

# 2013 North Carolina Legislation Related to Planning and Development Regulation

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The 2013 session of the North Carolina General Assembly marked the first time in modern history that the Republican Party controlled both houses of the legislature and the Governor's Office. While significant amendments were made to state laws in many areas, this shift did not produce major new legislation on planning and development regulation. More substantial changes were made to environmental laws.

One significant legislative initiative was a comprehensive modernization of the statute regarding quasi-judicial decision making and boards of adjustment. New statutes also addressed development near military bases, removal of vegetation for billboard visibility, and billboard repair and replacement. Legislation was considered, but not adopted, to limit use of design standards in development regulation, to eliminate zoning protest petitions, and to change municipal extraterritorial planning jurisdiction.

In related fields, a major initiative was adopted to establish stronger data-driven priorities for transportation funding. New state programs were established to promote energy development, regulate hydraulic fracking for natural gas production, and regulate wind energy projects. Other legislation reconstitutes major environmental regulatory commissions.

## Zoning and Development Regulation

### Quasi-judicial Procedures and Boards of Adjustment

Session Law (hereinafter S.L.) [2013-126](#) (H 276), effective October 1, 2013, modernizes the board of adjustment statute. The new legislation does not drastically alter the fundamental aspects of the prior law, but it does make several important changes. The bill was proposed by the North Carolina Bar Association. It had general support from most affected parties and was unanimously approved by both the House of Representatives and the Senate.

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The new law includes a number of stylistic and organizational changes to clarify the statute. Outdated, awkward, and confusing language and syntax are removed. Gender-neutral language is used throughout. Related provisions are consolidated and section headings are added for readability. The separate section on boards of adjustment in the county statutes is repealed and replaced with Section 153A-345.1 of the North Carolina General Statutes (hereinafter G.S.), a cross-reference to the city statute. This change eliminates current and future city-county differences. The law incorporates reference to recent legislation (G.S. 160A-393) on judicial review of quasi-judicial decisions.

The act also modernizes the statute and establishes uniform procedures to be applied across the state. Several provisions were added to the statutes to codify case law on various points, particularly the basic due process rules for all quasi-judicial zoning matters set by *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458 (1974).

### ***Specialized Boards***

In addition to the standard board of adjustment, G.S. 160A-388(a) now authorizes (but does not require) appointment of specialized boards to hear technical appeals. Some cities and counties have expressed an interest in having such special boards to hear appeals on stormwater plans, subdivision plats, or other engineering and technical matters. The law also continues to allow an ordinance to designate the planning board or governing board to hear any quasi-judicial matter.

### ***Notice of Hearings***

G.S. 160A-388(a2) creates a uniform notice requirement for hearings on quasi-judicial matters. The prior law required “reasonable notice to parties,” and local ordinances defined this notice in varying ways, if at all. The new notice provisions are similar to those required for a zoning map amendment, with the exception that newspaper published notice is not mandated. Notice of the hearing must be mailed to the person who submitted the application that is the subject of the hearing, the owner of the affected property (if that is not the person requesting the hearing), adjacent owners, and anyone else entitled to mailed notice under the local ordinance. A notice of the hearing must be posted on or adjacent to the site that is the subject of the hearing. Both the mailing and posting must be made in the ten- to twenty-five-day period prior to the hearing.

### ***Hearing Process***

Reflecting the law established in *Humble Oil*, G.S. 160A-388(e2) provides that decisions must be based on competent, material, and substantial evidence in the hearing record. The new law makes several adjustments to hearing practices. G.S. 160A-388(f) authorizes the board’s clerk to administer oaths to witnesses. Previously the law provided that the board chair would administer oaths, which is still also allowed. G.S. 160A-388(g) clarifies the process for requesting and objecting to subpoenas. Requests are made to the board chair by a person with standing to participate in the hearing. The chair is to issue subpoenas that are “relevant, reasonable in nature and scope, and not oppressive.” The chair is also to rule on motions to quash or modify a subpoena. Appeals of rulings on subpoenas may be made to the full board. False testimony under oath remains a misdemeanor, but the provision of the prior law limiting the use in any subsequent legal action of testimony made pursuant to a subpoena is now deleted.

### **Decisions**

Again codifying the law from *Humble Oil*, G.S. 160A-388(e2) provides that decisions must be in writing and reflect the board's determination of contested facts and the application of those facts to the applicable standards. The statute goes on to provide that the decision must be made in a reasonable time and be signed by the chair or other duly authorized member. The decision is effective when it is filed with the clerk to the board or another official specified by the ordinance. The decision must be delivered to the applicant, the property owner, and any other person who prior to the effective date submitted a written request for a copy of the decision. It can be delivered by personal delivery, electronic mail, or first-class mail. The person required to make delivery must certify that proper notice of the decision has been made.

These changes strongly suggest that a letter or other written decision document should be prepared for each quasi-judicial decision. In the past some boards relied on the minutes of the board meeting to serve as the written record of its decisions.

### **Appeals**

G.S. 160A-388(a1) defines the decisions that are subject to these appeals. It codifies the rule on the jurisdiction of the board by specifying that the decisions that can be appealed to the board are "any final and binding order, requirement, or determination" made by an administrative official charged with enforcement of a zoning or unified development ordinance. The ordinance may, but is not required to, assign appeals of decisions on other development regulations to the board of adjustment.

A number of changes were made regarding appeals to the board of adjustment. G.S. 160A-388(b1) consolidates the provisions on these appeals.

Appeals are initiated by a person with standing to appeal. A notice of appeal must be filed with the city or county clerk and must state the grounds for the appeal. New issues may be raised at the hearing, but if doing so would unduly prejudice a party, the board must continue the hearing to allow time for an adequate response.

The act adds a uniform time to make appeals to the board. Appeals must be filed within thirty days of notice of a final, binding administrative decision. Previously the law allowed each individual ordinance to set a time limit for making an appeal.

A question now arises of when this thirty-day period begins to run. G.S. 160A-388(b1)(2) stipulates that a final, binding determination by a zoning administrator must be provided in writing and delivered by personal delivery, electronic mail, or first-class mail to the person requesting it. That person then has thirty days from receipt of the decision to make the appeal. Any other person with standing, such as an affected neighbor, has thirty days from receipt of actual or constructive notice of the decision to file an appeal. An example of actual notice would be receipt of a copy of the decision, such as is provided to the person requesting the decision. Constructive notice can be provided by activity on the site, such as grading, surveying, or other clearly visible indicators that a regulatory determination has been made. Constructive notice can, however, be nebulous. For example, if the determination addressed building height or a particular land use, the construction or activity on site would have to proceed to the stage that the implications of the determination become visible to a neighbor. G.S. 160A-388(b1)(4) adds an alternative for owners who want a more definitive point for determining that constructive notice has been provided. It gives the landowner the option of posting notice of the determination on the site to provide constructive notice to parties who may appeal that determination to the board of adjustment. This posted notice can be provided for zoning or subdivision determinations and

is the responsibility of the owner, not the local government. It is not mandatory unless the local ordinance requires it. Posted signs must be prominent, must include contact information for the local official making the decision, and must remain on the site for at least ten days. The owner must verify the posting to the local government. If a posting is made, constructive notice has been provided, and the thirty-day period to appeal begins to run from the date the notice is first posted.

Once an appeal is made, the official who made the decision being appealed must compile all of the documents and exhibits related to the matter and transmit this record to the board. A copy of this administrative record must also be provided to the person making the appeal (and to the landowner if that is not the person making the appeal).

As with the prior statute, an appeal of an enforcement action stays enforcement unless there is imminent peril to life or property or the violation is transitory in nature. In those instances where enforcement is not stayed, the appellant may request an expedited hearing. If that request is made, the board must meet within fifteen days to hear the appeal. An appeal does not stay further processing of permit applications, but the appellant may request, and the board may grant, a stay of a final decision or issuance of building permits pending resolution of the appeal. Such a stay or issuance of a permit does not occur automatically; the appellant must request it.

Zoning officials whose determinations are appealed must appear as witnesses at the appeal hearing.

When the board of adjustment hears an appeal from another board, the statute confirms that the board does not take any new evidence but rather reviews the record made by the other board's hearing. For example, in the review of a decision on a certificate of appropriateness made by a historic preservation commission, the board of adjustment acts as an appeals court and does not conduct a new hearing.

The law also expressly authorizes the parties to an appeal to agree to voluntary alternative dispute resolution (such as mediation). The zoning ordinance may set up procedures to facilitate and manage this process.

The statute eliminates the provision in prior law for the board of adjustment to hear cases involving disputed lot lines. The rationale for this deletion is that the board has no particular expertise on surveying or property boundaries; thus these issues are best resolved judicially if necessary. Since the location of zoning district boundaries is an interpretation of the ordinance, a staff determination of those lines can be appealed to the board.

Finally, the statute now requires only a simple majority vote for board decisions on appeals. Previously a four-fifths vote was required to overturn a staff decision or rule in favor of an appellant on an appeal. The statute was also clarified to provide that only the seats occupied by members eligible to vote on a matter are considered when calculating the requisite majority vote (that is, vacant seats and the seats of members disqualified from voting due to a conflict of interest are not considered in the calculation if no alternate is available to occupy that seat for the matter). The seats of members who are simply absent or who do not vote are counted for calculation of required majorities.

#### ***Special and Conditional Use Permits***

The only substantial amendment specifically applicable to special and conditional use permits involves voting majorities. G.S. 160A-388(e) now provides that only a simple majority is required for the board of adjustment to issue these permits. A similar change was made in 1981 for governing board and planning board decisions on special and conditional use permits.

### ***Variances***

The standard for variances is simplified by deleting the “practical difficulty” language. It retains the requirement for a showing of “unnecessary hardship,” which under North Carolina case law has long been the principal consideration for variances.

One of the more significant substantive changes made by the law is clarification as to what should be deemed an unnecessary hardship. G.S. 160A-388(d) provides that the hardship must result from conditions peculiar to the property (such as location, size, or topography), not the personal circumstances of the applicant. Hardships common to the neighborhood or general public also do not qualify for a variance (on the rationale that those hardships were anticipated and relief from them is more appropriately obtained through an ordinance amendment). A self-created hardship cannot be the basis for a variance, though purchasing the property knowing that circumstances exist that might justify a variance cannot be deemed a self-created hardship (as the new owner essentially steps into the shoes of the prior owner and is eligible to make the same request as that owner could have made). Finally, although the alleged hardship must be real and substantial, the applicant is not required to show no reasonable use could be made of the property without a variance. The statute continues the prohibition on use variances and the requirement that any variance be consistent with the spirit, purpose, and intent of the ordinance. Conditions on variances are also still authorized.

The four-fifths majority vote is retained for variances. Several local governments were subject to local legislation changing the four-fifths majority rule. These new rules are preserved until June 30, 2015, to allow time for consideration of new local legislation if there is an interest in extending these particular provisions.

Variances for development ordinances other than zoning are authorized but not required.

### **Development near Military Bases**

Two new laws affect development and notice of potential development near military bases.

**S.L. 2013-59** (H 254) amends provisions regarding notice to military bases concerning adoption or amendment of local land use ordinances. It amends G.S. 160A-364(b) and G.S. 153A-323(b), which previously required notices of pending zoning map amendments be provided to base commanders. The updated law, effective May 22, 2013, expands the types of development regulation notices that must be submitted to the military base for review and comment. If no comments are received in thirty days, the opportunity to comment is deemed to be waived.

If the ordinance changes affect areas within five miles of a base perimeter, written notice must now be provided for the following:

1. Zoning maps
2. Permitted land uses
3. Telecommunication towers and windmills
4. New major subdivision preliminary plats
5. An increase in the size of an approved subdivision by more than 50 percent of its land area

While the statute addresses submission of proposed ordinances for review and comment, the last two items listed above concern individual project review rather than legislative amendments, thereby creating some ambiguity.

**S.L. 2013-206** (H 433) addresses construction of structures over 200 feet tall near military bases. The law (G.S. 143-151.70 to G.S. 143-151.77) is known as the “Military Lands Protection

Act of 2013" and is effective October 1, 2013. It applies to specified major military installations, including Fort Bragg and Pope Airfield, Seymour Johnson and the Dare County bombing range, Camp Lejeune (including New River and Cherry Point), the Elizabeth City Coast Guard Base, the ocean terminal at Sunny Point, the Naval Support Activity Northwest (on the Virginia–North Carolina border at Chesapeake), and the radar facilities at Fort Fisher. Associated support facilities for these installations located in the state are also covered.

The law prohibits cities and counties from authorizing (and persons from constructing) buildings or structures over 200 feet tall within five miles of these military bases unless the Building Code Council has issued a letter of endorsement for the structure. Cities and counties may not authorize extension of electricity, telephone, water, sewer, septic, or gas utilities to any unapproved tall structure. Entities proposing a tall structure must submit a notice of intent to seek an endorsement to the affected base commander and must provide such notice and a "Determination of No Hazard to Air Navigation" from the Federal Aviation Administration (FAA) to the Building Code Council. The council submits the application to the base for a review period of up to forty-five days and must deny endorsement if the base determines the proposed structure would interfere with the mission, training, or operation of the military installation or if no FAA determination is provided. The council must act on the application within ninety days. Prior existing tall buildings may not be reconstructed, altered, or expanded in ways that would aggravate or intensify a violation of these requirements. Civil penalties of up to \$5,000 are authorized for violations.

### **Cell Tower Modifications**

Federal legislation in 2012 (47 C.F.R. Part 1, App. B, § I.C.) extending payroll tax cuts and unemployment benefits included a provision broadening federal preemption of local regulation of cell tower modifications. It provides that state or local governments "shall approve" any eligible request to make modifications to an existing wireless tower or base station that do not "substantially change" the tower or base station. Eligible requests include collocation of new transmission equipment and replacement of existing equipment. The Federal Communications Commission in 2013 provided notice that it interprets this law using the same standards for defining a "substantial modification" that were previously set in the context of reviewing collocation agreements and facilities in historic districts.

**S.L. 2013-185** (H 664) amends G.S. 160A-400.50 to G.S. 160A-400.53 and G.S. 153A-349.50 to G.S. 153A-349.53 to conform state law to these federal changes. The act notes that it is state policy to facilitate placement of wireless telecommunication support facilities in all parts of North Carolina. It sets state standards regarding expedited review of collocation and minor modifications requests. Minor modifications include the following:

1. Adding not more than 10 percent or the height of one additional antenna array to the tower (with a 20-foot separation from the nearest existing antenna)
2. Adding not more than 20 feet in width or the width of the support structure at the level of the new appurtenance
3. Adding not more than 2,500 square feet to the existing equipment compound

Minor modifications (termed "eligible facility requests" by the statute) must be approved. An application is deemed complete unless the local government objects within forty-five days. Approval is required within forty-five days of an application being deemed complete. If the application is for a collocation that does not qualify as a minor modification, a decision to

approve or deny must be made in the same forty-five-day period. Fees for collocation requests are capped at \$1,000. The fee may not include consultant travel costs or a consultant contingency fee.

### **Bona Fide Farm Zoning Exemption**

The initial authorization for county zoning in 1959 included an exemption for agricultural operations. In recent years the scope of the farming exemption from county zoning has expanded to include silviculture, horticulture, aquaculture, agritourism, and the like. The trend toward more expansive definitions of exempt activity continued in 2013.

[S.L. 2013-347](#) (S 505) adds grain drying and storage facilities to the county zoning exemption for bona fide farming activities and expands the permissible location of farm activities. This law amends the definition of *agriculture* in G.S. 106-581.1 to include grain warehouses and warehouse operations that receive, load, weigh, dry, and store grain. The zoning exemption in G.S. 153A-340(b) is amended to include these grain storage facilities. G.S. 153A-340(b) is also amended to expand where farming activity can take place and still allow application of the zoning exemption to marketing, selling, processing, storing, and similar activity related to farm products. The law now exempts these activities for farm products produced not only on the farm property within the county's zoning jurisdiction but also those products produced on any other farm owned or leased by the farmer, wherever located.

### **Fraternity and Sorority Zoning**

A special provision related to zoning of fraternities and sororities was tucked in an omnibus regulatory reform bill adopted in 2013. Section 6 of [S.L. 2013-413](#) (H 74) provides that a city or county zoning or unified development ordinance may not differentiate between those fraternities and sororities that are approved or recognized by a college or university and those that are not. If a development ordinance would allow a sanctioned fraternity house in a particular zoning district, it must also allow unsanctioned houses. Similarly, special or conditional use permits for fraternity or sorority houses may not include a condition that the organization be sanctioned by a college.

### **Development Agreements for Brownfield Sites**

Cities and counties are authorized to enter development agreements that create vested rights for up to twenty years for approved development projects. The law provides that sites subject to development agreements have at least 25 developable acres. Section 44 of the omnibus regulatory reform bill adopted in 2013 ([S.L. 2013-413](#)) deletes the minimum acreage requirement in G.S. 153A-349.4 and G.S. 160A-400.23 if the property involved is subject to an executed brownfields agreement.

### **Definitions for Facilities Serving Food or Providing Lodging**

Two sections of the omnibus regulatory reform bill, [S.L. 2013-413](#), amend definitions of facilities subject to state public health regulations. These facilities are often subject to local zoning and development regulation as well. Occasionally local ordinances use or cross-reference the state definitions. Therefore these amendments may have modest effect on some zoning regulations.

Section 11 revises the definition of a *bed and breakfast* inn or home. These are facilities that are the permanent residence of the owner or manager and provide up to eight guest rooms with accommodations for periods of less than a week. The law revises G.S. 130A-247 to allow these

inns to provide three meals a day, provided the meals are not offered to the general public and the cost of any meals is included in the room rate.

Section 7 revises the definition of a *private club* in G.S. 130A-247 to include facilities deemed private clubs under the Alcholic Beverage Control law in G.S. 18B-1000.

### **Local Bills**

Two local bills modify zoning provisions for individual cities.

[S.L. 2013-264](#) (H 538) repeals G.S. 160A-393 (regarding judicial review of quasi-judicial decisions) and G.S. 160A-377 (appeals of subdivision plat decisions if they involve a quasi-judicial determination) for Apex, effective for quasi-judicial decisions made there after October 1, 2013. The stated purpose of this bill was to allow town board members to continue to communicate with residents about pending quasi-judicial matters. Of course the constitutionally based prohibition on undisclosed ex parte communications in quasi-judicial decision making continues to apply in Apex.

[S.L. 2013-270](#) (S 288) amends the text of the Aberdeen zoning ordinance to allow multifamily housing on three specific parcels totaling seven acres. Other than the multifamily allowance, development on the parcels must comply with the zoning regulations applicable to properties zoned R-10 as of March 1, 1989.

### **Bills Eligible for Consideration in 2014**

In previous legislative sessions, several local governments secured approval to post notices of public hearings on zoning amendments electronically rather than publishing the notices in newspapers. As with several recent sessions, bills were filed in 2013 to add other local governments to this list (H 504) and to extend this option to all local governments (S 186). Newspapers strongly objected to these bills. Senate Bill 287 included a provision to allow electronic notice in lieu of published notice for Mecklenburg and Guilford counties and the municipalities in those counties. The bill passed both houses but was not enacted since a conference report reconciling the differences between the two adopted versions of the bill was not acted upon.

House Bill 769, which passed the House but not the Senate, would prohibit county zoning ordinances from prohibiting the placement of manufactured homes on individual lots in single-family zoning districts (except in historic districts). The bill is eligible for consideration in 2014.

A recurring issue in some communities has been the location of temporary housing for a health care provider on a lot that already has a principal dwelling. A bill on this topic passed the House in 2011 but was not taken up by the Senate. A similar bill, House Bill 625, passed the House in 2013 and is eligible for further consideration in 2014. The bill would require that a temporary residence for a relative providing care for a mentally or physically impaired person be allowed as a permitted accessory use in any single-family zoning district. The bill limits the temporary structure in several ways. It (1) would have had to have been a transportable unit primarily assembled off-site, (2) can be no larger than 300 square feet, (3) is limited to occupancy by one person, (4) cannot be placed on a permanent foundation, and (5) must be removed within sixty days after care giving ceases.

In the waning days of the legislative session, the regulatory reform bill (House Bill 74) was amended to include a provision eliminating zoning protest petitions. After spirited debate this provision was adopted by the House, but it was deleted without debate by the Senate and not included in the version of the bill finally enacted.

## Community Appearance and Historic Preservation

### Billboards

Two provisions of [S.L. 2013-413](#) (H 74) concern outdoor advertising, one regarding cutting vegetation and the other repair and replacement of billboards.

The North Carolina Department of Transportation (NCDOT) administers permitting for billboards within 660 feet of interstate and federal-aid primary highways. Section 8(a) of S.L. 2013-413 allows owners of those NCDOT-permitted billboards to request tree cutting outside of the standard cut zone along on- and off-ramps as long as it will improve sign visibility and the total area of cutting does not exceed the permitted maximum. Governor McCrory's Executive Order No. 23 calls for NCDOT to consult with local governments before authorizing the expanded cut zone.

Section 8(b) of S.L. 2013-413 provides that local governments may not regulate or prohibit the repair or reconstruction of any billboard with a valid NCDOT permit. Such repair or reconstruction may not, however, increase the square footage of the advertising surface area. The new law explicitly authorizes changing an existing multipole structure to a new monopole structure. Other changes are not expressly authorized or prohibited. Could a sign owner change a conventional billboard to an electronic billboard? Could the owner increase the height of the billboard? The answer is not clear and will depend on the applicable NCDOT rules. North Carolina courts previously affirmed that state permit rules trump local prohibitions against reconstructing nonconforming signs. The new legislation appears to go further and establish protection for repairing and reconstructing both conforming and nonconforming signs.

### Enforcement against Terminated Uses

In the case of lawfully nonconforming uses that have been terminated, S.L. 2013-413 now requires that local governments "bring an enforcement action" within ten years of "the date of the termination of the grandfathered status." The new legislation may apply to two separate scenarios: an expired amortization period or the restarting of a former nonconforming use.

First, consider the expired amortization period. Imagine a local government adopted a new ordinance limiting doughnut shops and provided a twelve-month amortization period for existing doughnut shops to comply. After the twelve-month amortization period, existing doughnut shops must comply with the new rules or face enforcement actions. Under the new legislation, the local government must bring such enforcement action within ten years of the expiration of the amortization. After that ten-year period of no enforcement, a noncompliant doughnut shop may continue the activity or use that was originally restricted.

Alternatively, the new legislation could be read to apply to restarting a former nonconforming use. A local government may prohibit the restarting of a terminated nonconforming use for ten years from the time when the nonconforming status expired under the local ordinance. The implication is that after ten years, the nonconforming status may be reestablished. Generally, this is a nonissue; most terminated nonconforming uses are unlikely to relaunch after ten years of inactivity. But there may be a rare circumstance where a use formerly was lawfully nonconforming, sat quiet for eleven years, and then relaunches. The local government would not have an option for enforcement except in the case of a public safety concern.

### Other Legislation Related to Community Appearance

Additional laws concern matters of community appearance, including chronic violators of public nuisance ordinances, recycling stockpiles, and protection of farm operations.

G.S. 160A-200.1 sets the procedures for notifying chronic violators of a public nuisance ordinance. [S.L. 2013-151](#) (S 211) provides an additional option for notice. In addition to sending notice by registered or certified mail, the municipality may send notice by regular mail. Notice may be deemed sufficient if the regular mail is not returned by the post office within ten days of mailing and the notice is conspicuously posted on the premises in violation. Such notice is sufficient even if the registered or certified mail is unclaimed or refused.

Section 50 of S.L. 2013-413 provides that when nonhazardous recycling materials are stored in properly zoned storage facilities, local governments may not regulate the height or setback of the recyclable material stockpile except when it is on a lot within 200 yards of a residential district.

[S.L. 2013-331](#) (H 646) provides that no ordinance regulating trees may be enforced on land owned or operated by a public airport authority.

[S.L. 2013-314](#) (H 614) amends G.S. 106-701 to expand protection for agricultural and forestry operations (for convenience, a “farm operation”) from nuisance claims. If a farm operation is established for one year and was not a nuisance at the time it began, then an off-site change (new residential development, for example) will not make the farm operation a nuisance. A nuisance may be established if there is a fundamental change in the farm operation, although the legislation limits what may qualify as a fundamental change. Agricultural operations may include, among other things, commercial production of crops, livestock, poultry, and related products and appurtenances. Forestry operations include growing, managing, and harvesting trees. Sawmills are no longer excluded from the definition of forestry operations. If a nuisance claim is brought against a farm operation, attorneys’ fees may be awarded if the losing party (either the plaintiff asserting the claim or the defendant asserting an affirmative defense) made frivolous or malicious claims.

### **Local Bills**

[S.L. 2013-317](#) (H 186) provides that the towns of Cornelius, Davidson, Huntersville, Mooresville, and Troutman may enforce municipal noise ordinances on the waters of Lake Norman, although boat engine noise has special allowance.

[S.L. 2013-182](#) (H 294) authorizes Brunswick and Dare counties to remove abandoned vessels from navigable waters within the counties’ ordinance-making jurisdiction in the same manner as those counties handle abandoned or junked motor vehicles. A vessel is abandoned if: (1) it is moored or anchored without permission of the dock owner for more than 30 consecutive days in any 180 consecutive-day period or (2) it has sunk or is in danger of sinking or is a hazard to navigation or a danger to other vessels. Shipwrecks and underwater remains in place for more than ten years are not considered abandoned vessels and continue in the legal custody of the Department of Cultural Resources.

### **Bills Eligible for Consideration in 2014: Design Controls**

Legislation to limit local regulation of residential design and aesthetics had strong support when it passed the House but stayed in Senate committee. So the Senate could act on House Bill 150 in the 2014 legislative session. This bill prohibits regulation of building design elements for structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings. *Building design elements* are defined to include building color; siding style and materials; roof and porch style and materials; ornamentation; location and styling of windows and doors (including garage doors); and number, type, and layout of rooms. The inclusion of number, type,

and layout of rooms raises questions about other common zoning provisions. Residential units, for example, may be defined based on the number of kitchens included in the living area. The language of the design control bill may limit a local government's ability to define and enforce single-family residential uses.

Exceptions are provided for historic properties and regulations needed for safety codes, for manufactured housing, and for the National Flood Insurance Program. Additionally, design elements may be addressed through conditional use permits and conditional zoning if the owner consents.

## Boundary Adjustments and Jurisdiction

### Annexation and Extraterritorial Jurisdiction

In 2011 the General Assembly substantially amended state laws on municipal annexation. From 1959 until 2011, municipalities were allowed to annex territory as land became urbanized.

When adjacent land met specific standards for population density or land subdivision, the city could unilaterally annex it. In 2011 the law was amended to provide that a proposed annexation was terminated if the owners of 60 percent of the parcels in the proposed annexation area signed an objecting petition. In 2012 the petition process was replaced with a requirement for referendum approval of voters in the area to be annexed prior to municipal annexation. The 2012 legislation also required that cities that provide water and sewer services must extend water and sewer to properties within annexed areas within three and a half years if so requested by a majority of property owners. The city must do this at no cost to the owners.

This year was quiet on the annexation front. No statewide annexation legislation was adopted in 2013. No action was taken on House Bill 79, which would have put forward to the voters a constitutional amendment to require two-thirds of the voters in an area to approve a proposed involuntary annexation and to prohibit exercise of municipal extraterritorial planning jurisdiction.

In recent legislative sessions there has also been a good deal of discussion about limiting municipal extraterritorial planning jurisdiction. As with annexation, no statewide bills were adopted on this topic in 2013. No action was taken on House Bill 276, which would have eliminated authority for municipal extraterritorial planning jurisdiction, or on House Bill 680, which would limit authority to those cities exercising extraterritorial jurisdiction as of 2013.

### Local Bills

A number of local bills affecting municipal boundaries were enacted.

Notably, authority to have any extraterritorial jurisdiction was eliminated for Asheville ([S.L. 2013-30](#), H 224). A similar bill affecting Weaverville, House Bill 531, was adopted in the House but not in the Senate. It is eligible for action in 2014. Another bill that received considerable discussion and attention involved a large mixed-use development proposed to be located south of Durham. The owner sought city annexation in order to secure city water and sewer services. The city council denied the annexation and rezoning requests. The General Assembly reversed that decision. [S.L. 2013-386](#) (S 315) requires provision of city utility services to this property at the developer's expense and mandates eventual city annexation.

A number of bills annex specified areas to individual cities. These include areas added to Bessemer City ([S.L. 2013-354](#), H 1015) and Chadbourne ([S.L. 2013-214](#), H 526). Other bills

removed territory from the corporate limits of Grifton ([S.L. 2013-315](#), H 191), Kannapolis ([S.L. 2013-217](#), H 302), Lumberton ([S.L. 2013-215](#), H 567), Marshville ([S.L. 2013-213](#), H 421), Mills River ([S.L. 2013-62](#), H 671), Salisbury (the Rowan County airport, [S.L. 2013-60](#), S 269), and Shelby ([S.L. 2013-218](#), H 409). A specified area was transferred from Kannapolis to Landis by [S.L. 2013-212](#) (H 261). [S.L. 2013-219](#) (H 412) allows Eden to accept fees in lieu of annexation for property occupied by a Duke Energy generating plant.

Two local bills affected authority for noncontiguous annexations (often referred to as satellite annexations). [S.L. 2013-32](#) (S 56) expands this authority for Wallace, while [S.L. 2013-248](#) (S 177) removes it for Hookerton and Maysville.

[S.L. 2013-68](#) (S 257) is the latest in a series of bills clarifying county boundaries, applicable to the Guilford–Alamance County boundary.

## **Building and Housing Code Enforcement**

### **Inspections**

[S.L. 2013-118](#) (H 120) provides that for buildings subject to the North Carolina Residential Code for One- and Two-Family Dwellings (including townhomes), local building code inspectors may only perform those inspections required by the North Carolina Building Code unless the local government has approval from the North Carolina Building Code Council for additional inspections or there are unforeseen or unique circumstances requiring immediate action.

[S.L. 2013-160](#) (H 468) limits permitting for the installation of any natural gas, propane, or electrical appliance to an existing structure if the installer is licensed as a plumbing and heating contractor under G.S. 87-21 or as an electrical contractor under G.S. 87-43. In those cases the local government may only require one permit and the fee may not exceed the cost of any one individual trade permit.

[S.L. 2013-117](#) (H 88) provides that certain “custom contractors” may designate a lien agent on behalf of the property owner for whom the contractor is building a single-family residence.

### **Building Code Updates**

The North Carolina Building Code Council retains authority to periodically revise and amend the State Building Code on its own motion or upon application by a citizen, state agency, or political subdivision. [S.L. 2013-118](#) now provides that the regularized updates to the Residential Code will be every six years rather than every three years. The North Carolina Residential Code for One- and Two-Family Dwellings and related provisions of the Energy Code, Electrical Code, Fuel Gas Code, Plumbing Code, and Mechanical Code will be updated only every six years as well, with the next revision scheduled to be effective in 2019. The act also provides that the Building Code Council will publish on its website and in the North Carolina Register all appeal decisions and formal opinions of the Council.

### **Building Code Exemptions**

[S.L. 2013-75](#) (H 774) extends building code exemptions applicable to certain farm buildings and greenhouses to primitive camps and primitive farm buildings. Primitive camps include structures such as shelters, outhouses, sheds, rustic cabins, tepees, and administrative support buildings. Such structures must be less than 4,000 square feet and not be intended to be occupied for more than twenty-four consecutive hours. Primitive farm buildings include sheds,

barns, and other structures used in relation to traditional or heritage farming. [S.L. 2013-265](#) (S 638) provides that a farm building may maintain exempt status even if used for events such as weddings, receptions, meetings, or demonstrations.

S.L. 2013-265 also exempts buildings used for migrant farmworker housing from fire prevention code sprinkler requirements if the building is one floor and meets certain state and federal requirements.

Section 41 of [S.L. 2013-413](#) (H 74) provides that no building permit is required for routine maintenance of fuel pumps.

## Transportation

### Strategic Transportation Investments

Perhaps the most significant legislative initiative in the field of transportation was a key part of Governor McCrory's legislative program and served to supersede some of the main features of Governor Perdue's North Carolina Mobility Act, enacted in 2010. The "Strategic Prioritization Funding Plan for Transportation Investments," [S.L. 2013-183](#) (H 817), is intended to allow NCDOT to more efficiently use its existing funds and, according to Republicans, to reduce the political influences on project selection that characterized highway funding arrangements under prior Democratic administrations. Supporters of the act, codified as G.S. 136, Article 14B, also pointed out that many transportation funding formulas were first established in 1989 and needed updating. In any event the new program appears more data-driven than prior transportation improvement programming and based more on analyses of transportation needs. The Strategic Prioritization Funding Plan, however, does not include any new sources of revenue for transportation projects or alter existing ones.

The new formulas are scheduled to be fully implemented by July 1, 2015. Projects funded for construction before then will proceed as scheduled. The Strategic Mobility Formula divides projects into three categories: statewide, regional, and division-level. Projects of statewide significance compete for 40 percent of the available revenue. The selection process for this money depends entirely upon factors such as traffic volumes, accident statistics, impact on economic competitiveness, and freight movement. Regional projects compete for 30 percent of the available revenue, which is divided among seven regions on the basis of population. Each region is composed of two of the fourteen transportation divisions. Some 70 percent of the regional project rating is based on transportation and related data factors; 30 percent of the rating is based on project rankings developed by area transportation planning organizations and NCDOT transportation division personnel. Finally, the act calls for the remaining 30 percent to be shared among all fourteen divisions equally. Half of these project rankings are based on data concerning safety, congestion, connectivity, and the like, and half on more subjective local rankings.

[S.L. 2013-410](#) (H 92), the technical corrections bill, adopted after the Strategic Prioritization Funding Plan act, affects local input regarding regional and division-level fund distribution. It requires the transportation division engineer to take into account public comments. It directs NCDOT to ensure that "the public has a full opportunity to submit public comments, by widely available notice to the public, an adequate time period for input, and public hearings."

The Strategic Prioritization Funding Plan act, S.L. 2013-183, repeals the 1989 distribution formula as well as provisions establishing the Intrastate Highway System, as defined with regard

to the 1989 Highway Trust Fund and the Urban Loop Program. However, some projects authorized under these programs that will be underway by July 1, 2015, will continue as programmed construction projects. The act calls for capital expenditures to come solely from the Highway Trust Fund instead of both the Highway Fund and the Highway Trust Fund. Operations and maintenance are now to be funded from the Highway Fund. This new delineation allows about \$1.5 billion in additional funds to be spent on capital projects over ten years.

Funds to support secondary road needs are substantially reduced. Sections 2.1 to 2.9 phase out the Highway Fund secondary road construction program by June 30, 2014, limiting funding to maintenance and improvement. The act continues to require that the NCDOT secondary road maintenance and improvement program funding be based on a uniformly applicable formula and clarifies that the system for distributing funds does not apply to projects to pave unpaved secondary roads. Arrangements for the paving of these roads are more dramatically altered. Section 2.6(c) repeals an earmarked source of funds for this program, a requirement that \$15 of each vehicle title application fee be deposited into the Highway Trust Fund and used for secondary road paving. Funding from the Highway Fund is still possible, but Section 2.5 provides that projects must be selected on the basis of statewide, rather than county, prioritization.

Section 4.5 of the act amends G.S. 136-66.3, the statute governing local participation in state transportation projects, to repeal the provisions that prohibit local governments from thereby being disadvantaged with respect to other projects and that limit NCDOT funding in exchange for the participation.

S.L. 2013-183 also changes the way state aid for municipal streets (Powell Bill funds) is handled. Section 4.8 of the act repeals the Highway Trust Fund supplement to Powell Bill funds. Section 3.1 amends G.S. 136-41.1 to change the amount of Highway Fund revenues allocated to cities from 1¼ cents per gallon of the motor fuels tax to 10.4 percent of the net amount generated during the fiscal year. These new allocations are intended to ensure that municipalities receive as much Powell Bill funding over the next five years as they would have under prior formulas. Section 3.5 provides another sign of things to come. It directs NCDOT to collect lane-mile data from each municipality eligible to receive funds and to do so by December 1, 2013. It must then report by March 1, 2014, to the Joint Legislative Transportation Oversight Committee concerning at least three options to change the distribution formula to include lane-mile data. On another front, Section 3.1 also amends G.S. 136-41.3(a) to allow Powell Bill funds to be used by cities for greenways as well as bikeways and sidewalks and to be used for these facilities regardless of whether they are located within public street rights-of-way. In addition, Section 3.4 allows cities to use funds for independent bicycle and pedestrian improvement projects inside town limits or within the area of the applicable Metropolitan Transportation Planning Organization (MPO) or Rural Transportation Planning Organization (RPO).

Section 5.1 of the Strategic Prioritization Funding Plan act expands the role of the North Carolina Turnpike Authority. It authorizes the authority to undertake nine projects. Five projects are already named in existing law: the Triangle Expressway (consisting of four different segment projects) and the Monroe Connector. Three Turnpike Authority projects previously authorized in G.S. 136-89.183—the Cape Fear Skyway, the mid-Currituck bridge, and the Garden Parkway (Gaston County)—are specifically deleted, and other sections of the act repeal specific gap funding for the last two of these. The four remaining authorized projects must meet the following conditions: two must be ranked among NCDOT's top thirty-five projects, and either or both may be subject to a partnership agreement. Of the other two, one may be subject to a partnership agreement. All four must be included in the appropriate local transportation

plan and the current state Transportation Improvement Program. Toll projects must also be approved by the affected MPO and RPO.

Sections 5.7 and 5.8 concern the southeastern segment of the Triangle Expressway. They direct NCDOT to “strive to expedite” the federal environmental impact statement process to define the route and the Joint Legislative Transportation Oversight Committee to monitor the process. Essentially identical language is found in [S.L. 2013-94](#) (H 10). The story behind this segment of the expressway has unfolded over several decades. Possible future locations of the segment were protected in the 1990s by NCDOT through the adoption of roadway corridor official maps. However, one primary corridor protected in the mid-90s involved certain environmental and transportation planning problems. So highway planners refocused their attention on two alternative routes for this portion of the expressway segment. A route alternative more to the north (the “red route”) would cut through a relatively developed, populated area of southern Garner. Presentation of this red route to the public resulted in significant local opposition. As a result, in 2011 the General Assembly amended G.S. 136-89.183(a)(2)a. to prohibit consideration of that alternative. However, federal highway authorities determined that the environmental impacts of the red route should be formally considered as an alternative, even if a third route (the “orange route”) was ultimately chosen as most appropriate. With the southeastern portion of the Triangle Expressway thus in limbo, the General Assembly in 2013 added Sections 5.7 and 5.8 to S.L. 2013-183 to delete the 2011 language prohibiting the location of the expressway in the “red” corridor. This change will enable the federal environmental impact statement process to proceed for the southeastern segment of the Triangle Expressway and, if the General Assembly has its way, for the process to be expedited.

Section 5.2 of the act allows NCDOT or the Turnpike Authority to enter into three partnership agreements with private entities for projects, subject to various requirements, including mandated public hearings on applicable toll rates. Section 5.3 authorizes the authority to retain and enforce tolls and fees and to designate high-occupancy toll (HOT) lanes. It also expands the purposes for which the authority may use revenues derived from turnpike projects.

Finally, Section 6.1 of S.L. 2013-183 requires NCDOT to submit reports to the General Assembly on its recommended formulas for ranking projects in the new Strategic Prioritization Plan on August 15, 2013, October 1, 2013, and January 1, 2014. Section 6.2 requires the department to submit reports to the General Assembly on its transition to the new plan on March 1, 2014, and November 1, 2014.

### NCDOT Driveway Permits

NCDOT has adopted rules and policies concerning the size, location, direction of traffic flow, and the construction of driveway connections into State Highway System roads. In exercising this authority under G.S. 136-18(29), NCDOT may require the construction and public dedication of acceleration lanes, deceleration lanes, traffic storage lanes, and medians as they connect with any United States route, North Carolina route, or any secondary road route with an average daily traffic volume of at least 4,000 vehicles per day. These requirements, however, must be adequately related to the traffic generated by the development served by the driveway.

[S.L. 2013-245](#) (H 785) allows NCDOT to establish a statewide pilot program for sharing the costs of “oversized” transportation improvements in connection with driveway permits that should not legally be assigned to a single driveway permit applicant. The department is authorized to develop a formula for apportioning costs on a project-by-project basis between NCDOT

and private property developers. A developer is not required to participate in the program in order to obtain any necessary driveway permit.

The department must report on the pilot program to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division of the Legislative Services Commission no later than the 2021 legislative session.

A second act, [S.L. 2013-137](#) (H 684), concerns stretches of roadway where minimum sight distances between driveways are not established in NCDOT's "Policy on Street and Driveway Access to North Carolina Highways." This uncodified law directs the department to "consider exceptions" to the sight-distance requirements for driveway locations where road curves are close and frequent. The law then directs that exceptions must be granted where sufficient sight distances can be provided through the use of advisory speed signs, convex mirrors, and advanced warning signs. NCDOT may also consider lowering the speed limit on the relevant "curvy road." S.L. 2013-137 expressly permits NCDOT to assign the cost to the applicant of installing appropriate signage (speed limit reduction and driveway warning signs) around the driveway and installing and maintaining convex or other mirrors to increase traffic safety. The law directs the department to report to the Joint Legislative Oversight Committee on Transportation on the implementation of the law within 180 days of the date the act became law (June 19, 2013).

