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2017 North Carolina Legislation Related to Planning and Development Regulation

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The North Carolina General Assembly in 2017 made a number of revisions to the General Statutes regarding planning and development regulation. The law on how cities and counties document consideration of their plans when adopting zoning amendments was modified, and a clarification was made defining agricultural activities that are exempt from county zoning. Statutes of limitation were established to set time limits for local governments to seek court-ordered zoning enforcement. An exemption from local subdivision review was codified, a mandate was added for expedited review for some small subdivisions, and authority was granted for local governments to charge system development fees for water and sewer infrastructure. Laws governing wireless antennas and renewable energy were altered significantly.

Zoning

Plan Consistency Statement

In 2005, the North Carolina planning statutes were amended to require that the planning boards and the governing board review and consider adopted plans when a zoning amendment is proposed. Sections 160A-383 and 153A-341 of the North Carolina General Statutes (hereinafter G.S.) require that the mandatory planning board review of each proposed zoning amendment include written comments as to the proposed amendment's consistency with the comprehensive plan and any other relevant plans that have been adopted by the governing board. City councils and county boards of commissioners are required to approve a plan consistency statement before adopting or rejecting any zoning amendment. This requirement for a governing board statement on plan consistency was amended in 2017.

For the most part, the process of preparing, reviewing, and approving a plan consistency statement has become routine and unremarkable in most cities and counties. The staff typically drafts a plan consistency analysis as part of the staff report on proposed zoning amendments. That statement is reviewed and edited as needed by the planning board and submitted to the governing board. The governing board then reviews and edits the statement and approves it

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when it acts on the zoning amendment. While routine, the statute does impose some mandatory steps that must be observed to avoid potential judicial invalidation of zoning decisions. Adhering to the process has, on occasion, led to confusion about the interplay of plans and proposed zoning amendments.

In several instances local zoning decisions have been invalidated for a failure to observe the requirement for a governing board statement on plan consistency. While the substance of the statement is not subject to judicial review, whether it was formally approved by the governing board is. In *Wally v. City of Kannapolis*,[1] the state supreme court held that a staff analysis available for the board's review is not the same as the governing board itself approving a statement on plan consistency. In *Atkinson v. City of Charlotte*,[2] the court found that a conclusory statement noting that "this petition is found to be consistent with adopted policies" failed to meet the statutory requirement that the governing board statement describe how the action is consistent with adopted plans and explain why it is reasonable and in the public interest.

Session Law (S.L.) 2017-10 (SB 131) amends G.S. 153A-341 and 160A-383 to provide that if a city or county governing board adopts a zoning amendment that is determined to be inconsistent with an adopted plan, the zoning amendment is deemed to also amend the plan. The amendments apply to all proposed zoning amendments, text or map, filed on or after October 1, 2017.

When considering a zoning amendment, the governing board is directed to adopt a plan consistency statement that takes one of three forms, as follows:

1. a statement approving the amendment and describing how it is consistent with the plan,
2. a statement rejecting the amendment and describing how it is inconsistent with the plan, or
3. a statement approving the amendment and a declaration that the plan also is amended. In this situation, the statement must also include an explanation of "the change in conditions the governing board took into account in amending the zoning ordinance to meet the development needs of the community."

In all three options, the statement is to include an explanation of why the action being taken is reasonable and in the public interest, as required by current law.

So when a zoning amendment is adopted that is inconsistent with the plan (option three), the zoning amendment is deemed to also amend the plan. No additional request or application for a plan amendment can be required. The statute does not mandate that the effect of the zoning action be noted within the plan itself. To avoid confusion and assure that the plan accurately reflects actions taken by the governing board, it would be prudent for local governments to devise a process to note these amendments in the plan itself when action is taken under option three.

The statute does not address the situation of the board denying an amendment that is consistent with the plan. This situation, while not common, is legally permissible.[3] Given the directive that the plan consistency statement follow one of the three options noted above, in this situation it may be prudent (though not legally required) for the governing board to amend or qualify its plan first and then note the inconsistency when rejecting the zoning amendment.

1. 365 N.C. 449, 722 S.E.2d 481 (2012).
2. 235 N.C. App. 1, 760 S.E.2d 395 (2014).
3. Coucoulas/Knight Props., LLC v. Town of Hillsborough, 199 N.C. App. 455, 683 S.E.2d 228 (2009), *aff'd per curiam*, 364 N.C. 127, 691 S.E.2d 441 (2010).

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S.L. 2017-10 also makes a conforming amendment to the development agreement statute. It amends G.S. 160A-400.32 to provide that when a rezoning is done in conjunction with a development agreement, the provisions described above are applicable.

A simplified version of the amendment to the plan consistency review process was incorporated into the proposed revision of the zoning statutes approved by the Senate later in the 2017 session. Section 9.1 of Senate Bill 419, amending proposed G.S. 160D-6-5[4] (discussed below), deletes the three specific forms of a plan consistency statement but continues the policy change that adoption of a zoning amendment that is inconsistent with the plan is deemed to amend the plan. That bill is eligible for House consideration in 2018.

Statutes of Limitations for Land Use Enforcement

S.L. 2017-10 (SB 131) also amends the city and county zoning statutes regarding the time period within which enforcement actions must be initiated. These amendments are effective October 1, 2018, and apply to suits commenced on or after that date.

In most North Carolina cities and counties, zoning violations are investigated and cited on a complaint basis. Zoning officials do not tend to initiate independent investigations of violations absent the filing of a complaint. This new law, however, limits the authority of a city or county to pursue a violation if it has been known to the local government, or could have been known to them, and no enforcement action has been initiated. This may provide some incentive for local governments to cite known violations even if no complaint has been filed.

