
Coates' Canons Blog: Protest Petitions: Going or Staying?

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UPDATE: Although this bill was not adopted, in 2015 the General Assembly did abolish the supermajority requirement for adopting zoning map amendments if a protest petition had been filed. [S.L. 2015-160](#) allows written protests to be filed with the city clerk and requires those objections be presented to the council, but provides that a simple majority is required to adopt the amendment. This law also provides that if a council member is present and has not been excused from voting, but does not vote, that is not automatically counted as an affirmative vote on any proposed zoning amendment. This change in the law applies to zoning amendments initiated on or after August 1, 2015.

It is common in the waning days of legislative sessions for new and controversial issues to suddenly arise. This year one of those late session surprises has been a move to repeal the zoning protest petition statute.

A proposal to repeal the statute was added to a broad regulatory reform bill by the House Committee on Regulatory Reform on July 10 and approved by the full House on July 11. On July 19 the Senate adopted its version of this bill, which does not include the protest petition repeal.

What is a zoning protest petition?

The protest petition allows those most directly affected by a proposed zoning map amendment to make a formal objection (a protest petition) and thereby trigger a requirement that the amendment can only be adopted if approved by a three-fourths majority of the city council. If a person buys property zoned for commercial use and the city council later considers rezoning it to a less intensive use, that person can file a protest petition and trigger this supermajority voting requirement. Similarly, if someone buys a lot that is zoned for single-family residential use and after building their home the city council considers rezoning the lot next door to allow a fast food restaurant, that adjacent homeowner can file a protest petition and the zoning change can be made only if at least three quarters of the city council agrees to do so.

How did this special voting rule come to be a part of zoning ordinances? Who can trigger the higher voting majority? Why has this emerged as a late hot topic in the legislature?

Origins of the Protest Petition

While landowners and neighbors are significantly affected by zoning, the choice to change zoning restrictions is a discretionary policy choice of elected officials. Neither landowners nor neighbors can be given a veto over proposed zoning changes. Early cases set a the general rule that making land use regulatory decisions subject to land owner or neighbor approval was an unlawful delegation of legislative authority. *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (invalidating neighbor approval for setback line); *McKinney v. City of High Point*, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954) (neither owners nor neighbors have a legal right to the continuation of a particular zoning restriction).

The zoning protest petition was included in New York's 1916 zoning ordinance, the nation's first comprehensive zoning ordinance. The protest petition was an alternative to giving owners or neighbors a veto. It was included to promote stability in the ordinances, giving those most affected by a proposed amendment a degree of protection from unwanted changes. Edward Bassett, the legal architect of the New York ordinance noted that the protest petition was "a device for the protection of the property owner" and that its purpose was "to prevent easy or careless changes in the zoning regulations." The city is allowed to make changes in the regulation, but there must be broad consensus among the elected officials to do so if those most directly affected object.

The same protest petition provision was included in the model zoning act that was promulgated by the U.S. Department of Commerce in 1919 and adopted by most states in the 1920s. The protest petition was included when North Carolina adopted its municipal zoning enabling statute in 1923. It was deemed a good way to provide a degree of certainty and stability in zoning while allowing elected officials sufficient flexibility to amend the ordinance to reflect changing needs and circumstances. All cities with zoning are subject to the protest petition requirement. When zoning authority was extended to counties in 1959 the protest petition was not included in the county statute given the more rural nature of unincorporated lands.

The protest petition only applies to zoning map amendments (prior to 2006 the statute was not expressly limited to map amendments). It most often arises when neighbors object to the rezoning of a parcel, but it also allows land owners to object to a rezoning of their property. For example, in *Unruh v. City of Asheville*, 97 N.C. App. 287, 388 S.E.2d 235, *review denied*, 326 N.C. 487, 391 S.E.2d 813 (1990), the provision for a protest petition was applied when affected property owners objected to the application of a new historic overlay district by the city.

For the most part the protest petition has been applied uniformly to all North Carolina cities. There have been a few exceptions, however. For example, the authority to file a protest petition was eliminated for Greensboro in 1971 and then restored in 2009. When city and county planning programs were merged, the authority for a protest petition was extended to Durham County in 2003.

Qualification to File a Protest Petition

A key question is how to precisely define who can file a protest petition to trigger the three-fourths vote requirement. For many years the North Carolina statutes used the formulation set in 1923. It included three qualifying areas: the property itself, the 100-foot strip immediately adjacent in the rear, and the 100-foot strip directly across the street. In 1959 the legislature amended the statute to add the 100-foot strip “on either side thereof” to the qualifying areas.

