ACCG Annexation Arbitration Guidance

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Overview: Cities and property owners who wish to be included in a city have the ability to expand the city's boundaries through a process called annexation. Counties generally have few legal remedies to prevent this. There is a process, however, for counties to get a neutral third party to act as a "referee" and, to a limited extent, shape the zoning and density changes that go with the annexation. This is the annexation arbitration procedure found at O.C.G.A. §36-36-110 to §36-36-119. The process works like this:

- City notifies county of annexation petition, and the zoning requested for the property, within 30 days of the request,
- County has 45 days to file an objection,
- If County does not file an objection, the annexation proceeds but the zoning proposed by the city cannot be changed for one (1) year,
- If the County does file an objection and persuades the arbitration panel that the zoning or density should be modified, the panel can do that, and its modifications can remain in place for up to two (2) years,
- The arbitration panel consists of 2 city officials, 2 county officials, and 1 academic professional in public administration or land use planning, and
- If the annexation will have a financial impact on the county's existing capital assets, or create a need for new infrastructure to be provided by the county in response to growth in the area, the panel must quantify those costs and propose mitigating measures that could result in amendments to Service Delivery Agreements and related Intergovernmental Agreements.

Discussion

Annexation occurs when the corporate limits of a municipality are expanded to include land that had previously been in the unincorporated area of the county. In other words, land that had been subject to the county's land use regulations becomes part of the city, and thus subject to whatever zoning classification and density the city chooses to allow. Because cities generally allow higher density or more intensive uses of property, annexation can sometimes result in development the county believes is inconsistent with the county's land use plans for adjoining, unincorporated properties. The annexation arbitration process was enacted to provide a way for the county's concerns to be heard.

Annexation can occur when the General Assembly passes local legislation changing a city's boundaries. A county has no recourse outside of political channels when this happens. The annexation arbitration process cannot be used to challenge a local act expanding a city's boundaries.

There are two additional ways annexation can occur, and the annexation arbitration process was enacted to provide counties with a procedure for objecting to annexations occurring under these two methods. In summary, the owners of property by law have the right to submit an annexation petition to a municipality, requesting that their property be annexed into the city. The statutes refer to these as the "60% method" and the "100% method," which refer to the number of landowners submitting the petition. If *all* the owners of one or more parcels apply for annexation, that is called the 100% method, because 100% of the owners want to be annexed (frequently only one owner, or developer, is involved). There is another method available when everyone within an area does not consent to be annexed, but 60% of the landowners (by acreage) and 60% of the voters do. The specific procedures that must be followed for an annexation to occur under either of these methods are explained in the *Handbook for Georgia County Commissioners*, Fifth Edition, pp. 484-487. If a city fails to follow the statutory procedures under either method, the county may have the ability to contest the city's action by filing a lawsuit in court. But, as will be discussed below, the annexation arbitration process cannot be used to argue that the city failed to follow the required procedures for annexation.

To manage expectations, county commissioners should have a clear understanding of what the annexation arbitration panel can and cannot do. The arbitration panel ***cannot***:

1. Deny or "turn down" the annexation,
2. Require the City or applicant to start over and follow the statutory procedures, or
3. Consider any impact annexation will have on the local school system's budget in terms of additional students to be served.

In short, the arbitration panel does not rule "for" or "against" the county or the city. The process is not designed for one side to "win" and the other to "lose." And while school-related infrastructure costs to be paid *by the county governing authority* may be relevant, additional costs to be borne by the school system are not.

Instead, if the county has raised a valid objection, as that term is defined by law, and if the arbitration panel determines the county's objection warrants intervention by the panel, the arbitration panel ***can:***

1. Establish reasonable zoning, land use, or density conditions that will apply to the annexed property for a period of up to two (2) years,
2. Propose reasonable mitigating measures to address demands on county infrastructure, and
3. If the annexation causes a financial impact upon the county associated with the provision or maintenance of county infrastructure, the panel must quantify such impact in terms of cost.

