

You can tell me what to do, sometimes:

Local Zoning Ordinance Application to North Carolina and its political subdivisions

by

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EXECUTIVE SUMMARY

A delegation of the State's police power, North Carolina municipalities since the 1920s and counties since the 1950s have been empowered to impose local zoning regulations. In its initial iteration, the zoning enabling statute for municipalities did not address whether local zoning codes would apply to the State or its political subdivisions. To fill this breach, North Carolina courts developed a governmental-proprietary use test to determine if local zoning regulations would apply to government projects. Since 1951 for cities and 1959 for counties, North Carolina statutory law has superseded this judicial test and presently declares that local zoning laws are applicable to the "erection, construction, and use of buildings by the State of North Carolina and its political subdivisions." The term "building" is left undefined in the zoning enabling statutes. While a pair of judicial decisions and standard tools of statutory interpretation, including legislative history, give some suggestion on how a court may interpret "building" prospectively, more guidance is needed from the General Assembly in order to better elucidate and effectuate its intent. Faced with an undefined scope of "building," as well as the General Assembly's plenary ability to exempt the State and its political subdivisions from local zoning regulations on an ad hoc basis, local governments are forced to strike a "delicate balance" with State actors based more on politics and bargaining power than on a more legally principled basis. To better meet the general policy goals of enabling North Carolina municipalities and counties to zone as well as the policy of subjecting State and political subdivision buildings, but not other non-building uses to those local zoning laws, the General Assembly would do well to better define and cement their limitations on local zoning authority.

I. INTRODUCTION

What's in a name? That which we call a rose
By any other name would smell as sweet.
So Romeo would, were he not Romeo call'd,
Retain that dear perfection which he owes
Without that title. Romeo, doff thy name;
And for that name, which is no part of thee,
Take all myself.¹

Juliet got her man, and she loved him, no matter his name was the name of her family's sworn enemy. The name did not matter.

The law more often takes the view that names are important. What we call something determines how we classify something, and how we classify something often determines how the law is applied to it. The law seems to take the same view of names as Gwendolen, the name-crossed lover of Oscar Wilde's *The Importance of Being Earnest*. When confronted with the possibility that her love's name might be Jack and not Ernest, she responded:

Jack?... No, there is very little music in the name, if any at all, indeed. It does not thrill. It produces absolutely no vibrations... I have known several Jacks, and they all, without exception were more than usually plain. Besides, Jack is a notorious domesticity for John! And I pity any woman who is married to a man called John. She would have a very tedious life with him. She would probably never know the entrancing pleasure of a single moment's solitude. The only really safe name is Ernest.²

When it was discovered that her Ernest was in fact named Jack, her affections diminished. But when the adopted Jack found out he was named for the birth father, he consulted his father's military records and declared his name to again to be Ernest, a fudging of the truth. In a homophone-laden final scene, when confronted on this point by Gwendolen's aunt, Ernest/Jack

¹ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* (Act II, Scene ii, 1-2) (1597)

² OSCAR WILDE, *THE IMPORTANCE OF BEING EARNEST AND OTHER PLAYS* 20 (Pocket Books 2005) (1895)

responded that he had “realized for the first time in my life the vital Importance of being Earnest.” Gwendolen was none the wiser, and they all lived happily ever after.

North Carolina zoning law with regards to local zoning law applicability to the State of North Carolina and its political subdivisions is like Gwendolen. The name is important. Per North Carolina statute, local zoning laws only apply to “to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions.” Importantly, the name, term, “buildings” is not defined by the statute. At other points in the State’s zoning statutes, local governments are permitted to regulated “structures” and “land” in addition to “buildings,” but, again, per statute, local governments can only regulate State and political subdivisions with regards to “buildings.”

The resolution of what this name, “building,” represents and the resulting scope of local zoning law applicability is important for a few reasons. First, as a matter of fact, the State and its political subdivisions own a lot of land and real estate. According to State of North Carolina deeds, the State itself owns 1,040,144 acres. While this is only 3% of the state’s area, important parts of these lands are in populous areas, like Raleigh, Greenville, Wilmington, Greensboro, and Chapel Hill. Furthermore, local governments in every town and city own centrally-located, important real estate. Local zoning laws apply only to these lands as far as there is a “building” present. Second, as a seemingly narrow legal matter, the resolution of what a “building” is has public policy important implications. To the extent we are worried about local guidance of land use decisions, a broader definition of “building” would put more power in local hands. On the other hand, to the extent we are concerned about NIMBYism and overarching State policy concerns in public facility siting and provision of public services, a narrower definition of

“building” allows a freer hand in designing those services. Also, as a matter of public policy, why only “buildings,” whatever the definition? The deleterious effects of potentially non-building landfills or landing strips are equal to, if not greater than, any effects of State “buildings.” Why subject “buildings” to local zoning but not other non-building uses? What safeguards are in place to guard against governmental noxious uses of land? In the absence of more clear legislative guidance on the legislation’s intent and policy aims, how are courts to construe the scope of this provision and to what end?

North Carolina courts have addressed these issues only sparingly and, as with any court, on an ad hoc basis. Some of these questions are left unanswered by courts and perhaps are unanswerable by them given their limited tools of statutory construction and ability to announce policy. The General Assembly should clarify its policy intent and improve the across-the-board application of this law. In the shadow of uncertainty, local municipalities and the State play at the edges of this debate and employ pressure, including threats to strip particular municipalities of certain zoning authority, to form ad hoc solutions that may not reflect the true intent of the statute.

Part II of this paper traces the statutory and case law history of North Carolina zoning law with relation to zoning law applicability to the State and its political subdivisions. Part III uses standard tools of statutory construction to project forward how a court might interpret statutory provisions regarding local zoning and the State. Part IV briefly examines the interactions between a state political subdivision, the Town of Chapel Hill, and its citizens and the interactions between the University of North Carolina at Chapel Hill, a State entity, and the Town. Part V superficially surveys the general state of the law in other jurisdictions, investigates

a key difference with a sister jurisdiction. Part VI concludes with recommendations for the General Assembly to improve its guidance in this area.

II. LOCAL ZONING LAW AND THE STATE

A. *Zoning Power, Generally*

Constitutionally, the police power,³ the power to legislate for the protection of health, safety, and general welfare rests with the North Carolina General Assembly.⁴ Included in this legislative police power is the power to “zone,”⁵ the power to divide land into distinct districts and regulate certain uses and developments within those districts.⁶ In most matters, the General Assembly is very limited in its ability to delegate its legislative power. In matters of local concern, however, “the general rule that legislative power, vested in the General Assembly, may

³ BALLENTINE’S LAW DICTIONARY (2010) (defining police power as “[a]n attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of public weal and protection of public interests” and “[t]hat power in government which restrains individuals from transgressing the rights of others, and restrains them in their conduct so far as is necessary to protect the rights of all...” (internal citations omitted)

⁴ *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970); *See also* N.C. Const. art. II, § 1 (2010)(stating “[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.”).

⁵ 83 Am Jur 2d Zoning and Planning § 3

⁶ *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988) (holding that the power to zone real property is vested in the General Assembly by Article II, Section 1.); *Keiger v. Winston-Salem Bd. of Adjustment*, 278 N.C. 17, 178 S.E.2d 616 (1971) (holding “[t]he power to zone is the power originally vested in the General Assembly to legislate with reference to the use which may be made of land and the structures which may be erected or located thereon”)

not be delegated is subject to an exception permitting the delegation to municipal corporations and to counties of power to legislate concerning local problems.”⁷ As one of only two states with no “home rule” provisions,⁸ North Carolina municipal corporations and counties depend entirely on their General Assembly-approved charters and other statutory delegations of power for any and all of their powers, including the power to zone. The North Carolina Constitution provides:

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, *may give such powers and duties to counties, cities, and towns, and other governmental subdivisions as it may deem advisable* (emphasis added).⁹

This provision has been interpreted to mean that “[m]unicipalities have no inherent powers; they have only such powers as are delegated to them by legislative enactment.”¹⁰ Municipalities “are creatures of the legislature, public in their nature, subject to its control, and have only such powers as it may confer powers [which] may be changed, modified, diminished, or enlarged, and, subject to the constitutional limitations, conferred at the legislative will.”¹¹ The

⁷ Porter v. Suburban San. Serv., Inc., 283 N.C. 479, 196 S.E.2d 760 (1973); Allred v. City of Raleigh, 277 N.C. 530, 540, 178 S.E.2d 432, 437 (1971); *see also* Jackson v. Guilford County Bd. of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969)(holding “the General Assembly may confer upon county Boards of Commissioners power to adopt zoning ordinances notwithstanding N.C. Const., Art. II, § 1.)

⁸ Frayda S. Bluestein, *Do North Carolina Local Governments need Home Rule?*, POPULAR GOVERNMENT, Fall 2006, at 15

⁹ N.C. Const. art. VII, §1 (2010)

¹⁰ In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 16-17, 249 S.E.2d 698, 707 (1978)

¹¹ City of Asheville v. State, 192 N.C. App. 1, 20-21 (N.C. Ct. App. 2008) (internal citations omitted); *See also* Williamson v. City of High Point, 213 N.C. 96, 106, 195 S.E. 90, 96 (1938) (holding that “[Municipalities] are but

authority of municipalities is very limited and has been described as: (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the corporation -not simply convenient, but “only those which are indispensable, to the accomplishment of the declared objects of the corporation.”¹² Zoning regimes and regulations have never been characterized as implied or essential to the declared objects of local governments in North Carolina.¹³ North Carolina courts have declared that a local government “has no inherent power to zone its territory and possesses only such power as is delegated to it by the enabling statutes,”¹⁴ and that this “power to zone, conferred upon the legislative body of a municipality, is subject to the limitations of the enabling act.”¹⁵

The first North Carolina local zoning enabling statutes occurred when, based largely on the Standard State Zoning Enabling Act produced by the U.S. Department of Commerce, the North Carolina General Assembly first enabled cities and incorporated towns to zone in 1923.¹⁶ This power was later extended to counties starting in 1959.¹⁷ North Carolina state zoning

instrumentalities of the State for the administration of local government, and their authority as such may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the Legislature.”)

¹² *Bowers v. City of High Point*, 339 N.C. 413, 417 (N.C. 1994)

¹³ *See Town of Pinebluff v. Marts*, 673 S.E.2d 740 (N.C. Ct. App. 2009) (“In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State”)

¹⁴ *Heaton v. City of Charlotte*, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971)

¹⁵ *Davidson v. City of High Point*, 85 N.C.App. 26, 354 S.E.2d 280 (1987)

¹⁶ 1923 N.C. Sess. Laws, Chapter 250, Section 1 (page number not known)

¹⁷ 1959 N.C. Sess. Laws 1015

enabling statutes are now codified in Chapter 153A, Article 18, Part 3 for counties and Chapter 160A, Article 19, Part 3 for cities and towns.

State zoning enabling laws have been certainly been revised, augmented, and changed over the intervening eighty years, but the basic, broad grant of zoning power is remarkably the same. Per the 1923 City zoning enabling legislation:

Grant of Power - For the purposes of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. Such regulation may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained.¹⁸

Today's codification adds some additional clauses to this grant-of-power section, but the basic grant of power is essentially the same. Per N.C. Gen. Stat § 160A-381. Grant of power:

(a) For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land. The ordinance may provide density credits or severable development rights for dedicated rights-of-way...¹⁹

¹⁸ 1923 N.C. Sess. Laws, Chapter 250, Section 1

¹⁹ See also N.C. Gen. Stat. § 153A-340 (2010) Grant of power (a) For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and

The 1923 enactment went on to lay out how zoning districts would be established, the purposes of a zoning regime, methods of procedure, how changes would be made, how the zoning commission would operate, how the board of adjustments would operate, and what remedies would be available for violations. The original county zoning enabling legislation and current code provisions mirrors this grant-of-power language and statutory scheme.²⁰ The municipal zoning enactment did not, however, explicitly answer the question of to what extent these local zoning regulations would apply to either the State or any of its political subdivisions. The statute itself would not give any answer on this subject until 1951 for cities.²¹

Perhaps, it was understood that the zoning laws enabled under these enactments would not apply to the State or its political subdivisions. As a general matter in North Carolina law, it is a familiar statement that “[g]eneral statutes do not bind the State unless the state is expressly mentioned therein.”²² This idea became entrenched in North Carolina law when in 1846 Chief Justice Ruffin wrote “...it is a known and firmly established maxim that general statutes do not bind the sovereign unless expressly mentioned in them. Laws are *prima facie* made for the government of the citizen and not of the State itself.”²³ Between 1928 and 1951, the

use of buildings, structures, and land for trade, industry, residence, or other purposes. The ordinance may provide density credits or severable development rights for dedicated rights-of-way ...

²⁰ 1959 N.C. Sess. Laws 1015

²¹ The 1959 enactment of county zoning enabling legislation included a provision that local zoning would apply to all State and political subdivision buildings. See 1959 N.C. Sess. Laws 1015

²² *Yancey v. North Carolina State Highway & Public Works Commission*, 222 N.C. 106, 22 S.E.2d 256 (1942)

²³ *State v. Garland*, 29 N.C. 48, 50 (1846)

applicability of zoning statutes to the State and its political subdivisions was not expressly mentioned in North Carolina's zoning enabling statutes.

In this interim between cities being enabled to zone and a statutory attempt at defining the applicability of local zoning to the State and its political subdivisions, the North Carolina Supreme Court was confronted with this issue only once in *McKinney v. City of High Point*.²⁴ In *McKinney*, the North Carolina Supreme Court reached the same result as Chief Justice Ruffin might have, non-application of a zoning law to a State-created political subdivision, but in this case, the court reached its decision under a new test: the governmental-propriety use test.

