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LEGAL AUTHORITY FOR

MULTI-JURISDICTIONAL INDUSTRIAL PARK PROJECTS

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The first part of this white paper covers the general authority for a local government to engage in the development of an industrial/business park. The second part of the white paper deals specifically with the authority for two or more local governments to enter into this type of arrangement together.

This white paper is rather detailed, but this would be preferable to being less clear. Statutory citations are quoted in this memorandum for ease of reference.

It is quite common to see a local government engage in the development of industrial/business park property either in its own name, or by way of some affiliated economic development entity. There is clear statutory authority for this.

Portions of the Local Development Act, found in N.C.G.S 158-7.1 provides this authority. Subsection (a) of the Act gives very broad undefined authority for a local government to undertake efforts and make expenditures to promote economic development. In pertinent part, subsection (a) states:

> "Each county and city in this State is authorized to make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city or in the county;….."

Subsection (a) goes on to state that a local government is authorized to make such expenditures and undertake economic development efforts which:

> "…in the discretion of the governing body of the city or of the county commissioners of the county, will increase the population, taxable property, agricultural industries and business prospects of any city or county."

One could make the case that the broad grant of authority under subsection (a) is sufficient authority in and of itself to allow for a local government to develop an industrial/business park. However, pertinent portions of subsection (b) of the Act provide absolutely explicit authority, when it states:

> "A county or city may undertake the following specific economic development activities. (This listing is not intended to limit by implication or otherwise the grant of authority set out in subsection (a) of this section). The activities listed in this subsection may be funded by the levy of property taxes pursuant to G.S. 153A-149 and G.S. 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law.
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> 1. A county or city may acquire and develop land for an industrial park, to be used for manufacturing, assembly, fabrication, processing, warehousing, research and

development, office use, or similar industrial or commercial purposes. A county may acquire land anywhere in the county, including inside of cities, for an industrial park, while a city may acquire land anywhere in the county or counties in which it is located. A county or city may develop the land by installing, utilities, drainage facilities, street and transportation facilities, street lighting and similar facilities; may demolish or rehabilitate existing structures; and may prepare the site for industrial or commercial uses. A county or city may convey property located in an industrial park pursuant to subsection (d) of this section.

2. A county or city may acquire, assemble, and hold for resale property that is suitable for industrial or commercial use. A county may acquire such property anywhere in the county, including inside cities, while a city may acquire such property inside the city or, if the property will be used by a business that will provide jobs to city residents, anywhere in the county or counties in which it is located. A county or city may convey property acquired or assembled under this subdivision pursuant to subsection (d) of this section.

3. A county or city may acquire options for the acquisition of property that is suitable for industrial or commercial use. The county or city may assign such an option, following such procedures for such consideration, and subject to such terms and conditions as the county or city deems desirable.

4. A county or city may construct, extend or own utility facilities or may provide for or assist in the extension of utility services to be furnished to an industrial facility, whether the utility is publicly owned or privately owned.

5. A county or city may extend or may provide for or assist in the extension of water and sewer lines to industrial properties or facilities, whether the industrial property or facility is publicly or privately owned.

6. A county or city may engage in site preparation of industrial properties or facilities, whether the industrial property of facility is publicly or privately owned."

The omitted subsection 4 gives a local government the additional authority to build shell buildings.

As another indication of legislative support for a local government to undertake a project such as this, one can look to N.C.G.S. 153A-149(c)(16a), the statutory section which lists in great detail various activities and efforts a County government can appropriate tax proceeds to. A similar statute exists for municipalities. In pertinent part this statute states:

> "Each county may levy property taxes for one or more of the purposes listed in this subsection up to a combined rate of one dollar and fifty cents ($1.50) on the one hundred dollar ($100.00) appraised value of property subject to taxation. Authorized purposes subject to the rate limitation are:
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> (16a) Industrial Development - To provide for industrial development as authorized by G.S. 158-7.1"

Based on the above, it is universally accepted that a local government can undertake an industry/business industrial park development effort in its own name.

It is also accepted as the law in this State that if a local government is authorized to undertake and appropriate funds for a certain effort, it can also contract with a separate entity to do the same thing. N.C.G.S. 153A-449 reads as follows:

> "A county may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the county is authorized by law to engage in."