Section 2.15 of the bill amends G.S. 1-51 to provide that a suit against a landowner for violation of any land use regulation or permit must be initiated within five years. The five-year period starts to run when the facts of the violation are known to the governing board or any agent or employee of the local government or when the violation can be determined from the public records of the local government. Apparently any public record, such as filings with a utility department or tax listings, as well as filings with the planning and inspections department, trigger the running of this period.

In addition, the bill amends G.S. 1-49 to set a similar seven-year period to bring suit for a land use violation running from the time the violation is "apparent from a public right-of-way" or is in "plain view from a place to which the public is invited."

In both instances, an action for an injunction can still be brought later to address "conditions that are actually injurious or dangerous to the public health or safety." The new statutes of limitation are discussed in greater detail in "Tick Tock! The Clock Is Now Running for Zoning Enforcement."[5]

Farms and County Zoning

The 2017 farm bill, S.L. 2017-108 (SB 615), modifies the means of establishing that farmland is a "bona fide farm," provides clarification for the vexing issue of the application of the bona fide farm exemption from county zoning and municipal zoning in extraterritorial areas when agritourism is involved, and removes the authority of counties to apply zoning to large-scale hog farms. These amendments became effective July 12, 2017.

4. See the third edition of the bill at 105, www.ncleg.net/Sessions/2017/Bills/Senate/PDF/S419v3.pdf.

5. Adam Lovelady, *Tick Tock! The Clock Is Now Running for Zoning Enforcement*, Coates' Canons: NC Loc. Gov't L. Blog (Sept. 26, 2017), https://canons.sog.unc.edu/tick-tock-the-clock-is-now-running-for-zoning-enforcement.

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Defining a "farm." An initial question when applying the bona fide farm exemption from county zoning is what constitutes a "farm" for this purpose. G.S. 153A-340 was amended in 2011 to provide that production of any one of five items constitutes sufficient evidence that the property is being used for bona fide farm purposes. These items are (1) a farm sales tax exemption, (2) enrollment in the present use value property tax program for agricultural lands, (3) a Schedule F for the most recent federal income return, (4) a forest management plan, or (5) a United States Department of Agriculture (USDA) farm identification number. This law amends G.S. 153A-340(b) to remove the USDA Farm Identification Number as a means of establishing property that is being used for farm purposes. Unlike the farm sales tax exemption, the use value tax enrollment, and the farm income tax provision, securing a USDA farm identification number does not have minimum acreage or farm income requirements; rather, it is a registration program that is the first step to subsequent applications for various farm programs.

Defining farm uses—agritourism and residences. Since county zoning was first authorized in 1959, bona fide farming has been exempt from county zoning. But nonfarm uses, even those located on a bona fide farm, are not exempt. This law addresses two aspects of what constitutes "farm use" for purposes of the county zoning exemption.

The first involves residences on a farm. The law amends G.S. 153A-340(b) to provide that an existing or new residence is incidental to farming and thus exempt from zoning if it is constructed according to the residential building code and is occupied by the owner, lessee, or operator of the farm. Other buildings or structures "sheltering or supporting" the farm use and operation also are considered incidental to the farm use. In addition, the law amends G.S. 143-138(b4) to specify that nonresidential farm buildings are excluded from coverage by the state building code and that therapeutic equine facilities are included in this exception.

The second aspect involves agritourism conducted on a farm. Since "agritourism" has previously been included within an exempt farm use, counties have been faced with a number of difficult cases that turn on finding the right boundary between an exempt agritourism use and a nonfarm commercial use that is not exempt. Corn mazes or hay rides are clearly agritourism, while a grocery store that sells produce is not. But what about using farmland for wedding and party venues, rodeos, or shooting ranges?

The law amends G.S. 153A-340 to add a provision stating the circumstances needed to be shown to qualify the use of a building or structure as agritourism and, thus, a "farm purpose" in order to be exempt from county zoning. To qualify, the land must be owned by a person who holds a qualifying farmer sales tax exemption or is enrolled in the present-use value property tax program. An IRS Schedule F or a forestry management plan still qualify the property as a farm, but they are not sufficient to qualify agritourism as a nonfarm use exempt from zoning. The property must remain in one of the two qualifying circumstances for three years after the start of the agritourism use. If that is not done, the agritourism use becomes subject to county zoning.

The provision goes on to require that the agritourism use have at least some modest farm connection by including the following:

> For purposes of this section, "agritourism" means any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. A building or structure used for agritourism includes any building or structure used for public or private events, including, but not limited to, weddings,

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receptions, meetings, demonstrations of farm activities, meals, and other events that are taking place on the farm because of its farm or rural setting.[6]

Incidental farm activity. Section 8.1 of S.L. 2017-106 makes an additional minor change that could potentially have far-reaching implications. It amends the definition of "agriculture" in G.S. 106-581.1, a definition incorporated by reference into the bona fide farm exemption from county zoning. This definition previously included within "farming" packing, treating, processing and similar activities when performed on "the farm." The 2017 amendment changes this to include those activities when performed on "a farm," not just the particular farm involved, thus potentially opening the door to exempting a broader range of agricultural processing activities from county zoning. However, the definition in G.S. 106-581.1(6) still requires that the activities be "incident to the operation of the farm," which likely does not include industrial-scale agricultural processing operations involving products from many farms. Also, the bona fide farm exemption in G.S. 153A-340(b)(2) specifically says that for the zoning exemption, those incidental activities "when performed on the farm" include the farm itself and other farms owned or leased by the farm operator. Since that limitation was not amended, the implication is that there was no legislative intent to dramatically expand the exemption for industrial-scale processing activities.

Swine farms. The law also eliminates the exception for large-scale hog farms from the county zoning bona fide farm exemption. G.S. 153A-340(b) was amended in 1997 to allow counties to apply zoning to swine farms that had waste systems with a design capacity to accommodate 600,000 pounds of swine. This law repeals that provision. Large-scale hog operations are now exempt from county zoning.

