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Limits on "Down-Zoning"

Published: 12/20/24

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The North Carolina General Assembly amended state law to greatly restrict local government discretion to amend local zoning ordinances. The statutory provision, amended as part of the Disaster Recovery Act of 2024 – Part III, Session Law 2024-57 (S.B. 382), broadly defines "down-zoning" and provides that local governments cannot adopt a down-zoning without written consent from all impacted owners.

The precise interpretation and breadth of impact of this law are not perfectly clear. There are many questions. One thing is clear: the law dramatically alters the authority for local governments to amend local zoning ordinances.

This blog seeks to decipher the meaning and scope of the new limits on down-zoning. The blog outlines the amended statutory language; it investigates the meaning and scope of "down-zoning" as defined by state law; and it identifies some of the ways that local zoning administration may be impacted by the new limits.

Property Rights and Ordinance Changes

State and local law has long addressed this question of fairness that is central to land use regulations: To what extent should new regulations apply to existing development? Vested rights allow a property owner to develop land pursuant to an approved development permit even if the regulations are changed after the permit is issued. The permit choice rule ensures that if a property owner has already applied for a development approval (but not yet received approval) and then the regulations are changed, the property owner can choose for the permit to be reviewed under the old rules or reviewed under the new rules. As for existing development, local ordinance provisions about nonconforming situations generally allow existing land uses and development to continue, even if new regulations would not allow that existing development if it was proposed as new

development. All of these rules—vested rights, permit choice, and nonconformity provisions—provide protection for property owners against regulatory changes that might otherwise limit planned and existing development.

Additionally, North Carolina law has limited down-zonings by third parties. The prior version of G.S. 160D-601(d) prevented an individual from requesting to reduce the development rights on their neighbor's property without consent from the neighbor. The old law, though, maintained local government authority to make decisions about rezoning property and adjusting zoning standards. The local legislative body—the town council or county commission—had authority under prior law to make local legislation decisions to adjust rules according to local needs and priorities.

New legislation goes much further: It prohibits local government-initiated down-zoning and it broadens the definition of down-zoning. Session Law 2024-57 (S.B. 382), Section 3K.1.(a), amends G.S. 160D-601(d) to reads as follows (strike-throughs show text that was cut and underlines show text added):

> (d) Down-Zoning. – No amendment to zoning regulations or a zoning map that down-zones property shall be ~~initiated nor is it enforceable~~ initiated, enacted, or enforced without the written consent of all property owners whose property is the subject of the down-zoning ~~amendment, unless the down-zoning amendment is initiated by the local government.~~ amendment. For purposes of this section, "down-zoning" means a zoning ordinance that affects an area of land in one of the following ways:
>
> 1. By decreasing the development density of the land to be less dense than was allowed under its previous usage.
> 2. By reducing the permitted uses of the land that are specified in a zoning ordinance or land development regulation to fewer uses than were allowed under its previous usage.
> 3. By creating any type of nonconformity on land not in a residential zoning district, including a nonconforming use, nonconforming lot, nonconforming structure, nonconforming improvement, or nonconforming site element.

It should be noted that there are media reports that the General Assembly may revisit this topic in a future legislative session. For now, though, it is law.

Applicability

Section 3K.1.(c) of the session law states that the limits on down-zoning are effective upon adoption and apply retroactively to any "down-zoning" adopted after June 14, 2024. Here's the language:

> "This section is effective when it becomes law [December 11, 2024] and applies to local government ordinances adopted on or after that date and any local government ordinance enacting down-zoning of property during the 180 days prior to the date this section becomes effective [i.e., zoning amendments adopted after June 14, 2024]. Ordinances adopted in violation of this section shall be void and unenforceable."

This retroactive application means that some previous local government zoning actions—including actions that property owners and developers have relied upon—may be unenforceable without written consent from all affected property owners.

