

Tab 4



**RESOLUTION 2025-02**

**REQUESTING TOWN OF ORIENTAL’S DELEGATION TO THE GENERAL ASSEMBLY OF NORTH CAROLINA TO INTRODUCE AND/OR SUPPORT LEGISLATION TO EXEMPT THE TOWN OF ORIENTAL FROM THE PROVISIONS OF PART III, SUBPART III-K OF SB 382 AND TO RESTORE THE ORIGINAL PROVISIONS OF N.C.G.S. § 160D-601(d)**

**THAT WHEREAS**, Senate Bill 382, entitled “AN ACT TO MAKE MODIFICATIONS TO AND PROVIDE ADDITIONAL APPROPRIATIONS FOR DISASTER RECOVERY; TO MAKE TECHNICAL, CLARIFYING, AND OTHER MODIFICATIONS TO THE CURRENT OPERATIONS APPROPRIATIONS ACT OF 2023; AND TO MAKE VARIOUS CHANGES TO THE LAW (“SB 382”), became law on December 11, 2024; and

**WHEREAS**, Part III, Subpart III-K of SB 382 entitled LOCAL GOVERNMENT (the “Down-zoning Provision”), amends N.C.G.S. § 160D-601(d) by prohibiting local governments from enacting or enforcing any zoning regulations, or zoning map amendments, that would constitute “down-zoning” without first obtaining the written consent of all property owners whose property would be subject to such an amendment; and

**WHEREAS**, N.C.G.S. § 160D-601(d) previously required written consent for non-government initiated zoning regulation or zoning map amendments that reduced the uses of a property. The consent requirement of the Down-zoning Provision greatly extends the application of the consent requirement to now include amendments initiated by the local government as well; and

**WHEREAS**, the Down-zoning Provision applies to any zoning provision that reduces development density to any degree, removes any permitted uses of land from any zoning district, or creates non-conformities in non-residential zoning districts, all of which constitute the most basic tools local governments have available to maintain land use compatibility, achieve desired density, and ensure orderly growth and development; and

**WHEREAS**, as a practical matter, the Down-zoning Provision eliminates the authority of a local government to adopt a zoning text amendment applicable to entire non-residential zoning districts and severely limits the authority of a local government to adopt regulations related to residential zoning districts the given the time, effort, and cost of identifying all of the owners of parcels within such zoning districts, and the likelihood that all owners will consent to the amendment. In short, the Down-zoning Provision empowers a single property owner to override the will of a unanimous governing board, a developer, and perhaps all or a vast majority of the

other property owners affected by the amendment; and

**WHEREAS**, all North Carolina local governments continue to face planning challenges presented by growth and development. Each local government's zoning authority provides a means to balance those challenges with the needs of the particular community based upon the will of the people as determined through public engagement, and ultimately, elections. The Down-zoning Provision effectively freezes local government zoning in non-residential districts as such zoning regulations existed on June 11, 2024, and as such greatly diminishes local government authority to manage growth and change consistent with the needs of each jurisdiction; and

**NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE TOWN OF ORIENTAL:**

**Section 1.** That the elected representatives for the Town of Oriental who serve in the North Carolina General Assembly be and they are hereby requested to introduce and secure the passage of local legislation to exempt the Town of Oriental from the provisions of Part III, Subpart III-K of SB 382 so that the original provisions of N.C.G.S. § 160D-601(d) are restored and applicable to the Town of Oriental.

**Section 2.** That a certified copy of this resolution be forwarded to the Hon. Norman W. Sanderson, member of the North Carolina Senate, and the Hon. Keith Kidwell, member of the North Carolina House of Representatives.

ADOPTED THIS 30th DAY OF JANUARY, 2025.

  
SALLY BELANGIA, MAYOR

  
DIANE H. MILLER, TOWN MANAGER/CLERK



## SUMMARY

New G.S. 160D-601(d), legally and practically, prevents local governments from amending existing land use ordinances. As more specifically provided below, land use ordinances cannot be amended with any degree of legal certainty. Assuming away the legal issues, the cost of compliance will deter any effort to amend a land use ordinance. Further assuming away the legal issues and the cost of compliance, the likelihood of obtaining the consent of each landowner subject to an ordinance change is virtually 0%, thereby making any effort futile.

### **I. Existing Ordinance – Section 235.4 (Authorized by old 160D-601(d))**

235.4 Third-party down-zoning prohibited. No zoning map amendment that down-zones property shall be initiated nor is enforceable without the written consent of all affected property owners unless the amendment is initiated by the Town. Down-zoning affects an area of land in either of the following ways:

235.3.1 By decreasing the development density of the land; or

235.3.2 By reducing the permitted uses of the land.

### **II. Big Picture – What is the Check and Balance on Local Government Land Use Authority?**

1. Chapter 160D (and former 160A) requires public hearings for all land use changes; and

2. Elections are held every 2 years. Anything that is done can be undone . . . . Candidates for office often run on zoning issues.