Another statute also gives this authority to municipalities. Consequently, inasmuch as a local government can acquire land and develop it as an industrial/business park, as a proper public purpose, it can also contract with another entity to do this as well.

Prior to a few relatively recent statutory enactments, there was no explicit statutory authority for multiple local governments to share in the cost of developing industrial/business property, and to share a pro rata portion of the gain from such a development effort. However, there are other statutory provisions, which existed before the relatively recent passage of specific legislation, which give local governments the authority to engage in said projects. This inherent authority has been supplemented by three specific statutory amendments in recent years, whereby the legislative intent to allow two or more local governments to enter into multi-jurisdictional industrial park projects, has become explicit.

As a beginning point in this analysis, reliance is placed upon the statutory provisions summarized above in the discussion of legal authority for a single local government to acquire land and develop an industrial/business park project. The statutory authority outlined above, applies equally to a multi-jurisdictional development effort.

In the initial multi-jurisdictional industrial/business park projects in which this law firm was involved, reliance was placed upon existing statutory authority which implicitly gave two or more local governments the authority and ability to work together on an industrial/business park project.

N.C.G.S §160A-460 through 160A-464 ("Local Cooperation Act") provides explicit authority for two or more local governments to enter into contracts with each other to jointly undertake a project which would be in pursuit of a public purpose if carried out by any one of them alone. N.C.G.S. §160A-461 states:

> "Any unit of local government in this State and any one or more other units of local government in this State or any other state (to the extent permitted by the laws of the other state) may enter into contracts or agreements with each other in order to execute any undertaking. The contracts and agreements shall be of reasonable duration, as determined by the participating units, and shall be ratified by resolution of the governing board of each unit spread upon its minutes."

Consequently, inasmuch as the statutory authority mentioned earlier in this paper makes it clear that it is a proper public purpose for a local government to acquire and develop land to assist in recruiting new company facilities, under N.C.G.S. §160A-461 two or more local governments can work together on such a project.

However, as a practical matter, two or more local governments would only be motivated to collaborate on this type of project if each gains new jobs and increased taxes. These are the motivating forces for economic development overall. Most local government leaders recognize that jobs, and the citizens who fill them, know no geographic boundaries, such as a county line. The challenge in such an arrangement is how to have enforceable commitments for the local government, which is the host of most or all of the property for the industrial/business park property, to share gains realized from increased property values resulting from the development project. At the outset of this law firm's work on multi-jurisdictional industrial/business park project, there was not explicit authority that addressed this issue.

However, a general grant of authority for a county to enter into a continuing contract, thereby binding future governing boards to make appropriations in furtherance of such contracts, is contained at N.C.G.S §153A-13, which reads as follows:

> "A county may enter into continuing contracts, some portion or all of which are to be performed in ensuing fiscal years. In order to enter into such a contract, the county must have sufficient funds appropriated to meet any amount to be paid under the contract in the fiscal year in which it is made. In each year, the board of commissioners shall appropriate sufficient funds to meet the amounts to be

> paid during the fiscal year under continuing contracts previously entered into."

In essence municipal governments have the same authority. The wording is somewhat different, but the result seems to be the same. N.C.G.S §160A-17 reads as follows:

> "A city is authorized to enter into continuing contracts, some portion or all of which are to be performed in ensuing fiscal years. Sufficient funds shall be appropriated to meet any amount to be paid under the contract in the fiscal year in which it is made, and in each ensuing fiscal year, the council shall appropriate sufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into."

Based upon the above statutory authorities, it would seem that a county government board can enter into a contract which contains future reciprocal on-going commitments or actions on the part of each party to the agreement. By virtue of these continuing commitments and actions by each government, in future years of contract performance, each county government's board "shall appropriate sufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into." (N.C.G.S. §160-17, which applies to municipalities, reads "(s)ufficient funds shall be appropriated to meet any amount to be paid under the contract in the fiscal year in which it is made, and in each ensuing fiscal year …") These provisions would seem to implicitly obligate future local government boards to appropriate funds to make contractual payments which approximate a sharing of increased taxes gained from the joint development effort.

