A PRACTICAL PERSPECTIVE ABOUT ANNEXATION IN FLORIDA

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Annexation, in its simplest terms, is the addition of territory to municipalities. In Florida in particular, municipalities are located within Florida's sixty-seven counties. Orange County, Florida, for example, has thirteen municipalities located within its boundaries.

Annexation in Florida was traditionally employed to enable rural property to receive urban services. The premise was that only the cities could deliver essential services such as police, fire, water and sewer. However, with the onset of counties providing services, the traditional reason to annex has been diminished greatly. Rather than annexation being a logical prerequisite to the development of property, it has become, at least in urban counties, a kind of bargaining chip for property owners to negotiate with local governments in order to find the best deal for development of their property. In the absence of a reserve area agreement or joint planning area agreement, annexation in Florida has also become an invitation to litigation between cities and urban counties.

This Article will discuss the basics of voluntary annexation, involuntary annexation, annexation by special act, and annexation by charter under Florida law, with an emphasis on experience in Orange County, Florida. Annexation issues as seen from a county's perspective, a city's perspective, and a landowner's perspective will be discussed and analyzed. A short discussion of handling and avoiding annexation challenges will be done via a case study of two cases involving Orange County. Finally, a checklist for model joint planning area agreements, perhaps the best tool to avoid annexation

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litigation challenges, will be offered.

STATUTORY FRAMEWORK OF ANNEXATION IN FLORIDA

Annexation in Florida is governed primarily by chapter 171 of the Florida Statutes. This chapter sets out the basic criteria for voluntary annexation. Voluntary annexation is a statutory procedure whereby all of the property owners must consent in order for the city to annex the property. This chapter of the Florida Statutes also spells out the specifics of involuntary annexation, a procedure that requires a majority vote of the electors present in the area being annexed, and in some cases requires a referendum in the city doing the annexing. The statute also allows for special laws to supersede the general statutory procedure and sets forth the ability for a charter county to have a special voluntary annexation procedure which would preempt the general law.

Voluntary Annexation. Section 171.044 of the Florida Statutes allows a city to annex property if unanimous consent of the owners of that property occurs.[1] There are certain specific statutory notice and hearing requirements set forth in the statutory section.[2] Other restrictions on this type of annexation will be mentioned in the next section dealing with involuntary annexation.

Involuntary Annexation. The procedures for involuntary annexation are spelled out in section 171.0413 of the Florida Statutes.[3] In particular, a governing body wishing to annex property may pass an ordinance to annex the property. However, this ordinance cannot become effective until such time as a majority of the electors in the area to be annexed vote for the annexation.[4] This vote must occur in a referendum that must be held within thirty days following the

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1. FLA. STAT. § 171.044 (1995). The ordinance can be passed only after notice of the annexation has been published at least once each week for two consecutive weeks. *Id*. The notices are required to give the ordinance number and a brief general description of the area proposed to be annexed. *Id*. The description must also include a map showing the area and a statement that a complete legal description is available with the clerk. *Id*.

2. *Id*.

3. *Id*. § 171.0413.

4. *Id*. The referendum is to be held at the next regularly scheduled election following the final adoption of the ordinance or at a special election called for the purpose of holding the referendum. *Id*.

approval date of the annexation ordinance.[5]

Prior to the 1993 legislation known as "ELMS III,"[6] there was a requirement of a "dual referendum." In other words, it was necessary that a majority vote of the electors in the municipality doing the annexing also approve the annexation. However, after ELMS III, this requirement only applied if the proposed ordinance would cause the total area annexed by a municipality during any one calendar year cumulatively to exceed more than five percent of the total land area of the municipality[7] or cumulatively during one calendar year to exceed more than five percent of the municipal population.[8]

There are very specific notice and hearing requirements for the involuntary annexation[9] along with the requirement that if more than seventy percent of the land in the area proposed to be annexed is owned by entities who are not registered electors, then the owners of more than fifty percent of the land to be annexed must consent.[10]

Annexation by Contract. Besides the types of annexation already mentioned, one should always keep in mind the possibility that a proposed annexation may meet the requirement to be annexed by interlocal agreement. In the wake of ELMS III, section 171.046 of the Florida Statutes was added.[11] This statutory section allows enclaves to be annexed by interlocal agreement between cities and counties.[12] The contract annexation is limited to enclaves of less than twenty-five registered voters.[13] The enclave must be less than

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5. *Id*.

6. 1993 Fla. Laws Ch. 206.

7. FLA. STAT. § 171.0413(2) (1995). Because of the wording in the statute, it is important to consider the effect that the proposed annexation has upon the total land area of the city in combination with other annexations done by that city during a single calendar year. If the five percent threshold is met, then a referendum in the city will be required, and failure to conduct such referendum could lead to an annexation challenge. This is particularly important in jurisdictions annexing large tracts of undeveloped land.

8. *Id*. The need to determine whether the five percent population threshold is implicated would be particularly important in those jurisdictions annexing developed properties.

9. *Id*. § 171.0413. Besides noticing the referendum for two weeks prior to the date of the referendum, a copy of the ordinance and description of the property annexed is required to be prominently displayed at each polling station. *Id*.