### Sidewalk Dining

One of the more intriguing legislative actions this year could renew interest in sidewalk dining in municipalities across the state. Until July 13, 2013 (the effective date of the act described below), NCDOT lacked authorization to allow restaurants to serve food and drink on sidewalk tables located within the right-of-way of a state highway or street. Municipalities have been free to allow or encourage the use of the right-of-way of city streets for this purpose. However, in many towns and cities at least some of the streets in downtown or other pedestrian-oriented areas are maintained by NCDOT. Even where wide sidewalks run along the business routes of U.S.- or N.C.-numbered roads, abutting restaurant owners were not free to serve customers seated at tables on sidewalks within the NCDOT right-of-way.

[S.L. 2013-266](#) (H 192) amends G.S. 136-18(9) and adds a new G.S. 136-27.4 to address this issue. Rather than delegate permitting authority directly to affected local governments, the act authorizes NCDOT to enter into an agreement with a city or county that wishes to allow the use of state rights-of-way within the local government's zoning jurisdiction. Certain standards apply. The posted speed permitted on the street adjacent to the sidewalk dining area may not exceed 45 miles per hour. Restaurant furniture must be placed at least 6 feet from any street travel lane and in a way that would permit at least 5 feet of unobstructed paved sidewalk to remain clear and offer adequate passing space. In addition, any benefitting restaurant owner must provide evidence of adequate liability insurance that protects both the local government and NCDOT and agree to indemnify either of them in case of any claim arising from the operation of sidewalk dining activities. Nothing prevents either the local government or NCDOT from refusing to allow such activities if they cannot be conducted in a safe manner. If the street or highway involved is a federal-aid route, then sidewalk dining activities must also be permitted by the Federal Highway Administration.

### Ethics Standards for MPO and RPO Members

S.L. 2013-156 (S 411) is intended to restrict various ethics requirements (such as submitting a statement of economic interest) to voting members of Metropolitan Transportation Planning Organizations (MPOs) and Rural Transportation Planning Organizations (RPOs). Legislation adopted in 2012 had expanded state ethics requirements to MPO and RPO employees and advisory committee members as well. This regulatory reach was likely greater than originally intended.

### Charlotte Airport

The General Assembly adopted two acts concerning Charlotte Douglas International Airport, which is currently owned and operated by the City of Charlotte. The first (S.L. 2013-272 (S 380)) would have transferred airport ownership and control to a newly created regional airport authority. Soon after this act became effective, the City of Charlotte obtained a court-issued temporary restraining order prohibiting the transfer. In response, legislators passed a second act (S.L. 2013-358 (S 81)) to avoid the conclusion that the first legislative action was unauthorized. It created an airport commission that would be an agency of city government responsible for all airport operations. The city retains ownership of the airport assets. The matter seems to be headed to court.

## Environment

### Preemption of New Environmental Ordinances

Section 10.2(a) of S.L. 2013-413 (H 74) acts as a moratorium on local ordinances related to environmental issues through October 1, 2014. Under the new law, a local government may not enact an ordinance regulating a field that is also regulated by a state or federal statute or rule enforced by an environmental agency unless that local government approves the ordinance by unanimous vote of the members voting.

The defined *environmental agencies* include, among others, the Department of Environment and Natural Resources (DENR), the Environmental Management Commission (EMC), the Coastal Resources Commission, the Commission for Public Health, and the Sedimentation Control Commission. Given the broad coverage of the agencies identified as environmental agencies, this preemption rule covers many topics traditionally addressed by local regulation, such as stormwater controls, sedimentation controls, and stream buffers.

In conjunction with the moratorium on local environmental ordinances, the new law directs the Environmental Review Commission (ERC) to study the circumstances in which a local government should be able to regulate a field also regulated by environmental agencies. The commission will report its findings during the 2014 Session.

The legislation prohibits *enactment* of ordinances, except by unanimous vote. A plain reading of the law finds that existing ordinances may be maintained and enforced.

### Membership of State Environmental Commissions

Section 14.23(a) of S.L. 2013-360 (S 402) alters the membership of the EMC, the Coastal Resources Commission, and the Coastal Resources Advisory Commission. The new law terminates the terms of prior board members and adjusts the required qualifications for commission members. The EMC has been reduced from nineteen to fifteen members. Under the former

law, nine of the board members must not have had significant financial income from regulated industries or individuals. The new law eliminates that requirement. The Coastal Resources Commission now has thirteen members (previously, fifteen). The Coastal Resources Advisory Council now has twenty members (previously, forty-five).

### **Permitting Review**

Section 58.(a) of S.L. 2013-413 provides that the DENR, along with the Departments of Transportation and Health and Human Services and certain local governments, will review the process for environmental permit programs. The review will include examination of the role of professional engineers and the unauthorized practice of engineering, the scope of review of each permitting process, and ways to streamline the permit process. DENR will report its findings to the ERC by January 1, 2014. The ERC, in turn, will study the matter with the North Carolina State Board of Examiners for Engineers and Surveyors and the Professional Engineers of North Carolina and report its findings to the 2014 General Assembly.

### **Stormwater and Water Quality**

**S.L. 2013-395** (S 515) delays implementation of the Jordan Lake Rules until July 1, 2016. Jordan Lake has suffered from poor water quality resulting from upstream runoff since the lake's initial impoundment in 1983. In response, the General Assembly instructed the state EMC to address the high nitrogen and phosphorous levels in the lake. The rulemaking process began in the late 1990s when the EMC established a reservoir model and continued through stakeholder meetings and refinements from 2003–2008. The final rules were approved by the EMC in 2008. The General Assembly modified some provisions of the rules during the 2009 legislative session. The new act delays implementation until 2016. For additional information, see DENR's [Jordan Lake Rules](#) background materials.

For local governments enforcing the Sedimentation and Pollution Control Act, Section 33 of S.L. 2013-413 provides that a notice of assessment must state that the violator must either pay the assessment or contest it within thirty days.

For implementation under the state's stormwater runoff rules and programs, Section 51.(a) of S.L. 2013-413 excludes wooden slatted decks, the water area of swimming pools, or gravel from the definition of *built-upon area* in G.S. 143-214.7.

Section 52.(a) of S.L. 2013-413 exempts agricultural ponds from riparian buffer rules.

**S.L. 2013-121** (H 279) authorizes DENR to transfer stormwater runoff permits, water pollution source permits, and approved erosion and sedimentation control plans to new property owners provided there is no substantial change to the permitted activity. The department may not impose new or different terms and conditions upon such permits or plans without consent of the new owner except to comply with changes in law since the original permit issuance. The transfer of an erosion and sedimentation control plan is subject to the same local government review as for initial plan approval. Local governments administering erosion and sedimentation control programs are similarly authorized to transfer erosion and sedimentation control plans to new property owners.

**S.L. 2013-82** (H 480) directs DENR to develop Minimum Design Criteria for stormwater runoff permits. The department will submit its recommendations to the ERC by September 2014. In conjunction, the EMC will adopt rules to allow fast-track permitting without technical review for stormwater management system plans that comply with the Minimum Design Criteria and are prepared by professionals determined by the commission to be qualified to do so.

### **Surface Waters and Shorelines**

Section 56.(a) of S.L. 2013-413 allows any water treatment plant authorization that has expired within the last ten years to be reauthorized to allow its system to withdraw surface water at the same rate from the same water body as in the expired authorization. Reauthorization does not require the state environmental document typically required for authorizations.

During a declared water shortage emergency, [S.L. 2013-265](#) (S 638) allows a landowner to continue to withdraw water for agricultural activities from surface waters wholly located on the landowner's property or from groundwater sources unless the applicable state agency determines that the groundwater withdrawal causes negative impacts on neighboring groundwaters.

S.L. 2013-265 directs DENR and the N.C. Department of Transportation to jointly petition the Wilmington District of the U.S. Army Corps of Engineers to allow greater flexibility to perform stream and wetland mitigation outside of the immediate watershed where the impacting development occurs.

[S.L. 2013-384](#) authorizes cities to enforce local ordinances to protect the public's rights to use state ocean beaches and to regulate placement of personal property on these beaches. Cities may enforce such ordinances on state ocean beaches within or adjacent to the municipal boundaries. The North Carolina Court of Appeals recently held in *Town of Nags Head v. Cherry, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 723 S.E.2d 156, 157, *appeal dismissed*, 366 N.C. 386, 732 S.E.2d 580, *review denied*, 366 N.C. 386, 733 S.E. 2d 85 (2012), that only the state has authority to protect the public's rights to use the state's public trust ocean beaches. The new legislation responds to the *Cherry* case and clearly authorizes municipalities to enforce local ordinances on public trust ocean beaches. The issue of whether counties are authorized to enforce similar ordinances on beaches has not been addressed.

S.L. 2013-384 also adjusts legislation enacted in 2011 regarding terminal groins on ocean beaches. In the 1980s the Coastal Resources Commission adopted regulations to prohibit "shoreline hardening" of ocean beaches. While measures such as beach nourishment were allowed, construction of bulkheads, seawalls, groins, jetties, and similar "hard" structures that attempt to stabilize the shoreline location was prohibited. The General Assembly codified this general policy into the statutes in 2003. In 2011, G.S. 113A-115.1(d) was adopted to require permitting up to four terminal groins constructed in association with beach nourishment projects. The statute specified the analysis and information needed for permit applications for terminal groins and required a plan to monitor, mitigate, and finance mitigation of any adverse project impacts. S.L. 2013-384 amends this statute by: (1) allowing terminal groins to include more than one structure; (2) deleting the requirement for a showing that structures be "imminently" threatened as a prerequisite to the project and that nonstructural alternatives are impractical; (3) providing that the mitigation plan may not impose costs that exceed the benefits of the nourishment project; (4) allowing use of local taxes and property owners' association assessments as financial assurances for management plan implementation; and (5) deleting the requirement that the management plan include restoration of public, private, or public trust property rights adversely affected by the project. The law also repeals DENR authority to adopt implementing rules.

### **Solid Waste**

[S.L. 2013-409](#) (H 321) provides that local governments are no longer required to adopt a solid waste management plan. Local governments still must report annually to DENR on the locality's solid waste management program, and topics previously included in the solid waste

management plan are now required in the report. These include disaster debris management, scrap tire disposal, white goods management, prevention of illegal dumping and litter, and abandoned manufactured homes (if a county opts to manage those).

S.L. 2013-55 (H 706) provides that demolition debris from decommissioned manufacturing buildings—including electric generating stations—may be disposed on-site and is exempt from permitting as a solid waste management facility. In order to qualify, the material disposed must be inert debris (such as masonry, sand, gravel, or concrete) categorized as nonhazardous. The disposal must be within the footprint of the decommissioned building, be at least 50 feet from the property boundary, be 500 feet from the nearest drinking well, positioned to avoid the seasonal high groundwater table, be covered with 2 feet of graded soil, and comply with other applicable laws. The location of the debris must be filed with the county register of deeds and certified to DENR. Subsequent land transactions must state that the property contains demolition debris.

Under prior law sanitary landfills could not be located within one mile of state game lands. S.L. 2013-25 now provides that a sanitary landfill may be sited as close as 500 feet from state game lands if it is limited to demolition debris, is located within the boundaries of a municipality with a population of less than 15,000, and is separated from the game land by a primary U.S. highway.

## Energy

S.L. 2013-365 (S 76) directs the Mining and Energy Commission, with assistance from other agencies, to study creation of a comprehensive environmental permit for hydraulic fracturing, the appropriate rate of severance tax, and registration requirements for land men (oil and gas workers). In addition, the legislation revises the membership of the Mining and Energy Commission, revises membership and adjusts responsibilities of the Energy Policy Council, allocates offshore energy revenues, addresses bonding requirements, and amends provisions for allocating “allowables” in oil production.

S.L. 2013-51 (H 484) directs DENR to oversee permitting for wind energy facilities. The permitting applies to installation and expansion of facilities with a rated capacity of at least 1 megawatt. The permitting process will include submission of preapplication materials, notice to relevant agencies and parties, preapplication site evaluation, a scoping meeting, application and fees, and public notice and hearing. In addition to meeting applicable site-specific permit conditions, applicants must provide financial assurance for decommissioning and annual monitoring reports. The review process will consider risks to civil and military air travel and operations as well as impacts to species and habitats. Written notice will be provided to the Corps of Engineers, the U.S. Fish and Wildlife Service, the N.C. Wildlife Resources Commission, the commanding officer of potentially affected military installations, and other relevant parties. The criteria for permit approval include consideration of impacts to military and civilian air operations, impacts to cultural and natural resources, obstruction of navigation channels, applicable Mountain Ridge Protections, and any applicant compliance with other federal, state, and local requirements, including zoning.

### **Other Environmental Matters**

**S.L. 2013-242** (H 628) directs that when undertaking major facility construction and renovation, state agencies will follow the requirements of the Sustainable Energy-Efficient Buildings Program only if DENR determines that the cost of the project plus ten years of operation costs would be less if the agency followed the requirements than if it did not. Third-party certification expenses must be included in the cost calculation. Renovation projects with guaranteed energy savings contracts are exempt from the savings calculation requirement. Building rating systems used for the Sustainable Energy-Efficient Buildings Program must provide credit for—and not disadvantage—building materials manufactured and produced within North Carolina.

**S.L. 2013-388** (S 341) authorizes the EMC to modify certificates for interbasin water transfers upon request by the certificate holder, the submission process for certain documentation by the certificate holder, and the procedures for public notice and hearing and document-related findings.

# 2011 and 2012 North Carolina Planning and Development-Related Legislation

**Richard D. Ducker and David W. Owens**

The 2011 and 2012 sessions of the North Carolina General Assembly enacted a number of provisions affecting the planning community. Among the more notable are new exemptions from municipal development regulations for agricultural uses located within municipal extraterritorial planning areas, limits on use of development moratoria when applied to residential land uses, and new standards for when inspections can be made of residential properties. There were major changes to state policy on municipal annexation that now require support of residents of areas proposed to be annexed. Other laws set new standards for political signs in public rights of way; cover selective removal of vegetation in rights of way to improve billboard visibility; address recovery of natural gas from deep shale formations; and are directed at restructuring of state agencies and programs dealing with environmental protection.

## **Zoning and Development Regulation**

### **Agriculture and Local Government Planning**

#### ***Bona Fide Farms and Local Planning Jurisdiction***

For many years farms and agricultural activities have enjoyed special treatment under various North Carolina environmental and land use regulatory programs. One of the more well-known examples involves county zoning. A “bona fide farm” has been entirely exempt from such zoning, although nonfarm uses of farm properties are still subject to county zoning.

S.L. 2011-363 (H 168) advances the cause of agriculture by amending Section 153A-340 of the North Carolina General Statutes (hereinafter G.S.) to list specific items of proof that a land-owner may provide to demonstrate that certain property functions as a farm. These include (1) a farm sales tax exemption certificate; (2) a copy of the property tax listing showing that the farm qualifies for the present-use-value property taxation that applies to agricultural, horticultural,

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and forestry uses; (3) a copy of the farm operator's federal income tax form that demonstrates farm activity; (4) a forestry management plan; or (5) a farm identification number issued by the U.S. Department of Agriculture.

S.L. 2011-363 also adds a new G.S. 160A-360(k) to provide that land being used for bona fide farm purposes is exempt from a municipality's exercise of its powers in its extraterritorial planning jurisdiction (ETPJ). This new municipal ETPJ exemption applies not only to municipal zoning, but also to municipal subdivision control, building and housing code enforcement, soil erosion and sedimentation control, flood hazard protection regulations, stormwater control, community development authority, acquisition of open space, and other powers that a municipality may exercise in its ETPJ. Land used for farm purposes can be included within the geographic area of a city's extraterritorial boundary. That land is then exempt from city jurisdiction while in active farm use but becomes subject to city jurisdiction upon the cessation of that use.

Finally, S.L. 2011-363 goes on to amend the annexation statutes (specifically, G.S. 160A-58.54(c)) to provide that land used for farming purposes may not be made subject to any form of municipal-initiated annexation without the consent of the owners if the land was used for farm purposes on the date the municipal resolution of intent to consider annexation was adopted.

A related local act (S.L. 2011-34 (S 263)) became law (April 12, 2011) before S.L. 2011-363 (which became effective June 27, 2011). S.L. 2011-34 purports to allow each of the twelve municipalities in Wake County to exempt accessory buildings on bona fide farms from the "building code" to the same extent as the buildings would be exempt from county zoning if it applied. Exactly what this means may be academic, however, because S.L. 2011-363 prohibits all municipalities from enforcing the State Building Code (SBC) or any other planning and development-related regulation in their respective extraterritorial planning jurisdictions.

#### ***County Large-Lot Zoning***

Section 5 of S.L. 2011-384 (H 806) was adopted in order to reverse the effect of a particular North Carolina Court of Appeals case.

In *Tonter Investments, Inc. v. Pasquotank County*, 199 N.C. App. 579, 681 S.E.2d 536 (2007), *review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009), the court of appeals upheld the ability of a county to establish development standards in zoning districts that include large lots (over 10 acres) that were exempt from land subdivision regulations. The county ordinance that was upheld prohibited all residential uses in one of its agricultural zoning districts (A-2). It also prohibited *any* building or structure from being located on a lot unless (1) the lot included a minimum of 25 feet of frontage on a state road or a private road approved in accordance with the county subdivision ordinance and (2) the lot was located within 1,000 feet of a public water supply. The county offered the following rationales for the prohibitions: (a) the lack of improved roads in areas zoned A-2; (b) the potential strain on the county's ability to provide essential public services in these areas; (c) the fact that only five residences currently existed in the district; and (d) the aerial application of pesticides within a large part of the district. As a result, the court found that the ordinance provisions were based on concern for public safety and that the landowners were still allowed to make other uses of the land, as allowed by the county.

In reaction to this ruling, the General Assembly enacted S.L. 2011-384 to amend G.S. 153A-340 to provide that a county may not in its zoning ordinance prohibit the single-family residential use of lots exceeding 10 acres in various circumstances. First, such a prohibition is impermissible in districts where more than half of the land is used for agricultural or silvicultural (forestry) purposes. Certain commercial and industrial districts are excepted. Second, such a prohibition may

not be adopted because the lot lacks frontage on a public or approved private road. Finally, the prohibition may not be adopted because the lot is not served by public water or sewer lines.

Section 6 of S.L. 2011-384 does, however, direct the Legislative Research Commission (LRC), in consultation with the North Carolina Homebuilders Association and the North Carolina Association of County Commissioners, to study “the extent to which counties shall be able to require that lots exempt from county subdivision regulations must be accessible to emergency service providers.” The LRC is to report to the General Assembly by January 15, 2013.

#### ***Voluntary Agricultural Districts***

S.L. 2011-219 (H 406) makes several changes to North Carolina’s voluntary agricultural district legislation. It amends G.S. 106-737 to remove one of the primary requirements for participation in the program, the requirement that the farm property be enrolled in the state’s present-use-value property taxation program or at least be eligible to so participate. Instead, the property must simply be put to agricultural use. In addition, S.L. 2011-219 amends G.S. 121-41 to provide that a conservation agreement entered into for the purpose of enrolling property in a voluntary agricultural district need not be recorded unless the agreement is irrevocable as provided by G.S. 106-743.2.

A related act, S.L. 2011-251 (S 499), clarifies that Agricultural Development and Farmland Preservation programs are to be administered and supervised by the North Carolina Department of Agriculture and Consumer Services.

#### **Limits on Development Moratoria**

The use of development moratoria has been controversial in several communities in the state. In 2005 the General Assembly adopted G.S. 153A-340(h) and 160A-381(e) to establish the framework for county and city adoption of temporary moratoria on development approvals. In 2009 the Senate approved a bill that would have prohibited use of any moratorium adopted “for the purpose of developing and adopting new or amended ordinances.” That bill was not, however, taken up by the House of Representatives.

In 2011 a somewhat narrower limitation on the use of moratoria was adopted. S.L. 2011-286 (H 332) amends the two statutes mentioned above to provide that moratoria as to residential uses may not be applied for the purpose of developing or adopting plans or ordinances. Moratoria can still be adopted for commercial, industrial, and other non-residential uses and may still be applied to residential uses if the purpose of adoption is other than to allow time for plans or ordinances to be prepared and adopted.

#### **Statute of Limitations**

The General Assembly in 1981 added to the zoning enabling statutes an explicit nine-month statute of limitations for challenges of legislative zoning decisions. This time period was shortened to two months in 1996. In 2011 the legislature extended the time period for bringing judicial challenges to the validity of some zoning ordinance amendments, adoptions, or repeals.

S.L. 2011-384 (H 806) extends the time period to challenge legislative decisions to one year in many instances and as much as three years in others, but it retains the two-month limit for zoning map amendments. The new statute of limitations has three components:

1. *Zoning map amendments.* G.S. 1-54.1 sets a two-month statute of limitations for legislative zoning decisions that involve adopting or amending a zoning map

- or approving a request for a rezoning to a special or conditional use district or a conditional district, with such action accruing upon adoption of the ordinance or amendment. So for zoning map amendments, the law is essentially unchanged.
2. *Zoning text amendments.* G.S. 1-54(10) sets the general rule of a one-year statute of limitations to contest the validity of a zoning or unified development ordinance other than the map amendments noted above. In addition to lengthening the time period, the law also now provides that in these instances the action accrues when the party bringing the action first has standing, so the one-year clock does not start to run until a person acquires standing to challenge the ordinance. There is a limit on this, however, as a challenge based on alleged defects in the adoption process must be brought within three years of the challenged adoption.
  3. *Zoning enforcement actions.* G.S. 153A-348(c) and 160A-364.1(c) restate these statutes of limitation and provide that they do not prohibit a party in a zoning enforcement action and persons appealing a notice of violation from raising the invalidity of the ordinance as a defense. Apparently a challenge to the validity of an ordinance can be raised whenever the enforcement action is brought, regardless of how long the ordinance has been in effect. As with challenges to text amendments, the law does provide that a challenge based on alleged defects in the adoption process must be brought within three years of the challenged adoption.

### **Local Bills**

In 2009 the General Assembly authorized expedited notice of violations for chronic violators of municipal over-grown lot and both city and county public nuisance ordinances. G.S. 160A-200 and -220.1; 153A-140.2. In 2011 the legislature adopted a comparable provision for chronic violators of the Winston-Salem and Forsyth County zoning ordinances. S.L. 2011-142 (H 558) applies to violations by chronic zoning violators, defined as persons who own property whereupon the city or county took remedial action under the zoning ordinance at least three times in the previous eighteen months. The law allows the city or county to notify chronic violators that if their property is found to be in violation during the calendar year in which this notice is provided, the government shall without further notice take action to remedy the violation, and the expense of that action shall become a lien on the property. The notice must be made by registered or certified mail, as well as by regular mail and by posting the property. If the regular mail is not returned in ten days and the registered or certified mail is refused or unclaimed, the regular mail notice is deemed sufficient.

### **Bills Not Adopted**

#### *Design Standards*

While many communities rely on public and private investments and voluntary compliance to address aesthetic issues, local governments increasingly apply regulatory design standards on commercial developments and in particular areas such as historic districts, important entry corridors, particular residential neighborhoods, and downtown areas.

A number of communities have reformed their development regulations to focus on physical design features—particularly the dimensions and locations of buildings and streets—rather than on land uses, as is done with traditional zoning. Davidson, for example, has adopted a variation of a form-based code and other jurisdictions have actively considered incorporating some aspects of this approach (including Raleigh and Chapel Hill). These “form-based” codes

typically address the form and mass of buildings and the scale and types of streets and blocks. Building heights, building placement, the design of building fronts, and the relation of buildings to streets, sidewalks, and public open spaces become the focus of the regulation, as opposed to the focus on the use of land and buildings that is typical of traditional zoning regulation. It is common for some elements of a form-based code to be incorporated within a more traditional use-based zoning code.

Most aspects of form-based codes are within the expressly authorized portions of delegated local government regulatory authority. The zoning enabling statute specifically authorizes regulation of the height and size of buildings, the location of buildings and structures, and the size of open spaces. The foundation of these codes is generally a regulating plan that is based on community preferences for the physical form in which development will take place. The codes are often developed for a discrete geographic area, such as a downtown or a particular neighborhood. They frequently include standards for the form of buildings on a particular parcel or block as well as street design standards. Some include more detailed architectural standards to regulate building styles, features, details, and building materials. The use of graphics and architectural design guidelines is another common feature of form-based codes.

This increased attention on design features has created some apprehension, particularly for residential builders. These concerns have led to legislative consideration of limitations on the use of design standards in local development regulations. A proposal to add “design” to the list of explicitly authorized zoning tools was discussed during the 2005 comprehensive revisions to the zoning statute. Concerns from homebuilders about defining the scope of such authority led the bill sponsors to drop consideration of that idea. In 2011 the concern about use of design standards resulted in consideration of Senate Bill 731, which was approved by the Senate but not by the House of Representatives. The original version of the bill would have precluded application of design standards to any residential building with four or fewer units except in historic districts or where the standard(s) related to fire and life safety issues. After much discussion, the version of the bill that passed in the Senate made the limits on design standards applicable only for single-family residential structures in zoning districts with densities of five or fewer units per acre. In addition to historic districts and landmarks, the bill also allowed design standards imposed as conditions related to density bonuses, open space modifications, or modifications of buffers, setbacks, lot size, or screening requirements. Manufactured home design standards were also exempted. In the early days of the 2012 session, there was additional discussion about this bill and potential compromises. Those discussions did not result in a consensus, however, and thus no action was taken on the bill in 2012.

### ***Family Health Facilities***

A recurring issue in some communities has been the location of temporary housing for health care providers on lots that already have principal dwellings. House Bill 887, which passed in the House of Representatives in 2011 but not in the Senate, would have mandated that both city and county zoning allow these uses. The bill would have required that a temporary residence for a relative providing care for a mentally or physically impaired person be allowed as a permitted accessory use in any single-family zoning district. Special or conditional use permits could not be required. The bill limited the temporary structure in several ways. It would have had to have been a transportable unit primarily assembled off-site, be no more than 300 square feet in size, be limited to occupancy by one person, not be placed on a permanent foundation, meet all

setbacks and any maximum floor area ratios applicable to the primary dwelling, and be removed within sixty days after care-giving ceases. The Senate did not take up the bill in 2012.

#### ***Nonconforming Shooting Ranges***

Senate Bill 560, approved by the Senate in 2011 but not by the House of Representatives, would have provided some degree of protection for nonconforming sport shooting ranges. It would have amended G.S. 14-409.46 to provide that if a sport shooting range relocates due to “condemnation, rezoning, annexation, road construction, or development” to a location in the same county, it must be considered a pre-existing range for the purpose of civil liability, ordinance violation, or nuisance suits as related to noise. If the range relocates to a different county, it must comply with ordinances in effect at the time the property for the new range is purchased. The bill was not considered in 2012.

#### ***Video Sweepstakes***

Faced with several trial court rulings that “video sweepstakes” games were not covered by the state’s 2006 ban on video poker, there was an expansion of these gaming operations across the state. In 2010 the General Assembly created G.S. 14-306.4 to prohibit use of electronic machines and devices (any “entertainment display”) for playing sweepstake games (defined as any game you enter and thereby become eligible to receive a prize). Legislation was introduced in 2011 to further clarify the ban on video gaming (H 226, S 3), as was legislation to allow and tax this activity. No action was taken to adopt either. In the spring of 2012 the North Carolina Court of Appeals held G.S. 14-306.4 unconstitutional (*see Hest Technologies, Inc. v. State*, 725 S.E.2d 10 (N.C. Ct. App. (2012))). Soon thereafter legislation was introduced to tax these machines (H 1180), but no action was taken.

#### ***Electronic Notice of Hearings***

Two bills were introduced to allow electronic publication of notices of public hearings in lieu of newspaper publication (H 472, S 773). No action was taken on either.

### **Community Appearance and Historic Preservation**

#### **Campaign Signs**

Every election year the proliferation of campaign signs in public street and highway rights-of-way prompts controversy. Although many municipalities have detailed regulations concerning such signs, our state statutes and North Carolina Department of Transportation (NCDOT) rules have been largely silent on the topic of political and election signs.

S.L. 2011-408 (S 315) amends G.S. 136-32 to establish standards for “political” signs in the rights-of-way of both state (the use of “state” in this context, here and throughout this bulletin, refers to roads that are part of the NCDOT highway system) highways and municipal streets, although the regulations clearly seem intended to apply to campaign signs rather than the full range of political signs. A municipality may adopt and enforce its own ordinance prohibiting or regulating the placement of these campaign signs on city streets and those state highways inside city limits that are maintained by the city. If it fails to do so, then the state standards apply inside city limits. In any event, the standards always apply to state roads and highways in all unincorporated areas of North Carolina.

Several standards are particularly notable. Signs may only be displayed from the thirtieth day before the beginning of “one-stop” early voting until the tenth day after the primary or election day. In addition, the new law requires the party erecting the sign to obtain the permission of the owner of any residence, business, or religious property that fronts the right-of-way where the sign is erected. Finally, S.L. 2011-408 makes stealing, defacing, or removing a lawfully placed sign a criminal misdemeanor.

S.L. 2011-408 became effective October 1, 2011, and applies to any primary or general election held on or after that date.

### **Billboard Visibility and Vegetation Removal**

Outdoor advertising displays (billboards) erected in this state along Interstate and federal primary highways have long been subject to a dual set of regulations, one administered by the NCDOT and one administered by local governments that have adopted zoning. As a general rule, local governments may apply more demanding standards to new signs, but state statutes and rules typically govern existing nonconforming signs.

S.L. 2011-397 (S 183) was first introduced as a bill by the outdoor advertising industry both to allow the industry to expand opportunities for the location of “automatic changeable facing signs” (digital signs) and to allow sign owners to clear vegetation from public right-of-ways to allow signs to be better seen by the traveling public. Early versions of S 183 would have allowed digital signs to be reconstructed or erected anywhere that a billboard was located that was nonconforming under a local ordinance, effectively overriding local regulatory authority with respect to digital signs. Local government, planning, and environmental interests reacted strongly to this attempt to preempt local authority, and this language was removed from the bill.

Another concern of the outdoor advertising industry has been whether lawfully erected signs may be seen by the traveling public if vegetation within the highway right-of-way obscures the vista to the sign beyond the edge of the right-of-way. Along certain federal primary highways, the new legislation lets billboard owners cut down trees up to 380 feet from the sign; under prior rules vegetation removal, but not wholesale clear-cutting, was allowed up to 250 feet from the sign. Stricter standards will apply to billboards located inside city boundaries.

S.L. 2011-397 provides that if an outdoor advertising display is to be illuminated and requires an electrical permit (provided by a local government), the electrical permit must be issued if NCDOT has issued a sign permit for the structure. Normally the electrical permit would not be issued until both a local government zoning authority had issued a zoning permit and NCDOT had issued a sign permit. The provision may simply make it more difficult for local governments to enforce zoning regulations applicable to signs by coordinating zoning and building permits. However, it could lead to a claim that local zoning of billboards along federal highways is intended to be preempted entirely.

### **Historic Preservation**

Section 21.2 of S.L. 2011-145 (H 200), the Current Operations and Capital Improvements Appropriations Act of 2011, generally is designed to make the Roanoke Island Commission financially independent. But it also amends G.S. 143B-131.2(b)(1) to provide that the local government that has historic preservation jurisdiction over the Roanoke Island corridor (Manteo), rather than the Roanoke Island Commission, is authorized to require certificates of appropriateness for exterior changes to properties within the corridor and to enforce those certificates. Section 18.1 of S.L. 2012-142 (H 950), the 2012 amendments to the 2011 appropriations act, directs the Roanoke

Island Commission to report quarterly to the chairs of the House Appropriations Subcommittee on General Government and the chairs of the Senate Appropriations Committee on General Government and Information Technology concerning the promotion and development of the Elizabeth II State Historic Site and Visitor Center.

Section 18.2 of S.L. 2012-142 amends G.S. 121-7.7 (the State Historic Sites Special Fund) to make the state history museums and the Maritime Museum subject to the terms of the special fund. Section 18.3 of the same act directs the Department of Cultural Resources to develop comprehensive five-year plans for the Tryon Palace Historic Sites and Gardens and the North Carolina Transportation Plan.

S.L. 2011-367 (H 403) amends G.S. 160A-400.15 to allow a very small class of cities to apply demolition-by-neglect provisions to contributing structures located outside local historic districts. Such a city must (1) have a population of at least 100,000; (2) have designated portions of its central business district and adjacent historic district as an Urban Progress Zone; (3) be a “certified local government” for historic preservation purposes; and (4) be located in a county that has not received such certification.

## **Boundary Adjustments and Jurisdiction**

### **Annexation**

North Carolina cities have since 1959 had the authority to annex adjacent land when those areas became “urban.” Residents of some of these areas have long objected to being annexed into cities against their will. Others have praised the North Carolina laws on annexation as a critical factor in minimizing governmental fragmentation in metropolitan areas and allowing healthy city growth. The debate regarding reform of the annexation statutes has been heated in recent legislative sessions, prompting calls for annexation moratoria, mandatory referenda on annexation, and other modifications of the system.

In 2011 the General Assembly adopted S.L. 2011-396 (H 845) to substantially revise key features of state annexation law. The process (now in G.S. 160A-58.55) and standards for areas to qualify for annexation (now in G.S. 160A-58.54) are largely unchanged. G.S. 160A-58.63 now sets the standard for the degree of precision required for population, land area, and degree of land subdivision. The law no longer has different standards for annexation for small and large cities.

The most significant policy shift in the 2011 legislation was to provide that a proposed annexation is terminated if the owners of 60 percent of the parcels in the proposed annexation area sign petitions to deny the annexation. After the city completes its process and adopts an annexation ordinance, the county board of elections was to send a petition for opposition to the annexation to each property owner (as identified by the county tax assessor) in the affected area. Property owners were allowed 130 days after the adoption of the annexation ordinance to file their petition of opposition. S.L. 2011-173 (S 27) and S.L. 2011-177 (H 56) applied the provisions on involuntary annexations to nine specified recent annexations. The affected municipalities were Asheville, Fayetteville, Goldsboro, Kinston, Lexington, Marvin, Rocky Mount, Southport, and Wilmington.

Cities subject to the retroactive de-annexations challenged the 2011 legislation in court. The trial court held the petition procedure to be invalid as it allowed participation in objecting to an annexation by landowners but not by voters. Rather than waiting for this case to go through the

appellate process, the legislature in 2012 quickly amended the law to replace the petition to veto an annexation with a referendum approval prior to municipal action.

S.L. 2012-11 (H 925) created G.S. 160A-58.64, effective July 1, 2012, to require a referendum of all registered voters in a proposed involuntary annexation area. The referendum is held at the next municipal election that is more than forty-five days after the city adopts a resolution of intent to annex. If the referendum fails, the city may not adopt the annexation ordinance. The city is also then prohibited from beginning a separate annexation process for that area for thirty-six months after the referendum.

The fate of the nine individual municipal annexations that had been subjected to petition review in 2011 (Asheville, Fayetteville, Goldsboro, Kinston, Lexington, Marvin, Rocky Mount, Southport, and Wilmington ) was even more severe. S.L. 2012-3 (H 5) legislatively de-annexed all of these territories from their respective cities and prohibits any new involuntary annexation proposals for all of these areas for the next twelve years. S.L. 2012-124 (H 1169) allows reapplication of pre-existing county zoning to the nine areas affected by these de-annexations without the necessity of county hearings on the zoning amendments.

The new annexation law (G.S. 160A-58.56) requires that those cities that provide water and sewer services must extend water and sewer lines to properties within annexed areas within three and a half years if so requested by a majority of the owners. The city must do this at no cost to the property owners. No owner in the annexed area may be charged for initial installation of water or sewer connection lines.

Finally, the law adds provisions to require annexation of high poverty areas in certain circumstances. G.S. 160A-31 requires a city to annex contiguous property if petitioned to do so by the owners of 75 percent of the parcels in a high poverty area. There is a limited exception allowing cities to decline to annex these areas if the debt service to cover the cost of water and sewer extensions exceeds 5 percent of the city's annual water and sewer revenues. Such an annexation can also be requested by two-thirds of the residents of such an area, but annexation in that instance is not mandatory.

In other action regarding annexation, S.L. 2011-57 (H 171) prohibits municipal petitions for voluntary annexation of property it does not own, including street right-of-way easements.

### **Extraterritorial Jurisdiction**

The statute on municipal extraterritorial jurisdiction (ETJ) for planning and development regulation has undergone a number of amendments since its enactment in 1959. The original authorization exempted bona fide farms from municipal zoning coverage because this exemption existed for county zoning. The farm exemption in the extraterritorial area of cities was deleted in 1971 but reinserted into the statutes in 2011.

S.L. 2011-363 (H 168) created G.S. 160A-360(k) to provide that property being actively used for bona fide farm purposes is exempt from a municipality's ETJ for planning and all development regulations. Land used for farm purposes can be included within the geographic area of a city's extraterritorial boundary. That land is then exempt from city jurisdiction while in active farm use but becomes subject to city jurisdiction upon the cessation of that use. This law also provides that property in active farm use may not be annexed into a city without the written consent of the property owner. This law is discussed in more detail above.

In 2012 there was a good deal of discussion, and attendant proposals, about further limiting or even eliminating municipal extraterritorial planning jurisdiction. Among the ideas discussed were abolishing ETJ altogether, prohibiting use of ETJ in counties with countywide zoning or in

areas that are subject to county zoning (H 1043), and explicitly tying ETJ to future annexation or provision of urban services. Notions of allowing ETJ residents to vote in city elections or run for city office were also raised. The proposal that got the most attention involved creating a special legislative study committee to review the related issues of annexation, extraterritorial planning jurisdiction, and provision of urban services (H 281, S 231). These proposals passed in the House of Representatives, but the Senate did not agree, and thus no action was taken. A local bill to strip Boone's ETJ authority (S 949) passed the Senate but not the House of Representatives.

### **Local Bills**

Several local bills made specific changes to jurisdictional boundaries.

In 2011 specified areas were de-annexed from Roanoke Rapids by S.L. 2011-158 (H 367), from Tryon by S.L. 2011-159 (H 486), and from Cape Carteret by S.L. 2011-167 (S 289). S.L. 2011-124 (H 352) delayed a Kannapolis annexation. S.L. 2011-151 (H 358) required Chatham County approval prior to Apex or Cary annexations into the county. Boundary modifications for Morehead City–Beaufort were made by S.L. 2011-179 (H 565) and for Raleigh–Wake Forest by S.L. 2011-162 (H 573). Specifying the Alamance-Orange County boundary line was addressed by S.L. 2011-87 (S 200) and S.L. 2011-88 (S 201).

In 2012 there were seventeen local bills affecting local jurisdiction. The following jurisdictions had territory legislatively annexed to the city: Apex (S.L. 2012-109 H. 1106), Marion (S.L. 2012-97, H 945), and Wilmington (S.L. 2012-138, H 180). The following jurisdictions had territory legislatively de-annexed: Asheville (S.L. 2012-121, H 552); Burgaw (S.L. 2012-124, H 1169), Columbia (S.L. 2012-98, H 963), Elizabethtown (S.L. 2012-103, H 1050, H 1051), Mooresville (S.L. 2012-137, S 876), Morganton, (S.L. 2012-61, H 1032), Roanoke Rapids (S.L. 2012-116, H 1202), and Surf City (S.L. 2012-95, S 900). The following jurisdictions had boundary adjustments made legislatively: Archdale–High Point (S.L. 2012-102, H 1041), Asheville-Woodfin (S.L. 2012-119, H 1217), Butner (S.L. 2012-117, H 1206), Matthews-Stallings (S.L. 2012-110, H 1110), and Orange-Alamance Counties (S.L. 2012-108, H 1090). In other local bills that were adopted, any annexation into Davidson County by a city primarily outside the county now must first be approved by the county board of commissioners (S.L. 2012-54, H 943) and satellite annexation restrictions were relaxed for Ocean Isle Beach (S.L. 2012-96, S 901) and Wallace (S.L. 2012-118, H 1216).

Three new municipalities were authorized in 2011. S.L. 2011-110 (S 431) created the Town of Fontana Dam in Graham County. Two additional towns were authorized subject to the approval by referenda in November 2011 by the qualified voters in the affected areas. These were the Towns of Castle Hayne in New Hanover County (S.L. 2011-166, S 237) and Rougemont in Durham County (S.L. 2011-114, H 292). Voters subsequently rejected both incorporation proposals, by a narrow margin in Rougemont (168 against, 158 in favor) and overwhelmingly in Castle Hayne (620 against, 203 in favor).

## **Building and Housing Code Enforcement**

### **Inspections of Dwelling Units**

S.L. 2011-281 (S 683) stems from an effort on the part of residential landlords to curtail what they have perceived to be overly zealous regulation of residential properties, particularly involving periodic inspections. The law does not apply to inspections of construction work in progress, perhaps the most common kind of inspection that local governments will make. Furthermore,

it specifically does not apply to those periodic inspections (such as fire code inspections) that are specifically required under existing state law. Minimum housing inspections and residential rental licensing/registration systems seem to be the most likely targets.

S.L. 2011-281 allows traditional periodic inspections if certain requirements are met. First, the governing board must designate a target area. Second, no discrimination by housing type is allowed. Third, a public hearing on the inspection program must be held. Finally, a plan must be developed that addresses the ability of low-income property owners to comply with minimum housing standards.

S.L. 2011-281 also allows what might be called “reasonable cause” inspections. In order to conduct such an inspection, the law sets up an elaborate set of factors for determining whether an inspector has such cause. These include the prevalence of prior code violations, whether there is a complaint about or a request that the property be inspected, whether the department has actual knowledge of unsafe conditions, and whether violations are visible from outside the property. The statutes providing for administrative inspection warrants, to be used when a property owner refuses to consent to an inspection, remain unchanged.

Finally, S.L. 2011-281 places various restrictions on residential rental property licensing/registration programs that have been adopted by a small number of cities and on the fees that may be charged for properties that must be enrolled in such a program.

