Cementing the Deal:
Annexation Agreements

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I. Cementing the Deal: Annexation Agreements

If annexation is part of the overall development approval process, then seeking an annexation agreement to confirm the terms of development is recommended. Because governments always have the prerogative to change their minds (and regulations),[1] an annexation agreement can protect a developer from adverse changes in local laws.[2] Of course, both the authority for and scope of annexation agreements may be limited by State statute.[3]

Except as limited by State statute, annexation agreements can provide a significant degree of certainty for a developer.[4] They can ensure that zoning is granted and preserved,[5] protect against changes in ancillary development regulations, freeze fees that may be required, ensure access to utility services, establish streamlined building permit processes, extend time limitations for approvals or for undertaking certain actions, and address other issues of concern. By the same token, however, annexation agreements are the product of negotiations, and the municipality may have its own "asks" in terms of enhanced exactions and other contributions, extensions of utilities, and border

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[1] *See Sagittarius, Inc. v. Village of Arlington Hts.,* 90 Ill.App.3d 401, 404 (1st Dist. 1980). This fundamental power of legislative bodies is not without limitation (as such changes in law can neither violate constitutional limits or impact vested rights), *id.*, but it is anchored by the corresponding right set forth in the First Amendment to petition government for redress. *See* U.S. Const. Amend. I.

[2] *See* 65 ILCS 5/11-15.1-2(b).

[3] *See* Mandelker & Netsch at 100-01.

[4] Note that many States limit the duration for annexation agreements. *See, e.g.,* 65 ILCS 5/11-15.1-5.

[5] Because a local government cannot by contract subvert mandatory statutory procedures or bargain away legislative discretion, *see Martin v. City of Greenville,* 54 Ill. App. 3d 42, 44-45 (5th Dist. 1977), annexation agreements should be thoughtfully drafted to ensure that the initial adoption of zoning approvals is a condition precedent to other obligations in the agreement. Likewise, an annexation agreement should provide that the failure to take such zoning action will unwind the annexation.

protection matters. Assuming all terms are ultimately acceptable to the developer and municipality, then the chief task is ensuring that the terms of the annexation agreement adequately reflect the parties' intentions.

A. Annexation Agreements – The Short Game

The value of pursuing and entering an annexation agreement may depend on the nature of the development and the ultimate plans of the developer. To be sure, the negotiation of an annexation agreement can take considerable time. Moreover, an annexation agreement can authorize a municipality to exercise powers and to impose controls that are not ordinarily available in the absence of an annexation agreement.[6]

If a proposed development is discrete and does not require many bells and whistles to be completed, a developer may prefer simply to annex, pursue zoning, develop under generally applicable laws, and close up shop. Nevertheless, even if a developer would prefer simply to develop within a municipality pursuant to its generally applicable regulations, a municipality ordinarily has the ability simply to refuse to exercise its legislative discretion to annex without an annexation agreement.[7] As such, a developer may not always have an option whether to develop within a particular municipality without an annexation agreement. Fortunately, if a municipality has a policy of annexing property only pursuant to an annexation agreement, the municipality will typically have a standard annexation agreement that can be reviewed in advance, and

[6] *See Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402 (2005)(annexation agreement resulted in municipality gaining extraterritorial zoning and building code authority).

[7] *Cf. New York v. United States*, 505 U.S. 144, 177 (1992)(federal government cannot compel a State discretionary act); *Chicago Ass'n of Commerce & Indus. v. Regional Transp. Auth.,* 86 Ill. 2d 179, 186 (1981)(court cannot compel governmental discretionary act).

the terms of such standard agreement can be factored into the annexation assessment for a project.[8]

Ultimately, if a developer has a single, discrete project to pursue in a municipality, "going with the flow" often has the virtue of getting things done quickly. Importantly, municipalities know that as well. Thus, if annexation is necessary to effect a development, unless there is another municipality competing for the annexation,[9] a developer will need to play by the rules set by the municipality.

B. Annexation Agreements – The Long Game

Although a developer may have a degree of indifference when a discrete and straightforward project is contemplated, as the size, complexity, and duration of a development increase, so too does the need and desirability of an annexation agreement. Predictability has many virtues, and those virtues are not lost either in the process of pursuing a development or regulating one. Thus, both a developer and municipality have significant incentives to establish consistent (and even special) ground rules for a complex development.

One area that may be of particular interest for a significant development is the processing of permits. Establishing expectations and procedures for managing those expectations help both a developer and municipality. Not only will this serve to expedite review, it will also help the municipality manage its staffing and workloads.

[8] Keep in mind that the negotiation of an annexation agreement consumes the time and resources of all parties to the negotiation. As a result, the interests of the municipality and developer are often aligned in terms of seeking to conclude annexation agreement negotiations quickly and efficiently.

[9] *See* Part III.C, *infra*.

A developer can also seek to negotiate terms in an annexation agreement that will insulate it from (or give it a leg up on) competition. Some strategies for this include:

- Recapture agreements.[10] Such agreements allow a developer to have other properties benefiting from an improvement constructed to reimburse the developer for a portion of the improvement cost.
- Timing of construction and dedication of improvements. When a public improvement is initially installed, it typically remains the property of a developer until dedicated to and accepted by a municipality.[11] Under appropriate circumstances, limiting use of a to-be-dedicated facility to the original developer can give a significant competitive advantage to the developer. Because this will be addressed in an annexation agreement, however, it will need to be negotiated and a municipality may not be fully supportive of the concept.[12]
- Additional properties. If a developer has a multi-phased development planned, both the developer and the municipality may find it advantageous to annex only a portion of the overall property initially while reserving the right to add designated properties under pre-determined development terms. This strategy can offer the opportunity effectively to extend the duration of an annexation agreement. For example, when a designated

[10] *See, e.g.,* 65 ILCS 5/9-5-1.