"Down-Zoning" Defined Broadly

In land use law generally, "down-zoning" refers to rezoning a property to a new zoning district that is less intense or less dense than the prior district. Rezoning property from an industrial zoning district to a residential zoning district, for example, is a down-zoning. North Carolina law, however, defines down-zoning much more broadly.

To be clear, two of the three provisions discussed below were already in state law. But, those provisions are much more impactful now that they apply to local government-initiated amendments, not just third-party requests.

Let's consider each of the three ways in which the state law would consider a zoning amendment to be a down-zoning.

DENSITY
“By decreasing the development density of the land to be less dense than was allowed under its previous usage.”

Under the new law, an amendment to the zoning text or map may not reduce the density of development unless the owner consents to it.

Zoning ordinances commonly regulate the density of residential units in each residential zoning district. Plainly a zoning ordinance amendment or rezoning that reduced the residential density would be prohibited under the new law unless the owner consented to the reduction. For example, a local government can no longer rezone a corridor or small area of properties from multifamily zoning to single family zoning without the consent of all the owners within the corridor or area. Beyond that, other regulatory provisions could be implicated. Setbacks, buffers, and open space requirements limit the amount of a lot that can be developed. Does increasing such requirements decrease the development density of the land? Potentially. If so, then changes to such development standards may be limited by the new law.

USES
“By reducing the permitted uses of the land that are specified in a zoning

ordinance or land development regulation to fewer uses than were allowed under its previous usage."

Under the new law, an amendment to the zoning text or map may not reduce the permitted uses of the land unless the owner consents to it.

The phrasing of this provision suggests two different aspects of a zoning amendment that might trigger the down-zoning limits: *substantively* prohibiting a use that was previously allowed ("reducing the permitted uses") and *numerically* reducing the number of uses allowed ("to fewer uses"). Moreover, this new law applies to text amendments *and* map amendments, so the two different aspects could come up through a text change to a use table or through a rezoning.

A common understanding of down-zoning would suggest that this provision should be interpreted to focus on the substantive uses allowed, but the language is not clear. Under the new law, is a zoning amendment a down-zoning when it prohibits a use that was previously allowed? Or is it a downzoning when the number of permitted uses is less than the number previously allowed (regardless of the substantive uses allowed)?

Here's a simplified scenario to explore the potential implications. Consider a zoning ordinance use table that includes these districts and permitted uses.

R-1, Residential	**NC, Neighborhood Commercial**	**HC, Highway Commercial**
Single-family residential	Retail and restaurant	Gas station
Two-family residential	Multifamily residential	Truck stop
Bed and Breakfast	Religious assembly	Large format retail
Religious assembly	Gas station	
~~Short-term rental~~		
[Three-unit residential]		
[Four-unit residential]		

First, consider a text amendment. Suppose a local government is amending the zoning ordinance to

strike “short-term rental” from the permitted uses for R-1. Such an action would “reduc[e] the permitted uses,” so potentially that could not be “initiated, enacted, or enforced without the written consent of all property owners whose property is the subject of the down-zoning amendment.” (Such consent would be nearly impossible across an entire jurisdiction.) Alternatively, suppose the text amendment struck “Short-term rental,” but added “Three-unit residential” and “Four-unit residential” as permitted uses. In this case, the text amendment would result in more permitted uses, not less. Under the statutory language, arguably that is not a down-zoning.

Next, consider how this plays out for a rezoning action. Imagine that the town is seeking to encourage commercial development along a highway corridor, so the town seeks to amend the zoning map so properties along the corridor are rezoned from the Neighborhood Commercial zoning district to the Highway Commercial zoning district. Such action would allow for more intense uses (commonly thought of as “up-zoning”), but fewer uses. Additionally, some of the uses permitted under Neighborhood Commercial would no longer be permitted. Substantively and numerically that would be a down-zoning under the law.

The phrasing of this provision raises two more questions worth exploring: What is included in “permitted uses”? And, what is meant by “previous usage”?

