Ancel Glink | Diamond Bush DiCianni & Krafthefer

Think Ancel Glink

Municipal Annexation Handbook

Stewart H. Diamond
Julie A. Tappendorf

2017 Edition

www.ancelglink.com

Land Use

Table of Contents

MUNICIPAL ANNEXATION HANDBOOK

MUNICIPAL ANNEXATION HANDBOOK

INTRODUCTION

More than 50 years ago, Ancel Glink lawyers drafted the initial statute authorizing annexation agreements. Much has happened since then, but it remains as true today as in 1963 that Illinois municipalities and developers understand the opportunities and benefits of annexation. As landowners become more sophisticated, reliable and prompt municipal services (such as sanitary sewer, potable water, storm water, police, and other services) drive developments to cities. Even small villages with aging or inefficient utility systems may overcome their concerns about municipal expansion in favor of more potential taxpayers to improve or replace these systems. Increasingly, residential and even commercial landowners may have been unwilling to annex to a nearby municipality are re-thinking those issues.

In this era of changing times and needs, governmental officials who may be thinking previously unthinkable thoughts about community expansion should have a short text that describes the annexation process and introduces them to some of the terms and conditions contained within the almost inevitable annexation agreements. This handbook is intended to supply that need. Ancel Glink already produces a chapter of more than 100 pages on the subject of annexation and annexation agreements in a four-volume study of Illinois Municipal law, published by the Illinois Institute for Continuing Legal Education. However, that publication is principally used by attorneys. It is our intention that this handbook will introduce the reader to annexations and annexation agreements to provide an overall introduction to the process.

Ancel Glink, and other firms that represent municipalities, are prepared to assist your local attorney or be brought in as special counsel to negotiate annexation agreements. If the developers or landowners are serious about the process, they will pay for your consultants through escrows or other guarantees. They will agree to do this not from the goodness of their hearts but because their least favorite bargaining partner is a municipality that cannot make decisions or keeps changing its mind because its negotiators are uninformed and unsure of whether they are winning or losing, or whether the game is worth playing.

In light of the downturn in development over the past decade, it may interest the reader, as in a mystery story, to peek at the section dealing with economic downturn. Although time and the economy are often the major factors in dealing with these issues, there are things a municipality can and should do in the name of self-help.

Hopefully, this pamphlet will inspire you to decide whether land should or should not be annexed for the right reasons, along with giving you a list of the goals to be achieved and the general manner of achieving those goals.

Stewart H. Diamond
Julie A. Tappendorf
April, 2017

ABOUT THE FIRM AND THE AUTHORS

ANCEL, GLINK, DIAMOND, BUSH, DiCIANNI & KRAFTHEFER, P.C. was founded more than 85 years ago. As one of the preeminent local government law firms in Illinois, our firm of more than 37 attorneys has a tradition of excellence and innovation. Ancel Glink attorneys drafted the annexation agreement statute, and worked with the Illinois Legislature in the adoption of this important device. Ancel Glink represents governmental bodies in the Chicago metropolitan area and throughout the state of Illinois as corporate attorneys, and as special counsel. We also occasionally represent landowners and developers in their dealings with governmental bodies. Ancel Glink has adhered to the principal of providing the quality of work normally associated with the largest firms within a small firm environment. Our goal is to offer our clients effective and comprehensive representation at a reasonable cost. Our legal services and strategies match our clients' needs and resources. On our website, www.ancelglink.com, you can review many pages of questions and answers submitted to us, and download a large number of free pamphlets on local governmental issues. You can also visit our blog, Municipal Minute, for recent updates on municipal issues.

STEWART H. DIAMOND is an equity partner in the municipal law firm of Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C. Stewart is a graduate of the College and Law School of the University of Chicago, and did advanced work at University College, Oxford, England. . He has represented many Illinois governments as regular or special counsel. He is the originating Editor of the Illinois Institute for Continuing Legal Education's four-volume Illinois Municipal Law Series, and three-volume Illinois School Law. He is a co-author of handbooks on municipal, park district and township law. He has taught governmental law at Northwestern Law School and is a former Chair of the Illinois State Bar Association's Section on Local Government. Stewart is a member of the Legislative Committee of the Illinois Municipal League, and he has lectured on governmental issues before State and national organizations. Stewart is the co-author of the 173-page chapter on "Annexation and Annexation Agreements," which appears as the first article in Volume 2 of Annexation, Zoning and Regulatory Authority, in the Illinois Institute for Continuing Legal Education's four-volume Illinois Municipal Law Series.

JULIE A. TAPPENDORF is also an equity partner in the municipal law firm of Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C. Julie focuses her practice primarily on local government and land use matters. She has published on a variety of land use issues and has written extensively in the area of annexation and development agreements. She co-authored the books Handling the Land Use Case, 3d Ed. (Thompson Reuters, 2017), Planning and Development Case Book, 9th Ed. (CAP, 2016), Land Use Law: Zoning in the 21st Century (ALM, 2015), Development by Agreement: A Tool Kit for Land Developers and Local Governments (ABA, 2012), Agreements, Fees, and CIP (APA Education, 2005), Land Use Law: Zoning in the 21st Century (LJP, 2015), and Bargaining for Development (Environmental Law Institute, July 2003), authored chapters on annexation agreements in ALI-ABA's Land Use Institute publication (2006) and Trends in Land Use Law from A to Z: Adult Uses to Zoning (ABA, 2001), among other publications. Julie is an Adjunct Professor at The John Marshall Law School in Chicago, and lectures frequently on land use matters, both locally and nationally. She is also the author and moderator of the local government blog, Municipal Minute.

I. ANNEXATION AND DISCONNECTION

A. THE BASICS OF ANNEXATION

The Illinois Legislature has entrusted to the corporate authorities of municipalities the absolute right to determine the boundaries of their communities and the rate at which development will take place. The addition of new land to corporate boundaries is achieved through annexation in accordance with state statutory procedures. Annexations to municipalities in Illinois are governed by the "three C's:" Consent, Contiguity and Contract.

1. Consent

Other states have taken control over the expansion of boundaries away from municipal governments, and given it to state or regional agencies. In Illinois, however, the power to determine whether or not unincorporated land, developed or undeveloped, will be brought into the municipality or provided municipal services is in the hands of local governments. With some extremely rare exceptions, no owner of unincorporated property can require a municipality to annex his or her land, to zone it in any particular way, or even to provide municipal services, such as sewer and water, to the land. That is the case even if the land cannot be fully devoted to multi-family, commercial or industrial use without a connection to municipal utility systems. While a municipality may agree to extend its utility lines to unincorporated areas, it has no obligation to do so and most communities will not agree to provide these services without the owner of the land agreeing to annex to the municipality when the land becomes contiguous. On the other hand, there are statutory procedures that allow a municipality to annex land without the owner's consent.

2. Contiguity

Contiguity is the second element in the Illinois annexation process. There are an enormous number of cases that define the circumstances under which one parcel of land will become contiguous to the municipality. Absent contiguity to a municipality, land cannot be annexed to that municipality, although it can be the subject of an annexation agreement that can will provide for annexation of the land when contiguity is achieved. While there are some unsettled questions regarding contiguity, the principal obligation of an attorney representing a landowner is simply to make certain that the land is contiguous to the municipality at the time of annexation. If not, the normal one-year statute of limitations for contesting the validity of annexations is not applicable to defects relating to non-contiguity, and subject to the defense of estoppel or laches, a quo warranto lawsuit to contest the annexation of non-contiguous land can be filed at any time before the land becomes contiguous to the municipality.

3. Contract

The third of the "three C's" is contract. This refers to the great flexibility granted to property owners and municipalities to enter into annexation agreements prior to the annexation of the territory to the municipality. Annexation agreements are discussed in some detail in Section II of this handbook. In addition, the 27-part "point-counterpoint" dialogue between the

positions of municipalities and developers, in the appendices of this handbook, outlines the principal elements generally contained within annexation agreements, along with the difficult situations that municipalities can find themselves into if they are not aware of the pitfalls of agreeing to excessive developer demands. Some communities have transferred their legislative birthright for 20 years to developers who are unclear as to their developmental goals and have bound themselves to little, if any, limitations aimed at protecting the community against an annexation which will have negative financial implications. In most situations, the elected officials like to be able to assure their citizens that new development will "pay for itself." In order to do that, it is important that the promises made by developers before plan commissions and the corporate authorities are incorporated into annexation agreements with targeted performance standards and schedules.

B. GENERAL PRINCIPLES APPLICABLE TO ALL ANNEXATIONS

Under Illinois Municipal Code Section 7-1-1, there are four requirements that must be fulfilled for any type of annexation, whether court-controlled or non-court-controlled:

1. The territory to be annexed must be unincorporated and not incorporated into another municipality.

2. The territory must be contiguous to the annexing municipality.

3. Proper notice must be provided to fire protection and library districts that exercise jurisdiction over the territory when the annexing municipality provides fire protection or library services, as the case may be. Notice to the election authorities and post office branches is also required.

4. The new boundary of the annexing municipality as described in the petition for annexation will extend to the far side of any adjacent highway and must include all of every highway within the area to be annexed.

Some of these requirements are discussed in more detail below.

1. Contiguity: Section 7-1-1

As noted in Subsection A above, a municipality may only annex territory outside its corporate limits if it is contiguous to the municipality. In the annexation context, to be contiguous means to have "a substantial common boundary" *Spaulding School District No. 58 v. City of Waukegan,* 18 Ill.2d 526 (1960), a "common border of reasonable length or width" *In re Petition of Westmoreland, Incorporation, for Annexation of Certain Territory to City of Springfield*, 15 Ill.App.2d 51 (3d Dist. 1957) (abst.), or the territory and municipality "must touch or enjoin one another in a reasonably substantial physical sense." *Western National Bank of Cicero v. Village of Kildeer,* 19 Ill.2d 342, (1960). The determination of what constitutes contiguity is fact-specific and done on a case-by-case basis; however, courts generally construe the statutes liberally and in favor of contiguity. For example, in one case, 20 feet was not sufficient to satisfy contiguity *People ex rel. Cherry Valley Fire Protection District v. City of Rockford, Illinois,* 120 Ill.App.2d 275 (2d Dist. 1970), while in another, a tract of land 300 feet

wide was sufficient. *In re Annexation of Certain Territory to Village of Buffalo Grove*, 128 Ill.App.2d 261 (2d Dist. 1970). The analysis differs when highway-dedicated property is involved; when contiguity depends on a highway right-of-way, courts apply a stricter test. In these situations, a highway right-of-way includes only the portion of land that is "adjacent and parallel to" the existing municipal limits. 65 ILCS 5/7-1-10.

In some instances, what would appear to "break" contiguity is covered by an exception as provided in Section 7-1-1:

- Territory is still considered to be contiguous to the municipality even when that territory is separated from the municipality by a strip parcel, railroad or public utility right-of-way, or former railroad right-of-way that has been converted to a recreational trail. "Strip parcel" means a separation no wider than 30 feet between the territory to be annexed and the municipal boundary, but such territory shall not be considered annexed to the municipality;

- Except in counties with a population of more than 600,000 but less than 3,000,000, territory which is not contiguous to a municipality but is separated only by a forest preserve district, federal wildlife refuge, open land or open space that is part of an open space program, as defined in Section 115-5 of the Township Code, or conservation area, may be annexed to the municipality. The annexing municipality must show that the forest preserve district, federal wildlife refuge, open land, open space, or conservation area creates an artificial barrier preventing the annexation and prevents the orderly natural growth of the annexing municipality. The territory does not create an artificial barrier if the property sought to be annexed is bounded on at least 3 sides by: (1) one or more other municipalities (other than the municipality seeking annexation through the existing forest preserve district, federal wildlife refuge, open land, open space, or conservation area); (2) forest preserve district property, federal wildlife refuge, open land, open space, or conservation area; or (3) a combination of other municipalities and forest preserve district property, federal wildlife refuge property, open land, open space, or conservation area. The territory included within such forest preserve district, federal wildlife refuge, open land, open space, or conservation area shall not be annexed to the municipality nor shall it be subject to rights-of-way for access or services between the parts of the municipality without the consent of the governing body of the forest preserve district or federal wildlife refuge;

- In counties that are contiguous to the Mississippi River with populations of more than 200,000 but less than 255,000, a municipality that is partially located in territory that is wholly surrounded by the Mississippi River and a canal, connected at both ends to the Mississippi River and located on property owned by the federal government, may annex noncontiguous territory in the surrounded territory under Sections 7-1-7, 7-1-8, or 7-1-9 if the territory is separated from the municipality by property owned by the federal government. The above exception for federal property requires the consent of the federal government;

- Any territory located in a county with more than 500,000 inhabitants shall be considered to be contiguous to the municipality if only a river and a national heritage corridor separate the territory from the municipality, but such territory shall not be considered annexed to the municipality.

- A toll highway or connection between parcels via an overpass bridge over a toll highway shall not be considered a deterrent to the definition of contiguous territory.

2. Notice: Section 7-1-1

The following notice requirements contained in Section 7-1-1 apply to all annexations. These procedures should always be followed, regardless of the type of annexation undertaken by the municipality, with the caveat that different or additional notice and other procedural requirements may also be specified for particular types of annexations. In those instances, the requirements set forth for the specific annexations should be considered additional to the ones described in Section 7-1-1 unless they are identical to or conflict with Section 7-1-1 requirements. In case of a conflict, the procedures stated for specific types of annexations should prevail.

The entities listed below must be notified in writing, by certified or registered mail, of the proposed annexation at least ten days prior to the action taken, whether that action is by the corporate authorities or by means of a court annexation proceeding. This requirement has been interpreted by case law to mean that such notice must be mailed to the individual board members at their respective home addresses. In addition, the Illinois Supreme Court has held that the notice must state the date on which the action by the corporate authorities is contemplated.

- The trustees of a fire protection district if the annexing municipality provides fire protection, and the trustees of a public library district where a municipal public library is provided. The reason for the required notice to the fire protection district and library district is that the annexation of the territory, where the municipality provides these services, will result in the automatic disconnection of the area from the district. There is a procedure under which the disconnection can be contested, and also one where the fire protection district can accept a compromise approach and receive diminishing tax revenue for a number of years.

- The township commissioner of highways, the board of town trustees, the township supervisor, and the township clerk if land to be annexed includes any highway under township jurisdiction. Failure to provide this notice will result in the municipality having to reimburse the township for "any loss or liability caused by the failure to give notice." This provision is intended to protect a township, which otherwise might continue to unknowingly expend funds on roads that have come under municipal jurisdiction and care.

An affidavit of service of notice must be completed and then filed with the court clerk if annexation proceedings are pending in court, or with the county recorder if court proceedings are not involved.

Notice of annexation or disconnection must also be reported by certified or registered mail to the appropriate election authorities and the post office branches serving the territory within 30 days of the action taken. Failure to notify these particular authorities following the actions taken will not invalidate the annexation. "Election Authorities" means the county clerk where the clerk acts as the clerk of elections or the clerk of the election commission having jurisdiction.

Any annexation to be accomplished by court order requires notification by the corporate authorities or petitioners to all taxpayers of property (except petitioners) within the territory. The notice must be served by certified or registered mail at least 20 days before the court hearing or other action. No annexation, disconnection and annexation, or disconnection of territory in which electors reside made: (1) before any primary election to be held within the municipality and after the time for filing petitions as a candidate for nomination to any office to be chosen at the primary election; or (2) within 60 days before any general election to be held within the municipality, will be effective until the day after the date of the primary or general election, as the case may be.

3. Inclusion of Adjacent Roadways

The new boundary of any annexed territory, regardless of the method of annexation, "shall extend to the far side of any adjacent highway and shall include all of every highway within the area annexed." 65 ILCS 5/7-1-1. Highways are considered annexed even if they are not included in the legal description of the petition or the annexing ordinance. The appellate courts have consistently held that it is not necessary to include the far side of any adjacent highway in legal descriptions or on plats of annexation because, by operation of the statute, the boundary will automatically extend to the far side of any such highways. It is still best practice to include the far side of any adjacent highway in the legal description of the annexation petition and in the annexing ordinance.

4. Filing and Recording: Section 7-1-40

Within 90 days after any annexation or disconnection, the municipality must record in the recorder's office of the county where the territory is situated: (1) a certified copy of the ordinance, court order or resolution of annexation or disconnection; and (2) an accurate map of the territory annexed or disconnected. In addition, the annexation ordinance and the accompanying map of the annexed territory must be filed with the county clerk wherever the property is located.

5. Annexation Priority

Annexation priority relates to one of the requirements for all annexations – that the property be unincorporated and not within the corporate boundaries of another municipality. One of the most common areas of annexation disputes relates to annexation priority. Whenever more than one municipality takes a shot at annexing a particular unincorporated territory, the courts must sort out which municipality wins the annexation contest. Provided that there is no defect in the proceeding of any competing municipality, the territory will be annexed to the municipality that has priority.

The general rule of priority is that the first municipality to initiate its annexation proceeding is entitled to jurisdictional priority over the territory until it either declines to annex or otherwise abandons its annexation effort. This rule promotes the orderly process of annexing territory and avoids a race to the courthouse among competing municipalities. Important to determining priority is what act initiates a particular annexation proceeding.

For any court-supervised proceeding, the filing of an ordinance or petition with the clerk of the court has been deemed the initiation of that proceeding. A Section 7-1-8 petition proceeding is "initiated" upon the filing of the annexation petition with the municipal clerk. The courts have not been consistent in determining the time of initiation of a Section 7-1-13 proceeding. Where two Section 7-1-13 proceedings have been in competition, the courts have ruled that the first municipality to give notice (either by publication or certified mailing) of intent to annex was the first to initiate. On the other hand, when faced with a competition between a Section 7-1-13 and a Section 7-1-8 proceeding, courts have ruled that the Section 7-1-13 proceeding is not initiated until the annexation ordinance is actually adopted. This uncertain starting point for a Section 7-1-13 annexation not only causes uncertainty in the annexation process that could actually encourage a "race to the courthouse," but it has the potential of creating a host of priority issues.

6. Judicial Review: Section 7-1-46

Challenges to the validity of an annexation must be made no later than one year from the date the annexation becomes final, except that the limitation does not apply to annexations of property that was not contiguous at the time of annexation and is not contiguous at the time of the court action. The one-year limitation also applies to affirmative defenses contesting the validity of an annexation. *Village of Glendale Heights v. Glen Ayre Enterprises, Inc.*, 404 Ill.App.3d 205 (2nd Dist., 2010).[1]

The type of judicial review available for an annexation proceeding depends in part on the type of proceeding involved. For example, court-supervised proceedings have their first opportunity for judicial review when the court hears any objections to the proceeding in the initial hearing. Further review is possible through an appeal of the court's ultimate findings regarding the petition. 65 ILCS 5/7-1-3, 7-1-4. For proceedings that are not court-supervised, an uncompleted annexation effort can be enjoined. For a completed annexation, however, the exclusive remedy is through a writ of quo warranto unless an objecting party has a specific statutory alternative for filing a challenge.

C. SPECIFIC METHODS OF ANNEXATION

Complications may arise when parties disagree over what land should be included within the 60-acre limit. On one such occasion, the court in *Bowers v. City of Rockford*, 384 Ill.App.3d 655 (2nd Dist., 2008) held that the 60-acre limit does not include interior highways. Furthermore,

1 The 4th Appellate District construes Section 7-1-46 based on its plain meaning while the 2nd District uses legislative intent to interpret that section. Our only clue to the legislative intent is the language of section 7-1-46, which, in plain terms, bars the "commencement" of a stale "action", not the filing of an affirmative defense to a timely action" *Stivers v. Bean,* 2014 IL App (4th) 130255, 5 N.E.3d 196, 206.

municipalities may run into disagreement over what constitutes a legal boundary for 7-1-13 annexation purposes. For instance, an Illinois court recently held that the term "creek" only includes natural, rather than man-made water features. *People ex rel. T-Mobile USA Inc. v. Village of Hawthorn Woods*, 2012 IL App (2d) 110192 (2nd Dist., 2012).

