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Community Planning, Land Development, and Related Topics

Previous sessions of the General Assembly considered reports and bills proposing substantial updates of the planning and development regulation statutes. These included reports from the Smart Growth Commission and bills to address the scope of power delegated to local governments. None made serious progress through the legislative process.

There was a different result in 2005. The 2005 session brought the most substantial amendments in decades to the state's planning and development regulation statutes. Two major bills were adopted—S.L. 2005-418 (S 518), An Act to Clarify and Make Technical Changes to City and County Planning Statutes, and S.L. 2005-426 (S 814), An Act to Modernize and Simplify City and County Planning and Land-Use Management Statutes. A number of additional bills addressing important land use and development issues were also adopted.

The two major bills were sponsored by Sen. Daniel G. Clodfelter of Charlotte. Sen. Clodfelter, a former member of the Charlotte-Mecklenburg Planning Commission and the Charlotte city council, has a long-standing interest in planning issues. The principal sponsor of companion bills in the House of Representatives was Rep. Lucy T. Allen, a former mayor of Louisburg and the former president of the North Carolina League of Municipalities. The bills originated with a proposal by the North Carolina Chapter of the American Planning Association for a thorough update of the planning statutes, some of which had been in place for eighty years without a comprehensive update. After the bills were introduced, a number of interested groups actively participated in an intensive, informal process of revising the bills. These groups included the North Carolina Homebuilders Association, the North Carolina Association of Realtors, local chapters of the National Association of Industrial and Office Properties, the North Carolina League of Municipalities, and the North Carolina Association of County Commissioners. The result was broad consensus on the two bills. While lengthy deliberations, negotiation, and amendment led to these bills being considered at the deadlines for crossover and adjournment, both were unanimously approved in the Senate and had near-unanimous support in the House of Representatives (the vote in favor of S 518 was 111-1; for S 814, it was 104-12). Both bills received final legislative approval on August 24, 2005, and were signed into law by Governor Easley on September 22, 2005. The bills generally become effective January 1, 2006.

In addition to these bills, the General Assembly adopted legislation affecting local regulation of forestry activity, regulation of the display of governmental flags, city regulation of governmental land

uses that do not involve a building, continuing education requirements for code enforcement officials, and a variety of transportation measures.

Zoning

Unified Development Ordinances

Many local governments have an interest in better coordinating their development regulations. An increasingly common way of accomplishing this is to merge zoning, subdivision, and other development regulations into a single, unified development ordinance. These ordinances use common definitions, boards and commissions, and procedures for several types of development regulation. However, some local governments have believed that legislation is necessary to allow unification, while others have been uncertain whether tools and institutions used under one authority could be used in a different context.

Section 1 of S.L. 2005-418 revises G.S. 160A-363 and G.S. 153A-322 to specifically allow cities and counties to combine various planning and development ordinances into a single ordinance. This clarification recognizes internal coordination and simplification efforts. It allows a common organizational structure and a single set of definitions and procedures to be used for any and all development ordinances unless there is a specific restriction of authority. The ordinances that may be combined under this authority are those authorized by the Articles of G.S. Chapters 160A and 153A related to planning and development regulation. This legislation does not apply to separate ordinances adopted under the general ordinance-making authority (noise ordinances, nuisance lot ordinances, junk car ordinances, and so forth). Other amendments in both bills add references to unified development ordinances in the zoning and subdivision statutes.

Hearing Notices for Rezonings

State law has long required a public hearing prior to consideration of zoning amendments. G.S. 160A-364 and G.S. 153A-323 require that the notice of the hearing be published in a newspaper of general circulation once a week for two successive calendar weeks. The statutes also require mailed notice of the hearing to the most directly affected landowners when a zoning map amendment is proposed. However, there has heretofore been no general state requirement for posting a notice of the hearing on the affected site, even though many local ordinances required such notice.

Section 4 of S.L. 2005-418 changes that. It adds G.S. 160A-384(c) and G.S. 153A-343(c) to require that site posting be used to notify persons of hearings on rezonings. These statutes now require the county or city to prominently post a notice of the hearing on the site to be rezoned or on the adjacent street right-of-way. When multiple parcels are being rezoned, it is not necessary that each individual parcel be posted, but sufficient notices must be posted to provide reasonable notice to interested persons. This section also repeals the provision that exempted counties from having to mail notices of hearing on the initial county zoning of a parcel (there was no comparable city exemption).

Section 4 amends G.S. 160A-384(b) and G.S. 153A-343(b) to simplify the alternate notice provision for large-scale rezonings (those affecting more than fifty properties). Previously, if a mailing was not made to each property owner, four half-page newspaper advertisements were required. The amendment reduces the publication requirement to two half-page advertisements.

Two previous local bills (S.L. 2003-81 for Cabarrus County and S.L. 2003-161 for Raleigh and Lake Waccamaw) allowed substitution of electronic posting of hearing notices for newspaper publication. Senate Bill 518 as introduced proposed to extend this option statewide, allowing cities and counties to substitute electronic notice for one of the two required published notices. That provision was deleted from the bill by the Senate Judiciary Committee, however, largely due to concerns regarding adequate notice for those without Internet access.

Protest Petitions

If a sufficient number of the persons most immediately affected by a zoning change object to a proposed zoning amendment, the amendment may be adopted only if approved by three-fourths of all the members of the governing board. Prior to amendment in 2005, the North Carolina statutes used the formulation set by the original standard state zoning enabling act. The qualifying area for a protest was defined in G.S. 160A-385 to include a protest signed by "the owners of twenty percent (20%) or more either of the area of the lots included in a proposed change, or of those immediately adjacent thereto either in the rear thereof or on either side thereof, extending 100 feet therefrom, or of those directly opposite thereto extending 100 feet from the street frontage of the opposite lots." This formulation generated considerable confusion as to how it should be interpreted. Some local governments interpreted the statute to say that there were only two qualifying areas—the property being rezoned and a single 100-foot strip along the sides and the rear of the area being rezoned. Most local governments read it to say that there were five qualifying areas—the property being rezoned, the front, the rear, and the two sides. Still others read it to allow for an indefinite number of additional qualifying areas, as if there were an irregularly shaped parcel with many jogs in the zoning district boundary and each jog created another qualifying "side." The situation was further confused if there were streets adjoining the rezoned area on more than one side or if the affected area had no clear-cut "front" and "rear."

Section 5 of S.L. 2005-418 clarifies G.S. 160A-385 by substantially revising the definition of a qualifying area for a zoning protest petition. It simplifies the definition of a qualifying area for a protest so that it is triggered by a petition of either (1) the owners of 20 percent of the land included within the area proposed to be rezoned, or (2) the owners of 5 percent of the land included within a 100-foot-wide buffer around each separate area proposed to be rezoned (rather than 20 percent of any one of four sides). Street rights-of-way are not considered for the 100-foot buffer unless the right-of-way has a width greater than 100 feet. Given that many rezonings are of irregularly shaped parcels, this change will significantly simplify application of the protest calculation.

This section also changes the reference point for the 100-foot buffer. Previously, the buffer was the land immediately adjacent to the proposed zoning district boundary. Thus, when a large parcel was proposed for rezoning, if a 100-foot-wide strip of land within the parcel was left in the original zoning, no protest petition could be filed. This section changes the law to provide that when less than an entire parcel is proposed to be rezoned, the qualifying 100-foot buffer is measured from the property line rather than from the zoning district boundary.

Section 5 of S.L. 2005-418 also amends G.S. 160A-385 to provide that the three-fourths majority required if there is a qualified protest must be calculated on the basis of the number of council members eligible to vote on the matter. Vacant positions and council members who have a financial conflict of interest and are prohibited by law from voting on the matter are not considered in the calculation, but absent members and those who are present but choose not to vote are included.

These amendments also address whether and how a protest petition can be applied to text amendments, which poses the difficult question of how a qualifying area should be determined. For example, *Morris Communications Corp. v. City of Asheville*, 356 N.C. 103, 565 S.E.2d 70 (2002), addressed a situation where the city amended its zoning ordinance to include a sign amortization provision regarding nonconforming off-premise signs. Affected billboard owners protested, but the ordinance was adopted by a 4–3 vote. The city argued that the protest petition was not sufficient to trigger the three-fourths vote requirement, contending that owners of at least 20 percent of the land area in all the affected zoning districts would have to join the protest. The court held otherwise, ruling that only those with an "immediate and actual effect" from the proposed amendment should be considered. Section 5 of S.L. 2005-418 simplifies the protest provision and resolves this question by limiting application of protest petitions to zoning map amendments.