The phrase “permitted uses” raises questions. Surely principal land uses listed on the use table as allowed are permitted uses. What about uses allowed with special development standards? What about uses allowed by a special use permit? If a use is moved from “permitted” to “permitted by special use permit” is that a down-zoning? What about temporary uses or accessory uses? Are they permitted uses? It is not clear.

With regard to “previous usage,” the statute refers to “fewer uses than were allowed under its *previous usage*.” Is *previous usage* referring to how the property was actually used (it’s usage)? Or is that referring to the *previous regulation* or *previous district*? It is not clear.

NONCONFORMITIES

“By creating any type of nonconformity on land not in a residential zoning district, including a nonconforming use, nonconforming lot,

nonconforming structure, nonconforming improvement, or nonconforming site element."

Under the new law, an amendment to the zoning text or map may not create nonconforming situations in non-residential zoning districts unless the owner consents to it.

A bit of context may be helpful. Most zoning ordinances allow for nonconforming situations to continue. So, when an ordinance is revised in a way that makes a current building, activity, or lot out-of-compliance, the property owner is allowed to continue that situation as a lawful nonconformity. In other words, the ordinance would not allow that building, activity, or lot if the property owner proposed it new, but since the situation was already there before the ordinance changed, the owner is allowed to continue.

There is no general state law requirement for nonconforming provisions, but local zoning ordinances typically include them. Commonly an ordinance will require that a nonconforming use cannot be expanded or intensified, and that if the use is ceased for a period of time (12 months, for example) the owner loses status as a lawful nonconformity and must come into compliance with the new rules.

There are circumstances when a local government requires immediate compliance rather than alllowing a situation to continue as a lawful nonconformity. These typically arise for public health and safety reasons. For example, consider if a town ordinance did not address camping and the owner of a vacant lot near downtown began hosting dozens of individuals sleeping in tents. The town might adopt requirements to address sanitation and crowding, and the ordinance might require property owner compliance right away. In other words, the use would not continue as a lawful nonconformity.

The new legislation against down-zoning clouds the rules for nonconforming provisions and situations. Outside of residential zoning districts, a zoning amendment cannot create any type of nonconformity. That plainly prohibits the common approach of allowing situations to continue as a lawful nonconformity. Interestingly, the law leaves open the possibility of requiring immediate compliance.

As discussed more below under Amending Development Standards, this provision on nonconformities will greatly impact local government updates to an array development standards like parking, setbacks, landscaping, signage, and more.

What about vacant land? In some cases new development standards might apply to vacant land without triggering a "down-zoning." In order to create a nonconformity, there must be development that becomes nonconforming. For vacant land, though, new rules may not create a nonconformity so it might not amount to a down-zoning under the law.

What about old nonconformities? It appears that nonconformities existing prior to June 14, 2024, will continue unaffected by the new law. Local nonconforming provisions will still apply to those situations.

Implications for Local Zoning

So, what does this broad definition of down-zoning mean for local zoning ordinances? Here are some topics and considerations.

Rezonings Requested by Property Owners

A standard rezoning—where the property owner requests for property to change from one zoning district to another—will be unaffected, generally, by the new law because the property owner will be inclined to consent to the change. A local government will want to obtain written consent to the rezoning, especially if it falls within the broad definition of "down-zoning." An application for rezoning might be implied consent to the change, but local governments would be wise to obtain clear, written consent to the down-zoning.

Conditional zoning already requires consent from the property owner. Given that the new legislation greatly limits authority for generalized amendments and updates to zoning, local governments may be inclined to shift rezonings toward conditional rezoning to ensure consent and to address standards for development.

Addressing New Uses

North Carolina is home to creative folks. They come up with all kinds of new, entrepreneurial uses for property. Additionally, industries are constantly evolving and seeking new ways to operate. Zoning ordinances cannot address any and all future land uses. They must be amended from time to time. Recent examples are food trucks, solar farms, backyard chicken coops, short-term rentals, crypto-mining operations, and vape shops. As new uses arise, local governments must determine if current ordinance provisions address the use sufficiently or if new regulations are needed.