The Illinois Municipal Code provides for several means of annexing property to a municipality. 65 ILCS 5/7-1-1, et seq. The following section is intended as a guide for municipal staff and officials. Certain notice and other procedures required by statute are conditions to all annexations; other procedures are specific to particular methods of annexing property or to unique kinds of property being annexed. Understanding which steps to take in each instance is critical, since failure to comply with a statutory requirement could result in a legal challenge and a court decision invalidating the annexation. This section covers the most commonly used methods for annexing land to a municipality. In certain special circumstances, other methods and rules apply. All but involuntary annexation can be accomplished in connection with an annexation agreement with the owner.

1. Voluntary Annexation by Ordinance: Section 7-1-8

The owners that is contiguous to a municipality but has no electors, may file a written petition with the municipality requesting annexation. Following consideration of the petition, the corporate authorities then holding office may, by ordinance passed by a majority vote, annex the territory

In addition, the owners of record of all land within a certain territory and at least 51% of electors residing therein may file a written petition with the municipal clerk requesting annexation. Following consideration of the petition, the corporate authorities then holding office may, by ordinance passed by a majority vote, annex the territory. An Illinois court confirmed that this type of nonjudicial annexation is not subject to the referendum requirements of Section 7-1-6. *Sibenaller v. Milschewski*, 379 Ill.App.3d 717, (2nd Dist. 2008).

The annexation process is not complete until a copy of the ordinance annexing the territory and a map of the annexed territory is recorded with the County Recorder and filed with the County Clerk wherever the annexed territory is located following action by the municipality. *People ex rel. County of St. Clair v. City of Belleville*, 84 Ill.2d 1 (1981).

2. Annexation Requiring Court Action: Section 7-1-2

Annexation may be accomplished by court action when not all of the owners consent to the annexation under Sections 7-1-2 through 7-1-7 of the Illinois Municipal Code. Section 7-1-2 provides for both petition-initiated annexations and ordinance-initiated annexations. In each case, the petition or ordinance is filed with the circuit court in which the territory is located, and the court then conducts a hearing to determine whether the petition or ordinance meets the statutory requirements, including contiguity. Upon finding that the petition or ordinance does meet the statutory requirements, the court will order that the question of annexation be presented to either the corporate authorities or the electors within the territory for consideration. Because the process can go quite quickly, the petition is not usually filed until a land owner has executed

an annexation agreement with the municipality prior to filing the petition with the court. A detailed step-by-step summary of each respective process is provided below.

a. Petition-Initiated Process

The following is a step-by-step summary of the procedures for a court-supervised annexation initiated by the filing of a petition:

Step One: Filing of Petition

A majority of the owners of record of land in the territory and a majority of the electors residing in the territory must sign and file with the circuit court in the county in which the territory is located a petition expressing their desire to annex to a particular municipality. The petition must contain, at a minimum, the following:

1. The signatures of a majority of the owners of record of land in the territory and a majority of the electors residing in the territory.

2. A description of the territory to be annexed.

3. A statement that the territory is contiguous to the annexing municipality and is not within the boundaries of any municipality.

4. A request that the territory be annexed to a specific municipality.

5. A request that the circuit court set a date for a hearing to consider the petition for annexation and any objections filed to the petition.

6. A request that the circuit court submit the question of annexation to the corporate authorities of the annexing municipality following the hearing.

7. An affidavit of one or more of the petitioners that the signatures on the petition represent a majority of the owners of record of land in the territory and a majority of the electors residing in the territory.

8. A $10.00 filing and service fee shall be paid to the circuit court clerk.

No petitioner may withdraw from the petition except by consent of a majority of petitioners or where the court finds the signature was obtained by fraud.

Step Two: Court Sets Hearing

Upon receipt of the petition, the circuit court will enter an order fixing the date and time for the hearing on the petition. The hearing must be scheduled not less than 20 or more than 30 days after the filing of the petition.

Step Three: Objections

After the filing of the petition, but not less than 5 days prior to the date for the hearing, any interested person may file with the circuit court objections to the proposed annexation, including the following:

1. The territory is not contiguous to the municipality.

2. The petition is not signed by the requisite number of electors or owners.

3. The description of the territory is inadequate.

4. The objector's land is located on the perimeter of the territory, the objector does not desire annexation, and the exclusion of the objector's land will not destroy contiguity.

Step Four: Notice of Hearing

Not more than 30 or less than 15 days before the date fixed for the court hearing, the petitioners must give notice of the petition by publication at least once in one or more newspapers published in the annexing municipality or, if there is none, in one or more newspapers with a general circulation within the annexing municipality. A copy of the published notice must be filed with the municipal clerk who must send by registered mail a copy to the highway commissioner of each road district within the territory proposed for annexation. Also, a copy of the notice must be served by certified or registered mail, at least 20 days prior to the court hearing, on all taxpayers of record of the territory, unless the taxpayer is a petitioner. The taxpayer of record is obligated to notify the owner of record, if different than the taxpayer.

Step Five: Court Hearing

The circuit court conducts a hearing to determine the validity of the petition and to consider any objection that has been filed to the petition. Once the court has ruled on the objections, the court is required to find that the petition conforms to the statutory requirements in order to proceed, in which case the court will enter an order submitting the question of annexation to the corporate authorities.

Step Six: Submission of Question to Corporate Authorities

The question of annexation will be presented to the municipality for consideration and the municipality can either refuse to annex the territory, call for a referendum on the question of annexation of the territory, or adopt an ordinance annexing the territory. If an annexation ordinance is adopted and the corporate authorities do not call for a referendum, a petition signed by electors within the annexing municipality equal to 10% of the number of votes cast in the last election for mayor or village president and filed with the municipal clerk within 30 days can trigger the referendum. The majority vote of the electors within the annexing municipality then determines whether the territory in question should be annexed or not.

If no referendum is held or referendum petition filed within 30 days of the municipality's decision on the annexation, then the territory is annexed to the municipality.

Following the expiration of the 30 day period, the municipal clerk must send notice of the annexation to the highway commissioner. In addition, under the general annexation statute, certain annexation notices must be mailed prior to annexation of the territory. For example, at least 10 days prior to adoption of any annexation, notice must be sent to any library or fire protection district if the municipality operates a municipal library or a fire department. In addition, after the annexation of territory notice of the annexation must be sent to the election authorities and the post office.

b. Ordinance-Initiated Process

The following is a step-by-step summary of the procedures for a court-supervised annexation initiated by the filing of an ordinance:

Step One: Adoption and Filing of Ordinance

The corporate authorities of a municipality may initiate the court-supervised annexation process by enacting an ordinance expressing their desire to annex the described territory. No tract of land exceeding ten acres may be included in the ordinance unless the tract is subdivided into lots or blocks or is bounded on at least three sides by lands subdivided into lots or blocks. The ordinance must be filed with the circuit court in the county in which the territory is located, which ordinance must contain, at a minimum, the following:

1. A description of the territory to be annexed.

2. A statement that the territory is contiguous to the annexing municipality and is not within the boundaries of any municipality.

3. A request that the territory be annexed to a specific municipality.

4. A request that the circuit court set a date for a hearing to consider the annexation and any objections filed to the annexation.

5. A request that the circuit court submit the question of annexation to the corporate authorities of the annexing municipality following the hearing.

6. A $10.00 filing and service fee shall be paid to the circuit court clerk.

Step Two: Court Sets Hearing

Upon receipt of the ordinance, the circuit court will enter an order fixing the date and time for the hearing on the ordinance. The hearing must be scheduled not less than 20 or more than 30 days after the filing of the ordinance.

Step Three: Objections

After the filing of the ordinance, but not less than 5 days prior to the date for the hearing, any interested person may file with the circuit court objections to the proposed annexation, including the following:

1. The territory is not contiguous to the municipality.

2. The description of the territory is inadequate.

3. The objector's land is located on the perimeter of the territory, the objector does not desire annexation, and the exclusion of the objector's land will not destroy contiguity.

Step Four: Notice of Hearing

Not more than 30 or less than 15 days before the date fixed for the court hearing, the corporate authorities must give notice by publication at least once in one or more newspapers published in the annexing municipality or, if there is none, in one or more newspapers with a general circulation within the annexing municipality. A copy of the published notice must be filed with the municipal clerk who must send by registered mail a copy to the highway commissioner of each road district within the territory proposed for annexation. Also, a copy of the notice must be served by certified or registered mail, at least 20 days prior to the court hearing, on all taxpayers of record of the territory, unless the taxpayer is a petitioner. The taxpayer of record is obligated to notify the owner of record, if different than the taxpayer.

Step Five: Court Hearing

The circuit court conducts a hearing to determine the validity of the ordinance and to consider any objection that has been filed. Once the court has ruled on the objections, the court is required to find that the ordinance conforms to the statutory requirements in order to proceed, in which case the court will enter an order submitting the question of annexation to referendum.

Step Six: Submission of Question to Referendum

The question of annexation will be presented to the electors of the unincorporated territory under the procedures set forth in 65 ILCS 5/7-1-7. The question of annexation shall be submitted to the electors of the territory to be annexed at an election in accordance with the general election law. The court order will direct the municipal clerk to send, by registered mail, a notice of the date of the prospective referendum to the highway commissioner. The circuit court clerk will certify the question for submission.

If a majority of those casting ballots favor annexation, then the described territory shall be annexed to the municipality.

Notice must be sent by the municipal clerk to the highway commissioner of the results of the referendum within 15 days. In addition, after the annexation of territory notice of the annexation must be sent to the election authorities and the post office.

3. "Optional" Method Under Section 7-1-11

For territory that is not less than one square mile; contains at least 500 inhabitants; is not part of a municipality; and is contiguous to a municipality having less than 100,000 inhabitants, parties affected may apply to the circuit court for an order authorizing submission of the question to the electorate. The application must be signed by at least 100 electors and more than 50% of the property owners. Other requirements governing this method are specified in Section 7-1-11.

4. Involuntary Annexation of Surrounded or Nearly Surrounded Territory Under 60 Acres: Section 7-1-13

Territory containing 60 acres or less may be annexed by force (i.e., without consent of property owners) if it is wholly bounded by:

- one or more municipalities;
- one or more municipalities and a creek in a county with a population of 400,000 or more, or one or more municipalities and a river or lake in any county;
- one or more municipalities and the Illinois State boundary;
- one or more municipalities and property owned by the State except State highway right-of-way (the above highway exception does not apply in counties with populations between 800,000 and 2,000,000 inhabitants);
- one or more municipalities and a forest preserve district or park district;
- one or more municipalities and an interstate highway owned in fee by the State and bounded by a frontage road if the territory is a triangular parcel of less than 10 acres;
- one or more municipalities in a county with a population of more than 800,000 inhabitants and less than 2,000,000 inhabitants and either a railroad or operating property, as defined in the Property Tax Code (35 ILCS 200/11–70), being immediately adjacent to, but exclusive of that railroad property, except land or property that is used for agricultural purposes or to produce agricultural goods; or
- one or more municipalities and property on which a federally funded research facility in excess of 2,000 acres is located.

There are limitations to this method:

- 7-1-13 does not permit a municipality to annex territory of a forest preserve district in a county with a population of 3,000,000 or more without obtaining the consent of the district pursuant to Section 8.3 of the Cook County Forest Preserve District Act

- 7-1-13 does not permit a municipality to annex territory owned by a park district without obtaining the consent of the district pursuant to Section 8–1.1 of the Park District Code.

- 7-1-13 does not subject any railroad property to the zoning or jurisdiction of any municipality annexing the property.

Method of Annexation: The annexation must be approved by ordinance of the corporate authorities.

Notice and other Requirements:

- Notice of the contemplated annexation must be published once in a newspaper of general circulation within the territory to be annexed not less than ten days before the annexation ordinance is passed.

- Not less than 15 days before the passage of the annexation ordinance, written notice is required to be delivered in person or by certified mail on the taxpayers of record of the proposed annexed territory as appears from the authentic tax records of the county.

- If the territory lies wholly or partially within a township other than the municipal township, at least ten days' prior written notice of the time and place of the passage of the ordinance must be sent to the township supervisor of the township having jurisdiction.

- If the territory lies within the unincorporated area of a county, then the annexing municipality must give at least 10 days' prior written notice to the county board of the time and place of the passage of the annexation ordinance.

- Notice is required to the impacted landowners of land wholly bounded by one or more municipalities in a county with a population of more than 800,000 inhabitants and less than 2,000,000 inhabitants and either a railroad or operating property.

- No other municipality may annex the proposed territory for a period of 60 days from the date notice is mailed or delivered unless: (a) that other municipality has initiated annexation proceedings; or (b) a valid petition has been received by the municipality prior to the publication and mailing of the notices.

- A copy of the annexation ordinance together with an accurate map of the annexed territory must be recorded in the office of the recorder of the county where the annexed territory is situated.

- A document of annexation must be filed with the county clerk and county election authority.

D. DISCONNECTION

Boundary changes are not limited to annexations. Municipal boundaries can change through disconnection proceedings as well. 65 ILCS 5/7-3-1 *et seq.* A disconnection involves the removal of territory from a municipality, and there are several methods for accomplishing a disconnection. A few of these methods are discussed below.

One method involves a voluntary petition filed by property owners and approved by the municipality. 65 ILCS 5/7-3-4. This procedure is only available to properties on the boundary of the municipality, and it requires a majority of the owners affected by the petition to sign the disconnection petition. The petition requirements regarding ownership are similar to those in the annexation context, and the petition must be accompanied by a statement from the county clerk

verifying that all municipal taxes then due have been paid. The corporate authorities of the municipality may adopt an ordinance disconnecting the territory in question no sooner than 30 days after the disconnection petition is filed with the municipal clerk.

A second disconnection procedure is a court-supervised disconnection. This procedure is only available for territory on the border of the municipality in excess of 20 acres that, if disconnected, will not isolate any other land remaining in the municipality. Additionally, a court must determine that the disconnection will not disrupt the growth prospects of the municipality or disrupt any municipal facilities. Finally, the disconnection cannot unduly harm the municipality through loss of tax revenue. 65 ILCS 5/7-3-6. In considering these factors, the petitioner bears the burden of proof but courts will liberally interpret the disconnection standards to favor disconnection.

There are additional disconnection procedures that involve removal of property from one municipality and annexation to another. 65 ILCS 5/7-1-24; 7-1-25.

Although courts are usually favorable to disconnection petitions, Illinois courts have held that the existence of an annexation agreement can provide a municipality with an affirmative defense to a petition for disconnection. In other words, the annexation agreement itself can negate the property owner's entitlement to disconnection. One court based its holding on section 7-3-6 of the Illinois Municipal Code that provides that "[i]f the court finds that the allegations of the petition are true and that the area of land is entitled to disconnection it shall order the specified land disconnected from the designated municipality" (emphasis added). The court concluded that because the annexation agreement was still valid, the land was not entitled to disconnection. Another Illinois court held that a municipality can in fact assert promissory estoppel as an affirmative defense to a disconnection petition. *Falcon Funding, LLC v. City of Elgin*, 399 Ill.App.3d 142 (2nd Dist., 2010).

These cases seem to be at odds with an earlier decision by another appellate court that an annexation agreement must include specific language about disconnection for the municipality to defend a disconnection petition. The most careful approach would be for a municipality to have an annexation agreement for any voluntary annexation and to include in that agreement language prohibiting the owner (and subsequent owners) from filing a petition for disconnection, or taking any other action in furtherance of disconnection, for the life of the agreement.

II. ANNEXATION AGREEMENTS

A. A GENERAL DISCUSSION OF ANNEXATION AGREEMENTS

Annexation agreements bind both the municipality and the developer for a multi-year period. These agreements can and generally do extend for 20 years. The key subjects contained within such annexation agreements are zoning, utilities, impact fees, and the way in which the ordinances of the municipality can be modified during the life of the annexation agreements. Very little litigation arises out of carefully drafted annexation agreements and both the municipality and the developer are bound by the terms. Annexation agreements can be voluntarily amended by the parties. The initial passage of any amendment to an annexation agreement requires a public hearing before the corporate authorities, and the vote of at least two-thirds of the corporate authorities, including the Mayor.

Annexation agreements which require unrealistic promises from a developer often result in failed developments. Experienced developers are generally aware of the total amount of payments that can reasonably be produced through the sale of the units available on the site. One of the largest costs to a developer is the payment of impact fees. Municipalities in Illinois are granted sole control over the amount and distribution of impact fees to other governmental bodies, such as schools, fire protection districts, and libraries, along with contributions to the municipality itself.

Developers are also sometimes asked to oversize utilities to make them available for future development and to collect recapture fees from the future developers. The developers that pay for the initial system are entitled to a reservation of rights in the capacity that they have paid to create. Where the developers are being asked to replace an existing utility system, final decisions regarding developer contributions and other obligations can only take place once the municipality decides the size of the system that needs to be constructed. Once those decisions are made by the municipality and careful engineer's estimates are prepared, the final negotiations regarding the annexation agreement can take place.

Because Illinois municipalities have the ability to determine what land will be annexed to the community, the annexation of two or three parcels to the municipality may be able to achieve an upgrade of its utility system without obligating the municipality to annex any additional land. Communities that expand their utility systems at the expense of their current residents may feel compelled to annex additional land to spread the cost of the utility system more broadly and prevent escalating utility rates. Communities which expand their utility system at the expense of new developers do not feel this pressure, and can wait to see how well the first developments are absorbed into the municipality before deciding whether additional land should be annexed.

B. THE ANNEXATION PROCESS

As discussed in more detail in Section I, Illinois municipalities are given the absolute right to determine whether or not to annex land to the municipality. Most Illinois annexations are voluntary and based upon a petition signed by all of the owners and at least 51% of the electors (registered voters residing on the land to be annexed). Voluntary annexations are approved by

the corporate authorities of the municipality and require only a majority vote of the corporate authorities (four in a village). Where not all of the owners in an area proposed to be annexed will join in a voluntary petition, there is a process involving a court hearing, where a majority of property owners and majority of the electors can force some or all of the property to be annexed by a court petition. This method is normally used when the owners of property wish to annex land which is not itself contiguous to the community, but would be contiguous if certain intervening parcels were included in the annexation. This process can take some time and be rather expensive. The lawsuit can also be initiated by the municipality, in which case, the court will order a referendum to be held. If the petition is initiated by property owners and electors, the municipality can refuse to annex the property.

To help in standardizing and regulating municipal borders, there is a process where the municipality can involuntarily annex wholly-surrounded parcels of 60-acres or less. The land can either be surrounded by one municipality or by one or more municipalities, and in a few other special circumstances. In order for land to be actually annexed to a municipality, it must be "contiguous" to the municipality. Contiguity has been characterized as physical touching for at least 300 feet, although individual smaller lots can be annexed if they are contiguous to the municipal boundaries for a shorter distance. The 300-foot width rule has been utilized to prevent land being annexed to a municipality utilizing a very narrow corridor, such as a road, to annex large tracts of land at the end of the corridor. The specific requirements of each of these methods are described in Part I.

C. ANNEXATION AGREEMENT TERMS AND CONDITIONS

Most land that is going to undergo any new development is annexed to a municipality only after the municipality and the property owner have agreed on the terms of an annexation agreement. Land does not need to be contiguous to the municipality to support an annexation agreement. In almost every case, the municipality would not agree to an annexation agreement unless the land would be contiguous to the community within some reasonable period of time. Most municipalities will not annex large tracts of land without annexation agreements because a disgruntled or new property owner, once annexed, without an annexation agreement, can file a lawsuit seeking a zoning change which the municipality might find unacceptable. In effect, the municipality would be buying a lawsuit.

