ARTICLE 25

Community Planning, Land Use, and Development

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AS FAR AS most North Carolina communities are concerned, growth, development, and change are desirable and probably essential. For many North Carolina communities some form of growth, development, and change is ultimately inevitable. Will this growth, development, and change occur by choice or by chance? The effectiveness of a community's local planning program should reveal the answer. Community planning is based on the premise that the community as a whole has a substantial stake in determining how, when, and where the community should grow. Community planning is concerned about capturing the benefits of growth and avoiding its pitfalls. North Carolina local governments have a number of tools that they may use in influencing growth. However these tools are used, effective planning also means cooperating intelligently with the inevitable.

For most North Carolina local governments, city or county planning means *land use and development planning.* Land use and development planning involves the application of the planning process to all public and private activities that affect the physical use and the development of land, and the growth and the character of a community. Some jurisdictions prefer to view land use planning as simply an aspect of *community development*, emphasizing that the economic and social development of the community is closely related to its physical development. Many cities and some counties view one of their more important planning missions to be *growth management*, emphasizing that the policies, programs, incentives, and regulatory tools for influencing development are surely as important as the plans on which they are based. No matter what it is called, influencing the use and development of land is an important function of local government.

One feature of land use planning that distinguishes it from many other types of public planning is its concern with the performance of the private sector as well as the performance of the public sector. Some local governments view their function as simply to accommodate or respond to the growth that private development generates and to provide public services wherever and whenever they are demanded. It is also undeniably true, however, that the location of a new highway, the extension of utilities, or the nature of the standards of a zoning ordinance may strongly influence the location, type, and timing of private development projects. This interplay between public and private activities gives rise to the need for community planning.

A city or county may influence development in any of four major ways: (1) by establishing clear plans and policies providing direction to citizens, businesses, the development community, and other units of government in matters of growth and development; (2) by providing public programs and services and constructing and maintaining public facilities (streets, utilities, parks, schools, etc.); (3) by regulating the use, development, and maintenance of private and public property (e.g., through zoning and subdivision regulations, a minimum housing code, etc.); and (4) by extending subsidies, loans, and financial incentives to induce private parties to act consistently with municipal objectives. Table 25-1 elaborates on an array of these measures.

Since community planning involves so much coordination and facilitation, these approaches are often combined. For example, in a community development block grant area, a local government may install drainage facilities and make street improvements while offer subsidized housing rehabilitation loans to property owners in the affected area. Planners concerned about revitalizing a central business district may suggest landscaping plans or building facade designs for downtown merchants who wish to upgrade the area. At the same time the zoning ordinance may establish sign standards and height limits in the same area.

Ironically, much of the de-facto planning that a local government carries out does not primarily involve local staff planners. Street design standards are established in public works departments, and community public reinvestment programs are handled by community development. Utility extension decisions may implicate a joint utility provider, and the North Carolina Department of Transportation makes critical road network decisions. Knitting these decisions together to achieve community policy can be both conceptually and practically difficult. But it also illustrates that planning may be too important to be left solely to planners.

Table 25-1. *Methods Used by Cities for Influencing Land Use and Development*

1. Providing Public Facilities
Estimating needs, selecting sites, and determining sequence and timing of capital improvements (e.g., streets and roads)
Influencing pattern of development
Extending utilities to manage growth
Protecting future roadway corridors
Establishing capital improvement program (CIP) to link budgeting to comprehensive land use planning
Acquiring land and public improvements
Purchasing sites in advance
Encouraging donations of land
Requiring compulsory dedication of land and improvements in new developments (e.g., park land, streets, and utilities)
Requiring compulsory reservation of land
Imposing impact fees to pay for capital improvements required to serve new growth
2. Regulating Land Use and Development
Regulating division of land and construction of community or public improvements
Enforcing land subdivision ordinance
Adopting utility-extension policies
Adopting special assessment and cost reimbursement policies for public facilities
Regulating water supply and wastewater disposal systems
Establishing standards for designing, constructing, and accepting subdivision streets
Enforcing driveway permit regulations
Regulating use and development of land
Enforcing zoning ordinance
Adopting watershed protection regulations
Regulating soil erosion and sedimentation control
Establishing development standards for flood hazard area
Adopting special zoning restrictions around airports
Designating historic landmarks and establishing historic districts
Adopting special-purpose police-power ordinances (e.g., governing mobile home parks, outdoor advertising, and junkyards)
Requiring local environmental impact statements
Adopting roadway corridor official map ordinances
Enforcing the State Building Code
Establishing property maintenance and public health and safety standards
Adopting minimum housing code
Condemning abandoned or unsafe structures
Establishing junked-car program
Controlling weeds and litter
Abating public nuisances
3. Providing Direction and Leadership
Adopting comprehensive plan and publicizing it
Providing assistance to property owners, neighborhood groups, environmental groups, and other nonprofit organizations
Establishing voluntary design guidelines
4. Providing Financial Incentives
Providing rehabilitation grants and loans for housing
Providing housing rental subsidies
Providing loans and grants for historic preservation
Acting as economic entrepreneur
Constructing and leasing shell buildings; making site improvements on privately owned property; making cash grants

Growth North Carolina Style

The rate of population growth in North Carolina during the 1990s was 21.5 percent, the state's largest increase for any decade in the last seventy years. The number of North Carolinians living in urban areas (as defined by the U.S. Census) now exceeds 50 percent and could reach 60 percent by 2010. Urban travel demands are growing even faster. The North Carolina Department of Transportation now estimates that the amount of surface vehicular traffic, measured in vehicle miles traveled, is increasing at about 1.4 times the population growth rate statewide.[1] The amount of land converted into urban use may be growing still faster.[2] During the period 1970–1990 there were eleven communities in North Carolina, all municipalities, that met the Census definition for an urbanized area. In every case the physical size of the urbanized area grew faster than the rate of the corresponding population increase. In Charlotte the urbanized area grew twice as fast as the population increased. In Wilmington the urbanized area grew 2.4 times faster. In Winston-Salem the urbanized area grew 2.8 times faster than the growth rate of the population in the urban area.

The picture these statistics tend to paint is not simply one of growth, but one of an increasingly dispersed form of land development in this state that is concentrated in urban and metropolitan regions. It is a form of growth that appears to be highly correlated with an increasing dependency upon the automobile. It is sometimes known as *urban* (or more precisely, suburban) *sprawl*.

This dispersed form of development has spawned a reaction in certain planning circles and with some social critics. Planners, designers, even some developers, have lamented the decline of downtowns and urban life, the development of strip commercial projects with "big box" or franchised design, and the decline of the social cohesiveness that makes diverse neighborhoods and communities attractive. They have pointed to declining reinvestment in existing urban infrastructure and a continuing emphasis on providing new public investment on the urban fringe. They have criticized the form of development that makes dependency on the automobile so necessary. Sprawl, they contend, tends to result in conversion of open space and agricultural land to urban development and makes preservation of the environmental features of the countryside more difficult as the differences between urban and rural areas becomes increasingly blurry. As development disperses, it encourages North Carolina cities to "chase" new projects and the property tax revenues they represent by trying to annex them. Why, it is asked, can we not be smart about the way our communities grow?

Just what kind of growth is smart and what is the nature of a local government's role in ensuring that it occurs is less clear. To some planners the "smart growth" movement is a vindication of the principles that planners have been advocating for years. For some developers smart growth is a means of emphasizing that urban residents and municipalities need to be prepared to accept higher-density development projects and change in existing neighborhoods. Others see the associated principles representing a certain nostalgia for a way of life in a bygone era that some would like to re-create. The concept seems sufficiently malleable to allow a number of diverse groups to embrace it.

In any event certain planning and development principles are central to city and county planning. Not all of them, however, are likely to be put into practice.

One key planning principle is associated with compact development. One aspect is encouraging the more efficient use of vacant or underused parcels of land within existing urban areas. If land already served by streets, utilities, school, and other facilities can be used for development, the need for investment in major infrastructure on the urban fringe is reduced. Adaptive reuse involves making existing buildings suitable for new activities; urban infill suggests that passed-over undeveloped or under-utilized land parcels can be productively used. Adaptive reuse and urban infill can be used to revive older neighborhoods and provide better access to jobs in older, established employment centers. Opposition comes from most real estate developers and owners of land in outlying areas that might be blocked from developing on the urban fringe and in rural areas. This particular goal is unlikely to be achieved in many areas of the state.

Revitalizing older existing neighborhoods is typically a goal of local governments. Yet critics claim that such programs focus on the issues of interest of the more affluent, such as traffic congestion, urban sprawl, the design of new development, and environmental protection, and pay insufficient attention to issues of interest to those who remain in cities, such as housing, crime, and employment. Revitalizing older areas can be disruptive, resulting in more traffic in

1. Blue Ribbon Commission to Study North Carolina's Urban Transportation Needs: Final Report. Report to the 2006 Session of the 2005 General Assembly of North Carolina, p. 9.

2. "Urbanized Area Statistics in North Carolina," Prepared by the North Carolina Chapter of the American Planning Association, p. 2. Available on-line at http://www.nc-apa.org/urbanized_area_stats.htm.

older neighborhoods, higher property values, property taxes, and rents, and, in some cases, can dramatically change the character of neighborhoods. The likelihood of success often depends on the influence of neighborhood organizations and the strength of the market for renovated or redeveloped properties.

Ensuring a range of housing choices has long been a bedrock planning principle for most communities, but it may be inconsistent with certain other development policies. Making development generally more compact and dense and protecting rural open space and environmentally sensitive areas from development tends to result in higher prices for urban property. Well-financed commercial developers that favor urban areas, environmentalists, and owners of potential urban sites may favor the idea. Existing residential property owners enjoy an advantage if existing property values rise; such results work to the disadvantage of renters and those who do not own a home but wish to buy. One strategy for overcoming higher land and housing prices is to increase housing densities in and near existing residential neighborhoods. But residents who live near areas where higher density is proposed often intensely oppose it and are likely to argue "not in my back yard" (NIMBY). As a result, it is difficult to increase residential densities in existing neighborhoods except in certain special areas in large cities. An alternative is to encourage more compact development in newly developing "greenfield" areas.

Another planning principle is associated with the mixing of land uses and pedestrian-friendly projects. These ideas also concern urban form and design. Planners, architects, and developers tout "new urbanism," "traditional neighborhood design," "pedestrian-friendly developments," and "transit-oriented development." A key feature of these ideas is the need for a richer mix of land uses (residential, office, and commercial) than traditional zoning ordinances tend to encourage. One design concept associated with traditional neighborhood design involves construction of a town square or a village center surrounded with smaller shops, restaurants, theaters, and the like, with apartments and single-family houses all within walking distance. Developments with quality design that have incorporated these features have generally been popular with consumers. Land development regulations that incorporate these concepts tend to be accepted by the development community, if they are offered as options to those applicable to conventional development.