### **Homeowner’s Exemption from General Contractor License**

For some years G.S. 87-1 has provided that a licensed general contractor must superintend and manage a construction project costing more than \$30,000, with one exception: A licensed general contractor is not required if the owner intends to superintend the project him, her, or itself (“itself” applying to firms and corporations) and occupy the building after completion. Proof that such an owner is exempt is necessary to qualify for a building permit. Because this exception has been subject to some abuse, homebuilders and others have pressed for more accountability. S.L. 2011-376 (H 648) formalizes the process for qualifying for the owner exemption. An applicant for a building permit must execute a verified affidavit. First, the applicant must attest that the applicant is the property owner or, in the case of a firm or corporation, is legally authorized to act on behalf of such. Second, the applicant must attest that the owner will superintend and manage all aspects of the construction work and that this job will not be delegated to anyone else. The third attestation adds a new requirement: that the owner will be present for all inspections required under the State Building Code (SBC), unless plans for the building were drawn and sealed by a licensed architect.

The inspection department is directed to transmit a copy of the affidavit to the Licensing Board for General Contractors. If the Board determines that the applicant was not entitled to claim the exemption, then it must notify the inspection department. The inspection department is then directed to revoke the building permit.

### **Building Code Effective Dates**

S.L. 2011-269 (S 708) is designed to ensure that both the 2012 North Carolina Energy Conservation Code and the 2012 North Carolina Residential Code take effect as planned. Both were adopted by the North Carolina Building Code Council on December 14, 2010, and were approved by the Rules Review Commission within several months thereafter. Both became effective January 1, 2012, with a mandatory compliance date of March 1, 2012. In addition, several other changes to the State Building Code (SBC) were approved by the Building Code Council on April

21, 2011, effective January 1, 2012. These changes include certain appendices to the 2012 North Carolina Fire Code and seven changes to the 2012 North Carolina Residential Code.

### **Exemptions from the State Building Code**

According to G.S. 143-138(b4)(1), the “building regulations” of the North Carolina State Building Code (SBC) do not apply to “farm buildings” located in a county’s building code enforcement jurisdiction. Several acts adopted in 2011 and 2012 expanded this exemption.

In 2009 G.S. 143-138(b4)(1) was amended to clarify that building regulations do not apply to structures associated with the care, management, boarding, or training of horses and the instruction and training of riders. However, the 2009 law also provided that a farm building associated with horses was not exempt if it were to be used for a spectator event at which more than ten members of the public were to be present.

Action by the 2011 General Assembly served to expand that exemption. S.L. 2011-364 (H 329) removed the requirement that regulations apply to buildings used for equine spectator events at which more than ten members of the public are present. Thus horse arenas now are generally not subject to the building regulations. The 2011 law, however, does provide that all such buildings are subject to an annual safety inspection by city or county inspectors of any grandstands, bleachers, or other spectator-seating structures in the building. The spectator-seating structures must comply with any building regulations that are in effect at the time of the construction of the spectator-seating.

The exemption was expanded still further in 2012. S.L. 2012-187 (S 810) amended G.S. 143-138(b4) to include structures used for the display and sale of farm produce. In order to qualify, a structure may not include floor area greater than 1,000 square feet, must be open to the public no more than 180 days per year, and must be certified by the state to be a roadside farm market.

A different exemption concerns industrial machinery. Since 2007 the SBC has been inapplicable to design, construction, location, installation, or operation of “industrial machinery,” defined as “equipment or machinery used in a system of operations for the explicit purpose of producing a product.” That term does not include “equipment that is permanently attached to or a component part of a building and related to general building services such as ventilation, heating and cooling, plumbing, fire suppression or prevention, and general electrical transmission.” S.L. 2012-34 (H 813) expands the exemption to include equipment and machinery acquired by a state-supported center providing testing, research, and development services to manufacturing clients.

### **Other Building Code Issues**

S.L. 2012-90 (S 798), the omnibus emergency management act, established a permanent Joint Legislative Emergency Management Oversight Committee. Among the topics that this committee is authorized to study is “whether the State building code sufficiently addresses issues related to commercial and residential construction in hurricane and flood prone areas.”

### **Related Issues**

The State Building Code (SBC) requires that certain kinds of smoke alarms be installed in single-family and multi-family residential dwelling units whenever new construction, new occupancy types, or the rehabilitation of existing units occurs. However, smoke alarm requirements also apply to existing rental units for which no construction work is involved. S.L. 2012-92 (S 77), as amended by section 50 of S.L. 2012-194 (S 847), amends the state’s landlord-tenant

laws (G.S. 42-42 to -44) to upgrade the requirements for alarms in existing residential rental units, effective December 31, 2012. S.L. 2012-92 generally requires a landlord subject to those laws to install a tamper-resistant ten-year lithium battery smoke alarm whenever a landlord is otherwise obligated by law to install or replace a smoke alarm.

### **Building Code Review Involving State Buildings**

In 2009 the General Assembly transferred the responsibility for reviewing state building plans for compliance with the State Building Code (SBC) from the Department of Insurance (NCDOI) to the Department of Administration (NCDOA). It also transferred four building code review positions from NCDOI to NCDOA. They were to be funded from the Insurance Regulatory Fund through fiscal 2011–2012 and from the State Property Fire Insurance Fund thereafter. Section 20.3 of S.L. 2012-142 (H 950) makes the funding of these positions from the Insurance Regulatory Fund permanent.

### **Inspection Departments Must Handle Lien Information**

In order to ensure that they are properly paid, general contractors and subcontractors may perfect liens against real property owners for the work that the contractors and subcontractors perform. Although these liens may be established and recorded in the chain of title, the existence, amount, and timing of them sometimes lead to confusion. S.L. 2012-158 (S 42) is designed to make information about liens more available. It establishes “lien agents”—title insurance companies registered by NCDOI—that are to be selected by property owners to serve as intermediaries and contacts for contractors, subcontractors, owners, and others.

The new law affects Building Code officials and inspection departments in several ways. First, the new law amends G.S. 160A-417, G.S. 153A-357, and G.S. 87-14 to provide that any applicant for a building permit for improvements for which a lien agent is required must include the contact information for the lien agent in the permit application. This contact information for the lien agent must be “conspicuously set forth in the permit or in an attachment thereto.” Furthermore, the inspection department must maintain this lien agent information “in the same manner and in the same location in which it maintains its record of building permits issued.” Just to ensure that this lien agent contact information is available, the new law directs that any building permit issued under the law be “conspicuously and continuously posted on the property for which the permit is issued until the completion of all construction.”

S.L. 2012-158 (S 42) does not become effective until April 1, 2013, so inspection departments have plenty of time to prepare for its implementation.

## **Transportation**

### **Board of Transportation Reforms**

The Joint Legislative Transportation Oversight Committee recommended a package of bills for the 2012 session. Several of these were consolidated into S.L. 2012-84 (S 890). The law codifies several reforms previously mandated by gubernatorial executive order. It amends G.S. 143B-350 to move decision making on approval of highway construction plans and projects and construction contracts from the Board of Transportation to the Secretary of Transportation. It also amends G.S. 136-18 to require the North Carolina Department of Transportation (NCDOT) to use “professional standards” in selecting transportation projects. The process must

be a “systematic, data-driven process that includes a combination of quantitative, qualitative input, and multimodal characteristics, and should include local input.” In addition, NCDOT is directed to develop a process for standardizing or approving local methodologies used by Metropolitan Transportation Planning Organizations (MPOs) and Regional Transportation Planning Organizations (RPOs) in setting priorities. Finally, the law amends G.S. 143B-350 to strengthen the ethics requirements for members of the Board of Transportation. At each meeting, each Board member must sign a sworn statement saying that he or she has no financial, professional, or other interest in any project being considered. If a member has a conflict of interest, then S.L. 2012-84 requires the Board chair and the member to take “all appropriate steps to ensure that the interest is properly evaluated and addressed in accordance with (the) law and that the member is not permitted to act on any matter in which the member has a qualifying conflict of interest.” A related provision in the 2012 amendments to the 2011 appropriations act, section 24.16 of S.L. 2012-142 (H 850), makes members of MPOs and RPOs subject to the State Ethics Act, effective January 1, 2013.

### **Transportation Project Programming**

Several provisions of the Current Operations and Capital Improvements Appropriations Act of 2011 (S.L. 2011-145, H 200) remove limitations that apply to NCDOT road projects and enhance the role of the private sector in Department projects. Section 28.3 of S.L. 2011-145 removes the limitations on pilot projects for public-private partnerships for litter control and for providing traveler information at NCDOT rest stops. Section 28.4 removes the cap on the number of design-build transportation projects that the state may build. Section 28.9 directs NCDOT to increase the privatization of design and engineering work in highway projects.

Several changes affect the state’s Urban Loop Program and the Mobility Fund. Section 28.31A of S.L. 2011-145 reallocates \$25 million from the Highway Trust Fund to urban loop projects. A companion subsection, 28.34(a), amends G.S. 136-180 to remove the detailed descriptions of urban loops eligible for state funding from the statutes and allows NCDOT to designate and prioritize the projects. Finally, section 28.7 amends a law adopted in 2010 that provides for Mobility Fund projects. It deletes the requirement that project selection criteria be reviewed by various state and local organizations before NCDOT submitted its preliminary selection criteria report, which was due by October 1, 2011.

Section 28.10 of S.L. 2011-145 delays from October to January the state disbursement to eligible municipalities of one-half of their respective allocations of state Powell-bill funds (these funds, which come from gas tax revenues, are available for road and sidewalk improvements on municipality-maintained streets).

S.L. 2012-184 (H 1077) elaborates the terms under which NCDOT may enter into a pilot toll road project involving a public-private partnership. This law allows NCDOT to fix and collect tolls to the same extent as the North Carolina Turnpike Authority may and to act as the conduit issuer of private activity bonds for such a project.

In 2011 the General Assembly mandated that 50 percent of the funds associated with preliminary engineering projects in the NCDOT annual work plan be allocated toward outsourcing in 2011–2012 and 2012–2013. Section 24.3 of S.L. 2012-142 (H 950) increases that proportion to 60 percent for 2013–2014.

G.S. 136-44.2 provides that the Director of the Budget may allocate credit reserve balances in the State Highway Fund for “urgent needs.” Unallocated funds must be credited to a maintenance reserve. Section 24.6 of S.L. 2012-142 amends this statute to establish a procedure

whereby NCDOT must first submit a report on the expenditure request to the House and Senate committees on transportation, providing detailed information about the proposed use of such money, before the request is submitted to the Director of the Budget. The Director of the Budget must allocate up to \$5 million in funds for urgent needs. No more than \$5 million from the reserve may be spent on a single project.

Section 24.7 of S.L. 2012-142 reverts to the Highway Trust Fund those monies appropriated to the North Carolina Turnpike Authority for the Mid-Currituck Bridge project that remained unencumbered at the end of fiscal 2011–2012. It also does the same for the funds appropriated for fiscal 2012–2013 for the Mid-Currituck Bridge and Garden Parkway projects. Both projects have been criticized as being inadequately justified.

In 2010 Governor Perdue initiated legislation (G.S. 136-187 *et seq.*) to create the North Carolina Mobility Fund, a special transportation fund designed to support certain transportation projects of statewide and regional significance that would also relieve congestion and enhance mobility. Amendments to that legislation (affecting G.S. 136-188) adopted in 2011 directed NCDOT to establish project selection criteria and report to the Joint Legislative Transportation Oversight Committee. NCDOT did so, and the criteria are largely incorporated into an amended G.S. 136-188, as rewritten by section 24.8(a) of S.L. 2012-142. In order to be eligible for funding from the Mobility Fund, a project must (1) be on statewide or regional tier facilities; (2) be suitable for funding within five years; (3) be consistent with MPO/RPO “transportation planning efforts”; (4) be included in an adopted transportation plan; (5) be consistent with local land-use plans, if available; and (6) be part of a conforming transportation plan, if the project is in a non-attainment or maintenance area for air pollution purposes. There is no minimum project capital cost that applies to Mobility Fund projects, but only capital costs, including right-of-way acquisition and construction, may be funded. Projects eligible for Mobility Fund selection must be scored and ranked, and selections made accordingly. Eighty percent (80%) of the ranking score is based on the estimated travel time savings in vehicle hours that the project will provide over thirty years, divided by the cost of the project. The other twenty percent (20%) is based on whether the project provides an improvement to more than one mode of transportation and what types of other modes of transportation are involved in the project, as determined by a system of assigning points to be developed by NCDOT. However, notwithstanding these criteria, S.L. 2012-142 specifies that the initial project to be funded by the Mobility Fund will be the widening and improvement of Interstate 85 north of the Yadkin River Bridge.

Projects on the state’s secondary road systems were also made subject to changes in the way they are selected. Section 24.15 of S.L. 2012-142 directs NCDOT to develop a statewide system for selecting unpaved secondary roads for paving. Projects with the highest rankings statewide are to be selected, notwithstanding the formula for distributing funds regionally established by G.S. 136-17.2A.

The lingering issue of imposing tolls on traffic using Interstate 95 was also the subject of certain 2012 amendments to the 2011 appropriations act. Section 24.21 of S.L. 2012-142 directed NCDOT to conduct a comprehensive study of the transportation corridor containing Interstate 95. Skepticism about the wisdom of initiating I-95 tolls is reflected in several of the topics that the department is required to study. These include the “economic impact of tolling the present road on the residents and businesses along the Interstate 95 corridor” and the “(o)ptions for funding to make critical repairs and lane mile expansions to Interstate 95 without the use of tolls.” The report results are to be delivered to the 2013 General Assembly by March 1, 2013. In

addition, the department is specifically directed to refrain from establishing or collecting tolls on Interstate 95 before July 1, 2014.

### **Transportation Corridor Official Maps**

The Roadway Corridor Official Map Act was adopted almost twenty-five years ago to enable transportation planners to prevent land development from occurring in corridors that appear to be most suitable for future transportation projects. Adoption of a transportation corridor official map results in significant restrictions on the use of land included within the mapped corridor. Once the official map is filed with the register of deeds, no building permit may be issued for construction within the corridor, nor may land be subdivided for a period of up to three years after the appropriate application is submitted. To mitigate the harsh impacts of this delay, the legislation has provided certain property tax benefits to the owner of property within a protected corridor. In particular, corridor property has been taxed at 20 percent of the general tax rate that would otherwise apply, but only if no building or structures were located on the property.

S.L. 2011-30 (S 107) makes several changes. It amends G.S. 105-277.9 to provide that undeveloped or vacant land within a designated corridor is to be taxed at 20 percent of its appraised value rather than at 20 percent of the general tax rate. More important, the law also adds a new G.S. 105-277.9A to provide that if the property is improved with buildings or other structures, then the property is taxed at 50 percent of its appraised value, but only if the property has not been subdivided since it was originally included in the corridor. These tax arrangements are effective for taxes imposed for tax years beginning on or after July 1, 2011. However, these arrangements for taxing improved property within corridors expire with respect to tax years beginning on or after July 1, 2021.

Since the corridor official map statutes prevent a building permit from being issued or a subdivision plat from being approved for up to three years after an application is filed, an official map can serve to restrict and encumber property for long periods of time. S.L. 2011-242 (S 214) provides another alternative for the property owner. It allows a property owner to submit to the local government with land-use regulatory jurisdiction a request for a “corridor map determination.” If the three-year delay period has already run, then the request for a map determination to the local government forces the entity that adopted the transportation corridor official map (i.e., the Board of Transportation, the Turnpike Authority, a city, a county, or a transportation authority) to make a choice. The map-adopting entity must then either (1) authorize the local permitting jurisdiction to issue the appropriate permit, or (2) initiate proceedings to acquire the property for which the determination is sought. If it does neither, then the applicant’s property is treated as being unencumbered and free from official map restrictions. It is very important to note, however, that this new legislation did not become effective until December 1, 2011. It only applies to corridor official maps filed on or after that date.

### **Triangle Expressway Location**

The toll road projects to be undertaken by the North Carolina Turnpike Authority are specifically set forth in a statute (G.S. 136-89.183(a)(2)). One of these toll projects is known as the Triangle Expressway, the long-planned circumferential highway in Wake County, some portions of which are already in use. The locations of some of the southern and southeastern portions of the expressway (the Triangle Expressway Southeast Extension) were protected in the 1990s by

NCDOT through the adoption of roadway corridor official maps. However, a decade and a half later, not all of the segment locations have been chosen.

One corridor protected in 1995 (or thereabout), involving a segment known as the Triangle Expressway Southeast Extension, mentioned above, turned out to involve some new transportation planning and environmental problems. In order to consider two alternative routes for this portion of the expressway segment, highway planners developed a route alternative more to the north (the “red route”) that would cut through a relatively developed, populated area of southern Garner. Presentation of this “red route” to the public resulted in significant local opposition, and the General Assembly this spring intervened to ensure that this alternative would no longer be considered.

S.L. 2011-7 (S 165) amends G.S. 136-89.183(a)(2)a. to prohibit the Turnpike Authority from selecting any east-west corridor for the Southeast Extension that is located north of the 1995 protected corridor, except near its interchange with Interstate 40.

### **Transportation and Fuels**

One major initiative concerns the use of transportation fuels by the state. Part I of S.L. 2012-186 (H 177) directs the State Energy Office (in the Department of Commerce), in consultation with the Departments of Administration, Public Instruction, and Transportation, to create an inter-agency task force to study the feasibility and desirability of advancing the use of alternative fuels by all state agencies. The legislation directs the State Energy Office to make recommendations on the fuel mix and the types of alternative-fueled vehicles that would be appropriate for each agency, taking into account costs, geography, population densities, environmental impacts, and access to available infrastructure. The study must be conducted quickly. Results must be submitted to the Joint Legislative Commission on Energy Policy by December 1, 2012.

Part II of S.L. 2012-186 directs NCDOT to establish criteria for operating charging stations for electrical vehicles at state-owned highway rest stops in such a way as to recover certain costs associated with their use.

### **Public Transportation**

Public transportation programs were the target of several legislative initiatives in both 2011 and 2012. Section 28.17 of the Current Operations and Capital Improvements Appropriations Act of 2011 (S.L. 2011-145, H 200) eliminated the Aeronautics Council, the Bicycle Committee, and the Rail Council, all within NCDOT. Section 28.12 of the same act repealed the authority of NCDOT to administer and fund public transportation programs, thereby giving the General Assembly direct authority to do so. A companion section, section 28.15 of the 2011 legislation, established a process by which the General Assembly may approve the acceptance of federal railroad funds by NCDOT.

Section 28.12A of the 2011 Appropriations Act directed the Program Evaluation Division of the General Assembly to conduct a comprehensive evaluation of the North Carolina Railroad Company and to report the results to several legislative committees by May 1, 2012. But section 24.20 of the 2012 amendments to the 2011 Appropriations Act (S.L. 2012-142, H 950) repealed this provision. A related section, section 28.13 of S.L. 2011-145, added new G.S. 136-44.39 to authorize NCDOT to provide financial assistance to short-line railroads.

Section 28.21 of the 2011 act directed the Public Transportation Division of NCDOT to study the feasibility and appropriateness of developing regional transit systems, including the consolidation of such systems. But in the 2012 session the only system that benefited seemed to be the

Charlotte area transit system. Section 24.19 of the 2012 amendments to the 2011 appropriations act totally eliminated the “Regional New Starts and Capital Program” within the Public Transportation Division of NCDOT and reassigned the unexpended fund balance to the Lynx Blue Line Extension project, part of Charlotte’s rail transit system. It also added G.S. 136-176(e), a provision that now allows Highway Trust Fund monies to be used to provide matching funds for “fixed guideway” projects. (Charlotte’s is the state’s only current example.)

The subject of tolls on the state ferry system turned out to be a political football. Section 31.29 of S.L. 2011-145 directed NCDOT to establish ferry tolls for all routes, except for the Ocracoke/Hatteras Ferry and the Knotts Island Ferry. Then the General Assembly came back in 2012 with section 24.18 of S.L. 2012-142. It assigned the authority for determining tolls to the Board of Transportation and directed NCDOT to disregard any executive order issued by the governor concerning the subject. It also prohibited tolls from being imposed on the Cher Branch/Minnesota Beach ferry during fiscal 2012–2013. However, section 6.2 of S.L. 2012-145 (S 187), passed late in the 2012 session, postponed the increases in the tolls to be charged to use state ferries until July 1, 2013. To fill the revenue breach that would be suffered by the Ferry Division of NCDOT for fiscal 2012–2013, S.L. 2012-145 reallocated to the division \$2 million from project studies related to the Mid-Currituck Bridge project and another \$2 million from the General Maintenance Reserve in the Highway Fund.

### **The North Carolina Motor Fuel Excise Tax**

G.S. 105-449.80 provides a formula for establishing North Carolina’s motor fuel excise tax for six-month increments of time. The formula takes into consideration in part the retail price of motor fuels during certain preceding base periods. According to the formula, the North Carolina motor fuel excise tax that was 32.5 cents per gallon in the first six months of 2011 jumped to 38.9 cents per gallon during the first six months of 2012. This escalation in the tax apparently alarmed some in the 2012 General Assembly. Section 24.11 of S.L. 2012-142 (H 950) provided that for the period July 1, 2012, through June 30, 2013, the excise tax rate may not exceed 37½ cents per gallon. The change will likely reduce Powell bill fund distributions to municipalities in fiscal 2013–2014.

### **Converting Private Streets to City Streets**

S.L. 2011-72 (S 281) tackled a problem that annexing cities often face—how to deal with private streets that need to be upgraded before they become city public streets. The law allows certain cities to establish municipal service districts under G.S. 160A-536 *et seq.* for the purpose of converting private residential streets into municipal public streets. It also allows these cities to accept street-related common elements from community associations that are proposing that their streets be converted to public streets. Unfortunately, the new law includes provisions that drastically limit the cities to which it applies. Raleigh and Durham appear to be the most notable beneficiaries of the law.

### **Relocation of Municipal Improvements in State Rights-of-Way**

As a general rule of law, NCDOT may require cities (and certain other service providers) to remove or relocate their improvements that are located within a state road right-of-way when transportation needs demand it. Section 6.1 of S.L. 2012-145 (S 187) adds a new G.S. 136-27.3 governing the relocation of city utility lines under G.S. 136-18(10). It authorizes NCDOT to handle the engineering and utility construction and relocation work. The municipality is then

obligated to reimburse NCDOT once the work is completed within sixty days after the invoice date. Unpaid balances are subject to interest paid at a variable rate of the prime rate plus one percent (1%).

## Environment

### State Regulatory Procedures

S.L. 2011-398 (S 781) made substantial amendments to the state's Administrative Procedures Act for both state agency rule making and decision making on individual contested cases. Governor Perdue vetoed the bill on separation of powers grounds, contending it was an unconstitutional infringement on the executive branch of government by the legislature. Her veto was overridden.

The new law substantially restricts adoption or amendment of administrative rules by state agencies and commissions. G.S. 150B-19.1 was created to prohibit adoption of any rule not expressly authorized by state or federal law and to ensure that only rules reasonably necessary for the implementation of those laws are adopted. This section also provides general guidance that all rules are to minimize the burden on regulated parties and achieve their objectives in a cost-effective manner, be clear and unambiguous, not be redundant, and be based on sound, reasonably available scientific, technical, and economic information. Agencies are to conduct an annual review to identify and repeal rules that are unnecessary, unduly burdensome, or inconsistent with the principles noted above. Agencies are also to quantify the costs and benefits of proposed rules. G.S. 150B-21.4 is amended to require a fiscal note on any proposed rule that would have a substantial economic impact, which is defined as having an aggregate financial impact on all affected persons of at least \$500,000 (the impact figure in the previous law was \$3 million). The fiscal note must also include a description of at least two alternatives to the proposed rule and the reasons they were rejected.

S.L. 2011-398 also creates G.S. 150B-19.3 to specifically limit environmental rules. This law prohibits specified state agencies (Department of Environment and Natural Resources (DENR), Environmental Management Commission, Coastal Resources Commission, Marine Fisheries Commission, Wildlife Resources Commission, Commission for Public Health, Sedimentation Control Commission, Mining Commission, and Pesticide Board) from adopting any rule that is more restrictive than those imposed by federal law or rule unless (1) there is a serious and unforeseen threat to the public health, safety, or welfare or (2) the more restrictive provision has been expressly required by state or federal law, budget, or court order. Comparable restrictions on rule making were also included in Section 13.11B of the Current Operations and Capital Improvements Appropriations Act of 2011 (S.L. 2011-145, H 200), codified at G.S. 95-14.2, 106-22.6, and 143B-279.16. This trend to limit state regulation of topics that are subject to federal regulation continued in 2012. S.L. 2012-91 (H 952) limits state rules regulating toxic air pollutants. It amends G.S. 143-215.107(a) to exempt sources subject to federal regulation unless DENR determines that the source would present an unacceptable risk to human health.

S.L. 2011-398 also moves final decision-making authority in most individual contested cases from state agencies to administrative law judges. These judges previously conducted the hearing and recommended decisions.

## Agency Reorganization

The General Assembly moved two large programs from the Department of Environment and Natural Resources (DENR) to the Department of Agriculture and Consumer Services. Section 13.22A of the Current Operations and Capital Improvements Appropriations Act of 2011 (S.L. 2011-145, H 200) transferred the Division of Soil and Water Conservation, including all of its staff and programs; Section 13.25 transferred the Division of Forest Resources, including all of its staff and programs. These sections also made conforming changes to the many state statutes that address soil and water and forestry programs. Among these adjustments are the transfer of the Soil and Water Conservation Commission and the Forestry Council, the agricultural cost share program related to preventing nonpoint source water pollution, and programs related to forest fires and open burning permits.

In 1989 the state embarked upon a merger of environmental health and environmental protection programs into a single agency with the movement of many environmental health programs into DENR. In 1997 many of those programs were returned to the Department of Health and Human Services (DHHS). A small number of programs were, however, left in DENR. In 2011 the General Assembly returned to the agency placement of those remaining programs. Section 13.3 of the 2011 Appropriations Act abolished the Division of Environmental Health in DENR. That Division's public water supply program was moved to the Division of Water Resources, the shellfish sanitation program moved to the Division of Marine Fisheries, the environmental health and on-site waste disposal programs were moved back to DHHS, and several other functions moved to the Department of Agriculture and Consumer Services or were abolished.

## Energy Resources

### *Oil and Gas Development*

North Carolina currently has no commercial oil or gas extraction in the state. Proposals to add that capacity through use of new technology for shale gas extraction or off-shore oil and gas development continue to be proposed. In 2011 and 2012 the legislature took steps to advance these proposals.

The development of technology to extract natural gas from deep shale deposits has changed substantially in the past decade. Active development of gas using hydraulic fracturing in other parts of the country and in Canada have prompted considerable interest in the possibilities of shale gas extraction in North Carolina. Current state law prohibits hydraulic fracturing. In 2011 the General Assembly, in S.L. 2011-276, mandated a study on the topic (this law also added G.S. 113-420 to -424 to the statutes to establish procedures and compensation for owners when oil and gas operators enter surface property they do not own for operations such as surveys and inspections). DENR released a report on the natural gas resource, potential impacts of resource recovery, and associated regulatory issues on April 30, 2012.

The DENR report concluded that about thirteen counties in North Carolina are home to a potential resource, but precise estimates of the nature and extent of the resource are unknown pending exploration (most of the projections are based on only two test wells in Lee County). The DENR study estimated a potential for some 360 to 370 wells in the state, producing some 300 drilling jobs over seven years. An individual well takes about ten days to drill, with rigs trucked from site to site, and uses something on the order of three to five million gallons of water (about 10 to 30 percent of which is recovered). The water is injected into the deep wells with a mixture of sand and chemicals under high pressure to fracture the shale and release

natural gas. Concerns raised about the process include potential groundwater contamination (either from migration of injected chemicals or leakage from well casings), adequacy of water supply, compatibility of drilling and production facility with surrounding uses, noise and air quality impacts from drilling, runoff and spills from drilling operations, and damage to roads from movement of drilling equipment and infrastructure for processing and distribution. The intergovernmental issue of state preemption of local regulations has also been an ongoing point of discussion. On the positive side, proponents note the economic benefits of additional fuel resources, the economic and environmental advantages of more natural gas to replace oil as a fuel, and the jobs resulting from exploration, drilling, production, and distribution.

In 2012 the legislative debate was essentially whether to (1) repeal the ban on hydraulic fracturing (“fracking”) now and order development of appropriate regulatory standards or (2) start work on a new regulatory framework and remove the ban when that is done. In some respects this debate was more symbolic than it was resulting in immediate practical effects. Given the small size of the projected North Carolina resource, current low prices of natural gas, a national lack of storage capacity, and the lack of a distribution network for collection and processing recovered gas, most experts expect there will be little demand for drilling in the state over the next five years. The legislative leadership favored the former approach, while the governor supported the latter. The legislative view prevailed, as a bill to proceed immediately with removing the fracking ban and setting up new regulatory provisions was enacted over the governor’s veto.

S.L. 2012-143 (S 820) removes the ban on hydraulic fracturing. It revises the state Mining Commission to create a new Mining and Energy Commission (G.S. 143B-293.2). The new commission is directed to develop a modern regulatory program for shale gas extraction (G.S. 113-391). The proposed rules are to be adopted by October 1, 2014. Permits for exploration and development may not be issued until the General Assembly takes action to allow issuance. The new commission is directed to work with the League of Municipalities and Association of County Commissioners to examine local regulation of oil and gas exploration and development, allowing reasonable regulations that do not have the effect of prohibiting exploration or development. The three groups are also directed to examine the costs to local governments from infrastructure impacts (roads and the like) and how those costs should be addressed.

### ***Other Energy Issues***

Development of off-shore oil and gas reserves has in recent decades proven to be an important source for global energy resources. In the United States, the Gulf of Mexico has been heavily developed, and there are important off-shore oil and gas developments off the California and Alaska coasts. There was active interest in exploration and potential development of oil or gas resources off the North Carolina coast in the 1980s, interest that periodically reemerges. Likewise, there has been increased international development of off-shore wind resources. High-profile commercial wind projects have been proposed for areas off the Massachusetts coast and along the mid and north Atlantic coast. Studies indicate the wind potential off the North Carolina coast could also potentially support wind projects. This potential prompted both legislative and gubernatorial studies of these issues in 2009 and 2010 and led to legislative action in 2011–2012.

In 2011 the General Assembly approved Senate Bill 709. This bill directed the governor to pursue an interstate compact with Virginia and South Carolina relative to exploration, development, and production of off-shore energy development. Governor Perdue vetoed the bill, and her veto was not overridden. The bill also included a directive to prepare a study on onshore shale

gas development, a requirement that was subsequently incorporated into the adopted legislation noted above.

In other action, S.L. 2011-150 (H 266) allowed specified additional local governments to expedite leases for renewable energy facilities.

### **Water Quality and Supply**

S.L. 2011-394 (H 119) made a number of amendments to state statutes regarding water. It added provisions directing the Environmental Management Commission to develop model practices for stormwater capture and reuse, to encourage grey-water reuse, to exempt Type I solid waste composting facilities from water quality permitting, to require weather-based controllers for certain irrigation systems, to exempt some small dams from state permitting, to delay implementation of the Jordan Lake rules for two years, to grandfather existing lots from some aspects of the Neuse and Tar-Pamlico riparian buffer rules, and to add provisions allowing cisterns.

A number of additional laws adopted in 2011 affect specific water supply issues. S.L. 2011-374 (H 609) revised various statutes to promote state-local cooperation in developing future public water supplies, to allow creation of regional water supply planning organizations, and to allow funds from the Clean Water Management Trust Fund to be used to preserve lands for water supply reservoirs. S.L. 2011-218 (H 388) allows cross-connections between potable and reclaimed water with DNER approval. S.L. 2011-255 (S 676) clarified the rights of property owners regarding private drinking water wells.

In other water quality action, S.L. 2011-220 (H 492) removed certain “urbanized” unincorporated areas from stormwater program coverage if actual population growth in the county containing the unincorporated area occurred in an area consisting of less than 5 percent of the county’s land area. S.L. 2011-24 (H 62) disapproved French Broad River basin rules as adopted by the Environmental Management Commission. S.L. 2011-118 (S 501) allows modifications of existing swine houses.

In 2012 S.L. 2012-187 (S 810) made a variety of technical changes to environmental laws and laws affecting the administrative rule-making process. Among the changes with policy implications is an amendment to G.S. 143-213 to exclude any airborne contaminants from “discharges” subject to water quality regulations. S.L. 2012-200 (S 229) also revised a number of environmental laws. Several of these amendments affect land use and development. S.L. 2012-200 amends G.S. 143-214.5 to require local government water supply watershed regulations to allow an applicant to average density on two noncontiguous tracts under specified conditions. It amends G.S. 143-214.23 to prohibit local governments from treating privately owned land within riparian buffers as public land. It modifies the means of calculating encroachment into riparian buffers for single-family residences and septic systems within the Neuse and Tar-Pamlico basins. It delays implementation of Jordan Lake local stormwater management programs. It requires the Department of Health and Human Services to establish a variance procedure for setbacks from private drinking water wells. S.L. 2012-201 (H 953) likewise includes a number of amendments to environmental laws, including a delay in the implementation of the Jordan Lake rules.

### **Coastal**

#### ***Sea Level Rise***

A bill that would limit consideration of projections of increased sea level rise in state coastal planning and regulations generated national attention in the 2012 session. House Bill 819, as passed by the House of Representatives in 2011, addressed rules determining the oceanfront setback for repair and reconstruction of pre-2009 homes. A Senate committee in 2012 replaced

this bill with one that would have prohibited the state from using a recommendation from the Coastal Resources Commission's scientific advisory committee regarding sea level rise projections. The advisory panel had reviewed the science on this issue and in March 2010 reported a consensus recommendation that a figure of 39 inches of sea level rise by 2100 be used for planning purposes. NC-20, a group of coastal economic development and local government advocates, contended that the science on this issue was too uncertain to use such a figure. At their urging, the Senate committee approved a restriction that only historical data since 1900 could be used and that data could only be projected linearly (which results in a projection of an 8 inch rise by 2100) and could not include scenarios of accelerated rates of sea level rise. As adopted, S.L. 2012-202 (H 819), which became law without the governor's signature, prohibits the state from defining rates of sea level change for regulatory purposes prior to July 1, 2016. It directs the science panel to prepare and deliver its five-year update to its sea level rise assessment report by March 31, 2015. S.L. 2012-202 goes on to include the original provisions on setbacks for repair and reconstruction of existing residences and directs consideration of a new area of environmental concern for the mouth of the Cape Fear River, Caswell Beach, and Bald Head Island and consideration of eliminating the inlet hazard area of environmental concern.

#### ***Other Coastal Issues***

The General Assembly took several actions regarding ocean erosion control efforts. In the 1980s North Carolina adopted nationally significant policies to prohibit "shoreline hardening" of ocean beaches. While measures such as beach nourishment are allowed, construction of bulkheads, seawalls, groins, jetties, and similar "hard" structures that attempt to stabilize the shoreline location were prohibited under Coastal Resources Commission regulations. This general policy was added to the statutes in 2003 with the adoption of G.S. 113A-115.1. S.L. 2011-387 (S 110) adds G.S. 113A-115.1(d) to allow for the permitting up to four "terminal groins" that are constructed in association with beach nourishment projects. The statute specifies the analysis and information required for permit applications for terminal groins and requires a plan to monitor, mitigate, and finance mitigation of any adverse impacts of groin projects. S.L. 2011-78 (H 415) addresses the littoral rights of oceanfront property owners in two jurisdictions that have undertaken beach nourishment projects. It provides that these owners' prior littoral rights (including a right of direct access to the water) are not lost due to the presence of intervening public lands created by the beach fill projects. The law also provides that this shall not affect title to or public trust rights in the created lands along the ocean shoreline.

In other action, S.L. 2011-82 (H 506) authorizes Wrightsville Beach to remove abandoned vessels that pose a hazard to navigation or to other vessels.

#### **Waste**

For several decades the state has been engaged in efforts to address various issues related to hazardous wastes. This has included efforts to reduce wastes generated, to more carefully site and manage waste disposal sites, and to cleanup up various types of sites, including, particularly, leaking underground storage tanks and contaminated industrial sites. In recent years the legislature has moved to provide more flexibility in waste cleanup options.

S.L. 2011-186 (H 45) continues this trend. The Manufacturers and Chemical Industry Council has for years advocated a risk-based remediation program, and this law establishes it. Owners and responsible parties are given the option to present a risk-based remedy based on site-specific risk information. The proposed remedy can include a no-action alternative if a consultant

review reports that the contaminated site will not pose a major risk to health or the environment if the recommended remedial plan is followed.

In other action, S.L. 2011-394 (H 119) amended statutes regarding landfill disposal of beverage containers.

### **Conservation Lands**

The state's trust funds for acquisition of conservation lands were casualties of state budget cuts for 2011. Section 13.26 of the Current Operations and Capital Improvements Appropriations Act of 2011 (S.L. 2011-145, H 200) repealed the statutory authority for a \$100 million per year appropriation (which was rarely actually fully funded), allocated up to \$1.5 million for a program of buffers around military installations and for air corridor protection, allocated \$3 million for operations and debt service, allocated \$6.25 million for wastewater and water projects, and prohibited use of most of these funds for any land acquisition other than conservation easements. Section 13.11C of the act allocated funds for the Parks and Recreation Trust Fund, including \$8 million for capital projects, \$4.223 million for local grants, and \$705,000 for the coastal access program.

In other 2011 actions affecting conservation lands, S.L. 2011-209 (S 309) created G.S. 139-7.1 to allow any soil and water conservation district to establish a special reserve fund for the maintenance of conservation easements. S.L. 2011-274 (H 350) amended G.S. 105-275 to clarify the property tax exemption for conservation lands held by nonprofit organizations. In a local act, S.L. 2011-133 (H 410) facilitates efforts by Pinebluff to preserve undeveloped land for park purposes.

### **Miscellaneous**

In other action, S.L. 2011-394 (H 119) amended statutes regarding landfill disposal of beverage containers. S.L. 2011-372 (H 567) amended G.S. 153B-3 to stagger the terms on the Mountain Resources Commission.

## **Housing, Community Development, and Economic Development**

### **Housing**

Section 2.17 of S.L. 2012-79 (S 826) reorganizes the State Home Foreclosure Prevention Trust Fund legislation (G.S. 45-101 *et seq.*) to consolidate the program in the Housing Finance Agency (HFA), transferring functions which formerly were assigned to the commissioner of banks. In particular, the HFA will now collect fees from mortgage servicers, review the database to determine which home loans are appropriate for efforts to prevent foreclosure, and extend the allowable filing dates for certain foreclosure proceedings. S.L. 2012-79 also reassigned the responsibility for reporting on the foreclosure prevention program to the General Assembly from the banking commissioner to the HFA.

Other legislation, S.L. 2012-17 (H 493), makes various changes to the landlord-tenant laws. Most notable are changes to G.S. 42-51, which sets out those expenses that a landlord is authorized to deduct from a security deposit. Under the new law these deductions will now include unpaid late fees and fees paid to a real estate broker in order to re-rent the premises following the tenant's lease agreement breach.

## Community Development

Section 13 of S.L. 2012-142 (H 950), the 2012 amendments to the Current Operations and Capital Improvements Appropriations Act of 2011, makes a number of minor changes in programs administered by the North Carolina Department of Commerce that suggest a more active role for the General Assembly. Section 13.1 of the law allocates appropriations from federal block grants for the Community Development Block Grant Fund (CDBG); these appropriations were reduced from \$45 million for 2011–2012 to \$42.5 million for 2012–2013. S.L. 2012-142 also directs the commerce department to consult with the Joint Legislative Commission on Governmental Operations before reallocating CDBG funds, except in cases of an imminent threat to public health or safety. Section 13.4 of the law directs the North Carolina Economic Development Board to evaluate annually the state’s economic performance based on the data and goals of the Comprehensive Strategic Economic Development Plan. It also amends G.S. 143B-435.1, directing the commerce department to report to four different legislative committees, as well as to the Fiscal Research Division, regarding the use of “clawbacks” (efforts to recover grant funds from recipients that fail to achieve certain standards in the grant agreement) in various economic development programs. Finally, the law adds a new G.S. 143B-437.08 requiring the department to submit a written report each year to three legislative committees and the Fiscal Research Division concerning tier rankings, including a map showing the tier ranking of each county.

Section 13.6 of S.L. 2012-142 makes various changes to the One North Carolina Fund. The law limits the dollar value of commitments endorsed by the governor in a single fiscal year to \$14 million. It also directs the commerce department to study the minimum level of funding necessary to make the One North Carolina program successful and to report the results to four legislative committees and the Fiscal Research Division. The department must also report annually to the Joint Legislative Oversight Committee and the Global Engagement Oversight Committee and include statistics and data spelled out in S.L. 2012-142.

Section 13.13A of S.L. 2012-142 amends section 14.16(a) of the 2011 Appropriations Act to reallocate funds for the North Carolina Rural Economic Development Center Infrastructure Program that were reduced from \$16.505 million to \$13.462 million for 2012–2013 and to do the same for funds for other Rural Center programs, which were reduced from \$3.58 million to \$2.92 million.

Finally, section 13.15 of S.L. 2012-142 authorizes the Legislative Research Commission to study the funding and alignment of the membership of each of the regional economic development commissions.

## Economic Development

S.L. 2012-74 (H1015) includes a potpourri of changes designed to foster business and industrial development. Section 3 of the law provides a tax break to an unnamed airline by extending the period of time in which it may apply for a refund of certain sales tax paid on aviation fuel. Section 4 amends G.S. 143B-437.01(a) to allow funds from the state’s Industrial Development Fund to be used for projects involving otherwise eligible sewer improvements that are located in counties that adjoin the “county in which the building is located.” Section 5 of S.L. 2012-74 allows certain business developers to take advantage of a tax credit “carry-forward” if the taxpayer invests more than \$100 million in a development tier-one area. Section 6 makes technical changes to G.S. 143B-437.013(a), which defines eligible port enhancement zones. Finally, section 7 offers a one-year sales tax refund for purchases of specialized equipment used at state ports.

