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TO: Chapel Hill Town Council
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RE: Development Review Options
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Cities in North Carolina have multiple options for undertaking review of development proposals. However, only those development review tools authorized by state law may be employed and the requirements for the decision-making process set by state statutes and case law must be observed. Cities have some flexibility in setting additional procedures in local ordinances, provided those procedures are not inconsistent with state law. Also, the scope of conditions that may be mandated by cities as a condition of development approval vary in the degree of flexibility available to negotiate and accept voluntary conditions of approval.

1. State Requirements for Process

State law sets the procedures that must be followed based on the type of decision rather than the identity of the decision-maker or the label attached to the decision in the ordinance. The four basic types of decisions are:

1. *Legislative decisions* define the policies that are applicable. They include adopting or amending the text of the ordinance and amending the zoning map, including rezoning an individual parcel. Approving a development agreement is also a legislative decision.

State law mandates broad public notice and hearing requirements for these decisions. The council must refer them to the planning board for review and comment and must hold a duly advertised public hearing on these decisions. The council is not required to make findings or have evidence to support these discretionary decision, but the council must approve a statement regarding plan consistency and the rationale behind the decision.

2. *Quasi-judicial decisions* involve the application of ordinance policies to individual cases. Examples include special and conditional use permits and variances. A quasi-judicial decision involves two key elements—the finding of facts regarding the specific proposal and the exercise of judgment and discretion in applying predetermined policies to the situation.

Since quasi-judicial decisions do not involve setting new policies, the broad public notice requirements that exist for legislative decisions do not apply. However, the courts have imposed strict procedural requirements on these decisions in order to protect the due process rights of the parties involved. Only the standards set in the ordinance may be applied. There must be competent, substantial evidence in the record to support the decision. Witnesses presenting evidence at the evidentiary hearing are under oath and subject to cross-examination. Council members may not gather evidence outside the hearing – ex parte communication must be disclosed and should be strictly limited. Impartiality is required – council members with a bias or close ties to the parties must not vote or even participate in the discussion. A written decision document is required to resolve contested facts and apply the relevant standards to those facts.

3. *Advisory decisions* make recommendations on pending decisions. These are sometimes mandated by state law and in other instances are created by local ordinance. The most common mandated example is the advice on rezoning petitions given by planning boards to the council.

There are few statutory requirements regarding advisory decisions beyond complying with the open meetings law and avoiding financial conflicts of interest by board members. Considerable local discretion can be applied as to when and how advisory reviews are made.

4. *Administrative decisions* are the day-to-day non-discretionary matters related to the implementation of the development regulations in the ordinance. These decisions include issuing a certificate of zoning compliance for a permitted use. The ordinance must establish clear, objective standards for approval.

These decisions are typically assigned to professional staff since the decision-maker may only apply objective standards already in the ordinance. No public hearing is required as no public policy choices are being made (thus no legislative hearing to solicit public opinion) nor is any substantial discretion being exercised (hence no evidentiary hearing). If the objective standards are met, approval is mandatory. If the objective standards are not met, denial is mandatory. In either instance, appeal can be made to the board of adjustment by parties with standing.

A chart summarizing the differences in the mandatory process to be followed for legislative and quasi-judicial decisions is attached.

2. **Factors in Choice of Process**

There are a variety of factors to consider when crafting an ordinance to determine which type of development review process should be used.

Policy determinations. A key issue is whether the type and intensity of development proposed and its design raise unresolved policy issues. Where the policies and standards to be

applied need to be discussed and adopted, a legislative decision is needed. Where policy choices have been made and standards set, quasi-judicial or administrative decisions are appropriate.

Council involvement. A closely related question is how much involvement by elected officials is desired? Elected officials make legislative decisions, have little involvement in administrative decisions, and may delegate quasi-judicial decisions or make them directly. Given competing demands for council attention, determining which type of decision should be used for various types and scale of development proposals warrants careful and deliberate consideration.

Degree of discretion. Legislative decisions allow the greatest discretion, administrative decisions the least. Quasi-judicial decisions involve application of standards that require exercise of judgment, but the degree of discretion is limited to the application of predetermined standards.

