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Development Agreements

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Landowners, developers, and neighbors, to varying degrees, desire certainty and predictability regarding local land use and development regulations. Local governments, on the other hand, often want to have the flexibility to adjust regulations to address changing needs and perceptions of the public interests served by the regulations. The tension between certainty and flexibility is a particular concern when the focus in on approval and subsequent development of large-scale, long-term individual projects.

The resolution of this tension in land use law is in part found in the law of vested rights. Prior to 2006 there were three ways in North Carolina to secure a vested right to develop without compliance with newly adopted or amended regulations. These were: (1) the common law vested right; (2) securing a building permit; or (3) having an approved site specific or phased development plan. In 2006 the General Assembly added a fourth option -- a development agreement. This paper examines the development agreement option in some detail.

Vesting Rights Background

Prior to addressing the development agreement, a brief review of the three prior means of securing a vested right in North Carolina is useful to set the context for this new vested right. It is also important to note that none of these four means of vesting are mutually exclusive. An individual situation can, and often will, involve multiple types of vesting at various stages of the development.

Common Law Vested Rights

A landowner or neighbor has no vested right in the continuation of a particular regulation. McKinney v. City of High Point, 239 N.C. 232, 79 S.E.2d 730 (1954). Neither has a legally protected right to rely on the ordinance itself absent securing approval of a particular project proposal. The courts in numerous cases decided over the past forty-five years have firmly established a common law vested right in certain circumstances. These cases establish that an owner is vested in a particular regulatory regime when each of the four following tests are met: (1) the owner has made substantial expenditures; (2) the expenditures were made in good faith; (3) the expenditures were made in reliance on valid government approval, if such was required; and (4) the owner would be harmed without a vested right.

Building Permit

The first general statutory vested right was enacted in 1985. G.S. 153A-344(b) and 160A-385(b) provide that as long as there is a valid outstanding building permit, any zoning ordinance changes (including "amendments, modifications, supplements, repeal or other changes in zoning regulation and restrictions and zone boundaries") do not apply to the permitted project unless the owner consents. Importantly, this vested right only attaches to the development covered by a permit issued under the state building code and only exists as long as the building permit is outstanding.

Site Specific and Phased Development Plans

In 1990 the legislature broadened the statutory vested right to provide for vested rights based on site specific development plans and phased development plans approved by local governments. The law creates detailed sections of the zoning enabling laws, G.S. 153A-344.1 and 160A-385.1, to define these rights. The provisions establish a vested right for a minimum of two years and, at the city's or county's discretion, a maximum of five years for the type and the intensity of use allowed by the zoning in effect at the time of plan approval. If a local government has not amended its zoning ordinance to define and establish a process for approving site specific development plans, an owner may go to court to establish this vested right based on any zoning approval.

Aspects of the development beyond the type and intensity of the development have, at most, a limited vesting under this statute. Michael Weinman Associates General Partnership v. Town of Huntersville, 147 N.C. App. 2331, 555 S.E.2d 342 (2001).

Each local government defines by ordinance what constitutes a site specific development plan within its jurisdiction. G.S. 153A-344.1(b)(5); 160A-385.1(b)(5). The statute offers some guidance on such a definition in providing that a site specific development plan must describe with "reasonable certainty the type and intensity of use for a specified parcel" of land that is proposed for development. It must include site boundaries and natural features and the approximate location and dimensions of buildings and improvements. Other locally required land use approvals may be used for this purpose, including conditional and special use permits, site plans, and subdivision plats. Sketch plans and variances are not included.

Local governments also have the option of providing for a five-year vested right for more general phased development plans. G.S. 153A-344.1(d)(3); 160A-385.1(d)(3). A phased development plan also must show the type and the intensity of use but with a lesser degree of certainty and specificity regarding details. A single project may secure both types of development plan approvals, with the phased development plan securing a five-year vested right to the zoning classification and with subsequent site specific development plans securing a vested right for the particular project design consistent with the detailed zoning requirements within that classification.

