

12-1-2012

North Carolina's Annexation Wars: Whys, Wherefores, and What Next

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NORTH CAROLINA'S ANNEXATION WARS: WHYS, WHEREFORES, AND WHAT NEXT*

JUDITH WELCH WEGNER**

North Carolina has long been viewed by those around the country as having very beneficial state municipal annexation laws. Many other states have envied North Carolina's provisions for "satellite" annexation (a means for bringing areas at a distance from existing municipal boundaries within municipal jurisdiction based on voluntary petitions) and "involuntary" annexation (a means for municipalities to initiate steps to bring contiguous areas within municipal boundaries based on their "urban character" notwithstanding property owners' disinclination to be annexed).

In the past few years, North Carolina has witnessed significant "annexation wars," by which property owners have tried to encourage the General Assembly to gut the state's involuntary annexation laws and sharply limit the viability of "forced" municipal annexation. During the 2011 and 2012 legislative sessions, private parties opposed to prior involuntary annexation laws prevailed in persuading the General Assembly to significantly curb the ability of the state's municipalities to annex contiguous areas without the agreement of affected property owners, notwithstanding efforts by the state's municipalities to oppose such changes.

This Article initially proposes an approach to understanding municipal annexation that is rooted in an appreciation for local government ecology (including the powers and relationships of counties, municipalities, special districts, and homeowners' associations), rather than simply treating

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annexation as a matter of municipal boundary change. The Article then explicates the historical understandings of the law of municipal annexation in North Carolina and pressure points for change over the last decade.

The Article next analyzes statutory changes in North Carolina's municipal annexation law that occurred during the 2011 and 2012 sessions of the state's General Assembly. It then turns to key questions raised by these statutory revisions and explores possible ambiguities regarding delivery of public water and sewer services, growth management, and land use regulation.

The Article then identifies three areas in which the recent annexation changes may implicate local government ecology in North Carolina: possible tensions between "old" and "new towns" and related fragmentation of local government; town-county tensions; and relationships between general purpose governments and specialized service providers.

The Article concludes by suggesting areas worthy of attention in the future, including changes in the state's annexation law that may affect delivery of public water and sewer services by municipalities, implications for land use regulation and growth management, and potential shifts in local government ecology (including fragmentation of local government power, increasing tensions between towns and cities, and growth in special districts and other alternative service providers).

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INTRODUCTION

North Carolina has long been touted as one of the nation's most progressive states in terms of providing municipal governments with opportunities to extend their corporate boundaries.¹ Because North Carolina has historically allowed "involuntary" annexation at the discretion of local municipalities, such municipalities have been able to expand their territories, gain favorable debt finance ratings, and enhance their tax bases more readily than many municipalities in other parts of the country.²

In the last few years, North Carolina citizens affected by involuntary annexation initiatives have risen in protest and brought a number of lawsuits to challenge these municipal actions.³ They have also engaged in grassroots organizing and voiced their displeasure to the North Carolina General

1. See DAVID RUSK, CITIES WITHOUT SUBURBS: A CENSUS 2000 UPDATE 17–22 (3rd ed. 2003).

2. See DAVID RUSK, ANNEXATION AND THE FISCAL FATE OF CITIES 11, 16–20 (2006).

3. For collected information on efforts to bar involuntary annexation in North Carolina, see generally *Annexation News*, STOP NC ANNEXATION COALITION, http://www.stopncannexation.com/annexation_news.htm (last visited Nov. 16, 2012).

Assembly.⁴ The General Assembly in turn created a Special Legislative Study Committee on Municipal Annexation that met and held hearings from 2008–2009.⁵ During the 2009 and 2010 legislative sessions, the General Assembly considered related recommendations and numerous bills. In 2010, a substantial annexation reform bill passed the House but died in a Senate committee.⁶ Thus, the stage was set for North Carolina's "annexation wars," a contentious showdown between municipalities and their supporters, who sought to preserve the option for municipalities to initiate annexations of contiguous land with "urban" character, and individual property owners and rural supporters, who sought to restrict municipal expansion by substantially curbing cities' longstanding annexation powers.

In 2011, the North Carolina General Assembly adopted significant changes in North Carolina's longstanding annexation

4. *Id.*

5. Studies Act of 2008, ch. 181, § 46.1, 2008 N.C. Sess. Laws 723, 752. The Joint Legislative Study Commission on Municipal Annexation was directed to examine issues relating to:

- (1) State law governing involuntary annexation, voluntary annexation by petition, and voluntary satellite annexation;
- (2) Municipal compliance with current annexation procedural standards;
- (3) Provision of services to persons in areas subject to annexation;
- (4) The effect of creation of an independent review procedure for municipal annexation decisions;
- (5) Current standards for judicial review and appeal of municipal annexation decisions;
- (6) The impact of current annexation law on municipalities and the State as a whole;
- (7) Whether the State's current annexation law should be amended; and
- (8) Any other issue related to annexation deemed relevant by the Commission.

Id. § 46.3, 2008 N.C. Sess. Laws at 753. The Commission was directed to report to the General Assembly's 2009 legislative session. The author of this Article served as a member of the Special Committee and the Joint Commission.

6. See H.B. 524, 2009 Gen. Assemb., Reg. Sess. (N.C. 2009). The bill was passed by the House on July 23, 2009, and was then delivered to Senate which referred it to the Senate Finance committee on May 12, 2010. The bill was then re-referred to Senate Committee on Rules on May 17, 2010. See *House Bill 524*, N.C. GEN. ASSEMBLY, <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=h524&submitButton=Go> (last visited Nov. 16, 2012) [hereinafter *House Bill 524 History*].

laws.⁷ Notwithstanding firm opposition by the North Carolina League of Municipalities,⁸ the General Assembly effectively eviscerated longstanding statutory provisions that allowed municipalities to engage in involuntary annexation of contiguous property.⁹ The General Assembly also adopted legislation designed to “roll back” annexation provisions that had been adopted prior to the recent statutory change,¹⁰ resulting in substantial costs to municipalities that had proceeded with steps to implement prior annexation decisions and successful litigation by those municipalities, which challenged the legislation on state constitutional grounds.¹¹ During the 2012 legislative session, the General Assembly responded by expressly de-annexing the affected territories and prohibiting their reannexation for a period of at least twelve years.¹² In addition, the General Assembly further curbed involuntary annexation by substituting a referendum process for the remonstrance process that it had adopted in 2011.¹³

These changes in North Carolina’s annexation laws are important for several reasons. They reflect a substantial shift in the balance of influence in the General Assembly, as municipal

7. Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (codified as amended at scattered sections of N.C. GEN. STAT. ch. 160A (2011)).

8. *Issue: Annexation*, N.C. LEAGUE OF MUNICIPALITIES, <http://www.nclm.org/SiteCollectionDocuments/Legislative/2012%20Issue%20Sheets%20and%20MAG/Annexation%20Issue%20Brief%202012.pdf> (last visited Nov. 16, 2012) (detailing opposition to the 2011 changes). The NCLM endeavored to guide legislation toward procedural reforms, but was unsuccessful. *See Annexation Keeps North Carolina Moving Forward, Fairly*, N.C. LEAGUE OF MUNICIPALITIES, <http://www.nclm.org/SiteCollectionDocuments/Legislative/AnnexationFactSheet.pdf> (last visited Nov. 16, 2012) (discussing the NCLM’s position on annexation); *Memorandum Re: Additional Major Changes to the Annexation Laws*, N.C. LEAGUE OF MUNICIPALITIES, <http://www.nclm.org/SiteCollectionDocuments/Legislative/2012%20Legislative%20Memos/2012%20--%20Annexation.pdf> (last visited Nov. 16, 2012) (detailing the most recent changes to annexation legislation). The author of this Article expressed views regarding annexation policy and legislative strategies in connection with the NCLM’s efforts at advocacy, but did not necessarily agree with all positions taken by the NCLM’s leadership.

9. *See* Act of June 18, 2011, ch. 173, §§ 1–2, 2011 N.C. Sess. Laws 668, 668–69, *repealed by* Act of May 30, 2012, ch. 3, § 5, 2012-1 Adv. Legis. Serv. 5, 5 (LexisNexis); Act of June 18, 2011, ch. 177, §§ 1, 3, 2011 N.C. Sess. Laws 680, 680–82, *repealed by* Act of May 30, 2012, ch. 3, § 5, 2012-1 N.C. Adv. Legis. Serv. 5, 5 (LexisNexis).

10. *See infra* notes 241–67 and accompanying text.

11. *See infra* notes 242–50 and accompanying text.

12. *See* Act of May 30, 2012, ch. 3, §§ 2–4, 2012-1 N.C. Adv. Legis. Serv. 5, 5 (LexisNexis).

13. *See* Act of May 30, 2012, ch. 11, § 1, 2012-1 N.C. Adv. Legis. Serv. 25 (LexisNexis).

concerns were put aside in favor of those of individual property owners.¹⁴ They also significantly curtail a major tool that has kept North Carolina municipalities in good financial health when those in other states have flagged. Finally, they pose critical questions for the future regarding the provision of water and sewer services, growth management, and local government ecology. This Article accordingly provides a case study of the changing balance of influence and endeavors to identify and address questions that are likely to arise in the future as a result of the recent statutory changes.

The Article contends that, although annexation (the process of expanding municipal corporate boundaries) is often addressed in isolation, the process is better understood as but one dynamic within the ecology of local governmental and quasi-governmental activities. The Article therefore rejects the recent view that annexation should primarily be viewed as a quid pro quo through which municipal services are delivered in return for the payment of municipal property taxes. Viewing annexation in this kind of ecological context opens up a more neutral inquiry and permits a more clear-eyed view of related dynamics that includes municipal incorporation, the use of extraterritorial planning jurisdiction strategies, the creation and management of special districts, alternative means of service delivery, and the role of gated communities, all of which are touched on below.

Part I explains traditional views of annexation and the role of annexation within the ecology of local government in order to lay the groundwork for understanding the consequences of significant cutbacks in North Carolina's involuntary annexation authority. Part II then traces the history of North Carolina's annexation law, articulates themes evident from recent case law, and highlights the important provisions of the 2011 and 2012 annexation legislation. Part III turns to the implications of these legislative changes, focusing on the way ahead for local water and sewer infrastructure extensions, land use regulation, and local government fragmentation.

This Article contends that North Carolina's recent legislation will make involuntary annexation much more difficult, resulting

14. See Ann O'M. Bowman & Richard C. Kearney, *Are U.S. Cities Losing Power and Authority? Perceptions of Local Government Actors*, 48 URB. AFF. REV. 528, 539-41 (2012) (documenting perceptions of city managers about loss of cities' powers and contrasting views of state legislators).

in new pressures relating to provision of public water and sewer services that will likely be felt most by the state's smaller communities and their residents, who will potentially face higher rates. Voluntary annexation will likely increase as municipalities condition water and sewer extensions on agreements to accept annexation. This Article also suggests that greater attention should be given to linking land use regulation to annexation policies and advocates more widespread use of intergovernmental agreements relating to growth management. Finally, the Article suggests that the recent changes are likely to result in greater fragmentation in the delivery of governmental and quasi-governmental services, a matter deserving further study.

I. CONCEPTUALIZING ANNEXATION

This Part provides an overview of the role of annexation and the different frameworks for evaluating legal systems relating to annexation. It first discusses conventional understandings of annexation as municipal "boundary change" and then proposes a more comprehensive approach that treats annexation as one dynamic within the ecology of local governance (encompassing counties, municipalities, special purposes entities, and quasi-private entities such as homeowners' associations).

A. *Annexation as Boundary Change*

Often, annexation is considered in isolation as a system of boundary change that operates within certain standard parameters (i.e., which municipalities can annex, what criteria apply, what consequences result, what standards guide decision-making, and what procedural protections apply). These questions are indeed important ones that are reflected in statutory regimes in North Carolina and elsewhere. This conventional approach to annexation is an appropriate place to begin in order to understand the recent changes in North Carolina law.

Traditionally, annexation has been understood as a system for changing governmental boundaries.¹⁵ Such extensions bring associated territory within the corporate limits of the municipality. In some states, including North Carolina prior to the 2011 amendments, different criteria or procedures for annexation have applied depending on the population or other characteristics

15. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV 1115, 1117 (1996).

of the involved municipalities.¹⁶ Typically, two major types of policy justifications have driven annexation decisions and related statutory provisions governing such decisions insofar as they relate to municipalities.

On one hand, municipal annexation is designed to allow local governments to expand their boundaries to include “urbanized” or “urbanizing” areas, either because there is an expressed desire to bring land within those boundaries (typically by virtue of a voluntary petition by a developer or other landowners) or because there is a perceived need for more extensive services typically desired by urban populations (often allowing a municipality itself to be the judge by virtue of statutory criteria defining “urbanization” or “urban characteristics”).¹⁷

On the other hand, municipalities are often authorized to annex “contiguous” territory. Often, it is presumed that there is a “community of interest” that connects adjacent territory with areas already falling within municipal jurisdiction. It is also best to avoid fragmentation in the delivery of governmental services or governmental regulation among nearby territories in order to assure efficiency and consistency.¹⁸ Moreover, those living or working in areas that are adjacent to existing municipalities are often thought to benefit from municipal services in associated areas or to burden municipal areas by tapping into municipal services even without living or working there.¹⁹ In addition, policymakers often conclude that areas adjacent to existing municipalities represent territory that is appropriately subject to municipal regulation (in order to assure consistent and coherent land use planning).²⁰ They may also conclude that nearby areas

16. *Compare* Act of Sept. 22, 1998, ch. 150, § 6, 1998 N.C. Sess. Laws 432, 435–36 (relating to character of area to be annexed for cities under 5,000 in population), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649, *with* Act of Sept. 22, 1998, ch. 150, § 14, 1998 N.C. Sess. Laws 432, 446–48 (relating to character of area to be annexed for cities with population of 5,000 or greater), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

17. *See* Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 276–78 (1992). For a review of recent patterns of urbanization in mid-sized cities and related annexation issues, *see* Christopher Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 74 PITT. L. REV. (forthcoming 2012) (manuscript on file with the *North Carolina Law Review*).

18. For a discussion of the contiguity requirement, *see* Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 672–86 (1994).

19. *See* Reynolds, *supra* note 17, at 253–54.

20. *Id.* at 252–53.

should rightly be expected to contribute to the financial health of an adjacent municipality, based on the understanding that such areas at the city margin generally have access to and benefit from their close proximity to municipal services. Typically, both “urban character” and “contiguity” standards are incorporated into municipal annexation standards, as is the case in the North Carolina annexation statutes described below.²¹

It is important, nevertheless, to recognize that these two rationales are conceptually distinct and can play out very differently depending on the kinds of annexation policies state and local governments adopt. Once annexation has occurred, those living in the annexed area become part of the municipal electorate, are eligible to receive city services, are required to comply with municipal regulations, and are subject to municipal taxes.²² Not surprisingly, those subject to annexation may have different reactions to being annexed, depending on whether they have asked for their property to be reclassified in order to receive municipal services, or dislike affiliation with the city and the associated obligations to comply with municipal requirements and contribute taxes to municipal coffers.²³ If annexation does not occur, then the local ecology may become more complex and fragmented if alternative approaches are needed to provide desired services or planning oversight in smaller pockets lacking in general government oversight.

In 1960, Frank Sengstock, of the University of Michigan, authored what is perhaps the most widely known framework for comparing annexation decision-making protocols and associated procedures.²⁴ He distinguished between five major methods:

- *Legislative determination*, in which the state legislature reviews each proposed annexation;
- *Popular determination*, in which annexation results from referendum or petition;
- *Municipal determination*, in which the local government acts unilaterally to decide on annexation;

21. See *infra* notes 122–30 and accompanying text.

22. See, e.g., N.C. GEN. STAT. §§ 160A-58.3, -58.56 (2011).

23. For background on the most prominent group that opposed municipally initiated annexation in North Carolina, see STOP N.C. ANNEXATION COALITION, <http://www.stopncannexation.com/> (last visited Nov. 16, 2012) (featuring reporting on activities of an anti-annexation coalition).

24. FRANK S. SENGSTOCK, ANNEXATION: A SOLUTION TO THE METROPOLITAN AREA PROBLEM 9–41 (1960).

- *Judicial determination*, in which the courts determine whether the annexation can proceed; and
- *Quasi-legislative or administrative determination*, in which an independent non-judicial entity decides.²⁵

Sengstock's approach has framed many more recent debates about the desirability of differing annexation systems, but has also confounded those debates because many states have multifaceted annexation policies that employ several of these different approaches.²⁶

Scholars who have analyzed legal issues relating to annexation have brought a variety of lenses to bear in characterizing annexation, underlying policy considerations, and issues posed by varying statutory schemes. Specialized attention has been devoted to questions of voting rights for those annexed,²⁷ boundary problems in metropolitan settings,²⁸ and the problem of "municipal underbounding" (when poor and minority communities are not brought within municipal boundaries and thus lack important services).²⁹ Still others have addressed the specifics of individual states' statutes and case law.³⁰

The leading comprehensive analysis of annexation laws has treated annexation as a means for effectuating boundary changes, focusing on problems and statutory solutions of nearly two decades ago.³¹ Through that lens, involuntary annexation served

25. *Id.*

26. See Rex L. Facer II, *Annexation Activity and State Law in the United States*, 41 URB. AFF. REV. 697, 698 (2012).

27. See generally Clayton P. Gillette, *Voting with Your Hands: Direct Democracy in Annexation*, 78 S. CAL. L. REV. 835 (2005) (discussing various schemes whereby annexees and annexors could participate in annexation elections).

28. See Briffault, *supra* note 15, at 1136–37 (describing how "affluent localities can . . . use their regulatory authority to maintain their preferred fiscal position").

29. See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1113, 1159 (2008) (defining "underbounding" and advocating "state legal reforms that increase territorial outsiders' ability to initiate annexation"). See generally Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010) (discussing municipal underbounding and possible remedies that might be available by giving counties more substantial powers).

30. See, e.g., Wesley E. Henderson, *Annexation in South Carolina*, 17 SOUTHEASTERN ENVTL. L.J. 235, 242–44 (2008); Richard D. Zeinemann, *Overlooked Linkages Between Municipal Incorporation and Annexation Laws: An In-Depth Look at Wisconsin's Experience*, 39 URB. LAW. 257, 315–17 (2007).

31. See generally Reynolds, *supra* note 17. Among other things, Professor Reynolds distinguished between situations in which two municipalities compete to annex land located between them, and situations in which a single municipality seeks

the important purpose of maintaining municipalities as the principal providers of urban services, while counties instead served to provide services needed and used by all county residents.³² Any other approach would have confounded the distribution of financial responsibilities between counties and cities and led to a creeping increase in the powers and government services available through counties.³³ Thus, for example, if counties began to expand the range of services provided to pockets of urbanized growth within more rural, non-municipal territory, the costs of service delivery would be increased, efficiency would be lost, and municipal residents would end up subsidizing services to non-municipal residents through increased county property tax levies.³⁴ At the time of this 1992 study, many aspects of North Carolina's annexation statutes were regarded as models to be emulated by other states.³⁵ In particular, North Carolina's comprehensive involuntary municipal annexation power, with associated obligations to plan for and deliver urban services to contiguous land with urban characteristics, seemed fair and efficient.³⁶ The desire of residents in annexed areas to exercise "self-determination" seemed insufficient to outweigh the greater good.³⁷

to annex nearby land. Professor Reynolds effectively described the competing interests voiced in instances of involuntary (municipally-initiated) annexation. *Id.* at 253. For municipalities, there is a desire to provide services, accommodate population increases, regulate adjacent development, and "confirm the reality that [adjacent development is] already a functional part of the city" so that residents should pay their fair share of city expenses. *Id.* For other governmental units, annexation may result in overlapping jurisdiction but may also affect the division of sales tax revenues. *Id.* at 254-55. For landowners being annexed, Professor Reynolds contends that services should be provided on an equitable basis and assessment practices should be fair and even-handed. *Id.* at 257-58. In her view, however, involuntarily annexed residents should not be given a vote that could constitute a veto. *Id.* at 266-67.

32. *Id.* at 258-59.

33. *Id.*

34. *See id.*

35. *Id.* at 273-76, 286-87.

36. *Id.* at 286. She would also give residents in contiguous areas with urban characteristics the power to force annexation by adjacent municipalities. Such a scheme would address the problem of lower-income communities that are left behind when municipalities fail to use their involuntary annexation powers because the service needs that would accompany absorption of those contiguous areas may be more expensive than the property taxes they would yield. *Id.* at 270-71.

37. *Id.* at 256-58, 266-67.

B. Annexation as Local Government Ecological Adjustment

This Article endeavors to treat annexation within the more complex governmental and quasi-governmental ecological systems that have developed over the past two decades. It attempts to frame key questions that have driven annexation policy in the past in more neutral terms. It views annexation as one tool (but not the only tool) for delivering urban services of various sorts, addressing the fiscal health of municipalities and counties, adopting equitable tax policies, and dealing with the accountability and character of fragmented local governmental or quasi-governmental entities. Thus, for present purposes, “annexation as boundary change” is treated as only one of the possible choices to be made in connection with adjusting jurisdictional and territorial relationships in the ways just noted. It is important to understand the ecological niche within which annexation takes place before evaluating possible approaches to municipal annexation in that context.

1. Overview: The Ecology of Regulation and Service Delivery at the Local Level

Annexation occurs against the backdrop of systems that encompass several types of local government or quasi-governmental entities. Such systems differ in nuance from state to state, but several key dimensions are common. It is therefore critical to understand the differences between counties (general purpose entities with residuary state powers), municipalities (general purpose entities with heightened obligations for delivery of urban services), special purpose entities (narrowly defined entities with focused responsibilities), and quasi-governmental entities such as homeowners’ associations (with growing powers to deliver services and regulate private conduct). It is important to appreciate the roles and powers of these diverse entities, as well as their interaction, in order to understand the tensions and policy choices associated with annexation.

2. Ecological Niches: How Do They Differ, and Why Does it Matter?

a. Counties

Counties are territorial subdivisions generally regarded as governmental arms of the state, often with responsibilities for performing certain state-mandated functions (such as those

relating to courts, public health, delivery of social services, and limited public safety assistance) within their designated boundaries.³⁸ They therefore exist, as creatures of the state, to serve state administrative objectives, and are not the result of local decisions (such as those involved in establishing municipalities).³⁹

In North Carolina, counties have traditionally been expected to provide health, education, and welfare services to those living across their whole territorial expanse.⁴⁰ Such services include those relating to public health, medical coroners, registers of deeds, soil and water considerations, public schools, and social services.⁴¹ Counties in North Carolina are composed of incorporated areas (incorporated municipalities) as well as unincorporated areas (the remainder of the territory). Municipalities thus remain parts of counties, rather than being treated as separate territories that are removed from county jurisdiction, insofar as key services are delivered. As a result of this system, all citizens of a given county pay county property taxes (those living in rural unincorporated areas as well as those living within municipal boundaries). As indicated below, however, those living in municipalities pay additional municipal property taxes to cover costs associated with more intensive municipal services.

In important respects, the overlapping territorial relationship between counties and municipalities in North Carolina differentiates the state's local government ecology from ecologies in many other states. North Carolina has long been a rural state, and as a result, its citizens often identify themselves in terms of

38. For a recent review essay discussing challenges currently facing counties, see generally J. Edwin Benton et al., *Service Challenges and Governance Issues Confronting American Counties in the 21st Century: An Overview*, 40 STATE & LOC. GOV'T REV. 54 (2008).

39. For more background on the history of counties and differences between the states, see generally 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 1:26–:30 (3d ed., rev. vol. 2010). See also TOM DANIELS, *WHEN CITY AND COUNTRY COLLIDE: MANAGING GROWTH IN THE METROPOLITAN FRINGE* 46 (1999) (noting that counties control land use planning and zoning, court administration, road maintenance, and social welfare programs).

40. See A. Fleming Bell, II, *An Overview of Local Government*, in COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA 1, 12 (2007) (stating that the county has responsibility for “[a] number of major services and functions, especially health, education, and welfare”).

41. See *id.* at 14 (providing a table that shows the functions that counties and cities perform separately and together).

their county rather than necessarily in terms of towns or cities.⁴² Treatise writers have noted the significant differences in the role of counties across the country. One treatise, for example, contrasted New England and southern states in the following terms:

In this country, the designation county is applied to units of government with widely varying degrees of scope and function from the New England region in which the county was subordinate to the town and confined to primarily judicial and recordkeeping tasks to the Southern region in which the county is often the most important unit of general purpose government, especially in rural areas Because of the proliferation of special legislation, powers exercisable at a county's option, and minutely differentiated categories of classification according to population, the titles of county officers, the duties performed by county government, and the structure of county government have presented a bewildering kaleidoscope of form and function, even in one state jurisdiction.⁴³

The responsibilities and powers of counties thus vary from place to place. Some jurisdictions specify core powers of counties while giving those counties discretion to tap other powers to a limited extent (for example, by opting to zone certain areas of a county but not others),⁴⁴ while others have offered counties more

42. As of 2000, North Carolina ranked fortieth among the states in proportion of population classified as urban, and, as of 2010, ranked twenty-seventh among the states in terms of proportion of population living in metropolitan areas. N.C. OFFICE OF STATE BUDGET & MGMT., *HOW NORTH CAROLINA RANKS 3* (2012), http://data.osbm.state.nc.us/staterank/state_rankings.pdf. As of 2010, the state has a total of 48,617.905 square miles, 44,636.357 square miles (91.81%) of which are classified as non-municipal and 3,981.548 square miles (8.19%) of which are classified as municipal. *2010 County Municipal Totals*, N.C. OFF. ST. BUDGET & MGMT. (last updated Sept. 30, 2011), http://www.osbm.state.nc.us/ncosbm/facts_and_figures/socioeconomic_data/population_estimates/demog/muninonmunilabypercent_2010.html. Only ten of the state's 100 counties had more than twenty percent of their land falling within municipal boundaries, while eighty counties had less than ten percent of their acreage falling within municipal boundaries. *Id.*

43. 1 JOHN MARTINEZ, *LOCAL GOVERNMENT LAW* § 2:13, at 55 (2012).

44. See, e.g., N.C. GEN. STAT. § 153A-342(d) (2011) (authorizing counties to zone portions of the county's jurisdiction smaller than the county's entire territorial jurisdiction).

expansive authority to incorporate and claim “home rule” powers.⁴⁵

North Carolina falls somewhere in between these poles. The powers of counties have been expanded substantially to include many of those originally accorded to cities, such as engaging in land use planning, community development, recreational services, library operation, and more.⁴⁶ As counties have claimed such powers, there has, at least in some places, been a blurring of prior distinctions between county and city roles. This blurring has in turn contributed to the annexation wars.

b. Municipalities

Municipalities are legally created through the process of incorporation at the initiative of local citizens, either pursuant to general statutory schemes or by legislative action contingent upon local referenda.⁴⁷ They are generally described as having both a governmental and private (corporate) character and typically engage in both governmental and proprietary activities (for example, they may deliver electrical, water or sewer services).⁴⁸

45. “Home rule” has been defined as a method (through state constitutional provisions or statutes) that provides a local government with substantial autonomy and self-government capability. “Used in this way, home rule involves two components: (i) the power of local governments to manage ‘local’ affairs; and, (ii) the ability of local government to avoid interference from the state.” Jesse J. Richardson, Jr., *Dillon’s Rule Is from Mars, Home Rule Is from Venus: Local Government Autonomy and the Rules of Statutory Construction*, 41 *PUBLIUS: THE J. OF FEDERALISM* 662, 670 (2011); see also Frayda Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 *N.C. L. REV.* 1983, 1990 (2006) (defining home rule as “[t]he power of local self-government, or the power of local governments to deal with matters of local concern without having to turn to the state legislature for approval, as long as their actions do not contravene already defined state policies”) (alteration in original). While it is more common for municipalities to have home rule authority, counties in some jurisdictions can also be accorded home rule powers. See 1 MCQUILLIN, *supra* note 39, § 1:31 (“In some jurisdictions, constitutional home rule for counties exists.”).

46. See Bell, *supra* note 40, at 14 (listing forty-four areas of overlapping authority between counties and cities).

47. For a discussion of incorporation practices in North Carolina, see generally N.C. GEN. ASSEMB., JOINT LEGISLATIVE COMM’N ON MUN. INCORPORATIONS, SUMMARY OF MUNICIPAL INCORPORATION PROCEDURES IN NORTH CAROLINA, *available at* www.ncleg.net/documentsites/legislativepublications/Bill%20Drafting%20Division/Summary%20of%20Municipal%20Incorporation%20Procedure.pdf. For a discussion of more general practices see 1 MCQUILLIN, *supra* note 39, § 3:35 (discussing the power of the state legislature in creating municipal corporations).

48. For a discussion of governmental and proprietary functions, see 2A MCQUILLIN, *supra* note 39, § 10:25.

Depending on the jurisdiction, municipal corporations may be referred to as “cities,” “towns,” or “villages.”⁴⁹ States vary in the constraints they impose on municipal incorporation, but often specify how physically proximate a newly incorporated municipality may be to municipalities that predate the proposed new incorporation.⁵⁰

Once a municipality has been incorporated, its operation is governed by provisions of its charter relating to elected officials, administrative personnel, powers, responsibilities, and its financial base.⁵¹ Municipal responsibilities and powers are also addressed in state statutes applicable to all municipalities or to defined classes related to size, location, or other characteristics.⁵² Pursuant to state constitutions and state statutes, many states also authorize at least some of their municipalities to invoke “home rule” powers with regard to “local” or “municipal” affairs, or to respond more comprehensively to matters of local concern so long as not preempted by state legislation.⁵³

State constitutions may also limit the extent to which state legislatures can encroach on certain kinds of municipal decision making, at least when “special” rather than “general” legislation is employed to address certain sorts of peculiarly local subject

49. See Bell, *supra* note 40, at 2 (noting that a municipality in North Carolina may be called a city, town, or village, but that there is no legal distinction between the terms); 1 MCQUILLIN, *supra* note 39, § 2:58 (discussing nomenclature including “town” and “village,” and the significance of those words in different jurisdictions).

50. See, e.g., N.C. CONST. art. VII, § 1 (limiting new incorporations to no closer than one mile from the corporate limits of cities of 5,000 or more under the most recent census, no closer than three miles from the corporate limits of cities of 10,000 or more, no closer than four miles from cities of 25,000 or more, and no closer than five miles from cities with populations of 50,000 or more, unless approved by vote of three-fifths of all members of each house of the General Assembly).

51. For a discussion of municipal charters in general, see 2A MCQUILLIN, *supra* note 39, §§ 9:1–:36.

52. See, e.g., N.C. GEN. STAT. § 160A-3 (2011) (listing when general laws may be used to supplement municipal charters and providing that general laws supersede the charter when the two are in conflict); *id.* §§ 160A-11 to -12 (granting corporate power to municipal corporations and permitting municipal corporations to exercise corporate power as a municipality). See generally 1 MCQUILLIN, *supra* note 39, § 3:13 (discussing other states’ schemes for creating different classes of cities based on population or other criteria).

