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2019 North Carolina Legislation Related to Planning and Development Regulation

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The 2019 session of the North Carolina General Assembly convened for an organizational session on January 9, 2019, and began regular sessions on January 30, 2019. The General Assembly completed most of its work in early July, but an impasse on the budget continues to postpone adjournment. H.B. 966, the 2019–2021 budget bill, was approved by the General Assembly on June 27. However, it was vetoed by Governor Roy Cooper on June 28, largely because it did not address Medicare expansion. While a vote to override the veto has been on the House of Representatives' calendar since July 8, no vote has been taken and an adjournment date is uncertain. If additional legislative action affecting planning and development regulation is taken, it will be described in a supplement to this bulletin.

A relatively small number of bills affecting planning and development regulation were enacted in 2019, but they were significant. Part II of S.L. 2019-111 (S.B. 355) completely reorganizes the statutes related to planning and development regulation. That law is briefly summarized in this bulletin, but due to its length and complexity, it is the subject of separate School of Government publications coming later in the year. Check nc160D.sog.unc.edu for resources and training on that legislation. The legislature also enacted bills revising the law on third-party requests to downzone property, permit choice, vested rights, and judicial review of zoning decisions. Significant legislation was also enacted affecting regulation of short-term rentals and performance guarantees for subdivision improvement. Pending legislation that addresses outdoor advertising and a few other topics is also summarized at the end of this bulletin.

Reorganization of Statutes on Planning and Development Regulation: Chapter 160D

In 2014 the Zoning, Planning, and Land Use section of the North Carolina Bar Association initiated an effort to modernize the framework of the state's enabling statutes for planning and development regulation. The proposed legislation was extensively circulated, reviewed, and revised over a five-year period. Suggestions from city and county attorneys, attorneys who represented development interests, zoning officials, planning officials, and various organizations interested in development regulation (including the League of Municipalities, the N.C. Association of County Commissioners, the N.C. Home Builders Association, and others) were incorporated into successive drafts of the legislation.

The legislation was introduced as H.B. 548 in 2015 and as S.B. 419 in 2017. In each of those sessions, the bill was approved by one house of the General Assembly but not considered by the other house. An updated version of the bill was introduced in 2019 as S.B. 422 and H.B. 448. The updated bill incorporated all amendments made to the affected statutes in the 2015 to 2018 period, as well as ongoing suggestions made by the many reviewers of bill drafts.

Given the extensive review, vetting, and editing of the legislation in earlier sessions, the bill moved through the 2019 General Assembly with virtually no amendments. The Senate Judiciary Committee, which had several bills affecting this same subject matter under consideration, merged what was now a relatively noncontroversial reorganization bill (S.B. 422) with the more controversial set of amendments proposed by the N.C. Home Builders Association (S.B. 355),

reasoning that neither bill should be enacted without the other. Although merged into a single bill (Parts I and II of S.B. 355), the individual parts were debated independently throughout the legislative process. As a result, the more controversial Part I was substantially amended as it progressed, while the reorganization bill in Part II was largely unchanged. The Senate passed the reorganization bill exactly as introduced as Part II of S.B. 355. The House also passed the bill as introduced, with only minor technical edits to the telecommunications provisions to conform the bill to the existing statutes. The governor signed the legislation on July 11, 2019. It is S.L. 2019-111. Part II, the 160D legislation, is summarized below and is described in detail in forthcoming publications, while the provisions of Part I are discussed in this bulletin.

The new Chapter 160D of the North Carolina General Statutes (hereinafter G.S.) consolidates current city- and county-enabling statues now in Chapters 153A and 160A into a single, unified chapter and pulls in related statutes previously scattered throughout the General Statutes. Intentional differences between city and county authorities, principally the exemption of agricultural uses from county zoning coverage, are retained, but otherwise the statutory provisions for cities and counties will be identical.

Chapter 160D also places these statutes into a more logical, coherent organization. Provisions that affect all development regulations (such as definitions and provisions on moratoria, vested rights, and conflicts of interest) are placed together 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 major functions, including planning, zoning, subdivision, building and housing codes, environmental regulation, historic preservation, and community development.

Without making major policy changes or shifts in the scope of authority granted to local governments, the law includes many clarifying amendments and consensus reforms.

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 county zoning, subdivision, and other development regulations, including unified-development ordinances, will need to be updated by that date to conform to the new law. This delayed effective date also allows time for other legislation enacted in 2019 to be incorporated into the new Chapter 160D framework during the 2020 legislative session. Section 2.10 of S.L. 2019-111 provides that amendments made in 2019 to any of the statutes incorporated into Chapter 160D are to also be incorporated into Chapter 160D in 2020. There is one exception to this effective date. G.S. 160D-5-1(a) requires adoption of a comprehensive plan in order to exercise the authority to adopt zoning regulations. Cities and counties that currently have zoning regulations but that have not adopted a comprehensive plan are required to adopt a plan by July 1, 2022, to retain their authority to have a zoning ordinance.

The School of Government's forthcoming publications on the new Chapter 160D legislation will include detailed analysis of how the law amends existing statutes, a checklist of necessary amendments to local ordinances, tables that provide cross-references to where the existing statutes are located in Chapter 160D, and an annotated edition of the bill that identifies and notes each change in the current law.

Zoning Regulations

No Third-Party Down-Zonings

G.S. 153A-343 and 160A-384 are amended to prohibit third-party down-zonings without consent from the property owners. A neighbor, for example, cannot request that property be rezoned for reduced density unless the property owner has consented to that requested reduction. Note that property owners may petition for down-zoning of their own properties. The local government may initiate and adopt a down-zoning without an owner's consent. And as such, a neighbor could request for the local government to initiate a down-zoning.

"Down-zoning" is defined to mean a zoning ordinance that affects an area in one of the following ways:

1. by decreasing the development density of the land to be less dense than was allowed under its previous usage or
2. by reducing the permitted uses of the land that are specified in a zoning-ordinance or land development regulation to fewer uses than were allowed under its previous usage.

This amendment applies to zoning applications submitted on or after July 11, 2019. In conjunction with this change, S.L. 2019-111 (S.B. 355) removes the requirement for actual notice to property owners for a third-party rezoning previously outlined in G.S. 153A-343 and 160A-384.[1]

Conditional Approvals

Legislative conditional zoning. Conditional zoning is a flexible regulatory tool that allows standards and conditions to be tailored to the specifics of a particular project. Under G.S. 153A-342 and 160A-382, conditional-zoning approvals may establish standards and conditions that address conformance of the development with applicable standards, plans, and those conditions that address the impacts that the site's development and use are reasonably expected to generate. Additionally, the petitioner and the local government must agree to the conditions.

S.L. 2019-111, Sections 1.14 and 1.15, clarify G.S. 153A-342 and 160A-382. The amended language states that the petitioner must consent in writing to the conditions in order for those conditions to be effective. Unless the petitioner consents in writing, the zoning may not include any conditions or requirements not otherwise authorized by law.[2]

Notably, the amended language affirms the authority and flexibility for local governments and petitioners to negotiate appropriate conditions for conditional-zoning approvals. With written consent from the petitioner, such conditions may go beyond the basic zoning authority to address additional fees, design requirements, and other development considerations.

1. G.S. 153A-343, §§ (a), (b1); 160A-384, §§ (a), (b1).

2. "Unless consented to by the petitioner in writing, in the exercise of the authority granted by this section, including the establishment of special or conditional use districts or conditional zoning, a [local government] may not require, enforce, or incorporate into the zoning regulations or permit requirements any condition or requirement not authorized by otherwise applicable law, including, without limitation, taxes, impact fees, building design elements within the scope of G.S. 160A-381(h), driveway-related improvements in excess of those allowed in G.S. 136-18(29) and G.S. 160A-307, or other unauthorized limitations on the development or use of land." S.L. 2019-111, § 1.4.; S.L. 2019-111, § 1.5.

