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ANNEXATION IN COLORADO

A. Introduction and Historical Context

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

Annexation can take place in three ways: (i) landowner petition (a contractual relationship which can be memorialized in an agreement separate from a petition); (ii) annexation election; or (iii) unilateral annexation of enclave or municipality owned land.

B. Sources of Colorado Annexation Law

1. Municipal Annexation Act of 1965: CRS 31-12-101 *et seq*.

- Basic structure unchanged today: ***one-sixth boundary contiguity*** must exist between municipality and property to be annexed;
- Petition or election process to initiate annexation;
- Findings by the municipal governing body required.
- *"No subject relating to municipal government aroused more interest or emphasis in the Committee's study than the matter of logical municipal growth through annexation. . . [p]roviding adequate urban services to ever growing unincorporated fringe areas constituted one of most important problems to Colorado municipal government . . . Annexation is recognized as an important vehicle to achieve logical urban development."*

Report of the State Wide Committee to the Governor's Local Affairs Study Commission, December 1964.

2. Poundstone I (1974): Colo. Const. Art. XX, Sec.1

- 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.

- In addition, no property located in these three counties could be annexed by Denver unless approved by a unanimous vote of all members of the Board of County Commissioners of the county in which the land is located.

- Unaffected: Denver's ability as a county to change its boundaries pursuant to Article XIV, Section 3, Colorado Constitution and C.R.S. 30-6-100.3, *et seq.,* (still requires approval by electors in the county from which land is proposed to be removed for addition to Denver). This procedure was used by Denver in 1988 to annex the site in Adams County for the Denver International Airport.

3. Poundstone II (1980): Colo. Const. Art. II, Sec. 30

- 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;

  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.

C. Basic Principles of Annexation

- **Annexation can take place in three ways:**

  - Landowner petition (a contractual relationship which can be memorialized in an agreement separate from the petition) signed by more than 50% of the landowners [*Colo.Const.Art II Sec30(1)(b)*] who own more than 50% of the land C.R.S. 31-12-107(1).

  - Annexation election, in which only landowners and registered electors in the area may vote. Colo.Const.Art II Sec. 30(1)(b); C.R.S. 31-12-107(2). Note: a few municipalities require an election for all annexations.

  - Unilateral annexation of enclave or municipally owned land: C.R.S. 31-12-106.

  "Landowner" means the owner in fee of the surface estate, not the owner of the mineral estate if severed. C.R.S. 31-12-103(6). Joint tenant landowners are counted individually. Rice v. City of Englewood, 362 P.2d 557 (Colo.1961). As are tenants in common. BOCC v. Denver, 566 P.2d 335 (Colo.1977).

- ***One-sixth boundary contiguity*** must exist between municipality and property to be annexed: C.R.S. 31-12-104(1)(a).

  - Configuration of the parcel to be annexed is not relevant to review.

  - Roads, water bodies and most government lands may be "skipped" for purposes of establishing the required contiguity. (County roads are not "county owned open space" and thus may be skipped.) BOCC v. Aurora, 62 P.3d 1049 (Colo.App.2002).

  - Existence of contiguity satisfies the "community of interest" requirement of C.R.S. 31-12-104(1)(b).

  - Prior noncontiguous annexations render subsequent annexations relying upon those annexations void ab initio. C.R.S. 31-12-104(2).

- **Annexation Impact Report**

    - Required for annexations over 10 acres, unless waived by board of county commissioners. C.R.S. 31-12-108.5.

- **Notice and Hearing**

    - Required except for enclaves [Notice only: C.R.S. § 31-12-106(1)] and municipally owned property. C.R.S. 31-12-108; 109.

- **Establishing eligibility**

    - Series/simultaneous annexation of streets, rights-of-way, etc. permitted: C.R.S. 31-12-104(1)(a); 105(1)(e).

    - No division of property held in "identical ownership," without landowner consent unless separated by a "dedicated street, road or other public way;" written consent also required to annex 20 acres or more in identical ownership valued in excess of $200,000. C.R.S. 31-12-105(1)(a&b).

