county boundary commission to either stop or force a vote on the annexation, depending on the number of signatures as a percent of total owners and voters. In Nevada and Wyoming, when cities initiate annexation, protest by a majority of owners can stop the annexation from proceeding.

Who is permitted to sign the petitions varies among the 25 states allowing petitions to effect annexations. Fourteen allow only landowners to participate in the petition process and do not allow residents who do not own property to sign annexation petitions.²⁰ Eight states require

¹⁹ Office of the Attorney General, State of Tennessee, Opinion No. 13-106.

²⁰ Arizona, Arkansas, Colorado, Idaho, Indiana, Montana, Nevada, New Mexico, Ohio, Oregon, South Carolina, Utah, Washington, and Wyoming. Five of these have additional annexation methods that include referendum of

petitions to include both landowners and residents, sometimes with different thresholds for each (see table below).²¹ North Dakota allows petitions from either landowners or residents.²² Mississippi and Texas are the only states that allow only residents.²³ Corporations and businesses owning land are allowed to participate in the petition process in states where landowners can sign. Typically, states permit a business that owns property proposed for annexation to designate one agent to sign a petition for annexation.

The 2013 Tennessee Attorney General's opinion saying that residents cannot be excluded from voting in referendums simply because they don't own property in the area to be annexed may apply to annexation petitions as well if they decide the issue. In the one state where residents who were excluded from a petition process sued, North Carolina, the court found the petition process analogous to a vote because the petition decided the issue and ruled the statutes allowing it unconstitutional. A petition process that does not decide the issue, one that is simply a request for annexation, would likely not be subject to the same constitutional constraints.

resident voters. Montana cities can annex with a petition from either a majority of resident landowners (excluding non-owner residents) or any owners of a majority of the land area being annexed. (Montana Code Annotated, Section 7-2-4601.)

²¹ Georgia, Illinois, Louisiana, Maryland, Oklahoma, South Dakota, West Virginia, and Wisconsin.

²² "Upon a written petition signed by not less than three-fourths of the qualified electors or by the owners of not less than three-fourths in assessed value of the property in any territory contiguous or adjacent to any incorporated municipality . . . the governing body of the municipality, by ordinance, may annex such territory to the municipality." North Dakota Century Code, Section 40-51.2-03.

²³ Mississippi Code Annotated, Section 21-1-45. All annexations in Mississippi go through chancery court. Texas Local Government Code, Section 43.024 and 43.025.

**Thresholds for Petition Approval:
States where both residents and owners sign annexation petitions**

| State | Residents who sign | Owners who sign |
|-----------------------------|------------------------------|-----------------------------|
| Maryland ²⁴ | 25% of registered voters | Owners of 25% of land value |
| Illinois ²⁵ | Majority of qualified voters | Majority of landowners |
| West Virginia ²⁶ | Majority of qualified voters | Majority of landowners |
| Wisconsin ²⁷ | Majority of qualified voters | Majority of landowners |
| Louisiana ²⁸ | Majority of resident owners | Owners of 25% of land value |
| Georgia ²⁹ | 60% of resident electors | Owners of 60% of land area |
| Oklahoma ³⁰ | 75% of registered voters | Owners of 75% of land value |
| South Dakota ³¹ | 75% of registered voters | Owners of 75% of land value |

City representatives from several states say their petition processes are less costly than referendums and less cumbersome unless the annexation is large enough to make obtaining many signatures on a petition more difficult.³² Petition processes structured to avoid the costs associated with providing individual ballots, programming and using voting machines, securing polling locations, compensating election workers, providing notices and hearings are cheaper than elections. Some states require the owner or owners petitioning for the annexation to bear the cost of the petition process, whereas referendums are paid for by the annexing city.

In most states with formal petition processes, petitions can be initiated only by landowners, or in some cases by residents. Only Arizona has a formal statutory petition process that can be initiated by the city. Maryland allows cities to initiate the process only after obtaining consent from 25% of affected voters and owners.

²⁴ Annotated Code of Maryland, Section 4-402 et seq.

²⁵ Illinois Compiled Statutes, Section 5/7-1-2.

²⁶ West Virginia Code, Section 8-6-4.

²⁷ Wisconsin Annotated Statutes, Section 66.0217.

²⁸ Non-resident owners in Louisiana may petition for annexation through a referendum, in which only qualified residents can vote. If the area is vacant, with no resident owners or voters, it can only be annexed with written consent from all owners. Louisiana Revised Statutes, Section 33:172.

