UNC SCHOOL OF GOVERNMENT

NORTH CAROLINA Judicial COLLEGE

Agenda

Local Government Law Essentials for Judges

Friday, December 2, 2011 School of Government, Chapel Hill, NC

9:30 a.m.	**Welcome and Introduction** *Ann Anderson, School of Government*
9:45 a.m.	**Source and Nature of Local Government Authority** *Frayda Bluestein, School of Government*
10:30 a.m.	**Public Records Law Overview** *Frayda Bluestein*
11:15 a.m.	**Break**
11:30 a.m.	**Personnel Records** *Bob Joyce, School of Government*
12:00 p.m.	**Lunch at School of Government**
1:00 p.m.	**Confidentiality of Health Records** *Jill Moore, School of Government*
1:45 p.m.	**Land Use and Zoning Appeals** *David Owens, School of Government*
2:45 p.m.	**Break**
3:00 p.m.	**Local Government Liability** *Michael Crowell, School of Government*
4:00 p.m.	**Dismiss**

CJE Hours: 5

Local Government Law Essentials for Judges
Introduction to Local Government
Frayda Bluestein
December 2, 2011

Quiz

1. A city may allocate city tax revenue to supplement local funding for public schools that serve city taxpayers.

   True_____ False_____

2. A city council may, by majority vote, adopt an ordinance reducing the size of the council from seven to five.

   True_____ False_____

3. The General Assembly may, by local act, deannex property that was lawfully annexed by the city.

   True_____ False_____

4. The difference between cities, towns, and villages in North Carolina is:
   a. Their size.
   b. The amount of authority they have been delegated by the legislature.
   c. Both a. and b.
   d. The way the words are spelled.

5. The powers and structures of cities and counties in North Carolina are roughly equivalent.

   True_____ False_____

6. North Carolina is a "home rule" state.

   True_____ False_____

7. North Carolina is a "Dillon's rule" state.

   True_____ False_____

8. The structure and authority of a local government may be found in
   a. General Statutes in Chapter 160A (for cities) and Chapter 153A (for counties)
   b. Various other General Statutes sprinkled throughout the General Statutes.
   c. Various local acts of the General Assembly, which apply to one or more specific local governments.
   d. Charters (for cities) which are local acts of the General Assembly.
   e. Local ordinances modifying the structure of the local government, and which may or may not be consistent with the charter or the general law, and which are not codified or annotated in the General Statutes.
   f. All of the above.

9. Scope of Authority Score Card:
   a. Authority to impose a fee to cover the cost of development permits. [win] *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte,* 336 N.C. 37 (1994)(Broad Construction)
   b. Authority to charge a fee for stormwater programs. [loss] *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999) (Plain Language)
   c. Authority to regulate swine operations. [loss] *Craig v. County of Chatham*, 356 N.C. 40 (2002). (Preemption)
   d. Authority to use city-owned utility lines for fiber-optic services. [win] *BellSouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75 (2005). (Broad Construction)
   e. Authority for adequate public facility ordinance (APFO) or impact fees imposed on proposed development based on impact on school facilities. [loss] *Amward Homes v. Town of Cary*, 698 S.E.2d 404 (N.C. App. 2010); *Union Land Owners Ass'n. v. County of Union,* 689 S.E.2d 504 (N.C.App. Dec. 2009); *Durham Land Owners Ass'n v. County of Durham,* 177 N.C.App. 629 (2006). (*Ultra vires*, Statutory construction)

10. North Carolina local governments have authority to regulate baggy pants.

    True_____ False_____

Source and Nature of Local Government Authority

Frayda S. Bluestein
School of Government
December 2, 2011

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Can a city regulate saggy pants?

Session Overview

- Local governments are created by, and receive all of their authority from the state.
- Issues that come to the courts include:
  - Has the local government acted within its authority?
    - What authority has been delegated?
    - What is the scope of that authority?
  - Have statutory procedures been met?

National Perspective

- In a majority of states, local governments operate under “home rule”: A broad delegation of authority over matters of local concern.
- Sometimes limits state authority to preempt local powers.
- North Carolina is NOT a home rule state.

North Carolina local governments operate under specific grants of authority in individual statutes, charters, and

Cities:
Ch. 160A

Counties:
Ch. 153A

Schools:
Ch. 115C

Local Government Relation to State

Practically unlimited authority to define, restrict, control, local government structure and authority*

* Note state constitutional limit on local acts: Article II, sec. 24.

N.C. “Home Rule” powers

- Limited authority for local modification of government structure. G.S. 160A-101; G.S. 153A-58
  - Initiated by governing body, or by petition.*
  - Includes change in form and structure of government.
- SOG resources on changing form of government: http://www.sog.unc.edu/node/428

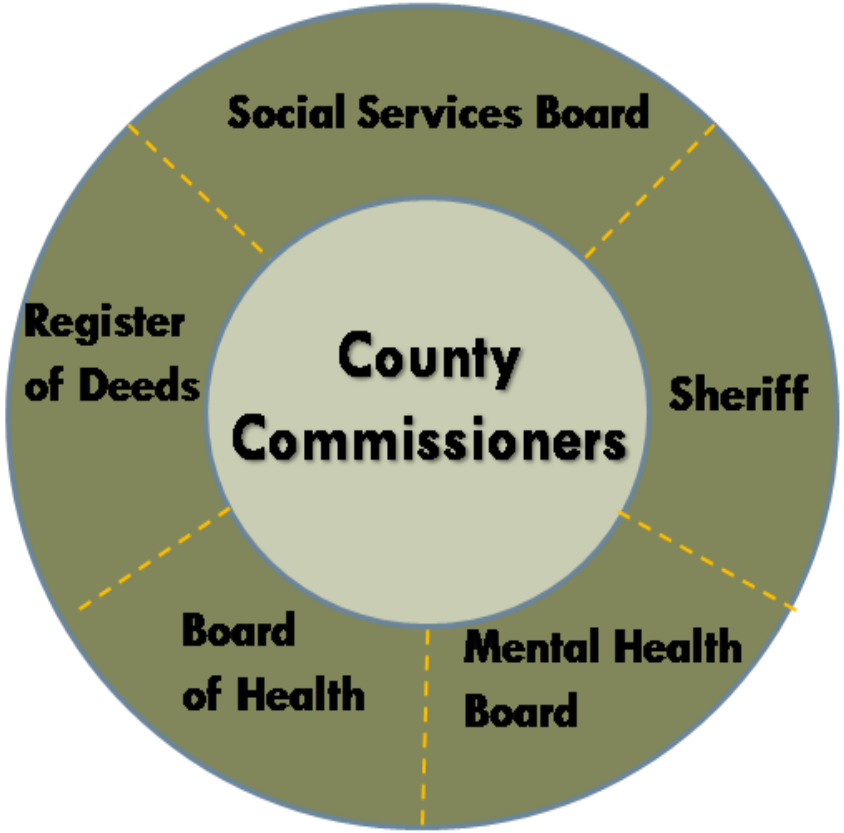
*Note: NC had no general right of initiative, recall, or referendum, but some city charters authorize it.

Statutory Interpretation Issues

- What authority has been granted?
- Role is to determine legislative intent.
  - How much to make of variation in procedural detail?
  - How much to make of variations in delegation among local governments.
  - Implications from specific authorization in local acts.

See blog post: What is a Local Act?

Counties and Cities Compared



COUNTIES:

- Local implementation of state programs
- More decentralized
- Commissioners have less control over administration of specific programs
- More mandated functions

Counties and Cities Compared

Significant overlap in authorized functions

What is the scope of authority?

Judge Dillon

Dillon's Rule:
A town possesses and may exercise the following powers and no others:
Those granted in express words;
Those necessarily or fairly implied in or incident to powers expressly granted; and those essential to the accomplishment of corporate purposes.

Circa 1868

Broad Construction: G.S. 160A-4

It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. **To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect**: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State. (1971)

See also: G.S. 153A-4.

Police Power Authority

- General ordinance-making authority to protect public health, safety, and welfare.
- Statutory preemption:
  - Local ordinance must be consistent with state and federal law and constitution
  - Must not conflict with or duplicate state law
  - No authority if state law "occupies the field."

G.S. 160A-174, 153A-121

Can a city regulate saggy pants?