Quasi-judicial special use permits. G.S. 153A-340 and 160A-381 are each amended to specify limits on conditions imposed through special use permits (also called conditional use permits).

> Conditions and safeguards imposed under this subsection shall not include requirements for which the [local government] does not have authority under statute to regulate nor requirements for which the courts have held to be unenforceable if imposed directly by the [local government], including, without limitation, taxes, impact fees, building design elements within the scope of subsection (h) of this section, driveway-related improvements in excess of those allowed in G.S. 136-18(29) and G.S. 160A-307, or other unauthorized limitations on the development or use of land.

To be sure, local governments may still "impose reasonable and appropriate conditions and safeguards upon" special use permits.[3] Those conditions, though, cannot extend to impact fees or other items specifically prohibited by statute. Design restrictions may still be imposed in compliance with G.S. 153A-340(l) and 160A-381(h), which allow design restrictions for commercial and multifamily development, in historic districts, or with written consent from the owner.

As stated in S.L. 2019-111, Part III, these provisions are effective immediately and "clarify and restate the intent of existing law and apply to ordinances adopted before, on, and after the effective date."[4]

Small Houses

Small houses are increasingly proposed in North Carolina. The proposals arise in a variety of settings, including affordable housing, "tiny homes," accessory dwellings, assisted living, and others. Very few North Carolina cities and counties prohibit these structures, provided that if one is to be used as a residence, it must be built to the State Building Code. However, in order to forestall any prohibition movement, S.L. 2019-174 (H.B. 675) amends G.S. 160A-381 and 153A-340 to prohibit city and county zoning ordinances from including a minimum square footage for any structure subject to the State Building Code for one- and two-family residential dwellings. The act also includes this restriction in the county subdivision-enabling statute. These provisions became effective on July 26, 2019. This law does not affect private restrictive covenants, which are far more likely to address this issue than local zoning ordinances.

Local Bills

Planning-board approval of rezoning. In past years, the General Assembly has authorized several local governments to delegate final decisions on rezonings to the planning board, usually with parties having the right to appeal those decisions to the governing board. This was originally authorized in Greensboro, Gastonia, and Cabarrus County and its municipalities. It was extended in 2017 to Randolph County and its municipalities, and in 2018 it was extended to Davidson County.

S.L. 2019-99 (H.B. 237) continues this trend by giving Brunswick County the authority to delegate rezonings to the planning board. As with previous bills on this subject, the delegation

3. S.L. 2019-111, § 1.12.
4. *Id.* § 3.1.

must be done by ordinance. If delegated, the planning board holds the required hearing and makes the required plan-consistency statement. Any person with standing may appeal the decision to the county board of commissioners within fifteen days of the decision. The county board makes a de novo decision on appeal, but apparently does not have to conduct an additional hearing.

Special use districts. S.L. 2019-61 (S.B. 84) amends zoning provisions for the Town of Walkertown in Forsyth County. The town was created in 1984 and was originally covered by the Winston-Salem/Forsyth County zoning ordinance. This act allows the town to establish conventional general-use zoning districts, which provide for a range of permitted uses, and special use districts, which allow only a single use. If property is proposed to be put in a general-use district, the governing board may not consider the intended use of the property. If placed in a special use district, only the specific, proposed use is to be considered. The council is to issue a special use district permit in these instances, but the permit is deemed to be a legislative act. As a practical matter, this is the same as treating these rezonings as conditional zoning rather than conditional use district zoning (where there is both a rezoning and a concurrent quasi-judicial conditional use permit). This practice is already authorized by current zoning statutes and will become mandatory statewide when Chapter 160D becomes effective in 2021 (as it authorizes legislative conditional zoning and quasi-judicial special use permits, but does not authorize a combined, concurrent legislative and quasi-judicial decision).

University student-housing project. S.L. 2019-8 (S.B. 272) applies to student housing associated with North Carolina Central University in Durham. It provides that student housing shall be a permitted use and shall be developed according to Durham's UC-2 zoning-district regulations, provided that the housing project is on land owned by the state or a university foundation, the project is included in the university's Millennial Campus Plan, and at least one of the parcels in the land assembled for the project allows student housing as a permitted use.

Subdivision Changes

Performance Guarantees

Performance guarantees allow a developer to obtain final subdivision plat approval and begin selling lots before the required infrastructure for the development is complete. The performance guarantee is a financial commitment from the developer to ensure that the local government will have funds available to complete the required infrastructure in the event that the developer fails to do so. The authority for performance guarantees has been refined by legislation and litigation over the last decade.

S.L. 2019-79 (S.B. 313) amends G.S. 160A-372 and 153A-331 to further clarify and limit the scope of performance guarantees. The discussion below outlines some of the existing parameters of the law and highlights the recent additions.

Completion, not maintenance. As was already the law, performance guarantees are only for completion of required infrastructure, not repairs or maintenance after completion.

Parties with rights. As previously required, only three parties may have or claim rights under a performance guarantee: the local government to whom the guarantee is provided,

the developer, and the entity issuing the financial instrument. Specifically excluded from that list are purchasers of the lots in the subdivision, future developers who may acquire the development, and other local governments who may get jurisdiction over the development (through annexation or adjustment of extraterritorial jurisdiction). In the event of a transition in the development—a change in ownership or jurisdiction—new guarantees may be needed to ensure that the proper parties are named.

Type of financial instrument. As was the case under prior law, the developer gets to elect the type of performance guarantee from the following menu of options:

- a surety bond issued by any company authorized to do business in North Carolina,
- a letter of credit issued by any financial institution licensed to do business in North Carolina, or
- another form of guarantee that provides equivalent security to a surety bond or letter of credit.

Amount. Performance guarantees must not exceed 125 percent of the reasonably estimated cost to complete the improvements. The local government may determine the estimate or use a cost estimate determined by the developer. Where applicable, costs should be based on unit pricing. The additional twenty-five percent over the estimated cost is for inflation and administrative costs. Any extension or new guarantees issued also must not exceed 125 percent of the reasonably estimated cost to complete remaining improvements.

Timing for issuance. The local government may determine whether a performance guarantee must be provided at the time of plat recordation or at a time subsequent to plat recordation.

Multiple guarantees. A developer may elect to post only one performance guarantee for a development project rather than multiple guarantees for different types of infrastructure. But the local government may still require separate guarantees for erosion- and stormwater-control measures.

Duration. The initial term of the performance guarantee shall be one year unless the developer elects a longer term. Moreover, when the financial instrument is a bond, the completion date for the bonded obligation shall be one year from the date the bond is issued, unless the developer elects a longer term.

Extension. The developer must make reasonable, good-faith progress toward completion of the required improvements, but if the performance guarantee is likely to expire before completion of the improvements, then the developer shall secure an extension on the guarantee or a new guarantee. The extension (or new guarantee) must be in an amount based only on the remaining improvements and for the duration necessary to complete the remaining improvements.

Release. Once the improvements are built to the local government specifications or accepted by the local government, the local government must release the performance guarantee. Letters of credit and escrowed funds must be returned. In the case of performance bonds, the local government shall provide written acknowledgment that the improvements are complete. There is no specification about the frequency of requests for such release.

These provisions apply to performance guarantees issued on or after July 4, 2019.

Other Provisions

Power-line burial. S.L. 2019-174 (H.B. 675) amends G.S. 160A-372 and 153A-331 to limit the authority of cities and counties to require burial of power lines as a part of subdivision approvals. The ordinance may not require a power line to be buried if the line existed above ground when the development's plat or development plan was initially approved (even if the power line was subsequently relocated) and the power line is located outside the parcel of land containing the subdivision or development plan. This restriction became effective on July 26, 2019.

Waste disposal. New laws were enacted regarding wastewater treatment that may affect subdivision regulations. These laws, described below, prohibit municipal regulation of off-site wastewater-treatment facilities that have been approved by the state, and they set a process in motion to amend state regulations for on-site wastewater-treatment systems.

