

August 9, 2012

*Practice Groups:*

*Real Estate Land Use,  
Planning and Zoning*

*Public Policy and  
Law*

## North Carolina General Assembly Continues Reform Streak

*By Amy H. Fullbright and James L. Joyce*

After the dust settled on the North Carolina General Assembly 2012 Short Session, 203 bills had become law, a handful of which survived gubernatorial veto. Although the General Assembly did not pass land use reforms as dramatic as it had in the 2011 Long Session, it continued its practice of reforming annexation and regulation, and several bills touched on land use and land development.

### Regulatory reform

One of the more comprehensive bills of the 2012 Short Session was [Senate Bill 810 / Session Law 2012-187](#) “Regulatory Reform Act of 2012.” Although many of the changes it introduced relate to administrative procedure, it did make a handful of changes that may be worthy of note to those involved in real estate development in this State:

The Department of Environment and Natural Resources is required to track and report on the time required to process permit applications under the One-Stop for Certain Environmental Permits Programs and Express Permit and Certification Reviews. The hope is that this may lead to improvements in processing times for environmental permits. It also allows a Port Enhancement Zone to include partial census tracts – these zones formerly could only include entire census tracts.

### Annexation Reform – Part 2

Continuing the grand overhaul of annexation law begun in the last session, the General Assembly passed a second annexation reform bill, [House Bill 925 / Session Law 2012-11](#) “Annexation Reform 2,” and revised annexations or annexation rules for a number of local governments.

Annexation Reform 2 replaces the petition process with a referendum on proposed annexations. The petition process, for annexations adopted after July 1, 2012, is no longer required. Rather, the statute requires municipalities to put proposed annexations to a referendum. The date of the referendum must be fixed by the Resolution of Intent, notice of the referendum must be conspicuously posted on the municipality’s web site, and must be set for the next municipal general election that is more than 45 days from adoption of the resolution of intent. If the referendum fails, the governing body may not proceed with adoption of an ordinance for the same area for at least 36 months.

Several annexations were reversed by [House Bill 5 / Session Law 2012-3](#). In addition, specific acts de-annexed areas in [Morganton](#), [Surf City](#), [Ocean Isle](#), [Marion](#), [Columbia](#), Elizabethtown ([two](#) separate [bills](#)), [Apex](#), [Roanoke Rapids](#), [Wallace](#), [Burgaw](#), and  [Mooresville](#).

Annexation rules were also altered for [Davidson County](#) and the [City of Wilmington](#).

## North Carolina General Assembly Continues Reform Streak

### Clean Energy and Economic Security Act

[Senate Bill 820 / Session Law 2012-143](#) “Clean Energy and Economic Security Act” (the “Act”) lifts a long-standing ban on the use of hydraulic fracturing and horizontal drilling for the development of oil and natural gas. At the same time, it directs various State agencies to develop a modern regulatory program for the management of oil and gas exploration and development activities. Nevertheless, it prohibits the Department of Environment and Natural Resources (DENR) from issuing of permits for these activities until such time as the General Assembly takes legislative action to allow issuance of such permits.

The Act reconstitutes the North Carolina Mining Commission as the Mining and Energy Commission (“Commission”) as a 15-member group made up of researchers, state officials, representatives of local governments in the Triassic Basin, members of conservation groups, oil and gas professionals, and representatives of the mining industry. Staff support to the Commission will be provided by DENR's Division of Land Resources (renamed the Division of Energy, Mineral, and Land Resources) and the North Carolina Geological Survey.

The Act also creates a 10-member Joint Legislative Commission on Energy Policy, which would consist of 10 legislative members (five each from the House and Senate, with at least one member from each house coming from the minority party) to exercise legislative oversight over energy policy in the State and identify areas for rule making by the Commission.

The Commission will be required to develop a spate of regulations to cover the entire development operation, from pre-drilling exploration through well construction, drilling, operation, casing, plugging, completion, and abandonment of wells. These regulations are to be designed to protect local water supplies, preserve air and water quality, require adequate safety standards for construction, and mitigate impacts on local infrastructure and environmental resources. These regulations must be adopted no later than October 1, 2014.

The bill also includes several specific landowner protection provisions, including a presumption of liability for water contamination against the oil and gas developer, compensation and supply of an alternate source in the event of damage to a water supply, a requirement that the developer reclaim surface property, provision of certain information prior to execution of leases, a three-day right of rescission for parties to an oil and gas lease, and several minimum requirements for oil and gas leases.

Finally, the Act leaves three important policy issues open for resolution going forward: revenue sources to support local communities, infrastructure, and the regulatory program; local government regulatory authority; and compulsory pooling. The Commission is to evaluate and report on these issues, including regulatory proposals, by January 1, 2013.

This bill was arguably the most controversial piece of legislation of the session, and thus went through several amendments and votes before it was finally ratified and presented to the Governor on June 21, 2012. She vetoed the bill on July 1, 2012, but that veto was overridden in the House and Senate the next day.

### Study regarding local option sales tax

[House Bill 1181 / Session Law 2012-189](#) authorizes the General Assembly's Revenue Laws Study Committee to study whether municipalities should be granted the authority to levy a local option sales tax to provide dedicated funding for beach nourishment and other natural resources preservation. The bill also authorizes the Revenue Laws Study Committee to study the taxation and valuation of

## North Carolina General Assembly Continues Reform Streak

leasehold interests in exempt real property. Reports are due when the General Assembly convenes for the 2013 session on January 30.

