Northern Illinois University Law Review

Volume 17 | Issue 3 Article 1

7-1-1997

Annexation Agreements - Boundary Agreements: Walking a Fine Line into the Future - A Map of the Dangers to the Unwary Land Use Traveler

Ronald S. Cope

Annexation Agreements — Boundary Agreements: Walking a Fine Line Into The Future — A Map of the Dangers to the Unwary Land Use Traveler

RONALD S. COPE*

INTRODUCTION

On December 20, 1973, the Village of Bloomingdale, DuPage County, Illinois entered into an annexation agreement with Urban Investment & Development Corporation, a Delaware corporation.[1] The agreement was designed to govern the development of approximately 850 acres of land.[2] At the time the developer had a plan calling for construction of a regional mall, which has since been constructed and is known as the Stratford Square Shopping Center, and for the development of other commercial uses and residential uses. The plan was conceptual in nature and the agreement was drafted in such a way as to allow both flexibility for change and a level of certainty to guide the parties into the future.[3] In 1973 the statutes of the State of Illinois permitted annexation agreements of ten years duration although with a change in the law, this one was extended to twenty years.[4] This agreement contained numerous provisions regarding such subjects as zoning, subdivision control, ordinance amendments, building control amendments, liquor control ordinance amendments, "most favored nation provision," the issuance of building permits and occupancy permits, bonding, easements and public improvements, conveyances of land to the Village, conveyances of land for park purposes, conveyances and contributions for the benefit of school districts, provisions for storm water and drainage and utilities, provisions for the construction of roads and highways, and even a provision regarding remedies which included the potential for

---

* Ronald S. Cope is a partner in the law firm of Ancel, Glink, Diamond, Cope and Bush. He is a lecturer in business law at the University of Chicago Graduate School of Business and has written in the area of land use for the Illinois Institute for Continuing Legal Education.

1. Village of Bloomingdale, Ill., Ordinance No. 73-66 (Dec 20, 1973).
2. *Id.*
3. *Id.*
4. Annexation Agreement between the Village of Bloomingdale, DuPage County, Illinois and Urban Investment & Development Corporation, para. 26.

disconnection.[5] It also included some unique financing mechanisms such as a repayment to the developer for monies advanced for the construction of division improvements out of sales tax revenues to be generated in the future.[6]

During the twenty year term of the agreement there was only one bump in the road. A disagreement arose as to the power of the municipality in regard to approving new developments under the terms of the zoning ordinance which was created to govern developments of 250 acres or more.[7] Because the original plan was conceptual in nature and because it was necessary to revise the plan for development as conditions changed, the ordinance approved for this development allowed for change, but also provided that the municipality would determine the "compatibility" of each new plan in accordance with what was already developed on the subject property.[8] Certain parameters were agreed upon as to what could be built without the need for approval, but changes in those parameters did require, ultimately, approval of the Village Board.[9]

The agreement worked. It provided guidelines for both the developer and the municipality and allowed a very successful project to go forward. Without this agreement, it is unlikely that the development would have taken place. The assurances the developer needed that the rules would not be changed during the game provided the predictability necessary for financing and for determining the economics of the project. At the same time, the municipality obtained a keystone for its overall development and a plan which envisioned the ideal growth of the community. Although the developers who initiated the agreement and the public officials who approved the agreement have since been replaced by others, this agreement has worked as a model of what annexation agreements can and should provide in carefully balancing the interests between local government and land development.

Looking at the past provides a level of comfort as to what might well take place in the future. Right now there is another 850 acres waiting to be developed -- local governmental officials and developers must exhibit the wisdom and foresight necessary to make the plan a reality which enriches

---

5. Annexation Agreement between the Village of Bloomingdale, DuPage County, Illinois and Urban Investment & Development Corporation, para. 26

6. *Id.*

7. *See* LaSalle National Bank v. Village of Bloomingdale, 507 N.E.2d 517 (Ill. App. Ct. 1987).

8. Annexation Agreement between the Village of Bloomingdale, DuPage County, Illinois and Urban Investment & Development Corporation.

9. *Id.*

the community. The following is intended as a brief map of dangers that lay ahead for the inexperienced land use traveler.

In order to reach this level of sophisticated contracting, it is necessary to take into account a number of issues.

I. ANNEXATION AGREEMENTS

Under Dillon's rule, municipalities only have the power granted to them by the state legislature and those powers reasonably to be inferred, including the "police power."[10] With the passage of the 1970 Illinois Constitution and the grant of home rule to municipalities with a population of 25,000 or more, or those who establish home rule by referendum, the question of the authority to enter into an annexation agreement and what terms may be included within an annexation agreement become a more general and rarefied constitutional dimension such as the applicability of the contracts clause of the United States Constitution,[11] and the "Reserved Powers doctrine."[12]

In 1963, the Illinois legislature passed a statute authorizing the corporate authorities of any municipality to enter into annexation agreements with "one or more of the owners of record of land in unincorporated territory."[13] Pursuant to this statute, the agreement may extend for a period of not to exceed twenty years.[14] The agreement may include the specific topics of: (a) the actual annexation of the territory; (b) subdivision and zoning of the property although the required public hearings must take place and any ordinance amendments must be enacted according to law.[15] The statute also provides authority for negotiating contributions of either land or monies or both and the granting of utility franchises.[16] It also contains a catchall provision which allows for the annexation agreement to contain

---

10. Dillon's Rule states it is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and not others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, -- not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. City of Des Plaines v. Metropolitan Sanitary District of Greater Chicago, 305 N.E.2d 639 (Ill.App. Ct. 1973).

