Coates' Canons NC Local Government Law

Subdivision Legislation: An Old Exemption and a New Expedited Review

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Author Name: Adam Lovelady

During the 2017 legislative session lawmakers adopted Session Law 2017-10 (S131), a law addressing an array of regulatory topics, including local zoning and subdivision regulations. With regard to subdivision regulations, Section 2.5 of S.L. 2017-10 adds one new category to the list of exempt

subdivisions: divisions to settle an estate. The new law also creates expedited review for qualifying subdivisions greater than five acres. The former is straightforward and codifies prior caselaw into the statutes. The latter requires some interpretation and explanation.

These changes to subdivision statutes are effective July 1, 2017. Land subdivisions after that date are subject to these new rules, and cities and counties should amend their ordinances to comply.

This blog explores these changes enacted in S.L. 2017-10 concerning subdivisions.

The North Carolina General Statutes outline municipal and county authority to regulate land subdivisions (N.C.G.S. § 160A-371 *et seq.* & 153A-330 *et seq.*). Generally this includes an application and review process; standards for aspects such as streets, infrastructure, and parks; and requirements to record a map of the subdivision (a plat) with the register of deeds. I have covered aspects of subdivision regulation in various posts on this blog, as well as in my book on the subject.

Codifying the old exemption for settling an estate

State law specifies certain divisions of land that are exempt from local subdivision regulations, including: recombination of lots, divisions creating lots greater than ten acres, divisions for public right-of-way, and divisions of two-acre tracts into three lots (N.C.G.S. § 160A-376 & 153A-335). My colleague, Rich Ducker, discussed these exemptions here.

S.L. 2017-10 amends the city and county statutes to add the following to the list of exempt subdivisions: "The division of a tract into parcels in accordance with the terms of a probated will or in accordance with intestate succession under Chapter 29 of the General Statutes."

This change is essentially codifying a rule we already had from the courts. In the 1974 case, *Williamson v. Avant*, 21 N.C. App. 211, 203 S.E.2d 634 (1974), cert. denied, 285 N.C. 596 (1974), the North Carolina Court of Appeals ruled that a division of land for the purpose of settling an estate is not

a division of land "for the purpose of sale or building development," so it is not subject to the subdivision regulations. This exemption was already standard practice and even reflected in the statutes concerning surveyor certifications for plats (N.C.G.S. § 47-30(f)(11)).

Expedited review for qualifying subdivisions

The more notable change of S.L. 2017-10 is the creation of expedited review for qualifying subdivisions of tracts greater than five acres. The city and county statutes, at N.C.G.S. § 160A-376 & 153A-335, now state the following.

(c) The city [or county] may require only a plat for recordation for the division of a tract or parcel of land in single ownership if all of the following criteria are met:

(1) The tract or parcel to be divided is not exempted under subdivision (2) of subsection (a) of this section.

(2) No part of the tract or parcel to be divided has been divided under this subsection in the 10 years prior to division.

(3) The entire area of the tract or parcel to be divided is greater than five acres.

(4) After division, no more than three lots result from the division.

(5) After division, all resultant lots comply with all of the following:

1. *Any lot dimension size requirements of the applicable land-use regulations, if any.*
2. *The use of the lots is in conformity with the applicable zoning requirements, if any.*
3. *A permanent means of ingress and egress is recorded for each lot.*

Let's consider what this new provision means.

Is it an exemption? No, not in the traditional sense. The traditional exempt subdivisions are listed in subsection (a) of NCGS 160A-376 & 153A-335. Indeed, the new exemption for settling an estate (discussed above) is added as the fifth exemption under subsection (a). Subsection (b), which was already in statute, authorizes cities and counties to have expedited review for certain classes of subdivisions. Subdivision ordinances commonly rely on this statute to create different standards and procedures for minor subdivisions as compared to major subdivisions. S.L. 2017-10 adds a new subsection (c) stating that if a subdivision meets certain standards, the local government may only require a plat for recordation (a final plat). The new provision specifies a class of subdivisions that will be subject to expedited review—essentially mandating a class of minor subdivision. To be clear, generally there is not a substantial difference between the process and standards for an exempt two-

into-three subdivision (it is exempt, but resultant lots must comply with the ordinance) as compared to the process and standards for an expedited subdivision. In certain cases, however, that distinction may be important.

Is the new provision mandatory or permissive? This is not clear, but it likely is mandatory. The language of the new provision states that the local government "may require only a plat for recordation." One reading of that phrase—emphasizing the permissive *may*—is that the local government may choose if it will require only a final plat for that category of subdivisions. Another reading—emphasizing the limiting *only*—would interpret the phrase to mean that a local government must only require a plat for recordation for that category of subdivisions. Local governments already had the option to treat qualifying subdivisions as a special class under subsection (b). Thus, in order to give meaning to the new provision, it is likely to be interpreted to require expedited review for qualifying subdivisions.

So what does that mean? Let's walk through the language of S.L. 2017-10 and some related questions about standards and procedures.

Qualifying Subdivisions

S.L. 2017-10 outlines specific standards that a subdivision must meet in order to qualify for expedited review. Some relate to the nature of the tract before division, and some relate to the nature of the division of land itself. A subdivision must meet each of the standards in order to qualify for expedited review.

First, the property must be greater than five acres. Note that this is a minimum; the tract may be larger. (In contrast, for the Two-Into-Three exemption, two acres is a maximum tract size.) For expedited review, the subject property is "a tract or parcel of land in single ownership." If Ms. Smith owns two contiguous four-acre parcels, for purposes of expedited review Ms. Smith has eight acres in single ownership.

