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## Community Planning, Land Development, and Related Topics

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In 2007 the General Assembly addressed specific land use issues, unlike the 2005 session in which comprehensive statutory revisions were adopted. A trend this year was for the state to set specific standards for how local regulations treat some types of land uses. The most vigorously debated of these was a bill limiting local regulation of wireless telecommunication facilities. Other land uses getting attention were landfills, parking lots, solar panels, and amateur radio antennas. Standards were also adopted for local ordinances requiring maintenance of nonresidential buildings. Transportation issues, particularly those related to funding road projects, also received substantial attention in 2007.

### **Zoning**

#### **Wireless Telecommunication Facilities**

The use of wireless telecommunication systems has dramatically expanded in the past decade. Projections are for the growth in use to continue at an accelerated rate in coming years. The widespread use of mobile devices for telephone calls, text messaging, Internet access, and other data transmission creates a demand for more infrastructure to support these uses.

While the demand for reliable and convenient access to wireless services grows, concern about the aesthetic impacts of cell towers and antennae grows as well. This is particularly true as new towers are proposed to be located in residential areas, historic districts, downtowns, and rural scenic areas. Many local ordinances limit the location of telecommunication towers to certain zoning districts, set height limits, require security fencing and landscaping, encourage collocation of multiple providers on a single tower, encourage use of existing structures (water towers, church

steeple, tall buildings) for antenna location, encourage use of camouflaging for towers (use of “stealth” designs), and include provisions for removal of abandoned towers.

Industry concern about restrictive local regulation of wireless communication facilities led to proposals for both federal and state preemption of local regulation. At the federal level, the Telecommunications Act of 1996 allows local regulation of the location of wireless facilities but sets some limitations. The act provides that local regulations may not unreasonably discriminate among providers of functionally equivalent services, may not prohibit or have the effect of prohibiting the provision of personal wireless services, and may not be based on the environmental health effects of radio frequency emissions. Local governments are required to act on permit requests within a reasonable time. Permit denials must be in writing and supported by substantial evidence.

In 2007 the wireless industry sought greater state preemption of local regulation. Senate Bill 831 was proposed to restrict local authority to use land use regulations to limit construction of wireless telecommunication facilities. As introduced, the bill would have set strict time limits for local permit decisions, limited the fees that could be charged for permit reviews, limited the duration of moratoria on wireless facilities, limited surety requirements for removal of unused facilities, limited technical information that could be required for permit reviews, prohibited blanket prohibition of new towers in residential districts, prohibited fixed separation requirements between towers, and limited zoning reviews of collocation applications. Cities and counties, as well as advocates representing planners, historic preservation, and scenic protection interests, opposed this degree of proposed state preemption.

After considerable negotiation, a compromise bill was enacted. S.L. 2007-526 (S 831), effective December 1, 2007, enacts G.S. 160A-400.50 to 160A-400.53 and G.S. 153A-349.50 to 153A-349.53. These provisions allow local government regulation of wireless telecommunication facilities based on “land use, public safety, and zoning considerations.” Local governments are expressly authorized to address “aesthetics, landscaping, land-use based location priorities, structural design, setbacks, and fall zones.” The act expressly provides that it does not limit local historic district or landmark regulations. Local governments may not, however, require information on an applicant’s “business decisions,” specifically including information about customer demand or quality of service. This distinction poses some inherent conflict, as it is not uncommon for an ordinance to allow new towers in sensitive areas (a land use consideration) only upon a showing that existing facilities are unavailable to provide adequate service (which some might consider a business decision). The act addresses this tension by specifying the information that can be required and considered in permit reviews. A local government may consider whether an existing or previously approved structure can reasonably be used to provide service; whether residential, historic, and designated scenic areas can be served from outside the areas; and whether the proposed tower height is necessary to provide the applicant’s designated service. A local government may also evaluate the feasibility of collocating new antennas and equipment on existing structures.

Local governments are required to provide streamlined processing for qualified collocation applications. Decisions on these applications must be made within forty-five days after receipt of a completed application (and decisions on all other applications must be made within a reasonable time consistent with other land use applications). Notice of any deficiencies in a collocation application must be provided within forty-five days after it is submitted. Qualified collocation applications may be reviewed for conformance with site plan and building permit requirements but are not otherwise subject to zoning requirements. Applications entitled to this streamlined review include those for new antennas on towers previously approved for collocation facilities if the installation is within the terms of the original permit. Other collocations entitled to this streamlined process include those that meet a set of specified conditions, including no increase in the height or width of the supporting tower, no increase in ground space for the facility, and new equipment being within the weight limits for the structure.

Local governments are prohibited from requiring that wireless facilities be located on city- or county-owned towers or facilities but may provide expedited processing for applications for wireless facilities proposed to be located on city- or county-owned property.

Two other key issues addressed by this act are the fees required for permit review and the construction of speculative towers. Local governments may charge a permit application fee that includes fees for consultants to assist in the review of the applications. These fees must be fixed in advance of the application and may not exceed the usual and customary costs of services provided. Local governments may add a condition to zoning approvals for new towers that building permits for the tower will not be issued until the applicant provides documentation of parties intending to locate facilities on the tower (but the zoning permit itself may not be denied due to the lack of documentation of a committed user). Zoning permits can require that permitted facilities be constructed within a reasonable time, but not less than twenty-four months.

### **Amateur Radio Antennas and Solar Collectors**

Two bills were enacted in 2007 to limit local zoning restrictions as applied to particular uses—amateur radio antennas and solar collectors for single-family residences.

