Coates' Canons Blog: Can Outside Material be Incorporated by Reference into Local Development Regulations?

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Simplicity and clarity are laudable objectives when drafting a zoning ordinance or other development regulation. One way this is accomplished is to cross-reference other material rather than repeating it in the ordinance. This is often referred to as "incorporation by reference." For example, rather than having a detailed definition of "adult businesses" that are subject to zoning restrictions, the ordinance can just borrow and apply the same definition used in state statutes regulating these businesses.

Is it permissible to do this? If so, what types of material can be incorporated into a local development regulation by reference? State laws and regulations? What about federal laws? Technical codes published by government agencies? Standards adopted by national non-governmental agencies? Maps published by others? What happens when the material that is incorporated is updated after the local ordinance is adopted?

A local development regulation "incorporates by reference" another document when it refers to that document and declares that it is a part of the development regulation and applies just as if it were fully set out in the development regulation itself. This gives that other document the same force and effect as the development regulation.

Examples

One of the more common items incorporated by reference into development regulations are definitions in state and federal law. A city zoning ordinance for example may include locational restrictions on adult businesses or family care homes. The land uses that are subject to the restrictions must be defined in the ordinance. Rather than including detailed definitions, however, the ordinance may simply state the rules apply to all "sexually oriented businesses as defined by **G.S. 160A-181.1(f)**" or to all "family care homes as defined in **G.S. 168-21**." These cross-references are useful in keeping local ordinances consistent with state enabling law.

A second common item incorporated are maps or designations promulgated by state for federal agencies. Use of officially promulgated flood insurance rate maps prepared for the National Flood Insurance Program is a common feature of floodplain zoning regulations. The flood insurance maps are used to define the zones within which flood hazard regulations apply. Another example would be a county ordinance that applies certain development restrictions within an "ocean hazard area of environmental concern as designated by the N.C. Coastal Resources Commission." Or a city could apply its stormwater management standards to a 100-foot buffer on either side of a perennial or intermittent stream "as shown on the most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geological Survey" (see **Cary Creek Limited Partnership v. Town of Cary**, 203 N.C. App. 99 (2010), for an example of this type of cross-reference in a local ordinance). In each of these instances the maps prepared by others become an integral part of the local development regulation.

A third common example is use of documents and standards promulgated by non-government agencies. These are often technical standards or model codes prepared by national groups. For example, a local zoning ordinance may provide that a density bonus shall be for available any building that "meets or exceeds the minimum U.S. Green Building Council's LEED Silver criteria."

Statutory Authority

While these provisions make for a simpler, cleaner development regulation and effectively coordinate related laws, regulations, and documents, is it legal to do this? The answer is yes, but there are limits.

Courts have long upheld incorporation of existing statutes and ordinances as an inherent legislative power. As state and federal laws are official documents readily and widely available and are applicable whether or not incorporated, it seems reasonable that they can be incorporated by reference into local development regulations. While questions are sometimes raised about incorporation of material other than state and federal laws, many courts have stated a general rule allowing incorporation by reference if the document to be incorporated is sufficiently identified and made a part of the public record. A number of states now have specific legislation that addresses incorporation by reference.

North Carolina has a statute that specifically addresses incorporation by reference in local ordinances. **G.S. 160A-76(b)** authorizes incorporation by reference into city ordinances "*any published technical code or any standards or regulations promulgated by any public agency.*" **G.S. 153A-47** provides substantially similar authority for counties. There is some ambiguity in these statutes. Authority to incorporate nongovernmental material into local ordinances assumes that the "technical codes" and perhaps "standards" that may be incorporated by reference are not limited to ones adopted by public agencies. Given the use and placement of the conjunction "or" in the statute, it is reasonable to interpret the sentence to mean that the phrase "promulgated by any public agency" applies only to "regulations." If that interpretation is correct, this allows incorporation of technical codes and standards promulgated by non-governmental entities. An alternative interpretation of the statutory authorization focuses on the placement of the word "any" and would have the "promulgated by any public agency" limitation applicable to standards and regulations, but not to technical codes. In either interpretation, non-governmental technical codes could be incorporated by reference.

These statutes do not explicitly address maps and other technical documents, but these are sufficiently similar to technical codes and standards that they can also likely be incorporated by reference even if not officially adopted as formal state or federal rules.

The material to be incorporated under the authority of G.S. 160A-76(b) or 153A-47 must have been "published." This suggests there needs to be a specific document that is readily-available to the general public (in either paper or electronic form) that includes the specific provisions that are being made a part of the city or county ordinance.

In addition to these general authorizations for incorporation by reference, several statutes address the issue for particular items. For example, **G.S. 160A-383.4** specifically authorizes ordinances that provide regulatory incentives for energy conservation to reference "generally recognized standards established for such purposes," such as use of the Green Building Council standards when allowing a zoning density bonus. Another critical example is use of flood insurance maps. State law mandates use of "the current floodplain maps prepared pursuant to the National Flood Insurance Program or approved by the Department [of Public Safety]" to define the base floodplain that must be included in flood hazard areas in local regulations. **G.S. 143-215.52(a)(1b)**, **143-215.56(c)**.

Copy of Incorporated Material

When material is incorporated by reference into an ordinance, that material does not appear in the ordinance. How does a citizen know just what is required for compliance with the ordinance? Failure to comply with the detailed requirements of the incorporated material is a violation of the ordinance, so it is important that enforcement officers, the regulated community, and citizens know just what is required.

