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## ANNEXATION

Annexation is the process by which land which is not within municipal corporate limits becomes land which is within municipal corporate limits. Each municipality has specifically defined boundaries,<sup>1</sup> drawn on a map, or set out in a written description, or both.<sup>2</sup> Annexation is consummated by the adoption of an Ordinance by the municipal governing board which changes the municipal limits to include the subject land. Every time a parcel is annexed, a map is recorded, along with a copy of the annexation ordinance.<sup>3</sup>

### A. TYPES OF ANNEXATIONS - GENERALLY

Annexation occurs in one of several ways: (1) voluntary annexation (by petition) and (2) involuntary annexation. Voluntary annexation is of two types: (a) contiguous annexation and (b) satellite annexation. Although all annexation procedures are statutory, the term “statutory annexation” is a less politically charged term often used to describe “involuntary annexation,” also called by its detractors “forced annexation.”

### B. EXTRATERRITORIAL JURISDICTION (ETJ) COMPARED

Annexations typically occur in areas which are already in the municipality’s “extraterritorial jurisdiction.” “Extraterritorial jurisdiction” is limited municipal jurisdiction over subdivision and zoning outside the municipal limits. “Extraterritorial jurisdiction” is the term in popular use but the statute which creates it simply refers to it

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<sup>1</sup> NCGS §160A-21.

<sup>2</sup> NCGS §160A-22.

<sup>3</sup> NCGS §160A-29.

as “territorial jurisdiction.”<sup>4</sup> That statute provides not only that all the powers granted in Article 19 of Chapter 160A, dealing with planning and regulation of development, “...may be exercised by any city within its corporate limits,” but that in addition, “...any city may exercise these powers within a defined area extending not more than one mile beyond its limits.”<sup>5</sup> (In Chapter 160A, the term “city” includes a town or village.) That area may be extended up to three miles with the consent of the county commissioners, based on population, as follows: 10,000 to 25,000 = two miles, 25,000 and up = three miles. The ETJ is extended by an ordinance adopted by the municipality.<sup>6</sup>

There are two limitations on the extent of the defined area: (a) where it overlaps with the ETJ of another municipality, the statute “splits the baby” unless the two municipalities agree on the location of the boundary line<sup>7</sup>, and (b) the municipality cannot extend the ETJ into an area where the county is administering zoning, subdivision regulation and the Building Code, unless the county agrees.<sup>8</sup>

The ETJ extension policies of some counties (Wake, for example) provide that the area into which that municipality’s ETJ may be extended is classified first as that municipality’s “urban service area.” In fact, prior to being included within a municipality’s ETJ, the land area may have been within its urban service area, for 10-20 years. The author of this manuscript has not found the term “urban service area” in the General Statutes. It is a planning tool originally promoted in a popular treatise<sup>9</sup> and now in general use. These areas are referred to as “urban service areas” not because urban services are provided there now. County governments do not typically provide many of the urban services which municipalities provide (e.g., police, water, sewer, street maintenance, parks and recreation). The term refers to areas into which a given municipality might be anticipated to extend its urban services over time. The urban

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<sup>4</sup> NCGS §160A-360.

<sup>5</sup> NCGS §160A-360(a).

<sup>6</sup> NCGS §160A-360(b).

<sup>7</sup> NCGS §160A-360(c).

<sup>8</sup> NCGS §160A-360(e).

<sup>9</sup> *Rathkopf Zoning and Planning*.

service area concept is a planning tool to project in which municipality a future growth area will ultimately be located. The concept aids planning for the extension of municipal ETJ's and such improvements as water and sewer lines by dividing up the county into areas anticipated eventually to be within the various municipalities. Before an area is annexed, it typically has already been in the municipality's "extraterritorial jurisdiction," or "ETJ" for perhaps 10 or 20 years before annexation occurs. Because of ETJ expansion, some fast-growing counties have substantially gotten out of the zoning and land development regulation process, and/or recognize that they will eventually be out of it entirely.

Prerequisites to the adoption of the ETJ ordinance are notice to all property owners by mail and a public hearing.<sup>10</sup> The ordinance must describe the area in terms of geographical features. A map or a written description or a combination of the two will suffice. The ordinance is to be recorded at the Register of Deeds.

The municipality must provide proportional representation to persons residing in the ETJ on the Planning Board and the Board of Adjustment.<sup>11</sup> ETJ residents may apply to the County Commission for those appointments. In planning jargon, those board members are referred to as the "outside members." Depending on the local ordinance, the "outside members" either vote only on the matters related to the ETJ or vote on all issues, irrespective of their classification or source of appointment.

If a property owner has acquired vested rights under a permit, certificate or other evidence of compliance issued by the local government surrendering jurisdiction, those vested rights survive the change of jurisdiction after the extension of the ETJ.

### C. TYPES OF ANNEXATIONS – IN DETAIL

#### (1) ANNEXATION BY PETITION

Many municipalities avoid the "forced annexation" arena and never, or only seldom, engage in annexation other than by petition. Voluntary annexation by petition occurs on a regular and frequent basis. Voluntary annexation has been described by our

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<sup>10</sup> NCGS §160A-360(a1).

<sup>11</sup> NCGS §160A-362.

court as “making it possible for property owners in the affected area to inject an element of choice as to which municipality will govern them.”<sup>12</sup> This is a major area where planners, landowners, developers and economic development people interact. Voluntary annexation petitions are filed by landowners not desiring development who wish to be within municipal limits in order to obtain water and/or sewer.

Many of the smaller municipalities in North Carolina were incorporated about 100 years ago. The reasons for incorporation at that time were often a desire to enact ordinances which would prohibit the hogs from wallowing in ruts in the town streets, and to provide a financial means for getting those streets paved. While hogs in the streets are not much of a problem now, street maintenance is still a vital function of municipalities. More important, however, is the providing of water and/or sewer utilities. Septic tanks often fail after 30 or 40 years. There may occasionally be other market-driven motives (police or fire protection, perhaps), but for whatever reasons, the developer of an industrial plant or of a business park or residential subdivision would typically rather develop with public water and sewer infrastructure and capacity. Fire protection by hydrants is preferable to using tanker trucks. Except in various rural or semi-rural areas which have sanitary districts, the municipality is typically the only source of the water and sewer. The capacity available for these utilities is frequently limited. State and Federal environmental requirements have resulted in the inability of municipalities to discharge even treated sewage at many locations where it could be done 10 years ago. Sewage treatment plants are incredibly expensive to build. Municipalities cannot afford to give away whatever water and sewer capacity they have available. The filing of an annexation petition is typically a prerequisite of providing water and sewer to a development.

To file a petition for annexation, the developer’s lawyers start at NCGS §160A-31. The procedure begins with presentation of a petition to the governing board. It must be signed by “each owner of real property in the area.” The statute spells out the contents

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<sup>12</sup> *Town of Hudson v. City of Lenoir*, 279 N.C. 156, 181 S.D.E. 2d 443 (1971).

of that petition. The petitioners may withdraw the petition before its adoption; to disallow the withdrawal and annex the area in error.<sup>13</sup>

If the area was served by a rural fire department and is in an insurance district,<sup>14</sup> rural fire protection district,<sup>15</sup> or a fire service district,<sup>16</sup> the municipality must contribute to paying the fire department's debt service.<sup>17</sup> The payment is subject to approval by the Local Government Commission. (The Local Government Commission, or "L.G.C." is a division of the State Treasurer's Office, which oversees municipalities' financial issues.)