S.L. 2007-147 (H 1340) amends the city and county zoning statutes to require that ordinances regulating the placement, screening, or height of antennas and their support towers or structures “reasonably accommodate” amateur radio communications and be the “minimum practical regulation” to accomplish city or county purposes. This general standard is substantially similar to the limited federal preemption approved by the Federal Communications Commission [Amateur Radio Preemption, 101 FCC2d 952 (1985)]. Cities and counties may not restrict the height of an antenna or support structure to 90 feet or less unless the restriction is necessary to achieve a clearly defined health, safety, or aesthetic objective. This law became effective October 1, 2007.

S.L. 2007-279 (S 670) provides that cities and counties may not prohibit solar collectors on detached single-family residences. This law applies to solar collectors used for water heating, active space heating, passive heating, or electricity generation. Ordinances may regulate the location or screening of solar collectors and may prohibit collectors that are visible from the ground if they are located on a façade facing an area open to common or public access, on a roof facing down toward such an area, or within an area between such façades and a public area. The law similarly restricts the use of deed restrictions and private restrictive covenants that would limit the use of solar collectors. Unlike most statutes affecting governmental land use restrictions, this statute allows the court to award costs and attorney fees to the prevailing party in civil actions arising under these provisions. This law became effective October 1, 2007 (and the limitations on deed restrictions apply only to those recorded after that date).

### **Parking Lots**

The 2007 appropriations act (S.L. 2007-323, H 1473) included a special provision on stormwater management that will affect the design of parking lots across the state. Section 6.22 of S.L. 2007-323 enacts G.S. 143-214.7(d2) to require that as of October 1, 2008, all surface parking lots have no more than 80 percent built-upon area. The remaining 20 percent of the parking area must either have permeable pavement or meet other design requirements for stormwater management (such as having grass or other permeable surfaces, bioretention ponds, or other water retention devices). Any permeable pavement or stormwater retention system used must comply with standards set by the Department of Environment and Natural Resources. Covered parking areas and multilevel parking decks are not covered by this requirement. The new law applies to applications for building permits, rezonings, and plat approvals made on or after October 1, 2008. Section 6.22 also directs the Environmental Review Commission to study issues associated with pervious surfaces for parking and allocates \$25,000 for the study. The commission is authorized to report its findings and recommendations to the 2008 legislative session.

### **Local Acts Affecting Zoning**

Four local laws were enacted in 2007 that affect individual cities and counties.

Three municipalities secured legislative approval to substitute electronic notice of public hearings for newspaper publication of these notices. S.L. 2007-86 (S 350) provides that Apex, Garner, and Knightdale may provide notice of public hearings through electronic means. The new law does not supersede the laws requiring mailed or posted notice nor does it alter the schedule for making the notices. Similar local legislation in 2003 allowed electronic rather than newspaper-published notice for Cabarrus County, Raleigh, and Lake Waccamaw.

Adoption of land use regulations can be controversial, particularly in rural areas that have not previously adopted zoning. Local governments in these areas have occasionally considered submitting the question of whether to adopt regulations to a public vote. Because there is no statutory authority for a local government to conduct a referendum of this type, individual authorization is needed to do so. S.L. 2007-137 (S 654) allows Rutherford County to conduct an advisory referendum on “high impact land-use zoning, such as heavy industry use.”

A simmering dispute over construction of a new state government parking deck in downtown Raleigh led to the adoption of S.L. 2007-482 (S 1313). This law amends G.S. 143-345.5 to provide that local zoning does not apply to any state-owned building built on state-owned land that is within six blocks of the state capitol unless the Council of State consents.

S.L. 2007-257 (S 649) removes the exemptions to height limits adopted in 2006 for Hendersonville and narrows the application of the height limits to a smaller specified area in the city.

### **Judicial Review of Quasi-Judicial Decisions**

The General Assembly has for several years considered legislation to codify various aspects of the procedures for judicial review of local government quasi-judicial land use approvals—appeals of decisions on special and conditional use permits, enforcement actions, variances, and some plats. In 2005 the Senate approved Senate Bill 970 to address these issues, but the bill was not taken up in the House of Representatives in 2005 or 2006. A slightly updated version of the bill, Senate Bill 212, was introduced in 2007 and again passed the Senate. It is eligible for consideration by the House of Representatives in 2008. Among the topics addressed by the bill are the content of the judicial petition used to start the appeal, standing to bring an appeal for individuals and groups, parties that must be named in the appeal and the process for others to intervene, specification of material to be included in the record to be submitted to the court, the scope of review by the courts and the degree of deference to the local decision-making board, and the judicial remedies available.

## **Land Subdivision Control and Development Fees**

### **Interest on Illegal Developer Exactions**

In *Durham Land Owners Association v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200 (2006), the North Carolina Court of Appeals invalidated the county’s school impact fee program because the county lacked legal authority to adopt it. However, it also ruled that the county was not liable to pay interest on the illegally collected fees that the court ordered refunded. In reaction to this decision, S.L. 2007-371 (S 1152) enacted G.S. 153A-324(b) and G.S. 160A-363(e) to require local governments to pay 6 percent annual interest on illegally enacted taxes, fees, or monetary contributions not specifically authorized by law.

### **Ban on Unauthorized Development Fees**

Senate Bill 1180, a related bill supported by the development community, provides that a local government may not impose a tax, fee, or monetary contribution for development that is not specifically authorized by law. It is intended to apply to any of the types of planning and land development regulations and development agreements authorized for cities by Article 19 of

G.S. Chapter 160A and for counties by Article 18 of G.S. Chapter 153A. But it is unclear whether the proposed prohibition is intended to apply to administrative fees for reviewing development-related applications, many of which are not expressly authorized by statute, or whether it is restricted to fees intended to defray the costs of public facilities made necessary by new development. Because of its reference to monetary contributions, the act appears intended to ban those contributions collected by local governments with adequate public facility ordinances intended to “advance capacity.” These contributions serve to speed up the construction of public facilities and break through development permission logjams. Senate Bill 1180 has passed the Senate and awaits action in the House of Representatives.

