

## Authority to Enact and Enforce Land Use Regulations

### Summary

Local governments in North Carolina have no inherent power. Municipalities and counties are created by the state and can exercise only those state powers that have been delegated to them by the General Assembly. The General Assembly can delegate or revoke such authority as deemed appropriate and may set procedural requirements for the use of delegated authority.

The General Assembly has made a general grant of regulatory authority to both cities and counties. In addition, the legislature has granted explicit authority to cities and counties for a variety of land development regulations, including zoning, subdivision control, building codes, housing codes, and a variety of specialized growth management and environmental regulations.

### Express Authority

G.S. 160A-174 allows a city to “by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.” G.S. 153A-121 provides substantially similar general ordinance-making authority for counties. The General Assembly has authorized a variety of regulatory authority under this general police power. Among the regulations for which specific authority is provided are ordinances on nuisance abatement, noise control, emission of pollutants, outdoor advertising, sewage tie-ons, flea markets, places of amusement, adult businesses, domestic and dangerous animals, explosive materials, firearms, and junked or abandoned vehicles. G.S. 153A-124 and 160A-177 provide that the enumeration of these powers to regulate particular activities shall not be deemed to be exclusive or a limiting factor upon the general authority to adopt ordinances.

In addition to general ordinance making authority, specific types of development regulations are authorized more specifically. The grant of zoning authority allows local governments to regulate the location of particular land uses, regulate the size of structures and lots, regulate construction and alteration of buildings, require provision of open space and buffers, provide landscaping, and protect historic, cultural, environmental, and community resources. As of 2012, 559 of the state’s 650 cities and counties had adopted zoning, covering about 91% of the state’s population.<sup>1</sup>

The grant of subdivision review authority allows local governments to require that developers provide adequate water, sewer, transportation, and recreation facilities for their developments.

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<sup>1</sup> David W. Owens and Dayne Batten, *2012 Zoning Survey Report: Zoning Adoption, Administration, and Provisions for Design Standards and Alternative Energy Facilities*, Planning and Zoning Bulletin No. 20, July 2012 (online at <http://sogpubs.unc.edu/electronicversions/pdfs/pzlb20.pdf>).

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A 2005 School of Government survey indicated 83% of responding N.C. cities and 88% of the state's counties had adopted subdivision ordinances.<sup>2</sup>

Other types of local development regulations that are explicitly authorized by statute include building inspection (enforcement of the state-adopted building code), minimum housing codes for habitability of occupied residences, historic district and landmark protection, open space protection, regulation of wireless telecommunication facilities, erosion and sedimentation control, floodway regulation, mountain ridge protection, and stormwater control.

### Implied Authority

When a development regulation ordinance contains a novel management technique that is not expressly mentioned in the enabling legislation, the question is raised as to whether legal authorization has been granted to use that technique.

In his 1872 treatise on municipal law, Judge John F. Dillon set forth a standard for the construction of state grants of authority to local governments that has since come to be known as Dillon's Rule:

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the court against the corporation, and the power is denied.<sup>3</sup>

In the 1971 revision and modernization of the state's municipal government statutes, the legislature determined that grants of state power to local government should be broadly rather than strictly construed.<sup>4</sup> G.S. 160A-4 provides:

It is the policy of the General Assembly that the cities of this state should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into

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<sup>2</sup> David W. Owens and Nathan Branscome, An Inventory of Local Government Land Use Ordinances in North Carolina, Special Series No. 21 (May 2006) (online at <http://sogpubs.unc.edu/electronicversions/pdfs/ss21.pdf?>).

<sup>3</sup> JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 55 (1872) (emphasis in original).

<sup>4</sup> Even during the period when Dillon's Rule was most rigorously imposed in North Carolina, it was applied more stringently to interpretation of grants of authority for taxes and fees and local government service provision than to grants of regulatory authority. David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 682–87 (2000).

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execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

The 1973 revision of the county statutes adopted a substantially similar provision, G.S. 153A-4.

These statutes do not convert North Carolina to a “home rule” state (those states where the state constitution or state statutes delegate full authority to local governments to regulate their internal affairs). The General Assembly rejected that approach in 1949 and 1955. Local governments must still have a basic authorization to act in a given area.

Several cases applied the statutory rule of broad construction in assessing the scope of local governments’ land use regulatory authority. In *River Birch Associates v. City of Raleigh*,<sup>5</sup> the court upheld the required conveyances of open space in subdivisions to private homeowners’ associations. In *Homebuilders Ass’n of Charlotte v. City of Charlotte*,<sup>6</sup> the court upheld the imposition of user fees for a variety of city services, including rezonings, special use permits, plat reviews, and building inspections. The court noted that such fees must be reasonable, generally not to exceed the cost of the regulatory program. The court in *Massey v. City of Charlotte*<sup>7</sup> held that the zoning enabling statutes authorized the use of conditional use districts even though at the time they were not explicitly authorized.

