

SPECIAL CITY COUNCIL MEETING
Thursday, August 18, 2011 – 10:00 a.m.
Committee Room – 2nd Floor – City Hall

Pursuant to the proper notification, the Durham City Council held a special meeting on the above date and time in the Committee Room in City Hall with the following members present: Mayor Bell, Mayor Pro Tempore Cole-McFadden and Council Members Brown, Catotti, Clement and Woodard. Excused Absence: Council Member Ali.

Also present: City Manager Thomas Bonfield, City Attorney Patrick Baker and City Clerk D. Ann Gray.

The meeting was called to order by Mayor Bell. He stated this meeting was scheduled for the administration to provide follow-up information regarding questions raised at the June 27, 2011 special meeting.

Subject: 751 South Project Voluntary Annexation Follow-up

City Manager Bonfield referenced material that was made available to council regarding follow-up responses and requested documents from the previous meeting on this item: 1) special meeting discussion notes from the June 27th meeting; 2) revised cost/benefit analysis for Scenarios A & B assuming annexation at the time of positive cash flow; 3) water and sewer revenue and cost comparison for RTP, Treyburn and 751 South; 4) NC Hwy 751 expansion threshold; 5) infrastructure standard requirements; 6) development allowed under current zoning; and 7) estimate of cost for mutual aid fire response.

It was noted the City Attorney's Office will be prepared to respond to any legal questions or concerns.

City Manager Bonfield provided the council with the following memo:

To: Mayor & City Council
From: Thomas J. Bonfield, City Manager
Date: August 18, 2011
Subject: 751 Assemblage Annexation and Utility Extension Agreement

In conjunction with your consideration of the follow-up responses to the issues and questions raised at the initial special meeting regarding the 751 Assemblage project possible annexation and utility service extension, I am providing my thoughts and recommendations on the significant issues and decisions that ultimately need to be made.

Utility Extension Agreement

Durham County previously amended the zoning of the 751 Assemblage properties to allow up to 1300 residential units and up to 600,000 square feet of commercial and retail development. Without passing judgment on the appropriateness of this decision or siding in the pending

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judicial deliberation regarding the validity of a citizen protest petition, the City currently has water and sewer capacity to serve the proposed development as approved by the County Commission. It is important that any action the City takes regarding the extension of utilities not directly or indirectly intervene in the pending litigation nor expand vested rights that may inure to the developer. Council should also be reminded that the City is under no obligation to provide water and sewer services to the development.

The City could either delay any decision to approve a utility extension agreement until after the initial litigation and/or any associated appeals are concluded, or enter into a utility extension agreement that automatically rescinds in the event that the courts ultimately overturn the invalidation of the protest petition and the property reverts to the lower density and intensity. Current indications are the trial, on the now narrowed issues of dispute, is scheduled for late November. The timing of any decision is uncertain. In the event the decision of the court is appealed by either party, the City Attorney advises the appellate process could run from 18 months to three years depending on the level of appeal.

The initial draft of a utility extension agreement places all obligations and risk on the developer and requires compliance with the latest storm water regulations. As long as language can be incorporated in the utility extension agreement that rescinds any City commitment to hold water and sewer capacity commitments in the event the project's density and intensity is reduced and which in no ways enhances any vested rights to the development, I would recommend moving forward with the utility extension agreement prior to the final outcome of litigation related to the development.

Should City Council agree to move forward with the utility extension agreement it will be important to communicate that this action is not a statement regarding the litigation.

Annexation

The annexation cost/benefit analysis completed by staff indicates that it is not likely that revenue streams from the project to support service costs will break even until at least FY15. Annexation options to consider include: (1) do not annex (2) proceed with annexation immediately (3) proceed to annex but delay effective date for three years (4) delay annexation until immediately prior to first property being sold and delay effective date for three years (approximately 4-5 years total) or (5) require deed/property restrictions agreeing to annexation and delay decision for annexation up to thirty years.

Due to the location of this development at the southern end of the county it is important to consider City boundary and service expansion policy and service delivery issues when considering annexation. Additionally, it is important to recognize that some City services will be impacted regardless of whether property is annexed due to interlocal agreements (fire) or service

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delivery models (parks and recreation). It is also important to note that due to the City's practice of "double rates" for utility services outside the City limits that it is highly conceivable that the financial benefits received from these double rates far exceed these interlocal agreement or other "open door" costs.