### **III. New Revision to G.S. 160D-601(d)**

#### **NO LOCAL GOVERNMENT INITIATED DOWN-ZONING WITHOUT CONSENT OF AFFECTED PROPERTY OWNER**

**SECTION 3K.1.(a)** G.S. 160D-601(d) reads as rewritten:

(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.

#### IV. Legal and Practical Problems with New Amendment

##### A. Legal Problems:

1. SB382 now bars any local government from initiating, enacting, or enforcing a zoning text or map amendment that down-zones property without the written consent of all property owners whose property is the subject of the downzoning.

2. “Down-zoning” was broadened to add a new prohibition on the initiation, enactment, or enforcement of a zoning text or map amendment that creates any type of nonconformity on land not in a residential zoning district without the prior written consent of all property owners whose property is the subject of the downzoning.

##### Examples:

(a) A local government wants to regulate Boat Wash facilities to protect against environmental damage along its waterfront. Governing Board wants to limit Boat Wash facilities to its MU zone and require an SUP. There are 2 boat wash facilities already in use in its MU zone. (Violation of subsection (d)(3) – Nonconforming Use).

**Legal Solution:** (1) The 2 boat wash facilities already in use must consent in writing to the new ordinance as they will be existing non-conforming uses unless they obtain an SUP. Why would they ever consent? If each doesn’t consent, there will be no new ordinance. But assuming they did consent, (2) ALL property owners within the MU-1 zone must also consent to allow the Boat Wash facility ordinance as the new ordinance prohibits a use in the MU-1. (Violation of subsection (d)(2) – Reducing permitted uses in the MU-1 zone). A legal solution MIGHT be to add 2 new uses to the MU-1 zone to overcome the loss of the 1 new use (Boat Wash Facility). So the Town adds 2 new uses to the MU-1 zone such as Horse Shoe Retailers and Buggy Whip Manufacturers to the list so that there is no NET reduction of permitted uses in the MU-1 zone. Will that work, who knows?

(b) A local government wants to create a new MU-V zone to limit vape shops to an area of Town away from schools and churches.

**Legal Solution:** (1) If there is an existing vape shop outside of the new proposed zone, then the property owner must consent as it will be an existing non-conforming use. Hard to imagine the property owner would consent. And when they don’t consent, there will be no new ordinance. But even if they do consent, (2) all property owners in the MU and MU-1 zones must

consent to the new ordinance as the uses on their property have now been reduced. (Of course, one might try the Horse Shoe and Buggy Whip trick to see if it works).

(c) A local government wants to amend its flood damage prevention ordinance.

**Legal Solution:** It's likely that a considerable number of properties in its commercial district will be non-conforming upon the adoption of the new ordinance. Therefore, all such properties must consent to the new ordinance. Again, if any one owner refuses to consent, there will be no new ordinance.

(d) A local government wants to amend a definition in its land use ordinance to clarify that building heights shall be measured from the grade at the middle of the front width of a lot at the street rather than the "mean" grade along the entire front width of a lot at the street.

**Legal Solution:** Run the new grade calculation for every lot in the local government's commercial zones. Identify which lots now have non-conforming structures on them, and then obtain the consent of each owner of each lot.

### 3. Additional Legal Problems:

(a) G.S. §160D 701 requires that "Zoning regulations shall be made in accordance with a comprehensive plan and shall be designed to promote the public health, safety, and general welfare." However, passage of SB382 makes it impractical or impossible to implement comprehensive plan policies that reduce the range of allowable uses, densities, or that add additional development standards that create nonconformities without first obtaining prior written consent of affected landowners, even in cases where the health, safety, and general welfare of the public is at stake.

(b) The requirement for local governments to obtain prior written consent from certain landowners before enacting new regulations violates the 14<sup>th</sup> Amendment of the United States Constitution pertaining to equal protection under the law for everyone as well as the right to due process since SB382 permits certain landowners to veto (via withholding their consent) legitimate legislative aims of local governments established in the General Statutes.

(c) G.S. §160D-701 compels local governments to adopt development regulations that "prevent the overcrowding of land" but SB382 makes it impossible to reduce the range of allowable land uses in a zoning district without the prior consent of landowners. (As an example, many local governments find that they have to exclude hotels from certain commercial zones over time as the street system and parking infrastructure cannot handle the extra load of traffic and vehicles).

(d) G.S. §160D-701 further compels local governments to adopt development regulations that "avoid undue concentration of population" but SB382 makes it impossible to reduce allowable densities without the prior consent of landowners.

(e) G.S. §160D-701 further compels local governments to “lessen congestion in the streets” but SB382 makes it impossible to control access management, driveway separation, or on-site circulation standards on existing or developed lots along commercial corridors without the prior consent of landowners.

(f) G.S. §160D-701 further compels local governments to adopt development regulations that “secure safety from fire, panic, and dangers” but SB382 makes it impossible to apply new flood damage prevention standards or require retreat from rising sea levels on lots with existing development in nonresidential zoning districts without the prior consent of landowners.

(g) G.S. §160D-701 further compels local governments to adopt development regulations that “facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements” but SB382 makes it impossible to establish new open space requirements, sidewalk connection standards, and greenway provision in areas with developed lots in nonresidential zoning districts without the prior consent of landowners.