Landowners and developers who contemplate some changed use of the land, typically beyond agricultural, will not normally annex to a municipality unless they receive, in an annexation agreement, a long-term commitment by the municipality to grant the zoning category sought, a reasonable density, some promise regarding utility services, a formula for impact fees and donations to other governmental bodies, required commercial zoning, if any, and certain understandings regarding engineering standards and the application of local ordinances. If an annexation agreement contains a promise of a zoning category, all public hearings regarding zoning, including special uses and variances, need to take place before the annexation agreement can be approved. For every annexation agreement, there must also be a notice of public hearing held before the corporate authorities. An annexation agreement can only be approved by a two-thirds vote of the corporate authorities (5 out of 7 in a village). Once approved, an annexation agreement can only be amended after the appropriate public hearings and by a similar extra

majority vote. In larger communities, unless it is clear that the municipality is not interested in annexing the property, the annexation and annexation agreement process is usually initiated with the administrative staff of the municipality, and with consultants, such as an attorney and an engineer. In smaller communities, especially those which have not had much experience with annexation agreements, the process is often conducted informally, with meetings and negotiations taking place prior to the holding of the actual noticed public hearings.

Smaller municipalities often move cautiously on the first wave of annexations to see how the community copes with a larger population. The first group of developers are often asked to improve or rebuild existing municipal infrastructure so that new development "more than pays for itself." Municipal officials may want to consider how the anticipated need for utility improvements will be paid for without new developers. Because there will be substantial up-front construction costs for utility improvements, only existing customers, including the small number of new residents allowed in a slow growth motif, will be available to bear the expense of utility expansion or replacement.

Almost no municipality can advance the up-front costs of utility expansion. Such expansion can be financed in a variety of ways, including the following:

a) referenda-approved general obligation bonds;
b) a combination of general obligation bonds and revenue bonds (revenue bonds alone cannot be sold without some reasonable anticipation of guaranteed future growth; or
c) developer's whole or partial contributions.
d) the creation of a special service area and the sale of bonds backed by the value of the land.

If the municipality is reasonable in its request, many developers can absorb into the cost of their homes or lots an amount of money sufficient to provide new or improved utility service to some or all existing municipal residents.

Utility services are extremely important because EPA rules make approval for small water and sewer companies very difficult. During development in the 1950s and 1960s, small wells and package plants were allowed, but these facilities would find it very difficult to meet current EPA standards. In addition, many counties in the urban fringe will not grant large-scale residential zoning near the borders of a municipality, which would be willing and able to serve the development upon annexation. Developers, therefore, come to municipalities that can provide them with utility services at a reasonable price and will allow them to construct specific kinds of residential and commercial developments, which will match the market. A municipality in the process of negotiating an annexation agreement must make certain that the demands being made on the developer will allow for the construction of a quality product. Annexation agreements which require too much of the developer could result in failed developments, or the developer attempting to evade or back out of some of the obligations. If, on the other hand, the municipality does not ask enough of the new developer, it will be the current residents of the community who may find themselves bearing some of the costs of the expansion.

Experienced negotiators for developers and the municipality can usually come to some agreement on most terms and conditions. A community, however, must first be prepared to engage in the reasonable "give and take" elements of negotiations.

In addition to annexation itself, the terms of an annexation agreement can contain this broad series of subjects provided for by statute. 65 ILCS 5/11-15.1-4 provides that annexation agreements can deal with the following subjects:

- The continuation in effect, or amendment, or continuation in effect as amended, of any ordinance relating to subdivision controls, zoning, official plan, and building, housing and related restrictions; provided, however, that any public hearing required by law to be held before the adoption of any ordinance amendment provided in the agreement must be held prior to the execution of the agreement, and all ordinance amendments provided in the agreement shall be enacted according to law.

- A limitation upon increases in permit fees required by the municipality.

- Contributions of either land or monies, or both, to any municipality and to other units of local government having jurisdiction over all or part of land that is the subject matter of any annexation agreement entered into under the provisions of this section shall be deemed valid when made and shall survive the expiration date of any such annexation agreements with respect to all or any part of the land that was the subject matter of the annexation agreement.

- The granting of utility franchises for the land.

- The abatement of property taxes.

- Any other matter not inconsistent with this statute or forbidden by law.

Very few provisions in annexation agreements have been found to be invalid and both municipalities and developers have had a difficult time trying to free themselves from the terms and conditions of annexation agreements, which seem to have been mistakes some years later. For example, if a developer agrees that a certain portion of the property will be developed commercial, he cannot force a change in that provision of the annexation agreement even if commercial users of the property have not been found for ten years, and the construction of additional single-family or multi-family residences would be immediately and highly successful. In that case, a developer can ask for an amendment to the annexation agreement to change the zoning, but the municipality is under no obligation to approve that request or to initiate public hearings, which would be required before any zoning change could be considered.

D. CONTENTS OF AN ANNEXATION AGREEMENT

An annexation agreement typically includes all of the terms and conditions of the development of the property that have been negotiated between the parties, including annexation

of the property to the municipality, zoning of the property, approval of subdivision and development plans, restrictions on the development of the property, construction of the required improvements, including utility facilities, and dedication of property or payment of fees in lieu of dedication. In addition to these property-specific provisions, certain provisions are fairly standard in an annexation agreement, including provisions setting out the performance security requirements for the development. Issuance of building and other permits can be addressed in the agreement as well. Some of the most common provisions in an annexation agreement are discussed below. For more information, see the checklist in the Appendices.

1. Zoning

No real estate developer will exercise its option over vacant property, or annex land to a municipality if already purchased, without knowing, often in great detail, the particular type of zoning districts which will be granted to the property, along with any necessary variances and special uses, including planned unit developments. If zoning cannot be agreed to, then the land will not be and should not be annexed. Most annexation agreements contain much more information about zoning than simply the zoning districts involved. Depending upon the size of the proposed project and the demands of the municipality, annexation agreements can contain substantial detail about the type and nature of the development. An annexation agreement that is fair to both parties, and likely to be successful, pins a developer down regarding the number and type of single-family residential units and contains an appropriate level of standards regarding the quality of the homes to be built. Depending upon the stage of the lot design shown, the agreement can either contain a specific number of permitted units, or allow some flexibility in unit number depending upon the final engineering considerations. A similar level of detail should be shown with regards to any townhouses and multi-family units.

Greater flexibility is generally needed for commercial or industrial development because the developer generally does not know the particular size or configuration of the structures which will be built. In any case where the structures are not definitively shown on a site plan, the municipality needs to retain substantial degrees of site plan approval. What should be relatively established at the time of the annexation agreement, except with very large parcels, is the proposed road network and the general location of land devoted to public use, such as school and park sites, as well as the locations for fire houses, police stations and other municipal buildings.

2. Utilities

One of the major costs in any land expansion for a municipality is the availability of central utility systems and the way in which those systems will serve the property. Since utility lines usually run within the right-of-way of municipal streets, the general location for the utilities is often determined at this stage of development. In some special circumstances, major trunk utility lines may be located not in municipal rights-of-way, but in land devoted to park use, detention facilities or bike or pedestrian paths. The subdivision ordinance of the municipality will tell the developer the minimum size of utility lines that need to be constructed.

In many cases, one of the largest costs associated with utilities is the expansion or replacement of an existing municipal water or sanitary sewage system. In that instance, the

developer generally will be asked to pay for the expansion or replacement of these systems in advance, and provided the opportunity to recoup some or all of the funds expended via recapture fees from future development. In a smaller community, several planned, large scale developments can produce enough residential units to pay for substantial utility improvements or new plants and mains, the replacement of which may be long overdue in the existing system. In addition, utility systems are generally built to certain established sizes so that the improvements may serve the existing population, as well as the expanded population from the new developments with, perhaps, some additional capacity. Extra capacity should be available to allow for the quick expansion of commercial facilities, the need for which is brought on by the increased population.

There is a limit to the amount of extra capacity that any development can be asked to bear. When negotiating the developer's obligations, it is necessary for all parties to total up the costs of land donation, impact fees to governmental bodies, utility charges, utility over-sizing, and any special conditions unique to the community, which might drive up certain costs. Each developer has a sense of the level of public improvements and charges that a successful development can withstand. Annexation negotiations are directed at making certain that the municipality is not short changed, and that the developer has a product which will sell and provide a reasonable profit. Developers are willing to make these payments because they cannot practically develop without entering into annexation agreements, and they have learned over a period of years that developments fail where there are inadequate utilities, parks, schools and at least the promise of significant retail growth. In return for these payments and the risk involved in borrowing the money to cover the cost of the utilities, the developer will rightly ask for a reservation of capacity so that the system he helped pay for will not be made available without discretion to some other developer who suddenly arrives upon the scene.

Additionally, in situations where the municipality requests over-sizing that is beyond the capacity of the developer to provide, the municipality agrees to allow the developer to recapture a portion of those extensive costs from future system users. A developer may also ask for the benefit of tax-exempt borrowing by utilizing special service area bonds to build a sewage treatment plant expansion or for the construction of new wells. These costs are known as "off-site costs" because these facilities are built off of the property at some location where services can be easily provided for a community or large area-wide system. These special service area bonds are guaranteed not by the credit of the municipality, or the rates of its utility users, but rather constitute a first mortgage on the developer's property. Such bonds are generally paid back through money received the first time that the property is sold. Some municipalities have also agreed to issue special service area bonds for the "on-site improvements," such as streets, sidewalks, water mains, sanitary sewers, storm sewers and even the cost of land on which the detention or retention basins will be located. On-site SSA bonds are often treated as first mortgages on the property, which can be assumed by the first homeowners. Although those bonds can be paid off without penalty, the new homeowners can, if they wish, assume this long-term debt and benefit from the continued tax-exempt interest rate. The community should be sure, however, that what is in effect a first mortgage is disclosed to the home buyer. This can be accomplished through the careful drafting of real estate disclosures.

3. Impact Fees

Non-home rule municipalities are very limited in the impact fees which can legitimately be sought from developers whose land has already been annexed. If the land to be developed, however, is outside the borders of the community, developers can be bound to pay additional or other impact fees to various governmental bodies that are negotiated in the annexation agreement. Impact fees are intended to cover the costs of services such as libraries, schools, fire departments and parks that governments will bear due to new residents generated by the development.

Impact fees are generally paid either by the dedication of land and/or the contribution of cash. If, for example, a municipality had an existing park system that was very large, it might choose to accept a cash donation from a developer in an amount equivalent to the value of the additional park land that would otherwise have been required due to the development. The same rule would apply to schools or libraries. Although these governmental bodies will suffer the costs of additional residents and students, they are given almost no role in the establishment and collection of impact fees. Municipalities that make the decision on annexation and development are given the ability, but not the obligation, to collect impact fees. In many instances, the municipality will get only a small portion of the fees, with the bulk of such charges being distributed to other governmental bodies.

In some cases, other governmental bodies urge the municipality to impose unacceptably large impact fees. A municipality must resist this temptation especially if it has many needs itself as a growing community with few revenue sources other than real estate taxes. Also, for that reason, municipalities should not turn over impact fees to other governmental bodies unless those governments agree to hold harmless and defend the municipality if disputes should arise regarding the impact fees. This is especially important since, as pointed out earlier, the municipality itself usually serves only as a conduit for the payment of these fees. This can be accomplished through an intergovernmental agreement between the municipality and district

4. Municipal Fees and Charges

An annexation agreement can contain a provision that provides limitations on fee increases or freezes fees at their existing levels. During periods of low inflation, such agreements may make sense, but a municipality with little experience in administering large-scale developments certainly cannot safely freeze its fee structure. This issue is a subject of substantial negotiations in annexation agreements.

5. Freezing of Ordinances

Annexation agreements generally provide the developer with a guarantee that any changes to municipality's zoning ordinance will not affect the development during the annexation agreement. That is a sensible provision because otherwise a municipality could zone property R-4, which may allow 3-story buildings, only to change the ordinance the next year to allow only single-story buildings in that district. Municipalities also typically agree to freeze their subdivision ordinances, except to the extent that the community is required to make

changes by a superior governmental body such as the state legislature or the EPA.

Most annexation agreements take a different approach regarding other ordinances. Developers are often afraid that the municipality will pass some type of regulatory ordinance that may, effectively, only apply to their project. Therefore, changes in municipal ordinances to apply to land covered under an annexation agreement must usually be general in nature and apply to other similar projects. Another developer's concern, other than the lack of stability, is that the municipality will pass an ordinance which will make it impossible for a home to be built for the price already agreed to with a buyer. For that reason, many annexation agreements provide that ordinances relating to building codes will only take effect, for example, six months after their passage. This will give the developer some time to re-price products made more expensive by code changes. Agreements also frequently provide that building code changes cannot make the construction of previously approved homes impossible or impractical.

Health and safety codes unrelated to construction raise another issue. A municipality should be able to enact ordinances relating to health, safety or welfare and make them apply throughout the community. That is especially the case if there is a tragedy of some sort which might have been prevented if a municipal ordinance required some safety device, such as a smoke detector, or in a case of some recent interest, sprinklers. Negotiations often take place as to how ordinances of this nature will take effect.

E. LEGAL AND PROCEDURAL ISSUES

An annexation agreement is really just another form of a development agreement. As with development agreements, the developer wants to guarantee that land use regulations, conditions, and exactions do not change during the life of the proposed development. The municipality wants as many concessions and conditions as possible beyond what it could reasonably require through subdivision exactions and other conditions through its normal exercise of its police power.

The principal difference between the two types of agreement is the benefit/burden of annexing the property to the municipality. The developer will obtain a variety of services and protections as a part of the municipality's territorial jurisdiction, but in turn will be subject to that municipality's land use regulations and payment of property and other taxes. The municipality will obtain additional tax revenues along with a larger tax base for G.O. borrowing, but must in turn provide police, fire, and often utility services to the newly annexed territory.

In drafting and negotiating an annexation agreement, certain legal and procedural issues should be considered. The legal issues relate to the municipality's police power and its authority to enter into an annexation agreement. The procedural issues include the provision of notice, holding of a public hearing, approval and adoption of the agreement, amendment or cancellation of the agreement, and restrictions on conditions. All of these issues are addressed in the Illinois statute that authorizes annexation agreements.

1. LEGAL ISSUES

a. Bargaining Away of the Police Power

The issue of whether a municipality bargains away its police power by entering into an agreement under which it promises not to change its land use regulations during the life of the agreement is commonly called "bargaining away the police power." Municipalities may not "contract away the police power," particularly in the context of zoning decisions. In other words, a municipality cannot bind itself to not exercise its police powers. Today, courts have no problem supporting annexation agreements against any reserved powers/bargaining away the police power argument, particularly if supported by state legislation and if the agreements have a fixed termination date – and that date is not decades away. In Illinois, the annexation agreement statute expressly authorizes municipalities to enter into annexation agreements and restricts the term of any annexation agreement to 20 years.

b. Enabling Act

Illinois statutes authorize a municipality to enter into an annexation agreement with owners of property that is contiguous or becomes contiguous. *See* 65 ILCS 5/11-15.1-1. In drafting an annexation agreement, reference should be made to the municipality's authority to enter into the agreement. Typically, this can be noted in the recitals with a simple statement that the municipality has the authority to enter into the annexation agreement pursuant to state statute.

2. PROCEDURAL ISSUES

a. Approval and Adoption of the Agreement

In addition to these legal issues, there are also several procedural issues that should be considered in negotiating and drafting annexation contracts. First, an annexation agreement must be approved by either resolution or ordinance and must be passed by a vote of two-thirds of the corporate authorities then holding office.

b. Public Hearing

Before the corporate authorities can approve the annexation agreement, a public hearing must be held by the corporate authorities. Notice of that public hearing must be published at least 15 to 30 days in advance of the public hearing. It is recommended that the annexation agreement contain appropriate language confirming that the public hearing has been held.

c. Amendment of Cancellation

All parties to the original agreement must consent to amend or cancel the agreement. By statute, an amendment to an annexation agreement must follow the same procedures that were required for the original approval, including the holding of a public hearing and approval by a resolution or ordinance. Because property often changes hand after development, the annexation agreement might include language requiring that the owner provide notice to the municipality of

any transfer of the property so that the municipality knows the proper owner in the event of any potential amendment. In addition, a provision setting forth the procedures for amendment should be incorporated into the agreement so that there is no question later as to how the agreement should be amended.

d. When Municipality Changes the Land Development Rules

The overriding concern of the developer in negotiating an annexation agreement (besides the annexation itself) is typically the vesting of development rights or the freezing of land development regulations during the term of the agreement.

The Illinois annexation agreement statute sets forth the proper scope of these agreements that allows the agreement to "freeze" any subdivision, zoning, plan, building, or housing regulation for the term of the agreement. In addition, the statute allows the agreement to limit any increases in permit fees during the life of the agreement. The Illinois statute further provides that any action taken by the municipality during the period the agreement is in effect that if applied to the property subject of the agreement would be a breach of such agreement, would not apply to that property without an amendment to the agreement.

The Illinois courts that have dealt with municipality changes in land use regulations have had no problem finding them inapplicable to the property subject to the agreement, so long as the agreement itself is binding. For example, the Illinois Supreme Court has held that no zoning change is valid as applied to the property during the term of the annexation agreement, if that agreement contains a zoning freeze or limitation.

e. Limits on Conditions

Under existing law on development conditions and exactions, municipalities have broad authority to require developers to make reasonable contributions toward whatever services and other resources the government will need to provide as a result of an annexation. The question is, can a municipality go further than what is permitted under exactions law based on an argument that the annexation agreement is a voluntary agreement? Provided the agreement is truly voluntary, the answer is probably yes, particularly with respect to annexation agreements. That is because most courts agree that municipalities are under no obligation to annex territory, so if the municipality chooses to annex territory solely as a matter of discretion, it may impose conditions by way of an agreement as it sees fit.

In the case of annexation agreements, it is the developer's choice to annex and protect itself by attempting to freeze zoning or land use regulations. To the extent that the developer chooses to annex its property to the municipality and to negotiate for any regulatory freezes, arguably the annexation agreement does convey a "governmental benefit" on the developer. The municipality should, therefore, be free to negotiate its best terms in exchange for the benefit conferred.

F. EXPIRING ANNEXATION AGREEMENTS – FINDING A SOFT LANDING

During the past 20 years, many municipalities have entered into annexation agreements with enthusiastic and optimistic real estate developers. Most of these parcels of property, if not initially contiguous to the communities, became contiguous and were annexed. Much of this land has been fully developed and the conditions of the annexation agreements fulfilled. In some cases, however, the land has not been entirely developed, and in other situations, either the municipality or the developer may have breached promises made in the agreement. The continuing serious downturn in the building and development industry is likely to raise issues of annexation agreement breaches by developers not seen since the 1970s. What is the legal effect of a terminated or breached annexation agreement?

State law helps communities and developers achieve a soft landing at the conclusion of annexation agreements. The statutes provide that an annexation agreement is effective for 20 years from its date of execution or such shorter term as is included within the agreement. An annexation agreement can only be approved after a noticed public hearing held before the corporate authorities, and its approval by the passage of an ordinance or resolution which must be passed by a vote of at least two-thirds of the corporate authorities then holding office. Almost all annexation agreements contain a provision stating what the term of the agreement is to be. Initially, the annexation agreement statutes limited such agreements to a 5-year term. The statutes were amended to permit 10-year agreements and finally 20-year agreements. Although nothing requires either party to agree to 20-year agreements, this is the period usually chosen. Because well drafted annexation agreements are mutually beneficial to the parties, the longer the agreement remains in effect, the likelier it is that both parties will achieve their desired goals.

One of the principal provisions contained in most annexation agreements is the zoning designation which will apply to the property during the term of the agreement. In many instances, the developer agrees to annex the land to the municipality in order to gain permission to construct a residential, commercial or industrial development which is fully elaborated on in exhibits attached to the annexation agreement. In other annexation agreements, the zoning category to be granted to the property is agreed upon, but the actual site plan will be presented later and approved during the term of the agreement.

65 ILCS 5/11-15.1-2 provides that:

> After the effective term of any annexation agreement and unless otherwise provided for within the annexation agreement, or an amendment to the annexation agreement, the provisions of any ordinance relating to the zoning of the land that is provided for within the agreement or an amendment to the agreement, shall remain in effect unless modified in accordance with law.