There are several mandatory statutory requirements for the process of securing local approval for site specific development plans. G.S. 153A-344.1(c); 160A-385.1(c). Notice must be given and a public hearing held on the individual development plan. Because the hearing determines whether an individual application is consistent with the requirements of the

ordinance, it should be an evidentiary quasi-judicial hearing.

Development Agreements

In 2005 the General Assembly added authorization for these agreements to the North Carolina statutes in conjunction with an overall modernization of the state zoning enabling statute. The development agreement provisions are set out at G.S. 160A-400.20 through 160A-400.32 for cities and 153A-379.1 through 153A-379.13 for counties. The municipal statute is set out below as Appendix One.

The impetus for legislative interest in development agreements was largely the increasing frequency of proposals for development projects far larger in scope and with longer build-out periods than previously seen in North Carolina. Several legislators, particularly those in the Charlotte area, were familiar with the use of development agreements in South Carolina (Tega Cay and Hilton Head were offered as examples in the legislative discussions).[1] These legislators suggested that negotiated development agreements might be mutually advantageous to developers and local governments as these large projects were considered, particularly where there were substantial public-private agreements for infrastructure improvements associated with the planning and regulatory issues.

A number of states had previously enacted statutes that expressly authorize cities and counties to enter into agreements with landowners that lock in existing local ordinances affecting a project for an extended period.[2] Among the states with these statutes – most of which are substantially similar – are Arizona, California, Colorado, Florida, Hawaii, Idaho, Louisiana, Maryland, Nevada, New Jersey, Oregon, South Carolina, Virginia, and Washington.

The model for most of the statutes, including the provisions adopted in North Carolina, is the 1979 California act. The California statute was adopted in reaction to the impacts of the state's common law late vesting rule on large, multi-phase projects. The classic example is Avco

1. Tega Cay, located just over the state boundary south of Charlotte (between Pineville and Rock Hill) began in 1970 as a gated community project of the Ervin Company on a 1,600 acre peninsula in Lake Wylie acquired from Duke Power. The area became a city in 1982 in the midst of a bankruptcy proceeding by the owner. The city's 2000 population was just over 4,000 and is projected to be 8,000 by 2010. Hilton Head, largely developed by Sea Pines Plantation beginning in the 1960's, is a considerably older and larger development. The town was incorporated in 1983 and had a population of 33,862 in 2000.

2. Several books and articles review the development agreement experience in other states. DAVID L. CALLIES, DANIEL J. CURTIN, JR. & JULIE A. TAPPENDORF, BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES (2003); David L. Callies, *Developers' Agreements and Planning Gain*, 17 URB. LAW. 599 (1985); Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission*, 22 URB. LAW. 23 (1990); Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761 (1993); John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal*," 25 URB. LAW. 49 (1993); Shelby D. Green, *Development Agreements: Bargain-for Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 Cap. U. L. REV. 383 (2004); Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719 (2001); Judith W. Wegner, *Moving toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987).

Community Developers, Inc. v. South Coast Regional Commission, 553 P.2d 546 (Cal. 1976). The landowner was developing an 8,000-acre planned community, secured subdivision and grading permits, and then spent some $2.7 million in construction of infrastructure. At that point the California coastal act became effective. The court held that the company had no vested rights as final building permits had not been issued, so there had been no detrimental reliance on the final approval.

While the development community did not originate the proposal to add this to the statutes, once it was presented they were very supportive. The lobbyists for the development community (particularly the state Homebuilders and Realtors Associations) noted that there are major risks when committing substantial funds to large, long-term projects without adequate assurance that local development standards will not become more demanding over the course of build-out. Local governments and the planning community, while likewise not originating the proposal to authorize development agreements and having not insignificant reservations about the concept, expressed an interest in an enhanced ability to address the off-site impacts and public facility implications of such large projects.

Basic Provisions

Use optional. The development agreement statute is enabling rather than a mandate. G.S. 153A-379.3; 160A-400.22. Unlike the building permit and site specific development plan vested rights, a local government can choose not to use this approach at all.