    - No annexation of property for which annexation proceedings have been initiated by another municipality (more on this later). C.R.S. 31-12-105(1)(c).

    - No annexation which will detach property from a school district without written consent of the district. C.R.S. 31-12-105(1)(d).

    - No annexation to expand municipal boundaries greater than 3 miles in "any one year." C.R.S. 31-12-105(1)(e)(I).

    - Three mile plan required. C.R.S. 31-12-105(1)(e)(I).

    - Flagpole annexations must permit annexation of abutting property "under the same or substantially similar terms and conditions." C.R.S. 31-12-105(1)(e)(II).

    - If annexing a portion of a street or alley, must annex the entire street or alley. C.R.S. 31-12-105(1)(f).

- Annexation shall not deny reasonable access to landowners, easement owners or franchise owners adjoining a platted street or alley that has been annexed and is not bounded on both sides by the municipality. C.R.S. 31-12-105(1)(g).

- Power of attorney not sufficient for annexation election. C.R.S. 31-12-105(1)(h).

- Three Mile Requirements

- C.R.S. 31-12-105(1)(e) 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. See, Town of Berthoud v. Town of Johnstown, 983 P.2d 174 (Colo.App.1999) (Letting stand a district court order that "one year" was a running 12 months, but see, C.R.S. 2-4-107: "year" defined as a "calendar year."

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

- The statute does not require that the three-mile plan be adopted prior to submission of an annexation petition; instead, it must be in place "prior to completion of any annexation within the three mile area . . ."; thus, prior to final action on the annexation ordinance and recording with the clerk and recorder under C.R.S. 31-12-113(2).

- The information required for a three mile plan is relatively limited. The plan must generally describe 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 to be provided by the municipality [*not such utilities provided by others*]

This requirement can be satisfied by including a three mile plan element in the comprehensive plan. See, C.R.S. 31-23-206(1);(2). The three mile plan must be updated at least once annually.

D. Landowner Consent or Voter Approval Required

- 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 and registered electors may vote. C.R.S. 31-12-107; 112.

- 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. C.R.S. 31-12-103(6).

- 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).

- 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. C.R.S. 31-12-105(1)(h).

- In 1999, the statute was amended to limit the effective term of a power of attorney for use in an annexation petition to five years. C.R.S. 31-12-107(8).

E. Achieving Continuity: Flagpoles and Other Configurations

1. One-Sixth Boundary Requirement Generally

- 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."* C.R.S. 31-12-104(1)(a).

- C.R.S. 31-12-104(1)(a) was amended in 1987 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.

- *"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."* C.R.S. 31-12-105(1)(e).

- 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).

- The shape and size of the parcel 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 2001, C.R.S. 31-12-105(1)(e) was amended to grant certain rights to property owners abutting the proposed "pole," giving them a time-limited opportunity [90 days maximum] to be annexed along with the "flag." This opportunity exists only until forty-five days prior to the public hearing on the main annexation itself (creating some timing problems for notice and hearing if such owners elect to petition for annexation). 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 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.

- Disconnection and re-annexation to satisfy contiguity requirement is acceptable. BOCC v. Greenwood Village, supra, 30 P.3d 846@849.

2. Series/Simultaneous Annexations

- The statutory basis for series/simultaneous annexations is C.R.S. 31-12-104(1) (a), last sentence:

> Subject to the requirements imposed by C.R.S. 31-12-105(1) (e), contiguity may be established by the annexation of one or more parcels in a series, which annexations may be completed simultaneously and considered together for the purposes of the public hearing required by Sections 31-12-108 and 31-12-109 and the annexation impact report required by Section 31-12-108.5.