53. For a discussion of home rule charter provisions, see generally 1 MCQUILLIN, *supra* note 39, §§ 3:43–:47. For a more detailed discussion of home rule powers, see Bluestein, *supra* note 45, 1988–2003 (discussing the authority that local governments have in home rule states).

matter.⁵⁴ In other respects, it is generally recognized that state legislatures possess plenary authority (within the constraints of state and federal constitutions), including authority to specify how municipal governments may be organized, reorganized, and operated.⁵⁵ The United States Supreme Court has been clear that individuals who object to state legislative decisions regarding the organization and operation of local governments are unlikely to find protection from the federal courts when asserting federal constitutional objections, whether because of substantive understandings about the operation of the due process clause, or because of separation of powers considerations.⁵⁶

In North Carolina, article VII, section 1 of the state constitution addresses the authority of the General Assembly with regard to local governments in the following terms:

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.⁵⁷

The state constitution also limits where incorporations can take place by proximity to pre-existing cities or towns.⁵⁸

North Carolina has also been reticent to give its municipalities or other local governments broad powers. It has not adopted "home rule" provisions common in many other states.⁵⁹ Moreover, North Carolina has long been recognized as a "Dillon's Rule" jurisdiction, meaning that statutory authority accorded to local governments has historically been interpreted

54. See, e.g., N.C. CONST. art. II, § 24(1) (prohibiting the General Assembly from adopting special legislation on a number of specific topics, including health and sanitation, and changes in town names, among others); *id.* § 24(4) (permitting the General Assembly to adopt general legislation to address the topics in section 24(1)). For a definition of general laws, see *id.* art. XIV, § 3. For a discussion of special versus general legislation, see generally 2 MCQUILLIN, *supra* note 39, §§ 4:31--54.

55. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

56. See *id.* at 179 (stating that there is no remedy for inhabitants who have been harmed by the state's actions); *id.* at 180 (stating that the city's property was not taken without due process).

57. N.C. CONST. art. VII, § 1.

58. See *supra* note 50.

59. See Bluestein, *supra* note 45, at 1983 (noting that North Carolina is a "Dillon's Rule" jurisdiction).

narrowly.⁶⁰ Although more recent statutory provisions suggest that the authority of both municipalities and counties should be interpreted more broadly,⁶¹ at least when interpreting local government authority to impose financial obligations on private parties,⁶² North Carolina courts tend to interpret such authority narrowly. As is true in many other jurisdictions, the North Carolina Constitution requires the General Assembly to enact “general laws uniformly applicable in every county, city and town, and other unit of local government,” while at the same time allowing enactment of “general laws” applicable to classes “defined by population or other criteria.”⁶³ “Local” or “special” legislation in certain areas is nonetheless prohibited.⁶⁴

Municipalities in North Carolina have authority to engage in land use regulation and zoning within their jurisdictions.⁶⁵ The General Assembly has also accorded municipalities “extraterritorial” planning jurisdiction over land within close proximity to their municipal boundaries.⁶⁶ In effect, the

60. See David Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 679–80 (2000) (noting the legislature's call for a narrow interpretation from 1868 to 1971, which has resulted in a judiciary trying to reconcile that century of precedent with a legislative call for broad interpretation beginning in 1971).

61. See N.C. GEN. STAT. § 160A-4 (2011) (“It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.”); *id.* § 153A-4 (including parallel language for counties).

62. See, e.g., *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 815, 517 S.E.2d 874, 881 (1999) (adopting a narrow interpretation of power to impose storm water fees).

63. N.C. CONST. art. XIV, § 3.

64. See *id.* art. II, § 24(1) (prohibiting local or special legislation “[r]elating to health, sanitation, and the abatement of nuisances;” “[c]hanging the names of cities, towns, and townships;” “[a]uthorizing the laying out, opening, altering maintaining, or discontinuing of highways, streets, or alleys;” or “regulating labor, trade, mining, or manufacturing” among other matters).

65. See N.C. GEN. STAT. § 160A-360 (2011) (authorizing the planning and regulation of development for any municipality within its limits).

66. All North Carolina cities may assert extraterritorial jurisdiction within one mile of their primary corporate limits. See *id.* § 160A-360(a). Cities between 10,000 and 25,000 in population can extend extraterritorial jurisdiction for up to two miles with approval by the county in which they are situated while those with populations of more than 25,000 can extend their jurisdiction up to three miles with the approval

recognition of extraterritorial jurisdiction reflects an appreciation of overlapping interests between municipalities and counties—something that might be better addressed in annexation policy as discussed below.⁶⁷

Municipalities in North Carolina also possess a number of other powers not accorded to counties, including those relating to public streets, operation of local electric systems, and provision of cable television.⁶⁸ As noted above, however, there has increasingly been a blurring of lines regarding city and county powers.⁶⁹ Moreover, cities and counties in some ways compete for property tax dollars, since the county levels property tax to cover county functions, while the city imposes additional municipal

of the county. *Id.* A city cannot assert extraterritorial jurisdiction where counties are enforcing zoning, subdivision and building code requirements, unless the city and county have agreed otherwise. *See id.* § 160A-360(e); *see also* *Town of Green Level v. Alamance Cnty.*, 184 N.C. App. 665, 675, 646 S.E.2d 851, 857 (2007) (rejecting county's contention that its water supply watershed qualified as a "zoning ordinance" and concluding that county's effort to implement a "rural community district" represented an arbitrary action by the county designed to block town's effort to extend extraterritorial jurisdiction). In all instances, the city must have designated its proposed extraterritorial jurisdiction area in light of "existing or projected urban development and areas of critical concern to the city, as evidenced by officially adopted plans for its development." § 160A-360(b); DAVID W. OWENS, *LAND USE LAW IN NORTH CAROLINA* 32–33 (2d ed. 2011) (discussing the requirement listed in § 160A-360(b)) [hereinafter OWENS, *LAND USE*]. They must also have prepared adequate maps, given notice, held a public hearing, and recorded the relevant limits. *See* § 160A-360. In areas where extraterritorial jurisdiction authority is accorded to municipalities, such powers are limited to those relating to land use planning and do not extend to the authority to enforce other sorts of police power regulations. *See* DAVID W. OWENS, *THE NORTH CAROLINA EXPERIENCE WITH MUNICIPAL EXTRATERRITORIAL PLANNING JURISDICTION* 5 (2006) [hereinafter OWENS, *ETJ*]. Despite this legislative framework, many smaller municipalities have not sought to assert extraterritorial jurisdiction. Professor Owens reported that, based on a 2006 survey, cities of under 1,000 tend not to report their practices or tend not to assert extraterritorial jurisdiction, with only approximately one-third of responding small municipalities indicating that they had asserted extraterritorial jurisdiction, while more than eighty-five percent of municipalities with populations of more than 10,000 had done so. *See id.* at 9. Moreover, approximately half of the cities with populations over 10,000 that use extraterritorial jurisdiction do not assert such jurisdiction to the full extent possible. *See id.* at 10 (stating that twenty-nine out of sixty cities with populations over 10,000 asserted extraterritorial jurisdiction beyond one mile). For more in-depth discussion of extraterritorial jurisdiction in North Carolina, *see* OWENS, *LAND USE*, *supra*, at 30–31.

67. *See infra* notes 371–89 and accompanying text.

68. *See* N.C. GEN. STAT. § 160A-296 (2011) (allowing municipalities to establish and control the streets within the municipality's corporate limits); *id.* §§ 160A-311 to -312 (authorizing municipalities to operate public enterprises, including electrical systems, cable television, and wastewater collection, among other things).

69. *See, e.g., id.* § 153A-340(a) (granting zoning authority to counties).

property taxes that fund the higher level of services expected within municipal bounds.⁷⁰ The result is that city taxpayers fund their own police services, but also, for example, support the sheriff's office at the county level. In addition, cities and counties split certain sales tax revenues (including optional county-level sales tax increments) according to legislative directive.⁷¹ Here, too, there are pulls and tugs that have contributed to the annexation wars.

c. Special Purpose Entities

Among the most important recent trends in local government ecology is the development of special purpose entities with governmental or quasi-governmental responsibilities.⁷² Such entities include "special districts" and "authorities" with particularized responsibilities for delivering specialized services or assuming specific regulatory responsibilities.

The range of special purpose entities includes districts or authorities responsible for public schools, community colleges, utilities (power, sewer, water, or solid waste), business improvement efforts, agriculture (or soil conservation), irrigation, historic preservation, and libraries, among others.⁷³ Generally,

70. See *id.* § 160A-209 (describing purposes for which cities may impose property tax); *id.* § 153A-149 (describing purposes for which counties may impose property tax).

71. See, e.g., *id.* § 105-481 (providing authority for counties to assess an additional 1.5% sales tax to meet city and county needs and reduce reliance on property tax). For a more extensive discussion of the ways that different sales tax options are allocated between cities and counties, see DAVID M. LAWRENCE & KARA A. MILLONZI, REVENUES: COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA 6 (2009), available at <http://sogpubs.unc.edu/cm/cmg1309.pdf> (discussing local option sales tax revenues and an option for county commissioners to distribute based on per capita or ad valorem (property) tax formulas).

72. For discussion of special districts, see generally D. Andrew Austin, *A Positive Model of Special District Formation*, 28 REGIONAL SCI. & URB. ECON. 103 (1998) (discussing the relationship between annexation authority and special district creation); Nicholas Bauroth, *Buyer's Remorse: The Relationship Between Local Economic Circumstances and Special District Policies*, 35 POL. & POL'Y 366 (2007) (discussing the size and characteristics of special districts by state); Jered B. Carr, *Local Government Autonomy and State Reliance on Special District Governments: A Reassessment*, 59 POL. RES. Q. 481 (2006) (questioning earlier empirical analysis of local government autonomy and special district creation); Janice C. Griffith, *Special Tax Districts to Finance Residential Infrastructure*, 39 URB. LAW. 959 (2007) (discussing experiences in Florida and Georgia with privatized infrastructure systems designed to foster residential development).

73. For a discussion of special districts and their forms, see generally Robert P. Yehl, *More than Little Boxes: Producing and Providing Local Services in*

such districts or authorities have specialized responsibilities for providing a relatively narrow range of services. They often have unique financial structures (tied to the types of services being delivered) and governance structures (in some instances with governing board representation tied to property ownership or representation inconsistent with proportional representation according to “one-person-one-vote” principles).⁷⁴

Academic and policy researchers have noted that many special districts and authorities lack the level of accountability associated with general purpose governmental entities such as counties and municipalities.⁷⁵ Such entities are typically governed by boards whose members are either appointed by governmental or other constituent entities, or elected from stakeholders with associated interests (such as property owners or benefited parties).⁷⁶ Recent research suggests that special districts and

Metropolitan America (May 2010) (unpublished Ph.D. dissertation, University of Houston) (on file with the *North Carolina Law Review*) (comparing experience of Houston and Dallas/Fort Worth, Texas). See also 1 MCQUILLIN, *supra* note 39, § 2:33 (“In a given state, a variety of special purpose units may be created to deal with a single general area of concern, such as water usage or control, with separate units dealing with irrigation, flood control, levee, reclamation, water, water conservation, protection and storm water, storm drain maintenance, and drainage and drainage improvement.”); KATHRYN A. FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT* 12–13 (Barry Rabe & John Tierney eds., 1997) (discussing types of special districts); Barbara Coyle McCabe, *Special-District Formation Among the States*, 32 ST. & LOC. GOV'T REV. 121, 124 (2000) (listing “water supply, sanitation, and sewerage or housing and community development,” “soil conservation and mosquito abatement,” “[c]emeteries,” “[h]ealth or [h]ospital,” “[p]arks,” and “[f]ire” amongst the types of special districts that have been created).

74. For a discussion of varying financial structures, see MEGAN MULLIN, *GOVERNING THE TAP: SPECIAL DISTRICT GOVERNANCE AND THE NEW LOCAL POLITICS OF WATER* ch. 3–4 (2009). For a discussion of principles affecting governance of special districts, see, e.g., *Ball v. James*, 451 U.S. 355, 355–57 (1981) (holding that allowing only property owners to elect the directors of a special district governing water and electricity operations did not violate the Equal Protection Clause of the Fourteenth Amendment); *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 51–54 (1970) (holding that the appointment of junior college trustees not in proportion to district population violated the principle of “one man, one vote”); *Sailors v. Bd. of Educ.*, 387 U.S. 105, 106–08 (1967) (discussing the election of county school board members by delegated local school board members, as opposed to direct election by county residents); see also Camille Pannu, *Drinking Water and Exclusion: A Case Study from California's Central Valley*, 100 CALIF. L. REV. 223, 245–60 (2012) (discussing governance structures of water districts in California).

75. See I.M. BARLOW, *METROPOLITAN GOVERNMENT* 7 (Michael Bradford ed., 1991) (concluding that special districts enable functions to be distanced from the political arena and reduce accountability).

76. See Nicholas Bauroth, *The Effect of Limiting Participation in Special District Elections to Property Owners: A Research Note*, PUB. BUDGETING & FIN., Summer

authorities are less accountable to stakeholders than general-purpose local governments with elected governing boards, and that costs associated with disaggregated special purpose entities often exceed those associated with general purpose governments.⁷⁷

In North Carolina, state statutes authorize a range of special purpose entities, including water, sewage, mass transit, soil and water conservation, electric, solid waste management, and airport districts.⁷⁸ For example, water and wastewater services can be provided through a variety of systems: municipal water systems, county water systems, county water and sewer systems, water and sewer authorities, intergovernmental agreement, sanitary district, or metropolitan water and sewer authorities.⁷⁹ In the end, special districts play important roles in providing specialized services in a flexible fashion that need not correspond with county or municipal boundaries. They remain public in character. In contrast, homeowners' associations governing gated communities approach service delivery from a private point of view.⁸⁰

d. Private Entities with Quasi-Governmental Responsibilities

Large subdivisions and associated homeowners' associations have become an increasingly important part of the American social and legal landscape.⁸¹ Often, developers of large-scale

2007, at 71–77 (analyzing how special district revenue sources vary by whether the special district is governed by elected officials or appointed officials).

77. Larita Killian, *The Continuing Problem of Special Districts in American Government*, 11 ACCT. & THE PUB. INT. 57–58 (2011) (discussing higher costs associated with special districts).

78. See N.C. GEN. STAT. §§ 63-78 to -89 (2011) (airport authorities); § 139-5 (soil and water conservation districts); §§ 160A-311 to -312 (authority to operate public enterprises including electric, gas, storm water, and other activities); §§ 160A-575 to -577 (public transportation authorities); §§ 162A-1 to -3 (water and sewer authorities).

79. For a discussion of water and sewage system options, see JEFFREY A. HUGHES & DAVID M. LAWRENCE, *LOCAL GOVERNMENT WATER AND WASTEWATER ENTERPRISES* 5–6 (2007).

80. For a thoughtful discussion comparing and contrasting the role of homeowners' associations and local governments, see generally Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

81. For an overview of the shapes, characteristics, and history of common interest communities, see generally GRAZIA BRUNETTA & STEFANO MORONI, *CONTRACTUAL COMMUNITIES IN THE SELF-ORGANISING CITY: FREEDOM, CREATIVITY, SUBSIDIARITY* (2012); EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 1–78, 122–

subdivisions seek voluntary annexation into nearby municipalities in order to ensure that residential buyers receive core urban services including water, sewer, solid waste removal, and police and fire protection.⁸² On the other hand, an increasing number of residential subdivisions function as gated communities that are deliberately established outside of municipalities with privatized arrangements for water, sewer, solid waste removal and security services arranged by contract between the homeowners' organization and private providers.⁸³ When gated communities are deliberately established outside of municipal boundaries, purchasers of associated residential properties often assume (correctly or incorrectly) that they will pay only county property taxes, and expect to cover utility and security costs, by virtue of private contracts, at a lesser cost than would be the case if they were also required to pay municipal property taxes.⁸⁴

Controversies relating to the operation of homeowners' associations have emerged with growing frequency in recent years.⁸⁵ Such controversies suggest that homeowners' associations

74 (1994); DONALD R. STABILE, *COMMUNITY ASSOCIATIONS: THE EMERGENCE AND ACCEPTANCE OF A QUIET INNOVATION IN HOUSING* 1–64 (2000).

82. For discussion of the high proportion of voluntary annexation compared to involuntary annexation in North Carolina, see *infra* notes 376–85 and accompanying text.

83. For a recent empirical analysis of the incidence of gated communities, segregation, and regional differences, see generally Elena Vesselinov, *Members Only: Gated Communities and Residential Segregation in the Metropolitan United States*, 23 SOC. F. 536 (2008). For an earlier, thoroughgoing study, see generally EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* (1997).

84. For an in-depth study of various sorts of gated communities in the Denver area, see Christine Richter & Andrew R. Goetz, *Gated Communities in the Denver-Boulder Metropolitan Area: Characteristics, Spatial Distribution, and Residents' Motivations*, 18 HOUSING POL'Y DEBATES 535, 548–53 (2007) (finding that “maintenance” is an important factor in decisions to move to a gated community). There is growing evidence of problems facing homeowners' associations in common-interest communities faced with substantial numbers of foreclosures. See James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1151–54 (1998); Casey Perkins, Note, *Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners' Associations*, 10 NEV. L.J. 561, 561–62, 572–73 (2010).

85. See, e.g., TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 159–61 (2009) (discussing free speech in “gated communities”); Wayne Batchis, *Free Speech in the Suburban and Exurban Frontier: Shopping Malls, Subdivisions, New Urbanism, and the First Amendment*, 21 S. CAL. INTERDISC. L.J. 301, 333–51 (2012) (discussing free speech in context of residential subdivisions); Mark Cantora, *Increasing Freedom by Restricting Speech: Why the First Amendment Does Not and Should Not Apply in Common Interest*

increasingly function in quasi-governmental roles with powers over expression of political views, aesthetics, land use, service provision, security arrangements, access to facilities, and more.⁸⁶

North Carolina, like other states, has modified its statutes relating to the powers and responsibilities of homeowners' associations and their governing boards in recent years.⁸⁷ Other states, such as Florida, have had more extensive experience with bankruptcies and foreclosures, resulting from developers defaulting on loans, which have left major subdivisions in dire financial straits without provision of promised infrastructure and services.⁸⁸ Ultimately, however, in many jurisdictions there has been a growing reliance on homeowners' associations in residential subdivisions to provide core infrastructure and services in areas outside of municipal boundaries and core service areas.⁸⁹ The implications of these developments have yet to be plumbed. As discussed below, gated communities and incorporated areas that provide very limited services have each played a role in North Carolina's annexation wars.⁹⁰

Communities, 39 REAL EST. L.J. 409, 422–29 (2011) (arguing that common interest communities should be allowed to limit otherwise protected free speech).

86. For a summary of recent litigation arising from a variety of disputes in common interest communities, see 8 POWELL ON REAL PROPERTY § 54A.05 (2012) (discussing disputes about pets, motor vehicles, parking, visitors, discrimination, finance, property injuries, and so on).

87. See generally North Carolina Planned Community Act, ch. 199, § 1, 1998 N.C. Sess. Law. 674 (codified as amended at N.C. GEN. STAT. ch. 47F (2011)); Patrick Hetrick, *Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 CAMPBELL L. REV. 1 (1999) (discussing the North Carolina Planned Community Act); Patrick Hetrick, *Wise v. Harrington Grove Community Association, Inc.: A Pickwickian Critique*, 27 CAMPBELL L. REV. 139 (2005) (discussing subsequent developments regarding the North Carolina Planned Community Act).

88. See Griffith, *supra* note 72, at 979–80. A possible solution to this situation is to establish a system of special "infrastructure development districts" that can be established at the request of municipalities or property owners in order to cover costs of infrastructure for particular developments, using tax exempt bonds. See generally *id.* (discussing Florida's and Georgia's systems, and explaining the benefits and drawbacks of such systems that avoid generally applicable property tax increases but may create difficulties regarding consumer disclosure and estimation of associated tax burdens).

89. See David L. Callies & Adrienne I. Suarez, *Privatization and the Providing of Public Facilities through Private Means*, 21 J.L. & POL. 477, 477–79, 492–503 (2005) (discussing privatization in Hawaii and elsewhere).

90. See *infra* notes 176–201 and accompanying text.

3. Analyzing Annexation in an Ecological Context

Treating annexation within this overall ecology of local regulation and service delivery provides a more flexible approach designed to help illuminate the choices that will likely be presented in the future as a result of recent statutory changes in North Carolina and that are already being addressed in jurisdictions that have not allowed involuntary annexation in recent years.⁹¹ This approach is also designed to move beyond the roadblocks that have arisen when key policy choices are framed in terms of raw political power, as was true in North Carolina's recent legislative debates.

The difficulty in moving forward to address crucial questions without expanding the inquiry to the dynamic forces at play within this ecological niche is illustrated by experiences in Georgia.⁹² Researchers at the University of Georgia developed a

91. Many jurisdictions that had not allowed involuntary annexation in recent years have begun to address this issue. However, it is difficult to provide a simple tally of states that have disallowed or allowed involuntary annexation because, in many instances, provisions regarding involuntary annexation may be targeted toward narrow circumstances (such as the need to annex "islands" located within municipal jurisdictions that are completely surrounded by a municipality yet do not pay municipal property taxes or receive municipal services). *See, e.g.,* Bryan H. Babb & Stephen C. Unger, *Setting the Annexation Record Straight: The Myth Underlying Annexation Reform in Indiana*, 51 RES GESTAE 36, 36–39 (2008) (providing analysis demonstrating that, contrary to statements by annexation opponents, there were at that time more than six states that allowed involuntary annexation).

92. *See generally* PAULA E. STEINBAUER, BETTY J. HUDSON, HARRY W. HAYES & REX L. FACER II, AN ASSESSMENT OF MUNICIPAL ANNEXATION IN GEORGIA AND THE UNITED STATES: A SEARCH FOR POLICY GUIDANCE (2002). In 2002, during a period in which annexation policy was under review, scholars affiliated with the Carl Vinson Institute of Government at the University of Georgia sought to assist policymakers by evaluating different states' approaches to annexation. *See id.* at 6–7. Their analysis relied on earlier fiscal impact studies conducted for several Georgia municipalities and a comparison of land use and annexation policy in three states. *See id.* at 28, 35–39. Most importantly for present purposes, they sought to develop a "stakeholder" approach to classifying state annexation laws as representing the interests of the state, counties, municipalities, residents of annexed areas, and universal benefits. *Id.* at 16–24. Under this approach, the authors regarded use of "boundary commissions," legislative annexation, and judicial review mechanisms as primarily benefiting the state. *Id.* at 16–19. Contiguity requirements, impact plans, prohibition on un-annexed "islands," and county approval were deemed to benefit counties. *Id.* at 21–22. Municipalities were benefited when noncontiguity was allowed, municipal land was subject to easy annexation, "islands" could be readily annexed, annexation could occur across county lines, annexation elections took place in the city, or municipalities could annex through local ordinance. *Id.* at 19–21. Residents of annexed areas were benefited if service plans were required, they participated in an annexation election, and if annexation could take place by petition. *Id.* at 22–23.

“stakeholder” approach that classified state annexation laws as reflecting interests states, counties, municipalities, residents of annexed areas, and universal benefits.⁹³ While the study was an interesting one, it ultimately proved ineffective in advancing policy choices because it appeared focused on positions rather than articulating potentially shared underlying interests (for example, creating a cost-effective system for water and sewer infrastructure).⁹⁴

The most recent empirical scholarship has moved away from merely classifying annexation structures and has instead documented and analyzed the more complex ecological relationships that link annexation policies with on-the-ground social effects. For example, David Rusk, the noted author of *Cities Without Suburbs*,⁹⁵ found that a close review of the 2000 census data revealed that “elastic cities” that could expand their limits through annexation had less poverty, more integrated schools, and stronger economies than their “inelastic” counterparts.⁹⁶ Rex Facer reviewed data from forty-two states between 1990 and 1998 and concluded that laws designed to facilitate annexation tended to stimulate annexation, but those designed to constrain annexation were unlikely to have substantial impact.⁹⁷ Professor Mary Edwards, one of the nation’s most insightful scholars of annexation, has recently completed several path-breaking studies in which she looks closely at the

“Universal benefit” was found if health and safety problems had to be abated, public hearings were required, and judicial appeals were allowed. *Id.* at 24.

93. *See id.* at 16–24.

94. In 2007 the National Association of Counties issued a report on annexation laws. *See* NAT’L ASS’N OF CNTYS., A LOOK AT ANNEXATION LAWS: A STATE BY STATE REPORT (2007). This report did not purport to evaluate different states’ approaches, but instead summarized key provisions of each state’s statutes, highlighting key provisions such as annexation by petition or election, use of local boundary commissions, criteria for annexation, judicial review provisions, and challenges available to affected property owners. *See generally id.* (highlighting the affected stakeholders with regard to annexation laws). In 2008, this study was referenced in connection with proposals for changes in Indiana’s annexation law, and some of its findings (particularly as to the number of jurisdictions that allowed “involuntary annexation”) were questioned following efforts to verify the associated summaries. *See* Babb & Unger, *supra* note 91, at 36, 40 n.10.

95. RUSK, *supra* note 1.

96. *Id.* at 25–30. He argued that “inelastic cities” contribute to suburban growth and lose population, while elastic cities capture that growth and gain population. Rusk conducted an additional study in 2006 in which he concluded that cities’ abilities to annex land is a primary determinant of their fiscal health and results in higher bond rating scores. RUSK, *supra* note 2, at 1.

97. Facer, *supra* note 26, at 697, 706.

localized impacts of differing annexation policies.⁹⁸ In a comprehensive 2011 study,⁹⁹ she found that high-density cities and cities with larger populations and growth rates annexed more frequently, as did cities with more undeveloped nearby land.¹⁰⁰ Cities with relatively low median incomes tended to annex more frequently, suggesting a fiscal imperative for annexation.¹⁰¹ She also found that cities that could annex noncontiguous areas were likely to annex more frequently, as were cities in states that limited municipal incorporation based on minimum population, minimum density, and minimum distance from existing municipalities.¹⁰²

Thus, empirical research is making it increasingly clear that state boundary-change policies do not necessarily result in simple or expected outcomes. As the work of these and other scholars

98. In a 2009 study, Professor Edwards and a colleague considered the relation between annexation, density, and local government spending and concluded that annexations of higher density land resulted in more efficient service delivery (as measured by lesser increases in per capita spending levels), while levels of spending associated with annexation of lower density areas depended on changes in land area relative to density. Mary M. Edwards & Yu Xiao, *Annexation, Local Government Spending, and the Complicating Role of Density*, 45 URB. AFF. REV. 147, 147, 163–64 (2009).

99. Mary M. Edwards, *Municipal Annexation: Does State Policy Matter?*, 28 LAND USE POL'Y 325 (2011). This study involved close analysis of a sample of 952 cities with populations of at least 10,000 for the period of 1990–1999, using a complex array of variables that have been thought to facilitate or constrain annexation. *Id.* at 329. The variables treated as constraints included requirements of public hearings, informational requirements, boundary agencies, judicial involvement, and elections. *Id.* at 330. The facilitators of annexation were petition processes, annexation of noncontiguous property, legislative authority, involuntary annexation, and incorporation requirements. *Id.* In addition to the major findings cited in the text, Edwards found that policies requiring impact analysis and service plans, requirements for local elections, and the existence of boundary agencies (all deemed to be “constraints”) were, in fact, associated with a larger number of annexations. *Id.* at 331. On the other hand, where a state required impact analysis, service plans, and public hearings, there were fewer annexations. *Id.* Edwards likewise found that cities that could annex noncontiguous areas were likely to annex more frequently, as were cities in states that limited municipal incorporation based on minimum population, minimum density, and minimum distance from existing municipalities. *Id.* She also found that the use of a boundary agency and judicial review requirements were linked to lower acreage growth through annexation, perhaps once again because cities annexed smaller acreage on a more frequent basis. *Id.* Annexation of more acreage is associated with systems that allow cities to annex involuntarily. *Id.* Larger but less frequent annexations were found in states that required public hearings, fiscal impact analysis and service plans prior to annexation. *Id.*

100. *Id.* at 331.

101. *Id.*

102. *Id.*

clearly shows, statutory policies on annexation may have differing results depending on the characteristics of communities involved. These policies may ultimately result in differing practices regarding the frequency of municipal annexation and the creation of special districts, and significantly impact cities' financial viability.

Part II now turns to North Carolina's experience more specifically, looking first to history and pre-2011 annexation provisions, then at lessons taught by recent annexation case law, and finally, at the important statutory changes implemented in 2011 and 2012.

II. ANNEXATION IN NORTH CAROLINA: HISTORY, RECENT EXPERIENCE, AND LEGISLATIVE REFORM

This Part provides more in-depth information regarding annexation and related practices in North Carolina. In particular, it summarizes the history of annexation legislation prior to recent changes, recent appellate case law, and key features of new annexation legislation adopted in 2011 and 2012.¹⁰³

A. *History and Pre-2011 Annexation Policy in North Carolina*

North Carolina has had a clear and thoughtful history regarding state annexation policy.¹⁰⁴ Prior to 1947, all annexations

103. For earlier law journal discussions of North Carolina's annexation laws, see, e.g., Tyson, *supra* note 17 (considering pre-reform annexation law in North Carolina and comparing it to Mississippi and Tennessee); Elizabeth R. Connolly, Comment, *Bargain Basement Annexation: How Municipalities Subvert the Intent of North Carolina Annexation Laws*, 29 N.C. CENT. L.J. 77 (2006) (criticizing problems with annexation laws that have resulted in municipal underbunding); Julia Sullivan Hooten, Note, "Caught Between a Rock and a Hard Place:" *Fringe Landowners "Can't Get No Satisfaction."* Is It Time to Re-Think Annexation Policy in North Carolina?, 24 CAMPBELL L. REV. 317 (2002) (discussing types of annexation disputes typically encountered in North Carolina); Karen Ubell, Recent Development, *Consent Not Required: Municipal Annexation in North Carolina*, 83 N.C. L. REV. 1634 (2005) (arguing for the continuation of involuntary annexation provisions). The foremost study of annexation is the three-volume treatise by Professor David Lawrence of the UNC School of Government. See *infra* note 104.

104. The University of North Carolina School of Government offers a brief history of the development of annexation law in North Carolina on its website. See *The History of Annexation Legislation*, UNC SCH. OF GOV'T, <http://www.sog.unc.edu/node/347> (last visited Nov. 16, 2012). Details of judicial interpretation prior to the 2011 legislative amendments are addressed in Professor David Lawrence's three-volume treatise. See 1 DAVID LAWRENCE, ANNEXATION LAW IN NORTH CAROLINA (2d ed. 2007); 2 *id.* (1st ed. 2004); 3 *id.* (1st ed. 2007).

were initiated by legislative action.¹⁰⁵ In 1947, the General Assembly authorized annexation of contiguous property by cities (the forbearer of involuntary annexation as it came to exist in later years).¹⁰⁶ In that same year, both voluntary annexation and involuntary annexation of contiguous property were permitted.¹⁰⁷ In 1959, the state legislature set particular “urban character” and service requirements with regard to involuntary (municipally initiated) annexation, differentiating between cities with populations of 5,000 or more and those of lesser population.¹⁰⁸ Immediately prior to the 2011 legislative amendments, key features of North Carolina’s annexation law included the following provisions.

1. Annexation by Petition

Annexation by petition could be accomplished in two distinct situations.

105. See 1 LAWRENCE, *supra* note 104, § 1.01–.04 (discussing legislative annexation). Legislative annexation has remained an option and continues to be in the aftermath of the 2011 and 2012 amendments. This form of annexation is not subject to statutory standards. The Supreme Court of North Carolina upheld legislative annexation authority in an early case, *Lutterloh v. City of Fayetteville*, 149 N.C. 65, 69, 62 S.E. 758, 760 (1908) (“In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety or justice we have naught to do.”). See also *Abbot v. Town of Highlands*, 52 N.C. App. 69, 77–78, 277 S.E.2d 820, 826 (1981) (upholding legislative annexation notwithstanding the Town’s failure to provide sewer service or include a golf course within the municipal boundaries, based on the court’s conclusion that absent constitutionally impermissible reasons, legislative judgment should control); *Jones v. Jeanette*, 34 N.C. App. 526, 531, 239 S.E.2d 293, 296 (1977) (upholding legislative annexation against claim that it was constitutionally unreasonable).