This formulation generated considerable confusion as to how it should be interpreted. Some local governments construed the statute to say that there were only two qualifying areas—the property being rezoned and a single 100-foot strip along the sides and the rear of the area being rezoned. Most local governments read it to say that there are five qualifying areas—the property being rezoned, the front, the rear, and two sides. Still others read it to allow for an indefinite number of additional qualifying areas, as if there is an irregularly shaped parcel with many jogs in the zoning district boundary and each jog creates another qualifying “side.” The situation was further confused if there were streets adjoining the rezoned area on more than one side or if there was no clear “front” and “rear” to the affected area.

In 2005 the statute was amended to resolve the confusion. G.S. 160A-385(a)(2) now provides that the petition must be signed by the owners of either:

1. 20% or more of the area included in the proposed change, or
2. 5% of a 100-foot-wide buffer extending along the entire boundary of each area proposed to be rezoned.

As stated in a bill analysis prepared and distributed when this 2005 bill was first introduced:

This revision to GS 160A-385 clarifies the definition of a qualifying area for a zoning protest petition without making substantive changes in the law. It simplifies the qualifying area for a protest to be 5% of the land in the 100-foot wide buffer around each separate area proposed to be rezoned (rather than 20% of any one of four sides). Given that many rezonings are of irregularly shaped parcels, this will significantly simplify application of the protest calculation.

After several months of discussions with all affected parties, the bill was amended at its first committee hearing to add a provision suggested by the North Carolina Homebuilders Association to provide that if a street right of way of at least 100 feet width adjoined a property being rezoned, that right of way would be considered part of the buffer from which a qualifying protest could be made (and that the property owners across such a wide street could not file a protest petition). That amended formulation is still in effect today.

Use of Protest Petitions in North Carolina

Even though the protest petition has a long history in zoning, it is not frequently a factor in North Carolina rezonings. In a 2006 School of Government survey two-thirds of the responding cities reported that no protest petitions had been filed in the previous year. **David W. Owens, Zoning Amendments in North Carolina (2008)**. However, protests were much more common in those cities with large populations—50% of the cities with populations between 10,000 and 25,000 reported having received a protest petition and 71% of the cities with populations over 25,000 had received one or more protest petitions in the past year.

Responding municipalities reported a total of 181 protest petitions filed in the previous year. Of these, 134 were determined to be adequate, thereby requiring a supermajority vote for adoption of the rezoning. These same municipalities reported consideration of 2,167 rezoning petitions in the previous year. Thus only 6% of the municipal rezoning petitions had a sufficient protest to subject the proposed rezoning to the supermajority vote requirement.

Even when a valid protest petition is filed, it rarely has a direct effect on the outcome of the proposed rezoning. Survey respondents reported 43% of the protested rezonings did not receive a simple majority vote in favor and thus would have failed even if no protest petition had been filed. 52% were adopted by a majority of three-fourths or more, thus passing despite the protest petition. Only 5% of the rezonings subject to a valid protest petition received a majority favorable vote but less than a three-fourths majority, thus failing to be adopted as a direct result of the protest petition.

The informal impacts of a protest petition are typically more substantial than its formal impact. The 52% approval rate for projects subject to a protest petition was considerably lower than the overall 76% approval rate for rezoning petitions. This lower approval rate indicates that the depth of opposition reflected by a protest petition can convince a majority of the city council to oppose a rezoning. In addition, an actual or threatened protest petition encourages the landowner, the neighbors, and the city to negotiate prior to a vote on the rezoning. This often leads to project revisions (and sometimes withdrawal of the protest) that influence the final vote of the city council.

2013 Legislation

Unlike the 2005 amendments to the zoning statutes, or the 2013 amendments to the board of adjustment statutes described in an **earlier post**, both of which underwent months of discussion, the proposal to repeal the protest petition statute emerged in the final days of the legislative session. It was reportedly incorporated into the House's broader regulatory reform bill (**S. 112**) at the request of members of the development community frustrated by neighborhood protests of rezoning proposals.

When the protest petition repeal was taken up on the House floor, an amendment was proposed to delete the repeal from the regulatory reform bill. That motion failed by a **35-76 vote**. However, while the Senate incorporated most of the other new provisions of the House bill in its version of the regulatory reform bill (**H. 74**), the protest petition repeal was not included.

Negotiations in the coming week will determine the fate of the zoning protest petition. Will it go or stay? We'll know the answer soon.

UPDATE (August 2013): The protest petition stays for now. The conference committee report on H. 74 deleted the proposed repeal of the protest petition. So the final version, adopted as S.L. 2013-413, does not address the protest petition.



Links

- www.ncleg.net/Sessions/2015/Bills/House/PDF/H201v6.pdf
- canons.sog.unc.edu/?p=7155
- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=s112&submitButton=Go
- www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2013&sChamber=H&RCS=1167
- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=h74&submitButton=Go