
CED in NC Blog: Local Government Support for Privately Constructed Affordable Housing

By Tyler Mulligan

Article: <http://ced.sog.unc.edu/local-government-support-for-privately-constructed-affordable-housing/>

This entry was posted on June 21, 2016 and is filed under **Built Assets & Housing, Community Development, Financial Assets**



County officials from Tarheel County as well as City officials from the county seat were

approached by two residential developers who are seeking to construct housing that is affordable to low and moderate income (LMI) persons. One developer, DoGooder Inc., is a private, for-profit developer who intends to construct multi-family housing in which half of the twenty apartment units will be rented at a rate that is affordable to LMI persons. DoGooder is financing the project through conventional private financing but has asked the City and County for a cash subsidy to “make the project feasible.” The other developer, Good Habits for Humans, is a nonprofit corporation whose staff and volunteers plan to construct one single family home and sell it to a family headed by a LMI person. Good Habits has asked the City and County to provide a cash grant to help them pay for staff supervision and construction materials for the project.

This post describes the legal authority for the City and County to provide the requested subsidies and explains some important differences between City and County authority in this area.

Background: Constitutional Considerations

As with all grant or subsidy questions, it is necessary to start with the North Carolina Constitution, because local governments are not permitted to give property or money away. Article 1, Section 32 of the [North Carolina Constitution](#) prohibits governments from making gifts “but in consideration of [in exchange for] public services” (see Frayda Bluestein’s [blog post discussing this provision](#)). In other words, a local government must receive valuable public service in return for any cash it pays to an entity. Further, the state constitution permits local governments to expend 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.

With respect to affordable housing, the North Carolina Supreme Court long ago determined that providing affordable housing to persons of low or moderate income serves a constitutional public purpose. Most of the cases pertain to the expansive Housing Authorities Law found at [North Carolina General Statutes Chapter 157](#). See, for example, *Wells v. Hous. Auth. of City of Wilmington*, 213 N.C. 744, 197 S.E. 693, 696 (1938) (holding that the Housing Authorities Law serves a constitutional public purpose); *Mallard v. E. Carolina Reg’l Hous. Auth.*, 221 N.C. 334, 20 S.E.2d 281, 285 (1942) (holding that the Housing Authorities Law serves a public purpose in rural as well as urban areas); and *In re Denial of Approval to Issue \$30,000,000.00 of Single Family Hous. Bonds & \$30,000,000.00 of Multi-Family Hous. Bonds for Persons of Moderate Income*, 307 N.C. 52, 60-61, 296 S.E.2d 281, 286 (1982) (finding that housing assistance for persons of “moderate incomes” serves a public purpose because legislature was “acting with the same public purpose in mind” as when assisting persons of low income). Note, however, the constitutionality is conditioned on the *necessity* of the activities—that is, the activities serve a public purpose “only when the planning, construction, and financing of decent residential housing is not otherwise available” because “private enterprise is unable to meet the need.” *Id* at 59-61; *Martin v. North Carolina Housing Corp.*

, 277 N.C. 29, 50, 175 S.E.2d 665, 677 (1970). [Necessity is a recurring theme in case law when private entities seek subsidy—compare to the necessity requirement described in this [prior post about economic development incentives](#).]

With the public purpose question largely settled, the only remaining matter is statutory authority. The North Carolina Constitution, Article VII, Section 1, states that the General Assembly “may give such powers and duties to counties, cities, and towns ... as it may deem advisable,” essentially making local governments creatures of the state. Accordingly, statutory authority must be identified for every activity undertaken by a North Carolina local government. In the affordable housing realm, counties and cities do not necessarily rely on the same statutory authority. The remainder of this post highlights some of the important differences between cities and counties in terms of statutory authority.

