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MEMORANDUM

TO: **Don Norrell, President/General Manager, The Woodlands Township**

FROM: **Monte Akers**

DATE: **February 23, 2018**

RE: **2017 Amendments to Annexation Laws as They Relate to The Woodlands Township**

Background and Question Presented: In 2007, The Woodlands Township entered into Regional Participation Agreements (RPAs) with the Cities of Houston and Conroe that provide, among other things, that neither city will annex any part of the Township for 50 years, provided the RPAs remain in effect.

In the 2017 regular Session, the Texas Legislature amended the state's annexation laws in Ch. 43, Tex. Local Gov't Code, to eliminate most of the authority of a home rule city to unilaterally annex adjoining territory. Without going into detail, the new law requires that in order to annex territory that cities such as Houston and Conroe must obtain consent of the owners of the area proposed for annexation, typically by an election but by petition under some circumstances. This raises a valid question of whether the changes in the law mean that protection from annexation afforded by the RPAs may no longer be needed for The Woodlands. In other words, because it is unlikely that residents of the Woodland will consent to be annexed by either city, does the change in the law mean that risk of annexation has become non-existent or significantly reduced?

Summary Answer: The risk of forced annexation of all or part of The Woodlands by Houston or Conroe has been reduced but not eliminated. Arguments exist that execution of the RPAs in 2007 bound the parties to terms for annexation based on the law then in effect, or that the RPAs constitute The Township's consent to annexation after 2057.

Discussion: Section 43.0754, Tex. Local Gov't Code, is the provision that authorizes RPAs between a district, such as The Woodlands, and an "eligible municipality" such as Houston or Conroe. Sec. 43.0754(c)(6) says that the agreement may provide for "any type of annexation of any part of the territory of a district to be deferred by an eligible municipality that is a party to a mutually agreeable period."

The language of the two RPAs that address deferral of annexation is similar but not identical, with differences related particularly to the effect of incorporation or adoption of another form of government on the ETJs of the cities.[1] However, the differences are not significant for the issue under consideration.

Section 43.0754 has limited application and there has been no reason for a court to address its application to an annexation deferred under an RPA. Therefore, the caution hereinafter expressed about assuming that neither city can annex The Woodlands in the future without consent because of the 2017 change in the law is just that—caution—and is not intended to be a binding legal conclusion. However, certain legal principles and analogies exist that must be considered, and which are outlined below.

1. The RPAs are contracts, and Article I, Section 10, Clause 1 of the U.S. Constitution prohibits a state from passing a law impairing the obligation of contracts. Although not every modification of a contractual promise impairs the obligation of a contract, and the prohibition against impairment of the obligation of contract "is not an absolute one, and is not to be read with literal exactness, like a mathematical formula." *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398 (1934); *City of El Paso v. Simmons*, 379 U.S. 497 (1965), the 2017 amendments to the annexation laws should not be presumed to be exempt from this Constitutional prohibition.

2. A more common methodology under Texas law by which annexation of a particular area by a city may be deferred is pursuant to Sec. 43.016, (formerly 43.035) or 212.172, Local Gov't Code. These provisions authorize and in some cases require a city and a landowner to enter into a "development agreement" whereby annexation is deferred for a period of time for lands used for agricultural, wildlife management, or timber uses (under Sec. 43.016), or for cities of less than 1.9 million by agreement of the parties (under Sec. 212.172). Such agreements are common throughout the state and can be of long duration (up to 45 years under Sec. 212.172(d). While the terms of these laws are not identical and have different purposes than those contained in Sec. 43.0754, a judicial or other interpretation that the 2017 change to the annexation laws make RPAs and/or development agreements void or voidable would have significant impact on the rights and contractual obligations of numerous cities and landowners, and would likely be vigorously opposed under Art. I, Sec. 10, Clause 1 and other legal theories.

3. The foregoing, as well as the basic rule that new laws do not have retroactive effect, provides an argument that the RPAs remain in effect and are dispositive of the question of whether and when annexation of the Woodlands may occur under the law. In other words, assuming The Township does not incorporate as a city, it is conceivable that Houston or Conroe might attempt to annex all or a portion of The Woodlands after 2057 or any earlier termination of the RPAs. A city argument would be that the law in effect authorized forced annexation, the RPAs established the terms under which annexation would occur, and that additional voter or petition consent of the Township's citizens is not required because it was not needed in 2007 or that the RPAs substitute for consent. Such an argument is bolstered by certain statements in

the RPAs such as Sec. 1.3, which provides that the RPA "shall be liberally construed so as to comport with the Act, other applicable law and the intentions and purposes of the parties as expressly stated or clearly implied herein;" language in Sections 2.3, 2.5, and 4.6 about the binding effect of applicable, or current, law on certain aspects of the agreement; Sec. 7.6, which provides that the agreement is binding on each party and on "each owner and future owner of land that is subject to the operation of this Agreement, during the annexation deferral period established in this Agreement," and Sec. 7.7, which provides that the agreement is binding on parties to which the agreements authority, duties and rights are transferred or assigned by operation of law.

4. Separate and apart from the foregoing, it is well-established that when considering the applicable law affecting vested property rights and land grants, the law in effect at the time of action by the sovereign (i.e. granting of the land or adoption of laws that determine real property rights) continue to apply to land even after a change in the sovereign or a change in the law. *See, e.g. Valmont Plantations v. State,* 346 S.W. 2d 853 (Tex. App. 1961, affm'd 355 S.W.2d 502 (Tex. 1962). That principle typically applies to water, mineral, and other use or ownership rights of landowners versus those of the state, and further research would be required to determine if it applies to the rights of landowner and a city with regard to annexation. However, the rule is another potential counterpoint to a conclusion that The Woodlands is free from risk of annexation based on the 2017 changes.

Other legal concepts are certain to exist that support or are contrary to a premise that the 2017 changes in annexation laws mean The Woodlands is immune from future annexation in the absence of voter or petition consent. However, it is my opinion that in the absence of a future dispositive Attorney General's Opinion or judicial ruling, the issues outlined above are of sufficient significance to discourage major Board actions or policy changes related to annexation or incorporation based on the potential effect of the recent changes in the law on The Township.

[1] Note that the Houston RPA has been amended twice, in 2011 and 2014, but with regard to the territory covered by the Agreement. The provisions related to annexation in the original 2007 RPA remain in effect.