SMALL COMMUNITITES
BIG ANNEXATIONS

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A. BASIC PRINCIPLES

1. Annexation is the process by which municipalities incorporate new territory, either before or after development has taken place. Over 70% of the total population of Colorado lives within the boundaries of a municipality.

2. Annexation can take place in three ways:

   - Landowner petition (a contractual relationship which can be memorialized in an agreement separate from the petition)
   - Annexation election
   - Unilateral annexation of enclave or municipality owned land

3. A central fact of annexation today is that it means added revenue for the annexing municipality. This has led to competition between municipalities for desirable land.

4. Annexation often, but not always, brings with it municipal utilities: water, sewer, electricity, police and other services.

5. Municipal Annexation Act of 1965L C.R.S. 31-12-101 et seq.

   - Basic structure unchanged today: ***one-sixth boundary contiguity*** must exist between municipality and property to be annexed;
   - Roads, water bodies and most government lands may be "skipped" for purposes of establishing the required contiguity.
   - Petition or election process to initiate annexation;
   - Findings by the municipal governing body required.

6. Poundstone I (1974)

   - Effectively blocked Denver's ability to undertake further annexation: required majority vote of a six member boundary control commission: three from Denver and one each from Adams, Arapahoe and Jefferson Counties.

7. Poundstone II (1980).

- Affects all Colorado municipalities.
- Imposed three alternative conditions, at least one of which must exist before an unincorporated area may be annexed:

  a) Approval of the annexation by vote of landowners and registered electors of the area to be annexed; or

  b) Petition for annexation signed by more than 50% of the land owners who own more than 50% of the land; or

  c) The area is entirely surrounded by or is solely owned by the annexing municipality.

B. THREE MILE PLAN REQUIREMENTS

Section 31-12-105(1)(e), C.R.S., imposes two separate "three mile" limitations:

1. No annexation may have the effect of extending a municipal boundary more than three miles in any one year, and

2. A precondition to final adoption of an annexation ordinance within the three mile area outside present municipal boundaries, in that the municipality have in place a plan for that area, in the nature of a comprehensive or master plan.

3. The statute does <u>not</u> require that the three-mile plan be in place <u>prior</u> to submission of an annexation petition; instead, it must be in place "prior to <u>completion</u> of any annexation within the three mile area . . .". It is only necessary that the three mile plan be adopted prior to final action by the City Council or Board of Trustees on the annexation ordinance.

4. The categories of information required for a three mile plan in compliance with the statute are relatively limited. The statute requires a plan which "<u>generally</u> describes the proposed location, character and extent of":

   - subways, bridges
   - waterways, waterfronts
   - parkways, playgrounds, squares, parks
   - aviation fields
   - other public ways, grounds, and open spaces
   - public utilities
   - terminals for water, light, sanitation, transportation and power <u>to be provided by the municipality</u> [not such utilities provided by others]
   - proposed land uses.

C. LANDOWNER CONSENT OR VOTER APPROVAL REQUIRED

1. With the limited exception of municipally-owned property and property which has been wholly surrounded by the municipality for three years, landowner consent is required for a valid annexation petition. This consent is obtained either by: (1) signature on an annexation petition (at least fifty percent of the landowners, owning at least fifty percent of the land), or (2) a successful election, in which only landowners may vote. Sections 31-12-107; 108, C.R.S.

2. For the purposes of the statute, "landowner" means the owner in fee of the surface estate, not the owner of the mineral estate if severed. Section 31-12-103(6), C.R.S.

3. Landowner consent on an annexation petition may be withdrawn prior to final action; such a withdrawal deprives the municipality of power to complete the annexation. Town of Superior v. Midcities Co., 933 P.2d 596 (Colo. 1997).

4. Many municipalities have required, as a condition to providing water or sewer service outside their boundaries, that the property owner sign a power of attorney granting the municipality the right to consent, on their behalf, to annexation when, as, and if the property becomes eligible for annexation in the future. House Bill 1061 (1996) eliminated the use of powers of attorney by municipalities to "vote" a parcel of property in an annexation election. Section 31-12-105(1)(h), C.R.S.

5. House Bill 1099 (1997) limited the effective term of a power of attorney for use in an annexation petition to five years. Section 31-12-107(8), C.R.S.

D. ACHIEVING CONTIGUITY: FLAGPOLES AND OTHER CONFIGURATIONS

1. The basic requirement that the property to be annexed must have at least a one-sixth boundary contiguity with existing municipal boundaries appears straightforward: *"...not less than one-sixth of the perimeter of the area proposed to be annexed is contiguous with the annexing municipality."* Section 31-12-104(1)(a), C.R.S.