Local Act

S.L. 2019-59 (S.B. 242) amends provisions for use of recreational fees collected under a county subdivision ordinance. Under current general law, cities may use these recreation and open-space fees for both land acquisition and construction of facilities, while counties are limited to land acquisition only. This law allows Harnett County to use the fees to develop and construct recreation facilities as well as to acquire land. The law caps the recreation fee Harnett County may impose at $500 per residential lot.

Permit Choice

In 2014, the General Assembly adopted the permit choice rule, originally codified to G.S. 143-750 and recodified to 143-755. Additionally, G.S. 160A-360.1 and 153A-320.1 were adopted to make clear that the permit choice rule was applicable to municipal and county development permits. The basic concept of the law is simple: Once an applicant submits a complete application for a development permit, if the applicable rules change before the permit is issued, then that applicant may choose whether the application is reviewed under the old rules or the new rules. S.L. 2019-111 (S.B. 355) adds definitions and clarification to G.S. 143-755, incorporates those changes into G.S. 160A-360.1 and 153A-320.1, and expands the scope of the permit choice rule. These provisions are effective immediately; they "clarify and restate the intent of existing law and apply to ordinances adopted before, on, and after the effective date."[5]

It should be noted that permit choice is related to, but distinct from, vested rights. The permit choice rule does not guarantee a right to develop; the rule allows the applicant to choose for an application to be reviewed under the rules applicable at the time of application. The application must still meet all of those prior standards in order to be approved and for development to be commenced. Vested rights, in contrast, are triggered after a project has already been approved. These issues and rights overlap, of course, and the new legislation further intertwines them, but the distinction may be important when applied to particular scenarios.

5. S.L. 2019-111, § 3.1.

Scope

S.L. 2019-111 expands the scope of permit choice. Under the new rules for vested rights, if an applicant applies for and obtains one development permit (the initial development permit), that permit triggers permit choice for subsequent development permits under the rules applicable at the time of application for the initial development permit.[6] For example, if an applicant submitted an application for subdivision plat approval, the permit choice rule would protect that applicant from changes to other development regulations that would apply to other development permits, such as zoning permits, site plans, and building permits. All rules in other development regulations applicable at the time the application for plat approval is submitted may, at the election of the applicant, be applied to the decision for approvals under those other regulations. That protection continues for eighteen months after the approval of the initial development permit. The applicant must be actively pursuing that original application to maintain the permit choice rights for other development regulations. As noted below, if the application is on hold for more than six months, permit choice rights are lost. Also, with regard to triggering this broad permit choice rule, the initial development permit cannot be a sign permit, erosion-control permit, or sedimentation-control permit.

Process

If the applicant chooses the old rule, the local government may not require the applicant to wait for action on the proposed rule change in order to get approval for the application.

If in a legal proceeding it is determined that an application was wrongfully denied or an illegal condition was imposed on the permit, and if the applicable rules were changed after the wrongful denial or illegal condition, then the applicant may choose which of the rules will apply to the permit and use. But if the applicant chooses to have the old rules apply, any provisions determined to be illegal are unenforceable with written consent from the applicant.

The permit choice rule may expire if an applicant delays. If an applicant puts a permit application on hold for six consecutive months, or if an applicant fails to respond to the government's requests for additional information for more than six consecutive months, then the application is discontinued. If the permit application is resumed, it will be reviewed under the rules in effect at that time.

Any person aggrieved by a state agency or local government failing to comply with the permit choice rule can seek a court order compelling compliance. The court will set down the action for immediate hearing, and subsequent proceedings must get priority from the court.

Vested Rights

G.S. 153A-344 and 160A-385 are amended to broaden and clarify the types of statutory vested rights. The statutes now identify several categories of permits that trigger vested rights: development permits for buildings, uses of buildings, land, or subdivisions of land; site-specific development plans under G.S. 160A-385.1 or 153A-344.1; development agreements; and multi-phased developments. The details of each are discussed below. These provisions are effective

6. G.S. 153A-344(d); 160A-385(e).

immediately; they "clarify and restate the intent of existing law and apply to ordinances adopted before, on, and after the effective date."[7]

Once a vested right is established under this statutory section, it "precludes any action by [the local government] that would change, alter, impair, prevent, diminish, or otherwise delay the development or use of the property allowed by the applicable land development regulation or regulations." An exception is provided, however, if there is a change in state or federal law that requires local government enforcement that occurs after the development application is submitted and if the change has "a fundamental and retroactive effect" on the development.[8]

Vested rights under one provision of G.S. 153A-344 and 160A-385 do preclude other vesting. Vesting may be established under multiple provisions of the statute as well as common law vesting.

Categories

Development permits. Development permits for a building, use of a building, use of land, or subdivision of land can establish statutory vested rights. A development permit is valid for one year, unless otherwise specified by statute, and the applicant is vested in that permit for the term of validity.[9] If the applicant fails to substantially commence authorized work, then the development permit and vesting expire. With the substantial commencement of authorized work under a valid permit, vesting continues.

Site specific development plans. Site specific development plans were identified and authorized as statutory vested rights years ago under G.S. 160A-385.1 and 153A-344.1. Those provisions continue. In summary, the local ordinance identified approvals that constitute site-specific development plans (approvals such as planned-unit-development plans, subdivision plats, and special use permits). Rights in a site-specific development plan are vested for at least two years and may vest for up to five years under the local ordinance.

Development agreements. Development agreements have been authorized since 2005.[10] The vesting rights under that authority continue. The term of vesting for a development agreement is not capped; it may be for any reasonable time as agreed to by the parties.

Multi-phased developments. Multi-phased developments were previously established as statutory vested rights, but clarifications and substantive changes are added through S.L. 2019-111 (S.B. 355). A multi-phased development is defined to be a development of at least twenty-five acres (down from 100 acres) to be developed in more than one phase and "[s]ubject to a master development plan with committed elements showing the type and intensity of use of each phase."[11]

The entire multi-phased development is vested at the time of site-plan approval for the initial phase. The vesting is in the land development regulations in place at the time of that initial approval, and the vesting lasts for seven years from the initial approval.[12]

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7. S.L. 2019-111, § 3.1.
8. S.L. 2019-111, § 1.3(b); 2019-111, § 1.3(e).
9. G.S. 153A-344(c); 160A-385(d).
10. G.S. 153A art. 18, pt. 3A; G.S. 160A, art. 19, pt. 3D.
11. G.S. 153A-344(f)(4); 160A-385(g)(4).
12. G.S. 153A-344(b)(5); 160A-385(b)(5).

Term of Vesting

Each category of statutory vesting has a specified term for vesting in the approval: one year to commence work under development permits, two to five years for site-specific development plans (per the agreement for development agreements) and seven years for multi-phased developments. In addition, once work is commenced, vesting is valid for twenty-four months of discontinuation of development or use, unless the statute provides a longer vesting period.[13] The twenty-four-month period is tolled for proceedings at the board of adjustment or in court relating to the development.

Appeals of Vested Rights Claims

S.L. 2019-111 establishes a new section, G.S. 160A-393.1, that outlines certain procedures and rights related to judicial appeals. Among other things, the new statutory section provides that a person claiming a statutory or common law vested right may submit information to the zoning administrator or other designated officer for a determination of the existence of a vested right. That determination may be appealed to the board of adjustment, which will review the question of vested rights de novo. In lieu of appealing to the board of adjustment, the person claiming vested rights may bring a civil action as outlined in the new statute (discussed more below).[14]

The statute concerning attorneys' fees and local government litigation requires courts to award attorneys' fees and costs to the appealing party if the local government "took action inconsistent with, or in violation of," the permit-choice and vested-rights statutes set forth at G.S. 160A-360.1, G.S. 153A-320.1, or G.S. 143-755.[15]

Definitions in Development Regulations

Defining *Building*, *Dwelling*, *Dwelling Unit*, *Bedroom*, and *Sleeping Unit*

S.L. 2019-111 (S.B. 355), Section 1.17, adds language to G.S. 153A-346 and 160A-390 about defining certain terms in local zoning and other development-regulation ordinances. Within local development regulations, the definitions of specified terms—*building, dwelling, dwelling unit, bedroom,* and *sleeping unit*—may not be inconsistent with definitions in a statute or in a rule adopted by a state agency, including the N.C. Building Code Council.