The rule against down-zoning will complicate the process of addressing new uses. Ordinance amendments addressing new uses commonly restrict uses and add development standards. Such actions likely will be down-zonings.

Amending Development Standards

Zoning ordinances have a wide range of development standards: parking requirements, vegetative buffering, setbacks, height limits, and more. The limits on down-zoning will complicate the process of amending development standards. Amendments to these development standards may amount to a "down-zoning" under the new law if the new development standard limits development density on any property *or* creates a nonconformity on property in non-residential zoning districts.

Going forward, local governments may consider re-characterizing how rules apply so that rules are not creating nonconformities in non-residential districts: in other words, making new ordinance rules only apply to development occurring after the effective date of the ordinance. So, for example, new parking rules do not apply to existing development, but do apply to applications for new development. Such action would not be "creating any type of nonconformity on land not in a residential zoning district." Existing development conforms with the rules applicable at the time of that existing development. And new development must conform with the new rules.

While such an approach may avoid the terminology "nonconformity," it is accomplishing similar ends to typical nonconforming provisions, so it may still run afoul of the new law. Additionally, it may prove difficult for local governments to keep track of which development standards apply to new developments and which apply to old development.

Changes in Jurisdiction

Jurisdictional boundaries change commonly: the general assembly might de-annex property from a town, a town might extend (or relinquish) extraterritorial jurisdiction, or a new survey might correct a county boundary. Regardless of the reason for the change, whenever property changes jurisdiction the local government receiving the property must take action to apply zoning rules to the property. My colleague, Jim Joyce, has written on this topic in the blog, What Happens When Property Changes Jurisdiction? Essentially, the local government must go through a rezoning process to amend the zoning map and apply the zoning regulations to the new property.

The limits on down-zoning will complicate the process of applying zoning after a change in jurisdiction. Without consent from the owner, an action to apply zoning to property that is newly

added to the jurisdiction cannot reduce density or reduce uses, and for nonresidential districts, the action cannot create nonconformities. In cases of voluntary annexation, this may be a nonissue (the owner is requesting the new jurisdiction and presumably will provide written consent to the down-zoning), but in many other cases of changed jurisdiction, the owner may oppose the jurisdictional change and/or oppose the new zoning.

New Ordinances and New Maps

Local governments commonly adopt updated or overhauled zoning ordinances and unified development ordinances. Along with that, they commonly adopt wholly new zoning maps to align the zoning map with the new ordinance and districts.

The limits on down-zoning will complicate the process. Given the broad definition of "down-zoning," ordinance updates and adoption of new maps will surely be impacted. Consent from every owner is impractical and unlikely. A local government potentially could allow for parallel zoning regulations (whereby the old rules are still available, but an owner could opt into the new rules), but such a system is unwieldy.

Even short of a comprehensive re-write or map update, any general changes to a zoning ordinance or map will be challenging. Imagine a new highway corridor district or gateway district overlay. Even if only one property was more restricted by the change, the law would require "written consent of all property owners whose property is the subject of the down-zoning amendment."

Incorporating Maps by Reference

G.S. 160D-105 authorizes local governments to "incorporate by reference flood insurance rate maps, watershed boundary maps, or other maps officially adopted or promulgated by State and federal agencies." As part of that, a local ordinance may be "automatically amended to remain consistent with changes in the officially promulgated State or federal maps." The limits on down-zoning likely will conflict with such automatic updates since maps with altered boundaries are likely to impose use and density limits as well as create nonconformities.

Compliance with Federal and State requirements

Local governments implement a range of state and federal requirements through zoning and related development regulations. The limit on down-zoning will complicate the process of implementing such requirements.