The amendment also adds references to the increasingly common practice of conditional zoning. It treats protests regarding amendments of conditional zoning districts in the same manner as the previously provided for conditional use district and special use district zoning. Amendments to special or conditional use districts and conditional zoning districts are exempt from the protest petition only if the type of use is not changed, the density of residential use allowed is not increased, the size of nonresidential development is not increased, and the size of any buffers or screening is not reduced.

Another question about protest petitions has been whether a protest could be withdrawn once submitted. The practice in most cities has been to allow withdrawal before the public hearing or before the vote, although others were uncertain that a protest could be withdrawn. Section 6 of S.L. 2005-418 resolves any uncertainty by amending G.S. 160A-386 to establish a uniform state rule. It provides that a person filing a protest against a proposed zoning amendment may withdraw the protest at any time before a vote on the rezoning. Only those protests that qualify at the time of the vote on the rezoning trigger the three-fourths majority requirement.

There is no comparable county statute on protest petitions. There was some discussion of including an authorization for optional county protest petitions in S 518, but that was not done. Counties may secure local legislation to authorize a protest petition, but unless they do so, it remains a feature of municipal zoning only.

Comprehensive Plan

Both the city and county zoning enabling statutes have always required that zoning be "in accordance with a comprehensive plan." Neither the North Carolina statutes nor case law mandate preparation of comprehensive plans, define their elements, or set a mandatory procedure for their adoption (with the modest exception of plans mandated under the Coastal Area Management Act). The zoning statutes were amended in 2005 to strengthen the role of adopted plans where they do exist.

Section 7 of S.L. 2005-418 amends G.S. 160A-387 and G.S. 153A-344 to clarify that planning board recommendations are required prior to initial adoption of zoning. It mandates referral of proposed zoning amendments to the planning board for review and comment (this review was previously mandated for counties but not for cities, although virtually all city zoning ordinances already provide for such a review). It allows the governing board to proceed with consideration of the amendment if no comments are made within thirty days of referral and specifies that the planning board recommendations are not binding on the governing board.

Section 7 of S.L. 2005-426 amends G.S. 160A-383 and G.S. 153A-341 to require that planning board review of zoning amendments include written comments on the consistency of the proposed amendment with the comprehensive plan and any other relevant plans (such as a small area plan, a corridor plan, or a transportation plan) that have been adopted by the governing board. The amendment provides that a statement from the planning board that the proposed amendment is inconsistent with a plan does not preclude the governing board from adopting the amendment. The governing board is also required to adopt a statement on plan consistency before adopting or rejecting any zoning amendment. This statement must also explain why the board believes the action taken is reasonable and in the public interest. The statement adopted by the governing board on plan consistency is not subject to judicial review.

Conflicts of Interest

Questions sometimes arise as to when a member of an elected board, planning board, or board of adjustment should refrain from participating in a matter before the board due to a potential conflict of interest. The North Carolina Supreme Court provided some general guidelines on the due process constitutional dimensions of this matter for legislative and quasi-judicial decisions in *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 511, 434 S.E.2d 604, 614 (1993). The state statutes were silent on the matter, however. There was also some concern that the statutes on voting by governing boards could be interpreted to limit nonparticipation in situations where the courts indicated that nonparticipation might be required. The 2005 General Assembly resolved these issues by setting specific rules for legislative, advisory, and quasi-judicial decisions by all local boards and commissions.

For legislative and advisory decisions, Section 5 of S.L. 2005-426 enacts G.S. 160A-381(d) and G.S. 153A-340(g) prohibiting financial conflicts of interest in consideration of zoning amendments. A governing board member must not vote on an ordinance if the member has a direct, substantial, readily identified financial interest in the outcome of the decision. The same rule also applies to planning board members making advisory recommendations on zoning text and map amendments.

For quasi-judicial decisions, Section 8 of S.L. 2005-418 enacts G.S. 160A-388(e1) and G.S. 153A-345(e1) to require impartiality for board members making quasi-judicial decisions. This rule applies to any board exercising the functions of a board of adjustment or making a quasi-judicial decision (such as a decision on a special or conditional use permit). Members must not participate in or vote on any matter in which they have a fixed opinion on the case prior to the hearing; have had undisclosed ex parte communications; have close family, business, or associational ties with an affected person; or have a financial interest in the outcome of the case.

Moratoria

Given the time required to complete the procedures for adoption or amendment of development regulations or even to rezone property, local governments sometimes adopt moratoria on development to preserve the status quo while plans are made, management strategies are devised and debated, ordinances are revised, or other development management concerns are addressed. Moratoria are also sometimes used when there are insufficient public services necessary to support development, such as inadequate water supply or wastewater treatment capacity.

Before 2005, there was no explicit statutory authority in North Carolina to adopt moratoria on development, with the exception of adult business siting. There was also considerable confusion and litigation regarding the proper procedure for adoption of moratoria. While it was generally agreed that statutory provisions were needed to clarify these questions, debate as to how this should be accomplished was perhaps the single most contentious issue in consideration of S 814. Section 5 of S.L. 2005-426 enacts G.S. 160A-381(e) and G.S. 153A-340(h) to explicitly recognize the authority of cities and counties to adopt temporary moratoria of reasonable duration. The new legislation also codifies the limitations on the use of moratoria and clarifies the procedures to be used in adopting and extending moratoria. These amendments are effective for moratoria adopted or extended on or after September 1, 2005.

The new law explicitly allows temporary moratoria to be placed on city or county development approvals (such as zoning permits, plat approvals, building permits, or any other regulatory approval required by local ordinance). It requires cities and counties to be explicit at the time of adopting a moratorium as to the rationale for the moratorium, its scope and duration, and what actions the jurisdiction plans to take to address the needs that led to imposition of the moratorium. The ordinance establishing a moratorium must expressly include the following four points:

1. A clear statement of the problems or conditions necessitating the moratorium, what courses of action other than a moratorium were considered by the city or county, and why those alternatives were not considered adequate
2. A clear statement of the development approvals subject to the moratorium and how a moratorium on those approvals will address the problems that led to its imposition
3. An express date for termination of the moratorium and a statement setting forth why that duration is reasonably necessary to address the problems that led to imposition of the moratorium
4. A clear statement of the actions proposed to be taken by the city or county during the moratorium to address the problems that led to its imposition, and a clear schedule for those actions

Renewal or extensions of moratoria are also limited by these statutes. Extensions are prohibited unless the city or county has taken all reasonable and feasible steps to address the problems or conditions that led to imposition of the moratorium. In addition to the four points noted above, an ordinance extending a moratorium must explicitly address this point and set forth any new facts or conditions warranting the extension.

The confusion in the case law regarding which process is to be followed in adopting moratoria is addressed by these statutes. They provide that if there is an imminent threat to public health and safety, the moratorium may be adopted without notice and hearing. Otherwise, a moratorium with a duration of sixty days or less requires a single public hearing with a notice published not less than seven days in advance of the hearing, and a moratorium with a duration of more than sixty days (and any extension

of a moratorium so that the total duration is more than sixty days) requires a public hearing with the same two published notices required for other land use regulations.

These statutes exempt several types of projects from the coverage of moratoria. In the absence of an imminent threat to public health and safety, moratoria do not apply to projects with legally established vested rights—that is, projects with a valid outstanding building permit or an outstanding approved site specific or phased development plan, or projects where substantial expenditures have been made in good faith reliance on a prior valid administrative or quasi-judicial permit or approval. The statutes also provide that moratoria do not apply to special or conditional use permits and preliminary or final plats for which complete applications have been accepted by the city or county before the call for a public hearing to adopt the moratorium. If a preliminary plat application is subsequently approved while a moratorium is in effect, that project can also proceed to final plat approval.

