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SUBDIVISION PLATS, PLANNED UNIT DEVELOPMENTS

A “subdivision” is of course at heart essentially the division of land into two or more parcels. Municipalities or counties may regulate subdivision. NCGS §160A-371 says: “A city may by ordinance regulate the subdivision of land within its territory or jurisdiction.” (See NCGS §153A-330 for counties.)

The statute defining “subdivision” is actually much more complex than that. When a municipality or county enacts a subdivision ordinance pursuant to NCGS §160A-372 or NCGS §153A-331, it may include the following:

- Provide for the ordinary growth and development of the city or county.
- Provide for coordination of transportation networks and utilities.
- Require dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision.
- Alternatively, require funds to be paid to be used to acquire recreation areas serving residents of the development or subdivision or more than one subdivision or development within the immediate area.
- Require rights-of-way or easements for street and utility purposes.
- Require dedication of rights-of-way pursuant to NCGS §136-66.10 or 66.11.

- Provide for the “distribution of population and traffic in a manner that will avoid congestion and overcrowding....
- “...Create conditions that substantially promote public health, safety and the general welfare.”
- Require a plat to be prepared, approved and recorded.
- Require that plats show specific data to determine readily and reproduce accurately on the ground the location, bearing and length of streets, lot lines, easements and other property boundaries.
- Provide for “the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with municipal plans, policies and standards” (enforceable by a range of options for performance guarantees “from which the developer may choose”).
- Provide for reservation of school sites (in conjunction with the Board of Education and the comprehensive land use plan).
- Require the developer to provide funds whereby the municipality may acquire recreational land or areas to serve the development or subdivision and other subdivisions within the immediate area.
- Allow the developer to provide funds to the municipality for roads in lieu of constructing streets within the subdivision.

Once a municipality adopts a subdivision ordinance, no subdivision plat can be recorded until the following has occurred:

- It has been submitted for approval.
- It has been approved.

- The approval has been entered on the face of the plat in writing by an authorized representative of the approving jurisdiction.
- The Review Officer designated by the Board of County Commissioners, must review the plat before it is recorded, and certify that it complies with all statutory requirements. (There are limited exceptions to this review set forth in NCGS §47-30.2(c)).
- It has been recorded in the County Registry and indexed.

The Review Officer “...shall not certify a plat located within the territory or jurisdiction of a city that has not been approved in accordance with NCGS §160A-373.” Similarly, there is an express statutory prohibition against the Clerk of Superior Court ordering or directing the recording of a plat in conflict with that section of the statutes.

A division of land is not a subdivision under the following scenarios:

- None of those divisions is created for the purpose of sale or building development, where there is no dedication of a new street or a change in existing streets. NCGS §160A-376(a).
- Combination or recombination of previously subdivided and recorded lots, where the total number of lots is not increased and the resultant lots comply with the municipalities subdivision regulations. NCGS §160A-376(a)(1).
- The resulting parcels are all greater than ten acres and no street right-of-way dedication is involved. NCGS §160A-376(a)(2).

- Public acquisition or purchase of strips of land for street or public transportation improvements. NCGS §160A-376(a)(3).
- Division of a tract in single ownership whose entire area is no greater than two acres into no more than three lots, where no street right-of-way dedication is involved, and where the lots meet the municipalities subdivision regulations. NCGS §160A-381(a)(4).

Similarly, the County statutes are NCGS §153A-335(a)(1) through (4).

A landowner and/or developer is required to obtain approval by the local government of any proposed subdivision and may not sell the land unless and until the plat has been approved under the ordinance and recorded in the office of the Register of Deeds. In fact, once a municipality or county has adopted a subdivision ordinance, any person who “...subdivides his land in violation of the ordinance or transfers or sells land by reference to...a plat...before the plat has been properly approved under such ordinance and recorded...shall be guilty of a Class 1 misdemeanor.” NCGS §160A-375(a); NCGS §153A-334(a). Also, building permits may be denied for lots that have been illegally subdivided. NCGS §160A-375(a); NCGS §153A-334.