Below are definitions provided in Section 202 of the 2018 State Building Code. Local governments are not required to adopt these definitions, but the definitions in the local zoning ordinance must not be inconsistent with them.

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13. Except where a longer vesting period is provided by statute, the statutory vesting granted by this section shall expire for an uncompleted development project if development work is intentionally and voluntarily discontinued for a period of not less than 24 consecutive months, and the statutory vesting period granted by this section for a nonconforming use of property shall expire if the use is intentionally and voluntarily discontinued for a period of not less than 24 consecutive months.
G.S. 153A-344(e); 160A-385(f).
14. G.S. 160A-393.1(a), (b).
15. G.S. 6-21.7; S.L. 2019-111, § 1.11.

> BUILDING. Any structure used or intended for supporting or sheltering any use or occupancy.
>
> . . . .
>
> DWELLING. A building that contains one or two *dwelling units* used, intended or designed to be used, rented, leased, let or hired out to be occupied for living purposes.
>
> DWELLING UNIT. A single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.
>
> . . . .
>
> SLEEPING UNIT. A room or space in which people sleep, which can also include permanent provisions for living, eating, and either sanitation or kitchen facilities but not both. Such rooms and spaces that are also part of a *dwelling unit* are not sleeping units.

The amended statute specifically references the N.C. Building Code Council, so it would appear that the State Building Code definitions may be central to this legislation. The statute, though, calls for local definitions for those select terms to not be inconsistent with any definition in a statute or adopted state rule. That is a broad category, as many statutes and rules may provide definitions for common terms such as *building* and *dwelling*. For example, here are two statutory definitions that are slightly different from the State Building Code definition.

Under the Unit Ownership Act, G.S. 47A, "'[b]uilding' means a building, or a group of buildings, each building containing one or more units, and comprising a part of the property; provided that the property shall contain not less than two units."[16] Under the statutes governing minimum housing standards, Chapter 160A, Article 19, Part 6,

> "[d]welling" means any building, structure, manufactured home or mobile home, or part thereof, used and occupied for human habitation or intended to be so used, and includes any outhouses and appurtenances belonging thereto or usually enjoyed therewith, except that it does not include any manufactured home or mobile home, which is used solely for a seasonal vacation purpose. Temporary family health care structures, as defined in G.S. 160A-383.5, shall be considered dwellings for purposes of this Part, provided that any ordinance provision requiring minimum square footage shall not apply to such structures.[17]

Defining *Development, Development Permit*, and *Land Development Regulation*

S.L. 2019-111 adds definitions to G.S. 143-755 for "development," "development permit," and "land development regulation" that are closely related to the definitions provided in Part II as part of the impending Chapter 160D recodification.

16. G.S. 47A-3.
17. G.S. 160A-442.

"Development" is defined to include

a. [t]he construction, erection, alteration, enlargement, renovation, substantial repair, movement to another site, or demolition of any structure.
b. Excavation, grading, filling, clearing, or alteration of land.
c. The subdivision of land as defined in G.S. 153A-335 or G.S. 160A-376.
d. The initiation of substantial change in the use of land or the intensity of the use of land.[18]

"Development permit" is defined to be

> [a]n administrative or quasi-judicial approval that is written and that is required prior to commencing development or undertaking a specific activity, project, or development proposal, including any of the following:

a. Zoning permits.
b. Site plan approvals.
c. Special use permits.
d. Variances.
e. Certificates of appropriateness.
f. Plat approvals.
g. Development agreements.
h. Building permits.
i. Subdivision of land.
j. State agency permits for development.
k. Driveway permits.
l. Erosion and sedimentation control permits.
m. Sign permit.[19]

Finally, "land development regulation" is defined to be

> [a]ny State statute, rule, or regulation, or local ordinance affecting the development or use of real property, including any of the following:

a. Unified development ordinance.
b. Zoning regulation, including zoning maps.
c. Subdivision regulation.
d. Erosion and sedimentation control regulation.
e. Floodplain or flood damage prevention regulation.
f. Mountain ridge protection regulation.
g. Stormwater control regulation.
h. Wireless telecommunication facility regulation.
i. Historic preservation or landmark regulation.
j. Housing code.[20]

18. S.L. 2019-111, § 1.1.
19. *Id*.
20. *Id*.

Short-Term Rentals

S.L. 2019-73 (S.B. 483) provides that properties subject to the Vacation Rental Act are also subject to the limitations on periodic inspections and certain rental-permitting requirements outlined in G.S. 160A-424 and 153A-364. In short, the new law appears to place limits on the extent to which local governments may inspect and regulate the operations of vacation rentals, including short-term rentals, but the new law does not affect the basic local government zoning authority to regulate the locations and development aspects of land uses, including short-term rentals. The act was effective when it became law.

Some background is helpful for discussing the scope of this new provision. Vacation rentals in North Carolina are regulated under the Vacation Rental Act, G.S. 42A. This chapter outlines landlord and tenant duties, specifies language to be included in vacation-rental agreements, and sets limits on how certain funds may be handled, among other provisions.

The chapter defines "vacation rental" as "[t]he rental of residential property for vacation, leisure, or recreation purposes for fewer than 90 days by a person who has a place of permanent residence to which he or she intends to return." Moreover, "residential property" is defined to include "[a]n apartment, condominium, single-family home, townhouse, cottage, or other property that is devoted to residential use or occupancy by one or more persons for a definite or indefinite period."[21]

This broad definition includes, for example, condominiums rented through a property-management company, single-family homes rented directly by the homeowner, and residential properties rented through an online platform such as Airbnb, HomeAway, or VRBO, as long as those rentals are for less than ninety days and for leisure purposes. Thus, short-term rentals such as those rented through Airbnb were already subject to the Vacation Rental Act.

S.L. 2019-73 (S.B. 483) makes those vacation-rental properties subject to the limits of G.S. 160A-424 and 153A-364. Those statutes outline the authority for and limits on periodic inspections for hazardous or unlawful conditions, as well as limitations on permitting and fees for residential rental properties. The full scope and detail of this authority is explored in Tyler Mulligan's bulletin *Residential Rental Property Inspections, Permits, and Registration: Changes for 2017*.[22] As Mulligan describes, G.S. 160A-424 and 153A-364 had long authorized periodic inspections of commercial and residential properties. Local governments had long conducted programs for the inspection, permit, and registration (IPR) of rental properties. The methods of these programs varied, including comprehensive inspection and certification of rental units before occupancy, spot-checking randomly selected rental units within a community, or focusing only on properties with a history of housing-code and safety violations.

Amendments in 2011 and 2016 set specific limitations on those IPR programs. The focus of those amendments was housing-code regulation and enforcement. Indeed, the forthcoming reorganization and recodification of the planning and development-regulation statutes into Chapter 160D reaffirms the focus and intent of the 2011 and 2016 amendments: The limits on inspections, permitting, and registration for residential rental properties are recodified to the

21. G.S. 42A-3.

22. C. Tyler Mulligan, *Residential Rental Property Inspections, Permits, and Registration: Changes for 2017*, Community & Econ. Dev. Bull. No. 9 (UNC School of Government, Mar. 2017), http://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/2017-03-22%2020161389%20CED_9.pdf.

article on minimum-housing-code authority (G.S. 160D-12-7), and the provision preventing permits is explicitly limited to Article 11 and Article 12 permits (building permits and minimum-housing permits, respectively).