Fortunately since this law firm's first involvement in this type of project, new statutory provisions have been enacted which give rather clear, explicit authority for local governments to enter into joint efforts to develop industrial/business park properties. In addition, one of these recent enactments clarifies that such multi-jurisdictional industrial/business park projects can be entered into for a period of up to forty years. This period of time allows sufficient time for each local government, which is not host to most or all of the industrial park, to realize enough benefit to justify investing in a development within another local government's jurisdiction. These new provisions, passed by the 2003 session of the General Assembly, arose out of a work group in which this writer participated.

N.C.G.S. §160A-466 was enacted, which amended the Local Cooperation Act, referred to above. It states that:

> "When two or more units of local government are engaged in a joint undertaking, they may enter into agreements regarding financing, expenditures, and revenues related to the joint undertaking. Funds collected by any participating

> unit of government may be transferred to and expended by any other unit of government in a manner consistent with the agreement. An agreement regarding expenses and revenues may be of reasonable duration not to exceed 99 years."

This seems to clarify that on-going financial commitments, necessary for a multi-jurisdictional industrial park project can be agreed to.

The other statutory amendment contained in the same legislative bill is even more explicit. A new statutory section, N.C.G.S. §158-7.3, reads as follows:

> "(a) Any two or more units of local government may enter into contracts or agreements to execute undertakings pursuant to Part 1 of Article 20 of Chapter 160A of the General Statues, under which each participating local government agrees to provide resources for the development of an industrial or commercial park or industrial or commercial site pursuant to G.S. 158-7.1. In consideration for that participation, the unit or units in which the park or site is located may agree to place the proceeds from some or all property taxes levied on the park or site into a common fund or transfer those proceeds to a nonprofit corporation or other entity. The proceeds placed into the common fund or transferred to the other entity may then be distributed among the participating local governments as provided in the contract or agreement.
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> 2. Any undertaking entered into pursuant to this section may be for that period that is agreed to by the participating local governments, up to a maximum of 40 years.
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> 3. Any undertaking entered into pursuant to this section is binding upon each participating local government for the duration of the contract or agreement. Any participating local government may bring an action to specifically enforce the contract or agreement."

This statutory amendment makes it abundantly clear that two or more local governments can:

1. Enter into a contract to jointly "provide resources for the development of an industrial or commercial park…"

2. Agree to place the "proceeds from some or all property taxes levied on the park or site into a common fund or to a nonprofit corporation or other entity."

3. Agree to a term of such an agreement "up to a maximum of 40 years."

4. "(B)ring an action to specifically enforce" such an agreement.

These two new statutory enactments lend significantly explicit legislative support for a multi-jurisdictional industrial/business park project.

Some states have a much more detailed statute which makes entering into this type of project in those states rather formulaic. This State does not have such a provision. However, in the opinion of this law firm, the statutory authority which exists in this State is sufficient to enable a multi-jurisdictional industrial/business park agreement and to make those agreements enforceable. Consultations with elements of the Institute of Government and the Local Government Commission seem to bear out this interpretation, subject of course to the specific terms of each transaction.

One other statutory provision, which predated the two recent enactments described above indicates the legislative approval of this type of transaction. However this statutory provision is too restrictive and needs amending.

In 1999, N.C.G.S. §105-129.3(d) was enacted. This legislation was drafted in view of one specific project. The requirements set forth in this legislation should be amended to give this term broader application. N.C.G.S. §105-129.3(d) reads as follows:

> "Exception for Two-County Industrial Park. For the purpose of this Article, an eligible two-county industrial park has the lower enterprise tier designation of the designations of the two counties in which it is located if it meets all of the following conditions:
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> 1. It is located in two contiguous counties, one of which has a lower enterprise tier designation than the other.
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> 2. At least one-third of the park is located in the county with the lower tier designation.
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> 3. It is owned by the two counties or a joint agency of the counties.
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> 4. The county with the lower tier designation contributed at least the lesser of one-half of the cost of developing the park or a proportion of the cost of developing the park equal to the proportion of land in the park located in the county with the lower tier designation.

Simply put, this provision gives the tier treatment to the property being jointly developed, which is the same as the most favorable tier treatment enjoyed by a county involved in this type of project. This provision also inherently indicates a legislative intent to allow for such transactions.

Based upon the above, this law firm is of the opinion that sufficient statutory authority exists for multi-jurisdictional industrial park arrangements among two or more local governments, and to make such agreements enforceable upon future local government boards