Chapter 160D

and Other Legislation Affecting Judicial Review of Local Development Regulations

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In 2019, the North Carolina General Assembly adopted a major legislative overhaul of the statutory authority for local development regulations as well as notable statutory changes to land use procedures and judicial review. This paper includes an overview of Chapter 160D, the legislative overhaul, and highlights the changes affecting judicial review that are outlined in Chapter 160D as well as other land use legislation.

The School of Government is offering a range of publications, resources, and training with more detail about Chapter 160D. Check nc160D.sog.unc.edu for more information.

I. Overview of Chapter 160D

The legislature adopted the long-debated complete reorganization of the state's planning and development regulation statutes. Originally introduced as Senate Bill 422 and House Bill 448, the legislation was adopted as Part II of S.L. 2019-111 (Senate Bill 355). To conform to this new statutory framework, every city and county development regulation in the state will need to be updated by January 1, 2021.

A. Consolidation and Reorganization

***Consolidation*.** The new Chapter 160D consolidates the previous county enabling statutes[1] and the city enabling statutes[2] into a single, unified new Chapter 160D. Related statutes on city and county development regulation previously scattered throughout the North Carolina General Statutes (hereinafter G.S.). are also relocated to Chapter 160D. These include, for example, provisions for land use regulation of adult businesses and family care homes. The existing statutory provisions are repealed and replaced by the relocated provisions in Chapter 160D. In addition, statutes remaining in other chapters, such as the seldom-used 1941 Model Airport Zoning Act in G.S. Chapter 63, are amended to use the procedures for ordinance adoption, administration, and enforcement that are set out in Chapter 160D.

The intent of this consolidation is to have a uniform set of statutes applicable to cities and counties and common to all development regulations. In most instances, previous parallel systems of city and county statutes produced the same statutory authority for both cities and counties. As development regulation statutes were adopted, the same language was usually added to both G.S. Chapter 153A for counties and Chapter 160A for cities. However, over the decades modest and often unintentional differences in the city and county statutes evolved. For example, when first enacted in 2005, the language on adopting a plan consistency statement prior to voting on a zoning amendment was identical for cities and counties, but in 2006, a clarification was made to the city statute, while the county statute was left unchanged (and in 2017, the city statute was again amended to bring it more into sync with the county version). Over the decades, similar scenarios played out for various provisions in the development regulation statutes, leaving confusion and uncertainty as to whether differences in the city and county language, sometimes subtle and sometimes substantial, were intentional or merely

[1] Article 18 of G.S. Chapter 153A.
[2] Article 19 of G.S. Chapter 160A.

a result of drafting oversight. Differences also led to confusion among developers and planners who worked with both cities and counties, as they often assumed, sometimes incorrectly, that the version of the statute they were most familiar with was equally applicable to cities and counties. Intentional differences between city and county authority, principally the exemption of agricultural uses from county zoning coverage, are retained in Chapter 160D, but otherwise the default is to have a unitary statute for both cities and counties. Similarly, the intent of Chapter 160D is to use the same ordinance adoption, administration, and enforcement procedures for all development regulations, with only a few intentional differences remaining for individual types of ordinances (such as specialized appeals of building code interpretations to the state rather than to the board of adjustment).

***Reorganization*.** Chapter 160D also places the development regulation statutes into a more logical, coherent organization. In addition to being scattered in other statutory locations, the provisions within the land use regulatory articles themselves could be confusing and hard to find. For example, the administrative provisions related to inspections, stop work orders, and enforcement for zoning were buried in the building permit parts in G.S. Chapters 153A and 160A. The provisions on development moratoria, which applied to all development regulations, were codified in the middle of the zoning part but applied to moratoria on subdivision plats or other development approvals. Notice and hearing provisions applicable to the same decision were in two different parts, as with the requirement for published notice of a rezoning hearing being in a different part from the mailed and posted notice requirements.[3] This body of statutes grew organically and sporadically over the course of a century, with each amendment and new program grafted on to the pre-existing organizational structure. The result was a convoluted organization that even experienced practitioners found challenging to navigate.