## Miscellaneous

### Urban Research Service Districts

Since 1973 counties have been authorized to adopt county research and production service districts that allow property owners to approve property tax levies for services to be provided either in addition to or to a greater extent than services or facilities that are provided in the rest of the county. This authorization was originally tailored for and still applies in the Research Triangle Park. S.L. 2012-73 (H 391) reworks and expands this law and provides for new “urban research service districts” that may be established within existing county research and production service districts.

### Water and Sewer Extensions

A bill that garnered considerable attention in the waning days of the 2012 session, Senate Bill 382, would have applied statewide but was prompted by a controversial proposed development south of Durham (known as the “751 South” project). The large mixed-use project has to date been supported by the county and opposed by the city, which refused to annex it and extend city water and sewer services to it. The bill would have required a city that extends water and sewer lines to a “designated urban growth area” outside the city to extend services to all property in that area on the same policy basis as extensions within the city.

### Attorney Fees

Successful litigants may not recover attorney fees as costs or damages unless doing so is expressly authorized by statute or if there has been a constitutional violation.

Statutory opportunities for attorney fees are quite limited. Among the situations where recovery of attorney fees is permitted under state statutes are the following: (1) where the court finds (a) that there was a complete absence of a justiciable issue of either law or fact raised by the losing party (a frivolous claim) or (b) that a state agency has acted without substantial justification; (2) in nuisance abatement actions; and (3) for enforcement of a handful of other specific laws (including the open meetings and public records laws, the State Fair Housing Act, and the Swine Farm Siting Act).

In 2011, in part motivated by recent litigation involving the imposition of impact fees, the General Assembly added a new category of cases in which attorney fees can be recovered that has implications for cities and counties engaged in development regulation. S.L. 2011-299 (H 687) adds G.S. 6-21.6 to provide that the court may award costs and reasonable attorney fees if a city or county has acted outside the scope of its legal authority. The court is directed to award attorney fees and costs if it also finds that the challenged action was an abuse of discretion.

### Emergency Management

The 2012 General Assembly enacted a substantial update of the state’s emergency management statutes.

S.L. 2012-12 (H 843) consolidates and reorganizes these statutes, mostly placing these provisions into a new Article 1A of Chapter 166A of the statutes. The provisions deal with both state and local government declarations of emergencies and disasters. While most of the prior law is not substantially changed, the new law clarifies various aspects of local authority, for example, by allowing a declaration to affect a defined area and by stating that restrictions can be tailored

to the needs generated by an individual event and that localities can impose curfews and order both voluntary and mandatory evacuations.

Additional modest modifications in state emergency management provisions were made by S.L. 1012-90 (S 798), such as extending the potential expiration of disaster declarations.

### **Bills Not Adopted**

#### *Eminent Domain*

For several years, there has been discussion about a constitutional amendment to prohibit use of eminent domain to acquire land for economic development purposes. That practice is not allowed by statute in North Carolina, but some feel it should be banned by the state constitution to prevent future legislatures from allowing it. The bill to call for a referendum on such a state constitutional amendment in November 2012 (H 8) passed the House in 2011 but not the Senate.

#### *Simple Majority to Adopt Municipal Ordinance*

The statute on adopting municipal ordinances, G.S. 160A-75, requires a two-thirds vote to adopt, amend, or repeal an ordinance if the vote is taken on the date it is first voted upon. If the action gets majority approval but not a supermajority, it is carried over to the next meeting for a final vote. The comparable county voting statute, G.S. 153A-45, requires a unanimous vote to adopt an ordinance at the meeting it is first voted upon but only requires a simple majority if a public hearing was required for the proposed ordinance. Since state law mandates a public hearing for all land development ordinances, this has the effect of going directly to a simple majority vote for county action on these ordinances. Senate Bill 413 would have applied this county process to municipal ordinances. It was adopted by the Senate in 2011 but not taken up by the House of Representatives.

### **Agenda 21**

In recent years, a notion has gained currency in some circles that “sustainable development,” “smart growth,” “regional visioning” projects, and the like are part of a coordinated international effort to undermine private property rights, automobile ownership, and the American way of life. Several states and many local governments have adopted resolutions identifying “United Nations (UN) Agenda 21” as a key element of this alleged conspiracy. “Agenda 21” refers to a statement on the environment and sustainable development approved at a UN-sponsored conference in Rio de Janeiro in 1992. A bill circulated for the 2012 session of the General Assembly would prohibit the state and local governments from adopting or implementing any “creed, doctrine, principle, or tenet” of this UN statement. House Bill 983 was introduced to allow consideration of the Agenda 21–based prohibition in 2012. The bill was not brought up for committee discussion, and no action was taken on it.



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# 2010 North Carolina Legislation Related to Planning and Development

Richard D. Ducker and David W. Owens

The 2010 session of the North Carolina General Assembly was dominated by the continuing state budget shortfalls. The legislature was faced with reducing expenditures by some \$850 million for the fiscal year. Since this was a short session the agenda was necessarily limited, but the budget discussions assured that few new initiatives, especially those requiring funding, would be addressed.

## Zoning and Development Regulation

### Video Sweepstakes

As a result of several trial court rulings that video sweepstakes games are not covered by the state's 2006 ban on video poker, these gaming operations rapidly expanded across the state. The General Assembly considered two responses—to ban the games or to allow, regulate, and tax them—and introduced bills in 2010 for both options.

The prohibition route prevailed. S.L. 2010-103 (H 80) creates G.S. 14-306.4 to prohibit the use of electronic machines and devices (any "entertainment display") for playing sweepstake games (defined as any game in which a player enters and becomes eligible to receive a prize). The law bans the use of electronic machines for real or simulated video poker (and any other card game), bingo, craps, keno, lotto, pot-of-gold, eight liner, and other similar video games. Activity on Indian tribal lands is exempted. The ban is effective December 1, 2010.

### Permit Extensions

Because of poor economic conditions over the past year, many development projects have continued to remain on hold and others have gone into foreclosure. Last year the recession prompted the adoption of S.L. 2009-406, which extended most state and local development approvals that were valid at any time between January 1, 2008, and December 31, 2010. This legislation suspended the expiration of permits and approvals throughout this three-year period and included

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sketch plans, preliminary plats, subdivision plats, site-specific and phased development plans, development agreements, development permits (such as zoning permits) and building permits in its coverage.

Given the slowness of the economic recovery, this session the development community sought a further two-year extension of these permits and approvals (so that the time periods for initiating development would not start to run until the end of 2012). Local governments suggested that if any further extensions were allowed, they should be limited to one year and that provisions should be added to deal with issues that have emerged regarding maintenance of sites, performance guarantees, and the like.

On the last day of the legislative session, S.L. 2010-177 (H 683) was adopted. The principal change in the law is an additional one-year extension of development approvals. The previous three-year period within which permits may not expire is now four years—January 1, 2008, to December 31, 2011.

S.L. 2010-177 made several critical additions to the 2009 legislation. Local governments (but not state agencies) may opt out of this additional extension altogether. A city or county may adopt a resolution providing that this new amendment does not apply to a development approval issued by that jurisdiction. The law also now includes three conditions for the additional extension of any development approvals. The holder of the development approval must (1) comply with all rules in effect at the time of original approval, (2) maintain all performance guarantees throughout the extended period, and (3) complete any infrastructure necessary to occupy permitted development.<sup>1</sup>

### **Local Bills**

When city and county planning operations were merged in Durham, the county secured authority to allow zoning protest petitions (which are required for cities but not allowed for counties). As originally authorized, the county used the standards for qualifying protests that had been authorized in the city legislation. These provisions, however, had not been updated since the statute on municipal protest petitions was amended in 2005. S.L. 2010-80 (S 1399) was adopted to conform the Durham County protest petition general procedures and definition of qualifying areas to current city standards.

S.L. 2010-62 (S 1435) enhances zoning enforcement options for Winston-Salem. It authorizes the city to summarily abate any violation that continues five days after a notice of violation, with the expense of the action to be paid by the violator. A lien (with the same priority as a tax lien) may be placed on the land to recover the costs if they are not paid. A secondary lien may also be placed on any other property in the city owned by the violator (other than the violator's principal residence). The city can also file a notice of *lis pendens* with the clerk of court upon issuance of a notice of violation. With this filing the notice of violation is thereafter binding on anyone acquiring title to the property.

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1. A complete description of this bill and its implications, along with sample opt-out resolutions, is provided in Richard D. Ducker and David W. Owens, "Development Approval Extension Extended," *Planning and Zoning Law Bulletin* No. 18 (Sept. 2010), available at [www.sog.unc.edu/pubs/electronicversions/pdfs/pzlb18.pdf](http://www.sog.unc.edu/pubs/electronicversions/pdfs/pzlb18.pdf).

### **Bills Not Enacted**

In 2009 the Senate approved Senate Bill 117, which would have prohibited use of any moratorium adopted “for the purpose of developing and adopting new or amended ordinances.” This bill was eligible for consideration in 2010 but was not taken up by the House of Representatives.

New limits on the use of eminent domain were also discussed in the 2010 session, but no action was taken. A referendum was proposed to add a constitutional amendment prohibiting the use of eminent domain to acquire land for economic development purposes. This practice is not currently statutorily authorized in North Carolina, but some legislators thought it should be banned by the state constitution to prevent future legislatures from allowing it. The bill calling for a referendum (House Bill 1659) did not pass.

### **Development Fees**

In 2009 the General Assembly adopted an unusual piece of legislation concerning new fees and fee increases applicable to subdivision development. G.S. 160A-4.1 and G.S. 153A-102.1 were enacted to require a city, county, sanitary district, or a water and sewer authority proposing these changes to provide notice of such on its website (if it had one) at least seven days prior to the meeting at which the matter was to first appear on the agenda. Section 11 of S.L. 2010-180 (H 1766, an omnibus environmental bill) amends these two statutes to allow the affected governmental unit to meet this notice requirement in several other ways as well. The new law requires the governmental unit to post notice in two of the following ways: (1) posting the notice on its own website, (2) posting the notice in certain prominent government buildings, (3) e-mailing the notice to a list of interested parties created by the unit, and (4) faxing the notice to a list of interested parties. If the unit does not have a website, it may ask the county to post the notice on the county’s website instead. This legislation applies to administrative fees and fees-in-lieu of dedicating recreation land or providing street improvements that may be required by the land subdivision control ordinance. It apparently also applies to connection, extension, impact, and capital expansion fees associated with providing water and wastewater facilities to new subdivisions.

One local act affecting subdivision fees was enacted. S.L. 2010-29 (H 1687) amends existing local legislation to allow the Town of Caswell Beach to join Holden Beach and Oak Island in imposing a sewer treatment fee and paying those fees to the provider of sewer treatment services.

## **Planning**

### **Community Planning Programs**

There have been various initiatives over the years to encourage and study community planning programs, including a number of legislative studies. These initiatives have included the NC 2000 Project of the early 1980s, the 1991–92 Statewide Comprehensive Planning study committee, the 1993–94 Partnership for Quality Growth study committee, several mountain area study committees in the 1990s, the 2000–2001 Smart Growth Study Commission, and the ongoing Legislative Study Commission on Urban Growth and Infrastructure Issues. The 2010 Studies

Act, S.L. 2010-152 (S 900), extended the urban growth and infrastructure study, with a final report now due upon convening of the 2011 legislative session.

### **Sustainable Communities**

Section 13.5 of the Current Operations and Capital Improvements Appropriations Act, S.L. 2010-31 (S 897), creates G.S. 143B-344.34 to G.S. 143B-344.38 to establish a sustainable communities initiative in the state. The act will address topics such as better transportation choices, provision of equitable and affordable housing, enhanced economic competitiveness, support of existing communities, the coordination of state policies and investments, and support of communities and neighborhoods. The new law creates a thirteen-member Sustainable Communities Task Force to provide oversight for the initiative. The task force will include members from six state agencies (the departments of Commerce, Environment and Natural Resources (DENR), Transportation, Administration, Health and Human Services, and the Housing Finance Agency). The governor appoints one additional member and the speaker of the House and president pro tempore of the Senate each appoint three members. The law specifies the interest areas to be represented by these seven appointees, each of whom is appointed to a four-year term. The interest areas include city government, county government, regional planning organizations, the building industry, the banking industry, a nonprofit organization involved in planning advocacy, and a professional planner who is a member of N.C. chapter of the American Planning Association. The task force is directed to seek funding for sustainable development initiatives, promote regional and interlocal partnerships, provide technical assistance to local governments, recommend state policies, develop a local government sustainable practices scoring system, and improve coordination among state agency efforts related to development and infrastructure and better integrate state, regional, and local efforts.

The law also creates a Sustainable Communities Grant Fund. Grants from this fund are to be used to fund regional, city, and county planning efforts to better integrate housing and transportation decisions and to improve land use and zoning capacities. In June 2010 the federal Department of Housing and Urban Development announced a \$100 million Sustainable Communities Regional Planning Grant program; thus, federal sustainable communities planning grants should soon be available to finance work in this area. The new state fund can be used to provide up to half of the local match required for these and other related federal grants. To be eligible for these grants, the recipient must be part of a regional sustainable development partnership with a defined work plan and memorandum of agreement concerning coordinated planning activities.

Beginning in 2011 the Sustainable Communities Task Force is to report each fall on policy recommendations, growth trends for each metropolitan region of the state, state policies and programs affecting sustainable communities, the task force's funding and grant activities, and related state-funded activities. Staff and administrative support for the task force is to be provided by DENR (and a vacant planning position in the Division of Coastal Management was transferred to the task force for staff support).

The entirety of this law expires on June 30, 2016.

## **Historic Preservation**

Certain historic landmarks enjoy special property tax treatment under North Carolina law. An amount equal to the difference between the taxes that would be due on 50 percent of the value of the property and on 100 percent of the value is deferred for up to three years. The deferred taxes become due and payable when the property loses its classification as a landmark as a result of a disqualifying event. A disqualifying event occurs when there is a change in the ordinance designating it a historic property or a change in the property, other than by fire or other natural disaster, causes the property's historical significance to be lost or substantially impaired. Section 17 of S.L. 2010-95 (S 1177) clarifies that no deferred taxes are due (all liens are extinguished) if the property's historical significance is lost or substantially impaired due to fire or other natural disaster.

Another class of property subject to special tax treatment is land within a historic district held by a nonprofit organized for preservation purposes for use as a future site for a historic structure to be moved to the site from another location. The land is exempt from property taxation altogether if the historic structure is moved to the property within five years from the time the property was originally classified. Section 15 of S.L. 2010-95 clarifies that no deferred taxes are due (all liens are extinguished) if a historic structure is located on the site within the permissible time period.

Section 19 of the studies act, S.L. 2010-152 (S 900), directs the Department of Cultural Resources to study designating the Endor Iron Furnace as a state historic site and to report to the 2011 General Assembly.

## **Transportation Mobility Fund**

Perhaps the most significant legislative initiative in the field of transportation was a key part of Governor Perdue's platform and is intended to make transportation funding more flexible. Section 28.7 of the 2010 Appropriations Act (S.L. 2010-31, S 897) adds a new G.S. Chapter 136, Article 14A, to establish the North Carolina Mobility Act. The legislation creates a transportation fund made up of appropriations or transfers from other funds that will be used to pay for North Carolina Department of Transportation (NCDOT) projects of statewide or regional significance. It calls for a transfer of \$31 million from the Highway Trust Fund to the Mobility Fund for 2011–12, \$45 million for 2012–13, and \$58 million for 2013–14 and annually thereafter.

These amounts are redirected from funds that otherwise would have been transferred from the Highway Trust Fund to the General Fund. Since some of the projects have been programmed for the North Carolina Turnpike Authority, the authority's appropriations from the Highway Trust Fund total \$84 million in 2010–11, \$99 million in 2011–13, and \$112 million in 2013–14 and annually thereafter. Projects to be funded under the act include the widening and improvement of Interstate 85 north of the Yadkin River Bridge, the Triangle Expressway in Wake County, the Monroe Connector/Bypass, the Mid-Currituck Bridge, and the Garden Parkway in Gaston County.

NCDOT is directed to develop project selection criteria and to submit a final report to the Joint Legislative Transportation Oversight Committee by December 15, 2010. NCDOT must also develop and update annually a report to submit to the committee containing a completion schedule for all Mobility Fund projects and an anticipated schedule for future projects.

### NCDOT Powers

A department or agency of state government will often sponsor an agency bill to make a series of technical and minor substantive changes to the statutes that will allow the department or agency to function more effectively and efficiently. S.L. 2010-165 (H 1734) represents such a bill with respect to NCDOT.

Several changes affect NCDOT's relationships with local governments. First, G.S. 136-18(38) is amended to authorize NCDOT to enter into agreements with local governments that allow NCDOT to receive funds from these governments to advance the construction schedule of a Transportation Improvement Program (TIP) project as well as to acquire rights-of-way. If such funds are to be reimbursed by NCDOT, the reimbursement must occur during the existing TIP. A second change authorizes NCDOT to locate and acquire rights-of-way for the installation of distributed antenna systems (or DAS, a form of wireless telecommunication facilities), "as permitted by local zoning." Later in the session, however, Section 14 of S.L. 2010-97 (S 1242) (a technical corrections bill) was adopted to delete the language "as permitted by local zoning." The effect of this provision remains unclear since these facilities may arguably still be subject to local zoning. Despite the fact that they may be classified as public utilities because they are heavily regulated and even though NCDOT may enjoy various benefits from having the facilities located within the state's right-of-way, these telecommunication facilities are owned and managed for a profit by private entities and apparently are still subject to zoning.<sup>2</sup>

Several features of S.L. 2010-165 also help to consolidate the authority of NCDOT and the secretary of transportation. One amends G.S. 143B-348, allowing the secretary or the secretary's designee to promulgate rules and regulations concerning all transportation functions assigned to NCDOT. This legislation continues a trend of consolidating in the office of the secretary of transportation rule-making authority previously assigned by statute to the Board of Transportation. These provisions were recommended by the Joint Legislative Transportation Oversight Committee. Second, the act makes technical changes to G.S. 159-81(1) reflecting the transfer of the North Carolina Turnpike Authority to NCDOT and to G.S. 136-89.189 affecting the length of certain turnpike project leases between the department and the authority.

Other changes include deleting a requirement in G.S. 136-18(40) that NCDOT report each year to both the Joint Legislative Oversight Committee and the Joint Legislative Commission on Seafood and Aquaculture on its progress in expanding public access to coastal waters. The act also rewrites G.S. 136-28.4 to require NCDOT to report annually rather than semiannually to the Joint Legislative Transportation Oversight Committee concerning the utilization of disadvantaged minority-owned and women-owned businesses.

One final series of technical changes eliminates references to a seven-year period concerning the TIP. The changes are designed to give NCDOT more flexibility in establishing programming options.

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2. See Bd. of Supervisors of Fairfax Cnty. v. Washington, D.C., SMSA L.P., 258 Va. 558, 522 S.E.2d 876 (1999) (telecommunication facilities within right-of-way of Virginia state highways and roads subject to zoning even where lease agreement with VDOT required telecommunication companies, as a substitute for lease payments, to purchase and install certain equipment for a closed-circuit television system, a highway advisory radio system, and emergency call boxes at various sites, all for the benefit of VDOT).

### **Pedestrian Safety Improvements on State Streets**

S.L. 2010-37 (S 595) is of special interest to municipalities. It reflects the increasing interest of cities in enhancing pedestrian-oriented facilities along major streets and the continuing skepticism of NCDOT about the suitability of such facilities along NCDOT streets and highways inside municipal limits. The act adds G.S. 136-66.3(c4) directing the department to accept and use any funding provided by a city for pedestrian safety improvement projects (e.g., mid-block crosswalks or pedestrian overpasses) to a NCDOT street or highway inside city limits. The city must fund all of the project cost, but NCDOT retains the right to approve the design and oversee the construction or erection of the safety improvement.

### **Studies**

S.L. 2010-152 (S 900), the studies act, authorizes studies the Legislative Research Commission (LRC) and other commissions, task forces, and committees may undertake. Several of these concern transportation. Section 4.5 of the act would allow an LRC committee to study “whether to limit the responsibility of developers for the cost of street or highway construction to the amount necessary to serve the projected traffic generated by a development.” Constitutional limitations probably already limit such responsibility, but the LRC may decide to study recommending more explicit statutory limitations on local government requirements regarding these developer exactions.

In addition, Section 36.1 of the studies act establishes the Railroads Study Commission. The commission must report to the 2011 General Assembly on a variety of passenger and freight rail issues. A related section of the act (Section 30.1) concerns the governor’s Logistics Task Force, which has already been established by Executive Order 30. It authorizes the task force to study combining the Global Transpark Authority, the North Carolina Ports Authority, and the North Carolina Railroad so as to merge the administration of air cargo, rail, and sea transportation infrastructure. The act also allows the task force to study establishing Class I rail service to the Global Transpark and the North Carolina ports.

Section 22 of the studies act affects the Legislative Study Commission on Urban Growth and Infrastructure Issues (discussed above), first organized in 2008. The act directs the commission to submit its final report by the time the 2011 legislative session begins. The state’s transportation infrastructure needs will surely be addressed in this report.

## **Economic and Community Development**

### **Incentives and Tax Credits**

S.L. 2010-147 (H 1973) modifies a variety of state-level economic development incentives with a potpourri of changes. First, it extends the sunset for various tax credits from the end of this year to the end of 2012, including those for “growing businesses” (G.S. 105, Article 3J) and for entities recycling oyster shells (G.S. 105-151.30). Second, it defines environmental disqualifying events that can cause a business to lose such a tax credit and applies that standard to the Growing Business program, the Site Infrastructure Development program (G.S. 143B-437.02), and the Job Maintenance and Capital Development Fund (G.S. 143B-437.012). Third, it establishes a tax credit for the production of certain interactive digital media (G.S. 105, Article 3F). Fourth, it directs that an eco-industrial park meeting certain energy and environmental standards be treated as if it were located in a development tier one area for purposes of various incentive

programs. It also establishes tax credits for both eco-industrial parks and university research facilities. Finally, it makes changes to tax credit features applicable to film and television production companies (G.S. 105-130.47 and G.S. 105-151.29) and raises the amount of the credit for a feature film from \$7.5 million to \$20 million. A separate act, S.L. 2010-89 (H 713), also concerns the calculation of state income taxes for film companies.

S.L. 2010-166 (S 1215) also affects economic development incentives. First, it amends G.S. 105-256(a) to require the secretary of revenue to prepare annually an economic incentives report that includes information on tax credits and refunds, itemized by credit or refund and by taxpayer, for the previous calendar year. The act makes conforming changes to various other statutes to ensure that information already required under other reporting requirements is included in the incentives report. Second, it adds a new G.S. 105-164.14A to define and allow annual economic incentive refunds of sales and use taxes to passenger air carriers, major recycling facilities, businesses in low-tier areas, motorsports racing teams or sanctioning bodies, analytical services businesses, and railroad intermodal facilities. It does the same under G.S. 105-164.14B with respect to air courier services, aircraft manufacturing, bioprocessing, financial services and securities operations, motor vehicle manufacturing , pharmaceutical manufacturing, semiconductor manufacturing, and solar electricity manufacturing. The act sets out certain minimum investment and wage standard requirements businesses or companies must meet to qualify for these refunds. The act also adds G.S. 105-164.29B to direct the secretary of revenue to make information on tax refunds available to a designated city or county official within thirty days after the information is requested.

S.L. 2010-186 (S 778) reflects the tension between economic development incentives and environmental requirements. It adds a new G.S. 113A-12(5) to provide that an environmental document under the State Environmental Policy Act (SEPA) is not required in connection with projects receiving public monies in the form of economic incentive payments. A subsequent act, S.L. 2010-188 (H 1099), provides that the prior act became effective June 1, 2010, but that the exemption does not apply to a project that was the subject of pending litigation or a court order issued prior to that date.

### **Unemployment**

Section 4.7 of S.L. 2010-123 (S 1202) amends Section 10.37 of the appropriations act (S.L. 2010-31, S 897) to address the state's unemployment problems. It authorizes the North Carolina Department of Health and Human Services to spend up to \$20 million to implement a temporary statewide subsidized employment program to create transitional employment opportunities for the chronically underemployed.

### **Main Street Program**

Section 14.6A of the appropriations act (S.L. 2010-31) amends G.S. 143B-472.35, the statute establishing the Main Street Solutions Fund, to make certain critical changes to that program. It provides that funding is now available only to active Main Street communities and designated micropolitan communities in tier two and three counties (the two less-distressed levels of county economic well-being). A *micropolitan* is defined as a geographic entity containing an urban core and having a population of between 10,000 and 50,000. No more than \$200,000 may be awarded to each eligible local government. Two dollars of non-state money must be provided as matching funds for each dollar awarded from the fund. The amendments also have loosened program requirements related to the location of eligible activities; public infrastructure and

historic preservation initiatives located outside of downtown core areas may now be funded. The legislation also expands the scope and nature of the downtown economic development initiatives that may be eligible for funding.

## **Environment**

### **Uwharrie Regional Resources Commission**

The General Assembly began discussion in 2009 about the implications of federal relicensing of Alcoa's Badin hydroelectric project on the Yadkin River. While no direct action was taken on the matter, S.L. 2010-176 (H 972) was enacted to establish a program to "encourage quality growth and development while preserving the natural resources" of the Uwharrie region. The law enacts G.S. 153C-1 to G.S. 153C-4, the Uwharrie Regional Resources Act. The act creates a ten-member Uwharrie Resources Commission to identify and evaluate issues; coordinate local and regional efforts and study new strategies and tools to address those issues; provide a forum for discussion, communication, and education; and make recommendations concerning the use, stewardship, and enhancement of important regional resources. The commission does not have independent planning or regulatory authority. It will be administratively housed within the Department of Commerce.

### **Water Resource Planning**

Several laws were adopted affecting water supply and water quality planning. S.L. 2010-150 (H 1747) amends G.S. 143-355(l) to require that local governments and community water systems plan for future water capacity issues. The plans must address intended actions when 80 percent of the system capacity has been allocated or when seasonal demand exceeds 90 percent of capacity. S.L. 2010-149 (H 1748) requires state agencies and agricultural groups to develop plans for agricultural water infrastructure needs and voluntary conservation practices. S.L. 2010-143 (H 1743) amends G.S. 143-355 to direct the Department of Environment and Natural Resources (DENR) to develop a basinwide hydrologic model for each of the state's seventeen major river basins. S.L. 2010-144 (H 1746) directs DENR to establish a task force to survey information on water and wastewater infrastructure needs, incorporating federal agency information into state planning efforts, and measures for monitoring the financial condition of public water and wastewater systems. S.L. 2010-151 (H 1744) modifies the criteria for water and wastewater grants and loans in several ways. It adds priority points for utilizing an asset management plan for projects with more than 1,000 service connections, for having high-unit-cost projects, for addressing a potential conflict between local plans or implementing plan coordination, and for adopting water conservation measures that are more stringent than the minimum required.

### **Miscellaneous**

The massive oil spill in the Gulf of Mexico prompted the General Assembly to review and update state laws on the subject of oil spills. S.L. 2010-179 (S 836) amends various statutes to clarify that limits on financial liability for cleanup and damages do not apply to spills from offshore oil and gas facilities. The law also enacts G.S. 113A-119.2 to specify the information required to be provided for state review of proposed offshore oil and gas exploration, development, and production facilities. The Coastal Resources Commission and the Department of

Crime Control and Public Safety are directed to review the Gulf of Mexico experience and make recommendations for any further action needed by the state.

S.L. 2010-195 (S 886) creates a rather narrowly targeted program for cleanfields renewable energy demonstration parks. To qualify, a site must have at least 250 contiguous acres, have a brownfields agreement with DENR, include a former manufacturing plant that employed at least 250 workers, plan to attract at least 250 new jobs, and be created to feature clean-energy facilities. If certified as meeting these standards, an on-site biomass renewable energy facility is eligible for triple credits from the Utilities Commission for renewable energy portfolio requirements. S.L. 2010-4 (S 388) allows funding for grants under the federal stimulus program to be used in projects eligible for state income tax credits for renewable energy projects. S.L. 2010-167 (H 1829) extends state income tax credits for renewable energy projects (and adds geothermal equipment to projects eligible for the credit) and creates a credit for commercial-scale renewable energy facilities. The law clarifies local government authority to finance energy programs. It also amends the state income tax credit for donation of conservation lands (G.S. 105-130.34 and G.S. 105-151.12) to clarify that donated property must be accepted for use for a qualifying purpose. S.L. 2010-63 (H 1814) allows Cabarrus County to undertake energy efficiency projects without bidding and lease restrictions. S.L. 2010-57 (S 1114) does the same for Asheville, Carrboro, and Chapel Hill.

The 2010 Studies Act, S.L. 2010-152 (S 900), also authorizes two studies by the Environmental Review Commission. The commission may study cost-sharing for water quality initiatives and the use and storage of reclaimed water.

## Jurisdiction

Major revision to the state's annexation laws was heavily debated in the 2009 session of the General Assembly, and a large number of bills on this topic were introduced. A key point of contention in House Bill 524 was whether and under what circumstances residents in areas proposed for annexation would be able to vote on the proposal. The bill also addressed refinements in the definition of which areas are sufficiently developed for urban purposes as to qualify for involuntary annexation. House Bill 524 passed the House in 2009 but did not emerge from a Senate committee in the short session.

Several local bills made specific changes to jurisdictional boundaries. Three laws de-annexed territory from cities. S.L. 2010-26 (S 1135) removed land from Red Oak and Rocky Mount, S.L. 2010-27 (S 1389) removed land from Graham, and S.L. 2010-28 (H 337) removed land from Statesville. S.L. 2010-86 (S 1444) allows Concord and Kannapolis to annex "donut holes" surrounded by city territory and allows Kannapolis to release land to the county. Three laws adjust jurisdictional boundary lines. S.L. 2010-61 (S 1362) does so for Orange and Alamance counties; S.L. 2010-75 (S 1361), for Greensboro and High Point; and S.L. 2010-85 (H 710), for Archer Lodge.

## **Building Code**

### **Broadband-Smart Grid**

Section 2.20 of the studies act (S.L. 2010-152, S 900) allows the LRC to study issues relating to the interoperability of telecommunication and smart-grid applications in homes and business. More specifically, it authorizes the study of state building design standards relative to smart grid and broadband deployments.

### **Carbon Monoxide Detectors**

Legislation adopted in 2008 authorized the North Carolina Building Code Council to amend the building code to require either battery-operated or electric carbon monoxide detectors in certain newly constructed residential units. It also required landlords to install such detectors in certain residential rental units by January 1, 2010. Sections 6(a) and 6(b) of S.L. 2010-97 (S 1242) clarify that this authorization and requirement apply to any dwelling unit having a fossil-fuel-burning heater, appliance, or fireplace or an attached garage.

### **Pyrotechnic Training and Permitting**

In 2009 the General Assembly adopted legislation effective February 1, 2010, providing for the training of persons who handle pyrotechnics in connection with a concert or public display and for the permitting or licensing of display operators. S.L. 2010-22 (S 992) expands the scope of this program and the responsibilities of the commissioner of insurance acting through the state fire marshal to administer the program. The legislation provides not only for licenses for display operators but also for assistant display operators and “proximate audience” display operators and sets forth requirements for “event employees.” The act also addresses license and examination fees, license reciprocity, discipline, and imposition of sanctions for rule violations.

### **Local Act**

One local act, S.L. 2010-30 (H 1953), amends G.S. 153A-357(c)(2) to allow Currituck County to withhold a building permit from any property owner who owes delinquent property taxes, so long as the owner has not protested the assessment or collection of the taxes.

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# 2009 North Carolina Planning and Development–Related Legislation

**Richard D. Ducker and David W. Owens**

The 2009 session of the North Carolina General Assembly addressed a number of issues of interest to the planning community. While several substantial new laws were enacted, action on several other bills was deferred.

In many respects the economic impacts of the 2008–9 recession dominated discussion. The economic crisis resulted in a serious state budget crunch. Projected revenues for the 2009–10 fiscal year were on the order of \$4.3 billion short of what would be needed to continue programs at the 2008–9 level—about a 20 percent shortfall. While the federal stimulus program provided just over \$1 billion to fill this gap, disagreements about the appropriate mix of budget cuts and new revenue to make up the remaining \$3 billion occupied a great deal of the year’s legislative agenda.

While the state budget was a principal focus of the session, the impacts of the economic downturn affected many other areas of state law. Concern about the effects of the recession on the development industry, for example, was the impetus behind enactment of legislation to extend previously issued development approvals.

The General Assembly also enacted significant transportation legislation in 2009, establishing new grant programs and expanding local taxing authority for some transportation programs.

## Zoning and Development Regulation

### Extension of Development Approvals

The lack of credit and dismal prospects for sales led many developers in 2008 and 2009 to postpone initiation of previously approved projects. This prompted concern in the development community that with the passage of time and no action on the developers’ part, development permits would soon begin to expire. The General Assembly addressed these concerns with enactment of a permit extension law, S.L. 2009-406 (S 831). The law was effective August 4, 2009.

The new legislation is modeled after permit extension legislation adopted in New Jersey. That state first adopted a law very similar to S.L. 2009-406 in 1992 during a prior economic downturn. The initial New Jersey law extended state and local development approvals for the January 1, 1989, through December 31, 1996, period. In light of the current recession, New Jersey in 2008

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again extended development approvals, this time for the period from January 1, 2007, through July 1, 2010 (N.J. Stat. Ann. §§ 40:55D-136.1 to -136.6).

The new North Carolina law extends most state and local development approvals that were valid at any time between January 1, 2008, and December 31, 2010. It provides that the running of any time period for taking action on a permit is suspended throughout this three-year period. The critical provision in this new law is as follows:

For any development approval that is current and valid at any point during the period beginning January 1, 2008, and ending December 31, 2010, the running of the period of the development approval and any associated vested right under G.S. 153A-344.1 or G.S. 160A-385.1 is suspended during the period beginning January 1, 2008, and ending December 31, 2010.

Several critical questions arise with the interpretation of this law. Some of the questions have clear answers; others do not.

**1. What “development approvals” are included?** The law defines *development approvals*. It lists a number of local government approvals that are explicitly covered, including sketch plans, preliminary plats, subdivision plats, site-specific and phased-development plans, development permits, development agreements, and building permits. The law as adopted had slightly different lists of city and county development approvals, but S.L. 2009-572 (H 1490), effective August 28, 2009, addressed this inconsistency. This second law amended the definitions to include “development agreements” and “development permits” in both the city and county definitions.

While listing specific approvals, S.L. 2009-406 also says all of these types of development approvals are included, “regardless of the form of the approval.” The “development permit” item alone would cover most local development approvals, given that the law defines *development* very broadly. The definition includes land subdivision, site preparation (grading, excavation, filling, and so forth), the “construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any building or other structure or facility,” and any use, change in use, or extension of use of land, a building, or a structure.

An interesting question is whether adopted conventional or conditional rezonings are included. Normally a legislative decision, such as a rezoning, does not in and of itself create a potential for vested rights. The owner must secure a specific administrative or quasi-judicial project approval (rather than a legislative action) to obtain a common law or statutory vested right. With a conditional use district rezoning, the owner concurrently receives a conditional use permit, and that permit would be extended by this new law. Some ordinances define a conditional rezoning with a site plan to be a “site specific development plan” under the vested rights provisions of the statutes. In these instances the site-specific development plan would be extended by the new law. On the other hand, a conventional rezoning is not a “development approval” within the definition of this law and is thus not affected by the permit extension provisions. The difficulty arises with a purely legislative conditional rezone. In these situations nothing similar to the permits listed within the law as local “development approvals” is adopted. Often site plans or other site-specific conditions are incorporated into a conditional rezoning rather than being approved in a separate and distinct action. In practice this process is very similar to a “development permit,” but it may not be the same thing from a legal standpoint. A conditional use district rezoning with an associated conditional use permit or one that is defined as a site-specific development plan is clearly covered by this law. How a purely legislative conditional zoning decision without a permit or statutory vested rights would be treated is uncertain, but it may well not be covered.

Among the state government approvals covered are environmental impact statements, erosion and sedimentation control permits, Coastal Area Management Act (CAMA) permits, water and wastewater permits, nondischarge permits, water quality certifications, and air quality permits.

S.L. 2009-406 does not affect federal permits or any permit whose term or duration is “specified or determined” by federal law.

**2. Are permits that expired after January 1, 2008, but prior to the effective date of the law revived by this law?** Yes. The law is not particularly precise on this point. However, it says if an approval was valid “at any point” during this period, the approval is covered and the time periods within the approval do not run at any time between January 1, 2008, and December 31, 2010. Certainly the amendment noted below regarding utility allocations assumes that the law indeed revives previously expired approvals.

**3. Does the law extend the expiration of approvals only to the end of 2010 or does a permittee get more time after January 1, 2011?** In all likelihood the amount of time left on an approval at any time during the three-year period does not start running until January 1, 2011.

The law says “the running of the period of the development approval” is suspended during the three-year period. This could be read to mean the “running out” of the approval is suspended, which would just move the expiration date forward. Another interpretation could be that the law restores only the time left on the approval as of the effective date of the law. However, since the act uses the phrases “running of the period” and provides that the running is “suspended” during the specified period, the law likely stops the clock during the entire period—that is, the period is tolled and resumes running January 1, 2011. For example, consider a development approval issued on July 1, 2007, that required construction to start within twelve months. Six months remained prior to the required initiation of construction on January 1, 2008, when the three-year period specified in the law started to run. Under this interpretation, the six months of time to initiate construction that remained on January 1, 2008, will still exist on January 1, 2011, and construction will not have to be initiated prior to June 30, 2011.

**4. What is included in the “development approvals” extended by the law?** A key question here is whether extension of a development approval also applies to nonregulatory aspects of the development, particularly regarding utility allocations. Apparently it extends these as well.

The quick amendment to S.L. 2009-406 by S.L. 2009-572 added a provision regarding utility capacity allocation that addresses this question in a backhand way. Clearly the amendment assumes the approvals picked up by the extension include associated utility allocations. The amendment provides that the law does not reactivate any utility allocation associated with development approvals that expired between January 1, 2008, and August 5, 2009, *if* the water or sewer capacity was reallocated to other development projects based on the expiration of the prior allocation and there is insufficient supply to accommodate both projects. The unstated implication is that if those two conditions are not present, the utility allocation is revived. If an entity’s development approval is revived but the associated water or sewer allocation is not, the law provides that this entity must be given first priority when new supply or capacity becomes available. Section 5.2 of S.L. 2009-550 (H 274) also had amended the law to deal with this allocation issue, but that amendment was superseded by S.L. 2009-572. S.L. 2009-572 includes a slightly different process for dealing with utility allocations applicable only to Union County.

The bill does not address the impact of the revival of expired approvals on public facilities other than those affected by water and sewer allocations. Decision-making bodies commonly consider the availability of public services (such as roads, schools, police, fire, and emergency medical services, parks, and the like) during the land use approval process. Occasionally the

level of service availability is a key factor in the approval or denial of the application or requires mitigation measures to deal with the impacts of the permitted development on that service level. The revival of previously expired approvals can sometimes significantly impact the calculation of needed mitigation or even project approval itself. Since this law makes no provision for consideration of this factor for other than water and sewer allocations, prudent local governments will need to carefully recalibrate their analyses of service allocations to include revived projects.

**5. Does the law extend internal deadlines within an approval?** In all likelihood, yes. Simple development approvals usually have only an effective date and an expiration date. But more complex development approvals may have other deadlines. For example, a plat approval may require installation of utilities or roads by a specific date; a conditional use permit may require traffic improvements or landscaping installation by a specific date; a development agreement will often include a detailed schedule for actions required of both the landowner and a unit of government. If S.L. 2009-406 extends the expiration of the basic development approval, how are these other deadlines affected?

While the law does not address this, the implication is that if the clock is not running with respect to permit expiration, it also is not running with respect to other ancillary deadlines associated with a covered development approval. The law, however, would not affect a condition based upon a specified sequence of events rather than time deadlines. For example, if an installation of a vegetative buffer was required prior to occupancy of a permitted building, the installation would not be affected by this law and would have to be completed prior to building occupancy, whenever that occurs. Also, the law would not affect definitions of uses within the ordinance having a time element. For example, the ordinance may define a *temporary use* or *temporary sign* as one that is in place for no more than thirty days and those limits would still apply, no matter when the use is initiated. Or the ordinance may limit yard sales to those lasting no more than one day and held no more frequently than four times in a calendar year. This law would not affect such time-based regulations since these provisions define a use rather than impose requirements upon its initiation.

**6. If an approval is extended, are the permittee's obligations also extended?** In all likelihood, yes. A typical example of this question arises with some plat approvals. For example, a final plat approval may be made prior to construction of all of the infrastructure, but with a condition that the infrastructure be completed within two years and that a performance bond or other performance guarantee be maintained for two years or until the infrastructure is approved by the government.

The maintenance of the performance guarantee is a condition of approval and must continue throughout the life of the approval to avoid noncompliance with a permit condition. This issue should be explicitly addressed in any development approvals, including such obligations, made between now and the end of 2010.

