Coates' Canons Blog: Subdivision Ordinances: What's Regulated, What's Not

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 One of my colleagues once said that the law of land subdivision control had to be one of the most obscure and arcane areas of the law that one could imagine. After initially taking offense (since I took some proprietary pride in my knowledge of this subject), it occurred to me that what was needed was for someone to shine some light into this dark corner of the law. One of the more technical (but important) topics is the scope of coverage of local government subdivision ordinances. This blog is devoted to the definition of "subdivision" for regulatory purposes. In May a follow-up blog will be devoted to the exceptions to this definition, as set forth in North Carolina's land subdivision control enabling statutes.

What types of land division fall within the ambit of local subdivision ordinances? In North Carolina the answers are primarily found in the municipal and county subdivision enabling statutes (G.S. 160A-376, municipal; G.S. 153A-335, county). These statutes govern the coverage of city and county subdivision ordinances by defining the term "subdivision" for regulatory purposes. A truncated portion of G.S. 160A-376(a), which includes the definition without certain exemptions, is set forth below:

§ 160A 376. Definition.
(a) For the purpose of this Part, "subdivision" means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions when any one or more of those divisions is created for the purpose of sale or building development (whether immediate or future) and shall include all divisions of land involving the dedication of a new street or a change in existing streets. . .

In 1975 the North Carolina Attorney General rendered an opinion that the subdivision enabling statutes pre-empt the regulatory field and that local ordinances must conform to the statutory framework, including the scope, coverage, and exemptions of the statutes. 44 N.C. A.G. 251 (1975). More recently, the North Carolina Supreme Court ruled in Three Guys Real Estate v. Harnett County, 345 N.C. 468, 480 S.E.2d 681 (1997) that the general authority of a county to regulate subdivisions (G.S. 153A-331) is insufficient to allow a county to regulate a division that is expressly exempt from regulation. As a result, unless a city or county is the subject of a local act that diverges from the scope of coverage of the general statutes in some way, one may expect that a local subdivision ordinance definition must mirror state law.

Another issue concerns how many lots must be created before subdivision regulations come into play. Prior to 2005, the enabling statute applied to "divisions into two or more lots, building sites, or other divisions into two or more lots, building sites, or other divisions for the purpose of sale or building development (whether immediate or future)." The 1975 Attorney General's opinion cited above declared that a farmer owning a fifty-acre tract was not subject to regulation if he conveyed title to a one-acre parcel of land split off from his farm. According to the opinion, the farmer's residual tract of land might not have been created for sale or building development purposes. In part because of this opinion some local governments (particularly rural counties) adopted an interpretation that the "first lot out" was exempt. Legislative amendments made in

2005 removed this possible ambiguity by providing that "subdivision" occurred when "*any one or more of those divisions* is created for the purpose of sale or building development (whether immediate or future) . . . " (Italicized language added.)

The language about "sale or building development" has also demanded interpretation. Is it a subdivision to divide a tract into defined areas for development with each area subject to a long–term ground lease? What little case law there is on point suggests that the answer is yes, if the individual lots or divided sites are defined clearly in the lease and the lessee is expected to build on the site. Thus a site plan for a shopping center that identifies outparcels for lease as well as for sale may be trated as a subdivision.

The statute speaks of divisions "of a tract or parcel of land." What about the establishment of a condominium project? Can that be regulated as a "subdivision"? The widespread consensus in this state is that the creation of typical condominium units or time shares does not involve subdivision to the extent that the individual property interests established do not include interests in the land itself.

What about divisions arising out of the settlement of an estate? Suppose that the owner of a small 25-acre farm prepares a will that specifically describes the three portions of the owner's farm that are to be distributed to the three children when the owner dies. Courts have generally found that that these occasional examples of "testamentary subdividing" are not for the "purpose of sale or building development." A somewhat different situation arises when the decedent leaves undivided property to his heirs by will or by intestacy. For each heir to take title to his own separate portion of the property, the property must be divided. One method is by voluntary partition whereby tenants in common all agree to exchange deeds dividing their commonly-held parcel of land into divisions representing equal shares for each. Is a voluntary partition of land a "subdivision" for purpose of G.S. 160A-376 and G.S. 153A- 335 if done in connection with the settlement of an estate? Apparently not in North Carolina, according to the court in the 1974 case of Williamson v. Avant, 21 N.C. App. 211, 203 S.E.2d 634 (1974), cert. denied, 285 N.C. 596 (1974). In that case the court declared that a "conveyance made for the purpose of dividing up the estate of a decedent among his heirs was not a 'division of land for immediate or future sale or development' within the meaning of G.S. 153-266.1 et seq. ," the predecessor statute to G.S. 153A-335, which contains essentially the same language. The heirs apparently agreed to a voluntary partition of the commonly owned property received from the decedent and took the additional step of having a plat prepared indicating the lots to be distributed to each. The court did not indicate how many lots were distributed to each heir or how long after the decedent's death the division was made.

The question remains whether tenants in common who purchase their property outright, rather than taking the property through a decedent's estate, may circumvent subdivision regulations by voluntarily partitioning among themselves a property that is suitable for development. Courts in other states have refused to recognize the façade of a voluntary partition and have found an intention to subdivide lot for sale or development in such situations.

Suppose that lots have been created that either are outside the scope of "subdivision" or are expressly exempt from the definition. Does zoning apply to those lots? Even if the zoning ordinance includes subdivision-ordinance-like standards? According to Tonter Investments, Inc. v. Pasquotank County, 199 N.C. App. 579, 681 S.E.2d 536 (2009), cert. denied, 363 N.C. 663 (2009), the answer is yes. Pasquotank's zoning regulations for the county's Agricultural District prohibited residential uses. Furthermore, no building or structure was allowed in this district on a lot created after the effective date of the provision was amended unless (1) the lot included frontage of at least 25 feet on a state road or a road approved under the ordinance and (2) the lot was located within 1,000 feet of a public water supply. The court held that these standards were within the scope of the county's zoning authority and could be applied to lots that were not subject to the county's subdivision ordinance.

Now you must admit, these parts of the law of land subdivision control are not that obscure, not even arcane. Check in on

May 31 when we will discuss the specific exemptions to land subdivision ordinances.

Links

- canons.sog.unc.edu/wp-content/uploads/2011/04/AerialPhoto_Farm.jpg
- canons.sog.unc.edu/wp-content/uploads/2011/04/AerialPhoto_Farm1.jpg
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-376
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-335
- www.aoc.state.nc.us/www/public/sc/opinions/1997/242-96-1.htm
- canons.sog.unc.edu/wp-content/uploads/2011/04/subdivision-review-process.png
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