Thus, the parties to the annexation agreement have the ability to provide that, at the termination of the agreement, any property remaining vacant will revert to some low density zoning category. In the absence of such a provision, any zoning category promised in the

annexation agreement and ultimately granted by ordinance remains in effect until the community, after a public hearing, typically before the Plan Commission, votes to change the zoning category or to remove or modify any special use. Of course, once the contractual promise contained within the annexation agreement for the retention of the existing zoning has expired, the municipality must be careful in rezoning the land to choose a category which is arguably the highest and best use of the land. Efforts by a community to precipitously "down-zone" land to a lower density, thereby rendering it much less valuable, is an invitation to litigation.

Once the annexation agreement has expired, the owner of the land can contest any new zoning category granted by the municipality through the use of a declaratory judgment lawsuit. Where the community has seriously abused its powers, a lawsuit can contain a count seeking damages under the Civil Rights Act although damages are rarely awarded. Communities desiring to make major changes in the applicable zoning certainly are entitled to take into consideration trends in the development of both the property subject to the annexation agreement and surrounding properties. Communities should be very cautious in seeking to modify the zoning category or land use plan for properties where the developer has installed, especially at its cost, the infrastructure to support the originally approved development plan. Sometimes, the neighbors of property which has been almost fully developed may seek to press the municipality to withdraw permission for the completion of a pre-approved plan, preferring the continuation of uncompensated open space. Governments that follow such requests may find this course of action to be quite expensive since the courts may conclude the community has effectively condemned the land and must pay for it.

What if, however, either the municipality or the developer has not fulfilled its obligations during the term of the agreement? One Illinois appellate court, in a decision which startled developers and municipalities alike, ruled that a lawsuit seeking to enforce the provisions of an annexation agreement had to be filed during the life of that agreement. *Bank of Waukegan v. Village of Vernon Hills*, 254 Ill.App.3d 24, (2nd Dist., 1993)[2]. The annexation agreement statute has now been amended to reverse that ruling and provide specific limitation periods for the enforcement of contract rights. 65 ILCS 5/11-15.1-4 provides that: "A lawsuit to enforce and compel performance of the agreement must be filed within the effective term of the agreement or within five years from the date the cause of action accrued, whichever time is later." Under this provision, both the municipality and the owner or developer must be fairly prompt in enforcing their rights under the annexation agreement.

If, for example, the developer has promised to build a road by the 10th year of a 20-year annexation agreement, the municipality must sue for damages or to compel the performance of that promise prior to the end of the annexation agreement. If a developer has agreed to donate a park by the end of the 18th year of an annexation agreement, the municipality can allow the annexation agreement to lapse without having filed suit, but a lawsuit must be filed within five years from the date that the breach occurred. For that reason, it is very important within

2 "Thus, although *Bank of Waukegan* does not spell out that it is addressing the situation in which an annexation agreement does not contain a survival provision, we believe that a proper reading of that decision in its historical context makes that inference clear. We therefore hold that *Bank of Waukegan* applies only to those circumstances and does not control where, as here, the annexation agreement contains a survival provision." *Forest Pres. Dist. of Du Page Cnty. v. First Nat. Bank of Franklin Park*, 401 Ill. App.3d 966 (2nd Dist. 2010).

annexation agreements to specify when actions must be taken or money must be paid. Nonetheless, under the language of the statute, if the developer is required to take some act during the life of the annexation agreement and fails to do so, the municipality can certainly argue that the date on which the cause of action accrued was the last day of the annexation agreement which passed without the performance having been accomplished. That date should 3begin the start of the five-year limitation period.

While 65 ILCS 5/11-15.1-2 provides that any zoning category granted to property in an annexation agreement continues in effect until changed in accordance with law, all other provisions within an annexation agreement terminate at its conclusion. There are several devices which a municipality may utilize in an effort to see to it that all promises are fulfilled or to extend the performance of promises beyond the statutorily established 20-year term. One method is simply to require that all promises made by the developer are accomplished within the 20-year period. This would include promises to donate land, pay impact fees to other governmental bodies and build needed infrastructure even if certain portions of the annexed land remain vacant. While municipalities are free to include such provisions in annexation agreements, it may be impractical and actually destructive to the eventual development of the land to require these pre-payments or pre-development activities.

Once land is no longer subject to an annexation agreement, it becomes fully subject to all of the ordinances of the municipality, and any promises by the community to waive the application of ordinances, or freeze or limit fee increases, will no longer apply to the property. To prepare for the termination of an agreement, the community should make sure that its ordinances, such as subdivision, impact fee requirements, building codes, and drainage and land movement ordinances are effectively in place.

Another device municipalities use to extend the promises made within an annexation agreement is to require that the owner of the land impose certain conditions and covenants of record. If the covenants provide that they cannot be modified without the permission of the municipality, then those terms and conditions should survive the expiration of the annexation agreement. Any covenant, however, must relate to development which has been achieved or to a changed zoning category now appropriate to the land. If the covenant does not relate to the new zoning, it will be unenforceable. For example, a covenant that a water park must close at 10:00 p.m. has no validity if the property is being developed as a shopping center.

Finally, home rule municipalities can enact an ordinance that allows annexation agreements to extend beyond the 20-year term. While it is generally thought that the power of both home rule and non-home rule communities to enter into annexation agreements are purely statutory, it can be strongly argued that a home rule community has the ability, by ordinance, to set forth its relationship with the owners of property within the boundaries of the municipality. Thus, once land is annexed to a home rule municipality, that community should be able to pass an ordinance giving its corporate authorities power to extend an annexation agreement for an additional term of years. If a home rule municipality were to seek to exercise this power it might lessen the chance of a challenge if the extension applied only to land which had not been fully developed within the initial 20-year term. For a non-home rule community, municipalities and

landowners may want to consider the disconnection and then immediate re-annexation of territory to start a new 20-year term of a perhaps re-negotiated agreement. If the land has not been annexed during the first 20 years, it can be argued that a new annexation agreement is also possible.

III. ECONOMIC ISSUES: HARD TIMES FOR REAL ESTATE DEVELOPERS – IMPACT ON MUNICIPALITIES

For almost 25 years, the occasional dips in the construction of new homes or multi-family units have been little more than seasonal aberrations. The price of homes continued to rise and low-cost mortgages have encouraged the "American Dream" of home ownership. Developers have entered into annexation agreements for 20-year terms assuming that their projects would be successfully completed in 4 or 5 years at the outside. Annexation agreements have required developers to pay increasing amounts of impact fees to a wide variety of governmental bodies. Even Illinois non-home rule communities began to take advantage of the fact that annexation agreements are not subject to the rather rigid provisions of State law and court interpretation that require impact fees to be "specifically and uniquely attributable" to the specific development. Some developers have also agreed to construct sewer, water, drainage, and road improvements much larger than those needed by their development, relying on recapture agreements that require future developers to pay their proportionate share of the costs of the oversized improvements. In this scenario, everything works so long as land values continued to increase and new developers were there to be "recaptured" from. In an extended economic downturn, however, none of these old rules apply.

In today's extreme situation, developers have walked away from their projects leaving half-completed homes, broken sewer systems, un-landscaped drainage basins, unfinished streets, and major intersections without traffic signals. In this situation, a municipality acquires a whole new set of potential friends and potential adversaries. Sometimes, it is hard to tell the friends from the adversaries. Any list of the players will likely include the following interests:

1) New voting citizens who have moved into homes on lots that have not been landscaped on streets that have not been finally paved, and who assume that their temporary certificates of occupancy issued by the municipality means that it is the community's responsibility to complete all of these improvements.

2) Banks and other financial institutions that have foreclosed on developers' loans and are unclear about how much additional money they will need to spend as the mortgagees in possession of the abandoned subdivision.

3) The trustee in bankruptcy and the bankruptcy judge, who sit above the entire process. If the bankruptcy goes far enough, a new developer, hopefully with more financial assets, may end up acquiring the land.

4) Finally, there is the financial institution or surety company that has issued an irrevocable letter of credit or a surety bond to guarantee the completion and payment of public, and in some cases, private improvements.

At each step of the process, the municipality needs to decide the extent to which it is obligated to place itself among this new cast of characters and whether it will function as a shallow or deep pocket or as an active or passive litigator.

A. RECOGNITION OF A PROBLEM

While this seems to be an obvious first step, often the municipality is not among the first players to know there is a problem. Most of us have been made aware of the recent downturn in the market for residential development because this issue is getting widespread news coverage for its impact on developers and home buyers and sellers. Not much has been reported, however, on the impact that this issue has on municipalities, except for the negative effect a downturn has on property tax revenues. Of course, the earlier the municipality can be made aware of a problem with a specific development, the better able it is to analyze its legal obligations and identify its rights and the role it wants to take in the process.

What should the municipality look for as signs that a particular development is in trouble and may not be completed as approved? One of the earliest signs of trouble is that the developer has missed deadlines for submission of required plans to the municipality or other governing bodies, or failed to revise plans in a timely fashion. This could be a sign that the developer is having financial difficulties and has either failed to pay its consultants or has not directed its consultants to do the work on the plans.

Another sign of trouble is an extended delay in completing all of the site improvements for a development. There is no immediate monetary reward to the developer for constructing and installing site improvements. As a result, the developer may focus only on those site improvements that are absolutely necessary for the development (such as utilities and roads) and delay putting in those site improvements that the developer thinks are not necessary to the residential development (such as landscaping, signage, lighting, and park improvements) in the hopes that the municipality may issue one or more building permits to allow the construction of homes, the sale of which will bring in needed cash. If a municipality is getting pressure from a developer to issue building permits in advance of completion of all of the site improvements, this could be the first sign of a cash flow issue with the developer.

If a developer is selling off portions of a larger development to other developers, that may be a sign that the developer is in financial trouble or has lost (or failed to get) financing from its lender. A municipality should pay careful attention to a developer's requests for approval of a transfer of all or a portion of the developer's obligations to complete a development, and if a municipality does approve a transfer of a developer's obligations for part or all of a particular development, it should ensure that completion of, and security for, the site improvements, both public and private, are adequately addressed in the transfer.

B. ANALYSIS OF MUNICIPALITY'S LEGAL OBLIGATIONS

At the first sign of trouble in a specific development or with a particular developer, a municipality should take steps to analyze its own legal obligations, if any, with respect to the

development. That should involve a careful review of all the approval documents (planned unit development or subdivision approval ordinance or annexation agreement) to determine who is responsible for completion of the on-site and off-site improvements for a particular development. In today's pay-your-own-way world of real estate development, it is almost always the developer, and not the municipality, that is obligated to construct all required improvements for a development. As a result, a well-drafted annexation agreement or planned unit development ordinance will clearly place all the obligations to construct and complete the development, including all public and private improvements, squarely on the developer. A good agreement or approval ordinance will also include a plan for phasing for completion of the development, require the developer to post adequate security with the municipality, and describe the penalties for failure to comply with the requirements of the ordinance or agreement.

If the agreement or approval ordinance is silent on some or all of these issues, the municipality's subdivision ordinance may be helpful in sorting out the issue of responsibility. A good subdivision ordinance will clearly state that it is the developer's sole financial responsibility to construct all the improvements required for the development, both on and off-site. The subdivision ordinance might also include requirements for security and penalties for non-compliance.

C. IDENTIFICATION OF MUNICIPALITY'S RIGHTS AND ROLE

Even if these documents place all responsibility on the developer to construct and complete a particular development, they may provide very little comfort when the developer fails or refuses to complete required improvements, particularly those improvements that have impact outside the developer's property. A much bigger problem occurs if, for example, a developer has not completed an important part of the municipality's utility system. Other problems occur where a utility facility, like a lift station, has been constructed but the developer gave up the ghost before transferring title to the land on which the lift station to the municipality sits. The same difficulty can also occur with municipal parks, or other sites agreed, often in an annexation agreement, to be transferred to another governmental body. There, the bankruptcy court may order the property to be transferred. That is especially the case if the subsequent purchaser of the land understands that, in order to gain the benefits of the pro-developer parts of the annexation agreement, the parts of that document not so favorable to the developer must be adhered to as well. If the land has already been platted with the words "hereby dedicated," it should constitute an irrevocable transfer of the land to the governmental body subject only to its final acceptance. Of course, all of these standard Illinois rules may have a somewhat perilous existence when questioned in a federal bankruptcy proceeding where the judge possesses extraordinary powers.

If a municipality is inclined to do so, it can use surplus funds to bring the public improvements up to an appropriate standard and perhaps even to make grants or loans to homeowners who find themselves the victim of the developers' bankruptcy. Such a municipality might become the subject of a heroic song, but rarely will a community use its funds in this way, especially when there may be other hemorrhaging problems within the corporate boundaries. The municipality should determine what its legal obligations actually amount to and what role it will take, if any, to address these problems. A municipality that has not accepted public improvements does not own them, although acceptance can be implied by the municipality, not

otherwise stating its position, which assumes maintenance responsibilities.

If a municipality wishes to maintain but not accept the improvements it needs to make its intent clear. Obviously, the municipality's first effort should be to call an irrevocable letter of credit or convince the subdivision surety company to finish the work and pay the contractor. Irrevocable letters of credit are generally secure unless the financial institution itself is experiencing difficulties. In some cases, the municipality has agreed to a prior reduction in the amount of the irrevocable letter of credit so that there may be insufficient money left to complete the work.

In the case of a surety bond, another problem may arise. For example, the surety company, which had no difficulty in taking the premium, may become slow in undertaking its contractual responsibility. The only way that surety companies historically stepped forward with vigor is where they believe that less money will need to be spent if the work is done quickly. Obviously, the first step is to read the language of the Surety Bond, although most standard bonds are non-reducible and continue in force until the governmental body has accepted the improvement. In that case, the municipality, if it wishes to plow snow from the streets for safety purposes, must make it clear that it is not accepting the improvement just by performing routine maintenance. If citizens very actively demand the public body to cause improvements to be completed, the municipality may wish to consider the creation of a special service area to provide the funds necessary to complete subdivision improvements where a developer has abandoned the project. Special assessments can also be used for this purpose.

If a subdivision or an entire planned unit development has a great amount of uncompleted facilities, the municipality needs to determine whether it is wise to force the completion of all improvements even if it could do so. That is because a subsequent developer of the land may wish to propose a significantly different site plan and the flexibility of that developer will be greatly diminished if the municipality imposes its full legal authority to cause the uncompleted parts of the previously approved and undeveloped subdivision to be entirely constructed. Communities may instead opt for temporary utility improvements such as an adequate, but eventually moveable, storm water detention area. Such an area needs to be established at a level to adequately drain the portions of the development already constructed, but leaving open, perhaps for another day 3 or 5 years in the future, a different design of the final construction.

The municipality needs to have some role or presence in the bankruptcy court because there may be obligations of the developer in a planned unit development, ordinance, an annexation agreement, or in the general ordinances of the municipality that the bankruptcy court will allow collectible assets to fund. Although the municipality may be an unsecured creditor regarding certain obligations, the court may recognize the need to use some available funds to secure the higher value of the land not yet developed or to satisfy ordinance violation claims.

The municipality needs to talk to all of the parties at interest before making a final decision on a specific project. The availability of assets, in particular situations, may dictate an entirely different course of action. A municipality must always remember that it was not a party to the contract between the homebuyer and the developer. It did not guarantee that the kitchen cabinets would completely fit. Nor does a municipality typically agree to construct or complete

the site improvements if the developer fails to do so. The problem of the municipality's intervention in these private disputes is present even in development taking place during good times. It is a process with much more pathos during bad times.

In addition, sometimes the municipality has the undesirable task of telling homeowners who were granted temporary certificates of occupancy that it has now become their responsibility, with the developer having defaulted, to complete the improperly-pitched and poured driveway and to install parkway trees. All of these obligations were initially that of the developer/builder. Most ordinances, however, pass on the obligation for completion of final subdivision improvements to the homeowner/voter. It is certainly human nature, but homeowners who demand perfection from their developers often seek to provide less than perfection when they become the party obligated to complete the work.

For those developments that envisioned placing maintenance responsibilities for the subdivision improvements in the hands of a homeowners association, the municipality may need to inform the homeowners association that it may have to step into the shoes of the developer earlier than expected. This assumes that the association has already been established, although often that is not the case until a substantial amount of the development is completed and a specific number of homes have been sold. Even if that threshold has not yet been reached, it may be desirable to have the association created earlier than expected, if possible, to ensure that the costs of completing the various improvements left undone by the developer are more fairly distributed throughout the development. This also has the added advantage of providing a more efficient administration of these matters and a centralized point of contact for the municipality.

In summary, an extended decline, or in some cases a complete halt, in the sale of houses creates massive problems for municipalities that enthusiastically approved modern planned unit developments and other residential developments. The situation is made even worse if foreclosures of houses result in abandoned or poorly-maintained private properties. There, the municipality will need to review, with great care, its property maintenance codes and the manner in which those codes can be enforced against both desperate families and absentee mortgagees. If the municipality has not enacted a property maintenance code, this may be the time to consider doing so. As to the problems associated with the developer itself, the municipality may need to dampen the expectations of homeowners for immediate subdivision completion while making sure that the health and safety of the community is not seriously degraded. This is a time where the elected and appointed officials of municipalities and their municipal attorneys may need to dust off the ancient files of the past and combine them with the ingenuity of the present in proceeding at a pace which does not add a bankrupt municipality to the bankruptcies of the residents and developers.

D. CONCLUSION

Municipalities and developers view the world differently. To some extent, their ability to meet at the annual 4th of July parade rather than in the circuit court depends upon really listening to the position of the other party stated in negotiations over the text of an annexation agreement. There are many opportunities for flexibility and tradeoffs. Careful listening on both sides will allow the parties to eventually reach a place where economic and political realities will not allow

further concessions and where fair agreements can be reached. For both home rule and non-home rule municipalities, annexation agreements can be used to make Asmart growth@ a reality. Ancel Glink attorneys have negotiated annexation agreements for many municipalities – and even a few developers – for more than forty years. We have also assisted numerous municipalities across the state navigate the annexation process and deferred against disconnect lawsuits. Please let us know if you enjoyed this pamphlet, and if we can help as a member of your annexation agreement negotiating team. You can learn more about the firm, download a number of other pamphlets dealing with local governmental issues such as zoning, planning, and economic development, and ask us questions at our website, www.ancelglink.com. If you are interested in more information about annexation agreements, you might consult Julie Tappendorf's book: Development by Agreement: A Tool Kit for Land Developers and Local Governments, (ABA Press, 2012) (Julie Tappendorf, David Callies and Cecily Talbert Barclay)

APPENDICES

A. CHECKLIST FOR DRAFTING ANNEXATION AGREEMENTS[4]

Agreements between property owners and municipalities regarding the use and development of land are an increasingly popular way to provide each party to the agreement certain guarantees about the development of a particular parcel of land. The property owner generally wishes to ensure that the municipality's zoning and land use regulations, conditions, and exactions remain fixed during the development of his property. The municipality typically seeks as many land development conditions as possible beyond what it could reasonably require through subdivision exactions, impact fees, and other conditions under the normal exercise of its regulatory authority or police power. Whether an annexation agreement will provide the security and control that both parties seek will depend, in part, on how well the approved draft of the agreement expresses the interests, intentions, and expectations of both parties. The following checklist describes the basic issues that an annexation agreement might address.

1. Definitions

All technical terms that will be used in the annexation agreement should be precisely defined in a "table" of definitions. Terms that have been defined in any applicable statute or ordinance should be defined the same way in the agreement.

2. Parties

All parties to the agreement should be named and their capacities to enter into the agreement clearly stated. In the case of developers/owners, their equitable or legal interests in the property should be stated. The current owner must be a party to the agreement. In the case of government entities, their authority to enter into development agreements should be recited.