²⁹ Official Code of Georgia Annotated, Section 36-36-32.

³⁰ Oklahoma Statutes Annotated, Section 21-105.

³¹ South Dakota Codified Laws, Section 9-4-1.

³² Rachel Allen, Staff Attorney, Colorado Municipal League, e-mail October 23, 2014; Larry Weil, Planning Director, City of West Fargo, email October 23, 2014; Eric Budd, Deputy Executive Director, Municipal Association of South Carolina, October 22, 2014.

Corridor Annexation: managing conflict and avoiding confusion

The pattern of annexation in some parts of the state has created conflict between cities and counties over responsibility for maintaining infrastructure and providing services. Where annexations to reach non-contiguous property proposed for development do not include roads and other public infrastructure adjacent to the annexed land, counties remain responsible for that infrastructure, which may become subject to additional wear and tear because of the development. Counties may not have sufficient revenue to support those increased infrastructure needs, particularly where the development is primarily retail and the associated sales tax revenue goes mainly to the city. In the worst cases, cities structure their annexations to avoid the infrastructure that is the most expensive to maintain, such as bridges. As noted in testimony on this issue before the Commission in August 2013, this occurred in Hawkins County where a municipality annexed up to a bridge, skipped over it, and continued annexing on the other side. The bridge was condemned, and the county spent \$28,600 on temporary repairs to keep it open. The cost to replace it was estimated at \$7.2 million. Kansas deals with the problem of annexing property without taking roads by allowing counties to force cities to annex roads that are adjacent to annexed property by notifying the city that such a road exists. The city then must declare it annexed unless another city also abuts the road, in which case the city must annex to the centerline.

Annexations drawn to include certain properties or infrastructure and exclude others have created confusion for residents and landowners about whether the city or the county is responsible for road maintenance and emergency services. In some cases, adjacent properties may be served by different providers, and even emergency service agencies may be confused about who is responsible for each property, creating a risk that either multiple agencies will respond or that none will. Resolving these problems requires considerable coordination among local governments.

Florida addresses the confusion created by certain types of annexation by including the county in the decision. Cities in Florida can annex unincorporated donut holes smaller than 10 acres by agreement with the county.³³ They can do this without a referendum or petition but cannot do so to annex undeveloped or unimproved real property.³⁴ In Ohio, cities seeking to annex must first have county commission approval.³⁵ Georgia allows counties to object to annexations when they believe the change in use or density will substantially burden the county. The law encourages the county, city, and property owners to negotiate a written agreement governing the annexation. If no agreement can be reached, the objection goes before a panel for binding arbitration.³⁶

³³ Florida Annotated Statutes, Section 171.031.

³⁴ Florida Annotated Statutes, Section 171.046.

³⁵ Page's Ohio Revised Code Annotated, Sections 709.03 and 709.15.

³⁶ Official Code of Georgia Annotated, Title 36, Chapter 36, Article 7. Procedure For Resolving Annexation Disputes.

Non-Contiguous Annexation: supporting economic development

Annexing areas not adjacent to the city limits will be more difficult under the new law because landowners and residents in between can stop them. In the past, cities could easily reach these non-contiguous properties by taking in roads and other rights-of-way. Although corridor annexation is still allowed, cities can no longer do this without consent where those who live along the roads and rights-of-way own the land under them. A 1994 decision by the Supreme Court of Tennessee on the validity of a referendum by which the City of Alcoa annexed the Topside area established that the owners of land subject to an easement or right-of-way are entitled to vote on whether that area can be annexed.³⁷ Many city and county roads are mere rights-of-way that allow the public to travel what was originally a private road. While local governments are responsible for maintaining them and keeping them safe, and anyone can use them, the land under them still belongs to the adjoining property owners and now cannot be annexed without their permission. Where, however, the roads and the land under them are owned by governmental entities, which is generally the case for state and federal highways, strip or corridor annexations that take in only the right-of-way are still possible without the consent of those who own property along them.

Sixteen states prohibit corridor annexation by statute. Cities in Louisiana and Kansas, for example, cannot annex a roadway or right-of-way without also including the properties on at least one side. Louisiana does, however, explicitly permit cities to use a narrow strip of right-of-way, excluding the paved road and adjacent properties, to annex non-contiguous government-owned property. Delaware, Florida, North Carolina, and South Carolina statutes explicitly forbid using roads, rights-of-way, and other easements to reach property that is not adjacent to the city. Courts in the other ten states have ruled that the contiguity requirement in their statutes makes corridor annexations invalid.³⁸ Often the nature of the land used for the corridor determines whether the annexation is valid.

