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Short Title: Land-Use Regulatory Changes. (Public)

Sponsors:

Referred to:

April 2, 2015

A BILL TO BE ENTITLED

AN ACT TO MAKE CHANGES TO THE LAND-USE REGULATORY LAWS OF THE STATE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 160A-385 reads as rewritten:

". . .

(b) Amendments in land development regulations, as defined in G.S. 160A-400.21(6), including, zoning ordinances or unified development ordinances, shall not be applicable or enforceable without the written consent of the owner with regard to ~~buildings and uses~~buildings, uses, or developments for which ~~either~~either: ~~(i) building permits have been issued pursuant to G.S. 160A-417 prior to the enactment of the ordinance making the change or changes so long as the permits remain valid and unexpired pursuant to G.S. 160A-418 and unrevoked pursuant to G.S. 160A-422 or (ii) a vested right has been established pursuant to G.S. 160A-385.1 and such vested right remains valid and unexpired pursuant to G.S. 160A-385.1.~~

(1) A zoning permit, which includes, but is not limited to, a site plan approval, a special exception permit, or any other permit or approval given under the authority of Article 19 of Chapter 160A of the General Statutes that authorizes the use of land, has been issued.

(2) A building permit has been issued pursuant to this Chapter, when the applicable application for either such zoning or building permit was submitted in accordance with G.S. 143-755 prior to the change in the development regulations so long as either permit remains valid and unexpired pursuant to law.

Amendments shall also not be applicable or enforceable without the written consent of the owner if a vested right has been established pursuant to G.S. 160A-385.1 and such vested right remains valid and unexpired or if a vested right is established by the terms of a development agreement authorized by Part 3D of this Article.

(b1) For purposes of this section, a multi-phased development shall be considered vested for the entire development with the land development regulations then in place at the time of application for the initial phase so long as the developer notifies the approving authority in the application that it is a multi-phased project."

SECTION 2. G.S. 153A-344 reads as rewritten:

". . .

(b) Amendments in land development regulations, as defined in G.S. 153A-349.2(6), including, zoning ordinances or unified development ordinances, shall not be applicable or enforceable without the written consent of the owner with regard to ~~buildings and uses~~buildings, uses, or developments for which either: ~~either (i) building permits have been issued pursuant to G.S. 153A-357 prior to the enactment of the ordinance making the change or changes so long as the permits remain valid and unexpired pursuant to G.S. 153A-358 and unrevoked pursuant to G.S. 153A-362 or (ii) a vested right has been established pursuant to G.S. 153A-344.1 and such vested right remains valid and unexpired pursuant to G.S. 153A-344.1.~~

(1) A zoning permit, which includes, but is not limited to, a site plan approval, a special exception permit, or any other permit or approval given under the authority of Article 18 of Chapter 153A of the General Statutes that authorizes the use of land, has been issued.

(2) A building permit has been issued pursuant to this Chapter, when the applicable application for either such zoning or building permit was submitted in accordance with G.S. 143-755 prior to the change in the development regulations so long as either permit remains valid and unexpired pursuant to law.

Amendments shall also not be applicable or enforceable without the written consent of the owner if a vested right has been established pursuant to G.S. 153A-344.1 and such vested right remains valid and unexpired or if a vested right is established by the terms of a development agreement authorized by Part 3A of this Article.

(b1) For purposes of this section, a multi-phased development shall be considered vested for the entire development with the land development regulations then in place at the time of application for the initial phase so long as the developer notifies the approving authority in the application that it is a multi-phased project."

SECTION 3. Part 3 of Article 19 of Chapter 160A of the General Statutes is amended by adding a new section to read:

"**§ 160A-393.1. Civil action for declaratory relief, injunctive relief, or other remedies.**

(a) Action for Relief Authorized. – Any landowner, permit applicant, or tenant aggrieved by a final and binding decision of an administrative official involving the application or enforcement of a city or county zoning or unified development ordinance or any other ordinance that regulates land use or development may, in lieu of an appeal to a board of adjustment prescribed by Chapter 153A or Chapter 160A of the General Statutes, maintain an original action in superior court or business court for declaratory relief, injunctive relief, damages, or any other remedies provided by law or equity, where any of the following claims or defenses are asserted by the aggrieved party:

(1) Constitutional matters.

(2) That the applicable ordinance is invalid or otherwise unenforceable.

(3) Ultra vires actions.

(4) Preemption, including G.S. 160A-174(b).

(5) 42 U.S.C. § 1983.

(6) Common law or statutory vested rights.

(7) Inverse condemnation.