The new law also provides for expedited judicial review of moratoria. Any person aggrieved by the imposition of a moratorium may petition the court for an order enjoining its enforcement. Such an action is to be set for immediate hearing and given priority scheduling by both trial and appellate courts. In these challenges, the burden is on the city or county to show compliance with the procedural requirements of the statutory provisions regarding moratoria adoption.

Conditional Zoning

In the 1980s, North Carolina cities and counties began to utilize conditional use district zoning. In this type of zoning, a new district with no automatically permitted uses is created and a concurrent conditional use permit is issued for a particular development within the new district. The use of this technique was approved by the courts and later incorporated into the zoning statutes.

Recently, some local governments began to utilize a variation of this process termed conditional zoning. In this type of zoning, a site is rezoned and site specific conditions are incorporated directly into the ordinance requirements. Unlike conditional use district zoning, conditional zoning does not involve a concurrent quasi-judicial conditional use permit. The entire process is a legislative decision. In 2001 and 2002, the North Carolina Court of Appeals approved the use of this technique. While previous local legislation authorized use of this technique for Charlotte and Mecklenburg County, there was no mention of it in the state statutes.

Section 6 of S.L. 2005-426 amends G.S. 160A-382 and G.S. 153A-342 to provide that zoning ordinances may include "conditional districts, in which site plans and individualized development conditions are imposed." As with conditional use districts, the statute provides that land may be placed in a conditional district only upon petition of all of the owners of the land to be included.

The 2005 amendments also address the origin and nature of conditions that may be imposed. G.S. 160A-382(c) and G.S. 153A-342(c) provide that specific conditions may be suggested by the owner or the government, but only those conditions mutually acceptable to both the owner and the government may be incorporated into the ordinance or individual permit involved. These statutes also provide that any conditions or site specific standards imposed are limited to (1) those that address the conformance of the development and use of the site to city or county ordinances and officially adopted plans, and (2) those that address the impacts reasonably expected to be generated from the development or use of the site. These provisions regarding conditions apply to both conditional zoning and to special and conditional use district zoning.

Spot Zoning

Section 6 of S.L. 2005-426 amends G.S. 160A-382 and G.S. 153A-342 to codify the existing court-mandated analysis of the reasonableness of small-scale rezonings. North Carolina courts have held that spot zoning is arbitrary and capricious unless the local government establishes a reasonable basis for it. The amendment requires that a statement analyzing the reasonableness of the proposed rezoning be prepared as part of all rezonings to special/conditional use districts, conditional zonings, and other small-scale zonings. The statute does not specify who must prepare this statement or when it is required, thus leaving some flexibility to local governments. For example, the petitioner for a

rezoning could be required to provide the statement as part of the application process, the statement could be prepared by local government staff for presentation at the hearing, the issue could be addressed by the planning board, or any combination of the above could occur.

Special and Conditional Use Permits

Section 5 of S.L. 2005-426 amends G.S. 160A-381(c) and G.S. 153A-340(c1) to clarify that planning boards may be authorized to issue special and conditional use permits (as opposed to having to use the board of adjustment authority). It confirms that governing boards and planning boards must follow quasi-judicial procedures when acting on special and conditional use permits and provides that both planning boards and governing boards need only a simple majority (not a four-fifths vote) to approve the permits. The legislation provides that vacant seats and disqualified members are not counted in computing required majority votes. It also simplifies the law by replacing detailed provisions on appeals of special and conditional use permits with a simpler cross-reference to an existing statute that already sets out those details.

Variances

Section 5 of S.L. 2005-426 amends G.S. 160A-381(b1) and G.S. 153A-340(c) to codify longstanding case law that use variances are impermissible (as changes in permitted uses must be addressed by ordinance amendment rather that by variance). Section 8 of S.L. 2005-418 makes this same amendment to G.S. 160A-388(d) and G.S. 153A-345(d). It also provides that any conditions imposed on a variance be related to the variance standards.

Boards of Adjustment

Section 8 of S.L. 2005-418 makes several amendments to G.S. 160A-388 and 153A-345 regarding board of adjustment procedures. It provides that alternate members of a board of adjustment may serve in the absence or temporary disqualification of any regular member (for example, when a board member is disqualified from participation on an individual case due to a conflict of interest) or to fill a vacancy pending appointment of a new member. This section also provides that the size of the board for purposes of calculating the requisite four-fifths vote is reduced by vacancies and members who are disqualified from voting if there are no alternate members available. The amendments to G.S. 153A-345 also add a new subsection to give county boards of adjustment the same subpoena power that now exists for cities.

Section 8 clarifies that the term “special exception” includes provision for special and conditional use permits (as is now commonly assumed).

Government Land Uses

The General Assembly in 1951 enacted G.S. 153A-347 and G.S. 160A-392. These statutes make city and county zoning regulations applicable to “the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions.” Thus, if a building is involved, zoning restrictions apply to land uses owned or operated by cities, counties, and the state.

Since a building is required to trigger application of zoning, and given that land uses per se are not covered, an open-air use of land without an associated building is not subject to local zoning regulations. The North Carolina Court of Appeals thus held in *Nash–Rocky Mount Board of Education v. Rocky Mount Board of Adjustment*, 169 N.C. App. 587, 610 S.E.2d 255 (2005), that a parking lot constructed at an existing high school was not subject to city zoning jurisdiction. The General Assembly had addressed this issue in 2004 S.L. by amending G.S. 160A-392 (but not the comparable county provision) to make municipal zoning applicable to the use of land as well as to the construction and use of buildings [S.L. 2004-199, sec. 41(e)]. However, in 2005, in S.L. 2005-280 (S 669) the General Assembly repealed the 2004 change so that the statute again provides that local zoning applies to state and local governmental entities only when a building is involved.

The General Assembly added one local exception to this reversal of course. Section 11(a) of S.L. 2005-305 (H 328) provides that all docks, buildings, and land under control of the State Ports Authority at Southport are fully subject to municipal zoning jurisdiction.

Planning and Regulatory Jurisdiction

While several bills were introduced that would have substantially altered the statutes on extraterritorial jurisdiction, only local bills making modest changes were adopted. S.L. 2005-115 (S 138) allows the City of Archdale to extend its extraterritorial jurisdiction up to two miles from the corporate limits. S.L. 2005-9 (H 446) adds specified land to the extraterritorial jurisdiction of the City of Roanoke Rapids.

Section 2 of S.L. 2005-305 allows the town of St. James to exercise land use regulatory powers as of October 1, 2005 (previously, Brunswick County had jurisdiction within town limits until the end of 2009). This section limits the town from exercising extraterritorial jurisdiction prior to 2010.

Miscellaneous

Throughout the statutes, S.L. 2005-418 and S.L. 2005-426 change the references to "planning agency" to the term "planning board." Both bills provide that they do not override previously adopted local legislation on these matters.

In 1994 the General Assembly amended G.S. 18B-901(c) to provide that the state Alcoholic Beverage Control (ABC) Commission "shall consider" local zoning and related land use factors in making ABC permit decisions. The statute had previously read that the commission "may consider" zoning in making these decisions. S.L. 2005-392 (H 1174) further amends this section to mandate that local governments return a Zoning and Compliance Form to the commission as part of the permit review process. This act also expands the provision relative to potential detriment to neighborhoods by specifying that the commission is to consider past revocations, suspensions, and violations of ABC laws within the previous year at the location, as well as evidence of illegal drug activity, fighting, disorderly conduct, and other dangerous activities (both within the facility and on the associated premises).

Wrightsville Beach's town charter previously required the town council to act as the board of adjustment. With growth of the town and the concomitant increase in the board's workload, the town sought and obtained an amendment to the charter [S.L. 2005-265 (H 1047)] to provide for appointment of a separate board of adjustment.