To avoid the problems of corridor annexation, Georgia allows non-contiguous annexation, either by the state legislature or by agreement between the city and county. State legislative authority to annex is limited only by the state and federal constitutions, and the Georgia Supreme Court has ruled that the legislature's annexation authority, something Tennessee's General Assembly does not have,³⁹ extends to non-contiguous property.⁴⁰ Six other states allow cities to annex certain non-contiguous territory. California, Missouri, and Wisconsin allow non-contiguous annexation only of government-owned property. Indiana, Kansas, and North Carolina all permit cities to annex other non-contiguous property but only when it is within a certain distance of the city limits and only with the owners' consent. Indiana limits

³⁷ Committee To Oppose The Annexation Of Topside And Louisville Road, et al., v. The City Of Alcoa And The Blount County Election Commission, 881 S.W.2d 269; 1994 Tenn. LEXIS 222.

³⁸ Arkansas, Idaho, Illinois, Kentucky, Ohio, Oklahoma, Oregon, South Dakota, Wisconsin, and Wyoming.

³⁹ Tennessee Constitution, Article XI, Section 9, approved by general election November 3, 1953. Public Chapter 113 of 1955 established Tennessee's annexation laws in response to this amendment.

⁴⁰ City of Fort Oglethorpe v. Boger, 267 Ga. 485.

non-contiguous annexations to commercial or industrial development, which avoids problems associated with providing public services to patchwork residential development. Counties in Indiana need a legislative act to opt into the statute that permits non-contiguous annexation, and eleven have done so.⁴¹ Kansas requires the city to get county approval for the annexation. These states do not allow the non-contiguous territory to be used to establish contiguity for further annexations. While Tennessee explicitly allows annexation only of contiguous property, by one report, at least one city has effected a non-contiguous annexation by deannexing the corridor used to reach what is now a non-contiguous incorporated island.

More Informative Plans of Services: making annexation attractive

Since the passage of Public Chapter 707, it will be more important than ever for cities to make annexation appealing to residents. Cities must now obtain the consent of residents or landowners through a referendum or petition process. If residents are not adequately informed about the effects of annexation, they are more likely to oppose it.

Before annexing new territory, Tennessee requires cities to adopt plans explaining what services will be extended to the area.⁴² This includes police protection, fire protection, water service, electrical service, sanitary sewer service, solid waste collection, road and street construction and repair, recreational facilities and programs, street lighting, zoning services, and city schools if maintained separately. These plans are required to include a reasonable implementation schedule for those services.⁴³ Unlike Tennessee, nine states require that at least some services be extended in accordance with a statutory timeline.⁴⁴ These timelines vary in length between one year and ten years. Although Tennessee does not set a specific timeline for any services by statute, residents can sue if the city materially alters the implementation schedule without their consent.⁴⁵

Tennessee also requires a public hearing on the plan of services before it is adopted. This is in addition to the public hearing on the annexation itself. Only six states require multiple hearings before finalizing annexation process.⁴⁶ North Carolina has one annexation hearing and one informational meeting that covers general information about the annexation but also incorporates information on the plan of services.⁴⁷

Although plans of services in Tennessee contain a wide range of information, cities are not required to provide financial information about their ability to implement those plans. City residents and residents of the unincorporated area are not informed as to how the city plans to pay for the extension of services, nor do they know what kind of tax consequences or service

⁴¹ Burns Indiana Statutes Annotated, Section 36-4-3-4(b).

⁴² Tennessee Code Annotated, Section 6-51-104.

⁴³ Tennessee Code Annotated, Section 6-51-102.

⁴⁴ Arizona, Georgia, Indiana, Iowa, Missouri, Montana, North Carolina, Oklahoma, Texas.

⁴⁵ Tennessee Code Annotated, Section 6-51-108.

⁴⁶ Florida, Iowa, Kentucky, North Carolina, Texas, Utah.