The revenue/expense models indicate that is not in the City's financial interest to annex the property for at least five years (and maybe more). In order to maximize flexibility in the future and to allow the City to monitor the build out and value assumptions incorporated into the annexation pro-forma, it is recommended that the City delay the effective date of annexation for at least five years by either delaying annexation decision until immediately prior to the first property being sold and then delaying the effective date for three additional years, or requiring deed/property restrictions agreeing to future annexation, and if the project is significantly developed or otherwise proves to be financially beneficial to the City in the future, proceed to annex the property in whole or part at that time.

The annex/delay effective date option appears to be the most assured way of delaying annexation but preserving the City's actions under new State annexation laws. The City could also rescind the annexation decision prior to its effective date if conditions change or the development does not proceed due to market or other conditions.

Should the decision be made to require deed restrictions extending voluntary annexation requests, provision language can be added to the utility extension agreement along with requirements for monitoring property transactions to assure the voluntary annexation commitments of the developer remain in place. The City Attorney may wish to comment further regarding the degree of assurance this option provides in the future.

NC 751 Widening

As indicated in the staff follow up report, NC 751 north of Stagecoach Road has a capacity of 16,400 vehicle trips per day (vpd) and currently experiences 12,000 vpd. As a result of already approved developments this number is expected to increase to 13,000 vpd in the next three years. At build out the 751 Assemblage development is projected to add approximately 9,000 more trips per day to this road segment, far exceeding its capacity. During the County zoning process for this development, committed elements associated with widening NC 751 were not included. It is recommended that some contribution toward the widening of NC 751 north of Stagecoach Road be pursued from the developer and incorporated into the utility extension agreement, regardless of whether the City annexes the development.

Fire Service

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The build out of this development, should it occur, whether annexed or not, will ultimately impact the City's needs to expand fire service in southern Durham. The cost benefit analysis indicates the development will contribute approximately 4.3% of the cost of fire service. It is recommended that Council direct an appropriate contribution toward fire station and equipment costs from the developer at an appropriate threshold of the development should annexation occur.

After the council read the above memo provided by the City Manager, Wesley Parham of the Transportation Department addressed council providing information on whether the NC Hwy 751 expansion was considered during the rezoning process. He stated it was not the practice to evaluate segments beyond the site because the primary focus is on intersections, which typically fail first, and he said they did not make that a requirement or add that as an additional condition for this project when the zoning application was submitted. Mr. Parham stated the applicant/consultant did prepare the study consistent with the methodology they use for all zoning applications and site plans that are required to do those studies per the city's UDO. He also stated the transportation department examined the extended impact, considered other development in the area, and looked at the cumulative traffic impact effect with the addition of 751 South project traffic and determined traffic load capacity would be exceeded. He also referenced when the capacity threshold would be reached [in 1-3 years of proposed development build out].

Pat Young of the City/County Planning Department addressed the council on the differences between Scenarios A & B and explained basis for different scenarios. [Scenario A Cost Benefit Analysis -100% applicant build out & Scenario B Cost Benefit Analysis – 48.1% applicant build out).

Council Member Catotti asked if there was existing transit to the site.

City Manager Bonfield stated there will be no transit to the site.

Council Member Catotti stated the lack of transit is a huge concern since it has been stated the site will provide jobs.

Robin Bibby, of the Budget Department, stated they do have an estimate for fixed route costs in the projection. She referenced Scenario A and the associated transportation costs.

Wesley Parham, of the Transportation Department, referenced a study being done mid-point to see if transit was needed in the future and developer providing lump sum contribution to the city in the amount of \$50,000.

Mayor Pro Tempore Cole-McFadden raised concern about the need for transit being available during construction phase. She stated if transit is not available how will people get to work. She asked what is the closest bus stop to the proposed site.

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Wesley Parham stated the nearest bus stop is located at Renaissance Parkway and 751 near Southpoint Mall.