Colocation of Small Wireless Telecommunication Facilities

S.L. 2017-159 (HB 310) establishes a new statutory regime for the regulation of small wireless infrastructure. The industry sought these changes to accommodate the next generation of wireless facilities, expected to be a network of numerous small transmitters of wireless signal to relatively small areas. This bill was subject to substantial negotiation between local governments (principally the League of Municipalities) and the wireless industry (principally AT&T and Verizon). This act became effective July 21, 2017.

Applicability. For purposes of these regulations, the act defines a "small wireless facility" as one in which the antennae, whether in an enclosure or exposed, measure no more than 6 cubic feet.[7] All other supporting equipment (meters, switches, grounding equipment, and the like) can be no more than 28 cubic feet.

The major new provision regarding regulation of small wireless facilities is a new G.S. 160A-400.54. There is not a comparable provision for counties, as the rules are intended to be applied to small wireless installations positioned on power poles, street lights, street signs, and the like along city streets (which, in North Carolina, are not owned or maintained by counties).

The small wireless facility must be placed on a pole not more than 50 feet high (plus an additional 10 feet for an antennae), provided that the pole is either in a city right-of-way or is on property outside of a right-of-way that is "other than single-family residential property." In areas zoned single-family residential where utilities are underground, the support pole may

6. G.S. 153A-340(b)(2a).
7. G.S. 160A-400.51.

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not exceed 40 feet. G.S. 160A-55 provides that new poles in city rights-of-way are subject to the same review and approval process as wireless facilities. New poles are limited to a height of 50 feet, but G.S. 160A-400.55(c) provides cities with the option of allowing poles and wireless facilities exceeding these limits.

Applications and fees. The city may specify the form and content of applications for small wireless facilities. However, the city may not require the applicant to provide more information in the application than is required for communications providers that are not wireless providers.

An application is deemed complete unless the city provides written notice of deficiencies within 30 days. If deficiencies are identified, the applicant can cure the deficiencies and resubmit without paying an additional application fee. The application is then deemed complete upon resubmission if the deficiencies are cured.

An applicant may submit a combined application for up to 25 separate colocation facilities.

Application fees can include the actual, direct, and reasonable costs to process and review applications, provided they do not exceed the application fee for similar activities and are capped at $100 per facility for the first five facilities and $50 per facility for each additional facility. A technical consulting fee of up to $500 also may be charged.

A city may not establish a moratorium on filing, processing, or deciding permits for colocation of small wireless facilities.

Permit decisions. City regulation can only provide for an administrative review. Approval cannot be subject to a quasi-judicial special or conditional use permit or a legislative rezoning. If the city does not act within 45 days of receipt of a completed application, it is deemed approved. Grounds for denial of a permit are limited. The standards that may be applied are

1. the city's "applicable codes," which for the purposes of these regulations is essentially the state building code, including electrical, mechanical, and fire codes, not zoning or other development regulations;
2. local code provisions or regulations that concern public safety, objective design standards for decorative utility poles, city utility poles, and reasonable and nondiscriminatory stealth and concealment requirements, including screening or landscaping for ground-mounted equipment (these requirements can be included in zoning or other ordinances and regulations);
3. public safety and reasonable spacing requirements concerning the location of ground-mounted equipment in a right-of-way;
4. historic district and landmark regulations.

If a permit is denied, the city must send the applicant documentation on why it was denied. The notice of denial must be sent on or before the date of denial. The applicant can then modify the application to cure the identified defects and resubmit within 30 days without paying an additional application fee. The city then has 30 days to review the resubmittal, at that point reviewing only the deficiencies cited in the denial.

Permit conditions and operation. The permit may not require the applicant to provide services for the city, such as reservation of fiber, conduit, or pole space.

As is the case with building permits, the permit may require that work commence within six months. It also may require that the facility be activated within one year of permit issuance.

A city can require that an abandoned facility (one that has ceased to transmit a signal, unless the provider is diligently working to restore service) be removed within 180 days of abandonment. The removal requirement applies to the wireless equipment but not the pole

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itself. If the provider does not remove the equipment, the city can undertake the removal and recover its actual costs of doing so.

A city can also require a work permit for work that involves excavation in the right-of-way, affects traffic patterns, or obstructs vehicular traffic.

Exemptions. No application, permit, or fee may be required for routine maintenance, for replacement of facilities of the same or smaller size, or for "micro wireless facilities" (a facility with dimensions no more than 24 inches long, 15 inches wide, and 13 inches high, with any exterior antennae limited to 11 inches).

G.S. 160A-400.57(a) provides that cities may not regulate the design, engineering, construction, installation, or operation of small wireless facilities in an interior structure or on the site of an athletic stadium or facility (unless it is city owned). However, building code provisions can be applied to these facilities.

Cities may not apply their regulation for facilities in the rights-of-way of state-maintained roads, which are regulated by the North Carolina Department of Transportation (NCDOT).

Rights-of-way and access to poles. The law also includes provisions requiring cities to allow use of their rights-of-way and to provide access to city utility poles. The city must allow access to city poles and may charge a reasonable and nondiscriminatory rate for their use, capped at $50 per pole per year. A request to colocate on a city pole may be denied if there is insufficient capacity or an engineering justification based on safety or reliability that cannot be remedied at the expense of the wireless provider. The law does not authorize location of wireless facilities on privately owned utility poles or structures without the consent of the owner.

Wireless providers are required to comply with city undergrounding requirements provided they are nondiscriminatory and have a waiver process.

State roads. Provisions applicable to NCDOT permitting of small wireless facilities within NCDOT rights-of-way are set out in a new G.S. 136-18.3A. The regulatory provisions for the state are considerably less specific than those that cities may impose. The state must administer the rules in a reasonable and nondiscriminatory manner, make permit decisions in a reasonable time, and require that any new utility poles not be more than 10 feet higher than nearby poles or a maximum height of 50 feet.