Below is a brief outline of the provisions G.S. 160A-424 and 153A-364 that are now applicable to vacation-rental properties, including short-term rentals.

First, the periodic-inspection statutes outline limited authority for periodic inspections of residential property. Note that these limits are specific to residential properties; inspections of commercial, industrial, and other nonresidential properties are not subject to these limitations. The authority for periodic inspections of rental residential property is as follows:

- When there is reasonable cause[23] to do so, the local inspections department may make periodic inspections "for unsafe, unsanitary, or otherwise hazardous and unlawful conditions" in buildings and structures.
- Periodic inspections are permitted in accordance with the fire-prevention code are permitted without reasonable cause.
- If done in accordance with specific requirements, a local government may require periodic inspections in designated blighted areas.[24]

Second, the periodic-inspection statutes establish limits on permitting and fees for residential rental properties. Per the statutes, local governments:

- may not require an owner or manager of rental residential property to register rental property with the local government or obtain a permit or permission to lease or rent residential property (except for certain properties with verified violations),
- may not require an owner or manager of residential rental property to enroll in a governmental program in order to obtain a certificate of occupancy,
- may not levy a tax or fee on residential rental property that is not also levied against other commercial and residential properties,
- may not make a violation of a rental-registration ordinance punishable as a criminal offense, and
- may not require an owner or manager of rental residential property to submit to an inspection before receiving a utility service from the local government.[25]

These provisions—limiting inspections, permitting, registration, and fees—plainly have some impact on the scope of local government regulation. S.L. 2019-73 (S.B. 483) makes clear that those limits apply to defined vacation rentals (including short-term rentals) just the same as other residential rental properties. The statutory limits, however, do not strip from local governments the basic authority for land use zoning and regulation.

23. Reasonable cause includes a history of more than four verified violations of the housing ordinances or codes on the property within a rolling twelve-month period; a complaint that substandard conditions exist within the building or a request that the building be inspected; an inspection department's actual knowledge of an unsafe condition within the building; or violations of the local ordinances or codes being visible from the outside of the property. G.S. 153A-364(a); 160A-424(a).

24. G.S. 153A-364(a); 160A-424(a).

25. G.S. 153A-364(c); 160A-424(c).

Land use regulations remain. Local governments have authority to define land uses, set reasonable development standards and limits on those land uses, and require some level of permitting for such land uses. So, for example, a local government may define land uses including single-family residence, townhome, multifamily building, and others. The local government can regulate which zoning districts those land uses are allowed in. And the local government can set standards for dimensions of a structure, size of a lot, provision of parking, access to streets and utilities, and more. In order to convert an old mill to loft condominiums, a property owner must comply with the zoning standards and obtain the proper permits. The provisions of the periodic-inspection statutes do not waive the basic zoning standards and permitting, but once that land use is properly established and permitted, the limits on inspections, permitting, and registration will apply for occupancy of the rental units.

Similarly, there is a strong argument that a local government may define *short-term rental* as a separate land use in the same way the local governments have long defined conventional *bed-and-breakfast* as a separate land use. For short-term rentals, as with bed-and-breakfasts, development regulations may identify the districts where a land use is permitted and establish development standards for that land use (size, occupancy limits, parking, lighting, etc.). As with many other land uses, a zoning-compliance permit or other zoning approval may be required in order to commence a short-term-rental land use.

To be sure, the language of S.L. 2019-73 clearly provides that properties subject to the Vacation Rental Act, such as short-term rentals, are subject to the limitations on IPR programs under G.S. 160A-424 and 153A-364. As outlined above, those provisions include limits on periodic inspections, limits on registration of the rental property, a prohibition against requiring enrollment in a governmental program, a restriction of taxes and fees to only those that are also charged to other commercial and residential properties, and a prohibition against requiring inspections for a utility hookup. Still, as with apartments, townhomes, and other rental residential development, local governments may still use their fundamental zoning authority to regulate short-term rentals.

In addition to this legislation, a proposal was made (though a bill not formally introduced) to preempt any additional local regulation of short-term rentals. The issue was deferred for additional stakeholder consultation and discussion. Should any further action on the proposal be taken in 2019, that will be addressed in a supplement to this bulletin.

Signs

S.L. 2019-119 (S.B. 220) allows individuals to remove political signs that have been left in public rights-of-way after a political campaign. G.S. 136-32 already allowed for political signs to be placed in the right-of-way of the state highway system from thirty days prior to the start of one-stop early voting until ten days after the election day. S.L. 2019-119 provides that any such sign remaining for thirty days after that period is deemed abandoned property and may be removed and disposed of without penalty. Municipal ordinances allowing signs in the right-of-way must include a comparable provision that any sign remaining thirty days after the applicable campaign period is deemed abandoned and may be removed and disposed of without penalty. These provisions will be effective on December 1, 2019.

As discussed in Adam Lovelady's blog post "Temporary Signs in the Right-of-Way,"[26] G.S. 136-32 addresses political signs as a category of sign (with preferential treatment as compared to other noncommercial speech). Such categorization is at odds with constitutional principles set forth by the United States Supreme Court in *Reed v. Town of Gilbert*.[27] Under that case and subsequent caselaw, noncommercial speech must be treated equally; a regulation cannot favor campaign speech over other forms of noncommercial speech.

S.L. 2019-119 also amends G.S. 163A-1046 to require county boards of elections to allow political advertising at polling places at least thirty-six hours prior to opening and at least thirty-six hours after closing the polling place.

Building- and Housing-Code Enforcement

S.L. 2019-174 (H.B. 675) makes several changes to the enforcement of the State Building Code and local government codes, effective October 1, 2019:

1. It amends G.S. 160A-413.5 regarding the alternate inspection for building components or elements submitted by licensed architects or engineers. It provides that the certification of inspection delivered to the city must be on a form created by the N.C. Building Code Council, specifies what the form is to include, and provides that the city may not require any information other than that specified for this form.
2. It amends G.S. 143-151.13 to create a new building-code-enforcement official: a "residential changeout inspector."
3. It requires a cost-benefit analysis for proposed changes to the Energy Conservation Code.
4. It exempts temporary movie, television, or stage sets and scenery from building-code inspection, provided they are being used for less than one year in one location and are inspected by a fire-code inspector (who is to use a fire-code checklist prepared by the N.C. Building Code Council).
5. It amends G.S. 160A-423 and 153A-363 to provide that permit holders may request and be issued a temporary certificate of occupancy if State Building Code requirements are met.
6. It amends G.S. 160A-417 and 153A-357 to provide that when residential building plans are submitted for structures subject to the one- and two-family residential code, all initial reviews must be performed within fifteen business days of submission. The city or county may not require these plans to be sealed by a licensed engineer or architect unless that is required by the State Building Code.

This act also directs the Department of Insurance to prepare a guidance paper on plan review and interpretation of the one- and two-family residential code by October 1, 2019. The N.C. Building Code Council is directed to consult with the Department of Environmental Quality to study options for use of debris at construction sites, including fill under porches and driveways.

26. Adam Lovelady, *Temporary Signs in the Right-of-Way*, Coates' Canons: NC Loc. Gov't L., UNC Sch. of Gov't Blog (Oct. 16, 2018), http://canons.sog.unc.edu/temporary-signs-in-the-right-of-way/.

27. 135 S. Ct. 2218 (2015).

Local Act

S.L. 2019-30 (S.B. 235) adds municipalities in Franklin and Nash counties to the list of smaller-population municipalities that are authorized to employ provisions in G.S. 160A-443(5b) regarding the authority to mandate repair or demolition of structures that have been vacated and closed because of housing-code violations. Chapter 160D will make this change for all local governments as of January 1, 2021.

Transportation

Map Act Repeal

After several years or litigation and legislative limbo, the Transportation Corridor Official Map Act has been repealed.

