Community and Economic Development in North Carolina and Beyond Blog: Notice and Hearing Requirements for Economic Development Appropriations

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Economic development appropriations pursuant to G.S. 158-7.1 have long required a properly-noticed public hearing prior to approval. When the appropriations involve business location incentives, the notice and hearing requirements take on constitutional significance as a result of North Carolina Supreme Court case law. In 2015, the General Assembly imposed additional notice and hearing requirements, mandating a public hearing for *any* economic development appropriation. The General Assembly modified the requirement again in 2019. This post offers guidance for understanding and complying with current notice and hearing requirements under G.S. 158-7.1.

Background

Local governments have held public hearings pursuant to Article 1 of North Carolina General Statutes Chapter 158 ("The Local Development Act of 1925") for decades. Prior to 2015, such hearings were required only when an economic development appropriation was related to real property or involved a business location incentive for "jobs and tax base" that "might otherwise be lost to other states." *Maready v. City of Winston-Salem*, 342 N.C. 708 (1996). Starting in 2015, Session Law 2015-277 required North Carolina local governments to issue notice and hold a public hearing prior to approval of *any appropriation* for economic development—even when the appropriation had nothing to do with real property or business location incentives.

The new, expanded requirement for public hearings now encompasses relatively routine appropriations such as salaries for development professionals, allocations for advertisements in trade magazines, and coordinating functions handled by Chambers of Commerce and similar organizations. Such routine expenditures had typically been included in annual budgets and approved through the annual budget process. Local officials began to question whether the public hearing for the annual budget could fulfill the expanded hearing requirement enacted in 2015. The General Assembly answered the question in Session Law 2019-112 by inserting new language into G.S. 158-7.1, allowing the annual budget hearing to serve as the required economic development hearing for routine appropriations included in the budget.

Notice of the hearing must be published prior to the hearing in any case. The form and content of the notice depends on the type of expenditure. A framework for determining the correct form of notice is described below.

A Framework for Notice and Hearing Requirements for Economic Development Appropriations

A public hearing must be held prior to approving appropriations for economic development purposes. The notice and hearing requirements can be determined using a basic three-step framework. The three-step framework will first be described, and then specific matters will be addressed.

STEP 1: Is the appropriation most correctly described as being "for economic development purposes?"

- **If yes**, then **proceed to step 2 below**.
- **However, if some other statute is more appropriate**, then the local government may follow the procedures directed by that other statute instead. See the explanation in the next section entitled: What are "appropriations for economic development purposes?"

STEP 2: Is the appropriation for (1) an activity related to real property and/or (2) a business location incentive provided to locate "jobs and tax base" that "might otherwise be lost to other states" as authorized by *Maready*?

- **If yes**, then publish a notice of hearing as prescribed by G.S. 158-7.1(c) that describes (1) the specific property-related activities being undertaken by the local government and/or (2) the business location incentives. See the explanation later in this post for more detail on the notice contents. The notice must be published at least 10 days before the public hearing is held. If the appropriation was also included in the annual budget, then after providing notice as prescribed by G.S. 158-7.1(c), the required hearing may be held as "part of the public hearing on the annual budget pursuant to G.S 159-12." The appropriation may be approved after the hearing.
- **If no, then proceed to step 3 below**.

STEP 3: Is the appropriation for a routine economic development purpose that has been included in the annual budget?

- **If yes**, then approve the appropriation only "after a public hearing, which may be part of the public hearing on the annual budget pursuant to G.S 159-12." Notice will conform with the process prescribed in G.S. 159-12 for all expenditures, except that appropriations for property-related activities and business location incentives must follow the specific notice requirements for those activities as described in step 2 above.
- **If the appropriation was not included in the annual budget**, then publish a notice of hearing describing the general nature of the economic development appropriation. The notice must be published at least 10 days before the public hearing is held.

What are "appropriations for economic development purposes?"

G.S. 158-7.1(a) authorizes local governments "to make appropriations for economic development purposes." As explained in a prior post, the term "economic development" is a general term imbued with little specific meaning. The term encompasses activities ranging from workforce training, to marketing the local jurisdiction in trade publications, to hiring a staff of development professionals, to constructing shell buildings in industrial parks. The statute requires a governing board to determine that each appropriation will, at a minimum, "increase the population, taxable property, agricultural industries, employment, industrial output, or business prospects of the city or county." Unfortunately, this broad language offers little help in determining what is or is not an economic development appropriation. Case law provides no assistance either. The North Carolina Supreme Court, in the seminal economic development case, *Maready v. City of Winston-Salem* , 342 N.C. 708 (1996), looked at essentially the same language in an earlier version of the statute and dismissed it as being merely the "self-proclaimed end" of the statute.