Public Accommodations

In 2016, House Bill 2, the so-called bathroom bill, regulated access to restrooms in government buildings based on biological sex, placed limits on the contracting authority for cities and counties, and established the Equal Access to Public Accommodations Act that preempted local nondiscrimination ordinances in North Carolina. This year the General Assembly passed S.L. 2017-4 (HB 142)—the HB2 repeal. The new law includes a provision that prevents local governments from adopting or amending ordinances "regulating public accommodations" until December 2020. Some have argued that the language of S.L. 2017-4 limits basic zoning authority for local governments, but the language of the repeal and common rules of statutory interpretation indicate that the new law does not affect zoning authority. The HB2 repeal is limited to matters of bathroom access, private employment practices, and nondiscrimination ordinances. This issue is discussed in greater detail in "Does the HB2 Repeal Limit Zoning Authority?"[8]

8. Adam Lovelady, *Does the HB2 Repeal Limit Zoning Authority?* Coates' Canons: NC Loc. Gov't L. Blog (Apr. 20, 2017), https://canons.sog.unc.edu/hb2-repeal-limit-zoning-authority.

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Local Bills

Planning boards adopt rezoning. S.L. 2017-19 (HB 25) allows additional jurisdictions to delegate rezoning decisions to the planning board provided an appeal to the governing board is also allowed. This law applies only to Randolph County and the municipalities located in whole or in part within the county. Similar local bills have previously been adopted for Greensboro, Gastonia, and Cabarrus County and its municipalities.

This law allows the governing board to delegate authority to conduct the required hearing and give final approval to zoning map amendments. The delegation must be done by ordinance (which may subsequently be rescinded or modified by ordinance). Decisions of the planning board are made by majority vote of the members of the entire board. Once the planning board makes a decision on a rezoning, a "person aggrieved" then has 15 days to file a written appeal with the city or county manager appealing the decision to the governing board. If appealed, the governing board considers the rezoning petition de novo (doing its own notice, hearing, and decision).

Subdivision Changes

Definition of "Subdivision"

State law has long specified that certain divisions of land are exempt from local subdivision regulations, including the recombination of lots, divisions creating lots greater than 10 acres, divisions for public right-of-way, and divisions of two-acre tracts into three lots. These are codified at G.S. 160A-376 and 153A-335.

S.L. 2017-10 (SB 131) amends the city and county statutes to add the following to the list of exempt subdivisions: "The division of a tract into parcels in accordance with the terms of a probated will or in accordance with intestate succession under Chapter 29 of the General Statutes." This change is essentially codifying a rule already established by the courts. In the 1974 case *Williamson v. Avant*,[9] the North Carolina Court of Appeals ruled that a division of land for the purpose of settling an estate is not a division of land "for the purpose of sale or building development" and, thus, is not subject to the subdivision regulations. This exemption was already standard practice, even reflected in the statutes concerning surveyor certifications for plats.[10]

Expedited Plat Reviews

In addition to the definition and exemptions for subdivisions, G.S. 160A-376 and 153A-335 allow local governments to provide for "expedited review of specified classes of subdivisions." Many local governments use this authority to provide expedited review for minor subdivisions (certain subdivisions with few lots and limited improvements). S.L. 2017-10 (SB 131) essentially creates a class of minor subdivisions that must be allowed under the local subdivision ordinance.

Notably, this is not an exempt subdivision; it is expedited review for certain qualifying subdivisions. The traditional exempt subdivisions are listed in subsection (a) of G.S. 160A-376 and 153A-335. Indeed, the new exemption for settling an estate (discussed above) is added as the fifth exemption under subsection (a). S.L. 2017-10 adds a new subsection (c) stating that if a subdivision meets certain standards, the local government may require only a plat for

9. 21 N.C. App. 211, 203 S.E.2d 634, *cert. denied*, 285 N.C. 596 (1974).
10. G.S. 47-30(f)(11).

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recordation (a final plat). Generally there is no substantial difference between the process and standards for an exempt subdivision as compared to the process and standards for an expedited subdivision, but in certain cases the distinction may be important.

Qualifying Subdivisions

S.L. 2017-10 outlines specific standards that a subdivision must meet in order to qualify for expedited review. Some relate to the nature of the tract before division, and some relate to the nature of the division of land itself. A subdivision must meet each of these standards in order to qualify for the new expedited review.

First, the property must be greater than five acres. Note that this is a minimum; the tract may be larger. (In contrast, for the two-into-three exemption, two acres is the maximum tract size.) For expedited review, the subject property is "a tract or parcel of land in single ownership." If Ms. Smith owns two contiguous four-acre parcels, for the purposes of expedited review Ms. Smith has eight acres in single ownership.

Second, at least 10 years must have passed since the property was subdivided through expedited review. The bill makes no mention of a change in ownership. If expedited review was used for any part of the property to be divided—even by a prior owner—the current owner must wait until 10 years have elapsed before she or he may again use expedited review.

Third, the subdivision must not be exempt as a 10-acre exemption. This one is straightforward. Divisions of land are exempt from subdivision regulation if all resulting lots are greater than 10 acres and there is no right-of-way dedication. If that exemption applies, the new expedited review does not apply. Indeed, given that the 10-acre exemption is more lenient, it is unlikely an owner would opt for the expedited review over the 10-acre exemption.

Fourth, the subdivision must result in no more than three lots. This is a calculation of the total lots from the subdivision. If Ms. Smith owns eight acres, she may carve off two, one-acre lots along the road (two home sites plus one lot with the remaining six acres) and qualify for the expedited review. If Ms. Smith carves off three home sites and keeps a five-acre lot, that subdivision would result in four lots and would not qualify for this expedited review.