Steps When Utilizing the Annexation Arbitration Process

When a city receives and accepts an application or petition for annexation, the city must notify the county within 30 days. This notification must be by "verifiable delivery," which means

the notice may be delivered by hand, by email, by certified mail, or by statutory overnight delivery, provided there is some form of written verification of the delivery. The city must also notify the impacted school system, but the school system is not authorized to file an objection or to participate in the annexation process.

The notice provided to the county must include a description of the property to be annexed, a description of the proposed zoning classification and land use of the area to be annexed, and information describing the time and place of any public hearing scheduled by the city for the zoning of the property to be annexed. It is advisable that someone from the county attend the city's public hearings and be informed on the zoning and increased density the city is considering for the property to be annexed. The city may or may not be inclined to zone the property in the manner the applicant has requested, and this could have a bearing on whether the county wishes to object and start the arbitration process.

When a county receives this notice, the county attorney should be involved early in the process. If there are deficiencies in the notice or the procedures the city has followed up to this point, legal action may be available to the county, but the arbitration process is not the appropriate place to make those arguments. The county attorney can evaluate whether a lawsuit is necessary, as well as the time limitations for asserting such claims.

The county should carefully consider the zoning classification the city proposes for the property and the extent to which it conflicts with the county's present zoning of the property. The county should also consider its comprehensive plan and future land use map, again with a view of whether the city's proposed zoning conflicts with the county's plans. Finally, the county should consider how the annexation and proposed zoning will impact existing county infrastructure and assets in the nearby area, and the extent to which new infrastructure demands will be placed on the county if the annexation is allowed. These are the main focal points for which the annexation arbitration process is available and intended.

In deciding whether to object, a county should keep these facts in mind: If the county does not object and the annexation proceeds with the zoning proposed by the city in its notice, the city cannot change the zoning for a period of one year, but may do so after one year without any opportunity for the county to object at that time. If the county does object, the most the arbitration panel can do is impose reasonable restrictions on the zoning or density for a period of two (2) years, giving the county time to plan and budget for growth in the area. The arbitration panel must also quantify the increased costs the county will incur, and that information, together with any proposed mitigating measures offered by the panel, can provide the basis for amending the SDS agreement or entering into new Intergovernmental Agreements with the annexing city. Note that the ability of the arbitration panel to quantify the county's increased costs is largely dependent upon the quality and detail of the financial evidence provided by the county at the hearing.

By statute, a county is allowed to initiate the annexation arbitration process by filing an objection within forty-five (45) days of its receipt of the notice. In order to object the governing authority of the county must officially vote to file an objection. The objection must then be provided to the city and to the Georgia Department of Community Affairs (DCA) by means of verifiable delivery. Delivery of the objection to DCA should be made by using this form: objection_notification.docx (live.com) sent to this link: planning@dca.ga.gov. The objection must meet the following requirements:

The county must allege that the annexation will result ***in a material increase in burden upon the county*** due to at least one of the following reasons:

a. The proposed change in zoning or land use,
b. Proposed increase in density, or
c. Infrastructure demands related to the proposed change in zoning or land use.

In support of the requirement that a "material increase in burden upon the county" must be alleged, the county is also required to state or summarize in the objection ***evidence of the financial impact*** the county contends will result from the annexation. DCA expects the county to address financial impact in its objection; the county is not required to attach all of the financial data it intends to introduce at the arbitration hearing, but it must provide at least a summary of what it intends to prove at the hearing. [Attorneys may disagree as to whether the statute absolutely requires the county to submit evidence of financial impact in order to state a proper objection. Regardless, DCA takes the position that it does, and DCA states it will reject any objection that fails to address financial impact upon the county].

Unrelated objections will not be considered by DCA, and DCA has the authority to refuse to seat an arbitration panel if the county's objection is not tailored to the statutory language above.

Note that the objection must be based on an increased burden imposed "upon the county." DCA interprets this phrase to mean that a burden upon the school system is not a valid basis for an objection, because the school system is separate legal entity and is not synonymous with the county.