⁴⁷ North Carolina General Statutes, Section 160A-58.55.

charges will result from the extension of services. Cities should already have this information before deciding to undertake the annexation process. Cities are required to submit their proposed plans of services to their local planning commission for study and written report. As originally written, the bills that became Public Chapter 462, Acts of 2013 (Senate Bill 1054 by Kelsey, House Bill 1263 by Carr, D.) would have required this information, but the provisions were removed before the bill passed. Fifteen states already provide this information through their plans of services.⁴⁸ The requirement may be very general, like Florida, which calls for the “method under which the municipality plans to finance extension of services,”⁴⁹ or it may be very specific like Utah, which calls for projected costs, tax consequences, and other information.⁵⁰

Deannexation: initiation by residents and landowners under limited circumstances

When a city has failed to fully implement a plan of services adopted when an area was annexed, residents and landowners’ only recourse under current law is to sue the city to provide the services. Although deannexation may seem to be a reasonable alternative, and one that might be acceptable to the city, residents and owners have no way to initiate the deannexation process.⁵¹ Of the 36 states with deannexation laws, Tennessee is one of only ten that do not allow residents or owners to initiate deannexation proceedings.⁵² Fifteen states allow only residents and landowners to initiate⁵³ while eleven allow either cities or residents and landowners to initiate the process.⁵⁴ Even in those other states where cities can initiate the process, residents are often given a chance to participate. Eight states require a referendum.⁵⁵ Including Tennessee, which requires a petition of ten percent of registered voters, five states allow those who don’t want to be deannexed to petition for a referendum.⁵⁶ Two states allow protests to completely halt a deannexation.⁵⁷ Three states require court approval before deannexing territory,⁵⁸ while three more require no approval whatsoever from a court or residents.⁵⁹

Local officials in Tennessee have expressed concern that allowing residents to initiate any deannexation could create donut holes and disorderly boundaries that lead to confusion over provision of services. This could increase travel time for services such as police or fire and

⁴⁸ Delaware, Florida, Indiana, Kansas, Kentucky, Maryland, Missouri, Montana, Nebraska, Nevada, North Carolina, Oklahoma, South Dakota, Utah, Wyoming.

⁴⁹ Florida Statutes, Section 171.042.

⁵⁰ Utah Code Annotated, Section 10-2-401.5.

⁵¹ Tennessee Code Annotated, Section 6-51-201.

⁵² Alabama, Alaska, Arizona, Arkansas, Delaware, Idaho, Kentucky, Oregon, Tennessee, Virginia.

⁵³ Colorado, Georgia, Illinois, Indiana, Michigan, Minnesota, Montana, Nebraska, North Dakota, Ohio, South Dakota, Utah, West Virginia, Wisconsin, Wyoming.

⁵⁴ Florida, Iowa, Kansas, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, South Carolina, Texas, Washington.

⁵⁵ Alaska, Arkansas, Delaware, Iowa, Kentucky, Louisiana, Missouri, Washington.

⁵⁶ Alabama, Arizona, Florida, Tennessee, Oregon.

⁵⁷ Kansas, Nevada.

⁵⁸ Minnesota, Mississippi, Virginia.

⁵⁹ Idaho, Oklahoma, Texas.

reduce the ability of local governments to protect and care for their citizens. In order to remedy these problems, eight states prohibit deannexations that would create donut holes by limiting them to areas on the city borders.⁶⁰

City officials have also raised concerns about recouping the cost of extending services to deannexed areas. Cities make substantial investments in areas where they extend services and expect to recover that investment through taxation or service charges. If residents initiate deannexation after the city has extended services, the city may lose money. However, cities in Tennessee, as in twelve other states,⁶¹ already have the power to continue taxing deannexed areas for indebtedness existing at the time of the deannexation.⁶² Only Kansas has adopted legislation specifically requiring owners to reimburse the cost of extending services, and this occurs only under narrow circumstances.⁶³ Furthermore, Texas and Missouri, although they allow other forms of resident initiated deannexation, make it easier for residents to deannex where the city has failed to provide services within a reasonable time. Tennessee also requires cities to charge users sufficient rates for utilities to pay for services provided to annexed areas. Residents who become deannexed could pay higher rates than they did as customers within the city.

Furthermore, counties may be obligated to assume responsibility for infrastructure such as roads or for emergency or other services in deannexed areas. In Wyoming, the city has to give 60-days' notice to the county so that the county can study the potential impact on their service burden.⁶⁴ In Kentucky, counties can refuse to accept uninhabited territory deannexed by cities.⁶⁵

Mutual Boundary Adjustment: informing residents and landowners

Public Chapter 707 amended Tennessee's annexation law to require a more participatory process, but did not change the mutual adjustment process. Tennessee allows adjacent cities, without giving notice or holding a public hearing, to adjust their mutually shared boundaries by contract. These boundary adjustments are permitted to avoid boundary lines that do not align with streets, lot lines, or rights-of-way⁶⁶ Although mutual adjustments are rare, they may have important consequences for those being shifted from one city to another. For example, residents may be subject to higher taxes or a school district they had not expected, or they may experience a change in the level of services they are provided.