Adoption process. Each individual development agreement must be adopted as an ordinance by the governing board with the same standard notice and hearing required for zoning test amendments. G.S. 153A-379.5; 160A-400.24. The mandated published notice of the public hearing on a proposed development agreement is for two newspaper advertisements, with the first at least ten but not more than twenty-five days prior to the hearing and each notice being in separate calendar weeks. The notice must specify the location of the property involved and describe the land uses proposed. The draft agreement must be complete and available for inspection at the time of publication of the notice of the hearing.

The statute does not specify whether referral of a proposed development agreement to the planning board for review and comment is mandatory. While the statute specifies that the agreement must be approved by ordinance, it is unlikely that the agreement itself would be considered a zoning text or map amendment, both of which are required by G.S. 160A-387 to be referred to the planning board. Of course if there is a rezoning associated with a development agreement, the rezoning must go to the planning board prior to governing board consideration.

If a local government decides to use development agreements, it can approach each on an ad hoc basis or it can adopt (presumably by ordinance) standardized procedures and requirements that will be followed whenever someone wants to proposed a development agreement.

Minimum acreage. A project must have a minimum land area of twenty-five developable acres to be considered for a development agreement. G.S. 153A-379.4; 160A-400.23. Wetlands, mandatory buffers, unbuildable slopes, and other portions of the property precluded from the development at the time of application are not to be considered in establishing this minimum acreage. A review of federal, state, and local regulatory programs applicable to the particular site

at the time of application is necessary to make this determination.

Maximum term. The maximum term of an agreement is twenty years. G.S. 153A-379.4; 160A-400.23. A city or county may elect to enter into an agreement with a shorter duration. This was one of the few aspects of the statute that was actively debated during legislative process. Many in the planning and local government community argued for a shorter maximum time period (such as ten or fifteen years). The concern was that a lengthy period increased the likelihood of adverse unanticipated events or changing physical conditions, as well as inappropriately limiting the ability of future local elected officials to apply new regulations deemed necessary to address changing public needs. The development community argued that the period should match the buildout period of large, complex, multi-phased projects. The ultimate resolution was to leave the maximum period at twenty years but to allow each local government the option of using a shorter period as they deemed appropriate on a case by case basis.

In the event a local government and developer want a longer period, they are explicitly authorized to enter subsequent development agreements that extend the original duration period. G.S. 153A-379.6(a)(2); 160A-400.25(a)(2). Each such extension, however, is a separate development agreement that must be separately noticed and adopted (and each individual agreement is subject to the maximum twenty year term).

A closely related question is the impact of a change in jurisdiction on the continuation of a development agreement. During the legislative debate, for example, cities expressed concern that a county might approve a very lengthy development agreement with development standards considerably different from municipal standards, leaving the city to deal with long-term "substandard" development if the property were annexed midway through the project development. The resolution of this concern was inclusion of a provision that where there is a change in local jurisdiction for the property subject to a development agreement (such as through annexation or extension of an extraterritorial boundary), the agreement is valid for the duration of the agreement or eight years from the date of change in jurisdiction, whichever is earlier. G.S. 153A-379.10; 160A-400.29.

Mandatory Contents of Agreements

The mandatory contents of the agreement are specified by this statute. G.S. 153A-379.6; 160A-400.25.

Property description. The agreement must include a legal description of the property covered by the agreement and the names of its legal and equitable owners.

Duration. It must explicitly specify the duration of the agreement.

Development plan. It must describe the proposed development of the property in some detail. The level of detail required is substantially greater than that required for a rezoning petition and, in some respects, more detailed than the information often required for a special or conditional use permit application. It is required to address the types of land uses, population density, building types, intensity of uses, placement of buildings on the site, and building designs. This will often involve use of attachments, such as site plans, sample building elevations, and the like, all of which need to be explicitly referenced and incorporated into the agreement. Given the duration of these agreements and the reasonable likelihood that those

directly involved in development agreement approval may not be available to resolve questions in the latter stages of the development, careful attention to specificity and record-keeping on this point is important for practical as well as legal reasons.

Public facility plan. Cost sharing on infrastructure provision may well be an essential aspect of the agreement and must be explicitly set forth in the body of the development agreement. The agreement must include a description of any new public facilities that will serve the development, a specification of who will provide them, and a schedule of when they will be provided so as to assure they will be available concurrently with the impacts of the development (the last point perhaps being of particular interest to those local governments with adequate public facility regulatory requirements).

