

Statement before TACIR

Louisville Mayor Tom Bickers

August 22, 2013

The opponents of annexation by ordinance (hereafter "ABO") make three primary legal or quasi-legal arguments in opposition to ABO. They argue that ABO constitutes an unlawful taking without compensation. They make the legal argument that ABO's violates certain unenumerated property rights of the impacted property owners and they also make a quasi-legal/public policy argument based loosely on concepts of procedural due process by claiming that ABO's deprive property owners (or perhaps non-owner residents registered to vote) a voice or political representation on the issue.

In addition, the opponents of ABO have made the public policy arguments that annexations in general are nothing more than a money grab by municipalities, that the promised municipal services are either never provided or long-delayed, and that since Tennessee is one of only three states that allows ABO it must be a bad thing. It is my intent to respond to those arguments.

Legal and Quasi-Legal Arguments

Argument: ABO's are an unlawful taking

In basic sense, the argument being made is that even though there is no change in ownership or title to the property at issue when there is an ABO, which is by nature an involuntary annexation by a municipality, the potential that new land use restrictions may be placed upon property or there may be an economic impact in the form of new taxes or fees, constitutes an unlawful taking of property without compensation. However, as the Tennessee Attorney General recently recognized in a Formal Opinion on July 25, 2013, the Tennessee Supreme Court has clearly ruled that involuntary annexation is not a taking. Simply stated, this issue has no legal merit.

In fact, our legislators should be cautious in even suggesting that the concept of a government taking be extended to legislative actions such as ABO's. Under the same rationale, there are countless actions taken every year by the General Assembly and local governments impacting land use, such as zoning, or creating some economic impact related to property ownership, that could be construed as a taking. That is a potential minefield that should be avoided.

Argument: ABO's deprive property owners of proper notice and political representation

The Attorney General's recent opinion also addresses the representation issue and opines that the argument is likewise without legal merit. Both the United States Supreme Court and the Tennessee Supreme Court have addressed the issue of annexation by ordinance and have held that such action does not violate any voting or due process right of the impacted property owners.

If we look beyond the legal argument and focus on public policy, the amount of notice and political representation that exists under the present statutory scheme should not be ignored. When the current growth boundaries were created, which put everyone on notice of the area contiguous to municipalities that was potentially subject to a future annexation in the next 20 years, elected officials in the county and county residents were included to represent the rights and interests of county residents potentially impacted by a future annexation. Thus, those residing outside a municipality had a voice in the creation of the Urban Growth Boundaries. Moreover, the growth boundaries were approved by

county commissions that were elected to represent those residing in the county and the interests of the county.

Under the existing statutory scheme, impacted property owners have an opportunity to be heard at one or more public hearings before the annexation as well as a minimum of two hearings on an ordinance. In fact, many municipalities go beyond what is minimally required to offer potentially impacted individuals a chance to be heard. Finally, after the annexation, the property owners that are registered to vote clearly have the right to express their disapproval at the polls, which is the same right all of us have as to any elected official, even those in the state legislature, who vote for legislation negatively impacting our personal self-interests.

Moreover, there are public policy issues that would be implicated if the only form of annexation was by referendum. For example, who possess the right to have a voice on the issue, voters residing on the property or the owner? Do we allow the owner to transfer small parcels of the large parcel in an attempt to influence a referendum, as happened in recently in Pigeon Forge? If someone owns multiple parcels, do they get multiple votes? Do residents in an apartment complex all get a vote? If so, why? What if the owner does not live in the county and therefore is not registered to vote? These are all public policy issues ignored in the proposed legislation.

If, as a matter of public policy a nonresident owner has a right to vote on annexation, why does he or she not have a right to vote in the county elections and state elections since both state and local governments routinely enact legislation or engage in rule-making that impacts property rights? There has been nothing suggested as to why annexation differs from other legislation impacting property rights. Why should a public policy supporting a right to vote be limited to annexations?