10. *Id*. § 171.0413(5); *see also id*. § 171.0413(6) (setting forth requirements when the area to be annexed does not have any registered electors and requiring the property owner's consent pursuant to section 171.0413(5) in such event).

11. 1993 Fla. Laws ch. 206.

12. FLA. STAT. § 171.046(2) (1995).

13. *Id*.

ten acres, cannot be developed or improved real property, and must meet the new definition of "enclave" that was added to the ELMS III legislation.[14] This new definition, found in section 171.031(13) of the Florida Statutes, defines enclave as "unincorporated improved or developed area that is enclosed within and bounded on all sides by a single municipality."[15] The only exception is if the unincorporated area is nearly all enclosed by a *single* municipality with the remainder bounded by "a natural or manmade obstacle that allows passage of vehicular traffic to that unincorporated area only through the municipality."[16]

Annexation by interlocal agreement has occurred in several instances in Orange County, Florida. In particular, one such annexation was done with the City of Winter Park. The statute does not set forth any specific criteria for notice and hearing. However, recommended practice would be the following: provide direct mail notice to each of the individuals in the area to be annexed; have at least one meeting with those persons to identify concerns and answer questions; have a resolution calling for the annexation as a companion to the interlocal agreement itself; and hold a public hearing to consider passage of the resolution and interlocal agreement.

Restrictions on Voluntary and Involuntary Annexation. The liberalized ability to annex enclaves was added to ELMS III in an apparent attempt to promote cleaner jurisdictional boundaries and hence a more efficient delivery of services.[17] However, the revision to the definition of enclave may have, in fact, done just the opposite. While the newly defined "enclave" applies to the statutory section that creates the ability to annex by contract, it also has the effect of liberalizing one of the few restrictions on voluntary annexation, namely that voluntary annexation must be "compact."[18] The net effect is a potential increase in annexation "by opportunity" which is often not consistent with ordered and logical growth.

Compactness. In particular, subsection 171.031(12) of the Florida Statutes defines compactness to mean a "concentration of a piece

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14. *Id*. § 171.031(13).

15. *Id*.

16. *Id*.

17. FLA. STAT. § 171.046(1) (1995) (stating that the "Legislature recognizes that enclaves can create significant problems in planning, growth management, and service delivery, and therefore declares that it is the policy of the state to eliminate enclaves").

18. *Id*. § 171.044(1).

of property in a single area and precludes" the creation of "enclaves, pockets or finger areas in serpentine patterns."[19] Prior to this definition of enclave, it was not entirely clear whether an enclave had to be surrounded on all sides by the jurisdictional boundaries of another local government.[20] Arguably, being completely surrounded was not required. Also, case law was very clear that an enclave could be either an incorporated or unincorporated area which was surrounded by another local government.[21] Finally, there was never any common law restriction that would have precluded property that was undeveloped from meeting the common law definition of enclave.

Hence, by revising this definition of enclave, the ability to voluntarily annex property has arguably been made easier because one of the strongest prohibitions has now been weakened. The converse of this argument, however, is that the statute requires that the annexed property must be *compact*, meaning that it cannot create "enclaves, pockets, or finger areas."[22] If we now know that an enclave is surrounded on *all* sides by another local government, by implication, a pocket must be something surrounded on less than all four sides by another local government. It will be interesting to see how the courts interpret this new statutory language.[23]

Contiguity. Another restriction to both voluntary and involun-

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19. *Id*. § 171.031(12). This statutory subsection goes on to state that annexation shall be designed in a manner to ensure that it will be "reasonably compact." *Id*.

20. See City of Sanford v. Seminole County, 538 So. 2d 113 (Fla. 5th Dist. Ct. App. 1989), where the court held that the annexation in that case met the particular requirement of compactness and contiguity. In so holding, the court noted that only annexations which are "in serpentine finger patterns" and hence, "winding or turning one way and the other" are prohibited. *Id*. at 115. Also, as to the prohibition of creating "pockets," the court defined pocket as "`a small isolated area or group'" holding that the annexations did not create such pockets. *Id*. (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 879 (1981)).

21. See City of Sunrise v. Broward County, 473 So. 2d 1387 (Fla. 4th Dist. Ct. App. 1985), where the court stated

> [w]e do not agree with the reasoning set forth in the opinion of the Attorney General in that the annexation of property resulting in the creation of enclaves, regardless of whether such an enclave consists of incorporated or unincorporated property, has the effect of frustrating the purpose of the statute; that is, to assure the creation of geographically unified and compact municipalities.

Id. at 1389.

22. *See* FLA. STAT. § 171.031(12) (1995).

