
Coates' Canons Blog: Conveyance of Local Government Property for Affordable Housing

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A developer of affordable housing for low and moderate income persons has approached the City and County about an affordable housing project near the City's downtown. The developer's plan is to acquire and assemble two adjacent parcels—one owned by the City and one owned by the County—and then develop 20 units of affordable housing on that site. There's a catch: The developer has asked the City and County to provide the two parcels as a gift to the project. Local governments are generally not permitted to make gifts to private individuals or entities, so the developer's request is immediately problematic. Can the local governments convey their property to the project in order to encourage the development of affordable housing? This post explains North Carolina law pertaining to the developer's request.

A prior post discussed local government authority to make appropriations in support of private construction of affordable housing. The content of that post—particularly the discussion of public purpose and statutory authority—is directly relevant to this discussion and should be read in conjunction with this post. This post expands on that earlier discussion by explaining the legal requirements for *conveying local government property* for the purpose of providing affordable housing.

General background on disposal of local government property

As explained in a prior post about property conveyance, we start with the general rule that, unless an exception is authorized by statute, North Carolina local governments *are required* to dispose of real property through competitive bidding procedures: sealed bid (G.S. 160A-268), upset bid (G.S. 160A-269), or public auction (G.S. 160A-270). In addition, case law generally prohibits local governments from placing conditions on a conveyance of property that will depress the price that a buyer would pay (*Puett v. Gaston County*). These competitive bidding procedures are always available to local governments for disposal of property.

An exception to those general rules is available when local governments convey property for the purpose of providing affordable housing to persons of low and moderate income (LMI). So long as certain public benefits are secured—namely, the recipient uses the property to provide safe, decent, and affordable housing for LMI persons—then a local government may use “private sale” procedures to convey the property to the buyer of its choice without undergoing a public bidding process. The specific statutory authority will be described later in the post.

Conveyance for Less than Fair Market Value – Constitutional Considerations

The authority to convey property by private sale does not mean that the property can be given away for less than it is worth. Gifts of public money or property are prohibited by Article 1, Section 32 of the North Carolina Constitution (for further legal analysis of that constitutional provision, see a blog post on the topic by my colleague Frayda Bluestein). A local government must receive valuable public service in return for any subsidy it provides to a private entity. Further, the state constitution restricts local governments to expending funds “for public purposes only.” Every expenditure must therefore serve a constitutional public purpose, and the North Carolina Supreme Court is the ultimate arbiter of what does or does not serve a public purpose. If an expenditure serves a public purpose, then it satisfies the constitution's gift clause as well.

As explained in a prior companion post, a local government expenditure to support the construction of affordable housing for LMI persons serves a constitutional public purpose when it is *necessary*—that is, in the words of the North Carolina Supreme Court, “*Only* when the planning, construction, and financing of decent residential housing is not otherwise available” for LMI persons through the normal activities of private enterprise. *Martin v. N. Carolina Hous. Corp.*, 277 N.C.

29, 50 (1970). Indeed, the court suggested that the public purpose might evaporate if the private sector began to provide adequate housing on its own and the identified needs “cease to exist.” *Id.* at 56-57. Under current economic conditions, the need for safe and decent affordable housing for LMI persons in most North Carolina communities is easily demonstrated.

A conveyance of property for less than fair market value is equivalent to an expenditure for the benefit of the recipient entity, so the same constitutional considerations apply to reduced-price conveyances as apply to appropriations. Accordingly, the public purpose rationale must be articulated in the approvals for the conveyance—that is, documentation should demonstrate the lack of available housing for LMI persons and should include a budget and pricing to show how the public’s financial support will assist LMI persons. Any subsidy in excess of what is necessary to make housing affordable for LMI persons would be inconsistent with the allowable public purpose and would amount to an unconstitutional gift to the housing developer.