We must therefore conclude that the General Assembly intended for the term "economic development" to remain ambiguous and general in nature. This has an important implication for determining when an appropriation is "for economic development purposes." The North Carolina Supreme Court has stated, "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).

The economic development statute, being "general in nature," therefore will not control when other statutes overlap, such as urban redevelopment law (G.S. Chapter 160A, Article 22), community development programs and activities (G.S. 153A-376, G.S. 160A-456), downtown revitalization districts (G.S. 160A-536), acquisition and disposition for redevelopment (G.S. 153A-377, G.S. 160A-457), and historic preservation (G.S. 160A-400.1 *et seq*.). Thus, when a local government appropriates funds for purposes described by those other statutes, the activity arguably is not "for economic development purposes" and the notice and hearing requirements of G.S. 158-7.1 will not apply unless the local government specifically elects to appropriate funds pursuant to G.S. 158-7.1.

When is an economic development appropriation for property-related activities or business location incentives?

Determining when an appropriation is related to real property or a business location incentive is not as simple as it may first appear, primarily because there is case law involved. As background, certain kinds of economic development appropriations—specifically property-related activities—have long been subject to specific notice and hearing requirements pursuant to G.S. 158-7.1(c) and (d). Before 2015, subsection (c) read as follows: "Any appropriation or expenditure *pursuant to subsection (b)* of [G.S. 158-7.1] must be approved by the county or city governing body after a public hearing." Thus, a public hearing was originally required only for the property-related activities appearing in subsection (b). In 2015, S.L. 2015-277 removed the limiting words "pursuant to subsection (b)," thereby making all economic development appropriations subject to the notice and hearing requirement.

The explicit references to subsection (b) prior to 2015 were important: the original notice and hearing requirements applied *only to subsection (b) activities*, all of which pertain to acquiring, improving, or conveying real property. Examples of those enumerated subsection (b) activities include developing an industrial park, acquiring and holding commercial property for resale, constructing industrial shell buildings, extending utilities, and conducting site preparation for industrial development (and more recently, rehabilitating historic structures). Thus, the statute was unambiguous in instances when a local government engaged *directly* in subsection (b)'s enumerated activities: the local government was required to publish notice and hold a public hearing prior to approving the appropriation.

The same result would occur whenever a local government engaged in those property-related activities *indirectly* by appropriating funds to induce a *private business* to engage in those activities. As a general rule, *this meant that all business location incentives were subject to the notice and hearing requirement.*

The logic was straight forward. G.S. 158-7.2 requires a local government to approve and account for all expenditures of its economic development funds by another entity. Incentives can only be paid lawfully to a business when that business promises to create jobs and increase the property tax base (as explained in this blog post), and essentially the only way for a business to accomplish that end is by making taxable improvements to real property. Further, the payment of a business location incentive is essentially the same as acquiring an interest in the business' property and then conveying that interest to the business for less than fair market value. (As explained in this prior post, Professor David Lawrence refers to this as the "economic equivalent" of engaging in those activities directly on page 107 of his book on economic development law.)

Even installation of machinery or related equipment, typically classified as personal property, involves improvements to real property to accommodate the equipment, particularly when the installation is significant enough to warrant a competitive business location incentive. Thus, paying a business location incentive is essentially the same as engaging in property-related activities directly, thereby implicating the notice and hearing requirements of subsections (c) and (d).

Furthermore, the notice and hearing for business location incentives was imbued with constitutional significance in *Maready*. The *Maready* court reviewed 24 cash incentives offered to private companies by the City of Winston-Salem and Forsyth County. All of the incentives were paid in cash, so the local governments did not engage *directly* in any of the real estate development activities of subsection (b). Nonetheless, the *Maready* trial court (quoted approvingly by the supreme court) specifically found that incentives "made pursuant to the provisions of N.C.G.S. 158-7.1(b) through (f) were approved … following publication of a notice of a public hearing … as provided in said statute." Thus, the local governments were following all of the procedural requirements as if cash business location incentives were the same as engaging in property related activities directly. The fact that all of the incentives took the form of cash payments was irrelevant in the court's view. And the court went further, stating that adherence to those "strict procedural requirements" was part of the constitutional public purpose rationale for incentives. As a result, local governments have long published notice and held a public hearing prior to approving any business location incentive. For additional detail on this practice, see Economic Development Law for North Carolina Local Governments, pages 97-98.

Later enactments in 2015 and 2019 do not (and cannot) change this constitutional imperative. Local governments are advised to continue the practice of publishing notice and holding hearings pursuant to subsections (c) and (d) for all business location incentives as if they were engaging in property-related activities directly. The constitutional public purpose analysis of the court remains in effect regardless of how the underlying statute is modified by the General Assembly.