Land Subdivision Control

Subdivision Plat Approval

S.L. 2005-418 includes several parts that will affect local government plat approval. Sections 2.(a), 2.(b), 3.(a), and 3.(b) collectively amend G.S. 160A-371 and G.S. 160A-373 (cities) and G.S. 153A-330 and G.S. 153A-332 (counties) to make several sets of changes to plat approval arrangements. The first set of changes clarifies that a local government may adopt a subdivision ordinance as a separate ordinance or as part of a consolidated unified development ordinance. Additionally, a city or county may apply any definition or procedure authorized for one type of land development ordinance to any aspect of a unified development ordinance and may apply any organizational arrangement authorized for any other planning and development ordinance to the unified development ordinance. The second set of changes enables cities and counties to provide for the review and approval of sketch plans and preliminary plats as well as final plats. In addition, it allows different classes of subdivisions to be made subject to different review procedures. The third set of changes provides that plats may be approved by any of the following: the board of commissioners; the board of commissioners on recommendation of a designated body; or a designated planning board,

technical review committee, or other designated body or staff person. The legislation answers affirmatively the question of whether special subdivision review committees or staff members are authorized to approve plats required by the ordinance. It also appears to make it possible for a zoning board, such as the board of adjustment, to be assigned that power.

Subdivision Ordinance Standards

Sections 2.(a) and 2.(b) of S.L. 2005-418 also amend G.S. 160A-371 and G.S.153A-330 to address a concern of the development community. These subsections provide that decisions on whether to approve a subdivision plat (either preliminary or final) must be made on the basis of standards set forth explicitly in the ordinance. Although the act does not prohibit or circumscribe the use of discretionary standards in subdivision regulations, it mandates that if ordinance criteria require the application of judgment, the criteria "must provide adequate guiding standards for the entity charged with plat approval."

Subdivision Ordinance Performance Guarantees

Several additional changes to the subdivision statutes are included in S.L. 2005-426. Sections 2.(a) and 2.(b) amend G.S. 160A-372 (cities) and G.S. 153A-331(counties), respectively, to make changes concerning the construction of community service facilities. First, a subtle but important addition to the statutes requires these facilities to be provided in accordance with not only local government policies and standards but "plans" as well. This reference establishes more fully the link between subdivision requirements and external plans, such as transportation plans and land use plans. Second, new language clarifies that performance guarantees are intended to assure successful completion of required improvements. The third and perhaps most important change is the addition of language declaring that if a performance guarantee is required, the local government must provide a range of options or types of performance guarantees that are available to the developer. These may include, but are not limited to, surety bonds and letters of credit. The law then provides that the type of performance guarantee to be used is at the election of the developer, not the unit of local government.

Scope of Land Subdivision Regulation

A subtle change can be found in the definition of "subdivision" in G.S. 160A-376 and G.S. 153A-335. Before S.L. 2005-426, a land subdivision ordinance applied to divisions involving "two or more lots, building sites, or other divisions for the purpose of sale or building development." Some local governments (mainly counties) have interpreted this language to allow the owner of a tract of land to sell a single building lot created from it without being subject to regulation. The amended language provides that a regulated subdivision includes divisions into "two or more lots, building sites, or other divisions *when any one or more of those divisions is created* for the purpose of sale or development." (Emphasis added.) The act effectively removes all doubt about whether the ordinance applies to the "first lot out."

Remedies for Subdivision Ordinance Violations

The remedies and sanctions available to local governments when there are violations of a subdivision ordinance have always been weak. Section 3.(a) and 3.(b) of S. L. 2005-426 amend G.S. 160A-375 and G.S. 153A-334 to help address this problem. Under the new law, local governments will now be able to withhold building permits for lots that have been illegally subdivided. This change may be viewed as a successful attempt to overcome the ruling of the North Carolina Supreme Court in *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985). In that case, the court ruled that there was no statutory authority for a local government to withhold a building permit for a lot merely because the lot was part of an illegal subdivision. (Local governments could, however, withhold a building permit if a lot violated the current zoning ordinance.) This new power to withhold a building permit for a subdivision ordinance violation must be used carefully, since it will have

consequences when an innocent purchaser of an illegal lot applies for the permit. However, the availability of this remedy will also give local governments greater leverage over subdividers who ignore local regulations.

The subdivision statutes have for some years provided that a local government may enjoin illegal subdivision and obtain a court order requiring the offending party to comply with the subdivision ordinance. However, to what extent a court may prevent or restrain unlawful subdivision activity from occurring or whether it may issue an order to correct or abate the violation has been unclear. S.L. 2005-426 provides a statutory basis for a local government to seek and a court to authorize the use of these remedies.

Presale of Lots

One aspect of S.L. 2005-426 that has caused alarm among planners is a section designed to allow developers to enter into contracts for the sale or lease of lots before a final, surveyed plat is approved and recorded. Some developers use these so-called “pre-sale” or “pre-lease” contracts to demonstrate to lenders the feasibility of the proposed development. Although the North Carolina Attorney General has rendered the opinion that entering into a sales contract to sell a lot from a parent tract constitutes a “subdivision,” the practice of developers entering into these contracts before a final plat is approved and recorded is not necessarily rare in this state. Section 3 of S.L. 2005-426 thus may be viewed as providing authorization for a not uncommon but arguably illegal practice.

Section 3 amends G.S. 160A-375 and G.S. 153A-344 to allow pre-sale and pre-lease contracts, but only after a preliminary plat has been approved. The requirement that a preliminary plat be approved by the local government before these contracts are executed—a last-minute addition to the legislation—should help ensure that planners are at least aware that a particular subdivision is being undertaken. The act provides that the closing and final conveyance of the lots subject to these contracts may not occur until after the final plat is approved and recorded.

G.S. 160A-375(c) and G.S. 153A-334(c) allow subdividers to pre-sell or pre-lease lots to builders and commercial intermediaries without any additional protection for these purchasers. If, however, the lots are to be sold to those who are not engaged in the construction business (that is, consumers), then a variety of protections apply. The buyer must receive a copy of the preliminary plat at the time the contract is executed. In addition, the buyer must be notified that no final plat has been approved and that there is no guarantee that changes will not be made to the plat before final approval. Also, the seller must furnish a copy of the final plat to the buyer before the closing. The contract or lease may be terminated by the buyer or lessee if the final recorded plat differs in any material respect from the preliminary plat.

Infrastructure Agreements

Section 8 of S.L. 2005-426 enables local governments to enter into reimbursement agreements with land developers who construct or install infrastructure on behalf of the public. Developers, as a condition of development permission, routinely install or construct infrastructural improvements on property that is eventually dedicated to a public agency or governmental unit. When a city or county uses its regulatory power to compel the developer to furnish the improvement, it is generally understood that the developer will determine who does the work and that no formal contract is required. However, in some cases it may be desirable for a developer to construct facilities and improvements that serve more than just the developer’s own property. Local governments may offer to reimburse the developer (or the developer’s contractor) to the extent that the improvements are “oversized,” and a local government may better make these arrangements through an agreement than through regulation. Enabling legislation for several different types of infrastructure agreements is included in S.L. 2005-426. Each piece is patterned after local legislation on the same subject.

Sections 8(a) and 8(b) add new G.S. 160A-499 and G.S. 153A-451 and provide one model for cities and counties to use. These provisions apply to the construction of local government infrastructure anywhere within a local government’s planning jurisdiction. The new law authorizes reimbursement agreements with developers and property owners for a wide variety of purposes,

including water and sewer utilities and street and traffic control improvements. In order to qualify, the facility or improvement must be included on the local unit's capital improvement plan. The city or county must also have adopted an ordinance setting out the procedures and terms under which it may enter into such an agreement. Perhaps the most distinctive feature of Section 8 is the requirement that if the work would have required competitive bidding had the project been undertaken by the local government, then the developer or property owner who actually undertakes the work must use the same bidding procedures that the local government would have used.

Earlier in the 2005 session, the General Assembly adopted a local act that mirrors the one described in the preceding paragraph. S.L. 2005-41 (H 489) authorizes reimbursement agreements for Apex, Broadway, Cary, Goldston, Holly Springs, Pittsboro, Siler City, Sanford, the municipalities located wholly or partially in Cabarrus County, and Lee, Durham, Chatham, and Cabarrus counties.

Sections 8(c) and 8(d) of S.L. 2005-426 enact new G.S. 160A-320 and G.S. 153A-280 to provide an alternative model for public enterprise improvements that are adjacent or ancillary to a private land development project. The new legislation allows a city or county to reimburse those costs associated with the design and construction of improvements that are in addition to those required by local land development regulations. The public bidding requirements of G.S. Chapter 143, Article 8, do not apply if two requirements are met. First, the public cost may not exceed $250,000. Second, the city or county must determine either that (1) the public cost will not exceed the local government's estimated cost of using force account labor or the cost of a public contract let through competitive bidding procedures or (2) the coordination of separately constructed improvements would be impracticable. The act clarifies that the improvements may be located on land owned by the private party or the local government. It also authorizes the private party to help the city or county obtain any easements that may be required.