B. The Governmental-Proprietary Use Test

In *McKinney*, the city, High Point, purchased land and erected a 184 foot high, 1,000,000 gallon capacity storage tank.²⁵ Neighboring property owners brought a suit against the city to recover damages, claiming that the city created a nuisance and a taking of property through diminution in value of their land.²⁶ Further, the property owners claimed the city had not

²⁴ 237 N.C. 66, 74 S.E.2d 440

²⁵ *Id* at 69, 442

²⁶ *Id.* ("Paragraph 9 of the amended complaint reads as follows: 'That the erection and maintenance of said water tank and its enclosure in said location by the defendant has materially damaged the said property of the plaintiffs; that it has tended to cheapen said property by placing by a structure out of keeping and harmony with the other buildings and structures located in said section, and particularly the property of the plaintiffs; **that the erection of said tank, in violation of said ordinance, has tended to industrialize a purely residential section, and has tended to defeat the very purpose for which said section or district was zoned by the defendant;** that said tank constitutes a constant hazard to plaintiffs' property from airplanes, windstorms, tornados, cyclones and electrical storms; that there is a constant hazard to plaintiffs' property from the danger of said tank leaking or bursting; that it is a painted a

followed either the procedure or substance of its own zoning ordinance.²⁷ The High Point zoning code required the approval of the Board of Adjustments for municipal utilities and limited the height of public buildings to sixty feet.²⁸ On this claim, the City defended by asserting that “the water tank erected by the defendant City of High Point in the portion of the City in which the

bright silver color so that the reflection of the rays of the sun upon it causes a continuous and blinding glare, and said tank constitutes a nuisance; that it further constitutes a wrongful and unlawful taking or appropriation of plaintiffs’ property; *that the plaintiffs have been damaged by the unlawful, careless, negligent and arbitrary acts of the defendant in the erection of the water tank and its enclosure herein described in close proximity to plaintiffs’ property*; by reason of wrongful, *unlawful* and negligent erection of said water tank and its enclosure the plaintiffs have been damaged in the sum of \$7,500.00.”)(emphasis added)

²⁷ *Id.* at 68, 442 (“Paragraph 4 of the amended complaint reads as follows: ‘That the section in which plaintiffs’ property is located was for many years, and is now, zoned as “Residence ‘A’ District,” as defined in “The Code of the City of High Point, North Carolina, 1950,” Chapter 24, Sections 24.7, 24.26 and 24.45 (formerly Chapter O, Art. II of the 1945 Code Ordinances of the City of High Point); that said ordinance specifies the type and height of buildings and structures that can be constructed or erected in said Residence “A” District, and specifically excludes all other types of buildings or structures; that the construction or erection of a public utility is not enumerated among the list of buildings and structures that can be constructed or erected in said Residence “A” District; that elsewhere in said Code the erection of a municipal utility in any district is provided for, but only after referral to, and report by, the Board of Adjustments, and according to the method prescribed therein; that the matter of the erection of the water tank described below was not referred to the Board of Adjustments, nor was *the procedure outlined in the said ordinance followed, and same was wrongfully and unlawfully erected in its present location; that said water tank further greatly exceeds the height requirements of said ordinance; that said ordinance was in full force and effect prior to the erection of said hereinafter described water tank, was in force and effect when same was erected, and is still in force and effect; that said ordinance is made a part hereof as fully as if set forth verbatim herein.*’”)(emphasis added)

²⁸ *Id.* at 69, 442

land of the plaintiffs is located, as referred to in the complaint, was designed and erected within the governmental function of the City of High Point for the sole purpose of supplying adequate water and water pressure to the citizens and business located in said city, particularly in the section in which the land of the plaintiffs is located.”²⁹

On the claim of governmental overreach in neglecting to follow the zoning code, the court held that the erection of the water tank was done by the city in its governmental capacity and that its zoning ordinances did not apply based on a governmental-proprietary use test.³⁰ The court adopted the rule that “municipalities are sometimes regarded as subject to the prohibitions or restrictions of their own zoning ordinances, in so far as the property is being used in the performance of a proprietary or corporate function as distinguished from a governmental function, the use of property for which is ordinarily held not to be within the prohibitions or restrictions of a zoning ordinance.”³¹ As a matter of policy, the court found that “[t]he need of a public building in a certain location ought to be determined by the federal, state, or municipal authority, and its determination on the question of necessary or desirable location cannot be interfered with by a local zoning ordinance.”³² Inferring that the water tower was erected for the purposes of health, sanitation, fire protection and selling water for gain to its inhabitants and businesses within the city, under North Carolina law, the court concluded that the water tank was erected for a governmental use and therefore zoning ordinances did not apply.

²⁹ *McKinney* at 70, 443

³⁰ *Id.* at 75, 446

³¹ *Id.* at 73, 445 (internal citations omitted)

³² *Id.* (internal citations omitted)

Interestingly, while the court found the city had the ability to disregard local zoning ordinances, the court did not clothe the city's governmental actions in a total immunity and recognized the ability of the neighboring landowners to still sue for damages under takings or nuisance theories, a potential safeguard against governmental overreach. The court found that the city having a right to erect and maintain this water tank in its governmental capacity did not prevent a recovery of damages for a taking or appropriating, in whole or in part, of property for a public use without due compensation.³³ Here, the plaintiff's allegations were that the construction and maintenance of this tank in a residential area had "cheapened" their property, that ordinance's maximum height had been exceeded, that the tank cast a shadow over their house, that the silver tank color caused a blinding glare, and that the operation of the tank defeated the purpose for which the section was zoned. The court found these assertions were sufficient "to allege a taking of the plaintiff's property for which compensation must be paid for any loss the plaintiffs suffered." Additionally, while the court found that an elevated water tank is not a nuisance per se, it did recognize the possibility of an operation becoming a nuisance if operated in a negligent or unreasonable way.³⁴ Conversely, the court recognized that no liability would be created if the operation were operated in an ordinary, careful, and reasonable way.³⁵ Here, there were no allegations of negligent or unreasonable operation of the water tower, so the nuisance action did not stand, but the possibility remains open on other facts.³⁶

³³ *Id.* at 75, 447

³⁴ *McKinney* at 76, 448

³⁵ *Id.*

³⁶ Though *McKinney*'s governmental-proprietary use test would be superseded by statute, this allowance for nuisance and takings theories may provide a check on State and political subdivision test land use with the threat of

C. Statute: All “Buildings” Subjected Local Zoning

McKinney’s governmental-proprietary use test was destined to become a one-time shot deal in North Carolina land use law, not based intrinsically on its facts or methods, but based on its timing. Even as the court was writing the *McKinney* opinion, the court was aware that a new statute on the applicability of local zoning regulations to the State and its political subdivisions had come into effect.³⁷ In 1951, the General Assembly passed “an act to amend... the General Statutes so as to make city zoning regulations applicable to buildings constructed by the State of North Carolina and its political subdivisions.”³⁸ The operative terms of the original act subjecting State and political subdivision actions to local zoning laws read in part:

All provisions of this Article are hereby made applicable to the erection and construction of buildings by the State of North Carolina and its political subdivisions...³⁹

While the new statute purported to subject only State and political subdivision “buildings” to local zoning laws regardless of their function, governmental or proprietary, it is unlikely that *McKinney* governmental-proprietary use test survived to apply to any non-building uses of land. A longstanding canon of statutory interpretation holds that negative inference may be drawn from the exclusion of language from one statutory provision that is included in other

suits under the North Carolina Tort Claims Act, a waiver of State sovereign immunity in particular situations. *See* N.C. Gen. Stat. § 143-291 (2010)

³⁷ *McKinney* at 74, 446. *See also* Davidson County v. City of High Point 33, 285 (The court’s citing of [the new statute] denotes a recognition that the application of a judicial test, such as the governmental-proprietary function test, is unnecessary when the Legislature has already expressed its intent on the subject...)

³⁸ 1951 N.C. Sess. Law 1246

³⁹ *Id.*

provisions of the same statute.⁴⁰ In this situation, the grant of zoning power allowed cities to regulate among other things the “location and use of buildings, structures and land for trade, industry, residence or other purposes.” By negative implication, the exclusion of “structures and land for trade, industry, residence or other purposes” means local zoning regulations are meant to apply only to buildings and not other non-building uses of land. Importantly, the term “building” is not defined itself or in relation to “structures” or other terms. Provisions mirroring this grant of power and applicability of local zoning regulations to the State and its political subdivisions were included in the 1959 act extending zoning authority to counties.⁴¹

The last sixty years have brought with them telling changes and exceptions, but the main operative language of this section are largely the same. Per the statute in its current form, N.C. Gen. Stat. §160A-392 for cities and N.C. Gen. Stat. §153A-347 for counties:

All of the provisions of this Part⁴² are hereby made applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions...

The latent ambiguity in the statute remains the same as it was in 1951: What does the term “building” mean? Again, this seemingly minute legal issue of statutory construction has important policy questions embedded in it. Under North Carolina law, the primary rule of judicial statutory construction is to effectuate the intent of the legislature.⁴³ When the language

⁴⁰ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (U.S. 2006)

⁴¹ See 1959 N.C. Sess. Laws 1015

⁴² The term “part” refers to either Article 19, Part 3 “Zoning” of Chapter 160A “Cities and Towns” or Article 18, Part 3 “Zoning” of Chapter 153A “Counties”.

⁴³ *In re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366 (2005).

of a statute is ambiguous, the courts are to determine the purpose of the statute and the intent of the legislature in its enactment.⁴⁴ In answering the legal question of what “building” means, courts will necessarily wade into the policy waters of what was the legislature intent in subjecting only “buildings” to local zoning control. Is the goal of this act to extend or contract zoning law applicability? Inferences cut both ways. If the baseline is Ruffin’s no-applicability-to-the-State rule, then the provision would be an extension of local power. If, however, the baseline is the governmental-proprietary use test, then the new buildings-only provision would extend local zoning to all State and political subdivision buildings regardless of use but remove any local jurisdiction over all non-building uses. It is true that the *McKinney* governmental-proprietary use test would not be handed down by the North Carolina Supreme Court until after the new statute went into effect, but the governmental-proprietary use test was already in use in other states.⁴⁵ Did the General Assembly enact this provision as a prospective preemption of the governmental-proprietary use test in North Carolina or merely as an extension of local zoning power over formerly presumed-to-be-exempt State and political subdivision actors? At bottom, the question is: What was the General Assembly’s intent in passing this legislation and subjecting only State and political subdivision “buildings” to local zoning?

To date, the scope of this provision, the provision subjecting State and political subdivision buildings to local zoning regulations, has been considered in an Attorney General advisory opinion and in a trio of court decisions. The Attorney General opinion gives some

⁴⁴ *Diaz v. Division of Social Services and Div. of Medical Assistance*, North Carolina Dept. of Health and Human Services, 360 N.C. 384, 628 S.E.2d 1 (2006).

⁴⁵ *McKinney* at 72, 444

guidance as to the breadth of issues zoning ordinances can address and on which command compliance from State and political subdivisions. Unfortunately, the opinion punts the question of what a “building” is. The court cases do shed some light into limited examples of what is not a “building.” Looking prospectively for a more complete definition of “building” for the purposes of this statute though, local governments must resort to canons of statutory construction and suppositions as to the policy reasoning of the statute. Court decision have given some indicia of what this “building” definition might look like, but a more complete, clear definition is needed for local governments, state government, and citizens to achieve the balance intended by these provisions subjecting State and political subdivision buildings to local zoning codes.

1. Attorney General Opinion

In June 1978, Attorney General Rufus L. Edmisten was called upon to answer: Would the State Construction Officer be bound by county or municipal Floodway/Floodplain Ordinances when building on State property located within a county or municipality? Under North Carolina law, it is the duty of the Attorney General to give, when required, his opinion upon all questions of law submitted to him or her by the General Assembly or by the Governor, Auditor, Treasurer, or any other state officer.⁴⁶ An opinion given by the Attorney General in the performance of his statutory duty to opine upon all questions of law submitted to the Attorney General by state officers is advisory only and not authoritative.⁴⁷ On this question presented, he found that:

⁴⁶ N.C. Gen. Stat § 114-2(5) (2010)

⁴⁷ *Lawrence v. Shaw*, 210 N.C. 352, 186 S.E. 504 (1936), *cert. granted*, 299 U.S. 537, 57 S. Ct. 315, 81 L. Ed. 396 (1937) *and rev'd*, 300 U.S. 245, 57 S. Ct. 443, 81 L. Ed. 623, 108 A.L.R. 1102 (1937).

In view of... the broad, general language of the statutes relating to the general zoning authority of counties and municipalities, we conclude that a floodplain ordinance adopted pursuant to [county or municipal zoning authority] would be binding upon the State with regard to the “erection, construction, and use of buildings” by the State. The application of these Parts to the State is expressly limited to the “erection, construction, and use of buildings.”⁴⁸

As to when these zoning regulations would not apply, he merely stated a truism without defining the statute’s key term, “building.” He opined only that “[t]he zoning authority contained in these Parts would not be applicable when the State is constructing something other than a building.”

2. Court Decisions

i. Davidson v City of High Point I

In *Davidson County v. City of High Point*,⁴⁹ the issue presented was “whether a city which owns a sewage treatment facility located in a county and outside the city’s boundaries must comply with the county’s zoning ordinances when upgrading that facility and providing sewage service to newly annexed areas of the city.”⁵⁰ The Court of Appeals court held that the city did not have to comply with the county’s zoning requirements because the definition of “building” did not encompass a statutorily-defined set of “public facilities.” The usefulness of this holding in scoping out the boundaries of “building” has been called into question, though. On appeal, the North Carolina Supreme Court reached the same result as the Court of Appeals, a decision for the city of High Point, but for entirely different and unrelated reasons.

⁴⁸ State Departments, Institutions and Agencies; North Carolina Department of Administration, Counties; Municipalities; Floodplain Ordinances, Op. Att’y Gen. (June 15, 1978)

⁴⁹ 85 N.C.App. 26, 354 S.E.2d 280

⁵⁰ *Id.* at 26, 281

The facts of the cases were as follows: In 1983, the city applied for and received a special use permit to expand its wastewater treatment facility located in the county's zoning jurisdiction subject to conditions and county Board of Commissioners final approval. The wastewater treatment plant expansion was meant to increase capacity in order to serve newly-annexed areas of the city. After the city's annexation was completed, it made no efforts to obtain approval from the county's Board of Commissioners before planning to increase capacity at the facility. The county sued alleging, among other things, that "the defendant's annexation and plans for the provision of sewer services to Davidson County residents using the Westside Wastewater Treatment Facility without the approval of the Davidson County Board of Commissioners violates the conditions upon which the special use permit was issued..." In short, the city, a State political subdivision, was violating county zoning regulations. The county argued that the statutory provision subjecting the "erection, construction, and use of buildings by the State of North Carolina and its political subdivisions" was intended to subject enterprises like this wastewater treatment to county zoning regulations. The court disagreed and found that "... the County's reliance on that statute is misplaced because we find the sewage facility in question was not intended by Legislature to be included in the 'buildings' subject to the County's zoning regulations." In short, the court held that "public enterprise" is not a "building."

As a matter of definition, under North Carolina statutes, cities and counties are empowered to operate "public enterprises."⁵¹ For cities, "public facilities" are defined to include: electric power generation, transmission, and distribution systems; water supply and distribution systems; sewage collection and disposal systems of all types; gas production,

⁵¹ See N.C. Gen. Stat § 160A-312 (2010); N.C. Gen. Stat. § 153A-275 (2010)

storage, transmission, and distribution systems; public transportation systems; solid waste collection and disposal systems and facilities; cable television systems; off-street parking facilities; and airports.⁵²

To resolve the question of whether “public enterprises” are “buildings” for purposes of the zoning statutes, the court turned to the “ordinary” meanings of the words. An oft-cited canon of statutory construction is that statutory words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise.⁵³ Turning to Black’s Law Dictionary, the court found that “[a] ‘building,’ in its ordinary sense, is defined as a ‘[s]tructure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof.’” Turning to Webster’s Third International Dictionary, the court defined “enterprise” as a “venture, undertaking, project; . . . an undertaking that is difficult, complicated . . . ; any systematic purposeful activity or type of activity” For the court, a “public enterprise” represented a “complex systematic purposeful activity or type of activity that is conducted for a public purpose or benefit,” “something greater in scope than a building.” The court noted that, in defining what is included in “public enterprise,” the statute used the terms “system” or “facility” to describe particular public enterprises. Again, turning to Webster’s Dictionary, the court found “system” defined as “a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose,” and “facility” defined as “something . . . that is built, constructed, installed, or established to perform some particular

⁵² See N.C. Gen. Stat. § 160A-311 (2010); N.C. Gen. Stat. § 153A-274 (2010)

⁵³ *State v. Wiggins*, 272 N.C. 147, 153 S.E.2d 37, 42 (1967) *cert. denied* 390 U.S. 1028, 88 S.Ct. 1418, 20 L.Ed.2d 285 (1968)

function or to serve or facilitate some particular end.” With these definitions as backing, the court held that “public enterprises” were not “buildings.” Further, the court went on to hold that “public enterprises” were not subject to the county’s general grant of zoning authority to regulate the use of “structures and land for trade, industry, residence, or other purposes.” The county appealed this result.

ii. *Davidson v. High Point II*

On appeal, the North Carolina Supreme Court upheld the result, a win for the city, but on different grounds dealing with municipal annexation law.⁵⁴ In doing so, the North Carolina Supreme Court followed the maxim that a court should avoid unnecessary decisions and that cases should be decided on the narrowest legal grounds available.⁵⁵ In issuing its own rationale, the court wrote:

While we agree with the result of the Court of Appeals reached in this case, we do so for a different reason. We express no opinion as to the correctness of the Court of Appeals’ conclusion that a city-owned public enterprise located outside corporate limits is not subject to the county’s zoning laws. The City made no such contention or argument either in the trial court or before the Court of Appeals. While the broad question addressed by the Court of Appeals certainly underlies this case, its resolution was unnecessary given the specific issue the parties argued and briefed.⁵⁶

Without endorsement from the North Carolina Supreme Court, the Court of Appeals’ method and precedent is not on firm ground. Further, the Court of Appeals logic seems overbroad and unpersuasive standing alone. The Court of Appeals’ opinion’s logic seems to be as follows: Municipalities are empowered to take on “public enterprises.” “Public enterprises”

⁵⁴ 321 N.C. 252, 362 S.E.2d 553 (1987)

⁵⁵ 21 C.J.S. Courts § 189. Decision restricted to questions presented (2010)

⁵⁶ 321 N.C. 252, 257, 362 S.E.2d 553, 556 (1987)

involve “systems” and “facilities.” These “public enterprises” with their “systems” and “facilities” are more complex and broader than just a “building,” therefore zoning laws that would apply to “buildings” do not apply to any “public enterprises.”

