SENATE BILL 355:
Land-Use Regulatory Changes.

2019-2020 General Assembly

Committee:		**Date:**	June 26, 2019
Introduced by:	Sens. Bishop, Newton, Searcy	**Prepared by:**	Bill Patterson
Analysis of:	Fourth Edition		Staff Attorney

OVERVIEW: Part I of Senate Bill 355 would make various changes to the land-use regulatory laws of the State.

Part II would reorganize and consolidate statutes governing the regulation of land use planning and development by cities and counties.

CURRENT LAW AND BILL ANALYSIS:

PART I

Permit Choice Changes

Current law provides that if a permit applicant submits an application for any type of development permit issued by the State or by a local government, and a rule or ordinance changes between the time the application was submitted and the time a permit decision is made, the applicant can choose which version of the rule or ordinance will apply to the permit.

Sections 1.1 and 1.2 of Senate Bill 355 would:

- Provide that if, for a period of six consecutive months or more, a permit application is placed on hold at the applicant's request or the applicant fails to provide information reasonably requested by the local or state government, the application review shall be discontinued and development regulations in effect at the time permit processing is resumed shall apply to the application.
- Clarify that permit choice statutes apply to land development regulations, and define the terms "development," "development permit," and "land development regulation."
- Provide that if the applicant opts for the version of a rule or ordinance in place at the time of the application for the development permit, that applicant cannot be required to wait for action on the outcome of any pending changes to that rule or ordinance.
- Provide that any person aggrieved by State or local government noncompliance with the permit choice statutes may seek a court order compelling compliance.
- Provide for expedited calendaring and review of permit choice related court actions at both the trial and appellate level.
- Make conforming and clarifying changes to county and city permit choice statutes.

Vested Rights Statutes Changes

Section 1.3 would amend county and city land development statutes to define the terms "development," "development permit," and "land development regulation" as they are defined in the permit choice statute, as amended by Section 1.1 of the bill, and to provide that:

- Without the land owner's written consent, amendments to land development regulations are not enforceable with regard to:
    - Uses of buildings or land, or subdivisions of land, for which a development permit application was submitted, and the permit subsequently issued, in accordance with permit choice statutes.
    - Vested rights established by a development agreement between a developer and a local government.
- Statutory vesting starts when the application for the development permit or building permit is submitted and lasts for as long as the permit remains valid.
- Local development permits expire one year after issuance if work authorized by the permit has not substantially commenced, unless otherwise specified in statute.
- The establishment of a vested right under one law does not preclude vesting under another, or vesting by application of common law principles.
- A vested right, once established, precludes any action by a county or city that would change, delay, or stop the development or use of the property, except where a change in State or federal law mandating local government enforcement occurring after the development application has a fundamental and retroactive effect on such development or use.
- Provide that except where a longer vesting period is provided by statute, the vesting period established by this section expires:
    - For an uncompleted project, if development work is intentionally and voluntarily discontinued for a period of not less than 24 consecutive months.
    - For a nonconforming use of property, if the use is intentionally and voluntarily discontinued for a period of not less than 24 consecutive months.

  The discontinuance period would be tolled during the pendency of any board of adjustment proceeding or state or federal civil action regarding the permit validity, use of the property, or the existence of the statutory vesting period, and during the pendency of any litigation involving the project or property that is the subject of the vesting.
- Where a local government requires multiple development permits in order for a development project to be completed, the project applicant can choose the version of each local land regulation applicable to the project upon submitting the initial development permit application. This provision would only apply to subsequent development permit applications filed within 18 months of the initial permit's approval date. An erosion and sedimentation control permit or a sign permit would not be considered an erosion and sedimentation control permit.

Section 1.3 would also expand the current definition of the term "multi-phased development" as used in county and city land development statutes by reducing the minimum size of a multi-phased development from 100 acres to 25 acres and by eliminating the current requirement that the master development plan include a requirement to offer land for public use as a condition of plan approval.

Down Zoning Amendments Not Initiated by a City or County

Section 1.4 and 1.5 would prohibit initiation or enforcement of a zoning amendment that down zones property without the written consent of all property owners subject to the amendment, unless the amendment is initiated by a city or county, and would delete a notice requirement that would be rendered obsolete by these changes. These sections also define the term "down zoning."

Procedure for Challenges to Land Regulation Decisions

Section 1.6 would provide that when a notice of violation or other enforcement order is stayed upon by an appeal to the board of adjustment, the stay applies to any accumulation of fines during the pendency of the appeal to the board of adjustment and any subsequent appeal, or during the pendency of any civil proceeding authorized by law, including a civil action authorized under Section 1.7 of the bill, and related appeals.

Section 1.7 would add a new section to the General Statutes authorizing landowners or permit applicants to bring an original civil action in superior court or federal court challenging the enforceability, validity, or effect of a local land development regulation based on grounds of unconstitutionality, preemption, or exceeding statutory authority. This section would also provide that, subject to state and federal law limitations, an action would not be rendered moot if the aggrieved person loses the applicable property interest as a result of a challenge to the local government action, and exhaustion of an appeal is required to preserve a claim for damages.

Section 1.8 would provide that a statute of limitation will not bar a party in an action provided for in Section 1.7 of the bill from raising as a claim or defense the enforceability or invalidity of an ordinance.

Section 1.9 would provide that in an appeal to superior court from a quasi-judicial decision of a city council, planning board, board of adjustment or other similar board, the court must allow the record to be supplemented through discovery if the appeal raises issues of lack of standing, due process violations, or action exceeding the board's statutory authority. This section would also provide that in an appeal raising these issues, whether the record contains competent, material, and substantial evidence is reviewable de novo.