In any action brought pursuant to this subsection and notwithstanding G.S. 160A-393, the aggrieved party may, in addition to the matters listed above, assert any other claims or defenses involving, arising from or relating to the application or enforcement of the ordinance, including without limitation claims or defenses relating to interpretation of the ordinance.

(b) Burden of Proof.- The burden of proof to show a violation of a city or county zoning or unified development ordinance or any other ordinance that regulates land use or development rests with the party seeking to enforce such ordinance.

(c) Time for Filing of Action. – Such action shall be filed within one year after the later of the following occurrence: (i) notice of the decision as provided in G.S. 160A-388(b1)(2) or (ii) where a taking of property is alleged by the aggrieved party, the final decision of a board of adjustment denying a variance has been delivered as provided in G.S. 160A-388(e2)(1), whenever the context makes the granting of such variance discretionary and not prohibited.

(d) Means for Obtaining Relief. – Except for exhausting the administrative remedy of a variance, if applicable, as provided in this section, once the aggrieved party selects an appeal to a board of adjustment as provided in G.S. 160A-388(b1) and the prescribed hearing proceeding is concluded, such procedures, including an appeal thereafter in G.S. 160A-393, shall be the exclusive means for obtaining relief as to the merits of the city or county enforcement action or administrative decision being challenged. Nothing herein shall preclude any other procedure authorized by law for claims arising under 42 U.S.C. § 1983."

SECTION 4. G.S. 160A-364.1(c) reads as rewritten:

"(c) Nothing in this section or in G.S. 1-54(10) or G.S. 1-54.1 shall bar a party in an action involving the enforcement of a zoning or unified development ordinance or in an action authorized by G.S. 160A-393.1 from raising as a claim or defense ~~to such enforcement action~~ in such proceedings the invalidity of the ordinance. Nothing in this section or in G.S. 1-54(10) or G.S. 1-54.1 shall bar a party who files a timely appeal from an order, requirement, decision, or determination made by an administrative official contending that such party is in violation of a zoning or unified development ordinance from raising in the appeal the invalidity of such ordinance as a defense to such order, requirement, decision, or determination. A party in an enforcement action or appeal may not assert the invalidity of the ordinance on the basis of an alleged defect in the adoption process unless the defense is formally raised within three years of the adoption of the challenged ordinance."

SECTION 5. G.S. 160A-393 reads as rewritten:

"**§ 160A-393. Appeals in the nature of certiorari.**

…

(j) Hearing on the Record. – The court shall hear and decide all issues raised by the petition by reviewing the record submitted in accordance with subsection (h) of this section. Except that the court may, in its discretion, allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is not adequate to allow an appropriate determination of the following issues:

(1) Whether a petitioner or intervenor has standing.

(2) Whether, as a result of impermissible conflict as described in G.S. 160A-388(e)(2), or locally adopted conflict rules, the decision-making body was not sufficiently impartial to comply with due process principles.

(3) Whether the decision-making body erred for the reasons set forth in sub-subdivisions a. and b. of subdivision (1) of subsection (k) of this ~~section.~~section, including an error related to the claims or defenses in subdivision (k)(4) of this section.

(k) Scope of Review. –

(1) When reviewing the decision of a decision-making board under the provisions of this section, the court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:

a. In violation of constitutional provisions, including those protecting procedural due process rights.

b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.

c. Inconsistent with applicable procedures specified by statute or ordinance.

d. Affected by other error of law.
e. Unsupported by substantial competent evidence in view of the entire record.
f. Arbitrary or capricious.

(2) When the issue before the court is whether the decision-making board erred in interpreting an ordinance, the court shall review that issue de novo. The court shall consider the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate.

(3) The term "competent evidence," as used in this subsection, shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if (i) the evidence was admitted without objection or (ii) the evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the decision-making board to rely upon it. The term "competent evidence," as used in this subsection, shall not be deemed to include the opinion testimony of lay witnesses as to any of the following:
a. The use of property in a particular way would affect the value of other property.
b. The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.
c. Matters about which only expert testimony would generally be admissible under the rules of evidence.

(4) The petitioner may assert and the court shall determine de novo, based on the record in subsection (j) of this section, any of the following claims or defenses:
a. Constitutional matters.
b. That the applicable ordinance is invalid or otherwise unenforceable.
c. Ultra vires actions.
d. Preemption, including G.S. 160A-174(b).
e. 42 U.S.C. § 1983.
f. Common law or statutory vested rights.

(5) In order to raise any of the claims or defenses listed in subdivision (4) of this subsection, to the extent that they do not involve some act of the decision-making board itself or any of its members, the claim or defense shall be made known to the decision-making board at the hearing.