⁶⁰ Arkansas, Florida, Georgia, Illinois, Minnesota, Oklahoma, South Dakota, Wyoming.

⁶¹ Arizona, Colorado, Florida, Idaho, Illinois, Iowa, Minnesota, Montana, Ohio, Oregon, Washington, Wyoming.

⁶² Tennessee Code Annotated, Section 6-51-204.

⁶³ Kansas Statutes Annotated, Section 12-505; only applies when residents initiate a deannexation within two years after resident initiated non-contiguous annexation.

⁶⁴ Wyoming Statutes, Section 15-1-421.

⁶⁵ Kentucky Revised Statutes, Section 81A.440.

⁶⁶ Tennessee Code Annotated, Section 6-51-302.

Ten other states allow mutual adjustments outside the normal annexation and deannexation processes. Four, like Tennessee, have no notice or hearing requirements.⁶⁷ The six states that require notice require anywhere between five days' and three weeks' notice of the public hearing.⁶⁸ The notice must be published in a newspaper in Arkansas, Illinois, Iowa, and Utah. Arizona requires mailed notice and Missouri does not specify the method of notice. Four of these six states also require a public hearing before the adjustment can be finalized.⁶⁹

Tennessee has no provision for affected owners and residents to consent to a boundary adjustment, but seven of these ten states do. Like Tennessee, cities in Arkansas, Massachusetts, and Ohio can perform adjustment without any form of resident or landowner consent. Arizona and Utah allow property owners to petition to stop the adjustment. Illinois and Missouri allow residents to force an election to approve the adjustment if enough protest. Iowa and Kentucky require property owners or voters to petition for the adjustment first. Minnesota allows residents or cities to petition for mutual adjustment, but it must be approved by a judge.

Implementing Statutory Allocations of Tax Revenue After Annexation

As discussed in the interim report on Public Chapter 441, the Growth Policy Act (Public Chapter 1101, Acts of 1998) requires local option sales tax and beer wholesale tax revenue collected in newly annexed areas to continue to go to the county for 15 years except for any increase in revenue, which goes to the annexing city. The law requires that counties continue to collect revenue from the local option sales tax and beer wholesale tax—"taxes distributed on the basis of situs of collection"—in the annexed areas until July 1 following the annexation. Then, for the next 15 years, the county is supposed to receive an annual amount equal to what these taxes produced in the annexed area in the twelve months preceding that July 1. Increases above this hold harmless amount are distributed to the annexing city.⁷⁰

Partly because of a lack of data on retail beer sales in annexed areas, all of the beer wholesale tax has gone to the annexing cities since the hold harmless provision went into effect, not just the increases. Recent changes in reporting requirements may make it possible for the Tennessee Department of Revenue to identify beer retailers among the lists of annexed businesses and request beer wholesalers selling to these businesses to provide the tax payment information necessary to calculate the hold harmless amounts.

The revenue department, cities, and counties all have roles in the reporting and distribution of the hold harmless amounts. Cities are responsible for reporting annexations to the Department of Revenue, but counties are responsible for providing the names and addresses of businesses in the annexed territory.⁷¹ Using the reported information, the department is

⁶⁷ Kentucky, Massachusetts, Minnesota, and Ohio.

⁶⁸ Arizona, Arkansas, Illinois, Iowa, Missouri, Utah.

⁶⁹ Arizona, Arkansas, Iowa, Utah.

⁷⁰ Tennessee Code Annotated, Section 6-51-115.

⁷¹ Ibid.

responsible for calculating the “annexation date revenue,” which represents the local share of revenue from the local options sales and beer wholesale taxes collected from annexed businesses during the previous year. Annexing cities are responsible for distributing the beer wholesale tax amounts.⁷²

While it is not clear that it would be possible to calculate the amount improperly paid to cities in the past, this error can and should be avoided going forward using information that is now 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.

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.

Comprehensive Growth Policies

The stated purpose of Tennessee’s Growth Policy Act (Public Chapter 1101) was to establish a comprehensive growth policy for the state, part of which was a requirement to designate urban growth boundaries, planned growth areas, and rural areas.⁷³ While the focus of the Act at the time was to deal with Tennessee’s frequent battles over annexation and incorporation, it

⁷² Ibid.