The annexation petition statute spells out a procedure in which the Clerk is "to investigate" the petition, "to certify the results" to the board, and to place the petition on the agenda for a public hearing. Newspaper publication is required, except where "there be no such paper,"<sup>18</sup> Property owners in the area and any existing citizens "who question the necessity" of the annexation may be heard at the public hearing.<sup>19</sup> The governing board may then annex the area by adopting an ordinance on that date, or within six (6) months after the hearing.<sup>20</sup>

Providing all municipal services to the newly annexed area is a condition of annexation.<sup>21</sup> Residents and property in the area become subject to the "debts, laws, ordinances and regulations in effect" in the municipality.<sup>22</sup> The Taxman cometh the next January, unless the annexation occurs during June in certain circumstances too arcane for this text.<sup>23</sup>

Other than the consent of the governed, the principal requirement for a voluntary annexation under this article is that the new area must be "contiguous."<sup>24</sup> "Contiguous" does not include annexing two areas at one time, the one being contiguous

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<sup>13</sup> *Conover v. Newton*, 297 N.C. 506, 256 S.E.2d 216 (1979).

<sup>14</sup> NCGS §153A-233.

<sup>15</sup> NCGS §69-25.1.

<sup>16</sup> NCGS §153A-300.

<sup>17</sup> NCGS §160A-31.1.

<sup>18</sup> NCGS §160A-31(c).

<sup>19</sup> NCGS §160A-31(d).

<sup>20</sup> NCGS §160A-31(e).

<sup>21</sup> NCGS §160A-31(e).

<sup>22</sup> NCGS §160A-31(e).

<sup>23</sup> NCGS §160A-31(e).

and the other being non-contiguous until the moment the ordinance is enacted as to the first area.<sup>25</sup> Unlike “statutory” annexation, where property must generally be “developed to urban uses” in order to be annexed, large undeveloped parcels can be annexed as a result of a petition. (The owner can obtain the right to water and sewer and then flip it.)

Where two municipalities attempt to annex the same area (for example, one municipality announces intent to annex it involuntarily and the owner petitions another municipality for voluntary annexation), the first off the block wins.<sup>26</sup> That follows the “prior in time, prior in jurisdiction” dictum.<sup>27</sup>

## (2) SATELLITE ANNEXATION

What do you do if you are the owner of a house outside municipal limits, served by a well which has become contaminated and/or a septic system which has failed? What do you do if you are a landowner or developer of a potentially large development for which you want municipal water and sewer, but which is not contiguous with municipal limits?

Assuming that the utility services can be made available, e.g., the water line happens to run by the homeowner’s lot, or the developer can budget the construction of a water and/or sewer extension, the answer is to obtain it from the nearest municipality. That may prove to be possible under the Satellite Annexation Act.

A voluntary petition may be filed, and acted upon by the municipality, even if the land is not contiguous with the municipality. This is called satellite annexation. Satellite annexations are governed by a separate set of statutes.<sup>28</sup> This procedure also begins with presentation of a petition to the governing board, signed by “each owner of real property in the area,” (excepting tax-exempt property, railroads, public utilities, electric and telephone membership corporations), and a metes and bounds description and a map.

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<sup>24</sup> NCGS §160A-31(b).

<sup>25</sup> *City of Kannapolis v. City of Concord*, 326 NC 512, 391 S.E.2d 493 (1990).

<sup>26</sup> *City of Kannapolis v. City of Concord*, *supra*.

<sup>27</sup> *Town of Burlington v. Town of Elon College*, 310 N.C. 723, 314 S.E.2d 534 (1984).

<sup>28</sup> NCGS §160A-58 *et seq.*

The statute spells out a procedure in which the Clerk investigates the petition and certifies that it is valid. Newspaper publication is required. (This statute was not anticipated to be used in an area without a newspaper, if indeed, there are any such places any more.)<sup>29</sup>

There are limitations on satellite annexations,<sup>30</sup> as follows:

- (b) A noncontiguous area proposed for annexation must meet all of the following standards:
  - (1) The nearest point on the proposed satellite corporate limits must be not more than three miles from the primary corporate limits of the annexing city.
  - (2) No point on the proposed satellite corporate limits may be closer to the primary corporate limits of another city than to the primary corporate limits of the annexing city, except as set forth in subsection (b2) of this section.
  - (3) The area must be so situated that the annexing city will be able to provide the same services within the proposed satellite corporate limits that it provides within its primary corporate limits.
  - (4) If the area proposed for annexation, or any portion thereof, is a subdivision as defined in G.S. 160A-376, all of the subdivision must be included.
  - (5) The area within the proposed satellite corporate limits, when added to the area within all other satellite corporate limits, may not exceed ten percent (10%) of the area within the primary corporate limits of the annexing city.

The statute then excepts over sixty cities and towns to which subsection (5), the 10% rule, does not apply, including in this area, Angier, Garner, Fuquay-Varina,

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<sup>29</sup> NCGS §160A-58.2.

<sup>30</sup> NCGS §160A-58.1(b).

Knightdale, Holly Springs, Louisburg, Morrisville, Oxford, Sanford, Wendell and Zebulon.

That list of requirements does not apply if the municipality “...has entered into an annexation agreement pursuant to Part 6 of this Article with the city to which a point on the proposed satellite corporate limits is closer and the agreement states that the other city will not annex the area but does not say that the annexing city will not annex the area.”<sup>31</sup>

Subsection (4) of the statute is the most troublesome. It creates a problem for the homeowner mentioned above who wants to be annexed to obtain water or sewer. It prohibits annexing part of a “subdivision.” A “subdivision” of course is not necessarily what the word conjures up in popular usage, a development perhaps with a landscaped entrance with a sign. A “subdivision” is simply the division of land. A “subdivision” is defined in NCGS §160A-376(a) as follows:

...all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions when any one or more of those divisions is created for the purpose of sale or building development (whether immediate or future) and shall include all divisions of land involving the dedication of a new street or a change in existing streets... (with certain exceptions set forth in subsections (a)(1) through (a)(4).

The problem is that there is a lot of land that does not “look” like a “subdivision” has been subdivided at some point in the last 100 years.

After the annexation, residents and property in the area become subject to the “debts, laws, ordinances and regulations in effect” in the municipality.<sup>32</sup> Taxation similarly begins in the next January, except in certain circumstances spelled out in the statutes.<sup>33</sup>

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<sup>31</sup> NCGS §160A-58.1(b2).

<sup>32</sup> NCGS §160A-31(e).

<sup>33</sup> NCGS §160A-58.3.

Water and sewer rates (indeed, any “public enterprise” rates) may be higher than in the satellite area, and the municipality has a duty to see that the costs of those services does not exceed the revenues realized therefrom.<sup>34</sup>

Property owners in the area and any existing citizens “who question the necessity” of the annexation may be heard at the public hearing.<sup>35</sup> The statute is a little more detailed as to what the board must find: in addition to finding that the property area meets the requirements that all the property owners signed the petition and that the petition is otherwise valid,<sup>36</sup> the board must also find that “the public health, safety and welfare of the inhabitants of the city and of the area proposed for annexation will be best served by the annexation.”<sup>37</sup> The governing board may then annex the area by adopting an ordinance, then or within six (6) months of adoption.<sup>38</sup>

#### 4. INVOLUNTARY ANNEXATIONS

The North Carolina involuntary annexation approach, legislated in 1959, has always been controversial. North Carolina’s annexation statutes give greater power to municipalities than the comparable statutes of many states. A North Carolina municipality can annex a property whose owner does not want to be annexed. Even worse, from the owner’s viewpoint, he does not even get the right to vote on it. Before 1959, most annexation was by petition, or by referenda, or by a local act of the General Assembly.<sup>39</sup> They were “not copied from the laws of other states.”<sup>40</sup> They were based on a report by the Municipal Government Study Commission which had been created in 1957 and proposed annexation as “an integral part of the planning process,” with particular reference to the expansion of utilities.<sup>41</sup>

Some refer to it as a “land grab,” and find it to be an abhorrent example of

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<sup>34</sup> NCGS §160A-58.5.