The recipient must agree to perform services in furtherance of the constitutional public purpose (provision of affordable housing for LMI persons) and the conveyance must be conditioned on the promised performance. Affordable housing services connected to a conveyance of property are typically described in the following terms.

- **Number of affordable housing units to be provided**
- **Eligibility of households to reside in affordable housing units based on household income**
- **Affordability level of housing units as a percentage of household income**
- **Timing and phasing of construction of affordable units**
- **Process for certification of eligible households and process for transfer from one eligible tenant or owner to another eligible tenant or owner**
- **Control period in number of years during which units will remain affordable for LMI persons and whether property will be returned to local government at end of period**

More information about these typical terms are found in the companion post about affordable housing expenditures, and a more in-depth treatment is available in the affordable housing and inclusionary zoning guide. A common method of securing public services related to a conveyance is through restrictions on the deed with a reverter clause; that is, a clause placed in the deed that requires ownership to revert back to the local government in the event that the recipient entity fails to perform the required activities. A deed of trust or lien is another method, but liens can be wiped out in the event of foreclosure. Sample affordability language for deed restrictions and liens is provided at pages 110-12 of the affordable housing and inclusionary zoning guide.

Securing the constitutional conditions as described above is necessary but not sufficient to convey property for affordable housing. A local government must also identify enabling statutes that provide authority for the conveyance. The applicable statutory authority is different depending on the type of local government (municipality or county) and the recipient of the property (nonprofit or for-profit).

Statutory Authority for Conveyance by Municipalities

Conveyance to nonprofit entity carrying out public purpose

Whenever a local government is authorized to appropriate funds to a not-for-profit entity carrying out a public purpose, the local government is also permitted to convey property “by private sale” to that entity “in lieu of or in addition to the appropriation of funds” pursuant to G.S. 160A-279. As noted earlier, private sale means that the local government may choose its buyer rather than undergoing a competitive bidding process. The procedures for private sale of property are provided in G.S. 160A-267. The local government must attach “covenants or conditions” to the conveyance to ensure that the property will be “put to a public use by the recipient entity.”

A municipality may contract with and appropriate funds to a private entity to carry out a public purpose in which the municipality is authorized to engage. G.S. 160A-20.1. In the affordable housing context, municipalities derive their authority to make appropriations for affordable housing from the Housing Authorities Law, G.S. Chapter 157, through the operation of G.S. 160A-456(b), which states: “Any city council may exercise directly those powers granted by law to ... municipal housing authorities, and may do so whether or not a ... housing authority is in existence in such city.” See designation procedure at G.S. 157-4.1.

Accordingly, because a city is authorized to exercise the powers of a housing authority and make appropriations for affordable housing pursuant to that authority, G.S. 160A-279 permits a municipality to convey property by private sale to a not-for-profit housing organization that promises to use the property and any associated subsidy for affordable housing for LMI persons. As discussed in the prior companion post, housing authority powers are extensive provided the requirements of the Housing Authorities Law are met, to include:

- Multi-family rental projects must include mandatory set-asides for low-income persons (G.S.157-9.4) and note that a “housing project” can include housing for “persons other than low or moderate income, as long as at least twenty percent (20%) of the units in the project are set aside for the exclusive use of persons of low income.” (G.S. 157-3(12))
- Housing authorities (and local governments exercising the powers of an authority) must “fix the cost of dwelling accommodations for persons of low income at the lowest possible rates consistent with ... providing decent, safe, and sanitary dwelling accommodations.” (G.S. 157-29) A municipality should therefore have oversight of the rental rate or sale price of affordable housing constructed with its property or appropriations.
- “No housing authority may construct or operate its housing projects so as to provide revenues for other activities of the city [or, by extension, other entities].” (G.S. 157-29) When property is conveyed to a third party, a municipality must exercise oversight of the budgets for construction and operation of the housing project to ensure that the municipality’s subsidy is going to LMI persons and not toward other activities of the third party.