School of Government Local Government Law Resources

- Coates' Canons NC Local Government Law Blog
- County and Municipal Government in North Carolina
- Local Government Law Bulletins
- Other Publications (search by topic or author)
- Faculty (by area of expertise)

Local Government Law Essentials for Judges
North Carolina Public Records Law
Frayda S. Bluestein
December 2, 2011

Ten Key Concepts

1. State law requires public agencies to provide broad access to records made or received in the transaction of public business. [G.S. 132-1]
2. Email and other electronic records are covered by the public records law. [G.S. 132-1]
3. The content of a record, not its form or location, determines whether it is subject to disclosure under the public records law.
4. The law does not apply to records that are personal and do not involve the transaction of public business. [*See, Associated Press v. Canterbury*, 688 S.E.2d 317 (W.Va. 2009); *Griffs v. Pinal County*, 156 P.3d 418 (Ariz. 2007); Denver Publ'g Co. v. Bd. of County Comm'rs, 121 P.3d 190 (Colo. 2005); State v. City of Clearwater, 863 So.2d 149 (Fla. 2003).]
5. The right of access includes the right to inspect and obtain a copy. [G.S. 132-6(a)] Public agencies may charge only "actual costs" for providing copies of public records, which means only those costs that would not have been incurred but for the request. Actual costs do not include employee time spent responding to the request. [G.S. 132-6.2]
6. The purpose or motive for which a person seeks a public record is irrelevant and cannot be requested as a condition of providing access. [G.S. 132-6(b)]
7. The law does not require public agencies to create records; only to provide access to records that exist. [G.S. 132-6.2(e)]
8. A record is subject to disclosure under the public records law unless a specific exception in the law allows or requires that it not be disclosed. There are two types of exceptions: some deny a right of access, though access is not prohibited (an example is criminal investigation information under G.S. 132-1.4); others prohibit disclosure (examples are trade secret information under G.S. 132-1.2(1), and exceptions in the various personnel privacy statutes).
9. There is no exception for "drafts" of public records. [*News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992)]
10. State rules dictate what records must be retained and for how long. Records of "short term value" may be discarded, but if they exist when a request is received, they must be provided unless an exception applies. [NC Records Retention Guidelines: http://www.records.ncdcr.gov/guidelines.htm]

Major Statutory Exceptions

Most personnel records [G.S. 153A-98 (counties); 160A-168(cities), 126-23(state agencies)]. The following information is public: (1) Name; (2) Age; (3) Date of original employment or appointment; (4) The terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the agency has the written contract or a record of the oral contract in its possession; (5) Current position; (6) Title; (7) Current salary; (8) Date and amount of each increase or decrease in salary with that department, agency, institution, commission, or bureau; (9) Date and type of each promotion, demotion, transfer, suspension, separation, or other change in position classification with that department, agency, institution, commission, or bureau; (10) Date and general description of the reasons for each promotion with that department, agency, institution, commission, or bureau; (11) Date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the department, agency, institution, commission, or bureau. If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the head of the department setting forth the specific acts or omissions that are the basis of the dismissal.(12) The office or station to which the employee is currently assigned.

Legal documents: Letters from lawyers to board, about litigation [G.S. 132-1.1(a)]; and trial preparation materials [G.S. 132-1.9]

Criminal investigation records: [G.S. 132-1.4]

Business trade secrets: Information that derives commercial value from not being generally known or independently ascertainable [G.S. 132-1.2; G.S. 66-152(2)(3))]

Records of local taxes that show income or gross receipts: [G.S. 153A-148.1 and 160A-208.1]

Minutes of closed sessions: For as long as necessary to avoid frustrating the purpose of the closed session. [G.S. 143-318.10(e)]

Social security numbers and other personal identifying information: Including drivers' license numbers, financial account numbers, state identification or passport numbers, employer taxpayer identification numbers, digital signatures, finger prints, passwords, biometric data. [G.S. 132-1.10]

Economic development project records: [G.S. 132-6(b)]

Medical records: Including (1) Records containing privileged patient information, and information about lead poisoning in children; and (2) Information or records that identify a person who has AIDS virus infection or who has or may have a communicable disease or condition. [G.S. 130A-12, G.S. 130A-143]

Resources: David M. Lawrence, *Public Records Law for North Carolina Local Governments*, 2d. ed., 2009; Coates' Canons: North Carolina Local Government Law Blog: http://sogweb.sog.unc.edu/blogs/localgovt

Case Problems

1) A public agency has established a Facebook page on which it posts information and receives comments. A local newspaper has requested a list of the names of each employee who has posted a comment to the agency's Facebook page within the past six months. What is the agency's legal obligation under the public records law with respect to this request?

2) The newspaper has submitted a request for copies of all emails sent or received by the elected members of a local government board within the past year. Board members have government-issued computers and email accounts, but they also use their private computers and email accounts to conduct some board-related communications.

a) Are communications on private computers and accounts subject to public access?

b) Are private communications on the public computers and accounts subject to public access?

c) One of the board members is the chair of a local political party committee. She claims that her communications about these activities are not subject to public access. Is she correct?

d) Another board member feels that email addresses of private citizens with whom he has corresponded about public business should not be subject to public access. He suggests that the emails be printed out and provided only in hard copy in order to avoid exposure of this information. Does the agency have this option under the public records law?

e) It will take significant time and effort for the agency's staff to identify records that must be provided under this request. In some cases, it may be necessary redact confidential information. May the agency charge the newspaper for any of this time?

3) A public agency receives a public records request from a citizen who seeks all the emails and phone records of a specific employee. It turns out that the citizen requesting the information is the estranged spouse of the employee whose records are being requested. The citizen is in fact requesting them to build her case against him in their divorce proceeding; she alleges that he's been having an affair with another employee within the agency. The agency would prefer not to get in the middle of this situation. May the agency refuse to provide the records and require the spouse to use the discovery process instead?

While awaiting the attorney's advice on this first question, the employee's supervisor reviews the requested records. It turns out that the spouse is correct, and that the review of the records discloses a large number of non-work-related communications between the two individuals in question. Does the public records law require the agency to provide these records to the citizen? Does the agency have a right to view them? May the agency disclose the records voluntarily, even if not required to do so under the public records law?

4) A local ABC board, recognizing the need to improve its operations, hired a private management consulting firm to study its operations and make recommendations for improvement. The firm has developed a draft set of recommendations, but is aware that several of them may be quite controversial. The firm has submitted the draft to the chair for her review prior to the official release of the report. The local newspaper somehow got wind of the existence of the draft report and has requested a copy. The ABC board chair argues that the document has not officially been received or approved by the board and is not a public record. Is this correct?

Public Records Law Overview

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School of Government
December 2, 2011

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Public Records G.S. 132-1

- Records made or received in the transaction of public business
- Right of access = inspection or copy

"Records" Broadly Defined

Records, not information.

Searchable information in electronic database may be considered electronic records.

Broad right of access:

Inspection or Copy

No requirement for requests to be in writing

No residency requirement

Records must be provided "as promptly as possible."

See blog post: Ask, Don't Compel

Content, not location determines status of email.

Does it involve the transaction of public business?

What can be charged?

- Actual, direct costs only
- Not personnel time

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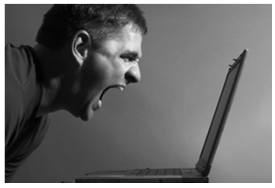
- Motive doesn't matter



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Public Records and Discovery

Public records law does not mirror discovery rules

Litigant may obtain records under public records law

See blog post on E-discovery, metadata, and public records

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No exception for drafts

Exceptions

- Records made or received in the transaction of public business are public unless an exception provides that they
  - Need not be provided, but you may do so
  - Shall not be provided, and you may not do so

Court Orders and Public Records

- Remedies for failure to release records (G.S. 132-9)
  - Standard civil action
  - Only a person denied access has standing
  - Mediation (G.S.7A-38.3E)
- Confidential records may sometimes be released "by court order"
  - See *In re Brooks,*143 N.C. App. 601 (2001)

Blog Posts on Pubic Records

- Framework for Analyzing Public Records Requests
- Email as a Public Record: Five Things You Should Know
- Metadata as Public Record
- When do Transparency Laws Apply to Private Entities?

- See also, David M. Lawrence *Public Records Law for North Carolina Local Governments*,

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Personnel Records after October 1, 2010

The General Assembly in SL 2010-169 amended the personnel records privacy statutes that apply to most public employers in North Carolina. These 2010 Amendments (as I will call them) make five basic changes and have raised many questions about the application of those changes.

To understand the changes and to address the questions, we must keep in mind one important distinction that is hard to keep hold of: the distinction between access to *information* and access to *records*.

The Fundamental Distinction: Access to *Information* vs. Access to *Records*

The state's Public Records Law (GS Chapter 132) on the one hand and the multitude of statutes that apply to privacy of personnel records of governmental employees on the other have employed fundamentally different approaches to public access.

The basic rule of the state's Public Records Law is that (with certain exceptions) *records* made or received in the course of public business are available for inspection by anyone. That is, access is to the very record itself. And the statute is clear [GS 132-6.2(e)] that a governmental entity need not respond to a public records request "by creating or compiling a record that does not exist." The right of access guaranteed by the Public Records Law is access to records, not information. If a requester wants information that has not been compiled into a record, there is no obligation on the part of the government to compile the information or create the record.

For the personnel records privacy statutes, the basic rule has been the reverse. Under the statutes[1] for

municipal employees (GS 160A-168),
county employees (GS 153A-98),
state employees (GS 126-23),
community college employees (GS 115D Art. 2A), and
public school employees (GS 115C Art. 21A)

[1] Along with several other statutes for mental health authorities, water and sewer authorities, public hospitals, and others, all to the same effect.

there has not been a statutory guarantee of access to original *records* in the personnel files, but instead a right of access to certain *information.* In fact, the statues have been clear that the records in the personnel files are *not* subject to access under the Public Records Act: the state employee statute says that personnel files "shall not be subject to inspection and examination as authorized by G.S. 132-6."