Another important planning concept emphasizes the reduction of traffic congestion and the availability of transportation alternatives. Suburban-style development tends to result in a street system hierarchy with higher-capacity streets designed to move traffic as quickly as possible with relatively little consideration given to pedestrians and bikers. Traditional neighborhood design (and the development regulations that enables such development) emphasize a system of narrow roads with on-street parking allowed on residential streets. Street connectivity is improved so that the streets in one neighborhood are connected to those in another, and a driver need not drive out to a more congested collector street or thoroughfare to go anywhere. Street-design standards, applied through land subdivision regulations, can influence the character of residential development in a major way. Making a community "walkable" means also providing sidewalks, pedestrian ways, and bike paths that knit together different buildings and land uses. These features can be incorporated into development regulations relatively easily and with relatively little opposition. Improving public transit to provide transportation alternatives is often a costly proposition and often necessitates providing operating subsidies to transit service providers. However, opposition to pedestrian, bicycle, and public transit programs is often not potent because auto users do not typically feel disadvantaged if others shift to transportation alternatives.

Recent planning thought, particularly that associated with the "New Urbanism," also addresses building design. Design issues tend to concern the relationship between the "built environment" (typically private buildings) and the "public realm" (including streets, sidewalks, plazas, and open spaces). Proponents argue that design should feature buildings and the pedestrians that use them, not automobiles and trucks. To accomplish this, new development in urban areas should be brought forward to the street right-of-way (to a "build-to" line), sidewalks should be furnished, on-street parking allowed, and off-street parking should be situated to the rear of buildings or in courtyard areas. Close attention thus needs to be paid to building configuration, bulk, and density. One of the results of increasing emphasis on building design is the rise of land development regulations that pay more attention to building form and less to the way a building is actually used. At an urban location it may not be so important whether portions of a several-story building are used for commercial, office, or residential purposes. "Form-based codes" do not dispense with land-use restrictions, but like historic preservation design standards they pay close attention to the form of buildings and how they fit into their surroundings. Design review and regulation of appearance is thus an integral part of smart growth. These changes are occurring because opposition from the development community is fading.

Improvements in project design can also assist in environmental protection. Clustering of new development so that substantial areas are left in open space can serve to protect environmentally sensitive land, and vegetated buffers can limit the impacts of stormwater runoff and protect wetland habitats. Landscaping and tree protection practices can preserve or restore vegetation as development takes place. Improved street design can not only improve traffic circulation; it is consistent with improved stormwater management.

Matters concerning urban form and development patterns, transportation, housing, and environmental quality routinely transcend the boundaries of individual local governments. Effective planning, at least as described above, is unlikely to occur without strong cooperative efforts among local governments and state agencies. Cities are likely to find it very difficult to reign in urban sprawl or achieve more compact development without at least some cooperation from counties. Indeed, a commitment to compact development might mean that more development was encouraged within municipal boundaries or within a municipality's planning jurisdiction and less in areas located within a county's planning jurisdiction. North Carolina counties that depend on new development outside of cities to generate tax revenues or that are particularly responsive to the interests of those in unincorporated areas may not be inclined to follow such a policy.

Utility extension policies illustrate this dilemma. Many North Carolina cities own and operate their own water supply and sewage disposal systems. Historically most utility systems have been coordinated to serve customers and, hopefully, generate a surplus of revenues, not necessarily to shape growth and development. But cities, the local governments most likely to provide water and sewer services in urban areas, are generally authorized to do so in areas outside as well as inside city limits and may be the only public providers of utility service in areas on the urban fringe. One approach that has been used by utility providers is to define an *urban service area* a geographic area within which urban services are provided or will be provided within the immediate planning period and outside of which such services will not be extended. The use of an urban service boundary is cost-efficient because it costs less to serve areas close to an existing network of lines than it does to extend the network into peripheral areas. Urban service boundaries are also consistent with policies promoting compact development. More and more counties, however, are being involved in providing water and sewer service. Some have their own systems. Some provide financial assistance to cities that choose to extend their own systems. Some have entered into more elaborate agreements with cities concerning the financing, construction, ownership, and maintenance of public systems. The increasing involvement of counties in public utility extension policy allows both cities and counties to fashion joint utility arrangements that will shape development in a large region. Ironically, however, since many county governments are relatively indifferent to or oppose municipal policies promoting compact development, better intergovernmental cooperation does not necessarily result in the kind of development that planning proponents would like to see.

General Comprehensive Plan (Land Use Plan)

The centerpiece of a local planning program has traditionally been thought to be a *general comprehensive plan*. A general comprehensive plan is designed to provide a community with an overview of its current physical development and to serve as a guide to its future development policy. Typically the plan includes a sketch of the city or county's historical development and statistical information about the community; discusses urban development issues and problems; and presents a series of maps, charts, illustrations, and photos displaying both current information and future projections. However, the primary function of the plan document is to outline in writing the policy that the community intends to pursue with respect to growth and development issues and to determine the steps necessary to put this policy into effect. For this reason the process by which the community establishes its development goals and objectives and the extent to which the community develops a consensus about the proper role that local government can play in influencing development is key. It is generally conceded that the comprehensive plan as a document can be only as effective as the process that has shaped it.

Except for those cities and counties that are subject to the Coastal Area Management Act (CAMA) (see below), local governments are not required by state law to adopt or use a comprehensive plan or land use plan. As a general rule, the state's planning legislation does not mandate the adoption of a plan, nor does it spell out or suggest what such a plan might consist of or the process for its formulation and adoption. As a result, the nature of plans and how they are used varies widely among North Carolina local governments. However, amendments in 2005 to the state zoning statutes requiring cities and counties to adopt statements analyzing the consistency of locally adopted plans with proposed zoning amendments (see below) provides additional recognition of comprehensive plans.

The process for developing a comprehensive plan is important. Certain parties with interests that will be affected by a plan (land developers and realtors, business owners, chambers of commerce and merchant associations, economic development interests, members of the farm community, housing and environmental organizations, utility providers, and other local governments and state agencies) are typically involved. It is often difficult for local governments to generate enthusiasm about plan making from citizens at large. But the rise of the Internet provides new options for doing so. Web pages provide easy access to the graphics that allow laypeople to understand better the nature of growth

and development and planning proposals. E-mail, list serves, even chat rooms, provide quicker and easier media for discussions than formerly was the case. Some communities have devised on-line surveys to gauge citizen preferences. Of course, there may be no full substitute for face-to-face meetings. Planners can use small focus groups to test new ideas. Neighborhood community meetings are often a staple way of bring proposals to people near where they live. Some local governments have experimented with *charrettes*. A charrette is an intense design exercise in which decision makers, supported by a cadre of information, staff resources, and drafting supplies, literally sketch out a proposal for the future of a downtown, a street corridor, a neighborhood, or some other small area. Such an exercise certainly encourages participants to "buy into" the ideas the charrette generates and reduces planning abstractions to practical applications.

A pivotal component of a general comprehensive plan is the *land use plan*. The land use plan is based on projections of population growth and land development patterns that have implications for public facilities, transportation, and economic development as well as housing, cultural and natural resource protection, and community appearance. In fact, many local governments use the terms *general comprehensive plan* and *land use plan* interchangeably.

Land use plans must be prepared for cities and counties in the twenty coastal counties subject to the Coastal Area Management Act. These plans must be consistent with guidelines adopted by the Coastal Resources Commission and approved by that agency. Local governments elsewhere in the state are under no similar legal obligation.

Certain rudimentary assumptions about land use must always be made if a city is to engage in transportation planning. G.S. 136-66.2 directs each North Carolina municipality, with the cooperation of the North Carolina Department of Transportation (NCDOT), to prepare a comprehensive transportation plan, which typically includes a local thoroughfare and street plan. Counties are authorized, but not compelled to join in. By law, NCDOT may "participate" in the development of such a plan only if all of the cities and counties within the area subject to the plan are in the process of developing a land development plan or all of those governments have adopted such a plan within the past five years. In metropolitan areas metropolitan transportation planning organizations (MPOs) made up of member governments prepare and adopt regional plans of the same type.

Cities and counties are increasingly preparing and adopting small-area development plans. Such plans may apply to downtowns, older inner-city neighborhoods, major growth corridors, or areas whose development may have implications for other jurisdictions. Small-area plans are typically prepared primarily to assist local governments in determining appropriate development policies. In addition, various state and federal aid programs require local government applicants to prepare a plan (often with land use and development implications) in order to qualify for financial assistance.

Other Uses of the General Comprehensive Plan

A comprehensive plan is generally intended to provide guidance to local governments when they make important development-related decisions. One prominent use of the plan is illustrated by the changes made in 2005 to the zoning statutes. They provide that prior to adopting or rejecting any zoning amendment proposal, a city or county governing board must adopt a statement "describing whether its action is consistent with an adopted comprehensive plan and explaining why the board considers the action taken to be reasonable and in the public interest."[3] Similarly, the planning board is directed to comment on "whether the proposed amendment is consistent with any comprehensive plan that has been adopted and any other officially adopted plan." Determining whether a project is consistent with the comprehensive plan or officially adopted plans may also be a requirement in certain other land development permitting decisions.[4]

3. G.S. 160A-383; G.S. 153A-341.

4. Although not required by state law, a local government may bind itself in its zoning ordinance to grant a special use permit or to rezone property only if the proposal is consistent with the unit's own land development plan. In addition, a subdivision ordinance may require that the dedication of land and the construction of improvements be consistent with the public facilities element of a comprehensive plan.

Strategic Planning

A model that serves as an alternative to comprehensive planning is *strategic planning*. Strategic planning is a process that emphasizes focusing on a few critical issues that are important to the community's future rather than trying to deal with everything at once. It involves looking outward at trends that may affect a community's destiny but that are beyond the community's control. Strategic planning is designed to be action-oriented so as to show what steps must be taken to achieve goals, who must take them, how much it will cost, and who will pay. It is well adapted to the resolution of economic development and housing issues involving a number of players (government units, businesses, private individuals, and nonprofit organizations) when a distribution of responsibility is necessary and the ability to respond to opportunities is important. Strategic planning is a particularly useful process for making spending decisions. Also, its focus on setting achievable goals and setting timetables for action make it valuable in resolving regulatory issues. Although comprehensive planning is still the primary model used in land use and development planning, it has been substantially influenced by the principles of strategic planning.

Organization for City or County Planning

Local planning programs involve a number of functions, departments, and local boards. The organizational arrangements often differ from one jurisdiction to another. The most important elements of a local planning program are listed below.