In 1987 the General Assembly adopted the Roadway Corridor Official Map Act (later renamed the *Transportation Corridor Official Map Act*). The law—codified at Article 2E of Chapter 136 of the General Statutes (G.S. 136-44.50 to -44.54)—allowed transportation corridors to be identified and then limits of up to three years be placed on approval of building permits or new subdivisions within the corridor. The law also allowed variances to be granted if no reasonable return could be made from the land, and it allowed landowners to petition for initiation of acquisition if the limits on development imposed an undue hardship.

In *Kirby v. North Carolina Department of Transportation*, the state supreme court ruled that filing a corridor-protection map under the Map Act was an exercise of the power of eminent domain rather than the police power, thus necessitating compensation.[28] Substantial litigation is ongoing as property owners and the state seek to resolve the amount of compensation owed. The General Assembly responded by suspending the Map Act program. S.L. 2016-90 (H.B. 959) amended G.S. 136-44.50 to place a one-year moratorium (until July 1, 2017) on the adoption of any new corridor official maps and to rescind all previously adopted maps. The law also directed NCDOT to study the development of a new process that equitably balances the property rights of landowners and the governmental interest in protecting transportation corridors from development. A final report of the study, with findings and recommendations, was to be presented to the legislature by July 1, 2017. The moratorium was later extended to July 1, 2019.

Now, S.L. 2019-35 (H.B. 131) officially repeals the Map Act statutes, Article 2E of Chapter 136 of the General Statutes. The legislation repeals G.S. 160A-458.4, which authorized cities to adopt transportation corridor official maps and ordinances in accordance with the Map Act. S.L. 2019-35 also repeals other statutory references to the Map Act.

Subdivision Streets

S.L. 2019-156 (H.B. 620) amends G.S. 136-18.07 to require NCDOT to update the *Subdivision Roads Minimum Construction Standards Manual* by July 1, 2020, and regularly thereafter, to accurately reflect federal law, state law, and applicable judicial decisions.

S.L. 2019-156 also calls upon NCDOT to create a publically available database with information about federal and state roads.

28. 368 N.C. 847 (2016).

Acquiring Right-of-Way

Municipal authority over municipal streets includes power to regulate curb cuts and require certain improvements for driveway connections as outlined in G.S. 160A-307. Section 1.16 of S.L. 2019-111 adds language to that statute to make explicit that "[a] city shall not require the applicant [for a driveway permit] to acquire right-of-way from property not owned by the applicant. However, an applicant may voluntarily agree to acquire such right-of-way." This amendment applies to driveway-permit applications submitted on or after July 11, 2019.

Environment

The General Assembly in 2019 debated several proposals to substantially restrict utility-scale wind-energy projects in North Carolina, address concerns about solar farms, and modify municipal regulation of wastewater-treatment systems. Three bills addressing these issues were adopted.

Renewable Energy

After considering proposals to prohibit or place a moratorium on large-scale wind-energy projects in most of the eastern area of the state, the General Assembly opted to consider more focused future regulation. S.L. 2019-132 (H.B. 329) addresses a number of issues related to renewable energy, including the utility regulation of charging stations for plug-in electric vehicles and the purchase of power from small hydroelectric-power producers. The act directs the Environmental Management Commission to adopt a regulatory program to manage how the state will deal with solar- and wind-energy equipment when permitted facilities close. Particular attention in the rules is to be given to whether the photovoltaic panels, batteries, wind turbines, and other equipment contain any hazardous materials and how the used equipment is disposed. The study for the development of these rules is directed to consider impacts of disposal on the state's landfills, whether financial assistance and assurance programs (such as the bonding requirements typically included in local permits for renewable-energy-project approvals) are necessary and adequate, and the infrastructure needed to support proper decommissioning. A stakeholder process is to be established to assist in the development of the rules, with a final report due by January 1, 2021.

Wastewater Treatment

S.L. 2019-131 (H.B. 495) amends G.S. 130A-335, effective July 19, 2019, to prohibit municipal ordinances regulating the use of off-site wastewater systems that have been approved by the state.

In S.L. 2019-151 (H.B. 268) the General Assembly disapproved a number of rules regulating on-site wastewater-treatment systems that had been adopted in 2018 by the Commission for Public Health. The act creates a ten-member task force to study and recommend new wastewater-management rules, with task-force recommendations to be submitted by February 1, 2020. This act also creates G.S. 130A-336.2, effective July 22, 2019, to create a new management program for alternative wastewater-system approvals. It creates a program for soil scientists to be certified as on-site wastewater evaluators who can provide plans for nonengineered alternative on-site wastewater systems. The plans developed by these evaluators

are to be submitted to the local health department for approval. This law provides that the state and local health departments have no liability for wastewater systems developed by these evaluators. Provisions are specified for applications, inspections, operations, enforcement, and fees. Also, S.L. 2019-126 (H.B. 761) amends G.S. 335(a2) to clarify that neither state nor local health officials have any liability from claims regarding septic-tank failures arising from soil conditions, site features, geologic conditions, or hydrogeologic conditions if a written evaluation was submitted by a soil scientist or licensed geologist.

Affordable-Housing Study

S.L. 2019-144 (S.B. 316) requires the state's more populous cities to prepare an affordable-housing report by October 1, 2019. The requirement applies to cities with a population of at least 90,000 in the state's 2016 population estimates. The ten cities required to submit this report to the General Assembly are Charlotte, Raleigh, Greensboro, Durham, Winston-Salem, Fayetteville, Cary, Wilmington, High Point, and Asheville.

The mandated affordable-housing report is to include the amount of affordable-housing units in the city that are subsidized by government revenue or tax credits or that have local government oversight. The reports must set forth each city's strategy to improve the availability of affordable and moderate-income housing. At a minimum, each report is also to address the extent to which the city has employed the following strategies to limit the cost of privately developed housing: rezonings for densities needed for production of moderate-income housing, provision of needed infrastructure, encouragement of housing rehabilitation, subsidies for construction-related fees, reduction of regulations for accessory dwelling units, inclusion of housing in commercial and mixed-use districts, density increases for transit corridors, reduced parking requirements, permission of single-room occupancy, use of state and federal funds and tax incentives, and use of Housing Finance Agency programs.

Jurisdiction

No significant changes were made in general statutes regarding annexation or extraterritorial jurisdiction. Bills were introduced to abolish municipal extraterritorial jurisdiction, but they were not considered in this session. However, the General Assembly did continue its recent trend of making changes in jurisdiction for individual cities.

Specified territory was annexed into Kannapolis by S.L. 2019-12 (S.B. 63). The annexation will be effective on June 30, 2020, but the city was authorized to exercise extraterritorial jurisdiction over the area until that date. A specified parcel of land area was removed from the corporate limits of Claremont by S.L. 2019-93 (H.B. 4). A bill to de-annex a specified area from Durham (S.B. 270) has passed both houses of the General Assembly, and reconciliation of differences in the versions adopted by each house is pending.

Several bills removed restrictions on satellite annexations. Three bills removed the limit in G.S. 160A-58.1(b) that satellite-annexation areas can be no more than 10 percent of the land area within primary corporate limits. This was done for Asheboro, Bunn, Franklinton, and Youngsville by S.L. 2019-103 (H.B. 170), for China Grove by S.L. 2019-58 (S.B. 80), and for Saluda

and West Jefferson by S.L. 2019-160 (S.B. 194). This brings the number of municipalities exempt from the 10 percent rule to 114. The requirement that noncontinuous areas be within three miles of the primary corporate limits was removed for Beaufort and Sanford by S.L. 2019-105 (H.B. 285).

Several coastal jurisdictions obtained annexation of navigable waters and received explicit authority to regulate navigable waters. S.L. 2019-95 added navigable waters and the unincorporated portion of the state-owned Rachel Carson Estuarine Research Reserve to Beaufort's corporate limits. S.L. 2019-108 (H.B. 429) added waters in Shallowbag Bay, Doughs Creek, and Scarboro Creek to Manteo's corporate limits. This law also authorized Manteo to regulate the operation and mooring of boats in this area, place channel aids, and otherwise regulate the use of navigable waters within the town limits. In the event of conflict between town and state or federal regulations of these water areas, the state or federal regulation prevails over the local regulation to the extent of the conflict. This act also authorizes Hyde County to impose the same type of regulation, subject to the same limits, for Silver Lake on Ocracoke Island.