Fifth, the resulting lots must meet applicable lot dimension requirements. This requirement is similar to, but slightly distinct from, the requirement for the recombination exemption and the two-into-three exemption. Those exemptions require that "the resultant lots are equal to or exceed the standards" of the city or county subdivision regulations. For the new exemption, the resultant lots must meet "[a]ny lot dimension size requirements of the applicable land-use regulations, if any."

Sixth, the resulting lots must have a permanent means of ingress and egress designated on the recorded plat. The subdivision must be designed to ensure access for the newly created lots. This could be accomplished with private easements or lots designed to have direct access to public roads. In any event, there must be permanent means of ingress and egress. Does it have to be usable? What if the platted easement is up a steep grade (where road construction is impractical)? There is not a clear answer here. It would seem that the access must be reasonably practical, but the statute merely calls for something designated on the plat. Note that other development regulations will apply. Depending on the intended use of the land, zoning or fire code requirements may require sufficient access for public safety concerns if and when the property is developed.

Seventh, the use of the resulting lots must comply with applicable zoning requirements. While subdivision regulation and zoning regulation are distinct authorities for local

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governments in North Carolina, in practice they are necessarily intertwined. The zoning requirements may specify the lot dimensions for a land subdivision, and the subdivision standards may be triggered by development of a new land use (changing from agriculture to multi-family, for example). Indeed, the General Statutes recognize this interrelation and explicitly authorize unified development ordinances consolidating zoning, subdivision, and other development regulations. The requirement that subdivisions requesting expedited review comply with zoning requirements reflects that interrelation and, perhaps, ensures that expedited review will not be abused to avoid basic standards for public health and safety.

Expedited Review

The new provision appears to establish a mandatory category of expedited review. Consider some of the procedural issues.

Final plat only. The statute now states that, for qualifying subdivisions, the local government "may require only a plat for recordation." In other words, only final plat review. For qualifying subdivisions there will be no sketch plan review nor preliminary plat review. This aligns with the minor plat review for many jurisdictions.

That language—"may require only"—may be interpreted a couple of ways, but the most likely interpretation is that local governments are required to provide this expedited review. One reading of the phrase—emphasizing the permissive *may*—is that the local government may choose if it will require only a final plat for that category of subdivisions. Another reading—emphasizing the limiting *only*—would interpret the phrase to mean that a local government must only require a plat for recordation for that category of subdivisions. Local governments already had the option to treat qualifying subdivisions as a special class under subsection (b). Thus, in order to give meaning to the new provision, it is likely to be interpreted to require expedited review for qualifying subdivisions.

Review and approval. Even exempt subdivisions are subject to a level of local review to confirm that they are exempt. For the new qualifying subdivisions, review is expedited, but it is still review. As with any other subdivision, before a plat review officer may sign off for a qualifying plat to be recorded, the plat must be approved by the local government subdivision officer. The local government subdivision officer must determine if the plat meets the standards to be a qualifying subdivision.

Other standards. Can the local government impose other subdivision standards, such as fees in lieu of parks or utility construction? It seems unlikely. The new provision states that for a qualifying subdivision the local government may require only a plat for recordation. The statute itself outlines the standards to qualify for expedited review (as discussed above). It appears unlikely that other subdivision standards may be imposed if the division is a qualifying subdivision under the statutory standards. Note, though, that one of those requirements is that the lots meet zoning requirements, so there may be situations where certain zoning requirements trigger improvements relating to the subdivision. Note, too, that subdivision review is one piece of development regulation. Other ordinances will address development standards and public safety concerns. Just because a landowner is relieved of certain subdivision standards does not mean the landowner gets a free pass on zoning, building code, fire code, public health codes, stormwater standards, or other elements of applicable development regulations.

Application fees. The statute does not state that the local government may charge fees for this review. The language of S.L. 2017-10 says local governments may require only a

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plat for recordation. So arguably a local government could not charge a fee for review of the subdivision application. North Carolina courts, however, have previously allowed that even without express statutory authority local governments may charge reasonable fees to cover the cost of administering a regulatory program, such as subdivision.[11] Given that the expedited review is analogous to a minor subdivision review, it is reasonable to impose a comparable application fee. To be clear, application fees may be permissible for expedited review subdivisions, but exaction fees likely are not. Fees in lieu of road construction, fees in lieu of park creation, and other fees that may be authorized for conventional subdivisions are not allowed for expedited review subdivisions.

Performance Guarantees

Cities and counties have the authority to regulate land subdivision, including requirements for a developer to provide specified infrastructure before final plat approval. In situations where a developer seeks final plat approval before the infrastructure is complete, a local government may accept a performance guarantee to ensure the completion of infrastructure after final plat approval. S.L. 2017-40 (HB 158) limits the parties that may claim rights or proceeds from a subdivision performance bond.

Over the past decade, as communities have recovered from the boom and bust of real estate in the 2000s, performance guarantees have been the subject of litigation in several cases across North Carolina. The General Assembly has added specifications and limits on local government authority for performance guarantees. S.L. 2015-187 defined certain financial instruments that may be used, specified that the developer gets to choose the type of financial instrument, outlined certain procedural matters, and set a cap for performance guarantees of 125 percent of the reasonably estimated cost of completing the unfinished infrastructure. Notably, that law specifically prohibited using performance guarantees for any repairs or maintenance. Now, S.L. 2017-40 sets limits on what parties may claim rights under a performance bond. Under the new law, "No person shall have or may claim any rights under or to any performance guarantee provided pursuant to this subsection or in the proceeds of any such performance guarantee other than the following:

a. The local government to whom such performance guarantee is provided.
b. The developer at whose request or for whose benefit such performance guarantee is given.
c. The person or entity issuing or providing such performance guarantee at the request of or for the benefit of the developer."