106. See Act of April 3, 1947, ch. 725, § 8, 1947 N.C. Sess. Laws 989 (codified as amended at N.C. GEN. STAT. §§ 160A-30 to -31 (2011)) (granting authority for a municipality to engage in involuntary annexation and providing that if fifteen percent of the qualified voters in the area to be annexed petitioned against the annexation, the governing board could initiate a referendum of those affected and at its discretion could also call for a referendum by the voters within the existing municipality; if a majority of both sets of voters voted for the annexation, it could proceed).

107. *Id.* The legislation further provided that territory containing fewer than twenty-five legal residents eligible to register and vote could not be annexed unless all property owners agreed to the annexation. *Id.* at 992.

108. See 3 LAWRENCE, *supra* note 104, § 2.01–.06, at 2-1 to 2-10 (discussing differences by size of community).

a. Contiguous Property

Owners of contiguous property could (and still can) petition a town to annex their property.¹⁰⁹ The petition must have been signed by *all* property owners of *all* parcels within the area proposed for annexation, and accordingly was often used for new subdivisions or small areas.¹¹⁰ The town council had discretion to approve such proposals so long as the area was contiguous, signatures of all lot-owners were included in the petition, the town council provided notice, conducted a hearing, and ultimately concluded that the annexation was desirable.¹¹¹

b. Satellite Annexation

North Carolina was also one of the first states to allow annexation by petition of noncontiguous satellite areas, beginning in 1967 by local act, and more generally beginning in 1974.¹¹² North Carolina's satellite annexation statutes, which remain largely unchanged by recent legislation, limited the circumstances in which eligible cities¹¹³ could pursue satellite annexation. Petitions must have been signed by all property owners other than non-profit and certain other entities generally exempt from property taxation.¹¹⁴ Several standards applied. The nearest point of the satellite area's boundaries could be no more than three miles from the annexing city and no point in the annexed area could be closer to another city than to the annexing city.¹¹⁵

In addition, the area of the satellite could be no more than ten percent of the total area of the city, and the city must have been able to provide a full range of services to the satellite area being annexed.¹¹⁶ If the annexing city sought to annex a portion of a residential subdivision, it had to annex the whole of the

109. See N.C. GEN. STAT. § 160A-31 (2011).

110. *Id.* § 160A-31(a).

111. *Id.* § 160A-31(b) (providing for annexation by petition procedures).

112. See Act of April 5, 1974, ch. 1173, 1973 N.C. Sess. Laws 277 (codified as amended at N.C. GEN. STAT. §§ 160A-58 to -58.8 (2011)).

113. Cities eligible to pursue satellite annexation include those eligible to receive gasoline tax revenues under section 136-41.1 of the General Statutes of North Carolina. See N.C. GEN. STAT. §§ 160A-58 to -58.1 (2011). In addition, the statutes prohibit satellite annexation by a substantial number of listed cities. See *id.* § 160A-58.1.

114. *Id.* § 160A-58.1(a).

115. *Id.* § 160A-58.1(b).

116. See *id.*

subdivision, not just part of it.¹¹⁷ The standard of review for cities electing to annex noncontiguous areas was constrained, limiting review by the governing board to a determination that "the public health, safety and welfare of the inhabitants of the city and the area proposed for annexation will be best served by the annexation."¹¹⁸

Cities were also authorized to enter into annexation agreements with other cities regarding areas of anticipated future development, specifying the areas that each could annex.¹¹⁹ Annexing cities were allowed to regulate land use and abate public health nuisances in satellite areas just as they could in their primary corporate areas, but satellite areas were not considered to be part of the primary corporate limits for purposes of extraterritorial jurisdiction over land use or abatement of public health nuisances.¹²⁰ Cities annexing satellite areas could also charge higher levels of fees for services (such as water and sewer) than they would otherwise charge those living in their primary corporate areas.¹²¹

2. Involuntary Annexation

North Carolina statutes have historically limited the areas that may be subjected to involuntary annexation. Only areas contiguous¹²² to an annexing city could be subject to forced

117. *Id.*

118. *See id.* § 160A-58.2 (providing that those residing in or owning property in the area proposed for annexation and residents of the city may appear and be heard on questions regarding the "sufficiency of the petition and the desirability of the annexation" and that the city council may approve the petition if otherwise valid, based on the stated criteria, that is, whether the petition is otherwise valid and "the public health, safety and welfare of the inhabitants of the city and of the area proposed for annexation will be best served by the annexation, the council may adopt an ordinance annexing the area described in the petition").

119. *See id.* § 160A-58.1(b)(2); *id.* §§ 160A-58.21 to -58.28 (relating to annexation agreements).

120. *See id.* § 160A-58.4 (describing extraterritorial powers).

121. *See id.* § 160A-58.5 ("For the purposes of G.S. 160A-314, provision of public enterprise services within satellite corporate limits shall be considered provision of service for special classes of service distinct from the classes of service provided within the primary corporate limits of the city, and the city may fix and enforce schedules of rents, rates, fees, charges and penalties in excess of those fixed and enforced within the primary corporate limits. A city providing enterprise services within satellite corporate limits shall annually review the cost thereof, and shall take such steps as may be necessary to insure that the current operating costs of such services, excluding debt service on bonds issued to finance services within satellite corporate limits, does not exceed revenues realized therefrom.").

122. "Contiguous area" is defined as

annexation, at least one-eighth of the external boundary of the annexed area had to coincide with the boundary of the annexing city, and no part of the annexed area could fall within the boundary of another municipality.¹²³ In addition, the annexed area must have been developed for “urban purposes”¹²⁴ at the time that a mandatory annexation report was filed. The annexation report detailed the location of the annexation, satisfaction of statutory standards, plans for providing municipal services, the impact of the annexation on any rural fire department, and the impact of the annexation on city finances and services.¹²⁵

Traditionally, there were (and continue to be) several alternative ways in which the “urban purposes” requirement could be satisfied.¹²⁶ Prior to the 2011 statutory amendments, two options were available to both small towns (with populations under 5,000)¹²⁷ and larger ones (with populations of 5,000 or more).¹²⁸ The annexing city could apply the “use and subdivision” test, which requires that a minimum of sixty percent of the *lots*

any area which, at the time annexation procedures are initiated, either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, the right-of-way of a railroad or other public service corporation, lands owned by the city or some other political subdivision, or lands owned by the State of North Carolina.

Id. § 160A-58.54.

123. *Id.*

124. *Id.* As discussed at notes 134–36, *infra*, cities with populations of 5,000 or more could also annex both areas “developed for urban purposes” and “land bridges” (areas lying between the municipal boundaries and areas developed for urban purposes) subject to certain limitations. As discussed below, the 2011 revisions abolished prior differences based on population. See *infra* note 227 and accompanying text.

125. § 160A-58.54.

126. For towns with populations under 5,000, the definition of urban purposes was found in former section 160A-36, while for those with populations of 5,000 or more the definition of urban purposes was found in former section 160A-48. N.C. GEN. STAT. §§ 160A-36, -48 (2009), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649. The 2011 annexation legislation made the standards applicable to larger towns applicable to all towns and recodified the relevant provisions at new section 160A-58.50. Act of June 17, 2011, ch. 396, § 9, 2011 N.C. Sess. Laws 1649, 1649–50 (codified at N.C. GEN. STAT. § 160A-58.50 (2011)).

127. N.C. GEN. STAT. § 160A-34 (2009) (referring to municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

128. *Id.* § 160A-46 (referring to municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

and tracts in the area are used for specified urban purposes (residential,¹²⁹ commercial, industrial, institutional or governmental) and that at least sixty percent of the *acreage* be subdivided into lots or tracts of three acres or less.¹³⁰ It could, in the alternative, use the standard that focused on *nonresidential use* (requiring every lot in the subdivided area to be used for commercial, industrial, institutional, or governmental purposes).¹³¹ Two additional options were available for cities with 5,000 or more population, both focusing on density, but in slightly different ways. An area could be subject to involuntary annexation if it had a density of 2.3 people per acre (“density standard”),¹³² or if it had a population density of at least one person per acre and the area was also subdivided in a particular way (“population and density standard”).¹³³

Historically, there was another important difference between the rules applicable to small and larger towns. Larger towns with more than 5,000 residents were able to annex areas that did not qualify under the “urban purposes” standard in conjunction with areas that did satisfy such standards under certain limited circumstances. So-called “land bridge” areas (referred to as “necessary land connections” in the statute) were, and still are, those that

[lie] between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent to the municipal boundary or cannot be served by the municipality without

129. “Used for residential purposes” was (and still is) defined as “any lot or tract five acres or less in size on which is constructed a habitable dwelling unit.” *Id.* § 160A-41(2) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.51 (2011)); *id.* § 160A-53(2) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.51 (2011)).

130. *See* N.C. GEN. STAT. § 160A-48(c)(3) (2009), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.54 (2011)).

131. *Id.* § 160A-48(c)(5), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

132. *See id.* § 160A-48(c)(1), *repealed by* Act of June 17, ch. 396, 2011 N.C. Sess. Laws 1649.

133. *See id.* § 160A-48(c)(2), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649. Under this standard, sixty percent of the acreage to be annexed must be subdivided into lots or tracts of three acres or less, and at least sixty-five percent of the number of lots or tracts must be one acre or less in size. *See id.*

extending services and/or water and/or sewer lines through such sparsely developed area[s].¹³⁴

In addition, at least sixty percent of the external boundaries of such a “land bridge” area must have been adjacent to any combination of the municipal boundary and the boundary of an area or areas “developed for urban purposes.”¹³⁵ Land bridge areas could not exceed twenty-five percent of the total area to be annexed.¹³⁶

A myriad of procedural requirements have also long governed the involuntary annexation process.¹³⁷ The annexation process itself proceeded through multiple steps, starting with a “notice of consideration,” followed no sooner than a year later by a “notice of intent,” then a mailed notice of a public hearing (explaining details of the proposed annexation and property owners’ rights), the adoption of the annexation report, a public information meeting, the public hearing itself, and the passage of the annexation ordinance.¹³⁸ Appeals could be taken to superior court by property owners in the affected area within sixty days of the passage of the annexation ordinance.¹³⁹ Grounds for appeal

134. *See id.* § 160A-48(d), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.54(a)(4)(b) (2011)).

135. *See id.* § 160A-48(d)(2), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.54(a)(4)(b) (2011)).

136. *See id.* § 160A-48(d). The statute specifically explained the purpose of the land bridge provisions in the following terms:

The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.

See id.

137. *See id.* § 160A-37 (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.55 (2011)); *id.* § 160A-49 (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.55 (2011)).

138. *Id.* § 160A-37(a)-(e), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.55 (2011)); *id.* § 160A-49(a)-(e), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.55 (2011)).

139. *Id.* § 160A-38(a) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.60 (2011)); *id.* § 160A-50(a)

prior to the 2011 amendments were limited to “failure of the municipal governing board to comply with the procedure set forth in the Part” or to meet the requirements set forth by statute as to the character of the area to be annexed, as discussed above.¹⁴⁰ Remedies included remanding the ordinance “for further proceedings if procedural irregularities were found to have materially prejudiced the substantive rights of any of the petitioners,” remanding to correct boundaries to conform with substantive criteria for annexation, remanding for amendment of plans to provide services, or declaring the ordinance null and void.¹⁴¹

The statutes also provided for remedies in the event that services are not provided as required and as set forth in the annexation plan. As of the effective date of the annexation, police, fire, waste collection, and street maintenance services had to be provided to the annexed area on substantially the same basis as they are within the existing municipality, although the annexing municipality could satisfy the fire protection requirement by contracting with a rural fire department and the waste collection requirement by contracting with a private firm.¹⁴²

Prior to the 2011 amendments, municipalities with populations of 5,000 or more were required to extend “major trunk water mains and sewer outfall lines”¹⁴³ so that newly

(regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.60 (2011)).

140. *See id.* § 160A-38(a) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649; *id.* § 160A-50(a) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

141. *Id.* § 160A-38(g) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.60 (2011)); *id.* § 160A-50(g) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.60 (2011)).

142. *Id.* § 160A-35(3)(a) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.53 (2011)); *id.* § 160A-47(3)(a) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.53 (2011)).

143. This language has been defined in judicial decisions, with one court concluding that “major” mains and lines vary in size depending on the size of the municipality and number of users. *See In re Annexation Ordinance*, 303 N.C. 220, 225, 278 S.E.2d 224, 228 (1981). Courts have also held that, under the earlier statute,

annexed areas “[would] be able to secure public water and sewer services according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.”¹⁴⁴ Smaller municipalities had similar obligations, though stated in slightly different terms.¹⁴⁵ Owners of “an occupied dwelling unit or an operating commercial or industrial property” in areas annexed by larger municipalities were also given an opportunity to request extension of water and sewer lines to individual lots or subdivisions provided that they signed an acknowledgment that such extensions were to be made “according to the current financial policies of the municipality for making such extensions” and provided that they submitted their requests within five days after the public hearing.¹⁴⁶ These municipalities were then required to amend their service plans (and the annexation report) accordingly.¹⁴⁷ If extension of trunk lines into the area was required, in smaller cities, contracts had to be let within one year of the effective date of the ordinance.¹⁴⁸ For larger cities, the construction of main water and sewer lines had to be completed within two years.¹⁴⁹ For all cities, if “installation of sewers was not economically feasible due to the unique

cities or water and sewer districts could require customers to pay the costs of extending lines if this practice was consistent with the policies applicable within existing city limits. *See* *Wallace v. Town of Chapel Hill*, 93 N.C. App. 422, 428–29, 378 S.E.2d 225, 228–29 (1989) (upholding a policy requiring a customer payment for extension of twelve-inch water lines, subject to subsequent reimbursement if others tapped onto such lines). Historically, North Carolina cities have employed a variety of extension policies (including requiring that a specified percentage of property owners petition for line extension before undertaking such an extension; requiring affected properties to pay some or all of the associated costs of extending services to individual properties; or subsidizing some costs). *See* 3 LAWRENCE, *supra* note 104, § 6.07(c), at 6-38.

144. *See* N.C. GEN. STAT. § 160A-47(3)(b) (2009) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.53 (2011)).

145. *See id.* § 160A-35(3)(b) (requiring that municipalities with populations of less than 5,000 persons “[p]rovide for extension of water mains and sewer lines”), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.53 (2011)).

146. *See id.* § 160A-47(3)(b) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.53 (2011)).

147. *See id.*

148. *See id.* § 160A-35(3)(b) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

149. *See id.* § 160A-47(3)(c) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

topography of the area, the municipality could agree to provide septic system maintenance and repair service until such time as sewer service was provided to properties similarly situated.”¹⁵⁰

Municipal failures to comply with these important requirements could be challenged in superior court by seeking a writ of mandamus.¹⁵¹ If the municipality failed to comply with required steps for extending water or sewer service, the superior court could order the city to proceed with construction.¹⁵² Under these provisions, the court could also order the municipality to pay costs of litigation and attorney’s fees.¹⁵³ On their own behalf, property owners could seek relief from tax obligations by petitioning the Local Government Commission for abatement of taxes if police and fire protection, solid waste services, and street maintenance services had not been provided within sixty days by either small or larger towns.¹⁵⁴ Property owners could also seek relief from larger towns that failed to extend water or sewer services in a timely manner.¹⁵⁵

150. See *id.* § 160A-35(3)(b) (regarding municipalities with populations of less than 5,000 persons); § 160A-47(3)(b) (regarding municipalities with populations of 5,000 or more persons).

151. *Id.* § 160A-37(h) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.55 (2011)); *id.* § 160A-49(h) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.55 (2011)). Mandamus was available if the municipality had not provided services set forth in its annexation plan on substantially the same basis and in the same manner as such services were provided within the rest of the municipality prior to the effective date of the plan and if services were still being provided on substantially the same basis and in the same manner as on the date of annexation. *Id.* § 160A-37(h), -49(h).

152. *Id.* § 160A-37(h) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649; *id.* § 160A-49(h) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

153. *Id.* § 160A-37(h) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649; *id.* § 160A-49(h) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

154. See *id.* § 160A-37(k) (regarding municipalities with populations of less than 5,000 persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.55 (2011)); § 160A-49(k) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.55 (2011)).

155. See *id.* § 160A-49(l) (regarding municipalities with populations of 5,000 or more persons), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649 (current version at N.C. GEN. STAT. § 160A-58.55 (2011)).

As discussed above, North Carolina's annexation provisions prior to 2011 provided more flexible options for voluntary "satellite" annexation and involuntary annexation initiated by municipalities than was the norm elsewhere in the country.¹⁵⁶ A number of procedural protections were accorded those subject to involuntary annexation, including requirements that cities prepare service plans and deliver promised services in a timely manner or face roll-back of taxes. The annexation procedures employed a multi-phase process with several opportunities for discussion and debate, as well as judicial review. As the next Section illustrates, however, these provisions provided the framework for a variety of small skirmishes in the courts before the ultimate outbreak of North Carolina's annexation wars between property rights advocates and municipal leaders, resulting in legislative changes in 2011 and 2012.

B. North Carolina's Recent Experience: Litigation and Its Lessons (2000–2011)

A review of appellate case law over the past decade reveals hard-fought battles regarding annexation in North Carolina. If the results of appellate litigation can be viewed as an indication of municipalities' compliance with applicable annexation ground rules, then in the vast bulk of cases, municipalities were doing a good job. The cases fall into several major categories, touching on six important topics: (1) constitutional provisions; (2) compliance with substantive standards set by statute; (3) compliance with statutory procedural requirements; (4) technical issues relating to litigation; (5) provision of urban services; and (6) evolving forms of quasi-government. A review of this recent history provides a helpful template for appreciating the changes made in annexation legislation in 2011.

Barefoot v. City of Wilmington,¹⁵⁷ decided by the Fourth Circuit in 2002, provides a particularly thorough analysis of constitutional claims, including challenges based on the Due Process, Equal Protection, Takings, and Privileges and

156. For discussion of satellite annexation in North Carolina, see discussion *supra* Part II.A.1.b. For comparison to annexation in other parts of the country, see Reynolds, *supra* note 17.

157. 306 F.3d 113 (4th Cir. 2002).

Immunities Clauses of the United States Constitution.¹⁵⁸ In *Barefoot*, residents of Wilmington challenged the city's decision to annex their property.¹⁵⁹ The court rejected their Equal Protection and Due Process claims, citing classic United States Supreme Court precedent, *Hunter v. City of Pittsburgh*,¹⁶⁰ decided nearly a century earlier. Likewise, the court rejected the plaintiffs' takings claim, stating that there was no proof of any physical taking and that annexation did not result in a singling out of those annexed to bear burdens that should have been borne by the public as a whole.¹⁶¹ Finally, the Privileges and Immunities Clause was inapposite insofar as it protected citizens of one state from being unfairly denied rights by another state, rather than establishing some sort of inherent natural rights arising from state citizenship.¹⁶²

A handful of cases considered substantive standards set by the annexation statutes. For example, municipal annexations were rejected as to land that was not yet commercially developed (where "urban character" is statutorily defined as referring to use at the time of annexation).¹⁶³ Similarly, governmental use had to be substantial in order to justify annexation.¹⁶⁴ The municipality was required to apply the use test strictly, calculating use by tract or parcel, not by acreage.¹⁶⁵ "Shoestring" annexations were held

158. *Id.* at 118; *see also* *Adams v. Vill. of Wesley Chapel*, 259 F. App'x 545, 548, 550–51 (4th Cir. 2007) (rejecting due process, equal protection, and takings challenges).

159. *Barefoot*, 306 F.3d at 118.

160. 207 U.S. 161 (1907). *Hunter* rejected assertions by citizens that Pennsylvania's scheme for city consolidation violated their rights. *Id.* at 178–79. The Court stressed the expansive discretion of the state legislature to establish its preferred regime for municipal configuration without running afoul of the Federal Constitution. *See id.* Thus, the action of one city in effectively annexing and absorbing another triggered no underlying constitutional right of citizens to vote and did not deprive those affected of due process. *See id.* In effect, the legislature was entitled under its plenary power to choose how to organize subsidiary units of government, and the legislative process itself was the only process required in order to avoid problems with separation of powers. *Id.*

161. *See Barefoot*, 306 F.3d at 125.

162. *Id.* at 125–26.

163. *See Hughes v. Town of Oak Island*, 158 N.C. App. 175, 178–79, 580 S.E.2d 704, 706–07, *aff'd*, 357 N.C. 653, 588 S.E.2d 467 (2003).

164. *See Arquilla v. City of Salisbury*, 136 N.C. App. 24, 34–35, 523 S.E.2d 155, 163 (1999), *superseded by statute as recognized in* *Fix v. City of Eden*, 175 N.C. App. 1, 18–19, 622 S.E.2d 647, 658 (2005).

165. *See Hayes v. Town of Fairmont*, 167 N.C. App. 522, 529, 605 S.E.2d 717, 722 (2004).

impermissible when inconsistent with the “contiguousness” standard.¹⁶⁶

Procedural issues were also raised, most often to limited effect. For example, appellate decisions rejected assertions that resolutions of consideration required prior to annexation, related informational meetings, or public hearings were inadequate.¹⁶⁷ Courts also found no flaw in methods used by municipalities in setting proposed annexation boundaries. For example, use of tax maps was upheld,¹⁶⁸ as was use of metes and bounds descriptions,¹⁶⁹ and use of parcel identification numbers from tax maps.¹⁷⁰

A range of technical issues also tended to curb litigation brought by parties unhappy with municipal annexation decisions. For example, the courts found that standing problems barred suits by a nearby municipality that sought to challenge a neighboring municipality’s voluntary annexation.¹⁷¹ Individuals who did not own property within an area being involuntarily annexed similarly had no standing to challenge the municipal decision.¹⁷² Likewise, efforts to take interlocutory appeals¹⁷³ or to seek relief in federal court after unsuccessful state litigation were rejected.¹⁷⁴ Individuals seeking to intervene after a city had reached a court-approved settlement to delay the annexation of a nearby subdivision were found ineligible to do so when they had not

166. See *Hughes*, 158 N.C. App. at 183–84, 580 S.E.2d at 709–10.

167. See *Arnold v. City of Asheville*, 186 N.C. App. 542, 551–52, 625 S.E.2d 40, 48 (2007) (quoting *Chapel Hill Country Club, Inc. v. Chapel Hill*, 97 N.C. App. 171, 188, 388 S.E.2d 168, 178 (1990)); *Anthony v. City of Shelby*, 152 N.C. App. 144, 147–49, 567 S.E.2d 222, 225–26 (2002).

168. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 507, 626 S.E.2d 747, 754 (2006).

169. *Hall v. City of Asheville*, No. COA07-1520, 2008 WL 2970059, at *3 (N.C. Ct. App. Aug. 5, 2008).

170. *Ashley v. City of Lexington*, ___ N.C. App. ___, ___, 704 S.E.2d 529, 537 (2011).

171. *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 544 S.E.2d 821 (2001) (finding no standing and no justiciability).

172. *Burnette v. City of Goldsboro*, No. COA05-1277, 2006 WL 2129718, at *2 (N.C. Ct. App. Aug. 1, 2006) (“[O]ur Courts have repeatedly held that ownership of property within the annexed area, as required by statute, is necessary to have standing to challenge an annexation ordinance.” (citations omitted)).

173. *Arnold v. City of Asheville*, 169 N.C. App. 451, 453, 610 S.E.2d 280, 282 (2005) (“[T]here is no right to immediate appeal from an interlocutory order.” (quoting *Evans v. Evans*, 158 N.C. App. 533, 534–34, 581 S.E.2d 464, 465 (2003))).

174. See *Barefoot v. City of Wilmington*, 306 F.3d 113, 120–21 (4th Cir. 2002).

proceeded in a timely manner.¹⁷⁵ Assertions that the Service Members Civil Relief Act should delay municipal annexations also proved unavailing.¹⁷⁶

The last two thematic categories—relating to the provision of urban services and evolving forms of quasi-government—reflect significant shifts in the framing of core annexation debates. The two themes are closely intertwined. The bellwether case illustrating both themes is *Nolan v. Village of Marvin*.¹⁷⁷ The *Village of Marvin* case involved efforts to annex 320 lots located in Union County.¹⁷⁸ The Village had a modest population, and accordingly fell within the statutory provisions regarding municipalities of less than 5,000 residents.¹⁷⁹ The Supreme Court of North Carolina rejected the Village's involuntary annexation efforts on grounds that the Village had not provided a "meaningful" extension of public services to affected properties.¹⁸⁰ The court found that the Village had only extended one out of nine possible types of public services ("administrative services") and that the remainder of services were provided by the county, state, volunteer organizations, or not at all.¹⁸¹ The Village had estimated that following the annexation, it would have more than \$80,000 in additional revenues, and that it might have approximately \$14,000 in additional costs, resulting in a net revenue gain of at least \$60,000.¹⁸²

The Supreme Court of North Carolina concluded that

[t]he primary purpose of involuntary annexation, as regulated by these statutes, is to promote "sound urban development" through the organized extension of municipal services to fringe geographical areas. These services must provide a meaningful benefit to newly annexed property owners and residents, who are now municipal taxpayers, and must also be extended in a nondiscriminatory fashion.¹⁸³

175. See *Home Builders Ass'n v. City of Fayetteville*, 170 N.C. App. 625, 630–31, 613 S.E.2d 521, 525–26 (2005).

176. See *Kegley v. City of Fayetteville*, 170 N.C. App. 656, 658, 613 S.E.2d 696, 697 (2005).

177. 360 N.C. 256, 624 S.E.2d 305 (2006).

178. *Id.* at 256, 624 S.E.2d at 305.

179. See *id.* at 256–57, 624 S.E.2d at 306.

180. See *id.* at 261–62, 624 S.E.2d at 308–09.

181. *Id.* at 258, 624 S.E.2d at 306–07.

182. *Id.* at 259, 624 S.E.2d at 307.

183. *Id.* at 261, 624 S.E.2d at 308.

At the same time, the court cautioned that “[o]ur decision does not require an annexing municipality to provide all categories of public services listed in N.C.G.S. § 160A-35(3).”¹⁸⁴ Dissenting, Justice Edmunds and Chief Justice Parker stated a differing view, concluding that the court lacked authority to add additional requirements to the involuntary annexation statute where its language was clear on its face.¹⁸⁵

Subsequently, a number of cases were brought challenging the extent of urban services and related benefits made available in the aftermath of annexation. The core standard applied related to provision of “some meaningful benefit” and judicial inquiries did not probe deeply into the details.¹⁸⁶ The appellate courts found that providing police protection to annexed areas qualified as the provision of a meaningful benefit.¹⁸⁷ The approach taken in reviewing types of services should be “quantitative, not qualitative” so that the number of incidents triggering police involvement in the newly annexed area was not of concern to the court.¹⁸⁸ Those living in annexed areas were, at times, skeptical as to whether they would actually gain enhanced services following annexation.¹⁸⁹ A North Carolina court demurred, however, saying that “[t]he law does not require a municipality to add employees or equipment in order to provide a meaningful extension of services,”¹⁹⁰ and rejecting suspicions of insufficient service based

184. *Id.* at 261–62, 624 S.E.2d at 308.

185. *Id.* at 263, 624 S.E.2d at 309.

186. The public policy requirement that annexation must provide some meaningful benefit was satisfied where there were findings of fact that residents of the annexed area would receive various benefits. *See Burnette v. City of Goldsboro*, No. COA06-1672, 2008 WL 132045, at *5 (N.C. Ct. App. Jan. 15, 2008).

187. *See Nolan v. Town of Weddington*, 182 N.C. App. 486, 491–92, 642 S.E.2d 261, 265 (2007) (“The ‘Declaration of Policy,’ instructs ‘[t]hat municipal boundaries should be extended in accordance with legislative standards applicable throughout the State[.]’ and that annexation should be governed by ‘uniform legislative standards[.]’ . . . [T]he [annexation] statute expressly contemplates that one type of service an annexing town may extend to an annexed area is ‘police protection[.]’” (first, second, third, and seventh alterations in original) (quoting N.C. GEN. STAT. §§ 160A-45(3), -45(5), -47(3)(a) (2005), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649))).

188. *Norwood v. Vill. of Sugar Mountain*, 193 N.C. App. 293, 312, 667 S.E.2d 524, 536 (2008) (“[O]ur inquiry into what types of services are provided is quantitative, not qualitative. Hence, it is not the number of incidents that the police will be involved in that concerns this Court, but rather the category of service provided.”).

189. *See id.* at 311, 667 S.E.2d at 536.

190. *Gates Four Homeowners Ass’n, Inc. v. City of Fayetteville*, No. COA10-60, 2010 WL 5135579, at *6 (N.C. Ct. App. Dec. 7, 2010) (concluding that there was a meaningful extension of services where the respondents promised to extend in the

on mere speculation.¹⁹¹ The city could expand sewer services according to its existing policies regarding payment and did not have to respond to a newly annexed resident's counteroffer suggesting differing terms.¹⁹² Courts were also unwilling to revisit a city's analysis of costs and benefits associated with extending sewer service to annexed areas.¹⁹³

*Pinewild Project, Ltd. Partnership v. Village of Pinehurst*¹⁹⁴ provides a bookend that drives home the important evolution of government and quasi-governmental entities raised in the *Village of Marvin* case discussed above and the closely related issues of providing urban services. Pinewild is a gated community located near the city of Pinehurst.¹⁹⁵ It deliberately established private streets and provided its own basic services.¹⁹⁶ Pinewild contended that Pinehurst's annexation plan was flawed because the gated community could deny access to police officers, firefighters, and waste collectors who sought to provide services following the

annexation report the exact category of services required by former section 160A-47(3)(a)), *disc. rev. denied*, 365 N.C. 329, 717 S.E.2d 395 (2011).

191. With respect to water service, a city need not provide identical service pre- and post-annexation. Rather, the service must be substantially the same. Speculation as to grievances and feared injury is insufficient to show that a city has failed to meet a statutory requirement. *See Hall v. City of Asheville*, No. COA07-1520, 2008 WL 2970059, at *2 (N.C. Ct. App. Aug. 5, 2008) (finding that where a city decided to cease providing water through a joint regional venture and instead operated its own water supply system, the provision of services was substantially the same because the reservoir was still owned and operated by the city).

192. *See Ashley v. City of Lexington*, ___ N.C. App. ___, 704 S.E.2d 529, 539, *disc. rev. denied*, 365 N.C. 347, 718 S.E.2d 377 (2011) ("Pursuant to its existing [sewer service] policy, Respondent was not required to pay to extend sewer service to Petitioners. According to Respondent's policy, '[Respondent] shall be entitled to consider and implement one of the following options[:]' either (1), deny a petition outright, or (2), negotiate a mutually acceptable cost-sharing agreement with any petitioner. Though Respondent's mass mailing of the form agreement did not invite counteroffers, nothing in the relevant policy indicated that Respondent was required to consider any counteroffers." (alterations in original)).

193. With respect to financing of extension of services, the court of appeals held that where annexation did not actually take place in 2010, petitioners' argument that the City violated former section 160A-47 by failing to project cost for that year was moot. Additionally, the accuracy of the City's prediction of the system development charges and sales tax revenues associated with annexation was beyond the scope of the court's appellate review. *Royal Palms MHP, LLC v. City of Wilmington*, No. COA10-1259, 2011 WL 2206801, at *1 (N.C. Ct. App. June 7, 2011), *disc. rev. denied*, ___ N.C. ___, 718 S.E.2d 632 (2011).

194. 198 N.C. App. 347, 679 S.E.2d 424 (2009).

195. *Id.* at 349, 679 S.E.2d at 426.

