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2018 North Carolina Legislation Related to Planning and Development Regulation

Adam S. Lovelady and David W. Owens

The 2018 session of the North Carolina General Assembly convened on May 16, 2018, and adjourned on June 29. The Assembly will reconvene on November 27. The relatively brief 2018 session considered budget amendments, bills that passed one but not both houses of the legislature in 2017, bills from study committees, constitutional amendment proposals, and various other matters deemed appropriate by the legislative leadership. A list of the bills related to planning and development regulation that were eligible for consideration, including actions taken on them, and links to copies of key bills and enacted legislation are available at the School of Government's Planning and Development microsite, https://www.sog.unc.edu/resources/microsites/planning-and-development-regulation/2018-bill-list.

Zoning

No major changes were made to the zoning enabling statutes in 2018. However, several modest refinements were made that affect zoning.

Costs for Street Improvements Related to Schools

The 2018 budget act, Session Law (S.L.) 2018-5 (SB 99), amends the municipal zoning statutes to limit the use of zoning to address street capacity issues related to schools. Section 160A-383(d) of the North Carolina General Statutes (hereinafter G.S.) is amended to add a provision that a city may not deny a "zoning or rezoning request" for a school based on consideration of the level of service of a road abutting or near the school.

G.S. 160A-307.1 is amended to provide that no "zoning, rezoning, or permit request" may be conditioned upon waiving or reducing the limits set forth in that section on imposing road improvement costs on schools. G.S. 160A-307.1 says a city's requirements for street improvements related to schools can only address safe ingress and egress from the school. It further provides that curb cut regulations do not apply to schools, that the subdivision statute limits on exactions for street improvements apply to schools, that a school cannot be required to

Adam S. Lovelady is associate professor of public law and government at the School of Government. David W. Owens is Gladys H. Coates Distinguished Professor of Public Law and Government at the School of Government. Both specialize in land use planning and regulation.

acquire right-of-way unless the school has condemnation authority, and the city must reimburse the school for the cost of any improvement to city streets. Those limits apply to any school providing instruction of any grade from kindergarten through the twelfth grade, including public, parochial, and charter schools. S.L 2018-97 (SB 335), the budget technical corrections act, temporarily repealed this amendment to G.S. 160A-307.1, but shortly thereafter, S.L. 2018-114 (HB 374) repealed that repeal, thus reverting to the amendment as originally worded in S.L. 2018-5. These limitations were made effective retroactively to August 1, 2017.

Temporary Food at Agritourism Activity

S.L. 2018-114 (HB 374) amends G.S. 130A-247 to allow local health departments to issue permits to temporary food establishments associated with agritourism, such as food trucks and stands. Previously the law allowed temporary permits for establishments operating at fairs, carnivals, circuses, and festivals. These permits can be for up to 30 days with a 15-day extension allowed. It should be noted that this law addresses only the health permit requirement and does not affect the food establishment's need to comply with local zoning regulations on the use served by the temporary food establishment (to the extent those uses are not exempt as farm uses in counties and municipal extraterritorial areas).

Local Bill on Planning Boards Adoption of Rezonings

S.L. 2018-124 (HB 509) allows Davidson County to delegate rezoning decisions to the planning board provided an appeal to the governing board is also allowed. This was done in 2017 for 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.

As with the earlier authorizations, this bill gives the county board of commissioners the option of delegating rezoning approval to the planning board. If delegated, the planning board conducts the mandatory public hearing and decides the proposed zoning map amendment and approves the required planning consistency statement. A person with standing then has 15 days to appeal the decision to the board of commissioners. If an appeal is made, the county board conducts a new hearing and makes a new decision on the proposed amendment. The ordinance may require the person making the appeal to pay the costs of the new hearing. If no appeal is made, the matter "may" be placed on the consent agenda of the next county board meeting for discussion or action.

This last provision is somewhat ambiguous, as the statute says the planning board action is a "final decision" absent an appeal to the board of commissioners. Apparently, if the ordinance does not require placing the matter on the commissioner's consent agenda, the rezoning is final once the 15-day appeal period ends, but if the ordinance does provide for placing the matter on the commissioners' consent agenda, the rezoning would likely not be effective until the board of commissioners approved the item.

Legislation Not Enacted in 2018

Two bills that were considered but not enacted merit attention because the sponsors of both have stated that they intend to pursue some if not all of the bills' provisions during the 2019 session.