Plat Requirements

S.L. 2017-27 (HB 454) alters and clarifies certain standards for subdivision plats. The amended law eliminates the use of control corners in favor of grid control, details the information needed for the plat title and the necessity of a map legend, clarifies options for the surveyor certification on the face of the plat, and tweaks the required qualities and dimensions of plats.

11. *See* Homebuilders Ass'n of Charlotte v. City of Charlotte, 336 N.C 37, 442 S.E.2d 45 (1994).

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Development Fees and Infrastructure Costs

System Development Fees for Water and Sewer Infrastructure

S.L. 2017-138 (HB 436) clarifies authority for cities, counties, and water authorities to charge system development fees (impact fees). The new law applies to all local government entities that own or operate water and/or sewer facilities. Those units of government may charge a "system development fee."

S.L. 2017-138 outlines specific standards for how the fee is to be calculated, the process for how it must be adopted, and when the fee will be assessed against a particular development project. System development fees may be assessed only on new development, not existing development. The new law places restrictions on how the unit of government may spend the fees collected. With the explicit authority for system development fees granted by S.L. 2017-138, there are limitations on the types of other upfront fees a local government or water authorities may charge. Additional details of the new law are discussed in "System Development Fees are the New Impact Fees."[12]

Reimbursements from Critical Infrastructure Special Assessments

In 2008 and 2009, the General Assembly authorized a new tool for local governments to finance infrastructure called special assessments for critical infrastructure needs. This relatively new tool is similar to traditional special assessments in many ways but with important differences. The new critical infrastructure special assessments are allowed for a broader variety of capital projects (including parking facilities; parks and recreation facilities; water, sewer, and stormwater infrastructure; transportation infrastructure; renewable energy facilities; cultural, hospital, and airport facilities; and more). Owners must petition for any project funded by the newer special assessment (under the conventional assessment, a petition is required only to fund streets and sidewalks as well as street lights in counties). Improvements may be constructed up front and then funded through the special assessment. And, funds from a critical infrastructure assessment may be used as security for revenue bonds or as additional security in project development financing. The general authority and procedures for special assessments for critical infrastructure are discussed in "Recent Amendments to Special Assessment Authority," though the procedures have been amended as outlined below.[13]

S.L. 2017-40 (HB 158) adjusts the procedures and limitations for special assessments for critical infrastructure. Upon receipt of a petition for a special assessment for critical infrastructure, the governing board must hold a hearing and adopt a preliminary assessment resolution. The new law outlines topics to be included in the preliminary assessment resolution. The amendments of S.L. 2017-40 make clear that special assessments may be used for all or a portion of the costs of the infrastructure project. Also, the new changes authorize the abeyance of assessments.

S.L. 2017-40 authorizes special assessment funds to be used to reimburse private parties that constructed the infrastructure up front. So, as part of a development project, an owner/developer could petition for a critical infrastructure special assessment, construct a public facility, and then be reimbursed by the special assessments collected on the properties over time.

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12. Kara Millonzi, *System Development Fees are the New Impact Fees*, Coates' Canons: NC Loc. Gov't L. Blog, (Aug. 15, 2017), https://canons.sog.unc.edu/system-development-fees-new-impact-fees.

13. Kara Millonzi, *Recent Amendments to Special Assessment Authority*, Coates' Canons: NC Loc. Gov't L. Blog (Sept. 5, 2013), https://canons.sog.unc.edu/recent-amendments-to-special-assessment-authority.

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Local Bills

Several bills affect individual local government authority on development fees and provision of infrastructure.

Orange and Chatham counties secured local legislation in 1987 to authorize imposition of school impact fees on new developments. S.L. 2017-36 (HB 406) repeals the authority of Orange County to do so, effective June 20, 2017.

S.L. 2017-49 (HB 349) allows Currituck County to enter into agreements with NCDOT for collection and use of fees in lieu of road construction under the county subdivision ordinance.

Building and Housing Code Enforcement

Inspections

S.L. 2017-130 (HB 252) makes various relatively modest changes regarding enforcement of the building code, largely clarifying recent amendments.

One notable new requirement will allow applicants to seek departmental administrative review of individual inspection decisions. The law amends G.S. 153A-352 and 160A-412 to require that each inspection department implement, by December 1, 2017, a process for informal internal reviews of inspection decisions. At a minimum these reviews must include: (1) an initial review by the inspector's supervisor; (2) a listing of the name, phone number, and email address of the supervisor with each permit issued, along with a notice of the availability of the review process; and (3) the procedures the department will follow when a permit holder requests an informal internal review. Beginning in 2018, an annual report of the informal reviews must be made to the legislature by January 15 of each year. The report is to include the number of reviews undertaken and the outcomes of the reviews. The reports can be submitted to city and county organizations for inclusion in a single report submitted on behalf of the organization's members.

This law also clarifies G.S. 153A-352 and 160A-412 to provide that no further certifications of building elements or components are required once certified by a licensed architect or engineer. Also, G.S. 143-140 is amended to provide that if a formal written interpretation of the building code changes after a building permit is issued, the permit applicant can choose which interpretation to follow unless that would cause harm to life or property.

Finally, G.S. 143-138 is amended to add "therapeutic equine facilities" to the farm building exclusion from the building code.

County Unsafe Buildings

S.L. 2017-109 (HB 530) amends G.S. 153A-366 and 153A-368 to extend to counties the same authority previously available to municipalities to deal with unsafe buildings in community development areas, including demolition and removal of the building. The provisions that apply to vacant and abandoned or dilapidated nonresidential buildings may be extended to residential structures if the county adopts an ordinance to do so. When buildings are removed, G.S. 153A-372 is amended to allow the county to place a lien on the property to recover the costs of removal and demolition.

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Local Bills

Publication of notice for housing code enforcement. S.L. 2017-20 (HB 111) allows the City of Winston-Salem to recover the actual cost of service of complaints and orders by publication when needed in housing code enforcement cases and to collect these costs as a lien on the affected property if not paid.