Governing Board

The key to the success of any local land use and development planning program is the governing board. The council or board of county commissioners exercises a number of powers affecting a land use planning program. It approves the budget and the financing for capital projects to be undertaken in the current fiscal year. (It may also approve a five- or six-year capital improvement program as an advisory measure.) The board allocates funds for boards, agencies, and departments that carry out planning-related responsibilities. It approves the location and the design of public buildings and other public facilities. In its legislative capacity the board adopts and amends various land use and development-related ordinances. It may retain for itself authority to issue conditional use permits for certain land uses outlined in the zoning ordinance and to approve subdivision plats. The governing board also affects the planning program by the quality of the appointments that it makes to the planning board, the zoning board of adjustment, and other planning-related commissions and agencies. Finally, it has ultimate authority to enforce local ordinances, and it approves any legal action taken against violators of the various land use and development-related ordinances.

Planning Board

One of the primary citizen boards that is critical to a local planning program is the *planning board* (also called the *planning commission*). Most North Carolina cities and counties have established a planning board made up of lay members appointed by the governing board. Many of the planning board's duties and responsibilities are advisory. The planning board is generally given the responsibility for supervising the development of the comprehensive plan. It may arrange for and supervise the preparation of special studies, land use plans and policies, and drafts of ordinances. It may adopt plans and policies, advise the governing board on them, and recommend ordinances and methods of carrying out plans. In addition, the planning board generally has specific duties in connection with the zoning ordinance. As described above, the planning board must provide a written recommendation to the governing board concerning whether a proposed zoning amendment is consistent with the comprehensive plan or any other officially adopted plan and any other matters deemed appropriate by the planning board. City and county planning boards must be granted a thirty-day opportunity in which to make a recommendation concerning any proposed amendment before the governing board may adopt the proposal.

In addition to having advisory responsibilities, a planning board may be delegated the authority to review certain development proposals. In particular, the planning board may be delegated the authority to approve subdivision plats (G.S. 160A-373; G.S. 153A-332). The planning board's potential versatility is indicated by the fact that it can take on the duties of certain other agencies if the governing board so desires. For example, the governing board may assign to a planning board any or all of the duties of the zoning board of adjustment (e.g., approval of zoning variances, issuance of conditional use permits, and hearing of appeals from decisions of the zoning official) [G.S. 160A-388(a); G.S.

153A-345(a)]. In addition, if at least two planning board members have demonstrated special interest, experience, or education in history or architecture, the planning board may be designated the historic preservation commission (G.S. 160A-400.7).

North Carolina local governments may also establish a joint planning board representing two or more local units of government. The Winston-Salem/Forsyth City–County Planning Board and the Charlotte-Mecklenburg Planning Commission are two of the better-known examples of such joint agencies.

Zoning Board of Adjustment

The zoning board of adjustment has three primary responsibilities under North Carolina law (G.S. 160A-388; G.S. 153A-345). First, it hears appeals of interpretations of the zoning ordinance. Generally this involves hearing appeals from decisions of the zoning enforcement official when an applicant for a permit or another aggrieved party claims that the zoning official has misinterpreted the ordinance. Second, the board of adjustment grants variances to the zoning ordinance. Third, it may be authorized by the governing board to grant conditional use permits for certain land uses and types of development outlined in the ordinance. Although it is common for a board of adjustment to be charged with some combination of these duties, it is also possible for any of these responsibilities to be delegated by the governing board to the planning board or retained by the governing board for itself [G.S. 160A-388(a); G.S. 153A-345(a)]. In fact, many smaller municipalities have chosen to merge their planning board and board of adjustment. Virtually all the board of adjustment's major decisions (issuing a variance or conditional use permit or reversing a decision of the zoning enforcement officer) must be made with the concurring vote of four-fifths of its members. Board of adjustment decisions may not be appealed to the governing board; rather, judicial review of such decisions may be had in county superior court.

Historic Preservation Commission

To initiate special review of development in a historic district or to designate a property as a historic landmark, a city or county must appoint a local historic preservation commission (see the section "Historic Districts and Landmarks," later in this article). The governing board may assign the functions of a historic preservation commission to a planning agency or to a community appearance commission (see the next section).

Community Appearance Commission

To focus attention on the entire community's aesthetic condition, a city or county may appoint a community appearance commission (G.S. 160A-451) and may also participate in forming a joint city-county appearance commission. The commission generally has no permit-granting or mandatory-approval authority; its powers are thus persuasive and advisory in nature (G.S. 160A-452).

Economic Development Commission

To promote local economic development, a city or county governing board may establish an economic development commission (G.S. 158-8). The commission, with the help of any staff it hires, may engage in community promotion and business recruitment; provide advice, analysis, and assistance concerning economic and business development matters; and help form nonprofit corporations that develop industrial park sites and shell buildings for relocating businesses. (See Article 26 on economic development.)

City or County Manager

The manager generally plays an unrecognized role in any land use planning program. In small cities or counties, he or she may make recommendations on matters affecting the city's development, enforce planning-related ordinances, and supervise the preparation of plans. In large cities that have a staff planner, the manager may be less directly involved in planning affairs. Still, he or she may coordinate the capital improvement program; administer the housing, community development, transportation, parks and recreation, and inspection programs; make recommendations on annexation and utility-extension plans, downtown revitalization plans, and economic development proposals; and coordinate the interdepartmental staff review of major development projects that come before the council.

Planning Staff

A local government land use planning program generally needs some professional planning help, which may be provided in any of the following ways:

1. The city or county may hire staff. Most cities with a population over 10,000 employ at least one staff planner to help execute a land use planning program. Usually planning staff are hired by and are ultimately responsible to the manager, but serve as staff to the planning board and other appointed boards with planning-related responsibilities.
2. The planning board itself may hire staff. The governing body that creates the planning board may authorize it to hire its own full-time staff with funds allocated for this purpose (G.S. 160A-363; G.S. 153A-322). Except for joint planning boards that represent more than one jurisdiction, however, this authority has not been used.
3. A city or county may contract for technical planning services provided by some other local unit of government (G.S. 160A-363; G.S. 153A-322).
4. Several local government units may share staff, each jurisdiction retaining its own planning board. Arrangements may be established through an interlocal agreement (G.S. Ch. 160A, Art. 20, Pt. 1).
5. A joint planning board created by two or more local governments may hire staff (G.S. 160A-363; G.S. 153A-322). Some of the state's large planning agencies are city-county boards with their own staff. The interlocal agreement establishing the joint planning board determines the financial contributions of each jurisdiction, the manner of appointment of board members, personnel practices affecting staff members, and the way in which work is assigned and supervised.
6. A private consultant may furnish technical assistance. Private planning consultants have been particularly active in preparing municipal zoning ordinances, economic development plans, and plans for downtown revitalization.
7. A substate regional organization may furnish technical assistance. North Carolina is divided into eighteen regions, each represented by a *lead regional organization* (LRO). LROs in North Carolina take one of three forms: a "regional planning commission" (G.S. 153A-395), a "regional planning and economic development commission" (G.S. 153-398), or a "regional council of governments" (G.S. 160A-475). Most of the LROs provide at least some local government planning and related technical assistance.
8. The Division of Community Assistance (DCA) of the North Carolina Department of Commerce may furnish technical assistance. This source provides a broad range of planning and managerial assistance through six field offices. It and its predecessor agencies have prepared a number of land use plans and zoning and subdivision ordinances for communities throughout the state. DCA also provides help with annexation studies, grant proposals, and a variety of other planning tasks.

Zoning Enforcement Official

In a large city, enforcement of the zoning ordinance may be the sole responsibility of the zoning enforcement official. In small cities and many counties the official may also be a building inspector, a city manager or clerk, or a police chief, or may enforce other local ordinances.

Inspection Department

The inspection department is the primary enforcement agency for a variety of development-related ordinances and codes. It typically enforces the State Building Code and sometimes also enforces the minimum housing code. In many cities, both large and small, it also enforces the zoning ordinance.

Community Development Department

In recent years the Community Development Block Grant (CDBG) program has become a key short- and mid-range program for carrying out a city's housing and development objectives in low- and moderate-income neighborhoods. Many cities and some counties have established a new, separate community development department or office to administer the program. In others the CDBG coordinator may report to the planning director. In some large cities the CDBG program may be administered within a community development division of an umbrella development or planning department. (See Article 27 on community development and affordable housing.)

Extraterritorial Jurisdiction for Land Use Planning

In North Carolina, as in most other states, a city may exercise jurisdiction in various planning-related matters over areas located outside its boundaries (G.S. 160A-360). Extraterritorial jurisdiction is justified on several grounds: North Carolina annexation laws encourage cities to annex nearby unincorporated urban areas. It is in a city's interest to ensure that areas that will ultimately be brought into the city are (1) developed in a manner consistent with the city's development standards and land use planning objectives, and (2) served by appropriate public facilities. Otherwise, unplanned growth and substandard development may thwart municipal annexation. In addition, even when a city has no annexation ambitions, unplanned growth and substandard development may have detrimental effects on nearby city areas.

In general, a city of any size may establish planning jurisdiction for one mile outside its boundaries. However, North Carolina law permits a city to exercise such extraterritorial jurisdiction unilaterally only if there is evidence that the county has not adopted a full-blown land use regulatory program in the affected area. Specifically a city may assume authority outside its limits without the consent of the county only if the county is not already enforcing three major types of development regulations in the target area: (1) zoning, (2) subdivision regulations,; and (3) the State Building Code [G.S. 160A-360(e)].

Where local governments work cooperatively, other jurisdictional arrangements are also possible. With the board of county commissioners' approval, a city with a population of 10,000 to 25,000 may extend its jurisdiction up to two miles outside city limits, and a city with a population of over 25,000, up to three miles [G.S. 160A-360(a)]. Alternatively, at the city council's request, the county may exercise any of the various land use regulatory powers within the city's extraterritorial jurisdiction or even within the city limits [G.S. 160A-360(d)]. Under a third arrangement a city may not exercise extraterritorial jurisdiction unilaterally, but it and the county may agree on the area in which each will exercise the various powers [G.S. 160A-360(e)].

The land use planning–related powers that may be exercised outside municipal boundaries include (1) zoning, (2) subdivision regulation, (3) enforcement of the State Building Code, (4) minimum housing code regulation, (5) historic district regulation, (6) historic properties designation and regulation, (7) community development projects, (8) jurisdiction of the community appearance commission, (9) acquisition of open space, (10) floodway regulation, and (11) soil erosion and sedimentation control regulation. No city may exercise in its extraterritorial area any power that it does not exercise within its city limits. Also, the boundaries of a city's extraterritorial jurisdiction are the same for all powers.