<sup>35</sup> NCGS §160A-58.2.

<sup>36</sup> NCGS §160A-31(d).

<sup>37</sup> NCGS §160A-58.2.

<sup>38</sup> NCGS §160A-58.2.

<sup>39</sup> *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980).

<sup>40</sup> *Lithium Corp. v. Bessemer City*, 261 N.C. 532, 135 S.E.2d 574 (1964).

<sup>41</sup> *Texfi Industries v. City of Fayetteville*, *supra*.

legalized taxation without representation. It is typically characterized in terms of the “big bad municipality” versus the overtaxed homeowner who wants nothing to do with any municipality. There are obviously certain attractions to that argument, in a nation founded on opposition to taxation. That is particularly so if the municipality is viewed not as a collection of homeowners and other taxpayers itself, but is characterized as a cold, heartless entity which exists only to pay its employees’ salaries. (Think of the term “pointy-headed bureaucrats” in the political jibes of some decades ago.)

If the “fairness” issue is posed in terms of comparing the taxpayer within the municipality and the taxpayer in the area proposed to be annexed, however, the picture changes somewhat. The reason is that a statutory annexation is actually often the culmination of an evolving relationship between the annexed property and the municipality in which the taxpayers in town have subsidized various activities and services for those out of town for years. During the time continuum in which a parcel may, over several decades, evolve from being rural land to being within an urban service area, to being in the extraterritorial jurisdiction, to being within municipal limits, the landowner has often received various services from the particular municipality for free. That is particularly so if the landowner is also a resident, or has tenants who use those services. Those services include use of municipal parks, community centers, civic centers, senior citizens centers, fire protection (through volunteer fire departments jointly funded by municipality, county and volunteer fundraising), zoning, land planning, including street and other infrastructure, design standards, residential and commercial development standards, building permits, planning for roadway construction in collaboration with other municipalities and NCDOT, unsafe building inspection and enforcement and minimum housing code enforcement.

From the point of view of the municipality, or of its taxpayers, much of the planning activity that the municipality engages in on an ongoing basis, other than providing police protection, is often for the benefit of the larger community, including the taxpayers in the ETJ, some of whom then oppose annexation when it occurs.

In that context, the “fairness” issue may be viewed in a different light. Whether the “pros” of annexation outweigh the “cons” varies from circumstance to circumstance. The “pros” often tend to be factual, as compared with the “cons,” which are often emotional or philosophical (other than of course the biggest “con,” which is having to pay municipal tax where one did not pay it before.)

The annexation laws were one response to the substantial social and demographic changes of the 1950’s, with the proliferation of suburbs within financial reach of the middle class. White flight to the suburbs took place throughout America in huge numbers. In some communities, that increased after *Brown v. Board of Education*.<sup>42</sup>

The annexation laws of various other states resulted in the creation of numerous small suburban municipalities around an urban core. It is this author’s impression that Los Angeles and St. Louis, for example, each consist of over 100 separate municipalities. In some areas of the country such as those, this means there is a separate municipality performing various specific limited functions, just a couple miles from the next one. That means many separate Town Halls and separate administrative staffs. The result in those areas is a much higher number of smaller governments. Whether that results in “less government,” or less expensive government, is an economic and demographic analysis far beyond the scope of this manuscript.<sup>43</sup> One obvious political and social result of the North Carolina approach is less social, racial and political balkanization.

Every year or so the General Assembly is flooded with bills against some aspect of annexation, often based on the objections that those who are to be annexed should have the right to vote on it. The subject was addressed in the 2005-2006 Session. The result was not to throw the baby out with the bath water, but to amend the procedures, and to give a break to owners of “present use tax rate” agricultural, horticultural and forest land.

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<sup>42</sup> *Brown v. Board of Education*, 349 U.S. 294 (1955).

<sup>43</sup> General conversations indicate that most people moving here from other places find our *ad valorem* taxes to be substantially lower than taxes were in the places which they left.

Basic concepts about statutory annexation include the following:

- Annexation is governed by detailed statutes.
- Annexation procedures are different for different sized municipalities.
- Annexed areas must be contiguous to the municipality.
- Annexed areas must already be devoted to urban use.
- Municipal services must be provided in annexed areas.
- Annexation is constitutional under the U.S. Constitution.<sup>44</sup>
- Citizens and property become subject to local ordinances.
- Property becomes subject to local tax.

Appellate opinions have ruled on most of the “big-picture” legal issues:

- Annexation is constitutional under the State Constitution.<sup>45</sup>
- Having two different “statutory” procedures based on size of municipality does not render the laws unconstitutional.<sup>46</sup>
- Annexation is not a “taking” of private property without just compensation.<sup>47</sup>
- It is not a taking to annex and then fail to provide service. (There is another remedy.)<sup>48</sup>
- It is not a violation of due process because owners or residents of annexed area do not have a right to vote on it.<sup>49</sup>

The General Assembly has the power to change municipal boundaries, just as it

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<sup>44</sup> *Berry v. Bourne*, 588 F. 2d 422 (4<sup>th</sup> Cir. 1978); see *Texfi Industries*, *supra*, for additional authorities so holding.

<sup>45</sup> *Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E.2d 288 (1973); *In re City of Durham Annexation Ordinance No. 5791*, 66 N.C. App. 472, 311 S.E.2d 898; *Raintree Homeowners Ass’n v. City of Charlotte*, 543 F. Supp. 625 (SDNC 1982), *aff’d sub nom, Baldwin v. City of Winston-Salem*, 710 F.2d 132 (4<sup>th</sup> Cir.); also *Forsyth Citizens Opposing Annexation v. City of Winston-Salem*, 67 N.C. App. 164, 312 S.E.2d 517, *cert. denied* and appeal dismissed, 310 N.C. 743, 315 S.E.2d 701, appeal dismissed, 469 U.S. 802, 105 S. Ct. 57, 83 L. Ed. 2d 8 (1984).

<sup>46</sup> *Williams v. Town of Grifton*, *supra*; *Campbell v. City of Greensboro*, 70 N.C. App. 252, 319 S.E.2d 323, *cert. denied* and appeal dismissed, 312 N.C. 492, 322 S.E.2d 553 (1984).

<sup>47</sup> *Moody v. Town of Carboro*, 301 N.C. 318, 271 S.E.2d 265 (1980), rehearing denied, 301 N.C. 778, 274 S.E.2d 230 (1981).

<sup>48</sup> *Supra*.

<sup>49</sup> *Matthews v. Blowing Rock*, 207 N.C. 450, 177 S.E. 429 (1934).

has the power to create or revoke a municipal charter. The General Assembly's power to do so is in the N.C. Constitution, by which the General Assembly may "...give such powers and duties to counties, cities, and towns...as it may deem advisable."<sup>50</sup> The General Assembly, by creating the annexation statutes, did not surrender its own power to incorporate land areas.<sup>51</sup>

The General Assembly has empowered municipalities to annex, through the 1959 statute. This manuscript focuses on municipal annexation. A municipality can annex only in strict accordance with the statutes. Which statutes apply depends on the size of the municipality. For municipalities over 5,000 persons, NCGS §160A-47 through 58 control; for municipalities under 5,000 persons, NCGS §160A-33 through 42 control.