The suspension of Spencer Mountain's charter was extended from June 30, 2019, to June 30, 2023, by S.L. 2019-29 (H.B. 336). This same act suspended the charter of the Town of Eureka in Wayne County until June 30, 2024.

Appeals and Court Procedures

Part I of S.L. 2019-111 (S.B. 355) provides several notable changes to the process and standards for appeals and judicial review of land use ordinances and permits. As stated in S.L. 2019-111, Part III, these provisions are effective immediately and "clarify and restate the intent of existing law and apply to ordinances adopted before, on, and after the effective date."

Fines Stayed During Appeal

S.L. 2019-111 amends G.S. 160A-388(b1)(6) to state that the accumulation of fines is stayed, along with other enforcement actions, when a notice of violation or other enforcement order is appealed to the board of adjustment or court.

Skipping the Board of Adjustment

For certain legal challenges, an applicant may bring an original civil action in superior or federal court in lieu of bringing an appeal to the board of adjustment under G.S. 160A-388(b1).[29] These original civil actions are allowed when the applicant claims that the ordinance is unconstitutional, ultra vires, preempted, or beyond statutory authority, or when the applicant claims that the ordinance constitutes a taking. When these issues are raised, appeals of administrative permit decisions, issuance of notices of violation, determinations of vested rights, and other administrative decisions may go straight to court.

Appeals of ordinance interpretation must still go to the board of adjustment before being appealed to court. If an applicant is appealing a notice of violation and disputes the fact of the

29. G.S. 160A-393.1(b).

violation (a question of fact, not a constitutional challenge or a question of statutory authority), that appeal still goes to the board of adjustment.

The new statutory section provides guidance on the time for appeal, joinder, standing, and more. The action must be commenced within one year after the date of notice of the decision's appeal.[30] A civil action brought under this statute may be joined with a petition for writ of certiorari under G.S 160A-393, but applicable rules, supplementation of evidence, and standards of review are distinct.[31]

The following criteria are used to determine whether an individual has standing to bring such civil actions against administrative decisions:

1. The person has an ownership, leasehold, or easement interest in the property that is the subject matter of a final and binding decision made by an administrative official charged with applying or enforcing a land development regulation, or the person has an option or contract to purchase that property.
2. The person was a development-permit applicant before the decision-making board whose decision is being challenged.
3. The person was a development-permit applicant who is aggrieved by a final and binding decision of an administrative official charged with applying or enforcing a land development regulation.[32]

Note that the action is not rendered moot if the party loses the relevant property interest as a result of the administrative action being appealed, and exhaustion of an appeal is required to preserve a claim for damages under G.S. 160A-393.1.[33]

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.[34] 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 the new G.S. 160A-393.2 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.

30. G.S. 160A-393.1(d).

31. G.S. 160A-393.1(e).

32. G.S. 160A-393.1(c).

33. *Id.* This provision is "[s]ubject to the limitations in the State and federal constitutions and State and federal case law," a limitation that may raise issues of case-or-controversy jurisprudence.

34. *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).

Attorneys' Fees

S.L. 2019-111, Section 1.11, amends G.S. 6-21.7 to make attorneys' fees mandatory for some local government litigation.

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."

If a court finds "that the city or county took action inconsistent with, or in violation of, [the Permit Choice and Vested Rights statutes set forth at] G.S. 160A-360.1, 153A-320.1, or 143-755, the court shall award reasonable attorneys' fees and costs."

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

Appeals in the Nature of Certiorari

With regard to supplementing the record once a case gets to superior court, previously G.S. 160A-393 was permissive, giving courts discretion to allow parties to supplement the record when needed. Now, with amendment by S.L. 2019-111, Section 1.9, 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.[35]

As with direct civil actions under G.S. 160A-393.1, for appeals in the nature of certiorari, 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.[36]

Concerning the standard of review, S.L. 2019-111, Section 1.9, adds language to G.S. 160A-393(k)(2) to affirm that the question whether a record contains competent, material, and substantial evidence is a conclusion of law to be reviewed by the court de novo.

S.L. 2019-111, Section 1.9, adds language to G.S. 160A-393(k)(3) to clarify 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.

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, "the court 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."

35. G.S. 160A-393(j).
36. G.S. 160A-393(d)(4).

Pending Legislation

Three bills that affect planning and development regulation have been approved by both the House of Representatives and Senate but have not yet become law. Supplements to this bulletin will be made when final action is taken on these bills.

S.B. 553, the 2019 Regulatory Reform Act, amends a number of statutes affecting state and local regulatory programs. It has been adopted by the legislature and is awaiting gubernatorial action.

S.B. 315, the 2019 Farm Act, makes a number of amendments to statutes affecting agriculture. It primarily addresses hemp production, but also includes several items affecting development regulation. It has been adopted by both houses of the legislature, but with differing provisions that must be reconciled.

H.B. 645 makes substantial changes to the authority of local governments to regulate outdoor advertising. It has been vetoed by the governor, and legislative action on a potential veto override or revision to the bill is pending.

Temporary-Event Venues

The pending 2019 Regulatory Reform Act, S.L. 2019-xxx (S.B. 553) creates G.S. 160A-383.6 (and 153A-341.4) and would allow, but not require, cities and counties to adopt regulations to permit temporary-event venues. If enacted, this provision would become effective on October 1, 2019.

A temporary event is defined as an event lasting no more than seventy-two hours. Temporary events can be public or private entertainment events, educational events, marketing events, meetings, sales, trade shows, or any other events that an ordinance might address. Only one temporary event may be allowed on a parcel at one time, and no more than twenty-four temporary events may be conducted on a parcel in a calendar year.

The statute defines how zoning regulations may address these temporary-event venues. The event may be considered an accessory use in any zoning district. The approval is not to be considered a zoning-map amendment, nor can a special use permit be required. The permittee can seek a rezoning to a district that would allow the events as a permitted use, and the city may allow up to twenty-four temporary events while the rezoning is pending.

The statute specifies that if these venues are permitted, the ordinance is to set forth the zoning districts where they are allowed, the permit process to be followed, the criteria for approval of event permits, the types of events that qualify, the duration allowed for the events, the venue's capacity limits, and the permit fee to be charged. The permit fee is capped at $100 for the initial permit and $50 for an annual renewal. A site inspection is required, and the N.C. Building Code Council is directed to prepare an inspection checklist for use by cities and counties. The site inspection must address the general structural stability of the venue, its fire safety, and whether it has sufficient toilet capacity. A building permit under the State Building Code is not required for the construction, installation, repair, replacement, or alteration of a temporary-event venue, but the local approval may require reasonable measures to address any safety or public-health concerns identified by the local inspection.

Miscellaneous Building-Permit Modifications

The pending 2019 Regulatory Reform Act, S.L. 2019-xxx (S.B. 553), also makes several modest changes to statutes regarding building permits. Drinking fountains are not to be required for

buildings with an occupant load of thirty or fewer, and only one toilet (and no service sink) is required for businesses with an occupant load of thirty or fewer. As of July 1, 2019, apartment complexes are permitted to have doorstep collection containers for refuse and recycling in exit access corridors if specified conditions are met. The act also amends G.S. 160A-383.1, effective October 1, 2019, to allow cities and counties to require that manufactured homes be installed in accordance with the setup and installation standards adopted by the Commissioner of Insurance. This requirement cannot, however, require a masonry curtain wall or skirting for homes located on land leased to the homeowner. Appearance standards for manufactured homes are still allowed by G.S. 160A-383.1(d), subject to this new limitation on the type of skirting that can be mandated.