The statute defines the "public facilities" to be described to include "major capital improvements" for (among others) transportation, water, sewer, solid waste, schools, parks and recreation, drainage, and health systems. G.S. 153A-379.2(12); 160A-400.21(12).

If the local government is to provide infrastructure improvements, the agreement must specify that the delivery date of the public facilities will be tied to the successful performance of the developer. G.S. 153A-379.5; 160A-400.24. If the obligation of the local government to provide infrastructure involves debt, the city or county must comply with all constitutional and statutory provisions regarding debts at the time of the obligation to incur the debt. G.S. 153A-379.12; 160A-400.31.

It is anticipated that this provision will encourage cities and developers to have explicit agreements regarding infrastructure. Where there are phased cost-sharing agreements, the development agreement can detail when payments will be made, improvements installed, reimbursement for excess capacity, and similar practical issues. These provisions can also address issues such as allocation of utility capacity.

Dedications. If there is to be any dedication or reservation of land for public purposes, they must be set out in the agreement. Street and utility rights of way, park and open space dedications, greenways, and school sites need to be addressed as applicable. Similarly, any provisions to protect environmentally sensitive lands are required to be included. This would include buffers, stromwater provisions, and the like.

Permits required. The agreement must also include a list of all local regulatory approvals required. The list is to include those approvals already secured and those yet to be secured. However, the failure to include a permit on this list does not relieve the developer of the necessity of securing it or of complying with the regulation omitted.

Conditions. The agreement must explicitly include any conditions, terms, or restrictions on the development. The authority to imposed conditions is broad. Conditions can be imposed if the city or county deems them necessary to protect the public health, safety, and welfare. The statute specifically mentions authority to impose provisions for preservation and restoration of historic structures.

Development schedule. The agreement must include a development schedule, including commencement and interim completion dates at five-year (or more frequent) intervals. G.S. 153A-379.6(b); 160A-400.25(b). The agreement may also include phases for the development and other defined performance standards to be met by the developer.

Coordination. If more than one local government is a party to the agreement, the

agreement must specify which local government is responsible for overall administration of the agreement.

Limitations on Agreements

Fees and conditions. The agreement cannot impose any tax or fee not otherwise authorized by law. G.S. 153A-379.1(b); 160A-400.20(b). This provision also specifies that an agreement does not expand local regulatory authority or authorize any local commitments other than those otherwise authorized by law. This provision was included to address concerns of the development community that local governments might use a potential development agreement as leverage to secure financial contributions or commitments for undertakings beyond those currently authorized by the statutes. Not surprisingly, there was a specific concern that local governments not be allowed to trade development agreement approval for new impact fees.

An interesting question is the impact of this limitation on matters voluntarily offered by the developer. The statute includes a 'catch-all' provision for what may be included within an agreement: "The development agreement also may cover any other matter not inconsistent with this Part." G.S. 153A-379.6(d); 160A-400.25(d). Some development and local government lawyers have concluded that this allows an agreement to include voluntary offers of payments for infrastructure and public amenities that could not otherwise be unilaterally required by a local government.

The agreement may not exempt the developer from the building code or any local housing code that is not part of the local government's development ordinances. G.S. 153A-379.13; 160A-400.32.

Use only existing laws. The development agreement must be consistent with the local laws in effect at the time of agreement approval. G.S. 153A-379.7; 160A-400.26. This provision is a modification of the development agreement statute that exists in many other states, including South Carolina. This limitation distinguishes these agreements from situations where an amendment to the ordinances is promised in return for developer concessions in the agreement or where the agreement authorizes development that would otherwise be inconsistent with local zoning and development regulations. The legislature felt to authorize such agreements would pose serious contract zoning issues.

