

# The Arbitration Handbook

For Annexation  
Land Use Disputes



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by

Georgia Municipal Association, Inc.

# Table of Contents

Chapter 1	Introduction
Chapter 2	What the Arbitration Panel Decides
Chapter 3	The Arbitrator’s Role and Responsibilities
Chapter 4	The Hearing Process
Chapter 5	Frequently Asked Questions
Appendix A	Copy of Dispute Resolution Statute
Appendix B	Form of Oath
Appendix C	Case Coordinator Duties
Appendix D	Draft Notice to Arbitrators from Case Coordinators
Appendix E	Form for Arbitration Decision-making, Findings and Recommendations
Appendix F	“Zoning, Land Use or Density Restrictions” Deed Filing Form
Appendix G	Arbitrator Immunity – Attorney General Memorandum



## **Chapter 1 – Introduction**

In the 2007 legislative session the Georgia General Assembly passed House Bill 2 placing into law a procedure for resolving annexation disputes between cities and counties when there is a proposed change in zoning or land use. These procedures start at Code Section 36-36-110 and a copy of the text of the law is included in this publication as Appendix A. The new law provides for disputes to be resolved by a panel of five arbitrators which will issue a decision binding on the county, the city and the property owner.

The provisions of the new law were crafted by elected and appointed city and county officials acting on behalf of the Georgia Municipal Association (GMA) and the Association County Commissioners of Georgia (ACCG). Although the new law is not perfect, it represents a best effort by both organizations to work together. As with any legislative enactment, it is not possible for the statutory language to address every possible situation that may arise or every procedural step that must be taken to implement the law.

Based on questions and feedback from the first group of eligible city officials, county officials and academics to receive arbitrator training under this new law, the staff of GMA and ACCG drafted this handbook and the forms included herein to assist future arbitrators in carrying out their duties. It is fully expected that while there remain some questions about the interpretation of the law, details will be fleshed out over time as a body of case law develops.

This handbook was drafted by staff of GMA and ACCG, with substantial input from staff at the Georgia Department of Community Affairs and the University of Georgia's Carl Vinson Institute of Government, to provide informal guidance to arbitrators of disputes under Article 7, Chapter 36 of Title 36 of the Georgia Code. None of the information contained in this publication is intended or should be viewed as legal advice, as regulations or as legally binding in any regard. The materials are provided to assist arbitration panels in organizing themselves and conducting their work in a timely fashion. The forms are provided for convenience only and the arbitrators may choose to use them or may develop their own.

## Chapter 2 – What the Arbitration Panel Decides

Arbitration is intended to provide the parties to a dispute with an opportunity outside of court to have a complete airing of their claims with a decision rendered by a neutral individual or panel. In this instance, there is a five-member panel that makes findings and recommendations regarding a change in zoning, land use or density proposed in conjunction with an annexation. The decisions made by the arbitration panel are dictated by the statute and focus on the impact on the county of the proposed change in land use and whether the county has acted consistently.

The panel is not authorized to approve or deny any particular annexation proposal, but may or may not choose to attach zoning, land use or density conditions to the property in question for one year. The panel may also propose reasonable mitigating measures as to an objection involving infrastructure demands. The city considering the annexation may take one of the following actions: 1) annex the property subject to the zoning, land use or density conditions established by the panel; 2) abandon the annexation; or 3) if the panel does not impose any zoning, land use or density conditions, annex the property at the zoning contained in the notice given to the county. If the city or the applicant for the annexation decides to abandon the annexation, the zoning, land use and density conditions applied to the property by the county cannot be changed by the county for one year from the date of such abandonment.

**Proper Objection Required.** Decisions the arbitrators are called upon to make in this process are set forth in the statute. First, the county must assert a proper objection with respect to a proposed annexation. For the objection to be proper, the decision to object must be made by majority vote of the county governing authority in an open meeting and based on one of the stated grounds for objection.

The county's objection must also be complete and be served on the city in a timely manner. In order to be timely, the county must deliver its objection to the city by certified mail or statutory overnight delivery no later than 30 calendar days after the day it receives notice of the proposed annexation from the city.

Furthermore, the county must document the nature of the objection. In particular, the county must show that the objection is grounded on a material increase in burden upon the county directly related to a proposed change in land use or zoning, a proposed increase in density, or infrastructure demands related to the proposed change in zoning or land use. The county must provide evidence of any financial impact forming the basis of the objection. If any of these requirements are not met, the objection is not proper.

If a county fails to submit a proper objection, the arbitration process should not proceed to the remaining questions regarding the validity and substance of the objection.

**Validity of the Objection.** If the county has submitted a proper objection, the arbitrators must then determine the validity of the objection. To do this the arbitrators must answer the following questions set forth in the law:

1. Does the proposed change in zoning or land use result in a substantial change in the intensity of the allowable use of the property or a change to a significantly different allowable use?

AND

Does the proposed change in zoning or land use differ substantially from the existing uses suggested for the property by the county's comprehensive land use plan or permitted for the property pursuant to the county's zoning ordinance or its land use ordinance?

*OR*

2. Does the proposed change in zoning or land use result in a use which significantly increases the net cost of infrastructure or significantly diminishes the value or useful life of a capital outlay project furnished by the county to the area to be annexed?

AND

Does the proposed change in zoning or land use differ substantially from the existing uses suggested for the property by the county's comprehensive land use plan or permitted for the property pursuant to the county's zoning ordinance or its land use ordinance?

If the panel determines that the objection is not valid, the work of the arbitration panel stops there. The panel will issue its decision finding that the objection is not valid and the parties to the process are then free to appeal that decision. Only if the arbitration panel finds that the objection is valid does it proceed to consider the facts and arguments presented by the parties and the factors for decision-making set forth in the statute.

**Hearing.** The law states: "The county shall provide supporting evidence that its objection is consistent with its land use plan and the pattern of existing land uses and zonings in the area of the subject property." O.C.G.A. § 36-36-115(a)(3). Thus, unless otherwise agreed by the parties to the proceeding, the county should go first to present its evidence and witnesses subject to cross-examination by the other parties.

The other parties will then present their evidence and witnesses, also subject to cross-examination by the county and other parties. If the arbitration panel as a whole determines that they need more information on a particular factual point or want additional explanation on a point of law, they can request this from the parties and schedule additional hearings as necessary provided the panel remains within the 60-day time frame allowed by the statute. The panel may decide that they would like for the parties to submit briefs summarizing the facts and their legal arguments. Once all of the testimony and evidence has been received, typically the hearing process will conclude with closing arguments by counsel for each of the parties.

**Deliberations.** The panel will then deliberate by discussing among themselves the facts and law. They may do this at the hearing or may schedule an additional day or time in the future for this. The law requires that the arbitration panel render their decision within 60 days following their appointment, which will not start later than the fifteenth day after the objection is filed. The Georgia Department of Community Affairs will notify all panelists and the parties once a panel is finalized and the 60-day period begins.

If the county's objection involves the financial impact on the county as a result of a change in zoning or land use or the provision of maintenance of infrastructure, the arbitration panel must quantify such impact in terms of cost.

In reaching their decision, the arbitration panel must consider the following:

- The existing comprehensive land use plans of both the city and the county;
- The existing land use patterns in the area of the subject property;
- The existing zoning patterns in the area of the subject property;
- Each jurisdiction’s provision of infrastructure to the area of the subject property;
- Whether the county has approved similar changes in intensity or allowable uses on similar developments in other unincorporated areas of the county;
- Whether the county has approved similar developments in other unincorporated areas of the county which have a similar impact on infrastructure as complained of by the county in its objection; and
- Whether the infrastructure or capital outlay project which is claimed adversely impacted by the county in its objection was funded by a county-wide tax.

**Findings and Recommendations.** The panel does not have the authority to approve or deny any particular annexation proposal. It may, however, decide to attach zoning, land use or density conditions to the property for one year or may decide that no new or additional zoning, land use or density conditions should be placed on the property. The panel may also propose any reasonable mitigating measures as to an objection involving infrastructure demands. The arbitration panel must create a record of its findings and recommendations and serve those on the parties. See the “Form for Arbitration Decision-Making, Findings and Recommendations” at Appendix E.

**Recording.** If the panel’s findings and recommendations include conditions on zoning, land use or density these must be recorded on the deed records of the property at issue (see “Zoning, Land Use or Density Restrictions” form at Appendix F).

**Good Faith Negotiations.** The law provides that the county and municipal governing authorities and the property owner or owners shall negotiate in good faith throughout the annexation proceedings. At any time, the parties may enter into a written agreement which will govern the annexation. If the parties reach a mutual resolution in this manner after a panel has been appointed but before a decision is issued, then the agreement will be adopted by the panel as its findings and recommendations. Similarly, if such an agreement is reached after a panel’s decision has been appealed to superior court and before the court issues an order, the agreement will be made a part of the court’s order. While this law provides a means for dispute resolution, the parties are encouraged to reach an agreement on their own.