23. *But see City of Sanford*, 538 So. 2d at 113 (discussing the court's interpretation of a "pocket").

tary annexation is that it must be contiguous to the annexing municipality. Contiguous is defined in subsection 171.031(11) of the Florida Statutes to mean "that a substantial part of a boundary of the territory sought to be annexed by a municipality is coterminous with a part of the boundary of the municipality."[24] There is clearly an element of subjectivity in determining whether property is in fact contiguous. In the case of *City of Sanford v. Seminole County*,[25] the court focused on the use of the word "a" in finding that only one side of the configuration being annexed had to be substantially contiguous. The court did not feel that it was necessary to look at the total perimeter of the area being annexed since the statutory definition focused on the requirement that a substantial part of a single boundary of the annexed area be coterminous with the annexing municipality.[26] While there is an element of subjectivity in determining whether property that has some connection to the annexing municipality is contiguous, it is logical to assume "corner-contiguity" (i.e. connection of the annexing municipality and annexed area by a single point) or a complete absence of contiguity would present a compelling case to invalidate an annexation.[27]

The question often arises as to whether the presence of a water body, county road, railroad corridor, or other similar property between the annexing area and the area to be annexed would preclude contiguity. Subsection 171.031(11) of the Florida Statutes specifically addresses this and states that such an obstacle would not preclude contiguity as long as "the presence of such a division does not, as a practical matter, prevent the territory sought to be annexed and the annexing municipality from becoming a unified whole with respect to municipal services or prevent their inhabitants from fully associating and trading with each other, socially and economically."[28] Thus, the key factor in determining whether the contiguity

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24. FLA. STAT. § 171.031(11) (1995).

25. 538 So. 2d 113 (Fla. 5th Dist. Ct. App. 1989).

26. *Id*. at 115.

27. *See* Illinois ex rel. Hanrahan v. Village of Wheeling, 356 N.E.2d 806, 815 (Ill. App. Ct. 1976) (holding that "point-to-point, or cornering, is generally not sufficient to satisfy the requirement of contiguity") (citing Western Nat'l Bank v. Village of Kildeer, 167 N.E.2d 169 (Ill. 1960)).

28. FLA. STAT. § 171.031(11) (1995); *see also* 1986 Op. Fla. Att'y Gen. 43 (holding that the City of Avon Park may not voluntarily annex a parcel of property separated from the municipality by a lake and otherwise surrounded by an incorporated land when the annexation would result in the creation of a municipal enclave surrounded by

requirement has been met is whether the existence of the water body or other similar area would cut off access to the annexed property or otherwise isolate it from the rest of the annexing municipality.[29] This same statutory subsection expressly prohibits rights of way, utility easements, railroad rights of way or similar entities from being annexed in a "corridor fashion" in order to gain contiguity.[30]

Other Restrictions. Another restriction that applies to both voluntary and involuntary annexation is that it must be limited to a single county.[31] There is also a further limitation on involuntary annexation that requires that the property be used for "urban purposes."[32] A fairly detailed formula is set forth in the statute to de

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unincorporated property, and the property would be geographically isolated from the municipality which would have the effect of preventing the annexed property and the municipality from being a unified whole).

29. *See* Town of Boynton v. State, 138 So. 639 (Fla. 1932) (discussing the existence of a lake and its effect on annexation); *cf.* 1971 Op. Fla. Att'y Gen. 245 (stating that the existence of a river or stream between a municipality and the territory proposed to be annexed will not necessarily preclude such annexation).

30. FLA. STAT. § 171.031(11) (1995); *see also* 1972 Op. Fla. Att'y Gen. 282 (stating that a tract of land that is separated from a municipality only by a county road that runs parallel to the city limits is contiguous within the definition of the statute). However, this opinion also stated that it is doubtful whether territory that was situated diagonally across a county road from the city, so that only the corners of the two areas could be deemed to be adjoining, would be held to be contiguous for annexation. *Id*.; *see also* 1985 Op. Fla. Att'y Gen. 58 (stating that the City of Ormond Beach should not undertake to voluntarily annex a piece of property when one side was contiguous to a previously annexed corridor but the rest of the property was surrounded by an incorporated land); 1971 Op. Fla. Att'y Gen. 315 (stating that an incorporated territory that is physically separated from a city by other territory and is connected to the city only by a state road cannot be annexed through the device of annexing a state road right of way).

There is also an interesting point to be made that a city may be without jurisdiction to annex a state road in the absence of some type of joinder and consent from the state. This is because the state (or more specifically the Board of Trustees of the Internal Improvement Trust Fund) may be the actual "owner" of the property and, as such, is uniquely qualified to be the petitioner for voluntary annexation. A similar argument may apply in a situation where a city is attempting to annex the bottom of a lake as part of its annexation, unless there is clear title evidence that the adjacent upland property owners also own the lake bottom.

31. FLA. STAT. § 171.045 (1995).

32. *Id*. § 171.043. While there has been some confusion on the issue, the Attorney General concluded that the service delivery plans required by Florida Statutes § 171.042 and the urban character requirements set forth in Florida Statutes § 171.043 need only be adhered to in cases of non-voluntary annexation. 1977 Op. Fla. Att'y Gen. 18. It should be noted however that there are a line of cases which indicate that annexation should not occur in lands which are not urban in nature. *See* State ex rel. Ervin v. City of Oakland Park, 42 So. 2d 270 (Fla. 1949) (holding that annexing wild, undeveloped and

termine whether the property can be used for urban purposes.[33]