First, this conclusion is overbroad. The statute subjects “all” State and political buildings to local zoning regulations. To the extent that there are “buildings” involved in a facility or system, it stands to reason that local zoning laws would apply to them. Public enterprise statutes are not alone in using the terms “system” and “facility.” Counties are empowered to construct county and district confinement “facilities”⁵⁷ and operate public library “systems.”⁵⁸ Cities are empowered to operate off-street parking “facilities” such as large parking garages, likely a “building.”⁵⁹ School “systems” are allowed.⁶⁰ To not allow overlap between “facility” and “system” on one hand and “building” on the other would allow these rudimentary “facility” and “system” definitions and exceptions to swallow a large part of the clear rule: All State and political subdivision “buildings” are subject to local zoning regulation.

Second, the Court of Appeals opinion is unpersuasive. In its opinion, it seems to argue that the empowerment to operate public enterprises has some bearing on the empowerment of other municipalities to regulate “buildings” within their zoning jurisdictions. The empowerment to run “public facilities” should have no bearing on this relationship. As noted above, as

⁵⁷ N.C. Gen. Stat § 153A-218 (2010); N.C. Gen. Stat § 153A-219 (2010)

⁵⁸ N.C. Gen. Stat § 153A-263 (2010)

⁵⁹ N.C. Gen. Stat. § 160A-302 (2010)

⁶⁰ N.C. Gen. Stat. § 115C-74 (2010)

creatures of State with no inherent powers, the State must enable any and all county and municipal powers. The empowerment to operate public enterprises, schools, police stations, or animal shelters should not have bearing on another's zoning authority, given that the General Assembly had to enable those powers and would have known they might involve "buildings." Again, the General Assembly expressly subjected all State and political subdivision "buildings" to local zoning. Presumably, the statute applies to "all" buildings political subdivisions are empowered to build. If a "public enterprise" has "buildings," then zoning should apply.

In sum, while the Court of Appeals did formulate a rough definition of "building" in dicta, it was not confirmed by the North Carolina Supreme Court. Further, the Court of Appeals' attempt at drawing a line between "building" and "public enterprise" appears to lack strong logical backing. After these decisions, attorneys and their clients would still need to wait for a more clear definition of "building" to trace the borders of when local zoning regulations would apply to the State and its political subdivisions.

iii. *A parking lot is not a "building" - Nash-Rocky Mount Board of Education v. The Rocky Mount Board of Adjustment*

The North Carolina Court of Appeals addressed what is not a "building" in *Nash-Rocky Mount Board of Education v. The Rocky Mount Board of Adjustment*.⁶¹ The facts of the case were as follows: In 2002, the Nash-Rock Mount Board of Education contacted the City of Rocky Mount about expanding the Rocky Mount Senior High School parking. The City of Rocky Mount issued a driveway and fence permit. After the parking lot went into operation, local residents began complaining about noise, dust, traffic congestion, and trash. After investigating

⁶¹ 169 N.C.App. 587, 610 S.E.2d 255 (N.C. Ct. App. 2005)

the situation, the City of Rocky Mount informed the School Board that it would need a special use permit. A Board hearing was held on the special use permit, and the issuance of the permit was denied. The School Board sued alleging that because the parking lot was not a “building” or “use of building” and the School Board was part of the State the Board of Adjustment had no jurisdiction over the School Board. Thus, the School Board did not need to comply with the Board of Adjustment zoning regulations.

The legal question present in the case was straightforward and on-point: whether the parking lot at Rocky Mount Senior High School falls within the grant of zoning power contained in N.C. Gen. Stat. 160A-392, the ability for municipalities to apply their zoning laws to the State and its political subdivisions. The Board of Adjustment argued that it did have jurisdiction in this case because the parking lot should be considered a “building” or a “use of a building” under the statute. The Court of Appeals held that that the parking lot fell into neither category.

With respect to the definition of a “building,” the Board of Adjustment first argued that it had jurisdiction because the Rocky Mount Zoning Ordinance defined the word “building” to include a “parking area.” The court rejected this argument summarily because, as a creature of the State, “a local entity cannot define the scope of the authority granted to it by the General Assembly.” Looking for evidence of what the General Assembly defined buildings to be for the purposes of zoning statutes, the court found no guidance. Like the *Davidson* court before it, the *Nash* court turned to the “plain and ordinary” meaning of “building.” It then weighed the *Davidson* dictionary definition of building:

[S]tructure designed for habitation, shelter, storage, trade, manufacture, religion, business, education and the like.... A structure or edifice inclosing a space within its walls, and usually, but not necessarily covered with a roof,"⁶²

against its own dictionary definition of “building”:

[A] constructed edifice designed to stand more or less permanently, covering a space of land, usually covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure -- distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy.⁶³

Without adopting one definition or the other, the court declared that a parking lot was plainly not a “building” as:

A parking lot is not a structure; it has no roof, walls, or any other kind of permanent, immovable features apart from a fence. Put simply, a parking lot is an open air space used to temporarily park automobiles and buses. It in no way resembles a building.⁶⁴

The court also concluded parking lot was not “use” of a “building” because “the General Assembly intended the word ‘use’ in the conventional zoning sense: as relating to the purpose for which the building was constructed.” It rejected the Board of Adjustment’s contention that because the parking lot was connected to the use of the school building their zoning jurisdiction reached to the parking lot as well.

III. PROSPECTIVE STATUTORY CONSTRUCTION

After fifty-nine years on the books, lawyers and local governments can be sure of one thing: a parking lot is not a “building,” the holding of the *Nash* case. At the extremes, common sense examples are clear. A skyscraper would be a “building.” A parking lot or soccer field

⁶² *Id.* at 590, 258 (internal citations omitted)

⁶³ WEBSTER'S THIRD NEW INT'L DICTIONARY 292 (1968). *See also* BLACK'S LAW DICTIONARY 207 (8th ed. 2004) (defining “building” as “[a] structure with walls and a roof, esp. a permanent structure”).

⁶⁴ *Nash* at 591, 259

would not be. In the middle, though, at the edge of “building” and “structure,” things become less unclear. In cases of doubt, how should a court interpret “building”: broadly or narrowly?

When dealing with statutes, courts turn to canons of statutory construction to guide their interpretations. Canons used in the decisions above include the maxims that: the primary rule of judicial statutory construction is to effectuate the intent of the legislature;⁶⁵ when the language of a statute is ambiguous, the courts are to determine the purpose of the statute and the intent of the legislature in its enactment;⁶⁶ and statutory words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise.⁶⁷

Unfortunately, these and other maxims and tools available to courts do not shed light on the exact meaning of “building” because the legislative intent is not clear. Is the goal to expand local power by clearly subjecting all State and political subdivision buildings to local zoning? Is the goal to clearly remove all non-buildings from local zoning oversight? If the statute is an expansion of local zoning power over State and political subdivision activities, how far is that power intended to extend? In short, again, what is the intent of subjecting just “buildings” to local zoning and not other non-building land uses?

A. Plain Language

⁶⁵ In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366 (2005).

⁶⁶ Diaz v. Division of Social Services and Div. of Medical Assistance, North Carolina Dept. of Health and Human Services, 360 N.C. 384, 628 S.E.2d 1 (2006).

⁶⁷ State v. Wiggins, 272 N.C. 147, 153 S.E.2d 37, 42 (1967) *cert. denied* 390 U.S. 1028, 88 S.Ct. 1418, 20 L.Ed.2d 285 (1968)

Traditionally, the first step in determining a statute's purpose is to examine the statute's plain language.⁶⁸ Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning.⁶⁹ In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute.⁷⁰ Indeed, both the *Davidson* and *Nash* courts used dictionary definitions of “building.” The problem here is that definitions can differ, and the differences change the power granted to local governments. The *Davidson* court discussed a “building” as a:

[S]tructure designed for habitation, shelter, storage, trade, manufacture, religion, business, education and the like.... A structure or edifice inclosing a space within its walls, and usually, but not necessarily covered with a roof

The *Nash* court defined it as:

[A] constructed edifice designed to stand more or less permanently, covering a space of land, usually covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure -- distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy

Other authorities define it differently. Black's Law Dictionary defines “building” as:

A structure with walls and a roof, esp. a permanent structure. • For purposes of some criminal statutes, such as burglary and arson, the term building may include such things as motor vehicles and watercraft.⁷¹

Ballentine's Law Dictionary defines “building” broadly as:

1. A structure designed and suitable for habitation or sheltering human beings and animals, sheltering or storing property, or for use and occupation for private and public business, trade, or manufacture. In the broad sense, any structure erected and fixed upon

⁶⁸ *Cashwell v. Department of State Treasurer, Retirement Systems Division*, 675 S.E.2d 73 (N.C. Ct. App. 2009).

⁶⁹ *Perkins v. Arkansas Trucking Services, Inc.*, 351 N.C. 634, 528 S.E.2d 902 (2000).

⁷⁰ *Id.*

⁷¹ BLACK'S LAW DICTIONARY

or in the soil, composed of different pieces connected together and designed for permanent use in the position in which it is so fixed, provided the purpose of use is that of habitation, trade, manufacture, religion, education, entertainment, or ornament. Still more broadly defined as any structure with walls and a roof.⁷²

These definitions conflict in subtle ways. Does there need to be a roof? Is there a wall requirement? Is there a “human shelter” requirement? Applying the definitions practically may produce different results. Is an outdoor stadium with no roof and no walls enclosing it a “building”? Would a water tower like the tower in *McKinney* be a building? How about bus depots, propane tanks, covered bus stops, rail platforms, park pavilions, large tents, boat docks, roadside farmers’ market stands, etc? Classifications, and therefore, the law’s application, would change based on the definition chosen.

Further, where is the line between “building” and “structure”? The law applies to the former, but not the latter. Ballentine’s Law Dictionary determines that “a building is always a structure,” but “all structures are not buildings.” It defines “structure” as:

In the broad sense, any construction or piece of work composed of parts joined together in some definite manner; in a restricted sense, a building of any kind, particularly one of size. Any form or arrangement of building or construction materials involving the necessity or precaution of providing proper support, bracing, tying, anchoring, or other protection against the pressure of the elements. An edifice for any use; that which is built, as a dwelling house, church, shed, store, etc...⁷³

In a footnote to its grant-of-power section, the Standard State Zoning Enabling Act upon which North Carolina zoning enabling legislation was based defined “other structures” as:

⁷² BALLENTINE’S LAW DICTIONARY

⁷³ BALLENTINE’S LAW DICTIONARY

This phrase would include other structures which possibly might not be defined as “buildings,” such as open sheds, billboards, fences, spite fences, etc., none of which can be strictly construed as “buildings,” as commonly understood.⁷⁴

Black's Law Dictionary defines “structure” as:

1. Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together <a building is a structure>...

The General Assembly has not supplied its own similar guidance or definitions in this area either.

B. Legislative Intent

Where the plain meaning of a statute is unclear, it is said that legislative intent controls.⁷⁵

To find this legislative intent, “a court may look to other indicia of legislative will, including the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means.”⁷⁶ Additionally, a court may consider “earlier statutes on the subject and the history of legislation in regard thereto, including statutory changes over a period of years, may be considered in connection with the object, purpose, and language of the statute.”⁷⁷ A court may find some ammunition in these veins, but, again, inferences cut both ways absent more clear legislative guidance.

⁷⁴ DEPARTMENT OF COMMERCE, ADVISORY COMMITTEE ON ZONING, A STANDARD ZONING ENABLING ACT 5 (Rev. Ed. 1926)

⁷⁵ Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

⁷⁶ Wal-Mart Stores East, Inc. v. Hinton, 676 S.E.2d 634 (N.C. Ct. App. 2009).

⁷⁷ Lithium Corp. of America, Inc. v. Town of Bessemer City, 261 N.C. 532, 135 S.E.2d 574 (1964)

1. Purposes appearing from the statute taken as a whole

The zoning enabling statute on the whole takes a very broad view of zoning purposes.

Per N.C. Gen. Stat. §160A-383, Purposes in View:

Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.⁷⁸

On balance, this might point to a large scope of “building” in order to better meet these general welfare aims no matter the user group, government or private.

2. Law before the statute

As noted above, North Carolina’s common law presumption is that laws do not apply to the State or its political subdivisions. Statutory construction maxims hold that statutes in derogation of the common law should be strictly construed,⁷⁹ and that statutes that invade the common law are to be read with a presumption favoring retention of long-established and familiar principles, except where a contrary statutory purpose is evident.⁸⁰ On balance, this might indicate a smaller scope of “building” to preserve the long-established principle of non-applicability of laws to the State and its political subdivisions.

⁷⁸ N.C. Gen. Stat. § 160A-383 (2010)

⁷⁹ *Stone v. North Carolina Dept. of Labor*, 347 N.C. 473, 495 S.E.2d 711 (1998).

⁸⁰ *Pasquantino v. U.S.*, 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619, 4 A.L.R. Fed. 2d 747 (2005)

3. Other indicators: Mischief to be remedied / End to be accomplished / Title

Other available indicators do not give a slant one way or the other. The mischief to the remedied and end to be accomplish are not clear beyond the very broad general welfare concerns zoning is intended to address. The title of the original act subjecting the State and its political subdivision merely uses the same “building” language. The title was: An Act to amend Article 14 of Chapter 160 of the General Statutes so as to make zoning regulations applicable to buildings constructed by the State of North Carolina and its political subdivisions.

4. Legislative History

Since 1951, there have been two big changes to this “erection, construction, and use of buildings” clause. In 2004, the text was changed to “erection, construction, and use of building and land.”⁸¹ This language was borrowed from a bill written by Senator Daniel Clodfelter in 2003. The stated purpose of Clodfelter’s bill was to “clarify, simplify and modernize city and county planning and land-use management authority.”⁸² This bill never made it out of committee. In 2005, the accepted change was repealed, and the clause reverted to “erection, construction, and use of buildings.”⁸³ The import was this change for interpreting “buildings,” though, is dubious. If anything at all, it might indicate a slightly more narrow “building” definition as the General Assembly has clearly limited zoning law applicability to just “buildings.”