- Must each individual annexation in a series/simultaneous annexation be supported by an individual annexation petition? A review of the statute and case law does not support this notion. C.R.S. 31-12-107(1)(a) permits "the landowners of more than 50% of the area excluding public streets and alleys, meeting the requirements of Sections 31-12-104 and 105" to petition. The petition must allege ownership of more than 50% of the territory to be annexed, exclusive of streets and alleys." C.R.S. 31-12-107(1)(c)(III). See also, BOCC v. Aurora, supra, 62 P.3d 1049 at 1055-56, construing Colo.Const.Art.II Sec.30(1)(b).

- The impact of this distinction is significant: so long as there is some private land associated with any annexation parcel in the series, the petitioner can claim that it is the owner more than 50% of the land, exclusive of streets and alleys, with respect to the entire series/simultaneous annexation. This has permitted series/simultaneous flagpole annexations of considerable length.

- The references to annexations in the statute are often in the plural, such as "annexation of one or more parcels in a series, which **annexations** may be completed simultaneously." The references to annexation petition are in the singular, except for the heading of C.R.S. 31-12-107 itself.

- If the statute is plain and its meaning is clear, it must be interpreted as written. Casados v. City and County of Denver, 832 P.2d 1048 (Colo.App. 1992). It is only if the statute is ambiguous

that the court may look beyond the words to such things as the objects ought to be obtained, the circumstances, legislative history and consequences of a particular construction. C.R.S. 2-4-203. It appears that the statute permits a single annexation petition, by a private landowner to support a series/simultaneous annexation including multiple parcels consisting exclusively of "public streets and alleys."

F. Annexation Agreements

- Once the Council / Board of Trustees has determined that requirements of C.R.S. 31-12-104 and 105 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. C.R.S. Section 31-12-101(1)(g). No election is required if 100% of landowners petition and have agreed to the conditions.

- C.R.S. 31-12-106(4), 31-12-107(4), 31-12-111, 31-12-112(1) and 31-12-121 specifically contemplate that annexation agreements may be entered into. Such agreements are judicially enforceable. The 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).

- An annexation agreement is a contract. Terms and conditions may also be imposed by a memorandum of agreement. C.R.S. Section 31-12-112(2).

- 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; dedicate surface and nontributary groundwater.

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

- 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, C.R.S. 24-68-101, *et seq*., may impose other constraints.

G. Challenge and Enforcement

1. Statutory Requirements & Limitations

- C.R.S. 31-12-116 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.

- 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 ordinance and agreement, being concerned with a **legislative** matter, 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 municipalities within one mile). C.R.S. 31-12-116.

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

- In 1991, the legislature closed an interesting loophole created by the sixty day limitation, adding subsection C.R.S. 31-12-104(2). The new 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 sub-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 C.R.S. 31-12-105(1)(e). Town of Berthoud v. Town of Johnstown, 983 P.2d 174 (Colo. App. 1999).

- 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. C.R.S. 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." BOCC v. Aurora, 62 P.3d 1049 (Colo.App.2002).

- 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, C.R.S. 24-65.1-101 *et seq*.. 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).

2. Jurisdiction for Zoning Purposes: Resolving the 60 Day Problem

- *C.R.S. 31-12-115:* "The annexing municipality may not institute the procedure *[outlined in state statutes or municipal charter to make land subject to zoning]* nor *[outlined in its subdivision regulations to subdivide land in the area proposed to be annexed]* at any time after a petition for annexation or a petition for an annexation election has been **found to be valid** in accordance with the provisions of Section 31-12-107." (emphasis supplied.)

- C.R.S. 31-12-107(I)(f) requires prompt action on a submitted petition:

> The clerk shall refer the petition to the governing body as a communication. The governing body, without undue delay, shall then take appropriate steps to determine if the petition so filed is substantially in compliance with this subsection (1).

- A petition is "found to be valid" likely by a finding of "substantial compliance," as referenced in 31-12-107(1)(g) [*petition for annexation*] or 31-12-107(2)(e) [*petition for annexation election*], and C.R.S. 31-12-107(I)(f).