Another amendment to S.L. 2009-406 indicates the legislature's intent that the obligations of a development agreement as well as the rights under it be revived along with any extended approvals. Section 5.1 of S.L. 2009-484 (S 838) amended the law to allow a development permit to be returned. Government entities are authorized to accept the voluntary relinquishment of a development approval by a permit holder who no longer wants the permit (or its obligations). This addressed a concern raised by the City of Raleigh, among others, about the impact of the revival of an erosion and sedimentation control permit on a permit holder who wished to abandon a project and leave the site undisturbed. The permit holder may voluntarily relinquish

the permit in these situations to avoid a continuing long-term obligation to implement erosion control measures.

**7. Are local governments prohibited from revoking or modifying approvals during this period?** No. The protection provided to permittees only concerns expirations related to the running of time. The law specifically says that an approval can be revoked or modified “pursuant to law.” Thus a misrepresentation in an application or a mistake made in issuing an approval would be unaffected by this law and can be addressed as before.

#### **Notice of Hearings for Third Party Rezonings**

S.L. 2009-178 (S 1027), effective June 16, 2009, amended the city and county zoning statutes [Section 160A-384 of the North Carolina General Statutes (hereinafter G.S.) and G.S. 153A-343] to require that actual notice of the hearing be given to the property owner of land subject to a rezoning petition if that person did not initiate the petition. The requirement for actual notice does not apply if the rezoning petition was initiated by the city or county. The property owner that must be notified is the owner as shown on the county tax listings.

The burden for providing this actual notice is on the third party requesting the rezoning. The statute requires that when a petition for the rezoning is made by a person other than the landowner or the local government, the petition must include a certification that the landowner has received actual notice of the application and the public hearing. This requirement imposes a logistical challenge for local governments, as a third party filing a petition cannot certify at the time of application that a hearing notice has been served on the owner because the hearing date is not set until after the application is accepted. Therefore cities and counties will need to establish a process that verifies that the petitioner delivers the hearing notice between the time the hearing date is set and the hearing is held.

The statute defines *actual notice* using the state’s Rules of Civil Procedure, which are applicable to court actions. Rule 4(j) sets out detailed standards on how the notice is to be provided. The general rule is that the notice must be personally delivered or sent registered, certified, or delivery-receipt mail. Rule 4(j)(1) says that service on a person may be made

- a. By delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.
- b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
- c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.
- d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, “delivery receipt” includes an electronic or facsimile receipt.

- e. By mailing a copy of the summons and of the complaint by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee.

Rule 4(j) goes on to set out similar specific requirements applicable for service on persons with a disability, the state, a state agency, local governments, corporations, partnerships, unincorporated associations, and other states and their agencies.

If after due diligence notice cannot be made by personal service or return-receipt mail, notice may be made by published notice. However, this published notice requires more lead time than the standard published notices for zoning amendments in general because this notice must be placed in the newspaper once a week for three successive weeks [Rule 4(j1)].

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

For the third consecutive legislative session, the General Assembly considered a bill to codify various aspects of the procedures for judicial review of local government quasi-judicial land use approvals and some plats. This year a slightly modified version of this bill was adopted.

S.L. 2009-421 (S 44) creates G.S. 160A-393 to establish the framework for judicial appeals of quasi-judicial decisions concerning development regulation ordinances. The law is effective on January 1, 2010, and applies to appeals of quasi-judicial decisions made on or after that date.

The law codifies the basic definition of *quasi-judicial* land use decisions that has been employed by the North Carolina courts for several decades. These decisions involve the finding of facts and application of standards that require judgment and discretion. For zoning, this would include special and conditional use permits, variances, and appeals of determinations involving interpretation and enforcement of the zoning ordinance. Site plan approvals are included only if the standards for approval by a decision-making board include discretionary as well as objective standards. The same is true for subdivision plat decisions—they are covered only if any of the approval standards require discretion (such as determining whether the associated development will have a significant adverse impact on neighboring property values or be compatible or harmonious with the surrounding neighborhood).

While it is unlikely that S.L. 2009-421 affects appeals of local government decisions made under ordinances that are not development regulations (those adopted under G.S. Ch. 160A, Art. 19, for cities and G.S. Ch. 153A, Art. 18, for counties), this is not precisely spelled out in the law. The fact that new G.S. 160A-393(a) states that the new law is applicable to appeals of quasi-judicial decisions when such appeals are in “the nature of certiorari as required by this Article” implies that the law is limited to decisions made pursuant only to development ordinances authorized by these two specific articles.

Several other factors support this interpretation. First, the law is codified within the city and county zoning enabling statutes and expressly applies to appeals of all quasi-judicial zoning decisions. The statute specifically mentions variances, special and conditional use permits, appeals of administrative determinations regarding the zoning ordinance (all of which have long been codified in the statutory section on boards of adjustment), and site-plan approvals that include discretionary standards. Second, the law specifically references appeals of several nonzoning decisions; inclusion of these particular additions may imply that others are excluded. It adds G.S. 160A-377 and G.S. 153A-336 to apply this framework to appeals of any city and county quasi-judicial decisions made under land subdivision ordinances if those ordinances include standards involving judgment and discretion (which are relatively rare in North Carolina). Inclusion of

these specific provisions regarding subdivision regulations, which are a part of the development regulation articles, raises a substantial question of the applicability of the law to the other non-zoning and non-subdivision parts of these articles, such as appeals of unsafe building orders under G.S. 160A-430 and G.S. 153A-370 or housing code enforcement orders under G.S. 160A-443 (especially since those statutes provide detailed, specific appeal procedures that were not amended by this law). S.L. 2009-421 also expressly covers appeals of several other specific nonzoning decisions. It adds a provision to the airport zoning act (G.S. 63-34) to include judicial review of some decisions under those ordinances. It also adds a provision to G.S. 162A-93(b) to apply this framework to judicial review of appeals of city decisions to extend water or sewer to certain areas within county water and sewer districts. There are certainly ordinances adopted under other statutory authorizations that are quasi-judicial in nature. For example, there may be standards involving discretion included within ordinances adopted under the general police powers (such as a junk car ordinance adopted pursuant to G.S. 153A-132.2 that requires findings about the negative aesthetic impacts outweighing the burdens placed on the owner). None of these are expressly covered by this law. The language of the new law, its placement in the statutes, and the inclusion of several other types of nonzoning decisions that are expressly brought within the law all strongly imply that S.L. 2009-421 does not apply to those decisions that are not expressly referenced.

The law specifies that the petition for judicial review (a petition for writ of certiorari) must contain the basic facts that establish standing, the grounds of the alleged error, the facts that support any alleged conflict of interest, and the relief the person seeks from the court. The proposed writ must include a direction to the responding local government to prepare and certify to the court by a specified date the record of the board's proceedings on the matter. The petition is filed with the clerk of superior court in the county in which the matter arose. The clerk then issues the writ ordering the city or county to prepare the record and certify it to the court. The petitioner must serve the writ upon all the respondents, following the same rules for service of a complaint in a civil suit. No summons is to be issued.

The law specifies three categories of entities with standing to bring these judicial appeals. The first category is those who applied for approval or who have a property interest in the project or property. Prior law was not entirely clear as to how far this category extended beyond the owner of the fee interest in the property. S.L. 2009-421 clarifies that this category includes the applicant for the approval being appealed and all persons with a legally defined interest in the property, including not only an ownership interest but also a leasehold interest, an option to purchase the property, or an interest created by an easement, restriction, or covenant. The second category is the local government whose board made the decision being appealed. The third category includes other persons who will suffer "special damages" as a result of the decision. Both individuals (such as a neighbor who contends the decision will adversely affect the value of his or her property) and qualifying associations are included. A long line of North Carolina cases details what constitutes "special damages" in this context, and the law does not change those rules. At one point in the legislative process, the bill also included an objective standard for third-party standing—anyone owning or leasing property within 200 feet of the boundary of the property subject to the decision being appealed. That provision was deleted prior to enactment.

S.L. 2009-421 reconciles conflicting case law on which associations have standing to bring these appeals. This was one of the few actively debated portions of the bill during its legislative consideration. Planning, historic preservation, and environmental advocates urged that associations be given standing whenever one of its members had standing. The development community was very concerned about the possibility of interest groups, particularly statewide organizations

or groups formed to fight a particular project, filing suit in order to delay approved projects. The compromise allows some, but not all, groups to have standing. Neighborhood associations and associations organized to protect and foster the interests of the neighborhood or local area are granted standing, provided at least one of the members of the association would have individual standing and the association was not created in response to the particular development that is the subject of the appeal.

Intervention is governed by the Rules of Civil Procedure, provided that a person with an ownership interest in the property as described above can intervene as a matter of right. Others must demonstrate that they would have standing to initiate the action.

The respondent in these matters is the local government, not the individual board making the decision (e.g., *Fife v. Town of Mayberry*). An exception occurs when the local government itself is seeking judicial review, in which case the board making the decision is the respondent (e.g., *Town of Mayberry v. Mayberry Board of Adjustment*). If a third party is making the appeal, the applicant must also be named as a respondent. The person making the appeal may also include any other person with an ownership interest in the property as a respondent. A respondent is not required to file an answer unless it contends the petitioner lacks standing, in which case an answer on that contention must be served on all petitioners at least thirty days prior to the hearing.

The superior court hears the appeal based on the record established by the board hearing the quasi-judicial matter. The law defines this record to include all documents and exhibits submitted to that board and the minutes of the meetings at which the matter was heard. Any party may request that the record include an audiotape or videotape of the meeting if it is available. Any party may also include a verbatim transcript of the meeting, with the cost of preparation of the transcript being the responsibility of the party choosing to include it. The record must be bound, paginated, and served on all petitioners by the local government within three days of filing it with the court. The court may allow the record to be supplemented with affidavits or testimony regarding standing, alleged impermissible conflicts of interest, and the legal issues of constitutionality or statutory authority for the decision (these legal issues are beyond the scope of issues that could have been addressed by the original decision-making board).

The law codifies the scope of review to be used by the courts. For the most part the new statutes confirm the long-standing case law on the grounds for review of a quasi-judicial decision. The courts may consider whether the board's decision was

1. in violation of constitutional provisions;
2. in excess of statutory authority;
3. inconsistent with procedures set by statutes or the ordinance involved;
4. affected by error of law;
5. unsupported by substantial, competent evidence in the record; or
6. arbitrary or capricious.

The law also reconciles conflicting case law on several dimensions of these reviews.

First, there is the question of deference to an interpretation of the ordinance made by the local decision-making board. Prior case law was clear that the trial court conduct a de novo review. However, some cases held the decision-making board's original interpretation should be overturned only if it was arbitrary or capricious. Other cases indicated the board's interpretation was entitled to great deference, particularly where an interpretation was well considered and consistently applied. Still other cases held the board's interpretation was entitled to no def-

erence at all. This facet of the legislation was also a focus of active debate during consideration of the bill, with the planning community arguing for substantial deference and the development community arguing for no deference. S.L. 2009-421 resolves the issue with a middle-ground position. It provides that the court is to consider the interpretation of the decision-making board but is not bound by that interpretation and “may freely substitute its judgment as appropriate.” The degree to which the board’s interpretation was in fact well considered and consistently applied will likely be a factor in determining when it is “appropriate” to use that interpretation to help ascertain the adopting board’s intent if the ordinance language is ambiguous.

The second question involves the use of hearsay evidence and opinion testimony by lay witnesses. In determining whether a decision was based on sufficient competent evidence, the law provides that the decision-making board may consider evidence that would not be admissible under the rules of evidence in a court proceeding, but only if there was no objection to its presentation or the evidence is “sufficiently trustworthy” and admitted under circumstances that reliance on it was reasonable. However, several specific instances of opinion testimony by non-expert witnesses are explicitly deemed not to be competent evidence. These include testimony about how the proposed use would affect neighboring property values, whether vehicular traffic would pose a danger to public safety, and any other matter upon which only expert testimony would generally be admissible under the rules of evidence.

Finally, the law addresses the remedies available for consideration by the court. It provides that the court may affirm or reverse the original decision made by the local government board or may remand it with either instructions or a direction for further proceedings. A remand can be made to correct a procedural record or to make findings of fact based on the existing record. If the court finds the board’s decision is not supported by substantial competent evidence in the record or has an error of law, the remand may include an order to issue the approval (subject to reasonable and appropriate conditions) or to revoke it. The relief can also include appropriate injunctive orders.

The new law makes one additional clarifying amendment to the state’s zoning enabling statutes. In 2005 new language to codify the conflict-of-interest standard for quasi-judicial decisions was added to the sections of the statutes on boards of adjustment because those sections contain the provisions for most quasi-judicial zoning decisions. S.L. 2009-421 amends G.S. 160A-388(e1) and G.S. 153A-345(e1) to confirm that it is the quasi-judicial nature of these decisions, not the identity of the board making the decision, that mandates these due process conflict-of-interest standards. Thus any board making a quasi-judicial land use regulatory decision—be it the board of adjustment, governing board, planning board, technical review board, historic preservation commission, or the like—is subject to the same rules on impartiality.

### **Energy Efficiency**

In 2007 and 2008 fifteen local governments received permission to provide zoning incentives for new energy-efficient development. S.L. 2009-95 (S 52), effective June 3, 2009, amends G.S. 160A-383.4 to allow all cities and counties to provide density bonuses and other incentives in land use regulations for significant achievements in energy conservation in new development or reconstruction projects.

In 2007 G.S. 160A-201 and G.S. 153A-144 were adopted to limit city and county ordinance restrictions on solar collectors on single-family residences. S.L. 2009-553 (H 1387) broadens those laws so that they now apply to all residential properties.

### Affordable Housing Discrimination

Proponents of affordable housing projects across the nation have long been concerned that neighborhood opposition can lead to land use regulatory decisions limiting the siting of these projects. The result of such limitations has been the exclusion of housing opportunities for low-income persons in these communities. In some states considerable case law or statutory provisions address this exclusionary zoning issue. But prior to 2009, there was little legislative attention to this issue in North Carolina.

S.L. 2009-533 (S 810) addresses this issue by creating G.S. 41A-4(f) to make it unlawful housing discrimination if a land use decision is based on the fact that a development includes affordable housing. It provides that a decision limiting high concentrations of affordable housing is not unlawful discrimination.

Complaints about alleged housing discrimination are made to the state Human Relations Commission and, if not resolved to the complainant's satisfaction, may thereafter be taken to court upon issuance of a right-to-sue letter by the commission. If an action goes to court, the court has the authority under G.S. 41-7 to order injunctive relief and may award a successful plaintiff actual and punitive damages, court costs, and reasonable attorneys' fees. These powerful remedies allow a plaintiff with limited resources the means to challenge unlawful discrimination.

Local governments should carefully and explicitly address this concern about unlawful exclusion of affordable housing in its land use decision-making. It is not unlawful discrimination if a citizen makes a discriminatory comment in a public hearing on a project that includes affordable housing. Still, especially in cases where such animosity is expressed or strongly implied, staff reports and board discussions should clearly establish a legitimate, nondiscriminatory land use basis for the decision.

### ABC Store Locations

S.L. 2009-36 (H 186) gives local governments a greater role in the location of ABC stores. This act amends G.S.18B-801 to prohibit a local ABC board from locating an ABC store within a city over the objection of the city's governing board. The law does allow the local board to seek an override of this prohibition by the state ABC board. This law became effective October 1, 2009.

A local bill on this topic, S.L. 2009-295 (S 68), allows the ABC board to limit the location of ABC stores within 1,000 feet of a school or church in Guilford County.

### Limits on Development Moratoria (Eligible in 2010)

Amendments to the zoning statutes in 2005 established a detailed process for the adoption of moratoria. Late in the 2008 legislative session, a Senate committee added a limitation on moratoria to an unrelated pending bill on North Carolina Department of Transportation (NCDOT) access permits. The proposed limit would have prohibited the adoption of any moratorium if "the sole purpose" of the moratorium was to update or amend a local plan or ordinance. This provision was ultimately withdrawn, but the concept returned in 2009. Senate Bill 117 would prohibit use of any moratorium adopted "for the purpose of developing and adopting new or amended ordinances." This bill passed the Senate but was not heard by a House committee. It is eligible for further consideration in 2010.

**Protest Petitions (Local Act)**

S.L. 2009-4 (H 64) restored the protest petition option in Greensboro for those upset with a proposed rezoning. The General Assembly in 1971 had removed the protest petition option in Greensboro.

**Land Subdivision Control, Development Fees, and Growth Management****Electronic Notice for Fees Associated with Subdivisions**

S.L. 2009-436 (S 698) requires a city, county, water and sewer authority, or a sanitary district to provide notice on its website (if there is one) whenever certain development-related fees or charges are proposed to be imposed or increased. Peculiarly enough, the fees or charges involved are those “applicable solely to the construction of development subject to the provisions of Part 2 of (G.S. Chapter 160A, article 19 or G.S. Chapter 153A, article 18).” These statutory citations refer to the city and county land subdivision control enabling statutes. The fees or charges involved appear to include administrative fees associated with the review and approval of subdivision plats or fees paid in lieu of dedicating recreation areas or constructing road improvements. However, water and sewer authorities and sanitary districts lack authority to regulate the subdivision of land. Therefore, it seems likely that the new law is intended to apply also to fees that public enterprises and utility service providers charge in association with capital expansion (impact fees), installation of improvements, extension of service, or providing service connections, if the fees are somehow linked solely to “subdivisions.”

The required notice must be placed on the website at least seven days before the meeting at which the fee increase is on the agenda of the affected governing board. The governing board must then offer a public comment period at a public meeting on the proposed fee changes prior to adoption of the fees. S.L. 2009-436 does not apply, however, if the proposed fee changes are included in a manager’s proposed budget for the year that is filed and advertised pursuant to G.S. 159-12 (part of the budget and fiscal control legislation).

The act became effective September 1, 2009.

**Study of the Transfer of Development Rights**

Section 2.42 of the Studies Act of 2009, S.L. 2009-574 (H 945), authorizes the Legislative Research Commission to study the transfer of development rights into the developed areas of counties, including Currituck and Chatham counties, in association with the use of conservation easements.

**Subdivision Road Improvements (Eligible for 2010)**

Senate Bill 761 is designed to limit a subdivider’s responsibility under a city or county subdivision ordinance for providing road-related improvements to the amount necessary to serve projected traffic generated by the proposed development as a percentage of traffic served by the total required improvements. The required cost apportionment, however, does not apply to the cost of improvements required to preserve the safe operations of the road nor to improvements required by NCDOT.

The bill has passed the Senate and is eligible for consideration in 2010.

### **Land Subdivision Regulation (Local Act)**

One local act adopted this year expands local government authority to regulate land subdivision. S.L. 2009-33 (S 385) amends G.S. 153A-335 as it applies to Macon County. It authorizes counties to exempt “family subdivisions” in which the grantee of a lot is within four degrees of kinship of the grantor from ordinances applicable to subdivisions in general.

### **Historic Preservation**

A new law that may be viewed as an environmental measure to protect land conservation easements also affects properties subject to historic preservation easements. A number of North Carolina properties are encumbered by covenants or easements held by the Preservation Fund of North Carolina or other historic preservation nonprofit organizations. S.L. 2009-439 (S 600) prevents any public entity that intends to acquire a property by eminent domain that is subject to a historic preservation easement from thus acquiring the property unless the entity can demonstrate to a court that it lacks any prudent and feasible alternative. The act does not apply to condemnation for utilities, stormwater or drainage improvements, or trails associated with greenways. In addition, neither NCDOT nor the North Carolina Turnpike Authority are subject to the new requirement if a project review is conducted pursuant to federal or state environmental impact review requirements and the mitigation measures to minimize the impact are identified in the review process.

### **Community Appearance/Public Nuisances**

#### **Notice to Chronic Violators of Overgrown-Lot Ordinances**

S.L. 2009-19 (S 452) is intended to improve the enforcement of municipal overgrown-lot ordinances. It amends G.S. 160A-200, which was applicable to twenty-six cities, to make that statute applicable to all cities. The new law defines a chronic violator of such an ordinance to be an owner of property with respect to which a local government has taken remedial action at least three times during the previous calendar year. S.L. 2009-19 then allows a municipality without further notice to take summary action to remedy the violation and makes the expense of the action a lien against the property so that it may be collected as unpaid taxes. The new law requires the requisite notices be sent by registered or certified mail.

The act repeals prior local legislation of the same sort, effective October 1, 2009, but preserves all ordinances that are consistent with the new statewide legislation. The act also provides that any new ordinance adopted under this authority may not become effective until October 1, 2009.

#### **Notice to Chronic Violators of Public-Nuisance Ordinances**

S.L. 2009-287 (S 564) is very similar to the overgrown-lot legislation discussed above. However, since it applies to all public nuisances ordinances, it is broader in scope. It also applies to both cities and counties by adding two new statutes, G.S. 160A-220.1 and G.S. 153A-140.2. They define a chronic violator of such an ordinance to be an owner of property with respect to which a local government has sent at least three violation notices during a calendar year. The law then allows a city or county without further notice to take summary action to remedy the violation.

and makes the expense of the action a lien against the property such that it may be collected as unpaid taxes. The new law requires the requisite notices be sent by certified mail.

The act repeals prior local legislation, effective October 1, 2009, but preserves all ordinances that are consistent with the new statewide legislation. The act also provides that any new ordinance adopted under this authority may not become effective until October 1, 2009.

S.L. 2009-287 and S.L. 2009-19 are examples of new general local government enabling authority that has grown out of the success of local legislation on the same subject.

### **Regulation of Junked Motor Vehicles**

G.S. 160A-303(b2) and G.S. 160A-303.2(a) both define junked motor vehicles for purposes of municipal regulation and towing. One element of the definition in both statutes has been that such vehicles be worth less than \$100. A number of local governments have secured local legislation to increase the value threshold for defining a *junked motor vehicle*. S.L. 2009-97 (H 867) uses the standards in these local bills to amend both G.S. 160A-303(b2) and G.S. 160A-303.2(a) and to raise the ceiling on the value of a junked vehicle from \$100 to \$500. No changes were made in the corresponding county statutes. Ordinances that take advantage of the new law may become effective no earlier than October 1, 2009.

### **Community Appearance/Public Nuisance (Eligible in 2010)**

House Bill 1353 would invalidate provisions in local ordinances that ban clotheslines used on residential property. However, the bill would allow cities and counties to adopt regulations affecting the location and screening of clotheslines. In particular a local government may prohibit the location of clotheslines that are visible by a person on the ground and that face areas open to common or public access. The bill has passed the House and is eligible for further consideration in the Senate.

### **Vegetation Removal and Billboards (No Action)**

The state's outdoor advertising control program regulates signs along certain federal and state highways. House Bill 1583 would have allowed the clearing of trees and other vegetation from the right-of-way for the express purpose of allowing outdoor advertising displays and buildings housing commercial establishments beyond the right-of-way to be more visible from the highway. The bill apparently died in a House committee.

## **Community Development, Housing, and Economic Development**

### **Housing Authorities in Certain University Towns**

S.L. 2009-218 (H 1093) amends G.S. 157-9.1 to allow housing authorities in municipalities with a population of less than 20,000 and that are home to a constituent institution of the University of North Carolina that has a student enrollment of more than 10,000 to provide housing for those with moderate incomes. County housing authorities in counties with a population of less than 80,000 that serve such an institution of higher education may do so as well.

**Violation of Fair Housing Act to Discriminate against Affordable Housing Projects**

S.L. 2009-533, which makes it a violation of North Carolina's Fair Housing Act to discriminate against affordable housing projects in land use or development-permitting decisions, is described in the section entitled "Affordable Housing Discrimination" above.

**State Residential Lead-Based Paint Hazard Reduction Program**

Legislation effective on January 1, 2010, establishes a lead-based paint reduction program that will allow North Carolina to take over the administration of such a program from the U.S. Environmental Protection Agency, as provided under federal legislation. S.L. 2009-488 (H 1151) establishes requirements for the certification of persons performing lead-based paint renovation work in certain forms of pre-1978 residential housing and child-occupied facilities.

**Housing for Public Employees (Local Acts)**

Two local acts reflect the interest of several local governments in taking an active role in providing housing for their public employees. S.L. 2009-154 (H 206) authorizes the City of Brevard, the Town of Rosman, Transylvania County, and the Transylvania County Board of Education to develop and provide affordable housing for employees on land owned and leased by a local unit. S.L. 2009-161 (S 498) provides similar authority for the Edgecombe County Board of Education to provide affordable rental housing for teachers and other school system employees.

**Eminent Domain and Housing for Those with Low or Moderate Incomes (Local Act)**

S.L. 2009-34 (H 227) authorizes the cities of Winston-Salem and Rocky Mount to use eminent domain to acquire certain substandard residential property to provide housing for persons with low or moderate incomes.

**Municipal Service Districts for Urban Revitalization**

Under prior law any municipality with a population of over 150,000 could establish an urban service district for a downtown revitalization project. S.L. 2009-385 (S 618) removes the population restriction. Now any municipality may create such a service district to support urban revitalization in central business districts, in business districts outside the downtown, in major transportation corridors, and in areas centered near "a major concentration of public or institutional uses, such as airports, seaports, colleges or universities, hospitals and health care facilities, or governmental facilities."

**Main Street Grant Funds**

Section 14.10 of the budget act, S.L. 2009-451 (S 202), makes certain changes to the popular Main Street Financial Incentive Fund by rewriting G.S. 143B-472.35. It changes the name of the fund to "Main Street Solutions." Under prior law the money was available only for cities affiliated with the North Carolina Main Street Center Program. Now the funds are available to "micropolitan" cities (cities with a population of between 10,000 and 50,000) located in counties designated as development-tier two or development-tier three. The act loosens some of the restrictions on the distribution of funds. However, it does provide that funding applications must include a copy of the "consensus local development plan" developed by the applicant city in conjunction with the Department of Commerce's Main Street Program and the city's regional economic development commission or its local council of government or both.

## **Small Business Assistance**

Section 14.3 of the budget act, S.L. 2009-451, makes changes to the One North Carolina Small Business Program, adding new G.S. 143B-437.89. It establishes a Small-Business Jobs Preservation and Emergency Assistance Fund in the North Carolina Department of Commerce designed to provide financial assistance in the form of loans to businesses whose annual receipts do not exceed \$1 million and who employ fewer than one hundred full-time employees. No small business may receive more than \$35,000. The act also requires loan recipients to file annual reports documenting the use of the money and the investment's impact.

## **Transportation**

### **Congestion Relief and Intermodal Transportation 21st Century Fund**

In the fall of 2007, then-Governor Easley, Senate President Pro Tem Basnight, and House Speaker Hackney jointly established the 21st Century Transportation Committee. Its charge was to review the state's transportation and transportation finance policies and report back to the General Assembly with interim recommendations for the 2008 short session and final recommendations for the 2009 session. The committee issued interim recommendations in May 2008, including public transportation proposals included in House Bill 2363 (Congestion Relief/Intermodal Transport Fund), introduced in the short session. That bill did not pass, but an expanded bill, House Bill 148, was introduced this year and eventually enacted as S.L. 2009-527. The new act establishes a structure to guide the state's investment in freight and passenger rail and public transportation. It is particularly significant for local governments and transportation authorities because it authorizes new sources of funding for public transportation programs throughout the state.

### ***State grants to various entities***

The law adds G.S. 136-252 to authorize the Secretary of Transportation, after consulting with the Board of Transportation, to make grant funds available for a variety of purposes and to a variety of entities. First, grants may be made to local governments and transportation authorities for public transportation. In order to qualify, a grant application must be approved by the metropolitan (transportation) planning organization with jurisdiction and must have adopted a wide-ranging transit plan that addresses traffic congestion, land use, housing needs, energy consumption, and access to service for those with lower incomes. In addition, a separate housing needs assessment must be prepared, with special emphasis on the problems associated with lower-income individuals being displaced because of new development around transit stations. Project grants may not exceed 25 percent of the project cost.

Second, grants may be made to short-line railroads to assist in economic development and developing access to ports and military installations. Grants may not exceed 50 percent of the project cost and total grants are limited to \$5 million a year.

Third, grants may be made to railroads for the construction or restoration of rail improvements and intermodal or multimodal facilities. Funds may be used to serve ports, military installations, or inland ports, or, alternatively, to improve rail infrastructure so as to mitigate truck traffic on highways. Grants may not exceed 50 percent of the project cost, and total grants are limited to \$10 million a year.

Fourth, grants may be made (i) to state ports for terminal railroad facilities and operations, (ii) for improvements for access to military installations, and (iii) for the North Carolina International Terminal. Grants may not exceed 50 percent of the project cost, and total grants are limited to \$10 million a year.

Fifth, grants may be made for the expansion of intercity passenger rail service.

The authority granted by S.L. 2009-527, however, was not accompanied with money. The General Assembly made no appropriations in the 2009 legislative session to fund any of these grants.

#### ***Local taxing authority***

Perhaps most importantly S.L. 2009-527 authorizes counties to levy sales taxes to fund projects, including bicycle and pedestrian infrastructure, that support public transportation. Certain counties may impose a half-cent sales tax to support public transportation through a special tax district that may include more than one county. The Triangle Transit Authority may propose such a district to include one or more Triangle counties (specifically Wake, Orange, and/or Durham). The Piedmont Authority for Regional Transportation (PART) may propose such a district in one or more Triad counties (specifically Forsyth and/or Guilford). The tax may be adopted only if approved by district voters in a referendum. Before such a referendum is held, the board of county commissioners in each affected county must approve the staging of the proposed referendum after holding a public hearing on the matter. If a referendum is held, the proposed tax must be approved by a majority of the voters in the entire district. However, if a particular county's voters do not approve the proposal but district voters as a whole do, the county is removed from the district. Prior to the levy of the tax, the relevant transportation authority must propose a financial plan based on the use of the tax proceeds. The plan must be approved by each affected county and by each regional (transportation) planning organization (MPO) represented in the district.

The act also allows the remaining members of PART (Alamance, Davidson, Davie, Randolph, Rockingham, Surry, Stokes, and Yadkin counties) and all counties other than Guilford, Forsyth, Wake, Orange, Durham, and Mecklenburg to adopt a quarter-cent sales tax for public transportation if approved by voters in a referendum in the individual counties. In order to qualify, either the county or at least one municipality in the county must operate a public transportation system. Funds are allocated between the county and the city according to the same formula used to allocate the proceeds of a vehicle registration tax (see below).

The act also adds a new G.S. 105-557 to provide for another possible source of revenue, a county vehicle registration tax. Any county may institute such a tax (not to exceed \$7.00 per vehicle) and use it for public transportation, so long as either the county or at least one municipality in the county operates a public transportation system. Within the levying county, the tax must be shared by the county and the municipalities, with the county receiving funds based on the population in the unincorporated area and the municipalities based on their respective municipal populations. If a county or a municipality does not sponsor a transit system, its share of the funds is reallocated to those entities that do.

In addition, the law also authorizes an increase in county vehicle registration taxes for those counties within the jurisdiction of the Triangle Transit Authority and PART. S.L. 2009-527 increases the allowable maximum fee from the present \$5.00 to a maximum of \$7.00, effective immediately, and to \$8.00, effective July 1, 2010.

The act provides one final authorization concerning a supplemental property tax in the Research Triangle Park (RTP) special tax district. Under existing law the district may levy up to

10 cents on each \$100 value of property for various county purposes. This new legislation authorizes an additional 10 cents per \$100 of assessed valuation to be used for public transportation within RTP or to provide public transportation from RTP to other public transportation systems or to the Raleigh–Durham International Airport. That levy must be approved each year by a special tax district advisory board and the board of county commissioners of both Wake and Durham counties.

#### **Transportation Corridor Mapping; Sale of Road Maintenance Materials**

S.L. 2009-332 (H 881) accomplishes several things. First, it makes technical and clarifying changes to G.S. 136-44.50 (the Transportation Corridor Official Map Act) to provide that the governing board of a county may adopt a transportation corridor official map. In addition, the Triangle Transit Authority and PART are now authorized to adopt corridor official maps not only for public transportation purposes, but also for portions of existing or proposed state highways. Finally, it permits NCDOT to furnish road maintenance materials to cities at prices established by the department.

The act became effective August 1, 2009.

#### **NCDOT Partnerships with Private Developers**

State partnerships with private developers to build roads date from as far back as 1987. In that year G.S. 136-28.6 was adopted to authorize NCDOT to “participate” in the costs of certain private engineering and construction contracts for work on state highways. S.L. 2009-235 (S 648), a department bill adopted this year, adds a variation on this theme by creating new G.S. 136-28.6A, which expires December 31, 2011. In contrast to existing law, which allows NCDOT participation only on roads included in the Transportation Improvement Plan or in a mutually adopted state–local transportation plan, the new law allows participation in any project performed on or abutting a state highway or facility proposed to be added to the system. The new law is intended to allow NCDOT participation for the limited purpose of completing “incidental work” on state highway projects and limits NCDOT’s participation to 10 percent of the engineering and construction contract amounts, or \$250,000, whichever is less. (Existing law allows NCDOT to participate in up to 50 percent of the engineering and construction contract costs.)

#### **Focus of Highway Statutes on All Transportation Modes**

S.L. 2009-266 (S 828) primarily concerns the letting of bids by NCDOT for certain construction, maintenance, and repair contracts and the award of contracts to certain minority contractors. However, most remarkably the act amends G.S. Chapter 136 some sixty-six times to change certain references from “streets,” “roads,” and “highways” to “transportation projects or transportation infrastructure.”

#### **U.S. Marine Corps Highways**

S.L. 2009-198 (H 1021) designates portions of U.S. Highway 17 and U.S. Highway 70 in eastern North Carolina as “The U.S. Marine Corps Highway: Home of the Carolina-Based Marines since 1941.”

### **Speed Limits on Newly Annexed Streets and Highways**

Before S.L. 2009-234 (S 649) became effective June 30, 2009, the speed limit on NCDOT-maintained highways (other than interstates and controlled-access highways) automatically became 35 miles per hour when the highway was annexed to the city. Now, because of the new act, the NCDOT speed limit posted on the road at the time it is annexed remains in effect until both NCDOT and the city pass concurrent ordinances to change the speed limit.

### **State Participation in Nonfederal Fixed-Rail Projects**

In 2000 G.S. 136-44.20(b1) was added to give NCDOT the authority to participate in (pay a portion of) the costs of fixed-rail projects sponsored by a Regional Public Transportation Authority (i.e., the Triangle Transit Authority), a Regional Transportation Authority (i.e., PART), or a unit of local government, but only if the project was federally approved and funded. S.L. 2009-409 (H 1005) amends this subsection to expressly authorize state funds to be used to fund projects such as these (or a project developed by NCDOT) even though they are not approved or funded by the federal government. The act also allows state funds to be used for administrative costs incurred by NCDOT while participating in these fixed guideway projects.

### **Transfer of North Carolina Turnpike Authority to NCDOT**

When the North Carolina Turnpike Authority was established in 2002, it was authorized to exercise its powers independently of NCDOT. However, to conserve the Turnpike Authority's spending and improve its efficiency, S.L. 2009-343 (H 1617) amends G.S. 136-182 in two respects. It first makes the authority "subject to and under the direct supervision of the Secretary of Transportation." Second, it allows members of the North Carolina Board of Transportation to serve as members of the Turnpike Authority Board. (Before, no more than two NCDOT members were allowed to serve as Turnpike Authority Board members.)

### **Traffic-Calming Devices on State Streets in Residential Subdivisions**

Tension between homeowners' associations and NCDOT over speed limits on state streets in residential subdivisions in unincorporated areas has resulted in a compromise represented by S.L. 2009-310 (H 182). The new law adds G.S. 136-102.8 to allow the department to establish policies for installing traffic tables or traffic-calming devices if certain requirements are met. The installation and utilization must be based on a traffic engineering study. The subdivision either must have a homeowners' association or the neighbors by agreement must have assumed responsibility for installed devices. The association or the neighbors by agreement must pay for and maintain the devices and post a bond to fund their maintenance and removal for at least three years after the installation.

The act became effective October 1, 2009, and applies to traffic tables and traffic-calming devices installed on or after that date.

### **Permeable Pavement for Bikeways and Sidewalks**

Section 25.6 of the budget act, S.L. 2009-451, amends G.S. 136-18(41) to direct NCDOT to determine, prior to the beginning of construction, whether sidewalks and other facilities for pedestrians and bicycles located within the right-of-way of NCDOT highways or streets must be constructed with permeable pavement.

### **Transportation Studies**

The Studies Act of 2009, S.L. 2009-574, authorized several important transportation studies. Section 4.4 of the act authorizes the Joint Legislative Transportation Oversight Committee to study the state's method of distributing transportation funds. Section 4.5 allows the committee to study ways to reduce highway construction expenses by considering life-cycle costs, durability, environmental impact, sustainability, longevity, and maintenance costs when selecting project pavement types. Sections 36.1 and 36.2 permit NCDOT to study the feasibility of "tolling" all interstate highways entering the state, with the cooperation of each surrounding state. Sections 37.1 and 37.2 allow the department to study and consider locating Richmond–Raleigh high-speed southeast passenger rail improvements along the planned U.S. 158 four-lane freeway corridor between Roanoke Rapids and Henderson.

### **Transportation Bills (Eligible for 2010)**

House Bill 116 concerns management and protection of railroad corridors, as recommended by the House Select Committee on a Comprehensive Rail Service Plan for North Carolina. It would reverse the presumption that a railroad has abandoned its right-of-way if it removes the tracks and makes no use of a right-of-way for seven years. House Bill 116 provides that abandonment may be accomplished only if the railroad first records a certificate of abandonment in the office of the register of deeds. It would also provide for drastic restrictions on development within railroad corridors for which official railroad corridor maps have been recorded. House Bill 116 has passed the House and is eligible for further action in 2010.

Senate Bill 222 would authorize the City of Wilmington to levy a one-half cent local sales and use tax to be used to mitigate auto congestion, if such a measure is passed by voters. It has passed the Senate and is eligible for further action in the 2010 legislative session.

### **Hazards and Emergency Preparedness**

Legislation enacted in 2008 mandated a study of ways to increase the capacity of cities and counties to plan for, respond to, and manage disasters. This study resulted in a number of recommendations, most of which were enacted in 2009.

Several of the acts clarify local government authority and responsibility in hazard situations and build local capacity to address these issues. S.L. 2009-192 (H 377) creates new G.S. 166A-54 to -57 to authorize the establishment of a voluntary certification program for emergency management personnel. The program is to be established by the Division of Emergency Management (DEM) in the Department of Crime Control and Public Safety. The law allows DEM to set standards for certification and training programs and provides for an advisory board and for issuance of certification and reciprocity with other states. S.L. 2009-146 (S 256) amends G.S. 14-288.12 to clarify local authority to order mandatory evacuations, set evacuation routes, and control reentry into disaster areas. S.L. 2009-194 (H 379) amends G.S. 166A-10 to clarify that the state government can enter into mutual aid agreements with local governments. S.L. 2009-196 (H 380) strengthens local emergency management capabilities by amending G.S. 166A-5 to allow state standards to be used for local emergency management plans and programs. It also amends G.S. 166A-7 to allow counties and cities to form joint emergency management agencies and ties funding to meeting state requirements.

At the state level, S.L. 2009-225 (S 258) authorizes DEM to create a voluntary model medical registry of frail persons who will need special assistance in natural disasters. The law also adds a provision to G.S. 166A-7(d) to allow cities and counties to coordinate creation of local voluntary registries. S.L. 2009-193 (H 381) specifies that DEM is the lead state agency for hazard risk management. S.L. 2009-397 (H 378) explicitly mentions the DEM in the organizational provisions of the Department of Crime Control and Public Safety.

## Environment

### Water Quality

The quality of water in Jordan Lake was a contentious issue even prior to the 1983 creation of the lake. For over a decade the state has been working toward the development of a comprehensive nutrient strategy for the Jordan Reservoir, similar to the strategies and rules that have been put into place for the Neuse and Tar-Pamlico River basins. After several years of studies and informal discussions, the formal rule-making process to establish the Jordan Lake Rules was initiated in 2007. This led to the adoption by the Environmental Management Commission (EMC) in 2008 of thirteen Jordan Lake watershed rules that set nitrogen and phosphorus reduction goals for each of the three arms of the lake (15A NCAC 2B .0262 to -.0273). These rules affect eight counties and twenty-six municipalities in this watershed. The rules address agriculture, storm-water management for new development, protection of riparian buffers, wastewater discharges, stormwater from state and federal entities (including NCDOT), fertilizer management, and options for offsetting nutrient reductions. For the first time, these rules included standards for nutrient reductions from existing development, a necessary step given the significant pollutants from this source in the Jordan watershed. These rules, however, were put on hold for a period of legislative review in 2009. The legislature adopted two bills that adjusted some of these rules.

The principal law affecting the Jordan Lake Rules was S.L. 2009-216 (H 239). This law replaced the EMC's rule on existing development with legislatively adopted standards. All local governments are to submit Stage 1 adaptive management programs by the end of 2009. More stringent Stage 2 programs would be required in 2014 and 2017 if needed based on water quality monitoring, with further measures potentially required in 2023. The law also created a Nutrient Sensitive Waters Scientific Advisory Board. Part II of S.L. 2009-484 made additional largely technical adjustments to several of the rules. The changes mandated by these two laws are to be incorporated into the EMC rules. With the passage of these two bills and the adjournment of the General Assembly, the entire set of Jordan Lake rules are now in effect.

Rules for the Falls Lake and Upper Neuse River Basin watershed have also been under development and discussion for some time. S.L. 2009-486 (S 1020) directs the EMC to develop a nutrient management strategy for this area by January 15, 2011, with implementation to be mandated no later than thirty months after the rules become effective. The EMC is also directed to provide credits to local governments and landowners for early implementation of nutrient and sedimentation reduction policies and practices. The law also includes adjustments to compensatory mitigation and sedimentation standards for water-supply watersheds.