Council Member Woodard asked what is the distance from the nearest bus stop to the site.

Wesley Parham stated more than 1 mile, less than 2.

Robin Bibby, of the Budget Department, commented on why bus costs were not included, and the timing on the demand for riders.

Mayor Bell asked who is responsible for widening the portion of NC 751 if it is outside of the city limits.

Wesley Parham stated the city could do it, a developer could do it or the other recourse would be seeking funds through the state TIP.

Council Member Brown asked if the city is obligated to provide transit to an area not incorporated into the city.

City Manager Bonfield replied no we are not.

Council Member Brown expressed concern with the lack of transit to the proposed area. He stated the proposed retail and office space should also drive demand for transit.

Martha Zeigler, of the Water Management Department, commented on "Revenue and Cost Comparison for RTP, Treyburn, and the 751 Voluntary Annexation." She stated RTP customers are predominately outside the city, with most sewer service being provided by the county. As heavy institutional users, RTP customers use much more water on average than those in the other areas compared. Treyburn customers are primarily within city limits. Also, she briefed the council on the cost-benefit analysis for water and sewer if no annexation occurred with double rates and the cost-benefit analysis with annexation [Scenario B].

Council Member Catotti asked about stormwater costs and if it is possible for the Jordan Lake Rules to be met.

Mayor Bell stated he previously said until he saw the numbers he was not impressed as to the value of extending water and sewer and not annexing and collecting double rates. He noted the staff is saying today potentially we might have a revenue stream but whether you can use that to reduce water rates is a different issue.

Paul Weibke, of Stormwater Services, stated regarding the Jordan Lake Rules the stormwater costs would be revenue neutral. In terms of Jordan Lake rules being met, it is possible but very difficult.

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Council Member Catotti asked if there will be stormwater leaving the site and degrading Jordan Lake. She stated they are not cleaning 100% of the water coming off property.

Paul Wiebke stated that is a true statement.

Council Member Woodard asked how does the infrastructure standards for the City vs. NCDOT compare.

Ed Venable, Manager of Engineering & Stormwater, stated the main difference would come in the use of water quality devices, for load purposes there is not much of a difference. The City is more aggressive at incorporating water quality devices than NCDOT.

Council Member Woodard asked if the development is not annexed how does county and city stormwater standards differ.

Paul Weibke stated generally infrastructure is built to City standards and reflected in the utility extension agreement and committed elements.

Mayor Bell stated he would not accept any development that is not built to city standards.

Council Member Woodard asked what is the fire mutual aid response agreement.

Fire Chief Pagan replied the current response agreement they have with the county which is a mutual aid agreement speaks to the closest unit being dispatched to the address of emergency. He stated the city has the closest fire service to the proposed site and the closest county fire service would be Parkwood. He stated if the city did not annex then Parkwood would have the responsibility but if they needed the city's assistance they would automatically respond along with them.

Council Member Woodard stated if there was an apartment fire in the proposed area who would respond when 911 is called.

Fire Chief Pagan stated if the area is not annexed, Parkwood would be primarily dispatched and Station 16 could arrive faster located on Farrington Road. Also, Chief Pagan commented on the placement of fire stations, current response times along the southern tier and the city's benchmark. He commented on the proposed development reducing the current response time for fire service in other areas.

Director of City/County Planning Department Steve Medlin commented on prior zoning for site and units allowed under prior zoning.

Director of Water Management Don Greeley commented on the water capacity vs. demand and money that is planned for capital needs in expanding water needs.

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City Manager Bonfield made comments on his memo dated August 18, 2011 providing some options for council to consider. He stated it is important that any action the City takes regarding the extension of utilities not directly or indirectly intervene in the pending litigation. Also, the city would not want to reserve capacity for a development that does not occur, so city could wait until after litigation is settled or could issue a utility agreement now and build in the option to rescind an agreement if development is not built out.

Mayor Bell asked the City Attorney if the council chose to enter into an agreement with the contingencies outlined by manager in his memo, would that have an impact on the existing litigation.

City Attorney Baker stated the way we would enter into the extension we would address that to make sure that it is not going to provide vested rights for the developer to build out of the development and we would address that in the utility extension agreement so it would not impact the litigation.