## Chapter 3 – The Arbitrator’s Role and Responsibilities

The cornerstone of an effective arbitration system is impartial arbitrators who decide the cases before them based on the facts and law presented to them by the parties to the dispute.

**Scope of Authority.** Arbitrators under this law are not empowered or directed to make independent factual investigations. In reaching their decisions they should rely on the information presented to them by the parties. If a party requests that certain information or testimony be excluded from the proceedings, the overriding consideration for the arbitrators should be fairness to the parties and the value of the information or testimony. The general tendency in arbitration is to err on the side of allowing information or testimony to be considered by the panel members.

To provide due process to all of the parties, all of the testimony and evidence presented needs to be subject to challenge and cross-examination. Thus, testimony by affidavit should not be allowed. Additionally, the arbitration panel and its individual members have no power to issue subpoenas or compel the attendance of witnesses. The arbitrators should rely on the parties to vigorously present their cases to the panel.

Arbitrators must maintain a record of all pleadings, documents, testimony, and other matters introduced at the hearing.

**Conflict of Interest.** It is very important as soon as the arbitrators have been selected for them to ensure that they have no conflicts, real or perceived, by conducting a thorough conflict check. Potential or alleged bias that is uncovered after the decision is rendered is one of the most common grounds for challenging an arbitration award. Therefore it is necessary that all questions of potential bias be addressed in advance, and the selected arbitrators should ensure they have no conflict of interest with respect to the parties, their counsel and their law firms and all expected factual and expert witnesses. The circumstances to be considered include, but are not limited to, bias toward a party, a business or personal relationship, previous or current involvement with a party, or financial interest in the outcome.

**Neutrality and Impartiality.** Note that city appointees do not represent or advocate for the interests of the city on the panel; likewise, the county appointees do not represent or advocate for the interests of the county. The objective is for the panel, as a group, to tap the knowledge and experience of the individual members to arrive at a logical and reasoned decision.

### Fairness

Parties should have a full and equal opportunity to give testimony and evidence. Each party should feel at the end of the hearing that he or she had a chance to tell "my story." Fairness also means that all parties are treated in an even-handed fashion throughout the hearing.

### Impartiality

All arbitrators are expected to be impartial--free from favoritism, bias or prejudice. The arbitrators should actively strive to avoid prejudging the case. They should also reserve reaching any conclusions until all testimony and evidence has been given.

All people have biases. They are a natural response to our life experiences. However, as arbitrators, you are required to leave your biases outside of the hearing room. Without impartiality, you will not objectively process the information presented in the hearing.

The arbitrators are impartial decision-makers addressing certain statutory questions. The arbitrators should not, through their questions or body language, convey a preference for a particular party or advocate for or against a party.

### **Role as Fact Finders**

Arbitrators are fact finders. Based on the evidence the arbitrators hear and see at the hearing, they must decide what are the reliable facts that can be applied to the limited issues presented to them and what are mere opinions, no matter how strongly held or stated.

### **Ensure the Hearing is Conducted in an Orderly Fashion**

The arbitrators should carry out this responsibility by:

- Determining what the statute requires the arbitrators to do and what flexibility they have to conduct the hearing (e.g., who can serve as witnesses, preparing witness lists, determining if affidavits are allowed, how sworn testimony is to be taken, what time frames apply to each part of the arbitration process, whether a time frame can be extended and for what reason).
- As necessary, limiting the number of witnesses, documentary evidence and the time for each party to present their respective cases. Each party, however, must be given an equivalent time to present their case. The parties should be advised that repetitive or duplicative testimony will be prohibited; for example, testimony may not be necessary if the parties are able to submit an agreed upon statement of facts (stipulations).
- Communicating to the parties what the procedure requires and where there is flexibility. Where flexibility exists, negotiate with the parties concerning how the arbitration process will run. The arbitration panel and the parties need to be clear from the beginning of the process what is required of all participants, what cannot be done, what has been agreed to, and what the time table will be for the entire process. It may be beneficial to put this agreement in writing and give copies to the parties.
- Requiring all participants to act courteously and respectfully during the hearing. Tell the parties at the outset what is expected of them and how the arbitration panel will respond if any participant does not act accordingly. The arbitrators should set the standard for proper hearing conduct by modeling the behavior required of the parties. If the parties feel that they are being treated fairly and respectfully, they will be much more likely to respond the same way toward the arbitrators and each other.

**Ex parte communications.** The law specifically prohibits the arbitrators from discussing the case with any of the parties to the matter outside the presence of the other parties to the matter. In signing their oath, the arbitrators promise that they have not done this and that they will not do this.

## Chapter 4 – The Hearing Process

The statute provides the arbitration panels a substantial amount of discretion in determining how to carry out its duties. This chapter contains recommended checklists for tasks to be completed during a pre-hearing conference, at the hearing and after the hearing. It also includes a recommended process for the arbitration hearing.

### **Pre-Hearing Conference**

**Case Coordination.** To handle the administrative aspects of the arbitration process, it is suggested that the parties, including the annexation applicant, each appoint an individual, such as a clerk, manager or administrative assistant, to serve as a case coordinator. These individuals, working together, will arrange hearing dates, a hearing site, recording of the proceedings and communication with the arbitrators. The case coordinators should talk with the parties' attorneys and request that they identify potential witnesses and experts that will be involved so that the arbitrators can complete their conflict checks to ensure that there is no relationship that would endanger their neutrality.

The parties should also be informed of the procedures that will result in the final hearing and decision. Case coordinators may also assemble an initial case file or take on such other administrative duties as the arbitration panel requires carrying out their duties. (See "Case Coordinator Duties" in Appendix C and "Draft Notice to Arbitrators from Case Coordinators" at Appendix D.) Counsel for the parties should be encouraged to confer directly so that they are on the same wavelength on as many issues as possible going into the session, or so they will at least know what preliminary disputes exist that must be initially resolved by the arbitrators.

The purpose of having the case coordinators work collectively is to avoid any communication between a party and one or more of the arbitrators outside the presence of the other parties. Such a communication is called "ex parte" because it is done by one party outside the presence and hearing of another party. Ex parte communication is prohibited by the oath arbitrators sign when they agree to serve. Of necessity, the arbitrators must communicate with the case coordinators to schedule the hearing(s). But, as noted above, this communication should be limited to administrative, not substantive matters and involve representatives of all parties. Aside from this, the arbitrators should only communicate with the parties and their counsel in the physical presence and hearing of the other parties.

Instead of the party case coordinators suggested above, the parties may decide to use a neutral third-party to act as the case coordinator. This is certainly acceptable if all of the parties agree. The important point is to avoid ex parte communication between the arbitrators and the parties.

**Pre-hearing Activities.** During this preliminary conversation, it is normal to discuss summaries of claims, the time to exchange documents and other information, stipulations, documents that will be submitted (separately and jointly), pre-marked exhibits that will be submitted (separately and jointly), lists of witnesses and the general subject matter of their testimony, motions (parties should be encouraged to submit these in advance), and requests for briefs, if necessary.

Once the discovery schedule is established at the preliminary conference, the parties should proceed with document exchange and other discovery in preparation for presentation of the case at the hearing. If disputes arise during the discovery process, counsel for the parties should come back to the arbitrators to resolve those disputes so that discovery can proceed and the case will be ready for hearing at the designated time.

### **Checklist for Panel**

1. Introduce panel members.
2. Sign oaths, if not already done.
3. Elect chairperson and clarify this role.
4. Review roles of arbitrators.
  - a. Neutral
  - b. Manage arbitration hearing in a just and efficient manner
  - c. No ex parte communications
5. Appoint a panel member who will be in charge of handling all evidence during the proceedings.
6. Appoint a panel member who will serve as the official recorder for proceedings. Discuss when proceedings will be recorded and ensure a recording method is arranged.
7. Discuss procedures for managing hearing(s) and be prepared to make the following decisions:
  - Admissibility and relevancy of testimony and evidence (documents, exhibits).
  - Need to recall witnesses.
  - Whether information and or testimony becomes cumulative or repetitious .
8. Review schedule of hearing(s) and deliberations. The arbitration panel should encourage the parties to make the process as efficient as possible by exchanging documents and information, agreeing to stipulations of fact (see below), agreeing to joint submission of pre-marked exhibits, identifying witnesses and the general subject matter of their testimony, and identifying documents. The panel may want to set a schedule for getting this done. Also, due to the expedited schedule for hearing the case and issuing a decision, the arbitration panel may want to require that the parties serve any motions well in advance of the hearing so that the arbitrators have time to read them and the other parties have time to serve responses well before the hearing.
9. Discuss requests for briefs, if necessary, as well as any limitations on the length of briefs and the amount of other items submitted as evidence.
10. Identify all relevant witnesses and evidence.