11. U.S. Const. Art. I, sec. 10, cl.1.

12. *See* Corp. of the Brick Presbyterian Church v. Mayor, Alderman and Commonalty of the City of New York, 5 Cow. 538 (NY 1826).

13. 65 Ill. Comp. Stat. Ann. 5/11-15.1-1 *et seq.* (West 1994).

14. *Id.*

15. 65 Ill. Comp. Stat. Ann. 5/11-15.1-2(b) (West 1994).

16. 65 Ill. Comp. Stat. Ann. 5/11-15.1-2(d)-(e) (West 1994).

"any other matter not inconsistent with the provisions of this code, nor forbidden by law."[17]

While the grant of power is broad, the question of what "matter" might be considered "inconsistent with the provisions of this code" or "forbidden by law" poses a danger for the unwary practitioner. For example, the question often arises as to whether or not a municipality can provide in an annexation agreement to grant a liquor license or licenses once the property is annexed. In the case of *Maywood Proviso State Bank v. City of Oakbrook Terrace*,[18] the court voided an agreement obligating the City to provide a license allowing alcoholic beverages to be served. The license could only be granted pursuant to the provisions of the Liquor Control Act. The Village had the right to refuse the request.[19]

II. JURISDICTION UNDER ANNEXATION AGREEMENTS

One of the most curious features of the annexation agreement statute relates to jurisdiction. The statute provides that "[l]ack of contiguity to the municipality of property that is the subject of an annexation agreement does not affect the validity of the agreement . . . ."[20] Another section of this same article provides that property that is "the subject of an annexation agreement adopted under this Division is subject to the ordinances, control, and jurisdiction of the annexing municipality in all respects the same as property that lies within the annexing municipality's corporate limits."[21] There is an exception to this jurisdictional statement and that is that section does not apply to: "(i) a county with a population of more than 3,000,000, (ii) a county that borders a county with a population of more than 3 million, or (iii) a county with a population of more than 246,000 according to the 1990 federal census and bordered by the Mississippi river, unless the parties to the annexation agreement have, at the time the agreement is signed, ownership or control of all property that would make the property that is the subject of the agreement contiguous to the annexing municipality, in which case the property that is the subject of the annexation agreement is subject to the ordinances, control, and jurisdiction of the municipality in all respects the same as property owned by the municipality that lies within its corporate limits."[22]

---

17. 65 Ill. Comp. Stat. Ann. 5/11-15/1-2(f) (West 1994).

18. 214 N.E.2d 582 (Ill. App. Ct. 1966).

19. For an analysis and topic by topic approach to annexation agreements see Stewart H. Diamond, MUNICIPAL LAW AND PRACTICE IN ILLINOIS, Volume II, IICLE, Ch. 11, 1994.

20. 65 Ill. Comp. Stat. Ann. 5/11-15.1-1 (West 1994).

21. 65 Ill. Comp. Stat. Ann. 5/11-15.1-2.1(9) (West 1994).

22. 65 Ill. Comp. Stat. Ann. 5/11-15.1-2.1(b) (West 1994).

In order to better understand this legislative scheme it is useful to become acquainted with the case of *Village of Lisle v. Action Outdoor Advertising Company.*[23] In that case, the Appellate Court faced the issue of whether annexation agreements with owners of property that were not contiguous to the municipality at the time the agreement was executed were enforceable.[24] Municipalities had routinely entered into annexation agreements with owners of noncontiguous territory and began providing utility service with the understanding and belief that the laws and ordinances of the municipality applied to the noncontiguous territory.[25] In the Lisle case, the annexation agreement between Lisle and the property owner provided that Lisle's ordinances would apply to the territory even though it was noncontiguous.[26]

In 1987, the Village and the property owners entered into an annexation agreement which permitted the owners to tap into the Village's sewer system, but also contained other limitations including one which provided the owners would develop their property in accordance with certain plans appended to the annexation agreement.[27] Following entering into the annexation agreement, the owners signed a lease with an outdoor advertising company allowing that company to erect and maintain an outdoor advertising display sign.[28] The sign company obtained a building and use permit from the County, but when the Village became aware of the construction its building department immediately issued a stop work order, which the sign company refused to obey.[29] The Village then filed a lawsuit seeking injunctive relief.[30] The Appellate Court found that the Village could not enforce its ordinances against noncontiguous property and, indeed, that the statutes only authorize "municipalities to enter into annexation agreements for property 'which may be annexed to such municipality as provided in Article 7'. . . ."[31] The court then concluded that only an agreement regarding contiguous property would be valid and enforceable.[32] The court reasoned that by allowing the Village in the instant action to enforce its ordinances against a property owner through an annexation agreement would permit it to enforce those ordinances even though it could not do so

23. 544 N.E.2d 836 (Ill. App. Ct. 1989).
24. *Id.* at 836.
25. *Id.*
26. *See* Village of Lisle v. Action Outdoor Advertising Company, 544 N.E.2d at 841.
27. *Id.* at 837.
28. *Id.*
29. *Id.*
30. Village of Lisle v. Action Outdoor Advertising Company, 544 N.E.2d at 838.
31. *Id.* at 839.
32. *Id.*

through actual annexation.[33] The Village would then be doing "indirectly what it is prohibited by statute from doing directly."[34]

