Community and Economic Development in North Carolina and Beyond Blog: Follow Procedures Prior to Acquiring Property for Redevelopment

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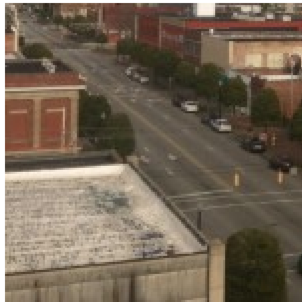

The Town of Renewville has ambitious redevelopment plans for several key—but tired and/or underdeveloped—properties along its Main Street. As we know from a prior post examining the limited situations in which a local government may discuss property acquisition in closed session, the Renewville town council intends to kick-start the redevelopment process by acquiring several of those key properties directly. After acquiring the properties, the council intends to engage development finance experts to conduct predevelopment analysis, and then it will sell the property to a private developer through a Request for Proposals (RFP) process, similar to the process completed by other North Carolina communities as described here and here.

However, a threshold determination must first be made. Is it necessary for the town to comply with any procedural requirements prior to acquiring the property? After all, local governments typically don't comply with any particular procedural requirements when they acquire property. In this case, however, the answer is "yes"—certain procedures must be followed if the town wishes to convey the property to private developers selected through its RFP process. The answer is the same for a county, too. This post explains why it is advisable to issue notice and hold a public hearing prior to acquiring property for redevelopment and discusses risk mitigation for local governments that fail to do so.

Start with the end in mind

The key to understanding why the town needs to hold a properly-noticed public hearing prior to acquisition, is knowing the end result desired by the town. Ultimately, the town hopes to sell each acquired parcel to one or more private developers who will redevelop the property consistent with the town's vision. It would not be acceptable to the town, for example, to undergo a competitive bidding process, only to find that the highest bidder lacked the experience, access to capital, or intent to redevelop the property in a timely manner. A worst-case scenario might involve a salvage company (not a developer) being the highest bidder for a key historic building, with plans to strip copper and other valuable materials from the building, and then use the building for storage over the next two decades. To avoid these undesirable results, the town desires to sell the property by negotiated private sale to the developer of its choice, with conditions on the conveyance to ensure the property is redeveloped in a way that is compatible with town goals.

There are several options for conveying property to a redeveloper as explained in this prior post on land banking authority, but *only one statute* grants Renewville authority to convey all of its key properties by private sale and to impose development conditions on the buyer. That one statute is G.S. 158-7.1 in the Local Development Act of 1925, pertaining to economic development activities.

Pursuant to G.S. 158-7.1, counties and cities may convey property "by private negotiation and may subject the property to such covenants, conditions, and restrictions as the county or city deems to be in the public interest…." The consideration (or sale price) for the property "may not be less than" the "fair market value,"[1] and a properly noticed public hearing must

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be held prior to approving the conveyance (G.S. 158-7.1(d)). In other words, G.S. 158-7.1 provides the conveyance authority that Renewville desires, provided the town complies with all the statutory requirements.

To sell property pursuant to G.S. 158-7.1, the local government should first acquire it by G.S. 158-7.1

There is a catch related to the broad economic development authority of G.S. 158-7.1. In order for the town to convey property pursuant to G.S. 158-7.1 at private sale and subject to conditions, the town must first acquire the property by G.S. 158-7.1. There are two reasons this preliminary step is required.

The first reason is constitutional. In the seminal economic development case, *Maready v. City of Winston-Salem*, 342 N.C. 708 (1996), the North Carolina Supreme Court opined on whether economic development activities authorized pursuant to G.S. 158-7.1 serve a constitutional public purpose. The court acknowledged that local government economic development activities, which necessarily involve private for-profit actors who stand to benefit from those activities, are ripe for abuse. However, the Supreme Court stated in *Maready* that the "strict procedural requirements the statute imposes" will prevent abuse. Therefore, local governments have long been advised to adhere carefully to the procedures imposed by G.S. 158-7.1 to remain safely within the bounds of the North Carolina Constitution's public purpose imperative.

The second reason relates to long-standing rules of statutory construction. Statutes *in pari materia* (relating to the same subject matter) should be read together. The North Carolina Supreme Court has stated, "It is a fundamental rule of statutory construction that sections and acts in pari materia, and all parts thereof, should be construed together and compared with each other." Redevelopment Comm'n of Greensboro v. Sec. Nat. Bank of Greensboro, 252 N.C. 595, 610 (1960). In those situations, "When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 238 (1985).

G.S. 158-7.1's broad language is certainly "general in nature," as discussed in this prior blog post, and arguably there are specific statutes about redevelopment, namely G.S. 153A-377 (counties) and G.S. 160A-457 (cities) pertaining to "acquisition and disposition of property for redevelopment." The latter two statutes authorize local governments to acquire any "inappropriately developed" property as necessary and convey it for redevelopment, and no procedural requirements are imposed prior to acquisition. Most important for this post's purposes, those statutes *specifically direct local governments to employ competitive bidding procedures upon sale*. Accordingly, if a local government acquires property for redevelopment purposes without first issuing notice and holding a public hearing under G.S. 158-7.1, then the unit has, by default, acquired the property pursuant to G.S. 153A-377 or G.S. 160A-457. It also follows that the unit must use competitive bidding procedures as required by those two statutes when the unit later seeks to convey the property to a developer.