The *information* which (before the 2010 Amendments) has been subject to public access has included the employee's

> name,
> date of original employment,
> terms of employment contract,
> current position,
> current title,
> current salary,
> date of most recent promotion, demotion, transfer, suspension, separation, or position classification, and
> station to which assigned.

That's where it stands for municipal and county personnel records privacy statutes. They say that the following "*information* with respect to each [municipal] [county] employee is a matter of public record."

The statues for state employees, community college employees, and public school employees take the matter one step further, however. Here, too, the *records* in the personnel file are not available for inspection under the Public Records Law. As with municipal and county employees, it is the specified *information* that is public. But for state agencies, community colleges, and public schools there is an additional requirement to "maintain a record of each of its employees, showing the following [public] information." [GS 115C-320(a)] Let's call this the Record Creation Requirement.

That is, for state agencies, community colleges, and public schools, there is an obligation to identify the *information* in a personnel file that is available to the public and compile that information in a record, which then may be "inspected and examined" and copied "by any person." [GS 126-23, GS 115C-320(c), and GS 115C-28]]

It is an open question just how faithfully state agencies, community colleges, and school systems have undertaken this record-creation task, and it may be that electronic records automation has eased the burden, but it is certain that the five changes in the 2010 Amendments complicate the task.

The Five Changes

The 2010 Amendments worked five changes in the public employer personnel records privacy statutes.

1. Salary Info Change. Expansion of information to be publicly available:

Old:

"date and amount of most recent increase or decrease in salary"

New:

"date and amount of each increase or decrease in salary with that [public employer]"

The effect of the Salary Info Change is that the public information now includes not simply the date and amount of the most recent change in salary, but the date and amount of all past salary changes with the current employer.

2. Job Action Info Change. Expansion of information to be publicly available:

Old:

"date of most recent promotion, demotion, transfer, suspension, separation, or other change in position classification"

New:

"date and type of each promotion, demotion, transfer, suspension, separation, or other change in position classification with that [public employer]"

The old statute was silly. It said that the information available was the "date" of the most recent of these job actions, whatever the action may have been, and not even whether the action was a promotion or a transfer or a dismissal. I wrote a blog piece about this: http://sogweb.sog.unc.edu/blogs/localgovt/?p=684

The Job Action Info Change addresses this silliness by saying that the public information now includes "the type." That is, the fact that the action on May 13, 2011 was a demotion is now public, not just the fact that *something* happened on that date.

The Job Action Info Change is similar to the Salary Info Change above. The public information now includes not simply the most recent job action, but the date and type of all past job actions with the current employer.

3. Promotions Description Change. Brand new provision with respect to promotions:

Old:

"date of most recent promotion"

New:

"date and general description of the reasons for each promotion with that [public employer]"

As we have seen, the Job Action Info Change dealt with promotions along with other job actions, such as demotions, transfers, and separations, expanding the public information to "each" promotion, not just the most recent. The Promotions Description Change goes a step further. It requires a general description of the reasons for each promotion.

The Salary Info and Job Action Changes are very significant. They require governmental employers to make available to the public much more information that the old statute did. But the Promotions Description Change creates a new kind of obligation. In the past, an employee might have been promoted even in the absence of any kind of "general description of the reasons." Perhaps everybody knew that this was the right employee for the promotion, or perhaps this employee's time had simply arrived. Or, perhaps, there really was a distinct reason for the promotion (a unique qualification, a fear of otherwise losing a good employee, etc.), but no one ever felt moved to make record of it. Now, it appears, there is an obligation, accompanying every promotion, to create a record containing a "general description of the reasons" and to make that record available to the public.

Here the General Assembly is identifying a new category of *information* that is to be available to the public and perhaps [see Question 7 below] imposing an obligation to create a record that might otherwise not have been created.

4. Disciplinary Info Change. Expansion of information to be publicly available:

Old:

"date of most recent . . . demotion, transfer, suspension, separation"

New:

"date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the [public employer]"

This change goes beyond amending the old language. Like the Job Action Info Change, it expands the information available from simply the date of the most recent action to the date and type of all past actions. It is, however, restricted to actions taken "*for disciplinary reasons*."

Therefore, the "types" of job action covered by the Disciplinary Info Change are

dismissals for disciplinary reasons,
suspensions for disciplinary reasons, and
demotions for disciplinary reasons

As a consequence, it would appear that in a circumstance in which an employee is suspended for inappropriate conduct, the publicly available information, including the "type" of action, would indicate that the suspension was "for disciplinary reasons," but would go no further in detail, as to go further would unlawfully divulge confidential personnel records information.

5. Written Notice of Dismissal Change. Brand new obligation to create specific written notices of dismissal:

Old:

"date of most recent . . . separation"

New:

"If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the [public employer] setting forth the specific acts or omissions that are the basis of the dismissal."

The Written Notice of Dismissal Change appears to be the most significant change worked by the 2010 Amendments. It has historically not been the case that each time an employee was dismissed in a disciplinary context the public employer has created a written notice "setting forth the specific acts or omissions." In fact, the notion of at-will employment has seemed to protect an employer from such an obligation. The Written Notice of Dismissal Change, however, appears to do two remarkable things: first, it appears to impose an obligation to create such written notices; and, second, it makes them available to the public.

Along with Promotions Description Change, this basic change appears to impose a new record-creation obligation—the duty to create a document that the public employer might otherwise not have created. With the Promotions Description Change, however, documenting the happy reasons that someone is promoted would seem to raise many fewer issues than documenting the unhappy reasons that an employee is dismissed.

To what employers does this new obligation to create a written notice of dismissal and make it public apply? It surely applies to state agencies, public schools, and community colleges, with their statutory Record Creation Requirement, but to what extent does it apply to cities and counties, whose statutes do not contain that requirement? The uncertain answer is found in the discussion at Question 13.

Questions Arising under the 2010 Amendments

The 2010 Amendments became effective October 1, 2010. Questions arose immediately upon enactment as to the scope and application of the amendments. On November 8, 2010 the state's Attorney General issued an opinion (which I'll call the 2010 AG Opinion) in response to questions posed by the state personnel director. The 2010 AG Opinion addressed some questions and not others. The opinion has direct relevance to all public employers affected by the 2010 Amendments, of course, and it is especially relevant to public school and community college employers because the Record Creation Requirement of the introductory language in the public school and community college personnel records statutes also appears in the state agency personnel records statute directly addressed by the attorney general ("shall maintain a record of each of its employees showing the following information with respect to each employee").

Questions Related to the Salary Info Change

Question 1. Is a public employer obligated to maintain in a way that is available to the public the full salary history of each employee for salary changes beginning October 1, 2010?

Yes. That is exactly what the Salary Info Change was all about. Under the old statutes, only the date and amount of the most recent change was ever available to the public. The 2010 Amendments make it clear that the date and amount of *each* change is available.

Question 2. Is a public employer obligated to research changes in salary occurring before October 1, 2010, to make that information available to the public?

Yes. To the extent that it has the information, it is now publicly available. The 2010 AG Opinion directly answers this question—the full salary history with the public employer is now publicly available information. As discussed on pages 1 and 2 above, it is not the original salary records that are publicly available, but rather the *information* from those records, which the public employer is obligated to gather, synthesize, and make available.

But, the 2010 AG Opinion makes clear, if, for some reason, the public employer does not have records that show salary history for some time prior to October 1, 2010, is not required to retroactively create such records. Instead, the attorney general expressed his "belief that the General Assembly intended to make public a record of *existing* salary and classification history."

Question 3: Is a public employer obligated to maintain, and make publicly available, the salary history of an employee with a former employer?

No. The 2010 AG Opinion makes clear that the obligation is on the public employer only to maintain (and thus make available) salary history with that public employer. However, the opinion seems to say that if the public employer has in its records prior salary history of that employee with former employers covered by the state's personnel records privacy statutes (that is, other public school systems, community colleges, state agencies, municipalities, counties, and a few others), the employer would have to make that prior salary history information available to the public.

Questions Related to Job Action Info Change

The Job Action Info Change is very similar with respect to its expansion of publicly available job action information as the Salary Info Change is with respect to salary information, so the questions and answers are very similar.

Question 4. Is a public employer obligated to maintain in a way that is available to the public the full job action history of each employee for promotions, demotions, transfers, suspensions, separations, or other changes in position classification beginning October 1, 2010?

Yes. The public employer is obligated to make that information available to the public now and to maintain it in an ongoing way so that it will be available indefinitely into the future.

Question 5. Is a public employer obligated to research changes in job actions occurring before October 1, 2010, to make that information available to the public?

Yes. Just as with salary information, this old job action information is available to the public to the extent that the employer has it. On request, the employer must search its records to discover the information and make it available. If, however, records do not exist with respect to actions taken before October 1, 2010, there is no obligation to recreate them.