Section 1.10 would provide that in a proceeding brought before a board of adjustment or in any civil action challenging conditions that were imposed without consent of a landowner or permit applicant, a city or county cannot assert the defense of estoppel based on a landowner's or permit applicant's having proceeded with development authorized under the permit choice statutes.

Section 1.11 would require a court to award attorneys' fees and costs to a party successfully challenging a city's or county's action, upon a finding that the city or county violated a statute or case law setting forth unambiguous limits on its authority, or took action inconsistent with or in violation of the permit choice statutes.

Restrictions on Permit Conditions Not Authorized by Otherwise Applicable Law

Sections 1.12 and 1.13 would prohibit cities and counties from including as a permit condition any of the following requirements for which either the city or county does not have authority to regulate: taxes, impact fees, certain building elements, driveway-related improvements in excess of those statutorily authorized, or other unauthorized limitations on land development or use.

Sections 1.14 and 1.15 would prohibit, without the written consent of the rezoning applicant, the denial of a conditional rezoning request based on conditions not authorized by statute or the enforcement of such unauthorized conditions.

Miscellaneous Provisions

Section 1.16 would prohibit a city from requiring a permit applicant for driveway improvements to acquire right-of-way from property the applicant does not own.

Section 1.17 would provide that the definition of "building" and "dwelling" a city uses when adopting zoning regulations must be consistent with any definition of those terms in another statute or in a rule adopted by a State agency, including the State Building Code Council.

PART II

CURRENT LAW: Counties and cities are authorized to adopt ordinances regulating land use to govern property development within their jurisdictions.

Land use regulations may involve any of the following:

- Extraterritorial jurisdiction (cities only)
- Subdivision ordinances
- Zoning ordinances
- Zoning regulation for manufactured homes
- Historical districts
- Building inspections and minimum housing codes
- Blighted areas
- Development agreements
- Cell towers
- Acquisition of open space
- Stormwater management

The authority granted to cities under Article 18 of Chapter 153A is substantially the same as that granted to counties under Article 19 of Chapter 160A, but there are some variances.

BILL ANALYSIS: Sections 2.2 and 2.3 of the bill would repeal Article 18 of Chapter 153A and Article 19 of Chapter 160A in, and **Section 2.4** would replace them with new Chapter 160D governing all local planning and development regulation.

In addition to consolidating and reorganizing existing planning and development regulations, Chapter 160D would make the following substantive changes to current law:

- G.S. 160D-1-5 would permit zoning maps to incorporate by reference floodplain rate maps and watershed boundary maps officially adopted by State and federal agencies, including updates to those maps.
- G.S. 160D-1-9 would limit participation by board members and staff in decisions when the applicant or other person affected by the decision is a person with whom the board member or staff has a close familial, business, or other associational relationship. If an objection is raised to a board member's participation and that member does not recuse himself or herself, the remaining members of the board shall by majority vote rule on the objection.
- G.S. 160D-2-3 would permit multiple local governments sharing jurisdiction over a single parcel to agree to assign exclusive jurisdiction to one unit of government, with landowner approval.
- G.S. 160D-2-4 would provide that, when a change in local government jurisdiction has been proposed, the local government that would potentially receive jurisdiction under the proposal can

receive and process an application for development approval, provided that no final decision could be made until jurisdiction is transferred.

- G.S. 160D-5-1 would require a local government to have a comprehensive development plan in place before adopting and applying zoning regulations. The plan would have to set forth goals, policies and programs intended to guide the jurisdiction's physical, social and economic development. (Under Section 2.9.(c) of the bill, local governments without such a plan in place would have until January 1, 2022 to adopt one.)
- G.S. 160D-6-5 would limit the required board statement of reasonableness to zoning map amendments (dispensing with this requirement for zoning text amendments).
- G.S. 160D-7-3 would establish uniform terminology for zoning districts and would authorize administrative review and approval of minor modifications in conditional district standards that do not change permitted uses or the density of overall permitted development.
- G.S. 160D-10-6 would shorten the list of mandated contents in development agreements and would authorize the parties to the agreements to negotiate terms for providing public facilities and other amenities and sharing in their costs.
- G.S. 160D-10-8 would provide that any party to a development agreement may enforce it by an action for injunctive relief.

Section 2.5 would make conforming changes to various statutory provisions.

Section 2.6 would repeal provisions in other articles of Chapters 153A and 160A, which are being relocated to Chapter 160D.

Section 2.7 would move two sections that are not being relocated to Chapter 160D from Article 18 to Article 23 of Chapter 153A.

Section 2.8 contains a severability clause.

Section 2.9 would provide transition provisions for application of Chapter 160D and would provide a full year after the effective date of the Act for any local government without a land use plan to prepare and adopt a plan in order to retain authority to adopt zoning regulations.

Section 2.10 would state the legislative intent that any changes enacted this session to the local land use planning and zoning laws be incorporated into the reorganization and consolidation of those laws contained in this bill and that legislation contained in the telecommunications provisions of Part II of this act makes no substantive policy changes from the statutes repealed. This section also directs the General Statutes Commission to recommend to the 2020 General Assembly any changes needed to accomplish this intent.

BACKGROUND: Part II of Senate Bill 355 is the product of a multi-year effort of the Zoning, Planning, and Land Use Law Section of the North Carolina Bar Association.

EFFECTIVE DATE: Part I of this act is effective when it becomes law. Sections 1.4, 1.5, and 1.16 of Part I of this act apply to applications for down zoning amendments or for driveway improvements submitted, and to related appeals filed, on or after that date. The remainder of Part I of this act applies to ordinances adopted before, on, and after that date.

Part II of this act becomes effective January 1, 2021, and applies to local government development regulation decisions made on or after that date and to ordinances adopted before, on, and after that date.