There are a substantial number of exceptions to such criminal liability, allowing parties to enter into contracts or leases making reference to approved preliminary plats prior to or in the absence of approval and recordation of the final plat. NCGS §160A-375 and NCGS §153A-334 were adopted in 2005, effective January 1, 2006, as a part of a fairly significant package of legislation relating to subdivisions and zoning following discussion and study of numerous planning issues.

The relevant recent cases are *Nazziola v. Landcraft Properties, Inc.*¹ and

¹ 143 N.C. App. 564, 545 S.E.2d 801 (2001).

Guilford Financial Services, LLC v. City of Brevard.² In *Nazziola*, the Court upheld the approval of a subdivision plat by the Planning Department of the City of Greensboro. The plaintiffs were neighbors opposed to the subdivision. Amazingly, the plaintiffs conceded that the City met the technical requirements of the development ordinance. (They were vainly attempting to contest the re-zoning seven years before.) The Court noted:

When issuing permits, a city's agent is merely an administrative official and must be governed by the literal provisions of the zoning regulations. *Lee v. Bd. of Adj. Of Rocky Mount*, 226 N.C. 107, 37 S.E.2d 128 (1946). Indeed, such administrative decisions are "made without a hearing at all, with the staff member reviewing an application to determine if it is complete and whether it complies with the objective standards set forth in the zoning ordinance." *County of Lancaster, S.C. v. Mecklenburg County, N.C.*, 334 N.C. 496, 508, 434 S.E.2d 604, 612 (1993). An applicant who meets all the requirements of the ordinance is entitled to the issuance of a permit as a matter of right; and, it may not lawfully be withheld. *See In re Rea Const. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 889-90 (1968).

In *Guilford Fin. Servs., LLC v. City of Brevard*, the city council denied a subdivision plat after a public hearing. The Court of Appeals attempted to sort

² 356 N.C. 655, 576 S.E.2d 375) (2002, adopting the dissenting opinion in 150 N.C. App. 1, 563 S.E.2d 27 (2002).

out some confusion caused by a somewhat unique ordinance, confusion at the board hearing as to whether it was quasi-judicial, the City Attorney originally considering it to be legislative in nature and apparently changing it to a quasi-judicial hearing in midstream. The Court of Appeals noted that the city could have adopted a ministerial subdivision ordinance, but instead enacted a quasi-judicial process.

The Court of Appeals majority unfortunately blurred the concept of a quasi-judicial hearing with the exercise of “discretion” which is more properly associated with a “legislative” action than a quasi-judicial action. The Court did, however, note the following: “We have not found other similar ordinances in North Carolina, and this analysis does not apply to any municipality whose ordinances establish a different type of process or subdivision approval.”

The principal difference between the majority opinion and the dissenting opinion appears to be whether to remand for another hearing or to order that the permit be granted. Our Supreme Court agreed with the dissent. The case is not likely to have significant precedential value.

NCGS §160A-371, 376 and NCGS §153A-335 and 376 allow instances where there will be a ministerial review of a plat and some cases where there will be a quasi-judicial review of the plat by allowing “major” and “minor” plats. The statute does not provide criteria for determining which scenario will be applicable to a particular plat. A particular municipality’s ordinances would likely provide that one class of plats be classified, by size and impact, as “minor subdivisions and another be classified as “major subdivisions.” The minor subdivision would be acted upon by a planning department official and/or perhaps a technical review committee of Town staff.

A sample ordinance would provide, like Greensboro's in *Nazziola*, that "the Site Plan or Plot Plan shall be approved when it meets all requirements of this ordinance."³ In that context, the reviewing officer "...is merely an administrative official and must be governed by the literal provisions of the zoning regulations."⁴ The statute does not require a hearing. The ordinance does not require a hearing. There is no hearing, and thus no quasi-judicial standard. For a different class of subdivision, where an ordinance provides for a hearing before a designated board or before the governing board, the quasi-judicial context applies.

NCGS §160A-371 and NCGS §153A-330, amended in 2005, regulates the process of approving or denying plats by the municipality or county, as follows:

Decisions on approval or denial of preliminary or final plats may be made only on the basis of standards explicitly set forth in the subdivision or unified development ordinance. Whenever the ordinance includes criteria for decisions that require application of judgment, those criteria must provide adequate guiding standards for the entity charged with plat approval.