Question 6: Is a public employer obligated to maintain, and make publicly available, job action history of an employee with a former employer?

The answer to this question is exactly the same as the answer in Question 3 with respect to *salary* information.

Questions Related to the Promotion Description Change

Question 7: With respect to promotions occurring October 1, 2010 and later, is a public employer obligated to create a written document containing a general description of the reasons for the promotion?

Yes. Two factors join together to render this conclusion.

First, for all public employers the 2010 Amendments make clear that a "general description" of the reasons for the promotion is part of the information that is to be publicly available with respect to employees. How can that information be made available unless it is written down somewhere?

Second, for state agencies, community colleges, and public schools, their statutes contain the Record Creation Requirement: The employer "shall maintain a record of each of its employees showing the following information with respect to each employee." This language is different from the language that introduces the personnel records privacy statutes for cities and counties, "the following information with respect to each [city] [county] employee is a matter of public record." Cities and counties might be able to argue that as long as they can come up with

a "general description" on request, they are not obligated to create a document at the time of the promotion. For state agencies, community colleges and schools, though, it looks like the requirement "shall maintain a record" directly means that a document must be created.

Keep in mind, however, that this newly-created record is what is to be publicly available. There may well be documents in the personnel file that relate to the promotion and contain information that led to the promotion. But those underlying documents are still confidential. Only the newly-created document with the "general description" is public. The 2010 AG Opinion puts it this way: "There is nothing in the amendments or the statutes they amend which require public employers to permit the public to inspect or copy the *documents* from which the information maintained in the public record is gathered." Since nothing requires that those underlying documents be made public, they are, in fact, confidential.

Question 8: Must public employers now create documents containing a "general description" of reasons for promotions that occurred before October 1, 2010?

No. The 2010 AG Opinion says that would be absurd. There is nothing, the attorney general said, "to indicate that the General Assembly intended to expand a public employer's obligations to create records of events which heretofore had gone undocumented." But, the attorney general said, if the public employer has the information concerning the reasons for an old promotion in its records, then it must make that information publicly available.

So, does a public employer have an obligation now to go back through all its records to determine whether it has information regarding old promotions? Presumably not.

But what if it receives a specific request for the reasons for an old promotion with respect to a particular employee or set of employees? Perhaps then it has an obligation to look in the record and determine whether there is information there from which a document containing a "general description" could be developed. If the answer is No, the inquiry is ended. If the answer is Yes, then an obligation presumably exists to create the document (but not to make public the underlying records).

Question 9: What is a "promotion" that triggers the requirement to create the "general description" document?

Damned if I know. Is it any job action that results in significantly greater responsibility, prestige, or pay? Who is to decide? The statute is silent on this question.

Question 10: What level of detail is sufficient to constitute a "general description" of the reasons for the promotion?

Damned if I know. Seemingly it would not be sufficient if, with respect to every promotion, a public employer maintained a record that said, "Most qualified candidate received

the promotion." Presumably, some personalization is required, but just how much detail is a mystery.

Questions Related to the Disciplinary Info Change

Question 11: If a public employee is suspended for clearly disciplinary reasons, what information must/may the employer make public?

The public employer must make available the information that the employee was "suspended for disciplinary reasons" and reveal no further information. Four considerations lead to this conclusion.

First, before the 2010 Amendments, all that would have been available was the *date* that some job action happened. The Job Action Info Change makes clear that for job actions generally, what must be made public is the date and *type* (that is, a suspension).

Second, the Disciplinary Info Change says that for job actions that happen for disciplinary reasons, both the date and the *type* must be made public. The "type" here, I believe, is not merely "suspension," but "suspension for disciplinary reasons." Otherwise there is no difference between what is required by Job Action Info Change and the Disciplinary Info Change. Why would the General Assembly have included the latter if it did not add anything?

Third, where the job action taken for disciplinary reasons is in fact a dismissal, the greater requirements of the Written Notice of Dismissal Change kick in. They do not in the case of a suspension.

And fourth, as we saw above in Question 7, the personnel file documents underlying the suspension are still confidential.

So what is publicly available is this information: "The employee was suspended on December 2, 2011 for disciplinary reasons."

Question 12: If an employee is dismissed, suspended, or demoted for poor performance (as opposed to any kind of objectionable conduct?), is that job action taken "for disciplinary reasons?"

Damned if I know. As my colleague Frayda Bluestein has written (in a blog post found here: http://sogweb.sog.unc.edu/blogs/localgovt/?p=3731) a lay person's understanding of a "disciplinary action" might typically involve an employee's personal misconduct, dishonesty, or criminal or ethical breach. In the world of human resources administration, however, adverse job consequences that turn on inadequate performance are commonly spoken of as "discipline."

The 2010 AG Opinion acknowledged that dismissals (and, by extension, other adverse actions) can be taken for reasons other than "disciplinary reasons." In that discussion, however, the only examples cited were separations from employed triggered by reductions in force or disability. The attorney general missed an opportunity to give us some guidance.

Questions Related to the Written Notice of Dismissal Change

Question 13: When an at-will employee is dismissed for disciplinary reasons, is the public employer obligated to create (and make available for public inspection) a written notice of dismissal setting forth the specific acts or omissions that are the basis of the dismissal?

Yes, according to the Attorney General and surely with respect to state agencies, public schools, and community colleges. The 2010 AG Opinion directly addresses this question, and speaks broadly about an obligation resting with all public employers (not just state agencies, community colleges, and schools) and applying to all public employees:

> "[P]ublic employers must now maintain for public inspection a copy of the final dismissal letter **regarding** each employee dismissed for disciplinary reasons." And, "public employers are required to document and maintain for public inspection a copy of the final decision of the public body dismissing each employee terminated for disciplinary reasons, *including employees who are not otherwise entitled to such information*."

Cities and counties have a good argument, however, with respect to at-will employees that the attorney general has gone too far in his interpretation of the statute. The very nature of at-will employment is that an employee is subject to dismissal at any time with notice or without notice. Surely, the argument goes, if the General Assembly had meant to impose on all public employers a requirement of a written statement of reasons for dismissal for at-will employees, it would have directly done it, not impose it through an amendment to the public records privacy statutes. Cities and counties must now decide for themselves whether they are to consider themselves bound by this aspect of the 2010 AG Opinion.

For state agencies, community colleges, and public schools, however, there is much less room to argue that the attorney general's opinion is not applicable. That is because of the Record Creation Requirement in their personnel privacy statutes ("shall maintain a record of each of its employees showing the following information with respect to each employee"). As amended the statutes for the state, community colleges, and public schools appear to say that these employers "shall maintain a record" of the specified information, and that specified information includes "the written notice of the final decision." The 2010 AG Opinion, whatever its weakness with respect to the statutes governing cities and counties, was directly interpreting the state statute that contains the Record Creation Requirement in language identical to the schools and community colleges statutes.

Question 14: If an employee is dismissed for poor performance, is the public employer required to create (and make available for public inspection) a written notice of dismissal?

Unclear. See Question 12.

Question 15: The statute requires the creation (and public availability) of the notice of "the final decision of the [public employer]." What constitutes such a final decision?

The statutes are similar, yet different:

- the municipal statute speaks to a "final decision of the municipality"
- the county statute speaks to a "final decision of the county"
- the community colleges statute speaks to a "final decision of the board of trustees"
- the public schools statute speaks to a "final decision of the local board of education"
- the state agency statute speaks to a "final decision of the head of the department"

The 2010 AG Opinion discusses what constitutes a "final decision," but it does so strictly in the context of the 2010 Amendments to the state agencies statute, a part of the State Personnel Act, which has a very specific and unique series of steps involved in the dismissal of covered employee. In that context, the attorney general said that a final decision is

- a decision from which the employee has no right to further review within the agency
- a decision on which the highest authority has passed judgment
- a decision made by an agent to whom decision-making authority has been delegated
- a decision that might have been appealed but, due to the passage of time, no longer is eligible for appeal.

"In all those cases," the attorney general said, "the decision is properly deemed 'the final decision' of the agency because there is nothing further that the employee can do to change the employer's decision without recourse to a superior administrative or judicial forum."

The Highway Patrol recently had occasion to interpret this "final decision" provision, in the firing of two officers. As reported in the *News & Observer* on May 7, 2011, the dismissal of the officers was apparently ordered by the patrol commander. The newspaper asked to see the "written notice of the final decision of the head of the department setting forth the specific acts or omissions that are the basis of the dismissal." The Highway Patrol would not give the newspaper the written notice, on the grounds that the patrol commander is not the "head of the department." That is the Secretary of Crime Control and Public Safety, they said, and the matter will come to him only if the fired officers appeal. Therefore, the patrol seems to say, unless the officers appeal, the "written notice" will never be made public. This argument, if the news account is reporting it correctly, appears not to fully account for the final of the four bullets above: a "final decision" includes "a decision that might have been appealed but, due to the passage of time, no longer is eligible for appeal."

