



Date: September 28, 2020

To: Wendell Davis, County Manager

Through: Jay Gibson, General Manager

From: Sara Young, AICP, Acting Planning Director
Don O'Toole, Deputy City Attorney

Subject: *Unified Development Ordinance* Text Amendment, Development Agreements (TC2000003)

Summary

Development agreements, as allowed by NCGS 160D Article 10 Development Agreements (formerly NCGS § 160A-400.20 through 400.32 (for municipalities) and 153A-349.1 through 349.13 (for counties)), authorize a city or county to enter into a contract with a person or entity that specifies development requirements, standards, and conditions that will govern the development of a property (see Attachment A for full statute). A development agreement can work in tandem with zoning requirements or in lieu of zoning requirements. The *Unified Development Ordinance* (UDO) prohibited such agreements until the prohibition was removed in 2016. Although the text prohibiting development agreements was removed, no text was added stating that they are affirmatively allowed. The proposed amendment adds an affirmative statement, limitations on development agreements, and process.

Recommendation

That the Board of Commissioners approve the attached Ordinance to amend Article 1, General, of the *Unified Development Ordinance*; and approve a consistency statement declaring the request consistent with the Durham *Comprehensive Plan* and that the request is reasonable and in the public interest. Information supporting these recommendations is found within this memo, attached documents, and any information provided through the public hearing.

Background

Municipalities and counties are authorized to enter into development agreements by statute (Attachment A). The General Assembly specifically recognized that:

- (1) *Development projects often occur in multiple phases over several years, requiring a long-term commitment of both public and private resources.*
- (2) *Such developments often create community impacts and opportunities that are difficult to accommodate within traditional zoning processes.*
- (3) *Because of their scale and duration, such projects often require careful coordination of public capital facilities planning, financing, and construction schedules and phasing of the private development.*

(4) Such projects involve substantial commitments of private capital, which developers are usually unwilling to risk without sufficient assurances that development standards will remain stable through the extended period of the development.

(5) Such developments often permit communities and developers to experiment with different or nontraditional types of development concepts and standards, while still managing impacts on the surrounding areas.

(6) To better structure and manage development approvals for such developments and ensure their proper integration into local capital facilities programs, local governments need flexibility to negotiate such developments.

Durham has no experience with such agreements. Until 2016, the UDO specified that development agreements were prohibited. The prohibition was removed by approval of TC1500001, but no additional text affirming development agreements was added at that time. After consultation with the City Attorney's office, it was deemed prudent to add such text ahead of any potential development agreements being proposed.

On June 3, 2020, the Joint City-County Planning Committee (JCCPC) discussed this item conceptually. The JCCPC indicated substantial interest in establishing and utilizing this regulatory tool and authorized staff to proceed with drafting a text amendment. On July 21, 2020, the Planning Commission held its public hearing and continued the hearing to August 11, 2020, for staff to consider the inclusion of additional text regarding public input and the role of the Planning Commission. The Planning Commission recommended denial with a vote of 4-10. The Planning Commission determined that the Ordinance request is not consistent with the adopted *Comprehensive Plan* and that the request is not reasonable or in the public interest based on comments received at the public hearing and the information in the staff report. The Durham City Council will consider this amendment at its September 21, 2020 meeting.

Issues

Development agreements are a regulatory tool that are worth exploring. They allow the city or county to enter into a contract with another party that provides a timetable for development, conditions of the development agreeable to both the jurisdiction and private party, assurances that regulations will not change over time with regard to later development phases of a project, and can allow for a jurisdiction to obtain community benefits, or in other words *"...opportunities that are difficult to accommodate within traditional zoning processes."* Such agreements can work in tandem with UDO provisions and other city and/or county regulations, or in lieu of such regulations. Development agreements can also be approved in coordination, or as part of, a rezoning. However, developments subject to a development agreement must be consistent with the uses allowed in the underlying zoning district.