⁸¹ 2004 N.C. Sess. Laws 812

⁸² 2003 N.C. Senate Bill 914

⁸³ 2005 N.C. Sess. Laws 280

Interestingly, the sponsor of the 2004 and 2005 bills was the same man, Senator Floyd Hartsell, and both bills passed with overwhelming majorities. Senator Hartsell could not be reached for comment about the politics, philosophies, or facts that drove the changes. Importantly, though, North Carolina law takes a narrow view of acceptable legislative history upon which a court could rely to elucidate the purpose or intent of legislation. Even if Senator Hartsell could illuminate the rationales and intent of the relatively recent changes, his views would not hold weight in North Carolina courts as to the proper interpretation of the law. In North Carolina, the intention of the legislature cannot be shown by the testimony of a member.⁸⁴ Testimony, even by members of the legislature which adopted the statute, as to its purpose and the construction intended to be given by the legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision.⁸⁵ Further, in determining legislative intent, an appellate court cannot look to the record of the internal deliberations of committees of the legislature considering proposed legislation.⁸⁶ Even commentaries printed with the General Statutes, which were not enacted into law by the legislature, are not treated as binding authority.⁸⁷ The court must only look to the factors listed above: title, prior state of the law, purposes, etc.

⁸⁴ *Styers v. Phillips*, 277 N.C. 460, 178 S.E.2d 583 (1971).

⁸⁵ *In re Estate of Pope*, 666 S.E.2d 140 (N.C. Ct. App. 2008).

⁸⁶ *Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 403 S.E.2d 291 (1991).

⁸⁷ *Id.*

In short, the North Carolina General Assembly has not defined what a “building” is. Tools of statutory construction do not give a clear answer because a clear intent as to the purposes or extent of this power is not shown by valid authority. While clearly, a gravel parking lot and other similar uses are not “buildings,” at the edges of “building” and “structure” legitimate, if potentially academic, distinctions and arguments can be had. Lawyers, citizens, and policymakers must meet at this edge and negotiate the unknown absent guidance from the General Assembly.

IV. CHAPEL HILL CASE STUDY

Chapel Hill, North Carolina presents an interesting case for this issue of state and local government authority. Chapel Hill is home to citizens, a State entity, the University of North Carolina at Chapel Hill, and a State political subdivision, itself, the Town of Chapel Hill. The interactions between these groups serve as examples of two sets of issues.

First, the interactions between the Town, its neighbors, and its citizens illustrate how a working definition of “building” is resolved in one community. It also illustrates how often other regulations and mechanisms allow oversight over both Town “building” and non-building uses. Whether zoning technically applies is often a moot issue.

Second, the town-and-gown interactions over the past decade illustrate the other salient issue regarding local zoning and the State, the plenary power of the General Assembly over Town powers. While the University and Town play at the edges of the “building” versus non-building issue, the real heat has been over the actual delegation of zoning authority over the University to the Town in the first place. In the words of the Chapel Hill Town Attorney, a “delicate balance” has been struck over the years among citizens, the University, and the Town

with regards to Town regulation of University developments. When the “delicate balance” has not been maintained, State actors can and have implicitly and explicitly threatened to strip the Town of the ability to zone University areas. As a strictly theoretical matter, this plenary ability calls into question the usefulness of a self-limitation, allowing State “buildings” to be zoned, when it can be disregarded unilaterally. If the General Assembly is willing to do it, the University and State constitutionally always maintain an undefeatable upper hand. As a practical matter, though, University and Town actors posit that if acting as nothing other than as a starting point, the default that the Town can regulate State “buildings” brings the parties to the table to seek mutually beneficial solutions. In their eyes, this default mandate to coordinate regulations and activities, coupled with an undefined scope of “building,” gives Town and University policymakers a lot of latitude to create local, narrowly tailored solutions. A better defined “building” would hamper this ability.

A. Town of Chapel Hill Activities – “Buildings” and Non-Buildings

Located in North Carolina’s Piedmont, Chapel Hill is a well-known college town. It boasts a population of roughly 55,000 people. Like many communities its size, the Town itself and other State entities provide many education, police, fire/rescue, sanitation, transportation, and recreation services to its citizens. These services are provided and housed in various potential “buildings” and non-buildings. Town Attorney Ralph Karpinos has guided Town actors through the zoning enabling statute’s ambiguity and potential applicability since 1985. Under his watch, the Town has drafted a zoning ordinance defining both “building” and “structure” to guide private as well as public action and application of local zoning ordinances. As a practical matter, regardless of the actual scope of local zoning ordinance application to

Town activities, Karpinos reports that other governmental processes and regulations dovetail nicely with the general goals zoning ordinances are intended to achieve. Whether to actually apply zoning or not is not often an issue. Even in relations with other State subdivisions, recent issues between the Town, citizens, and other State political subdivisions have been resolved on grounds other than if zoning regulations should technically apply.

In short, zoning regulation applicability is rarely contested in Town-citizen and Town-County/State interactions, apart from Town-University conflicts. The formal zoning process is often duplicative of other government processes. When zoning-related, general welfare concerns arise they are often addressed by other clearly applicable statutes or resolved politically.

1. Definitions – Ordinance

For the sake of definition, the Chapel Hill Land Use Management Ordinance does have several “building” and “structure”-related definitions to which the Town holds itself in order to comply with requirement that political subdivision “buildings” comply with local zoning. These definitions include:

Building: Any structure designed or intended for the support, enclosure, shelter, or protection of persons, animals, chattels, or property.

Building, accessory: A subordinate building detached from, but located on the same lot as the principal building, the use of which is incidental and accessory to that of the principal building.

Building, principal: A building or, where the context so indicates, a group of buildings in which is conducted the principal use of the lot on which such building is located...

Structure: Anything constructed or erected which requires location on the ground or attachment to something having a fixed location on the ground, including but not limited to principal and accessory buildings, signs, fences, walls, bridges, monuments, flagpoles, antennas, and transmission poles, towers, and cables.

Structure, accessory: A subordinate structure detached from, but located on the same lot as the principal structure, the use of which is incidental and accessory to that of the principal structure.

Structure, principal: A structure or, where the context so indicates, a group of structures in or on which is conducted the principal use of the lot on which such structure is located.

As a matter of these definitions applied, Karpinos advises Town actors that signs, water towers, greenways, outdoor storage areas, and large parking lots are not “buildings” and should not be subjected to the Town’s zoning process. The Town relatively recently moved its Town motor pool fleet storage to an area within the Town’s zoning jurisdiction but did not apply for a zoning permit. This, of course, follows the lead of the *Nash* case where a school parking lot was found not be a “building” and therefore beyond the scope of a city’s zoning jurisdiction. As an almost political matter of practice, the Town does apply for zoning permits for many parks, though, even when structures that might not strictly be defined as “buildings” are involved.

2. Restraints Town of Chapel Hill Activities

Discussions with Karpinos reveal that as a practical matter the election process and other government accountability measures provide a check against potential governmental overreach in constructing unwanted or unpopular “buildings” or non-buildings within the Town itself. As the owner of public buildings, structures, and land, local elected officials seek input through public processes for buildings and non-buildings alike. Of course, as the law stands, only “buildings” must go through the formal zoning process. However, removing this requirement from “buildings” or extending it to non-buildings would likely change little on the ground. The formal zoning process itself may be almost redundant given the other government accountability measures like public participation in parks planning and major public expenditures as well as the

ability to vote officials out of office. Additionally, the Town often times must conform to other local and State regulations not passed under the zoning power. Again, the statute only subjects State and political subdivisions to local *zoning* laws, not all local ordinances. These applicable regulations include building codes and state stormwater regulations. To date, these combined checks on the Town itself have limited Town-citizen confrontation over Town land uses.

3. Interaction with other entities

In addition to the University, the Town also deals with the State and other political subdivisions. Chief among these entities are Orange County, Chapel Hill's county, and Orange Water and Sewer Authority. Karpinos routinely guides the Town through interactions with these entities, but again, concerns are almost exclusively on grounds other than if Town zoning regulations would apply to a "building." For example, Karpinos deals with the Orange Water and Sewer Authority, a statutory public enterprise, on issues of facilities siting and zoning. Rarely, if ever, is *Davidson's* theory that "public facilities" are exempt from local zoning ever advanced in discussions. Conflicts and sites are negotiated on other grounds. An ongoing conflict between Orange County and citizens of the Town illustrates this point. Currently, there is an on-going public debate as to where a new waste transfer station should be located. To date, the Orange County is still considering local zoning in their site location criteria and is not arguing the transfer station is a non-building.⁸⁸ The debate about where to locate the transfer facility is running along social justice and environmental lines, not technical zoning questions of

⁸⁸ Samuel Spies, *County sets timeline for waste-site search*, THE CHAPEL HILL NEWS, February 13, 2008

what a “building” is. The County is not seeking to avoid local zoning laws limiting land use activities.

B. Town-and-Gown

Charles De Gaulle once famously said, “I have heard your views. They do not harmonize with mine. The decision is taken unanimously.” Depending on one’s viewpoint, this quote might accurately describe the University of North Carolina’s attitude toward the Town of Chapel Hill’s zoning authority over the past ten years. The University and State actors on its behalf have threatened to further limit Chapel Hill’s ability to regulate University development. They have done this in the name of greater State goals. In each instance, the Town has largely acquiesced to University demands. This ability of the State to strip zoning authority on an ad hoc basis calls into question the usefulness giving local governments of the local ability to regulate State “buildings” in the first place. If outcomes between local governments and major State actors, like public universities, are no different, what is the point? The Sword of Damocles hangs above an overly aggressive city or county.

As a practical matter, though, University and community leaders see this default that regulations do apply as an opportunity to communicate and reach mutually beneficial solutions. Results are different, even if just at the margins, than if the University did not have to answer to the Town in any fashion. If nothing else, the default state encourages some compromise and concessions as neither the Town nor University have forced the other to play out the string. Over the past ten years, two town-gown zoning-related disputes serve as examples of this cat-and-mouse game: the on-going expansion of Main Campus facilities and a new satellite campus, Carolina North.

1. Campus Expansion – Town-Gown Skirmishes

In the wake of increased enrollment targets across the University of North Carolina system, in November 2000, North Carolina voters approved a \$3.1 billion bond referendum for higher education. The University of North Carolina at Chapel Hill was slated to receive \$500 million of these funds to fuel the University's greatest campus expansion since World War II. As a matter of zoning, at the time of the referendum, the University was reaching the limits of its then-current zoning regime. The Town and University began meeting in January 2001 to discuss Chapel Hill's regulation of university growth based on an internal University plan developed to guide the next fifty years of University development. In early March, in order to accommodate the expected growth, Chancellor James Moeser asked the town to eliminate its cap on future campus construction and to replace town regulation of university projects with "courtesy review." The Town made a counter offer that would raise the cap, allowing projects under the bond issue - but not eliminate it. The proposal also would have eased but not eliminated town regulatory authority over University projects. Through the spring, controversy continued to surround the amount and type of university growth as well as the procedures under which any campus re-zoning would take place.⁸⁹

With this potential local hiccup in a major State project, the expansion of higher education facilities, State Senators leapt to action beginning in April 2001. Senator Dalton, the sponsor of bill titled "An Act to Resolve any controversy between the Town of Chapel Hill and the University of North Carolina at Chapel Hill," is quoted as saying, "It is my understanding that there is some controversy over there. I learned of it very late and I don't know much about

⁸⁹ Kirk Ross, *Senate ready to enter town-gown dispute*, THE CHAPEL HILL NEWS, April 8, 2001

it. What I do know is that the people of North Carolina very graciously approved a \$3.1 billion bond referendum for our universities. If there's a controversy that impedes the progress of this building program, the General Assembly can't have that.”⁹⁰

Later in May, Chancellor Moeser gave the go-ahead for Senator Lee to add a special provision to the budget bill to strip the Town of Chapel Hill of zoning authority over the University.⁹¹ Shortly thereafter, Chancellor Moeser asked for this provision to be removed. In his words:

After consultation with Senator Howard Lee and following discussions with [Chapel Hill] Mayor Waldorf, I asked the senator to withdraw the zoning provision included in the Senate's budget measure. Senator Lee convinced the Senate leadership to grant this request, which resulted in the deletion of the provision. We are grateful for his assistance.

The university supported the legislative proposal because we were convinced that the town would not approve the university's development plan in its entirety if it were split into separate zoning districts, each subject to a super majority vote by council members.

Since then, I have had productive conversations with the mayor, who now assures me that the town will handle the university's rezoning request as a single action instead of nine separate votes by the council. Our goal remains the approval of the university's campus development plan in its entirety. The successful implementation of the bond referendum projects and the master plan are crucial to the future of the university and the entire state.

We believe that the town is also committed to the university's progress and we trust that our discussions will move forward smoothly to a successful conclusion. We look forward to continuing that process in good faith as soon as possible.⁹²

In short, the threat worked, and the University got what it wanted. On July 5, 2001, the Town Council rezoned the 550-acre main campus to allow for the density requested and adopted an

⁹⁰ *Id.*

⁹¹ Kirk Ross, *Town's authority would be stripped in last-minute add to budget bill*, THE CHAPEL HILL NEWS, May 30, 2001

⁹² Kirk Ross, *University move damaged town-gown relations*, THE CHAPEL HILL NEWS, June 3, 2001

ordinance that laid out a swift review process for large-tract development plans. (The current iteration of this zoning district and review process is included as an appendix.) The first development plan under this regime adopted in October 2001 laid out a specific eight-year development schedule.⁹³

Then, in 2003, the University came back to the Town to tweak this development plan based on changed University needs. It proposed an air-conditioning chiller and additional parking decks. Neighboring landowners were strongly against the developments and applied serious pressure on the Town Council. After a few minor changes, though, the Town Council voted 6-2 in favor of these projects. Then-Mayor Kevin Foy, a supporter of the projects, explained:

What we are dealing with is the state of North Carolina. All municipal governments in North Carolina who have any state institutions, whether they're universities, prisons or something else, have much more limited regulatory ability. That's not unique to the University of North Carolina at Chapel Hill.⁹⁴

In more colorful language, Council member Ed Harrison voted with “violent resentment” for the projects changes because “we are under a threat. A gun is being held to our head.”⁹⁵ That implicit threat was the same threat made explicit before, the threat that the University would again seek to strip the Town of zoning authority. With other large projects on the horizon, like Carolina North, the then-proposed satellite campus on roughly 1000-acres of in-Town property, the Town wished to keep a seat at the negotiating table.

