

To: David Andrews

From: G. Nicholas Herman & Kevin R. Hornik

Date: February 15th, 2018

Re: Options for Developing Town Property for Affordable Housing

Mr. Andrews,

You have directed The Brough Law Firm, PLLC, on behalf of the Town of Carrboro (the “Town”), to research and outline the options available to the Town for developing affordable housing units on property owned by the Town. This Memorandum shall form the basis of the Town’s Affordable Housing Commission’s planning efforts with respect to how best to use Town property to provide affordable housing units for the community. The results of our research are outlined below.

North Carolina’s Housing Authorities Law (N.C. Gen. Stat. § 157-1, et seq.) authorizes local governments to create a “housing authority,” or a “public body and a body corporate and politic” vested with the power to undertake housing projects designed to provide housing for those with low or moderate income. However, N.C. Gen. Stat. § 157-4.1 authorizes city councils to either create a city-run “redevelopment commission... to exercise the powers, duties, and responsibilities of a housing authority” or to exercise those powers and duties itself. If the city council chooses to exercise those duties itself, it may assign the administration of those duties to any new or existing department of the city.

Local governments are authorized to engage in a number of different “housing projects” in an effort to provide affordable housing. This authority is detailed in N.C. Gen. Stat. § 157-1 through -70. The term “housing projects” covers a wide variety of activities related to the provision of affordable housing, including: planning for buildings or improvements related to affordable

housing, demolition of existing structures, construction, reconstruction, alteration, and repair of improvements, and any other work related to affordable housing. Of course, any fiscal involvement by the Town must meet the basic constitutional requirement that the expenditure of public funds be tied to some public purpose. However, a number of North Carolina Supreme Court Opinions clearly state that the provision of housing for persons and families with low income is a constitutionally-valid public purpose.¹

Generally, there are two categories of action available to the Town. The Town may engage in supply-oriented programs, which are designed to provide affordable housing options through affordable housing development projects either undertaken by the Town or subsidized by the Town. The Town may also engage in demand-oriented programs, which are designed to provide housing assistance funds to those seeking affordable housing. As the Town has already appropriated land in a number of subdivisions with the intention of providing affordable housing units to the community, our research efforts have focused primarily on the Town's supply-oriented authority.

Below, you will find an explanation of the Town's authority to use Town-owned land to provide affordable housing to persons of low to moderate income.

I. Authority to Finance Affordable Housing Projects

N.C. Gen. Stat. § 159-48(d)(7) very clearly authorizes city governments to borrow money and issue general obligation bonds to finance the development of affordable housing units. The statute specifically allows local governments to:

“[provide] housing projects for the benefit of persons of low income, or moderate income, or low and moderate income, including without limitation (i) construction or acquisition of

¹ See *In re Denial of Approval to Issue \$30,000,000.00 Single Family Housing Bonds and \$30,000,000.00 of Multi-Family Housing Bonds for Persons of Moderate Income*, 307 N.C. 52, 296 S.E.2d 281 (1982); *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970); *Wells v. Hous. Auth. Of City of Wilmington*, 213 N.C. 744, 197 S.E. 693 (1938).

projects to be owned by a city, redevelopment commission, or housing authority, and (ii) loans, grants, interest supplements and other programs of financial assistance to persons of low income, or moderate income, or low and moderate income, and developers of housing for persons of low income, moderate income, or low and moderate income. A housing project may provide 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 housing for the exclusive use of persons of low income. No rent subsidy may be paid from bond proceeds.”

This statute makes clear that the Town is authorized to develop affordable housing units, to be owned by the Town, or to provide financial assistance to those with low or moderate incomes, or to grant subsidies to developers who intend to provide housing for those with low or moderate incomes. The Town may finance these projects through the typical general obligation bond process, outlined in the Local Government Bond Act (N.C. Gen. Stat. § 159-43, et seq.).