However, if the annexation will require *the county governing authority* to make road improvements to serve schools or neighborhoods near the annexed area, such as road widening, the installation of new traffic signals, construction of turn lanes, etc., those things would be proper grounds to support the county's objection. The county should also examine its capital expenditures in the vicinity of the annexed area. For example, if the county has built a park, a fire station, or water/wastewater infrastructure near the annexed area, and if the county can show the annexation will cause a material adverse financial impact upon those capital projects, then these facts can and should be used to assert a proper objection.

A county cannot submit a valid objection by simply stating the annexation will require the county to alter its delivery of services, or that it will require amendments to the Service Delivery Strategy (SDS) Agreement (though the annexation in fact may require such an amendment). However, if the annexation will require the county to alter its delivery of services in the nearby area because of a change in zoning, an increase in density, or a change in infrastructure demands, and if altering service delivery rises to the level of being a *material increase in burden* upon the county, then these facts can be cited to support the county's objection. The point being that a change in service delivery must be directly tied to the proposed zoning change, an increase in density, or a change in infrastructure demands, and it must result in a material burden upon the county.

Proving the Validity of the County's Objection

When the arbitration panel meets and hears evidence offered by the county, the city, and perhaps the developer or property owner requesting the annexation, its first duty is to decide whether the county's objection is valid. The county has the burden of proof and must establish that the annexation and proposed change in zoning or land use will result in:

1. A substantial change in the intensity of the allowable use of the property, or a change to a significantly different allowable use, **or**
2. A use that significantly increases the net cost of infrastructure or significantly diminishes the value or useful life of a capital outlay project furnished by the county to the area to be annexed, **and**
3. Differs substantially from the existing uses suggested for the property by the county's comprehensive plan or permitted for the property pursuant to the county's zoning or land use ordinances.

As an initial matter, the county must provide evidence that the annexation and the city's proposed zoning is inconsistent with the county's land use plan and the pattern of existing uses and zonings in the area of the subject property. While this seems obvious, the county is required to show that the annexation and proposed zoning is inconsistent with the uses currently allowed by the county. This raises two important points: First, it will be very difficult for counties with no zoning or land use restrictions to meet this requirement. Such a county will have to rely on its comprehensive plan and future land use map, but those plans have no "teeth" without zoning or land use ordinances that prohibit what the annexation proposes to allow. Second, in counties with zoning, if the city proposes to zone the property exactly the same as the county's zoning, and with no increase in density, the county will have a difficult time asserting a valid objection, even though the county expects the city to re-zone the property to a more intensive use once the one-year waiting period expires. In this situation, a lawsuit focused on any procedural or substantive irregularities with the annexation would be more effective than the arbitration process.

The statute directs the arbitration panel to consider the following matters if there is evidence addressing them offered by any of the parties:

a. The comprehensive land use plans of both the county and the city,
b. The existing land use patterns in the area of the subject property,
c. The existing zoning patterns in the area of the subject property,
d. Each jurisdiction's provision of infrastructure to the area of the subject property,
e. Whether the county has approved similar changes in intensity or allowable uses for similar developments in other unincorporated areas of the county,
f. Whether the county has approved similar developments in other unincorporated areas having similar impact on infrastructure as complained of by the county in its objection, and
g. Whether the infrastructure or capital outlay project which the county claims is adversely impacted was funded by a "county-wide tax".

Item (a), the first on the list, requires an examination of the county's comprehensive plan. Because this is an important document in the annexation arbitration proceeding, counties should make sure their plans are updated and that they reflect actual conditions or trends in the community. Look for areas where the county's plans call for low density or low intensity uses, which are immediately adjacent to municipal areas that allow for higher density or intensity. These are the areas ripe for annexation. A county can remove some of the incentive for annexation if it provides a transition area next to rapidly developing municipal parcels.

Items (e) and (f) obviously require the county to be prepared to address arguments by the city that the "county has allowed the same thing" in other parts of the county. The last point, item (g), raises some debatable issues. If the city can show the impacted county infrastructure or capital project was financed with property tax revenue paid by both city and county residents, the city will no doubt argue that its residents paid their pro rata share of the project and therefore there is no adverse impact to taxpayers in the unincorporated area. But what about a county's share of SPLOST revenue? While SPLOST is a "county-wide tax," in most instances the county's share is limited by intergovernmental agreement, and if the affected infrastructure or capital outlay project was financed with the county's share of the SPLOST, it would seem the county should be able to "claim" the adverse impact on behalf of its unincorporated area residents. But if the infrastructure or capital project was a Level 1 or Level 2 "countywide" SPLOST expenditure, perhaps the city would have a better argument.