Predictability and certainty. An administrative decision is the quickest and most predictable for land owners and neighbors, while a quasi-judicial decision takes longer and requires more rigorous analysis. The legislative decision is by its very nature the least predictable and often slowest process. If the town wants to encourage development or redevelopment of a particular type in a defined area and already knows the standards that should be met, an administrative review rather than a rezoning would be appropriate. Average statewide processing times for various types of development approval are attached.

Degree and type of citizen engagement. Legislative decisions allow for the most citizen engagement. Quasi-judicial decisions allow those directly affected to present evidence as to whether or not the specified standards are met, but participation is more formal. Administrative decisions are largely determined by staff without necessarily consulting the public, though notice of pending decisions can be required.

Need for technical analysis. An administrative review is well suited to conduct technical analysis. The quasi-judicial process is well suited to resolve contested facts, especially where both sides to a land use dispute are well represented and have adequate resources to produce relevant evidence. Policy choices in legislative decisions can certainly be usefully informed by technical data and analysis, but at their core they are policy judgements rather than application of technical analysis.

Site-specific conditions and mitigation measures. The legislative process can now be used for this in North Carolina if conditional zoning is employed or it is done in tandem with a development agreement. Conditional zoning must be requested by the property owner and conditions are limited to those needed to bring the project into compliance with adopted plans and to mitigate impacts reasonably expected to be generated by the project. A development agreement adds more flexibility regarding mitigation measures and is particularly useful if there is to be cost-sharing on provision of infrastructure, mitigation measures, or other project improvements. The quasi-judicial process is useful when it is known that some conditions or exactions may well be needed, but a detailed individualized review is needed to determine their precise design or scale.

Administration and enforcement. Administration of standardized, uniformly applied rules is far simpler than developing and keeping track over time of rules that change from parcel

to parcel.

The choice of which development review process is appropriate for various types of development decisions involves some inherent trade-offs. A legislative decision allows a greater range of discretion and broad public engagement, but is not particularly quick or predictable. A quasi-judicial decision allows for a careful, searching inquiry into the facts, but is formal and legalistic, limiting possibilities for informal discussion among applicants, citizens and decision-makers. An administrative decision is quick and efficient, but requires more advance work on the ordinance, such as specifying necessary infrastructure improvements or setting design standards for a form-based regulation in order to assure the right standards are in place before an application is made. Efficiency and engagement are not mutually exclusive considerations, but sometimes one or the other will take precedence.

3. Scope and Form of Conditions

The scope of statutory authority and constitutional limits affect what requirements can be imposed on a developer to provide land, construct facilities, or make payments as a condition of development approval. The constitutional standard for exactions is the same no matter how they are imposed. A city can only require an exaction if it is reasonably related to the impacts expected to be generated and the amount of the exaction is no more than an amount roughly proportional to those anticipated impacts. Within those constitutional bounds, only exactions expressly authorized by state law can be mandated. Recent decisions emphasize that the courts closely examine the statutory authority to impose exactions.

Rezoning. Whether conditions can be imposed with a rezoning depend upon the type of rezoning involved.

For rezonings to a conventional zoning district, no conditions may be imposed. The standards for development must be uniform for all properties within the zoning district. If a condition is imposed, it is unenforceable. If a rezoning is based on a mistaken understanding by the council that the conditions would be enforceable, the entire rezoning may well be declared invalid if challenged in court. It is permissible for a landowner seeking a conventional rezoning to share their site design and project details with the council, though some ordinances prohibit that. In any event the owner is not bound to develop the project accordingly. Any plans and details submitted as part of a conventional rezoning must be considered illustrative only as the owner is entitled to develop in any way that is consistent with the standards for the applicable zoning district.

For rezonings to a conditional zoning district, individual site specific conditions may be imposed. Property may only be placed in a conditional district only at the request of the landowner. Individualized site specific conditions are then allowed, but only those “that address the conformance of the development and use of the site to city ordinances and an officially adopted comprehensive plan and those that address the impacts reasonably expected to be generated by the development or use of the site.” G.S. 160A-382(c).

Development agreements. Development agreements offer additional but not unlimited authority regarding imposition and enforcement of conditions, whether the agreement is done in

association with a rezoning or as an independent agreement.