The two sections have more in common, particularly with reference to procedures, than not. The Legislative "declaration of policy" for each category of municipal annexations are found in NCGS §160A-33 and NCGS §160A-47. The first three subsections of each such section are identical, as follows:

It is hereby declared as a matter of State Policy:

- (1) That sound urban development is essential to the continued economic development of North Carolina;
- (2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development;
- (3) That municipal boundaries should be extended in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of governmental services needed therein for the public health, safety and welfare.

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<sup>50</sup> N.C. Constitution, Art. VII, §1.

<sup>51</sup> *Jones v. Jeannette, Mayor*, 34 N.C. App. 526, 239 S.E.2d 293 (1977).

Subsection (4), for the municipalities over 5,000,<sup>52</sup> provides:

- (4) That new urban development in and around municipalities having a population of 5,000 or more persons is more scattered than in and around smaller municipalities, and that such larger municipalities have greater difficulty in expanding municipal utility systems and other service facilities to serve such scattered development, so that the legislative standards governing annexation by larger municipalities must take these facts into account if the objectives set forth in this section are to be attained;

Subsection (4), for the municipalities under 5,000,<sup>53</sup> provides:

- (4) That new urban development in and around municipalities having a population of less than 5,000 more persons tends to be concentrated close to the municipal boundary rather than being scattered and dispersed, so that the legislative standards governing annexation by smaller municipalities can be simpler than those for larger municipalities and still attain the objectives set forth in this section.

Subsection (5) of both statutes are essentially identical (differing only in an internal statutory reference).

- (5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality in accordance with G.S. 160A-35(3) (for smaller towns and G.S. 160A-47 for the larger ones).

The procedural statutes applicable to the two classes of municipalities are similar except for a relevance notice requirement applicable to the larger ones. The statutes are slightly less complicated for the smaller towns' post-annexation dealings with fire

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<sup>52</sup> NCGS §160A-47.

<sup>53</sup> NCGS §160A-33.

departments and solid waste providers. The statutes relating to the character of the area to be annexed are substantially less complicated for the smaller towns.

The procedural statutes both involve several steps:

1. Adoption of Resolution of Consideration (Notice of Intent).
2. Preparation of Annexation Report.
3. Giving public notice.
4. Holding public informational meeting.
5. Holding a public hearing.
6. Adopting Annexation Ordinance.
7. Providing required services in the area on a timely basis.

If the community is an area where the Federal Voting Right's Act<sup>54</sup> gives the U.S. Attorney General 60 days in which to approve the expansion of the number of voters, e.g., to monitor a change in the racial composition of the electorate (e.g., "preclearance"), that issue needs to be dealt with also. If not, the annexed area's population may not be able to vote within that 60 days but will still pay taxes and receive municipal services.<sup>55</sup>

On the assumption that most attendees at this seminar are not primarily dealing with towns under 5,000, the statutes relating to "over 5,000" municipalities will be reviewed first.

### PROCEDURAL REQUIREMENTS

1. **RESOLUTION OF CONSIDERATION.** The governing board must pass a resolution of consideration to consider annexation of the area,<sup>56</sup> containing a detailed description. The resolution must either be passed one year before the annexation, or the annexation's effective date must be delayed one year (that, is, give the one year's notice up front, or give it between the adoption of the annexation ordinance and the effective date of the annexation. The resolution must schedule an informational public meeting. The annexation report must be available before the hearing). This one-year advance

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<sup>54</sup> 42 USC §1973c.

<sup>55</sup> *Moore v. Swinson*, 58 N.C. App. 714, 294 S.E.2d 381 (1982).

<sup>56</sup> NCGS §160A-49.

warning is the principal procedural difference between the two sets of statutes. There are detailed provisions regarding the timeline and the newspaper publication requirements.

2. ANNEXATION REPORT. The annexation report,<sup>57</sup> includes the present and proposed municipal boundaries, the proposed water and sewer outfall extensions, plans for providing police, fire, solid waste and street maintenance to the area, plans for extensions of major trunk water mains and sewer lines, an explanation of how the municipality proposes to finance them, a statement showing the impact on any rural fire department, impact on fire insurance rates, and the revenue and expense impact of annexation on the municipal finances.<sup>58</sup> A municipality may not scale down its financial commitments to water and sewer extensions (e.g. offer less to newly annexed areas) unless it does so 180 days before the notice of intent to annex.<sup>59</sup>

A municipality is authorized to make expenditures for surveys or to study the proposed annexation, and after annexation, to make expenditures for constructing water and sewer lines and other facilities “...and for any other purpose calculated to bring services into the annexed area in a more effective and expeditious manner prior to the date of the annexation.” (Presumably, the “prior to” refers to the expenditure rather than the provision of service.)

3. INFORMATIONAL MEETING. A municipal representative presents the annexation report at a public informational meeting and again at public hearing.

4. THE PUBLIC HEARING. Actual notice of the public hearing must be mailed to owners of all freehold interests of property in the county tax records.<sup>60</sup> The report must again be explained at the public hearing. All persons who desire to, are entitled to speak.<sup>61</sup>

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<sup>57</sup> NCGS §160A-47.

<sup>58</sup> NCGS §160A-47.

<sup>59</sup> NCGS §160A-47.1.

<sup>60</sup> NCGS §160A-49(b).

<sup>61</sup> NCGS §160A-49(d).

5. ADOPTING ANNEXATION ORDINANCES.

Following the public hearing, the board may amend the report, which may require an additional public hearing within no sooner than 30 days and no later than 90 days later,<sup>62</sup> or (b) adopt the ordinance, no sooner than 10 days after the public hearing and no later than 90 days thereafter. The statute mandates in detail the contents of the annexation ordinance, including findings showing compliance with the statutes, statement of intent to provide services, commitment to appropriate funds necessitated by the annexation, and an effective date.<sup>63</sup>

6. AFTER THE ANNEXATION. The municipality must comply with certain statutory requirements:

(a) If a rural fire department serves the area, or it is in an insurance district,<sup>64</sup> or a fire service district,<sup>65</sup> the fire department has the right to request a good faith offer for a five year contract.<sup>66</sup> The statute sets forth numerous details requiring what constitutes a good faith offer in each situation. The fire department may complain to the Local Government Commission that the offer is not a good faith offer. The L.G.C. can remand the ordinance to the municipality; the annexation ordinance will not become effective until the L.G.C. approves of the offer.<sup>67</sup>

There is also an assumption of debt statute for both involuntary annexations.<sup>68</sup>

(b) If a solid waste firm serves the area, the municipality must contract with it for two years.<sup>69</sup> There is a one-year termination provision, with compensation for economic loss.<sup>70</sup> If the municipality fails to contract with the solid waste service, the service can appeal to the Local Government Commission, which can similarly stay the

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<sup>62</sup> NCGS §160A-49(e).

<sup>63</sup> NCGS §160A-49(e).

<sup>64</sup> NCGS §153A-233.

<sup>65</sup> NCGS §153A-300.

<sup>66</sup> NCGS §160A-49.1; NCGS §160A-37.1.

<sup>67</sup> NCGS §160A-49.1(h).

<sup>68</sup> NCGS §160A-58.2A.