…."

SECTION 6. Part 3 of Article 19 of Chapter 160A of the General Statutes is amended by adding a new section to read:

"**§ 160A-393.2. No estoppel effect when challenging unlawful conditions.**

No landowner or permit applicant shall be precluded from timely challenging any unlawful condition imposed on a development as part of the application of land development regulations as defined in G.S. 160A-400.21(6) as a result of actions by the landowner or permit applicant to proceed with the development or use and a local government shall not be authorized to raise estoppel, waiver, release, or acceptance or other similar grounds as a defense to such challenge. This section shall not apply to rezoning decisions."

SECTION 7. G.S. 6-21.7 reads as rewritten:

"**§ 6-21.7. Attorneys' fees; cities or counties acting outside the scope of their authority.**

In any action in which a city or county is a party, upon a finding by the court that the city or county ~~acted outside the scope of its legal authority,~~violated a statute or case law setting forth unambiguous limits on its authority, the court ~~may~~shall award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's ~~action, provided that if the court~~

~~also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs.~~action. In all other matters, the court may award reasonable attorneys' fees and costs to the prevailing private litigant."

SECTION 8. G.S. 160A-372 reads as rewritten:

". . .

(c) The ordinance may provide for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with municipal plans, policies, and standards. To assure compliance with these and other ordinance requirements, the ordinance may provide for performance guarantees ~~to assure successful completion of required improvements~~ either at the time the plat is recorded as provided in subsection (b) of this section or at a time subsequent to the recording of the plat, but prior to the issuance of a permit pursuant to G.S. 160A-417(a)(1), to assure successful completion of required improvements. In the event a city fails to adopt an ordinance setting forth performance guarantees in compliance with subsection (g) of this section, a city shall not be authorized to require the successful completion of required improvements prior to a plat being recorded. For any specific development, the type and term of performance ~~guarantee~~ guarantee, or any extension of the performance guarantee, shall be at the election of the ~~developer.~~developer provided that any performance guarantee or extension be available to assure the successful completion of improvements for which it is required. The developer shall be allowed, without limitation, to reduce the amount of the performance guarantee to reflect only the remaining incomplete items.

. . .

(g) For purposes of this section, all of the following shall apply with respect to performance guarantees:

(1) The term "performance guarantee" shall mean any of the following forms of guarantee:
   a. Surety bond issued by any company authorized to do business in this State.
   b. Letter of credit issued by any financial institution licensed to do business in this State.
   c. Other form of guarantee that provides equivalent security to a surety bond or letter of credit.

(2) The performance guarantee shall be returned or released, as appropriate, in a timely manner upon the acknowledgement by the city or county that the improvements for which the performance guarantee is being required are complete. If the improvements are not complete and the current performance guarantee is expiring, the performance guarantee shall be extended, or a new performance guarantee issued, for an additional period until such required improvements are complete. A developer shall demonstrate reasonable, good faith progress toward completion of the required improvements that are the subject of the performance guarantee or any extension. The form of any extension shall remain at the election of the developer.

(3) The amount of the performance guarantee shall not exceed one hundred twenty-five percent (125%) of the reasonably estimated cost of completion at the time the performance guarantee is issued. Any extension of the performance guarantee necessary to complete required improvements shall not exceed one hundred twenty-five percent (125%) of the reasonably estimated cost of completion of the remaining incomplete improvements still outstanding at the time the extension is obtained. At the election of the developer, the one hundred twenty-five percent (125%) of the reasonably estimated cost of completion may be conclusively determined by a report provided under seal by an architect licensed under the provisions of Chapter 83A of the General Statutes or an

engineer registered under the provisions of Chapter 89C of the General Statutes. This report may contain unit pricing information provided by a general contractor, licensed under Chapter 87 of the General Statutes, or any other competent source which the architect or engineer certifies, under seal, as accurate. The reasonably estimated cost of completion shall include all costs of inflation and costs of administration and enforcement, no matter how such related fees or charges are denominated.

(4) The performance guarantee shall only be used for completion of the required improvements and not for repairs or maintenance after completion.

(5) The developer shall have the option to post one form of a performance guarantee as provided for in subdivision (1) above, in lieu of multiple bonds, letters of credit or other equivalent security, for all development matters related to the same project requiring performance guarantees, including, without limitation, subdivision, erosion control, and storm water.

(6) No person shall have or may claim any rights under or to any performance guarantee provided pursuant to this subsection or in or to 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."