Section 8.(c) enacts new G.S. 160A-309 to give cities authority similar to that described in the last paragraph, except that it allows cities to enter into reimbursement agreements for intersection and roadway improvements that lie within city limits.

Development Agreements

The infrastructure agreements discussed above are good vehicles for allocating the costs of oversized public facilities that benefit both private development and the public. The state, however, has recently seen development projects that are far larger in scope and that are built out over longer periods of time than ever before. Local governments have noticed that the off-site impacts and public facility implications of such projects outstrip the ability of their regulatory tools to manage them. Developers have major concerns of their own, particularly in regard to the risks involved in committing substantial funds to projects without adequate assurance that local development standards will not become more demanding as the full extent of the project takes form. Even statutory procedures for establishing vested rights, enacted more than fifteen years ago, may not adequately satisfy the concerns of developers and local governments in these unusual circumstances. A new tool or mechanism has been needed. Fifteen states have authorized so-called "development agreements." Sections 9.(a) and 9.(b) of S.L. 2005-426 provide this authority to North Carolina cities and counties by making substantial additions to G.S. 160A-400.20 to -400.32 and G.S. 153A-379.1 to -379.13. South Carolina legislation served as the model.

The development agreements authorized by the new legislation are limited in scope. Under a development agreement, a local government may not impose a tax or a fee or exercise any authority that is not otherwise allowed by law. The development agreement must be consistent with the local laws that apply when the agreement is approved by the local government. The new legislation does not provide express authority for a local government to commit its legislative authority in advance. Cities and counties may not make enforceable promises to refrain from annexing the property, to refrain from using their taxing authority in a particular way, or even to refrain from rezoning affected lands at some future time. The agreement may require the developer to furnish certain public facilities, but it must also provide that the delivery date of these facilities is tied to successful performance by the developer in completing the private portion of the development. (This feature is designed to protect developers from having to complete public facilities in circumstances where progress in buildout may not generate the need for the facilities.) The ordinances in effect when the agreement is executed remain in effect

for the life of the agreement, but the development is not immune to changes in state and federal law. A development agreement may require the project to be commenced or completed within a certain period of time. It must provide a development schedule and include commencement dates and interim completion dates for intervals no greater than five years. However, the act expressly provides that failure to meet a commencement or completion date does not necessarily constitute a material breach of the agreement. The act does provide a procedure by which a local government may declare that the developer has materially breached the agreement and cancel the agreement, but it remains unclear whether traditional remedies for the breach of the contract (for example, an action for damages or specific performance) are also available.

The property subject to a development agreement must be at least twenty-five acres in size. The agreements may last no more than twenty years. In order to be valid, the agreements must be adopted by ordinance of the governing board. The same public hearing requirements that apply before a zoning text amendment may be adopted also apply before a development agreement may be adopted. Once executed by both parties, the agreement must be recorded, and it binds subsequent owners of affected land as well the current owner.

Easements within Certain Public Rights-of-Way

In most municipalities it is understood that if a subdivider offers to dedicate a street in a new subdivision to the public, the street interest dedicated also accommodates various public utilities that are typically located within street rights-of-way. In some unincorporated areas of the state, however, a subdivider of land may choose to establish the necessary easements within new public or private road rights-of-way to accommodate telephone, cable television, and other public utility services only if the service provider is prepared to pay the subdivider for doing so. In any case, utility easements that are not included or accommodated within a highway easement are viewed as burdens. S.L. 2005-286 (H 1469) alters these arrangements insofar as new publicly dedicated roads outside city limits are concerned. It enacts new G.S. 62-182.1 to provide that the recordation of a subdivision plat for an unincorporated area that reflects the dedication of a new public street or highway automatically serves to make that public right-of-way available for use by any telephone, cable television, or other public utility for the installation of lines, cables, and other facilities to provide service. The act requires utility service providers who wish to take advantage of this accommodation to comply with standards established by the Division of Highways of the North Carolina Department of Transportation (NCDOT) for accommodating utilities or cable television systems within its highway rights-of-way. The act also applies only to plats properly recorded under G.S. 47-30 (requirements for the recordation of maps in the office of the register of deeds) and in compliance with G.S. 136-102.6 (dedication of roads to NCDOT). S.L. 2005-286 applies only to maps and plats recorded on or after August 22, 2005, the effective date of the act.

Transportation

Transportation Corridor Official Maps

Legislation enacted in 1987 allows certain transportation agencies and governmental units to adopt transportation corridor official maps to protect potential corridors for future transportation projects from development. Legislation adopted in 2005 allows an additional agency to exercise this power and makes a technical change to the procedures that apply to such maps. S.L. 2005-275 (H 253) authorizes the North Carolina Turnpike Authority to adopt such a map to protect the rights-of-way of certain turnpike (toll road) projects over which it has jurisdiction. In addition, Section 9 of S.L. 2005-418 amends G.S. 136-44.50(d) to correct a statutory inconsistency. The statute requires work on an environmental impact statement or preliminary engineering to begin within one year after the adoption

of the official map. The new law clarifies that an amendment to the corridor does not extend the one-year period unless the amendment results in a substantially different corridor in a primarily new location.

Toll Roads and the Turnpike Authority

The North Carolina Turnpike Authority was established by the General Assembly in 2002 to take on the responsibility for designing, financing, constructing, and operating certain turnpike (toll road) projects. Each year since, the scope of its power and responsibility has been increased. In addition to granting the Turnpike Authority the power to adopt official maps, S.L. 2005-275 increases from three to nine the number of turnpike projects for which the authority is allowed to undertake planning and preliminary design. In particular, the act directs that one of these projects must be the long (over two miles in length) and long-discussed bridge connecting the Outer Banks with the mainland near Corolla. In order to provide accelerated completion of the project toll bridge, the legislation adds new G.S. 136-89.183A to allow the Turnpike Authority to contract with and license a single private firm to design, obtain all necessary permits for, and construct the Outer Banks toll project. It also allows the NCDOT to participate in the cost of preconstruction activities for this project if the participation is requested by the authority, and to use incentives to promote expedited completion of the project. The authority is directed to provide a project report to the Joint Legislative Transportation Oversight Committee on December 1, 2005, and annually thereafter until the pilot toll bridge project is completed.

S.L. 2005-275 also enacts new G.S. 136-89.183B governing the replacement project for the Herbert Bonner Bridge connecting the Outer Banks and Roanoke Island, a project managed by NCDOT. This new statute allows NCDOT to contract with a single firm and to use expedited procedures to complete the new Bonner Bridge at Oregon Inlet. The act, as amended by a later-adopted act [S.L. 2005-382 (H 747)], requires NCDOT to report on the progress of the bridge project to the Oversight Committee on December 1, 2005, and annually thereafter.

The later act, S.L. 2005-382, amends new G.S. 136-89.183B and adds several additional requirements. It directs NCDOT to implement all reasonable measures to expedite the completion of the environmental review required by the National Environmental Policy Act. It also provides that the department's contracting responsibility begins within ninety days after it receives a record of decision from the Federal Highway Administration and that the department must proceed in accordance with G.S. 136-28.11 (provisions applying to design-build construction for transportation projects). The later act also moderates the language of the earlier act in one respect. It provides that the General Assembly "recommends" the location of the Bonner replacement bridge and recognizes that "the preferred alternative for the bridge location cannot be determined prior to compliance with all federal and State laws and regulations."

Another feature of S.L. 2005-275 provides that the hurricane evacuation standard to be used for state bridge and highway construction projects must be no more than eighteen hours, which is the standard recommended by state emergency management officials.

State Road Systems and Certain State Road Work Plans

One purpose of S.L. 2005-382 is simply to update outdated references in the statutes to various types of state roads. It clarifies that the state primary system includes certain roads both inside and outside city limits that are designated by N.C., U.S., or Interstate numbers. The rest of the state highway system consists of the state secondary system. The act eliminates obsolete references to the state urban system.