3. Relationship of the Parties

The relationship between the parties to the agreement should be stated clearly. Typically, the statement will specify that the relationship is contractual and that the owner/developer is an independent contractor, and not an agent of the local government.

4. Property

The property that is the subject of the agreement should be clearly and thoroughly identified and described in the agreement.

5. Authorization

The Illinois annexation agreement statute that authorizes the agreement should be referenced. The ordinance or resolution that is adopted by the corporate authorities to approve

4 This checklist is adapted from the book Development by Agreement: A Tool Kit for Land Developers and Local Governments, Julie A. Tappendorf, David L. Callies, and Cecily Talbert Barclay (ABA Press, 2012).

the agreement should also be cited.

6. Intent of the Parties

The intent of the parties to be bound by the terms of the agreement should be clearly stated.

7. Recitation of Benefits and Burdens

The parties should recite the benefits each expects to gain from entering into the agreement, as well as the burdens each agrees to bear. Because the agreement will be treated as a contract, the consideration each party is to receive from the other should be stated clearly in order to ensure enforceability. It is especially important that the benefits to the municipality and community be expressed in terms that exhibit the agreement as consistent with (or as an exercise of) the police power.

8. Notice and Hearings

The date on which the public hearing was held should be noted, as well as all relevant findings resulting from the hearing. All other notice and hearing requirements should be recited.

9. Annexation of the Property

The agreement should include language setting forth the process for annexing the property to the municipality.

10. Applicable Land Use Regulations

The agreement should contain a statement of all land use regulations to which the development project will be subject. The agreement should specify which regulations will apply to the project regardless of future changes, or otherwise be affected by the agreement. The statement should make it clear that regulations not specifically identified as "frozen" will not be affected by the terms of the agreement, and will be subject to enforcement and change under the same criteria that would apply if there were no agreement.

11. Approval and Permit Requirements

The parties should specify all discretionary approvals and permits that will have to be obtained before the development can proceed beyond its various stages. Permits and approvals obtained prior to execution of the agreement should be specified. Any and all conditions that must be met before obtaining permits and approvals should be listed.

12. Zoning and Development of the Property

The agreement should specifically identify the permitted uses of the property, the density of use, and the bulk, yard, and height regulations for the property. The agreement should also

specify any zoning relief required for the development of the property, as well as all development approvals that the developer/owner intends to apply for and obtain prior to the development, including subdivision, zoning, and other approvals.

13. Dedications and Reservations

The agreement should provide, where appropriate, a statement of all reservations or dedications of land for public purposes that are required by law, ordinance, or any policy in effect at the time of entering into the agreement.

14. Utility Connections

All water and sewer service, either to be provided by the developer or by the local government, should be described in detail, together with schedules of construction completion (if not existing), cost allocation (between or among developers and government and later developers), and hookup or connection schedules.

15. Duration of the Agreement

The agreement should state a termination date and that date cannot be more than 20 years from the date of execution of the agreement. It should also specify project commencement and completion dates, either for the project on the whole, or for its various phases.

16. Amendments, Cancellation, or Termination

The agreement should recite the conditions and procedures required to amend, cancel, or terminate the agreement.

17. Periodic Review

The agreement should provide for periodic reviews of the project in order to determine compliance with the terms of the agreement. Procedures should be developed and specified for dealing with situations in which minor and major noncompliance is discovered.

18. Remedies

Remedies for breach on the part of either party should be provided. Specific remedies for specific breaches should be stated, if possible. The agreement should include a statement clarifying whether the remedies stated in the agreement are to be exclusive, or whether other statutory or common law remedies will also be available.

19. Enforcement

The agreement should specify that the agreement will be enforceable, unless lawfully terminated or canceled, by any party to the agreement or any party's successor in interest, notwithstanding any subsequent changes in any applicable law adopted by the municipality

entering into the agreement which alters or amends the laws, ordinances, resolutions, rules, or policies frozen by the agreement.

20. Hold Harmless Clause

The agreement should contain a provision that the property owner holds the municipality and its agents harmless from liability for damages, injury, or death that may arise from the direct or indirect operations of the owner, developer, contractors, and subcontractors for the project.

21. Insurance, Bonds

The agreement should specify the insurance coverage required by the developer/owner for the development project. Performance security requirements should be listed in detail. Applicable ordinances relating to bond or other security requirements should be cited.

22. Severability Clause

The agreement should include a clause specifying that the provisions of the agreement are severable, if the parties so agree. Any limitations on the severability of any particular clause or clauses should be clearly stated.

23. Merger Clause

A merger clause or other statement should specify that the terms of the agreement as stated in the written document are both a final and complete expression of the parties' intentions.

24. Statements of Incorporation by Reference

All documents related to the agreement or otherwise attached or appended to the agreement should be expressly stated to be incorporated into the agreement by reference. These might include lists of conditions, schedules of completion for public facilities, imposition of dedications, impact fees, and development plans and specifications.

25. Cooperation

The agreement should include a statement of the extent to which the municipality will cooperate with the owner in securing required permits from nonparty government agencies.

26. Subsidiary or Collateral Agreements

If the owner has obtained additional agreements relating to the development project from any nonparty agencies or persons (i.e., county, state or other governmental agency), those agreements and the parties should be specified.

B. FAQ'S ON ANNEXATION AND ANNEXATION AGREEMENTS

GENERAL ANNEXATION ISSUES

1. How many votes from a municipal board or council are necessary to annex land?

ANSWER: A majority of the corporate authorities. Note that a two-thirds (2/3) vote of the corporate authorities then holding office is required to approve an annexation agreement.

2. Can land be contiguous to a municipality if it is located across an intersection with only a "point-to-point" touching?

ANSWER: A parcel must be "contiguous" to a municipality in order to be annexed. Contiguity has been interpreted to mean that a parcel touches the municipality in a reasonably substantial manner. Whether or not a parcel is contiguous will depend on the facts of the particular situation but at least one Illinois court has held that a "point-to-point" touching or "cornering" is not sufficient to establish contiguity.

3. Can a property be annexed to a municipality if the point of contiguity is a road corridor extending out from the municipal boundary?

ANSWER: As noted above, contiguity is a fact-based issue and will depend on the particular circumstances or situation. In most circumstances, a "strip annexation" as described above would not be sufficient to establish contiguity.

4. Is land contiguous to a municipality if the parcel to be connected is 200 acres in size and the point of touching with the municipality is a 300-foot strip, a quarter-mile long, that extends out to a parcel of 200 acres?

ANSWER: Again, a determination of contiguity will depend on the specific circumstances. In a similar situation, an Illinois court upheld a municipality's annexation that relied on a 300 foot wide connecting strip extending 1300 feet beyond the municipality to establish contiguity.

ANNEXATION AGREEMENTS

5. What is the difference between an annexation agreement and a pre-annexation agreement?

ANSWER: Nothing. Although annexation agreements are sometime referred to as "pre-annexation agreements" because they must be entered into before the land is actually annexed, the statutory provisions regarding such an agreement refer to it as an "annexation agreement."

6. How many votes are necessary to authorize the execution of an annexation agreement?

ANSWER: An ordinance or resolution directing the execution of an annexation agreement and amendments to annexation agreements must be passed by a vote of two-thirds of the full corporate authorities, then holding office. This includes the council or board and the mayor. In a village with six trustees and a village president (mayor) the authorization of an annexation agreement requires at least five votes.

7. Can a mayor veto the action of the council or board approving an annexation agreement in those municipalities where the mayor has veto power?

ANSWER: Yes. Let us say, for example, that in a village an ordinance authorizing the execution of an annexation agreement is approved with five of the six trustees voting "yes" and one trustee voting "no." The ordinance has received the requisite five votes. Nonetheless, the mayor, who in this village has the power to veto all ordinances, can exercise a veto. A mayor's veto, however, can be overturned by the vote of two-thirds of the trustees, or 4 of the 6 trustee votes. Unless there is some change of view subsequent to the mayor's veto, the five trustees who previously approved the ordinance authorizing the execution of the annexation agreement, or at least 4 of them, are likely to act to override the mayor's veto. Since the statutes allow annexation agreements to be approved either by ordinance or resolution, an interesting technical question arises, since a mayor is only authorized, by statute, to veto certain resolutions. Since most annexation agreements involve the expenditure of some municipal money, it is likely that the mayor could exercise veto power over most resolutions on this issue. Someday, the courts may be asked to rule upon this interesting, technical issue.

8. How quickly can a municipality approve an annexation agreement?

ANSWER: Fairly quickly, but annexation agreements can only be approved after there has been a noticed public hearing before the corporate authorities with not less than 15 nor more than 30 days advanced notice. A longer process is necessary if the annexation agreement contains a promise of the zoning to be granted to the property. The presence of an ordinance or resolution authorizing the execution of an annexation agreement must also be referenced on the agenda of the meeting at which it is passed.

9. Can the text of an annexation agreement be modified after the public hearing?

ANSWER: Yes. The statute specifically allows changes to the annexation agreement after the public hearing and before approval of the agreement, although a question of proper notice might be raised if the text of the annexation agreement that was available before the public hearing did not contain some indication of the subjects added to the agreement after the public hearing. Items could likely be added to the annexation agreement after the public hearing, if they were raised and discussed

at the public hearing. Good records should be kept as to the state of the annexation agreement that was available to the public when the notice was published.

10. Must all annexation agreements be considered by a plan commission or zoning board of appeals?

ANSWER: No. Only those zoning ordinances which contain promises regarding zoning need be presented to the governmental body which holds public hearings on amendments, special use permits, or variances to zoning regulations. If the annexation agreement contains no contractual provision regarding zoning, the public hearing before the corporate authorities is the only one that is necessary.

11. Can or should the two typical public hearings be held together?

ANSWER: If done correctly, the two public hearings could be held the same evening or be consolidated. The only thing that the plan commission or zoning board of appeals should consider, however, are the aspects of the agreement that relate to zoning. The corporate authorities need to consider a much broader range of issues, such as economic incentives, if any, or the freezing of certain ordinance provisions. Because of a multiplicity of legal issues, your attorney should certainly be present at public hearings and especially joint public hearings.

12. How soon after the close of the public hearings can the corporate authorities act?

ANSWER: The corporate authorities can act immediately after the close of its own public hearing, although it probably needs to receive some recommendation from the public body which held the zoning hearing. That recommendation would normally be in writing, although it can be presented orally. The governmental body should make certain that a true and correct copy of the final version of the annexation agreement approved is in existence before authorizing its execution. Changes, however, can be made up until the last minute, and courts have allowed final versions of documents to be prepared after the meeting at which the agreement is approved so long as it is clear from the minutes of the meeting what changes and modifications the Board has finally agreed to.

13. Should annexation agreements be recorded?

ANSWER: Yes. The recording of an executed annexation agreement and amendments will serve as public notice to future owners, who are bound to the terms of the agreement.

14. Are all annexation agreements long documents?

ANSWER: No. If an annexation agreement is intended to cover only a single issue, such as the right of the owner to continue to operate a non-conforming business on the

site, the agreement may be quite short. Most annexation agreements are, however, fairly lengthy.

15. Can a municipality prepare a "standard" annexation agreement?

ANSWER: Yes. For ease in administration, many governmental bodies present applicants to annex with a "standard" or "form" annexation agreement. That agreement contains the general provisions which a governmental body expects from the owner of all annexed territory. Such an agreement will normally have a series of "special terms," which either modify or go beyond the terms contained within the "form" annexation agreement. Some annexation agreements can contain more than 100 pages.

16. Who should draft the annexation agreement?

ANSWER: Any municipality that frequently annexes land should consider the creation of a form annexation agreement. The negotiating position of any party in a contract is improved if the other party to the contract is forced to work off of the issues contained within your draft. Nonetheless, a municipality should not be afraid to consider a draft annexation agreement presented by a developer. While not ideal, some developers offer fair drafts so that beginning with the developer's draft may not disadvantage the annexing municipality. Since annexation agreements can last for up to 20 years, and the words contained within such agreements often have special meaning that may deviate from their common usage, attorneys should be involved in the creation of all annexation agreements. In some instances, they may merely review the work done by other knowledgeable non-lawyers, but the risk of executing a 20-year annexation agreement without review by your own lawyer presents most municipalities with unacceptable risks. Your in-house or consulting lawyer may, for example, be able to prepare a draft annexation agreement for the annexation of single lots to the community with simple "fill in the blanks." Where multiple lots with multiple potential residential or commercial units will be constructed upon the land, it is almost always a mistake to try to save the cost of a lawyer. Most municipalities require developers to pay for the municipality's legal and other consultant fees involved in the annexation agreement process. The developer's money should be paid over to the municipality and held in reserve while the process goes forward. When and if the money is paid out to the consultants, more money should be deposited with the municipality to guarantee that its expenses will be covered.

17. What consultants besides attorneys may be useful in negotiating annexation agreements?

ANSWER: Depending on the scope of the proposed development, the municipality may want to consult with attorneys, engineers, planners, economic consultants, traffic consultants and sometimes exhibit makers. With certain protections and safeguards, the developers should be required to advance funds to pay for the work required from these consultants. The developer must be assured that the fees

will be reasonable and that the consultants will promptly bill for their time so that any questions can be raised when the parties still remember whether the work accomplished was authorized and reasonably performed. Developers which are reasonably funded will not object to paying for the costs of such consultants. A municipality that gains prompt and beneficial advice is much better able to make timely decisions. Developers are likely to lose more money through delays in a project rather than being required to fulfill reasonable developer obligations.

18. Who should constitute a municipal negotiating team for an annexation agreement?

ANSWER: The situation in every municipality is different. Clearly, the chief negotiator must be someone who the municipality trusts and who the developer will respect. In some municipalities, the municipal attorney, highly experienced in the process, serves as a negotiator. For those communities with an administrative staff, a village administrator or manager would likely be on the negotiating team and may even be the chief spokesperson. In larger municipalities, the manager or administrator may simply receive written reports about the progress of the negotiations and the chief representative from the staff may be the director of planning or an in-house planner. At various times during the negotiating process, a police chief may join the negotiations as well as representatives from other governmental bodies, such as a fire protection district or representatives from schools.

Generally, elected officials stay away from these negotiations, but in some communities, either the mayor or a trustee or alderman, knowledgeable in these areas, can join the process. The elected officials certainly will need to play an ultimate role in the process, since a two-thirds vote of the corporate authorities is necessary to authorize the execution by the municipality of the annexation agreement. For the developer's side, it is not unusual for the developer to be joined by a lawyer, a planner and an engineer. For many parts of an annexation agreement, the municipal in-house or general consulting engineer needs to be close to the negotiations. Issues relating to utility services, traffic patterns and drainage issues require the assistance of a knowledge and independent engineering expert. Annexation agreement negotiations, principally conducted by staff and consultants, can take place in a closed session environment, except when a majority of a quorum of the governmental body becomes involved in the negotiations.

19. Can annexation agreements be discussed in closed session?

ANSWER: Generally not. Very few governmental contracts can be discussed in closed session. The principal exceptions are collective bargaining agreements with unions and contracts with municipal officers. Even with regard to consultant contracts, only the contract with a municipal attorney can be discussed, but not acted upon, in closed session. Certain portions of annexation agreements can be discussed in closed session if, for example, they involve the acquisition or sale of

municipal land. Occasionally, parts of annexation agreements involve litigation and can be discussed in closed session. A distinction must be made between discussing these specific items in closed session versus discussing philosophical issues such as density or approved housing types during any meeting of the government where a majority of a quorum of one of the public bodies is present. Your chief negotiator may need to get his or her marching orders for precedence established in previous annexation agreements, or through individual conversations or e-mail responses with board or council members.

20. What happens if negotiations for an annexation agreement aren't successful?

ANSWER: In Illinois, municipalities have the absolute right to determine whether they wish to annex land to the municipality or to reject annexation. There has never been a case where an owner of property has been able to force his way into a municipality that did not wish to annex the land. If the owner of a parcel of land does not wish to annex to the municipality, given the right conditions, there are statutory procedures by which a municipality can force annex the property, or work with other unincorporated property owners, who wish to annex, to bring the reluctant property owner into the municipality as part of a court process. Land that is involuntarily brought into a municipality does not receive the benefits that might be achieved in an annexation agreement, but neither is its owner subject to some of the restrictions which are often agreed to in annexation agreements.

21. What takes place at a public hearing on an annexation agreement?

ANSWER: Members of the public are able to look at a draft of the annexation agreement, which should be on file during the notice period. Typically, the proponent of the annexation agreement describes the general terms and conditions contained within the document. Members of the public are then invited to ask questions about the annexation agreement and to offer their suggestions to the corporate authorities as to whether it should be passed, rejected or amended. If there are many individuals who wish to speak for or against the annexation, reasonable procedural rules can be established or put in place if they had not been previously established. Annexation agreements have been invalidated when the governmental body did not fairly allow members of the public to state their views and even ask questions to other witnesses. With complicated or contentious annexation agreements, the proponents or objectors may offer expert witnesses to support their positions. State law now allows members of the public to address the board or council at the meeting where the passage of an ordinance authorizing the execution of the annexation agreement is before the corporate authorities.

22. Should the term of annexation agreements extend longer than the anticipated build-out of the development?

ANSWER: By statute, annexation agreements can have a term of up to 20 years. Most annexation agreements now follow that maximum standard. If, for some reason,

there are provisions in the annexation agreement that should not give the developer particular rights for the full term of the agreement, that provision or the entire agreement can be drafted to apply to a shorter term. If the agreement is relatively even-handed, it probably is fairest for both parties to have the benefits of the agreement for a full 20-year term. A 20-year annexation agreement is especially helpful in relationship to a large or difficult to develop parcel of land, or during periods when the economic cycle, with its ups and downs, may slow down building for a number of years.

23. Must a municipality hold a public hearing for a developer who submits a proposed annexation agreement?

ANSWER: Probably not. Since a municipality has an absolute right to annex or not annex land, it has the same right to choose to negotiate or to instead ignore a proffered annexation agreement.

24. Can a municipality agree to allow a developer to connect to its utility system at half the price offered to other residents of the community or without any charge?

ANSWER: Under state law, the scope of annexation agreements can be quite broad and can include the amendment to any Village ordinance, subject to following required procedures for zoning amendments. This would include a waiver of all or a portion of required utility connection or tap-on fees. Of course, a municipality should consider that once it waives fees for one developer, subsequent developers are likely to ask for similar treatment.

25. Can a municipality agree to something in an annexation agreement that is contrary to its own ordinances?

ANSWER: Yes, subject to certain limitations. Although state statute does allow a municipality to modify or waive its ordinances in an annexation agreement, if a particular modification would normally require a public hearing (such as a zoning ordinance amendment), then the municipality must hold the required public hearing prior to the execution of the agreement and follow other required procedures, including enacting ordinances, to effect the zoning amendment.

26. Can a municipality agree to give a liquor license or a restaurant license to a developer in an annexation agreement?

ANSWER: No. At least one court decision held that a municipality cannot agree to take action on a liquor license in an annexation agreement. There are, however, other methods of achieving the same result.

27. Can a municipality prevent an owner from seeking to disconnect land in an annexation agreement?

ANSWER: Yes, at least for the term of the annexation agreement. If the municipality wants to ensure that the property stays in the municipality for the term of the agreement, it should incorporate language prohibiting the owner or successor owner to take any action in furtherance of disconnection of the property from the municipality. Even if an agreement does not contain express language prohibiting disconnection, at least one Illinois decision held that a municipality may use an annexation agreement to defend against a disconnection action.

28. Can an annexation agreement contain promises regarding land owned by the developer, which is already within the boundaries of the municipality?

ANSWER: Although there is no case on the subject, we believe that as part of an annexation agreement, both a developer and a municipality can make agreements as to how a portion of other land associated with the land to be annexed can be jointly developed.

29. Can an annexation agreement prevent a developer from seeking rezoning for 20 years?

ANSWER: Yes. The annexation agreement statute specifically provides that an agreement may include language that would continue in effect any zoning (or other) ordinance for the term of the agreement.