Chapter 160D places all of the statutes on development regulation into a more user-friendly organization. Provisions that affect all development regulations (such as definitions and provisions related to moratoria, vested rights, and conflicts of interest) are grouped in one article, followed by articles that address geographic jurisdiction, creation and duties of boards, administration of regulations, the process for adoption and amendment of regulations, and judicial review of regulations. There are also detailed articles for each major type of development regulation, including planning, zoning, subdivision, building and housing codes, environment, historic preservation, and community development.

Chapter 160D is organized under fourteen articles:

- Article 1. General Provisions
- Article 2. Planning and Development Regulation Jurisdiction
- Article 3. Boards and Organizational Arrangements
- Article 4. Administration, Enforcement, and Appeals
- Article 5. Planning
- Article 6. Process for Adoption of Development Regulations

[3] The published notice requirements for municipal rezonings are in G.S. 160A-364, while the mailed and posted notice requirements are in G.S. 160A-384. County requirements are similarly separated.

- Article 7. Zoning Regulation
- Article 8. Subdivision Regulation
- Article 9. Regulation of Particular Uses and Areas
- Article 10. Development Agreements
- Article 11. Building Code Enforcement
- Article 12. Minimum Housing Codes
- Article 13. Additional Authorities
- Article 14. Judicial Review

As an aid to statutory navigation, Chapter 160D uses a numbering convention for individual statutory sections. As adopted, each section number used this convention: Chapter Number-Article Number-Section Number. For example, the first statutory section in Article 7 on zoning regulations was G.S. 160D-7-1. When codified, a similar but slightly different numbering convention will be used, adapting the Chapter 160D numbering to the convention used in other chapters of the G.S. Instead of a three-part number, there will be a two-part number: Chapter Number-Section Number. However, each section number will start with the relevant article number. For example, the first section in Article 7 on zoning regulations will be G.S. 160D-701, while the first section in Article 10 on development agreements will be G.S. 160D-1001. For clarity going forward, this publication uses the statutory numbering convention for the bill as codified rather than the version in S.L. 2019-111.

B. Consensus Reforms

While not making major policy changes or shifts in the scope of authority granted to local governments, Chapter 160D includes many clarifying amendments and consensus reforms in the statutes. Because some of these statutes were first adopted nearly a century ago, archaic terminology needed to be modernized. Superfluous and redundant language was deleted, and gender-neutral language was employed. More readable sentence structures and lengths were used to replace confusing and overly legalistic language. If reviewers objected that a proposed language modernization changed the meaning or scope of regulatory authority, then the bill drafters reverted to the existing statutory language as a default. Only consensus modernization of the existing language was included in Chapter 160D.

Chapter 160D also includes many modest substantive changes to previous law. These amendments clarify and reform the law without making major policy changes. For example, Chapter 160D reduces confusion by eliminating the 1980s tool of special and conditional use districts, leaving legislative conditional zoning and quasi-judicial special use permits in the statute (and employing uniform terminology for the names of these tools). Form-based zoning districts are explicitly authorized, plan consistency statements are simplified, and required statements of reasonableness for zoning map amendments are clarified. There are dozens of other consensus reforms in the new law, which are discussed below.

C. Implementation and Transition

***Delayed effective date*.** In order to provide time for the development, consideration, and adoption of necessary amendments to conform local ordinances to this new law, Chapter 160D is not effective until

January 1, 2021. All city and all county unified development ordinances, including zoning, subdivision, and other development regulations will need to be updated by that date to conform to the new law. Many of the needed amendments can be made now, but the authority to adopt a few of the changes will not exist until Chapter 160D is effective.[4]

***Incorporation of other statutory amendments*.** This delayed effective date also allows time for other legislation enacted in 2019[5] to be incorporated into the new Chapter 160D framework during the 2020 legislative session. Just as amendments to the existing statutes incorporated into Chapter 160D that were adopted in the 2015 and 2017 legislative sessions were incorporated into the version of Chapter 160D that was introduced in 2019, changes made by other bills adopted in 2019 will also be incorporated into Chapter 160D before it becomes effective.[6]

A number of the provisions of Part I of S.L. 2019-111 will need to be added to Chapter 160D, as will provisions in the other legislation enacted that affect other development regulations. Many of the provisions of Part I and other 2019 legislation are briefly noted in the discussion below where appropriate. Exactly how these provisions will be incorporated into Chapter 160D will be determined by 2020 legislation.