The act, however, also amends G.S. 136-66.1 to require that each highway division throughout the state take certain steps to make its road maintenance program a bit more transparent. Each division must develop an annual work plan for maintenance and contract resurfacing based on the needs set forth in the biennial maintenance and resurfacing needs report called for in G.S. 136-44.3. The plan must "give consideration" to special needs or information provided by municipalities within the division and must be made available to these cities upon request.

Municipalities, in turn, are directed to develop their own annual work plan with respect to roads in the state system that are within city limits. It, too, must be based on the needs report prepared under G.S. 136-44.3. Municipal work plans must be submitted to the appropriate highway district engineer and must be "mutually agreeable" to both parties.

Environmental Policies Affecting Transportation Projects

The General Assembly's unease with the construction pace of transportation projects has also shown up in several other ways. Section 28.8(b) of the Current Operations and Capital Improvements Appropriations Act of 2005 [S.L. 2005-276 (S 622)] adds new G.S. 136-44.7C. It directs the Department of Transportation to conduct an analysis of any proposed environmental policy or guideline to determine whether it results in increased cost to NCDOT projects. The analysis must be submitted to the Board of Transportation at least thirty days prior to the effective date of the policy or guideline. A companion provision applies to rules, policies, and guidelines adopted by other agencies. Section 28.8(a) enacts new G.S. 150B-21.4(a1) to require any agency that intends to adopt a rule affecting environmental permitting of NCDOT projects to conduct a similar analysis. This analysis must be submitted to the Board of Transportation before the initiating agency publishes its proposed rule change, and the agency must consider any recommendations that the board makes. If the board objects to the rule as adopted before the day following the rule's approval by the Rules Review Commission, then the rule's effective date is delayed as provided in G.S. 150B-21.3(b1) to give the General Assembly time to disapprove the rule.

NCDOT Reorganization

Section 28.11 of S.L. 2005–276 directs NCDOT to reorganize its units in a manner that reflects growing concern about the speed (or lack thereof) at which highway projects are being built. It transfers the Program Development Branch from the Deputy Secretary for Environmental, Planning, and Local Government Affairs to the office of the Chief Financial Officer. It also transfers both the Transportation Planning Branch and the Project Development and Environmental Analysis Branch from the same deputy secretary to the office of the State Highway Administrator. These three changes all refer to the units as they existed on May 1, 2005. In addition, the NCDOT may fill up to 196 existing or vacant positions in the Project Development and Environmental Analysis Branch and may make salary adjustments for positions that are difficult to fill. The department is also authorized to prepare plans for an incentive-pay program for employees of this branch.

NCDOT Stormwater Project

Section 28.20 of S.L. 2005-276 directs NCDOT to report to the Joint Transportation Oversight Committee by August 1, 2005, on its plan to clean up ocean outfalls in accordance with legislation adopted in 2004.

"Way-Finding" Signs within the Right-of-Way

Section 28.14 of S.L. 2005-276 authorizes NCDOT to manufacture and install "way-finding" signs within state highway rights-of-way for the Roanoke Voyages Corridor Commission and the Blue Ridge National Heritage Area Partnership. The signs are to inform travelers of the historic, educational, and cultural attractions on Roanoke Island (and up to thirty miles off the island) and throughout the twenty-five-county Blue Ridge National Heritage Area. The signs need not meet "normal transportation signage standards" (apparently, those sign standards that NCDOT administers).

Regional Transportation Authority Board Representation

S.L. 2005-322 (H 1202) amends G.S. 160A-635(a)(3), which concerns the composition of the Board of Trustees of a regional transportation authority. The act provides that one seat on the board

may be filled either by the chair of the metropolitan planning organization (MPO) or a member of the MPO designated by the organization. It removes the authority of the chair of the MPO to appoint as the chair's designee either the chair of the Transportation Advisory Committee or a designee approved by the committee.

The Future of Horace Williams Airport

The Horace Williams Airport in northern Chapel Hill is operated by the University of North Carolina at Chapel Hill and provides air transportation support for the planes that carry health-care and other university personnel to Area Health Education Centers (AHECs) and other locations. The university plans to include the airport in a site to be used by the university for the development of a satellite campus, known as Carolina North. For some years the General Assembly has succeeded in extending the life of the airport in its present form. Section 28.8(b) of S.L. 2005-276 enacts new G.S. 136-44.7C directing the Legislative Research Commission to study the continued viability of the AHEC program if Horace Williams Airport is not available and to report its findings to the 2006 session of the General Assembly.

Community Appearance

Tree Protection/Forestry Activity

The last five years have seen a growing interest among municipalities in preserving stands of trees from destruction and protecting undeveloped areas from clear-cutting. Although good arguments may be made that local governments have had the necessary general legislative authority to restrict and even prohibit activities of this sort, between one and two dozen local governments have taken a conservative course by seeking local acts specifically authorizing them to undertake narrowly prescribed regulatory activities. The struggle and debate during the past several years over whether local legislation is needed and what form local acts may take has pitted local governments and environmental groups against home builders and timbering interests. Some of the nagging questions on local government authority were resolved by the enactment of S.L. 2005–447 (S 681).

The act clarifies local authority over certain forestry activities in a way that recognizes tree protection as an adjunct of land development regulation but substantially restricts local authority in other respects. It prohibits cities and counties from enforcing any regulation affecting forestry activity on forest land that is assessed at its present-use value for purposes of local property taxes. (Such properties are typically found in rural areas but are also not uncommon in urban fringe areas.) In addition, municipal regulations may not be applied to forestry activity conducted in accordance with a forest management plan prepared by a registered forester. County regulations may not be applied to activity conducted in accordance with a management plan regardless of who prepared the plan.

There are, however, a variety of exceptions to this general prohibition. First, tree protection regulations that are part of land development regulations are exempt. Cities and counties may thus enforce these regulations if they are adopted as part of a zoning or land subdivision ordinance. (See, however, the discussion of restricting clearing "in anticipation of development," below.)

A second important exception to the prohibition against local regulations involves those regulations that are necessary to comply with any federal or state law, rule, or regulation. If, for example, a local government regulation protecting buffers along a water course is required under state watershed protection or stormwater management rules, that regulation may be enforced by a local government notwithstanding the new prohibition.

A third exception concerns the ability of a city to regulate trees within or affecting a municipal street right-of-way. For example, a city may require the trimming of trees if limbs or roots impede the use of the right-of-way.

A fourth exception allows local governments that are permitted to regulate trees and forestry activity under existing local acts to continue to do so.

One of the most important issues separating forestry and development interests from local government and environmental interests concerns clearing of sites in anticipation of development. The owner of land on the urban fringe may wish to harvest an old stand of timber before selling the land to a developer. Or a development company that has invested in land may wish to harvest the timber either simply to enjoy the cash flow or to avoid having to comply with the land development and tree protection standards that would apply (or would have applied) were a development application to be submitted.

The remedy for this "clearing in anticipation of development" that was made available in much of the local legislation adopted in the past five years was to allow the local government to withhold development permission for the property for a certain period of time after the clearing occurred. S.L. 2005–447 adopts similar standards. A city or county may deny a building permit or withhold site or subdivision approval for a period of up to three years after the completion of a "timber harvest" if it results in the removal of "all or substantially all of the trees that were protected" under development regulations that apply (or would have applied) to the tract of land. If the harvest is a "willful violation" of local government regulations, development approvals may be withheld for a period of five years after the clearing. Although withholding development permission seems like a strong remedy, the remedy is triggered only when a local government is prepared to demonstrate how its tree protection standards would have applied to the development site.