Suppose a city or county manager dismisses an employee for disciplinary reasons and that employee makes no appeal to the city council or the county commissioners. Can the city or county make the same argument: the statute speaks to a final decision "of the municipality" or "of the county." Can the argument be that unless the employee appeals, the action is not yet a "final decision of the city" or of the county? I am not persuaded. And anyway, as discussed in Question 13, cities and counties must decide for themselves whether, in light of the 2010 AG Opinion, they are bound to create these written notices at all.

Question 16: For disciplinary dismissals made before October 1, 2010, must the public employer retroactively create (and make publicly available) written notices of dismissal?

No. The 2010 AG Opinion says that public employers "are not required to retroactively attempt to create dismissal letters where former employees were terminated without being provided specific reasons."

But if such a document exists, it is probably now publicly available. See Question 17.

Question 17: There exists in the personnel file of a former employee a written notice of dismissal, created before October 1, 2010, setting out the misconduct of the employee. Is the public employer obligated to make that notice publicly available?

Yes. The 2010 AG Opinion says with respect to the requirement that written notices of disciplinary dismissal be made publicly available: "We cannot conclude that this requirement, even if applied to notices of dismissal written prior to the effective date of the Act, violates clearly established rights of former employees dismissed for disciplinary reasons."

The attorney general notes, however, that in some cases the employee may be entitled to a liberty-interest name-clearing hearing. See Question 18.

Question 18: When is an employee who is being dismissed for disciplinary reasons entitled to a name-clearing hearing?

It appears that the employee is entitled to the opportunity for a name-clearing hearing before the copy of the written notice of the final decision of dismissal is in fact made public. Here are the considerations at stake:

> a. Public employees enjoy, as citizens, the liberty "to engage in any of the common occupations of life."
>
> b. If the public employer speaks ill of a person in a way that seriously damages the person's "good name, reputation, honor, or integrity," that person is entitled to due process—that is, the opportunity for a hearing at which the person can clear her good name, reputation, honor and integrity.

c. The adverse information about the person must rise to the level of stigma. It is not enough simply that the public employer has documented poor performance.

d. The constitutional harm, if it arises, is not from the making public of the stigmatizing information. Rather, the constitutional harm is in not providing the opportunity for a name-clearing hearing.

e. The hearing, to be effective, must be afforded before the stigmatizing information comes to the hands of prospective employers.

These principles can be distilled from two recent Fourth Circuit decisions: *Sciolino v. City of Newport News, Virginia*, 480 F.3d 462 (4th Cir. 2007), and *Harrell v. City of Gastonia*, 392 Fed.Appx. 197 (4th Cir. 2010).

So, the best tact, it seems to me, is this: When an employee is dismissed for disciplinary reasons and the written notice "setting forth the specific acts or omissions" is created and will be publicly available, the employee should, at the time of dismissal be informed that she has the right to a hearing if she wishes it. The point of the hearing, she can be told, will not be to review the wisdom or correctness of the dismissal decision, but to give her the opportunity, if she wishes to pursue it, to tell her side of the story.

It seems to me that

a. few employees will at this point request a hearing, so the cost of this approach is low

b. even if employees sometimes request the hearing, it can be a simple and modest affair

c. the public employer is protected from constitutional liability when the stigmatizing information becomes public, even if the employee has not exercised her right to a hearing; she will likely be entitled to request the hearing after the information has become public, however.

Careful attention will be required with respect to former employees. If there exists in the file a written notice of the final decision on disciplinary dismissal setting out the acts and omissions leading to the dismissal, it is subject to being made public (see Question 18). How can the employer at that point offer the opportunity for a name-clearing hearing? I suppose the employer should undertake a good faith effort to reach the former employee to offer a hearing.

Question 19: If a written notice is prepared and handed to the employee but the employee asks for and is granted the opportunity to resign rather than be dismissed, does the written notice become publicly available?

No. A written notice in a disciplinary action becomes available "if the disciplinary action was a dismissal." When an employee resigns, there is no dismissal.

Question 20: What level of detail is required in "setting forth the specific acts or omissions that are the basis of the dismissal?

Damned if I know.

Further Reading

My colleague Frayda Bluestein of the School of Government has thought a lot about the 2010 Amendments and has posted a number of very helpful posts to the School's Coates Canons blog:

http://sogweb.sog.unc.edu/blogs/localgovt/?p=2798
http://sogweb.sog.unc.edu/blogs/localgovt/?p=3041
http://sogweb.sog.unc.edu/blogs/localgovt/?p=3487
http://sogweb.sog.unc.edu/blogs/localgovt/?p=3595
http://sogweb.sog.unc.edu/blogs/localgovt/?p=3731

Public Personnel Records Law After October 1, 2010

Local Government Law Essentials for Judges

Bob Joyce
School of Government
December 2, 2011

Way too many statutes

Way too many statutes

- municipal employees (GS 160A-168),
- county employees (GS 153A-98),
- state employees (GS 126-23),
- community college employees (GS 115D-27 thru -30), and
- public school employees (GS 115C-319 thru -321)
- others

Structure is the same

Public records law does not apply

Structure is the same

Public records law does not apply

GS 126-22(a): "Personnel files . . . shall not be subject to inspection and examination as authorized by G.S. 132-6"

Structure is the same

Public records law does not apply

But some *information* is available to the public

Structure is the same

Public records law does not apply

But some *information* is available to the public:

- name,
- date of original employment,
- terms of employment contract,
- current position,
- current title,
- current salary,
- date of most recent promotion, demotion, transfer, suspension, separation, or other change in position classification, and
- station to which assigned.

2010 Amendments

Five basic changes to the list of public *information*

1. Salary Info Change

- Old:

"date and amount of most recent increase or decrease in salary"

- New:

*"date and amount of **each** increase or decrease in salary with that [public employer]"*

2. Job Action Info Change

- Old:

"date of most recent promotion, demotion, transfer, suspension, separation, or other change in position classification"

- New:

*"date and **type** of **each** promotion, demotion, transfer, suspension, separation, or other change in position classification with that [public employer]"*

3. Promotions Description Change

- Old:

"date of most recent promotion"

- New:

*"date and **general description of the reasons** for **each** promotion with that [public employer]"*

4. Disciplinary Info Change

- Old:

"date of most recent . . . demotion, transfer, suspension, separation"

- New:

*"date and **type** of each dismissal, suspension, or demotion **for disciplinary reasons** taken by the [public employer]"*

5. Written Notice of Dismissal Change

- Old:

"date of most recent . . . separation"

- New:

"If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the [public employer] setting forth the specific acts or omissions that are the basis of the dismissal."

Guidance

2010 AG Opinion

Guidance

The 2010 AG Opinion:

Directly concerned GS 126-23 (state employees statute)

Salary Info Change Q 1

Is a public employer obligated to maintain in a way that is available to the public the full salary history of each employee for salary changes beginning October 1, 2010?

Salary Info Change Q 1

Is a public employer obligated to maintain in a way that is available to the public the full salary history of each employee for salary changes beginning October 1, 2010?

Yes.

Salary Info Change Q 2

Is a public employer obligated to research changes in salary occurring before October 1, 2010, to make that information available to the public?

Salary Info Change Q 2

Is a public employer obligated to research changes in salary occurring before October 1, 2010, to make that information available to the public?

Yes. AG Opinion directly says so.

Salary Info Change Q 2

Is a public employer obligated to research changes in salary occurring before October 1, 2010, to make that information available to the public?

Yes. AG Opinion directly says so.

But:

(1) Only to extent old records exist

(2) Access is to *information*, not to underlying records

Job Action Info Change Q 4

Is a public employer obligated to maintain in a way that is available to the public the full job action history of each employee for promotions, demotions, transfers, suspensions, separations, or other changes in position classification beginning October 1, 2010?

Job Action Info Change Q 4

Is a public employer obligated to maintain in a way that is available to the public the full job action history of each employee for promotions, demotions, transfers, suspensions, separations, or other changes in position classification beginning October 1, 2010?

Yes.

Job Action Info Change Q 5

Is a public employer obligated to research changes in job actions occurring before October 1, 2010, to make that information available to the public?

Job Action Info Change Q 5

Is a public employer obligated to research changes in job actions occurring before October 1, 2010, to make that information available to the public?

Yes.

Job Action Info Change Q 5

Is a public employer obligated to research changes in job actions occurring before October 1, 2010, to make that information available to the public?

Yes. But:

(1) Only to extent old records exist

(2) Access is to *information*, not to underlying records

Promotion Description Change Q 7

With respect to promotions occurring October 1, 2010 and later, is a public employer obligated to create a written document containing a general description of the reasons for the promotion?

Promotion Description Change Q 7

With respect to promotions occurring October 1, 2010 and later, is a public employer obligated to create a written document containing a general description of the reasons for the promotion?

Yes, it seems.

Promotion Description Change Q 8

Must public employers now create documents containing a "general description" of reasons for promotions that occurred before October 1, 2010?

Promotion Description Change Q 8

Must public employers now create documents containing a "general description" of reasons for promotions that occurred before October 1, 2010?

No.

Promotion Description Change Q 8

Must public employers now create documents containing a "general description" of reasons for promotions that occurred before October 1, 2010?

No.