<sup>69</sup> NCGS §160A-49.3.

<sup>70</sup> NCGS §160A-49.3(f).

annexation.<sup>71</sup> (That subsection of the statute is two pages long; this manuscript just hits the high points.) The 2006 amendment to NCGS §160A-49 provides a detailed definition of “economic loss” as a sum equal to 15 times the average gross monthly revenue (increased from 12 times) for the three months prior to adoption of the Notice of Intent.<sup>72</sup>

(c) Provide municipal services, “...on the same basis and in the same manner as such services were provided within the rest of the municipality prior to the effective date of the annexation.”<sup>73</sup>

(d) Construct the trunk water mains and sewer outfall lines called for in the report, within two years.<sup>74</sup>

#### REQUIREMENTS RE: CHARACTER OF AREA TO BE ANNEXED

What property can be annexed? The 2006 amendments focused on procedures; the character of the area which may be annexed has not been amended since 1983. The prerequisites to statutory annexation by a municipality over 5,000 include the following:

1. The area must not already be in another municipality.<sup>75</sup>
2. The area must be “adjacent or contiguous,” with a minor exception that where an entire sanitary district is annexed, there may be some noncontiguous areas.<sup>76</sup>

Contiguity is of critical importance to the legality of all annexations except satellite annexations. The reason for contiguity has been described as follows:

Contiguity has always been viewed as synonymous with the “legal as well as the popular idea of a municipal corporation in this country,” which is one of “oneness, community, locality, vicinity; a collective body, not several bodies; a collective body of inhabitants – that is, a body of people collected or gathered together in one mass, not separated into distinct

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<sup>71</sup> NCGS §160A-49(g).

<sup>72</sup> NCGS §160A-49.3(i).

<sup>73</sup> NCGS §160A-49(h).

<sup>74</sup> NCGS §160A-49(h).

<sup>75</sup> NCGS §160A-48(b)(3).

<sup>76</sup> NCGS §160A-48(b)(1).

masses, and having a community of interest because residents of the same place, not different places. So, as to territorial extent, the idea of a city is one of unity, not of plurality, of compactness or contiguity, not separation or segregation,” ...Contiguity, then, is an essential component of the traditional concept of a municipal corporation, which is envisioned as a governmental unit capable of providing essential governmental services to residents within compact borders on a scale adequate to insure “the protection of health, safety, and welfare in areas being intensively used for residential, commercial, industrial, and government purposes or in areas undergoing such development.”<sup>77</sup> Imposition of the contiguity requirement is one means of insuring that the annexation process remains consistent with principles of “sound urban development.”<sup>78</sup>

Contiguity is determined on the date the annexation is initiated. A “contiguous area” must “either abut directly on the municipal boundary or be separated from the municipal boundary by a street or street right-of-way, a creek or river, the right-of-way of a railroad or other public service corporation, lands owned by the city or some other political subdivision, or lands owned by the State of North Carolina.”<sup>79</sup> It must be contiguous with the municipal limits, and not contiguous only with a satellite area.<sup>80</sup>

Contiguity rules out, at least for an involuntary annexation, what has been called a “ribbon and balloon” or “shoestring” annexation.<sup>81</sup> The Court of Appeals recently expanded the “shoestring” annexation concept to focus on the municipal intent rather than the configuration of the “shoestring.”<sup>82</sup> (The majority Opinion contains no visualization of the “shoestring,” but the dissenting Opinion asserted that “the configuration of the annexation area does not rise to the level of flaunting the intent of the statute as was

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<sup>77</sup> NCGS §160A-33(2)

<sup>78</sup> *Hawks v. Town of Valdese*, 299 N.C. 1, 12-13, 261 S.E.2d 90, 97 (1980).

<sup>79</sup> NCGS §160A-53.

<sup>80</sup> *Hawks v. Town of Valdese*, 299 N.C. 1, 12-13, 261 S.E.2d 90 (1980).

<sup>81</sup> *Amick v. Town of Stallings*, 95 N.C. App. 64, 382 S.E.2d 221 (1989).

<sup>82</sup> *Hughes v. Town of Oak Island*, 158 N.C. App. 175, 580 S.E.2d 704 (2003).

found in *Amick*.”) The statute defining “contiguous” and the *Amick* decision logically apply as well to an annexation by petition. (A voluntary annexation petitioner and the municipality might be tempted to use a shoestring annexation to annex a property otherwise subject to satellite annexation but prohibited where the annexation would exceed the municipality’s 10% area limitation.)

3. At least one eighth (1/8) of the aggregate external boundaries of the annexation area coincides with the municipal boundary.<sup>83</sup>

4. Part or all of the area must be developed for urban purposes, defined in detail in the statute.<sup>84</sup> “Urban purposes” is defined in terms of either population or use, and must meet at least one of the following criteria: :

(a) Population equal to 2.3 residents per acre.<sup>85</sup> (This subsection is one of the principal differences in annexation by municipalities under 5,000, which may annex based on the character of the land only.)

(b) The total resident population is equal to at least one person per acre, and the area is subdivided such that 60% of the area is used for residential, commercial, industrial, institutional or government purposes, and is subdivided so that at least 60% of the total acreage consists of lots and tracts of three acres or less, and at least 65% of the total number of lots and tracts are 1 acre or less.<sup>86</sup> These are the “use” and “subdivision” tests, both of which must be met.<sup>87</sup>

Various appellate court decisions have focused on the “use” of the property. “Residential use” means “...any lot or tract five acres or less on which is constructed a habitable dwelling.”<sup>88</sup> “Proposed commercial use”, e.g., land held for future development, is not “used for industrial purposes.”<sup>89</sup> A municipality was allowed to count the acreage of a country club as “commercial or institutional,” although much of it

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<sup>83</sup> NCGS §160A-48(b)(2).

<sup>84</sup> NCGS §160A-48(c).

<sup>85</sup> NCGS §160A-48(c)(i);

<sup>86</sup> NCGS §160A-48(c)(2).

<sup>87</sup> *Lithium Corp. of Am. v. Town of Bessemer City*, 261 N.C. 532, 135 S.E.2d 574 (1964).

<sup>88</sup> NCGS §160A-53.

<sup>89</sup> *Southern Ry. v. Hook*, 261 N.C. 517, 135 S.E.2d 562 (1964).

was a golf course.<sup>90</sup> A municipality was allowed to count a 1.83 acre tract with a house on it as “residential” even though the grass was baled and fed to cattle.<sup>91</sup> On the other hand, municipalities have been denied classification of property in urban use when their previous records showed the land as “vacant.”<sup>92</sup> Future use does not count.<sup>93</sup> (Note: Some cases cited here arose out of “under-5,000” annexations, but the principles discussed are generally applicable to both statutes.)

(c) 60% of the total acreage less the acreage so used consists of lots and tracts three acres or less.<sup>94</sup> “Use” must be “...temporary or occasional or incidental or insubstantial.”<sup>95</sup> There must be buildings or man-made structures, together with appurtenances such as parking, access, ingress, and buffering.<sup>96</sup>

Where the statutes require that the municipality count persons or acreage or lots, NCGS §160A-54 provides procedures.<sup>97</sup> The reviewing court “shall accept” the estimates of the municipality if it uses prescribed methods, and if the opposing evidence fails to demonstrate that the population estimate error exceeds 10%,<sup>98</sup> the acreage estimate error exceeds 5%,<sup>99</sup> or the subdivision estimate error exceeds 5%.<sup>100</sup> No such permissible variances are provided by statute for municipalities under 5,000.