There is, however, no provision in this statute that prohibits a local government from negotiating with a landowner, rezoning the property to a conditional zoning district, and then entering into a development agreement to lock in that rezoning. Though the rezoning and development agreement are legally separate actions, if they are made in concert and essentially concurrently (albeit with the rezoning being a separate and initial vote), the practical effect is for all involved to view the legally distinct actions as a package deal. Whether such a close combination of decisions would constitute illegal contract zoning under North Carolina law is uncertain. The courts have sanctioned such a concurrent approach with conditional use district rezonings and an accompanying conditional use permit and it may well be that the rezoning-development agreement combination would receive similar sanction.

Periodic reviews. The local government must undertake a periodic review of the project (at least once a year) to verify compliance with the agreement. G.S. 153A-379.8; 160A-400.27.

Post Agreement Provisions

Recordation. The agreement must be recorded with the register of deeds in the county in which the property is located within fourteen days of approval. G.S. 153A-379.11; 160A-400.30. The agreement is binding on subsequent purchasers of the land.

Amendment. The statute makes provision for amendment, extension, and cancellation of the agreement. The parties may modify or cancel the agreement at any time by mutual consent. G.S. 153A-379.9; 160A-400.28. Any major modification to a development agreement requires the same notice and hearing as required for initial approval. G.S. 153A-379.6(b); 160A-400.25(b).

Subsequent regulatory amendments. The ordinances in effect at the time of the agreement generally are to remain in effect for the life of the agreement, with specified exceptions.

Subsequently enacted local ordinances and ordinance amendments can only be applied for the same grounds applicable to amendment of site specific and phased development plans. G.S. 153A-379.7(b); 160A-400.26(b). There are three types of changes that can be the basis for such a modification. First are those that have either landowner approval or that make the landowner financially whole. The landowner consent must be in writing and, for the compensation option, the landowner must be compensated for the full costs of change (excluding reductions in property value). Second are those situations where there have been either inaccurate or material misrepresentations in the application or there are emergent serious threats to the public health, safety, and welfare. In both of these instances the grounds for amendment or revocation must be established by notice and hearing. Third is the enactment of a category of general regulations not specifically aimed at the applicable property. This includes overlay zones that do not affect the type or intensity of use at the site and the enactment of local regulations that are "general in nature and are applicable to all property subject to land-use regulation" by the jurisdiction. G.S. 153A-344.1(e); 160A-385.1(e).

Subsequently enacted state and federal law may more readily be incorporated into a development agreement. If a state or federal law or regulation precludes the anticipated development, the local government is specifically authorized to modify the agreement to incorporate changes needed to secure compliance with state and federal regulatory changes. Examples would include changes needed for compliance with stormwater rules, erosion and sedimentation control, wetland protection, and the like.

The statute also provides for limited modification if local government jurisdiction for the property subject to the agreement changes. G.S. 153A-379.10(b); 160A-400.29(b). The jurisdiction assuming jurisdiction may modify or suspend the agreement if needed to protect the residents of the area within the agreement or elsewhere in the jurisdiction from a condition dangerous to health or safety.

Breach. In the event a local government review indicates the developer is in material breach of the agreement, the local government must within a reasonable time provide notice of the breach (describing and documenting its nature with reasonable particularity) and provide the developer a reasonable time to cure the breach. If the breach is not cured, the local government may unilaterally terminate or modify the agreement. The local government decision to do so may be appealed to the board of adjustment under the normal zoning appeals provisions.

Given the consequences for all parties, it is anticipated that as with most complex

contracts, the agreement itself will carefully define what constitutes a material breach and the remedies available to both parties in the event of breach.

Experience to Date

Early reports indicate very modest use of development agreements in this first year they have been authorized. However, a number of local governments have expressed interest in the concept and it appears use will gradually expand as local governments and large developers become more familiar with the tool.

One of the earliest uses of the development agreement was a July 2006 agreement between Holly Springs and Novartis Vaccines and Diagnostics, Inc. for an industrial development project. The project involved was a flu vaccine production facility on a 167 acre tract. The agreement had a twenty year term with provision for a fifteen year extension (with an acknowledgement that the parties intention was that the current development standards would remain stable for not less than 35 years). The agreement made the development subject to a previously approved PUD zoning of the site (with minor modifications specified to be approved administratively). The agreement also contained a promise to amend the PUD requirements in specified ways and purported to give the developer sole discretion to have the site rezoned to a standard industrial district at any time during the life of the agreement. The town agreed to specified road improvements and site preparation. The agreement exclusive of exhibits ran seventeen pages. The parties subsequently had a five year site specific development plan approved for the project.

