

Annexation—A Cautionary Tale

ANNEXTION HAS LONG BEEN A useful tool used by municipalities to manage growth, gain sources of tax revenue, add to a community's assets, better manage local resources, or rein in offensive uses or nuisances on adjoining properties. However, *Giannakopoulos v. Adams*, a recent case in Illinois, has shed light on problems that local planners, elected officials, and others could face if local zoning issues are not properly addressed at the time of annexation.

Zoning included separately

Annexation laws vary state by state. Sometimes newly annexed land comes with certain predefined zoning designations. In Illinois, for example, municipalities may specify through ordinance that annexed territory is automatically classified to the highest restrictive residential zoning classification. Other state laws provide that, in the absence of any action by the local government, annexed property retains the same or similar zoning it had in the previous jurisdiction or is otherwise considered “unzoned.”

However, zoning is a separate and distinct process from annexation and is often subject to different procedural rules and safeguards. In other words, merely *assuming* property is zoned in a certain way is not the same as *ensuring* its zoning is legal. It is incumbent upon planners and applicants for annexation to make sure the question of zoning is addressed separately when processing petitions.

Planners who fail to do so may ultimately find their long-term plans frustrated: Owners of annexed property may seek to continue or expand uses the community considered nonconforming, neighboring property owners may seek to enjoin presumably permitted uses because they were not given notice or an opportunity to be heard, and legal challenges may arise many years later, resulting in costly litigation and delaying well-laid planning goals.

Case facts

Such was the case with *Giannakopoulos v. Adams*, which pertains to an Illinois municipality's 1989 annexation of property containing the property owner's excavation business. The municipality approved the annexation but did not address how it would be zoned. As a result, under state law the property fell under the municipality's most restrictive residential zoning classification. Ten years later, a resident sued the owner and the municipality, seeking to terminate the use on the basis that it was not permitted under the municipality's residential zoning.

Seven years of litigation followed as courts tried to determine

if the use should be allowed to continue. Did the excavation business automatically become a nonconforming use upon annexation? Did the fact that the use was illegal under the county's zoning prior to annexation impact how it should be treated in the municipality? Did the municipality infringe upon the constitutional rights of nearby property owners, including the resident bringing the lawsuit, by not providing for notice and a hearing as required under state zoning laws?

The lower court enjoined the use as illegal and awarded the resident attorney fees, only to be overturned by the appellate court, which felt the use should be allowed to continue because it had been “established” at the time it was annexed. Not surprisingly, this unsettled question has been appealed to the Illinois

Supreme Court, which may have an entirely different opinion. No matter the outcome of this story, however, the moral remains the same: By ignoring the zoning process, the owner and the municipality exposed themselves to future liability.

Abide by zoning process

Fortunately, there is a clear process that can help nip this issue in the bud. First, all parties in the annexation process should contemplate what zoning is appropriate for the newly acquired use(s) and whether any current or expected future uses will require relief in the form of variances or conditional uses. In addition, the parties should consider

if such zoning is in accordance with the community's general plan and whether any changes need to be addressed in the plan before proceeding with zoning approvals.

Second is timing. It is a well-worn phrase in land-use law that “you can't zone through annexation.” In other words, until property is annexed, a community generally does not have a right to zone it except in limited cases where it may have previously had extrajurisdictional zoning authority. As a result, the annexation process needs to be completed first before the zoning process begins.

It is also worth noting that while annexations are often accompanied by agreements that contain the terms and conditions governing the annexation, including what relief the property owner or developer will seek to obtain from the community's zoning regulations, such agreements are merely contracts and do not often require the same notice, hearing, and procedural requirements mandated by state law for zoning decisions.

Therefore, it is important for a community to abide by its applicable zoning processes *following* annexation of the property to ensure that it has proper jurisdiction, even if that means approving zoning at a later meeting. This will help avoid later challenges that the community zoning decisions were predetermined and did not consider all applicable facts. ■

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