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MEMORANDUM

TO: Legislative Council-Advisory Commission on Intergovernmental Relations

FROM: Allen C. Hoberg, Director, Office of Administrative Hearings

RE: Annexation and the Bill Drafts on Extraterritorial Zoning

DATE: August 11, 2008

ANNEXATIONS (chapter 40-51.2)

The Office of Administrative Hearings ("OAH") has conducted four hearings under the provisions of N.D.C.C. chapter 40-51.2. Three of those have been personally conducted by me. Although this is not a traditional area of administrative law for state administrative law judges ("ALJs"), annexation hearings and issuing annexation decisions seem to work fairly well because of the way the statute is structured.

First, there are options in the annexation process, *i.e.* different ways to achieve annexation. But, if a city annexes by resolution, the city must adopt a specific resolution to annex. That resolution may be protested. If the resolution is successfully protested and the city wishes to proceed with annexation, the matter must be mediated. If mediation is not successful, the city may petition the director of the Office of Administrative Hearings for annexation and an administrative law judge is appointed to conduct a hearing and rule on the city's petition. There are certain specific notice requirements that must be met before a hearing is held. Upon compliance with these requirements a hearing is held. For the hearing process, the governor's appointee for mediation is required to give a report on the mediation efforts. At the hearing, evidence is given by interested parties, *i.e.* by the city and by others favoring annexation, as well as by those opposing the annexation. There are usually many witnesses and the documentary evidence is quite detailed and usually tailored to fit the factors and decision criteria of the statute.

The annexation by hearing provisions of chapter 40-51.2 are found in sections 40-51.2-08 - 40-51.2-16. The crucial part of those provisions, at least for the ALJ, is that the ALJ is given significant guidance for issuing a decision. That guidance is found in the factors listed in section 40-51.2-13 (1) (seven specific factors and one catch-all factor); and the criteria listed in section 40-50.2-13 (2) (three specific criteria). The statute also gives the ALJ power to determine terms and conditions, and to approve or disapprove of the annexation petition with or without amendment, wholly, partially, or conditionally. *See* sections 40-51.2-13 (3) and 40-51.2-14.

Although the statute does not tell the ALJ what weight to give the factors to be considered, the ultimate criteria when considering those factors are: 1) Is the area proposed to be annexed now, or about to become, urban in character? 2) Is city government in the area proposed to be annexed required to protect the public health, safety, and welfare? or 3) Will the annexation be in the best interest of the area proposed to be annexed? *See* section 40-51.2-13 (2)(a). Based on the factors, if any one of these three criteria are answered in the affirmative, the annexation may be approved. Also, the statute states that the ALJ may deny the annexation if it appears that annexation of all or a part of the property to a different city would better serve the interests of the residents of the property. *See* section 40-51.2-13 (2)(b).

In short, the ALJ hears and reviews all of the evidence presented by the interested parties and then considers that evidence in light of the factors listed in section 40-51.2-13 (1), ultimately deciding, based on those factors, whether any of the criteria of section 50-41.2-13 (2) are met. To some extent, the ALJ is left to weigh the factors and make those criteria determinations as he sees fit. But, these factors and criteria give substantial guidance to the ALJ in helping the ALJ write a meaningful decision.

To date, OAH ALJ's have found for the annexing city three times, twice stating additional terms and conditions, and have found against the annexing city once.

Finally, chapter 40-51.2 provides the method of paying for the ALJ's services. The annexing city must pay for those services. *See* section 40-51.2-17.

Chapter 40-51.2 is a good model for other statutes employing a quasi-judicial process for deciding land use issues.

EXTRATERRITORIAL ZONING (section 40-47-01.1)

First, under the current law, effective through July 31, 2009, in order to determine the extraterritorial zoning authority of the cities in a disputed area, *i.e.* in making a decision as to who has the authority, the ALJ must consider certain specific factors and any other relevant factor. Section 40-47-01.1 (6) (a)-(g). But nowhere is any guidance given about how to apply those factors, as is provided in the annexation statute for annexation hearings (application of factors to criteria - N.D.C.C. § 40-51.2-13 (2)(a)). It would be helpful if more guidance was given as to how these factors fit into an ultimate decision about who has the authority.

Under bill draft 90064.0200, in the statute as effective after July 31, 2009, added is a provision for an OAH ALJ to also rule on changes in zoning regulations or subdivision regulations (page 5, line 16-20). If the governing bodies are unable to agree, the ALJ is "to determine whether the proposed regulation is substantially related to the purpose of the regulation and does not unnecessarily burden affected parties." 40-47-01.1 (4). There is no listing of any specific factors or criteria for the ALJ to consider. Subsection 4 only goes on to say that an ALJ "may consider any factor determined to be relevant by the administrative law judge, including the need of the city to plan for development of the city and the preferences of the residents or property owners in the unincorporated territory." (Page 5, line 30 – page 6, line 2.) This is not much guidance. OAH ALJs are not experts in zoning, neither are they in annexation for that matter, but at least in the annexation statute the ALJ is given substantial guidance upon which to consider the evidence. I don't see that same type of guidance in this bill draft.

In bill draft 90140.0100, in regard to the statute as effective after July 31, 2009, as to subsection 3, my comment is similar. The ALJ is not given enough guidance "to determine whether the proposed regulation is substantially related to

planning practices consistent with the city's comprehensive plan and do not unnecessarily limit appropriate land use by affected persons." (Page 5, lines 5-10.)

In bill draft 90154.0100 the additional language for those provisions to be effective after July 31, 2009, is removed entirely, leaving only that portion of section 40-47-01.1 currently in effect also as the law after July 31, 2009.

Which bill draft should be law is for this commission and ultimately the Legislative Assembly to decide. Whichever bill draft, if any, this commission recommends, I ask you to consider putting some more substance in the legislation, including in existing legislation (e.g. bill draft 90154.0100), to give the ALJ as much guidance as possible, more than just some factors - if possible, put something in that tells the ALJ how to apply those factors.

As for bill drafts 90064.02 and 90140.01, both factors and criteria are needed.

Finally, a potential problem with both the existing law and the amendments effective after July 31, 2009, is that it is not clear who is to pay the for ALJ services provided in conducting a hearing and issuing a decision. Although one may assume that it is the governing body of the city petitioning the Office of Administrative Hearings that is responsible to pay for those services, nowhere does it specifically say that. Just as N.D.C.C. § 40-51.2-17 did, please put in something specific about who is to pay for the ALJ's services.

Thank you!