### **Local Legislation: Land Subdivision Regulation**

Several local acts adopted in 2007 expand the scope of local government authority to regulate land subdivision. S.L. 2007-237 (H 1143) applies only to Stanly County. It amends existing local legislation defining the scope of subdivision regulation by deleting an exemption for lots of at least 20,000 square feet with frontage on a state road of at least 100 feet. S.L. 2007-207 (H 1120) applies only to Pasquotank County. It repeals a local act defining “subdivision” that provided more exemptions than G.S. 153A-335 (the corresponding state enabling statute). The effect of the repeal is to bring Pasquotank County under the general statute. A third local act, S.L. 2007-339 (S 609), amends G.S. 153A-349.6, a statute authorizing development agreements, as it applies to Chatham County. The act authorizes the county under such an agreement to require a developer to provide funds to the county for the development and construction of recreational facilities to serve one or more developments within an area chosen by the county. G.S. 160A-372 allows municipalities, under the authority to regulate land subdivisions, to require developers to provide funds in lieu of dedicating land for recreational purposes. S.L. 2007-321 (H 1213) allows the Town of Cary to impose the same requirements when approving multifamily residential developments that do not involve the subdivision of land.

## **Historic Preservation**

### **Historic Rehabilitation Tax Credit**

Since 1994 North Carolina tax law has allowed income tax credits for the rehabilitation of historic buildings. Currently a taxpayer may claim either 20 percent of rehabilitation expenditures that qualify for a companion federal credit or 30 percent of eligible rehabilitation expenditures that do not qualify for the federal credit. The state credits may be used by “pass-through” entities such as partnerships, limited liability companies, and Subchapter S corporations so that the tax benefits are allocated directly to and used by the entity’s owners, who report the income and credits as owners on their own income tax returns. For most state tax credits, a pass-through entity must allocate the credit among its owners in the same proportion that other items, such as the federal rehabilitation credit, are allocated under the Internal Revenue Code. The 20 percent tax credit provides for the separate sale of the credit, however, by allowing a pass-through entity to allocate the tax credit among its owners at its discretion as long as each owner’s adjusted basis is at least 40 percent of the amount of credit allocated to that owner. This provision was set to expire January 1, 2008. S.L. 2007-461 (H 1259) removes the sunset, making the allocation provision permanent.

### **Local Legislation: Demolition of Historic Structures**

S.L. 2007-66 (H 827) is a local act that allows the towns of Cary and Wake Forest to regulate the demolition of certain historic structures within their jurisdictions. Among the historic structures that may be regulated are (1) state, local, and national landmarks; (2) structures listed in national, state, or county registers of historic places; and (3) certain structures that “contribute” to the historic district in which they are located. However, the act expressly provides that

G.S. 160A-400.14, which allows a city to delay the effective date of a certificate of appropriateness for a proposed demolition up to 365 days after it is approved, continues to apply to locally designated landmarks and structures within locally designated historic districts.

A related act, S.L. 2007-32 (H 303), applies only to the City of New Bern. It, too, allows the city to regulate the demolition of certain historic structures within the city. The act does not list the kinds of historic structures to which it applies. It allows the city to adopt an ordinance defining them. However, the act expressly provides that the power to regulate demolition applies “notwithstanding the provisions of G.S. 160A-400.14.” It is possible that this authority may be used to delay demolition indefinitely.

## **Planning Jurisdiction, Annexation, and Incorporation**

A number of bills were introduced that would have significantly altered state law on annexation and extraterritorial planning jurisdiction. None of these were enacted.

A substantial number of local bills on these topics were enacted. Specific areas were annexed into the following cities: Columbia (S.L. 2007-140, H 1144); Dallas (S.L. 2007-160, S 382); Earl (S.L. 2007-53, H 1041); Landis (S.L. 2007-139, H 1163); Morrisville (S.L. 2007-324, H 562); Ramseur (S.L. 2007-110, H 1193); and Sunset Beach (S.L. 2007-141, H 1153 and S.L. 2007-160, S 382). Navassa was authorized to enter into agreements for payments in lieu of annexation (S.L. 2007-314, H 1217). A substantial number of cities also secured approval to increase the permissible area within satellite annexations. These include: Ahoskie (S.L. 2007-311, S 220); Columbus (S.L. 2007-311); Cramerton (S.L. 2007-62, S 570); Durham (S.L. 2007-225, H 1250); Four Oaks (S.L. 2007-17, H 180); Green Level (S.L. 2007-26, H 326); Kannapolis (S.L. 2007-344, H 842); Mt. Pleasant (S.L. 2007-342, S 546); Norwood (S.L. 2007-71, H 537); Roanoke Rapids (S.L. 2007-311); Sanford (S.L. 2007-43, S 284); Watha (S.L. 2007-62), and Weldon (S.L. 2007-311). Specific areas were deannexed from Beech Mountain (S.L. 2007-74, H 621) and Greensboro (S.L. 2007-256, S 432). Annexation standards were modified for Oak Island (S.L. 2007-319, H 398).

Extraterritorial planning jurisdiction was authorized for River Bend (S.L. 2007-334, S 616) and extended to a specified area for Magnolia (S.L. 2007-40, H 407).

Three new municipalities were incorporated: Butner (S.L. 2007-269, H 986); Eastover (S.L. 2007-267, H 1191); and Hampstead (subject to approval in a referendum) (S.L. 2007-329, S 15).