Unless the information exists in the record.

Promotion Description Change Q 8

Must public employers now create documents containing a "general description" of reasons for promotions that occurred before October 1, 2010?

No.

Unless the information exists in the record.

Then, create a new "general description;" don't reveal the original record

Promotion Description Change Q 9

What is a "promotion" that triggers the requirement to create the "general description" document?

Promotion Description Change Q 9

What is a "promotion" that triggers the requirement to create the "general description" document?

Damned if I know.

Promotion Description Change Q 10

What level of detail is sufficient to constitute a "general description" of the reasons for the promotion?

Promotion Description Change Q 10

What level of detail is sufficient to constitute a "general description" of the reasons for the promotion?

Damned if I know.

Disciplinary Info Change Q 11

If a public employee is **suspended** for clearly disciplinary reasons, what information must/may the public employer make public?

Disciplinary Info Change Q 11

If a public employee is **suspended** for clearly disciplinary reasons, what information must/may the public employer make public?

"Suspended for disciplinary reasons on December 2, 2011."

Disciplinary Info Change Q 12

If an employee is dismissed, suspended, or demoted for poor performance (as opposed to any kind of objectionable conduct), is that job action taken "for disciplinary reasons?"

Disciplinary Info Change Q 12

If an employee is dismissed, suspended, or demoted for poor performance (as opposed to any kind of objectionable conduct), is that job action taken "for disciplinary reasons?"

Damned if I know.

Written Notice of Dismissal Change Q 13

When an at-will employee is dismissed for disciplinary reasons, is the public employer obligated to create (and make available for public inspection) a written notice of dismissal setting forth the specific acts or omissions that are the basis of the dismissal?

Written Notice of Dismissal Change Q 13

When an at-will employee is dismissed for disciplinary reasons, is the public employer obligated to create (and make available for public inspection) a written notice of dismissal setting forth the specific acts or omissions that are the basis of the dismissal?

Yes. Or maybe No.

Written Notice of Dismissal Change Q 13

When an at-will employee is dismissed for disciplinary reasons, is the public employer obligated to create (and make available for public inspection) a written notice of dismissal setting forth the specific acts or omissions that are the basis of the dismissal?

Yes. Or maybe No.

(1) 2010 AG Opinion: "[P]ublic employers are required to document and maintain for public inspection a copy of the final decision of the public body dismissing each employee terminated for disciplinary reasons, including employees who are not otherwise entitled to such information."

Written Notice of Dismissal Change Q 13

When an at-will employee is dismissed for disciplinary reasons, is the school system obligated to create (and make available for public inspection) a written notice of dismissal setting forth the specific acts or omissions that are the basis of the dismissal?

Yes. Or maybe No.

(1) 2010 AG Opinion: "[P]ublic employers are required to document and maintain for public inspection a copy of the final decision of the public body dismissing each employee terminated for disciplinary reasons, including employees who are not otherwise entitled to such information."

(2) Record creation requirement

Record Creation Requirement

GS 160A-168:

"The following information with respect to each city employee is a matter of public record . . ."

GS 126-23(a):

State agency "shall maintain a record of each of its employees showing the following information with respect to each employee . ."

Record Creation Requirement

GS 115C-320 (public schools)

GS 115D-28 (community colleges)

GS 126-23 (state government)

Written Notice of Dismissal Change Q 14

If an employee is dismissed for poor performance, is the public employer required to create (and make available for public inspection) a written notice of dismissal?

Written Notice of Dismissal Change Q 14

If an employee is dismissed for poor performance, is the public employer required to create (and make available for public inspection) a written notice of dismissal?

Damned if I know.

Written Notice of Dismissal Change Q 15

The statute requires the creation (and public availability) of the notice of "the final decision" of the public employer. What constitutes such a final decision?

Written Notice of Dismissal Change Q 15

The statute requires the creation (and public availability) of the notice of "the final decision of the local board of education." What constitutes such a final decision?

A decision from which the employee has no right to further review within the agency.

Written Notice of Dismissal Change Q 15

A decision from which the employee has no right to further review within the agency:

- A decision on which the highest authority has passed judgment
- A decision made by an agent to whom decision-making authority has been delegated
- A decision that might have been appealed but, due to the passage of time, no longer is eligible for appeal

Written Notice of Dismissal Change Q 16

For disciplinary dismissals made before October 1, 2010, must the public employer retroactively create (and make publicly available) written notices of dismissal?

Written Notice of Dismissal Change Q 16

For disciplinary dismissals made before October 1, 2010, must the public employer retroactively create (and make publicly available) written notices of dismissal?

No. AG says so.

Written Notice of Dismissal Change Q 17

There exists in the personnel file of a former employee a written notice of dismissal, created before October 1, 2010, setting out the misconduct of the employee. Is the public employer obligated to make that notice publicly available?

Written Notice of Dismissal Change Q 17

There exists in the personnel file of a former employee a written notice of dismissal, created before October 1, 2010, setting out the misconduct of the employee. Is the public employer obligated to make that notice publicly available?

Yes. AG says it does not "violate clearly established rights of former employees dismissed for disciplinary reasons."

Written Notice of Dismissal Change Q 17

There exists in the personnel file of a former employee a written notice of dismissal, created before October 1, 2010, setting out the misconduct of the employee. Is the school system obligated to make that notice publicly available?

Yes. AG says it does not "violate clearly established rights of former employees dismissed for disciplinary reasons."

But maybe a right to a name-clearing hearing.

Written Notice of Dismissal Change Q 18

When is an employee who is being dismissed for disciplinary reasons entitled to a name-clearing hearing?

Written Notice of Dismissal Change Q 18

When is an employee who is being dismissed for disciplinary reasons entitled to a name-clearing hearing?

When stigma is at issue

Written Notice of Dismissal Change Q 18

When is an employee who is being dismissed for disciplinary reasons entitled to a name-clearing hearing?

When stigma is at issue

Offer opportunity before information is disseminated

Written Notice of Dismissal Change Q 18

When is an employee who is being dismissed for disciplinary reasons entitled to a name-clearing hearing?

When stigma is at issue

Offer opportunity before information is disseminated

Great care will be needed with respect to former employees

Written Notice of Dismissal Change Q 19

If a written notice is prepared and handed to the employee but the employee asks for and is granted the opportunity to resign rather than be dismissed, does the written notice become publicly available?

Written Notice of Dismissal Change Q 19

If a written notice is prepared and handed to the employee but the employee asks for and is granted the opportunity to resign rather than be dismissed, does the written notice become publicly available?

No.

Written Notice of Dismissal Change Q 20

What level of detail is required in "setting forth the specific acts or omissions that are the basis of the dismissal?

Written Notice of Dismissal Change Q 20

What level of detail is required in "setting forth the specific acts or omissions that are the basis of the dismissal?

Damned if I know.

DISCLOSURE OF CONFIDENTIAL HEALTH INFORMATION IN COURT PROCEEDINGS

Jill Moore, UNC School of Government

December 2011

SUMMARY

There are many laws addressing the confidentiality of individually identifiable health information. The federal HIPAA privacy rule applies to most health care providers and prohibits them from disclosing any patient information except as specifically allowed by the rule. In addition, much patient information is privileged under state laws. HIPAA and state privilege laws both allow disclosures of patient information for court proceedings if certain conditions are met. The conditions set by HIPAA and the state laws are not exactly the same, but they overlap to produce a general rule: A health care provider may disclose a patient's individually identifiable health information for a court proceeding pursuant to either of the following:

- *A valid authorization form.* To be valid, the form must be in writing, contain certain elements specified in the HIPAA privacy rule, not be combined with any other document, and be signed by the proper person—either the patient or the patient's personal representative.[1]
- *A court order to disclose the information*. A court may order disclosure of patient information after determining that the disclosure is necessary to a proper administration of justice.

Sometimes information is not privileged under state law, but it is still protected under HIPAA. A health care provider who is asked to disclose such information for a court proceeding may not make the disclosure without either the patient's written authorization, a court order, or a subpoena, discovery request or other lawful process accompanied by notice to the patient or a qualified protective order. For more information, see section V in the outline that follows.

Sometimes information to be disclosed is subject to a law providing heightened protection, with the result that additional steps may be required before it may be disclosed in court. Two categories of information that may be particularly likely to present this issue in NC courts are (1) information about a person with a reportable communicable disease, such as HIV, and (2) information maintained by a federally assisted substance abuse program.

[1] To satisfy HIPAA, the personal representative must be a person who is authorized by applicable law to make health care decisions for another individual. 45 CFR 164.502(g). Examples of persons who may constitute personal representatives under NC law include the parent of a minor child, a legal guardian, or a person named as health care agent in a health care power of attorney, among others. If the person is deceased, the person who may authorize disclosure of information is the executor or administrator of the estate, or if there is no executor or administrator, the next of kin. GS 8-53.