(d) The annexation area is the entire area of county water or sewer district created under NCGS §162A-86(b)(1) only where there is a contract by which the district will provide the utility service.

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<sup>90</sup> Chapel Hill Country Club, Inc. v. Town of Chapel Hill, 97 N. C. App. 171, 388 S. E. 2d 168 (1990).

<sup>91</sup> Southern Glove Mfg. Co. v. City of Newton, 75 N. C. App. 574, 331 S. E. 2d 180, cert. Denied, 314 N. C. 669, 336 S. E. 2d 401 (1961).

<sup>92</sup> United States Cold Storage Co. v. City of Lumberton, 156 N. C. App. 327, 576 S. E. 2d 415 (2003) .

<sup>93</sup> Ridgefield props., L.L.C. v. City of Asheville, 159 N. C. App. 376, 583 S. e. 2d 400, aff’d, 358 N. C. 216, 593 S. E. 2d 584 (2004).

<sup>94</sup> NCGS §160A-48(c)(3).

<sup>95</sup> NCGS §160A-48(c)(3).

<sup>96</sup> NCGS §160A-48(c)(3).

<sup>97</sup> NCGS §160A-54.

<sup>98</sup> NCGS §160A-54(1).

<sup>99</sup> NCGS §160A-54(2).

<sup>100</sup> NCGS §160A-54(3).

(e) All tracts in the area are used for commercial, industrial, governmental or institutional purposes.<sup>101</sup>

Land which does not meet at least one of the “urban use” tests described above may be amended if it is a “necessary land connection” not to exceed 25% of the total area.<sup>102</sup>

5. The area must be shown by way of a metes and bounds description or a map, not an accumulation of “lots” described by their tax parcel numbers.<sup>103</sup> However, in a recent case, the Court upheld the City of Shelby’s Resolution of Consideration designating “Township No. 6 by the official mapping of Cleveland County.”<sup>104</sup> (*See Anthony v. Shelby* also for the standard of review.)

The new boundaries must follow recorded property lines and streets as boundaries<sup>105</sup> (some or all of a current or abolished water and sewer district boundary may be used in some circumstances.) Using streets and property boundaries should be done when “practical,” but some slack has been allowed on appeal. “Practical” ...is defined as “that which is possible or reasonable performance.”<sup>106</sup> Formerly, ridge lines were used. That made sense in terms of where gravity sewer lines could be constructed. This author never figured out how the municipality taxed part of a lot split by jurisdictions but not by a boundary line. The 2006 amendments changed that. Case law arising out of that subsection which refers to “topographical features” where practical, e.g., ridge lines, are now no longer applicable.

#### INVOLUNTARY ANNEXATION BY MUNICIPALITY OF UNDER 5,000

The procedures are not substantially different. Like its sister statute, the procedural statute for “under 5,000” municipalities was re-written in 2006. The

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<sup>101</sup> NCGS §160A-48(5)

<sup>102</sup> NCGS §160A-48(d).

<sup>103</sup> NCGS §160A-49(e)(1). *Blackwell v. City of Reidsville*, 129 N.C. App. 759, 502 S.E.2d 886 (1998), *cert. den.*, 349 N.C. 352, 517 S.E.2d 886 (1998).

<sup>104</sup> *Anthony v. City of Shelby*, 152 N.C. App. 144, 567 S.E.2d 222 (2002).

<sup>105</sup> NCGS §160A-48(e).

<sup>106</sup> *Greene v. Town of Valdese*, 306 N.C. 79, 291 S.E.2d 630 (1982).

governing board must first pass a resolution stating the intent of the municipality to consider annexation of the area, although the one-year advance notice is not required.<sup>107</sup>

The resolution fixes the date for the public informational meeting and the public hearing. The annexation report will be available before the public meeting. The timeline requires that the public meeting is between 45 and 55 days thereafter, and the public hearing is between 60 and 90 days thereafter. The notice of the public informational meeting and public hearing must “describe clearly the boundaries under consideration and include a legible map of the area.”<sup>108</sup> The statute prescribes the newspaper publication to be made. Also, notice must be mailed to the property owners.<sup>109</sup> There is a savings provision for where the property owners’ addresses cannot be obtained. The notice may be posted on “...all buildings or such parcels,” and in at least five other places within the area to be annexed.<sup>110</sup>

The annexation report includes the present and proposed municipal boundaries, the proposed water and sewer outfall extensions, plans for providing police, fire, solid waste and street maintenance to the area, plans for extensions of water mains and sewer lines, an explanation of how the municipality proposes to finance them,<sup>111</sup> a statement showing the impact on any rural fire department, impact on fire insurance rates, and the revenue and expense impact of annexation on the municipal finances. A municipality may not scale down its level of financial commitment to water and sewer extensions unless it does so 180 days before the notice of intent to annex.<sup>112</sup>

The ordinance of annexation may be adopted at a subsequent board meeting not

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<sup>107</sup> NCGS §160A-37.

<sup>108</sup> NCGS §160A-37.

<sup>109</sup> NCGS §160A-37(b).

<sup>110</sup> NCGS §160A-35.

<sup>111</sup> NCGS 160A-35.

<sup>112</sup> NCGS §160A-35.1.

less than 10 days after the public hearing and not more than 90 days after the public hearing.<sup>113</sup> An effective date as of the following January 1 is typical, with a proviso as to certain annexations which take place between June 30 and July 1.<sup>114</sup> The 2006 amendments also deferred the annexation date for property taxed based on a “present use” value appraisal. The two sections are identical.

The character of the area which can be annexed by a municipality under 5,000, was not changed by the 2006 amendments:

1. The area must not already be part of another municipality.<sup>115</sup>
2. The area must be contiguous to the municipality, except where an entire sanitary district is annexed, there may be some noncontiguous areas.<sup>116</sup>
3. At least one-eighth (1/8) of the aggregate external boundaries of the annexation area coincides with the municipal boundary.<sup>117</sup>
4. Part or all of the area must be developed for urban purposes, (defined in some detail as other than temporary use and containing actual buildings or other man-made structures, and parking, ingress, egress, utilities, buffering, and ancillary services and facilities.)<sup>118</sup> Urban purposes is defined as follows:
  - (a) 60% of the total lots are used for residential, commercial, industrial, institutional or government purposes;<sup>119</sup> and
  - (b) is subdivided so that at least 60% of the total acreage, not counting that used for commercial, industrial, governmental purposes, (land not within those categories would presumably be either “residential” or “vacant”), consists of lots and tracts of three acres or less,<sup>120</sup> (or)

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<sup>113</sup> NCGS §160A-37(e).

<sup>114</sup> NCGS §160A-37(f).

<sup>115</sup> NCGS §160A-37(b)(3).

<sup>116</sup> NCGS §160A-36(b)(1).

<sup>117</sup> NCGS §160A-36(b)(2).

<sup>118</sup> NCGS §160A-36(c).

<sup>119</sup> NCGS §160A-36(c).

<sup>120</sup> NCGS §160A-36(c)(1).

- (c) all tracts are used for commercial, industrial, governmental or institutional purposes,<sup>121</sup> (or)
- (d) the annexation area is the entire area of a county water or sewer district

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<sup>121</sup> NCGS §160A-36(c)(2).

created under NCGS 162A-86 (b)(1) only where there is a contract by which the district will provide the utility service. The boundaries of the annexation area must be recorded property lines and streets,<sup>122</sup> or some or all a current or abolished water and sewer district may be used in some circumstances.<sup>123</sup> (e.g., of the district used a ridge line, no longer otherwise acceptable).