## **Community Appearance/Public Nuisances**

A number of local acts were adopted by the General Assembly in 2007 designed to streamline and expand municipal enforcement of overgrown vegetation, public nuisance, and junked motor vehicle ordinances. It should be noted that at least some of these local acts risk violating Article 2, Section 24(1)(a) of the North Carolina Constitution, which prohibits the General Assembly from enacting any local legislation “relating to health, sanitation, and the abatement of nuisances.”

- S.L. 2007-31 (H 579) is a local act that applies only to the City of Greensboro and the Town of Spring Lake. It allows those municipalities to take summary action to remedy violation of their overgrown vegetation ordinances without giving further notice to a chronic violator during the same year. It also makes the expense of abating the nuisance a lien against the property. A chronic violator is one against whom the city has already taken remedial action three times.
- S.L. 2007-258 (S 652) accomplishes essentially the same thing as the immediately preceding act but applies only to the cities of Eden, Reidsville, and Rockingham.
- S.L. 2007-220 (S 608) applies only to the City of Durham. It amends existing local legislation and applies to both the city’s overgrown vegetation ordinance and its refuse

and debris ordinance. Under the act the city must have taken prior remedial action at least two times (was, three times) during the previous calendar year before having the authority for expedited removal.

- S.L. 200-73 (H 217) is a variation on the same theme that applies only to the towns of Cornelius and Davidson. It allows those municipalities to take summary action to remedy violation of their public nuisance ordinances without giving further notice to a chronic violator during the same year. It also makes the expense of abating the nuisance a lien against the property. A chronic violator is one against whom the city has already taken remedial action three times.
- S.L. 2007-254 (S 227) amends the Cornelius/Davidson act to extend its coverage to the City of Wilmington and New Hanover County.
- S.L. 2007-327 (S 181) tracks the Cornelius/Davidson act but applies only to the Town of Clayton.

## **Transportation**

### **Highway Construction Projects**

S.L. 2007-551 (H 1005) reflects the General Assembly's continuing concern about the state's highway construction needs. First, it amends G.S. 142-101(d) to direct the Debt Affordability Advisory Committee to make specific recommendations concerning the state's capacity for debt that is supported by the Highway Fund and the Highway Trust Fund. Second, it directs the North Carolina Department of Transportation (NCDOT) to review the state's Transportation Improvement Program (TIP) project planning, development, and priority-setting process to determine if legislation is needed to meet established transportation network performance targets and to study alternative funding sources. NCDOT's recommendations to the Joint Legislative Transportation Oversight Committee (JLTC) were due October 1, 2007. Third, it directs the Office of State Budget and Management (OSBM) to develop a statewide logistics plan to address long-term economic, mobility, and infrastructure needs. The study must identify priority commerce needs and the multimodal transportation infrastructure necessary to support industries vital to the state's economic growth. The act authorizes NCDOT to use up to \$1 million from the Highway Fund to pay for OSBM's study, which is to be delivered to the JLTC by April 1, 2008. Fourth, it amends G.S. 136-44.7D (Bridge construction guidelines) to provide that bridges crossing rivers and streams in watersheds must be constructed to accommodate the hydraulics of the water level for a 100-year flood. It directs that these bridges be built without regard to the riparian buffer zones established by the Division of Water Quality, Department of Environment and Natural Resources, and it prohibits any memorandum of agreement or agency rule that would contradict this mandate. Finally, it enacts G.S. 136-44.7E to provide that under federal law NCDOT is the co-lead agency with the U.S. Department of Transportation and all other federal, state, or local agencies are either participating or cooperating agencies. NCDOT is thus designated the authority for determining the need for the projects and for determining viable alternatives. Conflicts between agencies must be resolved by NCDOT "in favor of the completion of the project in conflict."

### **NCDOT Design-Build Construction Contracts**

S.L. 2007-357 (H 610) amends G.S. 136-28.11 to liberalize the use of design-build construction contracts by NCDOT. The act first clarifies that up to twenty-five of these contracts may be awarded each fiscal year. Also, NCDOT must now present to the JLTC information on the scope, nature, and justification of any project that costs more than \$40 million. The floor for this reporting requirement was formerly \$100 million. However, the act deletes the requirement that NCDOT also report on these projects to the Joint Legislative Commission on Governmental Operations.

## **Local Government Funding of State Highways**

The issue of whether and how local governments may contribute to or “participate” in the costs of highway improvement projects that are part of the TIP has been debated for some time. In 1987 a coalition of legislators representing rural areas and small towns was successful in securing legislation that limited the ability of local governments to contribute to state highway projects because of their concern that such “participation” warped the state’s highway priorities. In 2001, however, G.S. 136-66.3 was rewritten to provide that municipalities could participate in the right-of-way and construction costs of state projects as long as other state projects were not jeopardized. In 2004 G.S. 136-18(38) was enacted to allow NCDOT to receive funds from local governments and nonprofit corporations for the purpose of advancing the construction schedule of a project identified in the TIP and to provide for the reimbursement of these “loans” in certain circumstances.

Legislation adopted in 2007 further encourages local governments to help shoulder the costs of major highway construction and opens the door for the first time to county financial participation. S.L. 2007-428 (S 1513) affects both counties and cities. First, it amends G.S. 136-51 (first adopted in 1931) and makes conforming changes to G.S. 136-98 to authorize counties to participate in the cost of rights-of-way, construction, reconstruction, and improvement of roads in the state system under agreement with NCDOT. Furthermore, counties are expressly allowed to acquire land by dedication and acceptance, negotiated purchase, and eminent domain and to make improvements to portions of the state system located both inside and outside the county. The legislation does not, however, authorize counties to maintain, operate, or pay for a “county roads” system.