⁹³ Anne Blythe, *Town confronts UNC plans*, THE NEWS & OBSERVER, June 18, 2003

⁹⁴ Anne Blythe, *Issue tested town and gown*, THE NEWS & OBSERVER, August 28, 2003

⁹⁵ Anne Blythe, *UNC will get its deck, chiller*, THE NEWS & OBSERVER, August 27, 2003

In this instance, not all members of the Town Council were pleased with this tact and expressed doubt as to how much negotiating power the Town actually had. Council member Bill Strom voted against the projects and surmised, "In this application, we got to nibble around the edges, but we were not able to move any mountains. How much negotiating power do we have? I think that's a fine question to be asking right now. I think that [the] vote seemed to indicate that a majority of the council did not want to find that out the hard way." The hard way would have involved calling the University's implicit threat and testing the will of the General Assembly to follow through. One observer, a neighbor and retired University employee, would have liked to see that if for no other reason than to delineate the real bounds of the game. He said:

I think the threat of the university going to the legislature is probably a real one, and I can understand why the council members are concerned about that while hoping to maintain some measure of control. But I think ultimately they don't have any control. Personally, I wish they'd just go ahead if they feel that they don't want to give in to the university and test them. If the university goes to the legislature and they get what they ask for, then at least we know the charade is over.⁹⁶

The University and Town did indeed meet again to discuss the 975-acre Horace Williams Tract. The University and Town had initiated plans for the tract in 1995, 2000, and 2004 before reaching a 20-year Development Agreement in June 2009.⁹⁷ Interestingly, in 2006, then-Chancellor Moeser indicated in a letter to the Town that the University would not seek permission to avoid the Town's zoning authority.⁹⁸ In the end, the both parties agreed to bypass the ad hoc zoning process and utilize the Town's Development Agreement authority.⁹⁹ Under

⁹⁶ Anne Blythe, *Issue tested town and gown*, THE NEWS & OBSERVER, August 28, 2003

⁹⁷ Jesse James DeConto, *Accord Reached on Carolina North*, THE NEWS & OBSERVER, June 26, 2009

⁹⁸ Matt Dees, *UNC-CH to abide by town zoning*, THE NEWS & OBSERVER, February 8, 2006

⁹⁹ See N.C. Gen. Stat. § 400.20 et seq. (2010)

the agreement, the University has the right to build three million square feet of buildings while retaining flexibility as to the particulars of the development. For its part, the Town gained some certainty and a 300 acre set-aside permanently from development.¹⁰⁰ (Chapel Hill's "University District" Development Agreement Ordinance is included as an appendix)

2. Analysis

Minor tweaks and changes have been made to the University's Main Campus development review and zoning district in the intervening years. Procedurally, Town-approval timelines have been extended from ninety to 120 days. Substantively, though, the question is: While far from regulating State development of "buildings" like a non-State developer, what kind of oversight is the Town actually exercising over the University and its "buildings?"

Some argue not much. One resident claims, "In my opinion, [campus rezoning] has been an unmitigated failure. The relationship of trust has been eroded partially as a result of this process. They can rape and pillage as much as they want as long as they tell us what they're going to do and how much they're going to steal."¹⁰¹

Others like former Mayor Kevin Foy disagree. While some citizens want the Town to be much tougher on the University, he argues that the Town must be realistic. He also argues that the community has benefited from elements of the rezoning, noting that as part of its new zone, University has to conduct regular traffic studies to gauge the impact of its projects, must include construction practices that reduces or controls run-off, and reduced the ratio of parking spaces to people, a Town goal. Furthermore, new roads constructed on campus do not have to be

¹⁰⁰ Jesse James DeConto, *Accord Reached on Carolina North*, THE NEWS & OBSERVER, June 26, 2009

¹⁰¹ Matt Dees, *Town wants planning tweaks*, THE CHAPEL HILL NEWS, March 7, 2004

maintained by the Town and controls have been put on all types of stormwater run-off, construction run-off and permanent. In his words, “what we’ve been hearing lately is kind of a natural reaction on the part of many citizens: ‘This [new zone] is terrible. It accomplishes nothing. But that’s not true. [the new zone] isn’t perfect. But it’s not fair to say the town didn’t get anything.’”¹⁰²

University officials agree. According to one official, “in exchange for a predictable approval period, the University accepted very rigorous standards for mitigation of impacts on the community, periodic monitoring of our success in meeting these standards, and responsibility for completing all related studies. We agreed to be held accountable to the community for mitigations far beyond those agreed upon by our sister UNC institutions around the state.”¹⁰³

According to the same former University official, Nancy Suttentfield:

We [the University] take seriously our responsibility to be good stewards in this community. We are proud to be a leader in Chapel Hill -- as well as in North Carolina and the nation -- in using sustainable practices...

Controlling potential impacts on the community was at the heart of joint negotiations in 2001 when the Town Council approved [the new zone]. The negotiations are aimed to balance the goals, interests and values of the Chapel Hill community with the state's goals, directives and timelines for completing UNC's capital improvement projects -- classrooms, research labs and residence halls that are central to our educational mission.

We are committed to balancing the university's mission of teaching, research and public service and its fiscal accountability to taxpayers and students with its responsibility as a member of the Chapel Hill community. Although there can be times when both obligations diverge, the good news for the state, university and Chapel Hill is that there is no significant difference between the positions of the university and the town...¹⁰⁴

¹⁰² Anne Blythe, *UNC-CH seeks camps change*, THE NEWS & OBSERVER, March 16, 2004 at B3

¹⁰³ *Id.*

¹⁰⁴ Nancy Suttentfield, *Zoning must be agreeable to town, UNC*, THE CHAPEL HILL NEWS, May 1, 2005

Beyond the political spin and public-relations speak, though, there are two questions. Is the process different? Are the outcomes different? The answer to both questions is probably “Yes.” Without the status quo that zoning regulations do apply, would the University engage with the Town as much as it has on these development issues? Would it have conceded on the points it has, including redesigning the parking garage and traffic flow plans proposed in 2003? Would the University have sought to address other community concerns in 2001, like nixing support for an unwanted widening of South Columbia Street? Would the University have been at the negotiating table in the same negotiating stance with regards to Carolina North? The answer to all these questions is probably “No.” The process and outcomes are different than they would be if the University did not have to abide by any local zoning regulations to some extent. Whether the outcomes are different enough is a question for local politicians.

The question for State policymakers is whether each “delicate balance” struck in Chapel Hill or in other municipalities between a local government and a State actor as the scope of zoning regulations, what a “building” is, and the substance of zoning regulations actually applied to the State, a reflection of each side’s leverage in negotiations, reflects the State-local balance it intends in general in zoning matters. In Chapel Hill, neither side has tried to find out the hard way by sending the matter to a vote in the General Assembly, nor has the General Assembly proactively given an answer. Associate Vice Chancellor and Deputy General Counsel Patricia Crawford sees this ambiguity as to scope and malleability as to substance as a positive for both town and gown. Again, the default that zoning will apply in some way to “buildings” gets the parties into the same room to negotiate. They discuss issues and educate each other. Crawford sees these locally-crafted solutions in the shadow of scope and substance ambiguity as superior to a top-down General Assembly more precise balancing of State and local actor relative

leverage. And, in the end, while the Town has not exercised power over development similar to its powers over non-State developers, but it has gotten some concessions important to the Town, and the University has proceeded on its state-wide mission.

V. OTHER STATE SCHEMES, GENERALLY; WISCONSIN

North Carolina's provision that all State and political subdivision follow local zoning is relatively unique in this area of the law because "it is a general rule that in their use of land a state government and its agencies are immune from operation of local zoning regulations."¹⁰⁵ The rationale for this stance is that "while operating a governmental use in noncompliance with local zoning may result in harm to the residents of the city or at least to the immediate neighbors, the carrying out of an essential state function benefits the public at large. If local controls were permitted to exclude these uses, they might have nowhere to go."¹⁰⁶

A Georgia Supreme Court opinion explains that this rule is supported by four traditional tests: The *Superior Sovereign Test*, the *Governmental Propriety Test*, the *Power of Eminent Domain Test*, and the *Statutory Guidance Test*. Per the court¹⁰⁷:

The *Superior Sovereign Test* holds that since the state and its units and agencies occupy a superior position to municipalities in the governmental hierarchy, their exemption from municipal zoning regulation is a matter of preemption.¹⁰⁸ The *Governmental-Propriety*

¹⁰⁵ *Macon Asso. for Retarded Citizens v. Macon-Bibb County Planning & Zoning Com.*, 252 Ga. 484, 488-489 (Ga. 1984)

¹⁰⁶ JULIAN C. JURGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 105 (2003)

¹⁰⁷ *Macon Asso. for Retarded Citizens* at 488-489

¹⁰⁸ See *Edelen v. Nelson County, Ky. App.*, 723 S.W.2d 887, 889 (1987) (holding "[a] city or county is an instrumentality of state government, and as such, is immune from complying with zoning regulations."

Test holds that property of a state governmental unit is exempt from local zoning when a governmental function is being performed but not when a proprietary function is being performed.¹⁰⁹ Cases applying the *Power of Eminent Domain Test* take the position that when a political unit is authorized to condemn, it is automatically immune from local zoning regulation when it acts in furtherance of its designated public function.¹¹⁰ Under the *Statutory Guidance Test*, the courts simply look to the legislative statutes in order to glean some expression of legislative intent on the immunity question. (footnotes added)

With its *McKinney* test, North Carolina was once a governmental-proprietary test jurisdiction. Today, it is a statutory guidance test jurisdiction as courts look to the statutes to determine immunity.

A fifth test, a *Balancing of Interests Test*, has also emerged several states and may place a heavier burden on government to claim a degree of immunity from local zoning regulations.¹¹¹ In this test, a court weighs many factors to determine if zoning law will apply to a State or political subdivision actor. Per the New York's highest appellate court, among the factors to be weighed in the test are:

[t]he nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests... the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, and alternative methods of providing the needed improvement ... intergovernmental participation in the project development process and an opportunity to be heard.

¹⁰⁹ See *Town of Bourne v. Plante*, 429 Mass. 329, 332 (Mass. 1999) (holding "An entity or agency created by the Massachusetts Legislature is immune from municipal zoning regulations (absent statutory provision to the contrary) at least in so far as that entity or agency is performing an essential governmental function.")

¹¹⁰ See *Missouri Pac. R.R. v. 55 Acres of Land*, 947 F. Supp. 1301 (E.D. Ark. 1996) (finding, under Arkansas law, the grant of eminent domain to the railroad by the state legislature effectively exempted it from zoning, because of the superiority of the condemnation power over the zoning authority.

¹¹¹ JULIAN C. JURGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 108 (2003)

Per the court, “one factor in the calculus could be more influential than another or may be so significant as to completely overshadow all others, but no element should be thought of as ritualistically required or controlling.”¹¹² The court that initially adopted this test, the New Jersey Supreme Court “noted importance of the flexibility of this test, and emphasized that even where the balance tips in favor of immunity, ‘it must not . . . be exercised in an unreasonable fashion so as to arbitrarily override all important legitimate local interests.’”¹¹³

The results of these tests fall into three major categories, absolute immunity, limited immunity, and no immunity, based on the facts of a case and the substance of State statutory and constitutional provisions. Full examinations of these tests and trends in the law would fill volumes, and indeed, they do.¹¹⁴ A cursory review of cases and statutes, though, reveals an interesting sister jurisdiction worth further study and comparison with North Carolina: Wisconsin, another statutory guidance jurisdiction.

Similar to North Carolina’s statutes, per Wisconsin statute, all state buildings, structures, and facilities must be in compliance with local zoning laws. The statute reads in part:

(a) Except as provided...every building, structure or facility that is constructed for the benefit of or use of the state, any state agency, board, commission or department, the University of Wisconsin Hospitals and Clinics Authority, ... , shall be in compliance with all applicable state laws, rules, codes and regulations but the construction is not subject to the ordinances or regulations of the municipality in which the construction takes place

¹¹² In re County of Monroe's Compliance with Certain Zoning & Permit Requirements, etc., 72 N.Y.2d 338, 343 (N.Y. 1988)

¹¹³ Native Village of Eklutna v. Alaska R.R. Corp., 87 P.3d 41 (Alaska 2004)

¹¹⁴ Elaine M. Tomko-DeLuca, *Applicability of zoning regulations to governmental projects or activities*, 53 A.L.R.5th 1 (2004) ; ZONING AND LAND USE CONTROLS, Ch. 40, Regulation of Public and Quasi-Public Use §35.01 et seq. (LexisNexis Matthew Bender)

except zoning, including without limitation because of enumeration ordinances or regulations relating to materials used, permits, supervision of construction or installation, payment of permit fees, or other restrictions.¹¹⁵ (emphasis added)

Interestingly, this relatively similar provision of state law and its university-town environment have led some to hold up Madison, Wisconsin, home to the University of Wisconsin as a model of town-gown relations for Chapel Hill. Bill Strom, a then-Chapel Hill Town Council Member, visited Madison in 2006 and reported on city and university zoning relations.¹¹⁶ On the legal issue of whether the university had every sought to have zoning authority stripped from the city, he reported:

No discussion of UW seeking relief from the zoning authority of Madison has taken place, and UW does not consider making such a plea a viable option. When questioned in public session whether the conditional-use process they work through with Madison hurts efforts to meet their responsibility to their broad constituents and their statewide economic development mission, the answer was "not at all."

This difference in tactics might be a function of particular personalities, politics, and policies, but it may also be a function of the states' constitutions. Any university plea to strip Madison of its zoning authority might not be seen as a viable option because it might very well be practically impossible. Wisconsin, unlike North Carolina, has a "home rule" provision in its constitution.

Per Article XI, Section 3 of the Wisconsin Constitution:

Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

Zoning would seem to be the quintessential "local affair." Even if the University of Wisconsin and Wisconsin legislature wanted to strip Madison of its state-enabled zoning ability to zone university property, it would seem to be a more involved and therefore doubtful proposition. In

¹¹⁵ Wis. Stat. § 13.48 (13) (2010)

¹¹⁶ Bill Strom, *A model for town-gown relations*, THE CHAPEL HILL NEWS, October 4, 2006

short, without looking here at particular political, policy, or personality conflicts, it could be the case that the University of Wisconsin plays “nicer” because, constitutionally, it must.

VI. RECOMMENDATIONS, CONCLUSION

The two most salient features of North Carolina’s law with regards to local zoning of State and political subdivision “buildings” are an undefined scope of “building” and the plenary ability of the General Assembly to strip individual local governments of elements of their zoning authority. To the extent that local solutions, local “delicate balances,” do not reflect the legislature’s intent in subjecting *all* State and political subdivision “buildings” to local zoning, the General Assembly should fine tune this balance. Defining “building” in a clear way would clarify for State and local actors as well as citizens the scope of necessary zoning compliance for the State and its political subdivisions. The desired relationship between State and local government would be further cemented by reinforcing local zoning powers. To the extent that the General Assembly is serious about subjecting State and political subdivision “buildings” to local land use regulations and giving local populations more control, it might consider a North Carolina constitutional amendment giving local governments a degree of sovereignty over zoning and other local affairs.

In the end, though, the current state of the law might reflect a working system. The lack of case law reflects a lack of formal challenges to State and political subdivision actions. Perhaps, other governmental and political accountability measures and regulations are keeping governmental “building” overreach in check. The lack of statutory guidance might reflect a tolerance for ambiguity, an allowance legal space to resolve disputes politically and locally. The lack of Session Laws stripping municipalities of zoning authority might reflect municipalities

and State actors coming to mutually acceptable and beneficial solutions. The State meets enough of its goals; the local zoning authority and community reach enough of theirs. Where there is no smoke, there *may* be no fire.

APPENDIX

Relevant North Carolina Statutes

- Chapter 153A. Counties. Article 18. Planning and Regulation of Development. Part 3. Zoning.
- Chapter 160A. Cities and Towns. Article 19. Planning and Regulation of Development. Part 3. Zoning.

Relevant Chapel Hill Ordinance(s)

- Zoning District, Procedures Applied to UNC-CH Main Campus



North Carolina General Statutes

Chapter 153A.

Counties.

Article 18.

Planning and Regulation of Development.

Part 3. Zoning.

§ 153A-340. Grant of power.

(a) For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. The ordinance may provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11.

- (b) (1) These regulations may affect property used for bona fide farm purposes only as provided in subdivision (3) of this subsection. This subsection does not limit regulation under this Part with respect to the use of farm property for nonfarm purposes.
- (2) Except as provided in G.S. 106-743.4 for farms that are subject to a conservation agreement under G.S. 106-743.2, bona fide farm purposes include the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products as defined in G.S. 106-581.1 having a domestic or foreign market. For purposes of this subdivision, the production of a nonfarm product that the Department of Agriculture and Consumer Services recognizes as a "Goodness Grows in North Carolina" product that is produced on a farm subject to a conservation agreement under G.S. 106-743.2 is a bona fide farm purpose.