⁷³ Tennessee Code Annotated, Section 6-58-102.

was also an attempt to further growth planning statewide. Counties and cities agreed that urban growth boundaries would contain “territory that is reasonably compact yet sufficiently large to accommodate residential and nonresidential growth” over the following 20 years. This was to be territory contiguous to existing cities where the city could “efficiently and effectively provide urban services.”⁷⁴ Planned growth areas were designed to accommodate other areas of expected growth outside the boundaries of cities and their UGBs. This 20-year planning period is soon coming to an end.

While one of the primary reasons for cities and counties to establish growth plans—to define where cities could annex by ordinance without consent—has been eliminated, there are still several ways growth plans determine where annexation and incorporation can occur. No city can annex territory in another’s urban growth boundary, even by owner request. New cities can only incorporate in a planned growth area. Growth boundaries may also delineate cities’ planning and zoning authority outside city limits if a city has been given regional planning powers within a planning region by the Local Government Planning Advisory Committee (LGPAC).⁷⁵ This committee, with members appointed by the Governor, operates as part of the Department of Economic and Community Development, and has always been the authority responsible for regional planning commissions, as well as approving growth plans and changes to them. Cities that do not currently have regional planning status may apply to the LGPAC for regional designation, but any such planning region may not extend beyond the city’s urban growth boundary. In counties that do not have county zoning, the exercise of the regional powers is subject to the approval of the county legislative body.⁷⁶ There are 100 cities designated as regional planning authorities, with extraterritorial planning and zoning authority inside their UGB.⁷⁷

Updating Growth Plans: the next 20 years

Growth plans do not expire after 20 years—or after any length of time—but there is also no statutory requirement to update them. Although other states’ comprehensive plans are different than Tennessee’s growth plans, the Commission’s interim report noted that states typically require plans to be updated every two to ten years, providing an opportunity in those states to engage the public on issues related to future growth and development and municipal annexation. Tennessee’s county growth plans were based, in part, upon “historical experience, economic trends, population growth patterns”—which have most likely changed significantly over the past 15 years and will continue to change over the next 20. Actual growth and development in some counties has lagged projections and in other places far exceeded them—and this is certain to happen again. See the map below. Thirty-six counties already have Census-estimated 2013 populations higher than they were projected to have in 2020. Some

⁷⁴ Tennessee Code Annotated, Section 6-58-106.

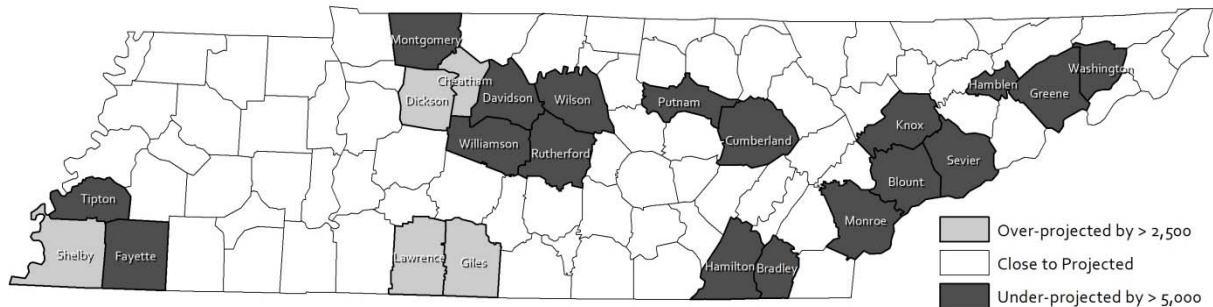
⁷⁵ Tennessee Code Annotated, Section 13-3-102.

⁷⁶ Tennessee Code Annotated, Section 6-58-106(d).

⁷⁷ *Status of Planning & Land Use Controls*. Tennessee Department of Economic and Community Development Local Planning Assistance Office, as of April 1, 2011.

counties have no designated planned growth areas and others have vast planned growth areas and no rural areas. This may not reflect current patterns of development in those counties.

Comparing Projected 2010 County Population to Census 2010



Unilateral Retraction of Cities' Urban Growth Boundaries

Making even small amendments to growth plans can be cumbersome. Although growth plans can be amended as often as deemed necessary, only 25 counties have done so. If a single city wants to retract its urban growth boundary for whatever reason, the entire coordinating committee has to be convened and two public hearings must be held. This coordinating committee is made up of the county mayor and each city mayor in the county, along with an owner of greenbelt property. If the coordinating committee approves of the amendment, each municipal government in the county must also approve it before it can be adopted. In an amended plan, the area formally part of an urban growth boundary would be re-designated as part of another city's urban growth boundary or either a rural or planned growth area. The proposed change is then presented to the state's Local Government Planning Advisory Committee for approval.