As a result of the Action Outdoor Advertising case, the legislature amended the statute to include the present language.[35] The amendatory language to Section 11/15.1-1 also validated annexation agreements covering noncontiguous property entered into before the date of the amendment.[36]

For most situations, the statute creates few problems since properties are generally annexed soon after the annexation agreement is executed. However, as to noncontiguous properties which are not annexed within a short period of time, the concern is that such properties could be subject to a distant municipalities' zoning, subdivision, and building codes well as, presumably, its ordinances imposing sales taxes while the county or nearby municipalities with more stringent or at least different laws would have no control. It might also present problems in regard to conflicting zoning concepts between a county and a municipality or even between two municipalities. The possibilities for litigation are numerous. Could, for example, a developer enter into an agreement with a municipality calling for a certain zoning classification which the county would not otherwise grant and go ahead and build that development under municipal zoning even though the property is not contiguous to the municipality and would otherwise be deemed to be subject to the county's zoning if not for the annexation agreement?

Litigation might be avoided if the statute was simply amended to provide: "(a) property that is the subject of an annexation agreement adopted under this Division is subject to the ordinances, control, and jurisdiction of the annexing municipality in all respects the same as property that is contiguous [instead of "that lies within"] to the annexing municipality's corporate limits, whether or not the property is contiguous . . . ."

In other words, Action Outdoor only held that the Village could not enforce its ordinances pursuant to an annexation agreement against noncontiguous property. The amendment purports to bring both contiguous and noncontiguous property into the corporate limits of the municipality for purposes of enforcing its laws, which is on its face a different matter entirely.

---

33. Village of Lisle v. Action Outdoor Advertising Company, 544 N.E.2d at 839.

34. Village of Lisle v. Action Outdoor Advertising Company, 544 N.E.2d at 839.

35. *See* Act of Jan. 1, 1991, P.A. 86-1169, 1990 Ill. Laws 1611; Act of Jan. 1, 1993, P.A. 87-1137, 1992 Ill. Laws 3091.

36. *Id.*

III. METHOD OF ANNEXATION

One of the more interesting phenomena of the annexation agreement statute is the provision which provides "land may be annexed to the municipality in the manner provided in Article 7 at the time the land is or becomes contiguous to the municipality."[37] Having entered into the annexation agreement, one would think that when the property does become contiguous it will, in fact, be annexed to the municipality. At least that is the expectation between the municipality and property owner. However, it is possible that the expectation will be thwarted by the residents of the annexing municipality. They might, by referendum, veto the annexation. Something no one anticipated.

There are two basic methods for annexing territory to a municipality. Under one method, where the property is contiguous and a petition is signed by the owners of record of all land within such territory and by at least 51% of the electors residing therein, the annexation takes place by virtue of an ordinance passed by the corporate authorities. It is only necessary to obtain a majority vote of the Village Board or City Council as the case may be and to record the ordinance annexing the territory along with an accurate map, and the property is deemed to be annexed.[38]

On the other hand, if some time passes between the signing of the annexation agreement and portions of the property are sold off by the original owner, a different result may take place. An annexation may take place by a written petition signed by a majority of the owners of record and also by a majority of the electors, which petition must conform to certain requirements of the statute.[39] This petition is filed in the Circuit Court and there is a court determination as to whether or not the petition is in good order.[40] If the petition is in good order, then the court orders the matter of the annexation back to the corporate authorities of the annexing municipality for final action.[41]

It is possible, however, that a petition for a referendum will be filed. A written petition filed with the municipal clerk by electors of the annexing municipality equal in number to 10% of the entire vote cast for all candidates for Mayor or President is sufficient to require that the proposition of the annexation be placed on a ballot for approval by the voters of the

37. 5 Ill. Comp. Stat. Ann. 5/11-15.1-1 (West 1994).

38. 5 Ill. Comp. Stat. Ann. 5/7-1-8 (West 1994).

39. 5 Ill. Comp. Stat. Ann. 5/7-1-2 (West 1994).

40. 5 Ill. Comp. Stat. Ann. 5/7-1-4 (West 1994).

41. *Id.* Please note that if the annexation petition is initiated by ordinance, then the annexation is subject to a vote of the "electors of the unincorporated territory."

community.[42] This, of course, could result in the curious situation where although the municipality and the property owners have agreed to an annexation because of the referendum, the annexation cannot take place. This would then place the parties in the strange position of continuing their relationship through the annexation agreement but unable to fulfill one of the agreements basic purposes. The property owners might argue they are still entitled to the same benefits in that they are to be treated the same as property that "lies within the annexing municipalities corporate limits."[43] If this was truly the case it would defeat the purpose of the referendum.[44] The land would be treated as if it was in the municipality even though there was no annexation because of the referendum. Indeed, there might be some situations where it would be far more desirable to avoid annexation and simply follow the terms of the agreement.[45]

IV. DEVELOPMENT AGREEMENTS

It would seem clear that formal agreements between landowners and local governments regarding the use of land is desirable for a variety of reasons. However, while in general parlance the term "development agreement" is used in the context of creating a relationship between local government and the property owner, the fact is that there is a difference between "annexation agreements" and "development agreements." The principal difference between the two is that the annexation agreement is authorized with reference to a parcel of land which is "in unincorporated territory."[46] In contrast, the land subject to a development agreement is already part of the municipal corporation. Otherwise, in theory and principle, the reasons for negotiating this type of agreement are the same. Yet, curiously, while ten states have adopted legislation enabling local governments to enter into development agreements with landowners/developers,[47] only four states

---

42. 65 Ill. Comp. Stat. Ann. 5/7-1-6 (West 1994).