Second, the act makes a similarly remarkable change in the law affecting municipalities. It enacts new G.S. 136-41.4 to allow a municipality to elect to have some or all of its Powell Bill funds “reprogrammed” for a project on the TIP-approved project list. The project may be located either within the municipality’s corporate limits or within “the area of any metropolitan planning organization or rural planning organization.” This latter feature of the act became effective October 1, 2007.

Finally, the act amends G.S. 136-18(29a) concerning the coordination of highway improvements associated with new or expanded public and private schools. For several years this subsection directed NCDOT to provide a written evaluation and written recommendations concerning how school driveway and access points tie into adjacent state roads, providing that it does not require schools “to meet” NCDOT’s recommendations. S.L. 2007-428 qualifies this language with a proviso that schools are not required to do so, except with respect to “those highway improvements that are required for safe ingress and egress to the State highway system.” Thus, the exception nearly engulfs the rule.

## **Traffic Impact Analysis for Sanitary Landfills and Transfer Stations**

Section 8 of S.L. 2007-550 (S 1492), the comprehensive solid waste act, adds a surprising provision that concerns traffic impact analysis. It enacts new G.S. 130A-295.5 to require applicants for permits for sanitary landfills and transfer stations to conduct a traffic study of the impacts of the proposed facility. Perhaps more important, it directs the Department of Environment and Natural Resources to include as a permit condition a requirement that the permit “mitigate adverse impacts identified by the traffic study.” The study must be wide-ranging enough to include analysis of traffic and road capacity from the nearest limited access highway used to access the site to the site itself. The study must analyze road conditions and other potential adverse impacts of the increased traffic associated with the proposed facility. However, an applicant may satisfy the requirement by obtaining certification from the division engineer of NCDOT that the proposed facility “will not have a substantial impact on highway traffic.”

The traffic impact study requirement applies to permit applications pending on the act’s effective date, August 1, 2007, but not to modifications of certain permits issued on or before June 1, 2006. It also does not apply to permits for certain sanitary landfills managed by investor-owned

utilities and permits determined by the Secretary of Environment and Natural Resources to be necessary to respond to an imminent hazard to public health or to a natural disaster.

### **Passenger Buses on Public Streets and Highways**

Buses used for public transportation are increasingly being designed in two sections that serve to increase the size of the bus. S.L. 2007-499 (H 514) enacts new G.S. 20-116(*l*) to provide expressly that a passenger bus owned and operated by a local government on public streets and highways as a single vehicle may be up to 45 feet in length. However, NCDOT may prevent the operation of these buses if it would present a hazard to bus passengers or to the motoring public.

### **Exemption of Certain Charlotte ETPJ Streets from NCDOT Approval**

Although S.L. 2007-440 (S 1482) is a general law, its reach is narrow. It applies only to subdivision plats with public streets in the extraterritorial planning jurisdiction (ETPJ) of municipalities with a population of at least 500,000 (Charlotte). Generally speaking, G.S. 136-102.6 establishes four requirements with respect to subdivision plats for unincorporated areas that include streets offered for public dedication: (1) if the streets are to be offered for public dedication, they must be so designated on the plat; (2) the right-of-way and design of the streets must meet the street standards adopted by NCDOT; (3) the subdivider must deliver to each lot purchaser a subdivision streets disclosure statement disclosing the status of the streets and whose responsibility it is to maintain them; (4) the plat must be approved by the NCDOT Division of Highways before it is recorded. S.L. 2007-440 effectively exempts from the requirements of G.S. 136-102.6 certain public streets in the City of Charlotte's ETPJ that were approved for construction by Charlotte before June 1, 2007, if they met Charlotte's street standards but not those of NCDOT. However, the act requires the subdivider to deliver an applicable subdivision streets disclosure statement to those buying lots in the subdivision.

### **Oyster Shells and Highway Beautification**

S.L. 2007-84 (S 1453) enacts new G.S. 136-123(b) to prohibit NCDOT or any other governmental unit from using oyster shells as ground cover for a landscaping or highway beautification project. It further directs that if a governmental unit comes into possession of oyster shells, it must make them available to the Department of Environment and Natural Resources, Division of Marine Fisheries, which uses them in oyster bed revitalization programs.

### **Transportation Bills Eligible for Consideration in 2008**

House Bill 1576 began as a bill to require NCDOT, municipalities, and metropolitan planning organizations to devise and implement a comprehensive traffic control plan to coordinate traffic signals to reduce energy consumption. The plan would apply to traffic signal patterns on state highways as they run through municipalities. A committee substitute adopted later in the House of Representatives would authorize but not require those governmental units to undertake such an effort. House Bill 1576 awaits action in the Senate.

House Bill 1559 would authorize operators of transit systems to erect certain "transit amenities" within public road rights-of-way. These may include transit shelters and benches along with trash and recycling receptacles, even commercial advertising displays. These transit amenities would have to be approved by NCDOT if they were located within a state- or federal-aid primary road right-of-way or approved by a municipality if within a municipal street right-of-way. The authority would expire if compliance with the terms of this law would jeopardize federal funding or would be inconsistent with federal law.

## **Regulation of Junked Motor Vehicles**

G.S. 160A-303(b2) and G.S. 160A-303.2(a) both define junked motor vehicles for purposes of local regulation and towing. One element of the definition in both statutes is the requirement that such vehicles be more than five years old and worth less than \$100. However, both statutes also include subparts that redefine this latter requirement as it applies to certain named municipalities so that vehicles with values up to \$500 may be regulated and towed. S.L. 2007-208 (S 426) extends the coverage of these subparts to the towns of Ayden, Cornelius, Davidson, Huntersville, and Spring Lake, and the cities of Eden, Greensboro, High Point, and Reidsville.