The process of adopting the annexation ordinance, the rural fire department, debt assumption, contracting with any solid waste firm, providing municipal services, and constructing utility infrastructure is generally similar to that provided for municipalities over 5,000. The statutory process of dealing with the solid waste provider appears perhaps to be a little less convoluted.<sup>124</sup>

If a solid waste firm serves the area, the municipality must contract with it for two years. There is a one-year termination provision, with compensation for economic loss.<sup>125</sup> If the municipality fails to contract with the solid waste service, the service can appeal to the Local Government Commission, which can stay the annexation.<sup>126</sup>

#### LITIGATION OVER ANNEXATION

1. Can a property owner seek judicial intervention to overturn the annexation?
2. Can a property owner seek redress if the municipality fails to deliver services?
3. Can a property owner recover tax payments if the municipality fails to deliver services?
4. Can other parties seek judicial intervention?

The answer to all four questions is “yes.” However, while the same person may be an opponent of the annexation, and be an aggrieved annexee who claims that the municipal services promised were not delivered and/or also seek tax relief, the claims, the procedures, and the remedies are separate and distinct. An opponent of annexation

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<sup>122</sup> NCGS §160A-36(d).

<sup>123</sup> NCGS §160A-36(c)(3).

<sup>124</sup> NCGS §160A-37.3.

<sup>125</sup> NCGS §160A-37.3(e).

can not succeed, for example, in having the annexation set aside for failure of the municipality to provide the services. The other parties who may seek judicial relief are rural fire departments and solid waste companies, and competing municipalities, where there is an inter-local annexation agreement.

Opposition to the annexation itself is by way of an appeal to the Superior Court pursuant to NCGS §160A-50 for municipalities over 5,000 and NCGS §160A-39 for those under 5,000. The two sections appear to be identical in substance. Relief from failure to provide services is by way of a writ of mandamus.<sup>127</sup> Tax abatement comes from the municipality by way of an order by the Local Government Commission. The tax abatement may be a result of not constructing the water and sewer lines,<sup>128</sup> or for failure to provide police protection, fire protection, solid waste or street maintenance.<sup>129</sup>

#### APPEAL TO SUPERIOR COURT

Who can appeal the annexation?

- (a) Any “person owning property in the annexed area who believes that he will suffer material injury.”<sup>130</sup>
- (b) A rural fire department to which the municipality has not made a good faith offer.<sup>131</sup>
- (c) A solid waste collection firm to which the municipality has not made a good faith offer.<sup>132</sup>

When? Within 60 days.<sup>133</sup>

How? File petition for writ and serve copy on municipality.<sup>134</sup>

Response? Municipality files transcript of minutes and report with the Court.<sup>135</sup>

Can the petitioner apply for stay order? Yes.<sup>136</sup>

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<sup>126</sup> NCGS §160A-37.(g).

<sup>127</sup> NCGS §160A-49(h).

<sup>128</sup> NCGS §160A-49(k).

<sup>129</sup> NCGS §160A-49(l).

<sup>130</sup> NCGS §160A-50(a).

<sup>131</sup> NCGS §160A-50(j).

<sup>132</sup> NCGS §160A-50(j).

<sup>133</sup> NCGS §160A-50(a).

<sup>134</sup> NCGS §160A-50(b).

What is the standard for the Court to grant or deny a stay? Discretionary.<sup>137</sup>

How prompt is review? Expeditious review, within 30 days.<sup>138</sup>

Jury trial? No.<sup>139</sup>

Scope of review? Whether the statutory procedures were followed,<sup>140</sup> and whether there was compliance with the statutory requirements for the population and/or character of the area (§160A-47 and 48)<sup>141</sup> (and of course the comparable sections for a small town annexation.)<sup>142</sup>

How strenuous is the review? The case law concludes that the degree of compliance must be whether the statutes were “substantially followed.”<sup>143</sup> For example, “slight irregularities will not invalidate annexation proceedings, if there has been substantial compliance....”<sup>144</sup> Several appellate cases have used the term “material prejudice.”<sup>145</sup>

Relief to be granted by Superior Court?

(a) affirm,

(b) remand for further proceedings,

(c) remand to amend boundaries,

(d) remand for additions to services, or

(e) declare the ordinance null and void if it can not be corrected by remand.<sup>146</sup>

Appeal? Any party may appeal to Court of Appeals. The Superior Court may allow the annexation to proceed as to a part which is not the subject of the appeal.<sup>147</sup>

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<sup>135</sup> NCGS §160A-50(c).

<sup>136</sup> NCGS §160A-50(e).

<sup>137</sup> NCGS §160A-50(e).

<sup>138</sup> NCGS §160A-50(c).

<sup>139</sup> NCGS §160A-50(f).

<sup>140</sup> NCGS §160A-50(f).

<sup>141</sup> NCGS §160A-50(f).

<sup>142</sup> NCGS §160A-50(f).

<sup>143</sup> Huyck Corp. V. Town of Wake Forest, 86 N. C. App.13, 356 S. E.2d 599, aff'd 321 S.E. 2d 139 (1988).

<sup>144</sup> In re City of New Bern, 278 N. C. 641,180 S. E. 2d 851 (1971).

<sup>145</sup> Sonopress, Inc. v. Town of Weaverville, 139 N. C. App. 378,533 S. E. 2d 537 (2000).

<sup>146</sup> NCGS §160A-50(g).

<sup>147</sup> NCGS §160A-50(h).

Effect on annexation date? The effective date is deferred to the last day of the calendar month after a final judgment.<sup>148</sup> The deadline for the municipality to provide services is extended by the lesser of the stay granted by the Court or one year.<sup>149</sup>

Counterclaim by municipality for tax revenues lost from delay? No.<sup>150</sup>

Resolved by settlement? Yes, subject to approval by Judge of Superior Court in the County in which the municipality is located.<sup>151</sup>

Standard of Review on appeal? Findings of fact are binding if supported by the evidence, but conclusions of law are reviewable *de novo* on appeal.<sup>152</sup>

See NCGS §160A-38 for population under 5,000.

### WRIT OF MANDAMUS

Who can seek a mandamus? Any “person owning property in the annexed area who believes that the municipality has not followed through on its service plans” or who has applied for a water or sewer line.<sup>153</sup>

When? Between 24 and 27 months of the annexation ordinance.<sup>154</sup>

How? File petition for writ of mandamus pursuant to Article 40, Chapter 1.<sup>155</sup>

What relief can the Court order? The Court can order the service provided and/or the utility lines built. The aggrieved person’s attorneys’ fees shall be charged to the municipality.<sup>156</sup>

See NCGS §160A-49(h) for mandamus statutes applicable to municipalities over 5,000, and NCGS §160A-37(h) for under 5,000. They appear to be identical.

### TAX RELIEF VIA LOCAL GOVERNMENT COMMISSION

Where to file? The Local Government Commission.

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<sup>148</sup> NCGS §160A-50(i).

<sup>149</sup> NCGS §160A-50(j).

<sup>150</sup> NCGS §160A-50(l).

<sup>151</sup> NCGS §160A-50(m).

<sup>152</sup> *Humphries v. City of Jacksonville*, 300 N. C. App. 186, 265 S. E. 2d 189 (1980).

<sup>153</sup> NCGS §160A-49(h); NCGS §160A-37(h).

<sup>154</sup> NCGS §160A-49(h); NCGS §160A-37(h).

<sup>155</sup> NCGS §160A-49(h); NCGS §160A-37(h).