Display of Flags

S.L. 2005-360 (H 829) began as a bill primarily aimed at preventing homeowner associations from enforcing deed restrictions in private developments that would restrict the display of the American flag (both for patriotic and for commercial purposes). But because this topic was taken up in a comprehensive revision of the laws governing homeowner associations [S.L. 2005-422 (H 1541)], H 829 was changed to focus on the regulation of flags displayed by local governments. A federal court case involving the City of Durham influenced the final form of the bill as enacted. In *American Legion Post 7 of Durham v. City of Durham*, 239 F.3d 601 (4th Cir. 2001), the Fourth Circuit Court of Appeals rejected a First Amendment challenge to zoning ordinance standards restricting the size and other features of publicly displayed flags. S.L. 2005-360 serves mainly to codify existing law. It enacts new G.S. 144-7.1 to declare that local governments may not prohibit the display of an official governmental flag if it is being displayed in accordance with patriotic customs and with the consent of the owner or the person with control of the property upon which it is displayed. However, the statute expressly allows local governments to impose "reasonable restrictions on flag size, number of flags, location, and the height of flagpoles," so long as the regulation does not discriminate against any official governmental flag. Official governmental flags include the American flag, the North Carolina flag, the flag of any U.S. state or territory or any of its political subdivisions, or the flag of any nation recognized by the U.S. government.

S.L. 2005-422 (H 1541) adds new G.S. 47F-3-121 to prevent certain private restrictive covenants (whether registered before or after October 1, 2005) from being construed to regulate or prohibit the display of the United States flag or the North Carolina flag. The restriction applies to flags larger than four feet by six feet if displayed on member-owned property, unless the covenants include certain express language to accomplish the regulation or prohibition. Similar provisions prevent covenants from being construed to regulate or prohibit the display of political signs. However, S.L. 2005-422 also provides that if political signs are permitted, the association may prohibit the display of political signs up to forty-five days before election day and up to seven days after it, if the regulation is no more restrictive than any applicable local government regulation that applies to such signs. A similar allowance is also available if a local government regulation governs the size and number of political signs that may be displayed. If the local government does not regulate political signs, the association must permit at least one political sign with dimensions no greater than twenty-four inches by twenty-four inches, if the sign is displayed on a member's own property.

Aquatic Weed Control

Several counties have been plagued by the growth of algae and various aquatic weeds in lakes and rivers, which diminishes the attractiveness of these bodies of water for recreation and other purposes. S.L. 2005-440 (H 1281) provides a new mechanism for addressing these problems by allowing counties to establish county service districts to fund control and cleanup of "noxious aquatic weeds" in lakes, rivers, and their tributaries. The new law enacts G.S. 153A-301(e) to permit a county to establish such a district for property that is contiguous to these waterways or that is provided access to the water by means of a shared, certified access site. The term "noxious aquatic weed" includes any plant organism so identified by the Secretary of Environment and Natural Resources and regulated as a plant pest by the Commissioner of Agriculture.

Overgrown-Vegetation Ordinances

In 1999 the General Assembly authorized the City of Roanoke Rapids to give chronic violators of its overgrown-vegetation ordinances a single annual notice that the city may remedy (abate) the violation and charge the costs to the property owner. That idea has proved popular and other cities have sought similar local legislation. This year several more cities were granted identical authority. S.L. 2005-81 (H 940) authorizes the towns of Ayden, Leland, and Pineville to use this procedure, as does S.L. 2005-202 (S 338) for the Town of Ahoskie. In addition, S.L. 2005-44 (H 962) provides similar authority for the Town of Matthews with respect to its public nuisance ordinance, and defines a chronic violator as someone to whom the city issued a violation at least three times in the previous calendar year. Section 10 of S.L. 2005-305 provides identical authority for the town of Bladenboro. In yet another variation upon these themes, S.L. 2005-45 (H 987) provides that if the town of Cramerton or Grifton gives a violator notice a second time for violation of the town's weeded lot ordinance in the same calendar year, the town must charge to the violator the expense of the subsequent action and a surcharge of up to 50 percent in addition to this expense to remedy the preceding violation. Like authority is granted by S.L. 2005-308 (H 1078) to the towns of Angier and LaGrange and by S.L. 2005-175 (H 196) to the cities of Oxford and Morehead City and the towns of Atlantic Beach and Newport.

These local acts may, however, run afoul of Article II, Section 24. of the North Carolina Constitution, which prohibits the General Assembly from enacting "any local, private, or special act . . . [r]elating to health, sanitation, and the abatement of nuisances." A person charged with violating an ordinance adopted pursuant to one of these local acts may be able to block enforcement by asserting the unconstitutionality of the act that authorized the ordinance.

Junked Motor Vehicle Ordinances

G.S. 160A-303 allows a city to regulate junked and abandoned motor vehicles that are a health or safety hazard. G.S. 160A-303.2 governs a city's ability to regulate these vehicles for purposes of community appearance. S.L. 2005-10 (H 75) makes local modifications to the definition of "motor vehicle" in each statute to allow regulation of a vehicle that does not display a current license plate, that is more than five years old, and that appears to be worth less than $500 (was less than $100). The amended definition in G.S. 160A-303 applies to the City of Henderson and the Town of Louisburg. The amended definition in G.S. 160A-303.2 applies only to the Town of Louisburg. A second local act, S.L. 2005-25 (H 973), makes the same change to the definition of motor vehicle in G.S. 160A-303.2 as it applies to the City of Jacksonville. A third local act, S.L. 2005-24 (H 963), amends an earlier local act (S.L. 2004-30) to make the same change effective to ordinances adopted by the Town of Matthews.

Building Code

Continuing Education for Code Officials

Legislation requiring continuing education for building code officials was finally enacted in 2005, after unsuccessful attempts in the past several sessions. S.L. 2005-102 (H 658) authorizes the North Carolina Code Officials Qualification Board to adopt a continuing education program for code-enforcement officials, beginning January 1, 2006. The board may adopt rules governing (1) the content and subject matter of the professional development courses; (2) arrangements for approval of courses, course sponsors, and instructors; (3) methods of instruction; (4) computation of credits; (5) waivers or variances from the professional development rules; and (6) sanctions for noncompliance. However, the appropriations bill adopted by the General Assembly apparently includes no additional funding for the Department of Insurance (DOI) to carry out the requirements of the new program.

At each certificate renewal after initial certification, an active code-enforcement official must present evidence that he or she has completed the required course credit hours during the twelve months before the certificate expiration date. In addition, S.L. 2005-102 provides that an individual who has been on inactive status must complete professional development courses during the period after becoming active again. Requirements range from four hours of credit up to twelve hours of credit, depending on the length of time the person has been inactive and whether he or she has been continuously employed by a city or county inspection department during the inactive period.

The act provides that the board must initiate the program no later than October 1, 2005, and put the program into effect no later than January 1, 2006. Furthermore, the act declares that it applies to certificates issued or renewed on or after January 1, 2006.

Code Official Exam Fees

For many years, code officials have been able to take certification exams administered by the Department of Insurance free of charge. These written exams have been administered on a quarterly basis at locations in Raleigh. Recently the North Carolina Code Officials Qualification Board and DOI staff have explored the possibility of changing the way exams are given. The first change would allow applicants to take the exam at a computer terminal rather than by using a pencil and paper. The second change would allow the exams to be given at testing centers located throughout the state. The third change would allow the exams to be given more frequently than they are now. Under the proposed format, exams would be administered by private testing and learning centers for a fee.

Section 1 of S.L. 2005-289 (H 736) amends G.S. 143-151.16 to allow the Qualifications Board to establish and collect fees from exam applicants. The bill allows the board to establish an exam fee of up to $125 per applicant and an exam review fee of up to $50 per applicant. The bill then authorizes DOI to use these funds to pay approved testing services firms to administer exams and review them with test takers. The act became effective October 1, 2005, and allows fees to be charged for applications made on or after that date.

Building Permits and Contractor License Requirements

Among other things, G.S. 87-14 prohibits those who enforce the State Building Code from issuing a building permit for work that must be supervised by a licensed general contractor without obtaining satisfactory proof that the applicant is so licensed. Section 21.1 of S.L. 2005-276 directs the North Carolina Code Officials Qualification Board to take steps to ensure that code officials enforce the requirements of that statute.

Toilets in Malls

Section 2 of S.L. 2005-289 amends Section 37 of S.L. 2004-199, which governs access to toilets in shopping malls. It removes the December 1, 2005, sunset provision for the amendment to G.S. 143-143.5, which provides that notwithstanding any other rule or law (including, apparently, the

State Building Code), toilets for public use in covered mall buildings may be located at horizontal travel distance of (no more than) 300 feet from potential users within the mall.