Panel Formation and the Hearing Process

By statute, an annexation arbitration panel must consist of five (5) arbitrators, consisting of two municipal elected officials (mayors or councilmembers), two county elected officials (county commissioners), and one person employed by an institution of higher education in Georgia and holding a master's degree or higher in public administration or planning (an academic). DCA maintains a pool of qualified persons in each of these three groups. To be in the

pool, a person must complete a mandatory training course offered by DCA in conjunction with the Carl Vinson Institute of Government at the University of Georgia. Every year ACCG recruits county commissioners with an interest in serving as an arbitrator, and any county commissioner interested in serving should contact ACCG.

When DCA receives a county's objection and validates that it meets the statutory criteria, it has 15 days to seat a panel. DCA picks names from each of the three groups at random (but never including anyone living in the county where the dispute exists) and submits four (4) names from the "city pool" to the county; the county is allowed to strike two (2) names, so that the remaining two (2) city members will sit on the panel. Similarly, DCA submits four (4) names from the "county pool" to the city, and the city likewise is allowed to strike two (2) of those persons, so that the two (2) remaining commissioners are seated on the panel. Finally, three (3) names from the academic pool are submitted to the city and the county, and each is allowed one (1) strike, with the remaining academic member seated on the panel.

The persons in the pool of qualified arbitrators serve voluntarily, which means they can decline to have their name drawn if scheduling or other reasons make it inconvenient for them to serve on a particular panel. If DCA cannot find enough qualified pool members willing to have their names drawn within the 15 days allotted for DCA to seat a panel, it is possible no panel will be seated to hear the dispute, and this has happened on occasion. Accordingly, unless and until that 15-day period is modified, county commissioners who have been trained and are eligible to serve as arbitrators should make every effort to do so if requested by DCA. The system is dependent upon volunteers willing to serve.

Before a panel begins to hear a dispute there will be an opportunity to make sure there are no conflicts of interest that could interfere with a panelist's neutrality. The panelists must also take an oath that specifically prohibits them from having "ex parte" conversations about the case, meaning they cannot talk to anyone about the substance of the dispute unless all parties are present, and they must base their decision on the evidence presented at the hearing, not upon any information they might obtain from independent research or investigation.

The panel is required to "meet" immediately for organizational and scheduling purposes. This initial meeting can be by teleconference, and the panel should select a chairperson, a secretary to keep minutes, and set a hearing date. The panel is required to reach a decision within 60 days of its appointment, so the hearing must take place in advance of that deadline. The panel will also consider whether it should employ a court reporter to make a verbatim record of the hearing, or a hearing officer to assist with ruling on objections and procedural matters. Should the panel employ either or both, the costs will be split evenly between the city and the county, along with the per diem fees of the arbitrators. But the county or the city can be required to pay 100% of these costs if the panel determines the city or county advanced a position that was "not valid." In other areas of the law, a party is required to pay an opponent's expenses as a consequence for taking a frivolous or groundless position. Here, it is not clear if the statute means "loser always pays all" or not. It appears this is a matter within the panel's discretion.

Also, it is generally understood that attorney's fees and expert witness fees are not "costs," and each side, including the landowner/developer, should be responsible for its own professionals' fees.

The Open Meetings Act applies to the hearing at which evidence is presented and received by the Panel. Notice must be published in the legal organ and a copy of the agenda must be posted at the site of the hearing and made available to the public. The public may attend the hearing and record it with sound or video equipment. As a general rule, however, the public does not have a right to speak or make arguments at the hearing. Instead, the county, the city and the applicant for annexation are allowed to call witnesses and introduce written documents as evidence. The hearing is not as formal as a courtroom trial, but the Chair, with or without the assistance of a hearing officer, should conduct the hearing in an orderly fashion and follow the basic sequence of a court proceeding. Objections may be made as to the admissibility of evidence, and the Chair will determine whether to sustain or overrule the objection. It is likely that expert witnesses will be called to testify, typically real estate appraisers and those with expertise in project design and development who can testify about infrastructure demands related to traffic, water and sewer, utilities, etc.