OUTLINE

I. **Laws protecting the confidentiality of health information** – Most of the health information that is collected or maintained by a health care provider is subject to more than one confidentiality law. There are federal and state laws that may apply. Some of the laws are generally applicable, while others apply only to information associated with particular types of providers, programs/services, or categories of health information (such as genetic information, or information about particular conditions).

a. Federal laws in general

i. *HIPAA Privacy Rule (45 CFR Parts 160 and 164)*. This federal regulation governs the use and disclosure of individually identifiable health information by health plans (insurers), health care clearinghouses (entities such as billing services that process data for health insurance transactions), and health care providers who engage in electronic transactions related to patients' insurance eligibility or claims.

ii. *Program-specific laws.* A number of health care programs or services receive federal financial assistance and thus become subject to federal regulations that address the confidentiality of the patient information they acquire. Such programs and services are typically subject to HIPAA and state privilege laws as well, and generally HIPAA and the privilege laws govern the disclosure of information in court proceedings (see section IV, below). However, the regulation that applies to federally assisted substance abuse programs (42 CFR Part 2) contains specific procedures and criteria for both patient authorizations and court orders for disclosures of information (see section VI, below).

b. State laws in general

i. *Privilege statutes.* Information acquired by health care providers in the course of treating patients is usually privileged. NC's physician-patient privilege statute (GS 8-53) applies to physicians, surgeons, and persons working under their direction and supervision. There are also privilege statutes applying to other types of health care providers, including

psychologists, optometrists, nurses, social workers, and counselors. When health information is privileged, it may not be disclosed in court proceedings without either the patient's authorization or a court order (see section IV, below).

ii. *Provider or facility-specific laws.* NC statutes and regulations contain dozens of provisions that address the confidentiality of information acquired or maintained by different types of health care providers or facilities, including hospitals, nursing homes, hospice agencies, home health agencies, emergency medical services, pharmacies, public health agencies, and mental health care providers or facilities. The facility-specific laws typically do not affect whether or how information may be disclosed for court proceedings—that will generally be governed by HIPAA and the privilege laws (see section IV, below).[2]

iii. *Category-specific laws.* Relatively few NC laws address the confidentiality of specific categories of health information. However, one that may be particularly important to court proceedings is the state communicable disease confidentiality statute (GS 130A-143). This law applies to all information or records that identify a person who has or may have a reportable communicable disease—a category that includes HIV, tuberculosis, hepatitis, and many sexually transmitted infections. The law provides heightened protection for such information when it is to be disclosed in court proceedings (see section VI, below).

II. **HIPAA and court proceedings** – The HIPAA privacy rule governs the use or disclosure of "protected health information," defined as individually identifiable information that pertains to any of the following: (1) the individual's physical or mental health status or condition, (2) provision of health care to the individual, or (3) payment for the provision of health care to the individual. HIPAA applies to health care providers only if they transmit health information electronically in connection with certain insurance transactions. It is likely that most health care providers in NC are subject to HIPAA, but some are not.

[2] Mental health facilities and providers that are subject to the confidentiality provisions of GS Chapter 122C may disclose confidential information about clients for court proceedings only pursuant to the client's written consent or a court order, regardless of whether the information is protected by a statutory privilege. If the facility or provider is also subject to HIPAA, the written consent must be on a HIPAA-compliant authorization form, as described in section II of the outline. GS 122C-53 (written consent), 122C-54 (court order).

a. Disclosure with patient authorization – The general rule under HIPAA is that the patient's authorization is required to disclose protected health information (45 CFR 164.508). The authorization must be in writing, include specific elements, and usually must be a separate, free-standing form (not combined with a consent to treatment form or other document). It must be signed by the patient, or if the patient lacks capacity to authorize disclosure, the patient's personal representative. (Personal representative has a specific meaning under HIPAA—see footnote 1.) A health care provider may disclose protected health information for a court proceeding pursuant to a written authorization that meets all of HIPAA's requirements.

b. Disclosure without patient authorization – There are several exceptions to the general rule that the patient's written authorization is required for disclosure, including an exception that specifically addresses judicial proceedings [45 CFR 164.512(e)]. A health care provider who is subject to HIPAA may disclose protected health information without the patient's authorization if the disclosure is for a judicial proceeding and is made pursuant to any of the following:

    i. *A court order*. The provider may disclose only the protected health information expressly authorized by the order.

    ii. *A subpoena, discovery request, or other lawful process.* The provider may disclose information pursuant to a subpoena, discovery request, or other lawful process other than a court order if (and only if) either of the following conditions is satisfied:
        1. The person who is the subject of the protected health information receives written notice that the information has been requested and is given the opportunity to raise an objection to the court; or
        2. A qualified protective order is obtained from a court before the information is produced. HIPAA describes a qualified protective order as either a court order or a stipulation by the parties that:
            a. Prohibits the parties from using or disclosing the information for purpose other than the litigation or proceeding for which it was requested, and
            b. Requires that the information and any copies made of it be returned to the health care provider who produced the information at the end of the litigation or proceeding.

III. **State privilege laws and court proceedings** – Generally information that health care providers acquire in the course of treating patients is privileged and may be disclosed in court proceedings only with the patient's authorization or a court order.

a. Physician-patient privilege (GS 8-53): Information that a licensed physician acquires in the course of attending a patient, and that is necessary to the physician's treatment of the patient, is privileged. The physician-patient privilege extends to nurses, technicians and others assisting or acting under the direction of a physician. *See, e.g., State v. Etheridge*, 319 NC 34 (1987). Generally the information may be disclosed in court proceedings only with the patient's (or personal representative's) authorization; however, the court may order disclosure if in the judge's opinion disclosure is necessary to a proper administration of justice. Such an order may compel disclosure before trial or before the filing of criminal charges when necessary to provide for the proper administration of justice. *In re Albemarle Mental Health Center,* 42 NC App 292 (1979). It is within the judges' discretion to determine whether disclosure is necessary. *E.g., Roadway Express v. Hayes,* 178 NC App 165 (2006).

b. Other privilege statutes that may protect health information: Other state statutes create privileges for relationships between patients/clients and their psychologists (GS 8-53.3), marital and family therapists (GS 8-53.5), private social workers (GS 8-53.6), counselors (GS 8-53.8), optometrists (GS 8-53.9), and nurses (GS 8-53.13).

c. When privilege does not apply

i. *Waiver.* A plaintiff who puts her medical condition at issue waives the privilege, permitting disclosure of her confidential information to the extent necessary for the defendant-physician to reasonably defend against the action. *Jones v. Asheville Radiological Group,* 129 NC App 449 (1998). A patient may otherwise waive the privilege expressly or by implication. *E.g., Cates v. Wilson*, 321 NC 1 (1987) (plaintiff waived the privilege by implication when she testified about her condition and her communications with her physician); Adams v. Lovette, 105 NC App 23, *aff'd per curiam,* 332 NC 659 (1992) (defendant impliedly waived the privilege when he objected to the plaintiff's request for his medical records not on the ground of privilege, but relevance).

ii. *Privilege removed by another law.* Several NC statutes provide that the physician-patient or other health care provider privileges do not apply in certain circumstances.

1. Child abuse – No privilege except the attorney-client privilege constitutes a ground for failing to report child abuse. GS 7B-310. Neither the physician-patient privilege nor the nurse-patient privilege may be invoked to exclude evidence about the abuse or neglect of a child under age 16. GS 8-53.1; s*ee also State v. Etheridge*, 319 NC 34 (1987); *State v. Efird*, 309 NC 802 (1983).
2. Victim's compensation – The physician and counselor/therapist privileges do not apply to communications or records concerning the physical, mental, or emotional condition of a claimant or victim if the condition is relevant to a claim for compensation. GS 15B-12(b).
3. Emancipation of a minor – The physician-patient privilege is not a ground for excluding evidence in an emancipation hearing. GS 7B-3503.

IV. **Information that is protected under HIPAA <u>and</u> privileged under state law** – Both HIPAA and state privilege laws permit a health care provider to disclose patient information for a court proceeding with the patient's authorization, or pursuant to a court order. If the disclosure is made with patient authorization, HIPAA requires the authorization to be in writing and on a form meeting specific criteria. If the disclosure is made pursuant to a court order, state law requires that the order be issued by a judge who has determined that disclosure is necessary to a proper administration of justice. A health care provider may therefore disclose information that is both protected under HIPAA and privileged under state law pursuant to either of the following:

a. <u>A valid (HIPAA-compliant) authorization form:</u> The form must be in writing, contain certain elements specified in the HIPAA privacy rule, not be combined with any other document, and be signed by the proper person—either the patient or the patient's personal representative.

b. <u>A court order</u>: A judge may order disclosure of patient information after determining that the disclosure is necessary to a proper administration of justice.