The authorization for development agreements does not have the same limitation on conditions as specified by the statute for conditional rezonings. The law specifies the items that must be included in a development agreement, including the land uses allowed, the design of the site and buildings, public facilities that will serve the development (and who will provide them and when they will be provided), dedication of land for public purposes, environmental protection measures, and “any conditions, terms, restrictions or other requirements determined to be necessary” to protect the public health, safety, or welfare. The agreement may also “cover any other matter” not inconsistent with this law. G.S. 160A-400.25. These provisions allow many specific details about project design and cost-sharing for public facilities to be incorporated into the terms of the agreement. The agreement can also be incorporated by reference into the terms of the conditional zoning applicable to the property. So a broad range of enforceable conditions that are mutually acceptable to the landowner and the city can be included in a development agreement.

There is one very important limit on these conditions, however. A city may not “exercise any authority or made any commitment not authorized by general or local act and may not impose any tax or fee not authorized by otherwise applicable law.” G.S. 160A-400.20(b). So, for example, a city or county that does not have special local legislation authorizing a school impact fee could not impose a school impact fee as a condition in a development agreement. This creates some ambiguity in the law as to the scope of voluntary provisions that can be included in a development agreement. Apparently a landowner can voluntarily agree to provide more in the way of an exaction that could be required, such as dedicating land for a school site, provided that does not involve a tax or fee not allowed by statute. In this example, accepting gifts of land for public purposes is allowed by statute, so a school site dedication would be a permissible condition while imposing an unauthorized school impact fee would be impermissible.

Special use permits. Individual conditions may be imposed on special use permits. The statutes allow “reasonable and appropriate conditions and safeguards” on any special use permit. G.S. 160A-381(c), 160A-388(c).

There are several important limitations to consider. First, any mandated exaction of land, construction, or payment of fees must have specific statutory authorization. Second, only the standards for approval of the permit set out in the ordinance can be considered so any conditions need to be reasonably related to bringing the project into compliance with those standards. Third, since this is a quasi-judicial decision, there must be competent, material, and substantial evidence in the hearing record that justifies the need for the condition.

Some Key Differences between Legislative and Quasi-judicial Decisions

	Legislative	Quasi-judicial
Example decision	Rezoning, text amendment, development agreement	Special use permit, variance
Decision-maker	Only governing board can decide (others may advise)	Can be board of adjustment, planning board, or governing board
Notice of hearing	Newspaper notice always required; Mailed notice to owners and neighbors and posted notice for rezonings required	Mailed notice to person initiating hearing, to land owner, and to abutting owners; posted on site
Type of hearing	Legislative	Evidentiary
Speakers at hearings	Can reasonably limit number of speakers, time for speakers	Witnesses are presenting testimony, can limit to relevant evidence that is not repetitious
Evidence	None required (but need sufficient to show action is not arbitrary and is in the public interest); members free to discuss issue outside of hearing	Must have substantial, competent, material evidence in record; witnesses under oath, subject to cross-examination; no ex parte communication allowed
Findings	None required (statement on plan consistency and rationale required for zoning amendments)	Written decision signed by chair of board, clearly determining contested facts
Standard for decision	Establishes standards	Can only apply standards previously set in ordinance
Conditions	Not allowed for conventional rezonings; allowed only if conditional zoning used (owner must request, conditions limited to plan consistency and impacts of project)	Allowed if based on standard in ordinance
Time to initiate judicial review	Two months to file challenge of rezoning, one year from standing for others (three year maximum for procedural irregularity)	30 days to file challenge
Conflict of interest	Requires direct, substantial, and readily identifiable financial interest to disqualify	Any financial interest, personal bias, or undisclosed ex parte communication disqualifies; impartiality required

Selected Data from 2012 SOG Survey of N.C. Local Governments

Rezoning

To conventional districts	55%
To conditional districts	45%

Average processing time (in calendar days) Municipalities with populations over 25,000 For “typical, noncontroversial project”

<i>Type of decision</i>	<i># of days</i>
Zoning verification	3
Building permit	7
Site plan	52
Special use permit	71
Rezoning	89