
CED in NC Blog: Notice and Hearing Requirements for Economic Development Appropriations

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As discussed in a [prior post](#), [Session Law 2015-277](#) requires North Carolina local

governments to issue notice and hold a public hearing prior to approval of *any appropriation* for economic development pursuant to [North Carolina General Statutes Chapter 158](#), Article 1, “The Local Development Act of 1925.” Local governments have held public hearings pursuant to that act for decades, but previously such hearings were required only when an economic development appropriation was related to real property or to an incentive payment for a private business. Now local governments must issue notice and hold a public hearing prior to approving *any* appropriation for economic development—even when the appropriation has nothing to do with incentives or real property. In fact, the [bill summary written by legislative staff](#) states “The bill standardizes the treatment of appropriations for economic development by: Making all appropriations subject to the public hearing requirement of G.S. 158-7.1(c).” Unfortunately, S.L. 2015-277 provides no guidance on the form of notice for the new set of required hearings. This post proposes a framework for understanding and complying with the old and new notice and hearing requirements under G.S. 158-7.1.

A Framework for Notice and Hearing Requirements for Economic Development Appropriations

The revised notice and hearing requirements for economic development appropriations can be understood using a basic two-step framework. The two-step framework will first be described, and then a more detailed explanation of the component steps will be provided.

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

- **If yes**, then hold a public hearing at least 10 days after publishing notice of hearing **as described in STEP 2 below**.
- **If some other statute is more appropriate**, then follow the procedures directed by that other statute.

STEP 2: What is the nature of the economic development appropriation?

- **If the appropriation is for an activity related to real property or for a business location incentive**, then publish a notice of hearing as prescribed by G.S. 158-7.1(c) or (d) that describes the specific property-related activities being undertaken by the local government or the subsidized activities being undertaken by the induced business, and hold a public hearing prior to approval of the appropriation. The governing board must determine that the appropriation will “increase the population, taxable property, agricultural industries, employment, industrial output, or business prospects of the city or county.”
- **If the appropriation is for some other economic development purpose**, then publish a notice of hearing describing the general nature of the appropriation and hold a public hearing prior to approval of the appropriation. The governing board must determine that the appropriation will “increase the population, taxable property, agricultural industries, employment, industrial output, or business prospects of the city or county.”

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.

Once it has been determined that a local government intends to appropriate funds “for economic development purposes,” G.S. 158-7.1 requires the local government to publish notice and hold a public hearing prior to approving the appropriation. The notice must be published in a publication meeting the standard set forth in [G.S. 1-597](#) and [G.S. 1-599](#). The specific information to be provided in the published notice is determined through the second step of the two-step framework: What is the nature of the economic development appropriation? If the appropriation is made for an activity related to real property or for a business location incentive, then very particular information must be included in the notice of hearing as prescribed by G.S. 158-7.1(c) and (d). Accordingly, it is necessary to explore when an appropriation is made for those purposes.

When is an economic development appropriation related to real property or for a business location incentive?

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 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.” (S.L. 2015-277 removed the reference to subsection (b), thereby making all economic development appropriations subject to the notice and hearing requirement.) Subsection (d) imposes a notice and hearing requirement for conveyance of property held or acquired *pursuant to subsection (b)*.

The explicit references to subsection (b) 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, mandating adherence with subsection (d) and subsection (d2) procedural requirements. (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.

Enactment of S.L. 2015-277 does not 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 lawful business location incentive, involve subsection (b) activities that require notice and hearing under 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: G.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: G.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"*

[NOTE: Business location incentive agreements often involve multiple 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 the agreement, provided the initial notice adequately describes the future appropriations and their purpose and they are not later modified in a material way after the public hearing.]

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 further such that all appropriations—even those that have nothing to do with real property or business location incentives—may be approved only after issuing notice and holding a public hearing. The requirements for those appropriations are discussed in the next section.

What procedures should be followed for other economic development appropriations that are not related to real property or business location incentives?

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.

Unfortunately, the statute provides no guidance on the form of notice for these miscellaneous appropriations. 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 notice and 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 notice and 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 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.

Does the notice and hearing for the annual budget approval process meet the G.S. 158-7.1 notice requirements?

Prior to approving an 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. Can the notice and hearing for the budget ordinance satisfy the notice and hearing requirement for G.S. 158-7.1? The answer is “probably not” for appropriations related to real property or business incentives, unless all of the required information is available for the budget approval process. However, it might be possible for other miscellaneous economic development appropriations, with some important caveats. Those caveats are discussed below.

The notice and hearing for G.S. 158-7.1 can probably be executed *in parallel* to the budget approval process, but public officials must be aware that the budget approval process (see Kara Millonzi’s [blog post on the process](#)) does not automatically comply with the requirements of G.S. 158-7.1. First, the minimum notice requirements of the budget approval process do not precisely match the notice requirements of 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 may not provide an adequate description of the economic development activities 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 an economic development appropriation might inadvertently be added to the budget or increased without complying with the notice provisions of G.S. 158-7.1. Economic development appropriations, due to the strict notice requirements and constitutional implications of following the procedures, should not exceed the amount listed in the notice—otherwise a new notice and public hearing is required for the excess amount.

Due the fact that the two approval processes are not identical, local governments are advised to keep the processes separate even if they run them in parallel. Publish a separate notice for economic development appropriations, even if it is published at the same time as the notice for the annual budget. Additionally, if the board holds the public hearing for the annual budget and the public hearing for economic development appropriations at the same meeting, be sure to separate the two hearings procedurally by closing the budget hearing before opening the hearing for economic development

appropriations. Public officials will need to use care when attempting to run these two approval processes in parallel to ensure that any modifications to the budget do not run afoul of the procedural requirements of G.S. 158-7.1.

Links

- www.ncga.state.nc.us/Sessions/2015/Bills/Senate/PDF/S472v3.pdf
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_158.html
- ncleg.net/Applications/Dashboard/Chamber/Services/BillSummary.aspx?sSessionCode=2015&sBarcode=S472-SMTM-96%28e1%29
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_160A/Article_22.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-376.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-456.html
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- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-400.1.html
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