- (3) The definitions set out in G.S. 106-802 apply to this subdivision. A county may adopt zoning regulations governing swine farms served by animal waste management systems having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater provided that the zoning regulations may not have the effect of excluding swine farms served by an animal waste management system having a design capacity of 600,000 pounds SSLW or greater from the entire zoning jurisdiction.

(c) The regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained, provided no change in permitted uses may be authorized by variance.

(c1) The regulations may also provide that the board of adjustment, the planning board, or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. No vote greater than a majority vote shall be required for the board of county commissioners or planning board to issue such permits. For the purposes of this section, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for calculation of the requisite majority. Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with G.S. 153A-345.

(d) A county may regulate the development over estuarine waters and over lands covered by navigable waters owned by the State pursuant to G.S. 146-12, within the bounds of that county.

(e) For the purpose of this section, the term "structures" shall include floating homes.

(f) Repealed by Session Laws 2005-426, s. 5(b), effective January 1, 2006.

(g) A member of the board of county commissioners shall not vote on any zoning map or text amendment where the outcome of the matter being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member. Members of appointed boards providing advice to the board of county commissioners shall not vote on recommendations regarding any zoning map or text amendment where the outcome of the matter being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member.

(h) As provided in this subsection, counties may adopt temporary moratoria on any county development approval required by law. The duration of any moratorium shall be reasonable in light of the specific conditions that warrant imposition of the moratorium and may not exceed the period of time necessary to correct, modify, or resolve such conditions. Except in cases of imminent and substantial threat to public health or safety, before adopting an ordinance imposing a development moratorium with a duration of 60 days or any shorter period, the board of commissioners shall hold a public hearing and shall publish a notice of the hearing in a newspaper having general circulation in the area not less than seven days before the date set for

the hearing. A development moratorium with a duration of 61 days or longer, and any extension of a moratorium so that the total duration is 61 days or longer, is subject to the notice and hearing requirements of G.S. 153A-323. Absent an imminent threat to public health or safety, a development moratorium adopted pursuant to this section shall not apply to any project for which a valid building permit issued pursuant to G.S. 153A-357 is outstanding, to any project for which a conditional use permit application or special use permit application has been accepted, to development set forth in a site-specific or phased development plan approved pursuant to G.S. 153A-344.1, to development for which substantial expenditures have already been made in good faith reliance on a prior valid administrative or quasi-judicial permit or approval, or to preliminary or final subdivision plats that have been accepted for review by the county prior to the call for public hearing to adopt the moratorium. Any preliminary subdivision plat accepted for review by the county prior to the call for public hearing, if subsequently approved, shall be allowed to proceed to final plat approval without being subject to the moratorium.

Any ordinance establishing a development moratorium must expressly include at the time of adoption each of the following:

- (1) A clear statement of the problems or conditions necessitating the moratorium and what courses of action, alternative to a moratorium, were considered by the county and why those alternative courses of action were not deemed adequate.
- (2) A clear statement of the development approvals subject to the moratorium and how a moratorium on those approvals will address the problems or conditions leading to imposition of the moratorium.
- (3) An express date for termination of the moratorium and a statement setting forth why that duration is reasonably necessary to address the problems or conditions leading to imposition of the moratorium.
- (4) A clear statement of the actions, and the schedule for those actions, proposed to be taken by the county during the duration of the moratorium to address the problems or conditions leading to imposition of the moratorium.

No moratorium may be subsequently renewed or extended for any additional period unless the city shall have taken all reasonable and feasible steps proposed to be taken by the county in its ordinance establishing the moratorium to address the problems or conditions leading to imposition of the moratorium and unless new facts and conditions warrant an extension. Any ordinance renewing or extending a development moratorium must expressly include, at the time of adoption, the findings set forth in subdivisions (1) through (4) of this subsection, including what new facts or conditions warrant the extension.

Any person aggrieved by the imposition of a moratorium on development approvals required by law may apply to the appropriate division of the General Court of Justice for an order enjoining the enforcement of the moratorium, and the court shall have jurisdiction to issue that order. Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in those actions shall be accorded priority by the trial and appellate courts. In any such action, the county shall have the burden of showing compliance with the procedural requirements of this subsection.

(i) In order to encourage construction that uses sustainable design principles and to improve energy efficiency in buildings, a county may charge reduced building permit fees or provide partial rebates of building permit fees for buildings that are constructed or renovated

using design principles that conform to or exceed one or more of the following certifications or ratings:

- (1) Leadership in Energy and Environmental Design (LEED) certification or higher rating under certification standards adopted by the U.S. Green Building Council.
- (2) A One Globe or higher rating under the Green Globes program standards adopted by the Green Building Initiative.
- (3) A certification or rating by another nationally recognized certification or rating system that is equivalent or greater than those listed in subdivisions (1) and (2) of this subsection. (1959, c. 1006, s. 1; 1967, c. 1208, s. 4; 1973, c. 822, s. 1; 1981, c. 891, s. 6; 1983, c. 441; 1985, c. 442, s. 2; 1987, c. 747, s. 12; 1991, c. 69, s. 1; 1997-458, s. 2.1; 2005-390, s. 6; 2005-426, s. 5(b); 2006-259, s. 26(a); 2007-381, s. 1.)

§ 153A-347. Part applicable to buildings constructed by the State and its subdivisions; exception.

Each provision of this Part is applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions.

Notwithstanding the provisions of any general or local law or ordinance, no land owned by the State of North Carolina may be included within an overlay district or a special use or conditional use district without approval of the Council of State. (1959, c. 1006, s. 1; 1973, c. 822, s. 1; 1985, c. 607, s. 4.)



North Carolina General Statutes

Chapter 160A.

Cities and Towns.

Article 19.

Planning and Regulation of Development.

Part 3. Zoning.

§ 160A-381. Grant of power.

(a) For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land. The ordinance may provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11.

(b) Expired.

(b1) These regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained, provided no change in permitted uses may be authorized by variance.

(c) The regulations may also provide that the board of adjustment, the planning board, or the city council may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. When deciding special use permits or conditional use permits, the city council or planning board shall follow quasi-judicial procedures. No vote greater than a majority vote shall be required for the city council or planning board to issue such permits. For the purposes of this section, vacant positions on the board and members who are disqualified from voting on a quasi-judicial matter shall not be considered "members of the board" for calculation of the

requisite majority. Every such decision of the city council or planning board shall be subject to review of the superior court in the nature of certiorari in accordance with G.S. 160A-388.

Where appropriate, such conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made of recreational space and facilities.

(d) A city council member shall not vote on any zoning map or text amendment where the outcome of the matter being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member. Members of appointed boards providing advice to the city council shall not vote on recommendations regarding any zoning map or text amendment where the outcome of the matter being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member.

(e) As provided in this subsection, cities may adopt temporary moratoria on any city development approval required by law. The duration of any moratorium shall be reasonable in light of the specific conditions that warrant imposition of the moratorium and may not exceed the period of time necessary to correct, modify, or resolve such conditions. Except in cases of imminent and substantial threat to public health or safety, before adopting an ordinance imposing a development moratorium with a duration of 60 days or any shorter period, the governing board shall hold a public hearing and shall publish a notice of the hearing in a newspaper having general circulation in the area not less than seven days before the date set for the hearing. A development moratorium with a duration of 61 days or longer, and any extension of a moratorium so that the total duration is 61 days or longer, is subject to the notice and hearing requirements of G.S. 160A-364. Absent an imminent threat to public health or safety, a development moratorium adopted pursuant to this section shall not apply to any project for which a valid building permit issued pursuant to G.S. 160A-417 is outstanding, to any project for which a conditional use permit application or special use permit application has been accepted, to development set forth in a site-specific or phased development plan approved pursuant to G.S. 160A-385.1, to development for which substantial expenditures have already been made in good faith reliance on a prior valid administrative or quasi-judicial permit or approval, or to preliminary or final subdivision plats that have been accepted for review by the city prior to the call for public hearing to adopt the moratorium. Any preliminary subdivision plat accepted for review by the city prior to the call for public hearing, if subsequently approved, shall be allowed to proceed to final plat approval without being subject to the moratorium.

Any ordinance establishing a development moratorium must expressly include at the time of adoption each of the following:

- (1) A clear statement of the problems or conditions necessitating the moratorium and what courses of action, alternative to a moratorium, were considered by the city and why those alternative courses of action were not deemed adequate.
- (2) A clear statement of the development approvals subject to the moratorium and how a moratorium on those approvals will address the problems or conditions leading to imposition of the moratorium.
- (3) An express date for termination of the moratorium and a statement setting forth why that duration is reasonably necessary to address the problems or conditions leading to imposition of the moratorium.

- (4) A clear statement of the actions, and the schedule for those actions, proposed to be taken by the city during the duration of the moratorium to address the problems or conditions leading to imposition of the moratorium.

No moratorium may be subsequently renewed or extended for any additional period unless the city shall have taken all reasonable and feasible steps proposed to be taken by the city in its ordinance establishing the moratorium to address the problems or conditions leading to imposition of the moratorium and unless new facts and conditions warrant an extension. Any ordinance renewing or extending a development moratorium must expressly include, at the time of adoption, the findings set forth in subdivisions (1) through (4) of this subsection, including what new facts or conditions warrant the extension.

Any person aggrieved by the imposition of a moratorium on development approvals required by law may apply to the appropriate division of the General Court of Justice for an order enjoining the enforcement of the moratorium, and the court shall have jurisdiction to issue that order. Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in those actions shall be accorded priority by the trial and appellate courts. In any such action, the city shall have the burden of showing compliance with the procedural requirements of this subsection.

(f) In order to encourage construction that uses sustainable design principles and to improve energy efficiency in buildings, a city may charge reduced building permit fees or provide partial rebates of building permit fees for buildings that are constructed or renovated using design principles that conform to or exceed one or more of the following certifications or ratings:

- (1) Leadership in Energy and Environmental Design (LEED) certification or higher rating under certification standards adopted by the U.S. Green Building Council.
- (2) A One Globe or higher rating under the Green Globes program standards adopted by the Green Building Initiative.
- (3) A certification or rating by another nationally recognized certification or rating system that is equivalent or greater than those listed in subdivisions (1) and (2) of this subsection. (1923, c. 250, s. 1; C.S., s. 2776(r); 1967, c. 1208, s. 1; 1971, c. 698, s. 1; 1981, c. 891, s. 5; 1985, c. 442, s. 1; 1987, c. 747, s. 11; 1995, c. 357, s. 1; 2005-426, s. 5(a); 2007-381, s. 2.)

§ 160A-392. Part applicable to buildings constructed by State and its subdivisions; exception.

All of the provisions of this Part are hereby made applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions.

Notwithstanding the provisions of any general or local law or ordinance, no land owned by the State of North Carolina may be included within an overlay district or a special use or conditional use district without approval of the Council of State. (1951, c. 1203, s. 1; 1971, c. 698, s. 1; 1985, c. 607, s. 2; 2004-199, s. 41(e); 2005-280, s. 1.)



Chapel Hill Land Use Management Ordinance (LUMO)

ARTICLE 3. - ZONING DISTRICTS, USES, AND DIMENSIONAL STANDARDS

This article establishes zoning districts and describes the various uses permitted within the zoning districts, as well as design regulations. Several types of zoning districts are established. First, "General Use" districts (section 3.3) divide the town into various residential, commercial and industrial zones. Each district establishes uses that are permitted "as of right," and uses permitted only as "special uses." Special uses require a public hearing in order to assess whether conditions are needed in order to make the use compatible with other uses in the district. The uses permitted in each district are listed in section 3.7.

"Special" districts (section 3.5) involve uses which cannot be adequately addressed by the base district regulations. Unlike the overlay districts, these districts are independent of the general use zoning districts. The special districts have separate use and design regulations.

3.5. - Special districts.

Special districts have been created to deal with unique, location-specific situations where special standards and procedures are appropriate. The following special districts are defined below: mixed use districts, office/institutional-4 district, traditional neighborhood development district, and transit oriented development district.

3.5.2 Office/Institutional—4 District (OI-4)

(a)

Purpose and intent.

The purpose and intent of the office/institutional-4 district (OI-4) is to establish procedural and substantive standards for the town council's review and approval of development on large tracts of land where the predominant use is to be college, university, hospital, clinics, public cultural facilities, and related functions.

The objective of this section and the OI-4 district is to allow for growth and development while protecting the larger community, nearby neighborhoods, and the environment from impacts accompanying major new development. A key feature of this district is the preparation of a development plan that would allow the property owner, immediate neighbors, and the larger community to understand specifically what levels of development are being proposed, and what impacts would likely accompany the development, so that mitigation measures can be designed and implemented.

(b)

Overview of Development Review Procedures.

Procedures in this zoning district are designed to facilitate:

- Articulation of development plans that involve multiple buildings in multiple locations over an extended time period on a given tract of land, as defined in a development plan;
- Identification of total infrastructure needs for such proposed development as specified in a development plan and cumulative impacts resulting from full development as specified in a development plan; and
- Provision of measures to mitigate the negative impacts, including off-site construction of parking decks as described in subsection (d)(2), phased in a manner appropriate with the pace of construction.

To this end, owners of property zoned OI-4 are encouraged to prepare detailed development plans, as described below, for review and approval by the town council. For buildings that are included in an approved development plan, site development permits for individual buildings are to be issued by the town manager, following a determination by the town manager that such individual building plans are generally consistent with the town council-approved development plan.

For development proposed within an OI-4 zoning district that is not included in a town council-approved development plan, but is a minor change according to the provisions of subsection (i) of this section, the town manager may approve a change to the development plan and issue a site development permit. For development proposed within an OI-4 zoning district that is not included in a town council-approved development plan and that cannot be considered a minor change to the plan according to subsection (i) of this section, such development shall be considered to be a special use, and subject to the special use permit procedural requirements of section 4.5 of this appendix. In the alternative, the applicant may apply to the town council for an amendment to the development plan.

Once a property is zoned office/institutional-4, all regulations, standards, and procedures prescribed for the previously-applicable zoning district shall apply until (1) a development plan is approved; or (2) six (6) months have elapsed, whichever comes first.

(c)

Concept plan review. Prior to submittal of a development plan or modification of development plan, a concept plan review shall be conducted by the Town Council. It is the intent of the conceptual development plan process to provide an opportunity for the Town Council, Town Manager and citizens to review and evaluate the impact of the proposed development on the character of the area in which it is proposed to be located.

(1)

Submittal requirements. Applications for conceptual development plan review shall be filed with the Town Manager. The Town Manager shall prescribe the form(s) on which information shall be submitted. Application submittal requirements shall include the following:

A.

Descriptions of proposed development with building locations, building sizes, parking arrangements, and description of building heights with consideration of impact on adjacent areas.

(d)

Development Plan.

A development plan shall address issues such as general location and size of new facilities, parking, utilities, stormwater management, impervious surface, and access/circulation. A development plan shall identify the general location, size, and proposed uses of buildings. A development plan shall project anticipated impacts on streets, water and sewer facilities, stormwater runoff, air quality, noise, and lighting.

(1)

Submittal requirements. Application submittal requirements shall include the following:

A.

Specific descriptions of proposed development with building locations, building sizes, parking arrangements, and description of building heights with consideration of impact on adjacent areas.

B.

Analysis of impacts resulting from proposed development, along with options to mitigate impacts relating to:

- **Transportation management (traffic, transit, parking, bikes, pedestrians, air quality);**
- **Stormwater management analysis (quantity and quality); and**
- **Noise and lighting analysis.**

C.

