

HB 483 Land Use Regulatory Changes—Bill Analysis

PCS to bill edition 3

The League opposes HB 483 Land Use Regulatory Changes.

- The bill incentivizes land use litigation in a number of ways, making this a dream bill for trial lawyers who specialize in this type of litigation.
- The costs brought by more litigation will be borne by taxpayers, whether municipal taxpayers paying for additional court costs and legal fees or state taxpayers paying for an additional case load for an already overburdened court system.
- By creating an uneven playing field in the courts, the bill weakens protections for neighboring property owners.
- Undermining performance guarantees means that local property tax owners will pay the cost of failing infrastructure, and it subjects property purchasers to the harms created by failing infrastructure.

Bill analysis

- **Sections 1/2:**
 - Expands statutory vested rights to include “zoning permits” (defined in the bill as including site plan approvals, special exception permits, or any other permit or approval that authorizes the use of land) as well as building permits. Vested rights are guarantees upon which property owners can rely when developing their land.
 - Broadens current statutory language regarding which local ordinances or rules apply to projects already in progress at the time those ordinances or rules are updated.
 - Adds two other statutory vested rights: for multi-phase projects and development agreements. Both of these situations involve long-term developments. Therefore, the provision allows developers to lock in a community’s current land use regulations for a period of time that can stretch over decades. This provision ignores the fact that cities update their development standards over time to accommodate changed growth patterns, technology, and community preferences. Development rights more appropriately become vested upon granting of development approvals by the city.
- **Section 3:**
 - **Subsection (a):** Expands current law significantly by bypassing appeals to the board of adjustment of any administrative decisions, in favor of direct action in Superior Court. This expansion occurs by converting claims that are now heard by Superior Court through a writ of certiorari to civil claims alleging a local government ordinance was invalid, preempted, etc. Due to increased attorney’s fees (granted in other parts of this bill) and other litigation expenses, municipalities would incur much larger liability in these types of actions. In addition, courts will be burdened by the increase in litigation that will inevitably result if this provision became law.
 - **Subsection (b):** In actions where a party alleges a land use ordinance violation, places the burden of proving that a violation occurred on the party bringing that action. In most cases, that party will be the local government or a neighboring property owner.
 - **Subsection (c):** Changes the current time period to bring an action that challenges a board of adjustment decision from 30 days to one year. This extension of time also applies to neighbors, who under current law are entitled to bring actions against

developers or local governments. Therefore, this provision prolongs uncertainty as to whether a development may move forward without challenge.

- **Subsection (d):** Seems to say that if an aggrieved party chooses to challenge an action using the board of adjustment process rather than the proposed “bypass” process that would send a claim into Superior Court, then the aggrieved party must stick with the board of adjustment process. But the language is very unclear as to this point. If passed, this subsection would surely incur more litigation to determine its meaning.
- **Section 4:**
 - Eliminates the statute of limitations that would ordinarily limit facial challenges to the validity of ordinances. These legal actions allege that an ordinance is invalid, and if successful, they strike down the local ordinance. The provision thereby creates a permanent cause of action for developers, who could challenge longstanding local ordinances at any time. Under the proposal, the challenge would arise in the context of a local government’s enforcement action. If a local government sought to enforce a violation of its land use ordinance, a developer, as a defense to an enforcement action, could allege a facial challenge to an ordinance (=“invalidity of the ordinance”). This right to defend against enforcement actions by mounting a facial challenge—without a time limit on that right—is virtually unprecedented; even federal constitutional claims are subject to a statute of limitations. In the end, this proposed language would put local ordinances constantly at risk for challenge, and no nearby property owner could rely on development decisions made by local governments. It would also perversely encourage developers to provoke a local government to take an enforcement action so that this type of challenge could proceed at any time, especially if the typical statute of limitations time period had passed.
- **Section 5:**
 - Sets the standard of review for appeals of quasi-judicial decisions as de novo for most claims. Under current law for these appeals, the reviewing court must evaluate the record of the quasi-judicial body’s decision. Normally, that scope of review is limited to the record below, and additional evidence is only allowed in narrow, prescribed circumstances. How do we reconcile those restrictions with this new standard of review for facial challenges? Particularly with (k)(4)(b.) (“that the applicable ordinance is invalid or otherwise unenforceable,”), by allowing aggrieved parties to bring a facial challenge to an ordinance in the appeal, this new provision would create confusion.
 - Contains confusing language in (k)(5), where it is unclear to which body’s “hearing” the provision applies. The decision-making board’s hearing? Or the Superior Court’s hearing?
- **Section 6:**
 - Eliminates estoppel as a defense for local governments. There are many different meanings of the legal concept of estoppel, but in the development context, estoppel would ordinarily prevent one party (the developer) from continuing to act in reliance on a development approval that they are challenging. In other words, if a developer accepts a permit but later has a problem with a permit condition, estoppel would suspend the development while the developer challenged that permit term. In these cases, the parties could work out a completely different set of conditions under which the development would then continue to proceed. However, with this proposal, a developer could bypass those negotiations, picking and choosing the permit conditions with which to comply while development gets underway, and then challenging the remaining provisions that are unpalatable. All the while, development would continue.