**Evidence.** The arbitrators may consider any evidence that the parties present. The arbitrators determine the admissibility, relevance, weight and credibility of the evidence that

is presented. Questions concerning admissibility of evidence, the validity of an objection and any other matters in the arbitration are to be decided by majority vote of the arbitrators.

- **Admissibility** - Although the formal rules of evidence do not apply in arbitration hearings, the arbitrators may be faced with a party representative who will assert that certain testimony or evidence is inadmissible. The arbitration panel should receive evidence that tends to prove or disprove a fact at issue in the case and exclude evidence which is irrelevant, immaterial, insubstantial, privileged or repetitive.
- **Stipulations** - Black's Law Dictionary defines a stipulation as "a voluntary agreement between opposing parties concerning some relevant point." A stipulation is intended to avoid the necessity of proving matters which are not in dispute. The matter can be a document or a fact. The parties may or may not agree to enter into stipulations. The arbitration panel should not force this. Common items that may be covered by a stipulation could include the authenticity of the comprehensive plans, the zoning ordinances and the annexation application.

## Hearing Outline

### Arbitrators' Opening Statement

**Purpose:** Conveys to those present how the arbitration panel intends to organize and conduct the hearing. The opening statement also lets the parties know what to expect and the rules that everyone must follow.  
Address everyone formally ( Mr./Mrs./Ms. etc.)

The chair of the arbitration panel should call the hearing to order and read the following statement:

**"This arbitration hearing is convened on (time) (date) and (place) under the authority of Article 7, Chapter 36 of Title 36 of the Georgia Code to hear the matter concerning \_\_\_\_\_ County, the City of \_\_\_\_\_ and (property owner/applicant)\_\_\_\_\_."**

- Let participants know that the panel will be making a record of the hearing and remind them that gestures or nods cannot be recorded. Instruct the parties that in order to ensure that the record accurately reflects all of the testimony, all communications should be verbal.
- Ask the parties whether they have received copies of the relevant documents. Note the receipt of the objection and responses, if any.

- Explain the role of the arbitrators-- impartial and neutral.
- Review procedures that will be followed in the arbitration session (order and presentation of witnesses, labeling and introduction of documents, etc.).
- Describe behavioral expectations for parties, witnesses and attorneys-- cooperation and courteousness.

- State that testimony is limited to relevant information.
- Let parties know that the panel will render a decision by (Date – not later than 60 days after the panel was constituted)
- Ask if there are any questions.

#### ***Swear in the witnesses.***

The following oath or affirmation should be sufficient:

**"Do you solemnly swear or affirm that the testimony you are about to give is the truth, the whole truth and nothing but the truth?"**

## **Conducting the Hearing.**

Since the law is silent regarding the format to be followed in conducting the arbitration, the panelists have broad discretion in how they will hear from the parties. The law states: “The county shall provide supporting evidence that its objection is consistent with its land use plan and the pattern of existing land uses and zonings in the area of the subject property.” O.C.G.A. § 36-36-115(a) (3). Thus, unless otherwise agreed by the parties, the county should go first to present its evidence and witnesses subject to cross-examination by the other parties.

**Opening statements:** Each party will give opening statements. The opening statement should summarize what each side will show through their evidence and witness testimony. The opening statement should also include the relief requested.

- Opening statement by County (if desired)
- Opening statement by City (if desired)
- Opening statement by Applicant/Property Owner (if desired)

### **Presenting the Case:**

- County representatives begin and present their case in chief by presenting evidence to support their position, primarily through questions, answers and documents. At this point in the hearing County witnesses will testify (direct examination).
- City cross-examines the county’s witnesses. Applicant/property owner also has an opportunity to cross-examine.
- If rebuttal and redirect are permitted, they occur after each cross-examination.
- Presentation of City’s case (direct examination, county and applicant/property owner cross-examination)
- Presentation of Applicant’s/Property Owner’s case (direct examination, county and city cross-examination)

**Closing Arguments:** The purpose of the closing statement is to bring all of the necessary elements of the case together in a simple, understandable way that shows why a position should be accepted by the arbitration panel. It is a summary of the case that applies the relevant law to the proven facts.

- Closing argument by County
- Closing argument by City
- Closing argument by Applicant/Property Owner

### **Arbitrators’ Closing Statements:**

- a. Declare the hearing closed if there are to be no future hearings.
- b. Tell parties when the decision will be rendered or when the next hearing will be held.
- c. Thank the parties for participating.

**Deliberations.** The panel will then deliberate by discussing among themselves the facts and law. They may do this at the hearing or may schedule an additional day or time in the future for this. The law requires that the arbitration panel render their decision within sixty days following their appointment, which will not start later than the fifteenth day after the objection is filed. The Georgia Department of Community Affairs will notify all panelists and the parties once a panel is finalized and the sixty day period begins.

The law directs that the panel act as a body by majority vote. The panel may elect one of its members to serve as chair but this person has no greater power or authority than the other arbitrators and should not make unilateral decisions on any matter.

Deliberations take place in open session after the hearing has been recessed. The deliberative phase allows the arbitrators to ponder all the issues that have been raised during the hearing and the evidence presented by each party in support of their case or in rebuttal to the case presented by the other party. Conflicting evidence is evaluated, and the arbitrators determine which facts have been proven. The facts are then applied to the issues, and the arbitrators determine what recommendations, if any, they should make. After the hearing has concluded, the arbitrators should not talk to any of the parties or other persons, including previous witnesses who have testified. If additional material testimony is needed, the arbitrators may reconvene the hearing for such purposes.

**Decision.** The arbitration panel must create a record of its findings and recommendations and serve those on the parties. See the “Form for Arbitration Decision-Making, Findings and Recommendations” at Appendix E.

**Challenging the Award.** An appeal of the arbitration panel’s decision is to be filed within ten calendar days of receipt of the panel’s findings and recommendations. The statute states that the grounds for appeal of the arbitration panel’s decision are to correct errors of fact or law, the bias or misconduct of an arbitrator, or the panel’s abuse of discretion. The law directs the superior court to schedule an expedited appeal and render a decision within twenty days from the date of the filing of the appeal.

### **Post-Hearing Checklist**

1. Create a record of the panel’s findings and recommendations (Appendix E).
2. Serve a copy of the findings and recommendations on each of the parties to the arbitration by certified mail or statutory overnight delivery.
3. Record any zoning, land use, or density conditions in the deed records of the county where the property is located (See Appendix F).
4. Allocate the remaining 25 percent of arbitration costs.

## Chapter 5 – Frequently Asked Questions

This chapter contains frequently asked questions designed to assist arbitrators in carrying out their duties.

### Open Meetings and Open Records

**1. What activities and meetings of the panel are subject to the open meetings act? Can the panel hold its pre-hearing conference and deliberations in private?**

Code Section 36-36-115(a)(1) states that “the meetings of the panel in which evidence is submitted or arguments of the parties are made shall be open to the public pursuant to” the Open Meetings Act. This includes the notice requirements, the requirement to take minutes and other requirements of the Open Meetings Act.

*Recommendation:* It is recommended that all of the work of the panel, including all meetings, be open to the public.

**2. Are records of the arbitration, including the notes taken by panelists, subject to disclosure?**

While the statute makes no specific reference to open records, under the Open Meetings Act, minutes of a meeting covered by the law must be taken. As to other records, it may be best to assume that records created by an arbitration panel are subject to the Open Records Act. As such, panels should assume that the official notes taken by panelists, as well as any personal notes, will be subject to public inspection.

*Recommendation:* A meeting agenda, a summary of the meeting and minutes of the meeting of the arbitration panel must be prepared. It is recommended that panelists assume any documents, maps, photographs, notes, records, communications or similar items received or generated in the course of serving on an arbitration panel are open records and subject to public inspection.

### Evidence and Testimony

**3. What parties are permitted to present evidence and testimony to the panel?**

According to §36-36-115(a)(1), the panel “shall receive evidence and argument from the municipal corporation, the county, and the applicant or property owner.”

**Does the panel have the power to issue subpoenas?**

No, there is nothing in the statute that grants panels the power to subpoena witnesses or evidence.

**Can community groups or other residents who are not a party to the proceedings be allowed to testify?**

As noted above, the panel “shall receive evidence and argument from the municipal corporation, the county, and the applicant or property owner.” The statute does not specify whether the panel may accept evidence and testimony from other parties, nor does it bar such testimony. It is important to note that the arbitration belongs to the parties, not to any other third party. Arbitrators are impartial decision-makers addressing certain statutory questions laid out in the law.