If a city intends to enforce zoning or subdivision regulations in its extraterritorial area, it must provide some means by which residents of the extraterritorial area may influence the decision making of both the planning agency and the zoning board of adjustment (G.S. 160A-362). A city is directed to ask the county commissioners to appoint some outside members to both the planning board and the zoning board of adjustment. The number of such appointees and their voting power are determined by the city, but the relative number of extraterritorial appointees on each board compared to the number of appointees who are municipal residents must reflect the relative population of the extraterritorial area as it compares to the municipality's population. If the board of county commissioners does not make these appointments within ninety days after it receives the request, the city council may make them instead.

Zoning

Of all the programs, tools, and techniques associated with land use planning, zoning is perhaps the best known. It may be used to achieve a variety of purposes. First, it can ensure that the community's land uses are properly situated in relation to one another so that one use does not become a nuisance for its neighbors. Second, zoning can ensure that adequate land and space are available for various types of development. Third, it can ensure that the location and the density of development are consistent with the government's ability to provide the area with streets, utilities, fire protection, and recreation services. Finally, it can set minimum design standards so that new development reflects aesthetic values, is of appropriate scale, and helps protect privacy.

Zoning involves the exercise of the state's police power to regulate private property in order to promote the public health, the public safety, and the general welfare. It may legitimately be used to protect property values. Zoning can foster economic development and expansion. However, it can also have the effect of restricting competition among commercial activities because the land available for certain uses may be limited. Promotion of the general welfare is a sufficiently elastic purpose to allow the adoption of standards that are justified solely in terms of aesthetics. Because

zoning is concerned with the use of property and not its ownership, the identity of owners is irrelevant from a legal perspective. Permits, approvals, and requirements of zoning "run with the land" and apply to future owners as well as present ones. Similarly, zoning distinctions based on whether property is owner- or renter-occupied are unenforceable. Zoning may legitimately be used to protect property values, but requirements that new developments meet minimum-floor-area standards or cost a certain amount may well be legally indefensible. The obligation of North Carolina local governments to accommodate low- and moderate-income housing through zoning remains unclear; nonetheless, zoning may not be used as a tool to discriminate on the basis of race or national origin.

Although zoning is primarily a tool for influencing the use of private property, in North Carolina it is also applicable to the construction and the use of buildings by the state and its political subdivisions (G.S. 160A-392; G.S. 153A-347). Zoning is prospective in nature: only land uses begun after the ordinance's effective date must comply with all the regulations. However, existing buildings and lots with characteristics that do not comply with the regulations are said to be *nonconforming* (see the discussion under the heading "Nonconformities and Amortization," later in this article), and a special section of the ordinance deals with nonconformities.

The characteristic of zoning that distinguishes it from most other types of land use regulations is that zoning regulations are different from district to district rather than uniform throughout a city. This feature permits the tailoring of zoning to address development problems, but also means that local governing bodies may be tempted to abuse the power by giving arbitrary and discriminatory treatment to certain property owners.

Basic Elements

A *zoning ordinance* consists of a text and a map (or series of maps). The text includes the substantive standards applicable to each district on the map and the procedures that govern proposals for changes in both the text and the map. The zoning ordinance divides the land within a city's jurisdiction into a number of zoning districts. The land in each district is governed by several types of regulations: (1) use regulations; (2) dimensional requirements, including setback and density standards; and (3) other miscellaneous requirements dealing with matters such as off-street parking, landscaping and screening, property access, required public improvements, and signs.

Uses Permitted by Right

If a use is permitted by right, the zoning standards for that use are typically spelled out in specific terms, and the zoning enforcement official grants the applicant routine permission to proceed. In some cases an applicant for a zoning permit must hire a design professional (e.g., an engineer, a landscape architect, or an architect) to prepare a site plan for a use authorized by right. Such a site plan may have to be reviewed by various departments, outside agencies, or a technical review committee made up of representatives of those departments or agencies. In some cities the city council or the planning board approves such a site plan. As a general rule, however, such a site plan must be approved as submitted, if it meets local standards.

Uses Permitted by Conditional Use Permits

Many jurisdictions contain a variety of uses that merit closer scrutiny because of their scale and effect or their potential for creating a nuisance. These conditional uses may be permissible in a particular district but only at particular locations and then only under particular conditions. *Conditional use permits* (also known as *special use permits* or *special exceptions*) may be issued by the council, the zoning board of adjustment, or the planning board. Regardless of which body issues the permit, the decision to grant or to deny it must be based on evidence supplied at a quasi-judicial hearing. The zoning ordinance must explicitly list the requirements that the applicant must meet and the findings that the issuing body must make in order for the permit to be issued. If these requirements are met, the board may not refuse to issue the permit. However, it may impose additional conditions and requirements on the permit that are not specifically mentioned in the ordinance. Such conditions may include specifications on the particular use to be made of the property; sign, parking, or landscaping requirements; requirements that the property owner dedicate land for and construct certain public improvements like streets, utilities, and parks; and specifications dealing with the timing of development. Conditional use permits may be used to deal with small-scale land uses like electric substations and day-care centers or with large-scale developments like shopping centers and group housing developments. Permission to develop or use land in accordance with a conditional use permit runs with the land and applies with equal force to future owners of the property.

Types of Zoning Districts

Most zoning ordinances include three basic types of zoning districts—residential, commercial, and industrial—and a variety of more specialized types of zones—office and institutional, flood hazard, mobile home park, agricultural, and perhaps planned unit development. There may be a number of residential districts, each based on different permissible dwelling types and required lot sizes (or densities).

Zoning districts may also be classified as *general use districts, conditional use districts* (also known as *special use districts*), or *conditional districts*. All zoning ordinances include at least some general use districts. Various uses or activities are permitted to locate and operate in a general use district either (1) by right or (2) subject to a conditional use permit or a special use permit). Generally, any use not specifically listed as permitted is, by implication, prohibited.

The zoning ordinances of some North Carolina cities and counties provide not only for general use districts, but for conditional use districts. Any use of land in a conditional use district is subject to a conditional use permit; there are no uses permitted by right. Thus all development in a conditional use district is subject to discretionary review. In cities and counties that rely on conditional use districts, it is customary for the governing board to grant the conditional use permit. This way the governing board can consider the application for a conditional use permit at the same time that it considers a petition for the rezoning of land to the conditional use district that authorizes such a permit.

A third type of zoning district that is authorized for cities and counties is the conditional district. Each conditional district is one-of-a-kind. The text of the zoning amendment adopting the zoning map change incorporates a series of conditions, stipulations, and requirements agreed to by both the property owner and the local governments, typically including a site development plan that shows in some detail just how and when the property will be developed. No conditional use permit or special use permit is involved.

Governmental Roles in Zoning

In most cities and counties, zoning involves the governing board, a planning board, the zoning board of adjustment, and planning and zoning staff. Collectively these groups carry out the legislative, quasi-judicial, advisory, and administrative functions of a local zoning program. The legislative and quasi-judicial roles of citizen boards in local zoning are a source of some confusion.

Legislative Role

The board of county commissioners or city council acts in its legislative role when it adopts or amends the zoning ordinance. When it makes the law, such a board has substantial discretion to make decisions as it sees fit. The governing board must hold a public hearing before it adopts or amends the ordinance. It need not explain its decision or make written findings of fact, but it must adopt a statement indicating whether the proposed zoning amendment is consistent with any adopted plan and in the public interest. The hearing required for legislative action is relatively free of formality. Speakers need not make sworn statements or restrict their statements to standards or topics set forth in the ordinance. City council members or county commissioners may be subject to lobbying efforts before or after the hearing.

Quasi-Judicial Role

Public hearings are also required when three other important types of zoning actions are taken: (1) issuance of variances, (2) issuance of conditional use permits, (3) and appeal of decisions of a zoning official. However, each of these types of cases must be heard in a quasi-judicial proceeding. The decision must be based on the criteria in the ordinance, witnesses must be sworn and offer testimony according to certain rules of evidence, board members may not discuss the case with any of the parties outside the hearing, and the board must make written findings of fact. Thus quasi-judicial hearings (sometimes known as *evidentiary hearings*) are more formal than legislative hearings and more demanding on those who participate in them. The kinds of cases just identified are often heard by the zoning board of adjustment, but if one of the matters listed above is heard instead by the planning board or governing board, then such a board must also follow quasi-judicial procedures when it hears such a case.

Variances

Because no zoning ordinance can anticipate every land use or development situation that will arise, a zoning ordinance must include a procedure for varying or waiving the requirements of the ordinance when practical difficulties or unnecessary hardships would result from strict enforcement of it. The permission granted by this procedure is known as a *variance*. In most North Carolina local governments, granting a variance is the responsibility of the zoning board of adjustment.

Even though zoning regulations may be burdensome on individual property owners, the board of adjustment's authority to grant variances is limited under the law. The board of adjustment lacks the wide legislative discretion that the governing board has. Often, matters that come before it could be handled better by the planning board and the governing board as proposals to amend the zoning ordinance. To issue a variance, the board must find that unless a variance is granted, the owner of the property will undergo practical difficulties or unnecessary hardships. The board typically must conclude that all of the following are true:

1. If the property owner complies with the provisions of the ordinance, he or she will be unable to enjoy a reasonable return from the property or to make a reasonable use of it.
2. The hardship affecting the property results from the application of the ordinance (not from market conditions or the existence of private restrictive covenants).
3. The hardship is suffered by the applicant's property. (The applicant's personal, social, or economic circumstances are irrelevant.)
4. The hardship does not result from the applicant's own actions.
5. The hardship is peculiar to the applicant's property and does not affect other properties in the same neighborhood. (If a number of properties suffer the same problem, the governing board should consider amending the zoning ordinance.)
6. The variance is in harmony with the general purpose and intent of the zoning ordinance and preserves its spirit. Use variances, which purport to authorize uses of land not otherwise authorized in the district, are prohibited by statute [G.S. 160A-388(d); G.S. 153A-345(d)].
7. By granting the variance, the board will ensure the public safety and welfare and do substantial justice.

Special Treatment of Certain Activities

Zoning applies to virtually all uses of property. However, the treatment of certain activities under zoning is especially noteworthy because special state legislation affects the extent to which zoning requirements apply.

Manufactured Housing

Manufactured home is the term used in state and federal law for what used to be called a *mobile home*. These units must be built to special construction standards adopted by the United States Department of Housing and Urban Development. The zoning of manufactured homes is subject to legislation adopted by the General Assembly in 1987 that was designed both to counter the exclusionary tendencies of many local zoning ordinances and to clarify that some special treatment of such units was permitted. G.S. 160-383.1 and G.S. 153A-341.1 prohibit cities and counties from adopting zoning regulations that have the effect of excluding manufactured homes from their entire zoning jurisdictions. However, cities and counties are expressly authorized to adopt special requirements affecting the appearance and the dimensions of manufactured homes that do not also apply to site-built homes. (The law recognizes prior case law holding that a municipality need not allow manufactured homes in every district in which it allows site-built residences.)