Second, it must have been at least ten years since the property was subdivided with this expedited review. There is no mention of change in ownership here. If this expedited review was used for any part of the property to be divided—even if it was by a prior owner—the current owner must wait until ten years have elapsed before she or he may use this expedited review again.

Third, the subdivision must not be exempt as a Ten-Acre Exemption. This one is straightforward. Divisions of land are exempt from subdivision regulation if all resulting lots are greater than ten acres and there is no right-of-way dedication. If that exemption applies, then the new expedited review does

not apply. Indeed, given that the Ten-Acre Exemption is more lenient, it is unlikely an owner would opt for the expedited review over the Ten-Acre Exemption.

Fourth, the subdivision must result in no more than three lots. This is a calculation of the total lots from the subdivision. If Ms. Smith owns eight acres, she may carve off two one-acre lots along the road (two home sites plus one lot with the remaining six acres) and qualify for the expedited review. If Ms. Smith carves off three home sites and keeps a five-acre lot, that subdivision would result in four lots and would not qualify for this expedited review.

Fifth, the resulting lots must meet applicable lot dimension requirements. This requirement is similar to, but slightly distinct from, the requirement for the Recombination Exemption and the Two-into-Three Exemption. Those exemptions require that "the resultant lots are equal to or exceed the standards" of the city or county subdivision regulations. For the new exemption, the resultant lots must meet "[a]ny lot dimension size requirements of the applicable land-use regulations, if any."

Sixth, the resulting lots must have a permanent means of ingress and egress designated on the recorded plat. The subdivision must be designed to ensure access for the newly created lots. This could be accomplished with private easements or lots designed to have direct access to public roads. In any event, there must be permanent means of ingress and egress. Does it have to be usable? What if the platted easement is up a steep grade (where road construction is impractical)? There is not a clear answer here. It would seem that the access must be reasonably practical, but the statute merely calls for something designated on the plat. Note that other development regulations will apply. Depending on the intended use of the land, zoning or fire code requirements may require sufficient access for public safety concerns if and when the property is developed.

Seventh, the use of the resulting lots must comply with applicable zoning requirements. While subdivision regulation and zoning regulation are distinct authorities for local governments in North Carolina, in practice they are necessarily intertwined. The zoning requirements may specify the lot dimensions for a land subdivision, and the subdivision standards may be triggered by development of a new land use (changing from agriculture to multi-family, for example). Indeed, the state statutes recognize this interrelation and explicitly authorize unified development ordinances consolidating

zoning, subdivision, and other development regulations. The requirement for expedited subdivisions to comply with zoning requirements reflects that interrelation and, perhaps, ensures that an expedited review will not be abused to avoid basic standards for public health and safety.

Expedited Review

The new provision appears to establish a mandatory category of expedited review. Above I outlined what divisions qualify for the expedited review. Now, consider some of the procedural issues.

Final plat only. The statute now states that for qualifying subdivisions, the local government "may require only a plat for recordation." In other words, only final plat review. For qualifying subdivisions there will be no sketch plan review nor preliminary plat review. This aligns with the minor plat review for many jurisdictions.

Review and approval. Even exempt subdivisions are subject to a level of local review to confirm that they are exempt. For the new qualifying subdivisions, review may be expedited, but it is still review. As with any other subdivision, before a plat review officer may sign off for a qualifying plat to be recorded, the plat must be approved by the local government subdivision officer. The local government subdivision officer must determine if the plat meets the standards to be a qualifying subdivision.

Other standards. Can the local government impose other subdivision standards such as frontage requirements, fees in lieu of parks, or utility construction? It seems unlikely. The new provision states that for a qualifying subdivision the local government may require only a plat for recordation. The statute itself outlines the standards to qualify for expedited review (as discussed above). It appears unlikely that other subdivision standards may be imposed if the division is a qualifying subdivision under the statutory standards. Note, though, that one of those requirements is that the lots meet zoning requirements, so there may be situations where certain zoning requirements trigger improvements relating to the subdivision. Note, too, that subdivision review is one piece of development regulation. Other ordinances will address development standards and public safety concerns. Just because a landowner is relieved of certain subdivision standards does not mean they get a free pass on zoning, building code, fire code, public health codes, stormwater standards, or other elements of applicable development regulations.

Application Fees. The statute does not state that the local government may charge fees for this review. The language of S.L. 2017-10 says local governments may require only a plat for recordation. So arguably a local government could not charge a fee for review of the subdivision application. North Carolina courts, however, have previously allowed that even without express statutory authority local

governments may charge reasonable fees to cover the cost of administering a regulatory program such as subdivision. See *Homebuilders Association of Charlotte v. City of Charlotte*, 336 N.C 37, 442 S.E.2d 45 (1994). Given that the expedited review is analogous to a minor subdivision review, it is reasonable to impose a comparable application fee. To be clear, application fees may be permissible for expedited review subdivisions, but exaction fees likely are not permissible. Fees in lieu of road construction, fees in lieu of parks, and other fees that may be authorized for common subdivisions are not allowed for expedited review subdivisions.

Conclusion

Among many other topics, S.L. 2017-10 amends the municipal and county authority relating to subdivision ordinances. This new law adds one new category to the list of exempt subdivisions: divisions to settle an estate. That amendment codifies the existing rule from caselaw, and does not significantly alter the law or practice of subdivision regulation. S.L. 2017-10 also creates a new category of subdivisions that will enjoy expedited review. Local governments may only require a final plat for certain qualifying subdivisions—those greater than five acres, resulting in no more than three lots, and meeting certain standards. This, in essence, creates a mandatory category of minor subdivisions, but the language requires some interpretation and the full implication of this law is not clear.