Jurisdiction

No significant changes were made to the General Statutes in 2017 regarding annexation or extraterritorial planning and development regulation jurisdiction. However, the General Assembly did continue its recent trend in making changes in jurisdiction for individual cities.

Specified territory was annexed into the following municipalities: Cornelius (S.L. 2017-70, SB 6), Durham (S.L. 2017-80, SB 266), Fairmont (S.L. 2017-76, SB 105), Indian Beach, with a specification that all structures added to the town are deemed conforming with town zoning (S.L. 2017-51, SB 219), Wake Forest (S.L. 2017-47, SB 260), and Walkertown (S.L. 2017-80, SB 266). Deannexations were made for: Carolina Shores (S.L. 2017-86, HB 397), Garner (S.L. 2017-76, SB 105), Kannapolis (S.L. 2017-84, SB 261), Kinston (S.L. 2017-85, SB 289), and Sunset Beach (S.L. 2017-85, SB 289). Troutman was granted extended extraterritorial jurisdiction for twelve months for an area proposed to be annexed. The charter for Centerville in Franklin County was repealed, dissolving the town (S.L. 2017-43, SB 122).

Miscellaneous Others

Renewable Energy

S.L. 2017-192 (HB 589) makes changes to the state regulations and incentives for renewable energy, such as wind and solar. Among other changes, the new law addresses standard contracts for and rates paid to small renewable energy producers. It outlines the process and standards electric public utilities are to follow in using competitive procurement to meet their renewable energy requirements. Because the new process can take into account geographic diversification, competitive procurement may push for more solar facilities in the central and western parts of the state. (To date, solar development has thrived mostly on flat, inexpensive land in eastern North Carolina.) The new law allows military bases, public universities, and other large consumers of energy to use direct procurement in meeting their renewable energy needs.

Most notably for planning and zoning purposes, S.L. 2017-192 establishes the Distributed Resources Access Act. This new law specifically authorizes net metering, allows for third-party leasing of solar equipment, and requires utilities to establish a subscription-based community solar program. In addition, the new law requires incentive programs for small solar facilities. Over the past several years, utility-scale solar has been the dominant form of solar development in North Carolina. These regulatory changes may drive additional rooftop and small-scale solar development in the state.

In addition to the provisions for solar energy development, S.L. 2017-192 establishes a moratorium on state permits for wind energy facilities through December 31, 2018. In the interim, the General Assembly will study the locations of military operations in the state in order to develop policies to protect and preserve them.

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Environment

S.L. 2017-10 (SB 131) calls on the Department of Environmental Quality (DEQ) to study and report on the appropriate size of and allowable activities in riparian buffers for intermittent streams. In addition, DEQ must study and report about when local governments should be allowed to exceed riparian buffer standards set by the state or federal government as well as measures to ensure that local governments do not exceed their authority for riparian buffers. S.L. 2017-10 also amends rules and requirements for allowable stormwater control measures, long-term erosion rates adjacent to terminal groins, and stream mitigation requirements, among other environmental matters.

Pending for 2018

Zoning Amendments

House Bill 507 includes a variety of amendments to land use regulations sought by segments of the development community. Zoning map amendments could be made only with the written consent of all affected property owners. The denial of permits on grounds that existing public facilities are inadequate to support the development would be prohibited. The use of performance guarantees for subdivision improvements would be modified. A person aggrieved by a failure to comply with the permit choice rule (allowing an applicant to choose between prior or new rules if the rules change after an application is submitted) would be allowed to go directly to court for relief. If a permit is approved, vested rights would commence at the time of application. Judicial review could be initiated without first going through the board of adjustment if the allegation is that the action was unconstitutional, in excess of statutory authority, in violation of vested rights, or a taking. The evidence that could be taken by courts in review of quasi-judicial decisions would be expanded, as would situations where attorney fees can be awarded to litigants. It also would amend the curb cut statute to limit city authority to require right-of-way acquisition.

Sign Regulation

House Bill 688 would clarify that cities can enforce prohibitions on political signs in rights-of-way and state rules on signs in rights-of-way for state roads within a city.

Statutory Reorganization: Proposed 160D

In 2014, the Zoning, Planning, and Land Use Section of the North Carolina Bar Association initiated an effort to modernize the framework of the state's enabling statutes for planning and development regulation. This proposal was developed in a very open process, with drafts of the proposals being shared and discussed at length with city and county attorneys, attorneys who represent development interests, zoning officials, planning officials, and various organizations interested in the topic (including the League of Municipalities, the County Commissioners Association, the North Carolina Association of Zoning Officials, the Home Builders Association, and others). The proposal was introduced in the 2015 session of the General Assembly as House Bill 548. That bill was discussed but not adopted.

In 2017, an updated and refined version of the proposal was introduced in the General Assembly as Senate Bill 419. The bill was unanimously approved by the Senate on June 28, 2017, and is eligible for consideration by the House in 2018.

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Senate Bill 419 consolidates and reorganizes the current planning and development regulation statutes as well as clarifies and modernizes the statutory language. The principal changes are to consolidate current city and county enabling statues now in Chapters 153A and 160A into a single, unified new Chapter 160D of the General Statutes and to place these statutes into a more logical, coherent organization. Having uniform, consistent authority, definitions, and procedures for cities and counties, while retaining broad substantive policy discretion for individual jurisdictions, has been the goal of this initiative.

While not making major policy changes or shifts in the scope of authority granted to local governments, Senate Bill 419 also includes a number of consensus modest reforms in the statutes. These are listed below by proposed Chapter 160D sections.

1-2. Provides clarity by adding definitions for many commonly used terms that are not defined in the statutes. For example, it distinguishes a "legislative hearing" from an "evidentiary hearing" rather than use the generic term "public hearing." Provides for the use of uniform and consistent terminology for the 500-plus local jurisdictions with zoning and development regulations.