This legislation does not affect *modular homes*. Modular homes are built in a factory, but meet the construction standards of the State Building Code. For zoning purposes they are typically treated in the same manner as site-built residences.

Establishments Selling Alcohol

The sale and the consumption of alcohol are activities beyond the reach of zoning. The sale, consumption, and transportation of alcohol are subject to a uniform system of state regulation administered by the North Carolina Alcoholic Beverage Control (ABC) Commission, which controls the issuance of permits for such activities and preempts local zoning. State law provides that the ABC Commission "shall consider" local zoning requirements in determining whether a permit should be issued for an establishment at a particular location. However, a local government may not use zoning requirements to prohibit the sale or consumption of alcohol at a particular establishment, if the ABC Commission has issued a permit for that activity.

Historic Districts and Landmarks

In its zoning text and on its zoning map, a city or a county may establish a historic district. Before doing so, it must establish a historic preservation commission and undertake an investigation and a report describing the buildings, sites, and features that give the proposed district historical, prehistoric, or architectural significance. Once a district is established, no exterior portion of a building or a structure may be erected, altered, relocated, or demolished unless the historic preservation commission issues a certificate of appropriateness for the change, based on the design guidelines

and the ordinance criteria adopted for the district. One special power granted to the commission allows it to delay the granting of a certificate of appropriateness for the demolition of a building in a historic district for up to one year after the approval date. During this period the commission and those interested in historic preservation may try to negotiate with the owner to save the building.

The historic preservation commission may also regulate the alteration and the demolition of individual buildings or sites designated as historic landmarks. Landmarks may, but need not necessarily, be located within a historic district. Their demolition or relocation may be delayed for up to one year as well.

Signs and Billboards

The erection and display of signs and billboards (outdoor advertising displays) have long been subject to local government zoning. Certain commercial off-premise signs located along particular major federal highways are also subject to requirements imposed by the North Carolina Outdoor Advertising Control Act, which is administered by the North Carolina Department of Transportation. In areas where both sets of regulations apply, it is generally true that local sign standards for newly erected signs are more restrictive and demanding than those adopted by the state, and take precedence. However, as described in the subsection, "Nonconformities and Amortization," below, local governments are prohibited from amortizing nonconforming signs that are subject to the Outdoor Advertising Control Act.

Watershed Protection/Stormwater Runoff Standards

North Carolina's watershed protection legislation, initially adopted in 1989, has important implications for cities and counties whose planning and zoning jurisdiction includes land within the watershed of a public drinking-water supply. This program is designed to protect water supplies from the impurities in the runoff from land within a watershed (nonpoint sources of pollution). The North Carolina Environmental Management Commission has classified over 200 such watersheds into five water supply categories: WS-I, WS-II, WS-III, WS-IV, and WS-V. It has also established statewide minimum watershed protection requirements that apply to the use and development of land in both the *critical area* of such watersheds and the remainder of the watershed. State law requires affected local governments to incorporate the appropriate land development standards into local zoning, land subdivision, and special-purpose watershed protection ordinances. Perhaps the two primary standards established by state law are the *minimum lot size* for single-family residential lots and the *built-upon-area ratios* for multifamily and nonresidential development. For example, the minimum residential lot size in the critical area of a WS-III watershed is one acre. In such a watershed the portion of the lot that is built upon (i.e., the area with impervious surface) may not exceed 36 percent of the total lot area. The regulations also allow a local government to choose a *high-density option*, which permits a property owner to develop a lot more intensively if certain engineering measures are taken to control stormwater.

In addition, North Carolina cities and counties are increasingly being expected to enforce similar development standards in order to comply with federal stormwater requirements under the Clean Water Act.

Nonconformities and Amortization

When land is zoned or rezoned, certain legally existing uses and structures may not conform to the new set of zoning regulations that apply. These nonconformities may take a variety of forms: nonconforming uses, nonconforming buildings (as to height, setback, etc.), and nonconforming lots (as to width, frontage, or area). In addition, a property may be nonconforming with respect to its provisions for off-street parking, its landscaping and buffering features, or the position or size of advertising signs on it.

It is widely assumed that the policy of zoning is to discourage the perpetuation of nonconformities. However, a close look at many ordinances reveals that most communities take a rather passive approach to elimination of nonconformities. Most ordinance provisions are designed to allow nonconforming uses or structures to continue. There are, of course, restrictions on their expansion or extension. Nonconforming structures may generally not be structurally altered or replaced. Nonconforming uses may generally not be converted to other nonconforming uses, and uses once abandoned may not be reopened. Nonetheless, nonconformities have proved to be very resistant to attempts to get rid of them.

A quite different method of treating nonconforming situations involves the concept of *amortization*. Amortization is based on the assumption that the owner of a nonconforming property may be required to come into full compliance with new development standards if the ordinance provides a time period within which the owner may recover the investment made in relying on the former rules. In some cases, amortization may require the removal of a nonconforming use or structure; in other cases it may require the upgrading of a nonconforming use or structure. Amortization provisions are most often applied to nonconforming signs and certain outdoor uses of land (like junkyards) that can be moved to other locations and do not involve entrepreneurial investments of great magnitude. These regulations have

been upheld both in principle and in application by the North Carolina courts, overcoming challenges that they violate the landowner's due process rights or that they amount to an unconstitutional taking of private property without just compensation.[5]

One class of nonconformities, those involving commercial off-premises signs (outdoor advertising signs), constitute a major exception to the rule that amortization is permitted. For many years the amortization of outdoor advertising signs along the Interstate and certain federal- and state-numbered highways has been effectively prohibited by a statutory requirement that if a sign owner is forced to remove such a sign, some governmental unit must pay the owner "just compensation"(G.S. 136-131.1). (Such a statute has been required by the U.S. Department of Transportation as a condition for a state to receive a full allocation of federal highway money.) In 2004 the amortization of off-premises outdoor advertising signs was also prohibited with respect to signs located anywhere in a city or county (G.S. 160A-199; G.S. 153A-143). The legislation provides for certain exceptions, however, if the sign owner and local government agree to relocate the nonconforming sign.

Ironically, nonconforming on-premises commercial signs, often thought to be smaller and less objectionable than nonconforming outdoor advertising displays, may still be made subject to amortization.

Vested Rights

Generally speaking, a project that fails to comply with new ordinance standards may be accorded nonconforming status only if it exists when the new standards become effective. A major issue in zoning law involves how new standards affect construction projects that are begun but not yet completed. If the project is largely a figment of the property owner's imagination, then the project when built will be required to comply with the new standards. If the law allows the owner to complete the project without complying with the new requirements (the project thus becomes nonconforming), the owner has established a *vested right*.[6]

Under North Carolina zoning law there are five ways for a property owner to qualify for protection. The first method is to establish a *common law vested right.* A common law vested right is established if an owner has made substantial good faith expenditures to carry out a project in good faith reliance on a valid project approval. Actual on-site construction is not required. Expenditures of money and binding contracts to purchase land, construction materials, inventory, and equipment qualify. So do expenditures of time, labor, and energy. However, proceeding in good faith requires that the sponsor not work at an extraordinary pace to beat a potential rezoning. In addition, the expenditures must be made in reliance on a valid project approval. A valid zoning or building permit will normally suffice.

The second method was established in 1985 by the General Assembly to provide an alternative form of protection to the property owner that was far easier to apply than the common law vested rights doctrine. G.S. 160A-385(b) and G.S. 153A-345(b) simply provide that no zoning ordinance amendment may be applied to property without the owner's consent if a valid building permit for the property had been issued before the adoption of the amendment and the permit remains outstanding. This statute does not apply, however, when the adoption of an initial zoning ordinance is involved.

The third method was established in 1990 to allow property owners to establish a vested right still earlier in the development process. The General Assembly directed local governments to provide for a vested right when a property owner obtained approval of a *site-specific development plan*, a plan for a particular use of land as proposed for a particular site, or a *phased development plan*, a general plan for a large-scale project staged over a long period. G.S. 160A-385.1 and G.S. 153A-345.1 provide that approval of a site-specific development plan establishes a vested right for between two and five years, as determined by the city or county. Approval of such a plan protects against zoning amendments affecting the type and intensity of use of the property, with certain exceptions. The law also au-

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5. *See, e.g.,* State v. Joyner, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed,* 422 U.S. 1002 (1975) (validating the amortization of salvage yards and junkyards over three years); Naegele Outdoor Advertising v. City of Durham, 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (1994) (validating the amortization of commercial off-premise signs over five-and-one-half years).

6. Technically the term *vested right* applies to a constitutionally protected property right to complete the project. However, for purposes of this discussion the term is used to apply also to the rights of property owners to complete a project based on provisions in state statutes or local ordinances that grandfather projects and that are more liberal than required by the U.S. Constitution.

thorizes but does not compel a local government to provide for the approval of a phased development plan establishing a vested right for up to five years. However, this statute also does not offer protection from adoption of an initial zoning ordinance.

Fourth, a zoning ordinance may, without reference to the law just described, define the extent to which it applies prospectively, if it is less restrictive than state law. For example, an ordinance provision may provide that projects for which development applications are received or lots recorded before the effective date of newly adopted amendments need not meet their terms.

Finally, it is possible for a developer to negotiate the right to complete a project under pre-existing development standards as a part of the adoption of a development agreement between the developer and the local governmental unit (see below).

Development Agreements

Recently North Carolina has seen development projects that are far larger in scope and that are built over longer periods of time than ever before. Local governments have noticed that the off-site impacts and public facility implications of such projects outstrip the ability of their regulatory tools to manage them. Developers have major concerns of their own, particularly in regard to the risk involved in committing substantial funds to projects without adequate assurance that local development standards will not become more demanding as the full extent of the project takes form. Legislation adopted in 2005 allowing cities (G.S. 160A-400.20 to -400.32) and counties (G.S. 153A-379.1 to -379.13) to enter into so-called development agreements provides a new tool.

These development agreements are limited in scope. Under such an agreement, a local government may not impose a tax or a fee or exercise any authority that is not otherwise allowed by law. Unless the agreement specifically provides for the application of subsequently enacted laws, the laws applicable to development of the property are those that are in force at the time of the execution of the agreement. (Thus the time of the execution of the agreement may be viewed as a point in time at which "vesting" may occur.) Cities and counties are not necessarily authorized to commit their legislative authority in advance. For example, cities may not make enforceable promises to refrain from annexing the subject property, to refrain from using their taxing authority in a particular way, or even to refrain from rezoning affected lands at some future time. The agreement may require the developer to furnish certain public facilities, but it must also provide that the delivery date of these facilities is tied to successful performance by the developer in completing the private portion of the development. (This feature is designed to protect developers from having to complete public facilities in circumstances where progress in buildout may not generate the need for the facilities.) The ordinances in effect when the agreement is executed remain in effect for the life of the agreement, but the development is not immune from changes in state and federal law. A development agreement may require the project to be commenced or completed within a certain period of time. It must provide a development schedule and include commencement dates and interim completion dates for intervals no greater than five years.