Council Member Catotti stated if the council chose to extend water and sewer and enter into a utility agreement when could they start construction.

City Attorney Baker said once they have that process they could start constructing as soon as they have the agreement.

City Manager Bonfield replied it would be at their discretion.

Council Member Catotti stated once those pipes are built and the capacity is there and if the court case took three years, she asked what is the significance of the city rescinding once they have the pipes built [the project is moving forward]. She stated she did not understand how doing a utility extension agreement cannot affect the litigation.

City Attorney Baker stated there is some risks on the developer's side with moving forward with any of the construction if the lawsuit comes back against the county and it turns out that they do not have the ability to build out the way it is currently zoned and it reverts back to the current zoning before the county made its decision, that is the risk the developer has with moving forward with this development and ultimately the county losing the lawsuit.

Senior Assistant City Attorney Don O'Toole stated the manager put this statement together; however, it was his understanding that the way this would be structured is that if council decided to pursue this option it would work that a utility extension agreement might be signed an entered into but construction would not be allowed to proceed until the superior court action was completed and any subsequent appeals. He stated no construction would occur until the current lawsuit with the county is fully resolved.

City Manager Bonfield stated they have not gotten to that point of negotiation and that would be something they would have to be built into the agreement. He stated not being that specific the

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question is still what impact would there be legally if the developer started building the infrastructure before the litigation was resolved recognizing this could take 3 years and appeals.

Senior Assistant City Attorney Don O'Toole stated if the developer was permitted to proceed with construction that would present serious legal problems for the city.

Council Member Catotti stated in contrast to what is stated in the manager's memo.

Senior Assistant City Attorney Don O'Toole stated he thought he had an understanding of what the potential agreement would be. He stated if a utility extension agreement were signed and construction proceeded under that agreement that could present a vested rights argument and there is a court case the developer might rely on. He stated he would have serious concerns about that.

City Manager Bonfield stated we are suggesting there not be any provisions in the agreement that provide additional vested rights to the developer.

Senior Assistant City Attorney Don O'Toole replied that is correct. He stated there is a vested rights paragraph in the utility extension agreement and if the city did decide to enter into a utility extension agreement at this point before resolution of the county case, we discussed that the paragraph would require significant bolstering to include a lot more information. Attorney O'Toole stated if construction was allowed to begin, he would have serious concerns about vested rights arguments and constitutional arguments being raised against the City.

Council Member Catotti stated if the developer spent millions of dollars that would give them some additional defense. She said she did not know why the City would move forward and she did not see the advantage for the City, only getting the City in a whole lot of hot water in the future. She stated proceeding forward would be a slap in the face to the citizens who filed the legal case and a judge just ruled that the case had merit to move forward and the City is going to disregard that and said the City should not be in that position. She stated we are not the County we are the City and we do things differently here. Council Member Catotti said if in fact if the court case is resolved in three years, why not revisit it then. She expressed disappointment with the recommendation by the manager.

City Manager Bonfield stated at this point the recommendation is that we would not do anything that would legally provide additional vested benefits to the development until the case is resolved.

Council Member Catotti referenced the manager's recommendation in the memo dated August 18th "I would recommend moving forward with the utility extension agreement prior to the final outcome of litigation related to the development."

City Manager Bonfield stated that is correct as long as the provisions of that do not in any way provide additional legally vested benefits.

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Council Member Catotti said I believe Attorney O'Toole stated it does cause legal problems.

City Attorney Baker stated we would address that in the vested rights portion of that and that is the clear message they have gotten from the manager that they do not in any way want to affect the county lawsuit. Also, he referenced another option which is to simply wait for that to go forward.

Mayor Bell referenced his concerns with the annexation that would come later and not being caught up in the involuntary annexation issues.