2. In 1987, Section 31-12-104(1)(a), C.R.S., was amended to confirm as legitimate the longstanding practice of annexing one or more parcels in a series, considered simultaneously, in order to annex property which, taken as a whole, does not have the requisite one sixth contiguity.

3. Also in 1987, the practice of annexing streets and water features as a means of establishing contiguity was legislatively approved: *"Within said three mile area, the contiguity required by Section 31-12-104(1)(a) may be achieved by annexing a platted street or alley, a public or private right-of-way, a public or private transportation right-of-way or area, or a lake, reservoir, stream, or other natural or artificial waterway."* Section 31-12-105(1)(e), C.R.S.

4. In using a street to serve as the "pole" to reach, and thus annex, the desirable "flag" of property, it is required that the municipality also annex the "pole." Board of County Commissioners v. City and County of Denver, 543 P.2d 521 (Colo. 1975). Use of a street as the "pole" does not eliminate the application of the one-sixth contiguity requirement to the perimeter of the "pole." Board of County Commissioners v. City of Lakewood, 813 P.2d 793 (Colo. App. 1991).

5. The shape and size of the parcel of property ultimately annexed, whether in a "flagpole" configuration or otherwise, is not relevant to its eligibility for annexation. Board of County Commissioners v. City and County of Denver, 548 P.2d 922 (Colo. 1976); Board of County Commissioners of County of Arapahoe v. City of Greenwood Village, 30 P.3d 846 (Colo. App. 2001), in which lot was divided into multiple one-foot strips to achieve contiguity.

6. House Bill 01S2-1001 (2001) amended Section 31-12-105(1)(e), C.R.S., to grant certain rights to property owners abutting the proposed "pole," giving them a time-limited opportunity to be annexed along with the "flag." This opportunity exists only until forty-five days prior to the public hearing on the main "flagpole" annexation itself. The annexing municipality is required to provide mailed notice to these abutting landowners of their right to annex. The abutting property owners must still submit an annexation petition and demonstrate the required one-sixth contiguity. Significantly, these owners may annex only *"upon the same or substantially similar terms and conditions"* as the main annexation. It is not yet clear whether this change in statute will either discourage flagpole annexations or result in abutting landowners taking advantage of the opportunity thus presented to annex.

E. ANNEXATION AGREEMENTS

1. Once the governing body has determined that requirements of Sections 31-12-104 and 105, C.R.S., have been met and that an election is not required, it may proceed to annex the area by ordinance, unless it chooses to impose "additional terms and conditions" upon the annexation, in which case an election must be held. Section 31-12-101(1)(g), C.R.S.

2. Annexation agreements are not required by law and are a matter of negotiation. It is a common practice to negotiate the conditions of annexation and have them proposed by the petitioners of a 100 percent landowner petition in an annexation agreement or as part of the petition itself. This avoids the necessity of an election. An annexation agreement is a contract. Terms and conditions may also be imposed by a memorandum of agreement. Section 31-12-112(2), C.R.S.

3. Example developer/annexor obligations: dedicate and improve roads, install water and sewer lines, pay fees for water transmission, make storm drainage improvements, participate in bridge costs, donate land for public purposes; construct necessary public improvements.

4. Example municipal obligations: provide water and sanitary sewer service to the annexed lands; initially zoning the property to the agreed-upon zone category.

5. The annexation agreement should affirmatively reserve the right of the municipality to rezone the property in the future. A municipality cannot be contractually bound never to rezone property, although Colorado's vested property rights act, § 24-68-101, *et seq.*, C.R.S., may impose other constraints upon such rezoning.

6. Sections 31-12-112(2) and 121, C.R.S., specifically contemplate that annexation agreements may be entered into and make such agreements judicially enforceable. Colorado courts have upheld the imposition of conditions by annexation agreement. City of Aurora v. Andrew Land Company, 490 P.2d 67

(Colo. 1971); Lone Pine Corp. v. City of Ft. Lupton, 653 P.2d 405 (Colo. App. 1982).

F. EXTRATERRITORIAL SERVICE AGREEMENTS: SECTION 31-12-121, C.R.S.

1. Extraterritorial service agreements permit cities and towns to lay a proper foundation for their future annexations. There is a growing recognition that municipal utility services constitute an effective planning tool to promote logical fringe area development which is in the long-range interest of municipal residents. A policy of providing municipal water to outside areas can also benefit fringe area residents. It usually means a sufficient supply of good water that can be reliably provided for many years. It means utility lines that are compatible with the developed municipal system.

