

# The Annexation Assessment in Development

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## **The Annexation Assessment**<sup>1</sup>

As part of the due diligence for a prospective development, certain factors may weigh heavily on whether annexation should be part of the overall development strategy.<sup>2</sup> This section will discuss various of those factors that may affect the overall cost-effectiveness of a development.

### A. Preliminary Determination Regarding Availability of Annexation Tools

However attractive annexation may be with respect to the negotiation and ultimate approval of a development, annexation often is off the table based on the location, size, or other circumstances affecting a property. Thus, a practitioner should understand the relative location of a development parcel to the corporate limits of the municipality in which the property lies (if applicable) or the proximity of the land to nearby municipalities if the land is unincorporated. This initial review can help determine whether annexation options are worthy of further analysis or not. In addition, this review may help sensitize one's antenna to possible risks to a development proposal – particularly if the development proposal may be controversial.<sup>3</sup>

### B. Zoning Considerations

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<sup>1</sup> Although this Part II of the article is set in the context of an annexation assessment, many of the matters discussed in Part II offer some basic guidelines for conducting pre-development due diligence for any project.

<sup>2</sup> In the context of the remainder of this article, matters relating to the annexation assessment include both whether to annex and whether to pursue disconnection.

<sup>3</sup> For example, if a controversial development is on the outskirts of a municipality and the municipality has the capability to annex the land involuntarily, efforts to develop pursuant to county zoning may be thwarted by annexation – even if one is on the brink of breaking ground. See *Vision Church v. Village of Long Grove*, 468 F. 3d 975, 1003-05 (7<sup>th</sup> Cir. 2006).

An elemental consideration for any development is the zoning policies of the local zoning authority.<sup>4</sup> Whether the local zoning authority would be amenable to the development proposal that a property owner contemplates is a critical question to address.

In undertaking a zoning review of the property, there are some must-do's, including without limitation:

- Review the zoning map to determine the zoning district in which the property lies and the zoning designations of adjacent properties.
- Review the text of the zoning ordinance regarding the regulations of the zoning district in which the property is located or (if unincorporated land is involved) the zoning district in which nearby properties are located. Particular attention should be given to the allowable and specially permitted uses in the district, the bulk and density standards,<sup>5</sup> the existence and applicability of any performance standards, and parking requirements. Obviously, the nature of the contemplated use for the property will make certain zoning regulations more significant than others.

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<sup>4</sup> For unincorporated land, one should review not only the regulations of the county or other applicable zoning authority, but also the zoning regulations of municipalities into which the property can be annexed.

<sup>5</sup> A careful practitioner should review relevant definitions in a local zoning code, especially with respect to terms utilized in describing bulk and density standards. Not only is there considerable variability among such terms from zoning code to zoning code, but those definitions can have great importance to a particular property. For example, in measuring building height, some zoning codes may use a starting point of finished grade, whereas others may use pre-development grade; additionally, some codes use the average grade, whereas others might use the lowest grade along a building foundation. One can quickly understand how such differences in zoning definitions can affect a development when one applies these definitions to a parcel with significant topographic variations.

- If the existing (or, for unincorporated land, nearby) zoning does not accommodate a desired use or development, review the regulations of other districts to determine which district is the best fit for the contemplated use.
- Be mindful of the zoning procedures that may apply to a development. Although most States have some generally applicable requirements for processing zoning applications, municipalities often customize their procedures in ways that can be significant, including application requirements, pre-application procedures, and relevant time frames. Moreover, when a home rule municipality is involved, the degree of customization in the local zoning process can be much greater.
- ***Talk to the local zoning administrator.*** Although the zoning administrator's words should not be taken as gospel truth, her or his perspective may offer valuable insights on how to address zoning issues affecting a proposed development.<sup>6</sup>

Although the zoning review may help assuage concerns about the viability of a development proposal under a particular locality, that should not be the end of one's initial assessment, as discussed below.

### C. Subdivision Review and the Availability of Utilities

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<sup>6</sup> As expert as any person may think he or she is about zoning, because each local zoning authority has its own rules and procedures, nobody can truly be a zoning **expert** in each community. As a result, before meeting with the zoning administrator, by all means do your homework about the local regulations, but recognize that your studied understanding of the local zoning code is likely to be less complete than the zoning administrator who works with the particular code on a daily basis.

The financial viability of a development is often determined in the details of the requirements for development. Although a practitioner should be mindful of procedures and standards set forth in a subdivision ordinance,<sup>7</sup> it is also important to review the technical details of a subdivision ordinance to assess whether satisfaction of those requirements will result in unanticipated costs.<sup>8</sup>

Part of the review of subdivision regulations should also include an evaluation of the availability, proximity, capacity, and costs for accessing necessary utility services. Where such essential utility services like water and sewer service are managed by governmental bodies, determinations for accessing the utilities may be more involved than simply determining which pipe is closest to the land.<sup>9</sup> Additionally, ascertaining the costs associated with various utility options will be an important part of the subdivision review. Because governmental control over utility services may dictate both the availability and cost of such services, these are critical questions to answer as part of the

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<sup>7</sup> Be mindful that certain subdivision standards may impact the perceived zoning rights for a property, as details such as the configuration of lots or the maximum length or minimum width of streets required under a subdivision ordinance may undercut the overall development capacity of a property. Because compliance with all development-related regulations is needed to undertake and complete the development, see *Willie Pearl Burrell Trust v. City of Kankakee*, 2016 IL App (3d) 150655 ¶17, the zoning and subdivision review should be closely coordinated.

<sup>8</sup> When recruiting a development team for a project, it is often useful to include engineers who have experience working in particular localities, as they may already have familiarity with technical requirements that could impact a development.

<sup>9</sup> In *Unity Ventures v. Lake County*, 631 F. Supp. 181 (N.D. Ill. 1986), *aff'd* 841 F.2d 770 (7<sup>th</sup> Cir. 1988), a developer seeking sewer service for his land from the county was unable to do so because of restrictions in intergovernmental agreements entered into by the county and various municipalities as part of the overall regional planning for providing sewer service.

due diligence for a development, and the answer to this question can also be decisive in the annexation assessment for a development.<sup>10</sup>

#### D. Exactions and Other Costs

To the extent that a development can be located in one municipality or another (or be developed in an unincorporated area), there is value in understanding what fees and costs will be required from one locality versus another. Further, one should attempt to assess how negotiable these fees and costs will be.<sup>11</sup>

#### E. Doubling Back

Once the first cut of due diligence for a development project is complete, one can assess under whose jurisdiction the development can most effectively and easily be completed.<sup>12</sup> If annexation (or disconnection) can be avoided, that is one less step in the process to address. On the other hand, the nature and extent of a development may warrant a need for greater certainty – certainty that may only be ensured through an annexation agreement.

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<sup>10</sup> *Cf. Flex-O-Glass, Inc. v. City of Dixon*, 307 Ill.App.3d 945 (2d Dist. 1999)(municipality that owned sewer utility had the ability to terminate service to company located outside the municipal boundaries).

<sup>11</sup> One yardstick for measuring how amenable a locality is to negotiating fees is to review recent annexation agreements. These can ordinarily be obtained through a Freedom of Information Act request. Such agreements may also reveal other matters or trigger other ideas relevant to formulating an overall development program.

<sup>12</sup> Because time often is money, getting the “best” deal is not always the best deal, especially if the effort required to secure that deal may require extensive time that not only increases carrying and other development costs, but exposes the development more to the vagaries of the relevant market.

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