If the State adopts the public policy that ownership of property, in and of itself generates some legal right to vote, then a Pandora's Box full of problems is opened. Do those opposing ABO really think that every nonresident who owns a piece of a time share in Gatlinburg or Pigeon Forge should have a right to vote in state and county elections? Why would we adopt a policy that reduces the electoral impact of residents?

Outside of voting issues, there are other public policy implications. For example, abolishing ABO's would virtually eliminate the opportunity to remove enclaves (aka islands or donut holes), which is one of the reasons why Louisville has engaged in annexations. In fact, it is the position of the state, through MTAS and our courts, that such enclaves are an anathema to sound municipal policy and should be eliminated. I would suggest the public policy of our state should be to encourage, if not mandate, the elimination of such enclaves. Unfortunately, eliminating ABO's would not only foster the creation of enclaves but make it difficult, if not impossible, for municipalities to eliminate them.

History demonstrates that enclaves are a natural result of a voluntary-only annexation policy. Louisville presents a perfect example. At the time of its incorporation in 1990, Louisville's charter provided that annexations would only be voluntary at the request of the property owner. This created a situation in which numerous enclaves developed. We had instances in which half the houses on each side of a street were in the town and half not even though the street was surrounded by miles of property inside the town. This created an impossible situation as we tried to provide services and meant that we were not getting gas tax revenues, for example, from those nonresidents to maintain the city street they lived on and was part of the town's roads. Voting was a nightmare as qualification to vote in municipal elections has to virtually be determined on a house by house basis. Every recent

contested election led to allegations of illegal voting by residents inside enclaves. We were pretty much begged by the county election commission to resolve the confusion by eliminating the enclaves.

The numerous issues related to enclaves led to Louisville's voters adopting a Home Rule charter that, among other things, changed the town's policy to allow involuntary annexations. In the absence of ABO, however, and under the legislation proposed, we could not have taken action with certainty to fix the problem. In fact, given that the parcels in several of the enclaves were owned exclusively by nonresidents, such as second homes, we could not even have a referendum as there would be no one to vote.

The other problem with enclaves is their potential impact on adjoining property owners. We had some large enclaves develop in Louisville. At least one included several hundred vacant acres owned by a nonresident of the property. Under county land use rules, an agricultural or other use could have been undertaken that could potentially reduce the property values of the hundreds of residences contiguous to it by millions of dollars. As the son of a farmer, I appreciate the need to protect and promote agricultural land use, but this would have been a situation of the use coming to the residences, not vice versa.

Moreover, the property in question could have been subdivided under less stringent county rules that would have created a lack of uniformity in Louisville on things such as storm water control, fire prevention and roads if the property owners in subdivision subsequently asked to be annexed. Under the proposed legislation, Louisville would have been powerless to deal with the issue at the front end.

One possible solution or compromise would be to allow ABO's that are restricted to closing enclaves. However, if public policy allows the use of ABO's to promote the interests of a municipality over the individual property owners of the parcels in the enclaves, why would should it only apply to enclaves? Why should the collective interests of the municipality and its residents be significant enough to outweigh the rights of those residing in or owning property in enclaves but not those on the edge of the municipality? Our public policies and the laws to carry them out should make rational sense, and those opposing ABO's have yet to make that demonstration in this instance.

Argument: ABO's violate property rights

While no Tennessee court has recognized the suggested property rights as enumerated rights of Tennessee citizens, those opposing ABO's claim they improperly violate certain unenumerated property rights of those owning (or is it living, or living and owning?) outside the corporate limits of a municipality. They argue such persons should be able to control what happens to and how they use their property. In many ways this is the identical argument of those opposing any form of zoning or land use. While appealing on first blush, a more thorough analysis of the issue reveals that the opponents of ABO are actually promoting a public policy that places greater value on the rights of someone outside a municipality than the collective rights of those inside the municipality.