30. Can an annexation agreement allow changes in the agreement to take place by motion rather than by annexation agreement amendment?

ANSWER: No. The annexation agreement statute requires that all amendments to an annexation agreement that has been approved by the corporate authorities must follow the same procedure as required for the original approval, including notice, a public hearing, and approval of the agreement by resolution or ordinance adopted by two-thirds vote of the corporate authorities. If an agreement, however, specifically states that, for example, fees can be increased by the municipality each five years by cost-of-living amounts, that modification can be implemented without amending the agreement.

31. Can an annexation agreement be amended more than once?

ANSWER: Yes. There is no limit on the number of times an annexation agreement can be amended, so long as the proper procedures for any amendment are followed.

32. Does an annexation agreement automatically bind future owners of the property?

ANSWER: Yes, state statute provides that the agreement is binding on successor owners of the property subject to the agreement.

33. Does an annexation agreement, signed only by a developer, bind the owner of the property if the deal falls through?

ANSWER: An annexation agreement must be signed by the owners of the property that is subject to the annexation agreement. If the agreement is only signed by a developer, it is not likely a valid annexation agreement under state statute unless the developer becomes a subsequent owner.

34. If there is more than one owner of a property, must they all sign the annexation agreement?

ANSWER: State statute provides that a municipality is authorized to enter into an annexation agreement with "one or more" of the owners of property to be annexed. Although the statute is not clear whether *all* owners must sign the annexation agreement, best practices would be to require that all current owners be signatories to the agreement to avoid a later challenge to the agreement by an owner who did not sign the agreement. Of course, if the agreement involved more than one parcel of land and the owner who signed the agreement is or was the owner of the land at question, the annexation agreement would be valid as to that issue.

35. Must land that is the subject of an annexation agreement be contiguous to the municipality?

ANSWER: No, state statute expressly provides that lack of contiguity to the municipality does not affect the validity of the agreement. It must be contiguous before it is actually annexed.

36. Is land subject to an annexation agreement covered by the ordinances of the municipality before it is annexed?

ANSWER: It depends. State statute provides that property that is subject to an annexation agreement is subject to the ordinances, control, and jurisdiction of the annexing municipality as if the property were within the corporate limits. However, this particular statutory provision does not apply to property within certain counties in the state, including Cook County and the "collar counties."

37. Can a Municipality enter into an annexation agreement for land located miles away from the municipal border?

ANSWER: Yes, so long as the property is not incorporated within another municipality. The statute does not require that the property be contiguous or even near the municipality. State law, however, involves the county in decisions whether land more than 1-1/2 miles from the municipal boundaries will be subject to municipal ordinances prior to annexation.

38. Can a municipality enter into an annexation agreement with land that is contiguous to another municipality?

ANSWER: Yes, so long as the property is not incorporated within another municipality's boundaries.

39. When must a breach in an annexation agreement be enforced?

ANSWER: A lawsuit to enforce and compel performance of an annexation agreement must be filed within the effective term of the agreement or within 5 years from the date of the breach, whichever is later.

40. Can elected officials be individually liable for financial damages upon a breach of an annexation agreement?

ANSWER: Generally, a breach by the municipality of an agreement will result in a suit only against the community. Annexation agreements should contain a provision preventing suits for damages against individual council or board members. If the board or council members conspire against a developer, a suit against individuals may result.

41. If a developer threatens to sue over an annexation agreement, can this be discussed in a closed session?

ANSWER: Yes, a municipality may discuss pending or probable or imminent litigation matters in executive session.

42. Can a new board or council ignore an annexation agreement entered into by a prior board or council?

ANSWER: No. The annexation agreement statute provides that an annexation agreement is binding on successor municipal authorities of the municipality.

43. Do the zoning approvals expire at the end of the term of the annexation agreement?

ANSWER: No. The annexation agreement statute was amended in the last ten years to provide that the zoning approval ordinances remain in effect even when the annexation agreement expires.

44. Does a Village's involvement with property owners seeking annexation through a 7-1-2 petition invalidate the petition on the grounds that the Village is illegally circumventing 7-1-2(a) (prohibiting municipalities from seeking to annex more than 10 acres without express owner consent)?

ANSWER: No. *The court in In re Village of Bull Valley*, 392 Ill.App.3d 577 (2nd Dist., 2009) found a petition to annex valid despite an objection under 7-1-3 that the Village "initiated and controlled" the annexation proceedings by preparing, encouraging, facilitating, and filing the petition, thus running afoul of the statutory restriction in 7-1-2(a). The court found that the landowners' voluntary execution of the petition

satisfied the statute's intent that property cannot be annexed against the will of its inhabitants.

45. Is a landowner's failure to develop property pursuant to an annexation agreement sufficient for a municipality's equitable estoppel defense against a landowner's petition to disconnect?

ANSWER: No. A recent Illinois court held that a landowner's failure to develop property, absent more, did not satisfy the necessary element of false representation; the court refused to conclude that the petitioner never intended to develop the land simply because he ultimately did not develop the land. *Falcon Funding, LLC v. City of Elgin*, 399 Ill.App.3d 142 (2nd Dist., 2010).

C. POINT-COUNTERPOINT – COMPETING THOUGHTS ON ANNEXATION

There is no doubt that the interests of municipalities and developers can be in competition concerning annexation and annexation agreements. Obviously, there are some municipalities desiring to expand their boundaries as quickly as possible. Likewise, there are some developers who believe that they can only develop their land to its maximum utility by developing in the county. These parties are moving on such different trajectories that they will never reach agreement. In such face-offs, if one or the other party believes that they have acquired the upper hand, litigation will normally ensue over whether the municipality has received or encouraged the filing of enough petitions in court to bring about a partially involuntary annexation, or whether a developer whose land has been annexed can disconnect because the community refuses to provide any services. In the normal course of events, however, municipalities are usually somewhat cautious about annexing property, and developers see benefits to building within a municipality. Beyond that point of agreement, there are usually a vast number of issues on which the goals and needs of the parties are different. Should the developer strive for the highest density possible, even if it is unlikely that this amount of density will ever be used? Should the municipality refuse to allow developers to annex unless they are prepared to help solve long-standing sanitary sewer, potable water, drainage or transportation problems not of their making?

Set out below is a point-counterpoint treatment of 27 issues where the general reactions of both municipalities and developers are stated. Their general view of the stated issue is often quite different. In a few cases, the responses have been merged. The goal of this exercise is to somehow bring the positions closer together and turn soliloquies into dialogue, because one-sided agreements often backfire. A developer who has fooled a municipality into agreeing to a completely one-sided annexation agreement, may face an adversarial situation each time it seeks to enforce the unfair position. Similarly, a municipality that has forced a developer into assuming unrealistic expenses in order to gain developmental approval may end up spending substantial public funds to sort out the problems of a failed project. Like most relationships that are expected to have a life of up to 20 years, some moderation in the position of both parties will result in a smoother long-term result. We hope that this point-counterpoint will raise and at least partially answer some of the most frequently asked questions about the terms and conditions of modern

annexation agreements.

For your convenience in locating issues that may be of particular interest to your municipality, the questions have been organized into the following general categories:

- General Annexation Issues – Issues 1-4
- Zoning and Development – Issues 5-9
- Subdivision Improvements – Issues 10-14
- Developer Incentives vs. Municipal Benefits – Issues 15-20
- Process – Issues 21-25
- Remedies – Issues 26 and 27

GENERAL ANNEXATION ISSUES

ISSUE 1

Municipality:

Q: We have the absolute right to refuse annexation.

A: This is the municipal perception regarding annexations in Illinois and it is almost entirely correct. While some states have gone to the model of a state annexation board or commission which governs whether or not land will be annexed to a municipality, in Illinois, that decision is left up to the corporate authorities of each city and village. If a municipality does not want to add land to its corporate boundaries, it need not do so. With the possible exception of refusing to annex land on the basis of race or any other protected class a municipality in Illinois retains the absolute right to deny annexation to any property owner. Although a property owner has the right to petition a municipality to annex land, the community is probably free to ignore the petition and certainly has no obligation to engage in a good-faith effort to enter into an annexation agreement.

Developer:

Q: We can develop in the county or in another municipality.

A: The developer is correct. The owner of land or a prospective developer who is denied annexation to a municipality does possess the right to develop that property in the county. Municipalities within a mile-and-a-half of unincorporated property seeking zoning approvals have the ability, by legislative action, to require the county board to approve zoning changes by an extraordinary majority vote. 55 ILCS 5/5-12007. If the land is within 1 ½ miles of municipal borders, and the municipality has adopted a comprehensive plan, the community's subdivision code will prevail, but zoning is within the complete power of the county. A municipality can, however, refuse to provide any services to the owner which has chosen to develop in the county or in a nearby community. Many

counties are also cool to the proposals of developers who seek special permission to develop in areas close to the borders of established municipalities.

ISSUE 2

Municipality:

Q: How can we affect development if the property isn't contiguous?

A: A municipality cannot annex land unless it is contiguous to it; but contiguity is not required for the municipality to enter into an annexation agreement. In such an agreement, the owner of the property promises to annex to the municipality when the land becomes contiguous. In the meanwhile, however, the municipality is for able to provide utility services to the property in return for certain promises, such as a limitation on density. In that way, a property owner may be induced to develop the land at a lower density than would be allowed under county zoning in return for the municipality agreeing to permit the developer to construct, usually at its cost, a utility line to the closest existing municipal service. In some counties, the entry into an annexation agreement extends the jurisdiction of municipal ordinances into the land covered by the annexation agreement. Such ordinances can cover building codes and even result in sales taxes going to the municipality.

Developer:

Q: Will they sell me utilities and vary their subdivision code if I can't immediately annex?

A: Many municipalities, anxious to affect the way in which property in the vicinity of its community develops, are perfectly willing to serve outlying parcels with sewer or water in return for the extension of these lines and certain promises and restrictions regarding development prior to the time when the property is contiguous to the municipality and can be annexed. Such annexation agreements generally also provide for more extensive terms and conditions at the time that the property literally comes under the jurisdiction of the municipality at the time of actual annexation. In many counties in the state, by statute, a municipality can extend the jurisdiction of its ordinances to properties which are the subject of an annexation agreement, but are not yet contiguous to the municipality. However, in Cook County, the collar counties, and one populous downstate county, such a provision is not in effect, and a municipality that enters into an annexation agreement involving non-contiguous land cannot make that property "subject to the ordinances, control, and jurisdiction of the annexing municipality." 65 ILCS 5/11-15.1-2.1. While the jurisdiction of the county still prevails in such cases, the property owner can agree, in an annexation agreement, to develop the property in accordance with stricter municipal standards as a matter of a contractual obligation.

State statute establishes yet another rule for Boone, DeKalb, Grundy, Kankakee, Kendall, La Salle, Ogle and Winnebago counties. In these counties, if property subject to an annexation agreement is more than 1 ½ miles from the municipal border, the land is governed by the ordinances of the municipality unless the county board retains jurisdiction by the affirmative vote of two-thirds of its members.

ISSUE 3

Municipality:

Q: Can we annex without the owner's consent if we wholly surround their properties or can we manage to block the annexation by other municipalities through extending corridors?

A: There are several methods open to municipalities under which land can be annexed to the community without the owner's consent. The most prominent of these provisions is 65 ILCS 5/7-1-13, under which a municipality may annex an unincorporated territory containing 60 acres or less if it is wholly surrounded by the annexing municipality, one or more municipalities or under several other stated conditions. Of more practical use and interest to municipalities are the provisions found at 65 ILCS 5/7-1-2, which allows land to be annexed to a municipality as a result of a court order upon the filing of a written petition signed by a majority of the owners of record of the territory and also by a majority of the electors, if any, residing in the territory. In that case, the land can be annexed to the municipality after a court hearing and with the consent of the municipality. In many instances, such a petition is prepared and encouraged by the municipality and is aided by prior annexation agreements for the non-contiguous land which required the property owner to join the petition when the requisite number of other potential applicants can be procured. The municipality itself can file a petition asking that certain unincorporated territory contiguous to its boundaries be annexed, but in that case, property owners on the perimeter can have their properties withdrawn from the territory and the land will only be annexed to the community after a successful referendum in the area proposed to be annexed. There are also restrictions on the size of the parcel of land which can be incorporated into a municipally-filed petition. Municipalities that have a strong desire to expand their boundaries need to very carefully evaluate the way in which these alternative annexation methods are to be implemented. Where a number of communities are competing for the annexation of land between their boundaries, much strategizing will usually take place. Courts have allowed annexations and disconnections over the objections of municipalities that have attempted to block annexation or disconnection through the use of what are in effect, unnatural spite strips.

Developer:

Q: Should I sign an annexation agreement before my choices of annexation are limited?

A: It is often great fun to try to play one community off against another if the circumstances permit. This is especially true since the law favors voluntary annexations and a developer has a brief window of opportunity to annex to one municipality even after another has begun an involuntary effort to annex. A careful study of the law regarding the priority of ordinances, petitions and court filings is invaluable. As well, a careful analysis of which community would be the best choice for annexation, and fair negotiations with that community, will be rewarded.

ISSUE 4

Municipality:

Q: Is it time for a boundary agreement?

A: One way to prevent disputes between municipalities as to which community will annex particular parcels of land is for the potentially competing municipalities to enter into a boundary agreement. 65 ILCS 5/11-12-9 allows municipalities, which have passed official plans, to enter into an agreement for a jurisdictional boundary line which can extend for up to 20 years and can be renewed. At the moment, the agreement can only extend a line 1½ miles from the municipal territory. In addition to the creation of such a line, that agreement can, subject to constitutional attacks by the property owner, establish the nature of the zoning and development which each municipality will grant to the land on its side of the line and can include provisions for revenue sharing. There is now a statutory requirement for a published public notice and a requirement that certified copies of such an agreement must be filed in the Recorder's Office. A municipality that has entered into boundary agreements with all of its neighbors certainly has a better opportunity to plan for the public improvements necessary to serve the area of its ultimate corporate boundaries. Absent boundary agreements, adjacent municipalities often duplicate their utilities, each hoping that the intervening land will annex to their community rather than to their neighbor.

Developer:

Q: Should I try to discourage a boundary agreement?

A: Yes, boundary agreements rarely benefit developers and its municipal contracting parties would appear to be statutorily exempt from any claims seeking damages for an excessive limitation on competition or an antitrust charge. 65 ILCS 5/1-1-10. This type of claim has been tried and was ultimately unsuccessful.

ISSUE 5

Municipality:

Q: How important is our comprehensive plan?

A: Any municipality interested in annexing substantial acreage to the community under annexation agreements must have a clear sense of how this new area of the community should be developed and how it will interact with the existing municipality. In most communities, the goal should be that the existing citizens of the municipality should not be asked to pay for expansions in municipal services. One exception to that rule would be a situation where there is some overriding need for the community to reach a size where it can provide services with economies of scale. Municipalities need to be conversant with and sensitive to the needs of the market place, but it is usually a mistake to permit the market place to totally dictate municipal needs and goals.

Developer:

Q: How can I predict the needs of the market place over 20 years?

A: Some large tracts of land, depending upon economic conditions, may take a long time to fully develop. Annexation agreements can be entered into for a period of up to 20 years. Since no developer can predict the needs of the market place over that period of time, annexation agreements involving large parcels of land need to accord the developer some flexibility.That is especially the case in times of economic uncertainty. Among the methods to achieve this are the establishment of total maximum density for industrial, commercial and residential portions of the parcel as well as some flexibility as to how that density can be moved around the site. Some annexation agreements for large parcels of land require at least preliminary site plans for a certain portion of the site but permit "concept plans" for other portions, merely indicating the anticipated use to be contained on those parcels. Where the developer needs flexibility, the municipality should require that all final site plans comply with "good planning standards" and be consistent with the use of parcels already approved or constructed.

ISSUE 6

Municipality:

Q: Is our zoning code up to the developer's needs?

A: In many cases, a municipality may receive a proposal for a land development that cannot be easily accommodated under its current zoning ordinance. Examples of this are proposed regional shopping centers, special industrial uses or residential

configurations not usually found within the municipality. In such cases, a municipality should seriously consider whether it can craft an add-on provision to its existing zoning ordinance which will permit the new use at one of a few locations rather than re-arranging its existing and properly functioning zoning code. The developer should be prepared to finance the cost of the preparation of the new section of the code which, for example, might only apply "to industrial parks containing more than 200 acres," which will only cover this development. If, however, the existing zoning code has not really worked well, then a total revision of all of the problem sections should be undertaken, perhaps at joint expense.

Developer:

Q: Do I try to clarify ambiguities in the zoning code that may be interpreted in my favor?

A: This is always an extremely tricky question. Sometimes, a developer or its consultants may review municipal ordinances and procedures and conclude that some controversial, but unstated desire of the developer could be accommodated under the existing code's language without raising the issue. If that is the case, then, at least, language would need to be added to the annexation agreement freezing the municipality's codes and at least hinting at the interpretation which the developer will later claim as the unambiguous interpretation. Depending upon the general philosophical position of the developer and his or her appetite for litigation, it is probably a better approach to state explicitly the interpretation of the existing codes which the developer needs and understands to be in effect. Remember that a municipality can agree in an annexation agreement, after proper hearings, to amend existing ordinances and to continue the ordinances in effect as amended.

ISSUE 7

Municipality:

Q: The developer is asking for too much density.

A: For many residential uses, the principal debate is over density. If the land is being annexed to the municipality, then the community has extraordinary flexibility as to whether it will permit a development with higher than favored density to be annexed to the municipality. In determining density, the municipality needs to consider surrounding uses, available infrastructure, and future goals. Sometimes a municipality may only be willing to annex land if its development will reduce the traditional residential density in the municipality, while in other instances, the municipality may want to annex land with a higher residential density so that housing opportunities will be available to senior citizens and the children of

current residents. For large-scale developments which may not be completed for a few years, market conditions may ultimately force or encourage a developer to reduce the maximum density allowed under the annexation agreements. All parties must recognize that density is a matter where bargaining is to be expected.

Developer:

Q: I better start high on density so I can compromise.

A: By and large, developers have only one thing to sell: the number of square feet in an industrial and commercial setting and the number of units in a residential setting. Most developers' initial proposals provide maximum numbers in these categories, because it is extremely unlikely that most governmental units will permit any amendments to an annexation agreement, particularly to add residential density, even if the market encourages it. In addition, engineering or other considerations not immediately apparent may require a developer to reduce building size or numbers simply to comply with municipal, county or federal regulations. Finally, most developers expect that a municipality will demand some reduction in the initial density proposed.

For all of those reasons, a community should be prepared to bargain over density unless it makes a clear statement to the developer that it does not enjoy bargaining and requests a Abottom line proposal.@ In most instances, the developer will come to a municipality to negotiate an annexation agreement after having obtained an option to purchase the property rather than having purchased it outright. Under those circumstances, a municipality will generally know if it has made an unreasonable demand upon the developer to unrealistically reduce the proposed density. The developer will simply allow the option to expire. It is, however, also to the advantage of a municipality not to annex property under an annexation agreement which contains an unrealistically low density count. Unless the agreement is entirely Aair-tight@ in all of its terms and conditions, a developer who has agreed to an unrealistically low density count will attempt to cut corners in some other manner to try to make the project profitable. Perhaps it is ultimately as bad for a municipality to have an overly-dense development as it is to have one which did not, for example, have enough units to sell to fully complete all of the promised subdivision improvements and recreational facilities. There are ways to deal with those problems, but the better method is to allow the developer a realistic opportunity to make a profit.

ISSUE 8

Municipality:

Q: Will the development really look like these pretty pictures?