Of course, these requirements of the Housing Authorities Law are merely reflective and redundant of the constitutional imperatives prohibiting gifts to private entities and requiring all appropriations to serve a public purpose.

Conveyance to for-profit entities

One limitation of G.S. 160A-279 is that it authorizes conveyances to not-for-profit entities only. For-profit entities are explicitly excluded. However, the extensive powers of a housing authority described in G.S. 157-9 include a blanket exemption from property disposition procedures: “No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.”

Accordingly, conveyance procedures may be ignored by a housing authority or by a properly designated municipality exercising the powers of a housing authority. (In practice, local governments don’t ignore procedures, but rather follow the minimal procedures for private sale enumerated in G.S. 160A-267.) A housing authority may therefore convey property to any entity, whether nonprofit or for-profit, for less than fair market value, provided the subsidy goes toward the constitutional public purpose of making the housing affordable to LMI persons and does not amount to an unconstitutional gift to the recipient. Other provisions of the Housing Authorities Law must be followed, such as the requirement to ensure that housing projects are priced as low as possible and that revenues from housing projects don’t fund other activities. Conditions on the conveyance should be imposed to secure the public benefits.

Statutory Authority for Conveyance by Counties

Like municipalities, counties are permitted to exercise the powers of a housing authority directly. Specifically, G.S. 153A-376(b) states that “[a]ny board of county commissioners may exercise directly those powers granted by law to ... county housing authorities.” See G.S. 157-33 for designation procedures. G.S. 157-34 makes the powers of a county housing authority essentially identical to those of a city housing authority. A county may contract with and appropriate funds to a private entity to carry out a public purpose in which the municipality is authorized to engage. G.S. 153A-449. Accordingly, all of the powers of conveyance available to municipalities described in the preceding section also pertain to counties.

However, unlike municipalities, counties possess an additional source of statutory authority for engaging in affordable

housing activities. G.S. 153A-378(3) establishes the following independent authority: “Under procedures and standards established by the county, to convey property by private sale to any public or private entity that provides affordable housing to persons of low or moderate income. The county shall include as part of any such conveyance covenants or conditions that assure the property will be developed by the entity for sale or lease to persons of low or moderate income.” [Counties may also convey property by private sale directly to LMI persons under subsection (4).]

Recall that statutory authority to convey property by private sale does not mean that property may be given away for less than it is worth. However, G.S. 153A-378 authorizes the county to impose conditions and restrictions on the conveyance, and those conditions may be considered in determining the fair market value of the property. Presumably, a requirement to use property for affordable housing for LMI persons at lower rent or sale price will reduce the fair market value of the property, and that adjusted fair market value may be used to price the conveyance to any buyer, whether for-profit or nonprofit.

Should the county wish to convey the property for *less than the adjusted value*, then that would involve an additional subsidy and the county must utilize G.S. 160A-279 for the conveyance. Recall that under G.S. 160A-279, a conveyance for less than fair market value is permitted “in lieu of” an appropriation, but only when the buyer is a not-for-profit entity carrying out a public purpose. For-profit entities are explicitly excluded under G.S. 160A-279. There is only one way for a county to convey property in furtherance of affordable housing to a for-profit entity for less than fair market value: the county must exercise the powers of a housing authority and comply with the Housing Authorities Law as outlined in the preceding section on conveyances by municipalities.

Statutory Authority to Lease Local Government Property for Affordable Housing

There is separate statutory authority for leasing local government property for affordable housing. G.S. 160A-278 authorizes municipalities (and counties through the operation of G.S. 153A-176) to lease property by private negotiation to any entity that will use the property to construct affordable housing for LMI persons. This statutory authority may be employed without requiring the county or municipality to exercise the powers of a housing authority.

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-268.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-269.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-270.html
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- sog.unc.edu/publications/book-chapters/community-development-and-affordable-housing
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-279.html
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-267
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-20.1
- www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?Chapter=0157
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-456.html
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