*Recommendation:* It is at the panel’s discretion who is allowed to testify and present evidence at the hearing. Due to the nature of the proceedings and to ensure efficiency, it is recommended that the panel limit testimony to parties to the dispute or witnesses that the parties request be allowed to present evidence. It is also recommended that each party be required to submit a list of witnesses prior to the initial meeting of the panel and specify the general nature of the testimony.

**4. What qualifies as evidence? What does not?**

In arbitration, the rules of evidence are typically relaxed and what is considered evidence is driven by claims in the objection, the responses to those claims and the statutorily mandated considerations. Since the panel is required to consider a number of factors as cited in §36-36-115(a)(2), it is expected the panel will receive evidence related to comprehensive land use plans, zoning and land use, and financial impacts (if any are alleged).

*Recommendation:* The panel should exercise its own discretion in accepting and evaluating evidence. As with witnesses that might testify, parties should be required to submit a list of evidence in advance that each party expects to present to the panel.

**5. Can the panel request post-hearing submissions of evidence?**

The statute does not address whether the panel can request additional evidence from the parties to be submitted after the proceedings. Due to the restrictions against ex parte communication, it is clear the parties may not send unsolicited information to the panelists outside of a formal hearing and should ensure that all parties receive a copy of any information sent to the panelists.

*Recommendation:* The panel should be able to request additional information from the parties in the dispute when such a request is made on record and there will be a future hearing on the evidence with an opportunity for it to be disputed. Any information requested must be provided to all parties.

**6. Can the panel limit the size (volume) of evidence and testimony presented?**

The statute does not speak to whether the panel can limit the amount of evidence and testimony presented during a proceeding. To ensure due process, it is important that all sides be given the opportunity to present information they feel is important for the arbitrators to hear.

*Recommendation:* The amount of evidence and testimony provided in any given proceeding can be determined on a case by case basis. It is recommended that the panel exercise its own discretion to limit the initial submission of testimony to facilitate the arbitration proceedings. For example, each party could be limited to a maximum 10-page brief summarizing the respective issues and positions of each party. Additional information could be allowed or requested by the panel if necessary. It is also in the panel's discretion to continue a hearing to a later date if the evidence submitted requires more time for study and consideration than may be reasonably allocated in one proceeding.

#### **7. How should the panel handle the receipt of evidence?**

The statute does not discuss specifically how evidence should be received by the panel.

*Recommendation:* The panel should maintain an evidence log and record all items of evidence received. At its discretion, the panel may require that the parties to the dispute provide an inventory list of evidence.

#### **8. Are witnesses able to provide testimony by affidavit?**

The statute is silent on this question. However, the purpose of a hearing is to allow due process and provide an opportunity for parties to cross-examine witnesses and/or counter evidence presented.

*Recommendation:* The panel should require all witnesses to testify in person and should not accept testimony by affidavit.

### **Oath and Arbitrator Ethics**

#### **9. Are arbitrators required to take an oath?**

Code section 36-36-114(e) requires arbitrators to sign the oath below at the time they are selected to serve on a panel. A form of oath that can be used is found in Appendix B.

The oath is as follows: *"I do solemnly swear or affirm that I will faithfully perform my duties as an arbitrator in a fair and impartial manner without favor or affection to any party, and that I have not and will not have any ex parte communication regarding the facts and circumstances of the matters to be determined, other than communications with my fellow arbitrators, and will only consider, in making my determination, those matters which may lawfully come before me."*

*Recommendation:* It is recommended that the first order of business of the panel be the signing of the oath. This should occur on the record and before considering any evidence or testimony.

**10. Are arbitrators able to be disqualified due to a conflict of interest? If so, how is that handled? How are conflicts of interest identified?**

There is no provision in the statute that addresses conflicts of interest involving arbitrators.

*Recommendation:* It is recommended that conflicts of interest be self-identified and arbitrators remove themselves from the proceedings if they feel that a conflict of interest exists. It is further recommended that the Georgia Department of Community Affairs ask arbitrators before they are appointed to a panel if they have any known conflict of interest. Questions arbitrators should ask of themselves include:

- Do I have any interest in the outcome of this proceeding that impacts my ability to be impartial or which creates an unfavorable appearance of partiality or bias?
- Do I have a relationship with any of the parties that impacts my ability to be impartial or which creates an unfavorable appearance of partiality or bias?

**11. What does ‘no ex parte communication’ mean and how far does it go?**

‘No ex parte communication’ means arbitrators should have no communication with any party to the dispute regarding the specifics and merits of a case outside of formal panel proceedings until a decision has been rendered. This covers all forms of communication, including electronic correspondence, telephone conversations, letters, and in-person conversations.

*Recommendation:* Arbitrators must refrain from all substantive discussions with any party or representative of a party to the dispute until after a decision has been rendered. Communications regarding panel logistics, including meeting times and locations, should be handled by the case coordinator(s) selected by the parties to the dispute (see Appendix C).

**12. What is DCA’s role in organizing and directing the arbitration?**

Under the arbitration statute DCA has a limited role. DCA is instructed to develop and maintain the three pools of arbitrators and, upon receiving notice of a dispute, to choose at random four names from the county pool, four names from the city pool and three names from the academic pool. As of the date of this publication, DCA has established the following summary of steps that it will take upon receipt of notice of a dispute:

Receive fax or mail of letter of notification of objection from county.

Review format (verify that vote was taken and reason for objection is given). Verify contact information for city.

Prepare initial list of possible panelists at random. Contact potential panelists to ascertain availability. Follow up, confirm availability (subject to schedule restrictions) of enough panelists.

Provide list of names of potential panelists to county and city. Request strikes.

Receive county's and city's strikes. If same academic is struck, notify parties and ask second submitter for new academic strike.

Appoint the panel: Issue memo and final list of panelists to both parties, cc GMA and ACCG.

## **Panel Procedures**

### **13. How is the panel managed? For example, who chairs the meeting? Who takes notes?**

The statute does not specify how the panel should manage itself or allocate duties. There is wide discretion available to each panel to decide how to function.

*Recommendation:* It is recommended that the arbitrators hold a pre-hearing conference to answer questions about managing the proceedings. The purpose of the conference can include selecting a chairperson, adopting procedures, identifying an official recorder, reviewing scheduling matters and addressing any other matters or responsibilities. Refer to Chapter 4 to find a list of panel duties and recommended tasks for the pre-hearing conference. For the sake of efficiency, the arbitration panel may hold the pre-hearing conference immediately before the actual hearing with the parties. Because state law contains very limited authorization for public bodies to conduct business by teleconference, it is suggested that the arbitration panel NOT meet by teleconference. Please note that knowingly and willfully participating in a meeting that violates the Georgia Open Meetings Act is a misdemeanor and may be punished by a fine not to exceed \$500.

### **14. How does the panel handle its own decision making process?**

According to §36-36-115(a)(1), the panel “shall by majority vote render a decision which shall be binding on all parties to the dispute...”

*Recommendation:* It is recommended that the panel determine all questions by a simple majority vote of the panel. If a chairperson has been selected by the panel, it is important to remember that the chair is a first among equals and cannot make any unilateral rulings, nor would the chair be excluded from voting on any matters.

### **15. What administrative support is available to the panel?**

The statute does not address the question of administrative support. There are a number of administrative tasks that must be completed. This includes scheduling meetings, identifying a location for the arbitration, notifying the parties of hearing dates, maintaining recordings of the proceedings, managing qualified expenses for reimbursement and recording any decision on the deed.

*Recommendation:* Since panelists are all volunteers, it is important to minimize the burden of serving on a panel. While it would be most efficient to have a single, neutral coordinator,

it is recommended that parties to the dispute each appoint a representative and then have these representatives jointly coordinate the dispute resolution process. For example, the city and county each might appoint the city and county manager, respectively. A list of duties that a case coordinator should complete is included in Appendix C.

**16. What legal support is available to the panel?**

The statute does not specify that legal support is available to the panel. Since the panel is not a city or county entity, neither the city nor county attorney is able to serve as counsel to the panel.

*Recommendation:* It is recommended that the panel conduct themselves as if it has no legal representation.

**17. Can an arbitrator ask his own city, county or academic institution’s attorney for advice on how to rule?**

No, it is important to remember that arbitrators are impartial decision-makers addressing certain statutory questions based on the evidence and testimony presented to them.

*Recommendation:* To ensure due process, no third party should be consulted when making a decision. This includes contacting your own attorney, ACCG, GMA or any other outside party.

**18. How are hearings and proceedings of the panel recorded?**

The statute does not speak directly to how the panel’s proceedings should be recorded. The panel may employ a tape recorder, video camera, professional court recorder or any other adequate manner to record the proceedings.