[4] Examples of ordinance amendments that cannot become effective prior to the effective date of Chapter 160D include the authority for two cities to agree that one of them will exercise exclusive development regulation jurisdiction for an entire parcel that lies partially in each of the jurisdictions (G.S. 160D-203; the authority to provide that appeals of historic district commissions on certificates of appropriateness go directly to court rather than initially to the board of adjustment (G.S. 160D-947)).

[5] Other 2019 legislation is described in more detail in Adam Lovelady and David W. Owens, *2019 North Carolina Legislation Related to Planning and Development Regulation*, PLAN. & ZONING L. BULL. No. 28 (UNC School of Government, Sept. 2019).

[6] S.L. 2019-111, § 2.10.

II. Changes to Judicial Review of Land Use Matters

Session Law 2019-111, the law adopting Chapter 160D, includes two parts. Chapter 160D is included as Part II. Part I is a collection of substantive revisions and clarifications to the authority for development regulations as well as the standards and processes for appeal of those development regulations. Whereas Part II is effective January 1, 2021, Part I is effective immediately. The changes outlined in Part I will be incorporated in the Chapter 160D.

The discussion below outlines the specific changes in Part I and Chapter 160D to judicial review and appeals processes.

A. Declaratory Judgments and Other Civil Actions

G.S. 160D-1401 provides new statutory language to confirm that individuals may bring a declaratory judgment action to challenge certain development decisions. In particular, the section authorizes declaratory judgment actions for legislative zoning decisions, vested rights claims, and challenges to land use authority related to administrative decisions. The procedural rules outlined at Article 26 of Chapter 1 of the General Statutes apply. The governmental unit making the challenged decision must be named a party to the action.

Legislative decisions. Under G.S. 160D-1401, a person may seek a declaratory judgment to challenge a legislative decision by a governing board, including a challenge to the validity or constitutionality of the development regulation. A challenge to a map adoption of amendment must be brought within sixty days of adoption.[7] A challenge to the validity of a development regulation (a challenge to text adoption of amendment) must be brought within one year of accrual of the action. Such action accrues when the party has standing to bring the action. A challenge to ordinance adoption on the basis of a procedural defect must be brought within three years after the adoption of the ordinance.[8]

Vested rights determinations. A person claiming a common law or statutory vested right may seek an administrative determination by submitting evidence to the zoning administrator or other authorized official.[9] That decision may be appealed to the board of adjustment and then the superior court in the nature of certiorari, as discussed more below.

In addition to that authority, G.S. 160D-108(c) and (g) authorize a person to bring an original civil action to determine statutory or common law vested rights in lieu of seeking that determination from a zoning administrator and appealing to the board of adjustment. G.S. 160D-1401 reaffirms that such action is brought as a declaratory judgment action. Part I of S.L. 2019-111, which will be incorporated

[7] G.S. 160D-1405.

[8] G.S. 160D-1405.

[9] G.S. 160D-108(c).

into Chapter 160D, stated that such challenges must be commenced within one year after the date on which written notice of the final decision is delivered to the party.[10]

Authority for administrative decisions. G.S. 160D-405 outlines the authority and procedures for appeals of administrative decisions. Such appeals commonly go to the board of adjustment and then to superior court in the nature of certiorari (discussed more below). A new statutory provision authorizes a person to bring an original civil action to challenge the constitutionality of a development regulation or to challenge whether a development regulation is ultra vires, preempted, or otherwise in excess of statutory authority. Such a challenge may go straight to court without an appeal to the board of adjustment. There are a couple of reasons for this clarification. First, a local board of adjustment is tasked with reviewing variances and administrative decisions; a board of adjustment is not authorized to rule on questions of constitutionality or state authority. So, on questions of constitutionality and statutory authority, there is no need to go to the board of adjustment. Allowing for an original civil action will improve efficiency. Second, the local board of adjustment typically is not equipped to answer questions of law such as constitutionality and statutory authority. Those issues are more appropriate in court.