The property subject to a development agreement must be at least twenty-five acres in size. Agreements may last no more than twenty years. In order to be valid, the agreements must be adopted by ordinance of the governing board. The same public hearing requirements that apply before a zoning text amendment may be adopted also apply before a development agreement may be adopted. Once executed by both parties, the agreement must be recorded, and it binds subsequent owners of affected land as well as the current owner.

Moratoria

Despite their best efforts to plan, local governments must often react quickly to new development issues that arise or to development projects that are large, unusual, or that involve community impacts that current land development regulations fail to address. This fast pace of change sometimes results in local government interest in adopting a development moratorium of some sort to preserve the status quo while plans are made, development strategies are formulated, and ordinances are revised. Often times a moratorium takes the form of a rather stringent development restriction adopted for a fixed period of time until a more permanent solution to the problem can be devised.

Legislation adopted in 2005 provides express authority for cities and counties to adopt moratoria, but also places a number of requirements on local governments wishing to make use of this tool. The new law [G.S. 160A-381(e); G.S. 153A-340(h)] allows temporary moratoria to be placed on city or county development approvals (such as zoning permits, plat approvals, building permits, or any other development approval required by local ordinance). However, it requires local governments, at the time of the adoption of the moratorium, to set forth its rationale, its scope and duration, and what actions the city or county plans to take to address the needs that led to the moratorium in the first place. In particular, the ordinance must set a clear date for the termination of the moratorium and include a state-

ment explaining why the time period is reasonably necessary to address the problems. In addition, the ordinance must include a statement of the actions proposed to be taken during the moratorium to address the problems that led to the moratorium imposition and a schedule for doing so.

The 2005 legislation also clarifies the procedures that a city or county must follow in adopting the ordinance. If the moratorium has a duration of greater than sixty days, then a public hearing must first be held with the same type of newspaper notices provided that are required for the adoption or amendment of other land use regulations.

Development projects for which certain types of progress have been made may not be made subject to a moratorium. In the absence of an imminent threat to public health or safety, moratoria do not apply to projects with legally established vested rights—that is, projects for which a valid outstanding building permit has been issued, for which a site-specific or phased development plan has been approved, or for which substantial expenditures have been made in good faith reliance on a prior administrative or quasi-judicial permission. The legislation also provides a special benefit to property owners and developers by providing that moratoria do not apply to projects for which a special use or conditional use permit application or a preliminary or final plat approval application has been accepted by the city or county before the call for the public hearing to adopt the moratorium. Thus where a moratorium is concerned, special protection is accorded to projects in the pipeline that otherwise would be expected to conform to new regulations.

Amendment of the Zoning Ordinance

Zoning Amendment Process

Unlike many local government ordinances, local zoning ordinances are amended fairly often. Most zoning ordinance amendments are map amendments that change the zoning district classification of particular properties and are known as *rezonings*. However, important alterations may also be made in the ordinance text.

When a local governing board amends the zoning ordinance, it acts in its legislative capacity. Proposals to amend the zoning ordinance may typically be submitted by anyone—a planning board member, a governing board member, a local government agency or commission, or a person in the community whether he or she is a property owner or not. State law stipulates that before the governing board may consider a proposed amendment, the planning board must have an opportunity to make recommendations on it. In some communities a zoning amendment petition is received by the planning staff to ensure that the petition is complete before the council decides whether to set a date for a public hearing to consider the proposal. In other communities the governing board refers the petition to the planning board and holds a public hearing on virtually every such petition submitted to it. State law requires the council to hold a public hearing before it adopts any zoning ordinance amendment. Notice of this hearing must be published several times in a local newspaper. In addition, in rezoning cases, notice must be posted on the property involved, and additional notice designed to inform neighbors must be supplied.

Substantive Limitations on Zoning Map Amendments

Rezoning is easily one of the most controversial aspects of zoning. Rezoning procedures do not always conform to the expectations that property owners and neighbors have about how zoning should work. Part of the problem is that property owners, neighbors, and local government board members are interested in discussing the nature of the particular use that will be made of land proposed for rezoning. However, most conventional zoning districts provide for a range of permissible uses. North Carolina zoning case law has made it rather difficult for those who participate in rezoning hearings to focus on the specific plans of the petitioner or to have any assurance about the specific way in which the property will be used if the land is rezoned. The use of conditional use districts and conditional districts may be viewed as legitimate means of circumventing restrictions placed on rezonings involving traditional zoning districts. In this regard there are several important legal principles established by North Carolina state courts:

1. To be rezoned to a general use district, land must meet the *general suitability* criterion, which requires that the property be suitable for any use permitted in that district. Any rezoning to a general use district that cannot be justified in terms of all the possible uses permitted in the new district is arbitrary and capricious and may be invalidated. Just how demanding this principle can be is illustrated when a petitioner suggests to the governing board that if the land is rezoned, it will be developed in a particular way. A series of North Carolina court rulings demonstrate that a petitioning developer does so at its peril.[7]

7. Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Hall v. City of Durham, 323 N.C. 293, 372 S.E.2d 564, *reh'g denied*, 323 N.C. 629, 374 S.E.2d 586 (1988).

2. Ad hoc conditions may not be attached to a zoning amendment involving a general use district. When rezoning a particular property, many governing boards have been tempted to include, in the amending ordinance, conditions on the manner of development that apply to the petitioner's land but do not apply to other lands zoned the same way. In doing so, however, boards run afoul of the zoning statute (G.S. 160A-382; G.S. 153A-342) that requires regulations to be uniform with respect to all properties within a general use district. Under North Carolina case law, special requirements not spelled out in the ordinance that are added as conditions to a rezoning are invalid and hence unenforceable.[8] The rezoning itself is not necessarily invalid, but the city or county does not gain the control that it expected over the land of the petitioning property owner.
3. A local government may not engage in *contract zoning*. Contract zoning involves a transaction in which both the landowner who seeks a rezoning and the governing board itself undertake reciprocal obligations in the form of a bilateral contract.[9] For example, a landowner might agree to subject his property to deed restrictions or make certain road improvements to enhance access to the land if the city council would agree to rezone the land when the landowner took these steps. Contract zoning of this type is illegal because by agreeing to exercise its legislative power in a particular way at a future date, a city abandons its duty to exercise independent judgment in making future legislative zoning decisions.[10]

Special Rezoning Methods and Issues

Conditional Use Districts

The relatively conservative legal doctrines just outlined have encouraged North Carolina cities to find more flexible ways of rezoning land. One such technique combines the discretion offered by the rezoning process with the condition-adding power of the conditional use permit. *Conditional use districts* were first expressly authorized by legislation in 1985 (codified primarily at G.S. 160A-382 and G.S. 153A-342), but several cities and counties were using the technique in the early 1970s.[11] In ordinances that provide for conditional use districts, it is common for each such district to correspond to or "parallel" a conventional general use district. For example, an ordinance that provides for a highway business district (a general use district) may also authorize a conditional use highway business district. The list of uses that may be approved for a conditional use district typically corresponds to the list of uses allowed in the particular general use district that serves as its parallel. In sharp contrast to a general use district, however, a conditional use district allows no uses by right. Instead, every use allowed in it requires a conditional use permit granted by the governing board. Because of this feature, the statutes prohibit the rezoning of land to a conditional use district unless all the owners of land to be rezoned consent to the proposal. The key feature of the conditional use district as a zoning technique is that the petition for the rezoning to such a district and the application for the conditional use permit required for any development in such a district are generally considered together. The public hearing for the rezoning and the public hearing for the conditional use permit are consolidated into a single quasi-judicial proceed-

8. In Decker v. Coleman, 6 N.C. App. 102, 169 S.E.2d 487 (1969), the city council rezoned a property bordering a residential area to permit a shopping center, but made the rezoning subject to a proviso that the developer leave a buffer strip around the development and not cut any access road through this strip into residential neighborhoods. The regulations for the particular commercial zoning district made no mention of such requirements. When the developer ignored these conditions, affected neighbors sought compliance in court. The court held that the conditions were unenforceable because they applied only to this property and not to other land with the same zoning district designation.

9. Chrismon v. Guilford County, 322 N.C. 611, 635, 370 S.E.2d 579, 593 (1988).

10. North Carolina courts have not had the occasion to rule on the validity of such a contract. However, *Chrismon* strongly implies that such contracts are void and unenforceable. Id. at 635, 370 S.E.2d at 593.

11. In Chrismon v. Guilford County, 322 N.C. 611, 370 S.E.2d 579 (1988), the North Carolina Supreme Court approved the use of these districts even though the controversy in that case predated the adoption by the North Carolina General Assembly of express enabling legislation for all local governments.

ing.[12] Some cities amend the zoning map and grant the permit with the same vote.[13] Most important, the petitioner or the applicant is encouraged to submit a development plan that indicates the proposed use of the land. If the city council is not pleased with the development proposal, it may choose not to rezone the property. If it is generally pleased with the proposal, it may restrict the use of the land (generally to that proposed by the developer) or mitigate the expected adverse impacts of the development by adding conditions to the conditional use permit, which is granted contemporaneously with the rezoning.

Conditional Districts

Conditional districts are a variation on the theme of conditional use districts. Conditional districts, used for many years by the City of Charlotte and Mecklenburg County, were found to be authorized implicitly by North Carolina's zoning enabling legislation in the case of *Massey v. City of Charlotte* [145 N.C. App. 345, 550 S.E.2d 838, *rev. denied*, 354 N.C. 219, 554 S.E.2d 342 (2001)]. In 2005 this legislation was amended to authorize the use of these districts explicitly. Each conditional district turns out to be one-of-a-kind, the result of a process of bargaining by interested parties, including, of course, the local government staff, planning board, and governing board. Most such districts, however, incorporate certain use restrictions and development standards. In addition, however, the text of the zoning amendment adopting the zoning map change incorporates a series of conditions, stipulations, and requirements agreed to by both the property owner and the local governments. The amendment also incorporates a site development plan that shows in some detail just how and when the property will be developed. Since no conditional use permit or special use permit is involved, the process is a purely legislative one. The formalities of quasi-judicial evidentiary hearings do not apply.