The increasing use of mandatory buffers and similar water quality protection measures has led to questions about mitigation and offsets where there are unavoidable impacts or more cost-effective measures of addressing water quality protection needs. S.L. 2009-337 (S 755) addresses this issue by expanding the potential use of compensatory mitigation banks. The law amends

G.S. 143-214.20 to provide additional mitigation options for nongovernmental permittees whose activities disturb riparian buffers. The law also makes provision for purchase of nutrient offset credits if the offset project is consistent with EMC rules and is located within the same hydrologic area as the associated nutrient loading. The law also directs the Department of Environment and Natural Resources (DENR) to study the effect of compensatory wetland, stream, and riparian buffer mitigation bank programs on the Ecosystem Enhancement Program.

Several other laws address water quality and quantity issues. S.L. 2009-322 (H 1100) directs DENR to develop stormwater best management practices for mulch and compost operations. S.L. 2009-345 (H 1378) creates G.S. 77-125 to -132 to require certain marinas to have pumpout facilities to handle sanitary waste from vessels. Affected marinas are those with ten or more wet slips for vessels 26 feet or more in length. If these marinas are located in no-discharge zones or where a petition for a no-discharge zone has been filed by the county or municipality, they must have pumpout facilities on site by July 1, 2010. The law also prohibits boats from discharging sanitary wastes in coastal waters. S.L. 2009-478 (H 569) directs DENR to allow the use of open-bottom culverts on private property, provided certain design specifications are met. These culverts may not be transferred to NCDOT. S.L. 2009-480 (H 1236) creates G.S. 143-355.2(h1) to establish a voluntary water conservation program for commercial car washes. A local bill, S.L. 2009-293 (H 1011), allows Raleigh to make assessments to owners of stormwater facilities to cover the costs to repair damaged or failed facilities. House Bill 1099, which passed both houses of the legislature but is still in conference committee (and is thus eligible for action in 2010), would address a number of additional water quality issues. These include allowing third party certification that parking lots and bioretention areas meet stormwater standards.

The Studies Act of 2009, S.L. 2009-574, authorizes several studies relative to water quality and quantity. Section 2.37 authorizes the Legislative Research Commission to study the feasibility and advisability of providing tax credits for installation of innovative, low-impact development stormwater management systems. Sections 6.2 and 6.3 authorize the Environmental Review Commission (ERC) to study issues related to interbasin transfers and water allocation and Section 6.10 authorizes the ERC to study ways to phase out animal waste management systems that use lagoon and spray-field systems. Section 39.2 authorizes the Department of Agriculture and Consumer Services to study the adequacy of regulations on land application of sludge and Section 6.10 authorizes the ERC to examine this same issue.

### **Mountain Area Planning**

The state role in the management of the mountain area of the state under a proposed Mountain Area Management Act was first actively debated in the 1974 General Assembly. That discussion continued in 2009 with the adoption of S.L. 2009-485 (S 968). The law creates a seventeen-member Mountain Resources Commission. Ten of the members are to be legislative and gubernatorial appointees, five from the mountain area regional planning agencies, and the remaining two from specified area interest groups. The commission is to identify issues and recommend programs to address mountain resource issues, coordinate resource planning and protection efforts, provide a forum for discussion, promote communication and education, collect research and information on provision of infrastructure and encouraging quality growth, and examine new strategies and tools for addressing pressures on mountain resources. The law also creates a thirteen-member Mountain Area Technical Advisory Council made up of professionals with environmental, engineering, planning, and governmental expertise.

The Studies Act of 2009, S.L. 2009-574, also authorizes the Legislative Research Commission to study “issues affecting important mountain resources” and to recommend policies and programs to address those issues.

### **Shoreline Hardening**

In the early 1980s, North Carolina adopted regulations under CAMA to prohibit use of most oceanfront shoreline hardening devices (bulkheads, seawalls, groins, and jetties) to address beach erosion. In 2003 this regulatory restriction was codified as G.S. 113A-115.1. The rules do allow temporary structures such as sandbags to protect imminently endangered structures while longer-term solutions are implemented. In recent years there has been resistance to requirements to remove the “temporary” structures and calls to allow some jetties to be installed as part of larger-scale beach nourishment projects. S.L. 2009-479 (H 709) does not take those steps, but it does place a moratorium until September 1, 2010, on requirements to remove permitted temporary erosion control structures in any community that was actively pursuing a beach nourishment or inlet relocation project on or before August 11, 2009. The Coastal Resources Commission is directed to study the feasibility and advisability of the use of terminal groins and report the results of that study to the ERC by April 1, 2010.

The Studies Act of 2009, S.L. 2009-574, authorizes DENR to study existing laws and policies regarding temporary erosion control structures (Section 41) and measures to mitigate the impact of erosion-threatened structures on public beaches (Section 42). In both instances, reports with recommendations may be made to the ERC. Section 6.9 of the Studies Act also authorizes the ERC to study establishing a system to notify prospective purchasers of coastal properties about coastal hazards.

### **Energy Conservation**

In addition to the legislation regarding solar collectors on residences and incentives for energy efficient developments (both of which are discussed above in “Zoning and Development Regulation”), the General Assembly adopted two other new laws to promote energy conservation.

S.L. 2009-522 (H 1389) establishes a new vehicle for cities and counties to assist homeowners and others in saving energy. The law adds new G.S. 160A-459.1 and G.S. 153A-455 to allow cities and counties respectively to create revolving loan programs for energy improvements. Once a fund is established, the city or county may make loans to finance purchase and installation of “distributed generation renewable energy sources” or energy efficiency improvements that are permanently affixed to real property. Interest for loans from the revolving funds may not exceed 8 percent, and the loans may not be for a term of more than fifteen years. It is anticipated that some of the funds from the Energy Efficiency Conservation Block Grants that will be available through the federal stimulus program may be placed in these loan programs and made available to assist in financing installation of solar panels, small wind turbines, and the like.

S.L. 2009-548 (H 512) extends the state income tax credit on renewable energy projects to include geothermal heat pumps and equipment.

Two local bills address energy conservation. S.L. 2009-427 (S 475) amends the Carrboro town charter to allow the town to prohibit private restrictive covenants forbidding conservation measures (such as clotheslines). S.L. 2009-149 (H 464) allows Raleigh to continue and expand its pilot program regarding LED lighting without use of the competitive bidding process and allows Raleigh and Winston-Salem to lease land for renewable energy facilities for up to twenty years without treating the transaction as a sale of land.

### **Wind Energy**

The General Assembly considered but did not enact legislation to regulate wind energy facilities. Senate Bill 1068 would regulate the location of turbines having a three-megawatt capacity and which are located within a half-mile of each other. In the coastal area, such facilities would require a CAMA permit, with detailed requirements having been specified as to the necessary supporting studies for permit applications and standards for permit decision. A similar program would be established in noncoastal areas, with permit applications to be considered by DENR. A key issue in the latter group was whether windmills should be allowed along mountain ridges. The bill would not allow these windmills in areas where they would be prohibited under the Mountain Ridge Law (but would exempt windmills to serve individual residences if the windmill is no more than 100 feet from the base to the turbine hub). Local regulations of windmills would not be preempted either in coastal or noncoastal areas. This bill passed the Senate and is eligible for further consideration in the House of Representatives.

The Studies Act of 2009, S.L. 2009-574, authorizes the Legislative Utility Review Committee to study a system of permits for siting wind energy facilities.

The budget act, S.L. 2009-451, also addresses wind energy projects. Section 9.14 authorizes the University of North Carolina to continue the coastal sounds wind energy study authorized in 2008. In 2009 a physical dimension was added to this study. The General Assembly allocated \$300,000 of the federal stimulus funds received in 2009 for a project involving the installation of up to three demonstration turbines and necessary support facilities. The wind turbines are to be installed in the North Carolina sounds by September 1, 2010. The law exempts the demonstration project from several contract and bidding requirements. It also exempts the project from several regulatory requirements (including the state Environmental Policy Act, erosion and sedimentation control permits, and CAMA permits) and directs that any other regulatory reviews be conducted expeditiously. The Utilities Commission is also directed to facilitate and expedite the demonstration project. Project implementation began shortly after enactment of the budget. In October 2009 the University of North Carolina at Chapel Hill and Duke Energy entered a contract to install three wind turbines in the Pamlico Sound about seven to ten miles west of Cape Hatteras. Duke Energy will pay for the turbines and their installation (an estimated cost of \$12 to \$15 million each) while UNC will research and document their effectiveness and environmental impacts.

### **Additional Studies**

The Studies Act of 2009, S.L. 2009-574, also authorizes several additional studies. Section 6.4 authorizes the ERC to study the desirability and feasibility of consolidating the state's policy-making, rule-making, and quasi-judicial functions into one comprehensive full-time commission. Section 6.7 authorizes the ERC to study how the state can grow in a sustainable manner through the year 2050 and Section 6.6 authorizes the ERC to examine ways to expand alternative energy use by state government. Section 2.38 authorizes the Legislative Research Commission to study incorporating farming into any cap and trade system that may be used for greenhouse gas emission limitations.

## Jurisdiction

Potential major revision to the state's annexation laws was the principal jurisdictional issue before the 2009 session of the General Assembly. Many bills on this topic were introduced. A compromise bill, House Bill 524, emerged as the vehicle for addressing annexation standards. The House passed the bill, but the late inclusion of a requirement for annexation approval by referendum led to the evaporation of the compromise support for the bill, and it was not taken up by the Senate.

The parade of cities securing authorization to undertake satellite annexations where the satellite land areas exceed the usual limit of not being more than 10 percent of the area within the primary corporate limits continued in 2009. These include Apex (S.L. 2009-53, H 758), Belmont (S.L. 2009-111, H 280), Bridgeton (S.L. 2009-156, H 646), Jamestown (S.L. 2009-323, H 688), Norwood (S.L. 2009-256, S 29), and Richlands (S.L. 2009-40, H 336).

Other local bills annexed specific areas into cities. These include Aberdeen (S.L. 2009-153, S 432), Eastover (S.L. 2009-23, S 214), Kannapolis (S.L. 2009-113, H 422), and Pine Knoll Shores (S.L. 2009-151, S 91). A specified area was removed from Landis (S.L. 2009-159, H 992), Kannapolis (S.L. 2009-430, S 346), Robbins (S.L. 2009-294, S 215), and Washington (S.L. 2009-469, H 921).

Several local governments had their extraterritorial jurisdiction authority modified in 2009. S.L. 2009-371 (S 53) provides Burgaw with a two-mile ETJ. S.L. 2009-251 (S 495) added a specified area to the Oak Ridge ETJ. S.L. 2009-260 (H 743) did the same for Wendell. S.L. 2009-426 (S 251) moves a specified area from the Faison ETJ to Sampson County jurisdiction and specifies the zoning for the tract.

Several potential new municipal incorporations were authorized. These include Archer Lodge (S.L. 2009-466, S 535), Sneads Ferry (S.L. 2009-431, S 359), and Swannanoa (S.L. 2009-467, S 553). All three were subject to approval by referendum. In the November 2009 elections, voters approved the incorporation of Archer Lodge and did not approve the incorporation of Swannanoa; the referendum for Sneads Ferry will be held in May 2010. Bills to authorize the incorporation of other potential new cities were not enacted. These include Enochville (S 549) and Lake James (S 538).

## Code Enforcement

### Housing Code Enforcement

Legislation that makes significant changes to the landlord-tenant law was enacted in 2009, but the final section of the act concerns housing code enforcement. The act, S.L. 2009-279 (S 661), makes two important additions to G.S. 160A-443, a key minimum housing code enabling statute.

Under prior law, the code enforcement officer could order a deteriorated dwelling to be either repaired or improved or closed or vacated. The choice remained in the owner's hands. In contrast the new law directs the housing-code official to issue an order requiring the property owner "to repair, alter or improve the dwelling in order to render it fit for human habitation." This repair order may be supplemented with an order to vacate and close the unit. However, the latter order may be used only if continued occupancy during the time allowed for repair "will present a significant threat of bodily harm, taking into account the nature of the necessary repairs, alterations, or improvements; the current state of the property; and any additional risks due to the presence and capacity of minors under the age of 18 or occupants with physical or

mental disabilities.” In addition, the initial order must state that failure to make timely repairs may result in an “unfit order” allowing the local government to arrange for direct summary action to carry out the order itself.

These changes became effective October 1, 2009.

### **Condemnation of Residential Buildings**

For over one hundred years, the North Carolina statutes have authorized cities to condemn unsafe buildings and structures. However, only since 2000 have cities been authorized to condemn certain buildings and structures solely because they have a blighting influence upon the neighborhood, and even that authority has been restricted to nonresidential properties. In order for a city to exercise this authority, the property must (i) be located within a community development target area; (ii) appear to be vacant or abandoned; and (iii) appear to be in such a dilapidated condition that it contributes to blight, disease, vagrancy, fire or safety hazards; is a danger to children; tends to attract persons intent on criminal activities; or otherwise constitutes a public nuisance. A companion statute, G.S. 160A-432.1, permitted a dozen municipalities to apply this power to residential properties as well.

S.L. 2009-263 (H 866) allows any municipality to exercise this authority with respect to both nonresidential and residential property. However, to do so a city must adopt an implementing ordinance after first holding a properly noticed public hearing. (Heretofore the statute did not require that an ordinance be adopted to implement it; a local building inspector was delegated the condemnation power directly by the General Assembly.) This change in the law also means that cities may take summary action to cause both residential and nonresidential buildings to be removed or demolished if the owner fails to do so.

The act repeals G.S. 160A-425.1 (the legislation applicable to a dozen cities) and an associated statute [G.S. 160A-432(a1)], effective October 1, 2009. The act also provides that any new ordinance adopted under this authority may not become effective until October 1, 2009.

S.L. 2009-9 (H 112), adopted in March 2009, added the towns of Louisburg, Spring Lake, and Wallace to the list of municipalities that could condemn residential buildings because of their blighting influence. However, that act was superseded by the later adoption of S.L. 2009-263, applicable to all cities.

### **Transfer of Building Code Enforcement for State Buildings**

Late in this year’s General Assembly a bill was adopted that makes major changes in the way new state building construction projects are reviewed for compliance with the State Building Code. S.L. 2009-474 (S 425), which grew out of the late summer rewriting of a bill on a different topic, shifts authority from the North Carolina Department of Insurance (NCDOI) and transfers it to the Office of State Construction in the Department of Administration (DOA). The law strips the commissioner of insurance, acting through the office of the state fire marshal, of the power (G.S. 58-31-40) to review plans for new, expanded, and remodeled state buildings to ensure they meet fire safety requirements. It adds new G.S. 143-345.11 to transfer this authority to the Secretary of Administration; it does direct the secretary to provide quarterly reports on plans reviewed and approved to the commissioner of insurance. The commissioner of insurance retains the authority to make necessary inspections of existing state properties to ensure fire safety, but any notice the commissioner gives to a state agency concerning defects or needed improvements must be forwarded to DOA. NCDOI does retain existing fire-safety review authority for plans for county, city, and school district buildings that exceed 20,000 square feet.

The act also adds new G.S. 143-139(e) to clarify that NCDOA through the Office of State Construction now will have general supervisory authority to administer and enforce all sections of the State Building Code with respect to state buildings. It will act as the official inspector or inspection department for purposes of G.S. 143-143.2. It will also be the only agency with authority to pursue enforcement remedies for code violations affecting state buildings.

To implement these changes, the act transfers from NCDOI to NCDOA four existing code review positions selected by NCDOA and requires that the positions continue to be supported by the Insurance Regulatory Fund through fiscal year 2011–12. Thereafter the positions will be funded by the State Property Fire Insurance Fund through the Office of the State Treasurer. In addition, the act creates within NCDOA four new positions that are each entitled “Engineering/Architectural Technician—Advanced” to help the Office of State Construction assume its new duties. These positions will also be supported for now by the Insurance Regulatory Fund to the tune of \$69,862 apiece.

Finally, Section 6 of the new law directs the North Carolina Code Officials Qualification Board to develop an expedited training course on State Building Code regulation and code-enforcement administration to facilitate the ability of NCDOA employees to obtain Level III standard certification. Specifically, it requires the board to issue a Level III standard certificate to anyone who (i) was employed by NCDOA when the act became effective; (ii) possesses a valid license to practice as a registered architect or registered professional engineer; (iii) successfully completes the expedited training course; and (iv) successfully completes all exams required by the board.

The portions of the act described above became effective October 1, 2009.

### **Building Permit Exemptions for Certain Electrical Lighting Devices and the Replacement of Residential Water Heaters**

S.L. 2009-532 (H 1409) exempts two types of work from the requirement that a building permit be obtained prior to the work being undertaken. The first is the replacement of a water heater in a one- or two-family dwelling unit by a licensed plumbing contractor who examines the work at completion. The contractor must ensure that (i) a leak test has been performed on gas piping; (ii) the energy use rate or thermal input is not greater than that of the water heater being replaced; (iii) there is no change in fuel, energy source, location, capacity, or routing or sizing of venting and piping; and (iv) the replacement is installed in accordance with the current edition of the State Building Code.

The other category of exempt work involves minor electrical work. The repair or replacement of electrical lighting fixtures or devices, such as receptacles and lighting switches, is exempt if the replacement involves a fixture or device having the same voltage and the same amperage or less and meets the electrical standards of the current edition of the State Building Code. Also exempt is the connecting of an existing branch circuit to an electric water heater that is being replaced. The replacement electric water heater must be placed in the same location and feature no greater capacity or electrical rating than the original. The work must be done by a licensed electrical contractor.

The new law amends G.S. 143-138(b5), 153A-357(a), and 160A-417(a). It became effective October 1, 2009.

**Confidentiality of Seals of Design Professionals in Building Permit Documents**

As a general rule, documents that are a part of an application for a building permit and the like are public records and available for inspection and copying. S.L. 2009-346 (H 1478) makes an exception to this general rule by adding G.S. 132-1.2(5) to the state's public records statutes to disallow a public agency from revealing the seal of a licensed design professional submitted in connection with the building permit approval process. The law specifically applies to documents sealed by either a licensed architect (Chapter 83A), a licensed professional engineer (Chapter 89C), or a licensed professional land surveyor (Chapter 89C). S.L. 2009-346 provides that if a city or county receives a request for a document submitted as part of a project approval that includes the seal of one of these design professionals and the document is otherwise a public record, then the city or county must allow examination and copying of the document without the seal. However, the law requires the examination and copying to be done consistent with any rules regarding unsealed documents that are adopted by the North Carolina Board of Architecture and the North Carolina State Board of Examiners for Engineering and Surveying. The purpose of the law appears to be to prevent the reproduction and counterfeiting of the seals of design professionals.

The law became effective October 1, 2009.

**Exemption of Certain Elevators from Building Code**

S.L. 2009-79 (S 114) adds new G.S. 143-138(c1) to provide that the North Carolina State Building Code and related standards affecting the installation and maintenance of limited-use or limited-access hydraulic elevators shall not apply to those owned by private clubs or religious organizations. The act also specifically provides that no local government may adopt an ordinance that conflicts with or limits the exemption above.

The legislation specifically provides that it is not to be construed to limit the authority of the North Carolina Department of Labor to perform safety inspections of hydraulic elevators. It does, however, direct the commissioner of labor to adopt rules affecting buildings with more than one elevator so that there is posted in the passenger cabin of each such elevator a distinct number in plain view for the purpose of identifying the elevator to "facilitate extrication from any elevator that malfunctions while occupied."

**Exemption of Farm Buildings Associated with Equine Activities from Building Code**

The North Carolina State Building Code does not apply to "farm buildings" located in a county's building-code-enforcement jurisdiction. S.L. 2009-245 (H 780) adds a new G.S. 143-138(b4)(1) to clarify that the code does not apply to structures associated with the care, management, boarding, or training of horses and the instruction and training of riders. The exemption includes free-standing or attached sheds, barns, or other structures used to store equipment, tools, commodities, or other items associated with equestrian activities. However, the new law also provides that a farm building associated with horses is not exempt if it is to be used for a spectator event at which more than ten members of the public are to be present. These provisions apply to all farm buildings, including those buildings whose construction either began or was completed prior to June 30, 2009, the effective date of the act.

### **Pyrotechnics Safety**

In 2007 the General Assembly revised the manner in which local governments were able to issue permits for indoor events involving pyrotechnics (fireworks). A fatal accident involving the transport of fireworks at the coast early this summer prompted expedited passage of a bill regulating who may handle them. S.L. 2009-507 (S 563) rewrites the law so that pyrotechnics may be exhibited, used, or discharged only at a concert or public exhibition and only by authorized personnel. A person is authorized who has completed a pyrotechnics training and permitting program developed and administered by the state fire marshal and is under the direct supervision and control of a “display operator.” Alternatively an active member of a local fire or rescue department is authorized if that person has had experience in pyrotechnics or explosives and is either qualified by the jurisdiction where permitting is sought or by the state fire marshal. In addition, the act adds new G.S. Ch. 58, Art. 82A, to provide for the training and permitting of display operators.

The act also amends G.S. 14-413 to provide that a local government may not issue a pyrotechnics permit unless the display operator provides proof of insurance in the amount of \$500,000 or an amount established in the State Building Code, whichever is greater. It also allows a local government to set an amount higher than the minimum if it chooses.

The pyrotechnics law also directs the commissioner of insurance to report to the General Assembly by May 1, 2010, and to recommend additional statutory changes and the need for additional personnel or other resources to implement the act.

### **Code Standards for College Buildings Used by High School Students**

G.S. 116-43.15 provides that the facilities of institutions of the University of North Carolina system and private colleges that comply with the North Carolina State Building Code may be used without modification by public school students participating in early-college or dual-enrollment programs. S.L. 2009-305 (S 689) amends the statute to clarify that this is true for both existing and new university facilities. It also provides that for purposes of the use and occupancy classifications of the building code, facilities accommodating these programs for high school students are to be treated as “Business—Group B” in the same manner as other college and university facilities. S.L. 2009-206 (H 735) amends G.S. 115D-41(b) to provide similar authorization for community college facilities.

S.L. 2009-206 also includes an unrelated provision affecting building code enforcement. Until August 1, 2009, a county may obtain a permit for the construction of administrative facilities under the 2006 version of the North Carolina State Building Code, notwithstanding any other established expiration date for the application of that version of the code.

### **Building Code Standards for Day-Care Facilities**

S.L. 2009-123 (H 1031) adds new G.S. 115C-521.1 to allow a public school that voluntarily applies for a child-care facility license to use an existing or newly constructed public school classroom for three- and four-year-old preschool students. However, the classroom must (1) include at least one toilet and one sink for hand washing; (2) meet kindergarten standards for overhead light fixtures; (3) meet kindergarten standards for floors, walls, and ceilings; and (4) include floors, walls, and chairs free from mold, mildew, and lead hazards. The public school must also meet all other day-care facility licensing requirements that do not apply to the physical classroom.

### Cistern Water for Toilets and Irrigation

S.L. 2009-243 (H 749) amends G.S. 143-138(b) to authorize the Building Code Council to adopt State Building Code regulations that would allow the use of cistern water for flushing toilets and outdoor irrigation. If adopted, the regulations may allow cisterns to be used in connection with the construction or renovation of both residential or commercial buildings and structures. The act expressly provides that no state or local government regulation may prohibit the use of cisterns to provide water for the uses mentioned above.

### Denial of Building Permits for Unpaid Taxes (Local Acts)

S.L. 2009-117 (H 103) is a local act that applies only to the following counties: Alexander, Alleghany, Anson, Bertie, Catawba, Chowan, Stokes, Surry, and Tyrrell. It allows these counties to withhold a building permit for real property for which property taxes are delinquent. The act already applies to Davie, Greene, Lenoir, Lincoln, Iredell, Wayne, and Yadkin counties.

S.L. 2009-68 (H 563) is very similar, but it requires the adoption of a local ordinance and allows the ordinance to provide that a building permit may be issued to a person protesting the assessment or collection of property taxes. It applies only to the towns of Columbia and Edenton.

Another bill of the same type, House Bill 1000, which applies to Allegheny and Surry counties, has passed the House, has been referred to a Senate committee, and is eligible for further action in 2010.

### Studies Act

The Studies Act of 2009, S.L. 2009-574, authorizes several studies of interest to building inspectors. Section 6.15 authorizes the ERC to study “the possibility of requiring new and renovated commercial buildings and new residential buildings to comply with energy conservation standards” [Green Building Code (House Bill 1443)]. Section 8.7 allows the Joint Legislative Utility Review Committee to study “the possibility of extending the standards governing energy efficiency and water use for major facility construction and renovation projects involving State, university, and community college buildings to major facility construction and renovation projects involving buildings of entities that receive state funding” [Energy Efficiency in State-Funded Buildings (House Bill 1199)]. Section 25.1 permits the State Board of Community Colleges to study strategies for making the construction process for community colleges more efficient (Senate Bill 418).

### Ethics

S.L. 2009-403 (H 1452) creates G.S. 160A-83 to require the governing boards of every city, county, local board of education, unified government, sanitary district, and consolidated city-county government to adopt a code of ethics for its use. It also creates G.S. 160A-84 to require all members of these governing boards to receive two hours of ethics training within a year of being elected or reelected.

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# 5

# Community Planning, Land Development, and Related Topics

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

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

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

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

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

## Zoning

### Unified Development Ordinances

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

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

### Hearing Notices for Rezonings

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

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

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

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

## Protest Petitions

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

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

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

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

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

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

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

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

## **Comprehensive Plan**

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

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

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

## **Conflicts of Interest**

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

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

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

## Moratoria

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

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

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

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

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

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

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

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

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

### **Conditional Zoning**

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

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

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

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

### **Spot Zoning**

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

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

### **Special and Conditional Use Permits**

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

### **Variances**

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

### **Boards of Adjustment**

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

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

### **Government Land Uses**

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

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

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

## **Planning and Regulatory Jurisdiction**

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

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

## **Miscellaneous**

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

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

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

## **Land Subdivision Control**

### **Subdivision Plat Approval**

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

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

### **Subdivision Ordinance Standards**

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

### **Subdivision Ordinance Performance Guarantees**

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

### **Scope of Land Subdivision Regulation**

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

### **Remedies for Subdivision Ordinance Violations**

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

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

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

### **Presale of Lots**

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

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

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

### **Infrastructure Agreements**

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

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

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

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

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

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

## **Development Agreements**

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

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

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

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

### **Easements within Certain Public Rights-of-Way**

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

## **Transportation**

### **Transportation Corridor Official Maps**

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

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

### **Toll Roads and the Turnpike Authority**

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

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

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

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

### **State Road Systems and Certain State Road Work Plans**

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

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

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

## **Environmental Policies Affecting Transportation Projects**

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

## **NCDOT Reorganization**

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

## **NCDOT Stormwater Project**

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

## **“Way-Finding” Signs within the Right-of-Way**

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

## **Regional Transportation Authority Board Representation**

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

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

## **The Future of Horace Williams Airport**

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

## **Community Appearance**

### **Tree Protection/Forestry Activity**

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

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

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

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

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

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

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

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

## Display of Flags

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

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

## Aquatic Weed Control

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

## Overgrown-Vegetation Ordinances

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

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

## Junked Motor Vehicle Ordinances

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

## **Building Code**

### **Continuing Education for Code Officials**

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

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

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

### **Code Official Exam Fees**

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

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

### **Building Permits and Contractor License Requirements**

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

### **Toilets in Malls**

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

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

### **Plumbing and Heating Work in Electric Generating Facilities**

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

### **No Permit If Taxes Not Paid**

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

### **Bills Eligible for Consideration in 2006**

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

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

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

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

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

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

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

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

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

## Historic Preservation

### Tryon Palace Historic Sites and Gardens Fund

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

### Statesville Historic District Structure Demolition

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

## Housing Code

### Local Legislation

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

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

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

## Hurricane Response

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

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

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# 5

# Community Planning, Land Development, and Related Topics

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

## **Zoning**

### **Wireless Telecommunication Facilities**

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Parking Lots**

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

### **Local Acts Affecting Zoning**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Historic Preservation**

### **Historic Rehabilitation Tax Credit**

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

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

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

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

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

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

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

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

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

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

## **Community Appearance/Public Nuisances**

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

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

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

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

## **Transportation**

### **Highway Construction Projects**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Regulation of Junked Motor Vehicles**

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

## **Vegetation Removal and Billboards**

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

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

## **Real Property Acquisition**

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

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

## **Eminent Domain**

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

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

## Code Enforcement

### Standards for Code-Enforcement Officials

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

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

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

### Master Meters in Condo Conversion Projects

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

### Insulation of Hot Water Pipes

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

### Exemption of Industrial Machinery from Building Code

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

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

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

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

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

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

### **County Pyrotechnic Displays**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Environment**

### **Landfill Siting**

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

## **Energy**

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

## Miscellaneous

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

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

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

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

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

*Richard Ducker*

*David Owens*

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# Community Planning, Land Development, and Related Topics

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

## **Zoning**

### **Wireless Telecommunication Facilities**

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Parking Lots**

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

### **Local Acts Affecting Zoning**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Historic Preservation**

### **Historic Rehabilitation Tax Credit**

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

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

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

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

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

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

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

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

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

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

## **Community Appearance/Public Nuisances**

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

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

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

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

## **Transportation**

### **Highway Construction Projects**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Regulation of Junked Motor Vehicles**

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

## **Vegetation Removal and Billboards**

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

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

## **Real Property Acquisition**

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

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

## **Eminent Domain**

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

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

## Code Enforcement

### Standards for Code-Enforcement Officials

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

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

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

### Master Meters in Condo Conversion Projects

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

### Insulation of Hot Water Pipes

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

### Exemption of Industrial Machinery from Building Code

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

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

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

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

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

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

### **County Pyrotechnic Displays**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Environment**

### **Landfill Siting**

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

## **Energy**

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

## Miscellaneous

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

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

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

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

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

*Richard Ducker*

*David Owens*

# Community Planning, Land Development, and Related Topics

The General Assembly enacted significant legislation in the 2008 short session affecting land use, development, transportation, and code enforcement. It provided enabling authority to set into motion a program for disposing of abandoned manufactured homes that dot the countryside. New legislation will now require local governments that operate public water systems to develop and carry out various water conservation measures. The legislature also reworked stormwater management standards for parking lots throughout the state and chose to disapprove coastal stormwater rules adopted by the Environmental Management Commission (EMC) and to replace them with certain statutory standards.

The bigger story may have been the bills in this field that were eligible for consideration but were not enacted. Bills to drastically change the annexation laws were blocked; a study commission will take up annexation next year. An amendment to a bill that would have significantly limited the existing laws on development moratoria was withdrawn. A bill that would have prevented local governments from accepting developer contributions in connection with development proposals (a big issue where adequate—public-facility ordinances are used) died in committee. A proposal by outdoor advertising interests to allow them to cut trees within certain state highway rights-of-ways so that their signs could be better seen from the road ran into potent opposition. Still another bill that would have limited the ability of local governments to make periodic inspections of property to check for compliance with housing and fire codes and unsafe building conditions never made it to the Senate floor. Finally, a bill concerning the judicial review of quasi-judicial land use decisions languished because of lukewarm support.

## Zoning

Among the most notable legislative activities regarding zoning in 2008 were two initiatives that failed.

The first initiative addressed the question of new limits on the use of development moratoria. Amendments to the zoning statutes in 2005 established a detailed process for the adoption of moratoria. The law requires public hearings in most instances and requires consideration and adoption of a written rationale for the moratorium. A local government must specify the reason for a moratorium and why other steps are inadequate, specify the length and coverage of the moratorium, and approve an action plan to address the problem that led to the imposition of the moratorium. The length of the moratorium is limited to a reasonable period given the stated purpose. There are limits on extensions of moratoria and limits on its applicability to completed applications submitted prior to the call for a public hearing on the moratorium. Despite these limitations, several moratoria have been adopted in recent years that sparked considerable local controversy. As a result, in the last days of the 2008 session, a Senate committee added a limitation on moratoria to a pending bill on North Carolina Department of Transportation (NCDOT) access permits (H 2313). The proposed limit would have prohibited the adoption of any moratorium if “the sole purpose” of the moratorium was to update or amend a local plan or ordinance. Cities and counties were concerned that because most moratoria are adopted to maintain the status quo pending an ordinance amendment of some description, this could be read to effectively prohibit the use of temporary moratoria in most situations. After several days of heated debate, the sponsor of the limitation amendment agreed to withdraw the proposal for the 2008 session.

The second initiative tackled judicial review of land use appeals. In 2007 the Senate approved S 212 to codify various aspects of the procedures for judicial review of local government quasi-judicial land use approvals, including appeals of decisions on special and conditional use permits, enforcement actions, variances, and some plats. S 212 addressed the content of the judicial petition used to start an appeal, standing to bring an appeal for individuals and groups, parties that must be named in the appeal, and the process for intervention. The bill also addressed the scope of review to be used by the courts, the degree of deference to the local decision-making board, and remedies available for consideration by the court. However, in 2008 the House used S 212 as a vehicle to address the confidentiality of records of participants in local park and recreation programs, deleting the relevant zoning provisions in S 212. The bill was enacted in that amended form.

Several bills were enacted affecting zoning as it pertains to specific local governments. Two of these acts expand upon prior local authorizations. Local legislation in 2003 allowed electronic rather than published notice of hearings for Cabarrus County, Raleigh, and Lake Waccamaw. In 2007 Apex, Garner, and Knightdale were also allowed to provide notice of public hearings through electronic means. S.L. 2008-5 (S 1579) adds Cary to the list of local governments authorized to substitute electronic notification of hearings for published notice. These electronic notices do not supersede statutory requirements for mailing notices of hearings or for posting notices of hearings on the site of affected properties, nor do they alter the schedule for making the notices. The second act extends the number of local governments explicitly authorized to use development regulations to provide incentives for energy conservation. In 2007 Asheville, Carrboro, Chapel Hill, Charlotte, and Wilmington were given the authority to grant density bonuses, adjust development regulations, and provide other incentives to developers of projects that make a significant contribution to reduction of energy consumption. S.L. 2008-22 (S 1597) adds Cary, Concord, Durham, Harrisburg, Kannapolis, Locust, Midland, Mount Pleasant, Stanfield, and Cabarrus County to the list of local governments authorized to do this. The third act of interest, S.L. 2008-41 (S 2126), amends the Winston-Salem charter regarding zoning penalties.

## Land Subdivision and Development Fees

### Land Partition

The partition of land owned jointly by tenants in common and its sale is important to those interested in land subdivision regulation. Both voluntary and involuntary partitions of land, common ways of dividing land among family members, are generally thought to be outside the scope of subdivision regulation. Sections 42.1 to 42.5 of the studies act, S.L. 2008-181 (H 2431), establish a joint Partition Sales Study Committee

to study how partitions sales procedures affect the economic use and loss of property by heirs in North Carolina. The committee must report to the General Assembly by March 1, 2009.

### Local Acts

Chapel Hill secured the adoption of an amendment to an existing local act affecting “fees-in-lieu” of dedication of recreation lands and facilities. S.L. 2008-76 (H 2580) amends the town charter provisions applicable to new subdivisions to allow the town to require payment of fees instead of accepting dedications if the recreation areas involved would be less than four acres in size (previously, two acres). It also allows the town to require payments in lieu of accepting dedications of recreation land in connection with both residential and nonresidential development projects that are subject to special-use or conditional-use zoning permits.

### Bills That Did Not Pass

In 2007 the Senate adopted S 1180, making it eligible for further consideration in the 2008 session. The bill prohibited a local government from imposing any tax or fee, or accepting a monetary contribution, in connection with development that is not specifically authorized by law. In particular the bill was targeted at local governments that invite developers to make “contributions” to defray certain infrastructure costs related to a development in order to meet “adequate-public-facility” standards in land development ordinances. The practice has become particularly common in a small number of metropolitan counties that enforce adequate-public-facility standards in connection with public schools. S 1180 was not taken up by the House and died in committee.

## Community Appearance and Nuisances

### Local Acts

Since 1999 over a half-dozen local acts have concerned the remedies that may be pursued by local governments in enforcing public nuisance ordinances (typically overgrown vegetation ordinances). Most include variations on the themes of providing notice to chronic ordinance violators, abating the nuisance, and establishing a lien against the property for unpaid costs. These local acts, however, may run afoul of Article II, section 24, of the North Carolina Constitution, which prohibits the General Assembly from enacting “any local, private, or special act . . . relating to health, sanitation, and the abatement of nuisances.”

In any event, S.L. 2008-6 (S 1653) allows Franklinton, Louisburg, Mount Airy, Pinetops, Smithfield, and Yadkinville to give annual notice to violators of overgrown vegetation ordinances. S.L. 2008-23 (S 1636) provides similar authority for Morehead City and Wilson; S.L. 2008-25 (S 1828) does so for Marshville, Wadesboro, and Wingate.

## Bills That Did Not Pass

In 2007 the Senate adopted S 150, making it eligible for further consideration in the 2008 session. The bill, pushed by outdoor advertising interests, would have allowed owners of billboards to cut more trees that might obscure their signs within state highway rights-of-way. Owners of these advertising displays along certain federally aided highways offered to pay more in administrative fees to NCDOT; the money would also fund the replanting of new trees elsewhere. In return owners would have been allowed to remove trees, shrubs, and other vegetation within 375 feet of their signs, an increase from the current standard of 250 feet. S 150 represented the industry's third attempt in as many years to secure favorable legislation. However, the bill was opposed by Speaker of the House Joe Hackney and Governor Michael Easley, and it died in a House committee.

## Historic Preservation

In 2007 Cary and Wake Forest secured local legislation that allows each of them to regulate the demolition of certain historic structures within their jurisdictions. Among the historic structures that may be regulated are (1) state, local, and national landmarks; (2) structures listed in national, state, or county registers of historic places; and (3) certain structures that "contribute" to the historic district in which they are located. However, the act also provides that towns may not prohibit the demolition of historic structures except in accordance with existing general law. The act apparently intends that G.S. 160A-400.14 applies to all of these historic structures. That statute allows a local government to delay the effective date of a certificate of appropriateness for a proposed demolition up to 365 days after it is approved. S.L. 2008-75 (H 2579) amends the 2007 act to extend the authority to Chapel Hill. S.L. 2008-58 (S 1970) includes essentially identical language to extend this same authority to the City of Wilson.

## Code Enforcement

### Managing Abandoned Manufactured Homes

Over the years an increasing number of old manufactured homes (formerly "mobile homes") have been abandoned, discarded, or vacated in back lots, mobile home parks, and isolated rural areas in North Carolina. There has not been an especially active repair market for older units, and the cost of dismantling and hauling the units away has often exceeded their value. Proposals to fund a program for dealing with nuisance manufactured homes by imposing a tax or fee on the purchase of new units have not

met with legislative success. This year, however, the General Assembly authorized a promising new multifaceted program, S.L. 2008-136 (H 1134), for funding the "deconstruction" and removal of units.

To break through the financial stumbling blocks that have thwarted past attempts at a solution, the General Assembly directs the Department of Environment and Natural Resources (DENR) to use up to \$1 million from the Solid Waste Management Trust Fund to fund the cleanup of abandoned units. The money is to be used by DENR to provide grants to counties to reimburse their expenses in undertaking a cleanup program, to provide technical assistance and support to counties, and to fund the administrative expenses of staffing, training, and program support. Reimbursement grants made to counties, a key feature of the program, are to be calculated on a per-unit basis and are based on the actual cost of cleanup activities, but may not exceed \$1,000 per manufactured home unit. However, a poor county (a tier-one development county or a tier-two development county for economic development purposes) is eligible to request a supplemental grant equal to 50 percent of the amount in excess of \$1,000 per unit. These poorer counties are also eligible for a special planning grant of \$2,500 from the Solid Waste Management Trust Fund. In making any of these grants DENR must review the budget submitted by the applicant county and settle on a grant amount that takes into account the availability of funds and the county's capacity to manage the program effectively and efficiently.

A county may choose whether or not to initiate an abandoned manufactured home program. If the county elects not to do so, the county must so state in the county comprehensive solid waste management plan that each county is required to develop. If the county decides to proceed with an abandoned manufactured home program, then it must develop a written plan outlining its intentions, which becomes a component of its comprehensive solid waste management plan. Among other things, the implementation plan must outline how an owner of a manufactured home may request designation of the unit as an abandoned manufactured home and how the county will dispose of units that are not "deconstructed." This latter matter is important because the act prohibits an intact abandoned manufactured home from being disposed of in a landfill. The act does, however, allow counties to charge a landfill disposal fee for deconstructed units.

The process for "managing" and removing such units is ambitious. Perhaps the key to S.L. 2008-136 is the definition of an "abandoned manufactured home." The unit must either qualify as a manufactured home (as defined for property tax assessment purposes in G.S. 105-164.3) or as a mobile classroom. It must also meet two additional tests. First, the unit must be either vacant or "in need of extensive repair." (Note that occupied units can still be deemed "abandoned.") Second, the unit must

pose an “unreasonable danger to the public health, safety, welfare, or the environment.” It appears likely that the public officials charged with enforcing this program will exercise considerable discretion.

The gist of the program is simply to locate those manufactured homes that meet the definition of “abandoned,” notify the “responsible party” (anyone possessing an ownership interest in the unit), give that party the opportunity to dispose of the unit, and, if the responsible party fails to do so, remove the unit from the premises and “deconstruct” it. Since much of the process is outlined in the statutes, an extensive implementing ordinance is probably not required. A county is authorized to contract with another unit of local government or private entity to carry out this program.

The “code enforcement” process for the counties that choose to participate in the program is as follows. The county must notify the responsible party and the owner of the land upon which the abandoned manufactured home is located that the unit must be disposed of. The notice must be in writing and served according to the Rules of Civil Procedure. The notice also informs the party that a hearing will be held before a designated public official not less than ten days nor more than thirty days after the notice is served. The notice must also declare that the responsible party has the right to file an “answer” to the order, to appear in person, and to give testimony in what is apparently a quasi-judicial hearing. If the hearing officer then determines that the unit is abandoned, then the officer must prepare findings of fact to support such a determination and order the responsible party to dispose of the unit within ninety days.