Subsequent decisions, however, make clear that the court’s adoption of a rule of broad construction in *Homebuilders* has limits.

In *Smith Chapel Baptist Church v. City of Durham*<sup>8</sup> the court held that since the language of G.S. 160A-314(a1) “clearly and unambiguously” limited stormwater utility fees to the costs of constructing and operating the physical aspects of a stormwater and drainage system, those fees cannot be required for the full cost of maintaining a comprehensive stormwater quality management program. The court held that where there was no ambiguity in the statute, the plain meaning rule applied and there was no need for the court to resort to an interpretation, strict or broad. Subsequently, a series of cases in the court of appeals regarding school impact fees emphasized that when fees or taxes are involved, the scope of implied authority is very narrow.<sup>9</sup>

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<sup>5</sup> 326 N.C. 100, 388 S.E.2d 538 (1990).

<sup>6</sup> 336 N.C. 37, 442 S.E.2d 45 (1994).

<sup>7</sup> 145 N.C. App. 345, 550 S.E.2d 838, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001).

<sup>8</sup> 350 N.C. 805, 517 S.E.2d 874 (1999). The scope of the use of fees was broadened by the General Assembly subsequent to this decision.

<sup>9</sup> *Durham Land Owners Ass’n v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200, *review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006) (provision of schools, while mandated by the state, is a general governmental obligation rather than a service provided to an individual for which a fee can be charged); *Union Land Owners Ass’n v. County of Union*, 201 N.C. App. 374, 689 S.E.2d 504 (2009) (while school capacity is a legitimate legislative concern, the tools enumerated within the zoning and subdivision statutes do not include authority to assess what is essentially a school impact fee); *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 698 S.E.2d 404 (2010), *aff’d per*

This rule was emphasized by the court in *Lanvale Properties, LLC v. County of Cabarrus*.<sup>10</sup> The court held the county lacked statutory authority under the county's zoning authority to impose a voluntary mitigation fee to remedy inadequate school capacity. The court noted that the express purposes of zoning ordinances include facilitating the "efficient and adequate provision" of public facilities, including schools. However, the grant of powers in zoning specifies the regulations that can be imposed to address that need. These include regulation of the size of buildings, lots, setbacks, density, and the use of land and buildings. The court held the county's provisions on adequacy of school capacity did not organize the county into districts or zones and did not govern specific categories of land use activities. Rather the court found the ordinance to be a "carefully crafted revenue generation mechanism" and that ordinance provisions for voluntary fees to address school capacity were outside the explicit authority granted under zoning ordinances. The court held there was no implied authority for the provisions, ruling G.S. 153A-4 to be inapplicable, and holding the scope of the zoning authority was not ambiguous and plainly does not include an authorization of provisions requiring developers to pay an adequate public facilities fee.

The rules of preemption and standard canons of statutory interpretation also limit local government flexibility regarding land development regulations. Where the legislature has provided specific direction to local governments, that direction must be followed.<sup>11</sup>

The courts have also often held ambiguity in regulations restricting the free use of property should be strictly construed, with "well founded doubts as to the meaning of obscure provisions" to be resolved in favor of landowners and the free use of property.<sup>12</sup> In the zoning context, the courts have long held that any ambiguity about limitations on the expansion or enlargement of nonconformities is to be resolved in favor of the landowner.<sup>13</sup>

## Process for Enactment

North Carolina statutes set out special mandates that must be observed by cities and counties in adopting, amending, or repealing ordinances establishing land development regulations.

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*curiam by evenly divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011) [stands without precedential value] (town had no authority to impose or accept fees collected pursuant to an Adequate Public School Facilities ordinance).

<sup>10</sup> 366 N.C. 142, 731 S.E.2d 800 (2012).

<sup>11</sup> See, e.g., *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 509, 434 S.E.2d 604, 613 (1993) (counties may not delegate decisions required by statute to be made by planning board to an individual staff member); *Five C's, Inc. v. County of Pasquotank*, 195 N.C. App. 410, 672 S.E.2d 737 (2009) (where statute explicitly lists the grounds for local regulation of manufactured housing, county has no authority to regulate on the basis of other factors).

<sup>12</sup> See, e.g., *Westminster Homes, Inc. v. Town of Cary Bd. of Adjustment*, 354 N.C. 298, 308, 554 S.E.2d 634, 640-41 (2001) (interpreting condition regarding gates in permitted fence); *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (upholding permit issued to construct football stadium at high school).

<sup>13</sup> See, e.g., *Atkins v. Zoning Bd. of Adjustment*, 53 N.C. App. 723, 729, 281 S.E.2d 756, 759 (1981) (upholding limits on expansion of nonconforming business).

Failure to observe these procedural requirements voids the adoption, amendment, or repeal of these ordinances. The requirements are in addition to those that must be followed for adoption of any other ordinance.