Statutory Authority for Municipalities

There is no statutory authority for affordable housing activities enacted solely for cities. Rather, cities rely on the same statutory authority as housing authorities through the operation of [G.S. 160A-456\(b\)](#), 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.” (See designation procedure at [G.S. 157-4.1](#).) These powers are more than adequate for the task. In what may set the record for the longest single paragraph in the statute books, [G.S. 157-9\(a\)](#) sets forth the extensive powers of a housing authority, to include:

- to prepare, carry out and operate *housing projects*
- to provide for the construction, reconstruction, improvement, alteration or repair of any *housing project* or any part thereof

A *housing project* is broadly defined in [G.S. 157-3\(12\)](#) to include direct provision of housing, payment of rent subsidies, provision of grants and loans to LMI persons to enable them to own a home, and provision of grants and loans and other financial assistance to public or private developers of affordable housing for LMI persons. 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](#).

Note that [G.S. 157-9.4](#) requires a housing authority (and by extension, a city exercising the powers of a housing authority) to impose the following requirements related to set asides for low income persons for any multi-family housing project assisted by a housing authority:

- At least twenty percent (20%) of the units in the project shall be set aside for the exclusive use of persons of low income, and
- Units set aside for low-income persons shall continue to be set aside for 15 years.
- Low income persons are defined in [G.S. 157-3\(15a\)](#) as persons in households earning not more than sixty percent (60%) of the local area median family income.

Accordingly, DoGooder’s multi-family development would be subject to the set-aside requirement of [G.S. 157-9.4](#), but Good Habits’ single family home would not.

In addition, the City should exercise oversight of the rental or sale prices and the budgets for construction and operation of any housing project subsidized by its appropriations to ensure compliance with [G.S. 157-29](#): the cost of housing units should be “at the lowest possible rates consistent with ... providing decent, safe, and sanitary dwelling accommodations” and the housing project cannot be constructed or operated to “provide revenues for other activities of the city [or, by extension, the contracted entities].” These latter 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.

Statutory Authority for Counties

Counties may also exercise the powers of a housing authority. Specifically, [G.S. 153A-376\(b\)](#) states that “[a]ny board of county commissioners may exercise directly those powers granted by law to county redevelopment commissions and those powers granted by law to county housing authorities.” [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](#). All of the powers pertaining to city housing authorities described in the preceding section also pertain to county housing authorities.

However, unlike cities, counties possess another source of statutory authority for engaging in affordable housing activities. [G.S. 153A-378](#) establishes independent authority for counties to “appropriate and expend funds for residential housing construction, new or rehabilitated, for sale or rental to persons and families of low and moderate income,” and to contract with any person or firm for that purpose. Accordingly, the County can contract with DoGooder and Good Habits for the construction of affordable housing under G.S. 153A-378 and therefore can evade the specific restrictions set forth in G.S. 157-9.4 pertaining to set asides.

The G.S. 157-29 requirements—to ensure subsidies lower housing costs for LMI persons and are not used for other activities—likewise don’t technically apply when the county employs G.S. 153A-378. These requirements, as already noted, are essentially redundant of constitutional requirements to ensure funds are used for a public purpose and do not amount to an unconstitutional gift to DoGooder and Good Habits, so they cannot be ignored. Thus, the contractual arrangements between the County and the affordable housing developer should include oversight of budgets and unit prices, not as much for statutory reasons, but rather for constitutional reasons. Other conditions to include in the contract with the developer are described in the next section.

Securing Public Benefits: Conditions to Impose on Affordable Housing Projects

With statutory authority established, it is necessary to return to the constitutional issues regarding gifts and public purpose. Although the City and County possess statutory authority to make grant payments to DoGooder and Good Habits, the local governments must secure public services in return for any payments. This final section explains in broad terms how to secure the public interests.

First, the public interests must be adequately described in any legal instruments. In the area of affordable housing, these interests fall into two broad categories: affordable housing *development* and affordable housing *services*.