Accordingly, appropriations for activities related to real property (whether or not connected to a business location

incentive), as well as appropriations for any business location incentive, must be approved after a properly noticed public hearing pursuant to subsection (c) or (d). The specific information to provide in a compliant subsection (c) or (d) notice of hearing is described in the next section.

What information must be included in the notice of hearing for an appropriation related to real property or a business location incentive?

G.S. 158-7.1(c) and (d) require publication of a notice of hearing at least 10 days prior to the hearing. The information to publish in the notice is determined according to the activity being funded.

For an activity involving acquisition of an interest in real property (or the economic equivalent), the notice shall describe:

- interest to be acquired
- the proposed acquisition cost of such interest
- the governing body's intention to approve the acquisition
- the source of funding for the acquisition
- and *such other information needed to reasonably describe the acquisition*.

For an activity involving the improvement of privately owned property (or the economic equivalent) by site preparation or by the extension of water and sewer lines to the property, the notice shall describe:

- the improvements to be made
- the proposed cost of making the improvements
- the source of funding for the improvements
- the public benefit to be derived from making the improvements
- and *any other information needed to reasonably describe the improvements and their purpose*.

For an activity involving the lease or conveyance of real property (or the economic equivalent), the notice shall describe:

- the interest to be conveyed or leased
- the value of the interest
- the proposed consideration for the conveyance or lease,
- and the governing body's intention to approve the conveyance or lease.

Sometimes a business location incentive does not fit neatly within one of the categories above. A notice of hearing should nevertheless be published to remain consistent with the "strict procedural requirements" that factored into the court's public purpose rationale in *Maready*. There are several common elements in the above notice provisions that should be included in any notice of public hearing for business location incentives that don't otherwise appear to fit:

- a description of the incentives to be granted and their value
    - *consistent with: S. 158-7.1(c) notice shall describe "interest to be acquired" and "the proposed acquisition cost"; "improvements to be made" and the "proposed cost of making the improvements" and G.S. 158-7.1(d) notice shall describe "interest to be conveyed or leased" and "value of the interest"*
- the public benefit or consideration to be derived from granting the incentives
    - *consistent with: G.S. 158-7.1(c) notice shall describe "public benefit to be derived from making the improvements" and G.S. 158-7.1(d) notice shall describe "proposed consideration for the conveyance or lease"*
- and such other information needed "to reasonably describe" the incentives.
    - *consistent with: S. 158-7.1(c) notice shall describe "such other information needed to reasonably describe the acquisition" and "any other information needed to reasonably describe the improvements and their purpose"*

Experienced local government officials will recognize immediately that they have been following the procedures above for years. Nothing discussed above is new. However, S.L. 2015-277 expanded the notice and hearing requirement such that all appropriations—even those that have nothing to do with real property or business location incentives—may be approved only after holding a public hearing. The requirements for those appropriations are discussed in the sections

below.

Note: Business location incentive agreements often involve annual appropriations over a span of years. A single notice and hearing prior to approving a multi-year incentive agreement can satisfy the G.S. 158-7.1 requirement for all subsequent appropriations pursuant to a single agreement, provided the incentive adheres to the form described in the initial notice and is not later modified in a material way.

What procedures should be followed for economic development appropriations that are both (1)not related to real property activities or business location incentives, and also (2)not included in the annual budget?

Local governments regularly appropriate funds for economic development activities that have nothing to do with real property or incentives. For example, local governments may appropriate funds to pay for an advertisement about the local business environment, to hire professional economic development staff, or to contract with the local Chamber of Commerce for networking and small business support services. Prior to 2015, there was no statutory imperative to hold a public hearing prior to approving such appropriations. As already noted, however, S.L. 2015-277 altered the statute to require a local government to hold a properly-noticed public hearing for *every appropriation* under the statute—regardless of whether or not it is connected to an incentive or improving real property.

The statute provides no guidance on the form of notice for these miscellaneous appropriations outside of the annual budget process. The statute requires notice and a public hearing prior to approving "any appropriation or expenditure pursuant to [G.S. 158-7.1]." Each appropriation or expenditure should be "reasonably" described—as opposed to merely declaring that a single lump sum will be appropriated for "economic development purposes" without further elaboration—for two reasons. First, the fact that the statute imposes the hearing requirement for "*any* appropriation or expenditure" suggests that each appropriation or expenditure is individually subject to the requirement and must demonstrate compliance. Second, the new hearing requirement is derived directly from the original statutory language, which has always required the notice "to reasonably describe" the activity being funded. In the absence of further guidance, however, presumably local governments may simply describe the activity to be funded in general terms, such as "$30,000 for small business support services."