If the responsible party fails to comply with the order, the county may dispose of the unit. Specifically, the county may enter the property where the unit is located and arrange to “deconstruct” and dispose of it in a manner consistent with the county’s plans. G.S. 130A-309.113(d) specifically provides that an “intact” abandoned manufactured home (one from which the wheels and axles, white goods, and recyclable materials have not been removed) may not be disposed of in a landfill. G.S. 130A-309.114 specifically provides that if the responsible party is not the owner of the land upon which the unit is located, the county may order the land owner to permit entry onto the land to permit the removal and disposal of the unit. It is unclear how this provision complements the state’s trespass statutes.

If the county removes, deconstructs, and disposes of the unit (whether by force account or by independent contractor), the responsible party is liable for the actual costs incurred. Such costs include not only abatement activities, but administrative and legal expenses as well, minus the amount of any grant money received by the county for disposing of that unit. Nonpayment of any portion of the county’s costs results in the imposition of a lien on any real property in the county that is owned by

the responsible party. Although the new abandoned manufactured home statutes treat such units as if they were public nuisances, the legislation clarifies that it does not affect the existing legal ability of local governments to abate public nuisances or exercise any existing powers that a city may have under G.S. Chapter 160A or that a county may have under G.S. Chapter 153A.

### **Carbon Monoxide Detectors**

Public discussion of global warming and carbon footprints has highlighted the growing menace of carbon dioxide in our atmosphere. However, carbon dioxide has a sibling, carbon monoxide, that can be lethal in confined quarters, particularly on residential premises. Because of the invisible, odorless danger caused by carbon monoxide, the North Carolina Child Fatality Task Force recommended legislation requiring the installation of carbon monoxide detectors in new residences (through the amendment of the North Carolina State Building Code) and in existing residential rental units as well.

Much of S.L. 2008-219 (S 1924) represents a compromise among a number of parties including landlords, builders, and those concerned with the public health and safety problems created by the gas. First, the act amends G.S. 143-138(b) to allow, but not compel, the North Carolina Building Code Council to amend the code to require either battery-operated or electrical carbon monoxide detectors in certain new residential units. The express authorization applies to each new dwelling unit with an attached garage, a fireplace, or a fossil-fuel-burning heater or appliance. The detectors to be used must be listed by certain nationally recognized testing laboratories and must be installed in accordance with either National Fire Protection Association standards or the standards outlined in the manufacturer’s instructions. It also authorizes the use of carbon monoxide detectors that are combined with smoke detectors.

The act also requires that carbon monoxide detectors be installed by landlords by January 1, 2010, for each building level of each rental dwelling unit with an attached garage, a fireplace, or a fossil-fuel-burning heater. Unless there is an agreement with the tenant to the contrary, the landlord is obligated to install new batteries in a battery-operated detector at the beginning of each tenancy, and the tenant is obligated to replace them as needed. In this regard, the relative obligations are similar to those that apply to the installation and maintenance of smoke detectors in residential rental units.

Finally, the act directs the Building Code Council to study the needs and benefits of carbon monoxide detectors and to report the results of its study to the General Assembly no later than July 1, 2009.

## Greenhouses Exempt from Building Code

Another new directive affecting the contents of the State Building Code, G.S. 143-138(b), grows out of S.L. 2008-176 (H 2313). This act deals primarily with driveway permits along state highways. However, one section of the act makes the Code inapplicable to greenhouses that are within a municipality's "building-rules" jurisdiction (apparently any area within which a municipality enforces the State Building Code, including, where applicable, a municipality's extraterritorial planning jurisdiction). A greenhouse is defined as a structure that

1. has a glass or plastic roof,
2. has one or more glass or plastic walls,
3. has an area over 95 percent of which is used to grow or cultivate plants,
4. is built in accordance with the National Greenhouse Manufacturers Association Structural Design manual, and
5. is not used for retail sales.

However, the act requires local governments subject to the exemption to approve additional requirements addressing various life safety hazards posed by greenhouses.

## Government Liability for Negligence

The so-called public duty doctrine holds that the government and its agents cannot generally be held responsible for damages or injuries that occur to members of the public simply because government has not adequately protected them from the actions of third parties. Thus government owes no duty of protection to the public generally; in effect a duty to everyone is a duty to no one. S.L. 2008-170 (H 1113) affects the ability of state departments and agencies to use the doctrine as a defense against suits for alleged negligence. It does not directly affect local government liability for the negligence of code enforcement officials. In fact the act declares that nothing in it "shall limit the assertion of the public duty doctrine as a defense on the part of a unit of local government or its officers, employees, or agents." Its real purpose is to codify for the first time the portion of governmental liability law that applies to state government.

The act enacts new G.S. 143-299.1A, which generally limits the use of the public duty doctrine to two circumstances. The first involves the alleged negligence of a state law enforcement officer in protecting the claimant from the actions of others or from an act of God. The second involves the alleged negligent failure of a state official or agent to properly perform a health or safety inspection required by statute. It is worth noting that North Carolina courts have refused to apply the public duty doctrine

to local government code enforcement officials involving the failure to conduct properly building or housing code or septic tank inspections. The new legislation is effective for claims made on or after October 1, 2008.

## Studies

Section 18.1 of the studies act, S.L. 2008-181 directs the North Carolina Building Code Council to "reexamine" its adoption of certain sections of the North Carolina Electrical Code to determine "whether they are necessary and cost-effective." The sections concern circuit-interrupter protection, allowable ampacities in certain cables, and tamper-resistant receptacles in dwelling units.

Section 34.1 continues the Joint Select Committee on Emergency Preparedness and Disaster Management Recovery. One of the topics it is directed to study is "(w)hether the State building code sufficiently addresses issues related to commercial and residential construction in hurricane and flood prone areas." The committee's final report, including any proposed legislation, must be delivered to the General Assembly by December 31, 2009.

## Local Acts

**Building permit thresholds.** In 1983 G.S. 160A-417 and G.S. 153A-357 were both amended to increase from \$2,500 to \$5,000 the value of the construction work below which no building permit was required. However, the act (Section 5 of S.L. 1983-614) specifically exempted Edgecombe, Nash, and Wilson counties from the increase in this threshold so that a stricter standard for building permits applied in those counties. This summer, twenty-four years later, the General Assembly enacted S.L. 2008-65 (H 2255), which repeals the exemption for these counties, thereby bringing these counties back under the \$5,000 threshold that continues to exist to this day. The act became effective September 1, 2008.

**Building condemnation authority.** About a dozen cities are subject to G.S. 160A-425.1. The statute allows named cities to declare nonresidential as well as residential buildings in community development target areas to be unsafe and order their removal. S.L. 2008-59 (S 1971) adds Rocky Mount and Wilson to the list of cities that may use this authority.

## Bills That Did Not Pass

The Senate passed S 1507 in 2007, making it eligible for further consideration in the 2008 session. It would have restricted the circumstances under which a local government could require periodic inspections in order to check for compliance with fire prevention regulations, minimum housing ordinances, and conditions giving rise to

building condemnation. Under the bill a local government could require periodic inspections in response to "blighted or potentially blighted conditions" in a designated target area. Otherwise periodic inspections could be conducted only where there was "probable cause."

The bill, however, also included provisions that would enhance the choices available to local minimum housing inspectors. It would have amended the housing statutes to provide that if a dwelling can be repaired or improved, the inspector could so require and would not have to allow the owner to comply by vacating and closing the dwelling. There are an increasing number of complaints about owners who simply board up houses to avoid having to repair them.

S 1507 never made it out of the House committee to which it was referred.

## Transportation

### State Road Connection and Encroachment Permits

One portion of S.L. 2008-176 reflects a legislative recommendation made by the Joint Legislative Transportation Oversight Committee. Section 1 of the act enacts new G.S. 136-93.1 to establish an express permitting review program for permits authorizing connections to the state highway system. The program applies to all permits for connections to the road system by way of a driveway, intersecting street, signal, drainage way, or any other encroachment. The problem has lain in the fact that some such permits take four months or more in some areas of North Carolina.

If a particular NCDOT highway division office routinely reviews and issues special commercial permits within an average of forty-five days, then the division is not compelled to adopt an expedited permit review process. Otherwise an express permit program must be established, supported by permit fees. A uniform system of fees must be adopted by NCDOT that is applicable to all participating divisions. Unless NCDOT contracts out for the permit review to be conducted by an engineering firm, the most that can be charged for the express review of all of the permits listed above is \$4,000. Program fee revenues are earmarked for the administration of the program, including the costs of program staff salaries and contract firms.

One other feature of the expedited application review process is that once the application is deemed to be complete, the permit must be issued or denied within forty-five days. Yet the act provides that if the application is neither denied or the permit issued within forty-five days, the failure is deemed to be a denial of the express permit application.

The act requires NCDOT to report annually to the Fiscal Research Division and the Joint Legislative Transportation Oversight Committee concerning how the program is working.

### Local Government Participation in State Highway Projects

Legislation adopted in 2006 opened the way for counties to play a larger role in the programming and funding of projects on the state highway system, if they choose to do so. S.L. 2008-180 (H 2314) represents a further expansion of the role of counties in such projects. In each instance the changes allows counties, like cities, to "participate" financially in the acquisition of land for and the construction and maintenance of state highway projects.

A number of statutory conforming changes have been made. First, the act amends G.S. 143B-350(f1) to provide that the fact that a county (as well as a city) participates financially in a state highway project "shall not be a factor considered by the Board of Transportation" in the development of its transportation improvement plan. Second, the act amends G.S. 136-18(27) to allow NCDOT to adopt rules for voluntary participation in state highway projects by counties as well as cities. Third, the act amends G.S. 136-66.3 to extend powers now held by cities to counties. The most notable of these are as follows. Where enabling authority allows it, counties, like cities, may require improvements to a state road such as additional travel lanes, turn lanes, curb and gutter, and drainage facilities in connection with land development projects abutting a state road. Similarly, a county as well as a city may pay for improvements to a road project in the state Transportation Improvement Plan that are in addition to the improvements that NCDOT would normally include in the project. In such instances NCDOT may now allow counties as well as cities a period of at least three years from the date the project is initiated to reimburse NCDOT an agreed upon share of the cost. Also, counties may now not only use eminent domain to acquire right-of-way for state projects, they may also employ the "quick-take" procedure available to NCDOT and cities. Fourth, an amendment to G.S. 136-98(c) seems intended to reassure counties that their participation is voluntary; it also provides that NCDOT "shall not transfer any of its responsibilities to counties without specific statutory authority." Finally, the act amends the roadway corridor official map statutes (G.S. 136-44.50 to 136-44.53) so as to allow counties to adopt such maps. Remarkably, the new legislation fails to clarify the nature of the geographic area for which a county may adopt an official map. It seems likely, however, that a county is authorized to adopt such a map for a road project located within the county's planning jurisdiction.

One other change made by S.L. 2008-180 amends G.S. 136-18(2) to add "broadband communications" to the list of infrastructural improvements and utilities that NCDOT may locate within a state road right-of-way and for which it may acquire right-of-way.

## Studies

The studies act, S.L. 2008-181 provides for the possibility of several transportation-related studies. Sections 27.1 and 27.2 direct NCDOT to study the amending of its standards so as to allow construction of sound barriers along existing state highways that generate significant noise in order to protect adjacent residential communities. The study, which is to include the costs of changing the standards and potential sources of funding, is to be submitted to the Joint Legislative Transportation Oversight Committee by March 1, 2009. Section 4.4 authorizes the Joint Legislative Transportation Oversight Committee to study, and report to the 2009 session, whether North Carolina should enter into a compact with South Carolina, Tennessee, and Virginia to coordinate efforts to establish an inland port. Section 6.2 authorizes the Environmental Review Commission to study the costs and benefits of adopting the California motor vehicle emission standards for North Carolina. Section 26.1 directs NCDOT to study the Piedmont and Northern Railway line in Gaston County to determine the cost of bringing the full line back into operation. The report to the Joint Legislative Oversight Committee is due by January 15, 2009.

## Local Acts

S.L. 2008-16 (S 1748) allows Chapel Hill to increase motor vehicle registration fees by an additional \$10 annually to support public transportation.

## Bills That Did Not Pass

In 2007 the House passed two transportation-related bills, H 1576 and H 1559, making them eligible for further consideration in the 2008 session. H 1576 would have authorized NCDOT, municipalities, and metropolitan planning organizations to devise and implement a comprehensive traffic control plan to coordinate traffic signals on certain state highways to reduce energy consumption. H 1559 would have authorized operators of transit systems to erect certain "transit amenities" (such as transit shelters, trash receptacles, and commercial advertising displays) within public rights-of-way. Both bills were left to die in the Senate committees to which they were referred.

## Environment

### Stormwater

The legislature enacted two notable acts regarding stormwater management in 2008 that have planning and development regulation implications. The first deals with a statewide requirement regarding parking lots and the second deals with coastal stormwater rules.

The parking lot provision had its origins in the 2007 budget bill. That act included a special provision on stormwater management that created G.S. 143-214.7(d2) requiring (as of October 1, 2008) that all surface parking lots have no more than 80 percent built-upon area and that the remaining 20 percent of the parking area have either permeable pavement or other design requirements for stormwater management (such as grass or other permeable surfaces, bioretention ponds, or other water retention devices). This requirement was modified in 2008. Section 8 of S.L. 2008-198 (S 845) repeals the 2007 provision and replaces it with a requirement that only applies in areas not subject to other stormwater management regulations (including rules applicable to water supply watersheds, high quality waters, outstanding resource waters, nutrient sensitive waters in the Neuse and Tar-Pamlico basins, the Randleman Lake watershed, and areas subject to Phase II or coastal counties stormwater rules). For other areas, the requirement applies to parking areas that have land disturbing activities (as defined by the Sedimentation Pollution Control Act) of an acre or more. The requirement gives two options for these lots: (1) the parking area may contain no more than 80 percent impervious surface; or (2) the stormwater runoff generated by the first two inches of rain that falls on at least 20 percent of the parking area must flow to an appropriately sized bioretention area. The bioretention area must meet standards to be set by DENR. Compliance with these requirements is also made a precondition for building permits for these projects.

The state has been wrestling with general stormwater management regulations for the better part of two decades. Statutes, regulations, and litigation have dealt with runoff standards applicable to a variety of areas. Perhaps none has been more controversial than the stormwater requirements for the coastal area. One result of this debate was legislative action in 2008 to take over the decision-making on the standards to be applied for coastal stormwater management. S.L. 2008-211 (S 1967) disapproves the coastal stormwater rules adopted by EMC in early 2008 and replaces those rules with the standards set out in the act. The standards differ based on the adjacent water bodies, with separate rules for (1) lands within 575 feet of Outstanding Resource Waters, (2) lands within one-half mile of and draining into waters with an "SA" classification, and (3) other development in coastal counties. The rules limit the amount of impervious surface coverage, require vegetated buffers adjacent to some waters, allow engineered solutions with some high density options, set standards for structural stormwater controls, and provide for vesting of some previously approved projects. Coastal jurisdictions generally are to comply with these rules rather than Phase II stormwater requirements. Also, S.L. 2008-198 (S 845) limits any new EMC rule-making covering coastal stormwater rules from becoming effective until October 1, 2013.

## Water Supply

A severe drought has affected many parts of the state over the past two years. The legislature updated the statutes to address this issue in 2008. S.L. 2008-143 (H 2499) adds a number of items to the statutes to deal with these concerns.

A key component of the new legislation is new G.S. 143-355.2. This statute requires each local government that provides public water to develop and implement water conservation measures to respond to a drought, including a water shortage response plan that must be reviewed and approved by DENR. The plan must include tiered levels of water conservation measures based on drought severity (but it may not include metering or regulating private drinking water wells). The state is authorized to order a local government to implement its management plan if the local government has not acted and action is necessary to minimize the harmful impacts of a drought and may, under extreme conditions, order a local government to move to a more stringent tier under its plan. A state default plan can be imposed if a local government fails to adopt its own plan. Newly enacted G.S. 143-355.3 authorizes the governor to declare a water shortage emergency. Once that declaration is made, DENR can require local governments to allow temporary interconnections among water systems and impose emergency rules on conservation and use of water in the affected area.

The act provides that

- separate meters must be installed for new in-ground irrigation systems;
- local governments or large community water systems must meet specified requirements to be eligible for funding to extend waterlines or expand water treatment capacity, including that water rate structures not be discounted for high volume users, that localities have a leak detection system, and that consumer education programs be enacted;
- water reuse must be studied and is encouraged.

The act also allows limited use of grey water for watering trees, plants, and shrubs at single-family homes; adds new reporting requirements for large-scale agricultural water users; and limits restrictive covenants that require watering of lawns during droughts.

In other action affecting water supply issues, S.L. 2008-10 (S 1872) extends the Environmental Review Commission's Water Allocation Study to allow an interim report to the 2009 General Assembly and require a final report by October 1, 2010. S.L. 2008-137 (S 1046) requires the Environmental Review Commission to study the impacts of a new fifty-year license being considered by the Federal Energy Regulatory Commission for Alcoa's Badin facility.

## Hazards and Emergency Preparedness

S.L. 2008-162 (H 2432) directs the state Division of Emergency Management to study ways and develop plans to increase the capacity of counties to plan for, respond to, and manage disasters. The study is to examine mandating that counties establish and maintain a county emergency management agency, having full-time local emergency management coordinators in each county, implementing an emergency management certification program for local staff, and developing registry programs for functionally and medically fragile persons who will need assistance during a disaster. The Division is to consult with the Association of County Commissioners when preparing the study and is to report its results to the legislature's Joint Select Committee on Emergency Preparedness and Disaster Management Recovery and the relevant Appropriations subcommittees by December 1, 2008. A comparable provision for this study was also included in the 2008 Studies Act, Section 20.1 of S.L. 2008-181.

## Other Environmental Legislation

Legislators enacted a variety of other legislation on environmental issues that have implications for planning and development regulation. Many of these acts are discussed in more detail in Chapter 11, "Environment and Natural Resources."

S.L. 2008-152 (S 1885) amends G.S. 1432-14.11 to add provisions for private parties to provide compensatory mitigation for wetland alteration through use of private wetlands mitigation banks that have been approved either by DENR for resources regulated under the Neuse or Tar-Pamlico rules or by the U.S. Army Corps of Engineers.

S.L. 2008-171 (H 1889) extends use-value property taxation to wildlife conservation land. To qualify, the property must have at least twenty contiguous acres, and be under a written wildlife habitat conservation agreement with the Wildlife Resources Commission. No more than 100 acres of an owner's land in any one county may be included nor may land owned by businesses that are publicly traded.

S.L. 2008-203 (S 1946) sets energy and water efficiency standards for state funded buildings.

The 2008 Studies Act, S.L. 2008-181 authorizes a variety of environmental studies, including consolidation of environmental regulatory programs, state permits for wind turbines, hazard disclosures in coastal real estate transactions, phasing out hog lagoons, and limits on use of eminent domain for conservation lands. Section 36 of the act also creates a fourteen-member Legislative Study Commission on Urban Growth and Infrastructure Issues. The Commission is directed to study options for fostering regional planning for water and transportation infrastructure, strategies for encouraging the use of incentive-based

planning in urban areas (including additional local land use regulatory tools), and strategies to help urban communities and regions address the challenges presented by rapid growth and resultant demands on schools, roads, and other public services. State agencies and local governments are directed to provide the Commission with any requested information in their possession or available to them. The Commission is to report to the 2009 General Assembly upon its convening.

## Miscellaneous

### Real Property Reappraisal

S.L. 2008-146 (S 1878) allows counties to reassess real property more frequently than once every eight years and requires certain counties to reassess within three years if their sales/assessment ratios deviate too far from the norm.

### Bills That Did Not Pass

H 878 passed the House in 2007, making it eligible for further consideration in the 2008 session. It would have called for a statewide voter referendum to consider an amendment to Article I, section 19 of the North Carolina Constitution to expressly prohibit the use of eminent domain for economic development purposes. The bill died in the Senate committee to which it was referred.

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# PLANNING AND ZONING LAW

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## PLANNING— AND DEVELOPMENT—RELATED LEGISLATION ADOPTED BY THE 2004 GENERAL ASSEMBLY

■ Richard D. Ducker and David W. Owens

By far the most significant legislation enacted in 2004 affecting land use and community planning was the legislation that very substantially limits the amortization of nonconforming commercial off-premises signs (billboards, that is) by local governments through zoning or other authority. The outdoor advertising industry overcame an eleventh-hour gubernatorial veto of another bill prohibiting amortization to gain what it has sought for years. The consolation for local governments is that the prohibition applies only to billboard amortization programs initiated after August 2, 2004, and does not apply to nonconforming on-premises commercial signs or other types of zoning nonconformities, which may still be amortized.

Other legislation this year is of moderate interest to those associated with land use and community planning. The life of the Joint Legislative Growth Strategies Oversight Committee has been extended to 2007, providing hope that the committee will focus attention on the need for changes in North Carolina's planning legislation. A provision in an obscure technical corrections bill gives cities the power to apply zoning not only to the buildings and structures of state and local governments, but also to other features of such properties (parking and landscaping, for example) that may not involve buildings and structures. Another act requires local governments to provide special notice to military bases within five miles of their boundaries if the local government is considering zoning amendments or other planning-related actions. In addition, the General Assembly has authorized a series of committees and special commissions and the Legislative Research Commission to undertake studies of a variety of topics that may spark interest.

### **Planning and Growth Management**

#### **Growth Strategies Oversight Committee**

The 2004 Studies Act, S.L. 2004-161 (S 1152), authorizes a large number of studies that, if actually conducted, will be of substantial interest to the planning community. Perhaps of

greatest interest to planners is Part III of the act. It extends the life of the Joint Legislative Growth Strategies Oversight Committee for another two years, so that the committee terminates in January 2007 rather than January 2005. The committee is specifically authorized to study the delegation of additional authority to cities and counties, the modernization of city and county planning statutes, and the establishment of transferable development rights.

## Planning agencies

One change to the city and county planning statutes was made this year with little fanfare. The state statutes authorize the creation of “planning agencies” within city and county government. The statutes have generally been understood to pertain to lay-member planning boards and commissions. Indeed, the statutes expressly allow a city or county to appoint a planning board or commission to function as a “planning agency.” The Senate’s technical corrections bill, S.L. 2004-199 (S 1225) amends G.S. 160A-361, 160A-363, 153A-321, and 153A-322 to change the references in those statutes from planning agencies to planning boards or commissions.

This change does create potential complications, however. The new act left untouched those references to planning agencies in the zoning and land subdivision control enabling statutes. In addition, some local governments have designated a technical review committee or planning department to serve as a “planning agency” for purposes of subdivision plat approval. Some further legislative clarification may be needed.

## Transit-Oriented Development as Municipal Service District

Municipal service districts allow cities to impose an additional ad valorem levy on property within the district to finance municipal services or facilities in the district to an extent greater than provided elsewhere in the city. S.L. 2004-151 (S 137) authorizes cities to establish municipal service districts for “transit-oriented development.” Such districts may be established within a *public transit* area, which is defined as an area within a one-fourth mile radius of any passenger stop or station located on a mass transit line. A city may provide any service or facility that it could provide in a downtown revitalization municipal service district. It may also provide passenger stops and stations, parking facilities, and any facility it may by law provide, including retail, residential, and commercial facilities. The act also allows cities to use special-obligation financing for projects within any municipal service district.

## Community Appearance

### Billboard amortization

One of the most contentious issues facing the General Assembly in the land use and development area in 2004 was the issue of billboard amortization. The outdoor advertising industry has long opposed amortization requirements (that is, requiring nonconforming features to come into compliance by the time a certain grace period has expired) and has vigorously challenged them in court. However, North Carolina courts have consistently held these requirements to be legal, provided a reasonable grace period for compliance is allowed.

The General Assembly adopted a moratorium requirement in the 2003 session (S.L. 2003-432) prohibiting local governments from initiating any new program that would amortize nonconforming off-premises commercial signs. That moratorium had an expiration date of December 31, 2004. In the 2004 session the General Assembly again focused on the issue. H 429, which had passed the House of Representatives but not the Senate in 2003, would have amended state law to prohibit use of amortization to remove any nonconforming commercial off-premises sign. (Billboards adjacent to federally funded highways are already subject to such a prohibition.) Late in the session, this bill passed the Senate but was vetoed by Governor Easley.

The governor expressed concern that the financial payments suggested by the act were too generous for the billboard industry. He urged the interested parties to negotiate further to address concerns of both local governments and the industry. The House of Representatives promptly voted to override the veto, but the Senate did not immediately take up the veto and instead encouraged the affected interests to further discuss the matter.

In the last days of the session, a compromise was reached and approved by the legislature. S.L. 2004-152 (H 1213) creates G.S. 153A-143 and 160A-199 to provide that counties and cities may not require removal of off-premise outdoor advertising signs that do not conform to local ordinances, unless they pay monetary compensation to the owners of such signs. There are five exceptions to the monetary compensation requirement:

1. the local government and sign owners agree to relocation of the sign;
2. the local government and sign owner enter a voluntary agreement providing for removal of the sign after a set period of time in lieu of monetary compensation;
3. the sign is a public nuisance or is a detriment to public health or safety;

4. removal is related to construction of streets, sidewalks, or public enterprises and the sign is allowed to be relocated to a comparable location; or
5. the removal is required pursuant to an ordinance of general applicability to demolition or removal of damaged structures.

When required, the monetary compensation is to be the fair market value of the sign (without consideration of the removal requirement). Fair market value is to be determined by referring to the factors in G.S. 105-317.1(a) regarding valuation of personal property for tax purposes, the listed property tax value of the sign, and other items of information regarding value that are submitted to the taxing authority. If no agreement on monetary compensation is reached, the local government may bring an action in superior court to determine fair market value. The act allows local governments to make payment of any required monetary compensation over a three-year period, provided the nonconforming sign remains in place until compensation is paid.

The law also specifies the content and factors to be considered in relocation agreements. Relocation sites are to be "reasonably comparable to or better than" the existing sign site, considering visibility, traffic count, demographics, zoning, lease costs, and the like. The government has to pay the cost of relocation. Cities and counties are authorized to provide dimensional, spacing, setback, and use variances as deemed appropriate to accommodate relocation. The act further provides for binding arbitration if the local government and sign owner have agreed to relocation but fail to agree about what constitutes a comparable or better site for relocation. If arbitration results in a finding that the proposed relocation site is not comparable, the local government must compensate the owner if it elects to proceed with removal.

There are several important limitations to the application of this amortization law. These restrictions on the use of billboard amortization do not apply to regulations in effect as of the effective date of the legislation, which is August 2, 2004. They do not apply to billboards made nonconforming by the geographic expansion of existing municipal ordinances through annexation or extraterritorial jurisdiction changes. They do not affect the exercise of eminent domain. Finally, they do not affect amortization of nonconforming uses other than off-premise outdoor advertising.

## Nuisances and Junked Vehicles

Several local acts were adopted in 2004 regarding nuisance lot enforcement, junk cars, and open space protection. S.L. 2004-93 (S 1355) adds Goldsboro to the list of cities authorized to give annual notice to chronic violators of the city's refuse and debris ordinance. S.L. 2004-30

(H 1447) amends the definition of a junked motor vehicle in G.S. 160A-303.2 for Greenville, Henderson, and Waynesville. These cities can apply their ordinance to unlicensed vehicles that appear to be worth less than \$500 rather than \$100 as in the state law.

Section 2.1(n) of the Studies Act of 2004 (S.L. 2004-161, S 1152) authorizes the Legislative Research Commission to study the environmental, aesthetic, and other public recycling impacts of junked and abandoned automobiles.

## Tree Protection

Section 71 of one of the technical corrections bills (S.L. 2004-203, H 281) amends S.L. 2003-128 to add the Town of Rutherfordton to those municipalities that are authorized to adopt tree preservation regulations for areas along public roadways and property boundaries.

## Historic Preservation

S.L. 2004-11 (H 1433) allows Wake County to appoint residents of municipalities and municipal extraterritorial planning areas within the county to its Historic Preservation Commission.

## Other Zoning and Land Subdivision Control Legislation

### Notice to Military of Zoning Hearings

The federal government will soon be undertaking a review of its military bases, considering whether to close or realign facilities. Military bases have a significant presence in North Carolina, particularly in the eastern portion of the state. Concern about potential loss or downsizing of these bases prompted a variety of state and local actions. As part of this effort, the General Assembly enacted S.L. 2004-75 (S 1161). This act creates G.S. 160A-364(b) and 153A-323(b) to require notices of hearings on certain proposed zoning ordinances changes to be provided to the military. If a proposed rezoning is within five miles of the perimeter boundary of a military base, notice of the hearing must be sent by certified mail to the commander of the base. Notice must also be mailed for any other ordinance adoption or amendment changing or affecting permitted uses in this area. The notice must be mailed in the ten- to twenty-five-day period prior to the hearing. The governing boards of cities and counties are also directed to take any military comments or analysis into consideration before acting on these ordinance adoptions or amendments.

## Government Uses of Land

G.S. 160A-392 was added to the statutes in 1951 to require state and local governments to be consistent with municipal zoning. The statute made city regulations applicable to the “erection, construction, and use of buildings.” The Senate’s technical corrections bill, S.L. 2004-199 (S 1225), amends this provision to extend this law to provide that municipal zoning also applies now to use of land that does not involve buildings (city zoning regulations on parking lots, for example). This amendment also removes the requirement for state approval of application of overlay districts to state-owned properties, as these districts are now commonly used for routine zoning requirements (flood hazard districts, historic districts, entryway corridor districts, and the like). The amendment also allows the Council of State to delegate authority to apply for a conditional use district to appropriate staff.

## Zoning/Land Subdivision—Local Bills

One local bill was enacted affecting zoning powers. In 2003 the Town of Chapel Hill secured authority to identify planned school sites and then require those sites to be reserved for acquisition as part of a special use permit or site plan development approval for up to twelve months. S.L. 2004-27 (S 1122) amends this local authorization to extend the reservation period to eighteen months.

An act concerning annexation in Cabarrus County (S.L. 2004-39, H 224) also provides that Cabarrus County and any of its municipalities are authorized to enforce any provision of the school adequacy review performed under the Cabarrus County subdivision ordinance, including the method used in that ordinance to address any inadequacy that may be identified as part of that review. The provision appears to be designed to authorize the conditioning of development approval upon the payment of a per-lot fee by developers. The fee is earmarked for school construction and is designed to mitigate inadequate school capacity.

There were no statewide bills affecting subdivision regulation adopted in 2004. One local bill, S.L. 2004-46 (H 1724), affects Harnett and Pitt counties. This act repeals 1997 and 2001 local acts modifying the definition of subdivisions for Harnett County and its municipalities. It adopts additional exemptions from subdivision regulation in Pitt County for divisions related to estate settlement and land transfers within an immediate family.

## Development-Related Studies

The 2004 Studies Act, S.L. 2004-161 (S 1152), authorizes a large number of studies that, if actually conducted, will be

of substantial interest to the planning community. Special legislative committees or commissions will conduct five of these studies. For example, Part III of the act extends the life of the Joint Legislative Growth Strategies Oversight Committee for another two years, so that the committee terminates in January 2007 rather than January 2005.

The committee is specifically authorized to study the delegating of additional authority to cities and counties, the modernizing of city and county planning statutes, and the establishing of transferable development rights. Part IV of the act also establishes a seventeen-member Study Commission on Residential and Urban Development Encroachment on Military Bases and Training Areas. The commission is to examine zoning regulations, deed registration, the purchase of development rights, and the need for buffers around military bases, with a report due to the 2005 session of the General Assembly.

Another study commission, established by Part XLIX of the act, is the Study Commission on Economic Development Infrastructure. That commission is directed to develop a plan to restructure and consolidate the infrastructure for the delivery of economic development to improve its organization and effectiveness. A fourth commission, provided for in Part XXXII, is the Hurricane Evacuation Standards Study Commission, directed to study the development and establishment of hurricane evacuation standards for state government. One permanent commission, the Environmental Review Commission, is authorized to study the effectiveness of environmental programs, sharing floodplain mapping information, and water restriction.

In addition to the studies conducted by special committees and commissions, the Legislative Research Commission is authorized to study a number of development-related issues. Potential study topics, summarized in other chapters, include light pollution, urban cores, equity-building homes, state-local relations, and soil and water conservation issues.

## Transportation

### Highway Funding

#### Urban loops

The Highway Trust Fund was established in 1987 to provide money for a variety of different types of highway construction and improvement projects. One class of projects funded from this source consists of urban loops in and around most of the larger cities of the state. Section 30.19 of the Appropriations Act (S.L. 2004-124) amends G.S. 136-180(a), which lists the urban loop projects for which Trust Fund monies may be used. The act adds to the

list (a) the six-laning of a portion of the Charlotte Outer Loop; (b) a multilane Gastonia loop to be known as the Garden Parkway; (c) the completion of the Raleigh Outer Loop; and (d) an expanded Wilmington bypass.

### The Intrastate Highway System

The Intrastate Highway System in North Carolina was established as a network of major, multilane arterial highways within and serving the state. These highways are also funded in part from the Highway Trust Fund. Section 30.21(a) of the Appropriations Act reorganizes the legislation affecting these routes and changes the standards for these routes. It also reclassifies those routes already funded by the Trust Fund as “first priority” and adds a second category of routes for which Trust Fund monies may be used once first-priority routes are funded. Finally it adds highway segments to the existing first-priority list and establishes an extensive list of projects that are second priority.

The legislation amends G.S. 136-178(a) to provide that the routes on the Intrastate System need *not* include at least four lanes if projected traffic volumes or environmental considerations dictate fewer lanes. Section 30.21(d) adds several routes to the priority list set forth in G.S. 136-179, including the Shelby Bypass and a portion of U.S. 321 in Watauga County that will allow the four-laning of that highway from the Tennessee state line to the South Carolina line. Section 30.21 also adds a new twist. It provides that funds allocated from the Trust Fund for the Intrastate System are primarily intended for use on first priority projects listed in G.S. 136-179. But if these funds, assigned by region, cannot be used for the listed projects, then the funds may be used for the other projects listed in G.S. 136-178. This new second priority list includes all of North Carolina’s interstate highways, many of the major U.S.-numbered highways, five North Carolina-numbered highways, and certain miscellaneous routes, including urban loop projects for which the initial construction has already been completed.

All of these changes expand the allowable uses of Intrastate System funds and grant the North Carolina Department of Transportation (NCDOT) and the Board of Transportation more flexibility in choosing projects for funding.

### Joint Funding with Local Governments

The issue of whether and how local governments may contribute to or “participate” in the costs of highway improvement projects that are part of the state’s Transportation Improvement Program (TIP) has been debated for some time. In 1987 a coalition of legislators

representing rural areas and small towns was successful in securing legislation that limited the ability of local governments to contribute funds to state highway projects because of concern that such “participation” warped the state’s highway priorities.

In 2001, however, G.S. 136-66.3 was rewritten to provide that municipalities could participate in the right-of-way and construction costs of state projects so long as other state projects were not jeopardized. This year, the General Assembly enacted S.L. 2004-168 (S 1089) to add G.S. 136-18(38) to refine these arrangements. The act allows the NCDOT to receive funds from local governments and nonprofit corporations provided for the purpose of advancing the construction schedule of a project identified in the TIP. If the funds are to be repaid by NCDOT, the reimbursement arrangements must be shown in the TIP. NCDOT has *seven years* after receiving such funds in which to repay the local governments or non-profits. [This period of time may be compared with the *three-year* period that municipalities have to repay funds owed NCDOT under one of these project cost-sharing arrangements. See G.S. 136-66.3(e1).]

### Medians in State Highways

Arrangements with respect to medians in major state highways running through urban areas can sometimes become a political issue with local governments. Section 30.16 of the Appropriations Act prohibit NCDOT from contracting for or building a median on U.S. 64 in Asheboro between Third Street and the intersection of U.S. 64 with N.C. 42. Section 30.17 of the act also directs NCDOT to construct six median cuts on Catawba Avenue in the Town of Cornelius at locations to be designated by the town.

### Highway Studies

Last year, the General Assembly adopted legislation directing the Joint Legislative Transportation Oversight Committee to contract with a consultant to study the state’s procedures for planning, designing, and letting contracts for transportation projects. The study was to identify specific, practical solutions to decrease the time it takes to complete a transportation project. Section 30.14 of the Appropriations Act directs the Department of Transportation to review and implement the applicable recommendations of the study, which is dated June 2004. Beginning October 15, 2004, and continuing until October 15, 2006, the department must also report quarterly to the committee on the department’s progress in carrying out the study recommendations. Section 78 of S. L. 2004-203 (H 281) clarifies that the target date for the study to be completed was April 1, 2004, not April 1, 2003.

Meanwhile, the search for long-term solutions to highway funding problems continues. Section 20.1 of the Studies Act of 2004 (S.L. 2004-161, S 1152) amends sec. 20.1 of S.L. 2003-284 to extend the deadline for the final report of the Highway Trust Fund Study Committee to January 31, 2005. It was November 1, 2004.

Part XVII of the Studies Act of 2004 (S 1152) also authorizes the Joint Legislative Transportation Oversight Committee to study the imposition of tolls on Interstate 95 vehicle traffic. In addition, the commission may study all aspects of transportation, including planning and scheduling of projects, legislative and executive oversight, revenues, funding, and the expenditures of the Highway Fund, the Highway Trust Fund, and federal aid programs for transportation.

## Other Transportation Modes

### Rail service to western North Carolina

Sec. 30.8 of the Appropriations Act authorizes the Rail Division of the North Carolina Department of Transportation to use up to \$1,066,000 of the funds in the Western North Carolina Reserve to acquire property and make infrastructural improvements in the Biltmore Village area of Asheville to develop a terminus for western North Carolina passenger rail service.

### Virginia–North Carolina Interstate High-Speed Rail

By adopting S.L. 2004-114 (S 1092) the General Assembly agreed to enter into a compact with the State of Virginia concerning the development of high-speed rail service within and through the two states. In a campaign spearheaded by North Carolina and Virginia, government and business leaders in certain southern states are planning to ask Congress for help in upgrading the track along key segments of the Charlotte to Washington corridor. By adopting the act, North Carolina consents to the establishment of the Virginia–North Carolina High-Speed Rail Compact Commission as a regional “instrumentality” for purposes of planning, promoting, and funding the system. Each state contributes five members to the commission. Transportation departments from the two states are directed to serve as the primary staff to the commission.

### Organizational arrangements for a Regional Transportation Authority

The chair of each Metropolitan (Transportation) Planning Organization (MPO) within the territorial jurisdiction of a Regional Transportation Authority (RTA) is a member of the RTA Board of Trustees. Sec. 56 of the House technical

corrections bill (S.L. 2004-203, H 281) provides that any such MPO chair may appoint, as his designee on the Board of Trustees, either the chair of the MPO Transportation Advisory Committee or a designee approved by the Transportation Advisory Committee.

## Local Legislation

**Trolley Easements.** S.L. 2004-53 (S 1233) allows the Town of Pinebluff to convey trolley easements to the owners of adjacent property at privately negotiated sales.

## Building and Housing Code Enforcement

### Code Handbooks

Section 21.2 of the Appropriations Act deletes a provision of G.S. 143-138(d) that required the Department of Insurance, no later than January 1, 2000, to publish handbooks providing explanatory materials concerning State Building Code requirements and each subsequent revision of the code. Handbooks meeting this deadline have not been completed, so the requirement was dropped.

## Building Code for Prisons

Section 17.6B of the Appropriations Act directs that if construction is begun before July 1, 2005, the 1,000-cell close-security prison to be built in Columbus County by the State of North Carolina is to be constructed in accordance with the 1999 version of the North Carolina State Building Code instead of the version of the code that might otherwise apply when construction begins. (The section catchline implies that recently completed prisons in Scotland, Anson, Alexander, Greene, and Bertie counties were constructed under the 1999 code version.) The act does, however, provide that the 1999 code applies only if prison construction documents have been reviewed by the Department of Insurance, the State Construction Office, and the Department of Correction.

## Toilets in Malls

Section 37(a) of S.L. 2004-199 (S 1225) adds a new G.S. 143-143.5 governing access to toilets in shopping malls. It provides that notwithstanding any other rule or law (including, apparently, the State Building Code) toilets for public use in covered mall buildings may be located at a horizontal travel distance of up to 300 feet from potential users within the mall.

## **Study of Residential Code**

The Studies Act of 2004 (S 1162) directs the North Carolina Building Code Council to study the Residential Building Code to determine “which provisions, if any, are unnecessary, outdated, or overly stringent, or will otherwise unduly increase the cost of housing.” It authorizes the council to submit its final report to the General Assembly no later than March 31, 2006.

## **Dilapidated Buildings—Local Bills**

The General Assembly in 2004 continued the recent trend of enacting local bills to provide individual jurisdictions greater flexibility and efficiency in enforcing code provisions regarding repair and demolition of dilapidated buildings. S.L. 2004-98 (H 1737) allows Winston-Salem and Reidsville to require that residences deemed unfit for human habitation under a minimum housing ordinance be either demolished or repaired after they have been vacated and closed for six months. S.L. 2004-70 (H 1726) allows Winston-Salem to order owners of residences that do not meet the housing code to repair rather than vacate the units. S.L. 2004-6 (H 1666) allows Garner to require demolition of unsafe residences in community development target areas under its unsafe building authority to use the same process as for demolition of nonresidential buildings.