City Manager Bonfield proceeded with referencing annexation scenarios outlined in his memo and the alternatives: (1) do not annex and (2) proceed with annexation immediately (3) proceed to annex but delay effective date for three years (4) delay annexation until immediately prior to first property being sold and delay effective date for three years (approximately 4-5 years total) or (5) require deed/property restrictions agreeing to annexation and delay decision for annexation up to thirty years. The annex/delay effective date option appears to be the most assured way of delaying annexation but preserving the City's actions under new State annexation laws. The City could also rescind the annexation decision prior to its effective date if conditions change or the development does not proceed due to market or other conditions. Should the decision be made to require deed restriction extending voluntary annexation requests, provision language can be added to the utility extension agreement along with requirements for monitoring property transactions to assure the voluntary annexation commitments of the developer remain in place.

City Attorney Baker stated if the council got to this point of annexation – you are really talking about how to do an annexation as cleanly and the cleanest way to do it is to have the fewest property owners to deal with. He stated the charter provision does allow us to enact an ordinance which does not come into effect until 3 years that gives the council some of the time. He stated the three year charter provision which gives the 3 year extension plus waiting until the sells of the property are going to occur would give the maximum time to have a clean annexation process.

Mayor Bell stated with the data presented at the June 27th meeting and on today, assuming litigation were resolved in favor of the county, he said the data indicates that the council would not want to annex this property today, tomorrow [the earliest would be three years down the road].

Mayor Bell asked the City Manager what was his recommendation on extending water and sewer to the property in question.

City Manager Bonfield replied if an agreement can be drafted, and the City Attorney assures me that one can be drafted that does not in any way impact the litigation case, I do not see why we can't make the provision, negotiate the agreement. He stated whether we like it or not the property is currently zoned what it is and there is a development plan associated with it. He noted the city is in the water and sewer business and referenced the financial/business side.

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Council Member Catotti asked if there could be other legislation to impact the annexation process.

City Attorney Baker replied there could be.

Council Member Catotti stated she wanted to wait on issuing utilities until the legal case is resolved.

Mayor Pro Tempore Cole-McFadden stated someone needed to convince her that the city would not be the subject to legal action under any circumstances.

Senior Assistant City Attorney O'Toole stated there is something called a substantive due process claim related to property rights creation which could possibly apply and it could be argued that the city council acted in an arbitrary and capricious manner. He stated the concern with creating a property right - basically the question is whether a vested right in something such as utilities has been created. He referenced the question of entering into a utility extension agreement and stated if construction was allowed to proceed prior to county case being resolved, it calls into question whether a property right has been created which was his concern.

City Attorney Baker stated that gets into the vested right portion of the negotiation of the utility extension agreement. He stated because we have not received the guidance of council they have not approached the subject with the developer. He stated if the council wanted under no circumstance construction to move forward and you want to make that a condition in the agreement based on the litigation. He said they have a menu of options but they needed some direction from the council.

Council Member Woodard stated there is the legal question and then there is the practical question possibly raising expectations of the developer or future/potential businesses or residents that might locate there and if it raises anxiety on those who are not in favor of this. He stated it is clear to him that moving ahead now does raise expectations and anxiety. He stated even though the property is zoned what it is now, that might change and said he did not feel the level of assurance from the attorney's office that there is not risk to the city. He stated he was not ready to move forward with the utility extension until a resolution of the legal case.

Attorney Lewis Cheek asked the Mayor if could address the council on the vested rights issue.

Mayor Bell replied not now, the discussion is between the council.

Council Member Brown stated he had more questions and he was concerned about the legal, environmental and transportation consequences. He said he could not support proceeding without legal resolution.

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Council Member Clement spoke in support of the manager's recommendation. He stated the staff has studied and analyzed the issues.

A motion was made by Council Member Clement to approve the recommendation of the City Manager to bring forward a utility extension agreement that would have service provisions - being absolutely certain in no way providing additional vested rights to developer and no potential impact on litigation case. The motion failed due to the lack of a second.

MOTION by Council Member Woodard seconded by Council Member Catotti that the City take no action on the utility extension agreement for 751 South until all pending legal action [pending legal action currently before court] on this project has been resolved was approved at 12:07 p.m. by the following vote: Ayes: Mayor Bell, Mayor Pro Tempore Cole-McFadden and Council Members Brown, Catotti, Clement and Woodard. Noes: None. Excused Absence: Council Member Ali.

There being no further business to come before the council, the special meeting was adjourned at 12:07 p.m.

D. Ann Gray, MMC
City Clerk