196. *Id.* at 352, 679 S.E.2d at 427.

annexation, with the result that the community would get no benefits from the annexation.¹⁹⁷

The North Carolina Court of Appeals rejected Pinewild's argument. It concluded that Pinehurst planned to maintain streets on the same basis in Pinewild as in other parts of Pinehurst's jurisdiction that had private streets.¹⁹⁸ Alternatively, Pinewild could offer its streets to the town for public dedication and have them maintained as was done for the town's pre-existing public streets.¹⁹⁹ Moreover, Pinewild had the option to dedicate the streets and receive police and waste collection services, or to continue as it had by providing such services by private contract.²⁰⁰ The court accordingly found that the *Village of Marvin* case did not control because Pinehurst, in all respects, proposed to extend an array of meaningful services (police, street maintenance, solid waste collection) rather than only the type of minimal "administrative" services (part-time tax collection and zoning) offered by the Village of Marvin.²⁰¹ The court also declined to review the annexation on public policy grounds, holding that to do so would contravene the statutory review standards.²⁰² In perhaps its most pointed statement regarding the core questions posed by the case, the court stated:

Were we to adopt Petitioners' argument, a gated community—and theoretically any community with restrictions on access to its private roads—could not be annexed by a municipality if its residents simply refused to allow police, firefighters, waste collection workers, administrative officials or certain other municipal employees access to their private streets. We do not believe the General Assembly intended N.C. Gen. Stat. § 160A-47(3) to provide private communities with an avenue to defeat annexation by denying access to municipal employees, when all other requirements of that statute are met. This would create unacceptable inequities between the

197. *Id.* at 355, 679 S.E.2d at 429.

198. *Id.* at 352–54, 679 S.E.2d at 427–29.

199. *Id.* at 353–54, 679 S.E.2d at 428–29.

200. *Id.* at 353–54, 679 S.E.2d at 428.

201. *Id.* at 355, 679 S.E.2d at 429.

202. *Id.* at 356, 679 S.E.2d at 430.

rights of citizens in private communities and those living on public roads.²⁰³

Experience gained through the most recent decade of litigation in North Carolina's appellate courts suggests some basic lessons that animated the debate about statutory reform that played out during the 2009–2011 period in the state legislature.

Clearly, constitutional claims provided no relief to those unhappy with involuntary annexation; North Carolina courts have repeatedly rejected them. The arguments in *Pinewild* had a different thrust, insofar as they focused on assertions about the legitimacy of private versus public governance and the extent to which individuals' and entities' desires for autonomy could be accommodated within pre-existing annexation law. Not surprisingly, the courts concluded that policy assertions about autonomy did not present a cognizable legal claim. The case law also suggested that, by and large, North Carolina's municipalities had played by the rules set by existing annexation statutes, with only occasional failures to comply with substantive standards. Procedural challenges against municipal annexation were also generally unsuccessful, and technical problems that impeded successful litigation arose fairly often.

A focus on the level and adequacy of urban services provided following annexation gained limited traction, but only in settings where virtually no meaningful benefits or services were provided following annexation. The courts were clearly reluctant to dig deeply into details. Efforts to block involuntary annexation on the basis that no urban services were needed or wanted likewise proved ineffectual.

The stage was therefore set for a substantial confrontation between angry residents who had no wish for affiliation with municipalities, and municipalities that claimed that they were

203. *Id.* at 353, 679 S.E.2d at 428. The court's analysis tracked the views earlier expressed by Professor David Lawrence, who concluded in his 2007 treatise on involuntary annexation in North Carolina that gated communities' "gate[s] should have no effect at all on some of the major municipal services" (such as police and fire protection since emergency access can be arranged), and that gates absolve a city of its responsibility to maintain street systems (since there is no public authority to maintain private streets or driveways), but could prove problematic for water and solid waste collection services (water lines may need to be placed on rights-of-way of public streets; solid waste collection may be impossible if streets are too narrow for collection trucks to navigate). 3 LAWRENCE, *supra* note 104, § 6.02(h), at 6-12 to 6-13.

playing by longstanding rules that had assured municipal health and a fair trade of services for tax dollars over the years.

C. Changing the Playing Field: North Carolina's 2011 and 2012 Annexation Legislation

The development of North Carolina's new annexation provisions played out over a number of years and reflected a good deal of pulling and tugging between advocates for property owners and advocates for municipalities. The public process began through the work of a House special study committee that was created in 2007 and held a number of hearings around the state.²⁰⁴ In 2008, the membership of the group was broadened to include Senate members as well.²⁰⁵ The study committee's report was subsequently submitted for consideration by substantive House committees where a number of alterations were made.²⁰⁶ In revised form, annexation revisions passed the House of Representatives and moved to the Senate. The Senate's leadership buried the bill in committee through the end of the session.²⁰⁷

The 2010 election brought substantial changes to the General Assembly, with Republicans claiming majority control in both houses and new leadership and many new members in both houses eager to make their mark.²⁰⁸ A number of annexation bills were submitted shortly after the General Assembly convened, including provisions that would have called for a moratorium on

204. See Studies Act of 2008, ch. 181, § 46, 2008 N.C. Sess. Laws 723, 752–53.

205. *Id.*

206. The principal reform bill co-sponsored by the House co-chairs of the Joint Legislative Study Committee during the 2009–2010 legislative session was House Bill 524 (co-sponsored by Rep. Goforth and Rep. Luebke, among others). H.B. 524, Gen. Assemb., 2009–2010 Reg. Sess. (N.C. 2009).

207. See *House Bill 524 History*, *supra* note 6.

208. Both the North Carolina House and the Senate had Republican majorities and leadership, for the first time in many years. See *House Leadership*, N.C. GEN. ASSEMBLY, <http://www.ncleg.net/House/houseleadership.html> (last visited Nov. 16, 2012); *Senate Leadership*, N.C. GEN. ASSEMBLY, <http://www.ncleg.net/Senate/senateleadership.html> (last visited Nov. 16, 2012). The House went from sixty-eight Democrats and fifty-two Republicans before the 2010 election to fifty-two Democrats, sixty-seven Republicans, and one Independent afterward, while the Senate went from thirty Democrats and twenty Republicans to nineteen Democrats and thirty-one Republicans afterward. See *State Legislative Election Results, 2010*, BALLOTPEdia.ORG, http://ballotpedia.org/wiki/index.php/State_legislative_elections_results,_2010#North_Carolina (last modified June 6, 2011).

involuntary annexation.²⁰⁹ The North Carolina League of Municipalities countered by presenting a detailed plan that offered up possible changes in substantive and procedural provisions,²¹⁰ while annexation opponents continued their demands for a referendum vote on involuntary annexation proposals.²¹¹ In the end, the anti-annexation forces carried the day, in two major and three minor respects. Low-income populations were also given new opportunities to seek annexation that had not previously existed. Finally, the legislature, in separate bills, sought to roll back involuntary annexation plans that were already nearing implementation in a number of communities. Although involuntary annexation is still technically available, only the largest cities are likely to be able to employ this technique going forward, in view of the substantial new costs that all municipalities are required to incur.

1. Changes Relating to Involuntary Annexation

The most significant changes resulting from the new legislation concern requirements for extension of municipal water and sewer service and provisions for those affected to block involuntary annexations.

a. Water and Sewer Services

Under prior legislation, cities were required to extend water and sewer services to areas subject to involuntary annexation as discussed above.²¹² Their obligations involved only extension of main trunk lines, and extension of service to individual lots on a

209. A search of the North Carolina General Assembly's website reveals that more than sixty bills relating to annexation were introduced during the 2009–2010 legislative session, and more than forty bills relating to annexation were filed during the 2011 session. See *Simple Bill Inquiry*, NORTH CAROLINA GENERAL ASSEMBLY, <http://www.ncleg.net/gascripts/SimpleBillInquiry/SimpleBillInquiry.pl> (select “2009–2010 Session” from drop-down menu, select “Next,” then select “Keyword,” and again select “Next,” then select “Annexation” and select “Search”; then, repeat the same process for “2011–2012 Session”) (last visited Nov. 16, 2012).

210. The North Carolina League of Municipalities issued a twenty-point proposal that sought to make numerous technical improvements in the state's annexation law. KELLI H. KUKURA & KIM S. HIBBARD, N.C. LEAGUE OF MUNICIPALITIES, A PROPOSAL TO THE JOINT SENATE AND HOUSE STUDY COMMISSION ON MUNICIPAL ANNEXATION (2008).

211. See generally STOP N.C. ANNEXATION COALITION, <http://www.stopncannexation.com> (last visited Nov. 16, 2012) (providing information on the efforts of annexation opponents).

212. See *supra* notes 144–51 and accompanying text.

comparable basis as specified with regard to lots in the existing municipality.²¹³ Those seeking actual hook-ups to lot lines were often expected to cover costs of connecting their homes to these major facilities.²¹⁴

The new legislation implemented two major changes, each of which imposes significant costs and other burdens on municipalities seeking to annex involuntarily. If a city provides or contracts to provide such services, it must provide owners of property to be annexed with notice and must provide them with services at no cost other than payment of user fees if a majority of affected property owners request such services within the statutory timeframe.²¹⁵ If less than a majority petition for such services, the municipality must pay a proportional share of costs for those seeking such services with the proportion dropping over a five-year period in which services can still be requested.²¹⁶ Thus, although the existing practice for current municipal residents has generally been to require them to pay for the cost of lines connecting their homes to main trunk lines, those henceforth subject to involuntary annexation would have such costs covered by the municipality. While this latter requirement seems clear, it is less clear whether entities that contract with municipalities for the delivery of water and sewer services can be expected to cover associated costs of such extensions, or whether the annexing municipality would be obligated to cross-subsidize such extension under these circumstances, as discussed below.²¹⁷

In addition, water and sewer service construction must now be completed within three and a half years of the effective date of the annexation.²¹⁸ While the process of annexation has been lengthened as a result of procedural changes, it may still be difficult for municipalities to be assured of completing extensions during this timeline because they may face engineering issues as they move from trunk line to local line construction. The upshot of this change is that municipalities will likely undertake

213. *See supra* notes 148–50 and accompanying text.

214. *See supra* notes 153–54 and accompanying text.

215. Act of June 17, 2011, ch. 396, § 8, 2011 N.C. Sess. Laws 1649, 1659–60 (codified at N.C. GEN. STAT. § 160A-58.56(b)(3) (2011)).

216. *Id.*, 2011 N.C. Sess. Laws at 1660 (codified at N.C. GEN. STAT. § 160A-58.56(b)(4) (2011)).

217. *See infra* notes 304–15 and accompanying text.

218. Act of June 17, 2011, ch. 396, § 8, 2011 N.C. Sess. Laws 1649, 1651 (codified at N.C. GEN. STAT. § 160A-58.53(3)(b) (2011)).

annexations and line extensions on a smaller scale and on a more fragmented basis. Smaller and more fragmented involuntary annexations may result in less wide-spread opposition, but may also result in less favorable economies of scale in municipal planning and borrowing. It remains unclear how such changes will affect the costs of borrowing for construction of water and sewer infrastructure.

The implications of these changes are significant, since they appear to link authority to engage in involuntary annexation very directly to provision of one type of urban service (water and sewer) and the availability of related infrastructure that carries substantial cost. Several possible outcomes were not discussed or perhaps foreseen during the process of legislative debate, but they are now more evident. One possible result is that larger cities with affiliated water and sewer authorities will be able to continue with involuntary annexation because they can absorb related costs and spread them across a larger municipal population. Another possibility, explored below, is that municipalities may feel obliged to shed their past role as water and sewer providers, and instead divest themselves of these responsibilities by contracting for services from quasi-governmental or private providers. Finally, cities (typically smaller cities) that do not currently directly provide water and sewer services will not try to do so, but will be able to continue their efforts to engage in involuntary annexation if they are able to provide other sorts of urban services (such as police protection and waste collection), provided that they are not blocked from doing so as a result of the new referendum requirement. In any event, the statutory changes may result in a more fragmented and less accountable system of providing water and sewer infrastructure, at a time when climate change and population growth have made the provision of well-organized, well-managed, and interconnected water and sewer infrastructure more important than ever.

It is also notable that the 2011 legislative changes did not attempt to address the number and types of other urban services offered to involuntarily annexed areas. During the 2010 legislative debate, there had been considerable interest on the part of some leading legislators to address these issues in the wake of the

Village of Marvin decision.²¹⁹ Proponents of this approach believed that municipalities should be obliged to provide more numerous or higher levels of services to newly annexed areas than those areas had previously received in order to justify the payment of additional municipal taxes. In the end, however, this approach to equating more substantial services with legitimate claims for higher taxes did not resurface during the 2011 legislative session given the changes in legislative power.²²⁰ The 2011 legislation instead focused directly on the highest-priced service (public water and sewer) and shifted the equation of municipal costs and property owner benefits in overpowering ways as explained above.

b. Blocking Involuntary Annexation: Anti-Annexation Petitions and Referenda

The 2011 legislation included a second major impediment to involuntary annexation: the creation of a remonstrance mechanism by which affected property owners could, by petition, block such annexations. An added provision was also included in the statutory statement of purpose, indicating that it is “essential” for citizens to have an effective voice in annexations initiated by municipalities.²²¹ The 2011 legislation guaranteed such voice by

219. Senator Daniel Clodfelter of Charlotte was a proponent of that approach. See S.B. 711 (1st Ed.), Gen. Assemb., 2009–2010 Sess. (N.C. 2009) (focusing on specifying the number and meaningful level of services).

220. See *House Leadership*, *supra* note 208.

221. Prior to the 2011 legislation the following statements of policy applied to cities with populations of 5,000 or more:

It is hereby declared as a matter of State policy:

- (1) That sound urban development is essential to the continued economic development of North Carolina;
- (2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development;
- (3) That municipal boundaries should be extended in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of governmental services needed therein for the public health, safety and welfare;
- (4) That new urban development in and around municipalities having a population of 5,000 or more persons is more scattered than in and around smaller municipalities, and that such larger municipalities have greater

requiring that property owners in areas subject to an involuntary annexation receive clear notice of their rights to invoke the petition option.²²² Under this remonstrance provision, the county tax assessor was required to develop a list of property owners based on tax listings and the board of elections was required to mail preprinted petitions to those on this list with costs borne by the municipality.²²³ If petitions from sixty percent of the property owners²²⁴ were returned reflecting opposition to the proposed annexation, the annexation was blocked for a minimum of three years.²²⁵

As is discussed in more detail below, the General Assembly modified these provisions yet again in 2012, substituting a referendum requirement that allows all residents of an area proposed for involuntary annexation (and only those residents,

difficulty in expanding municipal utility systems and other service facilities to serve such scattered development, so that the legislative standards governing annexation by larger municipalities must take these facts into account if the objectives set forth in this section are to be attained;

(5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality in accordance with G.S. 160A-47(3).

N.C. GEN. STAT. § 160A-45 (2009), *repealed by* Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649. The 2011 legislation modified paragraphs (4) and (5) and added a new paragraph (6) to read as follows:

(4) That areas annexed by municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality.

(5) That the provision of services to protect the health, safety and welfare is a public purpose.

(6) That it is essential for citizens to have an effective voice in annexations initiated by municipalities.

Act of June 17, 2011, ch. 396, § 8, 2011 N.C. Sess. Laws 1649, 1649–50 (codified at N.C. GEN. STAT. § 160A-58.50 (2011)).

222. *See* Act of June 17, 2011, ch. 396, § 8, 2011 N.C. Sess. Laws 1649, 1657–58, *amended by* Act of May 30, 2012, ch. 11, § 2, 2012-1 N.C. Adv. Legis. Serv. 25, 28–29 (LexisNexis) (to be codified as amended at N.C. GEN. STAT. § 160A-58.55(i)).

223. *Id.*

224. “Property owner” is defined as “any person having a freehold interest in real property.” N.C. GEN. STAT. § 160A-58.51(4) (2011).

225. Act of June 17, 2011, ch. 396, § 8, 2011 N.C. Sess. Laws 1649, 1657–58, *amended by* Act of May 30, 2012, ch. 11, § 2, 2012-1 N.C. Adv. Legis. Serv. 25, 28–29 (LexisNexis) (to be codified as amended at N.C. GEN. STAT. § 160A-58.55(i)).

not the residents of the annexing municipality) to vote on whether to allow the annexation to proceed.²²⁶

c. Other Changes

Several other more modest changes are worth highlighting. The 2011 legislation abolished differences in annexation policy between municipalities with fewer or more than 5,000 residents.²²⁷ This change was unfortunately made without any empirical examination of differences between smaller and larger municipalities, even though patterns of development may vary in significant respects depending on the size and location of municipalities, in particular whether they fall within the path of regional growth. The incidence of annexation in North Carolina appears to have differed significantly depending upon such considerations as discussed below,²²⁸ and a more nuanced set of annexation policies might have been developed to take into account size and regional differences.

During the extended period of legislative debate, a number of proposals surfaced to change the definition of “urban character” that had provided the cornerstone criteria for involuntary annexation in the past.²²⁹ In the end, however, requirements regarding development for urban purposes and the contiguity requirement were both slightly revised to include a new definition of residential use and to prohibit “spaghetti strings” that connected outlying parcels along public roads.²³⁰ Land bridge

226. See Act of May 30, 2012, ch. 11, §§ 1, 2, 2012-1 N.C. Adv. Legis. Serv. 25 (LexisNexis) (to be codified at N.C. GEN. STAT. §§ 160A-58.55(i), -58.64) (modifying section 160A-58.55 and establishing the referendum requirement in section 160A-58.64, which eliminates the petition process created as part of the 2011 amendments).

227. The legislation eliminated Parts 2 and 3 of Chapter 160A and instead established a new Part 7 governing all annexation by North Carolina municipalities. See Act of June 17, 2011, ch. 396, 2011 N.C. Sess. Laws 1649.

228. See *infra* notes 384–97 and accompanying text.

229. See, e.g., H.B. 524, 2009 Gen. Assemb., Reg. Sess. (N.C.).

230. See N.C. GEN. STAT. § 160A-58.51(1) (2011). This statute defines “contiguous area” as

[a]ny area which, at the time annexation procedures are initiated, either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, the right-of-way of a railroad or other public service corporation, lands owned by the municipality or some other political subdivision, or lands owned by the State of North Carolina. A connecting corridor consisting solely of the length of a street or street right-of-way may not be used to establish contiguity.

areas (“necessary land connections”) also continue to be eligible for annexation.²³¹ “Doughnut holes” and “islands” are now specifically designated as areas subject to involuntary annexation, and procedures otherwise applicable to areas subject to involuntary annexation do not apply in such contexts.²³²

Changes were also made in procedural provisions. The time horizon for involuntary annexation was elongated by requiring municipalities to devote a full year to planning following the adoption of a resolution of consideration,²³³ to be followed by a resolution of intent and associated procedural requirements including the development and distribution to property owners of a detailed annexation report.²³⁴ Additional notice requirements were added, with more detailed information to be distributed as part of required notice.²³⁵ Effective dates for involuntary annexations were standardized so that they now fall at the end of the fiscal year.²³⁶ Municipalities are now required to report in more detail to the Local Government Commission about their progress in offering urban services.²³⁷ Timing and standards for

Id.; see also *id.* § 160A-58.51(5). This section defines “used for residential purposes” as

[a]ny lot or tract five acres or less in size on which is constructed a habitable dwelling unit. The term also includes any lot or tract that is used in common for social or recreational purposes by either owners of lots with habitable dwelling units or owners of lots intended for occupation by dwelling units and the lot owners have a real property interest in the commonly used property that attaches to or is appurtenant to the owners’ lots.

Id. Additional legislation also prohibited municipalities from petitioning themselves for voluntary annexation of state-maintained streets unless the municipality owned the underlying fee and not just an easement. See Act of Apr. 28, 2011, ch. 57, § 3, 2011 N.C. Sess. Laws 75, 77 (codified at N.C. Gen. Stat. § 160A-31(i) (2011)).

231. See Act of June 17, 2011, ch. 396, § 8, 2011 N.C. Sess. Laws 1649, 1652 (codified at N.C. GEN. STAT. § 160A-58.54(a)(4) (2011)).

232. See *id.*, 2011 N.C. Sess. Laws at 1653 (codified at N.C. GEN. STAT. § 160A-58.54(a)(4)(c) (2011)).

233. See *id.*, 2011 N.C. Sess. Laws at 1654 (codified as amended at N.C. GEN. STAT. § 160A-58.55(c) (2011)).

234. See *id.*, 2011 N.C. Sess. Laws at 1654–55 (codified as amended at N.C. GEN. STAT. § 160A-58.55(c)–(d) (2011)).

235. See *id.*, 2011 N.C. Sess. Laws at 1653–55 (codified as amended at N.C. GEN. STAT. § 160A-58.55(b), (d) (2011)).

236. See *id.*, 2011 N.C. Sess. Laws at 1656 (codified as amended at N.C. GEN. STAT. § 160A-58.55(h)(5) (2011)).

237. See *id.*, 2011 N.C. Sess. Laws at 1658 (codified at N.C. GEN. STAT. § 160A-58.55(o) (2011)).

judicial review were also changed.²³⁸ Now, the petition process provides an initial avenue to block an involuntary annexation, and appeals may be filed within sixty days of the end of the 130-day petition period.²³⁹ When challenges to involuntary annexations are brought in superior court, the relevant standard is no longer whether the annexation was conducted in “substantial compliance” with statutory requirements, but rather whether “procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.”²⁴⁰ Property owners who prevail in such litigation are also entitled to receive awards of attorneys’ fees and court costs.²⁴¹

Finally, additional provisions clarified the meaning of “bona fide farm” and re-emphasized legislative intent to keep bona fide farms from facing involuntary annexation.²⁴² The definition of “farm” was loosened by removing references to farming tied to a “domestic or foreign market” and instead providing that evidence from state and federal tax information could suffice to establish “bona fide farm” status.²⁴³ Annexation of bona fide farms is now disallowed without the consent of the property owner.²⁴⁴ The likely result will be to create “doughnut hole” areas within municipal boundaries that are immune from annexation until the property is no longer used for farming purposes. In addition, bona fide farms at the margins of municipalities were made exempt from municipal extraterritorial jurisdiction for purposes of land use planning and regulation.²⁴⁵

238. *See id.*, 2011 N.C. Sess. Laws at 1664 (codified as amended at N.C. GEN. STAT. § 160A-58.60 (2011)).

239. *Id.*

240. *See id.*, 2011 N.C. Sess. Laws at 1665 (codified at N.C. GEN. STAT. § 160A-58.60(g)(1) (2011)).

241. *See id.* § 8, 2011 N.C. Sess. Laws at 1666 (codified at N.C. GEN. STAT. § 160A-58.60(n) (2011)).

242. Act of June 17, 2011, ch. 363, § 3.1, 2011 N.C. Sess. Laws 1504, 1505 (codified at N.C. GEN. STAT. § 160A-58.54(c) (2011)).

243. *Id.* § 1, 2011 N.C. Sess. Laws at 1504–05 (codified at N.C. GEN. STAT. § 153A-340(b)(2) (2011)).

244. *See id.* § 3.1, 2011 N.C. Sess. Laws at 1505 (codified at N.C. GEN. STAT. § 160A-58.54(c) (2011)) (clarifying definition of “bona fide farm” purposes and prohibiting annexation without written consent).

245. *See id.* § 4, 2011 N.C. Sess. Laws at 1505 (codified as amended at N.C. GEN. STAT. § 160A-360(k) (2011)).

2. Changes Affecting Low-Income Areas Previously Not Readily Annexed

Municipal underbounding²⁴⁶ is an important issue that received considerable attention during the recent legislative debate in North Carolina. Prior to the recent statutory changes, it was often the case that poor (and commonly minority) enclaves were not able to qualify for voluntary annexation either because there was fragmented property ownership and difficulty in gaining the 100% approval needed for a successful petition, or because the municipality was not willing to take in an area where providing services would exceed anticipated tax revenues.²⁴⁷ Likewise, involuntary annexation was often unavailable because the level of development did not satisfy the “urban character” requirements relating to population density, subdivision, parcel size, or established uses.²⁴⁸

Statutory revisions targeted the problem of underbounding in two distinct ways. Both new provisions pertain to poor community enclaves where the income of fifty-one percent of households equals two hundred percent or less of the poverty threshold.²⁴⁹ Under the first new provision, the focus is on the desires of property owners in such areas. If seventy-five percent of affected property owners petition for annexation, a municipality *must* annex a qualifying area, provided the population of the area is less than or equal to ten percent of the municipality’s total population and one-eighth of the area’s aggregated external boundaries are contiguous with the municipality.²⁵⁰ Only one such annexation is required of a municipality in a three-year period, and exemptions are available from the annexation requirement if associated requirements to extend water and sewer services would push the municipality’s annual debt service payments beyond acceptable bounds.²⁵¹

246. See *supra* note 29 and accompanying text.

247. UNC CTR. FOR CIVIL RIGHTS, INVISIBLE FENCES: MUNICIPAL UNDERBOUNDING IN SOUTHERN MOORE COUNTY 14, 24 (2006), <http://www.law.unc.edu/documents/civilrights/briefs/invisiblefencesreport.pdf>.

248. See *supra* notes 124–33 and accompanying text.

249. See Act of June 17, 2011, ch. 396, § 10, 2011 N.C. Sess. Laws 1649, 1667, 1669 (codified at N.C. GEN. STAT. 160A-31(b1), (j) (2011)).

250. *Id.*, 2011 N.C. Sess. Laws at 1667 (codified at N.C. GEN. STAT. 160A-31(b1) (2011)).

251. *Id.*, 2011 N.C. Sess. Laws at 1668 (codified at N.C. GEN. STAT. § 160A-31(d2)(1) (2011)).

The second approach focuses on residents of such enclaves rather than property owners. Under this approach, a petition for voluntary annexation may be submitted by two-thirds of the resident households in the area (based on having at least one adult resident in each of the petitioning households sign such a request).²⁵² Such area must also be contiguous.²⁵³ In such cases, the municipality is permitted but not required to annex.²⁵⁴ Thus, a new option is created for a less-than-one-hundred percent voluntary annexation petition at least for areas characterized by low socio-economic indicators.

3. Rolling Back Recent Annexations: A Drama in Three Acts

Much of the fury that spurred the 2011 and 2012 annexation reforms was voiced by citizens who had themselves recently been subjected to involuntary annexation. It was therefore not surprising that the General Assembly sought to redress their grievances during the first act of the recent annexation drama by rolling back involuntary annexations that had been in the pipeline for some time but had not yet taken effect. The General Assembly accordingly adopted separate legislation that suspended certain pending involuntary annexations that were nearing completion or that had already become effective, and directed local boards of elections in those areas to consider petitions that would seek to block the annexations permanently.²⁵⁵

Act II of the drama occurred when several of the affected municipalities, along with named individuals in the annexation areas, filed suit in superior court to overturn the legislation.²⁵⁶ The complaints recited in detail the expenditures that they had already made in reliance upon the annexation law in effect at the time they had commenced work on the referenced involuntary

252. *Id.*, 2011 N.C. Sess. Laws at 1669 (codified at N.C. GEN. STAT. § 160A-31(j) (2011)).

253. *Id.*

254. *Id.*

255. See Act of June 18, 2011, ch. 173, §§ 1–2, 2011 N.C. Sess. Laws 668, 668–69 (affecting areas in the process of annexation in Kinston, Lexington, Rocky Mount, Wilmington [Monkey Junction], Asheville/Biltmore Lake, Marvin, Southport, and Fayetteville [Gates Four]); Act of June 18, 2011, ch. 177, §§ 2–3, 2011 N.C. Sess. Laws 680, 681 (including Goldsboro, whose annexation ordinance had already become final).

256. Verified Complaint, *City of Goldsboro v. State*, 11-CVS-18230, 2012 WL 1440446 (Wake Cnty. Super. Ct. Mar. 27, 2012).

annexations, and challenged the roll-back provisions on a number of grounds.²⁵⁷ The municipalities then challenged the 2011 petition-veto provisions on the basis that these provisions allowed only property owners, not other residents, to vote, allegedly violating state constitutional provisions prohibiting²⁵⁸ the imposition of property qualifications on the right to vote,²⁵⁹ the equal protection²⁶⁰ and “exclusive emoluments” clauses,²⁶¹ and provisions authorizing legislative oversight of local governments.²⁶² The City of Goldsboro and a property owner in the area annexed also asserted claims under the takings clause based on vested rights in contracts and expenditures to provide water and sewer services and the disruption of plans for house construction by the property owners.²⁶³ Meanwhile, property owners who believed they benefited from the statutory changes intervened on the side of the state.²⁶⁴ While the use of a petition-veto (often referred to as a “remonstrance” right) by registered voters as part of the structure of annexation decisions is not new for North Carolina,²⁶⁵ the recent case posed different questions

257. *Id.* at 11–20.

258. *Id.* at 20–23.

259. N.C. CONST. art. I, § 11 (“As political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office.”).

260. *Id.* § 19 (“No person shall be denied the equal protection of the laws . . .”).

261. *Id.* § 32 (“No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.”).

262. *Id.* art. VII, § 1 (“The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.”).

263. See Verified Complaint, *supra* note 256, at 22–23.

264. See generally Intervenor-Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for Judgment on the Pleadings, *City of Goldsboro v. State*, No. 11-CVS 18230, 2012 WL 1440446 (Wake Cnty. Super. Ct. Nov. 28, 2011) (attacking each of the claims put forward by Plaintiffs to challenge the legislation).

265. See *Wood v. City of Fayetteville*, 43 N.C. App. 410, 412, 259 S.E.2d 581, 582 (1979). The case involved a challenge against veto-petition provisions brought by the City of Fayetteville and city taxpayers who claimed that veto-petition by non-resident voters opposing annexation was invalid. *Id.* at 412, 259 S.E.2d at 583. The petition-veto provision differed from the one in the 2011 annexation legislation because it allowed registered voters to petition and block annexation in certain parts of the state. *Id.* at 411, 259 S.E.2d at 582. The City and certain taxpayers challenged the veto-petition provision on grounds of improper delegation of legislative authority, exclusive emoluments, and inappropriate local legislation regarding health and sanitation. *Id.* at 412, 259 S.E.2d at 582. The court of appeals concluded that the veto-

because of the 2011 legislation's limitation of petitioning rights to property owners and because of the substantial sunk costs imposed upon municipalities that were already well along in the process of annexation when the 2011 session laws regarding petition-vetoes about pending annexations took effect. In March 2012, the Wake County Superior Court concluded that cities' challenges should be sustained²⁶⁶ and the matter was expected to be appealed.²⁶⁷ The trial court's order did not explain its rationale, but it was clear that the court's conclusion cast into doubt not only the "roll-back" provisions affecting municipalities that were already far along with the process of annexation, but also the general contours of the annexation petition-veto process for other cities going forward.²⁶⁸

The litigation raised several important questions regarding the application of the state constitutional provisions just mentioned. It is clear that there is no constitutional right to vote on annexation decisions.²⁶⁹ Moreover, the North Carolina Court of Appeals has held that annexation statutes that afford a vote to resident individuals but not to corporations located in an area being annexed are permissible.²⁷⁰ On the other hand, the courts have invalidated statutes that differentiated voting rights of

petition provision could not be challenged because of lack of standing. *Id.* at 415, 259 S.E.2d at 584.

266. See *City of Goldsboro v. State*, No. 11-CVS 18230, 2012 WL 1440446 (Wake Cnty. Super. Ct. Mar. 27, 2012). A companion case was filed by the City of Rocky Mount. See *City of Rocky Mount v. State*, No. 11-CVS 18288, 2012 WL 1440446 (Wake Cnty. Super. Ct. Mar. 27, 2012).

267. See Rob Christensen, *Cities Win Case Against State Law*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 28, 2012, <http://www.newsobserver.com/2012/03/28/1963104/superior-court-judge-rules-that.html>.

268. See *City of Goldsboro*, 2012 WL 1440446, at *1 (declaring new veto-petition provisions codified at sections 160A-58.51(a)(1) and 160A-58.55(h)(5), (h)(7) and (i) "ultra vires, void ab initio, and of no effect").