SECTION 9. G.S. 153A-331(e) reads as rewritten:

"(e) The ordinance may provide for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with county plans, policies, and standards. To assure compliance with these and other ordinance requirements, the ordinance may provide for performance guarantees ~~to assure successful completion of required improvements~~ either at the time the plat is recorded as provided in subsection (b) of this section or at a time subsequent to the recording of the plat, but prior to the issuance of a permit pursuant to G.S. 153A-357(a)(1), to assure successful completion of required improvements. In the event a county fails to adopt an ordinance setting forth performance guarantees in compliance with subsection (g) of this section, a county shall not be authorized to require the successful completion of required improvements prior to a plat being recorded. For any specific development, the type and term of performance guarantee, or any extension of the performance guarantee, ~~guarantee from the range specified by the county~~ shall be at the election of the ~~developer.~~developer provided that any performance guarantee or extension be available to assure the successful completion of the improvements for which it is required. The developer shall be allowed, without limitation, to reduce the amount of the performance guarantee to reflect only the remaining incomplete items."

SECTION 10. G.S. 160A-382(b) reads as rewritten:

"(b) Property may be placed in a special use district, conditional use district, or conditional district only in response to a petition by the owners of all the property to be included. Specific conditions applicable to these districts may be proposed by the petitioner or the city or its agencies, but only those conditions mutually approved by the city and the petitioner may be incorporated into the zoning regulations or permit ~~requirements.~~requirements; provided however, notwithstanding anything to the contrary, in the exercise of the authority granted by this section, including the establishment of special or conditional use districts or conditional zoning, a city may not require, enforce or incorporate into the zoning regulations or permit requirements any condition or requirement not authorized by otherwise applicable law, including, without limitation, taxes, impact fees, building design elements within the scope of G.S. 160A-381(h) not voluntarily offered by petitioner, street improvements in excess of those allowed in G.S. 160A-372, driveway related improvements in excess of those allowed in G.S. 136-18(29) and G.S.

160A-307 or other unauthorized limitations on the development or use of land. Conditions and site-specific standards imposed in a conditional district shall be limited to those that address the conformance of the development and use of the site to city ordinances and an officially adopted comprehensive or other plan and those that address the impacts reasonably expected to be generated by the development or use of the site.

A statement analyzing the reasonableness of the proposed rezoning shall be prepared for each petition for a rezoning to a special or conditional use district, or a conditional district, or other small-scale rezoning."

SECTION 11. G.S. 153A-342(b) reads as rewritten:

"(b) Property may be placed in a special use district, conditional use district, or conditional district only in response to a petition by the owners of all the property to be included. Specific conditions applicable to the districts may be proposed by the petitioner or the county or its agencies, but only those conditions mutually approved by the county and the petitioner may be incorporated into the zoning regulations or permit ~~requirements.~~ requirements; provided however, notwithstanding anything to the contrary, in the exercise of the authority granted by this section, including the establishment of special or conditional use districts or conditional zoning, a county may not require, enforce or incorporate into the zoning regulations or permit requirements any condition or requirement not authorized by otherwise applicable law, including, without limitation, taxes, impact fees, building design elements within the scope of G.S. 153A-340(l) not voluntarily offered by petitioner, street improvements in excess of those allowed in G.S. 160A-372, driveway related improvements in excess of those allowed in G.S. 136-18(29), or other unauthorized limitations on the development or use of land. Conditions and site-specific standards imposed in a conditional district shall be limited to those that address the conformance of the development and use of the site to county ordinances and an officially adopted comprehensive or other plan and those that address the impacts reasonably expected to be generated by the development or use of the site.

A statement analyzing the reasonableness of the proposed rezoning shall be prepared for each petition for a rezoning to a special or conditional use district, or a conditional district, or other small-scale rezoning."

SECTION 12. G.S. 160A-381(c) reads as rewritten:

"(c) The regulations may also provide that the board of adjustment, the planning board, or the city council may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Conditions and safeguards imposed under this subsection shall not include requirements for which the city does not have authority under statute to regulate nor requirements for which the courts have held to be unenforceable if imposed directly by the ~~city.~~city, including, without limitation, taxes, impact fees, building design elements within the scope of G.S. 160A-381(h) not voluntarily offered by petitioner, street improvements in excess of those allowed in G.S. 160A-372, driveway related improvements in excess of those allowed in G.S. 136-18(29) and G.S. 160A-307 or other unauthorized limitations on the development or use of land. When deciding special use permits or conditional use permits, the city council or planning board shall follow quasi-judicial procedures. Notice of hearings on special or conditional use permit applications shall be as provided in G.S. 160A-388(a2). No vote greater than a majority vote shall be required for the city council or planning board to issue such permits. For the purposes of this section, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for calculation of the requisite majority. Every such decision of the city council or planning board shall be subject to review of the superior court in the nature of certiorari in accordance with G.S. 160A-388.

