

January 2018 Legal Q&A - Annexation

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How did legislation passed in 2017 affect municipal annexation?

On December 1, 2017, municipal annexation as it existed for over a century in populous counties changed dramatically. On that date, Senate Bill 6 became effective. Tex. S.B. 6, 85th Leg., 1st C.S. (2017). The bill requires landowner or voter approval of annexations in the state's largest counties (those with 500,000 population or more) and in counties that opt-in to the bill through a petition and election process.* These are "Tier 2" annexations under the bill.

Cities not subject to S.B. 6 (i.e., those in counties with a population of less than 500,000 that are not annexing into such a county and those in a county that has not held an election to become subject to the bill) may continue to annex under laws not affected by S.B. 6. These are "Tier 1" annexations under the bill.

*The petition process is as follows: A majority of the registered voters of the county must approve being a Tier 2 county at an election ordered by the commissioners court on the request by petition of a number of registered voters of the county equal to or greater than 10 percent of the registered voters of the county. TEX. LOC. GOV'T CODE § 43.001(3)(B).

Why is Senate Bill 6 detrimental to the state's economy?

History has shown that the state's grant of broad annexation power to Texas' home rule cities is one of the least understood and most contentious governance issues. It is also one of the most important from the perspective of how the state deals with population growth. Interesting is the fact that the legislature has rarely acted to broadly limit municipal annexation. Even when major reforms were enacted in the past, the core authority remained largely intact. Why is that? It was because key legislators understood that cities support the state's economy through the services they provide. Annexation was a means of ensuring the vitality of Texas cities.

After December 1, 2017, when S.B. 6 limited annexation authority, Texas became the only state in the nation that denies both state financial assistance *and* annexation authority to its cities. Restricting annexation authority without implementing fiscal assistance programs under which the state helps cities pay for the infrastructure on which the entire state depends is an unprecedented policy decision.

The 2017 legislature appears to have lost sight of the reasons behind annexation. In the process, it may have dealt a punishing blow to Texas. In a state that currently adds 1,400 people each day to its population, S.B. 6 will curtail the ability of cities to manage that incredible growth. That being said, and in spite of the legislature's confusing, continued efforts to harm the state's economic engines, city officials in Texas are resilient and will find innovative ways to keep the Texas miracle alive.

What are "the three questions of annexation?"

The Municipal Annexation Act of 1963 (now codified in Chapter 43 of the Texas Local Government Code) has been amended so many times over the years to address specific situations that it is difficult to decipher. In order to begin the process, there are three fundamental questions a city official should ask when deciding whether and how to annex any piece of property: (1) *why* does the city want to annex; (2) does the city have the *authority* to annex; and (3) what *procedures* must a city follow? Those questions and their answers follow.

Why does the city want to annex?

The TML Legal Department largely advises on the annexation process from a legal rather than a policy standpoint, but city officials should understand the reasons behind an annexation to explain it to current city residents and those targeted for annexation. Most cities annex for two basic reasons: (1) to gain more control over land use and development in the ETJ; and/or (2) to ensure that residents and businesses outside a city's corporate limits who benefit from access to the city's facilities services share the tax burden associated with constructing and maintaining those facilities and services.

Each city should carefully consider the pros and cons of annexation, and also have an understanding of why or whether it is necessary, prior to annexing. There are numerous city officials and planning and law firms in Texas with expertise in this area, and cities should take advantage of their experience. Imposing appropriate planning and land use controls in an area is a complex proposition, but the financial aspects of why cities annex may be even more complicated.

Does the city have authority to annex (including S.B. 6)?

Extraterritorial Jurisdiction

An area to be annexed must be within the city's extraterritorial jurisdiction (ETJ), and the area to be annexed cannot be located within the ETJ of another city.

Non-Annexation Agreements

Section 43.016 of the Texas Local Government Code was originally enacted in 2007. The provision should be the first place a city looks when it decides to annex because it prohibits a city from annexing an area that is appraised for ad valorem tax purposes as agricultural, wildlife management, or timber management (whether it is subject to S.B. 6 or not) unless the city offers a development agreement to the landowner that would:

- guarantee the continuation of the extraterritorial status of the area; and
- authorize the enforcement of all regulations and planning authority of the city that does not interfere with the use of the area for agriculture, wildlife management, or timber.