There are still plenty of disputes that are best handled through an administrative appeal process through the board of adjustment. Questions of ordinance interpretation or a determination of facts about a violation are still handled through the board of adjustment. S.L. 2019-111, Section 1.7, which will be incorporated into Chapter 160D, clarifies that a challenge based on ordinance interpretation must still go to the board of adjustment before it is appealed to court.

Part I also provides a statute of limitations for such challenge: one year after the date on which written notice of the final decision is delivered to the party.[11]

Permit Choice Appeals. Part I of S.L. 2019-111 outlines authority for civil action to compel compliance with the permit choice rules outlined in G.S. 143-755, G.S. 160A-360.1, or G.S. 153A-320.1. The statutory language provides that "[a]ctions brought pursuant to any of these sections shall be set down for immediate hearing, and subsequent proceedings in those actions shall be accorded priority by the trial and appellate courts."

Other civil actions. G.S. 160D-1404 makes clear that parties may bring other civil actions authorized by law. Chapter 160D does not limit that availability of other civil actions except as expressly stated.

[10] S.L. 2019-111, § 1.7.

[11] S.L. 2019-111, § 1.7.

B. Appeals of Quasi-Judicial Decisions

G.S. 160D-1402 restates the provisions for appeals in the nature of certiorari previously codified at G.S. 160A-393 and 153A-349 with a few clarifications.

Stays, enforcement, and work. Section 1402(e) clarifies that on appeal, a party may request a stay of the approval or enforcement action that is being appealed. The court has discretion to grant that stay and to require conditions to provide for the security of the adverse party. A stay in favor of a local government cannot require a bond or other security. Section 1402(*l*) makes clear that in the absence of a stay a person with a development approval may commence work while the approval is on appeal. If, however, that approval is reversed on appeal, then the person does not have any vested rights based on actions taken during appeal and must proceed as if no development approval was granted.

Preservation certificates of appropriateness. A person cannot commence development work within a local historic district or affecting a local historic landmark until he or she has obtained a certificate of appropriateness (COA) from the historic preservation commission. Under prior law, appeals of COA decisions went to the local board of adjustment, which had to review the matter in the nature of certiorari. This process provides for a local appeal before parties go to court, but most boards of adjustment are not accustomed to sitting as an appellate tribunal reviewing a decision from another board. In that scenario, the board of adjustment cannot take new evidence and is greatly limited in overturning the preservation commission. This step commonly adds time and cost to a case that is heading to court anyway.

G.S. 160D-947 allows for local governments to choose to continue with COA appeals going to the board of adjustment. Notably, the new statute also allows local governments to opt for COA appeals to go straight to superior court, like appeals of all other quasi-judicial decisions. The default rule now is that the appeals go to superior court. If a local government opts for appeals to the board of adjustment prior to judicial review, then that provision must be made in the development regulations.

Whether the appeal goes to the board of adjustment or directly to superior court, the procedures and standards set forth at G.S. 160D-1402 for appeals in the nature of certiorari apply. Appeals of COA decisions must be filed within thirty days after the decision is effective or written notice is provided—the same as other quasi-judicial matters.[12]

Supplementing the record. Previously G.S. 160A-393 gave courts discretion to allow parties to supplement the record in superior court cases when needed. Now, with amendment by S.L. 2019-111, Section 1.9, which will be incorporated into Chapter 160D, courts must allow the record to be supplemented with affidavits, testimony of witnesses, documentary evidence, or other evidence if the petition raises questions of standing, conflicts of interest, constitutional violations, or actions in excess of statutory authority.[13]

[12] G.S. 160D-947, 160D-1405.

[13] G.S. 160A-393(j).

Standard of review for prima facie case. S.L. 2019-111, Section 1.9, affirms that the question of whether a record contains competent, material, and substantial evidence is a conclusion of law to be reviewed by the court de novo.

***Incompetent evidence*.** S.L. 2019-111, Section 1.9, clarifies that even if there is no objection before the local decision-making board, opinion testimony from a lay witness shall not be considered competent evidence concerning projected property-value impacts, projected traffic impacts, or other matters requiring technical expertise.

