HOUSE BILL 483:
Land-Use Regulatory Changes.

2016-2017 General Assembly

Committee:	Senate Judiciary I	**Date:**	June 13, 2016
Introduced by:	Rep. Jordan	**Prepared by:**	Brad Krehely
Analysis of:	PCS to Third Edition H483-CSRN-46		Committee Co-Counsel

SUMMARY: House Bill 483 would make changes to the land use regulatory laws in North Carolina. The Proposed Committee Substitute: (1) removes former Section 1 of the bill (allowing a permit applicant to choose which version of the rule or ordinance will apply if the rule or ordinance changes between the time of submission of the permit application and the permit decision) because this provision was enacted in the Regulatory Reform Act of 2015), (2) vests all stages of of a multi-phase development at the time of application for the initial phase if the developer gives notice that this is a multi-phase project, (3)adds Sections 9-15 of the PCS, (4) modifies the effective date, and (5) makes other conforming and substantive changes.

BILL ANALYSIS:

Sections 1 and 2-- Vesting

Sections 1 and 2 provide that amendments in city and county land development regulations, including zoning ordinances or unified development ordinances, must not be applicable or enforceable without the written consent of the owner with regard to buildings, uses, or developments for which either of the following applies:

- A zoning permit which includes, a site plan approval, a special exception permit or any other permit or approval given under the authority of Chapter 160A, Article 19, that authorizes the use of land has been issued.
- A building permit has been issued prior to the enactment of the ordinance making the change or changes so long as either permit remains valid and unexpired.

Amendments must not be applicable or enforceable without the written consent of the owner if a vested right has been established and such vested right remains valid and unexpired or if a vested right is established by the terms of a development agreement.

These sections vest all stages of a multi-phase development at the time of application for the initial phase if the developer gives notice that this is a multi-phase project. The vesting provisions, as enacted in G.S. 160A-385(b1) and G.S. 153A-344(b1) are effective with respect to phased development approvals which are valid and unexpired on the effective date of this act.

Sections 3 and 5— Claims filed directly with superior or business court without going to the board of adjustment

Section 3 provides that certain claims can be filed directly in superior court or business court without having to appeal to a board of adjustment. Any landowner, permit applicant, or tenant aggrieved by a final decision involving any ordinance that regulates land use or development may, in lieu of an appeal to the board of adjustment, may sue in superior court or business court 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 unenforceable, (3) preemption (including the requirement that city ordinances be consistent with State or federal law), (4) claims under 42 U.S.C. section 1983 (civil rights act), (5) common law or statutory vested rights, or (6) inverse condemnation. This list is not exclusive, and the aggrieved party may raise any other available claims or defenses, including asserting error in the interpretation of an ordinance.

The burden of proof to show a violation of an ordinance regulating land use or development is on the party seeking to enforce the ordinance.

An action must be filed within one year after the later of the following:

- Notice of the decision under 160A-388(b1)(2); or
- 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 whenever the context makes the granting of the variance discretionary and not prohibited.

Except for exhausting the administrative remedy of a variance, if applicable, once the aggrieved party selects an appeal to a board of adjustment and the prescribed hearing proceeding is concluded, such procedures are the exclusive means for obtaining relief as to the merits of the city or county enforcement action or administrative decision being challenged. However, this does not limit other procedures allowed for civil rights claims under federal law.

Section 5 amends the statute dealing with appeals of quasi-judicial decisions of decision-making boards when that appeal is to superior court. It provides that the petitioner may assert and the court must determine de novo any of the following claims or defenses: (1) Constitutional matters, (2) that the applicable ordinance is invalid or unenforceable, (3) ultra vires actions, (4) preemption (including the requirement that city ordinances be consistent with State or federal law), (5) claims under 42 U.S.C. section 1983 (civil rights act), or (6) common law or statutory vested rights. It also provides that claims or defenses, to the extent they do not involve some act of the board or its members, must be made known to the decision-making board at the hearing.

Section 4—Statute of Limitations-

Section 4 provides that statute of limitations provisions do not prohibit a party from raising, as a claim or defense, the invalidity of the ordinance in any action challenging the enforcement of a zoning or unified development ordinance or any action which can be filed in business court or superior court under newly-enacted G.S. 160A-393.1.

Section 6--- No Estoppel Effect When Challenging Unlawful Conditions-

Section 6 provides that a landowner or permit applicant must not be precluded from challenging any unlawful condition imposed on a development, and a local government is not permitted to raise estoppel or other similar grounds as a defense to such challenge. This does not apply to rezoning decisions.

Section 7—Attorney Fees Against Cities or Counties

Under current law, if a city or county is a party in an action and acted outside the scope of its legal authority, then the court may award reasonable attorneys' fees and costs to the party who challenged the local government's action. If the court finds that the city or county abused its discretion, then the court shall award attorneys' fees.

Section 7 provides that if the court finds that the city or county violated a statute or case law setting forth unambiguous limits on its authority, then the court shall award reasonable attorneys' fees and costs to the party who challenged the action. In all other matters, the court may award reasonable attorneys' fees and costs to the prevailing private litigant.