A: Too often annexation agreements and the zoning ordinances which implement them do not require the developers to actually construct units which resemble the pretty pictures that have been shown to the Plan Commission and to the corporate authorities. It is simply assumed that the developers will fulfill their promise. Unfortunately, such a presumption may be misplaced. One of the main benefits of an annexation agreement, from the standpoint of a municipality, is to significantly pin down the developer on the nature of the planned project. There are methods to give the developer flexibility, but the municipality should strive, to the greatest extent possible, to have each of the developers' significant promises spelled out in words and images and attached to the annexation agreement as binding exhibits. Among the ways to grant flexibility is to say that the development will take place "substantially in accordance with," rather than the phrase which is sometimes necessary, "in strict accordance with." A careful negotiation of items relating to the exact nature of the development is one of the key elements in almost every annexation agreement.

Developer:

Q: How do I switch from quadriplexes to zero lot line to detached residential?

A: Over the past 25 years, residential developers have come to believe many things which turned out to be untrue. Among these are that there would no longer be a market for detached, single-family residential units and that only quadriplexes and zero lot line units would satisfy developers' needs. Many readers will never have seen or heard about a quadriplex or a zero lot line unit, as the market for single-family detached housing came back and did away with these once popular types of housing. Perhaps they will return. While developers require flexibility, municipalities truly feel a strong need to know what will be developed on a large residential parcel. Developers can make efforts to gain flexibility within a particular market type, but sometimes historical shifts in the housing market may require developers to seek an amendment to the annexation agreement rather than being accorded total discretion to switch building types. There is generally no opposition to approving lower density or higher quality units. The reverse transformation is more difficult. Since annexation agreements are generally for the full 20-year term, and require the two-thirds vote of the corporate authorities after a public hearing to amend, developers do incur a not-easily extinguishable risk if market conditions change. Perhaps this is one other reason why a developer should assist the municipality by offering full cooperation in order to get an annexation agreement drafted and actuated within a short period of time. This will allow the developer to offer units, while the product being sold is still favored by the market place.

ISSUE 9

Municipality:

Q: How do I prevent all these houses from looking alike?

A: Either in an annexation agreement, or in the general ordinances of the community, municipalities should adopt anti-monotony regulations. Aside from some very special communities or neighborhoods which are designed for uniformity most municipalities desire some architectural diversity. Frequently, annexation agreements contain the elevation drawings for a number of residential housing types, all of which are approved in advance without further review. The developer must, however, vary the housing types which occur within a fixed area. Even housing types which are quite similar can be designed to have a different appearance through changes in color, external materials and window, door, garage and roof-line design details.

Developer:

Q: Do I really have to argue about the color coordination of the garbage receptacles?

A: Being a developer in a number of communities quickly leads to the realization that no two municipalities are exactly alike. Some municipalities have little or no interest in the design of the buildings to be built, while other communities wish to micro-manage the development down to the last detail. From a legal standpoint, Illinois courts have allowed communities to use aesthetic considerations as one of the factors in determining whether request for zoning should be approved. Since municipalities have a complete right to determine whether land shall be annexed to the community, a developer who deals with a municipality where aesthetics count must make peace with this view. Where a municipality has an architectural review commission, a prospective developer would do well to review the minutes and decisions of that body. The developer can then suggest language to be placed within the annexation agreement which meets the spirit of that body's reason for being, while countering potential adverse aspects such as delays in decision making. A developer can even ask for some change in the standard to be used by an architectural review commission so that, for example, the approval of that Commission will not be "unreasonably refused."

SUBDIVISION IMPROVEMENTS

ISSUE 10

Municipality:

Q: Will the existing roads accept the new traffic?

A: The four major planning considerations in annexation are: density, utilities, drainage, and access. For a municipality to accept a large new subdivision, it

needs to evaluate whether the existing road network will become clogged by the new traffic and how roads within the new development will lead into future roads. In an annexation agreement, a municipality can bargain over the size and nature of roadways, traffic signals, and off-site improvements. The municipality must understand that no single developer can solve all of the municipality's current problems in utility, drainage or access matters, but these issues cannot be ignored, because a new development will only add to the existing problem. Municipalities are free to negotiate over the type of new roads to be constructed and contributions to existing roadway improvements. Some annexation agreements require developers to give money to the community to be added to that of other developers so that commonly needed roadway improvements can eventually be made. Where dollars are paid into a fund for off-site improvements, they should only be used for those purposes and the developer can and should insist on the fulfillment of that promise in the annexation agreement.

Municipalities should carefully lay out roadway needs in a subdivision code. If that code is adhered to, developers will not face one of their key concerns which is being treated differently than other developers. Improvements to roadways which go beyond those required by ordinance can be the subject of a recapture agreement, wherein future users of an oversized roadway can, upon connection, be required to repay the developer who constructed more than its percentage share of the roadway improvements.

Developer:

Q: Do I have to contribute to resurfacing the Appian Way?

A: If a governmental body is unreasonable regarding the roadway improvements it feels are necessary it may effectively cripple redevelopment on the fringes of the community. There is little that a developer can do about this other than to seek to develop in the county. Ironically, non-home rule counties have the specific statutory right to require the payment of funds for transportation impact fees. Non-home rule municipalities do not have this specific statutory right, although they can require these through an annexation agreement. Home rule municipalities can legislate regarding these matters as long as the required payments will comply with constitutionally-mandated standards. If a municipality has been deficient in requiring previous developers to construct adequate road networks, it can make it a condition of an annexation agreement that the new user of the road network help to fund future off-site expansion. The phrase "off-site" as used here refers to peripheral or nearby roads which will need to be expanded when the developers "on-site" improvements and new residents or occupants are in place.

ISSUE 11

Municipality:

Q: We want guarantees of subdivision improvements.

A: One of the worst things that can happen to a municipality is to approve a development and allow the construction of homes, industrial or commercial buildings when the developer is unable or unwilling to produce the public improvements which will service the development or certain private elements of the project which are for general use. The problem becomes worse if the developer has sold units to unsuspecting third-parties who demand to move into to residential, commercial or industrial units which they have paid for, when important elements of the development are not finished. A common example would be a developer who goes into bankruptcy or loses interest in completing the final surface on roadways, the required drainage pond, sidewalks or parking lots for guests in a residential development, or for customers in a commercial development. For that reason, State law permits a municipality to condition the approval of plats of subdivision on the posting by the owner or developer of a guarantee that certain improvements will be constructed. Normally, the interests of the municipality are in seeking guarantees for improvements which will be dedicated or transferred by bill of sale to the municipality. Among such subdivision improvements are streets, sanitary and storm sewers, drainage ponds, sidewalks and traffic signals. Many municipalities require developers to post security to guarantee the construction and completion of elements of the construction which will remain privately owned but reflect promises made to potential purchasers. Among these facilities are common recreational facilities, off-site drainage facilities and, in the case of commercial or industrial developments, parking lots and pre-treatment plants for industrial users with Astrong@ sewage effluent.

Municipalities used to have the choice of demanding cash, surety bond or an irrevocable letter of credit. There are positive and negative things to say about each of these forms of security. However, under current law (65 ILCS 5/11-39-3), developers, under some circumstances, have been given the statutory right to determine which of these and possibly other forms of security will be posted. The legislature pre-empted the power of home rule communities to require a particular form of security, and seem to limit the power of communities to take another path in an annexation agreement. In recent years, municipalities have favored irrevocable letters of credit over surety bonds because of the ease of gaining the funds which will then allow the municipality to itself complete the unfinished subdivision improvements. Generally, irrevocable letters of credit are reduced in amount as the project is completed. The one significant advantage of surety bonds is that typically they remain a commitment from the surety company to pay, if necessary, the full amount of the bond even after part of the work has been successfully performed. If a developer seeks to compel only one kind of security, a careful reading of the statute may allow the municipality to argue for another

result. Note that the structure of the statute is all built on alternatives to a cash security. If the municipality doesn't require a cash security, it probably can continue to dictate the type of other security required, such as an irrevocable letter of credit.

Developer:

Q: We want to give surety bonds or corporate guarantees.

A: Developers may begin to press, under 65 ILCS 5/11-39-3, to be permitted to give only corporate guarantees that the work will be completed. Such guarantees were accepted by unsophisticated municipalities, which found quickly enough that the guarantees were of no use if the company went bankrupt. Even at its broadest reading, the limitations contained within the new statute appear to give the developer only a choice among reasonable alternatives.

ISSUE 12

Municipality:

Q: We won't accept subdivisions piecemeal.

A: An annexation agreement should contain some provision regarding the manner in which subdivision improvements will be accepted. Once subdivision improvements, such as streets, sidewalks, streetlights, and drainage facilities are accepted by the municipality, it will be the obligation of the municipality, typically after a one-year period covered by a subdivision bond, to begin to maintain the improvements. That includes both regular maintenance and the correction of discovered deficiencies. Usually, a municipality has adequate time to learn of any problems with these systems because a request to turn over subdivision improvements does not usually come until the final road surface is completed and parkway landscaping has been accomplished. By this time, the municipality will have some opportunity to determine whether subdivision improvements are properly functioning. Thereafter, a commercially-purchased subdivision surety bond, typically equal to the amount of 5% or 10% of the total improvement costs, will be presented to the municipality and it is the obligation of the bonding company in the absence of the developer to undertake corrections due to a failure of material or installation.

Developers generally want to have municipalities accept subdivision improvements on a piecemeal basis as parts of a subdivision are completed. Municipalities normally will only accept ownership and maintenance responsibility for the subdivision improvements when an entire subdivision is done. In some cases, the systems in a subdivision are dependent upon certain common elements contained within a nearby, and yet unplatted, subdivision being improved by the same subdivider. In those cases, the municipality may ask that no

subdivision improvements will be accepted until all aspects of an improvement have been completed. If a municipality, for example, accepts streets too early in a subdivision's history, it may be obligated to make repairs caused by truck traffic flowing through to another subdivision being improved by this developer. All of these items should be negotiated in the annexation agreement.

Developer:

Q: When will they give me a final subdivision checklist?

A: The developer's complaint in this dialogue is that the municipality unduly delays the acceptance of a subdivision even when all of the improvements are completed. No sooner does the subdivider complete all the improvements on a subdivision punchlist, than the municipality will furnish the developer with an updated punchlist. The developer is justified in seeking to include within an annexation agreement specific language dealing with the way in which subdivision checklists or building inspection will be carried out and the period of time after completion when a municipality will accept the subdivision. Delay of the acceptance of a subdivision by a municipality can result in a developer being required to pay, for example, for snow plowing on soon to be public roads for yet another year.

ISSUE 13

Municipality:

Q: Private roads are great, but...

A: One of the great temptations in the development of residential subdivisions is a developer who wishes to build a Aquaint@ subdivision which will generally result in a proposal that the roads be narrower than regular municipal streets. Not coincidentally, this Aquaintness@ often results in the developer being able to build more units because less land is set aside for dedicated rights-of-way. In addition, a developer may ask to build the streets to a somewhat lesser standard than is contained within the municipal subdivision regulations because the area will allegedly receive less traffic. This is a temptation which the municipality should not fall under. In some rare instances, the nature of a particular development may permit narrower streets but they should be built to the same construction standards as are all municipal streets. Even if the streetscape is smaller, the municipality may wish to insist on standard dedicated rights-or-way in the event that the narrower streets, often with no chance for on-street parking, will present future problems. The developer may propose that the streets should be both substandard and private with the full responsibility of street maintenance being the responsibility of a homeowners association. This is perhaps the strongest temptation of all, but in practice, these homeowners become voters who often conclude, after a short period of years, that they would be delighted to turn over

the undersized and underbuilt streets to the municipality for Aafter the fact@ incorporation into the municipality's street system. These residents will argue that they are paying taxes to the community just like other residents and that the municipality should take over their private roads. At that point, the municipality may well feel that it was short-sighted in accepting the developer's proposal.

Developer:

Q: Private roads may give me later worries.

A: In many cases, a developer who has built private, under-designed roads which are the responsibility of the homeowners association succeeds in achieving an economic advantage over other developers in the municipality who must construct public roads. Sometimes, however, this is a short-term victory. In the early years of a development, the homeowners association is often controlled by the developer who still retains ownership of many of the lots. At some point, however, the actual residents begin to control the association. At that time, they may observe that the private roadways are costing them a good deal of money to maintain. Not infrequently, this will result in a lawsuit against the developer contending that the road improvements are substandard. Another alternative is for the homeowners association to demand that the municipality accept dedication of these private roads because of the substantial tax revenues that are coming to it as a result of the development. In any case, developers and municipalities should both be cautious when a proposal is made so that any of the subdivision improvements will be maintained by private parties.

ISSUE 14

Municipality:

Q: How do we satisfy the schools, parks and fire protection districts on impact fees?

A: Much has been written about impact fees. The Illinois Subdivision Code gives governmental bodies the right to require land or cash in lieu of land for school and park purposes. From this bare bones statutory authority, both home rule and non-home rule municipalities normally seek, in annexation agreements, levels of contribution for school, parks, libraries, fire protection districts, other governments, and sometimes for the municipality itself. Some of these impact fees will be valid if agreed to in a voluntary annexation agreement but would exceed the power of the municipality if required in ordinance for land already within the community.

There are really two ideas supporting the concept of impact fees. First, new development should pay its own way. Under those circumstances, a residential development that will bring new citizens into the community who require more

park land and improved school facilities should be prepared to pay for them. The legal dilemma is whether they should pay for those facilities all at once through impact fees, or whether the burden is more properly placed on new residents' future taxes? In general, that is the way in which existing residents have paid for these facilities. In addition, there is often a period of time where residents may move into an area, but they have not yet paid any taxes to the governments whose facilities they will be using. Impact fees are really an effort to partially fill the tax gap and to give the governmental units at least some revenue to begin providing services to the new residents.

Although a number of lawsuits have been filed by developers who have paid impact fees and then claimed that they were unconstitutional Atakings,@ no case has yet upset impact fees included within an annexation agreement. Nonetheless, municipalities must be careful to not permit other governmental bodies to dictate excessive impact fees which will either drive developers away or cause them to be unwilling to agree to make certain other improvements, desired by the municipality, such as extensive drainage facilities because they are being forced into making excessive and economically unsustainable payments to other governmental bodies. Luckily, national organizations have prepared charts that indicate the number of children likely to be generated from a development for the purpose of computing school impact fees, along with standards for park, fire fighting and library costs. Annexation agreements sometimes use these standards which sometimes require that a recomputation be made once the actual number of residents in a development can be determined.

Governmental bodies usually do not require impact fees from industrial or commercial property since these developments tend to be purely tax generators. However, an industrial development may, for example, only make sense in a municipality if a sizeable contribution, like an impact fee, is made to a fire protection district for special equipment needed to battle fires in the new type of construction being permitted.

Developer:

Q: Are these impact fees reasonable, or do I care so long as they are competitive?

A: There are no two ways around it, developers hate impact fees. It is their belief that governments should be able to plan for new development and borrow for needed new construction with the tax dollars of future residents paying back the loans over a 20 or 30 year period. Developers forget the fact that the highest percentage of governmental costs relates to personnel expenses which must be paid as soon as the new students present themselves at the schools or younger students arrive at the park district. A sophisticated developer will get over his or her distaste for impact fees so long as the impact fees are clearly stated and equally applied to all developers in the community. This presents something of a problem for non-home

rule communities, though, since it may be difficult to sustain the validity of impact fees for land already within the community at the same level that are agreed to within annexation agreements. At least for land being annexed to the municipality, the local government should strive for fairness and uniformity. Under those circumstances, the developer will simply convert his or her negative energy into positive statements in promotional brochures for the development which explains how careful provisions have been made so that schools, parks and other facilities will be immediately available to the new residents of this wonderful project.

DEVELOPER INCENTIVES AND MUNICIPAL BENEFITS

ISSUE 15

Municipality:

Q: How will we know if we are "giving away the store?"

A: You may not know unless your community has some experience with bringing in land under annexation agreements. This is an area where experienced legal, planning and engineering consultants can be of great assistance to you. One way of judging whether a developer is presenting a fair proposal is the extent to which he or she is willing to fund an independent review of the proposal by consultants chosen by the municipality and approved and paid for by the developer.

Developer:

Q: How can I get them to make up their minds before I retire?

A: Developers generally find that it is a worse problem dealing with municipalities that cannot make up their minds than it is to deal with a municipality which is a sophisticated and hard bargainer. If you confront the latter, you may have to give up more but at least you will be able to catch rather than miss a good commercial or housing market. You should be willing to respond quickly to realistic demands and to agree to pay for independent consultants the community wants to use. The consultants can be asked for an estimate of their services and can be required to bill in a clear and prompt manner. In general, developers who have "put one over" on a municipality in an annexation agreement may find that the municipality has other ways of restoring an equilibrium.

ISSUE 16

Municipality:

Q: We need to solve yesterday's drainage mistakes and prepare for tomorrow's new

standards.

A: What is a municipality to do if prior uncontrolled or under-regulated developments have given the existing residential areas within the community serious drainage problems? Sometimes land not yet developed has the potential for retaining more water than even modern regulations would require. These expanded detention or retention basins may hold the water in newly developed areas and allow it to be released only when the existing municipal facilities in built-up areas can accept the flow. Annexation agreements, if reasonable requirements are sought, can help to solve a municipality's prior mistakes. Municipalities should, however, be prepared to offer concessions of one sort or another to the developer who is being asked to be the drainage hero for the community. Sometimes that developer can be granted increased densities.

If the land in question is to be developed with commercial or industrial property, the community can offer real estate or sales tax rebates or if the improvement will benefit the entire community, tax increment financing. If there are other developments planned in the future which will benefit from the oversized improvements, the municipality can ask the developer to construct them and impose on the new developments a recapture formula, including the payment of interest, which will allow the constructor of the facilities to recover a very large percentage of the land and construction costs. The municipality must appreciate the fact, however, that no single developer can or should be asked to single-handedly solve a problem which the community has brought upon itself.

Developer:

Q: I need to establish all fixed drainage costs to pay the right price for the land.

A: One thing that every developer seeks to do in an annexation agreement is to make those concessions expressed in the agreement the last ones which will be necessary. The developer buys land, borrows money, and lets contracts for specialized construction with the assumption that certain costs, such as those associated with utilities, road and drainage improvements can be reasonably established, at least for the initial part of the development. Obviously, the developer has no control over recession, inflationary pressures, market forces, or changes brought about by unexpected geological conditions. The developer should, however, be able to be assured that subdivision standards will not become stricter or more costly based on changes in municipal ordinances, with one exception.

Municipalities are permitted in annexation agreements to freeze their current ordinances in place for some or all of the term of the annexation agreement. Developers must recognize, however, that a municipality may become subject to standards imposed upon it by superior governmental bodies, such as counties or

the State. For that reason, municipalities should be prepared to freeze the effect of subdivision code changes, except those brought about by the mandate of a superior body. Some municipalities are prepared to freeze subdivision standards for the maximum 20-year term of an annexation agreement. Other communities may desire to have some flexibility with regard to those general ordinances applicable throughout the community after a 5 or 10-year period.

ISSUE 17

Municipality:

Q: Should we freeze non-subdivision or health and safety ordinances?

A: A proposed annexation agreement submitted by a developer to a municipality will frequently ask that all municipal ordinances regulating the property should be frozen both as regard to content and permit fees for the life of the annexation agreement. Certainly, a developer has a great interest in seeing to it that no special fees are applicable to the property that are not applicable elsewhere in the municipality, or that more beneficial terms will not be granted to any other competing development. On the other hand, it might not be a good policy and may be political suicide for a municipality to freeze all of its ordinances for 20 years for what might be a fairly large neighborhood of the community. That is especially the case if some lives are lost due to a defect in construction methods, which the municipality cannot correct by new ordinance language in the very development where the tragedy took place. In negotiations, the parties can generally work out a reasonable compromise, which stresses uniformity.

Developer:

Q: How can I sell houses at a fixed cost if I may have to install a new Aordinance required extra@ like sprinkler systems?