- "Substantial compliance," is in turn established by resolution under C.R.S. 31-12-108(1):

> **As a part** of the resolution initiating annexation proceedings by the municipality or of a **resolution finding substantial compliance of an annexation petition** or of a petition for an annexation election, the governing body of the annexing municipality shall establish a date, time and place that the governing body will hold a hearing to determine if the proposed annexation complies with sections 31-12-104 and 105 or such parts thereof as may be required to establish eligibility under the terms of this part one. **The hearing shall be held not less than 30 days nor more than 60 days after the effective date of the resolution setting the hearing.** (emphasis supplied.)

- Thus, under the statute, annexation and zoning may not be initiated (and, arguably, the municipality has no jurisdiction to do so) until the substantial compliance resolution is adopted. However, if that resolution must also establish a hearing within 60 days, the municipality only has that time to bring the zoning and subdivision applications to a final stage. For a large annexation this is not nearly enough.

- What to do? At latest count, there are four alternatives:

1. Set the annexation hearing, then simply keep continuing it under C.R.S. 31-12-108(3) [*after taking 1 hour of testimony*] until the land use applications catch up. This is the most common approach.

2. Act by ordinance to permit the Council to table an annexation petition for up to ____ days/months after receiving it under C.R.S. 31-12-107(1)(f) and before

adopting the resolution of substantial compliance under C.R.S. 31-12-108, all in order to, in the words of the ordinance, "enable the land use applications to be processed to a final stage." Does this really solve the jurisdictional problem? Only if the municipality may confer land use jurisdiction upon itself for property not within its boundaries, separate and apart from the jurisdiction conferred by C.R.S. 31-12-115.

3. Act by ordinance to grant the governing body such additional time as it wishes between the adoption of the resolution of substantial compliance and the date of eligibility hearing (and customary second resolution under C.R.S. 31-12-110) on the annexation itself. This still relies on the municipality having the authority to vary the terms of the statute, but does not raise the jurisdictional question, since the resolution of substantial compliance will have been adopted and jurisdiction conferred under C.R.S.31-12-115.

4. Adopt the resolution of substantial compliance under C.R.S. 31-12-108, set the hearing within the 60 day maximum, conduct the hearing and adopt the second resolution declaring the property eligible for annexation, but delay action on the annexation ordinance itself until the land use applications (and also likely the annexation agreement) have been brought to final form. This avoids the necessity of either taking a jurisdictional risk, or adopting an ordinance varying the terms of the statute. However it also means that the City Council or Board of Trustees must explain to members of the public at the "eligibility hearing," that it is not really annexing the property yet, that all of their comments, while important, are not really going to be acted on at this time.

For statutory municipalities, options 2 and 3 are not available.

3. Movement of Agriculture Vehicles and Equipment

- C.R.S. 31-12-115(6), added in 2004, prohibits the adoption or enforcement of any restriction on rights-of-way within the annexed area if the same have been customarily or regularly used for "movement of any agricultural vehicles and equipment," to the extent such use is in existence at the time of annexation, and for the period the land remains in that use.

- Zoning of the annexed area for other than agricultural uses does not affect the restriction.

- Notice to adjacent property owners is required 30 days prior to adoption of an ordinance or regulation "affecting the right-of-way."

- Significantly, municipalities are permitted to adopt and enforce traffic regulations that are "consistent with the customary or regular use of the right-of-way or are necessary for the safety of vehicular and pedestrian traffic . . ."

4. Conflicting Annexation Claims of Two or More Municipalities

- C.R.S. 31-12-114 governs the procedure for resolving these claims. Subsection (1) provides:

> At any time during a period of notice [of the annexation hearing] given by a municipality pursuant to section 31-12-108, any other municipality may adopt a resolution of intent pursuant to section 31-12-106 or receive a petition for annexation or a petition for an annexation election pursuant to section 31-12-107 with the area partly or wholly overlapping the area proposed for annexation by the first municipality. If this occurs, the respective rights of the several municipalities shall be determined in accordance with an election as provided in this section.