[11] *See Pasquinelli v. Village of Mundelein,* 257 Ill.App.3d 1057 (2d Dist. 1994).

[12] Local regulations can prevent a developer from unilaterally trying to effect this outcome. It is not uncommon to limit certificates of occupancy until improvements have been completed ***and*** dedicated to the municipality.

add-on property is annexed, it can be accomplished pursuant to a new annexation agreement (even if it could have been annexed and developed under the original annexation agreement). The new annexation agreement can include as a condition that rights and obligations for the originally annexed property remain intact.

- Flexible zoning. For larger developments that will take years to accomplish, a developer and municipality may be able to reach terms to grant special zoning regulations that will incorporate flexibility in the land uses and establish consistent standards for each type of land use allowed. This will allow development to adapt to changing market conditions without having to repeat zoning procedures that could encounter protests from new residents in the area.[13]

A long-term development plan is dependent not just on agreement terms but relationships as well. Because of this, if a long-term development is contemplated, there can be intangible benefits ***not*** to negotiate for the very last nickel on every issue. If one negotiates too well, it may set up conditions where there is an ongoing effort for payback. A good working relationship between a municipality and a developer will likely deliver many benefits over the duration of the development.

C. Competing Municipalities

[13] *See generally* Filippini, "Locally Unwanted Land Uses (LULUs): A Municipal Perspective," *The Practical Real Estate Lawyer*, 21 ff (March 2010).

Without question, being in demand has its advantages. Thus, when a development is desired by multiple municipalities, there is an opportunity to leverage that demand into concrete benefits. These could include financial incentives such as tax abatements,[14] special financing,[15] tax increment financing,[16] business districts,[17] sales tax incentives,[18] and direct economic incentive grants.[19] Additionally, the competition among municipalities may help secure more favorable zoning and other development benefits.

When dealing with local governments, however, one should keep in mind the adage of "pigs get fat, hogs get slaughtered." Trying to play one municipality off another in order to extract the greatest number of concessions can backfire. This was the circumstance involved in *Unity Ventures v. Lake County*.[20] As discussed in that case, "inadequate planning can result from a developer playing one municipality off against another in annexation negotiations,"[21] which presented potential problems for various governmental bodies affected by the proposed development. The developer ultimately annexed to a municipality pursuant to an annexation agreement that granted zoning

[14] *See, e.g.,* 35 ILCS 200/18-165.

[15] Special services areas are a tool that can be creatively used by a developer. *See* 35 ILCS 200/27-5 *et seq.*

[16] *See, e.g.,* 65 ILCS 5/11-74.4-1 *et seq.*

[17] *See, e.g.,* 65 ILCS 5/11-74.3-1 *et seq.*

[18] *See, e.g.,* 65 ILCS 5/8-11-20.

[19] *See, e.g.,* 65 ILCS 8-1-2.5.

[20] *Unity Ventures v. Lake County,* 631 F. Supp. 181 (N.D. Ill. 1986), ***aff'd*** 841 F.2d 770 (7th Cir. 1988).

[21] *Id.* at 204.

essentially for whatever use the developer wanted.[22] But the fallout from the developer having negotiated too hard was that its ability to secure sewerage services was lost as a result of intergovernmental agreements among other localities.[23]

In response, the developer sued. A jury originally awarded the developer damages of $9.5 million, which amount was trebled to $28.5 million under federal antitrust laws.[24]

Unfortunately for the developer, it ultimately got nothing. The courts vacated the jury verdict, finding that the public interest in promoting good regional planning did not infringed on the developer's civil rights[25] nor did the underlying intergovernmental agreements violate antitrust laws.[26, 27] No damages were awarded. Even today, more than 35 years later, much of the 585 acres for which Unity Ventures had negotiated so aggressively remains undeveloped.

IV. Concluding Thoughts

For many developments, the local zoning jurisdiction is obvious and without prospect for change. Nevertheless, unincorporated properties often have the opportunity to annex to a municipality, and properties on the fringe of one municipality may pursue

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[22] *See People ex rel. Foreman v. Village of Round Lake Park,* 171 Ill.App.3d 443, 446 (2d Dist. 1988).

[23] *Id.* at 186.

[24] Id. at 185.

[25] *Id.* at 206.

[26] *Id.* at 195-96.

[27] During the pendency of the *Unity Ventures* case, Congress adopted the Local Government Antitrust Act of 1984, P.L. No. 98–544, 130 *Cong. Rec.* H11850–51 (daily ed. Oct. 10, 1984) (the "***Act***"), which prohibits damages from being entered against local governments for violations of the Clayton Act (15 U.S.C. §§ 15, 15a or 15c). The Act had prospective effect, so it did not affect the decision in *Unity Ventures*, but it did insulate local governmental bodies from similar challenges going forward.

disconnection either to develop under County regulations applicable to unincorporated land or to seek annexation from another municipality.

When opportunities for annexation exist, a prudent developer will assess the relative merits of annexation. In addition to considerations of applicable regulations as discussed in this article, there are also other important inquiries to make regarding the amenability of a municipality to provide financing opportunities or other development incentives. Less concrete factors may also come into play, such as the cachet associated with a municipality, the stability of its governing body, and the quality of its staff.

In sum, when playing the zoning game,[28] one cannot always choose the rules and referee. But when you can, choose wisely.

[28] I strongly encourage anyone involved in the land development business to read Richard F. Babcock's *The Zoning Game* (1966). Despite its age, the book continues to offer important insights about the land development process with humor and appropriate skepticism.