For example, Louisville is a waterfront community bordering the Fort Loudon reservoir (Tennessee River). Three separate significant watersheds flow through the town into the reservoir. Numerous residents own residences impacted by the water quality of not only the reservoir, but the watersheds feeding into the reservoir. Any activity by a property owner outside the town that impacts the watershed and the quality of the water has a direct impact on those property owners. We, much like the residents of Newport and Cocke County dealing with Champion, understand that everyone upstream is our neighbor. Almost every annexation Louisville has undertaken in the last two years was aimed in

part at preserving our watersheds and waterways and thus preserving our residents' property values, as the activity of one property owner outside the town harming the watershed has the potential to cause millions of dollars of reduced residential property values.

I strongly suggest that any public policy under which the rights of one property owner on the edge of a municipality are deemed greater and of more value than the collective rights of those inside the municipality potentially impacted by his or her use of their property is a repugnant public policy and I would invite anyone to explain why it is not. In the absence of a right enumerated in either the State or Federal Constitution, we should not adopt as public policy the concept that the self-centered interest of one or a few are of more value than the interest of the community as a whole. That is exactly what we are doing when we focus solely on the alleged interests of those residing outside a municipality. I appreciate that there are property owners implicated in an annexation that have significant personal concerns about how they will be able to use their property after the annexation. However, as public servants we should be focused on what is best for the community as a whole, not the self-interests of some.

Public Policy Arguments

Argument: Annexations are simply a money grab by cities and therefore should be severely limited

When it comes to annexation, one size does not fit all and not all annexations are about increasing property tax revenues. As noted above, Louisville has engaged in annexations for other reasons, such as preserving residential property values and being able to provide better services by eliminating enclaves. Money was not the motivation. In fact, Louisville does not have a property tax. The Owners and residents of property annexed into Louisville actually save money. For example they no longer have to pay for services such as fire protection and in many instances they receive an indirect economic benefit in that their insurance premiums go down as they are part of a municipality with a better fire rating than the county.

Moreover, a review of the cost implications of annexations, as reflected in the materials provided by TML, indicates that annexations, when done properly under the current scheme, generally cost a municipality more than the revenue stream generated. We should look at the data on this issue and not rely on generality, anecdote or supposition.

Argument: Cities do not provide promised services, if at all

Again, one size does not fit all. The provision of municipal services to newly annexed areas is governed by the Plan of Services. If the Plan of Services does not adequately provide for new services, the residents in the newly annexed area have a remedy in court. In some municipalities, such as Louisville, all municipal services are provided within six months of annexation. If there is a problem in this area, then we should deal with the problem in a limited way instead of removing ABO as a form of annexation. The state should not treat all municipalities the same as those who may be failing to properly conduct annexation. Putting things in context, we should only punish those who commit a crime, not everyone that has the potential to commit one.

Argument: Tennessee is one of only three states that allows ABO's so therefore they must be bad

This is an overstatement that was repeated numerous times by those proposing legislation to eliminate ABO's. In reality, there are numerous different annexation schemes utilized by States and many have some form of ABO, even if only to address enclaves. This is addressed in detail in the written

presentation from TML and the TACIR staff has prepared a report on it. I would respectfully suggest that we should do what is best for Tennessee and all of its citizens, whether they reside within or without a municipality, and not be governed by what other states do, whether the issue be annexation or a state income tax

Conclusion

Our governments should only act in the form of creating new law, or changing existing law (thereby creating the potential for confusion or unforeseen problems) if there has been demonstrated a justification for the action. Justification for government action should be premised on valid information and data, not anecdote, conjecture or supposition. Our governments should utilize that data and information to determine if a problem exists, where it exists, and why it exists. If there is a need for government action, then government action should be limited to only what is needed to solve the problem. We should not overact to solve the problem as that may create unforeseen problems and maybe even punish the innocent. We should not use a sledge hammer to kill a gnat. In this instance, that is what much of the legislation proposed on this issue appears to be doing