43. 65 Ill. Comp. Stat. Ann. 5/11-15.1-2.1 (West 1994).

44. Please note the referendum issue would only come up if *all* the property owners failed to join in the Petition and it was necessary to use the Court ordered procedure. But 65 Ill. Comp. Stat. Ann. sec. 11/15.1-4 (West 1994) allows for an action to "compel performance" of the agreement. It is not clear how this would impact the legislative act of passing an annexation ordinance.

45. *E.g.*, Developer would get sewer and water and pay no municipal real estate tax.

46. 65 Ill. Comp. Stat. Ann. 5/11-15.1-2-1(West 1994).

47. Colo. Rev. Stat. Ann. sec. 24-68-102 (West 1988); Fla. Stat. Ann. sec. 163.3220 (West 1990); Haw. Rev. Stat. Ann. sec. 46-121 (Michie 1985); Idaho Code sec. 67-6511 (1991); La. Rev. Stat. Ann. sec. 33:4780.21 (West 1990); Md. Code Ann., Code of 1957, Art. 66B. Zoning and Planning sec. 13.01 (1957); Nev. Rev. Stat. sec. 278.0201 (1985); N.J. Stat.

appear to have authorized annexation agreements.[48]

It is not clear why Illinois has not adopted a statute authorizing development agreements. Even in the absence of such enabling legislation, such agreements might be valid. Certainly, in regard to home rule municipalities, it would seem that a development agreement would be valid. The policies behind a development agreement and an annexation agreement are the same.[49] In *Village of Orland Park v. First Federal Savings & Loan Association of Chicago*,[50] the court considered an attempt to avoid obligations contained in an annexation agreement executed pursuant to the statutory authority contained in the pre-annexation agreement statute. After first noting that the bank's case involved agreements which preceded the enactment of the statute, the Illinois Appellate Court then observed:

> The authorization of pre-annexation agreements by statute, such as sec. 11/15.1-1, serves to further important governmental purposes, such as the encouragement of expanding urban areas and to do so uniformly, economically, efficiently and fairly, with optimum provisions made for the establishment of land use controls and necessary municipal improvements including streets, water, sewer systems, schools, parks, and similar installations. This approach also discourages fragmentation and proliferation of special districts. Additional positive effects of such agreements include control over health, sanitation, fire prevention and police protection, which are vital to governing communities.[51]

Similarly, the California statute permitting development agreements sets forth as part of its findings the following:

> (a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

Ann. sec. 40:55D, 45.2. See, Patrick J. Rohan, ZONING & LAND USE CONTROLS. (Matthew Bender, 1994).

48. Ill. Comp. Stat. Ann. 5/11-15.1-1 (West 1994); Cal. Pub. Util. Code sec. 26406 (West 1973); Minn. Stat. Ann. sec. 414.0325 (West 1987); N.C. Gen. Stat. sec. 160(a)-58.21 (1989).

49. *See supra* note 46 and surrounding text.

50. 481 N.E.2d 946 (Ill. App. Ct. 1985).

51. *Id.* at 950.

> (b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce economic costs of development.[52]

Certainly, the same reasons which prompt annexation agreements also prompt development agreements, and the fact that property is already within the municipality is not a meaningful difference to justify not enacting a development agreement enabling statute. Without such a statute, such agreements face challenges on several fronts.

1. The first level of argument would be that such an agreement would be ultra vires. That is, that this type of agreement is one which would have to be specifically authorized by the state legislature.[53] A proponent of this position would point to the fact that legislation was passed in order to enable municipalities to enter into annexation agreements and that this demonstrates that development agreements, especially those dealing with the same subject matter as the annexation agreement statute, would have to be authorized by similar legislation. In response, it could be pointed out that in 1970, the Illinois Constitution was amended to give municipalities additional power and authority. In addition to creating home rule municipalities, Article 7, sec. 10 of the Illinois Constitution provides for intergovernmental agreements and specifically states the following:

Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance.

Under this provision any unit of local government may contract with individuals, unless specifically prohibited by law or by ordinance. Absent a showing of some specific prohibition as to the subject matter of the agreement it should be deemed valid.

2. Since, however, land use is a major concern of such agreements it would be contended that the law prohibits contract zoning. Contract zoning generally refers to the circumstance where an agreement or contract is entered into between the zoning authorities and the property owner whereby the zoning authority agrees to change a zoning ordinance in exchange for the property owner performing certain acts. There does not appear to be

52. Cal.Gov't. Code Art. 2.5, Ch. 4, Title 7, Sec. 65884.

53. *See infra* note 4.

any one single basis for the rule against such zoning practices, but generally it is contended that the zoning authority might use the zoning power to further private interests in violation of public policy and that generally, the legislative prerogative inherent in zoning should not be bargained away.[54]

In the case of *Cederberg v. City of Rockford*, the court dealt with the situation where an ordinance rezoning property from residential to local business was adopted because the owners executed a restrictive covenant limiting otherwise permissible uses allowed under the local business classification.[55] The court held the restrictive covenant void and then proceeded to determine the validity of the ordinance.[56] The court held that the ordinance was also void and in so doing recited the following rationale:

> The cases cited support the conclusion that, under these circumstances, the restrictive covenant is void. In addition, although the exact problem presented by this case seems never to have been decided in Illinois, a somewhat similar case has established the rule that "zoning ordinances should not be subject to bargaining or contract." *(Hedrich v. Village of Niles*, 112 Ill.App.2d 68, 77, 250 N.E.2d 791 (1969).) It was there noted that when zoning is conditioned upon collateral agreements or other incentives supplied by a property owner, the zoning officials are placed "in the questionable position of bartering their legislative discretion for emoluments that had no bearing on the merits of the requested amendment." (*Hedrich*, supra, at p. 78, 250 N.E.2d at p. 796.) This reasoning is clearly applicable to the instant case. There is no indication in the record that the rezoning was necessary or that it was granted only after a consideration of the appropriate use of the land within the total zoning scheme of the community.[57]

In contrast to the *Cederburg* case is the case *of Goffinet v. County of Christian.*[58] In that case, the Christian County Board adopted an ordinance rezoning certain property to permit the defendant Illinois Nap Gas Company to construct a plant where synthetic gas would be produced.[59]

---

54. Bruce R. Bailey, Comment, *Use and Abuse of Contract Zoning*, 12 UCLA L. Rev. 897 (1965), Hedrich v. Village of Niles, 250 N.E.2d 791 (1969).

55. 291 N.E.2d 249 (Ill. App. Ct. 1973).

56. *Id.* at 252.

57. *Id.* at 251-252.

58. 333 N.E.2d 731 (Ill. App. Ct. 1975).

59. *Id.* at 732.

The ordinance granting the rezoning contained certain conditions limiting the use of the land.[60] In particular, the ordinance limited the use of the property to the particular plant proposed and no other and also provided that, upon removal of the plant, the zoning classification of the property would revert to agricultural.[61] The plaintiff's argument was that the restrictions imposed did not apply to other tracts in the same zoning classification. Consequently, the rezoning was conditional and, therefore, invalid.[62]

The appellate court disagreed.[63] The court recites a litany of cases which it describes as having given conditional rezoning ordinances a "mixed reception" with some states approving and others disapproving.[64] The court ultimately states:

> In our view, the *Treadway* case [*Treadway v. City of Rockford*, 24 Ill.2d 488, 182 N.E.2d 219 (1962)] and the appellate decisions alluded to do not compel the conclusion that any and every conditional rezoning ordinance adopted by a legislative zoning agency in Illinois will be invalid. *Treadway* stated that conditional rezoning ordinances have not fared well because they introduce an element of contract which has no place in the legislative process or because they constitute an abrupt departure from the comprehensive plan contemplated in zoning . . . .
>
> However, we do not believe it to be an absolute precept that any and all conditional rezoning in Illinois is forbidden. Without doubt, there is a suitable and proper place for utilization of the process. Some conditional rezoning may be in the public good, subservient to a comprehensive plan, in the best interest of the public health, safety and welfare and enacted in recognition of changing circumstances. Not all conditional rezoning is onerous, destructive or an abandonment of the power of the zoning agency nor does it stem from improper motives.[65]

60. Goffinet v. County of Christian, 333 N.E.2d at 731.
61. *Id.* at 732-34.
62. *Id.* at 734.
63. Goffinet v. County of Christian, 333 N.E.2d at 735.
64. *Id.*
65. *Id.* at 735-36.

It might also be contended that there is a distinction between contract zoning and conditional zoning. In contract zoning the parties spell out the terms of their arrangement in contemplation of a zoning ordinance being passed. In conditional zoning the specific terms and limitations are contained within the legislative act itself. Where those conditions clearly relate to the particular development, it is hard to imagine that the traditional contract zoning issues of the legislature selling its legislative prerogative would make sense. The conditions are those directly related to enhancement of the project.

Another possibility is to have the developer go through the zoning process prior to entering into the development agreement so that a determination is already reached as to the propriety of the zoning. The development agreement would then assure that the zoning remained in place during the term of the agreement. The proper legislative finding having taken place before entering into the agreement. In addition, the agreement would cover other issues such as the construction of utilities, water facilities, sanitary and storm sewer facilities and the like which it could be argued are part of the authority of the municipality granted pursuant to statutes which allow for the sale of such services. There might also be included a sales tax sharing agreement which is specifically authorized pursuant to statute.[66]

3. A further issue which confronts those seeking to enforce development contracts is what's called the "Reserved Powers" doctrine. *In the case of Corp. of the Brick Presbyterian Church v. Mayor*, Aldermen and Commonalty of the City of New York, the plaintiffs were suing the city for an alleged breach of quiet enjoyment of a lease that had been entered into in 1766.[67] The lease, signed by the city, provided that the lessees were entitled to use the property as a cemetery provided it was fenced and never used for private secular purposes.[68] In 1823, the Alderman of the City of New York decided to enact an ordinance prohibiting the use of the premises as a cemetery.[69] The New York Supreme Court determined that the city legislative body had no power to make a contract "which should control or embarrass their legislative powers and duties."[70] In short, the court

66. 65 Ill. Comp. Stat. Ann. 5/8-11-20 (West 1997). This statute permits a variety of economic incentive agreements.

67. 5 Cow. 538, (N.Y. 1826).

68. *Id.* at 539.