## **Jurisdiction and Boundary Adjustments**

### **New Incorporations**

One new town was created in 2004. S.L. 2004-37 (S 1127) creates the Town of Wallburg in northern Davidson County. The law does not allow the new town to annex into Forsyth County and limits annexation in portions of Davidson County. Also, limitations on satellite annexation near other towns are not applicable to Kernersville and Winston-Salem relative to Wallburg.

### **Extraterritorial Planning Jurisdiction**

S.L. 2004-4 (S 1189) allows Chadbourn to extend its extraterritorial jurisdiction up to two miles.

### **Annexation**

A number of additional municipalities secured relief from the 10 percent limit on the area of satellite annexations. S.L. 2004-57 (H 1385) made this change for Creswell,

Fuqua-Varina, Garner, Holly Ridge, Knightdale, Leland, Mayodan, Morrisville, Mount Holly, Randleman, Rolesville, Washington, Wallace, Warsaw, Wendell, and Zebulon. S.L. 2004-99 (S 1309) does the same for Apex. Sec. 13(b) of the House of Representatives’ technical corrections bill, S.L. 2004-203 (H 281), adds Calabash, Catawba, Dallas, Godwin, Louisburg, Marion, Mocksville, Oxford, Pembroke, Rockingham, Rutherfordton, and Waynesville to this list.

Additional local bills annex or de-annex specific territory for municipalities. Among these are S.L. 2004-39 (H 224) for Kannapolis and Mount Pleasant; S.L. 2004-56 (H 1369) for Emerald Isle, Stanfield, and Midland; S.L. 2004-31 (H 1471) for Bakersville; S.L. 2004-40 (H 1475) for Badin; S.L. 2004-42 (H 1593) for Swansboro; S.L. 2004-43 (H 1678) for Norwood; S.L. 2004-17 (S 1096) for the Concord and Kannapolis boundary; S.L. 2004-107 (S 1343) for Whiteville; and S.L. 2004-86 (S 1356) for the Whitsett and Gibsonville boundary. S.L. 2004-103 (H 1688) allows use of a deferred effective date for voluntary annexations by Concord.

## **Environment**

### **Stormwater Controls**

In response to state and federal requirements, North Carolina local governments began in the mid-1990s to be required to adopt comprehensive stormwater management programs. These mandated stormwater control programs include both structural stormwater controls and management measures such as education and used-oil recycling programs. These programs are designed to manage both the quality and quantity of stormwater runoff.

Six municipalities with populations over 100,000 were required to implement stormwater management programs in Phase I of these requirements (Charlotte, Raleigh, Greensboro, Winston-Salem, Durham, and Fayetteville) and smaller municipalities (called “urbanized areas”) were required to adopt similar comprehensive stormwater management programs in what is generally known as Phase II of the storm-water program. This applies to municipalities with populations over 10,000 and a density of 1,000 persons per square mile. New development in unincorporated areas of counties in urbanized areas is also covered. At least 123 North Carolina cities are included, as are a number of unincorporated areas.

The state has been working since then to develop both rules and a permitting program for these mandated programs. A particular difficulty has been assignment of responsibility for stormwater management in urbanized areas outside city limits. The issue of how runoff from state roads is to be managed has also been difficult to resolve.

The State Environmental Management Commission adopted temporary rules for these programs in late 2002. The EMC adopted permanent rules in mid-2003, but there has been substantial controversy regarding adoption of permanent rules. The Rules Review Commission has delayed the effective date of the rules and litigation regarding this delay is pending. S.L. 2004-163 (S 1210) establishes a framework for affected local governments to comply with the Phase II stormwater management program requirements. New development in those included unincorporated areas must meet stormwater management standards if it is either within the federally designated urbanized area or is within the extraterritorial jurisdiction of a covered municipality. In some situations management must extend countywide.

## Coastal Areas

Two enactments address individual situations subject to Coastal Area Management Act (CAMA) regulations. In previous legislative sessions the General Assembly has directed the Coastal Resources Commission to waive the general rule limiting the amount of impervious surface a development could have immediately adjacent to rivers and sounds in limited circumstances—generally situations involving redevelopment projects along already developed urban waterfronts. S.L. 2004-117 (S 732) extends this trend to at least one non-urban area. It directs the Coastal Resources Commission to implement a pilot program in a single non-oceanfront county whereby the county can in its land use plan designate an undeveloped area as a “new urban waterfront area.” The area may not exceed 500 acres or more than a mile of waterfront and may not be adjacent to waters classified by state agencies as outstanding resource waters, nutrient sensitive waters, high quality waters, SA waters, primary or secondary nursery areas, or critical habitat areas. Development in this designated area is to comply with CAMA permitting standards, except that it is to be treated the same as an existing urban waterfront area but must meet the thirty-foot vegetated buffer requirements. The development must secure a National Pollution Discharge Elimination System (NPDES) water quality permit for an overall stormwater management plan for the area within the common plan of development. If commercial, civic, and open space proposed in the permit application is not provided within six years of permit issuance, mitigation is required for encroachment into riparian buffers that would have otherwise been required absent this pilot program. Annual reports on the costs, benefits, and impacts of the development permitted under the pilot program are required. The pilot program requirement expires on July 1, 2010. It is anticipated that this pilot program will be applied to a proposed development along the Albemarle Sound in Chowan County. S.L. 2004-1

(H 1411) designates an area on Hatteras Island immediately west of the new inlet area temporarily opened by Hurricane Isabel as an unvegetated beach area for purposes of setting a vegetation line for setback determinations.

## Farmland Preservation

The Appropriations Act, S.L. 2004-124 (H 1414) allocated \$62 million to the Clean Water Management Trust Fund and authorizes up to \$4.1 million of this to be used for farmland preservation projects. It also directs the Department of Agriculture to prepare a plan for farmland preservation.

## Economic Development

### Rural Economic Development Center Funds

Probably the most important economic development initiative begun in 2003–2004 grows out of a \$20 million special appropriation to the Rural Economic Development Center. S.L. 2004-88 (H 1352) establishes the North Carolina Infrastructure Program. Of this amount \$15 million must be used to provide grants to local governments to construct critical water and wastewater facilities and to provide other infrastructure needs to sites where the facilities will generate private job-creating investment. Plans call for the funding of over thirty water and sewer projects to help businesses locate in rural areas. In addition, plans call for building two telecenters to bring access to computers, training, and support for entrepreneurs and small businesses. The additional \$5 million is earmarked for matching grants to renovate and utilize vacant industrial buildings to house new businesses.

On another front, section 13.8 of the Appropriations Act (S.L. 2004-124, H 1414) increases prior appropriations made to the Rural Economic Development Center by \$1.144 million. An additional \$1 million is allocated to research and demonstration grants for the e-NC Authority to establish up to four business and technology telecenters. These centers are intended to enable high-speed Internet service and other forms of technology to be used in distressed urban areas and to provide digital literacy training to allow the creation of technology-based enterprises and enhance the productivity of these businesses. In addition, \$144,000 is appropriated for the Institute for Rural Partnership.

## Department of Commerce

S.L. 2004-88 (H 1352) codifies provisions for and appropriates emergency nonreverting funds for the One North Carolina Fund for fiscal year 2003–2004. It adds G.S. 143B-437.70 to -437.74 to provide that money in this fund may be allocated only to local governments so that they may secure commitments for the recruitment, expansion, or retention of new and existing businesses. Local governments must use the money for (1) equipment; (2) renovations to existing buildings; (3) water, sewer, gas, or electric utility line improvements for existing buildings; or (4) utility improvements for new buildings to be used for manufacturing or industrial operations. Funds may be disbursed from the One North Carolina Fund only in accordance with agreements between the state and the local government and between the local government and a grantee business. The program requires local governments to match funds allocated by the state and to recapture funds from businesses who fail to provide or maintain the necessary jobs and to reimburse the state accordingly.

Another jobs program managed directly by the state is the Job Development Investment Grant Program. Adopted in 2002, the program allows the state to make a grant of up to \$6,500 per job to a new or expanding business that promises quality job growth. Section 32G of the Appropriations Act makes several program changes. It extends the expiration date of the Economic Investment Committee's authority to enter into new agreements from January 1, 2005, to January 1, 2006. It increases the cap on the amount of grants made in any year from \$10 million to \$15 million and increases the number of permissible grants from fifteen to twenty-five. In order to provide security to business applicants, it adds G.S. 143B-437.57(c) to provide that a community economic development agreement with a business is a legally binding obligation of the state and is not dependent upon state funding. It also adds G.S. 143-437.57(a) (25) to require the agreement to include a provision encouraging the business to contract with small businesses headquartered in the state for goods and services. Finally, section 32G directs the chairs of the finance committees of the two chambers of the General Assembly to conduct a comprehensive, systematic study of the Job Development Investment Grant Program for submittal by April 1, 2005. The study is to examine the costs and effectiveness of the program and the utilization of the program in various geographic areas of the state.

Legislators also gave attention to the Site Infrastructure Fund created in the Department of Commerce. Section 6.26 of the Appropriations Act amends G.S. 143B-437.02(b) to allow the money to be used not only for site development for new or relocating businesses but also to acquire options for the purchase of land for large, regional industrial sites that cannot be assembled by local governments. The

acquisition of the options must be approved by the Site Selection Committee.

Section 5.2 of the Appropriations Act appropriates \$45 million in federal Community Development Block Grant funds for further allocation by the Department of Commerce as follows:

State Administration	\$1 million
Urgent Needs/Contingency	\$50,000
Scattered Site Housing	\$13.2 million
Economic Development	\$10.96 million
Community Revitalization	\$12.2 million
State Technical Assistance	\$450,000
Housing Development	\$2 million
Infrastructure	\$5.14 million

The act also directs the Department of Commerce in partnership with the Rural Economic Development Center to award up to \$2.25 million in demonstration grants to local governments in very distressed rural areas for critical infrastructure and small business assistance.

Section 13.7 establishes the Trade Jobs for Success (TJS) initiative, led by the Department of Commerce in cooperation with the Employment Security Commission and the North Carolina Community College System. The program allows displaced workers to receive on-the-job training to learn new job skills and educational assistance to allow them to qualify for new jobs. The initiative also authorizes in-state relocation assistance and mentoring to workers and financial assistance to employers.

## Regional Economic Development Funds

Section 13.6 of the Appropriations Act appropriates \$1.75 million to the North Carolina Partnership for Economic Development to be split equally among the several regional economic development partnerships for each to develop and implement a strategic economic development plan. In addition section 13.7 redistributes interest earnings (\$125,681) from money appropriated to the Global TransPark Development Zone according to a formula that favors disadvantaged counties with lower enterprise factors.

## Industrial Revenue Bonds

In the past those who wished to take advantage of industrial revenue bonds issued by counties to finance new industrial development had to demonstrate that the project met a certain wage standard. The applicant had to demonstrate that the operator of the project paid an average weekly manufacturing wage that (1) was above the average manufacturing wage paid in the county or (2) was not less than 10 percent above the average weekly manufacturing wage paid in the state as a whole. S. L. 2004-132

(S 1063) amends G.S. 159C and 159D to eliminate entirely the wage standard for industrial revenue bonds. It also directs the Department of Commerce to encourage those applying for industrial revenue bonds to locate the projects in development zones.

## Sales Tax Refunds and Exemptions

The General Assembly also provides a variety of new tax refunds, exemptions, and credits to particular classes of businesses in order to promote economic development. Section 32B.1 of the Appropriations Act adds (1) airplane manufacturing, (2) computer manufacturing, (3) motor vehicle manufacturing, and (4) semiconductor manufacturing to the list of businesses that may qualify for a refund of sales and use taxes paid. It also amends G.S. 105-164.14(j) to provide that if the new facility is located within an enterprise tier one, two, or three area, the amount of investment that a qualifying business must make is reduced from \$100 million to \$50 million. These sales and use tax refunds expire July 1, 2009.

## Investment Tax Credits

Section 32C of the Appropriations Act changes the amount of a qualified business investment credit that may be used by a business in a particular tax year from \$6 million to \$7 million. It also postpones the expiration date of the business investment credit program from January 1, 2007, until January 1, 2008.

Section 32D of the Appropriations Act adds a new G.S. 105, article 3F, to establish tax credits that businesses may apply against their income or franchise taxes for their research and development costs, uncoupling the state's research tax credit program from the federal tax credit program in the process. If the research is conducted by a qualifying North Carolina university or college, the credit is equal to 15 percent of the expenses. If the research is conducted by others, the allowable percentage credit (based on the total amount of research expenses, whether the business is a small business, and whether the research is performed in a lower-enterprise-tier county) may not exceed 3 percent. The Research and Development Tax Credit applies to research activities conducted on or after May 1, 2005, and expires with respect to tax years beginning January 1, 2009.

## Housing

### Home Protection Pilot Program

One of the results of economic dislocations in North Carolina in recent years has been a rise in the number of houses lost

to foreclosure. The North Carolina Home Protection Pilot Program is designed to assist workers who have lost jobs and need temporary assistance to avoid losing their homes. Section 20A.1 of the Appropriations Act directs the North Carolina Housing Finance Agency (NCHFA) to develop and administer a pilot program in certain counties. NCHFA is to make loans to threatened home-owners, designate and fund nonprofit counseling agencies, and directly provide services such as direct mortgagee negotiations on behalf of unemployed workers. Remarkably, the act also provides that if a qualifying mortgagor files for loan assistance under this program, the mortgagee is prevented by law from taking certain steps that would disadvantage the mortgagor. For example, a mortgagee may not accelerate the maturity of a mortgage obligation, procure a deed in lieu of foreclosure, or enter a judgment by confession pursuant to a note accompanying a mortgage. The act directs NCHFA to report by May 1, 2005, on (1) the extent of the problem of increased foreclosure filings statewide, (2) improvements recommended to the laws affecting foreclosure procedures, and (3) the benefits and feasibility of creating a foreclosure avoidance loan fund.

## Housing Authorities

The only new legislation affecting housing authorities is an obscure provision in a technical corrections bill. Section 40 of S.L. 2004-199 (S 1225) prohibits a housing authority from erecting or maintaining any fence or gate around occupied housing units that is electrified or that includes spikes or barbed wire.

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# 13

# Land Use, Community Planning, Code Enforcement, and Transportation

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The 2003 General Assembly enacted a major transportation initiative, temporarily limited local authority to compel removal of nonconforming billboards, adopted appearance standards for some factory-built housing, and ratified a number of local bills concerning a wide variety of land development and code enforcement issues.

## Zoning

The only statewide bill adopted in 2003 directly affecting zoning establishes an eighteen-month moratorium on new amortization of off-premise billboards. Several bills were introduced to limit use of amortization (a regulatory requirement that land uses or structures that were legal when initiated but that violate current regulations come into compliance or be removed after a reasonable grace period). S 534 and H 429 would have broadly eliminated amortization of nonconforming buildings, structures, or signs. Under these bills cities and counties would have had to pay monetary compensation for removal of nonconformities. H 429 passed the House of Representatives but remained in Senate committee at adjournment. An alternative bill, H 984, would have provided detailed guidelines for limitations on nonconformities and would have allowed continued amortization of signs, adult businesses, and junkyards. S.L. 2003-432 (H 754) was adopted as a compromise. This act places a moratorium on any new ordinances and prohibits

extending or expanding existing ordinances amortizing off-premise advertising signs until December 31, 2004.

Five local bills affecting zoning were enacted.

- S.L. 2003-3 (H 35) exempts Waynesville from mailed notice requirements if it rezones its entire territory before January 1, 2004. The town will have to make four half-page published notices in lieu of the mailed notices.
- S.L. 2003-83 (H 124) amends the protest petition statute for Durham County to provide that the protest must be received in time to allow the county at least four working days before the hearing to verify the sufficiency of the petition.
- S.L. 2003-162 (H 249) amends the Wilmington city charter to allow the city to use legislative conditional zoning without an accompanying special or conditional use permit. The statute allows the zoning only upon request of the landowner, requires the rezoning to be made “in consideration of” relevant plans, and requires the petitioner to hold a community meeting prior to making the rezoning petition. This scheme is similar to the process established by local legislation in Charlotte and approved by the court of appeals in *Massey v. City of Charlotte*, 145 N.C. App. 345, 550 S.E.2d 838, *rev. denied*, 354 N.C. 219, 554 S.E.2d 342 (2001) and *Summers v. City of Charlotte*, 149 N.C. App. 509, 562 S.E.2d 18, *rev. denied*, 355 N.C. 758, 566 S.E.2d 482 (2002).
- S.L. 2003-330 (H 440) provides that agricultural land uses are exempt from town zoning in Wentworth.
- S.L. 2003-237 (S 494) authorizes Chapel Hill to require reservation of school sites as part of zoning approvals (including site plan and special use permit reviews). The school sites must be included in the comprehensive plan along with town council and school board approval of the sites. The statute also requires mailed notice to affected owners prior to plan adoption.

## **Subdivision**

There were no statewide bills regarding subdivision regulation enacted. As in most sessions of the past decade, several local bills were adopted making modest changes in the definition of subdivisions subject to local regulation. S.L. 2003-79 (H 765) adds an exemption to the definition of subdivisions for Chowan County. It provides that the division of land as part of an estate settlement is exempt from local subdivision regulation [as the court of appeals ruled thirty years ago in *Williamson v. Avant*, 21 N.C. App. 211, 203 S.E.2d 634, *cert. denied*, 285 N.C. 596, 205 S.E.2d 727 (1974)], but that compliance and building permits can be denied for the resultant lots if they do not meet minimum size requirements for zoning, septic tanks, or building setback ordinances. S.L. 2003-245 (H 70) repeals a 1991 subdivision exemption applicable to Pender County.

## **Building Code**

### **Homeowner Recovery Fund Permit Fee**

Since 1991 local inspection departments have collected a fee from each general contractor who applies for a single-family residential building permit. This fee is then remitted to the Licensing Board of General Contractors and earmarked for its Homeowners Recovery Fund. The fund provides financial assistance for homeowners who have suffered a loss resulting from dishonest or incompetent work performed by a licensed general contractor or someone who fraudulently acts as one. S.L. 2003-372 (S 324) doubles the fee from \$5 per permit to \$10. The act provides that the inspection department may continue to retain \$1 of each such permit fee collected.

## **Elimination of Architect or Engineer Review**

S. L. 2003-305 (H 994) amends G.S. 133-1.1(c), the statute that specifies when a registered architect or engineer must review plans and specifications for a government project. It allows cities, counties, local boards of education, and the state of North Carolina to erect pre-engineered structures without the involvement of a registered architect or engineer, if several requirements are met. First, the structure must be a garage, shed, or workshop no larger than 5,000 square feet in size. Second, the buildings must be for the exclusive use of city, county, public school, or state employees for purposes related to their work. Third, these pre-engineered structures must be located at least 30 feet from other buildings or property lines.

## **Subcontractor Bids**

The general contractor's licensing law, G.S. 87-1, requires that a person who submits a bid for a public contract have a license covering the work involved in that contract. In many cases, however, a project involves multiple trades, and these may be subcontracted by the bidding contractor. S. L. 2003-231 (S 437) authorizes the North Carolina General Contractors Licensing Board to adopt rules allowing a licensed HVAC or electrical contractor to bid on projects that include general contracting work, so long as the cost of the general contracting work does not exceed a percentage of the total bid price, as established by board rules. The act also allows the board to adopt temporary rules to exercise this authority.

## **Pyrotechnic Displays**

A recent tragic fire caused by a fireworks display in a Rhode Island nightclub spawned several legislative reactions in this state. The first affects the authority of local governments to approve pyrotechnic displays at concerts and various public exhibitions. S. L. 2003-298 (S 521) amends G.S. 14-413 to provide that a board of county commissioners may not issue a permit for the indoor use of pyrotechnics at a concert or public exhibition unless the local fire marshal or the State Fire Marshal certifies their safety. In particular a fire marshal must certify that (1) adequate fire suppression will be used; (2) the structure is safe for the use of pyrotechnics, given the type of fire suppression available; and (3) egress from the building is adequate, based on the size of the expected crowd. The statute also requires such certifications from cities authorized by local act to grant pyrotechnic permits. In addition the act also authorizes the State Fire Marshal to certify the pyrotechnics used in certain concerts or exhibitions authorized by The University of North Carolina at Chapel Hill. Most of the act became effective December 1, 2003.

## **Sprinkler Requirements**

The North Carolina Building Code does not require sprinklers in clubs and bars. S. L. 2003-237, however, allows Carrboro to adopt an ordinance to require sprinklers in bars, clubs, and other similar places of public assembly if these establishments sell alcoholic beverages and are designed for occupancy by at least 100 people. Restaurants are exempt. The requirement may be made applicable to any new occupancy, and the sprinklers must be installed before the certificate of occupancy is issued. The regulation may also be made applicable to any existing occupancy three years following the date the ordinance is enacted. Another act, S.L. 2003-247 (H 773), extends similar authority to the Town of Chapel Hill. However, Chapel Hill may apply such regulations to bars and clubs with occupancies of over 100 but less than 200 people only if required egress points are one story above or below grade. Otherwise the regulation may not apply except to occupancies exceeding 200 people. The Chapel Hill legislation would allow an existing club lacking sprinklers up to five years to comply, if its existing occupancy exceeds 200. It would also allow a club up to five years to comply if its occupancy exceeds 150 and it lacks suitable at-grade egress.

## **Building Condemnation**

The municipal building condemnation statutes (G.S. 160A-426 to G.S. 160A-432) have authorized all cities to use summary procedures to demolish nonresidential buildings in target areas. Using summary procedures a city can demolish such a building without a court order if the owner refuses to do so. However, the power to demolish residential buildings without a court order has been available to only a few cities that have managed to obtain the necessary local legislation. S.L. 2003-23 (S 465) allows two cities (High Point and Goldsboro) and S.L. 2003-42 (S 123) allows three more (Clinton, Lumberton, and Franklin) to use summary procedures under the unsafe building condemnation statutes to demolish residential structures in community development target areas.

## **Housing Code**

Current legislation (G.S. 160A-441) governing the application of minimum housing ordinances seems to imply that if a dwelling is deteriorating (but not yet dilapidated), a minimum housing inspector's order must allow the owner the choice of whether to repair the dwelling or, alternatively, whether to close it and board it up. Because of the blighting effect of boarded-up houses, some local governments have sought other options. S.L. 2003-76 (S 290) and S.L. 2003-320 (S 357) allow Greensboro and Roanoke Rapids, respectively, to require owners to repair such properties rather than vacating them. A bill that would have extended this power to all local governments, H 628, remained in a House committee at adjournment.

## **Community Appearance**

### **Historic Preservation**

G.S. 105-129.35 provides that a taxpayer can receive a state income tax credit for rehabilitating an income-producing historic structure if the taxpayer qualifies for a corresponding federal income tax credit. The state tax credit is equal to 20 percent of the qualifying expenditures. This session several changes were made to this statute. Section 35A.1 of the appropriations act, S.L. 2003-284 (H 397), amends G.S. 105-129.35 to require that a taxpayer intending to claim the credit provide the Department of Revenue a copy of the certification made by the State Historic Preservation Officer verifying that the structure has been rehabilitated in accordance with the law. S.L. 2003-415 (S 119) liberalizes the ability of partnerships, joint ventures, and the like to take advantage of these credits by allowing the credit to be allocated among any of the structure's owners so long as the particular owner's adjusted basis for the property at the end of the year in which the structure is placed into service is at least 40 percent of the amount of the credit allocated to that owner. (Before this enactment, the credit could not exceed the owner's adjusted basis.) In addition, the act extends the expiration date for these "pass-through" provisions to January 1, 2008 (was, January 1, 2004).

S.L. 2003-46 (H 512) allows nonresident property owners to serve on the Nags Head Historic Preservation Commission.

### **Nuisance Abatement Ordinances**

**Overgrown vegetation ordinance.** S.L. 1999-58 authorized the City of Roanoke Rapids to give chronic violators of its overgrown vegetation ordinance a single annual notice announcing that the city may remedy (abate) the violation and charge the costs to the property owner. That idea proved popular and other cities followed the lead of Roanoke Rapids. This year several more cities were granted identical authority. S.L. 2003-77 (S 478) authorizes Durham and Monroe to use this procedure, and S.L. 2003-80 (S 83) adds Rocky Mount to the list of those cities that are

included in the original act. S.L. 2003-120 (H 153) adjusts the authority of Winston-Salem under the original act by defining a *chronic violator* as someone to whom the city issued a violation notice at least three times in the previous calendar year (was, took remedial action against). S.L. 2003-40 (S 356) extends similar authority to the City of Henderson with respect to its “weeded-lot” ordinance. In addition this act authorizes the city to notify a repeat violator that not only may the city charge the expense of its remedial action to the owner; it may also impose a surcharge of up to 50 percent of the expense of the action to remedy the preceding violation.

**Refuse and debris ordinance.** S.L. 2003-133 (H 735) authorizes Durham to give annual notice to chronic violators of the city’s refuse and debris ordinance. A *chronic violator* is defined as someone against whom the city took remedial action under the ordinance at least three times in the previous calendar year. S.L. 2003-120 extends similar power to Winston-Salem, but here a *chronic violator* is someone to whom the city issued violation notices under the ordinance at least three times in the previous calendar year.

**Nuisance ordinance procedure.** S.L. 2003-51 (S 477) amends the Durham city charter to allow the city council to delegate to the housing appeals board the authority to hear public health nuisance cases.

## Manufactured/Modular Housing

One of the more remarkable pieces of comprehensive legislation adopted by the General Assembly this year affects manufactured and modular housing. S. L. 2003-400 (H 1006)

- broadens the circumstances in which manufactured homes can be considered real property;
- requires the owners of manufactured home communities to give notice to tenants if the community is going to be converted to another use;
- adds new requirements governing the sale of manufactured homes;
- adds new requirements governing the licensure of manufactured home manufacturers, dealers, salespersons, and setup contractors; and
- requires that new modular homes meet certain design and appearance standards.

One section of S.L. 2003-400 provides the first definition for modular homes that the North Carolina statutes have ever included. According to new G.S. 105-164.3(21a), a *modular home* is a “factory-built structure that is designed to be used as a dwelling, is manufactured in accordance with the specifications for modular homes under the North Carolina State Residential Building Code, and bears a seal or label issued by the Department of Insurance pursuant to G.S. 143-139.1.”

Legislation adopted in 2001 made important changes to the law affecting the classification of manufactured homes as real property. This law allows an owner of a single- or doublewide manufactured home to qualify the unit as real property by, among other things, submitting an affidavit to the Division of Motor Vehicles stating that the owner of the manufactured home also owns the land on which the home is located. S.L. 2003-400, adopted this year, also allows units to be qualified as real property if the unit’s owner has entered into a lease of at least twenty years for the land on which the manufactured home is affixed.

S.L. 2003-400 also adds new G.S. 42-14.3, which applies to an owner of a manufactured home community (which consists of at least five manufactured homes) if the owner intends to convert the land to another use. In such a case, the landowner must give each owner of each manufactured home notice of the intended conversion at least 180 days before the home owner is required to vacate and move, regardless of the term of tenancy. Local government code inspectors should note that if the manufactured home community is being closed under a valid order issued by the state or a local government (for example, if the community’s water system is contaminated), the owner of the manufactured home community must give notice of the closure to each community resident within three business days of the date on which the order is issued.

Perhaps the most remarkable feature of the act is an amendment to G.S. 143-139.1 establishing minimum appearance standards new modular homes must meet in order to qualify for a label or seal that indicates conformance with the State Building Code. These appearance standards are similar to the zoning standards some local governments apply to manufactured

homes to ensure that the units blend into existing neighborhoods. Few of these existing zoning appearance regulations have ever been applied to modular homes, however. The legislation, adopted with support from the modular home industry, represents a preemptive strike by the industry and others to dissuade local governments from applying zoning regulations to modular homes in the same manner the regulations are applied to manufactured homes. The following construction and design standards apply to modular homes manufactured after January 1, 2004:

- For homes with a single predominant roofline, the pitch of the roof shall be no less than 5 feet rise for every 12 feet of run.
- The eave projections of the roof shall not be less than 10 inches (excluding roof gutters) unless the roof pitch is 8/12 or greater.
- The minimum height of the first story exterior wall must be at least 7 feet 6 inches.
- The materials used in and texture of the exterior must be compatible in composition, appearance, and durability to the materials commonly used in the exteriors of standard residential construction.
- The modular home must be designed to require foundation supports around the perimeter. These may be in the form of piers, piers and curtain walls, piling foundations, perimeter walls, or another type of approved perimeter support.

## Tree Protection

The topic of tree protection continues to generate interest among municipalities and in the General Assembly. In 2000 the towns of Apex, Cary, Garner, Kinston, and Morrisville gained authority to adopt ordinances regulating the planting, removal, and preservation of trees and shrubs [S.L. 2000-108 (H 684)]. In the 2001 session, Cary, Garner, and Morrisville, along with their sister Wake County municipalities of Knightdale and Fuquay-Varina, and the two cities of Durham and Spencer again turned to the General Assembly to clarify and expand their authority as regards tree preservation. S.L. 2001-191 (H 910) expressly authorizes these municipalities to adopt regulations governing the removal and preservation of existing trees and shrubs prior to development within certain buffer zones. The perimeter buffer zone extends up to 65 feet along roadways and property boundaries adjacent to undeveloped land. The regulations must allow for reasonable access onto and within the property they affect. In addition, they must exclude normal forestry activities that either are taxed at present-use value (in accordance with the state's program for use-value taxation) or are conducted pursuant to a forestry management plan prepared or approved by a registered forester. The 2001 legislation gives several important new powers to the affected cities. First, if all or substantially all of the perimeter buffer trees which should have been protected from clear-cutting are removed and afterward a property owner seeks a permit or plan approval for that tract of land, the city may deny the building permit or refuse to approve the site or subdivision plan for that site for a period of up to five years following the "harvest." Second, a municipality subject to the act may adopt regulations governing the removal and preservation of specimen or "champion" trees on sites being planned for new development. The application of these specimen or champion tree regulations is not restricted to the corridors or buffer zones that are subject to the clear-cutting restrictions.

Legislation affecting six additional municipalities was adopted in 2003. S.L. 2003-128 (H 679) amends S.L. 2001-191 to add Raleigh to those municipalities included in the 2001 local act. Five other entities obtained local acts addressing their particular needs, but these acts are somewhat less ambitious than the 2001 legislation. The provisions governing tree protection in S.L. 2003-246 (H 516) (applicable to Statesville, Rockingham, and Smithfield), in S.L. 2003-73 (H 517) (applicable to Holly Springs), and in S.L. 2003-129 (H 679) (applicable to Rutherfordton and Wake County) are essentially identical. The notable features that apply to the five local governments are as follows.

1. The perimeter buffer zone within which tree cutting is restricted can only extend up to 50 feet along public roadways and up to 25 feet along property boundaries adjacent to undeveloped properties.

2. The area within the required buffer may not exceed 20 percent of the area of the tract, excluding road and conservation easements.
3. Tracts of two acres or less that are zoned for single-family residential use are exempt.
4. Local governments may not require surveys of individual trees.
5. A local government may deny approval of a site plan or a subdivision plat for a period of just three years after an impermissible harvest of trees from the land involved.
6. If the owner of a harvested area replants the buffer zone within 120 days of the harvest with plant materials consistent with the required buffer area, then site plan or subdivision approval may be denied for a period of only two years.

The local act affecting Holly Springs became effective June 25, 2003, but the provisions that affect the remaining local governments become effective January 1, 2004.

## Transportation

### The “Moving Ahead” Transportation Plan

The most significant piece of transportation legislation adopted in 2003 must certainly be that advocated by Governor Easley and known as the North Carolina Moving Ahead Transportation Initiative. S.L. 2003-383 (H 48) requires the state to spend \$700 million in the next two years to improve roads and public transit. The main objective of the act is to provide money for infrastructure maintenance, preservation, and modernization, particularly for two-lane highways. The plan assigns \$630 million to improve and widen roads, in accordance with the current equity distribution formula used for general highway funds. In suburban areas the money will be used to add turn lanes and pave shoulders to enhance traffic safety. In rural areas the money will be used to pave dirt roads and widen lanes. In addition, a number of bridges will be improved. Some \$70 million is targeted for public transportation development. Although the act does not specify particular projects, it appears that some of these funds will be used to build the commuter rail line that will extend from Raleigh to Durham and a light rail system in the Charlotte region.

The “Moving Ahead” initiative allows cash balances to be borrowed from the Highway Trust Fund, which was established in 1989 and is funded with certain gas tax revenues and highway use, vehicle registration, and title fees. (Moneys in the Trust Fund have been previously limited to new construction projects, including seven urban loops.) The act is based on the state’s apparent intention to replenish the Trust Fund money when it sells \$700 million in bonds that remain unsold from a \$950 million bond issue voters approved in 1996. The act also amends G.S. 136-176 to require the North Carolina Department of Transportation (NCDOT) to report to the Joint Legislative Transportation Oversight Committee twice each year, first on its intended use of the funds and later on its actual current and intended future use of the funds. Each year NCDOT must also certify to the committee that use of the Highway Trust Fund cash balances will not adversely affect the delivery schedule of any Highway Trust Fund project. The funds made available for Moving Ahead projects must be reduced to the amount above which NCDOT cannot so certify.

S.L. 2003-383 also amends Section 2.2(j) of the appropriations act to establish a complicated reimbursement arrangement by which \$490 million is transferred from the Highway Trust Fund to the General Fund during fiscal 2003–2005 to partially compensate the General Fund for the annual transfer over the last fourteen years of motor vehicle sales tax revenues from the General Fund to the Highway Trust Fund. However, the act requires that this transfer of \$490 million be repaid to the Highway Trust Fund over the next five years.

The Moving Ahead transportation act also establishes a twenty-seven-member Blue Ribbon Commission to study “the unique mobility needs of urban areas in North Carolina.” The commission is to study (1) innovative financing approaches to address urban congestion, (2) local revenue options which would give urban areas more control over regional mobility, and (3) any other urban transportation issues that the commission cochairs approve for consideration.

## Funding of Urban Loops

For the second year in a row the General Assembly made some slight changes in the description and location of urban loop highway projects in the North Carolina Intrastate System. These projects are funded by the North Carolina Highway Trust Fund and are delineated in G.S. 136-179 and G.S. 136-180. Section 29.11 of the appropriations act, S.L. 2003-284,

- adds two new urban loop sections: the Fayetteville Western Outer Loop (upgrading a proposed connector) and a multilane extension of the Greenville Loop to the west and south of the city.
- adds two interchanges to the Greensboro Loop and makes changes to the Raleigh Outer Loop, the Wilmington Bypass, and the Winston-Salem Northbelt.
- identifies seven different road sections that are eligible for funding as part of the Durham Northern Loop.
- provides that the cross sections for these Durham Northern Loop projects will be established by the metropolitan planning organization (MPO) and NCDOT through the state and federal environmental review process.

Priorities must be set by mutual agreement of the MPOs and NCDOT through the Transportation Improvement Program.

## MPO/RPO Funding

Section 29.14(a) of the appropriations act allocates \$750,000 from the Highway Trust Fund to the rural transportation planning organizations (RPOs). In addition, \$2 million is appropriated for matching loan funds to be made available to MPOs located in air-quality nonattainment or maintenance areas under the federal Clean Air Act. The lead planning agency of an MPO must provide matching funds and the money may be used only in efforts to avoid a lapse in conformity with the air-quality plan. The loans must be repaid within five years.

Section 29.14 also allocates \$750,000 for matching grant funds to be used by regional transportation agencies located in nonattainment or maintenance areas. The funds must be matched by the regional agency and must be used to support regional transportation planning, but they need not be repaid.

## Virginia-North Carolina Interstate High-Speed Rail Commission

Section 29.19 of the appropriations act amends legislation adopted in 2001 that established the Virginia-North Carolina Interstate High-Speed Rail Commission. It directs the commission to study the establishment of an interstate high-speed rail compact not only between North Carolina and Virginia, but between these states and other states as well. Since the commission failed to report its findings to the Governor and the General Assembly by October 20, 2002, as specified in 2001 legislation, this year's act allows the commission to report before November 30, 2004, and terminates the commission as of that date.

## Studies

The appropriations act provides for several new major studies, indicating a certain legislative dissatisfaction with the state's transportation project planning process. Section 29.12 establishes a Highway Trust Fund Study Committee made up entirely of members of the General Assembly, including the chairs of the Joint Transportation Oversight Committee. The committee is to study the current status and feasibility of current Highway Trust Fund projects and the "(u)nanticipated problems with the structure of the Highway Trust Fund." The committee is also directed to study questions about the equity of existing funding distribution, the feasibility of altering project eligibility requirements with an eye to allowing NCDOT to add projects if these projects will not jeopardize those previously planned, and the possibility of using Highway Trust Funds as

matching funds for certain federal projects. The committee must report to the Joint Legislative Transportation Oversight Committee no later than November 1, 2004.

Section 29.21 of the appropriations act directs the Joint Legislative Transportation oversight Committee to contract with an independent consultant to study transportation project processes from the inception of the projects to their completion. The study is to examine NCDOT planning, design, and contract-letting procedures; the effect of other resource and regulatory agency decisions on the project-delivery process; and “all significant causes of delay” in project processes.

## **Environmental Permits and NCDOT Construction Projects**

Section 29.6 of the appropriations act creates G.S. 136-44.7B concerning the modification and cancellation of permits issued by the Department of Environmental and Natural Resources (DENR) for construction projects included in the Transportation Improvement Program. The new legislation provides that once issued by DENR, such permits do not expire and may not be modified or canceled unless one of several exceptions is met. One such exception involves a change in federal law that would necessitate changes in a permit to avoid jeopardizing federal program recognition or funding or that would mandate the expiration of the permit. Another basis for modifying or canceling a permit is any change in state law that includes an express statement that the change is applicable to “ongoing transportation construction programs.”

## **Bikeway Funding**

G.S. 136-71.12 authorizes NCDOT to spend any of its available federal, state, local, or private funds to establish bikeways and trails. S.L. 2003-256 (S 232) amends this statute to allow counties and municipalities to spend “any funds available” for these purposes as well.

## **Rail Corridor Subdivisions**

Section 29.23(a) of the appropriations act amends G.S. 160A-376 and G.S. 153A-335, the statutes defining the scope of coverage of local government land subdivision control ordinances. The new provision exempts from regulation the purchase of strips of land for public transportation system corridors. A similar exemption remains in effect for land division associated with the widening or opening of streets.

## **Municipal Funding of State Roads outside City Limits**

S.L. 2003-132 (H 627) allows Greensboro and Kernersville to fund the construction of roads outside their respective city limits and outside their respective extraterritorial planning jurisdictions. However, the funds may be appropriated only if the roads are to be state roads maintained by NCDOT. The act also provides that the authorized cities may not fund roads within the limits of another municipality without that municipality’s consent.

## **Miscellaneous Related Topics**

### **Adult Entertainment**

In 2001 the U.S. District Court ruled that the state’s regulations applicable to dancers at clubs with ABC licenses were unconstitutional because they were content-based restrictions of free speech and were not narrowly drawn to address a compelling governmental interest. The case, *Giovani Carandola, Ltd. v. Bason*, 147 F. Supp. 2d 383 (2001), involved topless dancers at Christie’s Cabaret, in Greensboro. In 2002 the Fourth Circuit Court of Appeals issued a narrower

ruling but still upheld the injunction against enforcement, holding that the regulation was too broad because it covered serious artistic performances as well as adult clubs. 303 F.3d 507 (4th Cir. 2002). S.L. 2003-382 (S 996) enacts G.S. 18B-1005.1 to address this statutory flaw by clarifying the state's authority to regulate sexually explicit performances at facilities with ABC licenses. The act codifies the regulatory prohibition against performers in these facilities exposing their genitals or simulating sexual acts, clarifies that the regulatory intent is to prevent adverse secondary impacts, and provides an exception for serious literary, artistic, scientific, or political expressions.

### **Electronic Notice**

Two local bills may be indicative of a new trend—substitution of electronic posting of hearing notices for newspaper publication. S.L. 2003-81 (S 425) allows Cabarrus County to post notices of public hearings on ordinance amendments on the Internet rather than in a newspaper. The county must use the same schedule that is required for published notices and will still have to make any required mailed notices. S.L. 2003-161 (S 292) creates the same provisions for Raleigh and Lake Waccamaw but specifies that these municipalities are not relieved of any required posting of notice on the affected sites themselves.

### **Raleigh Historic District**

Several decades ago state government acquired a number of historic homes adjacent to the state government complex in Raleigh and converted the structures to office space. S.L. 2003-404 (S 819) will return these homes to residential and commercial use. The law will allow the sale of most of these structures, subject to conservation agreements that will protect their historic and architectural character. Up to \$5 million from the net proceeds of the sale are to be placed in a trust fund for upkeep, maintenance, and repair of the Governor's Mansion (a historic structure adjacent to this area). The act also creates an eight-member Blount Street Historic District Oversight Committee to monitor the act's implementation.

### **Environment**

S.L. 2003-427 (H 1028) creates G.S. 113A-115.1 to add to the statutes the state's ban on oceanfront bulkheads, groins, jetties, and similar shoreline hardening erosion control devices [some form of the ban has been in place as an administrative rule adopted by the Coastal Resources Commission (CRC) since 1979]. Limited use of sandbags to protect imminently threatened oceanfront structures is still permissible. S.L. 2003-427 also allows the CRC to issue a general permit for offshore parallel sills of stone or riprap used as estuarine shoreline erosion control devices when the sills are employed in conjunction with existing, created, or restored wetlands.

S.L. 2003-428 (S 945) allows limited site preparation work on projects that require an air quality permit prior to that permit being issued. The work can include site clearing and grading, construction of access roads, utility installation, and construction of ancillary structures (offices, fences, and so forth). The act also creates G.S. 215.108A(g) to specifically provide that the state's air quality permitting program does not affect the validity of local zoning, subdivision, or other land use regulatory programs.

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