The General Assembly has considered legislation that would change the way growth plans can be amended, but none of these previous bills would have permitted unilateral retraction of a city's urban growth boundary. For example, 2013 Senate Bill 613 by Yager (House Bill 135 by Keisling) would have established two different processes for changing growth plans. Under this bill, an "amendment" to a growth plan would be when a city proposes to change only its own UGB, or a county proposes to adjust a boundary between a planned growth and rural area. This type of amendment would follow the existing procedures for adoption. Any proposed change that affects more than one growth plan boundary would be a "revision" and go through an even more rigorous process. Under the proposed bill, growth plans could be revised only once every seven years, and the process would generally follow current law except that convening the coordinating committee would require approval either by the county legislative body or by the municipal legislative bodies representing at least half of the municipal population of the county, making revisions much more difficult than they are under current law.

Making the Joint Economic Community Development Board more Effective

The Growth Policy Act required each non-metropolitan county to establish a joint economic community development board (JECDB) to “foster communication relative to economic and community development between and among governmental entities, industry, and private citizens.”⁷⁸ Other than this, JECDBs have no statutory powers or authority. Any other functions they may have are determined by interlocal agreement among the municipalities and county. These boards have been useful in many counties, but others question the need for required meetings and wish to have more flexibility.

The state has other widely used entities for promoting local economic development. Industrial Development Corporations—commonly known as IDBs—are non-profit corporations with broad powers to acquire and develop buildings and sites for economic development.⁷⁹ There are currently 165 active industrial development boards in Tennessee, according to the Secretary of State’s office, which is responsible for maintaining certificates of incorporation for IDBs.⁸⁰ Of the 95 counties in Tennessee, 88 have at least one IDB incorporated, but the majority of boards are incorporated either by a single city or by the county alone. Just nine boards are joint boards with city and counties together, although county boards commonly represent the economic interests of the cities within them.

When a city or county government forms an IDB individually, local government officers or employees cannot serve as directors. At least seven directors are elected by the municipal governing body—city council, board of aldermen, or county commission—and each must be a qualified elector and taxpayer of the municipality.⁸¹ When two or more local governments form a joint IDB—permissible under Tennessee Code Annotated Section 7-53-104—city and county officers, but not other employees, can serve as directors.⁸²

JECDBs, at a minimum, include all city and county mayors plus one person with land in Tennessee’s Greenbelt program. More members can be added if the board chooses. JECDBs are required to meet four times annually. JECDBs are not the same as county coordinating committees, which convene only to adopt and amend county growth plans and have more requirements for including representatives from various interests. The coordinating committee was intended to be a broad-based group that includes all of the mayors, as well as representatives of the largest municipal and non-municipal utilities, the largest school system, the largest chamber of commerce, the soil conservation district, and four members representing environmental, construction, and homeowner interests.⁸³

⁷⁸ Tennessee Code Annotated, Section 6-58-114(b).

⁷⁹ Tennessee Code Annotated, Section 7-53-102.

⁸⁰ Tennessee Code Annotated, Section 7-53-203. List received from Kevin Rayburn, Assistant Director, Business Services Division, Office of Tennessee Secretary of State, October 2, 2014.

⁸¹ Tennessee Code Annotated, Section 7-53-301.

⁸² Tennessee Code Annotated, Section 7-53-104 does not define “officers”, but provides that the “city manager or other comparable chief administrative officer” may serve as a director.

⁸³ Tennessee Code Annotated, Section 6-58-104 explains the composition of the coordinating committee.

The JECDB can help bridge gaps between cities and counties by bringing the different leaders together on a regular basis. For example, one former city manager recounted how his county's JECDB was able to pool funds from the county and three cities to hire a full-time economic development director and also successfully applied for a THDA housing grant that the county alone had been unable to receive.⁸⁴

The Tennessee Department of Economic and Community Development (TNECD) administers the state's ThreeStar Program, which promotes "county progress in the areas of economic development, responsible fiscal management, public safety, health and education." Each county's ThreeStar program must be administered by the county JECDB or another designated administrator. Participating counties become eligible for an annual ThreeStar grant, as well as other program incentives from TNECD. There are only minimal requirements, however, that the Joint Economic Development Board simply meets statute requirements and that JECDB meeting minutes must be submitted for documentation.⁸⁵ There is no incentive in the program to do more with the JECDB. Eighty-five Tennessee counties were granted ThreeStar status in 2014.⁸⁶

Another TNECD program that uses JECDBs is the Select Tennessee certified sites program. This program assists communities in preparing sites for investment and job creation. Because counties may often have several potential sites for development but limited funds to prepare and market them, TNECD encourages JECDBs to determine which site is in the best interest of the community.