A landowner may either: (1) accept the agreement; or (2) decline to make the agreement and be subject to annexation. An annexation without offering an agreement is void. The intent is to allow a landowner who truly intends to continue using his land for agriculture, wildlife

management, or timber management to remain outside of a city's limits, but not to allow unscrupulous developers to subvert city regulations.

Authority

Once a city decides it wants to annex property, the first step is to determine whether it has the *authority* to annex. To determine a city's authority, it is important to understand the fundamental difference between a general law city and a home rule city. Volumes have been written on the differences between the two. For purposes of brevity, and as a basic rule of thumb, the following statement will suffice:

A home rule city (usually over 5,000 population) may do what is authorized by its charter and not specifically prohibited or preempted by the Texas Constitution or state or federal law; A general law city (usually under 5,000 population) has no charter and may exercise only those powers that are expressly granted or implied by statute.

The previous statement is *very* generalized, but it serves to illustrate the fundamental difference between the two types of cities for all purposes, including annexation. Home rule annexation authority was, until 2017, very broad in allowing annexation without consent. It remains so for many cities in smaller counties. But the passage of S.B. 6 in 2017, which requires landowner and/or voter approval of annexations in the state's largest counties (those with 500,000 population or more) and in counties that opt-in to the bill through a petition and election process ("Tier 2" annexations), puts most home rule cities on par with general law cities.

General law cities, for most annexations, are (and always were) required to receive a request from landowners or voters prior to annexing. The bottom line for general law cities everywhere, and for home rule cities in the state's largest counties (or a county that opts into S.B. 6 by election) is that the legislature severely limits their authority to annex.

What annexation procedures must a city follow?

The provisions that give a city the power or *authority* to annex were all generally codified together in one place – Subchapter B of the Texas Local Government Code (and in the charter of a home rule city).

Senate Bill 6 turned that order on its head. Some of the authority remains there (i.e., for "Tier 1" annexations), while some was moved to Subchapter A. But S.B. 6, which requires landowner and/or voter approval of annexations in the state's largest counties (those with 500,000 population or more) and in counties that opt-in to Tier 2 status through a petition and election process, placed that authority in new subchapters C-2 through C-5 and also included the procedures for those annexations in those same subchapters.

Thus, the *procedures* that a city must follow for an annexation are codified as follows:

- Non-S.B. 6 Counties ("Tier 1" Annexations) – those with population less than 500,000 and that haven't opted in to Tier 2 status by election:

1. Subchapter C (plan annexations – three-year process)
2. Subchapter C-1 (exempt annexations – much shorter service plan, notice, and hearing process) of the Local Government Code.