G.S. 160A-76(b) and 153A-47 address this need when technical codes, standards, or regulations are incorporated by reference into a city or county ordinance. An official copy of the incorporated material must be available for inspection in the office of the city or county clerk. It would be prudent for the city or county to file an official copy of any other material incorporated by reference with the city clerk, to be maintained with comparable materials such as the code itself.

Readily available reference copies on the city or county web site and in planning offices would also be useful, even if not legally required.

Future Amendments

While existing external material can be incorporated by reference, what about future amendments to that material? Do cities and counties have the option of automatically including future amendments to that material in the incorporated material? It is often useful to do so in order to keep the local ordinances and the incorporated material in synch without the necessity of amending the local ordinance to explicitly reference every subsequent update of the incorporated material.

This aspect of the issue is more difficult to resolve. It raises the question of whether incorporation of material that does not yet exist unlawfully delegates the local government's legislative authority. Case law around the country is divided on the degree to which this can be done. Some cases hold any incorporation of future amendments is not permissible as it allows the entity responsible for the incorporated the material to effectively amend the local ordinance in ways unknowable to the local government's elected officials. An alternative is to tie the legality of incorporating future amendments to the nature of the material incorporated. For example, some courts allow incorporation of future amendments of material that has a purpose independent of the ordinance that incorporates it, such as definitions in state and federal statutes and independently produced technical codes, but do not allow incorporation of future amendments of material created for the sole purpose of implementing the ordinance, such as having a conditional rezoning subject to future conditions to be developed and approved by the land owner and neighbors. This later example is almost certainly impermissible.

In addition to this constitutional concern, in North Carolina the statutory authority to incorporate future amendments into city and county ordinances is less certain. The statutes on local ordinance incorporation by reference do not address future amendments. On the other hand, the state Administrative Procedure Act (APA) does. **G.S. 150B-21.6** allows incorporation by reference in state agency rules of any code, standard, or regulation adopted by another state or federal agency or a "generally recognized organization or association." This law expressly gives rule-making agencies the option of whether or not to include subsequent amendments and editions of the incorporated material. The rule must clearly state which option is to be applied. While the APA is not applicable to city and county ordinances, the court has noted that its principles and provisions are "highly pertinent" in relation to local development regulations. Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners of Town of Nags Head, 299 N.C. 620, 625, 265 S.E.2d 379, 382 (1980).

If the principles in G.S. 150B-21.6 are applied to local ordinances, these ordinances have the option of incorporating only the current edition of the material or future amendments as well. This seems to be a reasonable interpretation of the law, but one that cannot be uncertain until the statutes or the courts address it directly.

Any incorporation by reference should be specific about which option (current version only or version as may be subsequently amended) is intended. For example, the ordinance could adopt by reference a technical code adopted on a specified date or it could adopt that technical code "including subsequent amendments." If subsequent amendments are to be incorporated, that also places an obligation on the local government staff to regularly update the official copy being maintained by the city clerk.

Prospective Amendment of Zoning Maps

Incorporation by reference of future updates to maps and similar materials poses a special problem when it comes to zoning maps. Even if incorporation of future amendments is not an unlawful delegation, incorporation may not be done in a manner contrary to the express provisions of state law. County of Lancaster v. Mecklenburg County, 334 N.C. 496, 509, 434 S.E.2d 604, 613 (1993). An amendment of the boundaries of a zoning district is a zoning map amendment – a rezoning – and the statutes have very specific notice and hearing requirements for zoning map amendments. In addition to the advertised hearings for text amendments, state law imposes extra procedures for zoning map amendments – mailed and posted notice of the hearing, opportunity for protest petitions, and the like. A zoning map amendment that does not follow these procedural mandates is invalid.

For example, a local zoning often ordinance uses federal flood insurance rate maps (FIRM) to define the boundaries of a flood hazard overlay zoning district. When the FIRM is periodically updated, the zoning map needs to be amended to reflect the new flood hazard district delineations. While it may be acceptable to incorporate by reference FIRM updates into the zoning *text*, there is a problem with automatically incorporating amendments to the FIRM into a zoning *map* if that changes the boundaries of zoning districts. The same would be true for an update to a water supply watershed boundary

map if that boundary is used in the ordinance to define the boundaries of a zoning district.

Thus it is likely that any incorporation by reference of future amendments of maps that would in effect amend a zoning map cannot be accomplished under the current statutes. A local government must to go through the statutorily mandated zoning map amendment process (click here and here for related posts) to incorporate an updated map that amends zoning district boundaries into its regulations.

Conclusion

It is legally permissible to incorporate by reference external material into a local development regulation. That likely, but not certainly, includes the authority to include subsequent amendments unless doing so would be contrary to a specific state statutory mandate.

When incorporation by reference is used, the local government should:

1. Be very specific as to exactly what is incorporated. Provide exact titles, date of publication, edition, references to the entity that adopted the material, and any other necessary identifying information to make it very clear what is incorporated.
2. Be specific as to whether only the current edition of the material is to be incorporated or whether subsequent editions and amendments are also included.
3. Make sure that copies of the material are readily available for anyone who needs to be aware of, enforce, or comply with the requirements of the incorporated material.
4. If additional specific procedures are required by state law, such as the mandate for mailed and posted notice for zoning map amendments, that likely precludes incorporation of future amendments without following those mandated procedures.

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-181.1
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=168-21
- appellate.nccourts.org/opinions/?c=2&pdf=6824
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-76
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-47
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-383.4
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-215.52
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-215.56
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=150B-21.6
- canons.sog.unc.edu/?p=7491
- canons.sog.unc.edu/?p=1828