An industrial development corporation can recruit businesses and sell industrial revenue bonds to fund the development of industrial plants or commercial sites and buildings. According to a Tennessee Attorney General opinion, JECDBs do not have the authority to construct a manufacturing building or to lend or grant funds contributed to the Board by the participating local governments to an industrial development corporation.⁸⁷ The opinion added that there is no statutory authority under which the interlocal agreement could be written to authorize the Board to issue bonds on behalf of all its members.

⁸⁴ Dana Deem, MTAS Municipal Management Consultant, via email October 2, 2014.

⁸⁵ Program Overview, January 2014. <http://www.tn.gov/ecd/threestar/pdf/ThreeStarProgramOverview.pdf>

⁸⁶ Tennessee Department of Economic and Community Development, "ThreeStar Status Awarded to 85 Counties," press release, August 14, 2014. <http://news.tn.gov/node/12820>

⁸⁷ Opinion No. 05-176 — Joint Economic Development Board of Weakley County.

References

"Dates for Regular Elections," Reference Number: CTAS-867. University of Tennessee County Technical Assistance Service (CTAS). <http://ctas-eli.ctas.tennessee.edu/reference/dates-regular-elections> (accessed 10/20/2014).

Lobertini, Steve. *Ordinance Drafting and Enactment: Issues and Recommendations*. University of Tennessee Municipal Technical Advisory Service, 2007. http://www.tmaa.us/pdfs/mtas_ord_drafting.pdf (accessed 1/15/2015).

Municipal Boundary Changes in Tennessee: An Interim Report on Public Chapter 441, Acts of 2013. Tennessee Advisory Commission on Intergovernmental Relations. December 2013.

Nevad, Warren. "Conducting Municipal Elections," Reference Number: MTAS-184. University of Tennessee Municipal Technical Advisory Service (MTAS), 2014. <http://resource.ips.tennessee.edu/reference/conducting-municipal-elections> (accessed 10/20/2014).

Status of Planning & Land Use Controls. Tennessee Department of Economic and Community Development Local Planning Assistance Office, 2011. <https://www.gnrc.org/wp-content/uploads/2011/12/status-complete-2011.pdf> (accessed 1/22/2015).

Interviews and Persons Contacted

Rachel Allen, Staff Attorney
Colorado Municipal League

Tom Belshe, Deputy Director
Arizona League of Cities and Towns

Eric Budds, Deputy Executive Director
Municipal Association of South Carolina

J. Rodney Carmical, Executive Director
Tennessee County Highway Officials Association

Joseph Coleman, Research and Federal Relations Manager
Kentucky League of Cities

Dana Deem, Municipal Management Consultant
Municipal Technical Advisory Service (MTAS)

David L. Edgell, AICP, Principal Planner
Delaware Office of State Planning Coordination

Sam Edwards, Executive Director / Chief Legal Counsel
Greater Nashville Regional Council

Ron Fults, Legal Counsel (County)
Greater Nashville Regional Council

Mark Goins, State Elections Coordinator
Office of Tennessee Secretary of State

Cara Harr, Elections Division
Office of Tennessee Secretary of State

Jeff Hoge, Director, Right of Way Division
Tennessee Department of Transportation

Laura Kidwell, Senior Counsel, Financial Division
Tennessee Attorney General's Office

Susan Moore, General Counsel
Georgia Municipal Association

Amy New, ThreeStar Program Director
Tennessee Department of Economic and Community Development

Pete Peterson, City Manager
Johnson City, Tennessee

Kevin Rayburn, Esq., Assistant Director, Business Services Division
Office of Tennessee Secretary of State

John Reinbold, General Counsel
Tennessee Department of Transportation

Clifford A. Rodgers, Administrator of Elections
Knox County

Alice Rolli, Assistant Commissioner, Strategy
Tennessee Department of Economic and Community Development

Ken Small, Financial Technical Assistance Manager
Florida League of Cities

Ken Smith, Executive Director,
Alabama League of Municipalities

Larry Teague, Deputy Attorney General (TN)
Real Property and Transportation Division

Larry M. Weil, Planning Director
City of West Fargo, North Dakota

Geoff Wilson, General Counsel
Colorado Municipal League

Kelly Wolfe, Mayor
Jonesborough, Tennessee