Annexation by Special Law. Subsection 171.044(4) of the Florida Statutes specifically says that the procedures for voluntary annexation shall be "supplemental to any other procedure provided by general or special law."[34] There are a number of special annexation laws that exist in Florida, and hence, special laws should always be checked prior to beginning annexation procedures. One such example of a special law is a Gainesville Special Act which allows for certain liberalized procedures for annexing enclaves.[35] There are also a number of special laws that pertain to annexation in areas in South Florida.[36]

Annexation by Charter. The same statutory subsection states that the voluntary annexation procedures do not apply to municipalities and counties with charters that provide for an exclusive method of municipal annexation.[37] For example, Orange County has a specific charter provision dealing with annexation, although it is arguably not an exclusive method of municipal annexation. In particular, section 505 of the Orange County Charter states: "Annexation in areas that are defined in the Orange County Comprehensive Plan as preservation areas" cannot be annexed unless there is a majority vote of the persons residing in the preservation area.[38] In addition, a majority of the county commissioners in the unincorporated area must agree to the annexation.[39]

This special procedure for voluntary annexation was implemented in Orange County in 1994 by the passage of an ordinance creating the Gotha Preservation District.[40] The boundaries of the

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unoccupied land receiving no benefits from the city was invalid); Town of Crystal River v. Springs O'Paradise, Inc., 154 So. 2d 727 (Fla. 2d Dist. Ct. App. 1963) (holding annexation invalid where town not equipped to supply municipal services to additional territory). *But cf.* Bower v. City of Tampa, 316 So. 2d 570 (Fla. 2d Dist. Ct. App. 1975) (holding annexation valid despite the fact that land annexed was tidal shores which were mostly submerged, uninhabited, unimproved and undeveloped and city had never supplied the land with municipal services of benefit to the property).

33. FLA. STAT. § 171.043 (1995).

34. *Id.* § 171.044(4).

35. See Chapters 77-557 and 77-558, Laws of Florida, relating to annexation.

36. *See, e.g.*, 1986 Fla. Laws ch. 427 (relating to the annexation of enclaves in the City of Delray Beach).

37. FLA. STAT. § 171.044(4) (1995).

38. Orange County Charter, § 505 (1994).

39. *Id.*

40. *See* Orange County Code, §§ 33-301 to -306.

preservation area were created, and the area designated as a preservation annexation district pursuant to the special charter procedures.[41]

ANNEXATION ISSUES FROM A CITY'S PERSPECTIVE

From a city's perspective, annexation is extremely important to a growing city as it presents economic opportunity, social equity, and expanded urban services.[42] Central cities are focal points of every metropolitan area with transportation and communication systems, labor force and employment structure, financial networks, cultural heritage and many other aspects of daily lives deeply interconnected with cities.[43] When a central city is restricted from growing, disparities between the central city and region may develop and act as a deterrent to growth. One author has theorized that restrictive annexation policies in cities such as New Orleans, St. Louis, and Chicago have resulted in those cities suffering more disproportionately from inner city blight than cities that have allowed growth in an unrestrictive manner such as Charlotte and Houston.[44] In short, city planners believe that if a region is to prosper and expand, the central city must be allowed to do the same. Other authors have pointed out that annexation helps cities by adding additional areas served through economies of scale.[45] Specifically, costs can be lowered through overall unit costs as part of changes in operation and service delivery.[46] Second, annexation may provide an entree to privatization and alternative service delivery.[47] Finally, annexation can be used as a tool for implementing proper building and zoning classifications.[48]

Annexations are also inviting to municipalities because of the fiscal impacts. Besides expanding its ad valorem tax base, cities may

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41. *Id*.

42. THOMAS WILKES ET AL., SOUP TO NUTS: RECIPE FOR A FULL COURSE ANNEXATION 473 (1994).

43. *Id*. at 473–78.

44. *Id*. at 477–78.

45. Jack Schluckebier, *Managing Growth and Increasing Revenues through Annexation*, QUALITY CITIES, Nov. 1993, at 8.

46. *Id*.

47. *Id*. Schluckebier notes that the effect may "unleash competitive service forces." *Id*.

48. *Id*. at 8-9.

also obtain utility taxes and franchise fees based upon gas, water, phone and cable system operations.[49] Also, state revenue sharing is based upon population growth formulas. Therefore, to the extent that cities increase their population through the annexation of populated areas, they are able to get a higher share of certain revenues such as gas taxes. Finally, miscellaneous revenue sources such as fines, fees, utility connections and related fees are also factored into the total revenue gain formula.[50]

In the end, a cost-benefit analysis must be done by the municipality in order to determine whether the revenue gain will be greater than the reserve expended in order to provide the services and otherwise entice the property owner to annex into a municipality. As discussed by Jack Schluckebier, each decision to pursue annexation should be based upon the following criteria:

1. Whether the annexation is politically feasible (i.e., is the annexation legal and will approval be obtained)?

2. Whether the annexation is technically feasible (i.e. does the city have the capacity, plans, funding and expertise to deliver what has been promised and to make this delivery on time)? and

3. Is it economically feasible (i.e. does the cost to deliver the services as promised and in the time frame promised justify the annexation considering the benefits that will accrue to the municipality[51])?