269. See *Barefoot v. City of Wilmington*, 306 F.3d 113, 121–23 (4th Cir. 2002) (explaining that there is no substantive federal constitutional right to vote on annexation and no equal protection violation if certain decisions such as incorporation are put to referendum but others such as annexation are not). See generally 2 MCQUILLIN, *supra* note 39, § 7:22, at nn. 18–19 (collecting cases from other jurisdictions regarding the right to vote in annexation decisions).

270. See *Textfi Indus., Inc. v. City of Fayetteville*, 44 N.C. App. 268, 273, 261 S.E.2d 21, 25 (N.C. App. 1979) (rejecting a claim by a corporate lessee in area to be annexed that it should have had right to vote and to receive notice in connection with annexation action; relying on text of article I, section 11 of the Constitution of North Carolina, which states that "[a]s political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office," as basis for rejecting lessee's claim).

property owners and residents if suspect classifications were involved or if there was an infringement on fundamental rights.²⁷¹ In an earlier case arising from South Carolina's practice of allowing only property owners to vote on annexation decisions, the Fourth Circuit found the practice to be unconstitutional since it differentiated between property owners and residents as to a matter that was of general interest.²⁷²

The state constitutional provision that specifies that "no property qualification shall affect the right to vote" raised slightly more complex questions. This provision was adopted in the aftermath of the Civil War,²⁷³ and there is relatively limited precedent interpreting the meaning of this or comparable provisions elsewhere.²⁷⁴ A crucial issue under this provision was whether the 2011 annexation law's petition-veto provision should be treated as a "right to vote" for purposes of this constitutional

271. See *Barefoot*, 306 F.3d at 121-22 ("Later decisions, however, have qualified the state's power to some degree, subjecting annexations to some scrutiny under the Fourteenth Amendment. Where the exercise of a state's discretion in ordering its political subdivisions involves the creation of suspect classifications or infringes on fundamental rights, the state action will be upheld only if it furthers a compelling state interest." (citing *Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978) and *Muller v. Curran*, 889 F.2d 54 (4th Cir. 1989))).

272. See *Hayward v. Clay*, 573 F.2d 187, 187 (4th Cir. 1978). Later Fourth Circuit cases raised related but distinct issues. In *Berry v. Bourne*, 588 F.2d 422, 425 (4th Cir. 1978), the court upheld a South Carolina annexation provision that allowed seventy-five percent of property owners to petition for annexation, before action would be taken by the governing body, reasoning that there was no vote by property owners or anyone other than the governing board. In *Muller v. Curran*, 889 F.2d 54, 57 (4th Cir. 1989), the court found Maryland's arrangements for incorporation to be unconstitutional in the absence of a compelling state interest, where a petition of twenty percent of residents as well as of property owners with twenty-five percent of the assessed property value in the area had to be received before the county council could decide to submit the issue of incorporation to an election involving all registered voters. For a similar conclusion reached by the Missouri Supreme Court, see *In re Extension of Boundaries of Glaize Creek Sewer Dist.*, 574 S.W.2d 357, 364 (Mo. 1978) (en banc) (finding an equal protection violation in connection with statutory provisions relating to sewer district boundary extension that accorded only property owners in the area to be annexed and in the existing district right to vote).

273. This provision had its genesis in the North Carolina Constitution of 1868, which included a provision that stated: "As political rights and privileges are not dependent upon or modified by property, therefore no property qualification ought to affect the right to vote or hold office." N.C. CONST. art I, § 22 (1868).

274. Other states with constitutional provisions regarding property qualifications and voting include California and Idaho. See CAL. CONST. art. I, § 22 ("The right to vote or hold office may not be conditioned by a property qualification."); IDAHO CONST. art. I, § 20 ("No property qualifications shall ever be required for any person to vote or hold office except in school elections, or elections creating indebtedness, or in irrigation district elections . . .").

provision. The General Assembly referred to the mechanism chosen as a "petition," a term used elsewhere in the annexation statute to refer to requests to city councils for voluntary annexation.²⁷⁵ In the context of the petition-veto provision, however, petitions were to be lodged with local county boards of elections, and the statute contemplated that if a sufficient number of petitions were filed, the annexation would be blocked and could not be reinstituted for three years.²⁷⁶ The mechanism imposed thus differed from other instances in which courts have held that petitions do not constitute votes because ultimate decisions remain lodged with elected decision makers.²⁷⁷ Perhaps the most analogous case law concerns petitions by landowners that in effect block consideration of incorporation proposals by elected decision-makers and, as a result, curtail the right of residents in an area proposed for incorporation to vote upon such proposals.²⁷⁸ Because there was no otherwise applicable right to vote on annexation decisions in North Carolina, however, the appellate courts might well have had to determine whether the petition-veto system in fact created a right to vote only for property owners (triggering automatic results once petitions are filed with local boards of elections), and whether the 2011 annexation reforms raised questions under the equal protection provisions of the state constitution.²⁷⁹

275. See N.C. GEN. STAT. § 160A-31 (2011) (relating to voluntary annexation).

276. See Act of June 17, 2011, ch. 396, § 9, 2011 N.C. Sess. Laws 1649, 1657 (codified at N.C. GEN. STAT. § 160A-58.55(i) (2011)).

277. See, e.g., *Carlyn v. City of Akron*, 726 F.2d 287, 290 (6th Cir. 1984) (upholding an Ohio structure that allowed property-owner petition to elected board as a means of annexation, where elected board of county commissioners had final say in reaching annexation decision).

278. See, e.g., *Curtis v. Bd. of Supervisors*, 501 P.2d 537, 546 (Cal. 1972) (holding that strict scrutiny applied under these circumstances); *City of Seattle v. State*, 694 P.2d 641, 647, 650 (Wash. 1985) (invalidating provision that allowed property owners to block annexation election on state and federal equal protection grounds, and invalidating provision requiring a reasonable relationship between taxes and services that applied only to some cities based on state "special legislation" provisions).

279. The other focal provision of the state constitution, the "exclusive emoluments" clause, has proved difficult to interpret. North Carolina courts have stated that the goal of the "exclusive emoluments" clause "is to prevent the community from surrendering its power to another person or set of persons by grant of exclusive or separate emoluments or privileges unless they are granted in consideration of public services." *City of Asheville v. State*, 192 N.C. App. 1, 46, 665 S.E.2d 103, 134 (2008) (internal quotation marks omitted). The North Carolina courts have also been clear that the touchstone in interpreting the exclusive emoluments provision relates to whether the general welfare or individual welfare is advanced

Act III in this grand drama occurred in May and June of 2012, when the General Assembly took further steps to roll back pending involuntary annexations²⁸⁰ and replaced the 2011 petition-veto provisions with a referendum system that effectively undercut most legal claims presented in Act II. More specifically, the legislature eliminated the petition-veto system and substituted a mandatory referendum system that allowed registered voters in an area proposed for involuntary annexation (without regard to whether they owned property) to block the proposed annexation by majority vote.²⁸¹

The General Assembly has considerable constitutionally afforded discretion regarding “fixing of boundaries” of cities and towns.²⁸² Precedent from elsewhere also suggests that courts generally accord state legislatures considerable discretion in determining the process of annexation.²⁸³ It would thus appear that North Carolina has joined the ranks of states that make involuntary annexation extremely difficult. It also appears that individual citizens’ preferences have been given much more weight than the judgments of elected city leaders with regard to most municipal boundary setting decisions.

4. Summary

Although a myriad of possible changes were posed as part of the debate leading up to the recent statutory changes to North Carolina’s annexation laws, in the end changes were relatively few

and whether there is a reasonable basis for legislative action. *See* *Town of Emerald Isle ex rel. Smith v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987).

280. *See* Act of May 30, 2012, ch. 3, §§ 1, 4, 2012-1 N.C. Adv. Legis. Serv. 5, 5 (LexisNexis) (legislatively de-annexing areas that had been subject to litigation).

281. *See* Act of May 30, 2012, ch. 11, §§ 1–2, 2012-1 N.C. Adv. Legis. Serv. 25, 25, 28–29 (LexisNexis) (adding referendum requirement and eliminating petition-veto provision introduced in 2012).

282. *See* N.C. CONST. art. VII, § 1 (“The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.”).

283. *See* 2 MCQUILLIN, *supra* note 39, § 7:19 (collecting cases regarding voting on annexation); *id.* § 7:18 at 569–71 (“Since compulsory incorporation of governmental areas is not favored in this country, the question of annexation of territory to municipal corporations is usually referred to the inhabitants. This is true in many cases where the municipal corporation to which an area is to be annexed is a ‘home rule’ or constitutional charter city or municipality. Statutes frequently require that municipal boundaries shall be extended only upon the consent of a majority of the inhabitants of the district sought to be annexed.” (footnotes omitted)).

but very fundamental. Earlier skirmishes evident in the past decade's annexation litigation had shown opponents of existing law that technical fixes would be insufficient to allay their concerns about self-determination, property rights, and costs. Two fundamental shifts in the involuntary annexation provisions raise the specter that in many locales, involuntary annexation can no longer be afforded by municipalities (which have to carry many more costs in extending water and sewer services than had been true previously) and extensive preparations and planning will henceforth be subject to referendum vote and possible veto by property owners in annexation areas. The situation facing economically disadvantaged areas was improved, since petitions by a substantial proportion of (but not all) property owners can force municipal annexation along with absorption of associated costs, and also provides residents (who are not property owners) the opportunity to seek annexation at a municipality's discretion. The legislature also rolled back involuntary annexation ordinances in a number of locales and, in 2012, gave residents of areas proposed for involuntary annexation even more power to block such proposals by virtue of required annexation referenda (not just petition-vetoes). All and all, it appears that the state's municipalities lost the recent annexation wars and must now prepare to face new realities. The remainder of this Article employs empirical evidence along with legal analysis to shed light on the likely future in the wake of the recent statutory reforms, focusing in particular on issues relating to infrastructure provision, land use planning and growth management, and local government fragmentation.

III. WHAT NEXT?

This Part considers three major types of questions that are likely to arise in the aftermath of the recent changes to North Carolina's annexation policies: those relating to water and sewer infrastructure, those relating to municipal regulatory authority, and those relating to intergovernmental relationships. It focuses on the three most significant policy impacts of annexation: infrastructure extension, land use planning and growth management, and government fragmentation, considering each in turn. This Part argues that water and sewer extensions will likely be tied to agreements for voluntary annexation in the future. It also recommends closer linkage between extraterritorial planning jurisdiction, annexation, and growth management policies. Finally

this Part argues for a more comprehensive re-envisioning of the duties and relationships between cities, counties, special districts, and gated communities in order to avoid fragmentation and unintended adverse consequences that might otherwise stem from North Carolina's recent annexation wars.

A. *Infrastructure*

As discussed earlier, the new referendum mechanism imposed on involuntary annexations in 2012 is likely to substantially hinder municipalities' ability to engage in involuntary annexation. As municipalities face hard choices relating to water and sewer infrastructure extension, it appears that they have at least three choices.

1. Proceeding with Involuntary Annexations

The new legislation is very explicit in describing the obligations regarding water and sewer infrastructure of municipalities that choose to proceed with involuntary annexation (subject to a potential referendum override).²⁸⁴ There is no obligation to extend water and sewer services if a majority of property owners do not request them. If a majority requests these services, the municipality must provide the requesting property owners with water and sewer service within three and a half years "at no cost other than periodic user fees."²⁸⁵ Other property owners may request hook-ups for a period of up to five years at reduced connection rates.²⁸⁶ Only after a period of five years can a municipality charge connection fees as provided under its general

284. See N.C. GEN. STAT. § 160A-58.56 (2011); discussion *supra* Part II.C.1.a.

285. See § 160A-58.56(a)–(b). If owners of a majority of the affected parcels do not request water and sewer, the municipality may proceed with the annexation without extending water and sewer to any property owners in the area to be annexed and may impose prorated charges on property owners requesting services. *Id.* § 160A-58.56(b)(4), (d).

286. *Id.* § 160A-58.56(d). Prorated rates range from fifty percent of the "average cost of the installation of water and sewer for a residential lot" in the first year after annexation to ninety percent of the average cost in the fourth year after annexation. *Id.* Average cost is defined as "the cost for residential installations from curb to residence, including connection and tap fees, in the area described in the annexation ordinance." *Id.* § 160A-58.56(h)(2). The right to request water and sewer service extends to "property owners" of "parcels," *id.* § 160A-58.56(b)(1), indicating inclusion of commercial parcels even though the permitted installation charges are benchmarked against residential costs.

policies.²⁸⁷ In the interim, it cannot charge property owners in the annexed area any other fee (such as “availability fees” that have often been charged) unless the property owner requests service.²⁸⁸ Several specific questions are posed by these provisions.

a. Likelihood of Proceeding?

How likely is it that North Carolina’s cities and towns will proceed with involuntary annexations in the face of statutory changes? What will be the implications of these decisions for the state of water and sewer infrastructure? It is by no means easy to answer these questions. To a significant degree, decisions will depend upon the financial realities facing individual municipalities, and the structural arrangements they use to help residents access water and sewer services. The fiscal note prepared by the fiscal research staff of the North Carolina General Assembly concluded that it was impossible to say with any certainty what the fiscal impact of 2011 annexation changes might be.²⁸⁹

The likelihood and method of proceeding would seem to depend on the water and sewer infrastructure, its capacity, the fiscal health of their water and sewer program, and the costs associated with expanding main trunk lines and establishing individual lot hook-ups. Infrastructure capacity clearly varies from system to system, with added complexities associated with topography in extending lines. It is, however, possible to gain some insight into fiscal health and possible incremental costs of lot hook-ups.

Data on municipalities in the state collected and published by the North Carolina State Treasurer indicates that the situations of municipalities vary significantly across at least two variables: the role of individual cities in providing electrical power and city

287. *Id.* § 160A-58.56(b)(4) (“After five years, and only if connection is requested by a property owner in accordance with subsection (e) of this section, the municipality may charge for the connection according to the municipality’s policy.”).

288. *Id.* § 160A-58.56(e) (“Notwithstanding Article 16 of this Chapter [relating to public enterprises and their charges], the municipality may not charge, for any reason, any property owner within the area described in the annexation ordinance, for the installation or use of the water or sewer system unless that property owner is, or has requested to become, a customer of the water or sewer system.”).

289. See Memorandum from Rick Shreve, Fiscal Research Div., to House Fin. Comm. 2 (May 5, 2011), available at <http://www.ncleg.net/documentsites/committees/HouseFinance/Meeting%20Documents/5-5-2011/H845%20Fiscal%20Memo.pdf>.

size.²⁹⁰ Data for the fiscal year ending June 30, 2010, prior to legislative changes, indicated that for cities with electrical systems, those with populations over 2,500 tended to subsidize other funds through their operation of water and sewer services.²⁹¹ Those under 2,500 in population tended to subsidize water and sewer operations from other sources.²⁹² For cities that did not provide electric power directly, those with populations of more than 50,000 and those with populations between 2,500 and 9,999 tended to show modest transfers of water and sewer funds, perhaps to pay indirect overhead costs, give municipalities an acceptable rate of return, or subsidize the general fund.²⁹³ Those with populations of more than approximately 16,000 tended to generate substantial cash flows from these operations, with the largest cities generating the most substantial cash flows.²⁹⁴ Significantly, municipalities with populations under 2,500 have had the most problematic operating margins for water and sewer systems and tended to be the most heavily subsidized by other funding sources.²⁹⁵ In a 2011 report (for the fiscal year ending June 30, 2010), the State Treasurer's Office advised jurisdictions with negative operating margins that user fees were likely too low or operating expenses were too high (or both) and that combining

290. See, e.g., Memorandum from Sharon Edmundson, Dir., Fiscal Mgmt. Section to Officials of Mun. with Water & Sewer Syst. & Their Indep. Auditors 2 (May 11, 2011), <https://www.nctreasurer.com/slg/Memos/2011-16.pdf> [hereinafter Edmundson Letter] (providing municipalities with financial data about water and sewer systems across the state, segregated first by municipalities with and without electric systems and then by population groups).

291. See *id.* The legislature recently set new limits on the extent to which revenues from certain specified municipal electric systems could be used for other purposes. See Act of June 28, 2012, ch. 181, § 2, 2012-3 N.C. Adv. Legis. Serv. 158 (LexisNexis) (to be codified at N.C. GEN. STAT. § 159B-39(c)) ("The amount transferred [to other funds of the municipality] may be less than the following, but in no event may the amount transferred exceed the greater of the following: (1) Three percent (3%) of the gross capital assets of the electric system at the end of the preceding fiscal year. (2) Five percent (5%) of the gross annual revenues of the electric system for the preceding fiscal year.").

292. See Edmundson Letter, *supra* note 290, at 5.

293. *Id.*; see also SHADI ESKAF ET AL., ENVIRONMENTAL FIN. CTR., UNC SCH. OF GOV'T, RESULTS OF THE 2010 NORTH CAROLINA WATER AND WASTEWATER FINANCIAL PRACTICES AND POLICIES SURVEY 28 (2011), http://www.efc.unc.edu/publications/2011/FinancialPracticesAndPoliciesSurvey_Results.pdf (indicating, without referencing size of population served, that thirty-eight percent of respondent water and wastewater systems paid indirect costs, two percent gave a rate of return, and six percent subsidized general funds).

294. See Edmundson Letter, *supra* note 290, at Report 1, C-2.

295. See *id.* at 5.

into regional systems might be advisable.²⁹⁶ As of the 2011 report, North Carolina had more than 200 jurisdictions with populations below 2,500,²⁹⁷ many but not all of which had negative operating margins.²⁹⁸

Data is also available regarding the costs historically charged to property owners seeking water and wastewater hook-ups, based on surveys conducted by the UNC School of Government's Environmental Finance Center and the North Carolina League of Municipalities.²⁹⁹ A 2009 survey indicated that water tap and wastewater (hook-up) fees reported by respondent utilities in the state ranged from under \$200 to over \$3,000, with the bulk clustered in the range of \$400 to \$1,000, and with approximately two-thirds of systems charging the same tap fees to municipal and non-municipal customers.³⁰⁰ In addition, approximately one-third of responding systems charge some sort of "system development fee" for water and nearly half charge such fees for wastewater connections, in amounts ranging from \$300 to \$4,000.³⁰¹ Depending on the jurisdiction involved, the level of tap fees for water and sewer, and the use of system development charges for water and sewer, the subsidy for an individual lot hook-up might run to more than \$5,000. Depending on the number of parcels being annexed, and those that seek water and sewer services, the total costs of subsidizing hook-ups could be substantial.

296. *Id.*

297. *See id.* Twenty of these jurisdictions had municipal electric systems and 197 jurisdictions did not.

298. Of the 194 jurisdictions without electrical systems that reported data, 147 reported negative operating margins. *See id.* at Report 1, A-5 to A-12.

299. *See North Carolina Water & Wastewater Rates and Rate Structures*, UNC ENVTL. FIN. CTR., <http://www.efc.unc.edu/projects/NCWaterRates.htm> (last visited Nov. 16, 2012) (annual reports from 2005 to 2012); *Publications*, UNC ENVTL. FIN. CENTER, http://www.efc.unc.edu/publications.html#water_wastewater (last visited Nov. 16, 2012) (additional relevant publications and studies in the "Drinking Water & Wastewater" section); *Residential Tap Fees and System Development Charges (Impact Fees) in NC*, UNC ENVTL. FIN. CENTER, http://www.efc.unc.edu/projects/tap_impactfee.htm (last visited Nov. 16, 2012) (information about tap fees and impact fees).

300. *See* SHADI ESKAF & CHRIS NIDA, UNC ENVTL. FIN. CTR., TAP FEES AND SYSTEM DEVELOPMENT CHARGES FOR RESIDENTIAL WATER AND WASTEWATER CONNECTIONS IN NORTH CAROLINA AS OF JANUARY 2009, at 2 (2009), http://www.efc.unc.edu/publications/2009/NCTapFeesandSDC_Memo2009.pdf. A total of 287 water rate structures and 223 wastewater rate structures were represented in the survey. *Id.*

301. *See id.* at 3–4. The water charges clustered in the range of \$300 to \$1,200, and approximately half of respondents charged more than \$1,200 for wastewater connections. *See id.* at 4.

These two data sets suggest that North Carolina municipalities are not on an equal footing when it comes to annexation and potential costs of extending water and sewer services to newly annexed areas. As one might expect, it appears that small towns (below 2,500 in population), whether or not they have electric systems, will have less flexibility than large cities to absorb newly mandated costs associated with individual lot hook-ups. For the largest cities, where water and sewer may at least to some extent function as a potential revenue source that can subsidize other aspects of municipal budgets, involuntary annexation may continue to be financially feasible (assuming such annexations are not blocked by referenda) since there is at least some margin to cover associated costs. For other cities of intermediate size, situations may differ. Since it appears that water and sewer systems in small towns are already in many instances a source of financial concern, there may be an impetus to follow the State Treasurer's advice and move toward combining into regional systems, if the available infrastructure can handle resulting changes and if there is adequate funding and incentives to do so.

b. Implications for Hook-Up Fees Within the City?

In addition to the initial question (the financial feasibility of extending water and sewer services to areas newly subject to involuntary annexation), a second issue may arise if residents within municipalities object to inequitable treatment arising when those newly annexed receive substantial subsidies for new hook-ups while those within existing municipal boundaries do not.

The new statutory mandate to cover costs associated with water and sewer hook-ups for property owners in involuntarily annexed areas is very specific and addresses municipal obligations as to newly annexed property, but not property that already falls within municipal bounds. Historically, as previously explained, municipalities have not been required to cover hook-up costs for those connecting to water and sewer lines within the existing jurisdictions.³⁰² Indeed, on the advice of the North Carolina Local Government Commission, most municipalities in North Carolina have come to operate their utility systems as "public enterprises" and manage related budgets on an enterprise fund basis

302. See *supra* notes 143-50 and accompanying text.

(balancing payments by those receiving services with costs of operation) rather than planning to pay related costs directly from local tax funds.³⁰³ The question whether adjustments need be made to existing practices regarding hook-ups within established boundaries thus must be addressed against the backdrop of established law that treats rate-setting for water and sewer services as falling within common law utility rules and the Equal Protection Clause.³⁰⁴

By statute, the following terms apply to municipal decisions in setting fees and rates for public enterprises:

A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city.³⁰⁵

This provision would seem to give a municipality considerable discretion to set hook-up fees for residents within existing boundaries.³⁰⁶ A city might conclude that it would be fairer to cover costs of hook-ups for existing residents or property owners in future areas subject to voluntary annexation, because it is now obliged to do so by the 2011 annexation legislation for

303. Kara A. Millonzi, *Lawful Discrimination in Utility Ratemaking*, LOC. FIN. BULL., October 2006, at 2, www.sog.unc.edu/pubs/electronicversions/pdfs/lfb33.pdf. Historically, property taxes and sales tax revenues were used, *id.* at 1, but cities are legally authorized to use a variety of approaches to financing public enterprises including water and sewer systems. See N.C. GEN. STAT. § 160A-313 (2011) ("Subject to the restrictions, limitations, procedures, and regulations otherwise provided by law, a city shall have full authority to finance the cost of any public enterprise by levying taxes, borrowing money, and appropriating any other revenues therefor, and by accepting and administering gifts and grants from any source on behalf thereof.").

304. See Millonzi, *supra* note 303, at 3.

305. N.C. GEN. STAT. § 160A-314(a) (2011).

306. See *South Shell Inv. v. Town of Wrightsville Beach, NC*, 703 F. Supp. 1192, 1207 (E.D.N.C. 1988), *aff'd*, 900 F.2d 255 (4th Cir. 1990) (upholding against equal protection challenge policies of city that imposed impact fee and higher charges on new development than on other town residents); *Davis v. Town of Southern Pines*, 101 N.C. App. 570, 570, 400 S.E.2d 82, 82 (1991) (upholding substantially higher tap fee for one homeowner where sewer line had been extended without other assessments or connection charges). A recent decision by the Supreme Court of the United States supports this view. See *Armour v. Indianapolis*, 132 S. Ct. 2073, 2077 (2012) (finding no equal protection violation when city employed differentiated system of charges for sewer improvements, declining to give refunds to those who had paid lump sums but forgiving future charges for those using staged payments).

involuntarily annexed areas and might want to treat all residents on a comparable basis.³⁰⁷ On the other hand, it could view the special obligations imposed by the new legislation as uniquely addressing perceived inequities or burdens associated with adjustments to new property tax burdens. This position seems particularly warranted since the new legislation itself specifically states that after five years those in involuntarily annexed areas would again be subject to general municipal utility policies. Existing case law, which recognizes that municipalities have considerable discretion in setting utility rates and fees, would seem to give municipalities substantial flexibility on this point.³⁰⁸

c. Implications for User Rates in Involuntarily Annexed Areas in the Long Term?

As indicated above, the 2011 legislation limits municipalities' power to impose costs associated with water and sewer extensions to those property owners in involuntarily annexed areas unless such owners have requested associated services. Accordingly, availability fees may no longer be charged to those who do not immediately seek connections within five years of annexation.³⁰⁹

307. *See, e.g.*, *Fulghum v. Town of Selma*, 238 N.C. 100, 105, 76 S.E.2d 368, 371 (1953) (upholding city's right to charge higher rates to non-residents but noting that city had duty of equal service to those living within municipal boundaries).

308. *See, e.g.*, *Bogue Shores Homeowners Ass'n v. Town of Atlantic Beach*, 109 N.C. App. 549, 555, 428 S.E.2d 258, 262 (1993) (upholding town's determination that charges for residential condominiums should be set on the same basis as those for single family residences, rather than those for motels).

309. *Compare* N.C. GEN. STAT. § 160A-58.56(b)(3) (2011) (requiring water and sewer lines and connections to be provided at no cost other than periodic user fees), *and* § 160A-58.56(d) (providing for prorated payments based on timing of application for water and sewer services), *and* § 160A-58.56(e) ("Notwithstanding Article 16 of this Chapter [relating to public enterprises and their charges], the municipality may not charge, for any reason, any property owner within the area described in the annexation ordinance, for the installation or use of the water or sewer system unless that property owner is, or has requested to become, a customer of the water or sewer system."), *and* § 160A-58.56(f) ("The initial installation of water or sewer connection lines to property shall be completed without charge to the property owner. Title to water or sewer connection lines shall vest in the property owner following completion of the initial installation. The property owner shall be responsible for maintenance and repair of water and sewer connection lines on the owner's property following the initial installation."), *and* § 160A-58.56(h) ("For purposes of this section, the following definitions apply: (1) 'At no cost other than periodic user fees.' The municipality may not charge the property owner who responded favorably under subdivision (b)(3) of this section for any costs associated with the installation of the water or sewer system. The municipality may not charge a property owner who applies to participate in the water and sewer system under subsection (d) of this section prior to the first periodic user fee charge, and on that bill the owner may be

In addition, the legislation very specifically requires annexing municipalities to address and cover all or a proportion of costs associated with extending services to the lot or parcel level, not just to cover costs of trunk lines, for those who do seek hook-ups.³¹⁰

Do these provisions requiring annexing municipalities to cover immediate costs of hook-ups (and to forego “availability charges”) have implications for how rates for involuntarily annexed areas can be set in the longer term? A reasonable reading of the legislation and other existing statutes suggests not. The 2011 legislation is very clear in focusing on “initial installation costs”³¹¹ and specifically carves out the right of municipalities to set “periodic user fees” and to set connection fees five years after the annexation in accordance with generally applicable municipal policies (if a property owner seeks to connect).³¹² Moreover, North Carolina statutes specifically state that noncontiguous areas subject to satellite annexation can be designated as receiving “special classes of service” different from areas within primary corporate boundaries.³¹³ It is possible that a

charged no more than as provided in subsection (d) of this section.”), *with id.* § 160A-317(a) (“A city may require an owner of developed property on which there are situated one or more residential dwelling units or commercial establishments located within the city limits and within a reasonable distance of any water line or sewer connection line owned [by the municipality] . . . to connect the owner’s premises with the water or sewer line or both, and may fix charges for the connections. In lieu of requiring connection under this subsection and in order to avoid hardship, the city may require payment of a periodic availability charge, not to exceed the minimum periodic service charge for properties that are connected.”).

310. *See* Act of June 17, 2011, ch. 396, § 9, 2011 N.C. Sess. Laws 1649, 1651 (codified at N.C. GEN. STAT. § 160A-58.53(3) (2011)) (requiring annexing municipalities to prepare a “statement setting forth the plans for . . . [e]xtension of water and sewer services to each lot or parcel”).

311. *See id.* (“The initial installation of water or sewer connection lines to property shall be completed without charge to the property owner. Title to water or sewer connection lines shall vest in the property owner following completion of the initial installation. The property owner shall be responsible for maintenance and repair of water and sewer connection lines on the owner’s property following the initial installation.”).

312. *See id.*, 2011 N.C. Sess. Laws at 1659 (codified at N.C. GEN. STAT. § 160A-58.56(b)(4) (2011)) (“After five years, and only if connection is requested by a property owner in accordance with subsection (e) of this section, the municipality may charge for the connection according to the municipality’s policy.”).

313. *See* N.C. GEN. STAT. § 160A-58.5 (2011) (special rates for water, sewer and other enterprises). This provision states:

For the purposes of G.S. 160A-314, provision of public enterprise services within satellite corporate limits shall be considered provision of service for

municipality might want to designate involuntarily annexed areas as ones receiving “special classes of service” under the statutes, but that approach seems inadvisable if the only basis for that decision would be to recoup hook-up fees required to be covered by the municipality under the 2011 legislation. If, however, there are reasons other than these related to covering these costs (for example, because of topography, service costs, or infrastructure development costs relating to newer customers), such differentiation may be permissible.³¹⁴ At the same time, it seems likely that water and sewer user charges would rise for all rate payers since the costs of subsidizing hook-ups for involuntarily annexed areas could be substantial.

d. Obligations if Alternative Providers are Responsible for Water and Sewer Utilities?

In a number of jurisdictions across the state, water and sewer services are provided by regional, private, or other providers.³¹⁵ The 2011 annexation legislation addresses this situation in very explicit terms, stating that, if

the residents in the existing city boundaries are served by a public water or sewer system, or by a combination of a public water or sewer system and one or more nonprofit

special classes of service distinct from the classes of service provided within the primary corporate limits of the city, and the city may fix and enforce schedules of rents, rates, fees, charges and penalties in excess of those fixed and enforced within the primary corporate limits. A city providing enterprise services within satellite corporate limits shall annually review the cost thereof, and shall take such steps as may be necessary to insure that the current operating costs of such services, excluding debt service on bonds issued to finance services within satellite corporate limits, does not exceed revenues realized therefrom.

Id.

314. See *Wall v. City of Durham*, 41 N.C. App. 649, 659, 255 S.E.2d 739, 745 (1979); Millonzi, *supra* note 303, at 5.

315. A study published by the UNC School of Government’s Environmental Finance Center and the North Carolina League of Municipalities in March 2012 indicated that the pattern of water and sewer provision across the state was as follows (based on 494 responses): 375 systems were municipally owned, fifty-nine systems were county districts, seventeen were sanitary districts, eight were authorities, two were metropolitan districts, thirty-one were not-for profits, and two were for-profits. SHADI ESKAF, ENVTL. FIN. CTR., UNC SCH. OF GOV’T & CHRIS NIDA, N.C. LEAGUE OF MUNICIPALITIES, *WATER AND WASTEWATER RATES AND RATE STRUCTURES IN NORTH CAROLINA 1* (2012), http://www.efc.unc.edu/publications/2012/NCLM_EFC_AnnualW&WWRatesReport-2012.pdf (summarizing service providers by type).

entities providing service by contract with the public system, (ii) the annexing municipality does not provide that service within the existing city boundaries, (iii) the area to be annexed is in an area served by the public water or sewer system, and (iv) the municipality has no responsibility through an agreement with the public water or sewer system to pay for the extension of lines to areas annexed to the city, the city shall have no financial responsibility for the extension of water and sewer lines under this section.³¹⁶

Because of the substantial costs associated with funding hook-ups for water and sewer services in involuntarily annexed areas, it will be particularly important in the aftermath of the 2011 legislation to determine when and how this exemption might apply.