1-4. Explicitly provides that development approvals run with and be attached to the land, as uniformly practiced but not explicitly stated in the statutes.

1-5. Allows officially adopted floodplain rate maps and watershed boundary maps, including updates, to be incorporated by reference into zoning maps, saving time and money for all concerned. Clarifies that digital maps can be used. Specifies record keeping for the official version of adopted maps.

1-8. Confirms administrative process to claim a vested right, while allowing the claim to be brought initially in court if the claimant so desires. In addition to state statutory vested rights, which are unchanged, establishes a default, one-year life for local permits if no other time is set in the ordinance. Eliminates the "phased development plan" as redundant to the subsequently enacted and longer lasting multi-phase development plan vested right.

1-9. Clarifies conflict-of-interest provision, setting limits on participation by board members and staff in decisions where a close relationship to the applicant would require it. Defines a "close familial relationship" that is subject to conflict-of-interest limits. Clarifies that the remaining board members rule on any objection to participation, not just in quasi-judicial cases.

2-2. Provides that if a city does not exercise all of its regulatory authority within an established extraterritorial planning jurisdiction, the county has the option of applying its regulations there.

2-3. Allows cities and counties, with landowner approval, to agree on a single jurisdiction for the regulation of parcels with split jurisdiction.

2-4. Allows hearings and permit processing, but not decisions, to proceed in anticipation of a shift in regulatory jurisdiction between cities and counties. Allows assumption of jurisdiction and application of development regulations to take place simultaneously.

3-1. Modernizes potential duties of planning boards, including facilitation of citizen engagement. Clarifies use of advisory comments from other boards on quasi-judicial matters.

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3-2. Confirms that requirements for the quasi-judicial process apply to any board making a quasi-judicial decision.

3-7. Simplifies hearing notice requirements for county commissioners' appointment of extraterritorial members of municipal boards.

3-8 to 3-10. Confirm that appointed boards can have rules of procedure, that members must take an oath of office, and that members are appointed by the city or county governing board unless otherwise specified.

Article 4. Establishes administrative provisions applicable for all development regulations using a generalized version of administrative provisions currently in the building code part of existing statutes. Retains any specific administrative provisions contained in the Articles addressing individual types of development regulation.

4-3. Simplifies and clarifies permit administration by specifying who can make applications. Requires identification of who makes final, binding administrative decisions. Specifies the process for permit modification and revocation. Expressly allows certificates of compliance/occupancy.

4-5. Clarifies that where otherwise authorized by law, appeals of administrative decisions that challenge the validity of an ordinance may be taken directly to court without petitioner having to first appeal to the board of adjustment.

4-6. Clarifies staff requirements for the production of materials to be provided to boards of adjustment and the parties prior to evidentiary hearings and clarifies the process for making and resolving any objections to what is to be included in these materials. Clarifies that only entities with standing have a right to participate as a party in evidentiary hearings, but the board may allow others to present competent, material evidence that is not repetitive. Clarifies how objections on evidentiary questions are resolved.

5-1. Requires jurisdictions to have a plan in order to apply zoning (phased in for the few jurisdictions without plans). Specifies process for plan adoption and amendment (similar to the existing process for rezonings). Notes permissive (but not mandatory) plan elements. Confirms that plans are advisory in nature with no independent regulatory effect.

5-3. Confirms that jurisdictions may coordinate their planning.

6-2. Clarifies time period for posting notices of hearings on proposed legislative amendments, using the same time period required for mailed notices. Allows combined notice and hearing on proposed changes in local government jurisdiction and amendment of applicable development regulation. Clarifies requirements regarding optional notice of proposed amendments to neighboring property owners.

6-4. Clarifies that ordinances can require advisory review by the planning board of ordinances other than for zoning. Simplifies plan consistency statements when multiple properties are proposed to be rezoned.

6-5. Limits governing board statement of reasonableness requirement to zoning map amendments. Explicitly allows combined plan consistency and reasonableness statement. Simplifies statements when multiple properties are proposed for rezoning.

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7-3. Adds clarity by using uniform terminology—“conditional zoning” for legislative actions and “special use permits” for quasi-judicial decisions. Simplifies processes by eliminating use of concurrent legislative rezoning and quasi-judicial conditional use permits. Allows legislative conditional zoning and quasi-judicial special use permits, just not as a single process. Allows option of administrative process for minor modification of conditional districts. Clarifies that regulations can be organized based on the physical form of structures built as well as on land uses allowed. Confirms that standards can be applied jurisdiction-wide.

7-5. Clarifies that cities and counties can define and authorize staff to approve applications for minor modifications to special use permits administratively.

Article 9. Consolidates in a single location existing provisions regulating individual land uses and areas that are currently scattered in various Chapters of the statutes.

9-47. Expedites appeals on certificates of appropriateness decisions made by the historic district commission by allowing (but not requiring) ordinances to provide for direct appeal to superior court, as is done with other quasi-judicial decisions.

10-5. Simplifies use of development agreements by reducing the list of their mandated contents. Clarifies process for voluntary provision of public facilities and cost-sharing if beyond permissible mandatory exactions.

10-8. Clarifies enforcement provisions in the event of a breach of a development agreement.

12-3. Establishes a uniform process for addressing abandonment of the intent to repair dwellings rather than have similar but varying processes for different-sized cities.

Article 13. Makes provisions regarding community development the same for cities and counties (which is generally but not uniformly the case with existing law). Retains substantive distinctions, such as authorizing only some projects in downtown areas.

14-2. Clarifies that persons with quasi-judicial approvals that have been appealed to court may proceed with development unless a party seeks and secures a judicial stay. Clarifies that appeals of legislative and quasi-judicial decisions may be joined on appeal.

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