II. Authority to Dispose of Public Property for the Provision of Affordable Housing

As a general rule, North Carolina local governments are required to dispose of public property through competitive bidding procedures—i.e., sealed bids (per G.S. 160A-268), upset bids (G.S. 160A-269), or public auctions (G.S. 160A-270). Further, local governments may not place conditions on the sale of public property that will depress the value of the property. However, one key exception to these general rules deals with local government authority to dispose of public property for the creation of affordable housing stock.

In cases where public property is sold to ensure the availability of safe, decent, and affordable housing for persons of low to moderate income, local governments may use “private sale” procedures to convey public property to the buyer of its choice, without undergoing the public bidding process.²

It is important to note, however, that under no circumstances may a local government convey property for less than it is worth. Article I, Section 32 of the North Carolina Constitution

² N.C. Gen. Stat. § 160A-279 and N.C. Gen. Stat. § 160A-267

prohibits the conveyance of “exclusive emoluments”—i.e., gifts of money, property, or privilege from the government—without some commensurate value in return. Where public property is being conveyed at less than market value, the local government must receive some valuable public service in return for any subsidy the government provides.

It is also worth noting that the North Carolina Constitution authorizes local governments to spend money “for public purposes only.”³ The North Carolina Supreme Court has determined that the expenditure of public money to provide affordable housing stock serves a “public purpose” when it is necessary—i.e., when decent affordable housing is “not otherwise available” to persons of low to moderate income.⁴ This is significant in that it requires a showing that private enterprise has not provided adequate housing on its own.

Because the conveyance of public property for less than fair market value is equivalent to an expenditure of public funds for the benefit of the recipient, the public purpose for the conveyance must be clearly articulated. This may be managed by demonstrating the lack of affordable housing stock for persons of low to moderate income in the community, and a description of how the local government’s financial support will benefit those with low to moderate incomes. Generally, this should be accompanied by a clearly defined budget and projected costs, as any public money expended in excess of what is necessary to provide the stated public benefit will be considered an unconstitutional exclusive emolument or gift to the developer.

Additionally, it is wise to require specific performance guarantees from the recipient. This can be accomplished by drafting a clear written agreement between the local government and the recipient, detailing, among other things: how many affordable housing units will be provided, any eligibility criteria for households to purchase or rent the affordable housing units, the affordability

³ Article V, Section 2(1) of the North Carolina Constitution

⁴ *Martin v. North Carolina Housing Corporation*, 277 N.C. 29, 50 (1970).

level of housing units as a percentage of household income, timing and phasing of the development and construction of affordable housing units, the process for certification of eligible households and the process for transfer from one eligible owner or tenant to another, and the period for which affordable housing must be provided on the property and whether the property will be returned to the local government at the end of that period.

Another common method for ensuring the provision of affordable housing following the conveyance of public property is through the inclusion of restrictions on the deed, which may also include a reverter clause. Such restrictions would prohibit the property from being used for any purpose other than the provision of affordable housing. A reverter clause would ensure that if, at any time, the property ceases to be used for affordable housing or otherwise violates the deed restrictions or other written agreements between the recipient and the local government to provide affordable housing on the property, ownership of the property will revert back to the local government.

In addition, local governments must clearly identify statutory authority to convey public property for affordable housing. There are a number of statutes which provide this authority, varying depending on what type of local government unit is making the conveyance (municipality or county), the recipient of the property (for-profit or non-profit), and the type of conveyance made (sale or lease). The following will briefly detail the statutory authority for municipal governments to sell or lease public property to for-profit and non-profit entities for the provision of affordable housing units.

A. Sale to Non-Profit Entities

Pursuant to N.C. Gen. Stat. § 160A-279, whenever a local government is authorized to appropriate funds to non-profit entities carrying out a public purpose, the local government is also

authorized to convey public property by “private sale” to that entity. Private sales allow local governments to choose their preferred buyer, as opposed to entering into a competitive bidding process. Private sales must be conducted according to the procedures outlined in N.C. Gen. Stat. § 160A-267 and, as described above, the local government must attach “covenants or conditions” to the conveyance to ensure that the property will be put to public use.