The last two sentences in NCGS §160A-371 referring to decisions on approval or denial of plats, standards explicitly set forth in the ordinance, and "adequate guiding standards for the entity charged with plat approval" impose, by implication, a quasi-judicial procedure on at least the more complicated class of subdivision plats.

The case of *Riverbirch Associates v. City of Raleigh*⁵ remains significant after over 15 years. The *Riverbirch* opinion is an excellent discussion of the plat process, preliminary plats and final plats, also constitutional issues and quasi-judicial hearing proceeding issues.

In *Riverbirch*, the Court held that the ordinance could require dedication of recreation areas to homeowners associations. The statute stated that the ordinance "may

³ Section 30-3.11.4, Development Ordinance of City of Greensboro.

⁴ *Nazziola v. Landcraft Properties, Inc., supra*.

provide...for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision.” NCGS §160A-372. The statute did not say that the ordinance could require dedication to a homeowners association. The Raleigh ordinance so required. The property owner argued that the ordinance exceeded the statutory authority of the City.

⁵ 326 N.C. 100, 388 S.E.2d 538 (1990).

The North Carolina Supreme Court held as follows:

(1) The plain words of the statute make it abundantly clear that the legislative intent is to somehow secure to the residents of the “immediate neighborhood within the subdivision” the benefit of particular recreation areas.

(2) The legislature has specifically provided that the powers granted to municipalities in Chapter 160A “shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. NCGS §160A-4 (citing numerous cases in support of this proposition).

Riverbirch Associates argued that the City was exercising its police power to further the narrow private interests of the homeowners association members. The Court noted that one aspect of preserving open space involves providing for its future maintenance. The Court held that the Raleigh ordinance requiring the dedication to the homeowners association “...is a reasonable means to provide for the preservation of open space.” Therefore, the Court held “...that a city ordinance providing for conveyance of open space to an association of homeowners living within the subdivision is reasonably related to the purposes of preserving urban open space.”

The *Riverbirch* opinion concluded:

Where there was a valid preexisting condition governing development of a subdivision to which the developer agreed, a city does not improperly exercise its police power by denying an application which would violate that condition.

For authority more on the landowner's side, there is a line of cases holding that because the zoning and subdivision regulations are in derogation of private property, such provisions should be liberally construed in favor of the owner. *See Heaton v. City of Charlotte*.⁶

PLANNED UNIT DEVELOPMENTS

A Planned Unit Development is a type of development which contains a variety of dwelling types, including multi-family, plus recreational amenities, other non-residential uses associated with residential use such as churches, schools and fire stations, and sometimes retail uses. The term PUD is probably not used so much now; the current terms appear to be as PDD or MXD. Early opposition to PUD zoning focused on the placement of multi-family units in a neighborhood with single-family homes. Our Supreme Court put this issue to rest in *Woodhouse v. Board of Commissioners*,⁷ as follows:

We turn now to the question of whether the *types* of residential

⁶ 277 N.C. 506, 178 S.E.2d 352 (1971).

⁷ 299 N.C. 211, 261 S.E.2d 882 (1979).

dwellings permitted in a PUD may diverge from those permitted in the particular district under traditional zoning regulations. Since we have concluded that the provisions of Article IX control the establishment of a PUD, the intent and spirit of those provisions must control. As we have noted, based on abundant authority, the primary virtue inherent in PUD legislation is flexibility. 2 *Anderson, supra*, §11.14; *Hanke, supra*; 82 Am. Jur. 2d, *supra*. Moreover, authorities concur that the planned unit development concept contemplates “dwellings of various *types*.” 2 *Anderson, supra*, §11.13 (emphasis added); *Lloyd, supra*, 82 Am. Jur. 2d, *supra*. In light of what we perceive to be the intent and purpose of planned unit developments in general, and this planned unit development in particular, we hold that under this ordinance, there is no restrictions on the *types* of residential dwellings permitted in a PUD, regardless of the particular zoning restrictions in the district in which the PUD is located.