An example of use of the tool for a large mixed use project is an April 2007 development agreement between Catawba County and Cresent Resources (along with three other developers). The agreement covered proposed development of a mixed use project on a 2,126.5 acre area along Lake Norman in the Sherrills Ford area of the county. The term of the agreement was twenty years. The approved development included up to 2,417 dwelling units and a village center with retail, office, governmental, educational, and service uses. A substantial natural area acquisition was also included. Several conditional rezonings preceded and were incorporated into the development agreements. The agreement specified several off-site highway improvements to be made by the developers, provided for installation of a bike path and sidewalks, school parking lot improvements, dedication of a park site, reservation of a school site, a requirement of a good faith effort to acquire and relocate a historic structure, dedication of a county service center site, reservation of a site for a future YMCA, reservation of a site for a county medical center, and dedication of pump station sites and line easements for the county sewer system. The county agreed to a schedule for provision of county water and sewer lines to the area, a capacity reservation, and the parties agreed as to utility fees. The development agreement, exclusive of a number of attached and incorporated exhibits, ran thirty pages.

A less complicated example is a December 2006 agreement between Polk County and Bright's Creek Holdings regarding a 1, 370 lot single-family subdivision in an unzoned area of the county. The term of the agreement was eighteen years. The county approved a Master Plan for the overall project and reviewed subdivision plats for each phase as the project progressed. About 470 lots had been or were nearing plat approval at the time of the agreement. The agreement provided for submission of additional subdivision plats that would have 150 lots submitted for approval every three years, all in accordance with the approved Master Plan. This

agreement ran eight pages.

Knightdale has also reported early use for large master planned developments. The agreements address minimum tax base anticipated to result from new construction, allocation of water capacity, provision of associated infrastructure and recreations amenities, and funding agreements regarding the infrastructure (including reimbursement for off-site and over-sized capacity).

Appendix One

Municipal Statute on Development Agreements

Part 3D. Development Agreements.

§ 160A-400.20. Authorization for development agreements.

(a) The General Assembly finds:

(1) Large-scale development projects often occur in multiple phases extending over a period of years, requiring a long-term commitment of both public and private resources.

(2) Such large-scale developments often create potential community impacts and potential opportunities that are difficult or impossible to accommodate within traditional zoning processes.

(3) Because of their scale and duration, such large-scale projects often require careful integration between public capital facilities planning, financing, and construction schedules and the phasing of the private development.

(4) Because of their scale and duration, such large-scale projects involve substantial commitments of private capital by developers, which developers are usually unwilling to risk without sufficient assurances that development standards will remain stable through the extended period of the development.

(5) Because of their size and duration, such developments often permit communities and developers to experiment with different or nontraditional types of development concepts and standards, while still managing impacts on the surrounding areas.

(6) To better structure and manage development approvals for such large-scale developments and ensure their proper integration into local capital facilities programs, local governments need the flexibility in negotiating such developments.

(b) Local governments and agencies may enter into development agreements with developers, subject to the procedures and requirements of this Part. In entering into such agreements, a local government may not exercise any authority or make any commitment not authorized by general or local act and may not impose any tax or fee not authorized by otherwise applicable law.

(c) This Part is supplemental to the powers conferred upon local governments and does not preclude or supersede rights and obligations established pursuant to other law regarding building permits, site-specific development plans, phased development plans, or other provisions of law.

§ 160A-400.21. Definitions.

The following definitions apply in this Part:

(1) Comprehensive plan. — The comprehensive plan, land-use plan, small area plans, neighborhood plans, transportation plan, capital improvement plan, official map, and any other plans regarding land use and development that have been officially adopted by the governing board.

(2) Developer. — A person, including a governmental agency or redevelopment authority, who intends to undertake any development and who has a legal or equitable interest in the property to be developed.