2. An extraterritorial water or sewer service agreement generally involves a contract with the municipality for a specified amount of water or sewer service - usually at a higher rate than is charged users inside the municipality. In return for the guarantee to supply the service, the contract may require that development in the outlying area be in conformance with municipal building regulations--an assurance to both municipal residents and fringe are dwellers that development will be orderly and subject to some reasonable standards. The contract may also provide that the service area will annex to the municipality when it is eligible--meaning when the land achieves the required one-sixth contiguity with municipal boundaries.

G. CHALLENGE AND ENFORCEMENT

1. Section 31-12-116, C.R.S., provides the only means for challenging a municipal annexation. This opportunity is limited to a sixty day period following the effective date of the annexation ordinance. The challenge right is strictly limited to:

   - Any landowner or qualified elector in the area annexed;
   - the board of county commissioners of any county governing the area annexed; or
   - any municipality within one mile of the area annexed. (added in 1990).

2. In 1991, the legislature closed an interesting loophole created by the sixty day limitation, adding subsection 31-12-104(2), C.R.S. The subsection declared "noncontiguous," "disconnected municipal satellites" located more than three miles from the annexing municipality to be void *ab initio*, and removed the sixty day limitation from actions brought to challenge such attempted annexations. The subsection goes on to similarly void any annexation subsequently relying on the initial (void) annexation attempt. Review is available under this Section only to a municipality within one mile of the challenged annexation, and only if the challenging municipality has a three mile "plan in place," as required by Section 31-12-105(1)(e), C.R.S. Town of Berthoud v. Town of Johnstown, 983 P.2d 174 (Colo. App. 1999).

3. Recent litigation between the City of Aurora and Douglas County has highlighted the role of the board of county commissioners governing the area

proposed to be annexed. As amended by Senate Bill 45 in 1987, Section 31-12-104(1)(a) provides, *inter alia,* that *"[c]ontiguity shall not be affected by the existence of a platted street or alley, a public or private right-of-way or area, public lands, whether owned by the state, the United States, or an agency thereof,* ***except county-owned open space****, or a lake, reservoir, stream or other natural or artificial waterway between the annexing municipality and the land proposed to be annexed."* (emphasis supplied). This "skipping rule" allows the annexing municipality to ignore, for purposes of contiguity, intervening lands of the types described, with the exception of "county-owned open space." The Douglas County Board of County Commissioners, faced with a pending (and, in the county, unpopular) Aurora annexation, promptly adopted a resolution declaring two intervening county roads to be "county-owned open space," and thus land which destroyed the required contiguity. The district court agreed. The Colorado Court of Appeals reversed the district court, holding that active county roads were not "open space."

4. Douglas County and the City of Aurora have also litigated the extent to which a county may use regulations enacted under the Areas and Activities of State Interest Act, Section 24-65.1-101 et seq., C.R.S. The Court of Appeals held in 2001 that the county lacked authority to require an annexing developer to obtain a county permit under such regulations before it could seek to annex to Aurora. Board of County Commissioners of the County of Douglas v. Gartrell Investment Company, LLC, 33 P.3d 1244 (Colo. App. 2001).

5. In Colorado, annexation is a legislative act; rezoning is quasi-judicial. This difference leads to interesting problems when (as is commonly the case) an annexation petition is accompanied by a request for rezoning:

   - The annexation agreement, being concerned with a legislative matter, is permissible and can be negotiated through the liberal use of ex-parte contacts. The agreement can be challenged at any time by declaratory judgment; challenge to the annexation ordinance itself is time limited (sixty days) and plaintiff-limited (landowner; county; other municipality within one mile). Section 31-12-116, C.R.S.

   - The rezoning request is quasi-judicial; ex-parte contacts are prohibited; challenge (in Colorado by certiorari review) is strictly limited to within thirty days of final action.

6. In 1999, the legislature enacted subsection 31-12-118(2)(b), C.R.S., which gave priority to incorporation proceedings (only for proposed new municipalities of more than 75,000 inhabitants) over a pending annexation. The measure became law just in time to allow the election on the question of the incorporation of the City of Centennial. The Colorado Supreme Court held that the measure was not unconstitutional special legislation. City of Greenwood Village v. Petitioners for Proposed City of Centennial, 3 P.3d 427 (Colo. 2000).