## **Vegetation Removal and Billboards**

North Carolina's outdoor advertising control program regulates signs along certain federal and state highways. North Carolina is one of a minority of states that allow the clearing of trees and other vegetation from the right-of-way for the express purpose of allowing outdoor advertising displays beyond the right-of-way to be more visible from the highway. Even so, the state has been plagued over the years with a rash of incidents that appear to involve unauthorized vegetation removal in the vicinity of these signs.

Senate Bill 150 would expand the area along the right-of-way within which vegetation removal is authorized by permit, but it would increase the fees associated with permits and establish a more elaborate system for enforcing laws pertaining to unauthorized vegetation removal from the right-of-way. The bill has passed the Senate and is eligible for consideration by the House of Representatives in 2008.

## **Real Property Acquisition**

### **Notice to Local Governments before Land Acquisition**

The North Carolina Department of Administration (NCDOA) acquires land on behalf of state agencies, with the approval of the Governor and the Council of State. If the land is appraised at more than \$25,000 and is acquired for other than a transportation purpose, the land may be acquired only after NCDOA gives written notice to the Joint Legislative Commission on Governmental Operations. S.L. 2007-396 (S 1167) expands the scope of this duty to include gifts of land. It also requires that this advance notice be given to the board of county commissioners and county manager of the county where the land is located and to the city council and the city manager if the land is within a city's corporate limits. Notice must be provided to the chairs of a local governing board at least thirty days before the acquisition. Local elected officials, or the governing board as a whole, may provide written comments to NCDOA, which must forward them to the Governor and the Council of State.

### **Eminent Domain**

In the case of *Kelo v. City of New London*, 545 U.S. 469 (2005), the United States Supreme Court held that a Connecticut city's use of eminent domain strictly for economic development purposes and in the absence of blight was constitutional. In 2006, and in reaction to the *Kelo* decision, the General Assembly amended several statutes to ensure that North Carolina local governments lacked any authority to use eminent domain in the circumstances found in *Kelo*.

House Bill 878, introduced in 2007, would call for a statewide voter referendum to consider an amendment to Section 19 of Article I of the North Carolina Constitution to reinforce the ban on eminent domain for economic development purposes. The bill seems intended to allow the use of eminent domain in the context of urban redevelopment, but the language in the bill in its present form makes its scope unclear. It has passed the House of Representatives and awaits further action in the Senate in 2008.

## **Code Enforcement**

### **Standards for Code-Enforcement Officials**

S.L. 2007-120 (H 700), initiated by the Department of Insurance, makes some technical changes in the statutes governing the certification of those officials who interpret and enforce the North Carolina State Building Code. Many of the changes simply conform the statutes to the classifications and rules for Code-enforcement officials that have been adopted by the North Carolina Code Officials Qualification Board (COQB). For the first time the statutes provide for five different types of Code-enforcement officials: (1) building inspectors, (2) electrical inspectors, (3) mechanical inspectors, (4) plumbing inspectors, and (5) fire inspectors. Similarly the statutes would for the first time provide for Level I, Level II, and Level III certificates for each of the five categories of inspectors.

Perhaps the most significant change concerns the sanctions that COQB may impose in disciplinary actions involving a Code-enforcement official. Under the act the board may (1) suspend, (2) revoke, (3) demote to a lower level, or (4) refuse to grant any or all of certificates that the disciplined Code-enforcement official holds. This amendment to G.S. 143-151.17 is in reaction to a decision by the North Carolina Supreme Court [Bunch v. North Carolina Code Officials Qualification Bd., 343 N.C. 97, 468 S.E.2d 55 (1996)] that held that any sanction imposed by the board had to apply to all of the certificates that a disciplined Code-enforcement official holds, not simply to the certificate that applied to the work that the inspector was performing at the time of the alleged misconduct.

The bill was effective December 1, 2007, and applies to offenses committed on or after that date.

### **Master Meters in Condo Conversion Projects**

G.S. 143-151.42 prohibits the use of master meters in multifamily residential units that are normally rented or leased for a month or more, including apartment buildings, residential condominiums, and townhouses. The use of individual meters is designed to encourage each occupant to be responsible for his or her own conservation of electricity and gas. The statute specifically makes the law inapplicable to hotels, motels, dormitories, rooming or nursing houses, or homes for the elderly. S.L. 2007-98 (S 1178) amends G.S. 143-151.42 to exempt hotels and motels that have been converted into condominiums. In these instances the conversion of a master meter system to a system of individual meters for each dwelling unit can be rather costly.

### **Insulation of Hot Water Pipes**

S.L. 2007-542 (H 1702) amends G.S. 143-138(b) to allow the State Building Code to be amended to include rules concerning energy efficiency. The rules may require all hot water plumbing pipes that are larger than one-quarter inch to be insulated. This authorization is effective January 1, 2008, and applies to all new construction for which permits are issued on or after that date. In addition, the act directs the North Carolina Building Code Council to study the extent to which hot water lines should be insulated to achieve greater energy efficiency and to amend the North Carolina State Building Code as necessary to achieve those ends. The Council must report its findings and actions to the Environmental Review Commission and the 2008 Regular Session of the General Assembly by April 1, 2008.