- For the rather complicated definition of when proceedings for annexation have been "commenced," see C.R.S. 31-12-105(1)(c), stating that no annexation under C.R.S. 31-12-106 or C.R.S. 31-12-107:

> *". . . shall be valid when annexation proceedings have been commenced for the annexation of part or all of such territory to another municipality, except in accordance with the provisions of section 31-12-114. For the purpose of this section, proceedings are commenced when the petition is filed with the clerk of the annexing municipality or when the resolution of intent is adopted by the governing body of the annexing municipality if action on the accepting of such petition or on the resolution of intent by the setting of the hearing in accordance with section 31-12-108 is taken within 90 days after the said filings, if an annexation procedure initiated by petition for annexation is then completed within 150 days next following the effective date of the resolution accepting the petition and setting the hearing date and if an annexation procedure initiated by resolution of intent or by petition for*

an annexation election is prosecuted without unreasonable delay after the effective date of the resolution setting the hearing date."

- Once it is determined that there are conflicting annexation claims, C.R.S. 31-12-114(2) provides that proceedings for annexation by both municipalities are "held in abeyance pending the holding of an election of the qualified electors resident within such area or as described in subsection (4) of this section . . . "

- The second municipality is obliged to petition the district court for the election. The petition must be filed within 30 days after the second municipality's resolution of intent or the date of the filing of the petition for annexation with the second municipality. Note: the date of filing of the petition will generally control, and this is underscored by C.R.S. 31-12-105(1)(c), unless it is annexation of an enclave or municipally owned land under C.R.S. 31-12-106.

- At the election, "qualified electors and qualified nonresident landowners" in the area claimed by both municipalities may vote. A likely "qualified nonresident landowner" would be the Colorado Department of Transportation, when a series/simultaneous annexation relies on segments of state highway. CDOT typically will not sign annexation petition; it is unlikely it would vote in an election under C.R.S. 31-12-114. If the overlap area consists solely of CDOT right-of-way, the election may result in a tie (0 to 0), in which case the court must order both annexations void, barring both municipalities from continuing with the current annexation proceedings insofar as they relate to such disputed area." C.R.S. 31-12-114(6).

- Where the disputed area has less than two-thirds boundary contiguity with either municipality, the electors get two questions: for or against annexation, and for annexation to [*municipality 1*] or [*municipality number 2*].

- If less than 2/3 boundary contiguity, question 2 only.

- The election is decided by a majority of votes cast, except a three-quarters majority vote is required to defeat annexation to a municipality with more than two-thirds boundary contiguity of the total area proposed for annexation or the disputed part thereof. C.R.S. 31-12-115(9).

- Unless the area of overlap is more than one-third of the area proposed for annexation (inclusive of streets) to the first municipality, either municipality may proceed to annex the area not claimed by the other without waiting for the election. C.R.S. 31-12-115(10).

- Proceedings by one municipality to challenge the annexation of another where there are conflicting annexation claims are exclusively governed by C.R.S. 31-12-116. City & County of Denver, et al. v. Jefferson County District Court et al., 509 P.2d 1246 (Colo.1973); Berry Properties v. City of Commerce City, 667 P.2d 247 (Colo. App. 1983).

- No such suit may be brought prior to "the effective date of the annexing ordinance by the annexing municipality." C.R.S. 31-12-116(1)(a). This means that municipalities claiming the same territory must proceed through the annexation election process under C.R.S. 31-12-114 before commencing a challenge against each other, on whatever basis (including other defects in the annexation process).

- Of course, C.R.S. 31-12-116(2)(a)(II) continues to apply, requiring a motion for reconsideration within 10 days of the effective date of the ordinance finalizing the challenged annexation.

TIMELINE AND PROCESS FOR ANNEXATION

The process for annexation of property showing the time frame for accomplishing the various requirements for an annexation under the Municipal Annexation Act, C.R.S. § 31-12-101, *et seq*.