Miscellaneous Zoning Modifications

House Bill 507 included a variety of amendments to land use regulations sought by segments of the development profession, primarily the North Carolina Homebuilders Association. Third-party rezonings, those proposed by someone other than the land owner or the local government, could be made only with the written consent of all affected property owners. Zoning approvals could not be denied because existing public facilities are inadequate to support the development.

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 commence at the time of application.

Judicial review of a zoning decision could be initiated without going through the board of adjustment if the allegation is that the action was unconstitutional, in excess of statutory authority, violates vested rights, or is a taking. The evidence that could be taken by courts in their review of quasi-judicial decisions would be expanded, as would situations where attorneys' fees could be awarded to litigants. The curb cut statute would be amended to limit city authority to require right-of-way acquisition.

Reorganization and Modernization of the Development Regulation Statutes

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 an open process: drafts of the proposals were 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 Home Builders Association, and others). The proposal was introduced in the 2015 session of the General Assembly as House Bill 548. A house committee approved the bill and a study of it was authorized by the house, but no action was taken in the senate. In 2017 an updated and refined version of the proposal was introduced as Senate Bill 419. It was unanimously approved by the senate but was not considered by the house.

The bill would consolidate and reorganize the current planning and development regulation statutes as well as clarify and modernize the statutory language. The principal changes would consolidate current city and county enabling statues now in Chapters 153A and 160A into a single, unified new Chapter 160D and organize these statutes in a more logical, coherent whole. While it would not result in major policy changes or shifts in the scope of authority granted to local governments, the bill included a large number of clarifying amendments and consensus reforms.

Subdivision Changes

Legislation Not Enacted

House Bill 507, which passed the house in 2017 and was considered by the senate in 2018, included, among other changes, proposed amendments to the land subdivision statutes. It is likely that these or similar provisions will be introduced again in the 2019 legislative session.

The proposed changes would give developers greater flexibility and control related to subdivision performance guarantees. A developer could provide the guarantee at the time of plat recordation or some time after recordation. A developer would also be able to determine the term of the guarantee and that of any extension. In addition, a developer would have discretion to reduce the amount of the guarantee to reflect the work remaining. Under House Bill 507, a developer could choose to have the guarantee amount determined by a licensed architect or registered engineer, and that estimate would be conclusive. A developer could also choose to provide one bond or multiple bonds for all related performance guarantees.

Development Fees and Infrastructure Costs

Permitting Fees

A 2015 North Carolina law requires that fees collected by the local inspections department must stay with that department. A 2018 law requires local finance officers to report to the Local Government Commission the revenues and expenditures from building inspections. The basic statutory language of each rule is straightforward, but in practice the meaning and scope are less clear.

To understand the scope of the provisions for fees, one must first know how laws authorizing local government development regulations are structured within the General Statutes. The principal authorities for development regulations are outlined in Article 18 of Chapter 153A for counties and Article 19 of Chapter 160A for municipalities. Each of those articles is broken into parts covering distinct topics, such as subdivision regulation (Part 2), zoning (Part 3), and minimum housing standards (Part 6).

The authority for administering all of the different development regulations is outlined in the part titled "Building Inspection" (G.S. Chapter 153A, Article 18, Part 4 and Chapter 160A, Article 19, Part 5). The core of this part pertains to local administration of the North Carolina State Building Code, but the grant of authority is much broader. These parts within the General Statutes are where cities and counties get authority for processing the variety of development permit applications; making inspections for the building code, zoning ordinance, and housing code compliance; issuing orders to correct violations; bringing judicial action for enforcement; and other administrative duties related to land development regulations.

Under the administrative powers outlined in the statutes, cities and counties are authorized to "fix reasonable fees for issuance of permits, inspections, and other services of the inspection department" (G.S. 153A-353 and 160A-414). Because of the structure and language of the statutes, the "permits, inspections, and other services of the inspection department" is a broad category that may include zoning, housing code, and other permitting, in addition to building code permits.

Two recent changes to state law affect the accounting for and reporting of permitting fees. In 2015 the General Assembly amended the statutes concerning permitting fees to specifically state: "All fees collected under the authority set forth in this section shall be used for support of the administration and activities of the inspection department and for no other purpose" (G.S. 153A-354 and 160A-414; S.L. 2015-145). In 2018, the General Assembly used the state budget bill, S.L. 2018-5, to add new requirements for reporting permitting fees and expenses to the Local Government Commission. Under the new requirement, "the finance officer of each city

and county shall include in the statement the total revenues received from building inspections, by type, and the total expenditures paid from all revenues received, by type."