Plumbing and Heating Work in Electric Generating Facilities

Section 3 of S.L. 2005-289 enacts new G.S. 87-21(c2) to provide that North Carolina contractor licensing requirements do not apply to plumbing, heating, and fire sprinkling work done in electric generating facilities regulated by the State Utilities Commission or the Federal Energy Regulatory Commission.

No Permit If Taxes Not Paid

A small but growing number of counties have sought legislation allowing them to refuse building permits to those who owe delinquent property taxes on property they own. Section 3 of S.L. 2005-433 (H 787) allows Greene, Lenoir, Iredell, Wayne, and Yadkin counties to adopt an ordinance allowing building permits to be withheld in these circumstances.

Bills Eligible for Consideration in 2006

The Rehabilitation Code. The idea of a so-called rehabilitation code as part of the State Building Code dates back to 2001. In that year, legislation was enacted allowing Mecklenburg County and the incorporated municipalities within the county to apply new code standards to the rehabilitation of existing buildings in the county, effective for a four-year pilot period from January 1, 2002, to January 1, 2006. These code standards were based primarily on the New Jersey Building Rehabilitation Code. A key feature of the 2001 legislation provided that any building or project constructed in compliance with such a code would not be required to be retrofitted to come into compliance with whatever statewide building code requirements might apply when the pilot program expired.

According to the 2001 legislation, additional local governments throughout the state were also permitted to enforce the code if the particular local government inspection department was approved by the Building Code Council to conduct local plan review for all building types and occupancies. Since the inception of the rehabilitation pilot program, about a dozen other eligible North Carolina local governments have chosen to make the rehabilitation code available for local rehabilitation projects.

Senate Bill 522, introduced by the sponsor of the 2001 legislation, Sen. Daniel G. Clodfelter from Mecklenburg County, seems intended to prolong and protect the pilot project. It would extend the expiration date of the pilot program from January 1, 2006, to January 1, 2007. It would also postpone (from April 1, 2006, to April 1, 2007) the date by which Mecklenburg County must submit a final report on the use of the rehabilitation program to the Building Code Council, the Department of Insurance, and the General Assembly.

In June 2005, however, the North Carolina Building Code Council formally approved the rehabilitation code as an alternative to the *Existing Buildings* volume of the State Building Code, initiating the rule-making process that should culminate in the rehabilitation regulations becoming part of the code by January 2006. Because it now seems likely that the rehabilitation code will be adopted on a statewide basis anyway, it is possible that Senate Bill 522 may be left to die.

Jet noise zones. Senate Bill 835 addresses noise problems caused by military aircraft and has ramifications for the State Building Code, local zoning ordinances, and private real estate sales contracts. The bill would authorize a city or a county to establish noise zones for areas near military bases as part of a local zoning ordinance. It would also direct the Building Code Council to evaluate the need for additional noise abatement requirements in military noise zones and to "amend the State Building Code accordingly." Perhaps most significantly, Senate Bill 835 would enact new G.S. 39-51 requiring the seller of real property located within a noise zone established by a local government to inform a potential buyer of that fact if the noise levels caused by military aircraft activity "would be material to the ordinary, reasonable, and prudent buyer." In this regard it would also direct the North Carolina Real Estate Commission to include a statement concerning military aircraft noise in the

standard real estate disclosure statement that the commission makes available. Such a disclosure statement may be used by the seller of real property as part of a property sales agreement.

It is important to note that the bill would apply only to aircraft noise associated with military activity. It expressly excludes noise associated with facilities used by the National Guard. It also does not apply to the noise associated with civilian commercial airports.

Building inspector liability. Several years ago the North Carolina Supreme Court, in *Thompson v. Waters*, 351 N.C. 462, 526 S.E.2d 650 (2000), held that the so-called "public duty doctrine" did not apply to local government code officials' activities in reviewing building plans and making site inspections. The public duty doctrine holds that certain law-enforcement officials owe no duty to members of the general public to ensure their safety and cannot be held liable for failure to prevent crimes and other wrongs from occurring. In the context of building code enforcement, the public-duty doctrine would have shielded building inspectors (and their local governments) from liability for failure to detect code violations in the construction of a building in a suit brought by the purchaser or occupant of the building.

Since the *Thompson* case, there has been some discussion about adopting legislation to accomplish through legislative channels what the courts refused to do judicially. Senate Bill 1143 may be viewed as one small step in that direction. The bill declares that it restores protection to local governments and their building inspectors when performing activities relating to building inspection. It would shield both local governments and inspectors from liability for acts or omissions involved in building inspection activities, subject to several exceptions. However, one of the exceptions appears to engulf the rule. The act would exclude acts or omissions that are "material to the value of the structure and demonstrated by clear and convincing evidence." This language seems to leave the liability door wide open since it is a rare inspector-negligence suit that does not involve a claim that the resulting damage has materially affected the value of the structure inspected. The bill also excludes liability protection for actions involving the operation of a motor vehicle.

Historic Preservation

Tryon Palace Historic Sites and Gardens Fund

Section 19A.1 of S.L. 2005-276 enacts new G.S. 121-21.1 to establish the Tryon Palace Historic Sites and Gardens Fund as a special nonreverting fund in the Department of Cultural Resources to repair, renovate, expand, and maintain the sites and gardens. All entrance fee receipts will now be credited to the fund. The act also directs the Tryon Palace Commission to report annually to the Joint Legislative Commission on Governmental Operations, the House and Senate Appropriations Subcommittees on General Government, and the Fiscal Research Division.

Statesville Historic District Structure Demolition

G.S. 160A-400.14 provides generally that a historic preservation commission may delay issuing a certificate of appropriateness for one year from the application date if the applicant proposes to demolish a building in a historic district. S.L. 2005-143 (H 1020) authorizes the City of Statesville to adopt an ordinance prohibiting such demolition, except upon the issuance of a permit granted by the city council. In determining whether to issue the permit the council may consider (1) the location of the structure within the district, (2) the state of repair of the structure, (3) the architectural and historical significance of the structure, (4) the owner's plans, (5) the impact of the demolition on the district, and (6) the economic impact of the denial of the permit upon the owner. The act specifically authorizes the city to require as a condition of the permit that the owner replace the structure to be demolished with another structure that conforms to plans submitted by the owner and approved by the city council.

Housing Code

Local Legislation

Two local acts adopted this year affect housing legislation. S.L. 2005-200 (S 474), which applies only to Greenville and High Point, allows these cities to order dwellings determined unfit for human habitation repaired or demolished after a period of six months. If the owner of a deteriorated building has opted to vacate and close the building to comply with an enforcement order and the governing board determines that the owner has no intention of repairing the building and that the closed building causes detrimental effects on the neighborhood, the city may adopt an order that the building either be repaired or demolished within ninety days. If the building is dilapidated, the owner may be ordered to demolish and remove the dwelling within ninety days.

Section 12 of S.L. 2005-305 (H 328) allows Morehead City to order an owner of residential property to repair rather than vacate and close the building. Like the Greenville/High Point act, S.L. 2005-305 also authorizes the city to order that dwellings deemed unfit for human habitation be repaired or demolished after a period of six months.

Like the local acts relating to overgrown vegetation, discussed above, these two acts may run afoul of Article II, Section 24, of the North Carolina Constitution, which prohibits local acts relating to "health, sanitation, and the abatement of nuisances."

Hurricane Response

Though not as devastating as 1999's Hurricane Floyd or the 2005 storms that struck the Gulf Coast, six hurricanes affected North Carolina in the late summer and fall of 2004. These storms caused substantial flooding, landslides, and wind damage in both the mountain and coastal areas.

S.L. 2005-1 (S 7) was enacted in response. It appropriates over $94 million in state funds to assist in disaster relief programs. It allows modification of the State Hazard Mitigation Grant program to provide housing buyout and relocation assistance for those persons in the mountains whose homes were severely damaged or destroyed in landslide hazard areas. This act also allows the expansion and modification of programs established in response to Hurricane Floyd to provide assistance and relief from the effects of the 2005 hurricanes; provides aid to Canton and to Hyde County for repair and replacement of public infrastructure and buildings; and accelerates flood hazard, streambed, and landslide hazard mapping in affected areas.

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