Agritourism and Farm Catering Businesses

The General Assembly in 2017 clarified the law regarding the scope of agritourism activities that are exempt from county zoning. S.L. 2017-108 amended G.S. 153A-340 to exempt agritourism if it is located on a farm with a state sales-tax exemption or if the property is enrolled in the use-value property-tax program. It also defined "agritourism" to include recreational, entertainment-oriented, or educational rural activities such as "farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions." In 2019 the General Assembly provided further exemption from zoning for shooting ranges and catering businesses located on bona fide farms.

The pending 2019 Farm Act, S.L. 2019-xxx (S.B. 315), largely deals with hemp production. It proposes to amend G.S. 99E-30(a) and 153A-340(b)(2a) to expand the range of uses that can be considered agritourism on a qualified farm. It adds hunting, fishing, shooting sports, and equestrian activities to agritourism uses. To qualify as agritourism for zoning purposes, a shooting range must be in a county with a population of less than 110,000 in the last census, comply with guidelines for design and site evaluation set by the Wildlife Resources Commission, and comply with local zoning and development regulations. The statute requires the full board of county commissioners to vote on whether the shooting range meets those guidelines.

The Farm Act also provides that cities and counties may not require regulatory approval (other than health and safety rules) for a business that provides on-premise or off-premise catering from a bona fide farm.

Farm Signs

The pending 2019 Farm Act, S.L. 2019-xxx (S.B. 315) amends G.S. 136-129(2a) to modestly expand permitted agricultural signs along primary highways. If enacted, the signs can promote any bona fide farm exempt from county zoning, can be up to three feet long on any side (they were previously limited to two feet), and can be located on any bona fide farm property owned or leased by the farm owner or lessee.

Outdoor Advertising

H.B. 645 passed both chambers of the General Assembly but was vetoed by Governor Cooper. Legislative consideration of a veto override is pending. The legislation amends the statutes concerning billboards along North Carolina highways. The bill defines certain key terms, including "customary use," "main-traveled way" (or "traveled way"), and "sign location or site."

The legislation sets parameters for permitting signs in unzoned areas. Notably, the bill extends significant permission for sign owners to relocate and reconstruct signs under several different circumstances.

Relocation related to condemnation. If enacted, H.B. 645 would create a new G.S. 136-131.3(a) to allow sign owners to relocate existing signs in the event of condemnation of the property on which a sign was located. The relocation must be within a two-mile radius of the existing sign location and subject to criteria listed below. The proposed regulations are not limited to N.C. Department of Transportation (NCDOT) actions, but apply to any lawfully erected outdoor advertising sign required to be removed as a result of action taken by a public or private condemnor.

If H.B. 645 is approved, the following criteria will apply to applicable relocation sites:

- The site must be located within 660 feet of the nearest edge of the right-of-way of a highway (that is part of the interstate or federal-aid primary-highway system).
- If the existing sign is in a zoned area, then the relocated sign must be in an area zoned commercial or industrial within the same local government's zoning jurisdiction. If the existing sign is in an unzoned area, then the relocated sign must be in the same local government's unzoned jurisdiction.
- It cannot be located in a locally designated historic district except by consent from the governing board.
- Construction on the relocation site must commence within one year of the date of removal from the existing site.
- Reconstruction must meet the standards of G.S. 136-131.2, allowing multipole signs to be converted to monopole structure and requiring that the square footage of the advertising surface area not be increased.
- The sign height may be increased to no more than fifty feet above road grade or the base of the sign.

Relocation in general. Beyond relocation for signs on condemned property, if enacted, H.B. 645 will create G.S. 136-131.3(b) to allow for relocation of NCDOT-permitted signs generally. Under H.B. 645, any sign with a valid NCDOT permit that does not qualify for relocation under Subsection (a) is allowed to be relocated within 250 feet of the boundaries of the lot where the sign had previously been located. Beyond that locational requirement, the relocation must meet the criteria for relocation sites set forth for condemnation relocations. Such relocations can only occur once every ten years, although that time limit does not apply to relocations on the same sign location or site, as defined.

On-site relocation of nonconforming signs. G.S. 136-131.3(c), as established in H.B. 645, authorizes on-site relocation for nonconforming signs. The provision is phrased to apply to lawfully erected signs that "would not be conforming to customary use if relocated on the same sign location or site." "Customary use," as defined, means meeting the zoning standards in zoned areas or in accordance with the state-federal agreement under the Highway Beautification Act. Under H.B. 645, such nonconforming signs can be relocated on the same sign location or site if they meet the following requirements:

- The structural members of the sign at the relocated site are of like material.

- The size of the sign face or faces is not increased.
- The height of the sign at the relocated site does not exceed fifty feet, measured from the adjoining road grade or the base of the sign, whichever allows for the greatest visibility, except that a sign can be fifty feet above the top of a sound wall or noise barrier constructed between the sign and the main-traveled way.
- The relocation on the same sign location or site was not denied by the Federal Highway Administrator or any other federal official delegated the responsibility for enforcing the federal-state agreement referenced in the definition of "customary use" in G.S. 136-128.

Sign relocation for sound walls. Subsection (f) of G.S. 136-131.3, as proposed under H.B. 645, provides that the authorities for relocation and reconstruction of G.S. 136-131.3 apply whenever a sign is affected by the construction of a sound wall. Also, a lawful sign can be raised up to fifty feet above the top of the sound wall.

Relocation and view corridors. Some local governments have overlay zoning districts or other local regulations for scenic corridors or significant thoroughfares that regulate, among other things, signs and billboards. G.S. 136-131.4, as proposed under H.B 645, provides specific provisions concerning sign relocations and view corridors (specific areas where outdoor advertising is prohibited).

Under H.B. 645, a sign that is not within the view corridor cannot be relocated into the view corridor without approval from the local government. A sign that is located within a view corridor can be relocated within the same view corridor, subject to the standard requirements for relocation. Alternatively, a sign located within a view corridor can be relocated within five miles of the existing sign location, subject to the standard requirements for relocation.

Additional provisions for relocated signs. The new G.S. 136-131.3(d), if H.B. 645 is enacted, will provide that relocated signs cannot be denied because of vegetation obstructing visibility, and sign operators may remove vegetation in accordance with NCDOT policies. Local ordinances cannot prevent such vegetative cutting.

The new G.S. 136-131.3(e), if H.B. 645 is enacted, will set provisions for permitting related to relocated signs. For relocations related to condemnation, NCDOT will be required to issue a new permit for signs that complies with the relocation criteria outlined in G.S. 136-131.3(a). For general relocations, on-site relocations of nonconforming signs, and relocations for sound walls, no new permit will be required, but NCDOT will be able to require an addendum to an existing permit.

Under the new G.S. 136-131.5, as proposed under H.B. 645, if a sign is to be relocated to a site within five miles from the perimeter boundary of a military base, then the sign owner must notify the base commander or designee, the county board of commissioners, and the city council, if applicable. Those notified parties then have thirty days to submit comments about the compatibility of the proposed sign with the military operations.

G.S. 136-131.3(g), if H.B. 645 is enacted, will clarify that, if a sign is on condemned property, the fact that the sign is not relocated does not prejudice a determination of compensation owed to the sign owner.

Unzoned areas. H.B. 645 amends G.S. 136-130.1 to set parameters for permitting signs on unzoned commercial or industrial areas. In order to qualify, one or more commercial or industrial activities on the site must maintain certain licenses and activities. The bill also

includes guidelines for making determinations about these criteria, including guidelines for measurements and a list of nonqualifying activities.

If H.B. 645 is enacted, an unzoned commercial or industrial area will be defined in G.S. 136-128 to be "[a]n area where there is no zoning in effect that is within 660 feet of the nearest edge of the right-of-way of the interstate or primary system, in which there is at least one commercial or industrial activity that meets the criteria set forth in G.S. 136-130.1."