Date	Action Required
	Petition for Annexation ("Petition") signed and submitted. Petition referred to Council by City/Town Clerk.
	Send notice by regular mail to landowners abutting the annexed road, advising of their right to petition for annexation on "the same or similar terms and conditions." C.R.S. § 31-12-105(1)(e.3).
1	City/Town Council adopts Notice of Public Hearing ("Notice") and Resolution of Intent to Annex ("Resolution of Intent"), Finding Substantial Compliance, and Setting Annexation Hearing.
3	Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).
10	Send a copy of the Notice, Resolution of Intent and Petition to the Board of County Commissioners, County Attorney, and any special districts and school districts serving the area proposed to be annexed. C.R.S. § 31-12-108(2).
10	Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).
10	City/Town begins preparation of Annexation Impact Report ("AIR") for filing with the Board of County Commissioners, pursuant to C.R.S. §31-12-108.5, unless the Board of County Commissioners waives the requirement, or the property to be annexed is ten acres or less. **].** The impact report must include the following:

1. A map or maps of the City/Town and adjacent territory, showing:
    a. Present and proposed boundaries of the City/Town in the vicinity of the annexation;
    b. The present streets, major trunk water mains, sewer interceptors and outfalls, other utility lines and ditches, and the proposed extension of streets and utility lines in the vicinity of the proposed annexation;
    c. The existing and proposed land use pattern in the areas to be annexed.
2. A copy of any draft or final annexation agreement.
3. A statement setting forth the plans of the City/Town for extending to or otherwise providing for, within the area to be annexed, municipal services performed by or on behalf of the municipality at the time of annexation.
4. A statement setting forth the method under which the City/Town plans to finance the extension of the municipal services into the area to be annexed.
5. A statement identifying existing districts within the area to be annexed.

6. A statement on the effect of annexation upon local-public school district systems, including the estimated number of students generated and the capital construction required to educate such students.

15 File AIR, if required, with the Board of County Commissioners.

17 Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).

24 Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).

30 Request certificate of publication from owner, manager or editor of newspaper. Add certificate to the record at annexation hearing. C.R.S. § 31-12-108(2).

35 City/Town Council conducts public hearing on annexation petition. C.R.S.§ 31-12-109.

35 After hearing, pursuant to C.R.S. § 31-12-110, City/Town Council adopts a resolution identifying findings of fact.

35 After hearing City/Town Council adopts Ordinance Approving Annexation. C.R.S. § 31-12-113.

35 After hearing City/Town Clerk signs Certificate of Annexed Plat.

36 Original Annexation Ordinance and one copy of the annexation map filed in the office of the City/Town Clerk. C.R.S. § 31-12-113(2)(a)(I).

36 Three certified copies of the annexation ordinance and map, containing a legal description, filed for recording with the County Clerk and Recorder. C.R.S. § 31-12-113(2)(a)(II)(A).

36 Effective date of Annexation. C.R.S. § 31-12-113(2)(b).

40 County Clerk and Recorder files one certified copy of the annexation ordinance and map with the Division of Local Government of the Colorado Department of Local Affairs. C.R.S. 31-12-113(2)(a)(II)(B).

40 County Clerk and Recorder files one certified copy of the annexation ordinance and map with the Department of Revenue. C.R.S. 31-12-113(2)(a)(II)(B).

Enclave Annexations:

Piece by Piece, the Granby Case

What is an enclave annexation?

- According to C.R.S. § 31-12-106, when an unincorporated area has been "entirely contained" within the boundaries of a municipality for at least three years, the municipality may annex the property without regard to the eligibility requirements in C.R.S. § 31-12-104, the limitations in C.R.S. § 31-12-105, or the hearing requirements of C.R.S. § 31-12-109.