**19. What happens if an arbitrator cannot participate in the proceedings for whatever reason?**

The statute is silent on this question. Arbitrators should make every effort possible to fulfill their duties and complete their service on a panel.

*Recommendation:* It is recommended that every effort be made by panelists to fulfill their volunteer duties. If an arbitrator knows he or she will not be available to serve during a specific extended period, the arbitrator is encouraged to notify DCA in advance of selection for service on a panel. If an arbitrator is unavailable for service after being selected for a panel, the arbitrator should inform the case coordinator(s) as soon as possible.

**20. Who maintains order in the room during a hearing and how?**

Although not specified in the statute, it is the responsibility of the arbitrators to maintain orderly proceedings and ensure hearings occur in a fair and efficient fashion.

*Recommendation:* Arbitrators should discuss the proposed procedures and operations of the hearing during the pre-hearing conference. These should then be reviewed at the beginning of every hearing to ensure all parties are aware of the rules. Panels should make every effort to adopt procedures that provide consistency and fairness. A sample outline of panel proceedings can be found in Chapter 4.

**21. Who is responsible for swearing in the witnesses? Please provide a script.**

The statute does not provide for an oath for witnesses, however, witnesses should be sworn in prior to giving testimony.

*Recommendation:* The oath should be administered by the chair of the panel and the language below can be used. The chair may swear in all or multiple witnesses at once if they are present.

"Do you swear or affirm that the testimony which you are about to give will be the truth and nothing but the truth?"

**22. How does a panel know if an objection is proper and valid?**

The county must assert a proper objection with respect to a proposed annexation. For the objection to be proper, the decision to object must be made by majority vote of the county governing authority in an open meeting and based on one of the stated grounds for objection.

The county's objection must also be complete and be served on the city in a timely manner. In order to be timely, the county must deliver its objection to the city by certified mail or statutory overnight delivery no later than 30 calendar days after the day it receives notice of the proposed annexation from the city.

Furthermore, the county must document the nature of the objection. In particular, the county must show that the objection is grounded on a material increase in burden upon the county directly related to a proposed change in land use or zoning, a proposed increase in density, or infrastructure demands related to the proposed changed in zoning or land use. The county must provide evidence of any financial impact forming the basis of the objection. If any of these requirements are not met, the objection is not proper.

Requirements for a valid objection are in code section 36-36-113(d).

### **23. What factors can be considered in deciding the case?**

After determining the objection is valid, code section 36-36-115(a)(2) identifies several factors that the panel must consider in making their findings. These are:

- (A) the existing comprehensive land use plans of both the county and city;
- (B) the existing land use patterns in the area of the subject property;
- (C) the existing zoning patterns in the area of the subject property;
- (D) each jurisdiction's provision of infrastructure to the area of the subject property;
- (E) whether the county has approved similar changes in intensity or allowable uses on similar developments in other unincorporated areas of the county; and
- (F) whether the county has approved similar developments in other unincorporated areas of the county which have a similar impact

The statute does not specify the weight or priority to be given to the factors. There is disagreement as to whether other factors not listed may be taken into consideration by the panel.

*Recommendation:* The panel must exercise its judgment in evaluating all the evidence and testimony presented by the parties.

### **24. How are expenditures by panelists handled?**

Code section 36-36-115(d) provides arbitrators with “the same per diem, expenses and allowances for their service on the committee as is authorized by law for members of interim legislative study committees.” Currently members of the General Assembly receive \$173/day plus mileage reimbursement. Code section 45-7-21(b) states that members of boards that are to receive the same daily expense allowance as members of the General Assembly shall receive \$105/day regardless of the actual per diem paid to members of the General Assembly. At this time it is not clear whether the arbitrators are to receive \$105/day or \$173/day or whether this amount covers all expenses including mileage. GMA and ACCG have asked DCA to seek guidance on this matter from the Attorney General.

### **25. How are the costs to the property owner handled?**

Code section 36-36-115(a)(5) provides that “the reasonable costs of participation in the arbitration process of the property owner or owners whose property is at issue shall be borne by the county and the city.” The statute further provides in §36-36-115(a)(4) that the county shall bear at least 75 percent of the cost of the arbitration and the remaining 25 percent will be apportioned equitably between the city and the county by the arbitration panel.

*Recommendation:* The property owner will need to keep track of costs of participation in the arbitration process and submit them for reimbursement after the panel renders a decision.

**26. How should the panel allocate the remaining 25 percent of the costs between the county and the city?**

The statute provides in §36-36-115(a)(4) that the county shall bear at least 75 percent of the cost of the arbitration and the remaining 25 percent will be apportioned by the arbitration panel equitably between the city and the county as the facts of the appeal warrant. As to that 25 percent, if the panel determines that any party, including the property owner, has advanced a position that is substantially frivolous, the costs shall be borne by the party that has advanced such position

*Recommendation:* It is up to the discretion of the panel to determine how the remaining 25 percent is apportioned among the parties. The panel can use this discretion to provide redress if one party causes delay or inconvenience in the proceedings. If the panel determines that one party has advanced a substantially frivolous position, the panel may decide to assess all of the unallocated 25 percent of costs to that party. In such a case, the panel may assess that cost on any party to the dispute.

**27. If conditions are to be placed on a property, who is responsible for recording the decision on the deed and how should it be accomplished?**

Code section 36-36-115(a)(5) requires that “if the decision of the panel contains zoning, land use, or density conditions, the findings and recommendations of the panel shall be recorded in the deed records of the county with a caption describing the name of the current owner of the property, recording reference of the current owner’s acquisition deed and a general description of the property, and plainly showing the expiration date of any restrictions or conditions.” The statute does not specify who is responsible for filing the decision with the deed or whether the panel may ask the city or county attorney to perform the filing. Note that § 36-36-118 also restricts the use of the property for a period of one year even if the annexation is abandoned or if the parties reach an agreement.

*Recommendation:* If the arbitration panel’s decision contains zoning, land use or density conditions, it is up to the panel to ensure that the panel’s decision, including those conditions, is recorded on the deed. The panel can work with the county and city to devise the most appropriate way to accomplish this. For example, if the county and city have assigned staff to act as case coordinators, then those staff may be able to carry out this duty on behalf of the panel. A deed form for use in submitting the decision to the county court where the property is located can be found in Appendix F.

## **Appendix A - Statute**

### **OFFICIAL CODE OF GEORGIA ANNOTATED TITLE 36. LOCAL GOVERNMENT**

#### **CHAPTER 36. ANNEXATION OF TERRITORY**

#### **ARTICLE 1. GENERAL PROVISIONS**

##### **§ 36-36-11. Effect of objection to land use following rezoning; minimum procedures for addressing issues**

(a) The intent of this Code section is to provide a mechanism to resolve disputes over land use arising out of the rezoning of property to a more intense land use in conjunction with or subsequent to annexation in order to facilitate coordinated planning between counties and municipalities particularly with respect to areas contiguous to municipal boundaries; provided, however, that on and after September 1, 2007, such dispute resolutions shall be governed by the provisions of Article 7 of this chapter and the provisions of this Code section shall be limited to proceedings initiated prior to such date.

#### **ARTICLE 7. PROCEDURE FOR RESOLVING ANNEXATION DISPUTES**

##### **§ 36-36-110. Applicability**

The procedures of this article shall apply to all annexations pursuant to this chapter but shall not apply to annexations by local Acts of the General Assembly.

##### **§ 36-36-111. Notice of annexation**

Upon receipt of a petition of annexation, a municipal corporation shall notify the governing authority of the county in which the territory to be annexed is located by certified mail or by statutory overnight delivery. Such notice shall include a copy of the annexation petition which shall include the proposed zoning and land use for such area. The municipal corporation shall take no final action on such annexation except as otherwise provided in this article.

##### **§ 36-36-112. Prohibition on a change in zoning or land use**

If no objection is received as provided in Code Section 36-36-113, the annexation may proceed as otherwise provided by law; provided, however, that as a condition of the annexation the municipal

corporation shall not change the zoning or land use plan relating to the annexed property to a more intense density than that stated in the notice provided for in Code Section 36-36-111 for one year after the effective date of the annexation unless such change is made in the service delivery agreement or comprehensive plan and is adopted by the affected city and county and all required parties.

**§ 36-36-113. Objection to annexation; grounds and procedures**

(a) The county governing authority may by majority vote object to the annexation because of a material increase in burden upon the county directly related to any one or more of the following:

- (1) The proposed change in zoning or land use;
- (2) Proposed increase in density; and
- (3) Infrastructure demands related to the proposed change in zoning or land use.

(b) Delivery of services may not be a basis for a valid objection but may be used in support of a valid objection if directly related to one or more of the subjects enumerated in paragraphs (1), (2), and (3) of subsection (a) of this Code section.