<sup>156</sup> NCGS §160A-49(h).

Who can file? Any property owner.<sup>157</sup>

When? Within 60 days after the 2-year period which the municipality has within which to construct the lines<sup>158</sup> or within 90 days if the municipality fails to provide services within 60 days after the annexation.<sup>159</sup>

Relief? The L.G.C. can order the municipality to rebate a portion of the taxes. Per NCGS §160A-49(k) and NCGS §160A-37(h), it is only a nominal amount based on a complex formula). Perhaps more important, however, L.G.C. can order the municipality not to levy any further taxes until the fiscal year commencing after the completion of the utility extension or after providing the municipal services.

### PRACTICAL CONSIDERATIONS

The practical considerations which come to mind are what this author will call the economics of annexation and the politics of annexation, for (1) the developer, (2) the landowner opposed to annexation and (3) the municipality. There is also a practical consideration for the attorney, municipal administrator or planner to read the law in this area with a particularly high degree of care.

(1) To a landowner or developer who wants water and sewer for a project, annexation is usually the ticket. The economic benefit is obvious. The politics of the situation include involvement in municipal affairs, networking, local Chamber of Commerce activities, efforts to obtain an awareness of and possibly an impact on decisions regarding where water and sewer infrastructure will be extended. In other words, “be a player.” Then, once the utility infrastructure is near enough, the developer can extend the transmission and collection lines to make the project work. Once that becomes feasible, the voluntary annexation itself is, as observed above, fairly simple. The developer can negotiate entering into an agreement relating to a deferred annexation date, and may perhaps qualify for an economic development incentive.

(2) The property owner who does not want his property to be annexed would also be well served by networking and keeping an ear to the ground regarding future

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<sup>157</sup> NCGS §160A-49(k) and (l)

<sup>158</sup> NCGS §160A-49 (k)

municipal expansion. Particularly, as a result of the 2006 amendment which incorporated the one-year advance notice, and the present use tax rate basis for a deferral of the annexation effective date, that property owner needs to take advantage of the notice to be sure that the land is used for agriculture, horticultural or forest uses.

(3) From the municipal point of view, the practical considerations involve the difficulty of investigating, analyzing and preparing the annexation paperwork, e.g., the metes and bounds description, the map, the annexation report, the planning staff time and/or possible consultants, and the expense of both. Then there are the political repercussions of annexation. Also, during the annexation process, which can now take a year for the advance notice plus several months for the informational and public hearing procedures, and another two years for the construction of utility infrastructure, the municipality will be well advised to designate a particular staff person or persons to field inquiries, run interference for other municipal staff, and generally smooth feathers of the foes of the annexees.

After adopting the annexation ordinance, the municipality will have to spend a lot of money providing services for many months before it obtains any tax revenues. That will likely require entering into engineering services contracts and construction contracts. A municipality may, but is not required to, purchase an existing privately owned water or sewer facility.<sup>160</sup> It is more likely to buy a water system, abandon the wells, and use the transmission and distribution lines than to buy a small sewage treatment plant. Utility construction will likely require a bond issue or other financing. It will likely require assessments on the benefited properties.<sup>161</sup> Again, assessments will entail a significant cash flow problem for the municipality. Assessments may be paid off by the owners of the assessed property over eight years. There is a ten year statute of limitations, and the collection process can be long and arduous. (Most folks who are assessed for a sewer line will not find it easy to pony up \$5,000 to \$10,000 for an infrastructure improvement.) The good news here is that if the homeowner gets behind, and if a civil

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<sup>159</sup> NCGS §160A-49 (l).

<sup>160</sup> *Huntley v. Potter*, 255 N. C. 619, 122 S. E. 2d 681 (1961).

action is filed, it is like a tax foreclosure,<sup>162</sup> and the mortgage lender will often pay off the assessment to protect its security interest. That means the municipality collects its money, and the landowner ends up paying 5-6% instead of the 8% statutory interest.

Even if the persons whose property was involuntarily annexed accept the annexation gracefully, (and particularly if they do), the future political demands upon the elected board from those annexed areas are not inconsiderable. In my anecdotal experience, residents of subdivisions which are involuntarily annexed come down to Town Hall a lot more frequently to request street resurfacing, stop lights, traffic controls, minimum housing inspections, nuisance abatements, and other municipal functions than people who have not developed an attitude of “being owed something” for having been brought into the Town.

(4) For the attorney, municipal administrator or planner attempting to analyze the law in this area, to advise a municipality, citizen or corporation, one consideration is that statutory changes are frequent and numerous. There are dozens of appellate cases, maybe hundreds, arising from annexation. This manuscript only touches on a handful of them. The result is that some of the case law grew out of statutes which have been repealed or modified. The tip here is to start each inquiry with the current statute itself and use the case law cautiously.

#### ANNEXATION AGREEMENTS WITH OTHER MUNICIPALITIES

By statute, two or more municipalities may enter into agreements “...to designate one or more areas which are not subject to annexation by one or more of the participating cities.”<sup>163</sup> While those municipalities would likely have been authorized to enter into such an agreement by virtue of the Inter-Local Cooperation statute,<sup>164</sup> or probably even without specific enabling authority, the legislation relating to annexation agreements contains an effective enforcement measure. It specifically provides that no municipality

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<sup>161</sup> NCGS §160A-216, *et seq.*

<sup>162</sup> NCGS S 105-374(g).

<sup>163</sup> NCGS §160A-58.23.

<sup>164</sup> NCGS §160A-461.

may annex an area contrary to the agreement.<sup>165</sup> It provides that the offended municipality may file a petition in the Superior Court.<sup>166</sup> Upon finding that the respondent municipality has violated the agreement (the statute also says “...has violated this Part” of the statutes, but exactly what is intended by that language is not clear), the Court may (1) remand the annexation ordinance to the municipality for further proceedings, or (2) declare the annexation void.

The only limits on the nature and scope of such agreements are that they be adopted by ordinance authorizing the agreement, after a public hearing, that they not exceed 20 years, that the area described not exceed a three-mile distance from the municipal limits without special approval by the County Commission,<sup>167</sup> and that termination of the agreement by a municipality may not be accomplished without giving five years’ written notice.<sup>168</sup>

#### ANNEXATION AGREEMENTS WITH DEVELOPERS

Annexation agreements with developers can provide for such details of annexation as (1) agreed (usually deferred) effective dates of annexation (this allows the developer to sell out to investors before paying municipal taxes, or if the developer retains ownership, allows the property to produce some income before taxes are due), (2) staged annexation of portions of a large property (for the same reasons). Such an annexation agreement may stand alone, or be part of a more comprehensive Development Agreement dealing with infrastructure, road widening, and other development issues.

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<sup>165</sup> NCGS §160A-58.25.

<sup>166</sup> NCGS §160A-58.27.

<sup>167</sup> NCGS §160A-58.24(e).

<sup>168</sup> NCGS §160A-58.25(f).

Caveat: The annexation statutes are complex and detailed. The author of this manuscript often finds something new in them during subsequent readings. This manuscript is not a substitute for careful review of the statutes with your facts clearly in mind. Many of the cases cited in this manuscript are old. Some parts of them are of critical importance in defining terms. They are generally the seminal cases. Some parts of them, however, are not applicable to the different language used in subsequent statutes. If you do a computer search, you will bring up many more recent cases, instead of those cited here. Those may assist you in anticipating the viewpoints of current appellate judges. This manuscript does not attempt to provide that particular perspective.

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