A: The new governmental interest in requiring sprinklers to be installed in residential housing is a perfect example of the tension caused by conflicting interests which must be resolved in an annexation agreement. If a developer specifically insists that the ordinances of the municipality may not be amended to require residential sprinkling systems, then that language should be placed within the annexation agreement itself. Otherwise, a compromise which many municipalities and developers ultimately reach is to say that the municipality may only impose new ordinances which are uniformly applied in similar situations, specifically relate to life and safety rather than aesthetic considerations, and give the developer some period of time between six months and one year to build the costs of the new system into housing units which have already been sold based upon the ordinances then in force.

ISSUE 18

Municipality:

Q: It's the Developer's responsibility to fund site costs.

A: There was a time in Illinois when municipalities built roads, utility systems and other improvements to create the public infrastructure to encourage development. Currently, with extremely rare exceptions, such as improvements in brownfield areas to revitalize under-used industrial zones in large cities, almost all public infrastructure is constructed by private developers. Developers and their lenders understand that it is the responsibility of the developer to construct such improvements, and it is within the annexation agreement that the commitment to do so should be made. One other exception to this general rule is the growing insistence of large, sales tax-generating commercial developers or major companies bringing large-scale industrial plants to new areas to seek economic incentives, such as industrial revenue bonds, special service areas and tax increment financing. Aside from that last category, the actual cost of the development is generally borne by the developer even if the government can provide certain tax incentives, such as tax exempt bonds. Most residential developers will simply be asked to pay for all costs associated with both on-site and off-site development, and, in some cases, to oversize public improvements subject to recapturing costs for excess capacity when future development takes place. 65 ILCS 5/9-5-1.

Developer:

Q: It's SSA, TIF, STR, SOS.

A: From the standpoint of a sophisticated developer, governments can often be induced to provide some incentives, when the developer has a choice of coming to one community or choosing another location for a business. Usually, residential developers will not be offered such incentives. Where, however, a municipality is very anxious to have a particular area of the community developed and a large sewage treatment plant or water processing plant built, certain concessions can be offered to the developer who is prepared to pioneer in this region. Where a developer proposes a project which will be a generator of large amounts of sales tax, or a significant use of natural gas or electricity so that it will produce utility taxes, municipalities are generally prepared to consider SSAs (Special Service Areas), TIFs (Tax Increment Financing districts) STRs (Sales Tax Rebate) and other financial incentives. For more information about these and other financing methods, download the Economic Development Toolbox For Municipal Officials at our firm's website, www.ancelglink.com. Municipalities and developers must be aware, however, of the "SOS" movement, which is often an acronym used by citizens who see such incentive programs as drains on their possible tax revenue.

"Save Our Suburbs" is a frequent name chosen by such groups, which will often come to meetings to denounce the development and especially public subsidies, which they often claim, in the case of a TIF District, are principally at the expense of the public school system.

ISSUE 19

Municipality:

Q: We need the ability to issue stop orders.

A: Municipalities will encounter an enormous range of skills and philosophies among developers. Some developers are entirely prepared to work with a municipality and its inspectors, while others look for opportunities to move forward as quickly as possible, being prepared to face the "consequences later." Unless those consequences are very severe, the municipal inspectors will always find themselves outfoxed and out-maneuvered by the developer, which will be to the detriment of the individuals who use or occupy the buildings being constructed. The best weapon a municipality has, with a developer/builder who will not follow the municipality's ordinances, is the imposition of stop orders. Courts have upheld the validity of those orders so long as they are brief in duration and the municipality moves to enforce its position in court. Municipalities should resist provisions in annexation agreements which seek to take the ability to impose stop orders away from the community. It's too easy for a developer to place foundations too close to lot lines, close up walls before there can be an inspection of the plumbing or electrical systems, or to allow people to move into buildings without occupancy permits. When the municipality has the power to issue stop orders and does so, builders will suddenly begin paying attention to the ordinances of the municipality. Ideally, stop orders will affect not only the single project being abused, but all permits and the property or at least those in the affected phase.

Developer:

Q: Stop orders are a slow death.

A: It is absolutely true that a municipality that uses stop orders in an improper manner can add extraordinary costs to the construction and development process. For that reason, developers are entitled to seek provisions in annexation agreements that require municipalities to take certain actions when they issue stop orders. annexation agreements often provide that municipalities must give some short reasonable notice before imposing a stop order, unless to do otherwise would constitute a danger to health or safety. Developers should ask municipalities to make every effort to include all defects which have been observed in a building in a stop order, or in a final punch list needed to gain an

occupancy permit so that once the corrections are made, the stop order can be lifted or the occupancy permit granted.

ISSUE 20

Municipality and Developer (Same for both):

Q: Municipality's reasonable out-of-pocket expenses should be paid.

A: Unless a municipality has large cash reserves and wishes to free its consultants from any taint of influence from the developer it should seek the developer's payment of the community's reasonable out-of-pocket and perhaps administrative expenses. Serious developers should understand that a municipality may not always trust the developer's experts who are put forward to support the validity and magnificence of the project. If there are traffic problems, municipalities may need to hire an independent traffic expert. If the developer is seeking tax increment financing, sales tax rebate or industrial revenue bonds, the municipality will want the advice of bond counsel and financial consultants. The community almost always will need to seek the review of an independent engineer and with larger projects, a real estate planner. Accountants, arborists, experts on drainage and treatment plant expansions are only a few of the experts a modern municipality will need to talk to before it becomes comfortable entering into an annexation agreement. Sometimes, the developer and the municipality can agree in advance on a single engineering or traffic consultant trusted by both parties who could offer an independent opinion.

In all cases, both parties will need lawyers to assist them in understanding the reports of the experts and in negotiating the terms of the annexation agreement. Serious developers should be prepared to pay for the costs of all of these expert parties. In addition, under the philosophy that development should pay for itself, a municipality may wish to adopt a fee schedule which requires the developer to pay both out-of-pocket expenses, and reasonable administrative costs. In return for cash advances for expenses, or the posting of an irrevocable letter of credit, the municipality should be prepared to provide a reasonable schedule for the developer, during which a final decision will be reached. The creation of a schedule can certainly take into consideration a reasonable number of anticipated public hearings and time for the corporate authorities to reach a final decision.

PROCESS

ISSUE 21

Municipality:

Q: Home rule powers will give us added authority.

A: This is probably both an overstatement and true. It is an overstatement because even home rule units do not appear to gain any added extraterritorial power as a result of achieving home rule. The language of the Illinois constitution and cases interpreting its Article VII which principally relates to home rule lead us to a belief that even a home rule unit needs statutory authority to operate outside of its corporate boundaries. Statutes relating to local governments have always given them some extraterritorial power such as the ability to deal with the source of health dangers, drainage problems and to regulate subdivisions near their borders. On the other hand, efforts by a home rule municipality to involuntarily annex 70-acre parcels rather than the 60-acres established by statute or to seek to license taverns within three miles of the municipal borders would likely be met with judicial invalidation. On the other hand, within established statutory powers a home rule community could probably contract for an annexation agreement in excess of the 20 years permitted by statute, especially if the land had been annexed during this period of time and the owner and the municipality both agreed to the extension. Home rule communities may also be able to enter into Adevelopment agreements@ with the owners of land already within the municipality which may contain provisions similar to those in annexation agreements.

Developer:

Q: We like you as a non-home rule municipality.

A: Developers may reasonably fear that a community which achieves home rule powers may be able to increase the costs of development or add additional regulatory hurdles. A well-drafted annexation agreement can easily limit the power of a municipality, even if it achieves home rule powers, to impose regulations, taxes and licensing requirements that make development difficult. While the developer will seek to gain the addition of such provisions, even with regard to a non-home rule community, the 20-year binding effect of an annexation agreement would likely limit the power of the non-home rule community even if it achieves home rule powers sometime during the annexation agreement term.

ISSUE 22

Municipality:

Q: We need an open, transparent process.

A: Municipalities should seek an open, transparent process. The annexation of some parcels of land are quite controversial. This is especially the case if the proposed development deviates in some way from the nearby existing property. Obviously, a commercial project, a solid waste transfer station, or a 16-story tower, if

proposed to be built next to existing single-family residential uses are likely to encourage the residential neighbors and others to attend municipal meetings. Where controversy is anticipated, it should be welcomed and accommodated. Too often, technical defects upset annexations where a municipality sought to short-circuit or short-change the hearing process. It will usually not harm the ability of a developer to ultimately move forward if the hearing process is extended several weeks or even several months until all reasonable questions can be answered, and the suspicion of the public that the matter is being railroaded through the governmental body can be dissipated.

It may not always be easy to achieve, but it is almost always in the government's best interest to see to it that the hearings before advisory bodies and the corporate authorities are well publicized and the process is transparent. The courts will normally uphold even controversial decisions by governmental bodies when they can observe that the exercise of discretion by the municipality took place in an open forum. The courts will accept reasonable limitations on the time, manner and place of public comment but efforts to truncate or obscure the process are often met with lawsuits and further delays. Most issues relating to annexation agreements cannot be discussed in closed session.

Developer:

Q: We need a quick process with a guaranteed conclusion date.

A: Impatient people probably shouldn't be developers. Where, as in the case of an annexation agreement, a municipality has the absolute right to deny or grant the application, a developer must exercise the reasonable discretion that goes with a not-perfect bargaining position. Nonetheless, developers should not be shy about their actual needs. If one item a developer needs is a specific answer by a particular date, that requirement should be made clear early in the presentation process. The developer should be prepared to explain why the answer is needed within the suggested time frame. One example may be the expiration of a contract to purchase the land, which still might be owned by someone else.

In a proper case, a governmental body can, if it wishes to, move very quickly to complete the entire public hearing process relating to the annexation of land. Although there are some technical problems with doing so, municipalities can hold joint public hearings of advisory and non-advisory governmental bodies. On the other hand, municipalities will be quite angry if a quick time schedule is demanded by a developer who then does not fulfill that part of the schedule which is within the developer's control. The developer must also be careful not to demand a schedule from the municipality where the anger of an opposition group is not given some reasonable time to dissipate. Where the developer's requests are unreasonable, the corporate authorities may choose to favor their angry citizens over a developer, no matter how charming.

ISSUE 23

Municipality:

Q. We need a developer who respects and understands political realities.

A: A developer who wants a community to annex land with a 30% increase in density over what it has ever permitted before, or one who seeks a heavy sales tax rebate from a community that has just brought a similar developer to town without such a rebate is probably not a good partner for a 20-year annexation agreement. Sophisticated and successful developers will make every reasonable effort to determine whether their developmental goals can be accommodated within a particular community. A failure to do so places the developer at risk for a huge waste of time and a substantial waste of money. A developer, for example, needs to determine, based on past history, whether a mayor or village president has adequate board support to fulfill his or her promises, or at least offer reasonable predictions.

It is important to remember that an annexation agreement requires the vote of two-thirds of the corporate authorities, and in some communities, that number of elected officials haven't agreed upon anything for a long time. The mere fact that a mayor promises a result does not mean that aldermen or trustees who request information should be ignored. On the other hand, a politically savvy developer may well conclude that there is one noisy trustee or alderman who requires a great deal of information and has no chance at all in being on the winning side of an annexation dispute. Under those circumstances, the developer probably needs to be polite, but perhaps not completely forthcoming. Remember, however, that sometimes, that lone alderman or trustee may eventually be the mayor who might cast a deciding vote on a petition to amend the annexation agreement. Once a developer has a good sense of where the power lies in a community, and its tolerance for negotiations, the developer simply needs to bring into play all the skills that have been honed over the years in deals involving the acquisition of land and the employment of consultants and contractors. No two municipalities are the same, and wise developers understand that generally one cannot litigate their way into a municipality, and that learning the political realities of a community is crucial to success.

Developer:

Q: We need a municipality that isn't swayed by a small number of citizens with parochial concerns or unrealistic impact fee demands.

A: Illinois law has given the elected officials of a municipality the right to decide how large a community will become and how it will be developed. Mayors,

aldermen and trustees quickly learn to appreciate the fact that they cannot satisfy all of the citizens all of the time. They also must learn that subsidiary governmental bodies, such as school districts, park districts, fire protection districts and others have a legitimate right to seek impact fees but not the right to establish municipal policy by demanding that the community provide unrealistically high impact fee payments. Often, undeveloped land is located adjacent to land which has already been developed. In some cases, residential neighbors have gotten use to looking out over farmers' fields or wooded areas. They have come to treat the adjacent undeveloped land as a adjunct to their own properties or as conveniently-placed open space. Unfortunately, these nearby residents do not own the adjacent land and they, and other citizens, may be unwilling to support public funding necessary to acquire the land for true open-space uses. Instead, they seek unrealistically wide buffers, reduced density or architectural controls which may make the development of the adjacent land impossible.

A small number of citizens can present their views most strongly to plan commissions, zoning boards of appeals and to the corporate authorities. While the village board or city council may well ask the developer to make reasonable accommodations regarding adjacent neighbors it is very unusual for these nearby property owners to have purchased their land without knowing that development would eventually take place on the adjacent vacant parcels. Wise governmental officials are able to draw a line between assisting the legitimate desires of adjacent property owners and accommodating a hidden agenda to make adjacent development impossible. Sometimes these dissenting residents are not even occupants of land within the municipality. Such views are often considered with less than full attention.

The same consideration must take place when a municipality considers the amount of impact fees which are to be paid to other governments. While both home rule and non-home rule communities can negotiate for impact fees which may be in excess of those which could be imposed upon land within the municipality's boundaries, unrealistic demands by other governmental bodies must be resisted.

ISSUE 24

Municipality and Developer (Same for Both):

Q: Twenty years is too long or too short.

A: In some cases, both the municipality and the developer may seek to negotiate annexation agreements which are shorter or longer than the maximum 20-year term provided by statute. Much depends on the size of the tract to be annexed and the reasonable expectation of the time it will take to fully develop the parcel.

Obviously, the owner of larger parcels will seek a longer annexation agreement because it is likely that the build out may take some time. With changed economic conditions, however, sometimes even a smaller, marginal parcel may remain as a vacant or cultivated field for some period of time. One of the benefits of annexation agreements is that particular provisions can be effective for a variety of time periods. An annexation agreement may last for 20 years, but the municipality and the developer may agree that building fees and regulatory ordinances will only be frozen for the first three to five years. Thereafter, it can be agreed that the developer will pay the then-current rates and be subject to the then-current regulations. Another possibility is to limit the amount of the increase in fees to the actual costs incurred by the municipality.

Developers often seek limitations in particular kinds of regulations which specifically relate to their business. For example, the owner of a landfill may limit the growth of taxes or payments due as tipping fees and may gain a prohibition of any other taxes or fees which relate either to the business or its customers. On the other hand, municipalities may agree to limit regular sales taxes, but retain their right to impose taxes under later-acquired home rule powers. Municipalities that contemplate sales tax revenue from a development should prohibit for the full term of the annexation agreement the transference of the acceptance point of retail sales, especially to another municipality that is willing to agree to grant a rebate of a large percentage of the taxes transferred by the retailer.

Some annexation agreements contain provisions that allow the parties, by mutual agreement, to extend the term of the annexation agreement beyond the statutorily-permitted 20 years. Of course, if the land has not been annexed to the community during the life of the annexation agreement, there appears to be no reason why a new annexation agreement cannot be entered into. If the land has become annexed to the municipality during the term of the annexation agreement - especially if the municipality has become home rule - the governmental body and the developer may likely agree to further extensions in the term of the annexation agreement. These contracts are sometimes referred to as development agreements. An aggressive proposal by a municipality would include in the annexation agreement a provision allowing the municipality, at its option, to extend the term of the annexation agreement at the end of 20 years for an additional fixed term.

ISSUE 25

Municipality and Developer: (Same for both)

Q: No surprises and compliance with agreed-upon terms.

A: The annexation of land to a municipality is important both to the community and to the developer. The goal of both parties, while not always achievable, is to engage in a process where there will be few surprises and the parties will comply

with agreed-upon terms. This does not mean that a municipality can guarantee the land will become contiguous and be annexed or that a developer will consent to newly raised or unrealistic terms and conditions. One way that a municipality may make the process of annexation and negotiating an annexation agreement less ad hoc is through the development of a form annexation agreement, which will be made available to all persons seeking to annex a substantial parcel of land to the community. While the community should be willing to deviate from this form agreement, a developer must have some idea as to whether the general conditions under which the municipality is comfortable seem reasonable or intrusive.

In the absence of a boundary agreement, a developer has the option of negotiating with two municipalities at the same time and playing one off against the other. A community can avoid this situation if it requires a developer, prior to engaging in negotiations to only deal with one community at a time. If a municipality is involved in lawsuits with prior developers over annexation agreements, it should probably disclose this early in discussions with a new developer. The same is true of a developer's legal history. There is nothing more embarrassing to all of the parties involved than to have a citizen or a reporter inform the elected officials at a public hearing that this particular developer who is promising a great deal is currently involved in litigation with three other communities. The political process is inherently uncertain. Without seriously disadvantaging either party's bargaining position, efforts should be made to remove as much uncertainty as is possible.

REMEDIES

ISSUE 26

Municipality:

Q: No money damages or disconnection.

A: What is to be the developer's remedy if a municipality breaches an annexation agreement? One example might be that the municipality would fail to zone the property as contracted or to permit connection to its utility systems. Annexation agreements should have provisions dealing with the specific remedies of the parties in the case of a breach. Municipalities should strive for an agreement that opens the community to a prayer for injunctive and declaratory relief, or mandamus, but forbids the developer from collecting money damages. The municipality can agree to promptly respond to a suit of this nature and to be prepared to pay damages if they are assessed as a result of a delay caused by a municipal appeal, but there should be no money damages through the trial court stage. In addition, municipalities should seek to include a provision that prevents the owner of the property from seeking the disconnection of the land anytime during the annexation agreement. Without such a provision, it can be argued that

the owner has not waived the ability to seek statutory disconnection so long as it can prove compliance with the requisite standards. Different courts have viewed this issue in different ways.

A lawsuit to enforce and compel performance of an annexation agreement must be filed within the effective term of the agreement or within five years from the date the cause of action accrued, whichever time is later.

Developer:

Q: We need actual money damages and disconnection on material breach.

A. Although most municipalities will not agree to such a provision, a developer is certainly within his or her rights to seek money damages if a municipality slows the promised development through breaches of its obligations. The main reason that a developer agrees to enter into an annexation agreement is for certainty. No existing or future board or council should be able to change its mind once having made a series of promises in the annexation agreement. Whether it is a failure to annex, to construct a road, to exercise its powers of eminent domain or increase the size of its utility plant a flat-out breach by a municipality, or even a slow-down in a promised schedule, can cost the developer dearly and even force it into bankruptcy.

Under those circumstances, the municipality can, under the terms of an annexation agreement, be required to pay for its breach. Again, municipalities normally will not agree to these provisions, especially since there are tort immunity defenses available to the community for the exercise of discretionary acts and the granting or failure to grant a permit. To turn what would be an immunized tort into a significant contractual damage claim is not a good strategy for the municipality. Municipalities should, however, listen to requests by a developer to be permitted to disconnect their land in the event that the community is guilty of a material breach of an annexation agreement. If, for example, the community refuses to expand its sewage treatment plant and the developer cannot move forward it is not unreasonable to give the injured party the right to seek mandatory disconnection of the parcel or at least to seek disconnection under available statutory procedures.

ISSUE 27

Municipality and Developer (Same for both):

Q: We should promise to cure technical defects.

A: It is probably an important provision of an annexation agreement, both for the municipality and for the developer, to require the parties to take any reasonable

action necessary to facilitate the validity of the annexation agreement or the annexation of the territory through the curing of technical defects. If there was a technical error in the annexation agreement which does not affect its validity then the parties should be required to reasonably re-negotiate to cure, for example, some mutual mistake of fact. This provision would be entirely even-handed because no one can predict in advance whether the technical defect would favor or disfavor one party or another. If, however, the defect tainted the entire annexation agreement process, then a provision to cure defects is probably not binding on the parties since the agreement itself is invalid.

Ancel Glink | Diamond Bush DiCianni & Krafthefer

www.ancelglink.com

312-782-7606