Sections 8 and 9- Performance Guarantees-

Cities (Part 2 of Article 19 of Chapter 160A) and counties (Part 2 of Article 18 of Chapter 153A) are authorized to adopt ordinances to regulate the subdivision of land within their territorial jurisdiction. These statutes authorize subdivision ordinances to require the construction of "community service facilities." To ensure compliance with these and other ordinance requirements, cities and counties are authorized to provide for performance guarantees at the time the plat is recorded. Performance guarantees are financial assurances that guarantee funds if the developer fails to complete the agreed-to improvements and may include: a surety bond issued by a company, a letter of credit by a financial institution, or other forms of guarantee that provide equivalent security.

Section 8 would provide that for cities, the ordinance may provide for performance guarantees either at the time the plat is recorded or at a time subsequent to the recording, but prior to the issuance of a permit under G.S.160A-417(a)(1). If the city fails to adopt an ordinance setting forth performance guarantees that comply with current law, a city must not be authorized to require successful completion of required improvements prior to a plat being recorded. This section provides that the type and term of the performance guarantee or extension of the performance guarantee is at the election of the developer provided that the guarantee or extension be available to assure the successful completion of the requirements for which the performance guarantee is required. The developer also would be allowed to reduce the amount of the performance guarantee to reflect only remaining incomplete items.

Section 8 also would add the following provisions with respect to performance guarantees:

- At the election of the developer, the 125% of the reasonably estimated cost of completion may be conclusively determined by a report provided by a licensed architect or a registered engineer. This report may contain unit pricing information provided by a licensed general contractor or any other competent source which the architect or engineer certifies as accurate. The reasonably estimated cost of completion shall include all costs of inflation and costs of administration and enforcement, no matter how such charges are denominated.

- The developer may post one form of a performance guarantee 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 subdivision, erosion control, and storm water.
- No person other than the following may claim any rights to any performance guarantee: (1) the local government to whom the performance guarantee is provided, (2) the developer for whose benefit the performance guarantee is given, and (3) the person or entity issuing the performance guarantee for the benefit of the developer. This provision G.S. 160A-372(g)(6), 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.

Section 9 makes the following changes in the performance guarantee statutes for counties (which also appear in Section 8 for cities). The ordinance may provide for performance guarantees either at the time the plat is recorded or at a time subsequent to the recording, but prior to the issuance of a permit. If the county fails to adopt an ordinance setting forth performance guarantees that comply with current law, a county must not be authorized to require successful completion of required improvements prior to a plat being recorded. This section provides that the type and term of the performance guarantee or extension of the performance guarantee is at the election of the developer provided that the guarantee or extension be available to assure the successful completion of the requirements for which the performance guarantee is required. The developer also would be allowed to reduce the amount of the performance guarantee to reflect only remaining incomplete items.

Sections 10-13- Limit Illegal Conditions on Conditional Zoning and in Special Use or Conditional Use Permits

Under current law governing conditional zoning and in special use or conditional use permits, cities and counties are prohibited from imposing requirements for which they do not have authority under statute or from imposing requirements for which the courts have held to be unenforceable.

Sections 10-13 add specificity to these provisions for which the city or county does not have authority to expressly include: taxes, impact fees, building design elements not voluntarily offered by petitioner, street improvements in excess of those allowed by statute, driveway related improvements in excess of those allowed by statute, and other unauthorized limitations on the development or use of land.

Sections 14 and 15—No "Enforcing" Inspections Policies Beyond those Allowed by Building Code

Current law restricts the authority of inspection departments by prohibiting a county or city from "adopting" a local ordinance or resolution or any other policy that would require regular, routine inspections of one or two family residential buildings or structures in addition to the specific inspections required by the Building Code, unless the county or city has obtained the approval of the Building Code Council to conduct such inspections. Exempt from the prohibition are inspections upon unforeseen or unique circumstances that require immediate action.

Sections 14 and 15 would provide that counties and cities may not "enforce" a local ordinance or resolution requiring regular inspection beyond those allowed by the North Carolina Building Code.

Section 16- Curb Cut Regulations

G.S. 160A-307 provides that a city may regulate the size, location, and manner of driveway connections into any street or alley. The ordinance may require the construction or reimbursement of certain construction costs for driveway connections into any street or alley if (1) the need for such improvements is reasonably attributable to traffic using the driveway and (2) the improvements serve the traffic of the driveway.

Under current law, no street or alley under the control of DOT may be improved without the consent of the DOT. However, if there is a conflict between the driveway regulations of the DOT and the driveway improvements required by the city, then the more stringent requirement applies.

Section 16 eliminates the provision requiring that more stringent requirements apply when there is a conflict between DOT driveway regulations and driveway improvements required by the city. This section also provides a city is not authorized to require the acquisition of a right of way from property not owned by the applicant.

EFFECTIVE DATE: 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.