ANNEXATION ISSUES FROM A COUNTY'S PERSPECTIVE

Provision of service issues. The annexation issues that a county is confronted with are usually diametrically opposed to those that a city faces. One of the most disruptive aspects of annexation is its impact on the ability of the urban counties to plan for their provision of services. It is extremely difficult to decide where to site water and wastewater plants, fire stations, and other major capital infrastructure projects if the property to be served by such capital infrastructure projects might ultimately end up being annexed by a city.[52] A corollary to this problem is that it is difficult to decide future work force requirements for fire, law enforcement, and other services if

49. *Id*. at 8.
50. Schluckebier, *supra* note 45, at 8.
51. *Id*. at 9.
52. WILKES, *supra* note 42, at 484.

annexations are to occur.[53] The issue is complicated further by the fact that there are often enclaves of property that are not included in the annexation. This may be because they are high crime or undesirable areas that the city chooses not to annex or possibly these areas may be excluded because the property owners simply will not agree to the annexation. The result is that it becomes more difficult to deliver services such as police and fire protection because those service providers do not have a clear and logical service area. This also becomes problematic when one considers the possibility of duplicating services such as water and sewer. The extreme situation is having water or wastewater lines from the city utility provider and the county utility provider along side each other.

In addition, the provision of water and wastewater is often complicated because some municipalities, as a prerequisite to annexation, require that the annexed property get its water and wastewater service from the annexing municipality. This type of requirement has been upheld in several court cases and has withstood arguments that it is a violation of the reserved powers doctrine.[54] Because of the city's need to increase its service area and the potential profitability arising from the provision of water and wastewater, this need to expand customer base may create inevitable conflict with a county's need to preserve its own customer service base. This is particularly the case when plants and other infrastructure have been put into place by the county.

With the advent of reclaimed water and increasing requirements to provide reclaimed water, the annexing municipality may also feel the need to expand its potential customer base for reclaimed water. In addition, the municipality may begin to see the need to have areas in which to dispose of reclaimed water. Again, these goals are often on a collision course with those of the county, especially in the case of an urban county that provides services.

The provision of solid waste service is typically not as problematic. This is because there is language in the annexation statute which specifically allows franchise garbage haulers who are providing service in areas that have been annexed to continue through the

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53. *Id.*

54. *See, e.g.*, City of Clearwater v. United States Steel Corp., 462 So. 2d 1171 (Fla. 2d Dist. Ct. App. 1984).

term of their contract or for five years, whichever is shorter.[55] However, an interesting question arises in the event that garbage services are provided through a special assessment mechanism. Does annexation change the assumptions upon which the fee is based? Did the original assumptions upon which the fee was based contemplate the possibility of annexation? These same questions should be asked for any special assessment, including a stormwater utility.

In addition to the service provision issue, urban counties often have planning and growth management staffs and regulations which are as sophisticated, if not superior to those of a city.[56] The same rule applies in many cases to urban counties providing police and fire protection. Environmental laws and regulations may also be more lenient in a small municipality than in a sophisticated urban county.[57]

The more significant problem is that annexation may be used as a tool to circumvent growth management laws and environmental laws that would have been put in place by a sophisticated county. Exacerbating this problem is an apparent lack of recognition at the state level that the annexation of unincorporated areas to municipalities may, in fact, create urban sprawl, because the annexation may be a catalyst for growth in areas that are far out of the reach of the basic transportation system of a county.[58] This perception also ignores the reality that it is entirely possible that certain rural municipalities may exist within urban counties that are less sophisticated than the urban counties.[59]

Another problem counties are faced with in the aftermath of annexation is that there are sometimes pre-existing contract rights and duties between the county and private interests which are disrupted.[60] For example, in the litigation between Orange County and the City of Orlando, which resulted in a Joint Planning Area Agreement between those two local governments, one of the primary annexing landowners had entered into utility agreements with the

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55. FLA. STAT. § 171.0624(a) (1995).

56. WILKES, *supra* note 42, at 486.

57. *Id*.

58. *See generally* FLA. ADMIN. CODE ANN. ch. 9J-5 (1994); WILKES, *supra* note 42.

59. A specific example of this is found when one compares the small rural town of Oakland, located within Orange County, with the much larger and more comprehensive Orange County Government.

60. WILKES, *supra* note 42, at 485.

county prior to the annexation.[61] These agreements had to be terminated and renegotiated as part of the master settlement of the litigation.

Annexation often also creates confusion about the ownership and maintenance of the roads located in the annexed areas.[62] It is often assumed that the mere annexation of a road will transfer title to the annexing local government. This is typically not the case since the unincorporated area may often have a deed which vests it with title to the road. When the statutory procedure to vacate the road under chapter 336 of the Florida Statutes is not observed, it will often be necessary to obtain a quit claim deed from the county government in order to clear title to the road bed.[63]

Issues with respect to providing maintenance, enforcing traffic laws, and updating maps in order to aid emergency service personnel frequently occur. The requirement to provide drainage areas for annexed roadways and the maintenance obligations for drainage areas are often in a state of flux.[64] Finally, there are potential unknown impacts on various local governments' concurrency management systems. The only real way to combat these types of problems is by agreement between the county and city government, preferably prior to a given annexation.