On the face of the statute, municipalities are relieved from obligations to fund water and sewer hook-ups if the area being annexed is served by a public water and sewer system other than the municipality itself, and if the municipality “has no responsibility”³¹⁷ through an agreement with the associated water and sewer system to pay for water and sewer extensions. As indicated above, approximately two-thirds of the state’s water and sewer systems are currently operated by municipalities, with approximately one-third made up of other providers.³¹⁸ The statutory text just quoted exempts municipalities from paying associated hook-up costs if they currently have no contractual obligation to “pay for the extension of lines”³¹⁹ to areas annexed. Since the pre-2011 annexation law only required municipalities to extend trunk or main lines as part of involuntary annexation plans, this language appears to refer to contractual provisions relating to whether the municipality or the water authority covers trunk or main line costs under existing contracts.³²⁰ Moreover, as discussed above, past contractual arrangements may have assumed that system development fees (charged to property owners along with tap fees by a substantial number of utilities) may have been a part of the mix.

What is more vexing is determining what options are available to municipalities going forward. Can those with

316. Act of June 17, 2011, ch. 396, § 9, 2011 N.C. Sess. Laws 1649, 1659 (codified at N.C. GEN. STAT. § 160A-58.56(a) (2011)).

317. See N.C. GEN. STAT. § 160A-58.56(a)(iv) (2011).

318. See *supra* note 315.

319. § 160A-58.56(a)(iv).

320. See *supra* notes 144–51 and accompanying text.

associated utilities contractually shift responsibility for costs of water and sewer extensions to the utility itself with associated changes in costs for ratepayers? What happens if municipalities (particularly those with very small and financially shaky water and sewer systems) opt to create new regional entities or sell their utilities to other providers in the face of substantial fiscal pressures and declining property tax revenues, as suggested by the North Carolina State Treasurer?³²¹

Prior to the recent legislative amendments, a series of North Carolina cases had dealt with provision of water and sewer services by public water and sewer authorities distinct from municipalities whose territories they serviced. In cases relating to the Orange Water and Sewer Authority (serving Chapel Hill, Carrboro, and parts of Orange County), the Supreme Court of North Carolina explicitly stated that cities have no obligation to provide duplicative services when independent water and sewer authorities already provide such services.³²² In addition, the North Carolina Court of Appeals had indicated that municipalities may delegate responsibilities for providing services to others but are not relieved of their “primary duty” to provide services as a result.³²³ Municipalities were also obligated to provide equal services to existing and new customers.³²⁴

North Carolina statutes previously explicitly limited the extent to which larger municipalities could reduce financial support for water and sewer services provided to areas newly subject to involuntary annexation.³²⁵ The relevant statutory

321. See *supra* notes 289–90 and accompanying text.

322. See *Moody v. Town of Carrboro*, 301 N.C. 318, 324–25, 271 S.E.2d 265, 270 (1980); see also *In re Annexation Ordinance* (Goldsboro), 296 N.C. 1, 16, 249 S.E.2d 698, 707 (1978) (holding that the city did not need to duplicate services provided by Air Force base both before and after annexation). Professor David Lawrence has also observed that cities may not duplicate services offered by existing county water and sewer districts unless water lines fail to provide sufficient flow for fire protection. See 3 LAWRENCE, *supra* note 104, § 6.02(i), at 6-15.

323. See *Wallace v. Town of Chapel Hill*, 93 N.C. App. 422, 429, 378 S.E.2d 225, 229 (1989).

324. See 3 LAWRENCE, *supra* note 104, § 6.02(i), at 6-15 to 6-16 (discussing cases requiring comparable services in terms of quality and cost of services).

325. See Act of September 22, 1998, ch. 150, § 13, 1998 N.C. Sess. Laws 432, 446, *repealed by* Act of June 17, 2011, ch. 396, § 7, 2011 N.C. Sess. Laws 1649, 1649 (“For purposes of the extension of water and sewer services required under G.S. 160A-47, no ordinance or policy substantially diminishing the financial participation of a municipality in the construction of water or sewer facilities required under this Article may apply to an area being annexed unless the ordinance or policy became effective at least 180 days prior to the date of adoption by the municipality of the

provision was not carried forward through the 2011 amendments, so it seemingly no longer applies.³²⁶ Instead, the focus under the 2011 statutory amendments rested solely on explicit affirmative requirements to cover installation costs and to avoid imposing any other financial obligations on property owners who had not sought to receive services, except those associated with user fees (rather than other dimensions of water and sewer finance).

The effect of these requirements is that North Carolina municipalities probably cannot simply delegate responsibilities to provide related services to other water and sewer utilities without continuing to have some responsibility for assuring comparable services within the city as between pre-existing and newly annexed areas.³²⁷ The deterrent of added costs will likely mean that all but the most financially solid cities will find it difficult to continue to engage in involuntary annexation. For smaller cities, particularly those with small service populations and financially weak water and sewer programs, these realities will pose significant challenges because it will likely prove impossible to annex nearby areas so as to stabilize or strengthen their municipal water and sewer funds. As water and sewer infrastructure grows older and there is less money in municipal coffers to subsidize upkeep, it is likely that water and sewer charges will climb and that there will be little money to convert to larger, updated regional systems with the kind of interconnectivity needed as the state faces potential future droughts.

Another corollary is the financial challenges that will be faced by municipalities which must address new petitions by property owners and residents to extend public water and sewer to relatively high-poverty areas. The statutory revisions mandate that municipalities annex such areas if seventy-five percent of

resolution giving notice of intent to consider annexing the area under G.S. 160A-49(a).”). This provision had played an important part in the analysis in *Capps v. City of Kinston*, __ N.C. App. __, __, 715 S.E.2d 520, 526 (upholding installation fee requirement), *discretionary review denied*, 365 N.C. 362, 719 S.E.2d 22 (2011).

326. See Act of June 17, 2011, ch. 396, § 7, 2011 N.C. Sess. Laws 1649, 1649 (repealing N.C. GEN. STAT. § 160A-41.1). No similar language occurs in section 160A-58.56, which now addresses provision of water and sewer services.

327. See 3 LAWRENCE, *supra* note 104, § 6.02(j), at 6-22 (discussing pre-2011 law) (“[I]f some other entity provides one or the other of these [water and sewer] utilities, the city must work with that entity to determine whether any such major line extension is necessary. If it is, and if the other entity is not willing to pay for the extension, presumably the city must do so . . . according to the policies in effect in such municipality.” (internal quotation marks omitted)).

property owners petition, unless they receive an exemption from the Local Government Commission as a result of problems with debt limitations.³²⁸ To the degree that municipalities face added costs for extending water and sewer into involuntarily annexed areas and are precluded from charging newly annexed properties in such areas with availability fees or tap fees, cities will likely have to borrow more to extend such services, reducing their capacity to address high-poverty areas at the same time. The resulting dynamics may well cause additional challenges for high-poverty areas that have only recently found recourse to seek water and sewer extensions as discussed above.³²⁹

2. Proceeding with Voluntary Annexations

Voluntary annexation of contiguous or satellite parcels is likely to become more attractive to cities than it has been in the past. In contrast to the newly revised involuntary annexation statutes, those relating to voluntary annexation do not explicitly state that water and sewer services must be provided in connection with the annexation, other than for financially distressed areas that must generally be annexed following a proper petition.³³⁰ It has long been understood that cities are not obligated to extend water and sewer services to all properties within established city limits, since a multitude of factors typically affect such decisions (costs, revenues, established and prospective service patterns, or capacity to take on additional customers) and discretion is required.³³¹ In reaching voluntary annexation decisions, however, petitioners and municipalities typically want to be clear on whether such services will be included.

Can a municipality specify that those seeking voluntary annexation must consent to hooking up to and paying associated costs of public water and sewer services as a condition of approval? Such action is expressly authorized by statute so long as the property is within city limits (as it would be following annexation), is within a “reasonable distance” of water and sewer lines, and the property is developed with “one or more residential dwelling units or commercial establishments.”³³² The city is

328. See N.C. GEN. STAT. § 160A-31(d2) (2011).

329. See *supra* Part II.C.2.

330. See § 160A-31(b1).

331. See 2 LAWRENCE, *supra* note 104, § 6.02(b) (summarizing cases establishing no municipal obligation to extend water and sewer services).

332. N.C. GEN. STAT. § 160A-317(a) (2011).

expressly authorized to “fix charges for the connections” and “in order to avoid hardship, the city may require payment of a periodic availability charge, not to exceed the minimum periodic service charge for properties that are connected.”³³³ Alternatively, can a municipality require those outside municipal boundaries to seek voluntary annexation as a condition of securing public water and sewer services? North Carolina courts have long recognized that, although municipalities cannot require water and sewer connections by property owners outside their boundaries,³³⁴ they do have authority to extend public water and sewer systems by voluntary contract to users outside the corporate limits, and to set differing fees and charges for such services.³³⁵ They have also clearly indicated that a city cannot compel those outside its boundaries to hook up to municipal water and sewer lines in the absence of authority to do so.³³⁶

Courts in other jurisdictions have upheld municipal decisions to condition extension of water and sewer services to nonresidents upon agreements to be annexed.³³⁷ The most germane North Carolina case to date is *Cunningham v. City of Greensboro*,³³⁸ which involved purported agreements from three developers to accept extensions of water and sewer services in return for commitments to seek voluntary annexation.³³⁹ Unfortunately, the record was unclear as to whether the City actually conditioned extensions of water and sewer services upon

333. *Id.*

334. *See* *Atl. Constr. Co. v. City of Raleigh*, 230 N.C. 365, 368, 53 S.E.2d 165, 168 (1949).

335. *See id.* at 369, 53 S.E.2d at 168.

336. *Id.*

337. *See* *Satrom v. City of Grand Forks*, 163 N.W.2d 522, 525–26 (N.D. 1968) (referencing an ordinance establishing grounds for termination of services if property owners resist annexation); *Williams Bros. Pine Line Co. v. City of Grand Forks*, 163 N.W.2d 517, 521 (N.D. 1968) (holding that company’s refusal to annex its property was grounds for termination of contract for water services); *Bakies v. City of Perrysburg*, 108 Ohio St. 3d 361, 2004-Ohio-5231, 843 N.E.2d 1182, ¶ 22 (Ohio 2006) (upholding annexation agreement between city and subdivision residents as valid and enforceable contract); *Fairway Manor, Inc. v. Bd. of Comm’rs of Summit Cnty.*, 521 N.E.2d 818, 823 (Ohio 1988) (“The municipality has the sole authority to decide whether to sell its water to extraterritorial purchasers.”); *Andres v. City of Perrysburg*, 546 N.E.2d 1377, 1381 (Ohio Ct. App. 1988) (upholding ordinance requiring property owners to sign annexation agreements in order to have sewer service extended to their properties).

338. ___ N.C. App. ___, 711 S.E.2d 477 (2011); *see also* *Honey Properties v. City of Gastonia*, 252 N.C. 567, 571, 114 S.E.2d 344, 347–48 (1960) (upholding agreement between property owner and city regarding sewer connection and annexation).

339. *Cunningham*, ___ N.C. App. at ___, 711 S.E.2d at 480.

agreements to seek voluntary annexation. Property owners subsequently sought to withdraw consent from the earlier agreements regarding utility services and annexation.³⁴⁰ The court of appeals rejected the City's claim that it had entered into binding "annexation agreements" with the developers (since by statute such agreements entailed agreements between governmental entities rather than governments and private parties).³⁴¹ In addition, the court of appeals concluded that it was permissible for affected private parties to withdraw consent to voluntary annexations, in keeping with prior case law.³⁴² Finally the court of appeals stated that the public enterprise statutes (including section 160A-314(a) of the General Statutes)³⁴³ did not explicitly provide municipalities with the power to impose the kinds of conditions at bar; however, it did not rest its decision on this proposition, since it found that any such agreements did not run with the land where they had not been recorded.³⁴⁴

It is unclear how a future North Carolina court would resolve the important question of conditioning water and sewer service in areas outside city boundaries on agreements to petition for voluntary annexation. Although the authority cited by the court in *Cunningham* addressed fee-setting power rather than explicit authority to link water and sewer provisions with an agreement to

340. *Id.* at ___, 711 S.E.2d at 480.

341. *Id.* at ___, 711 S.E.2d at 482.

342. *Id.* at ___, 711 S.E.2d at 486.

343. *Id.* at ___, 711 S.E.2d at 484.

344. *Id.* at ___, 711 S.E.2d at 485-86. The court seemed skeptical of the city's argument that it could require the annexation condition in light of the statutory language of section 160A-314(a) of the North Carolina General Statutes, stating:

A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city.

Id. The court noted that the North Carolina cases cited in support of the city's claim related to "a municipality's right to establish rates for extraterritorial service and make no reference to any right that a municipality may possess to condition the provision of water and sewer service on a customer's consent to be voluntarily annexed." *Id.* at ___, 711 S.E.2d at 484. It concluded that "the record contains no indication" that the city in fact imposed such a condition at the time that it connected any individual customer residing in the affected developments to its water and sewer facilities. *Id.* As a result, the Court concluded that none of the city's "arguments in reliance upon various statutory provisions have merit." *Id.*

annex,³⁴⁵ analysis by Ohio's courts³⁴⁶ is particularly persuasive. In a number of decisions, the Ohio courts have concluded that a municipality has no duty to supply water and sewer to external users, that it has a duty to protect municipal customers by making sound decisions regarding extending services, and that where cities had authority to set the terms of extending water and sewer externally they could condition such extensions on agreements for annexation.³⁴⁷ Although the statute referenced in *Cunningham* expressly addresses rates, at least some North Carolina cases have made clear that there is no obligation to extend such services and that the municipality had discretion to do so.³⁴⁸ As courts in Ohio have concluded, parties to contracts of this sort generally are capable of making reasonable bargains without the need for excessive oversight from the courts.³⁴⁹ The *Cunningham* court's narrow reading of the North Carolina statute is reminiscent of prior case law that applied Dillon's Rule to limit statutory authority for municipalities.³⁵⁰ Where such narrow readings have been used, notwithstanding clear statutory language that directs courts to take a broader view of local authority,³⁵¹ it is often because the courts are uneasy with municipalities imposing fees without direct authorization. In this context, however, there is clear authority for municipalities to impose differential fees, and requiring consent to voluntary annexation simply provides

345. *Id.* (citing *Fulghum v. Town of Selma*, 238 N.C. 100, 104–05, 76 S.E.2d 368, 371 (1953), *Atl. Constr. Co. v. City of Raleigh*, 230 N.C. 365, 368–69, 53 S.E.2d 165, 168 (1949), and *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 212–13, 280 S.E.2d 490, 492 (1981), *aff'd*, 305 N.C. 248, 287 S.E.2d 851 (1982)).

346. *See Moody v. Town of Carrboro*, 301 N.C. 318, 324–25, 271 S.E.2d 265, 270 (1980); *see also In re Annexation Ordinance (Goldsboro)*, 296 N.C. 1, 16, 249 S.E.2d 698, 707 (1978).

347. *See Bakies v. City of Perrysburg*, 108 Ohio St. 3d 361, 2006-Ohio-1190, 843 N.E.2d 1182, ¶ 33; *Fairway Manor, Inc. v. Bd. of Comm'rs of Summit Cnty.*, 521 N.E.2d 818, 821 (Ohio 1988); *Andres v. City of Perrysburg*, 546 N.E.2d 1377, 1380–81 (Ohio Ct. App. 1988); *see also Morrison Homes Corp. v. City of Pleasanton*, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976) (upholding annexation agreement in absence of explicit authority).

348. *Cunningham* addressed section 160A-314(a), which authorizes municipalities to “establish and revise . . . schedules of rents, rates, fees, charges, and penalties” for the use of or the services furnished by public enterprises.

349. *See Andres*, 546 N.E.2d at 1381 (finding no economic duress); *Cunningham*, __ N.C. App. at __, 711 S.E.2d at 484.

350. *See, e.g., Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 43–44, 442 S.E.2d 45, 49–50 (1994) (discussing difference between Dillon's Rule and current statutory interpretation).

351. *See N.C. GEN. STAT. § 160A-4* (2011) (providing for broad interpretation of municipal authority).

property owners with an option: commit to joining the city and receiving services, or find other means of acquiring water and wastewater services (such as using wells and septic systems).

Two other statutory provisions may also provide some modest support for adopting a view similar to Ohio's. North Carolina has a relatively unique system for voluntary annexation of satellite areas designed to integrate extension of water and sewer services in such settings with becoming a formal part of the municipality that is providing such services.³⁵² The very fact that North Carolina couples a service provision to more distant areas with annexation suggests a legislative view that service provision and becoming part of the municipal provider of such services are closely linked. The satellite annexation provisions specifically state that special rates can be set for "public enterprise" services to such locales, but goes further to direct cities engaging in such annexation to review on a yearly basis revenues received and operating costs to assure that they remain in balance (implicitly, then, requiring the city to attend to the financial interests of those receiving services within the primary corporate limits).³⁵³ Implicit here is an assumption that more distant recipients of public enterprise services should not receive such services if the greater interests of the municipality would be compromised, but instead need to pay their way. Since municipalities have no duty to extend services to those outside municipal boundaries, they may reasonably do so in the way contemplated by state statutes (linking services with voluntary annexation), but not otherwise.

The 2011 annexation legislation also included new language that was not in force when *Cunningham* was decided. In a new provision relating to recording and reporting, the 2011 amendments state that "[t]o be enforceable, any written agreement with a person having a freehold interest in real

352. See *supra* notes 112–18 and accompanying text.

353. See N.C. GEN. STAT. § 160A-58.5 (2011) ("For the purposes of G.S. 160A-314, provision of public enterprise services within satellite corporate limits shall be considered provision of service for special classes of service distinct from the classes of service provided within the primary corporate limits of the city, and the city may fix and enforce schedules of rents, rates, fees, charges and penalties in excess of those fixed and enforced within the primary corporate limits. A city providing enterprise services within satellite corporate limits shall annually review the cost thereof, and shall take such steps as may be necessary to insure that the current operating costs of such services, excluding debt service on bonds issued to finance services within satellite corporate limits, does not exceed revenues realized therefrom.").

property regarding annexation shall be recorded in the county register of deeds office in which the real property lies.”³⁵⁴ As discussed in *Cunningham*, state law has long provided for “annexation agreements” between municipalities, whereby they agree to delineate trajectories of further growth.³⁵⁵ Thus, the new statutory language seems to refer to other sorts of agreements, since it refers to agreements “with a person having a freehold interest in real property.”³⁵⁶ While there are other references to “agreements” in the newly revised statutes, they generally refer to other service providers rather than to agreements with private parties.³⁵⁷ Accordingly, it is quite plausible to view this new provision as implicitly authorizing annexation agreements between municipalities and private parties seeking voluntary annexation.³⁵⁸

If the North Carolina courts ultimately conclude that authority exists to allow municipalities and private parties to enter into annexation agreements, what lessons might municipalities in North Carolina wish to heed in using such an approach? Initially, it will prove useful for North Carolina municipalities to learn from the experience of those in other states that explicitly authorize annexation agreements.³⁵⁹ In some

354. See Act of June 17, 2011, ch. 396, § 11, 2011 N.C. Sess. Laws 1649, 1670 (codified at N.C. GEN. STAT. § 160A-58.90(b) (2011)) (governing recording of annexation agreements).

355. See *Cunningham*, __ N.C. App. __, __, 711 S.E.2d 477, 481–82 (2011) (citing N.C. GEN. STAT. §§ 160A-58.21 to -58.28 (2011)).

356. § 160A-58.90(b).

357. See, e.g., Act of June 17, 2011, ch. 396, § 9, 2011 N.C. Sess. Laws 1649, 1670 (codified at N.C. GEN. STAT. § 160A-58.56 (2011)) (relating to provision of water and sewer services by agreement).

358. See, e.g., 65 ILL. COMP. STAT. ANN. 5/11-15.1-1, -2 (West 2005) (discussing annexation agreements in Illinois and stating that such agreements may cover, among other things, ordinances relating to zoning). Compare *City of Louisville v. Fiscal Court*, 623 S.W.2d 219, 224–25 (Ky. 1981) (rejecting broad provisions of annexation agreement relating to zoning, tax rates, and deannexation on the grounds that the terms of the agreement were unlawfully taking on powers of the legislature) and *Mayor & Council of Rockville v. Rylyns Enter.*, 814 A.2d 469, 499–500, 506–07 (Md. 2002) (rejecting the requirements of an annexation agreement on the grounds that the agreement incorporated unauthorized conditional zoning) with *Town of Brockway v. City of Black River Falls*, 2005 WI App 174, ¶¶ 21–37, 285 Wis. 2d 708, 725–33, 702 N.W.2d 418, 427–43 (rejecting claims that annexation agreement constituted improper contract away of police power).

359. See, e.g., 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West 2005) (“The corporate authorities of any municipality may enter into annexation agreement with one or more of the owners of record of land in unincorporated territory. That land may be

jurisdictions, annexation agreements are treated as a particular type of “development agreement” which typically addresses both future zoning and infrastructure issues.³⁶⁰

North Carolina has accorded municipalities specific authority to undertake development agreements, but only in certain circumstances.³⁶¹ Thus, local governments need to carefully parse differences between “annexation agreements” (linking public enterprise service provision with voluntary annexation, perhaps in a range of settings that are more expansive than those that relate to development agreements³⁶²) and “development agreements” (linking zoning, public facilities such as schools, land dedications, and the duration of agreements³⁶³). Accordingly, it will be important for North Carolina municipalities to shape annexation agreements in ways that are not inconsistent with statutory constraints on broader types of development agreements.³⁶⁴ In addition, North Carolina has recently authorized cities to adopt “conditional zoning” strategies that explicitly permit implementation of tailored zoning districts tied to very specific land use requirements embodied in special use permits.³⁶⁵ Avoiding issues relating to “contract zoning” or inappropriate conditional zoning are particularly important because local governments may not “contract away” their police power obligations.

3. Provision of Water and Sewer Services by Contract

A third option for municipalities is to forego either involuntary annexation or voluntary annexation and instead provide water and sewer services to outlying areas by contract. There is considerable authority that suggests that municipalities have wide discretion in setting costs for water and sewer services

annexed to the municipality in the manner provided in Article 7 at the time the land is or becomes contiguous to the municipality.”).

360. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-500.05 (2008) (describing Arizona development agreements). For discussion of development agreements generally, see JAMES A. KUSHNER, 2 SUBDIVISION LAW & GROWTH MANAGEMENT § 10:17 (2d ed. 2011).

361. *See* N.C. GEN. STAT. §§ 160A-400.20 to .32 (2011) (development agreements authorized for projects involving twenty-five acres or more).

362. *See Id.* §§ 160A-58.21–58.28 (2011) (relating to annexation agreements).

363. *See* §§ 160A-400.20–.32 (relating to development agreements).

364. *See, e.g.*, *City of Louisville v. Fiscal Court*, 623 S.W.2d 219, 224–25 (Ky. 1981) (city may not agree to cooperate fully in securing zoning, preferable taxation, and deannexation).

365. *See* N.C. GEN. STAT. § 160A-382 (2011).

outside municipal boundaries.³⁶⁶ Costs of water and sewer services for customers outside municipal boundaries tend to run as much as twice the rates applicable to customers within municipal boundaries.³⁶⁷ In the view of at least some observers, there is no significant constraint on the extent to which municipalities may raise rates for those outside municipal boundaries.³⁶⁸ Decisions to this effect are found not only in North Carolina but also in Arizona and Ohio.³⁶⁹

The Supreme Court of North Carolina's decision in *Atlantic Construction Co. v. City of Raleigh*³⁷⁰ very clearly confirmed the authority of municipalities to set rates as they saw fit for customers outside municipal boundaries, particularly since municipalities had no formal responsibility to serve such customers.³⁷¹ Arguably, under *Atlantic Construction Co.*, there is a very limited basis for judicial review of such contracts.³⁷² Moreover, state court decisions have concluded that contractual agreements regarding annexation and service provision are binding on associated parties.³⁷³ At least some observers believe that *Atlantic Construction Co.* limits judicial review of decisions by municipalities to set particular rates for extraterritorial contracts for water and sewer services.³⁷⁴

366. See, e.g., *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 212–13, 280 S.E.2d 490, 492 (1981) (“[T]he setting of such rates and charges is a matter for the judgment and discretion of municipal authorities, not to be invalidated by the courts absent some showing of arbitrary or discriminatory action. The great weight of authority is to the effect that in the setting of such rates and charges, a municipal body may include not only operating expenses and depreciation, but also capital cost associated with actual or anticipated growth or improvement of the facilities required for the furnishing of such services.”), *aff’d* 305 N.C. 248, 287 S.E.2d 851 (1981). See generally Kara Millonzi, *Lawful Discrimination in Utility Ratemaking: Classifying Extraterritorial Customers*, LOC. FIN. BULL., Oct. 2006, at 1 (discussing utility ratemaking for extraterritorial customers).

367. *ESKAF & NIDA*, *supra* note 315, at 14 (providing data on water and sewer rates which suggests that water rate for outside customers is 1.88 times the rate for inside customers, and sewer rate for outside customers is 1.95 of the rate for inside customers).

368. See Millonzi, *supra* note 366, at 4.

369. See *id.* at 5–6 (citing cases).

370. 230 N.C. 365, 53 S.E.2d 165 (1949).

371. *Id.* at 368–69, 53 S.E.2d at 168.

372. See Millonzi, *supra* note 366, at 4.

373. See *id.* at 5–6 (citing relevant authorities).

374. See *id.* at 4.

4. Summary

This Section has focused on a number of vexing questions that remain for municipalities inclined to pursue annexation in the aftermath of recent legislative amendments. All but the largest municipalities are unlikely to continue to pursue involuntary annexation because of the financial obligations involved. Instead, the extension of needed water and sewer infrastructure is likely to depend on voluntary annexation agreements and contractual arrangements that impose related costs on those being served.

B. Regulatory Authority, Extraterritorial Jurisdiction, and Growth Management

As was just discussed, the provision of core water and sewer infrastructure has increasingly become the first and foremost rationale for annexation in the minds of many citizens and state legislators. A second major rationale for annexation concerns the needs of cities and towns to regulate nearby areas in order to facilitate a smooth transition when such areas ultimately come within corporate boundaries and in order to reduce nuisance-like adverse impacts during the interim. This rationale is closely linked to land use considerations, since activities on nearby land (not yet within municipal boundaries) may well affect property owners and residents of the municipality. Moreover, advance planning is often important to assure that when (at a future date) nearby property is absorbed within municipal boundaries, the standards applicable to property development will mesh smoothly with municipal requirements going forward. An associated, but often understated, concern relates to how municipalities can regulate growth and address growth management.

1. Extraterritorial Jurisdiction

Systems of extraterritorial jurisdiction (“ETJ”) reflect legislative willingness to allow cities to deal with such transition issues. Cities are given regulatory authority over nearby areas just outside the corporate boundaries, and residents of such areas are involved at least to some extent in land use planning decisions as explained above.³⁷⁵ Significantly, North Carolina statutes allow municipalities to work with counties in shaping designated areas

375. See N.C. GEN. STAT. §§ 160A-360(a), -362 (2011).

of growth as part of the process of delineating ETJ areas that exceed the statutory minimum available.³⁷⁶

The relationship of ETJ designations to annexation and growth management policies received little attention during the 2011 legislative debate on annexation reform, most probably because the financial implications of annexation for taxpayers and related infrastructure issues held center stage. Moreover, courts in North Carolina and elsewhere have concluded that constitutional problems are generally not posed when property owners and others in areas subject to extraterritorial jurisdiction are not given voting rights in municipal elections or municipal decision making generally.³⁷⁷ Accordingly, there has generally been limited litigation regarding ETJ areas and associated municipal authority,³⁷⁸ and the current statutory structure seems quite settled and accepted. It is conceivable that the concerns for self-determination that animated the recent changes in involuntary annexation law might re-emerge in this context, notwithstanding the settled law. The stakes are different, however, insofar as only limited regulation is involved and major costs such as those relating to water and sewer service and responsibility for municipal property tax liability are not involved. Representation is provided on planning boards and boards of adjustment.³⁷⁹ The recent amendments have given added protection to the operation of bona fide farms.³⁸⁰ While, under prior law, such farms could be involuntarily annexed and were taxed at current use value, they now cannot be annexed without written consent of the property owner.³⁸¹ They are also explicitly removed from municipalities'

376. See *Id.* § 160A-360(a); see also OWENS, ETJ, *supra* note 66, at 12–13 (discussing interactions between cities and counties regarding extraterritorial jurisdiction).

377. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70–75 (1978); *City of Raleigh v. Morand*, 247 N.C. 363, 366–67, 100 S.E.2d 870, 873 (1957); *State v. Rice*, 158 N.C. 635, 638–39, 74 S.E. 582, 583 (1912); see also 5 MCQUILLIN, *supra* note 39, § 15:28 (discussing territorial operation). See generally Recent Case, *The Supreme Court, 1978 Term: Voting Rights of Nonresidents Subject to Municipal Powers*, 93 HARV. L. REV. 141 (1979) (discussing the *Holt Civic Club* decision and the possible consequences of the ruling).

378. See 3 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 35.7 (4th ed. 2012).

379. See N.C. GEN. STAT. § 160A-362 (2011).

380. Act of June 27, 2011, ch. 363, § 1, 2011 N.C. Sess. Laws 1504, 1504 (codified at N.C. GEN. STAT. §§ 153A-340(b)(2), 160A-36, -48, -58.54, -360 (2011)).

381. *Id.* § 3.1, 2011 N.C. Sess. Laws at 1505 (codified at N.C. GEN. STAT. § 160A-58.54 (2011)).

extraterritorial jurisdiction so long as bona fide farming continues.³⁸²

Except for this connection regarding the treatment of bona fide farms, North Carolina's statutes have not historically treated extraterritorial jurisdiction as directly linked to annexation policy. Nonetheless, logic and evidence drawn from planning practice and local legislation suggests that it might be advisable to do so more directly and that such an approach might reduce the kinds of friction that led to North Carolina's recent annexation wars.

Logically, there is a close linkage between ETJ designations and both voluntary and involuntary annexation decisions. Both relate in large part to land that is contiguous or in the development path of city growth and both require clear, officially-developed plans (on the one hand relating to development patterns and on the other evidencing the existence of development and the potential to extend municipal services to developed areas). Moreover, in ETJ areas, property owners are on notice that their area is one in which the nearby city has a significant interest.³⁸³ They also have at least modest direct representation in the process of planning through county appointees on the city planning board and board of adjustment.³⁸⁴ Logically, ETJ areas should be those whose residents may work in and benefit most from being adjacent to the city. In addition, it would seem fairest to extend those subject to city regulation full membership in the city (as voters and taxpayers) within a reasonably foreseeable period of time. The UNC School of Government's 2005 survey of planners indicated that at least two-thirds of responding municipalities regarded ETJ areas as likely to be annexed (nine percent reporting likely annexation in the next decade with the balance believing that annexation would

382. *Id.* § 4, 2011 N.C. Sess. Laws at 1505 (codified at N.C. GEN. STAT. § 160A-360 (2011)) ("Property that is located in the geographic area of a municipality's extraterritorial jurisdiction and that is used for bona fide farm purposes is exempt from exercise of the municipality's extraterritorial jurisdiction under this Article. Property that is located in the geographic area of a municipality's extraterritorial jurisdiction and that ceases to be used for bona fide farm purposes shall become subject to exercise of the municipality's extraterritorial jurisdiction under this Article.").