(c) The objection provided for in subsection (a) of this Code section shall document the nature of the objection specifically providing evidence of any financial impact forming the basis of the objection and shall be delivered to the municipal governing authority by certified mail or statutory overnight delivery to be received not later than the end of the thirtieth calendar day following receipt of the notice provided for in Code Section 36-36-111.

(d) In order for an objection pursuant to this Code section to be valid, the proposed change in zoning or land use must:

(1) Result in:

(A) A substantial change in the intensity of the allowable use of the property or a change to a significantly different allowable use; or

(B) A use which significantly increases the net cost of infrastructure or significantly diminishes the value or useful life of a capital outlay project, as such term is defined in Code Section 48-8-110, which is furnished by the county to the area to be annexed; and

(2) Differ substantially from the existing uses suggested for the property by the county's comprehensive land use plan or permitted for the property pursuant to the county's zoning ordinance or its land use ordinances.

**§ 36-36-114. Arbitration panel; composition and membership**

(a) Not later than the fifteenth calendar day following the date the municipal corporation received the first objection provided for in Code Section 36-36-113, an arbitration panel shall be appointed as provided in this Code section.

(b) The arbitration panel shall be composed of five members to be selected as provided in this subsection. The Department of Community Affairs shall develop three pools of arbitrators, one pool which consists of persons who are currently or within the previous six years have been municipal elected officials, one pool which consists of persons who are currently or within the previous six years have been county elected officials, and one pool which consists of persons with a master's degree or higher in public administration or planning and who are currently employed by an institution of higher learning in this state, other than the Carl Vinson Institute of Government. The pool shall be sufficiently large to ensure as nearly as practicable that no person shall be required to serve on more than two panels in any one calendar year and serve on no more than one panel in any given county in any one calendar year. The department is authorized to coordinate with the Georgia Municipal Association, the Association County Commissioners of Georgia, the Council of Local Governments, and similar organizations in developing and maintaining such pools.

(c) Upon receiving notice of a disputed annexation, the department shall choose at random four names from the pool of municipal officials, four names from the pool of county officials, and three names from the pool of academics; provided, however, that none of such selections shall include a person who is a resident of the county which has interposed the objection or any municipal corporation located wholly or partially in such county. The municipal corporation shall be permitted to strike or excuse two of the names chosen from the county officials pool; the county shall be permitted to strike or excuse two of the names chosen from the municipal officials pool; and the county and municipal corporation shall each be permitted to strike or excuse one of the names chosen from the academic pool.

(d) Prior to being eligible to serve on any of the three pools, persons interested in serving on such panels shall receive joint training in alternative dispute resolution together with zoning and land use training, which may be designed and overseen by the Carl Vinson Institute of Government in conjunction with the Association County Commissioners of Georgia and the Georgia Municipal Association, provided such training is available.

(e) At the time any person is selected to serve on a panel for any particular annexation dispute, he or she shall sign the following oath: *"I do solemnly swear or affirm that I will faithfully perform my duties as an arbitrator in a fair and impartial manner without favor or affection to any party, and that I have not and will not have any ex parte communication regarding the facts and circumstances of the matters to be determined, other than communications with my fellow arbitrators, and will only consider, in making my determination, those matters which may lawfully come before me."*

**§ 36-36-115. Meetings of arbitration panel; duties; findings and recommendations; compensation**

(a) (1) The arbitration panel appointed pursuant to Code Section 36-36-114 shall meet as soon after appointment as practicable and shall receive evidence and argument from the municipal corporation, the county, and the applicant or property owner and shall by majority vote render a decision which shall be binding on all parties to the dispute as provided for in this article not later than the sixtieth day following such appointment. The meetings of the panel in which evidence is submitted or arguments of the parties are made shall be open to the public pursuant to Chapter 14 of Title 50. The panel shall first determine the validity of the grounds for objection as specified in the objection. If an objection involves the financial impact on the county as a result of a change in zoning or land use or the provision of maintenance of infrastructure, the panel shall quantify such

impact in terms of cost. As to any objection which the panel has determined to be valid, the panel, in its findings, may establish reasonable zoning, land use, or density conditions applicable to the annexation and propose any reasonable mitigating measures as to an objection pertaining to infrastructure demands.

(2) In arriving at its determination, the panel shall consider:

(A) The existing comprehensive land use plans of both the county and city;

(B) The existing land use patterns in the area of the subject property;

(C) The existing zoning patterns in the area of the subject property;

(D) Each jurisdiction's provision of infrastructure to the area of the subject property;

(E) Whether the county has approved similar changes in intensity or allowable uses on similar developments in other unincorporated areas of the county;

(F) Whether the county has approved similar developments in other unincorporated areas of the county which have a similar impact on infrastructure as complained of by the county in its objection; and

(G) Whether the infrastructure or capital outlay project which is claimed adversely impacted by the county in its objection was funded by a county-wide tax.

(3) The county shall provide supporting evidence that its objection is consistent with its land use plan and the pattern of existing land uses and zonings in the area of the subject property.

(4) The county shall bear at least 75 percent of the cost of the arbitration. The panel shall apportion the remaining 25 percent of the cost of the arbitration equitably between the city and the county as the facts of the appeal warrant; provided, however, that if the panel determines that any party has advanced a position that is substantially frivolous, the costs shall be borne by the party that has advanced such position.

(5) The reasonable costs of participation in the arbitration process of the property owner or owners whose property is at issue shall be borne by the county and the city in the same proportion as costs are apportioned under paragraph (4) of this subsection.

(6) The panel shall deliver its findings and recommendations to the parties by certified mail or statutory overnight delivery.

(b) If the decision of the panel contains zoning, land use, or density conditions, the findings and recommendations of the panel shall be recorded in the deed records of the county with a caption describing the name of the current owner of the property, recording reference of the current owner's acquisition deed and a general description of the property, and plainly showing the expiration date of any restrictions or conditions.

(c) The arbitration panel shall be dissolved on the tenth day after it renders its findings and recommendations but may be reconvened as provided in Code Section 36-36-116.

(d) The members of the arbitration panel shall receive the same per diem, expenses, and allowances for their service on the committee as is authorized by law for members of interim legislative study committees.

(e) If the panel so agrees, any one or more additional annexation disputes which may arise between the parties prior to the panel's initial meeting may be consolidated for the purpose of judicial economy if there are similar issues of location or similar objections raised to such other annexations or the property to be annexed in such other annexations is within 2,500 feet of the subject property.

### **§ 36-36-116. Appeal**

The municipal or county governing authority or an applicant for annexation may appeal the decision of the arbitration panel by filing an action in the superior court of the county within ten calendar days from receipt of the panel's findings and recommendations. The sole grounds for appeal shall be to correct errors of fact or of law, the bias or misconduct of an arbitrator, or the panel's abuse of discretion. The superior court shall schedule an expedited appeal and shall render a decision within 20 days from the date of filing. If the court finds that an error of fact or law has been made, that an arbitrator was biased or engaged in misconduct, or that the panel has abused its discretion, the court shall issue such orders governing the proposed annexation as the circumstances may require, including remand to the panel. Any unappealed order shall be binding upon the parties. The appeal shall be assigned to a judge who is not a judge in the circuit in which the county is located.

### **§ 36-36-117. Annexation after conclusion of procedures; remedies for violations of conditions**

If the annexation is completed after final resolution of any objection, whether by agreement of the parties, act of the panel, or court order as a result of an appeal, the municipal corporation shall not change the zoning, land use, or density of the annexed property for a period of one year unless such change is made in the service delivery agreement or comprehensive plan and adopted by the affected city and county and all required parties. Following the conclusion of the dispute resolution process outlined in this article, the municipal corporation and an applicant for annexation may either accept the recommendations of the arbitration panel and proceed with the remaining annexation process or abandon the annexation proceeding. A violation of the conditions set forth in this Code section may be enforced thereafter at law or in equity until such conditions have expired as provided in this Code section.

### **§ 36-36-118. Abandonment of proposed annexation; remedies for violations of conditions**

If at any time during the proceedings the municipal corporation or applicant abandons the proposed annexation, the county shall not change the zoning, land use, or density affecting the property for a period of one year unless such change is made in the service delivery agreement or comprehensive plan and adopted by the affected city and county and all required parties. A violation of the conditions set forth in this Code section may be enforced thereafter at law or in equity until such period has expired. After final resolution of any objection, whether by agreement of the parties, act of the panel, or any appeal from the panel's decision, the terms of such decision shall remain valid for the one-year period and such annexation may proceed at any time during the one year without any further action or without any further right of objection by the county.