- § 31-12-104 Eligibility requirements
  - Contiguity
    - (but see (c) "contiguity is hereby declared to be a fundamental element in any annexation")
  - Community of interest
- § 31-12-105 Limitations
  - (a) Cannot split land held in "identical ownership" (same landowner) regardless of number of parcels
  - (b) Annexing land in identical ownership of more than 20 acres and improvements with an assessed value in excess of $200,000 without consent of landowner
  - (c) Restricts annexation of land already in process of being annexed
  - (d) Restricts annexation which results in detachment of area from any school district without school district board's approval
  - (e) Restricts annexations which extend a municipal boundary more than three miles in any one direction from any point of such municipal boundary in any one year
- § 31-12-109 Hearing requirements
  - No hearing is required for an enclave annexation
  - However, Notice of the annexation under C.R.S. § 31-12-108(2) is still required. Notice is of meeting at which annexation ordinance is to be considered, not notice of an annexation hearing, per se.

Other relevant statutes

- § 31-12-106(1.1)
  - (a) No enclave may be annexed pursuant to this section if any boundary of the enclave consists, at the time of annexation, of only a public right-of-way. Municipality must truly surround the enclave.
  - (b) and (c). Where enclave annexation involves more than 50 acres and 100 residents (according to most recent census), C.R.S. § 31-12-106(1.1)(b) and (c) creates a somewhat complicated committee process.
  - Must create an "annexation transition committee," a nine member committee appointed by municipal governing body representing residents, owners and the county, to "communicate" with the municipality concerning the annexation.
- § 31-12-108.5
  - Enclave annexations still must comply with impact report requirements.
- § 31-12-107(5)
  - A private owner may force an enclave annexation
  - First must petition for annexation
  - If not done within year, owner may file action for a mandamus in district court and recover attorney fees from municipality

Granby and Annexations

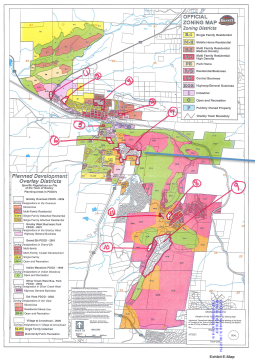
- Granby has historically been active in annexation
- Expanded Town drastically via annexations since 2003
- Town was approximately 1000 acres, now well over 7000 acres

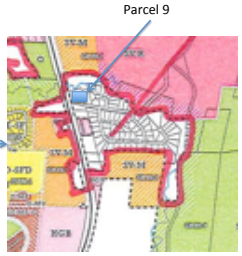
Granby and Marijuana Establishments

- November 2010 - the Granby electors voted to exclude medical marijuana facilities from within the Town
- May 2014 - Board of Trustees held hearing and adopted ordinance prohibiting recreational marijuana facilities within the Town.

County Application

- October 16, 2014, Town notified by the county that two Retail Marijuana License Applications (retail and cultivation facilities) were received for a parcel of land that was unincorporated within Grand County, but entirely surrounded by lands within the Town

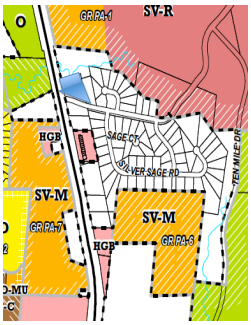




Board did not want to annex entire unincorporated area for two reasons

(1) Residents within the area had expressed desire not to be annexed

(2) "Annexation transition committee" (C.R.S. § 31-12-106(1.1)(b) and (c)) would delay annexation. Time of the essence as county was to review application in December



Can an enclave consist of less than the entire area that is surrounded by the municipality?

Alternatively,

is 100% contiguity required for an area to properly be deemed an enclave?

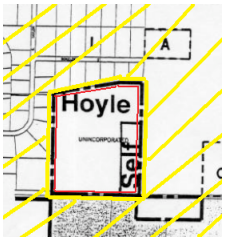
- **Enclave annexation defined:**
- Colorado Constitution. Article II, Section 30
  - No unincorporated area may be annexed to a municipality unless one of the following conditions first has been met:

    ….