69. *Id.*

70. *Id.* at 540 (N.Y. 1826).

concluded that the earlier legislature had no power to limit future legislative discretion by contract or covenant.[71] The cemetery use had to cease.[72]

In the case of *Stone v. Mississippi*, the Mississippi legislature in 1867 chartered a company to engage in the lottery business for a period of twenty-five years.[73] One year later the Mississippi Constitution was amended and in 1870, the Mississippi legislature passed an act which had the effect of repealing the 1867 charter.[74] The U.S. Supreme Court concluded that "the legislature cannot bargain away the police power of a State."[75] The repeal of the earlier grant was, therefore, valid.[76]

The Reserved Powers doctrine is still recognized today and was discussed by the U.S. Supreme Court *in United States Trust Company of New York v. New Jersey*,[77] Pitted against the Reserved Powers doctrine in that case was the "Contracts Clause" of the United States Constitution, which simply provides that "no state shall . . . pass any . . . Law impairing the Obligation of Contracts."[78] If the legislative body had, in effect, entered into a binding and valid contract, then the "Reserved Powers" provision would not apply.[79] But if the agreement affected the police power or eminent domain power, something which could not be bargained, the doctrine did apply.[80] So, for example, the United States Supreme Court held in *Fletcher v. Peck*, that the Contracts Clause of the Constitution was applicable to an attempt by a subsequent Georgia legislature to repeal earlier state land grants issued after widespread fraud and bribery were discovered.[81] So too, in the case of *State of New Jersey v. Wilson*, the United States Supreme Court speaking through Chief Justice Marshall held that certain lands could not be subject to taxation where agreement had been reached with the Delaware Indians that this land would not be subject to any tax.[82]

---

71. Corp. of the Brick Presbyterian Church v. Mayor, Aldermen and Commonalty of the City of New York at 542.

72. *Id.*

73. 101 U.S. 814 (1879).

74. Stone v. Mississippi, 101 U.S. at 816.

75. *Id.* at 817.

76. *Id.* at 821.

77. 431 U.S. 1, 21-25 (1977).

78. U.S. Const., Art. 1, sec. 10, cl. 1.

79. 431 U.S. at 24-25.

80. *Id.* at 24, note 21.

81. 10 U.S. (6 Cranch) 87 (1810).

82. 11 U.S. (7 Cranch) 164, (1812).

The State of New Jersey had sought to impose a tax through a legislative act.[83] The court held the earlier agreement binding.[84]

Whether a development agreement would be viewed as an improper binding of a subsequent legislature and invoke the "Reserved Powers" doctrine or whether it would be viewed as an enforceable contract subject to the "Contracts Clause," would in large measure turn upon the characterization of the agreement. There is no sure test which is all the more reason for an enabling act.[85] As for home rule municipalities, it should seem apparent that their authority would clearly allow for the passage of an ordinance which would spell out the parameters of development agreements. This ordinance would be fashioned in the same manner as the enabling legislation which permits annexation agreements and since there appears to be no prohibition under state law which preempts such home rule authority, such an ordinance would most likely be held valid.[86]

V. BOUNDARY AGREEMENTS

One of the more fascinating issues is determining whether there has been a boundary agreement which limits the ability of a municipality to annex a particular piece of property.

The case of *Village of Lisle v. Village Woodridge*, involved a boundary agreement between the Villages of Lisle and Woodridge which was entered into in 1979.[87] The written agreement provided in pertinent part as follows:

---

83. *Id.* at 166; *See also* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819)(holding an act of the New Hampshire legislature that altered the charter of Dartmouth College granted by the British Crown void under the Contracts Clause of the Constitution as the original charter was not dissolved by the revolution).

84. *Id.* at 167.

85. One other interesting argument relates to the enforcement of a disconnection provision. The court in the case of Elm Lawn Cemetery Company v. City of Northlake, 237 N.E.2d 348 (2nd Dist. 1968) held that a provision calling for disconnection in the agreement was valid and enforceable although not specifically provided for in the annexation statute. In so doing, the court stated "[e]nforcement of the agreement according to its plain terms in no way infringes the discretionary power of the board since it had already exercised its discretion." *Id.* at 248 (quoting Arlington Heights National Bank v. Village of Arlington Heights, 213 N.E.2d 264, 269 (1966)).

86. Ill Const. Of 1970 art. VII, sec. 6 (1970); Wilmette Park Dist. v. Village of Wilmette, 490 N.E.2d 1282 (Ill. 1986); Chicago National League Ball Club, Inc. v. Thompson, 483 N.E.2d 1245 (Ill. 1985).

87. 548 N.E.2d 1337,1338 (Ill. App. Ct. 1989).

"2. Neither Lisle nor Woodridge shall act to annex or exercise any zoning or subdivision control authority beyond the boundary line established by this Agreement."[88]

On March 7, 1987, Woodridge's board of trustees authorized by ordinance the purchase of approximately 140 acres of land, part of which was on the Lisle side of the boundary-line established by the agreement.[89] This parcel was purchased from Forest City, the beneficial owner of a land trust, and that purchase was conditioned on Woodridge and Forest City entering into an annexation agreement as well as Woodridge approving a zoning ordinance for the property.[90] Lisle filed suit claiming that the annexation was in violation of the boundary agreement.[91] Woodridge argued that the boundary agreement prohibiting the parties from annexing beyond the boundary line was invalid as an unauthorized assumption of power.[92] In short, the Village contended that the agreement was ultra vires.[93]

The court stated the following:

> The crucial language relevant to this appeal is contained in paragraph 2 of the agreement. To the extent the agreement prohibits Woodridge from acting to annex the subject property, we find it to be invalid and unenforceable. Our decision in *Village of Long Grove v. Village of Kildeer* (1986), 146 Ill.App.3d 979, 100 Ill.Dec. 341, 497 N.E.2d 319, is controlling on this issue. In *Village of Long Grove* we held that there was no statutory authority for municipalities to enter into a boundary line-agreement prohibiting annexation. (146 Ill.App.3d at 980-82, 100 Ill.Dec. at 342-43, 497 N.E.2d at 320-21.) That holding applies equally to an agreement prohibiting an act to annex. Thus, the boundary line agreement in this case is invalid to the extent that paragraph 2 purports to prohibit any act to annex by either Lisle or Woodridge.[94]

The court further went on to advise that even though the statute had been amended to expressly authorize boundary-line agreements prohibiting

---

88. *Id.* at 1338.
89. *Id.*
90. *Id.* at 1339.
91. Village of Lisle v. Village Woodridge, 548 N.E.2d at 1339.
92. Village of Lisle v. Village Woodridge, 548 N.E.2d at 1340-41.
93. *Id.* at 1340.
94. *Id.* at 1342.

annexations that amendment would only act prospectively.[95] Since this boundary line agreement was entered into in 1979, it was not affected by the amendment.[96]

One other point of significant interest in the Village of Lisle case relates to intergovernment cooperation and intergovernmental agreements. Lisle argued that the agreement was authorized pursuant to Article VII, sec. 10, of the Illinois Constitution[97]. The court refused to accept this argument, stating:

> Finally, Lisle contends that the agreement is valid pursuant to article VII, section 10, of the Illinois Constitution (Ill. Const.1970, art. VII, sec. 10) and section 5 of the Intergovernmental Cooperation Act (Ill.Rev.Stat. 1987, ch. 127, par. 745). Article VII, sec. 10, of the Illinois Constitution clearly authorizes municipalities to enter agreements to "exercise, combine, or transfer any *power* or function, in any manner not prohibited by law or by ordinance." (emphasis added)(Ill. Const.1970, art. VII, sec. 10.) The Intergovernmental Cooperation Act provides, in pertinent part: "Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity or undertaking which any of the public agencies entering into the contract *is authorized by law to perform.*" (emphasis added) (Ill. Rev. Stat. 1987, ch. 127, par. 745.) Both article VII, section 10, of the Illinois Constitution and section 5 of the Intergovernmental Cooperation Act authorize municipalities to enter into cooperative agreements, but only to the extent that the agreement encompasses subject matter over which the municipalities already have authority. Article VII, section 10, uses the word "power," and section 5 limits the agreement to those functions a municipality is "authorized by law to perform." Clearly, neither article VII, section 10, nor section 5 gives municipalities a separate source of authority to perform functions not otherwise authorized by the Constitution or statute. Accordingly, we reject Lisle's argument that article VII, section 10, and section 5 grant municipalities the authority to enter into

95. *Id.*

96. Village of Lisle v. Village Woodridge, 548 N.E.2d at 1342.

97. Ill.Const. 1970 Art. VII, Sec. 10) and Sec. 5 of the Intergovernmental Cooperation Act (Ill.Rev.Stat. 1987, ch. 127, para. 745).

> agreements which give the municipalities powers which they otherwise do not have.[98]

Of course, one might respond that each municipality certainly has the authority to determine whether or not to annex certain property. Indeed, the law is clearly established in this state that the determination of whether a municipality should expand its boundaries is clearly a question for the legislative branch of government.[99] The agreement here was, it could be contended, an exercise of the power to refuse to annex.

Indeed, the Illinois Second District Appellate Court has recognized the power of a home rule municipality to pass a resolution to provide that the city would neither accept annexation nor supply municipal services to certain areas outside its boundaries designated as "open space."[100] The court held that the resolutions "clearly pertain[ed] to the 'government and affairs' of the municipality," did not involve the exercise of "extraterritorial jurisdiction or 'inverse condemnation' and were within Naperville's home rule powers, and thus were not subject to 'collateral attack for voidness.'"[101] Although this was the act of a home rule municipality, there at least seems to be some viable argument for the notion that if a municipality has the authority to choose not to annex, and this applies to home rule as well as non-home rule municipalities, it may then contract with another municipality to describe the areas which it will not annex.

It is clear, however, that Section 11-12-9 of the Municipal Code, clearly permits and, indeed, requires the establishment of boundary lines, if not, boundary agreements. First, for the purposes of planning jurisdiction, this section provides as follows:

> If unincorporated territory is within one and one-half miles of the boundaries of two or more corporate authorities that have adopted official plans, the corporate authorities involved may agree upon a line which shall mark the boundaries of the jurisdiction of each of the corporate authorities who have adopted such agreement.

This one and one-half mile reference is in connection with the general power of a municipality to prepare and adopt a comprehensive plan reflecting the present and future development or redevelopment of the

---

98. Village of Lisle v. Village of Woodridge, 548 N.E.2d at 1342-43.

99. *See* Spaulding School Dist. No. 58 v. City of Waukegan, 165 N.E.2d 283 (Ill. 1960); *See also* North v. Board of Education of Community High School Dist. No. 203, 145 N.E.158 (Ill. 1924).