Judicial instructions. S.L. 2019-111, Section 1.9, clarifies the decisions that a court may make when handling an appeal from a quasi-judicial decision. When the court determines that a permit was wrongfully denied, "[it] shall remand with instructions that the permit be issued, subject to any conditions expressly consented to by the permit applicant as part of the application or during the board of adjustment appeal or writ of certiorari appeal." Additionally, the statute now includes language to address wrongful zoning enforcement: "If the court concludes that a zoning board decision upholding a zoning enforcement action was not supported by substantial competent evidence or was otherwise based on an error of law, the court shall reverse the decision."

C. Subdivision Decisions

G.S. 160D-1403 recodifies and clarifies the rules of appeals of subdivision plat decisions. Most subdivision decisions are administrative in nature. As defined in G.S. 160D-102, administrative decisions are those that involve the determination of facts and the application of objective standards set forth in the development regulation. Administrative decisions may be made by a staff person, committee, board, or governing body—the status as administrative is determined by the objective standards, not by the person or board making the decision. G.S. 160D-1403 restates the prior rule that administrative subdivision decisions are appealed to superior court. Such an appeal must be filed within thirty days of receipt of the written notice of the decision. As was the case under prior law, a local government could also establish rules for an administrative subdivision decision to be appealed to the local board of adjustment under 160D-405.

Some subdivision decisions are based on quasi-judicial standards, which require the decision-making board to apply judgment and discretion. Quasi-judicial subdivision decisions are appealed to superior court in the nature of certiorari and subject to the procedures outlined at G.S. 160D-1402, just like other quasi-judicial decisions.

D. Attorneys' Fees

Part I of S.L. 2019-111, legislation that will be incorporated into Chapter 160D, amends G.S. 6-21.7 to make attorneys' fees mandatory for some local government litigation.

Unambiguous Limits on Authority. If a court finds "that the city or county violated a statute or case law setting forth unambiguous limits on its authority, the court shall award reasonable attorneys' fees and costs." The statute defines *unambiguous* to mean "that the limits of authority are not reasonably susceptible to multiple constructions."

Permit Choice and Vested Rights. If a court finds "that the city or county took action inconsistent with, or in violation of, [the Permit Choice and Vested Rights statutes] . . . , the court shall award reasonable attorneys' fees and costs."

Other Matters. In other matters of local government litigation, the courts maintain discretion and "may award reasonable attorneys' fees and costs to the prevailing private litigant."

F. Additional Judicial Rules

Joinder. G.S. 160D-1402(m) clarifies that a civil action challenging an ordinance may be joined with an appeal in the nature of certiorari challenging a quasi-judicial decision. Part I of S.L. 2019-111 included similar joinder provisions that will be incorporated in Chapter 160D.

Estoppel and conditions. North Carolina courts have long recognized that when an applicant enjoys the benefits of a permit approval, the applicant cannot then challenge the conditions of that approval.[14] In other words, the applicant that begins the development and enjoys the benefits of the permit is estopped from challenging the rules of the permit or the conditions imposed. That rule remains, but Part I of S.L. 2019-111, legislation that will be incorporated into Chapter 160D, provides an important clarification and limitation. If the applicant did not consent to the condition in writing, and the applicant is challenging the unconsented condition, then the applicant may proceed with the development and the local government may not assert the defense of estoppel against the applicant. This new statutory language is further incentive for local governments to ensure written consent from the applicant for any and all conditions.

Mootness. Part I of S.L 2019-111, which will be incorporated into Chapter 160D, establishes a specific mootness rule. For appeals in the nature of certiorari and original civil actions, an action is not rendered moot if the party loses the relevant property interest as a result of the local government action being appealed, and exhaustion of an appeal is required to preserve a claim for damages under G.S. 160A-393.1.[15] This provision is "[s]ubject to the limitations in the State and federal constitutions and State and federal case law," and these limitations may raise issues of case-or-controversy jurisprudence.

[14] *See, e.g., Convent of the Sisters of Saint Joseph v. City of Winston-Salem,* 243 N.C. 316, 90 S.E.2d 879 (1956); River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990).

[15] G.S. 160A-393(d)(4).