(3) Development. — The planning for or carrying out of a building activity, the making of a material change in the use or appearance of any structure or property, or the dividing of land into two or more parcels. "Development", as designated in a law or development permit, includes the planning for and all other activity customarily associated with it unless otherwise specified. When appropriate to the context, "development" refers to the planning for or the act of developing or to the result of development. Reference to a specific operation is not intended to mean that the operation or activity, when part of other operations or activities, is not development. Reference to particular operations is not intended to limit the generality of this item.

(4) Development permit. — A building permit, zoning permit, subdivision approval, special or conditional use permit, variance, or any other official action of local government having the effect of permitting the development of property.

(5) Governing body. — The city council of a municipality.
(6) Land development regulations. — Ordinances and regulations enacted by the appropriate governing body for the regulation of any aspect of development and includes zoning, subdivision, or any other land development ordinances.
(7) Laws. — All ordinances, resolutions, regulations, comprehensive plans, land development regulations, policies, and rules adopted by a local government affecting the development of property, and includes laws governing permitted uses of the property, density, design, and improvements.
(8) Local government. — Any municipality that exercises regulatory authority over and grants development permits for land development or which provides public facilities.
(9) Local planning board. — Any planning board established pursuant to G.S. 160A-361.
(10) Person. — An individual, corporation, business or land trust, estate, trust, partnership, association, two or more persons having a joint or common interest, State agency, or any legal entity.
(11) Property. — All real property subject to land-use regulation by a local government and includes any improvements or structures customarily regarded as a part of real property.
(12) Public facilities. — Major capital improvements, including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities.

§ 160A-400.22. Local governments authorized to enter into development agreements; approval of governing body required.

A local government may establish procedures and requirements, as provided in this Part, to consider and enter into development agreements with developers. A development agreement must be approved by the governing body of a local government by ordinance.

§ 160A-400.23. Developed property must contain certain number of acres; permissible durations of agreements.

A local government may enter into a development agreement with a developer for the development of property as provided in this Part, provided the property contains 25 acres or more of developable property (exclusive of wetlands, mandatory buffers, unbuildable slopes, and other portions of the property which may be precluded from development at the time of application). Development agreements shall be of a term specified in the agreement, provided they may not be for a term exceeding 20 years.

§ 160A-400.24. Public hearing.

Before entering into a development agreement, a local government shall conduct a public hearing on the proposed agreement following the procedures set forth in G.S. 160A-364 regarding zoning ordinance adoption or amendment. The notice for the public hearing must specify the location of the property subject to the development agreement, the development uses proposed on the property, and must specify a place where a copy of the proposed development agreement can be obtained. In the event that the development agreement provides that the local government shall provide certain public facilities, the development agreement shall provide that the delivery date of such public facilities will be tied to successful performance by the developer in implementing the proposed development (such as meeting defined completion percentages or other performance standards).

§ 160A-400.25. What development agreement must provide; what it may provide; major modification requires public notice and hearing.

(a) A development agreement shall at a minimum include all of the following:
(1) A legal description of the property subject to the agreement and the names of its legal and equitable property owners.
(2) The duration of the agreement. However, the parties are not precluded from entering into subsequent development agreements that may extend the original duration period.
(3) The development uses permitted on the property, including population densities and building types, intensities, placement on the site, and design.

(4) A description of public facilities that will service the development, including who provides the facilities, the date any new public facilities, if needed, will be constructed, and a schedule to assure public facilities are available concurrent with the impacts of the development.
(5) A description, where appropriate, of any reservation or dedication of land for public purposes and any provisions to protect environmentally sensitive property.
(6) A description of all local development permits approved or needed to be approved for the development of the property together with a statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction does not relieve the developer of the necessity of complying with the law governing their permitting requirements, conditions, terms, or restrictions.
(7) A description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for the public health, safety, or welfare of its citizens.
(8) A description, where appropriate, of any provisions for the preservation and restoration of historic structures.