### **Exemption of Industrial Machinery from Building Code**

It has never been entirely clear what regulatory powers the Engineering Division of the North Carolina Department of Insurance (DOI) and local electrical inspectors have over electrical appliances and equipment. Article 4 of G.S. Chapter 66 concerning electrical materials, devices, appliances, and equipment, authorizes the Commissioner of Insurance to evaluate these goods

when they are to be sold or installed in this state. The Commissioner may approve national standards and suitable qualified testing laboratories to determine whether particular goods may be approved and labeled. What has been less clear is how this evaluation process should work, particularly when DOI is directed to “specify any alternative evaluations which safety requires.” Although the role of the local electrical inspector in evaluating electrical equipment was diminished by legislative amendments in 1989, the electrical inspector may still “initiate any appropriate action to proceedings to prevent, restrain, or correction any violation” of the relevant statutes.

S.L. 2007-529 (S 490) provides that the State Building Code does not apply to the regulation of the design, construction, location, installation, or operation of “industrial machinery.” That term does not include equipment that is permanently attached to or a component part of a building and related to services such as ventilation, heating, and cooling, plumbing, fire suppression or prevention, and general electrical transmission. The act provides that if an electrical inspector has “any concerns” about the electrical safety of a piece of industrial machinery, the electrical inspector may refer the matter to the Occupational Safety and Health Division in the North Carolina Department of Labor. The inspector, however, may not withhold the certificate of occupancy nor mandate third-party testing of the industrial machinery.

### **Limits for License Classes for General and Electrical Contractors**

Effective October 1, 2007, S.L. 2007-247 (H 1338) raises project value limits for certain general contractor licenses and electrical contractor licenses. It first amends G.S. 87-10(a) to raise the project limit for a limited general contractor license from \$350,000 to \$500,000 and for an intermediate general contractor license from \$700,000 to \$1 million.

The act also raises the project value limit for a limited electrical contractor’s license from \$25,000 to \$40,000 and the limit for an intermediate electrical contractor’s license from \$75,000 to \$110,000. Additionally, the act also delegates to the State Board of Examiners of Electrical Contractors the power to modify these project value limitations upward to a maximum of \$100,000 (for a limited license) and \$200,000 (for an intermediate license). However, these “adjustments” may be adopted by the board no more than once every three years and must be based upon an increase or decrease in the project cost index for electrical projects in North Carolina.

### **County Pyrotechnic Displays**

G.S. 14-410(a) and G.S. 14-413 allow boards of county commissioners to issue permits for both outdoor and indoor public events involving pyrotechnics (fireworks). If the pyrotechnics are used indoors, then the county board may issue the permit only if the local or state fire marshal has certified that adequate fire suppression is available, that the structure is safe, and the building has adequate egress based on the size of the expected crowd. (This special review of pyrotechnic exhibitions stems from a deadly Rhode Island fire in a night club several years ago.)

S.L. 2007-38 (H 189) amends these two statutes to allow a board of county commissioners to adopt a resolution delegating to a city the authority to approve the use of pyrotechnics if the site is within the city limits. If the pyrotechnics are to be used indoors, the certification from a fire marshal is still required for these city permit reviews, however.

### **Threshold for Fire Safety Review of Public Construction Plans**

G.S. 58-3140(b) requires construction plans for certain buildings proposed for use by a county, city, or school district to be reviewed by the Commissioner of Insurance for fire safety. S.L. 2007-303 (H 735) amends that subsection to make the law applicable only to those buildings that include 20,000 square feet or more; the previous threshold was 10,000 square feet. The act became effective October 1, 2007, with respect to plans submitted to the commissioner on or after

that date. The legislation was recommended by the House Select Committee on Public School Construction as a means of streamlining the construction plan review process.

### **Reduction of Building Permit Fee for Energy Efficiency**

S.L. 2007-381 (S 581) enacts new G.S. 153A-340(i) and G.S. 160A-381(f) to authorize (but not require) counties and cities to reduce the permit fees or provide rebates for construction projects using sustainable design principles to achieve energy efficiency. These financial incentives may be extended to buildings that are certified as meeting (1) the LEED certification standard (Leadership in Energy and Environmental Design), or a higher standard, as adopted by the U.S. Green Building Council; (2) a “One Globe” or higher standard, as adopted by the Green Building Initiative; or (3) any other national certification or rating that is equivalent to or that establishes a standard greater than either of the first two.

The act, effective August 2, 2007, provides expressly for authority some North Carolina local governments thought they already had.

### **Local Act: Building Permits and Unpaid Taxes**

S.L. 2007-38 (S 624) applies only to Gates County and amends an existing local act. It allows the county to withhold a building permit for real property for which property taxes are delinquent. Similar laws also apply to Davie, Greene, Lenoir, Lincoln, Iredell, Wayne, and Yadkin counties.

### **Nonresidential Maintenance Code for Cities and Counties**

For many years some local governments have expressed interest in adopting a local commercial and industrial property maintenance code. Such a code would set forth “minimum standards of maintenance, sanitation, and safety” for nonresidential buildings that are not necessarily so unsafe that they are fit for condemnation. In this regard such an ordinance would be similar to a minimum housing ordinance, except that it would apply to nonresidential properties. 2007 proved to be the year that these hopes began to be realized.

S.L. 2007-414 (S 556) authorizes the adoption of nonresidential maintenance codes by enacting two new statutes, G.S. 160A-439 and G.S. 153A-372.1, that closely track the procedures outlined in the minimum housing statutes. Any city or county is authorized to adopt a commercial maintenance code of its choice.

One important feature of the legislation is that a local government acting under a commercial maintenance code, as under a minimum housing ordinance, is authorized to arrange for the work on the property to be done if the owner fails to do so. It may also establish a lien on the property for the expenses incurred. S.L. 2007-414 also expressly provides that a local government may impose a civil penalty for violation of an ordinance adopted under the act.