ANNEXATION FROM A LANDOWNER'S PERSPECTIVE

A landowner determining whether to annex should consider a range of tangible factors[65] including the following:

1. Ad valorem tax changes;
2. Impact fee structure;
3. Service fees (water, wastewater, drainage);
4. Improvements scheduled in current capital improvement

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61. The specific utility agreement set forth the terms and conditions upon which the development would have its package plant subsumed into the County utility system.

62. This is particularly troubling when one considers the resulting confusion which confronts emergency service personnel from various local governments.

63. While Chapter 336 of the Florida Statutes sets forth a statutory "vacation" process whereby counties can divest themselves to title to right of way, there does not appear to be an analogous general law provision pertaining to municipalities.

64. This is even more problematic when the drainage facilities for an annexed road are not adjacent to that annexed road such as a large drainage pond that may provide drainage for the road and other impervious area.

65. WILKES, *supra* note 42, at 487–88.

plan;
5. Concurrency management status (if in Florida);
6. Policy for allowing special financing (in Florida these would include Community Development Districts and Municipal Service Taxing Districts);
7. Policy for sharing costs for utility extension;
8. Policy for extending impact fee credits;
9. Land use policies;
10. Willingness of jurisdiction to enter into developer's agreements that will make necessary commitments for future service capacity, infrastructure, and land use;
11. Reliance of jurisdiction on other jurisdictions for providing basic services such as water, sewer, and solid waste;
12. Whether the County is already providing basic services or will be able to provide those services in the near future; and
13. Whether there is any type of interlocal agreement addressing annexation in existence between the county and city.[66]

A landowner will also want to factor intangible considerations[67] into his or her decisions such as:

1. Any objections from the county;
2. The extent to which the proposed annexation is part of a larger annexation;
3. Attitude of jurisdiction towards annexation in past decisions;
4. Attitude of local government staff toward growth;
5. Relationship of jurisdiction to other permitting agencies;
6. Political stability of jurisdiction;
7. Attitude of surrounding land owners and residents to annexation;
8. and jurisdiction's ability to sustain annexation in face of opposition.[68]

Once the property owner considers all of these factors a decision should be made whether to annex. It should be kept in mind that not only should the typical statutory procedures for voluntary and involuntary annexation be checked, but also any particular special act or charter provision should likewise be consulted. Landowner

66. *Id.*
67. *Id.* at 489.
68. *Id.*

experts[69] have theorized that keys to successful annexations are as follows:

1. Have a clear analysis of the benefits and costs of annexation;
2. For existing development or raw land in multiple ownership, have a unified association with authorized representatives;
3. Enter into a developer's agreement or annexation agreement (for multiple owners or existing development areas) that specifically identifies any commitments the municipality is offering, including land use designations, provision of services, reservation of capacity, and willingness to approve special financing districts;
4. Enlist the support of the local official(s) representing the area to be annexed;
5. Be prepared to identify and address the concerns of adjacent property owners in both jurisdictions;
6. Prior to initiating an annexation, work with local staff and elected officials in both jurisdictions to assure intergovernmental coordination; and
7. Ideally, the jurisdictions involved should have some type of planning reserve agreement, joint planning area agreement, or related interlocal agreement.[70]

HANDLING AND AVOIDING ANNEXATION CHALLENGES

The annexation statute affords a remedy to affected parties who believe they will suffer a material injury by virtue of the annexation.[71] The Florida annexation statute states that the remedy is review by certiorari and that a petition for writ of certiorari must be filed within thirty days of the passage of the annexation ordinance.[72] If the complainant prevails, the landowner is entitled to reasonable costs and attorney's fees under this statute.[73]

The scope of certiorari is limited to following procedural due process, meeting the essential requirements of law, and having com-

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69. *Id*. at 489–90.
70. WILKES, *supra* note 42, at 491–92.
71. FLA. STAT. § 171.081 (1995).
72. *Id*.
73. *Id*.

petent and substantial evidence.[74] Hence, it is often necessary to seek other means of challenging the annexation. One such means is to challenge the annexation pursuant to chapter 163 of the Florida Statutes.[75] Such was the case in litigation between Orange County and the City of Ocoee where the county challenged the city's zoning which occurred simultaneous with the annexation. The theory of the challenge was that the zoning occurred prior to an amendment to the city's comprehensive plan, in derogation of the requirement that county zoning and subdivision regulations are in full force and effect until a municipality amends its comprehensive plan.[76] Chapter 163 affords a specific remedy for affected parties who believe that a development approval by a local government is inconsistent with a comprehensive plan.[77] The theory in that particular case was that the act of rezoning the property without getting a comprehensive plan amendment was an act by the city that was in derogation of the county's comprehensive plan.

The annexation statute expressly defines "parties affected" as those persons or firms owning property in, or residing in either a municipality proposing annexation or contraction, those persons owning property proposed for annexation to a municipality, or any governmental unit with jurisdiction over the area proposed for annexation.[78] Interestingly, the term "parties affected" defined by the statute does not include residents of the unincorporated areas, many of whom are often most impacted by the annexation and ensuing

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74. Campbell v. Vetter, 392 So. 2d 6, 8 (Fla. 4th Dist. Ct. App. 1981). In so holding, the court noted that it was not within the court's purview to reweigh the evidence. The burden of proof falls upon the entity objecting to the annexation. Gillete v. City of Tampa, 57 So. 2d 27 (Fla. 1952).