**§ 36-36-119. Good faith negotiations; written agreement governing terms of annexation**

The county, the municipal governing authorities, and the property owner or owners shall negotiate in good faith throughout the annexation proceedings provided by this article and may at any time enter into a written agreement governing the annexation. If such agreement is reached after the arbitration panel has been appointed and before its dissolution, such agreement shall be adopted by the panel as its findings and recommendations. If such agreement is reached after an appeal is filed in the superior court and before the court issues an order, such agreement shall be made a part of the court's order. Any agreement reached as provided in this Code section shall be recorded as provided in Code Section 36-36-115.

## Appendix B

### ARBITRATOR OATH

I do solemnly swear or affirm that I will faithfully perform my duties as an arbitrator in a fair and impartial manner without favor or affection to any party, and that I have not and will not have any ex parte communication regarding the facts and circumstances of the matters to be determined, other than communications with my fellow arbitrators, and will only consider, in making my determination, those matters which may lawfully come before me.

This \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

Arbitrator Signature:

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[Print Arbitrator Name]

## **Appendix C - Case Coordinator Duties**

To handle the administrative aspects of the arbitration process, it is suggested that the parties, including the annexation applicant, each appoint an individual, such as a clerk, manager or administrative assistant, to serve as a case coordinator. These individuals, working together, will arrange hearing dates, a hearing site, recording of the proceedings and communication with the arbitrators. They may also assemble an initial case file or take on such other administrative duties as the volunteer arbitration panel requires to carry out their duties. The purpose of having the case coordinators work collectively is to avoid any communication between a party and one or more of the arbitrators outside the presence of the other parties. Such a communication is called “ex parte” because it is done by one party without notice or an opportunity to counter by another party.

Instead of the party representative case coordinators suggested above, the parties may decide to use a neutral third-party to act as the case coordinator. This is certainly acceptable if all of the parties agree. The important point is to avoid ex parte communication between the arbitrators and the parties. It is recommended that the case coordinator(s) accomplish the tasks listed below.

1. Ensure arbitrators sign oath
2. Establish location of meetings
3. Schedule pre-hearing conference and formal proceedings
4. Notify parties and arbitrators of hearings/meetings
5. Collect briefs and other material submitted by parties and distribute to panel and the parties
6. Establish a schedule for the exchange of evidence/witness lists
7. Keep an accurate file of evidence offered during the proceedings
8. Arrange to record hearing
9. Coordinate any billing and reimbursement matters
10. Maintain case file
11. May assist in preparing or transmitting arbitration decision to parties
12. Arrange for filing of deed form.

## Appendix D – Draft Notice to Arbitrators from Case Coordinators

Dear [name and address of arbitrator #1] [name and address of arbitrator #2]  
[name and address of arbitrator #3] [name and address of arbitrator #4]  
[name and address of arbitrator #5]

You have been selected to serve as arbitrators in the annexation and land use dispute concerning \_\_\_\_\_ County, the City of \_\_\_\_\_ and [insert other parties]. We will be serving as the case coordinators for this matter and communicating with you jointly to ensure that there is no ex parte communication.

We propose the following date(s) and location for the first meeting of the arbitration panel. Please let us know if this will work for you and, if not, other dates you would be available to meet.

We will compile an initial case file consisting of the following: the application for annexation and notice to the county; the county's objection; some or all of the comprehensive plans for the city and for the county; some or all of the zoning or land use ordinances and maps of the city and of the county; and any other documents provided by the parties. Provision of these documents does not mean that they have been agreed to by the parties or are relevant, authentic or admissible. One or more parties may have an objection to one or more documents and it will be the panel's duty to rule on such objections.

To ensure compliance with the Open Meetings Act as applicable, we will have notice of the panel's meetings posted at the meeting place and give notice to the legal organ of the county where the property at issue is located and where the panel meetings will be held, if different.

Please respond to all of us in replying to this notice. We appreciate your service on the arbitration panel.

[Case coordinator #1]  
[Case Coordinator #2]  
[Case Coordinator #3]

# Appendix E

## FORM FOR ARBITRATION DECISION-MAKING, FINDINGS AND RECOMMENDATIONS

Parties:

County: \_\_\_\_\_  
\_\_\_\_\_

Municipality: \_\_\_\_\_  
\_\_\_\_\_

Property Owner(s): \_\_\_\_\_  
\_\_\_\_\_

Annexation Applicant (if different from property owner):  
\_\_\_\_\_  
\_\_\_\_\_

### **Real Property Location and Description:**

### **Proper Objection:**

The county must assert a proper objection with respect to a proposed annexation. For the objection to be proper, the decision to object must be made by majority vote of the county governing authority in an open meeting and based on one of the stated grounds for objection.

The county's objection must also be complete and be served on the city in a timely manner. In order to be timely, the county must deliver its objection to the city by certified mail or statutory overnight delivery no later than 30 calendar days after the day it receives notice of the proposed annexation from the city.

Furthermore, the county must document the nature of the objection. In particular, the county must show that the objection is grounded on a material increase in burden upon the county directly related to a proposed change in land use or zoning, a proposed increase in density, or infrastructure demands related to the proposed changed in zoning or land use. The county must provide evidence of any financial impact forming the basis of the objection. If any of these requirements are not met, the objection is not proper.

Has a proper objection been submitted?

Yes ( )

No ( )

If a county fails to submit a proper objection, the arbitration process should not proceed to the remaining questions regarding the validity and substance of the objection.

**Arbitration Panel Decisions**

1. Determine if objection is valid.

a. Does the proposed change in zoning or land use result in a substantial change in the intensity of the allowable use of the property or a change to a significantly different allowable use?

OR

Does the proposed change in zoning or land use result in a use which significantly increases the net cost of infrastructure or significantly diminishes the value or useful life of a capital outlay project furnished by the county to the area to be annexed?

Yes ( )

No ( )

AND

b. Does the proposed change in zoning or land use differ substantially from the existing uses suggested for the property by the county's comprehensive land use plan or permitted for the property pursuant to the county's zoning ordinance or its land use ordinance?

Yes ( )

No ( )

2. If objection is valid and involves the financial impact on the county as a result of a change in zoning or land use or the provision of maintenance of infrastructure, quantify such impact in terms of cost.

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3. Did the county provide supporting evidence that its objection is consistent with its land use plan and the pattern of existing land uses and zonings in the area of the subject property? O.C.G.A. § 36-36-115(a)(3).

Yes ( )

No ( )

4. In reaching its decision, the panel must consider:

The existing comprehensive land use plans of both the county and the city.

*Facts and Issues Considered:*

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The existing land use patterns in the area of the subject property.

*Facts and Issues Considered:*

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The existing zoning patterns in the area of the subject property.

*Facts and Issues Considered:*

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Each jurisdiction's provision of infrastructure to the area of the subject property.

*Facts and Issues Considered:*

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Whether the county has approved similar changes in intensity or allowable uses on similar developments in other unincorporated areas of the county.

*Facts and Issues Considered:*

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Whether the county has approved similar developments in other unincorporated areas of the county which have a similar impact on infrastructure as complained of by the county in its objection.

*Facts and Issues Considered:*

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AND

Whether the infrastructure or capital outlay project which is claimed adversely impacted by the county in its objection was funded by a county-wide tax.

*Facts and Issues Considered:*

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*Additional Notes and Information:*

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**ARBITRATION PANEL FINAL FINDINGS AND RECOMMENDATIONS:**

Does the panel find that zoning, land use or density conditions should be placed on the property for one year?

- Yes ( )
- No ( )

If yes, the following reasonable zoning, land use or density conditions shall apply for one year and be recorded on the deed records for this property:

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Does the panel propose mitigating measures as to an objection pertaining to infrastructure demands?

- Yes ( )
- No ( )

If yes, the following mitigating measures are proposed as to an objection pertaining to infrastructure demands:

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Decided this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

Signature: \_\_\_\_\_

Print name: \_\_\_\_\_

# Appendix F – Form for Deed Filing

After recording return to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## ZONING, LAND USE OR DENSITY RESTRICTIONS

STATE OF GEORGIA

COUNTY OF \_\_\_\_\_

THIS INSTRUMENT, made this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, placing zoning, land use or density conditions on real property owned by \_\_\_\_\_ as shown by \_\_\_\_\_ deed recorded in Deed Book \_\_\_\_\_, page \_\_\_\_\_ in the \_\_\_\_\_ County, Georgia records and described as being:

ALL THAT TRACT OR PARCEL OF LAND LYING AND BEING IN LAND LOT \_\_\_\_\_ OF THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_ COUNTY, GEORGIA, BEING LOT \_\_\_\_\_, BLOCK \_\_\_\_\_. \_\_\_\_\_ SUBDIVISION SECTION NO\_\_\_\_, AS PER PLAT RECORDED IN PLAT BOOK\_\_\_\_, PAGE\_\_\_\_, \_\_\_\_\_ COUNTY, GEORGIA RECORDS.