383. See N.C. GEN. STAT. § 160A-360(a1) (2011) ("Any municipality planning to exercise extraterritorial jurisdiction under this Article shall notify the owners of all parcels of land proposed for addition to the area of extraterritorial jurisdiction, as shown on the county tax records.").

384. See *id.* § 160A-362.

likely result at some yet-to-be-determined date).³⁸⁵ Anecdotal evidence presented in the course of legislative debate regarding the plight of economically distressed areas that had often been left behind without annexation also indicated that many such communities fell within municipal ETJ areas but until the recent statutory changes had difficulty qualifying for annexation under prior law.³⁸⁶

At least some areas of the state have adopted local strategies that link policy regarding ETJ areas, annexation plans, and anticipated future growth. For example, municipalities in the Charlotte-Mecklenburg area began using annexation agreements pursuant to local legislation in 1984.³⁸⁷ In 1991, and on several later occasions, Charlotte and other nearby cities were specially authorized to link annexation agreements with a system of designated "spheres of influence" to guide future extension of extraterritorial jurisdiction, land use planning, annexation, and service provision.³⁸⁸ Likewise, in 1987, Orange County and the towns of Chapel Hill and Carrboro developed a "joint planning agreement" that included shared commitments to observe designated "transition" and "rural buffer" areas, engage in "courtesy" review of each other's land use decisions in transition areas, set parameters for density of development, and limit extension of water and sewer services through the Orange Water and Sewer Authority to areas flagged for transition.³⁸⁹

Approaches developed in other states could assist North Carolina in the future to more closely link and align the legal frameworks employed as means to bring about coordinated land use planning, transitional development in areas near cities, provision of services, and ultimately boundary changes. One

385. OWENS, ETJ, *supra* note 66, at 9–10.

386. See UNC CTR. FOR CIVIL RIGHTS, *supra* note 247, at 13–21.

387. See Act of June 22, 1984, ch. 953, 1984 N.C. Sess. Laws 35; OWENS, LAND USE, *supra* note 66, at 31 & n.50 (discussing timeline of legislative acts regarding Mecklenburg County and extraterritorial jurisdiction).

388. See Act of May 29, 1991, ch. 161, 1991 N.C. Sess. Laws 292 (granting extraterritorial powers to the following municipalities in Mecklenburg County: Matthews, Mint Hill, Pineville, and Charlotte); Act of June 30, 1994, ch. 590, 1994 N.C. Sess. Laws 226 (revising Act of May 29, 1991); Act of June 21, 2001, ch. 228, 2001 N.C. Sess. Laws 586 (allowing Charlotte to exercise extraterritorial powers granted in Chapter 160A, Article 19 of the North Carolina General Statutes over named towns in its "Sphere of Influence").

389. See Act of May 22, 1987, ch. 233, 1987 N.C. Sess. Laws 310 (codified at N.C. GEN. STAT. §§ 160A-58.20, -360.1 (2011)); Richard D. Ducker, *The Orange County Joint Planning Agreement*, POPULAR GOV'T, Winter 1988, at 47.

interesting model is that provided by California, whose approach apparently influenced the strategy adopted in Mecklenburg County.³⁹⁰ California has authorized the creation of county-wide boundary review commissions (“Local Agency Formation Commissions”) which can designate “spheres of influence” for local governments within a county, taking into account a variety of factors including present and planned land uses, present and probable needs for public facilities and services, and adequacy of public facilities and services and the existence of social or economic interest.³⁹¹ Another approach might be to formalize and expand the process by which cities and counties can reach intergovernmental agreements regarding projected land use regulation, service delivery, and annexation, perhaps using an expanded model similar to the one which currently allows municipalities to enter into annexation agreements³⁹² or some more generalized model similar to that adopted locally in Orange County in 1987.³⁹³

2. Growth Management and Annexation

In many other states, annexation issues are framed in terms of growth management, although that phrase does not necessarily clearly convey what is intended.³⁹⁴ On the one hand, annexation may be justified in terms of the need to accommodate municipal growth (for example by adding territory where existing urban areas cannot adequately absorb a growing population).³⁹⁵ On the other hand, “growth” may refer to growth in municipal tax base or revenues that is needed to maintain a balanced budget during a

390. See OWENS, LAND USE, *supra* note 66, at 32 n.50 (stating that the strategies adopted in Mecklenburg County are “similar to the ‘spheres of influence’ used in California local government law (where each county has a Local Agency Formation Commission that sets ‘spheres of influence’—areas of future municipal jurisdiction to be used in mandatory land use plans, service areas, annexations, and municipal ‘prezoning’ of unincorporated areas)”).

391. CAL. GOV’T CODE § 56425(e) (West 2010 & Supp. 2012).

392. See N.C. GEN. STAT. §§ 160A-58.21 to -58.28 (2011).

393. See *supra* note 389 and accompanying text.

394. See, e.g., *City of Harriman v. Roane Cnty. Election Comm’n*, 354 S.W.3d 685, 690–91 (Tenn. 2011) (invalidating annexation outside of city’s urban growth boundaries).

395. See *Enlarging, Extending and Defining the Corporate Boundaries of the City of Horn Lake, Desoto Cnty. v. Town of Walls*, 57 So. 3d 1253, 1259 (Miss. 2011) (applying state standards to determine if expansion is necessary using factors such as city’s internal growth, city’s population growth, need to expand city tax base, remaining vacant land within the municipality, and other factors).

time of increasing demands.³⁹⁶ “Growth” is not, as such, a factor under North Carolina’s annexation law.

a. Prior Experience in North Carolina

Empirical research demonstrates, however, that growth and annexation are directly linked, either because annexation serves as a tool to capture growth (and increase revenues) for existing cities or as a factor that precipitates alternative responses (municipal incorporation that recognizes small new pockets of growth as independent cities, or creation of gated communities that seek to manage their infrastructure and governance through private mechanisms of their own). Different forms of annexation also typically reflect differences in growth patterns, with voluntary annexation often used to capture the creation of new subdivisions upon the request of developers, and involuntary annexation more commonly used to capture growth that has already taken place through development at the urban fringe. Important recent work by Professor Russell Smith offers significant evidence about such patterns, drawing upon a close review of twenty years of data on municipal incorporations and annexations drawn from the North Carolina Secretary of State’s records.³⁹⁷

i. *Annexation Patterns*

In these important studies, Professor Smith focused on the incidence of annexation, population and land area added, and geographic patterns.³⁹⁸ During the study period, nearly three-fourths of North Carolina municipalities engaged in some sort of

396. See *Bakies v. City of Perrysburg*, 108 Ohio St. 3d 361, 2006-Ohio-1190, 843 N.E.2d 1182, ¶ 33 (upholding annexation based in part on need for increased tax revenue and financial growth).

397. See generally Russell M. Smith, *City Limits? The Impact of Annexation on the Frequency of Municipal Incorporation in North Carolina*, 51 SOUTHEASTERN GEOGRAPHER 422 (2011) [hereinafter Smith, *City Limits*] (focusing on patterns relating to incorporation and annexation, including frequency of annexation and the land and population annexed as potential factors that may explain these patterns); see also Russell M. Smith, *An Examination of Municipal Annexation Methods in North Carolina*, 52 SOUTHEASTERN GEOGRAPHER 164 (2012) [hereinafter Smith, *An Examination*] (focusing more specifically on the types of annexation employed in North Carolina during the period 1990–2009 and the differences between the periods 1990–1999 and 2000–2009).

398. Smith, *An Examination*, *supra* note 397, at 169 (analyzing data relating to more than 14,000 annexation ordinances that involved more than 400 municipalities in the study period).

annexation, resulting in a total of 1,755 square miles of land being added to the state's municipal areas.³⁹⁹ The state's most urban areas (Wake, Mecklenburg, and Guilford Counties) had the highest levels of annexation in terms of increased land area, perhaps in part because these counties had developed systematic approaches to annexation that helped them proceed over the years to bring fringe areas within municipal boundaries.⁴⁰⁰ Even within these counties, municipalities differed substantially in the frequency (number) of annexations.⁴⁰¹ Annexation activity also varied by region, with the most significant rate of annexation occurring in areas with substantial population and economic growth.⁴⁰²

The available types of annexation were employed disproportionately, with voluntary annexations (by petition of contiguous or satellite landowners) being by far the most generally used approach, accounting for about ninety percent of the total annexations during the study period.⁴⁰³ That left only 9.3% of annexations over a twenty-year period that resulted from municipally initiated "involuntary" annexation, with use of voluntary annexation increasing significantly from the 1990–1999 period and involuntary annexations decreasing during the

399. *Id.*; Smith, *City Limits*, *supra* note 397, at 435.

400. *See* Smith, *City Limits*, *supra* note 397, at 434–36.

401. For example, sixty municipalities conducted only one annexation in a twenty-year period, while the state's capital (Raleigh) conducted 832. *See* Smith, *An Examination*, *supra* note 397, at 169. Raleigh had 780 voluntary annexations (contiguous or satellite) with only fifty-two involuntary annexations over twenty years. *Id.* at 173, 175.

402. *See id.* at 171. The highest rates of annexation were found in the Piedmont crescent, composed of the Charlotte area, the Triad (Greensboro, Winston-Salem and High Point) and the Research Triangle (Wake, Durham and Orange Counties). *Id.* This combined area saw 8,541 total annexations or sixty percent of the annexations in the state during the twenty-year period of Smith's study. *Id.* (including all forms of annexation, such as voluntary contiguous, voluntary satellite, legislative, and involuntary). The coastal region had 28.7% of the total annexations during this period, and the mountains had 10.9%. *Id.*

403. Smith, *An Examination*, *supra* note 397, at 169–71. Nearly two-thirds of the annexations across the state involved voluntary annexation of property contiguous to municipal boundaries (annexations requested by those with land just outside existing municipal boundaries, often sought by developers in order to secure access to municipal public utilities). *See id.* at 169–70. An additional 23.8% of annexations (a total of 3,368 annexations) involved "satellite annexation" (annexation of areas that were not contiguous, where property owners voluntarily petition for annexation). Only 1.1% of annexations were handled by the state legislature. *Id.* at 170.

following decade.⁴⁰⁴ Use of various types of annexation also varied by region.⁴⁰⁵

Professor Smith's findings thus confirm that annexation is closely tied to growth, but also illustrate apparent differences in development patterns, tendencies of developers and other landowners to seek voluntary annexation, and municipal capacity to engage in involuntary annexation (with associated financial and infrastructure study requirements).

ii. Annexation and Incorporation

Professor Smith's work also sheds important light on the relationship between annexation and municipal incorporation patterns in North Carolina. Population growth in an area can either be accommodated by bringing areas within municipal boundaries, or can become more dispersed if new municipalities are incorporated or growth is concentrated in isolated gated communities that prefer to operate privately or seek targeted services from the counties in which they are located.⁴⁰⁶

Professor Smith found that forty-six municipalities had been incorporated in North Carolina in the 1990–2008 period (second only to the number incorporated in Texas, another high-growth state, during this time).⁴⁰⁷ Several important trends emerged from

404. *See id.* at 170 (showing that a total of 738 involuntary annexations occurred during the period of 1990–1999 (constituting 11.8% of all annexations) while there were only 583 involuntary annexations during the period of 2000–2009 (constituting 7.4% of all annexations)).

405. In the Piedmont area, 177 municipalities engaged in some form of annexation, with a mean of 48.5 annexations per municipality in the region during the twenty-year study period. *Id.* at 171. Approximately two-thirds of annexations in this region involved voluntary annexations of contiguous land. *Id.* The coastal region had about half of the number of annexations as did the Piedmont with only 62% of coastal region's municipalities engaged in annexation (158 out of 254 municipalities) over the study period. *Id.* at 171–72. Nearly 90% of the annexations in the coastal area were voluntary (contiguous or satellite), but the coast had a higher proportion of legislative annexations than other parts of the state—1.6% in the coastal region versus 1.2% in the mountains and 0.9% in the Piedmont. *Id.* The mountain region had the lowest regional proportion of annexations (approximately 11%), the highest proportion of municipalities that engaged in some type annexation during the period (84.5%), and the highest proportion of involuntary and satellite annexations. *Id.* at 172.

406. *See Smith, City Limits, supra* note 397, at 423, 431 (recognizing that growth and development at the fringes of urban areas are fertile grounds for voluntary and involuntary annexation proceedings and summarizing scholarly research that incorporation of new cities is meant to provide new services and to prevent annexation by nearby cities).

407. *Id.* at 430.

his analysis. Professor Smith's review of county-level data suggested that, at least to some degree, perceived threats of annexation stimulated efforts to incorporate.⁴⁰⁸ Because incorporation is a legislative process in North Carolina, those seeking to incorporate must typically convince their legislative delegations that they should proceed, and have a lesser likelihood of proceeding if existing municipalities object.⁴⁰⁹ Professor Smith found that the three largest and most urban counties in the state (Wake, Mecklenburg, and Durham) had not experienced any municipal incorporations during the study period, which in his view reflected a longer history of urbanization and shared political understandings that establishment of new municipalities was inadvisable.⁴¹⁰ On the other hand, the forty-six incorporations that did occur during his study period were clustered in counties just outside those that were home to major cities.⁴¹¹

Professor Smith's research suggests that cities in highly urbanized counties are likely to face relatively few new incorporations, perhaps because they have already passed the tipping point and become urban enough that relatively few new growth nodes try to stand in the way of extending urban boundaries.⁴¹² Those engaged in development in these areas often desire to receive urban services such as access to public water and sewer systems.⁴¹³ Alternatively, annexation may add to property values simply by allowing developers to identify property for sale with a favored zip code and mailing address. On the other hand, these data suggest that North Carolina has witnessed the growing development of "exurbs" beyond the ring of suburban

408. *Id.* at 437-39 (concluding that "the magnitude of annexation [the Population Annexed and Land Area Annexed] does have a statistically significant connection to municipal incorporation activity in North Carolina at the county level").

409. *See id.* at 428 (explaining that no area may incorporate without the approval of the North Carolina General Assembly and that this decision is typically made by the Joint Legislative Commission on Municipal Incorporation).

410. *Id.* at 431-35.

411. *See id.* at 431-32 (observing that the incorporations occurred in twenty-four counties, including Union and Stanley Counties (seven municipalities in Union County, three in Stanley County, both near Mecklenburg), Forsyth, Guilford, and Alamance Counties (the area near the "Triad" which includes Greensboro, Winston-Salem, and High Point; with three new municipalities in Forsyth, five new municipalities in Guilford and five in Alamance), and Brunswick County (five new municipalities located near the coastal city of Wilmington, which is situated in adjacent New Hanover County)).

412. *Id.* at 431, 435 (hypothesizing that the presence of existing cities accounted for the lack of incorporations in the most urban counties of North Carolina).

413. *Id.* at 423.

development absorbed by or closely associated with major urban centers.⁴¹⁴ There is a long-term potential that exurbs will reduce the “elasticity” of the state’s major cities in future decades, if attention is not paid to forging shared understandings regarding growth trajectories and cost-efficient service delivery strategies with the major cities and urbanizing counties that they surround.⁴¹⁵

b. Future Considerations

Managing growth is likely to become ever more important in North Carolina. Census data for 2010 indicates that the state grew by nearly double the rate of growth in the United States as a whole between the 2000 and 2010 census.⁴¹⁶ It was the sixth-

414. “Exurb” has no universally accepted definition, but it is a term that has been used for the last few decades by urban planners to describe the following kinds of areas:

Exurban counties surround all metropolitan areas, extending outward about 60 to 70 miles from circumferential highways. Exurban counties include some low-density, metropolitan counties that have been added to larger metropolitan areas since 1960; many adjacent, nonmetropolitan counties; and some nonadjacent, nonmetropolitan counties.

Judy S. Davis, Arthur C. Nelson & Kenneth J. Dueker, *The New 'Burbs: The Exurbs and Their Implications for Planning Policy*, 60 J. AM. PLANNING ASS'N 45, 46 (1994). See generally Laura Taylor, *No Boundaries: Exurbia and the Study of Contemporary Urban Dispersion*, 76 GEOJOURNAL 323 (2011) (providing a more recent review of the literature on exurbia). Commentators on recent census data have suggested that “exurbs are history,” and that 2010 census data suggests greater growth in cities and more dense suburbs. See William Frey, *The Demographic Lull Continues, Particularly in Exurbia*, BROOKINGS: UP FRONT (April 6, 2012, 1:23 pm), <http://www.brookings.edu/up-front/posts/2012/04/06-census-exurbs-frey> (observing that outer suburban counties, including outer suburbs and exurbs, have been in a slower growth trajectory since the late 2000s).

415. See Smith, *City Limits*, *supra* note 397, at 426 (“[M]unicipalities that are able to grow (elastic) their city limits will be better able to capture fleeing tax revenues. Inelastic municipalities will not have as great a chance to grow their population or tax revenues due to suburbanization and growth on the fringes of cities.”).

416. Compare *State & County Quickfacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/37000.html> (last visited Nov. 16, 2012), with *North Carolina: 2000, Census 2000 Profile*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/2002pubs/c2kprof00-nc.pdf> (last visited Nov. 16, 2012) (showing that North Carolina’s population grew by 18.5% from 8,049,313 to 9,535,483), and *Fast Facts: 2010*, U.S. CENSUS BUREAU, http://www.census.gov/history/www/through_the_decades/fast_facts/2010_fast_facts.html (last visited Nov. 16, 2012) (showing that the population of the United States as a whole grew by only 9.7%, from 281,421,906 to 308,745,538).

fastest-growing state in the country.⁴¹⁷ Growth has occurred in very different ways in different parts of the state.⁴¹⁸ There are three major and two smaller areas of high growth that experienced more than twenty-five percent growth during the 2000–2010 period: near Charlotte, near the Research Triangle Park, near East Carolina University in Pitt County, near Virginia on the coast, and on the coast near Wilmington.⁴¹⁹ Although the percentage rate of growth may shift slightly as areas are built out, these or nearby areas are likewise projected to realize the state's most substantial population growth during the 2010–2020 period.⁴²⁰ At the same time, other more rural parts of the state have experienced low or negative growth over the past decade and are expected to have a similar experience in the decade to come.⁴²¹

The 2011 annexation legislation on its face applies to all municipalities, but it needs to be viewed against this real-world

417. See PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000–2010, at 2 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

418. See N.C. OFFICE OF STATE BUDGET AND MGMT., *County/State Population Projections*, http://www.osbm.state.nc.us/ncosbm/facts_and_figures/socioeconomic_data/population_estimates/county_projections.shtm (last visited Nov. 16, 2012) (providing links to detailed projections for population totals in North Carolina).

419. See N.C. OFFICE OF STATE BUDGET AND MGMT., *Population Growth: 2000–2010*, http://www.osbm.state.nc.us/ncosbm/facts_and_figures/socioeconomic_data/population_estimates/demog/20002010growthmig.pdf (indicating high growth counties on North Carolina map, including Iredell, Mecklenburg, Cabarrus and Union Counties (near Charlotte); Wake, Franklin, Johnston, Harnett, and Hoke (near Raleigh); New Hanover, Pender, and Brunswick Counties (near Wilmington); Pitt County (near Greenville), and Pasquotank and Currituck Counties (near Virginia Beach and Norfolk)).

420. See N.C. OFFICE OF STATE BUDGET AND MGMT., *Projected Population Growth: 2010–2020*, http://www.osbm.state.nc.us/ncosbm/facts_and_figures/socioeconomic_data/population_estimates/demog/20102020growthmig.pdf (last visited Nov. 16, 2012).

421. See *County Estimates*, N.C. OFF. OF STATE BUDGET AND MGMT., http://www.osbm.state.nc.us/ncosbm/facts_and_figures/socioeconomic_data/population_estimates/county_estimates.shtm (last visited Nov. 16, 2012) (providing links to detailed data). Compare NORTH CAROLINA OFFICE OF STATE BUDGET AND MANAGEMENT, *Population Growth: A2010–J2011*, http://www.osbm.state.nc.us/ncosbm/facts_and_figures/socioeconomic_data/population_estimates/demog/2011provgrowthmig.pdf (last visited Nov. 16, 2012) (displaying 2011 population data), with NORTH CAROLINA OFFICE OF STATE BUDGET AND MANAGEMENT, *Projected Population Growth: 2010–2020*, http://www.osbm.state.nc.us/ncosbm/facts_and_figures/socioeconomic_data/population_estimates/demog/20102020growthmig.pdf (last visited Nov. 16, 2012) (displaying projections for population change between 2010 and 2020). See discussion *supra* Part II.C.2.c.

context. As discussed above, cities in areas that are growing economically and are experiencing population growth are the most likely to be able to continue to annex. This dynamic is related to their ability to receive petitions for voluntary annexation, tie extension of strong water and sewer systems to voluntary annexation, fund their water and sewer systems so as to extend such services in a way that covers associated costs, or grow and develop in ways that meet involuntary annexation standards and create strong enough financial structures that they will be able to extend water and sewer services while bearing costs now imposed under the new involuntary annexation provisions. On the other hand, cities in less economically dynamic areas are generally smaller and less economically robust, less likely to be desirable locales for seeking voluntary annexation or extension of water and sewer services (since in more rural areas use of well and septic systems are more common), and less able to buffer water and sewer expenditures because of more limited tax bases.

An inevitable question is therefore posed: does it make sense to adopt a uniform annexation policy that applies statewide given the significantly different situations facing municipalities that are in the path of population growth and those in low- or modest-growth areas that may regard annexation as a financial lifeline? The 2011 legislative changes abolished differences in involuntary annexation standards based on city population, giving all cities the opportunity to annex based on the same "urban character" criteria.⁴²² Despite pleas from the League of Municipalities and others to consider the implications of annexation reform for the financial welfare of cities,⁴²³ little attention was devoted to such concerns. In the aftermath of legislative reform, it is worth posing related questions for ongoing attention and research.

There appears to be a significant risk that cities in areas with modest growth will be less able to expand corporate boundaries and tax bases in the future. The General Assembly and state

422. See discussion *supra* Part II.C.2.c.

423. See *Annexation Keeps North Carolina Moving Forward, Fairly*, *supra* note 8 (arguing that annexation has many benefits and characterizing proposed reforms to make annexation policies more rigorous as allowing "a few to veto success for many"); Thomas W. Bradshaw, Jr. & Richard A. Vinroot, Op-Ed, *A Tool that Built N.C.'s Cities*, *NEWS & OBSERVER* (Raleigh, N.C.), June 9, 2009, at 9A (op-ed by former mayor of Raleigh and former mayor of Charlotte advocating for reasonable annexation reform, extolling the benefits of annexation for North Carolina citizens and municipalities, and arguing that requiring a vote of citizens before annexation occurs weakens municipalities).

agencies such as the Department of the State Treasurer and the Local Government Commission will therefore need to pay closer attention to the financial viability of such municipalities, particularly when such municipalities have municipally operated water and sewer systems that show signs of stress. For example, the State Treasurer has reported that many very small municipal water and sewer systems are underfunded and should consider regional systems as alternatives.⁴²⁴ It seems unlikely that small systems with aging infrastructure are positioned to expand to regional systems and update needed infrastructure without state support. Accordingly, it may be necessary to find means to supplement funding for small local governments in rural settings when annexation is no longer a viable option that can foster financial health.⁴²⁵

On the other hand, different issues may face municipalities in high-growth areas. They must address greater needs for coordination of decisions regarding land use planning, regulation, annexation and service provision. They may also face greater pressure from “gated communities” or other concentrated populations to incorporate “paper cities” that serve to block annexation and property tax obligations to other nearby communities, while providing minimal services.⁴²⁶ It is accordingly worth considering whether parts of North Carolina that are in that particular trajectory of growth might need additional authority to deal with related issues. The General Assembly might also need to tailor its approach to approving proposed municipal incorporations with related issues in mind.⁴²⁷

424. Memorandum from Sharon Edmundson, Dir., Fiscal Mgmt. Section, to Officials of Municipalities with Water & Sewer Syst. & Their Indep. Auditors 5 (May 2, 2012), <https://www.nctreasurer.com/slg/Memos/2012-17.pdf>.

425. One such alternative may be Tax Increment Financing (known as “Project Development Financing” in North Carolina), although its use in North Carolina has been sparse to this point. *See* Adam C. Parker, Comment, *Still as Moonlight: Why Tax Increment Financing Stalled in North Carolina*, 91 N.C. L. REV. (forthcoming 2013) (comparing the elements of North Carolina’s tax increment financing statute against other states’ statutes and concluding that the availability of other public finance substitutes, ancillary factors, and the complexity of North Carolina’s statute have discouraged use of Tax Increment Financing in North Carolina).

426. *See supra* Part II.C.1.b.

427. In the waning days of the 2012 legislative session, the General Assembly considered legislation calling for a study of incorporation, extraterritorial jurisdiction and municipal services. *See* S.B. 231, 2011–2012 Reg. Sess. (Version 5) (N.C. 2012) (Senate version calling for a study committee relating to incorporation and ETJ), <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S231v5.pdf>. The House had added coverage of municipal services to the agenda for the study and the Senate

The close connection between planning, growth management, ETJ boundaries and infrastructure was evidenced quite dramatically in the final days of the 2012 North Carolina legislative session. Legislation requiring municipalities to extend water and sewer infrastructure into areas within their urban growth boundaries (that is, territory generally designated as falling within their ETJ areas)⁴²⁸ was introduced and passed the

did not concur as of June 28, 2012. S.B. 231, 2011–2012 Reg. Sess. (N.C. 2012), Bill History, *available at* <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=S231>. Version 3 of the Senate bill had proposed to set more specific standards for municipal incorporation (including provision of specified water and sewer services, a minimum property tax rate, and minimum population densities tied to proximity to existing municipalities). *See* S.B. 231, 2011–2012 Reg. Sess. (Version 3) (N.C. 2012), *available at* <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S231v3.pdf>. It had also limited extensions of public water and sewer services by public providers other than the municipality in question into areas with close proximity to municipal limits. *Id.* The fourth version eliminated the provisions regarding water and sewer extensions. *Compare* S.B. 231 § 4, (Version 4) (N.C. 2012) (indicating that § 4 of this version only pertains to the date of enactment), *available at* <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S231v4.pdf>, with S.B. 231 § 3, 2011–2012 Reg. Sess. (Version 4) (N.C. 2012) (attempting to restrict other public entities providing water and sewer services near municipalities). In the end this legislation did not pass.

428. Section 160A-360 of the General Statutes of North Carolina, which governs territorial jurisdiction for land use planning, reads in pertinent part:

(a) All of the powers granted by this Article may be exercised by any city within its corporate limits. In addition, any city may exercise these powers within a defined area extending not more than one mile beyond its limits. With the approval of the board or boards of county commissioners with jurisdiction over the area, a city of 10,000 or more population but less than 25,000 may exercise these powers over an area extending not more than two miles beyond its limits and a city of 25,000 or more population may exercise these powers over an area extending not more than three miles beyond its limits. The boundaries of the city's extraterritorial jurisdiction shall be the same for all powers conferred in this Article. No city may exercise extraterritorially any power conferred by this Article that it is not exercising within its corporate limits

(b) Any council wishing to exercise extraterritorial jurisdiction under this Article shall adopt, and may amend from time to time, an ordinance specifying the areas to be included based upon existing or projected urban development and areas of critical concern to the city, as evidenced by officially adopted plans for its development. Boundaries shall be defined, to the extent feasible, in terms of geographical features identifiable on the ground. A council may, in its discretion, exclude from its extraterritorial jurisdiction areas lying in another county, areas separated from the city by barriers to urban growth, or areas whose projected development will have minimal impact on the city

(d) If a city fails to adopt an ordinance specifying the boundaries of its extraterritorial jurisdiction, the county of which it is a part shall be authorized

House.⁴²⁹ More specifically, the initial House version of the legislation provided as follows:

A city that extends water and sewer service to a designated urban growth area outside its corporate limits may not deny water and sewer service to a property owner that the city includes in that urban growth area for reasons not applied equally to property owners within the corporate limits. The city may charge the property owner in the urban growth area up to twice the rate for water and sewer services that the city charges property owners within the corporate limits and may charge the property owner in the urban growth area for the cost of infrastructure improvements necessary to provide the water and sewer services outside the corporate limits. If the city subsequently annexes some or all of the urban growth area to which the city has provided water and sewer services, then the city may no longer

to exercise the powers granted by this Article in any area beyond the city's corporate limits

(e) No city may hereafter extend its extraterritorial powers under this Article into any area for which the county at that time has adopted and is enforcing a zoning ordinance and subdivision regulations and within which it is enforcing the State Building Code. However, the city may do so where the county is not exercising all three of these powers, or when the city and the county have agreed upon the area within which each will exercise the powers conferred by this Article.

. . . .

(g) When a local government is granted powers by this section subject to the request, approval, or agreement of another local government, the request, approval, or agreement shall be evidenced by a formally adopted resolution of that government's legislative body. Any such request, approval, or agreement can be rescinded upon two years' written notice to the other legislative bodies concerned by repealing the resolution. The resolution may be modified at any time by mutual agreement of the legislative bodies concerned.

N.C. GEN. STAT. § 160A-360 (2011).

429. News accounts reported that the bill was designed to force Durham city officials to extend water and sewer service to a major proposed development in their urban growth area, something they had previously declined to do because of substantial related costs. See Jim Wise, *Bill Could Require City Water and Sewer Service for 751 South*, NEWS & OBSERVER (Raleigh, N.C.), June 27, 2012, at 3B. Efforts by local representatives to derail the bill in the house failed, and it passed and was sent to the Senate. See Ray Gronberg, *Pro-751 bill goes to Senate*, HERALD-SUN (Durham, N.C.), June 28, 2012, at A1. The Senate took up the bill on June 28, 2012 but declined to endorse it. Ray Gronberg, *Senate Turns Down 751 Bill, for the Moment*, HERALD-SUN (Durham, N.C.), June 29, 2012, at A1. It was sent to conference committee. See *id.*

charge a different rate for the provision of the water and sewer services for those annexed areas.⁴³⁰

Passage of this or similar legislation would put municipalities with ETJ areas designed to manage growth in some difficult positions, particularly given its ambiguous terms. On its face, the proposal appears designed to require municipalities that have asserted extraterritorial jurisdiction to extend water and sewer infrastructures to ETJ residents (who are not taxpayers) using the same criteria applied within the existing corporate limits.⁴³¹ Seemingly, then, if in-town residential users can receive water and sewer services upon request, so too could those in the ETJ area, even though the ETJ area may have very different development patterns, with higher costs of service delivery resulting from lower density, for example. If residential and some commercial users in-town are eligible for public water and sewer, does the proposed statute mean that any type of commercial users located in the ETJ area, requesting any volume of water and sewer services, must be provided it, even if providing such services would exhaust the availability of water for in-town residential users? It is also not clear whether municipalities might develop policies that set density or topography or similar criteria as bases for extending service either in- or out-of-town. The proposed legislation also does not address how promptly such service might need to be delivered, since there are no set time limits for extension as there are in the annexation statutes.

Financial considerations likewise seem ill-posed. The property owner requesting services can be charged the cost of infrastructure outside the corporate limits, but what would the property owner's responsibilities be if the extension necessitates substantial improvements in the system as a whole, or if substantial costs are incurred to develop capacity that property owners in the ETJ area have not yet requested? Would affected cities be required to take on and carry debt to meet such uncertain demands? Would existing ratepayers be required to

430. See S.B. 382, 2011–2012 Reg. Sess. § 1 (Version 4) (N.C. 2012) (Senate bill requiring water and sewer service in a designated urban growth area), *available at* <http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S382v4.pdf>.