75. *See* FLA. STAT. § 163.3171 (1995) (stating that a municipality may not exercise jurisdiction over unincorporated areas unless the property is the subject of an interlocal agreement between the annexing city and county and meets certain specific statutory requirements).

76. *See id*. § 171.062(2) (stating that county zoning and subdivision regulations remain in effect until "the municipality adopts a comprehensive plan amendment that includes the annexed area"); *cf*. FLA. STAT. § 171.062 (1991) (stating that the zoning and subdivision regulations would remain in effect "until the area is rezoned by the municipality to comply with its comprehensive plan").

77. *See* FLA. STAT. § 163.3215 (1995) (providing that an adversely affected party must seek injunctive relief to prevent development inconsistent with a comprehensive plan); *see also* Leon County v. Parker, 566 So. 2d 1315 (Fla. 1st Dist. Ct. App. 1990) (requiring that a verified complaint be filed with the local government as a condition precedent to filing suit pursuant to section 163.3215(4) of the Florida Statutes).

78. FLA. STAT. § 171.031(5) (1995).

development.[79]

The experience in Orange County is that the absence of this category of persons has sometimes resulted in the county government acting as a type of private attorney general representing the interest of those unincorporated residents who are impacted by the annexation.

THE JOINT PLANNING AREA AGREEMENT IN FLORIDA

The joint planning area agreement, in its simplest terms, is a contract between a city and county which spells out the specific terms and provisions of annexation in that county. One of the most important components of this agreement is laying out a given area that will be a candidate for future annexation by the municipality, pursuant to the terms and conditions of the joint planning area agreement and general law, and any special acts and charter provisions.[80] Conflicts in the annexation are inevitable because many urban counties are now akin to "super cities" that provide urban services. The result is that these super cities are competing with other cities for utility customers. Because an overhaul of the legislative framework for annexation may not be realistic, one of the best approaches for avoiding conflicts is the promulgation of joint planning area agreements between counties and cities. Orange County has entered into two such joint planning area agreements. One is with the City of Ocoee and the other is with the City of Orlando. Both of these were spawned by annexation litigation and were the settlement device for those lawsuits.[81]

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79. Residents of unincorporated areas who may be affected by the annexation are apparently not deemed parties affected under the statute. These individuals have certain interests in the annexation involving issues of service provisions, urban spill-overs, fiscal affairs, and political arrangements. *See* FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, ANNEXATION IN FLORIDA: ISSUES AND OPTIONS 84-2, at vii (1984). While such individuals may not have standing to challenge the annexation per se, they frequently have standing to challenge rezoning of the annexed property.

80. There is statutory authority for these types of agreements pursuant to section 163.3171 of the Florida Statutes. *See also* FLA. STAT. § 163.3177(h) (requiring that the intergovernmental coordination element of the comprehensive plan have "procedures to identify and implement joint planning areas, especially for the purposes of annexation").

81. See Orange County v. City of Ocoee, CI93-245, Division 34 and Orange County v. City of Orlando, CI-94-1947 and CI-94-2388. Another excellent measure to avoid conflicts between local governments is to set up a multi-jurisdictional board such as has been done in Volusia County, Florida via its charter which created an entity known as the "Volusia Growth Management Commission."

In formulating a joint planning area agreement in Florida, one of the most important aspects is to carve out water, wastewater, and reclaimed water service areas for the service providers.[82] This will often go a long way to avoiding disputes because it allows the customer base issue to be decided early. This will also allow the city and county to plan properly for their infrastructure needs for these types of services.

The extent to which future areas to be annexed will impact fire and police services should also be taken into account.[83] In particular, if there is any type of a "white elephant," like a fire station or other capital facility that was intended to service county residents, but becomes surrounded by the city, provisions should be made in the joint planning area agreement to sell this to the annexing entity at a certain point. In the case of the Orange County/City of Orlando Joint Planning Area Agreement, a formula was arrived at whereby the city would contract with the county for fire delivery to the annexed areas up to a certain population level.[84] Once that population threshold was reached, the city would then be required to purchase a county fire station in the annexed area and take over the service delivery requirement.

The fiscal impacts of annexation should also be considered and the risk should be allocated between the city and county.[85] In the case of the City of Orlando/Orange County Joint Planning Area Agreement, a formula was reached for sharing public service tax revenue. In particular, in the case of annexation of properties of over 100 acres, the city is required to share a certain percentage of the public service tax revenue with the county.[86] The county and city created a formula whereby they will mutually agree upon which projects that are of benefit to the city and county so that funding will be

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82. There exists companion water and wastewater utility territorial agreements between: (1) Orange County and Ocoee; and (2) Orange County and Orlando.

83. This is especially important in urban counties where there are multiple police and fire providers.

84. Section 12 of the Joint Planning Area Agreement between Orange County and Orlando called for the city to buy a fire station servicing the annexed area at such time as the revenues that would be generated if the ad valorem tax and the MSTU rate that were levied against the annexed properties exceeded the operating costs of the fire station.