(h) The reliance on landowner consent in SB382 leaves many substantive questions unanswered, such as: what if the land in question is in probate, or what if some or all of the landowners cannot be contacted? Did a corporate landowner get proper authority from the corporation, LLC, or other entity? Is consent granted in perpetuity, or must it be re-established following transfer of ownership? Can consent be revoked, and if revoked, what is the cure? Must the Trustee of a Deed of Trust also consent (as the lender has a property interest in the land)? If the Trustee doesn't sign a consent, and the landowner consents, does the landowner consent violation a provision of the deed of trust by potentially diminishing the value of the collateral? Do judgment creditors also have to consent as they have an interest in the property? If it's determined later than consent was defective, is the ordinance now void? These questions remain unanswered and bring an extraordinary degree of uncertainty and complexity the application of zoning text or map amendments.

## **B. PRACTICAL PROBLEMS:**

1. Legal Certainty. Given the foregoing, no attorney will be able to offer clear direction on the most basic zoning questions. What local government wants to foot the bill in court to sort out what the law is going to be as to the foregoing questions? As a result, nothing will move forward, and a local government's land use ordinance that existed as of July 11, 2024 will likely be its last land use ordinance. Note that G.S.

2. Costs of Compliance. Putting aside the legal issues, do local governments have the legal budgets to identify and track down dozens, and likely hundreds of landowners? And do they have the staff in place to handle all of the documentation necessary to verify compliance?

3. Likelihood of Obtaining Consent. Why would a landowner consent to the creation of a non-conforming use on his/her property? Won't happen. Additionally, note that consent is required of EVERY landowner in a zone if a new use is prohibited. It's not that the lot owned by the objecting landowner won't be subject to the new rule and all of the consenting

owners will be subject to the rule. It's that there won't be a new rule. Why would a local government waste its time on a new land use regulation recognizing that obtaining 100% consent is virtually impossible?



**SECTION 3J.23.(b)** The Office of Learning Research at The University of North Carolina, as established by Section 2A.8 of this act, shall study and report the following to the Joint Legislative Education Oversight Committee by December 31, 2025:

- (1) For the purpose of comparing student performance, recommendations for nationally standardized tests for use in third grade and eighth grade that would be appropriate for administering to (i) students in nonpublic schools who are receiving Opportunity Scholarships beginning with the 2026-2027 school year and (ii) students attending schools in public school units. To the extent practicable, the Office of Learning Research shall recommend only one test for use in third grade and one test for use in eighth grade.
- (2) Alignment between the nationally standardized tests selected pursuant to subdivision (1) of this subsection and the standard course of study for third grade and eighth grade, respectively, including a crosswalk between the standards assessed by the nationally standardized tests and the standard course of study.
- (3) Feasibility of developing a through-grade assessment for third and eighth grade that would meet the following criteria:
  - a. Assess mastery of the standard course of study.
  - b. Consist of multiple testing events throughout the year that are aggregated into a summative score.
  - c. Replace the current end-of-grade assessments for third and eighth grade.
  - d. Yield data that can be used with the Education Value-Added Assessment System (EVAAS).
  - e. Comply with federal law.

**SECTION 3J.23.(c)** The State Education Assistance Authority shall designate as the nationally standardized assessments to be administered by nonpublic schools, in accordance with G.S. 115C-562.5(a)(4), the tests recommended by the Office of Learning Research at The University of North Carolina for use in third grade and eighth grade in accordance with subsection (b) of this section.

**SECTION 3J.23.(d)** Notwithstanding G.S. 115C-562.7(c), the State Education Assistance Authority shall submit the report required by G.S. 115C-562.7(c) by December 1, 2027, and annually thereafter, based on the data submitted by nonpublic schools in accordance with G.S. 115C-562.5(c)(1) beginning with the 2026-2027 school year.

## **SUBPART III-K. LOCAL GOVERNMENT**

### **NO LOCAL GOVERNMENT INITIATED DOWN-ZONING WITHOUT CONSENT OF AFFECTED PROPERTY OWNER**

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- (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."

**SECTION 3K.1.(b)** If any provision of this section is declared unconstitutional or invalid by the courts, it does not affect the validity of this section as a whole or any part other than the part so declared to be unconstitutional or invalid.

**SECTION 3K.1.(c)** This section is effective when it becomes law 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. Ordinances adopted in violation of this section shall be void and unenforceable.

#### **PART IV. MISCELLANEOUS PROVISIONS**

**SECTION 4.1.** Severability. – If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part declared to be unconstitutional or invalid.

**SECTION 4.2.** Effective Date. – Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 20<sup>th</sup> day of November, 2024.

s/ Phil Berger  
President Pro Tempore of the Senate

s/ Timothy Reeder, MD  
Presiding Officer of the House of

Representatives

VETO Roy Cooper  
Governor

Became law notwithstanding the objections of the Governor at 4:50 p.m. this 11<sup>th</sup> day of December, 2024.

s/ Mr. James White  
House Principal Clerk