100. Forest Preserve Dist. v. Kelley, 387 N.E.2d 368, 372 (Ill. App. Ct. 1979).

101. *Id.* at 372.

municipality. The municipality is given the authority to make the plan applicable "to land situated within the corporate limits and contiguous territory not more than one and one-half miles beyond the corporate limits and not included in any municipality."[102]

Furthermore, this plan:

> may be implemented by ordinances (a) establishing reasonable standards of design for subdivisions and for resubdivisions of unimproved land and of areas subject to redevelopment in respect to public improvements as herein defined; (b) establishing reasonable requirements governing the location, width, course, and surfacing of public streets and highways, alleys, ways for public service facilities, curbs, gutters, sidewalks, street lights, parks, playgrounds, size of lots to be used for residential purposes, storm water drainage, water supply and distribution, sanitary sewers, and sewage collection and treatment; and (c) may designate land suitable for annexation to the municipality and recommended zoning classification for such land upon annexation.[103]

The statute, therefore, grants subdivision control to a municipality even as to property located outside its municipal borders and a plat of subdivision of a contiguous area may not be recorded unless it is in conformity with the applicable official map and subdivision control ordinances of the municipality.[104] The Illinois Supreme Court in *Petterson v. City of Naperville*, has upheld the statutory grant of extraterritorial jurisdiction with regard to subdivision controls.[105]

In this connection there has been much confusion between zoning control and subdivision control. It is important to note that a county's zoning ordinances control in any county that has enacted a zoning ordinance regardless of whether such ordinance was enacted before or after the municipality's exercise of its extraterritorial jurisdiction.[106] While this has been the accepted law, how is this impacted by the amendments to Section 11-15.1-2 discussed earlier?

The statute also answers the question of what happens when two municipalities are closer than three miles to each other. The statute states:

---

102. 65 Ill. Comp. Stat. Ann. 5/11-12-5(1) (West 1997).

103. 65 Ill. Comp. Stat. Ann. 5/11-12-5(1) (West 1997).

104. See 65 Ill. Comp. Stat. Ann. 5/11-12-12 (West 1993).

105. 137 N.E.2d 371 (1956).

106. *See* City of Canton v. County of Fulton, 296 N.E.2d 97 (Ill. App. Ct. 1973); City of Urbana v. County of Champaign, 389 N.E.2d 1185 (Ill. 1979).

In the absence of such an agreement, the jurisdiction of any one of the corporate authorities shall extend to a median line equidistant from its boundary and the boundary of the other corporate authority nearest to the boundary of the first corporate authority at any given point on the line.[107]

It should be noted, however, that this does not in any way limit the power of a municipality to annex property that is not within its boundary line. It only serves to extend the limit of planning authority. The statute is specific in stating that while the parties may agree not to annex territory "which lies within the jurisdiction of any other municipality," it goes on to state the following: "In the absence of such a boundary line agreement, nothing in this paragraph shall be construed as a limitation on the power of any municipality to annex territory."[108]

Finally, one further note concerning this issue. In the case of *Groenings v. City of St. Charles* the court considered a boundary agreement entered into between two non-home rule municipalities, pursuant to which they agreed to neither annex nor exercise zoning or subdivision control beyond territory located on their side of the boundary line established by the agreement.[109] Property owners who desired to annex to St. Charles in preference to the Village of Wayne, filed suit challenging the validity of the boundary agreement claiming that the agreement "tortiously interfered with their prospective economic advantage" and that their lack of participation in the formation of the agreement was a denial of due process.[110] The appellate court rejected this argument.[111] The court reasoned that in order to have a property interest a person must have more than a unilateral expectation of that interest.[112] The party must have a legitimate claim of entitlement to that property interest.[113] In this case, the plaintiff, while arguing that there was a decrease in property value as a result of the limitation as to where its property could be annexed failed to demonstrate that St. Charles would have annexed the land even if there had been no boundary agreement.[114] The court pointed out that St. Charles was under no obligation to annex plaintiff's property.[115] Under these circumstances,

---

107. 65 Ill. Comp. Stat. Ann. 5/11-12-9(West 1993).
108. *Id.*
109. 574 N.E.2d 1316 (Ill. App. Ct. 1991).
110. Groenings v. City of St. Charles, 574 N.E.2d at 1318.
111. *Id.* at 1324.
112. *Id.*
113. Groenings v. City of St. Charles, 574 N.E.2d at 1324.
114. *Id.*
115. *Id.*

the plaintiff had no property interest and no claim to due process in the establishment of the boundary agreement.[116]

CONCLUSION

If a magician had conjured up this complexity of legal "tricks" to thwart the best intentions of those seeking a land development agreement, our conjurer might have stated: "Please watch carefully and you will observe that at no time has the land moved." This is both the sad and humorous part of the sorry state of our present laws governing this subject.

Legally conceived lines might vacillate in the legislative or judicial winds, but the land itself is eternal from pristine prairie to urban slum and, perhaps, back again in a far distant time. The law should reflect the felt needs of society. The key to the law thought Justice Holmes, in fact, its very essence, was predictability (being able to advise a client as to how a court will decide specific legal questions). Combining the land, which still has not moved, with laws allowing predictable outcomes should be the goal in drafting land development agreements. Unfortunately, competing local interests, almost like feuding medieval barons, have caused a patchwork of legislation very suitable for legal alchemy, but not very suitable to serve the people affected.

What is needed is a thorough analysis and re-ordering. There should be a statute permitting development agreements and there should be a clear linkage between sections of the code dealing with planning, subdivisions, and boundaries and those sections dealing with agreements and annexations. Until easily understood linkages are created, uncertainty and unpredictability will remain along with the likely potential for litigation.

---

116. *Id.*