85. *See generally* WILKES, *supra* note 42; Schluckebier, *supra* note 44.

86. *See* Section 13 of the Joint Planning Area Agreement between Orange County and the City of Orlando (1994).

through shared monies.[87]

It is very important to specifically address use of rights of way, maintenance of rights of way, and the obligation to annex rights of way and attendant drainage areas.[88] In the case of the City of Orlando/Orange County Joint Planning Area Agreement, the city is required to annex any right of way over 500 feet if the area on both sides of that right of way has been annexed into the city.[89]

National Pollutant Discharge Elimination System ("NPDES") permitting requirements should also be addressed.[90] In particular, it should be made clear that the city will take on the obligation for NPDES permitting in those areas that are annexed. To the extent that drainage basins cross jurisdictional boundaries, it is also highly beneficial to have some type of a joint drainage agreement in place along with the joint planning area agreement.

A conflict resolution mechanism is another key element of the joint planning area agreement.[91] In the case of the Orlando/Orange County Joint Planning Area Agreement, the East Central Florida Regional Planning Council was identified as the mediation group to resolve future disputes between the two parties. In particular, that entity was to be consulted in the event that either party had a dispute with respect to the interpretation of the joint planning area agreement, along with any other disputes.[92]

There should be a disclaimer for third party beneficiaries in the agreement so that it is clear that third party property owners do not have a cause of action against the city or county based upon an interpretation or use of the joint planning area agreement.

A statement that the agreement is valid and enforceable is important to dispel argument that the governing bodies are without authority to contract away their approvals in a joint planning area

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87. *Id*. The author notes that not all jurisdictions may have a public service tax in place as in Orange County.

88. *See supra* note 60.

89. *See* Section 10 of the Joint Planning Area Agreement between Orange County and the City of Orlando which addresses both maintenance and condemnation (1994).

90. *See generally* 33 U.S.C. § 1311 (1994 & Supp. I 1996).

91. An example of this can be found in the Joint Planning Area Agreement between Orange County and Ocoee which creates a Planning Advisory Council comprised of representatives of both local governments (1994).

92. *See* Section 15 of the Joint Planning Area Agreement between Orange County and Orlando (1994).

agreement.[93] A related covenant is that the local governments will enforce the agreement in any judicial administrative or appellate proceedings.

To the extent that the city may create some type of a community development district, the county may want to address this point in the joint planning area agreement. The goal would be to exculpate the county from any liability in connection with a failed community development district.[94]

It is desirable that the agreement address any decisions by the parties to support some type of special act that the parties deem to be mutually beneficial.[95] It may be helpful to actually include a draft special act as an attachment to the joint planning area agreement itself.

The joint planning area agreement should be incorporated into the intergovernmental coordination element of the respective comprehensive plans of the participating local governments. A statement that violation of the terms of the joint planning area agreement is also a violation of the respective comprehensive plans provides one device to enforce the agreement.[96] The joint planning area, which is the area proposed for future annexation, should likewise be shown on the respective future land use maps for each of the participating local governments.[97]

To the extent that some of the statutory criteria for restricting annexation, such as compactness and contiguity, may be subjective, the parties may want to spell out objectively what characteristics

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93. There should also be language in such a covenant stating that the joint planning area agreement has been fully delivered, that the parties have authority to execute the agreement, and that the agreement has been validly approved.

94. This is particularly important if the creation of the Community Development District is called for in the annexation agreement between the landowner and the annexing jurisdiction.

95. An example is a reference in the early drafts of Joint Planning Area Agreement between the City of Orlando and Orange County which mentioned a special act to eliminate enclaves. The author notes that any type of special act which has the effect of taking away the right of the landowner to make the annexation decision promises to be highly controversial.

96. This is one of the most effective mechanisms for enforcing the joint planning area agreement as it arguably implicates the remedies found in Chapter 163 of the Florida Statutes. This will help property owners weigh their options as they seek to develop their land.

97. This puts landowners on notice of what their options for development of the property are.

meet this criteria. This is particularly beneficial to a city. For example, the parties may want to define a contiguous parcel as one where at least a given percentage of the total area to be annexed is coterminous with the annexing municipality's boundaries.[98]

In this way, the contracting parties can fill in the gaps that have been created by the Florida annexation statute and provide certainty to all parties as to whether there will be an annexation challenge.

CONCLUSION

Whether it is used as a tool for property owners to obtain services in rural counties, a mechanism for cities to increase their customer base for the provision of services, a device for landowners to shop for the laws and regulations that best suit their development, or a simple way for homeowners to bring government closer to home, the experience in Florida is that the annexation business is booming. Intergovernmental coordination demands that cities and counties sit down before landowners come in with annexation proposals. It is crucial that the terms and conditions upon which annexation can occur, and most importantly, that the areas to be annexed, are determined in a logical and orderly pattern. In Florida, a well drafted joint planning area agreement provides a device to effect this intent and maximize benefits to cities, counties and property owners.

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98. Similar types of definitions were included in the Joint Planning Area Agreement between Orange County and Orlando (1994).