The new act also includes a procedure for dealing with owners that vacate and close their buildings and “abandon the intent to repair.” It tracks a similar procedure in the housing code statutes. However, under this nonresidential maintenance act, the local government must typically wait two years before following up with an order to repair or demolish (under the minimum housing statutes a period of only one year is required). Furthermore, in the case of vacant manufacturing facilities or industrial warehouse facilities, the buildings must have been vacated and closed for a period of five years before the governing board may take further action.

### **Probable Cause for Periodic Inspections**

Senate Bill 1507 is a potentially significant bill that has passed the Senate and is eligible for further consideration in 2008. It addresses several issues involving unsafe buildings. First, it would affect the circumstances in which a city or county inspector may make periodic inspections for unsafe, unsanitary, or otherwise unlawful conditions in buildings. (Note that periodic inspections of work in progress would not be affected.) Periodic inspections to check for

compliance with fire prevention regulations, minimum housing ordinances, and conditions giving rise to condemnation would be strictly limited. A city or county could require periodic inspections as an effort to respond to “blighted or potentially blighted conditions” in a target area designated by the local government or within a community development block grant target area designated by certain other state or federal agencies. Otherwise, inspectors could make periodic inspections only when there is “probable cause.” According to the bill, probable cause would mean (1) the owner has a history of more than one verified violation of a housing ordinance within a twelve-month period, (2) there has been a complaint that substandard conditions exist or an occupant has requested that the building be inspected, or (3) the inspections department has actual knowledge of unsafe conditions within the building acquired as a part of “routine business activities conducted by government officials.”

Senate Bill 1507 also would make a fundamental change to the minimum housing statutes. It would amend G.S. 160A-443(3)(a) to provide that if a dwelling unit can be repaired or improved, the inspector could so require and would not have to allow the owner to comply by vacating and closing the dwelling. The proposed change is a remarkable one because there are increasing complaints about owners who simply board up houses to avoid repairing them.

Finally, the bill proposes a series of changes to residential landlord-tenant law. Senate Bill 1507 spells out a series of building conditions that would be considered “inherently dangerous conditions.” It would provide that if a landlord has knowledge or notice of these conditions but failed to remedy them within a reasonable period of time, the landlord would be deemed to have breached an implied covenant with the tenant.

## **Environment**

### **Landfill Siting**

Faced with several proposals to site major new landfills in the state, a moratorium on permitting new landfills was enacted by the General Assembly in 2006. In 2007 the General Assembly set new standards for landfill siting and design. Legislation enacted in the closing days of this session substantially updates and strengthens both the process and standards for permitting new landfills. S.L. 2007-550 (S 1492) makes a number of changes to state laws that are discussed in more detail in Chapter 12, “Environment and Natural Resources.” Of particular note in respect to planning and development regulation are several siting and permit review procedures. New landfills must be (1) 200 feet from perennial streams or wetlands, (2) outside the 100-year floodplain, (3) five miles from the boundary of a National Wildlife Refuge, (4) one mile from the boundary of a state gameland, and (5) two miles from the boundary of a state park. Landfills must be consistent with state and local solid waste management plans. Traffic studies and traffic mitigation measures may be imposed on landfills and transfer stations. Continuation and even some expansion of landfills existing as of June 1, 2006, are not subject to most of these requirements.

### **Energy**

A number of bills were enacted to enhance energy efficiency and promote use of renewable energy sources. The major bill, S.L. 2007-397 (S 3), largely affects power suppliers and is reviewed in detail in Chapter 12, “Environment and Natural Resources.” Several other bills on this topic affect local governments and community planning. S.L. 2007-381 (S 581) allows cities and counties to charge reduced building permit fees and provide fee rebates for building construction and renovation that meets nationally recognized sustainable building standards. S.L. 2007-241 (H 1097) allows Asheville, Carrboro, Chapel Hill, Charlotte, and Wilmington to grant density bonuses, adjust development regulations, and provide other incentives to developers of projects that make a significant contribution to the reduction of energy consumption. S.L. 2007-542 (H 1702) authorizes changes in the state building code to require insulation of hot water pipes.

### **Miscellaneous**

A 2006 fire at an Apex hazardous waste facility led to a study commission on the issue of regulation of these facilities. The outgrowth of this attention was the adoption of S.L. 2007-107 (H 36). Among other provisions this act strengthens the role of local governments in mandatory contingency plans for dealing with mishaps at these facilities.

At the conclusion of a ten-year moratorium on new swine farm waste lagoons, the General Assembly adopted S.L. 2007-523 (S 1465) to substantially update and revise the standards for swine waste handling.

A study commission on assuring continued access to the waterfront for traditional users led to the enactment of a package of recommendations on this topic. S.L. 2007-485 (S 646) allows for use value property taxation of “working waterfront” property (commercial fishing piers and commercial fishing operations and fish houses) for tax years beginning on and after July 1, 2009; creates an Advisory Committee for Coordination of Waterfront Access within the Department of Environment and Natural Resources; directs the Department of Transportation to expand public access to coastal waters in its road planning and construction program; provides for waiving permit fees for emergency permits under the Coastal Area Management Act; and directs the Division of Emergency Management in the Department of Crime Control and Public Safety to study ways to facilitate construction and repair of water dependent structures (such as fish houses) located in flood hazard areas.

S.L. 2007-518 (H 820) addresses the issue of interbasin water transfers. It authorizes a substantial study of surface water allocation in the state and revises the process for securing approval to make interbasin transfers.

These bills are discussed in more detail in Chapter 12, “Environment and Natural Resources.”

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