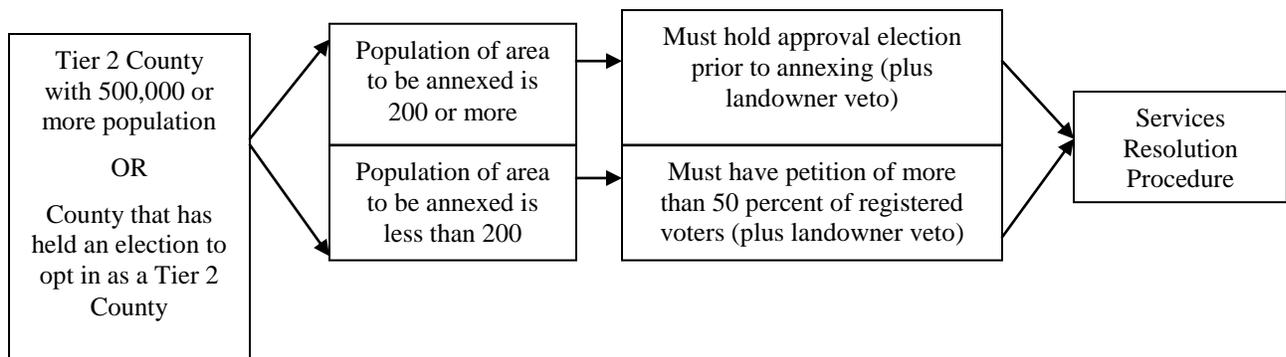
*Which subchapter to follow (Subchapter C or Subchapter C-1) is based on whether or not the area must be included in an annexation plan. The term “annexation plan” is a legal term of art, and is adopted for the purposes of deciding which procedures apply to the annexation of a particular area. Certain areas are exempt from the plan requirement. For example, if an area contains fewer than 100 residential dwellings, the area is not required to be placed in an annexation plan. Also, if the land is annexed by petition of area landowners or voters, the area is not required to be in a plan. Because of these exemptions, it is probably fair to say that many annexations will not be required to be in an annexation plan. Thus, some cities will have a one page plan stating that they do not intend to annex any area for which an annexation plan is required. With the passage of S.B. 6, the requirement no longer applies to annexations in the state’s largest counties (those with 500,000 population or more) or in counties that opt-in to Tier 2 status through a petition and election process, all known as “Tier 2” counties. TEX. LOC. GOV’T CODE §43.0505.

- S.B. 6 Counties (“Tier 2” Annexations) – requires landowner and/or voter approval of annexations in the state’s largest counties (those with 500,000 population or more) and in counties that opt-in to the Tier 2 status through a petition and election process
 1. Subchapter C-3 (annexation on request of each landowner)
 2. Subchapter C-4 (annexation of area with population less than 200 - petition)
 3. Subchapter C-5 (annexation of area with population of 200 or more – election/petition)

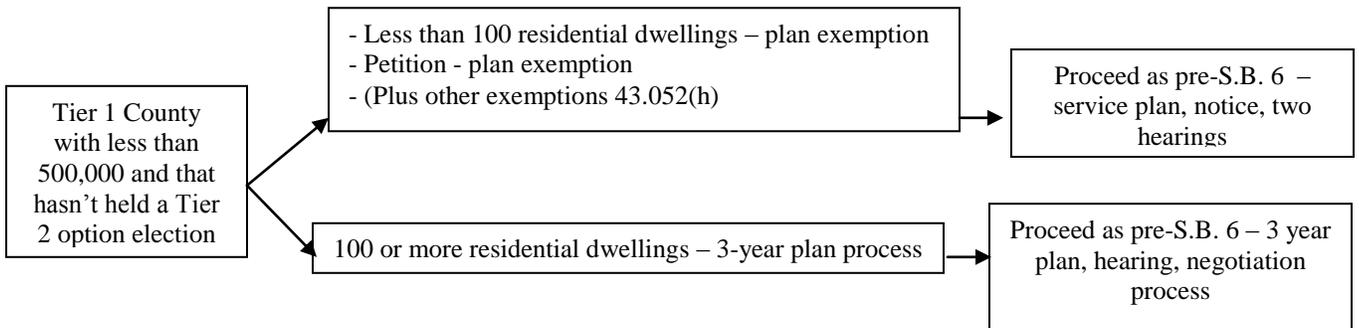
Can you show how the process works graphically?

Yes. The following charts should prove helpful in figuring out where to start.

New S.B. 6 Requirements (When Annexing in or into a Tier 2 County – Travis, Tarrant, Harris, Fort Bend, El Paso, Denton, Dallas, Collin, Bexar, Henderson, and any other County that has Opted in to Tier 2 by Election):



Process for Cities in Smaller Counties (Those with less than 500,000 population and that have not Opted in to Tier 2 by Election)(Essentially Pre-S.B. 6 Law – Plan and Plan-Exempt Processes):



Is more comprehensive information about annexation available?

Yes! The League has prepared a complete handbook on annexation that is available at www.tml.org, under Legal Research, Land Use and Building Regulations. In addition, the TML legal staff is always available at legalinfo@tml.org or 512-231-7400.