    (c) The area is **entirely surrounded by** or is solely owned by the annexing municipality
- C.R.S. § 31-12-106(1)
  - Annexation of enclaves. When **any** unincorporated **area** is **entirely contained within the boundaries of a municipality**, the governing body may by ordinance annex such territory …
- C.R.S. § 31-12-103(4) (Definitions)
  - (4) "Enclave" means an unincorporated **area** of land **entirely contained within the outer boundaries** of the annexing municipality

Hoyle v. City of Louisville, 2002 CV 1228 (Boulder District Court)

- Owners petitioned to force enclave annexation
- Louisville, on MSJ, argued Owners' land did not constitute an enclave because it "adjoins and is contiguous with property located in unincorporated Boulder County" the property lacks the crucial requirement as it is not "entirely contained" within the limits of the City



Court Held

- "Prior to its deletion in 1997, a petition pursuant to § 31-12-106(2) did not involve eligibility requirements of § 31-12-104, but only if the annexation area 'had more than two-thirds boundary contiguity with the annexing municipality for a period of not less than three years'"
- Instead of two-thirds contiguity requirement, the current statute refers only to an area "entirely contained" within the boundaries of a municipality
- City's interpretation implies that 100% contiguity, rather than 2/3rds, is now required
- Holding: There is no requirement for contiguity within the plain meaning of "entirely contained within"

C.R.S. § 31-12-105 (c)(Limitations)

- "No annexation pursuant to section 31-12-106… shall be valid when annexation proceedings have been commenced for the annexation of part or all of such territory to another municipality"

Town Acts

- Based on *Hoyle*, legislative history, statutory language, and the Town electors' and Town Board's decisions to exclude marijuana from their community, the Board decided to move forward with enclave annexation of Parcel 9
- Published notice to consider adoption of an emergency ordinance annexing enclave at its meeting December 9, 2015
- "Emergency" for timing reasons

Injunction and Preliminary Hearing

- Property owner and business owner filed case seeking declaratory and injunctive relief on November 28, 2014
- December 2, 2014, served notice of preliminary injunction hearing to be held December 5, 2014
- Asserted:
  - Lot 9 is not an enclave under Constitution or statutes
    - Property surrounding parcel is not part of municipality
  - No contiguity existed as required by § 31-12-104
  - Acting in bad faith by targeting business

Preliminary injunction shortcomings

- "Any ordinance accomplished in accordance with the provisions of this part 1 shall not be directly or collaterally questioned in any suit, action, or proceedings, except as expressly authorized in this section." § 31-12-116(4)
  - Improper Timing. § 31-12-116(1)(a) "in no event shall [judicial review] be instituted prior to the effective date of the annexing ordinance by the annexing municipality"
    - Not even passed yet, much less recorded
  - Lack of Standing. § 31-12-116(1)(a) and case law explicitly state that right of review of annexation is limited to landowners and registered electors in the area proposed to be annexed, in addition to the county or municipalities within one mile.
    - Business owner only had a leasehold interest
  - No Motion for Reconsideration. § 31-12-116(2)(a)(II). Any party wishing to review an annexation must file a motion for reconsideration with the governing body within ten days of the effective date of the ordinance finalizing the annexation. Jurisdictional precondition to right to obtain judicial review.

Subsequent Events

- After this was brought to their attention, opposing counsel vacated preliminary injunction hearing.
- Although not required, Board of Trustees permitted public comment regarding the issue at its December 9, 2014, meeting.
- Annexation Ordinance passed unanimously.
- December 17, 2014- Landowner submitted its motion to reconsider
- December 19, 2014- Discussions with opposing counsel regarding Town's motion to dismiss. Opposing counsel stated they intended to amend their pleadings. Moments later dismissed the matter without prejudice. Informed us intended to re-file matter.

Action Barred

- All actions to review the findings and decisions of the governing body regarding annexations must be brought within 60 days after the effective date of the ordinance. Otherwise "forever barred." C.R.S. § 31-12-116(2)(a)(I)
- 60 day period passed without incident

Conclusions

Still undecided by Colorado Appellate Courts, but likely outcome would permit annexation of less than all the area surrounded by your municipality