Likewise, a single appropriation to a third party, such as a Chamber of Commerce or a nonprofit economic development corporation (EDC), that contemplates expenditures for multiple activities, probably cannot be described merely by reference to the recipient entity, such as "$50,000 for nonprofit EDC." It is probably necessary for the notice to describe the activities to be performed by the third party. Keep in mind that G.S. 158-7.2 requires a local government to approve and account for all expenditures by a third party pursuant to G.S. 158-7.1. The mandatory G.S. 158-7.2 approval of expenditures by third parties, when coupled with the new G.S. 158-7.1 notice and hearing requirement, suggests that the notice should, at a minimum, describe the general nature of each activity to be funded.

What procedures should be followed for routine economic development appropriations (not property-related activities or business location incentives) thatare included in the annual budget?

The Local Government Budget and Fiscal Control Act, G.S. Chapter 159, Article 3, requires a local government to provide notice to the public of its proposed budget and to hold a public hearing on the budget. For details, see Kara Millonzi's blog post on the budget approval process.

G.S. 158-7.1 sets forth specific notice requirements for property-related activities and business location incentives. Can notice for the annual budget process substitute for those specific notice provisions?

No, for several reasons. First, the plain meaning of the statute requires more specific notice. As revised in 2019, the hearing for an economic development appropriation included in the annual budget may be "part of the public hearing on the annual budget pursuant to G.S. 159-12." General notice is required for the annual budget hearing. However, "[i]f the appropriation or expenditure is for the acquisition … [or] the improvement of privately owned property…" then G.S. 158-7.1(c) states that "the notice shall describe…" and imposes specific, additional notice requirements for those particular appropriations. The statute does not distinguish between an appropriation that was or was not included in the budget. Rather, the statute imposes the notice requirement based upon the character of the "appropriation or expenditure" as a property-related activity, not based on the forum for the public hearing or the approval process (budget or otherwise). This result makes sense. The General Assembly intended to alleviate the notice and hearing requirements for routine economic

development expenditures, but it did not withdraw the specific notice requirements for property-related activities (and related business location incentives).

Second, the requirement to provide specific notice for business location incentives could not have been withdrawn because it is enshrined in economic development case law. As already noted earlier, the North Carolina Supreme Court in *Maready* identified the statute's "strict procedural requirements" as part of the rationale for finding a constitutional public purpose for business location incentives. As a result, local governments have long published specific notice and held a public hearing prior to approving any business location incentive.

There are other procedural reasons that the notice for the annual budget hearing cannot substitute for the notice required for property-related activities and business location incentives. The minimum notice requirements of the budget approval process do not precisely match the notice requirements for property-related activities found in G.S. 158-7.1, which requires that notice be provided at least 10 days prior to the public hearing. Second, a budget ordinance is a summary document and does not incorporate specific line-item expenditures, so it is unlikely to provide an adequate description of the property-related activities or incentives to be funded. Third, under the budget approval process, the budget ordinance may be modified by the governing board following notice to the public, which means that the public might not receive adequate notice prior to approval of an appropriation related to property or incentives that was modified during the budget process.

What should a local government do in the event that a property-related activity or business location incentive changes in some material way following publication of the notice?

A new notice should be published and a new hearing held if the original notice had somehow described the activity or incentive inadequately or in a way that might have created misunderstanding in the public, particularly if the change is less favorable to the public than the original notice led the public to believe.

For example, say that a local government publishes notice and holds a public hearing regarding incentives to be offered to induce a business to locate in North Carolina, and the business has promised to make a certain taxable investment and create a certain number of jobs. Assume that correct information was provided in the original notice of hearing to "reasonably describe" the public benefit, and the public hearing was held. Weeks later, the business states that it must revise its projections—it will make a lower taxable investment and will create fewer jobs than originally anticipated. Arguably, the original notice exaggerated the "source of funding for the improvements" and "the public benefit to be derived from making the improvements." The original notice was potentially misleading—in a way that is unfavorable for the public—and this would suggest that a new notice and hearing is warranted.

Would a new notice and hearing be required if the business planned to make a larger investment and create more jobs than originally anticipated? Typically, it would not be necessary to republish notice if the public benefit improved. However, care should be exercised if other aspects of the transaction have changed in a way that could be misleading to the public. For example, what if the higher investment was a result of the company deciding to expand into activities viewed unfavorably by the community, such as hazardous or polluting activities? That fact, if not disclosed in the original notice, might mean the notice did not "reasonably" describe the public benefit to be derived from the economic development appropriation.