WITNESSETH: That pursuant to Georgia Code section 36-36-115(b) the ARBITRATORS designated below make the findings and recommendations attached hereto and place the following restrictions or conditions on the use of the property above mentioned for one year from the date of this instrument, and applying to all heirs and assigns of right, title or interest in the property, with such restrictions or conditions automatically expiring as of \_\_\_\_\_, \_\_\_\_\_:

[Insert zoning, land use or density conditions. Attach completed “Form for Arbitration Decision-Making, Findings and Recommendations.”]

IN WITNESS THEREOF, the said ARBITRATORS, as set out and stated hereinabove, have hereunto set their hands and delivered this instrument the day and year first above written.

Signature: \_\_\_\_\_  
Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_  
Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

Printed name: \_\_\_\_\_

Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_  
Printed name: \_\_\_\_\_

Signed, sealed and delivered in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Notary Public

# Appendix G

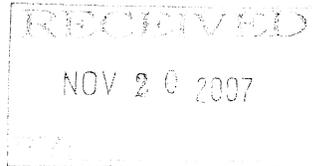


THURBERT E. BAKER  
ATTORNEY GENERAL

## Department of Law State of Georgia

40 CAPITOL SQUARE SW  
ATLANTA, GA 30334-1300

November 19, 2007



WRITER'S DIRECT DIAL  
(404) 656-2488  
FAX (404) 657-3239

### MEMORANDUM

To: Mike Gleaton  
Jim Frederick ✓  
Georgia Department of Community Affairs

From: Wright Banks  
Shereen M. Walls *SMW*  
Business and Finance Section

Re: House Bill 2, Alternative Dispute Resolution  
O.C.G.A. §§ 36-36-110 through 119

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You have asked that we advise you on several questions that have arisen regarding the above referenced law which provides a method of resolving annexation disputes between cities and counties using binding arbitration. House Bill 2 amended “Chapter 36 of Title 36 of the Official Code of Georgia Annotated, relating to annexation of territory . . . .” 2007 Ga. Laws 292; O.C.G.A. §§ 36-36-110 through 119. You have written that the law requires the Department of Community Affairs (DCA) to maintain pools of trained volunteers who would serve as arbitration panelists, when necessary.

Your first question is whether the members on each volunteer panel of arbitrators are immune from being sued in their individual capacity by a party who may not be happy with the decision rendered by the panel. There is no specific statutory immunity for those volunteers. There are certain statutes in which the General Assembly has specifically prescribed immunity, such as the immunity provided for the Commissioner of Securities under O.C.G.A. § 10-5-21. *Womack v. State*, 270 Ga. 56 (1998) (Court finds that it is not unconstitutional for the legislature to preclude counterclaims against the Commissioner of Securities because immunity from suit is a legislative prerogative.)

The Department of Administrative Services, Risk Management Services, General Liability Agreement provides coverage to “[a]ny natural person who is a volunteer participating as a volunteer, with or without compensation, in a structured, volunteer program organized, controlled, and directed by a State of Georgia ‘department’ for the

purpose of carrying out the functions of the State 'department', but shall not include any health care provider and any volunteer when providing services pursuant to Article 8 of Chapter 8 of Title 31, at the time of any 'occurrence' covered by the terms of this Agreement." General Liability Agreement; Agreement No. CGL-401-14-08, p. 3, A 10. I have attached a copy of the General Liability Agreement hereto as Exhibit "A" for your file.

In addition, the Georgia Tort Claims Act (GTCA) defines "[s]tate officer or employee" to include "any natural person who is a volunteer participating as a volunteer, with or without compensation, in a structured volunteer program, organized, controlled, and directed by a state government entity for the purposes of carrying out the functions of the state entity." O.C.G.A. § 50-21-22 (7). The GTCA provides immunity for: "[a] state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor." O.C.G.A. § 50-21-25(a). It may be prudent for DCA to have those that participate as arbitrators as described in the statute, O.C.G.A. § 36-36-114, request sign something indicating that they are volunteering to do so with DCA. Attached hereto as Exhibit "B" is a form which we have revised for your use.

You also asked whether the repealing language in House Bill 2, Section 3, 2007 Ga. Laws 292, § 3, which provides that "[a]ll laws and parts of laws in conflict with this Act are repealed" operates to repeal the Service Delivery Strategy law, in O.C.G.A. § 36-70-25.1, which established a process of mediation for resolving annexation disputes between local governments. It appears that O.C.G.A. § 36-70-25.1 applies to disputes regarding service delivery strategy, rather than disputes regarding annexation. *Compare* O.C.G.A. §§ 36-36-110 ("The procedures of this article shall apply to all annexations pursuant to this chapter but shall not apply to annexations by local Acts of the General Assembly.") and O.C.G.A. § 36-70-25.1 (b) ("If a county and the affected municipalities . . . do not reach an agreement on a service delivery strategy, the provisions of this Code section shall be followed as the process to resolve the dispute."). "Repeals by implication are not favored by law, and a subsequent statute repeals prior legislative acts by implication only when they are clearly and indubitably contradictory, when they are in irreconcilable conflict with each other, and when they can not reasonably stand together." Sutton v. Garmon, 245 Ga. 685, 687 (1980).

House Bill 2 expressly provides that it "the provisions of Code Section 36-36-11, relating to the effect of an objection to land use following a rezoning and the minimum procedures for addressing related issues, shall not be used on or after September 1, 2007." Thus, the process in O.C.G.A. §§ 36-36-110 through 119 replaces the procedures in O.C.G.A. § 36-36-11 "on and after September 1, 2007." House Bill 2, § 1 (a); O.C.G.A. § 36-36-11 (1).

Memorandum  
November 19, 2007  
Page 3

I trust this is responsive to your request. If you have any questions, please give me a call.

SMW/  
Encl.

C: Mike Beatty, Commissioner- w/ encl.  
Robert L. Stevens, Special Assistant to the Executive Office-w/ encl.  
Georgia Department of Community Affairs

**CONSENT TO PARTICIPATE IN GEORGIA DEPARTMENT OF COMMUNITY  
AFFAIRS ARBITRATION PANEL**

I, \_\_\_\_\_, hereby volunteer and consent to participate in the arbitration panel which is being organized, controlled and directed by the Georgia Department of Community Affairs pursuant to O.C.G.A. §§ 36-36-110 through 119 on \_\_\_\_\_ in \_\_\_\_\_ County, Georgia at the \_\_\_\_\_.

I understand that I am not obligated or required to participate in the arbitration panel and that by volunteering to do so, I will be participating in activities organized, controlled and directed by the Georgia Department of Community Affairs and will be subject to the direction and control of the Georgia Department of Community Affairs and required to comply with various directions, policies, rules and procedures of the Georgia Department of Community Affairs and by Georgia law.

This consent is given freely and voluntarily by me without coercion, duress, threat or promise of any kind and covers the period from \_\_\_\_\_ hours on \_\_\_\_\_ to \_\_\_\_\_ hours on \_\_\_\_\_, unless earlier revoked by me in writing delivered to and received for by the Georgia Department of Community Affairs.

By signing below, I certify that I am 18 years of age and am otherwise competent to give this consent.

Dated at \_\_\_\_\_ this \_\_\_\_ day of \_\_\_\_\_

Signature: \_\_\_\_\_

Printed: \_\_\_\_\_

Witness: \_\_\_\_\_

Printed: \_\_\_\_\_

To the Attorney General of the State of Georgia

RE: House Bill 2, Alternate Dispute Resolution, OCGA 36-36-111 – 119

Dear Sir,

The above-referenced law provides for a method of resolving annexation disputes between cities and counties using binding arbitration, and provides for some, but not all, of the administrative procedures necessary to effectuate same. The law requires the Department of Community Affairs to maintain pools of trained volunteers who would serve as arbitration panelists (if called upon to do so) and specifies the qualifications of the panelists.

A number of questions have arisen concerning the law and its administration, including serious concerns raised by participants at the first volunteer arbitration panelist training session held at the Carl Vinson Institute of Government last month. The two most important questions are:

- Are arbitrators who participate on these panels immune from being sued as an individual for serving on a panel, such as by a party unhappy with the decision rendered by the panel? (If not, the majority of volunteers have indicated that they will not serve until some type of immunity is provided.)
- The Service Delivery Strategy Law, passed back in 1992, established a mediation process for resolving annexation disputes between local governments at 36-70-25.1 Does the standard clause in Section 3 of HB2, repealing all laws in conflict with this Act actually repeal or nullify any of the provisions of OCGA 36-70-25.1?

We would appreciate your review and interpretation of the law and analysis of the questions included above. If there is anything that we can do to assist you in this review, please call either Jim Frederick (404-679-3105) or Mike Gleaton (404-679-3107).

Sincerely,

Mike Beatty, Commissioner  
Department of Community Affairs