Protest Provisions

The North Carolina municipal statutes provide an important procedure that allows neighboring property owners to protest rezoning proposals that affect nearby land. A zoning map amendment requires a super-majority vote (three-fourths of all city council members) if enough affected property owners formally protest the proposed rezoning (G.S. 160A-385). The three-fourths vote is required if a protest petition is submitted by the owners of at least 5 percent of the land encompassed in a one hundred-foot perimeter "collar" around the area to be rezoned. Alternatively, a super-majority vote may also be triggered if the owner(s) of at least 20 percent of the area proposed for rezoning file a timely protest. This latter possibility allows some protection for the property owner in case neighbors propose that his or her property be downzoned. In any event an eligible petition must be submitted to the city clerk at least two working days prior to the public hearing date. However, anyone who signs the protest petition may withdraw from the petition at any time up to the vote on the rezoning.

Municipal zoning protest petitions have now become a relatively common and effective tool for neighbors to use who oppose a particular rezoning. The tool is apparently unavailable in the context of county zoning.

Spot Zoning

Another legal doctrine that limits a governing board's discretion in rezoning property involves *spot zoning*. The North Carolina Supreme Court defines spot zoning as

> [a] zoning ordinance or amendment which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected. . . .[14]

Zoning decisions that result in this spot zoning pattern are not necessarily invalid and illegal, however, unless there is no reasonable basis for treating the singled-out property differently from adjacent land. Whether there is good reason for the distinction depends, for example, on (1) the size of the tract; (2) the compatibility of the disputed zoning action with an existing comprehensive zoning plan; (3) the benefits and detriments of the rezoning for the petitioning property

12. It stands to reason that if a legislative hearing and a quasi-judicial hearing are combined, the more demanding requirements of quasi-judicial hearings have to be observed. Most, but not all, cities treat such hearings as quasi-judicial.

13. The grant of a special use or conditional use permit by a city council, a board of county commissioners, or planning board requires only a majority vote. G.S. 160A-381; G.S. 153A-340.

14. Blades v. City of Raleigh, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972).

owner, the neighbors, and the surrounding community; and (4) the relationship between the uses envisioned under the new zoning and the uses of adjacent land.[15] Whether a specific instance of spot zoning is illegal depends to a substantial degree on the particular facts and circumstances of the case. In any case the evolving doctrine of spot zoning is consistent with the notion that any rezoning that smacks of favoritism or lacks proper justification risks invalidation.

Confiscatory Zoning

Because zoning is a potent form of land use regulation, zoning requirements may have a drastic impact on a particular property. The constitutional doctrine that comes into play most frequently in this context is the provision of the Fifth Amendment to the U.S. Constitution that prohibits the taking of private property for public use without the payment of just compensation. It has long been true that a law restricting the use of property can have such a confiscatory effect as to constitute a regulatory taking. However, it was 1987 before the United States Supreme Court clarified that if a property owner proves such a taking, the remedy is not merely the invalidation of the regulation; the offending government may be held liable in damages for losses suffered by the property owner during the period when the unconstitutional regulation was in effect.[16]

Determining whether an unconstitutional taking has occurred typically depends on a balancing of the interests of the regulating government and the interests of the property owner. Two rules of thumb are clear: (If a regulation prevents the use or the development of land to create a common law nuisance (e.g., if a rule prevents new residences from being built in a floodway), such a prohibition is not a taking, regardless of its effect on the value of the property. In contrast, if a regulation does not prevent a nuisance but does prevent an owner from making any practical use of a property or enjoying any reasonable return from it, the restriction amounts to a taking.[17]

Exclusionary Zoning

In general, the term *exclusionary zoning* describes zoning efforts designed to prohibit certain types of land use activities within a jurisdiction. Some communities have tried to exclude completely certain less-popular land uses like junkyards, massage parlors, hazardous waste storage facilities, billboards, mobile homes, other types of low- and moderate-income housing, pawnshops, and nightclubs. Although the courts have not addressed constitutional challenges to exclusionary zoning, at least one North Carolina case suggests that housing types and land use activities that are otherwise legal and do not constitute nuisances per se cannot normally be excluded from a jurisdiction where they would otherwise locate or operate.[18]

Subdivision Regulation

The word "subdivision" usually calls to mind a relatively large residential development of single-family homes. For regulatory purposes, however, subdivision may best be thought of as a process by which a tract of land is split into smaller parcels, lots, or building sites so that the lots or parcels may eventually be sold or developed or both.

Most subdivision ordinances are based on the premise that the division of land generally signals that the land will soon be developed and used more intensively than it was before subdivision. As a result, those who purchase the subdivided tracts or lots will make more demands for community facilities and services. The platting and recording of a subdivision map offer a city the opportunity not only to review the design of the resulting lots but also to ensure that the subdivider provides streets, utilities, and other public improvements that will be required to serve the needs of those who purchase the subdivided land.

15. Chrismon v. Guilford County, 322 N.C. 611, 628, 370 S.E.2d 579, 589 (1988).

16. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

17. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). *See also* Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989), *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989).

18. Town of Conover v. Jolly, 277 N.C. 439, 177 S.E.2d 879 (1971) (invalidating special "trailer" ordinance prohibiting mobile homes used as permanent residences anywhere within city limits).

Table 25-2. *Local Government Authority to Impose Exactions as a Condition of Subdivision Plat Approval under the General Statutes*

	Type of Community Facility				
Type of Extraction	Parks	Utilities	Streets	Schools	Fire Stations
Construction or installation of improvements	Yes	Yes	Yes	Probably not	Probably not
Dedication of land	Yes	Yes, for utility easements	Yes	No	No
Payment of fees in lieu	Yes	No express authority	Yes, for street construction	No	No
Payment of impact fees under public enterprise authority	No	Probably,	No	No	No

Subdivision Design

The most fundamental subdivision design considerations concern the arrangement of lots and streets. Ordinance provisions commonly specify minimum lot sizes and lot widths, or require lots to front on a dedicated street for a certain distance. Standards for street design may include width specifications for rights-of-way and pavements, and maximum lengths for blocks and cul-de-sacs; these provisions ensure that emergency vehicles can easily reach any lot and that traffic is not overly concentrated at a particular intersection.

One design consideration that attracts much attention is the balance maintained between adequate access to lots and lot owners' privacy. Although developers and lot purchasers generally value cul-de-sacs for the isolation from traffic that they afford, they may be inappropriate if they make travel especially circuitous, put an excessive burden on existing through streets, or make garbage collection, emergency vehicle response, and street and lot drainage substantially more difficult.

Exactions and the Financing of Subdivision Improvements

The questions of who will finance subdivision improvements and community facilities and how they will be maintained are fundamental to subdivision regulation. Many local governments now expect subdividers to provide certain public improvements at their own expense. These *exactions* may take the form of requirements for (1) construction or installation of infrastructural improvements, (2) dedication of land, (3) payment of fees in lieu, or (4) payment of impact fees. Table 25-2 details the authority of cities and counties to exact various types of facilities by the different means at its disposal.

Forms of Exaction

Construction or Installation of Infrastructural Improvements

Virtually all subdivision regulations require the subdivider to construct or install certain subdivision improvements. The subdivision enabling statutes (G.S. 160A-372; G.S. 153A-331) allow cities and counties to require the "construction of community service facilities in accordance with (municipal) (county) policies and standards. . . ." *Community service facilities* defies exact definition, but the most commonly required subdivision improvements include streets, curbs and gutters, drainage swales or storm sewers, sidewalks, and water and/or sewer lines.

Subdivision development sometimes provides an excellent opportunity to arrange for streets, utility lines, or stormwater drainage improvements that are designed not only for a particular subdivision but also for future development. If a sewer line must be extended from the end of a sewerage network to a tract being subdivided, the owners of land along the line may wish to connect to it at some future time. A six-inch water line might adequately serve the particular subdivision, yet it might be wise to lay a twelve-inch main in order eventually to serve expected development on the far side of the subdivision. Several approaches are used to allocate costs. If a developer is the first to demand service in a newly developing area, the developer may be required to furnish the line. However, the local government may impose acreage fees or other charges on later developers who use the facility, and pay over some of these funds to the original developer in partial reimbursement for all the extra costs that the original developer assumed. Alterna-

tively, if a city or county requires a subdivider to provide capacity exceeding that necessary to serve the subdivision, then the local unit may pay for the extra capacity from its general funds on the theory that the oversized facilities will benefit the community generally.

Dedication of Land

There are instances in which improvements are required on lands or within easements that the developer does not own or control (e.g., the extension of a water line within an existing public utility easement). More commonly, however, improvements will be made on site. If the improvements are to be available for public use or are to be connected to a public system, the city or county will require the *dedication* of the land so improved and will accept the dedication only after the improvement has been completed and inspected. For purposes of development approval, then, a dedication is a form of exaction involving a requirement that the developer donate to the public some interest in land for certain public uses. North Carolina law allows both cities and counties, as a condition of subdivision plat approval, to require the dedication of sites and easements for streets, utilities, and recreation areas.

Compulsory dedication is based on the assumption that it is often desirable for a public agency to own, control, and maintain the improvements, the facilities, and the open space in a new subdivision. In many instances, however, such government responsibility for control and maintenance is neither possible nor practical. Local governments must give careful thought to whether common facilities are made public or are allowed (or required) to remain private.

Payment of Fees in Lieu

An alternative to compulsory dedication and improvement is to require or allow a subdivider to pay a fee that represents the value of the site or the improvement that would otherwise have been dedicated or provided. *Fees in lieu* can be an attractive option when the developer's contribution must be prorated if the exaction is to be fair and legal. Both city and county ordinances may provide for fees in lieu of the dedication of recreation areas and for fees in lieu of the construction of road improvements. Because of the administrative burdens in accounting for these funds, relatively few North Carolina jurisdictions use this exaction technique.

Payment of Impact Fees

In contrast to the forms of exactions just listed, the use of *impact fees* by North Carolina cities and counties is not expressly authorized by general statute. Several dozen cities and several counties are subject to local acts authorizing the use of impact fees, which are also known as *facility fees* or *project fees*. In addition, there is evidence that express enabling legislation authorizing impact fees may not always be needed if the facilities are part of a public enterprise.[19] Express enabling authority is very likely required to use impact fees for streets, parks, and schools.[20]

Impact fees are similar to fees in lieu, but generally are established as part of a comprehensive attempt to allocate the costs of a wide range of community facilities to new development. Impact fees can be applied to multifamily residential, commercial, and even office and industrial development; they are rarely restricted in application only to new subdivisions. They are generally collected when building permits are issued, usually just before the development creating the need for new services actually begins, rather than at the time of plat approval.

The validity of a system of impact fees depends on the system's analytical basis. The steps that follow highlight the elements of a plan for the application of impact fees:

1. An estimate is made of the cost of acquiring land for and constructing each new public facility that is within the local government's jurisdiction that must be provided during the planning period (e.g., twenty to twenty-five years), and that will be funded with impact fees. These estimates usually extend far beyond the time horizons used in a typical five- or seven-year capital improvement program.