Affordable Housing Development

Affordable housing *development* typically involves the construction and operation of housing units for the benefit of LMI persons. The key elements to define for any affordable housing development include the following:

- **Set-aside of affordable units:** How many units will be set aside for LMI persons? This can be expressed as a percentage (“20% of the units in the project”) or as a fixed number of units. More creative set-asides can be designed to require fewer units to be set aside if very low-income persons are served. Examples can be found starting on page 40 of my [affordable housing and inclusionary zoning guide](#).
- **Qualifying households:** Who is eligible to rent or purchase the set-aside units? Qualifying households are usually expressed in terms of a percentage of area median income, and the upper limit is defined by statute. G.S. 157-3(15a) defines “Persons of low income” as persons in households earning annual income, adjusted for family size, that does not exceed 60% of [Area Median Income as defined by the U.S. Department of Housing and Urban Development](#). “Persons of moderate income” is defined at G.S. 157-3(15b). See page 43 of the [affordable housing and inclusionary zoning guide](#) for examples.
- **Affordability level:** How much will be charged to LMI persons for each unit sold or rented? Typically the unit cost is expressed as a percentage of the household’s median income. The [generally accepted level of affordability](#) for a unit is no greater than 30% of the household’s annual income.
- **Timing and phasing:** When will the affordable units be constructed and made available for purchase or rent? Local governments typically seek to ensure that affordable units are developed and made available to LMI persons as soon as possible, and that local government resources are recaptured if construction is not accomplished on time as agreed. Furthermore, if affordable units are proposed to be developed concurrently with market-rate units, then it is advisable to impose phasing requirements so that affordable units are constructed and made available concurrently with market-rate units. See pages 81 to 88 of the [affordable housing and inclusionary zoning guide](#) for examples and additional detail.
- **Eligibility and transfer controls:** When a LMI household moves out of an affordable unit, will the unit be made available to another LMI household? What entity is responsible for marketing the units and determining whether a household is eligible to purchase or rent an affordable unit? How will those processes be managed? See pages 97

to 108 and page 121 of the [affordable housing and inclusionary zoning guide](#) for examples and additional detail.

- **Control period:** For how long must the units remain affordable to eligible households? To be consistent with the statutes (G.S. 157-9.4), fifteen years appears to be an appropriate minimum, but [research indicates that perpetual affordability is achievable](#) with the right management and is desirable to protect the public's investment in the housing project. Examples are provided on page 109 of the [affordable housing and inclusionary zoning guide](#).

Once agreement has been reached on the affordability terms for the housing project, those terms should be memorialized in appropriate legal instruments to secure the public interests. The most common mechanisms for protecting the public's investment include deed restrictions (or covenants running with the land), deeds of trust, and ground leases. See pages 110 through 112 of the [affordable housing and inclusionary zoning guide](#) for sample language.

Affordable Housing Services

There is an array of services associated with providing affordable housing. Some of those services are closely associated with housing development and were already mentioned above, such as marketing available units, determining eligibility of households, and monitoring units over time. Other services may include housing and credit counseling for eligible households. Both cities and counties possess statutory authority to engage in these services directly or to contract with private entities for their provision. Any payments made in exchange for these services should be in amounts that are appropriate for the public services to be received. Any payment in excess of the fair value of the service provided would amount to an unconstitutional gift. It bears repeating that the state constitution does not allow local governments to make gifts to private entities—not even to charitable nonprofit organizations (as explained in [Frayda Bluestein's post](#)). Public services are typically secured through a binding written contract.

Topics Discussed Elsewhere

Property Conveyance for Affordable Housing

The topic of property conveyances for affordable housing is a separate matter that is discussed on pages 138-39 of the book [Local Government Property Transactions in North Carolina](#).

Inclusionary Zoning

The topic of inclusionary zoning is covered exhaustively in the [affordable housing and inclusionary zoning guide](#). A basic primer on inclusionary zoning is provided in a [previous blog post](#).

Rent Control

Affordable housing projects are exempt from North Carolina's rent control provisions found in [G.S. 42-14.1](#). This topic is explored in detail on pages 151-53 of the [affordable housing and inclusionary zoning guide](#).

Links

- www.ncga.state.nc.us/legislation/constitution/nconstitution.html
- canons.sog.unc.edu/?p=8068
- www.ncga.state.nc.us/gascritps/Statutes/StatutesTOC.pl?Chapter=0157
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-456.html
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