Preliminary timetable and sequencing schedule for building construction and for related mitigation measures.

Individual effects must be evaluated in the context of the whole development plan and not in isolation. Impacts shall be evaluated in accordance with guidelines endorsed for use by the town council.

(2)

Off-site components. Mitigation measures involving construction of parking decks may need to be developed outside the boundaries of the development plan. Notwithstanding any other provision of this Land Use Management Ordinance, a parking deck proposed to mitigate impacts of a development plan, and approved by the town council as part of a development plan, may be located on a site not within the boundaries of an OI-4 zoning district. Any such facility shall be reviewed as a site development permit according to the provisions of subsection (i)(2) of this section.

(e)

Permitted uses and development intensities.

Permitted uses shall be identical with uses listed in the use matrix (section 3.7) as being permitted in OI-3, except that place of assembly shall be considered to be a permitted use and not a special use. The maximum floor area allowed shall be as provided in a development plan that is approved by the town council. Special restrictions apply in perimeter transition areas (see subsection (g)).

For purposes of calculating compliance with a specified maximum floor area, the following land uses shall not be counted as floor area: new residential development (including Dwellings and residence halls), and new public cultural facilities.

(f)

Standards.

Development in the OI-4 zoning district shall be designed in a manner that provides a mix of uses which are integrated, interrelated and linked by pedestrian ways, bikeways, and other transportation systems. Development plans shall, as practical and consistent with applicable laws and regulations, include measures to encourage reduction of automobile use and promote alternative modes of transportation; to mitigate adverse environmental impacts; to promote conservation of non-renewable energy resources; and to achieve visual continuity in the siting and scale of buildings. Specifically, a development plan shall address the following:

(1)

Noise: Noise levels from development proposed in the development plan shall not exceed those allowed by the Town of Chapel Hill Noise Ordinance.

(2)

Environment: Development proposed in the development plan shall minimize impacts on natural site features, and be accompanied by measures to mitigate those impacts.

(3)

Transportation: Development proposed in the development plan shall be accompanied by measures to mitigate transportation impacts that are caused by the development.

(4)

Stormwater management: Development proposed in the development plan shall be accompanied by measures to mitigate stormwater impacts (quantity and quality) that are caused by the development.

(5)

Public utilities: There shall be a general demonstration that water, sewer, and other needed utilities can be made available to accommodate development proposed in the development plan.

(6)

Historic districts: The provisions of section 3.6.2 of this appendix shall apply to any development proposed within one of Chapel Hill's Historic Districts.

(g)

Perimeter transition areas.

A development plan shall designate a perimeter transition area establishing appropriate standards at borders of the development plan, necessary to minimize impacts of development proposed in the development plan on adjacent property, to be approved by the town council as part of the development plan. Standards shall address:

(1)

Screening mechanical equipment,

(2)

Exterior lighting,

(3)

Height limits,

(4)

Landscaping.

(h)

Procedures for approval of development plans.

Applications for a development plan, special use permit, or site development permit shall be filed with the town manager.

(1)

Application submittal requirements. The town manager shall prescribe the form(s) of applications as well as any other material he/she may reasonably require to determine compliance with this section. Applications shall include information described in subsection (d) (1).

(2)

Process for review.

A.

Applications for development plan approval shall be reviewed by the planning board and forwarded to the town council for consideration at a public hearing. The Planning Board shall review the application and the Town Manager's report and shall submit to the Town Council a written recommendation based on the findings required in subsection (h)(3). The Planning Board shall prepare its recommendation within thirty-five (35) days of the meeting at which the Town Manager's report is submitted to it or within such further time consented to in writing by the applicant or by Town Council resolution. If the Planning Board fails to prepare its recommendation to the Town Council within this time limit, or extensions thereof, the Planning Board shall be deemed to recommend approval of the application without conditions.

B.

Notice of the date, time, and place of the public hearing shall be published in a newspaper of general circulation in the planning jurisdiction once a week for two (2) successive weeks, with the first notice to be published not less than ten (10) nor more than twenty-five (25) days prior to the date of the hearing.

C.

The public hearing shall be open to the public and all interested persons shall be given the opportunity to present evidence and arguments and to ask questions of persons who testify. The town council may place reasonable and equitable limitations on the presentation of evidence and arguments and the cross-examination of witnesses to avoid undue delay. All persons who intend to present evidence at the public hearing shall be sworn.

D.

The applicant shall bear the burden of presenting evidence sufficient to establish persuasively that the proposed development will comply with the determinations required in subsection (h)(3).

E.

A record of the proceedings of the hearing shall be made and shall include all documentary evidence presented at the hearing. Town council action on an application for development plan approval shall occur within one hundred twenty (120) days of the date of submittal of a complete application.

(3)

Town council action.

A.

The town council shall approve a development plan unless it finds that the proposed development would not:

- Maintain the public health, safety, and general welfare; or
- Maintain the value of adjacent property; or
- Comply with all required regulations and standards of this chapter, including all applicable provisions of article 2 and with all other applicable regulations; or
- Conform with the general plans for the physical development of the Town as embodied in this chapter and in the comprehensive plan.

B.

Town council action shall be to:

- Approve;

- Approve with conditions; or
- Deny.

(i)

Actions after decision on development plan.

(1)

Recording approval. If the application for approval of a development plan is approved or approved with conditions, the town manager shall issue the approval in accord with the action of the town council. The applicant shall record such approval in the office of the county register of deeds. The development plan, including all conditions attached thereto, shall run with the land and shall be binding on the original applicant as well as all successors, assigns, and heirs.

(2)

Individual site development permits. If the development plan is approved, or approved with conditions, the town manager may then accept applications for individual site development permits for specific buildings that are described in the development plan. No work on a building identified on the development plan may begin until a site development permit has been issued. The town manager shall prescribe the form(s) of applications as well as any other material he/she may reasonably require to determine compliance with the development plan. Any application for a site development permit in a perimeter transition area shall include provisions for mailed notification to property owners within one thousand (1,000) feet of the proposed development. If the town manager finds that the application is consistent with the development plan, he/she shall approve the application and issue the site development permit within fifteen (15) working days of the submittal of a complete application. If the town manager finds that the application is not consistent with the development plan he/she shall deny the application within fifteen (15) working days of the acceptance of the application and refer the applicant to the special use permit process described in section 4.5 of this appendix. Alternatively, the applicant may apply for an amendment to the development plan.

(3)

Expiration, abandonment, revocation of development plan. If an application for a site development permit pursuant to an approved development plan has not been submitted to the town manager within two (2) years of the date of approval of the development plan, the approval shall automatically expire. On request by the holder of an approved development plan, the town council shall approve the abandonment of the plan if it determines that no subsequent development approvals have been granted and no construction activity has taken place pursuant to the development plan. If material conditions of a development plan are violated, and remain in violation after giving the property owner a reasonable amount of time to correct such violation, the town council may revoke the plan after notification to the property owner and opportunity for property owner response at a public meeting of the town council.

(j)

Process for amending development plan.

The town manager is authorized to approve minor changes and changes in the ordering of phases in an approved development plan, as long as such changes continue to be in compliance with

the approving action of the town council and all other applicable requirements, and result in a configuration of buildings that is generally consistent with the approved development plan. The town manager shall not have the authority to approve changes that constitute a modification of the development plan.

Before making a determination as to whether a proposed action is a minor change or a modification, the town manager shall review the record of the proceedings on the original application for the development plan and any subsequent applications for modifications of the development plan, and shall use the following criteria in making a determination:

(1)

A change in the boundaries of the development plan approved by the town council shall constitute a modification;

(2)

A substantial change in the floor area or number of parking spaces approved by the town council shall constitute a modification. (General rule: more than a 5% increase in overall net new floor area or parking in a development plan approved by the town council would be considered substantial.);

(3)

Substantial changes in pedestrian or vehicular access or circulation approved by the town council shall constitute a modification. (General rule: changes that would affect access or circulation beyond the boundaries of a development plan would be considered substantial.); and

(4)

Substantial change in the amount or location of open areas approved by the town council shall constitute a modification.

If the proposed action is determined to be a modification, the town manager shall require the filing of an application for approval of the modification, following procedures outlined in this section for initial approval of a development plan.

(Ord. No. 2005-06-15/O-5, § 1)

3.5.5. University-1 District

(a)

Purpose and intent. The purpose and intent of the University-1 district (U-1) is to establish procedural and substantive standards for the town council's review and approval of development on large tracts of land where the predominant uses are to be public or private development for college/university, research activity, civic, hospital, clinics, cultural, and/or related or support functions with integrated supporting housing, general business, convenience business, office-type business, recreation, utility, and/or open space uses.

The objective of the U-1 district is to allow for orderly and sustainable growth and major new development while mitigating impacts to nearby neighborhoods, the community, and the environment.

A key feature of this district is the concurrent review of a rezoning application and an initial proposed development agreement within such district that allows the property owner, immediate neighbors, and community to understand the type and intensity of development being proposed, the timing of that development, the potential impacts of the development, the mitigation measures that will be implemented to address those impacts, and the commitments of both the developer and the town regarding public facilities and services needed to support the proposed development. A development agreement that is approved by ordinance as a legislative decision of the town council pursuant to G.S. 160A-400.22 is an integral component of the U-1 zoning district.

(b)

Overview of development review procedures. Procedures in this zoning district are designed to facilitate:

1.

Articulation of a long-term development plan that provides a context for more detailed intermediate and short term plans and projects;

2.

Articulation of detailed plans that involve multiple buildings over an extended time period on a defined portion of the zoning district that is subject to an individual development agreement;

3.

Identification of the infrastructure needs and impacts related to the development specified in a development agreement;

4.

Provision of measures to mitigate the negative impacts of development in the development agreement and to promote sustainability of approved development, with the mitigation implemented in a manner appropriate with the pace of development; and

5.

Provision of predictability and certainty as to the type, intensity, and design of development set out in a town council-approved development agreement.

Applicants proposing that property be zoned U-1 must submit a long-range development plan and supporting analysis at the time of petition for rezoning to this district. Upon approval by the town council of a development agreement in this district, site development permits for individual buildings are to be issued by the town manager, following a determination by the town manager that such individual building projects do not violate the town council-approved development agreement.

For development proposed within the U-1 zoning district that is not included in a town council-approved development agreement, but is a minor modification according to the provisions of this section, the town manager may approve a change to the development agreement and issue a site development permit.

Except as specifically authorized as a permitted use under subsection 3.5.5(g)(1), development proposed within this zoning district that is not included in a town council-approved development agreement and/or that cannot be considered a minor modification to a development agreement shall be

considered to be a special use and subject to the special use permit standards and procedural requirements of section 4.5 of this appendix. In the alternative, the applicant may apply to the town council for an amendment to the development agreement.

The terms used within this section have the same meaning and scope as provided by this appendix and state law. Provided, however, that to the extent a council-approved and owner-executed development agreement define a term to have a different meaning or scope, that meaning and scope shall apply as specified in the development agreement.

(c)

Minimum requirements. Only areas with a minimum of twenty-five (25) contiguous acres of developable property (as defined by G.S. 160A-400.23) under common ownership or management may be placed in a U-1 zoning district.

An application for rezoning to a U-1 district may only be initiated by the owner of the property to be rezoned or a duly authorized agent of the owner.

An application for rezoning to a U-1 district must, in addition to all other requirements of this ordinance, include:

1.

A long-range plan for the development of the entire area proposed to be included in the district.

2.

An ecological assessment of the entire area proposed to be included in the district.

3.

A proposed development agreement for a discrete portion (of not less than twenty-five (25) developable acres) of the land to be placed in the district.

The town manager may specify forms and reasonable requirements related to these mandated materials to be submitted with a rezoning petition.

(d)

Long-range development plan. When an application for a rezoning to this district is submitted, the developer shall submit a long-range development plan that depicts all development anticipated for a period of not less than fifty (50) years to provide an opportunity for the town council, town manager and citizens to see the developer's current plans at a conceptual level for long-term development of all property within the proposed zoning district. This long-range plan is necessary to provide a context for individual development agreements for development within the district. The long-range plan shall represent a good faith depiction of the developer's intentions relative to overall development of the site. It is not, however, submitted for town approval and shall not be deemed to create a binding commitment on behalf of the developer or the town.

The long-range development plan shall be submitted to the town manager prior to or concurrently with the submission of an application to rezone property into this district. An updated long-range development plan shall also be submitted with all applications for approval of a development agreement within the district or for approval of major amendments of a development agreement within the district.

(e)

Development agreement. A proposed development agreement in this district must include all provisions mandated by state law and shall at a minimum include:

1.

A legal description of the property subject to the agreement and the names of its legal and equitable property owners.

2.

The duration of the agreement.

3.

The development uses permitted on the property, including population densities and building types, intensities, placement on the site, and design.

4.

A description of public facilities that will service the development, including who provides the facilities, the date any new public facilities, if needed, will be constructed, and a schedule or triggering points to assure public facilities are available concurrent with the impacts of the development.

5.

A description, where appropriate, of any reservation or dedication of land for public purposes and any provisions to protect environmentally sensitive property.

6.

A description of all local development permits approved or needed to be approved for the development of the property together with a statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction does not relieve the developer of the necessity of complying with the law governing their permitting requirements, conditions, terms, or restrictions.

7.

A description of any conditions, terms, restrictions, or other requirements determined to be necessary by the town council for the public health, safety, or welfare.

8.

A description, where appropriate, of any provisions for the preservation and restoration of historic structures.

9.

A development schedule, including commencement dates and interim completion dates at no greater than five-year intervals, provided, however, the failure to meet a commencement or completion date shall not, in and of itself, constitute a material breach

of the development agreement pursuant to G.S. 160A-400.27 but must be judged based upon the totality of the circumstances.

The development agreement may provide that the entire proposed development or any phase of it be commenced or completed within a specified period of time. The development agreement may include other defined performance standards to be met by the applicant and/or its successors in interest.

(f)

Permitted within the boundary of a development agreement.

(1)

Permitted uses within a development agreement. The predominant uses are to be public or private development for college/university, research activity, civic, hospital, clinics, cultural, and/or related or support functions with integrated supporting housing, general business, convenience business, office-type business, recreation, utility, and/or open space uses. Uses that may be approved within a development agreement in this district include all uses allowed within the OI-4 district as permitted uses, special uses, or accessory uses. The maximum floor area, density of development, building heights and general locations, other attributes of development intensity, and design guidelines for the development permitted shall be as provided in a town council-approved development agreement. The development agreement may provide that specified uses shall require a town council-approved special or conditional use permit.

A large central cogeneration/utility plant may only be approved within a development agreement in this district upon approval of a conditional use permit by the town council. For the purposes of this section, a large central cogeneration/utility plant includes any facility designed to produce steam, heat, electric power, chilled water, or cooling for other buildings and that is designed to or has the capacity to serve more than two million square feet of building space. The process established by section 4.5.3 of this appendix shall be followed in the consideration of this conditional use permit and sections 4.5.4 and 4.5.5 of this appendix shall apply to modification, expiration, and revocation of this conditional use permit. The town council shall not approve that permit unless each of the following findings is made:

1.

That the use is located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare;

2.

That the use is located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property, or that the use is a public necessity;

3.

That the use conforms with the general plans for the physical development of the town as embodied in the comprehensive plan; and

4.

That the use conforms with the applicable terms of the development agreement.

(g)

Permitted and special uses outside a boundary area of a development agreement.