As discussed more fully in a Coates' Canons blog post on the topic ("Administering Development Regulations and Accounting for Permitting Fees"), the exact scope of the accounting and reporting requirements are not clear. It is prudent under this law for a local government to account for the fees and expenditures related to all development regulation permitting. Under the statutory requirement and applicable case law, permitting fees must be based on a reasonable estimate of the cost of administration. Those fees must go toward the cost of permitting functions. For the new financial reporting, the statutory language and legislative context indicate that this is limited to building code permitting fees. There is some ambiguity, though, as to whether other permitting fees must be reported.

Water and Sewer Impact Fees

In 2017 the General Assembly authorized system development fees—impact fees for water and sewer providers—in SL 2017-138 (HB 436). The law, which was codified at G.S. Section 162A-200 *et seq*., outlined specific standards for how the fee must be calculated, the process for adoption, and when the fees can be assessed. The new law placed restrictions on how the unit of government may spend the fees collected. Kara Millonzi discusses the standards and procedures for system development fees in her post "System Development Fees are the New Impact Fees" on the Coates' Canons blog.

S.L. 2018-34 (HB 826) amends the 2017 law to clarify the timing for collecting fees. Under the revised law, fees for a subdivision are collected at the later of (1) plat recordation or (2) when water or sewer service is committed. For a development other than a subdivision, fees are collected at the earlier of (1) application for connection or (2) when water or sewer service is committed. The new law also modestly adjusts the accounting requirements for system development fees. In addition, the time horizon for calculating capital improvements necessitated by the development is now between 5 and 20 years (it was 10 to 20 years). Kara Millonzi discusses the revisions to the system development fee authority in her Coates' Canons blog post "2018 System Development Fee Law Changes."

Building and Housing Code Enforcement

S.L. 2018-29 (HB 948) made several statutory changes to speed up the process of building code inspections. The law created a pool of inspectors available to make inspections if the local government is not able to complete an inspection quickly, established provisions to allow more inspectors at the local level, and clarified requirements related to licensed architects and engineers to certify certain building components.

Department of Insurance Pool of Inspectors.

Section 2 of S.L. 2018-29 creates a process for the Department of Insurance to create and assign a pool of inspectors.

As part of this new system, local governments must document inspection requests. Each local inspection department must maintain a record of each inspection request that includes the date and time received, type of inspection, address of inspection, person to whom request directed, and name of the requestor. The local department may inform the requestor that inspection

cannot be performed within two business days. For calculating time, a request received after noon is deemed to be received on the next business day.

The department of insurance will establish a pool of qualified State Building Code–enforcement officials. If inspection is not completed by a local department within two business days of being requested, the permit holder may then make a written request to the insurance commissioner asking that an inspector from the pool be assigned to complete the request. The submission form is specified by statute and includes information about identification, permit documentation, and timing of the request.

Prior to assigning an inspector from the pool, the insurance department must verify that the permit holder wants the inspection to be completed; that the local department received a request for inspection; that the inspection has not been completed (and the reason why); and other information the commissioner may deem relevant.

The commissioner will inform the local inspection department if a pool inspector will be assigned. Upon receiving such notice, the local department is to provide information regarding outstanding building permits and previously conducted inspections related to them (similar information for other projects by the same permit holder or requestor also may be provided). The commissioner will charge a fee, and the local inspections department must reimburse any fees charged on inspections that were not completed. Within one business day of receipt, the commissioner is to forward the pool inspector's report to the local inspection department, the permit holder, and the requestor if different from permit holder.

Additional Local Inspectors

Section 5 of S.L. 2018-29 authorizes local governments to establish mutual aid contracts for assistance in the administration and enforcement of the State Building Code as now outlined at G.S. 160A-413.6 and 153A-353.1.

North Carolina already recognizes comity for certified building inspectors from other states. Section 7 of S.L. 2018-29 adds language to G.S. 143-151.14 to extend that comity to inspectors certified by the International Code Council. In addition, all inspectors working under a comity certificate are now required to be in good standing with their certifying board and to take short-course training in North Carolina within three years of obtaining the North Carolina certificate.