The National Flood Insurance Program requires that local governments must adopt minimum standards for flood damage prevention in order to participate in the program and for property owners to have access to federal flood insurance. The state Water Supply Watershed Program requires development regulations at the local level to protect drinking water supplies for North Carolina communities. When the standards are revised or the maps are updated, local governments must take action to update local ordinances accordingly. Such action could amount to a down-zoning, and the local government may be caught between the federal or state requirement and adhering to the limits on down-zoning.

What about related development ordinances? What about floodplain regulations?

The language of G.S. 160D-601(d) is focused on zoning ("No amendment to *zoning* regulations or a *zoning* map . . ."). The heading of the subsection ("Down-Zoning") suggests this is about zoning. And "down-zoning" is defined to be "a zoning ordinance that affects an areas of land . . . ." Other provisions of Article 6 of Chapter 160D also distinguish between zoning and other development regulations. G.S. 160D-604 requires planning board review for *zoning amendments* and allows planning board review for amendments to other *development regulations*. With all of that, it seems that the limitation on "down-zoning" applies only to zoning ordinances, not other development regulations.

There is some statutory language and some practical implications that suggest that the limit may apply more broadly. Section 160D-601 itself is titled "Procedure for adopting, amending, or repealing *development regulations*." Moreover, subsection (d)(2) refers to permitted land uses "that are specified in a zoning ordinance *or land development regulation.*" So perhaps the limit on down-zoning applies further than the zoning ordinance.

Floodplain regulations are a particularly tricky topic here. Floodplain regulations are authorized separately from zoning (G.S. 143-215.51 through -215.61 and G.S. 160D-923). Floodplain regulations, however, are zoning-like—maps identify different regulatory districts and land uses and development densities are regulated in those districts. Floodplain regulations commonly are incorporated into zoning regulations or are very closely related to the zoning ordinance. A floodplain ordinance that is adopted as part of a zoning ordinance would be subject to the limitations on down-zoning. For a floodplain ordinance that is adopted as stand-alone development

regulation, perhaps the down-zoning limitations of G.S. 160D-601(d) do not apply. Even then, the floodplain ordinance is establishing districts and regulating land uses, so it may be viewed as zoning anyway.

Presuming that the limits on down-zoning do apply to floodplain regulations, that could create significant problems for compliance with the National Flood Insurance Program (NFIP). As noted above, NFIP regulations require that local governments adopt certain minimum regulations for flood damage prevention and those regulations must align with the federal floodplain mapping. If a local government failed to maintain an adequate ordinance or adopt current maps, residents may lose access to federal flood insurance. For more on floodplain rules, check out these FAQs.

Conclusion

G.S. 160D-601(d), as amended, sets a new, broader definition of "down-zoning" and greatly limits local government authority to amend zoning ordinances and maps without property owner consent. Many questions remain about the precise meaning of the law, the breadth of the implications, and whether the General Assembly may revisit the legislation.

In the meantime, here is a simple list of questions for evaluating "down-zonings."

> Is it a "down-zoning"?
>
> - Is the change an amendment to the zoning text or map?
>   - If yes, continue to next question. If no, evaluate if the amendment is effectively a zoning amendment (like in the case of floodplain ordinances).
> - Does the text or map amendment reduce development density?
>   - If yes, it's a "down-zoning" (jump down to next section). If no, continue to next question.
> - Does the text or map amendment limit a use that was previously permitted and/or reduce the number of uses allowed? (Reminder: There is ambiguity as to whether this is substantive, numeric, or both.)
>   - If yes, it's a "down-zoning" (jump down to next section). If no, continue to next question.
> - Does the text or map amendment affect property in a nonresidential zoning district?

    - If yes, continue to next question. If no, it likely is not a “down-zoning.”
- For text or map amendments affecting nonresidential zoning districts, does the text or map amendment create a nonconforming situation?
    - If yes, it’s a “down-zoning” (jump down to next section). If no, it likely is not a “down-zoning.”

If it is a “down-zoning”:

- Can the local government get written consent from all affected property owners?
    - If yes, then the amendment may proceed with proper written consent. If no, then the amendment cannot be initiated, enacted, or enforced.