Therefore, because a developer would not necessarily have to adhere to agreed-upon conditions in a permit, the proposal incentivizes developers to not negotiate in good faith during initial development approvals.

- Under this proposal, local communities and nearby residents face an increased risk of undesired or incompatible development because the terms of any permit would be up for negotiation even after the permit was issued. Meanwhile, the developer could begin building without heeding the provisions of the permit that they would prefer to challenge.
- Local governments would therefore lose the certainty that comes with agreeing to permit terms, and the only remedy would come through (expensive) litigation.
- **Section 7:**
 - Awards attorneys fees automatically if local government violated a statute or case law setting forth unambiguous limits on its authorities. Automatic attorney's fees create an incredibly forceful stick for local governments and taxpayers, who would foot the bill for this increased litigation.
 - Automatic attorney's fees are a legal remedy typically reserved only for causes of action where fundamental rights are at stake. Otherwise, in the U.S. justice system, the default rule is that both parties pay their own litigation expenses.
 - Makes attorney's fees discretionary in all other matters to the prevailing PRIVATE litigant, which again creates an uneven playing field for remedies at the expense of local government taxpayers and incentivizes litigation.
- **Sections 8/9:**
 - Shifts performance guarantee decision-making to developers, leaving local governments and their taxpayers holding the bag when the amount of the guarantee does not cover the cost to repair and otherwise upgrade substandard infrastructure.
 - Performance guarantees such as bonds and letters of credit are used to ensure—to the standards of the local government—completion of site infrastructure such as roads, curb and gutter, ditches, sidewalks, water/sewer lines, retaining walls, and post-construction stormwater controls. Giving local governments tools like performance guarantees to ensure the infrastructure meets these standards makes good policy sense; local governments assume the cost of maintaining most of this infrastructure after a developer sells the properties.
 - However, this provision completely undermines the effectiveness of this tool by allowing the developer to determine the cost of completion of this infrastructure (and hence, the amount of the guarantee). It also undermines the tool by allowing developers to reduce the amount of the guarantee at their discretion. Together, these provisions have the potential to limit the amount of funds available to local governments if the developer builds substandard infrastructure.
- **Sections 10-13:**
 - Reduces the city's ability to negotiate the terms of development with individual developers by barring the city from suggesting certain terms dealing with transportation improvements and building design standards.
- **Sections 14-15:**
 - Reiterates a current prohibition on local building codes.
- **Section 16:**
 - Reverts road standards on state roads within municipal limits to NCDOT's standards. In doing so, this provision eliminates the ability of cities to prioritize different community transportation goals than NCDOT on these streets.