Clarification for Alternative Inspections for Components

In 2015 the General Assembly adopted S.L. 2015-145 (HB 255) that amended G.S. 153A-352 and 160A-412 to allow licensed architects and engineers to certify that building components meet standards of the State Building Code. Under that law, no city or county inspection is required for a building component if certain criteria are met: one, the design is completed under the valid seal of a licensed architect or engineer; two, field inspection is performed by a licensed architect or engineer or a person under their direct supervision; and, three, a signed written statement from the licensed architect or engineer that the component is compliant with the North Carolina Residential Code for one- and two-family dwellings.

This year those provisions were amended by section 1(a) of S.L. 2018-29. The language is re-codified as G.S. 160A-413.5, and counties are now authorized under G.S. 153A-352. Under the new provisions, the inspection certification from the licensed architect or engineer is provided by electronic or physical delivery. The city/county must confirm receipt through reciprocal means. The amendment makes clear that the local government and inspectors are

released from liability for the inspection. In addition, the amendment defines "component" and "element," clarifying that components and elements are not "systems."

Jurisdiction

No significant changes were made in 2018 to the General Statutes regarding annexation or extraterritorial planning and development regulation jurisdiction. The General Assembly did, however, continue its recent trend of making changes in jurisdiction for individual cities.

Specified territory was annexed into Apex (S.L. 2018-53, HB 930). Specified territory was removed from the corporate limits of Kinston (S.L. 2018-54, HB 942), Hendersonville (S.L. 2018-109, SB 776), Mineral Springs (S.L. 2018-122, SB 802), Mooresville (S.L. 2018-55, HB 946), and Winston-Salem (S.L. 2018-57, HB 971). Specified property was transferred from one city to another by three laws: transfers from Black Mountain to Montreat (S.L. 2018-108, SB 775), Hamby Bridge to Stallings (S.L. 2018-58, HB 978), and Wrightsville Beach to Wilmington (S.L. 2018-107, SB 566).

The limit that satellite annexation areas can be no more than 10% of the land area within primary corporate limits was removed for Carthage and Pollocksville (S.L. 2018-56, HB 950). As of this writing, 107 municipalities are exempted from this limit. Annexation agreements between private landowners and the municipality were authorized for Eden (S.L. 2018-18, HB 955 and S.L. 2018-19, SB 956)).

Finally, two laws make modest adjustment of county boundary lines. The Alamance-Guilford boundary is adjusted by S.L. 2018-61 (HB 1076), and the tri-county corner boundary for Wake, Chatham, and Harnett counties is adjusted by S.L. 2018-62 (HB 1082). Both laws include transition provisions for any property changing to a different county.

Miscellaneous Others

Transportation

The budget act (S.L. 2018-5) also extended for another year the moratorium on adoption of any new transportation corridor official maps, now extending to July 1, 2019. The act also requires the N.C. Department of Transportation to submit a report to the General Assembly every 60 days (beginning September 1, 2018) on the total number of claims for compensation for property damages due to the recording of official maps under this law, the number of claims settled, the costs of settled claims, and the attorneys' fees incurred by contracted counsel.

Environment

S.L. 2018-114 (HB 374), a regulatory reform bill, made a number of adjustments to state environmental laws. It directs the Environmental Management Commission to review local government stormwater programs to determine which local governments have standards that exceed state minimum requirements. It modestly relaxes Coastal Area Management Act restrictions on permit renewals for certain existing erosion-control structures. It provides that impervious surface limits are deemed to be met for coastal subdivisions recorded more than 20 years ago if the original stormwater permit has been transferred to the homeowners' association with no intervening notice of noncompliance.

The budget act (S.L. 2018-5) also includes several special provisions related to environmental programs associated with planning and development regulation. Implementation of the 2009 Jordan Lake rules and 2011 Falls Lake rules for nutrient and phosphorous reduction are delayed for an additional year. Funding is restored to the landslide hazard mapping program for western North Carolina.

Finally, the protection of agricultural operations from nuisance suits is significantly expanded by S.L. 2018-113 (SB 711). This amendment was prompted by several recent successful nuisance actions brought by neighbors against large-scale hog operations. Since 1979 North Carolina has had a "Right to Farm" law that protects existing farms from nuisance claims by neighbors who move to land near them. The law has always provided that if there is a substantial change in farm use that harms neighbors' property, the changed operation is subject to nuisance laws. This amendment provides that a nuisance suit must be brought within the first year of operation of a farm or within a year of a fundamental change in its operation. It then provides that a change in the size of the farm or a change in the type of agricultural product being raised is not a "fundamental change" in the existing farm. Thus, for example, if large-scale hog operations were added to a farm that has operated for over a year growing field crops, the hog operations would also be shielded from nuisance suits.