### Provisions of environmental bills

Several sections of [Senate Bill 229 / Session Law 2012-200](#) “Amend Environmental Laws” could have an effect on local land use practices:

- Section 7 of this bill allows for two noncontiguous properties, under certain circumstances, to be treated as a single contiguous property for purposes of compliance with local water supply watershed programs.
- Section 8 permits development within the Neuse and Tar-Pamlico River Basin buffers under certain conditions.
- Section 9 delays the implementation deadline for local stormwater management programs under the Jordan Lake new development rule and requires that the Environmental Management Commission develop a new rule for new development to replace 15A NCAC 02B .0265. Section 11 of [House Bill 953 / Session Law 2012-201](#) has a similar effect.
- Section 11 creates a variance process for horizontal separation setbacks from existing private drinking water wells.

### Mechanics’ Liens

Two bills together will have a dramatic effect on the operation of mechanics’ and materialmen’s liens in the State.

First, [Senate Bill 42 / Session Law 2012-158](#) “Mechanics’ Liens / PVT Lien Agent” requires owners of real property who hire contractors for undertakings of \$30,000 or more to designate a title insurance company or agency as the owner’s lien agent for purposes of the project. The lien agent’s contact information must then be provided by contractors to any subcontractors or lower-tier subcontractors they hire, and must be posted on the property until work is completed. Lien claimants must provide notice to the lien agent within 15 days of their first furnishing of labor or materials or before the recordation of a conveyance of an interest in the property, or file a claim of lien before the recordation of a conveyance of an interest in the property, in order to perfect a claim of lien upon real property. Closing attorneys to transactions involving the property may satisfy their professional obligations by making inquiry to the lien agent as to any notices of claim of lien.

The other bill, [House Bill 1052 / Session Law 2012-175](#) “Mechanics’ Liens / Payment Bond Reforms,” creates a number of new rules governing mechanics liens and the procedure for collecting against a payment bond. The changes to liens are as follows:

- Mechanics’ lien claimants must serve a copy of a claim of lien upon real property upon the record owner of the property and on any contractors through which subrogation is asserted in order to perfect the claim of lien.
- Former owners are no longer necessary parties to actions to enforce claims of lien, and subsequent purchasers and lenders are no longer necessary or proper parties to actions after the claim of lien is discharged.

## North Carolina General Assembly Continues Reform Streak

- Liens upon funds by subcontractors arise automatically, but anyone against whom the interest is claimed may make, receive, use, or collect payments as usual until the claimant gives notice of the claim of lien upon funds.
- Lien waivers by contractors do not waive lien rights of subcontractors for wrongful payment after a claim of lien upon funds has been asserted, but does waive any lien rights the subcontractor may have by way of subrogation.
- Liens by way of subrogation may be claimed based on the last date on which it or the contractor through which the claim is asserted furnished materials or labor, or based on the last date on which the contractor claiming the lien furnished materials or labor.
- Licensed contractors making false written statements of sums due or claimed are now subject to disciplinary action, including revocation, restriction, or suspension of a license.

The changes to payment bond rules include the following:

- For projects for which a payment bond is required by G.S. 44A-27, contractors must furnish copies of any payment bonds required if requested to do so by a claimant.
- Contractors must also provide to each subcontractor that it engages a project statement containing the name and physical address of the project, the name of the contracting body, the name of the contractor, the contact information for an agent authorized by the contractor to accept service of the requests for payment bond, the notice of public subcontract, and any notice of claim on payment bond, and the name and address of the principal place of business of the surety issuing the payment bond.
- Subcontractors claiming funds under the bond are limited to labor and materials provided within 75 days of the claimant's service of a notice of public subcontract to the contractor as that notice is described in this law.

### RTP Amendments

[House Bill 391 / Session Law 2012-73](#) “Research Triangle Park District Amendments” makes a number of changes to the rules regarding County Research and Production Service Districts and Urban Research Service Districts.

The statute expands the types of uses permitted in County research and production service districts to include educational and residential uses, and it permits the developer of a research and production service district established prior to June 1, 2012, to amend the covenants to expand the range of permitted uses within the district. It also lifts restrictions on the ownership of property and the number of permitted permanent residents, permits a county participating in a multi-jurisdictional industrial park to opt not to tax such a district, and increases the permitted additional tax rate on property within such a district from 15 cents per \$100 of value to 20 cents per \$100 of value.

It also permits counties to create “urban research service districts” within county research and production service districts that are similar to research and production service districts. These areas are not subject to the maximum tax rate for research and production service districts, but the additional tax must not exceed that levied in the prior year by the largest city contiguous to the research and production service district.

## North Carolina General Assembly Continues Reform Streak

### What's next

The General Assembly will reconvene January 30, 2013 to address additional issues in the 2013 Long Session.

Your voice is important in determining the outcome of those issues that remain unresolved. Please contact your local representatives or the Government Affairs team at K&L Gates to find out more about particular bills and how to get involved.

---

#### Authors:

**Amy H. Fullbright**

amy.fullbright@klgates.com

+1.919.743.7352

**James L. Joyce**

jim.joyce@klgates.com

+1.919.743.7336

## K&L GATES

Anchorage Austin Beijing Berlin Boston Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg  
Hong Kong London Los Angeles Miami Milan Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh  
Research Triangle Park San Diego San Francisco São Paulo Seattle Shanghai Singapore Spokane Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of more than 40 fully integrated offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit [www.klgates.com](http://www.klgates.com).

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2012 K&L Gates LLP. All Rights Reserved.