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19. The statutes allowing North Carolina cities to finance public enterprises and to fix rates, fees, and charges for services furnished by a public enterprise (G.S. 160A-313, -314) have been held to authorize implicitly the use of impact fees to fund capital improvements to water and sewer systems [South Shell Investment v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988), *aff'd*, 900 F.2d 255 (4th Cir. 1990) (unpublished)]. (1994)]. *See also* Town of Spring Hope v. Bissette, 53 N.C. App. 210, 280 S.E.2d 490 (1981), *aff'd*, 305 N.C. 248, 287 S.E.2d 851 (1982).

20. *See* Durham Land Owners Association v. County of Durham, __N.C. App. __,__S.E.2d __, 2006 WL 1526112 (June 6, 2006) (county lacked enabling authority to adopt impact fees for public school construction).

2. The appropriate distribution of costs is determined on the basis of the costs of each facility that are attributable to, and that should be equitably borne by, both new and existing developments in each zone, service area, or planning district. Such a distribution of costs assumes that the community at large is obliged to provide public facilities such as roads and drainage improvements to serve existing residents at appropriate service standards. These costs are then allocated among the various development sectors—residential, commercial, and industrial.
3. A series of formulas or factors is used to allocate the appropriate portion of costs to each development project. For example, in the case of street improvements, the impact fee may be based on the number of trips generated by the land uses in the proposed development.
4. Once collected, these fees must be placed into trust funds or capital improvement funds, where they are earmarked by both type of facility and zone, service area, or planning district to be served.
5. When the funds reach appropriate levels, they are expended on the facilities for which they were collected so that residents of the new development actually benefit from the facilities. The fees may have to be refunded if they are not spent and facilities are not constructed within a reasonable time.

Exactions and the Constitution

An important dimension of exactions is their constitutional implications. Unless exactions are flexibly applied, they amount to an unconstitutional taking of private property for public use without just compensation. Exactions must be properly and fairly related to the need for the new public facilities generated by a new development.

In *Dolan v. City of Tigard*,[21] the U.S. Supreme Court ruled that the U.S. Constitution requires "rough proportionality" between the impact of the development and the nature and the extent of the exaction. Although precise mathematical calculation is not required, some sort of individualized determination must be made to justify an exaction requirement as it is applied in a particular case. The Court also held that a local government bears the burden of proving that an exaction is constitutional.

Subdivision Review Process

In North Carolina, final approval of subdivision plats may be granted by (1) the governing board, (2) the governing board on recommendation of a designated body such as the planning board, (3) a planning board, (4) a technical review committee, or (5) a designated body or staff person. Most cities and counties also review a *preliminary* or *tentative plat*. Local units have many choices in organizing the review process.

Pre-application Procedures

Some communities encourage developers first to submit a *sketch plan* or *design plan* to the planning staff or the plat approval agency. The purpose is to bring representatives of local government and the subdivider together so that the local unit can learn what the subdivider has planned and the subdivider can better understand the unit's requirements in approving the subdivision.

Review and Approval of the Preliminary Plat

Normally the next important step in the review process is submission and approval of a preliminary plat. To call a subdivision map submitted at this stage "preliminary" may be misleading because the plat will, in large measure, fix the nature, the design, and the scope of the subdividing activity to follow. Furthermore, it serves as a general blueprint for the installation of whatever improvements or community facilities the developer is to provide. One important aspect of preliminary plat review is the comments and the recommendations obtained from various city and county departments and agencies outside local government before formal action is taken on the preliminary plat.

Review and Approval of the Final Plat

Generally, the final plat is submitted for approval and reviewed by various agencies in much the same manner as the preliminary plat is. The final plat must be approved if it is consistent with the approval given the preliminary plat. If the developer may install improvements after final plat approval, the approval of construction plans may be delayed until the final plat approval stage.

21. 512 U.S. 374 (1994).

In some circumstances a city or county may require no preliminary plat at all; only the final plat is reviewed. Many local governments classify subdivisions as *major* or *minor* on the basis of the number and the size of the lots involved. Major subdivisions are typically subject to the two-stage review process described earlier; minor subdivisions (those that do not involve the installation of public improvements and do not have a major impact on the community) are often reviewed just once—at the final plat stage.

Once the final plat is approved, the plat must be recorded in the county register of deeds' office before lots may be sold.[22] The register of deeds may not record a plat of a subdivision subject to regulation unless the chair or the head of the plat approval agency has indicated on the face of the plat that it has been approved and a plat review officer (typically a county tax mapper) has certified that various other state law requirements for the recording of plat maps have been met.

Guaranteeing Developer Performance

In general, a developer may not begin to construct subdivision improvements until the preliminary plat is approved. Once that approval is granted, the developer is obliged to arrange for certain dedications to be made and improvements to be installed or constructed before the final plat may be approved. One way to ensure that streets are properly constructed, and utilities and drainage facilities properly installed, is to withhold final plat approval until these improvements are completed, inspected, and, if appropriate, accepted by the city or another government unit. A much more common practice is to allow final plat approval if the subdivider has provided adequate assurance to the local government that improvements will be completed after the final plat is approved. If performance guarantees are required, the ordinance must provide a range of options from which a developer may choose. Common forms of guarantees include letters of credit, bonds, and securities held in escrow.

In addition, a city or county may withhold the building permit for a lot that has been illegally subdivided (G.S. 160-375; G.S. 153A-334).

Other Regulatory Tools and Techniques

Thoroughfare Planning

In 1987 the General Assembly adopted a series of legislative measures designed to enhance the ability of both cities and the North Carolina Department of Transportation to acquire or protect the right-of-way for proposed new streets and highways. These measures gave cities the power (1) to establish setback requirements for structures based on proposed rather than actual rights-of-way (G.S. 160A-306); (2) to require fees in lieu of road improvements as a condition of subdivision plat approval (G.S. 160A-372); (3) to require the construction of road improvements as a condition of obtaining a municipal driveway permit (G.S. 160A-307); (4) to approve transfers of density to other portions of a development site in order to obtain the dedication of the full right-of-way for a thoroughfare (G.S. 136-66.10, -66.11); and (5) to adopt a roadway corridor official map to reserve a right-of-way for a proposed road (G.S. 136-44.50 through -44.53).

Perhaps the tool that is now being used the most is the municipal driveway permit. Cities may require an applicant for a driveway permit for a city street to provide medians, acceleration/deceleration lanes, and turning lanes if necessary to serve driveway traffic generated by the development.

Another potent but legally risky tool is the roadway corridor official map. A city may adopt an official map ordinance for a road that is shown on the city's comprehensive street plan or that is included in the city's capital improvement program. (The Board of Transportation (BOT) may also adopt an official-map designation; BOT's action must apply to a portion of the existing or proposed State Highway System that is included in the State's Transportation Improvement Program). Once an official map is adopted and recorded, no building permit may be issued for land within

22. Among the more controversial provisions in the 2005 amendments to the subdivision statutes [G.S. 160A-375(b); G.S. 153A-334(b)] are those that allow subdividers to enter into contracts for the sale of lots described on an approved preliminary plat before the final plat is approved and recorded. The subdivider/seller must provide a variety of disclosures to the prospective buyer when the contract is executed. The closing and conveyance of the lot may not occur until after the final plat has been approved and recorded.

the corridor, and no land within the corridor may be subdivided for up to three years after the application for development permission is submitted. A city may adopt an official map for a corridor located either inside its city limits or within its extraterritorial planning jurisdiction. If the county consents, a city may even adopt an official map for a route located outside its extraterritorial planning jurisdiction. A city is also authorized to acquire the right-of-way for a road shown on an official map even though it is located outside city limits.

Because North Carolina counties are not generally authorized to acquire right-of-way for or maintain public streets and roads, their role in thoroughfare planning through the use of right-of-way protection is much less prominent than that of cities.

Building Code Enforcement

The North Carolina State Building Code, adopted by the North Carolina Building Code Council, applies throughout the state. However, each city and county is responsible for arranging for enforcement of the code within its jurisdiction. The code generally applies to new construction, but it includes a fire code volume that applies to the use of existing buildings and other provisions governing existing buildings and their rehabilitation. The code also provides for the issuance of building permits and certificates of occupancy. These approvals are particularly important in the development and construction processes because they signify not only consistency of plans and work with the requirements of the State Building Code, but also compliance with other state and local regulations applicable to the work.

The North Carolina State Building Code is based on a model international building code that has been adapted with amendments exclusive to North Carolina. The code applies to all types of new buildings, structures, and systems except farm buildings outside city building code enforcement jurisdiction and several other minor classes of property. Generally, a city or county may not modify or amend the code as it applies locally. However, proposed local amendments to the fire prevention volume of the code that are found to be more stringent than the state code must be approved by the North Carolina Building Code Council. To arrange for local code enforcement services, a city may (1) create its own inspection department; (2) form a joint inspection department with another local unit; (3) hire an inspector from another unit on a part-time basis, with the approval of the other unit's governing board; (4) contract with another unit for the second unit to furnish inspection services to the first; (5) request the county of which it is a part to provide inspection services throughout the city's jurisdiction without any contract between the two; or (6) contract with a certified code enforcement official who is not a local government employee. A county may make similar arrangements.

Since 1979 no person may enforce the State Building Code without a certificate from the North Carolina Code Officials Qualification Board. Each inspector must hold a certificate for one of several levels of competency (G.S. 143-151.13). All inspectors must complete certain training and continuing education courses to obtain and retain their respective certifications. In addition to supervising code official training and certification, the Code Officials Qualification Board may revoke an inspector's certificate for various reasons, including gross negligence.[23]

Minimum Housing Code Enforcement

A local government is authorized to adopt its own minimum housing ordinance establishing the standards that any dwelling unit must meet to be fit for human habitation (G.S. 160A-441). The standards may deal with structural dilapidation and defects, disrepair, light and sanitary facilities, fire hazards, ventilation, general cleanliness, and other conditions that may render dwellings unsafe and unsanitary. Most units try to use this authority to encourage the rehabilitation of substandard housing. If a housing inspector finds after a formal hearing that a dwelling is unfit for human habitation but can be rehabilitated, the inspector may issue an order requiring the building to be repaired, improved, or vacated and closed. If the dwelling cannot be rehabilitated, the inspector may issue an order requiring the dwelling to be removed or demolished. If the property owner fails to comply with such an order after having every reasonable opportunity to do so, the inspector may carry out the order directly. No demolition order may be executed unless the governing board (typically the city council) enacts an ordinance to that effect for each property to be demolished.

23. In a limited number of instances, the owners of new residences have been successful in convincing the board that an inspector's certificate should be revoked because of the inspector's failure to inspect adequately the house that they bought and to detect and have corrected construction mistakes made by contractors.

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