Coates' Canons Blog: Wouldn't It Be Nice? Agreements on Large-Scale Development

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Note: In 2015 the General Assembly amended the development agreement statute discussed below to remove the requirement for a minimum acreage and the limit on the maximum term of an agreement. The agreement can not be for a project of any size and for a length deemed reasonable by the parties. S.L. 2015-246, Section 19.

Wouldn't it be nice if local governments, developers, and neighbors could sit together, talk through controversial large development proposals, and work to reach consensus about what would be a good project for all concerned? Wouldn't it be nice if at least some of this process could be informal, not requiring witnesses under oath and subject to cross-examination, with no strict limits on individual conversations along the way? And wouldn't it be nice, should that lead to consensus, that an effective tool would be available to implement that agreement, something everyone could rely on over time? It would be nice and the tool does now exist in North Carolina.

Prior to the economic downturn it was increasingly common to see development projects that involved hundreds of housing units, often with substantial associated commercial, office, and institutional development. When the economy recovers, we will once again see proposals for new large-scale developments.

For the most part there were two basic choices open to local governments for how these large-scale development proposals were reviewed and decided – a legislative rezoning or a quasi-judicial special or conditional use permit. Both choices are still available, but a new tool provides a third option that is worth considering in the right circumstances.

The first option — a legislative policy decision on a rezoning petition – has the value of allowing maximum flexibility and discretion for the local government. Apart from holding a public hearing and getting a planning board comment prior to a final decision, city or county officials can hold whatever discussions they want. They retain great leeway in deciding what course of action is in the best public interest. A key downside, however, is that the governing board can (following the same process) change their mind and a few years down the road rezone the property to something else. Or a subsequent developer can walk away from agreed-upon future contributions to pay for public infrastructure. Given the lengthy buildout period for large-scale projects, the possibility of things coming unraveled in a messy way prior to the completion of the project can be worrisome.

The second option – using a conditional use permit or a similar regulatory approval – has the advantage of much greater certainty and predictability, but the decision-making process is much more formal and cumbersome. With these quasi-judicial decisions the courts insist on use of a very careful process in order to protect the legal rights of those affected by the decision. The decision-makers cannot engage in discussions outside the formal hearing. The decision must be based on pre-determined standards. There must be substantial evidence in the record to document whether those standards are met. This is a great tool in the right context, but one that does not allow negotiation, informal discussion, and building towards a consensus decision.

A new tool became available to North Carolina cities and counties in 2006 to bridge the gap between these two options. Cities and counties can now enter into development agreements with landowners. Local governments are free to use informal discussions with the landowner, neighbors, and interested members of the public in reaching the agreement. The final agreement must be approved as an ordinance (with a public hearing). The development agreement gives reliable local government approval to a substantial development project. It sets the conditions that must be met, including long-term cost-sharing agreements for provision of public infrastructure to serve the development. It commits the developer to meeting those conditions. It allows the parties to rely on the agreement for up to twenty-five years. This approach allows the flexibility, informality, and discretion of the legislative process to be used, but also results in a reliable, binding,

contractual agreement. The government and the owner are thus assured of long-term enforceability.

A new report from the School of Government (**The Use of Development Agreements to Manage Large-Scale Development: The Law and Practice in North Carolina**) details the legal requirements for use of this option and reports on how it has been used across the state in the first three years it has been available. It also includes three brief case studies of agreements reached in Catawba County, Chapel Hill, and Wilmington, along with copies of those agreements.

The report concludes that development agreements offer an important new opportunity, but one that must be used carefully to be successful. The developer must provide details on the scope and design of the project. Substantial investment in production and analysis of technical information (such as traffic studies, public service demands, infrastructure design, environmental impacts, and fiscal implications) is often necessary. The agreement itself can be a complicated legal document requiring substantial time of government and private attorneys. The statute leaves some ambiguity about a few key legal issues and these must be carefully considered. The negotiation process can be lengthy and demanding upon staff, advisory boards, elected officials, applicants, neighbors, and the public. But the payoff can likewise be substantial. It allows an open discussion and negotiation among the public and private parties interested in and affected by large developments. It allows a consensus to be reached on the appropriate scale and design of development and the conditions needed to prevent adverse public impacts.

For the most part only relatively large and complicated projects will justify the time and effort needed to successfully negotiate and adopt a development agreement. The existing zoning and subdivision review process, along with standard cost-sharing agreements for utilities, are adequate to deal with routine projects. Development agreements offer an effective way to reach a broad, reliable, and implementable resolution of the challenging issues often raised by more substantial and complex development proposals, especially those involving off-site public improvements or high cost, long-term investments. For these projects the development agreement offers a reasonable and effective alternative for meeting the needs of the local government, the land owner, and the public.

So, **wouldn’t it be nice?** If and when it does all work out, it is.

Links

- www.sog.unc.edu/publications/books/use-development-agreements-manage-large-scale-development-law-and-practice-north-carolina
- www.youtube.com/watch?v=L–cqAI3IUI