Ultimately, approval of an agreement is a legislative action, and prior to governing body action a public hearing must be held. If the terms of the agreement are not seen as beneficial to the city or county, the applicable governing body can deny approval, or at least require additional consideration prior to taking final action. To be approved, an agreement must be adopted as an ordinance, and subsequently recorded at the register of deeds office.

When reviewing examples of development agreements entered by other jurisdictions, the use has been primarily for economic development purposes, although the statute does not require that limitation.

- High Point's development agreement around its downtown stadium involves a mixed-use development and provided the applicant assurances on the timing and vesting of development standards, along with the provisions extending utility service by the City.¹
- A development agreement for a single-family development in Locust, NC provided for density limits, and architectural standards outside of zoning allowances.²
- A development agreement was required in Cary as part of a rezoning approval, and was intended to integrate "... public capital facilities construction and the phasing of [the development] to ensure that public facilities are available and enjoyed by Town citizens before [the development] generates substantial increased demand on existing public facilities."³ Additional terms of the agreement included phasing, reimbursement of expenditures, and certain waiving of fees.

Development agreements can become a valuable tool in addressing certain policy initiatives or community benefits that zoning is not always capable of addressing. To address affordable housing, for example, a development agreement could be used to provide incentives to a developer for the developer to provide affordable units, provide developable land for affordable units, or a combination. This potential has already been broached by a developer.

The proposed text amendment performs the following functions:

1. *Explicitly states that development agreements, pursuant to state statute, are permitted-* an affirmative statement regarding the permissibility of development agreements.
2. *Specifies that development agreements must adhere to provisions of the UDO unless explicitly modified within the approved agreement-* establishing, through ordinance, the flexibility within a development agreement to allow for development conditions and standards that may not meet typical UDO zoning requirements.
3. *That only uses and housing types allowed in the underlying zoning district are permitted-* limiting that flexibility to maintain consistency with the underlying zoning regarding allowed uses on a subject property.
4. *Additional text added since July 21, 2020:*
 - a. That a pre-submittal conference and neighborhood meeting consistent with those required for zoning map changes must be held.
 - b. That the Planning Commission shall have the ability to review and provide a recommendation to the governing body on development agreements that modify UDO standards or are associated with a rezoning.
 - c. Further limit the ability to modify the UDO through a development agreement by making it impermissible to include provisions that lessen environmental protection standards.

¹ See [Elliott Sidewalk, LLC Development Agreement](#)

² See [Locust, NC and JBH Development LLC Development Agreement](#)

³ See [Development Agreement for the Fenton Mixed-Use Development](#)

Staff did not include time limits or minimum acreage requirements, since a specific development schedule must be included within any development agreement, and no value in limiting the acreage of the project was determined. Staff has determined that both limitations would be arbitrary in nature without further information regarding the need for such restrictions.

Consistency with the *Comprehensive Plan*; Reasonableness and in the Public Interest.

The purpose of this text amendment is to affirm a significant regulatory tool that can be used to achieve community benefits stated in the various development policies found within the *Comprehensive Plan*, which staff believes is a reasonable undertaking and in the public interest. Affirming such a tool would also further the *Durham Comprehensive Plan Vision*, which states:

- “Promote the creation, enhancement and sustainability of a healthy, livable, safe and beautiful community for all Durham citizens.
- Promote a range of choices in transportation, education, housing and economic opportunities to effectively serve a diverse community.
- Promote the identity of our distinct neighborhoods by encouraging design elements and public facilities appropriate to the character of each area.
- Protect our historic heritage, open spaces and natural resources.
- Provide opportunities for high quality growth and development.”

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Attachments:

Attachment A: Development Agreement statutory authority (*NCGS Chapter 160D Article 10 Development Agreements*)

Attachment B: Statement of Consistency Pursuant to NCGS § 153A-341

Attachment C: AN ORDINANCE TO AMEND PROVISIONS OF THE *UNIFIED DEVELOPMENT ORDINANCE* Regarding Development Agreements (TC2000003)

Attachment D: Planning Commission comments