(1)

Permitted uses outside the boundary area of a development agreement. Uses that may be approved as permitted uses within the zoning district but outside the boundary area or terms of a town council-approved development agreement are:

Community gardens;

Local farmers markets;

Recreational facility, non-profit;

Trails, greenways, and recreational land;

Public use facilities;

Solar energy collection arrays;

Radio, television, or wireless transmitting and/or receiving facilities, provided the total height of an antenna-supporting structure is not more than one hundred twenty (120) feet and there is a five hundred-foot or more setback from the property line;

Wind turbines designed to produce 100kW or less, provided the total height is not more than one hundred twenty (120) feet, there is a minimum ground clearance of thirty (30) feet from rotors, and there is a five hundred-foot or more setback from the property line. Wind turbines designed to produce 100kW or less may also be located on rooftops.

(2)

Uses subject to a special use permit outside the boundary area of a development agreement. Uses that may be approved as special uses within this zoning district outside the boundary or terms of a town council-approved development agreement (including proposed uses for property formerly covered by a development agreement that has expired or been terminated) are limited to those uses allowed within the OI-4 district as permitted uses, special uses, or accessory uses as set forth in Table 3.7-1 (Use Matrix). These special uses shall be subject to the dimensional requirements for the OI-4 district as set forth in Table 3-8.1 (Dimensional Matrix) and the perimeter transition area requirements applicable in the OI-4 district.

These permitted uses shall require a zoning compliance permit pursuant to section 4.9 of this appendix and, as is provided for OI-3 and OI-4 districts in Table 3.7-1 (Use Matrix), shall not require a special use permit based on the floor area of the proposed development.

(h)

Existing conditions within a U-1 zoning district. Existing uses, structures, and conditions within a U-1 zoning district as of the effective day property is placed in this district may be continued as specified by this section. All existing uses of land that do not involve the use of a building can be continued as they exist as of the effective date the property is zoned U-1 and can be changed to any use permitted by subsection 3.5.5(f)(1). Any existing building within the U-1 district can be used for the use in effect as of the effective date property is zoned U-1 and can

be changed to any use permitted pursuant to a development agreement as authorized by subsection 3.5.5(f)(1). Any existing building being used for a use permitted by this appendix or by an applicable development agreement may be expanded to the extent that the town manager finds that the expansion is exempt from the transportation impact analysis requirements of subsection 5.8(g) of this appendix. Any new construction, development, or site improvements associated with continuation of existing conditions shall be consistent with the terms of all applicable development agreements in effect within the district.

(i)

Development standards. Development in the U-1 zoning district shall be designed to provide a mix of uses within all major phases of the development that are integrated, interrelated and linked by pedestrian ways, bikeways, and/or other transportation systems. Development agreements shall, to the extent practical and consistent with applicable laws and regulations, include measures to encourage reduction of automobile use and promote alternative modes of transportation; to provide sustainable building design and land uses; to mitigate adverse environmental impacts; to promote conservation of non-renewable energy resources; to exceed minimally accepted practices; and to achieve visual continuity in the siting and scale of buildings.

Specifically, a development agreement in this district shall at a minimum address the following:

1.

Plan consistency. The proposed development shall be generally consistent with the long range development plan for the district submitted by the owner. The development shall be generally consistent with the adopted comprehensive plan for the town.

2.

Transportation. Proposed development shall be accompanied by reasonable measures to mitigate transportation impacts that are caused by the development. Proposed development shall address parking, transit, traffic, road, greenway, bikeway, and pedestrian access.

3.

Fiscal impact. Proposed development shall be accompanied by reasonable measures to mitigate any adverse fiscal impacts for the town; provided that, pursuant to GS160A-400.20(b), the town may not impose any tax or fee not authorized by otherwise applicable law.

4.

Housing. Proposed development shall be accompanied at appropriate times by on-site housing to mitigate the impacts that are caused by the development. Such housing shall address student and/or workforce housing needs. A range of housing availability and price levels shall be provided within each major phase and area of the proposed development.

5.

Noise and lighting. Noise and lighting levels from proposed development shall not exceed those allowed by town ordinances or the provisions of the development agreement, whichever are more stringent.

6.

Environment. Proposed development shall seek to minimize impacts on natural site features and shall be accompanied by reasonable measures to mitigate those impacts. Proposed development shall address preservation of open land and natural areas, management of stormwater quality and quantity, energy generation and use, preservation of solar access, solar orientation of buildings, air quality, sustainable water and wastewater management, protection of stream buffers, soil erosion and sedimentation control, landscape and vegetation protection.

7.

Public utilities and services. Proposed development shall assure that there are adequate public utilities and services and shall be accompanied by reasonable measures to assure the availability of such services concurrent with the creation of the need for the services. There shall be a general demonstration that police, fire, emergency, water, sewer, school, recreation, and other necessary utilities and public services will be available to accommodate the proposed development.

The development agreement shall provide for regular monitoring, reporting, and evaluation of the effectiveness of the development standards.

(j)

Amendments and modifications to development agreements. A development agreement may be amended or canceled by mutual consent of the parties to the agreement or by their successors in interest.

Either party may propose a major amendment or minor modification to any town council-approved development agreement. Upon receipt of a proposed adjustment, the town manager shall consider the following criteria in making the determination as to whether a proposed adjustment is a major amendment or a minor modification to a development agreement:

1.

A substantial change in the boundaries of the development agreement shall constitute a major amendment. Any single proposed increase or decrease in the area of land subject to the development agreement approved by the town council of more than five (5) percent shall be considered substantial. A cumulative increase of fifteen (15) percent or more in the land area subject to the development agreement shall be considered substantial.

2.

A substantial change in the floor area or number of parking spaces shall constitute a major amendment. Any single proposed increase or decrease in new floor area or number of parking spaces of more than a five (5) percent in a development agreement approved by the town council shall be considered substantial. A cumulative increase of fifteen (15) percent or more in the floor area or number of parking spaces subject to the development agreement shall be considered substantial. Provided, under no circumstances shall a change in floor area of less than one thousand (1,000) square feet or fewer than ten (10) parking spaces be deemed either a major amendment or minor modification and such changes shall be reported by the applicant to the town manager.

3.

Changes that would substantially affect pedestrian, bicycle, or vehicular access or circulation beyond the boundaries of the development agreement shall constitute a major amendment.

4.

Substantial change in the amount or location of open space within the boundaries of a development agreement shall constitute a major amendment. Any single change that increases or decreases the amount of open space by more than five (5) percent shall be considered substantial. A cumulative increase or decrease in the amount of open space by fifteen (15) percent or more or a substantial change in the location of designated open space shall be considered substantial.

Notwithstanding the above, some proposed changes to a town-council approved development agreement that do not meet the threshold to constitute a major amendment may in the judgment of the town manager, because of size, perimeter location or transportation impacts, merit public review. In the event the manager makes such a determination he may submit the proposed minor modification at a town council meeting to allow an opportunity for council review and citizen comment. Unless the other party to the development agreement agrees otherwise, such a review shall not extend the time period allowed for a decision by the manager on the minor modification or convert the change from a minor modification into a major amendment.

All proposed adjustments to a town council-approved development agreement shall be publicly posted in such a manner that citizens of Chapel Hill will have the opportunity to express any concerns to the town council and/or the town manager. The town manager shall determine whether a proposed adjustment to a town council-approved development agreement is a major amendment or a minor modification within fifteen (15) working days of receipt of a proposed adjustment and shall promptly notify the town council and applicant of that determination. If the proposed action is determined to be a major amendment, the town manager shall require the filing of an application for approval of the amendment, following procedures outlined in subsection 3.5.5(k) of this appendix.

In the event state or federal law is changed after a development agreement has been entered into and the change prevents or precludes compliance with one or more provisions of the development agreement, the town council may modify the affected provisions, upon a finding that the change in state or federal law has a fundamental effect on the development agreement. In so doing, the procedures set forth for original approval of the development agreement shall be followed.

Except for grounds specified in G.S. 160A-385.1(e), the town shall not apply subsequently adopted ordinances or development policies to the development that is subject to the approved development agreement.

(k)

Procedure for review of development agreements, amendments, and modifications.

(1)

Application submittal requirements. Applications for approval of a development agreement, a major amendment to a previously approved development agreement, and a minor modification to a previously approved development agreement within a U-1 zoning district shall be submitted to the town manager. The town manager shall prescribe the form(s) of applications as well as any other material as the town manager may reasonably require to determine compliance with this section.

(2)

Process for review.

A.

Informal consultation. Prior to submission of a proposed development agreement or a major amendment to a previously approved development agreement within this district, the applicant shall consult with the town manager and town council regarding the proposed development. The applicant is encouraged to engage in active discussion and collaboration with the town staff, town council, town advisory boards, neighbors, and the community in the preparation of a proposed development agreement or amendment and plans for development.

B.

Draft agreement. A draft development agreement and long-range development plan for the activity to be addressed in the development agreement shall be submitted to the town manager prior to the submission of a formal development agreement. The manager and applicant shall present the draft agreement to the planning board, such other advisory boards as deemed appropriate by the town council, and the town council for review and comment. The manager and applicant shall also present the draft agreement in informal public information sessions for public review and comment. A formal application for approval of a development agreement may be submitted upon completion of the review, comment, and revision of the draft development agreement.

C.

Initial development agreement. Applications for approval of an initial development agreement within this zone shall be processed concurrently with the petition for rezoning to the U-1 district. The public hearing on the initial development agreement shall be noticed and held concurrently with the hearing on the proposed rezoning. Notice of the public hearing before the town council on the proposed development agreement shall follow the same notice requirements as are applicable for hearings on proposed zoning atlas amendments. The public notice shall include the location of the property covered by the proposed development agreement, the development uses proposed on the property, and the place a copy of the proposed development agreement may be obtained or reviewed. The town council's public hearing on the proposed development agreement shall be open to the public and all interested persons shall be given the opportunity to present comments. The town council shall take action on an application for an initial development agreement within this zone concurrently with action on the application for rezoning to this district. The initial development agreement may be applicable to all or part of the land within the district, provided the initial development agreement must be applicable to no less than twenty-five (25) developable acres.

D.

Subsequent development agreements and major amendments. Subsequent new development agreements within this zoning district and major amendments of a previously approved development agreement shall be considered using the following process:

1.

Upon receipt of an application for approval, the town manager shall review the proposal for completeness. The town manager shall determine within

fifteen (15) working days whether the application is complete and shall promptly notify the town council and applicant of that determination. If the application is determined to be incomplete, a notice of the deficiencies in the mandatory items to be included in a proposed agreement or major amendment shall be provided to the applicant with the notice of the town manager's determination. If the application is determined to be complete, the town manager shall notify the applicant of that determination and shall prepare a report on the proposed agreement or major amendment.

2.

The town manager shall submit a complete proposed agreement or major amendment and the town manager's report to the planning board for review and comment. The planning board shall review the application and the town manager's report and shall submit to the town council a written recommendation regarding the proposed agreement or amendment. The planning board shall submit its recommendation within thirty-five (35) calendar days of the meeting at which the town manager's report is submitted to it or within such further time consented to in writing by the applicant or by town council resolution. If the planning board fails to prepare its recommendation to the town council within this time limit, or extensions thereof, the town council may consider the proposed agreement without a comment or recommendation from the planning board.

3.

The town council shall hold a public hearing on a proposed subsequent development agreement or major amendment to a previously approved development agreement. Notice of the date, time, and place of the public hearing before the town council shall follow the same published, mailed, and posted notice requirements as are applicable for hearings on proposed zoning atlas amendments. The public notice shall include the location of the property covered by the proposed development agreement, the development uses proposed on the property, and the place a copy of the proposed development agreement may be obtained or reviewed. The town council's public hearing on the proposed agreement or major amendment shall be open to the public and all interested persons shall be given the opportunity to present comments.

4.

The town council shall issue a decision on a proposed subsequent development agreement or major amendment to a previously approved development agreement within one hundred twenty (120) calendar days of the date of the town manager's determination that a complete application was submitted or such further time as mutually agreed to by the applicant and the town.

E.

Minor modifications to a previously approved development agreement may be approved by the town manager as long as such changes continue to be in substantial compliance with the approving action of the town council and all other applicable requirements and result in a configuration of buildings/development that is generally consistent with the town council-approved development agreement. The town manager shall not have the authority to approve changes that constitute a major amendment of a town council-development agreement.

F.

The time periods referenced in this subsection shall not run during any period in which the applications for subsequent development agreements or major amendment to a previously approved development agreement have been returned to the applicant for substantial modification or analysis. The time periods set forth in this subsection may also be modified by mutual consent of the applicant and the town council.

(I)

Actions after decision on a development agreement.

(1)

Recording approval. If the application for approval of a development agreement or major amendment is approved or approved with conditions, the town manager shall execute the development agreement or amendment in accord with the action of the town council. The applicant shall then execute the development agreement or amendment and record the development agreement or amendment in the office of the applicable county register of deeds within fourteen (14) days after the town enters into the development agreement. The burdens of the development agreement are binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement.

(2)

Individual site development permits. After an executed development agreement is recorded, the town manager may then accept applications for individual site development permits for specific buildings that the applicant proposes to build within the physical boundaries covered by the agreement. No construction work on any such building identified in the agreement may begin until a site development permit has been issued. The town manager shall prescribe the form(s) of applications as well as any other material the town manager may reasonably require to determine compliance with the agreement. The town manager shall approve or deny of the individual site development permit application within fifteen (15) working days of the manager's determination that the individual site development plan application is complete. The town manager shall approve the application upon finding it is substantially consistent with and does not violate any term of the agreement and shall deny approval upon finding the application is not substantially consistent with or violates a term of the agreement. If the application is denied, the town manager shall specify the grounds for finding that it is inconsistent or in violation and refer the applicant to the special use permit process described in section 4.5 of this appendix. Alternatively, the applicant may modify the site development permit application or apply for a major amendment to the development agreement. Provided, under no circumstances shall a change in floor area of less than one thousand (1,000) square feet or fewer than ten (10) parking spaces be deemed either a minor modification or major amendment of the development agreement nor require approval or modification of an individual site development permit; such changes shall be reported by the applicant to the town manager.

(3)

Expiration, abandonment, revocation of development agreement. The term of the development agreement shall be set forth in the agreement and shall not exceed a term of twenty (20) years. The development agreement shall also contain specific provisions relative to default or termination of the agreement.

(4)

Periodic review and amendment of the development agreement. The town manager shall at least every twelve (12) months conduct a review of the development agreement at which time the applicant or its successors in interest must demonstrate good faith compliance with the terms of the development agreement. The town manager shall promptly report the results of this review to the town council. If, as a result of this periodic review, the town council finds and determines that the applicant or its successors in interest has committed a material breach of the terms or conditions of the agreement, the town manager shall serve notice in writing, within a reasonable time not to exceed thirty (30) working days after the periodic review, upon the applicant or its successors in interest setting forth with reasonable particularity the nature of the breach and the evidence supporting the finding and determination, and providing the applicant or their successors in interest a reasonable time in which to cure the material breach. If the applicant or its successors in interest fail to cure the material breach within the time given, then the town council unilaterally may terminate or modify the development agreement pursuant to G.S. 160A-400.27(c); provided, the notice of termination or modification may be appealed to the board of adjustment in the manner provided by G.S. 160A-388(b). Thereafter the applicant or its successors in interest may pursue any other rights and remedies available at law or in equity. If the town council elects to unilaterally modify the agreement, the applicant or its successors in interest may elect for the development agreement to be terminated rather than accede to the development agreement with the modifications unilaterally made by the town council.

(Ord. No. 2009-06-22/O-13, § 1)