Where appropriate, such conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made of recreational space and facilities."

SECTION 13. G.S. 153A-340(c1) reads as rewritten:

"(c1) The regulations may also provide that the board of adjustment, the planning board, or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Conditions and safeguards imposed under this subsection shall not include requirements for which the county does not have authority under statute to regulate nor requirements for which the courts have held to be unenforceable if imposed directly by the ~~county.~~county, including, without limitation, taxes, impact fees, building design elements within the scope of G.S. 153A-340(l) not voluntarily offered by petitioner, street improvements in excess of those allowed in G.S. 160A-372, driveway related improvements in excess of those allowed in G.S. 136-18(29), or other unauthorized limitations on the development or use of land. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. Notice of hearings on special or conditional use permit applications shall be as provided in G.S. 160A-388(a2). No vote greater than a majority vote shall be required for the board of county commissioners or planning board to issue such permits. For the purposes of this section, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for calculation of the requisite majority. Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with G.S. 160A-388.

SECTION 14. G.S. 153A-352(b) reads as rewritten:

"(b) Except as provided in G.S. 153A-364, a county may not adopt or enforce a local ordinance or resolution or any other policy that requires regular, routine inspections of buildings or structures constructed in compliance with the North Carolina Residential Code for One- and Two-Family Dwellings in addition to the specific inspections required by the North Carolina Building Code without first obtaining approval from the North Carolina Building Code Council. The North Carolina Building Code Council shall review all applications for additional inspections requested by a county and shall, in a reasonable manner, approve or disapprove the additional inspections. This subsection does not limit the authority of the county to require inspections upon unforeseen or unique circumstances that require immediate action. In performing the specific inspections required by the North Carolina Building Code, the inspector shall conduct all inspections requested by the permit holder for each scheduled inspection visit. For each requested inspection, the inspector shall inform the permit holder of instances in which the work inspected is incomplete or otherwise fails to meet the requirements of the North Carolina Residential Code for One- and Two-Family Dwellings."

SECTION 15. G.S. 160A-412(b) reads as rewritten:

"(b) Except as provided in G.S. 160A-424, a city may not adopt or enforce a local ordinance or resolution or any other policy that requires regular, routine inspections of buildings or structures constructed in compliance with the North Carolina Residential Code for One- and Two-Family Dwellings in addition to the specific inspections required by the North Carolina Building Code without first obtaining approval from the North Carolina Building Code Council. The North Carolina Building Code Council shall review all applications for additional inspections requested by a city and shall, in a reasonable manner, approve or disapprove the additional inspections. This subsection does not limit the authority of the city to require inspections upon unforeseen or unique circumstances that require immediate action. In performing the specific

inspections required by the North Carolina Building Code, the inspector shall conduct all inspections requested by the permit holder for each scheduled inspection visit. For each requested inspection, the inspector shall inform the permit holder of instances in which the work inspected is incomplete or otherwise fails to meet the requirements of the North Carolina Residential Code for One- and Two-Family Dwellings."

SECTION 16. G.S. 160A-307 reads as rewritten:

"§ 160A-307. Curb cut regulations.

A city may by ordinance regulate the size, location, direction of traffic flow, and manner of construction of driveway connections into any street or alley. The ordinance may require the construction or reimbursement of the cost of construction and public dedication of medians, acceleration and deceleration lanes, and traffic storage lanes for driveway connections into any street or alley if:

(1) The need for such improvements is reasonably attributable to the traffic using the driveway; and

(2) The improvements serve the traffic of the driveway.

No street or alley under the control of the Department of Transportation may be improved without the consent of the Department of Transportation. ~~However, if there is a conflict between the written driveway regulations of the Department of Transportation and the related driveway improvements required by the city, the more stringent requirement shall apply.~~ Nothing herein shall authorize a city to require the acquisition of right of way from property not owned by the applicant."

SECTION 17. G.S. 160A-385(b1), as enacted by Section 1 of this act, and G.S. 153A-344(b1) as enacted by Section 2 of this act, are effective with respect to phased development approvals which are valid and unexpired on the effective date of this act. G.S. 160A-372(g)(6), as enacted by Section 8 of this act, is declarative of existing law as to all performance guarantees issued pursuant to Chapter 160A or Chapter 153A and is not intended to be a change in existing law as to performance guarantees whenever issued. The remainder of this act is effective when it becomes law, and applies to permit applications filed, permits previously issued which remain valid and unexpired on the date this act becomes law, actions filed in court, and claims and defenses asserted on or after that date.