Municipalities are specifically authorized to make appropriations for affordable housing under the Housing Authorities Law⁵ and N.C. Gen. Stat. § 160A-465(b), which states that: “[a]ny 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.” Therefore, since cities are authorized to exercise the powers of a housing authority and to make appropriations for the provision of affordable housing pursuant to that authority, N.C. Gen. Stat. § 160A-279 permits municipalities to convey public property by private sale to non-profit entities that covenant or agree to use the property and any associated subsidies to provide affordable housing for persons of low to moderate income.

B. Sale to For-Profit Entities

The provisions of N.C. Gen. Stat. § 160A-279, described above, which allow local governments to convey property to non-profit entities, do not apply to conveyances to for-profit entities. However, Pursuant to N.C. Gen. Stat. § 157-9, housing authorities are generally exempt from property disposition regulations. The statute specifically states that “[n]o provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to a[] [housing] authority unless the legislature shall specifically so state.”

⁵ N.C. Gen. Stat. Chapter 157

As a result, when a municipality properly assumes the role of housing authority, as authorized by N.C. Gen. Stat. § 160A-456, the municipality is not obligated to follow the general procedures for the disposition of property by a municipality. As a result, municipal governments may convey public property to for-profit entities in much the same way they are authorized to convey property to non-profit entities, provided that the requirements of the Housing Authority Law and North Carolina Constitution are met.

C. Lease of Public Property for Affordable Housing

Finally, N.C. Gen. Stat. § 160A-278 authorizes municipal governments to engage in private negotiations to lease property to any entity that will use the property to construct affordable housing for persons of low to moderate income. This authority stands on its own, and does not require municipal governments to exercise or assume the powers of a housing authority.

III. Types of “Housing Projects” that Local Governments May Engage In

N.C. Gen. Stat. § 157-9(a) authorizes housing authorities, and, by extension, local governments acting under N.C. Gen. Stat. § 160A-456(b), to “prepare, carry out and operate housing projects” and to “provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof.” This provides very broad authority to engage in the provision of affordable housing to persons of low to moderate income, when necessitated by the housing market.

“Housing project” is broadly defined under N.C. Gen. Stat. § 157-3(12), and includes the direct provision of affordable housing stock, payment of rent subsidies, provision of grants and loans to persons of low to moderate income, and the provision of grants, loans, or other financial assistance to public or private developers engaging in the construction or provision of affordable housing stock to persons of low to moderate income.

It is worth noting that where a housing authority, or local government acting as a housing authority, assists in the provision of a multi-family affordable housing development, the following requirements must be met:

1. At least 20% of the units in the housing project must be set aside for the exclusive use of persons of low income,
2. Units set aside for persons of low income must continue to be set aside for at least 15 years, and
3. “Persons of low income” must be defined as those in households earning no more than 60% of the local area median family income.

Additionally, it is common practice for municipal governments to oversee or regulate the rental or sale prices for affordable housing units, and to oversee the budget for construction and operation of affordable housing projects subsidized by the local government to ensure compliance with N.C. Gen. Stat. § 157-29’s requirement that the cost of affordable housing units be at “the lowest possible rates consistent with...providing decent, safe, and sanitary dwelling accommodations” and that the housing project cannot “provide revenues for other activities of the city.”

IV. Conclusion

Ultimately, it is clear that the Town has significant authority to provide affordable housing within the community. The Town may do so by selling or leasing Town-owned property to for-profit or non-profit entities who will construct affordable housing units on the property, so long as the housing market and the available housing stock necessitate government action. It is also clear that the typical open bidding procedures are not required in these circumstances. Rather, the Town may engage in a “private sale” so long as any resulting sales agreements clearly express the public

benefit to be provided, the projected budget, and the projected costs to the developer. In essence, it must be clear that any benefit conveyed to the developer—whether through a subsidy or reduction in sales price—does not exceed the value of the public benefit provided.