HOUSE BILL 483:
Land-Use Regulatory Changes.

2016-2017 General Assembly

Committee:	Senate Judiciary I	**Date:**	June 20, 2016
Introduced by:	Rep. Jordan	**Prepared by:**	Brad Krehely
Analysis of:	PCS to Third Edition H483-CSRN-55		Committee Co-Counsel

SUMMARY: ***House Bill 483 would make changes to the land use regulatory laws in North Carolina. The Proposed Committee Substitute differs from H-483-CSRN-46 which was heard in Committee in the following ways: (1) deletes former Sections 4 (dealing with statutes of limitations) and Sections 10 and 11 (which added specifics to certain statutes prohibiting cities and counties from imposing requirements which are not allowed by statute or the courts), (2) modifies language in the vesting provisions found in Sections 1 and 2 to clarify the effect of vesting and to provide that a vested right remains vested for 10 years for multi-phased developments, (3) rewrites Sections 3 and 4 dealing with claims in superior and business court instead of having to appeal to the board or adjustment to amend the time frame for commencement of an action and to require notice to abutting landowners, (4) clarifies the term "unambiguous" for purposes of determining attorneys' fees against local governments, (5) clarifies language indicating that a city may not require an applicant to acquire right of way from property not owned by the applicant, and (6) 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 any of the following approvals or permits have been validly issued and remain unexpired:

- A zoning approval, which includes, but is not limited to, a zoning permit, a site plan approval, a conditional use permit, or any other permit or approval given under the authority the General Statutes that authorizes the use of land.
- A building permit issued under Chapter 160A or Chapter 153A.

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. A vested right, once established as provided for in this section, precludes any action by a city which would change or delay the development or use of the property as set forth in the application, except where a change in State or federal law mandating

local government enforcement occurs after the application is submitted that has a fundamental effect on such development or use. 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 and submits a plan describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property and showing the proposed phase boundaries.

A right which has been vested remains vested for a period of ten years for multi-phased developments. Nothing prohibits a judicial determination that a vested right exists in a particular case.

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 4— 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. It provides that permit applicant and certain property owners who are aggrieved by a final decision of an administrative official involving the application or enforcement or a city or county zoning ordinance, subdivision ordinance, unified development ordinance, or other ordinance regulating the use or development of land may, in lieu of taking an appeal to a board of adjustment, maintain an original action in the superior court or business court for declaratory relief, injunctive relief, damages, or other remedy provided or allowed by law or equity, where any one or more of the following claims or defenses are asserted:

- That the ordinance violates the United States or North Carolina constitutions.
- That the ordinance or the final decision of the administrative official is invalid or unenforceable on grounds of ultra vires, pre-emption, including pre-emption under G.S. 160A-174(b), or is otherwise in excess of authority.
- That the ordinance or the final decision of the administrative official violates common law or statutory vested rights of the aggrieved person.
- That the ordinance or the final decision of the administrative official constitutes a taking of property.

The aggrieved party may join any other claims and defenses arising from or relating to the final decision of the administrative official, including, without limitation, claims or defenses relating to the interpretation or application of the ordinance.

Time for Commencement of Action. – Any action brought pursuant to this section must be commenced within one year after the date on which written notice of the final decision is delivered to the aggrieved party by personal delivery, electronic mail, or by first-class mail.

Availability of alternative remedy.- Any person otherwise entitled to maintain an action under this section may elect instead to present any of the claims or defenses by way of appeal to the board of adjustment and may thereafter appeal from a decision by the board of adjustment. Once an appeal setting forth such claims or defenses has been filed and its related hearing before the board of adjustment commenced, a party may not thereafter bring an action as authorized by this section, provided, however, that nothing herein shall be deemed to preclude a party from maintaining an action under federal law or a takings claim.

Notice to abutting landowners.- A person who commences an action pursuant to this section shall notify by first class mail the owners of all parcels of land abutting the parcel of land that is the subject of the complaint that such action has been filed. The notice shall include a copy of the complaint. The notice must be mailed no later than 30 days after the commencement of the action, unless an extension not to exceed 30 days is granted pursuant to Rule 6(b) of the North Carolina Rules of Civil Procedure.

Section 4 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:

- That the ordinance violates the United States or North Carolina constitutions.
- That the ordinance or the final decision of the administrative official is invalid or unenforceable on grounds of ultra vires, pre-emption, including pre-emption under G.S. 160A-174(b), or is otherwise in excess of authority.
- That the ordinance or the final decision of the administrative official violates common law or statutory vested rights of the aggrieved person.

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 5--- No Estoppel Effect When Challenging Unlawful Conditions-

Section 5 provides that a landowner or permit applicant must not be precluded from challenging any unlawful condition imposed on a development. 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 6—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 6 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. For purposes of this section "unambiguous" means that the limits of authority are not reasonably susceptible to multiple constructions.

Sections 7 and 8- 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 7 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 7 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 8 makes the following changes in the performance guarantee statutes for counties (which also appear in Section 7 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 9 and 10- Limit Illegal Condition in Special Use or Conditional Use Permits

Under current law governing 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 9 and 10 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 11 and 12—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 11 and 12 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 13- 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 13 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 may not require the applicant to acquire 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 7 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.