The process that must be followed mandates a public hearing on the proposed action.<sup>14</sup> There must be two published notices of the hearing, the first notice appearing at least 10 but not more than 25 days prior to the hearing and the second notice appearing in a separate calendar week. The notice must be sufficiently detailed to apprise interested parties of the nature of the proposed action. When a zoning map is amended, the hearing notice mandate is broadened to also require mailed notice to the property owner and adjacent owners plus a posting of the hearing notice on or adjacent to the site affected. If the rezoning was not initiated by the landowner or the local government, the land owner must be provided actual notice of the hearing.<sup>15</sup>

If the regulation is a zoning ordinance, cities and counties are also required to submit the proposed action to a planning board for review and comment.<sup>16</sup> The planning board must be given up to 30 days to comment. The planning board's comment must be in writing and must address whether the action is consistent with any approved plans of the local government. The city council or county board of commissioners must consider, but are not bound by, the planning board recommendation.

For cities, if the land owner or a sufficient number of the owners of adjacent properties object to a zoning map amendment, a three-fourths majority of the city council is required to adopt the amendment.<sup>17</sup>

Any additional special procedural requirements set forth in the local ordinance itself must also be strictly followed. The most common of these is a requirement to mail notice of the hearing on a rezoning to a wider audience.

When a zoning ordinance amendment is adopted or rejected, the governing board is required to approve a statement describing whether the action is consistent with its adopted plans and why the board considers the action taken to be reasonable and in the public interest.<sup>18</sup>

## **Process for Enforcement**

The statutory provisions for administration and enforcement of local land development regulations are not as detailed as those for enactment of regulations. There are general provisions regarding appeals of zoning decisions to the local board of adjustment, some aspects

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<sup>14</sup> G.S. 153A-323, 160A-364.

<sup>15</sup> G.S. 153A-343, 160A-384.

<sup>16</sup> G.S. 153A-344, 160A-387.

<sup>17</sup> G.S. 160A-385.

<sup>18</sup> G.S. 153A-341, 160A-383.

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of violations, and detailed provisions regarding violations involving unsafe buildings and dilapidated housing.

The statute on zoning appeals, G.S. 160A-388, was substantially modified in 2013 by S.L. 2013-126. Appeals of any final, binding, determination by the local government staff first go to the local board of adjustment. Appeals must be made within 30 days of receipt of the staff determination being appealed. The board must conduct an evidentiary hearing on the appeal, with all due process rights observed (witnesses under oath and subject to cross-examination, impartial board members, substantial evidence to support all findings of fact, written decisions, decisions made in a reasonable time, and so forth). The statute requires a notice of the hearing be provided to the property owner and adjacent owners at least 10 but not more than 25 days prior to the hearing. A notice of the hearing must also be posted on the affected site. The full staff file on the case must be transmitted to the board and the parties prior to the hearing. The staff member who made the determination being appealed is required to attend as a witness. A party may request issuance of subpoenas for other witnesses or documents. Alternative dispute resolution is authorized but not mandated. Appeals of the decision of the board of adjustment are made to superior court, which then reviews the decision as an appeals court.<sup>19</sup>

A local government initiates enforcement action through issuance of a notice violation. If a building is involved, a stop work order can be issued to halt work in progress.<sup>20</sup> Permits may be revoked if there is an ordinance violation.<sup>21</sup> Both of these enforcement actions may be appealed to the board of adjustment. An appeal to the board of adjustment stays the enforcement action pending the outcome of the appeal.<sup>22</sup> Notices of violation are typically sent to the owner of the property as identified in county tax records. If land alteration, physical development of the site, or active use of the land is underway, the notice of violation is also often provided to the person undertaking the activity alleged to be a violation.

In addition to these general provisions, more detailed statutes allow a local government to issue orders to repair, close, vacate, or demolish unsafe buildings.<sup>23</sup> The local inspector gives notice to the owner of unsafe conditions. If the owner fails to take corrective action, written notice of the nature of the problem is provided and the owner is provided a hearing before the officer on the issue.<sup>24</sup> After the hearing the officer may order corrective action. That order may be appealed to the local governing board.<sup>25</sup> The order of the local governing body may then be appealed to superior court. A similar process is followed for enforcement of regulations on the

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<sup>19</sup> G.S. 160A-393.

<sup>20</sup> G.S. 153A-153A-361, 160A-421.

<sup>21</sup> G.S. 153A-362, 160A-422.

<sup>22</sup> G.S. 160A-388(b1)(6).

<sup>23</sup> G.S. 153A-366, 160A-426.

<sup>24</sup> G.S. 153A-368, 160A-428.

<sup>25</sup> G.S. 153A-370, 160A-430.

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maintenance, safety, and sanitation of nonresidential buildings<sup>26</sup> and violations of minimum housing codes.<sup>27</sup>

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<sup>26</sup> G.S. 160A-439.

<sup>27</sup> G.S. 160A-443.