(b) A development agreement may provide that the entire development or any phase of it be commenced or completed within a specified period of time. The development agreement must provide a development schedule, including commencement dates and interim completion dates at no greater than five-year intervals; provided, however, the failure to meet a commencement or completion date shall not, in and of itself, constitute a material breach of the development agreement pursuant to G.S. 160A-400.27 but must be judged based upon the totality of the circumstances. The development agreement may include other defined performance standards to be met by the developer. The developer may request a modification in the dates as set forth in the agreement. Consideration of a proposed major modification of the agreement shall follow the same procedures as required for initial approval of a development agreement.

(c) If more than one local government is made party to an agreement, the agreement must specify which local government is responsible for the overall administration of the development agreement.

(d) The development agreement also may cover any other matter not inconsistent with this Part.

§ 160A-400.26. Law in effect at time of agreement governs development; exceptions.

(a) Unless the development agreement specifically provides for the application of subsequently enacted laws, the laws applicable to development of the property subject to a development agreement are those in force at the time of execution of the agreement.

(b) Except for grounds specified in G.S. 160A-385.1(e), a local government may not apply subsequently adopted ordinances or development policies to a development that is subject to a development agreement.

(c) In the event State or federal law is changed after a development agreement has been entered into and the change prevents or precludes compliance with one or more provisions of the development agreement, the local government may modify the affected provisions, upon a finding that the change in State or federal law has a fundamental effect on the development agreement, by ordinance after notice and a hearing.

(d) This section does not abrogate any rights preserved by G.S. 160A-385 or G.S. 160A-385.1, or that may vest pursuant to common law or otherwise in the absence of a development agreement.

§ 160A-400.27. Periodic review to assess compliance with agreement; material breach by developer; notice of breach; cure of breach or modification or termination of agreement.

(a) Procedures established pursuant to G.S. 160A-400.22 must include a provision for requiring periodic review by the zoning administrator or other appropriate officer of the local government at least every 12 months, at which time the developer must be required to demonstrate good faith compliance with the terms of the development agreement.

(b) If, as a result of a periodic review, the local government finds and determines that the developer has committed a material breach of the terms or conditions of the agreement, the local government shall serve notice in writing, within a reasonable time after the periodic review, upon the developer setting forth with reasonable particularity the nature of the breach and the evidence supporting the finding and determination, and providing the developer a reasonable time in which to cure the material breach.

(c) If the developer fails to cure the material breach within the time given, then the local government unilaterally may terminate or modify the development agreement; provided, the notice of termination or modification may be appealed to the board of adjustment in the manner provided by G.S. 160A-388(b).

§ 160A-400.28. Amendment or cancellation of development agreement by mutual consent of parties or successors in interest.

A development agreement may be amended or canceled by mutual consent of the parties to the agreement or by their successors in interest.

§ 160A-400.29. Validity and duration of agreement entered into prior to change of jurisdiction; subsequent modification or suspension.

(a) Except as otherwise provided by this Part, any development agreement entered into by a local government before the effective date of a change of jurisdiction shall be valid for the duration of the agreement, or eight years from the effective date of the change in jurisdiction, whichever is earlier. The parties to the development agreement and the local government assuming jurisdiction have the same rights and obligations with respect to each other regarding matters addressed in the development agreement as if the property had remained in the previous jurisdiction.

(b) A local government assuming jurisdiction may modify or suspend the provisions of the development agreement if the local government determines that the failure of the local government to do so would place the residents of the territory subject to the development agreement, or the residents of the local government, or both, in a condition dangerous to their health or safety, or both.

§ 160A-400.30. Developer to record agreement within 14 days; burdens and benefits inure to successors in interest.

Within 14 days after a local government enters into a development agreement, the developer shall record the agreement with the register of deeds in the county where the property is located. The burdens of the development agreement are binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement.

§ 160A-400.31. Applicability to local government of constitutional and statutory procedures for approval of debt.

In the event that any of the obligations of the local government in the development agreement constitute debt, the local government shall comply, at the time of the obligation to incur the debt and before the debt becomes enforceable against the local government, with any applicable constitutional and statutory procedures for the approval of this debt.

§ 160A-400.32. Relationship of agreement to building or housing code.

A development agreement adopted pursuant to this Chapter shall not exempt the property owner or developer from compliance with the State Building Code or State or local housing codes that are not part of the local government's planning, zoning, or subdivision regulations.