431. See *id.* (forbidding denial of water and sewer services to property owners in the urban growth area “for reasons not applied equally to property owners within the corporate limits”).

carry associated costs until such time as others in the ETJ area requested services?⁴³²

Legislative proposals such as this one leave municipalities in a difficult quandary, one that legislators may fail to fully understand. Authority to engage in planning and guide development is essential to crafting meaningful strategies for cost-efficient provision of infrastructure.⁴³³ Policies that assume it is possible to deliver “utilities on demand” focus on individual property owners’ interests but do not take adequate account of the complexities and costs of serving a population as a whole. The medical establishment has come to understand that it is shortsighted to focus only on individual patients’ immediate treatment needs, rather than using the lens of public health analysis to track population-based patterns of illness and identify means of avoiding it. Similarly, public policy makers need to consider a system’s overall structure in order to provide public goods and manage the pace at which they can be paid for and delivered.

A number of states facing significant growth pressures have, in the last few decades, adopted statewide land use planning protocols which mandate more intensive regional planning processes.⁴³⁴ For example, Oregon has been a leader in such strategies, establishing a statewide commission to review land use goals and requiring counties and municipalities to develop comprehensive plans and associated regulations consistent with

432. Ultimately, a conference committee developed a revised version of the proposed legislation that would purportedly have applied only to the City of Durham. In the waning hours of the 2012 legislative session, this legislation passed the House, was calendared in the Senate, was pulled from consideration in the Senate, and was defeated by one vote. See Editorial, Ray Gronberg, *Senate Defeats 751 Bill—By One Vote*, HERALD-SUN (Durham, N.C.), July 4, 2012, at A1; see also Ray Gronberg, *Good Riddance to 751 Measure*, HERALD-SUN (Durham, N.C.), July 5, 2012, at A8 (providing an editorial opinion on the negative aspects of this bill).

433. See, e.g., Env’tl. Fin. Cntr., UNC SCH. OF GOV’T, <http://www.efc.unc.edu/index.html> (last visited Nov. 16, 2012).

434. See ZIEGLER, *supra* note 378, § 36.21 (4th ed. 2012); Rebecca Lewis & Gerrit-Jan Knapp, *Institutional Structures for State Growth Management: An Examination of State Development Plans*, 44 ST. & LOC. GOV’T REV. 33, 37–39, 41–43 (2012) (discussing experience in Connecticut, Rhode Island, Delaware, Florida, Maryland, and New Jersey); Daniel R. Mandelker, *Implementing State Growth Management Programs: Alternatives and Recommendations*, 45 J. MARSHALL L. REV. 307, 308–09, 315–16 (2012) (discussing program coverage and criteria for state growth management programs).

statewide objectives.⁴³⁵ Others have subsequently followed Oregon's lead.⁴³⁶

North Carolinians have traditionally preferred limited government,⁴³⁷ and it seems unlikely that statewide planning processes will be adopted any time soon. On the other hand, the state has agreed to specialized planning procedures for sensitive areas such as its coast and mountains.⁴³⁸ A time may therefore come when the General Assembly will realize that growth-related issues are affecting different areas of the state differently, with the result that legal structures may need to adapt. It might be possible, for example, to develop an integrated approach to land use planning, infrastructure development, service delivery, funding of municipal and county services, extraterritorial jurisdiction, annexation authority, and related issues. Climate change that may exacerbate extreme weather, North Carolina's changing demographics and rapid pace of growth, and sharply constrained public funds will likely build pressure for a more systematic approach to the interrelated challenges of providing infrastructure, managing growth, and planning for the future. Should that time come, the General Assembly might wish to address these issues through a system that creates incentives and responsibilities for county-city coordination and long-term approaches to relevant decision-making, at least in high-growth areas, along the lines employed in the vanguard of other states.

C. City, County, and Other Relationships: Local Government Ecology Redux

The preceding Sections have considered how recent legislative changes may affect public infrastructure, local land use

435. See ZIEGLER, *supra* note 378, § 36.21 (discussing OR. REV. STAT. §§ 197.030–065 (1994), the Oregon State Land Use Act of 1973, and other state statutes).

436. See *id.* (referencing regional or statewide planning requirements in Florida, Georgia, Maine, Maryland, Massachusetts, New Jersey, Rhode Island, Vermont, and Washington).

437. See Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2053–54, 2059 (1999) (discussing evolution of the North Carolina Constitution and hesitancy among citizens and the General Assembly to accord strong powers to the executive branch). For a more general discussion of North Carolina's constitutional history and governance philosophy, see generally, JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* (1993).

438. See Coastal Area Management Act of 1974, N.C. GEN. STAT. §§ 113A-100 to -134.3 (2011); Mountain Ridge Protection Act of 1983, N.C. GEN. STAT. §§ 113A-205 to -214 (2011).

regulation, and growth management practices in the future. These important activities occur within the local government ecology discussed earlier in this article.⁴³⁹ Additional lingering questions concern how North Carolina's new annexation legislation may change the ecology of local government itself, including the dynamics between municipalities, counties, and public or private service providers. This Article has contended that it is important to consider annexation within the context of local government ecology. Even though it may be difficult to predict resulting developments with certainty, the Article concludes by considering how important issues such as those just referenced are likely to be affected by recent statutory changes.

This Section first describes in more detail three important long-term questions that are likely to arise within North Carolina's local government ecological system as a result of recent annexation law reforms. In an attempt to discern how these questions might be resolved, it then turns to relevant social science research and the experience of other states with annexation policies similar to those that have recently been adopted in North Carolina.

1. Long-Term Questions About Local Government Ecology

Traditionally, annexation has been viewed as a means for municipal boundary change.⁴⁴⁰ This Article has taken a different stance, and suggested that annexation should be viewed as one dynamic within the context of the ecology of local governance.⁴⁴¹ This Section outlines three significant questions that are likely to arise in future years as a result of the recent changes in North Carolina's annexation law. Although immediate changes in provision of infrastructure and application of regulatory systems will have more significant immediate impact, these longer-term dilemmas are likely to result in more fundamental shifts in governance at the local level in North Carolina. They accordingly warrant at least preliminary review.

a. Old Towns, New Towns: Will Fragmentation Increase?

The North Carolina Constitution limits the extent to which new municipalities can be incorporated in close proximity to

439. *See supra* Part I.B.2.

440. *See supra* Part I.A.

441. *See supra* notes 27–31 and accompanying text.

those that already exist.⁴⁴² Limitations on involuntary annexation (both those related to referendum requirements and those relating to provision of public water and sewer hook-ups at no cost) have the effect of curtailing the geographic growth of existing municipalities. Although state constitutional constraints continue to limit new municipal incorporations within specified distances from existing municipal boundaries, it is possible that the new annexation requirements will allow a growing number of new municipalities to be incorporated outside of existing municipal limits (which will now be more significantly constrained). On the other hand, the recent statutory changes may reduce the pressure for “defensive annexation” and may instead lead primarily to more intensive growth on the fringes of existing municipalities, leading to a different type of fragmentation (one that results in undifferentiated population density without establishment of a separate government identity).

While North Carolina has yet to assess the implications of more fragmented local governance, recent annexation reforms raise the specter of added costs from establishing a larger number of municipalities (rather than bringing urban growth within existing municipalities) or unrecognized costs imposed on municipalities as a result of urban growth outside their perimeters (such as costs for traffic protection within municipal boundaries that results from use of roads by those living beyond city limits).

b. County Versus Town: Can (Rural) Ranchers and (Suburban) Farmers be Friends?⁴⁴³

Recent legislative deliberations regarding North Carolina's annexation policy revealed significant schisms between county and municipal interests that are likely to persist. In more rural areas, property owners potentially subject to involuntary annexation sought the support of county commissioners to fight back against municipal efforts to bring them within local boundaries.⁴⁴⁴ County representatives also expressed concern that

442. See *supra* note 50.

443. See RICHARD RODGERS & OSCAR HAMMERSTEIN, OKLAHOMA! 85–90 (1943).

444. For summaries of local political activities by annexation opponents, see, for example, Barbara Hunter, *Annexation Is All About the Money—More for Government, Less for Citizenry*, STOPNCANNEXATION (Jan. 16, 2007, 12:15 AM), <http://www.stopncannexation.com/Annexaboutmoney.htm> (originally printed in the Asheville Citizen-Times); Joel Burgess, *Jones: Annexation a Drain on Taxpayers*,

municipal annexation would shift the distribution of sales tax revenues to the disadvantage of counties, particularly since such revenues play a significant role in funding schools.⁴⁴⁵

Recent census data also suggests that substantial differences in rural-urban mix characterize various North Carolina localities.⁴⁴⁶ The increasing antipathy to urban interests evident during recent legislative debates⁴⁴⁷ suggests that North Carolina can anticipate a growing disjunction between counties with substantial urban populations and counties with much more limited municipal populations. Moreover, over the last several decades, counties have retained core state functions such as those relating to public health and school support, but have increasingly been afforded nearly all the powers available to municipalities.⁴⁴⁸ At some point, fundamental questions regarding differences between rural and urbanizing areas, the allocation of funding sources, and the respective responsibilities of cities and counties may need to be revisited in response to changing times.

c. General Versus Specialty Providers: Comprehensive Governments or Services à la Carte?

Recent annexation reforms change both the physical and fiscal landscape for delivery of public water and sewer services, and may result in significant shifts in delivery patterns and providers as discussed above.⁴⁴⁹ At a deeper level, however, these changes have undercut the traditional model by which

STOPNCANNEXATION (Jan. 9, 2007, 12:15 AM), <http://www.stopncannexation.com/AnnexaDrain.htm> (originally printed in the *Ashville Citizen Times*); *see also infra* note 445 (discussing the legislative position of the North Carolina Association of County Commissioners).

445. *See 2011–2012 Legislative Goals*, N.C. ASS'N OF CNTY. COMM'RS, <http://www.ncacc.org/index.aspx?NID=151> (last visited Nov. 16, 2012) (calling for modernization of annexation laws requiring development of joint utility service plans for urbanizing areas, requiring cities to reimburse counties for the loss of sales tax due to an annexation, increasing the degrees of urbanization required to annex property, allowing boards of county commissioners to request annexation referenda, requiring the direct provision of municipal water and sewer services to customers within three years of an annexation, providing that counties have the option of continuing to provide utilities to annexed areas, setting the effective date for involuntary annexations to be June 30 following the date of adoption or final resolution of an approval, and prohibiting municipalities from annexing across county boundaries without prior consent of the Board of Commissioners of affected county).

446. *See supra* notes 416–21 and accompanying text.

447. *See supra* note 229.

448. *See supra* Part II.B.2.a, b.

449. *See supra* Part II.C.1.a.

municipalities serve as providers of public infrastructure, and regulatory and other services, as a comprehensive package, offering the same terms to those who are newly annexed as to those who have long resided within municipal bounds.

This approach goes one step beyond the growing practice of state and local governments of charging user fees for certain services such as parks and recreation activities, rather than treating such services as part of the overall menu of public goods delivered to all and paid for through comprehensive tax schemes. Instead, it gives private citizens new choices about whether to affiliate with adjoining municipalities and share the benefits and burdens of participation in the body politic, or instead to stand apart and seek to secure desired services on an à la carte basis.

During North Carolina's recent annexation wars, the focus has been on delivery of public water and sewer services. Nonetheless, there would seem to be no theoretical reason why such an approach might not extend to a variety of other offerings, including access to parks and recreation programs, libraries, solid waste management, and public safety assistance. Historically, cooperation on such matters has often been arranged by contract between municipalities, counties, special authorities, private solid-waste-removal entities and volunteer fire departments.⁴⁵⁰ A key question, however, is whether the recent annexation changes, with resulting acrimony between counties and municipalities in many locations will prove a tipping point. Instead of assuming that there should be cooperation and cost-sharing, will these changes usher in a new era in which municipalities, counties, quasi-governmental entities, special districts, authorities, or even homeowners' associations from large subdivisions begin to compete to offer such services on a fee-for-service basis? Would such developments be cost effective? Would the result be greater privatization? What would be lost or gained?

2. The Lessons of Experience

While it is impossible to answer the fundamental questions just described with any certainty, it is worth considering the

450. See Jeffery A. Hughes & David M. Lawrence, *Article 38: Local Government Water and Wastewater Enterprises*, in COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA 5, 5–7 (2007) (discussing how locales can provide wastewater enterprises); Kara A. Millonzi, *County Funding for Fire Services in North Carolina*, 43 LOC. FIN. BULL., May 2011, at 1, 3, 10, 12 (covering local contracting options for fire services).

lessons of experience from other states in order to plan for future consequences. Happily, both careful empirical studies comparing southern cities (particularly those comparing cities in North and South Carolina before the recent annexation changes) and broader evidence from around the country serve as initial points of reference for what may come. The evidence available does not track directly with the questions just posed, but deserves consideration on its own terms.

a. Comparative Studies of Southern Cities and States

Professors Olga Smirnova and Jerry Ingalls have recently examined annexation and related practices in southern cities and compared the experiences of North Carolina and South Carolina.⁴⁵¹ Their work suggests that fragmentation will grow and reliance on specialized providers will likely increase.

In an initial study involving eight southern states, the researchers found that where referendum requirements were employed to limit involuntary annexations, growth within metropolitan statistical areas occurred primarily in suburbs rather than in central cities that could not annex fringe areas without popular support.⁴⁵² This study also documented the growth in special districts as related to annexation methods. Over the thirty-year study period, jurisdictions employing referenda experienced nearly four times the increase in special districts than was the case

451. Olga Smirnova & Jerry Ingalls, *The Influence of State Annexation Laws on the Growth of Selected Southern Cities*, 47 SOUTHEASTERN GEOGRAPHER 71, 71 (2007) [hereinafter Smirnova & Ingalls, *Southern Cities*] (comparing data from Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee). In an initial study, they explored data from Metropolitan Statistical Areas (MSAs) over the thirty-year period from 1970–2000, using information drawn from U.S. Census data (covering population and government). *Id.* The researchers used Sengstock's annexation framework to classify the respective states' principal forms of annexation. *Id.* They then compared the median scores of MSAs and central cities in these types of states in connection with several issues: overall population growth, growth in number of municipalities, and growth of special districts. See generally Olga Smirnova & Jerry Ingalls, *Annexation, Incorporation and the Health of Central Cities in North and South Carolina*, 16 N.C. GEOGRAPHER 5 (2008) [hereinafter Smirnova & Ingalls, *North and South Carolina*].

452. Smirnova & Ingalls, *Southern Cities*, *supra* note 451, at 78–80. In contrast, the jurisdictions that employed municipal determination strategies had the lowest ratios of growth in metropolitan statistical areas as a whole compared to central cities (indicating that more people were absorbed into central cities when municipal determinations were employed). *Id.* at 79–80.

in jurisdictions that gave municipalities broad discretion to engage in involuntary annexation.⁴⁵³

In a subsequent study, Smirnova and Ingalls focused more explicitly on annexation, incorporation, and related issues through an in-depth comparison of the effects of North Carolina and South Carolina annexation policies on central cities.⁴⁵⁴ The researchers sought to determine whether there were important differences in annexation and incorporation policies in the two states (including impact of the policies on actual practice and actual patterns that resulted); whether differences in annexation statutes and related patterns of annexation and incorporation influenced the growth of central cities; and whether annexation and incorporation statutes affect patterns of growth of special districts within metropolitan statistical areas ("MSAs").⁴⁵⁵

The researchers observed that North Carolina law had clearer standards and benchmarks for annexation,⁴⁵⁶ allowed involuntary annexation (at the time of the study), authorized intergovernmental agreements, and required municipalities and special districts to proceed under express statutory authority for stated objectives.⁴⁵⁷ In contrast, South Carolina had less clear but more constrained annexation practices (employing case-by case review, voter referenda, and county review processes), gave municipalities greater power through "home rule," did not generally authorize intergovernmental agreements, and did not limit the purpose of geographic scope for special districts.⁴⁵⁸

The researchers' in-depth comparison of developments in North and South Carolina is quite illuminating.⁴⁵⁹ They compared

453. In states using annexation referenda, special districts increased by 113% as compared to states in which municipalities had more discretion (where the number increased by only 30%). *Id.* at 81.

454. See Smirnova & Ingalls, *North and South Carolina*, *supra* note 451, at 7 (using four decades of data from the U.S. Census of Governments and Census of Population for the 1962–2002 and 1960–2000 periods respectively and focusing on twenty-four MSAs).

455. *Id.* at 7–8.

456. *Id.* at 8. In contrast to North Carolina, South Carolina statutes set a five-mile perimeter around existing cities within which new incorporation is not permitted.

457. *Id.* at 9–10.

458. *Id.* at 8–10.

459. When comparing annexation activity, Smirnova and Ingalls cited North Carolina as the state with the fifth highest number of annexations during the period of 1970–1998. *Id.* at 11. It is difficult to determine the significance of this pattern for present purposes since the data do not distinguish between voluntary and involuntary annexation and reflect some patterns of action more than ten to forty years old. *Id.*

growth patterns in the two states as a whole, growth in MSA populations, growth in central cities population, growth in the counties where central cities were located, and growth by MSA outside of central cities.⁴⁶⁰

Dramatic differences were evident particularly as to resulting distribution of population growth. In North Carolina, central city population grew dramatically, while in South Carolina, central city population growth was relatively stagnant.⁴⁶¹ Population growth in MSAs outside central cities reflected the opposite trend.⁴⁶² Thus, South Carolina witnessed a significant increase in population living in non-central city locations, while in North Carolina the population living outside of central city locations grew much more modestly. The researchers also looked intensively at patterns affecting the major cities in the two states, focusing on Columbia and Greenville, South Carolina and Charlotte, North Carolina,⁴⁶³ and concluded that in North Carolina "much of the metropolitan growth is being absorbed by . . . central cities; [while] in South Carolina, central cities seem to be stagnant or even declining" as growth occurs in unincorporated places instead.⁴⁶⁴ Smirnova's and Ingalls' work

Nonetheless, despite the limitations of this information, it is clear that North Carolina absorbed substantial population and acreage within its municipalities through annexation during this period.

460. *Id.* at 11–15.

461. In North Carolina, central city populations grew by 119% over the forty-year period, while in South Carolina such population grew by only 15%. *Id.* Strikingly, population growth in counties with central cities grew by 114% in North Carolina over the study period but only by 61% in South Carolina, suggesting that growth was being absorbed into North Carolina counties with urban centers, while that was less the case in South Carolina. *Id.* at 13.

462. *Id.*

463. In focusing on these major cities, the researchers explored patterns of annexation, incorporation and special districts. They found significant differences between the North Carolina and South Carolina cities and MSAs. The Charlotte MSA and the City of Charlotte had grown much more significantly, and had seen a modest increase in the number of municipalities (which grew from thirty-three to forty-five) and special districts (which grew from nine to fourteen during this period), during which its land area had grown from 76 to 242 square miles. The City of Columbia had only a 19% increase in population (compared to Charlotte's 168% growth), lost two of its municipalities, and had seen the number of special districts grow from nine to twenty-seven, while its land area grew to only 125 square miles as a result of annexation. The City of Greenville, South Carolina lost 15% of its population, while its MSA grew by 85%, two municipalities were lost, special districts grew from twenty-three to forty-six, and land area grew to only twenty-six square miles. *Id.* at 16–18.

464. *Id.* at 15.

also yielded important insights regarding patterns of incorporation and establishment of special districts. North Carolina had substantially more incorporations than did South Carolina, with many of the incorporations taking place in the 1990s in the fast-growing Charlotte area.⁴⁶⁵ South Carolina suburbs had limited opportunities to incorporate and even fewer options to annex, fueling major growth in the number of special districts particularly during the 1980s and 1990s.⁴⁶⁶ In the researchers' view, this mushrooming of special districts in South Carolina may reflect efforts to arrange for service delivery and local control that is harder to achieve given differing annexation, incorporation, and intergovernmental agreement policies.⁴⁶⁷

Finally, the researchers examined interrelated patterns of annexation, incorporation and special districts in the same three major cities and found significant differences between these cities and associated MSAs. The Charlotte MSA and the City of Charlotte had grown much more significantly, had seen a modest increase in the number of municipalities (which grew from thirty-three to forty-five) and special districts, and had significant growth in MSA land area.⁴⁶⁸ One of the two South Carolina cities had had only a modest increase in population, while the other had lost population. Both cities lost municipalities, special districts grew substantially, and land area grew quite modestly.⁴⁶⁹ Overall, the researchers concluded that South Carolina's "cities may ultimately act as a drag on economic growth," and traced these risks at least in part to its annexation policies.⁴⁷⁰

North and South Carolina have very different histories and economies, and their public policies on issues such as public higher education and economic development have differed. Notwithstanding such differences, the studies just summarized suggest important hints about how the questions posed earlier in this Section may be answered. Annexation will prove more difficult to achieve and patterns of growth may shift to areas outside center cities, even if such growth does not result in new

465. *Id.* (during the 1990s, twelve of thirty-five new incorporations occurred in counties near Charlotte (an area experiencing particularly substantial growth)).

466. *Id.* at 16 (stating that, by 2002, special districts in South Carolina MSAs totaled 197, while in North Carolina the number stood at 138).

467. *Id.*

468. *See supra* notes 455–67 and accompanying text.

469. *See supra* notes 455–67 and accompanying text.

470. Smirnova & Ingalls, *North and South Carolina*, *supra* note 451, at 19.

incorporations (now that the threat of involuntary annexation has largely been removed). Demands for special districts and other forms of service provision seem likely to increase. The impact of statutory changes to annexation law on the fiscal health of North Carolina's major cities and relating growth patterns remains uncertain, given the radical economic changes that have occurred since the studies were completed.

b. Insights from Elsewhere

The empirical studies just described offer important insights regarding two of the three key issues of local government ecology addressed in this Section: the relationship between old and new municipalities and the role of local governments and other entities as providers of public services. Additional insights about the question of municipal-county relationships and possible developments involving alternative service providers can be gleaned by considering developments from around the country.

The question of municipal-county relationships is perhaps the most vexing of the issues enumerated here. Each state has a distinctive history regarding the roles played by counties, municipalities, and other forms of local government.⁴⁷¹ For example, Professor Michelle Wilde Anderson has begun to research and explain the unique dimensions of county responsibilities and municipal obligations in California.⁴⁷² Academic researchers have also proceeded apace to delineate the challenges and tensions affecting such governmental entities and their relationships.⁴⁷³ The reality, however, is that such issues must be taken under advisement in light of local circumstances.

Experience from around the country can also be brought to bear in analyzing how "à la carte" services should be provided to areas potentially served by local governments. For example, during the 2011 legislative session, the General Assembly authorized the creation of "service districts" that could provide

471. See *supra* Parts II.A–B

472. See generally Michelle Wilde Anderson, *Sprawl's Shepherd: The Rural County*, 100 CALIF. L. REV. 365 (2011) (showing that rural counties, at the least, encouraged suburban development on undeveloped land).

473. See, e.g., Kathryn A. Foster, *Exploring the Links Between Political Structure and Metropolitan Growth*, 12 POL. GEOGRAPHY 526, 527–43 (1993); Christopher Hoene, Mark Baldassare & Michael Shires, *The Development of Counties as Municipal Governments: A Case Study of Los Angeles County in the Twenty-First Century*, 37 URB. AFF. REV. 4, 575–91 (2002).

enhanced police and public safety protection in areas outside municipalities in Wake and Mecklenburg Counties.⁴⁷⁴ The imperative for experimentation may be particularly strong in those areas, but the significance of such changes may be underappreciated at this point. The question is likely soon to be posed as to why provisions for special service areas should be limited to these locales, and whether it makes sense to allow cities, counties, and gated communities to enter into contractual service arrangements on a broader basis.

The experience of other states suggests that it is ill-advised to consider only the respective roles of counties and cities in analyzing how governmental or quasi-governmental services are provided. In many states, special districts have begun to assume responsibilities for assuring delivery of public services such as water and sewer.⁴⁷⁵ In some jurisdictions where homeowners' associations have taken responsibility for providing important water and sewer infrastructure, state legislatures have indicated that it may be reasonable to require that "fall back" public service districts with financial responsibilities be created as a contingency plan.⁴⁷⁶

At this juncture, it can only be stated that the relationship between cities and counties has been significantly under-theorized in North Carolina and elsewhere in recent decades. Although significant attention has been accorded to practices of municipalities, much less attention has been given to the role and practices of counties.⁴⁷⁷ The growing importance of special districts has been documented, and scholarship to date has suggested that creating specialized entities to take responsibilities for important functions such as water and sewer services can tend to reduce public accountability and raise costs.⁴⁷⁸ Today, there is

474. Act of May 23, 2011, ch. 100, § 1, 2011 N.C. Sess. Laws 196 (codified at N.C. GEN. STAT. § 153A-301(a)(10) (2011)).

475. See MEGAN MULLIN, *GOVERNING THE TAP: SPECIAL DISTRICT GOVERNANCE AND THE NEW LOCAL POLITICS OF WATER* 2-5 (2009).

476. See, e.g., FLA. STAT. ANN. § 190.046 (West 2000) (community development districts of 1,000 acres or more); Julian Juergensmeyer, *Infrastructure and the Law: Florida's Past, Present, and Future*, 23 J. LAND USE & ENVT'L. L. 441, 446 (2008) (discussing community development districts).

477. But see generally Anderson, *supra* note 472 (considering California's experience with rural development in counties).

478. See, e.g., Rebecca M. Hendrick, Benedict S. Jimenez & Kamna Lal, *Does Local Government Fragmentation Reduce Local Spending?*, 47 URB. AFF. REV. 467, 467, 502 (2011) (reviewing 2002 data from 126 metropolitan regions and 538 counties in the same regions and concluding that total spending by local governments is higher

limited empirical scholarship regarding the role of gated communities and homeowners' associations in providing critical services, although there is a growing understanding that large-scale homeowners' associations tend to function as quasi-governments with important issues regarding procedures and fairness raised as a result.⁴⁷⁹

In the end, it is often expedient for municipalities, counties, and special districts to avoid discussion or legal frameworks guiding their respective relationships, in order to maximize their flexibility and avoid confronting opposing political views. On the other hand, for the greater good, it will likely become increasingly important for the North Carolina General Assembly to establish structures to shape such relationships in order to assure appropriate accountability regarding financial considerations and to coordinate policy positions regarding infrastructure, land use, growth management, as well as financial and other issues. North Carolina has historically been at the forefront of framing sound approaches to such challenges. It is time for the state to reassert that leadership by grappling with the politically charged questions raised by relationships between counties, cities, special districts and private parties engaged in providing infrastructure and regulating its communities.

The General Assembly has in recent years conducted modest studies about related questions, but has yet to step up to the challenges presented by significant differences in the state's regions, variations in governmental structures, growth and infrastructure management, and government finance in meaningful ways.⁴⁸⁰ It is time for it to do so, perhaps by revisiting

in regions and counties with more single-purpose governments and in jurisdictions where a greater percentage of spending is done by counties, but finding additional nuances that need to be considered).

479. See Barbara Coyle McCabe, *Homeowners Associations as Private Governments: What We Know, What We Don't Know, and Why It Matters*, 71 PUB. ADMIN. REV. 535, 535 (July/Aug. 2011); Barbara Coyle McCabe, *The Rules Are Different Here: An Institutional Comparison of Cities and Homeowners Associations*, 37 ADMIN. & SOC. 404, 411 (2005).

480. See Studies Act of 2009, ch. 574, § 6.3, 2009 N.C. Sess. Laws at 1617 (continue study of water allocation issues); *id.* § 6.7, 2009 N.C. Sess. Laws 1609, 1617 (study sustainable growth through the year 2050, including what it means to be "sustainable," and how economic development, transportation and water/sewer infrastructure, natural resources and quality of life fit that definition); Studies Act of 2008, ch. 181, § 36.1, 2008 N.C. Sess. Laws 723, 742 (charging the Legislative Study Committee "to determine what measures the General Assembly may take to foster regional water resource and transportation planning, incentive-based local land use

these issues. North Carolina needs to take lessons from other states that have faced significant growth pressures in recent years and position its counties and municipalities to take on related challenges more effectively by looking them directly in the eye.⁴⁸¹ While North Carolina's recent annexation wars have in some ways impeded meaningful conversation due to the sharp differences in world view, attention to the consequences that will likely result from annexation changes should serve as a "wake-up call" for all concerned to attend to related issues.

CONCLUSION

This Article has endeavored to position North Carolina's recent annexation wars in the context of debates regarding desirable local government ecology (the powers and responsibilities of counties, municipalities, special districts and quasi-public gated communities). It has contended that annexation debates are best situated in this broader context, rather than viewed as simply a limited choice between extending municipal boundaries or not. The Article has provided a national context for understanding annexation policies, but has also focused specifically on North Carolina's experiences, tracking historical practices, case law reflecting disputes in the last decade, and recent statutory changes. It has then endeavored to assess the implications of North Carolina's annexation wars and the ways these wars have resolved policy debates regarding how water and sewer infrastructure should be funded, land use planning and growth management should proceed, and differing mixes of city, county, and private authority should be approached in the future. The Article has offered a number of significant observations, based on its analysis of recent statutory changes:

- Changes in involuntary annexation laws are likely to curtail the extension of public water and sewer services in the state as planning, engineering, and financial arrangements become more difficult for municipalities.
- Municipalities that provide public water and sewer services will likely move more substantially toward providing such services to those outside municipal limits by conditioning

planning, and more responsive and cost-effective planning to accommodate rapid population growth in North Carolina's urban areas").

481. See *supra* notes 361–62.

voluntary annexations on contracts for such public services or through independent, higher-cost arrangements to deliver such services to those outside municipal boundaries.

- Pressures will likely increase on small municipalities to provide public water and sewer services through regional providers.
- Annexation policy and extraterritorial planning jurisdiction remain important tools for land use regulation and growth management, but the apparent tendency of the General Assembly to intervene in local decisions creates a risk of making it more difficult to establish rational policies on a local or statewide basis.
- North Carolina's recent annexation law amendments may have significant implications for the local government ecology within the state. If the experience of other states can be applied, it is likely that the state will witness growth in special districts, and that state law will need to be revised to address associated issues.
- North Carolina is a substantially rural state, with a small number of counties and cities with high-growth characteristics. It will be important for the state to consider whether uniform approaches to local government authority, annexation policies, and more remain sound policies, or whether more nuanced approaches should be adopted to take into account the differences among localities.
- North Carolina has traditionally been a state characterized by good and responsible government. Its recent "annexation wars" have revealed important tensions in the realm of local government ecology, particularly as to the relationships between municipalities, counties, special districts and homeowners' associations. These "wars" have also revealed important strains (such as those relating to public finance and overlapping authority) that may make collaboration between local governments and quasi-governmental entities more difficult. North Carolina should give considered attention in coming years to "reinventing" the relationships between local government and quasi-governmental entities in order to steer a clear and appropriate course that assures effective delivery of government services, in a fair, cost-effective, and accountable fashion, in the twenty-first century.

Because North Carolina has been an imaginative and far-sighted leader in structuring local government responsibilities in the past, it will be important for the state to recognize that its recent annexation reforms are an initial step toward changing its the local government ecology for years to come. This Article has sought to identify key questions posed by its recent statutory amendments in terms of the delivery of public water and sewer services, land use regulation and growth management. It has also sought to identify key pressure points that may lead to changes in local government ecology in the future, and to offer insights from comparative studies and practices in other jurisdictions that may illuminate the way ahead. Although the recent statutory changes have effectively undercut North Carolina's role as a jurisdiction with progressive insights regarding annexation and related local government boundary changes, the state's rich culture of good local government may still yield fresh insights about a way forward in the face of changing assumptions about the appropriate balance between private preferences and local governance for the greater good.