At the conclusion of the hearing the panel must reach a decision by majority vote of the panelists. As noted, the decision must be made within 60 days of the panel's appointment, but the Chairperson does have the authority to extend that time by up to ten (10) additional days.

An important change in the law now allows the city and county, by mutual agreement, to "pause" the arbitration proceeding for up to 180 days in order to pursue settlement discussions. This allows time for the parties to explore a compromise without the pressure of the 60-day clock running while negotiations take place.

If the parties cannot agree to a voluntary resolution, the panel is required to make a decision. The panel has a limited set of options available to it:

1. It could rule the county's evidence does not show a material increase in burden upon the county will result from the annexation, and therefore the panel will not impose any zoning or land use modifications, or propose any mitigating measures.
2. It could rule the county's evidence does show a material increase in burden upon the county will result from the annexation, and to reduce that burden the panel may:
   (a) Impose reasonable land use or density restrictions (more restrictive that what the city's proposed zoning would allow) that will apply to the annexed property for a period of up to two (2) years. Such restrictions must be recorded in the deed records for the subject property. In some cases, the Panel's restrictions could result in the property owner or developer abandoning the project, but in other instances the developer could choose to phase-in the project to satisfy the two-year window.
   (b) Quantify and state in writing the financial impact the annexation will have on the county. This will benefit the county when amending service delivery agreements,

preparing or amending intergovernmental agreements, or perhaps when considering sales tax allocations.

(c) Propose reasonable mitigating measures pertaining to infrastructure demands resulting from the annexation. It is somewhat unclear if the word "propose" means the panel's mitigating measures are mandatory or merely suggestive. The panel could, for example, propose that the city (and perhaps the developer) contribute toward the costs of making road improvements on the county's road system near the annexed area (such as new traffic signals), or that the city contribute in some fashion to the county's increased cost in public safety services in the area near the annexation. The county should encourage the panel to obtain the city's consent to any such proposals if possible, but if not urge the panel to write its findings in a way that will support the county's position when formulating SDS and related Intergovernmental Agreements after the annexation goes into effect.

Either party has the right to appeal the Panel's decision to superior court. Appeals must be filed within 10 days of receipt of the decision. The superior court will not "re-try" the case or listen to evidence. Instead, the judge will review the record of the hearing prepared by a court reporter or such other manner used by the Panel. The judge cannot substitute his or her judgment for that of the Panel in terms of the which witnesses were more credible or compelling. Instead, the judge can overrule the Panel's decision only if there was a legal error in the way the hearing was conducted, proof of bias or misconduct by the Panel, or if the Panel "abused its discretion." This later term refers to something more than a "harmless error" or a finding about which reasonable people could disagree. It requires an error or mistake which reasonable people following the law would not have made, and which would change the outcome.

In prior years, DCA was not required to keep a database of all arbitration panel decisions that had been issued. Going forward DCA must now keep such a database, and as decisions are added and made publicly available, counties will be able to see how similar disputes were decided in other areas of the state, and get an idea of the range of outcomes that might be expected.

Conclusion

Residents in the unincorporated area of the county living near, but not in, the area to be annexed understandably feel disenfranchised by annexation. They have no representation on the city council, and therefore expect their county commissioners to be their voice in opposition to change. It can be difficult to explain to these citizens the limitations counties face in trying to stop an annexation in its tracks. Counties can speak for these citizens by filing an objection showing that the change in zoning, density or intensity of use is inconsistent with the land uses near the annexed area. But it is not a valid objection simply to say that the majority of area residents "don't want it." Counties must focus on the *"material increase in burden upon the county"* to state an objection that gives the panel the ability to alter the proposed changes.

Inconvenience to area residents is not a burden upon the county, but increased costs to the county for additional infrastructure or services caused by growth are.