As already discussed, Renewville does not want to use competitive bidding because those procedures would undermine the town's carefully constructed RFP process. Renewville's RFP process will function as intended only if the town can utilize private sale procedures and impose conditions as authorized by G.S. 158-7.1(d). To avail itself of G.S. 158-7.1(d)'s conveyance authority, which is provided for property that is "held or acquired pursuant to [G.S. 158-7.1(b)]," Renewville must overcome the presumption that it acquired property pursuant to G.S. 160A-456 (or G.S. 153A-377 for counties) by explicitly operating under G.S. 158-7.1 from the beginning. Renewville should therefore adhere to G.S. 158-7.1(c) acquisition procedures, to include issuing notice and holding a public hearing prior to acquisition, and the town should explicitly refer to G.S. 158-7.1 in resolutions it adopts related to acquiring the key properties.

What if a local government acquires property without following G.S. 158-7.1 acquisition procedures?

There are two situations in which a local government may seek to use G.S. 158-7.1 private sale procedures for disposition of property even though it did not follow G.S. 158-7.1 procedures at the time of acquisition.

Situation 1: Property originally acquired for a purpose other than economic development

The first situation occurs when a local government has acquired property for some reason unrelated to private development. For example, a local government might acquire property as a result of a tax foreclosure process, as described in this post on tax foreclosure and redevelopment by my faculty colleague Chris McLaughlin. Or a local

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government may acquire property for a purpose unrelated to development—such as construction of government offices—and then later the unit's plans change and the property becomes surplus.

When property is acquired for a purpose other than redevelopment, and then later the unit desires to avail itself of the special disposition authority of G.S. 158-7.1, the local government should take specific action to mitigate legal risk for itself (and for the eventual purchaser of the property) by formally adopting a resolution that the property is now being held for disposition as economic development property under G.S. 158-7.1. A conservative approach would suggest that the local government should, prior to adopting that resolution, issue notice and hold a public hearing pursuant to G.S. 158-7.1(c). The rationale for the conservative approach is twofold. First, the *Maready* decision imbues G.S. 158-7.1's "strict procedural requirements" with constitutional significance, so evading G.S. 158-7.1 procedures at any point is inadvisable. Second, holding a properly noticed public hearing complies with the intent of G.S. 158-7.1 by ensuring that the public is given an opportunity to comment on the unit's decision to hold and convey the property for economic development, as opposed to simply disposing of the property immediately through competitive bidding.

In addition, from the point that the local government resolves to hold the property for disposition as economic development property, the local government should consistently treat the property as economic development property. This means that all expenditures associated with that property (e.g., marketing, site preparation, etc.) should comply with G.S. 158-7.1 notice and hearing procedures as discussed in this blog post on notice and hearing requirements for economic development appropriations.

Situation 2: Local government simply failed to follow G.S. 158-7.1 acquisition procedures

The second situation occurs when a local government has acquired property with the intent of conveying property for development, but it simply failed to follow G.S. 158-7.1 procedures prior to acquisition. This second situation is more troublesome, because as already discussed above, the local government has essentially acquired the property pursuant to G.S. 153A-377 or G.S. 160A-457 by default, and those statutes call for competitive bidding at disposition.[2] A local government that seeks to convey such property by private sale, rather than using competitive bidding, could be challenged in court as acting outside of its authority.

This is not a theoretical concern. In 2012, a plaintiff filed suit in Superior Court to prevent a local government from conveying property by private sale under G.S. 158-7.1 because the unit had failed to follow the "strict procedural requirements" of the statute at the time of acquisition. The plaintiff's complaint sought to have the unit's original acquisition nullified—and the complaint survived summary judgment. Ultimately, the local government was able to "cure" the defect by starting over and following all of the required acquisition procedures, but the developer pulled out of the deal anyway due to the delay and risk associated with the conveyance. No appeal was filed, so it serves as a warning but offers no helpful legal precedent.

Case law therefore leaves no clear answer as to whether it is possible to "cure" a failure to adhere to the "strict procedural requirements" for acquisition under G.S. 158-7.1. A safer alternative to "cure" might be to use other statutory means for conveyance, if appropriate. For example, negotiated sale is permitted for public-private partnerships for construction under G.S. 143-128.1C, as explained in a post by my faculty colleague Norma Houston. In a central business district, a municipality may convey property by private sale when a public facility will be constructed as part of a downtown development project (G.S. 160A-458.3). For historic structures, conveyance by private sale to historic preservation organizations (but not real estate developers) is permitted under separate authority as described in this blog post on sale of historic structures for redevelopment. Finally, an urban redevelopment area could be established around key properties under G.S. Chapter 160A, Article 22, after following the procedures described in a blog post on urban redevelopment areas , and the properties within the redevelopment area could be conveyed by competitive bidding with redevelopment conditions imposed pursuant to G.S. 160A-514.

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Outside of those statutory alternatives, a local government that has failed to comply with the procedural requirements of G.S. 158-7.1 upon acquisition, but still wishes to convey the property using the statute's private sale procedures, could attempt to "cure" the procedural defect after the fact, but it will need to wrestle with the legal risk involved. In addition, local officials should keep in mind that they aren't the only ones who would worry about the legal risk. Any developer who would purchase the tainted property also faces risk: the property could become a source of protracted litigation, holding up development plans indefinitely—and it is possible that a court could invalidate the original acquisition entirely. As they say, "An ounce of prevention is worth a pound of cure."

Endnotes:

[1] Some conveyances pursuant to G.S. 158-7.1 may be subsidized as described in this blog post on economic development incentives. However, the typical private developer does not meet the requirements for a subsidized conveyance, as explained in this blog post about the constitutional concerns with providing subsidies to real estate developers.

[2] A narrow exception exists within G.S. 160A-457 for municipalities disposing of property in a "community development project area"—a term with specific meaning related to a federal grant program of the past—so that narrow exception is unlikely to apply to contemporary redevelopment efforts. For examples of community development project areas, see Neighborhood Revitalization Strategy Areas and Community Revitalization Strategy areas.

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