V. **Information that is protected under HIPAA but <u>not</u> privileged** – Patient information may not be subject to a privilege for a variety of reasons. The information may be outside the scope of the privilege, *see Prince v. Duke University,* 326 NC 787 (1990) (only clinical information necessary to treat the patient is protected by the privilege); or the privilege may have been waived or removed by action of another law (see section III, above). However, if the health care provider who has the information is subject to HIPAA, the information is still protected health information under HIPAA and the health care provider may not disclose it except as permitted by that law. The health care provider may disclose the information for court proceedings only if one of the following circumstances applies:

a. <u>Patient authorization</u>: The health care provider may disclose information to the extent the patient (or personal representative) has authorized disclosure in writing on an authorization form that meets HIPAA's criteria as described in section II, above. *A written statement from the patient that is sufficient to authorize disclosure under the privilege laws is not automatically sufficient under HIPAA as well—it must satisfy all of HIPAA's criteria for patient authorizations. If it does not, the health care provider has no authority to disclose the information.* In this situation the health care provider should, and likely will, refuse to disclose the information. The health care provider may suggest that the person seeking the information obtain a HIPAA-compliant authorization form from the patient or a court order for the information, but the provider has no duty to do so.

b. <u>Court order</u>: The health care provider may disclose information to the extent disclosure is expressly authorized by a court order.

c. <u>Subpoena, discovery request, or other lawful process</u>: The health care provider may disclose information pursuant to a subpoena, discovery request, or other lawful process *provided* it is accompanied by notice to the patient or a qualified protective order as described in section II, above. *In the absence of notice or a qualified protective order, the health care provider has no authority to disclose protected health information*. The provider may be obliged by a subpoena or other process to take some action—such as appearing at a time and place designated in the subpoena—but he or she may not disclose protected health information in response to a subpoena alone. In the absence of proper notice to the patient or a qualified protective order that satisfies HIPAA's requirements, the provider needs something else authorizing disclosure: most likely either the

patient's written authorization on a HIPAA-compliant authorization form, or a court order. See John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, Health Law Bulletin No. 82 (Sept. 2005), available at http://sogpubs.unc.edu/electronicversions/pdfs/hlb82.pdf.

VI. **Information that has heightened protection under a specific federal or state law** – Sometimes the information sought is subject to a law that provides heightened protection, with the result that additional steps may be required before the information may be disclosed in court. (This is in addition to satisfying HIPAA and state privilege law requirements, if they apply.) Two circumstances that may be particularly likely to arise are:

a. The information sought identifies a person who has or may have a reportable communicable disease (such as HIV). Any information or record that identifies a person who has or may have a reportable communicable disease is strictly confidential and not a public record for purposes of GS Chapter 132. The person who is the subject of the information may request in camera review of the records. During testimony about such information, the judge may exclude from the courtroom all persons except officers of the court, the parties. GS 130A-143(6).

b. The information or records sought are maintained by a federally assisted substance abuse facility. Court orders for such information are subject to procedures and limits set forth in subpart E of 42 CFR Part 2. *See also Spangler v. Olchowski,* 187 NC App. 684 (2007) (interpreting and applying those provisions). Patient authorizations to disclose such information must meet specific criteria set forth in subpart C.

Procedures for Judicial Review

CHAPTER 29

The overwhelming majority of land use decisions by local governments are not challenged in court. Several surveys conducted by the School of Government indicate that judicial review is sought for only a handful of variance, special or conditional use permit, or zoning amendment decisions. Table 29.1 summarizes these reported judicial appeal rates.[1] Still, given the volume of decisions made, the courts are called upon to review a sizable number of land use regulatory decisions each year, and it is typically the most controversial and complicated cases that come before the courts.

Form of Action

While the occasional case is appropriate for federal courts,[2] most litigation on land use regulatory ordinances takes place in state courts.

Challenges to legislative land use regulatory decisions are brought under Sections 1-253 to -267 of the North Carolina General Statutes (hereinafter G.S.), the state's declaratory judgment statute. These provisions may be used to address disputes regarding the constitutionality, validity, or construction of ordinances.[3] However, they do not allow for advisory opinions or judgments before a genuine controversy arises. A legislative regulatory decision is not reviewable upon a writ of certiorari.[4]

Appeals of quasi-judicial land use regulatory decisions are reviewed by the superior court in proceedings in the nature of certiorari.[5] In most instances judicial appeals of administrative land use decisions will also be in the nature of certiorari.[6]

G.S. 160A-393(c) sets the requirements for a petition for writ of certiorari. The petition must contain the basic facts that establish standing, the grounds of the alleged error, the facts that support any alleged conflict of interest,[7] and the relief the person seeks from the court. G.S. 160A-393(f) provides that upon filing the petition, the petitioner shall submit to the clerk of superior court a proposed writ. The proposed writ must include a direction to the responding

1. David W. Owens, Zoning Amendments in North Carolina 18 (School of Government, Special Series No. 24, 2008).

2. See Chapter 23 regarding federal statutory claims. Chapters 24 through 28 also discuss federal constitutional claims that may serve as the foundation for litigation in federal courts.

3. Taylor v. City of Raleigh, 290 N.C. 608, 620, 227 S.E.2d 756, 583 (1976); Blades v. City of Raleigh, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972); Vill. Creek Prop. Owners' Ass'n, Inc. v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

4. *In re* Markham, 259 N.C. 566, 569, 131 S.E.2d 329, 332, *cert. denied*, 375 U.S. 931 (1963); Massey v. City of Charlotte, 145 N.C. App. 345, 355, 550 S.E.2d 838, 845, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001).

5. In 2009 the General Assembly codified most of the provisions for judicial review of quasi-judicial zoning decisions as G.S. 160A-393. G.S. 153A-349 makes this section applicable to appeals of county quasi-judicial zoning decisions. *Also see* G.S. 153A-345(e2) and 160A-388(e2). An appeal of a decision not to consider an application for a quasi-judicial permit due to an incomplete application must also be made in the nature of certiorari. Northfield Dev. Co., Inc. v. City of Burlington, 165 N.C. App. 885, 599 S.E.2d 921, *review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004). Appeals of quasi-judicial decisions made under other development ordinances (such as subdivision regulations) are reviewed in the same manner. G.S. 160A-377 and 153A-336. In *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 568 S.E.2d 887 (2002), which involved denial of a variance for a cul-de-sac length limit in a subdivision ordinance, the court held that the superior court has discretion to grant a writ of certiorari "in proper cases" and that this was such a case.

6. Administrative decisions under zoning ordinances are appealed first to the board of adjustment, and the board's decision can subsequently be appealed to superior court in the nature of certiorari. G.S. 153A-345(e); 160A-388(e), -393(b)(3). Uncertainty arises with administrative land use regulatory decisions that are made under ordinances other than zoning where the ordinance involved does not provide for an appeal to the board of adjustment. It is likely that such an appeal would also be a "proper case," as the court held in *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 148, 568 S.E.2d 887, 889–90 (2002).

7. An allegation of improper conflict of interest must be made in a timely fashion. In *McMillan v. Town of Tryon*, 200 N.C. App. 228, 683 S.E.2d 747 (2009), the appellate court upheld the trial court's decision not to allow a complaint to be amended to add a conflict of interest allegation when the motion to amend was filed nearly a year after the initial complaint and a week after the defendants motion for summary judgment with supporting affidavits. The court noted that even if the defendants' motion added new information about the details of the case, the plaintiff's failure to undertake any discovery until that point should not burden the defendants. Thus the court held that the trial court did not abuse its discretion in denying the motion to amend the complaint.

Table 29.1 **Frequency of Judicial Review Sought**

Type of Approval (Year Surveyed)	Total Number Sought	Percent (%) Appealed to Court
Variance Petitions (2002)	1,806	2.5
Special and Conditional Use Permit Applications (2004)	2,207	1.6
Zoning Map Amendments (rezonings) (2006)	3,029	0.9

local government to prepare and certify to the court by a specified date the record of the board's proceedings on the matter. The petition is filed with the clerk of superior court in the county in which the matter arose. The clerk then issues the writ ordering the city or county to prepare and certify to the court the record. The petitioner must serve the writ upon all respondents, following the same rules for service of a complaint in a civil suit. No summons is to be issued.[8] The clerk is directed to issue the writ without notice to the respondent(s) if the petition is properly filed and is in proper form.

The respondent may, but is not required to, file an answer to the petition for writ of certiorari.[9] The common practice in North Carolina is not to file such an answer. Rather, the record of the quasi-judicial proceeding is submitted and the parties deal with the merits of the matter through motions to dismiss or at trial. However, an answer must be filed to contest standing, and that answer must be served on all petitioners at least thirty days prior to the hearing on the petition.[10]

In general it is inappropriate to challenge a legislative decision as part of judicial review of a quasi-judicial or administrative decision applying the ordinance.[11] In *Simpson v. City of Charlotte,*[12] a neighbor appealed to the board of adjustment the zoning administrator's decision to issue a permit for expansion of a quarry. The board upheld the decision to issue the permit, and that decision was then appealed to superior court. The trial court held the ordinance provision at issue to be invalid. The court of appeals overturned that determination, holding that the board of adjustment had the authority only to grant or deny the permit and that the trial court through its derivative appellate jurisdiction could therefore not go beyond that issue to address the validity of the ordinance.

The constitutionality of an ordinance provision cannot be challenged in a certiorari review of a board of adjustment decision. In *Batch v. Town of Chapel Hill,*[13] the court held that it was an error to join a complaint alleging constitutional causes of action (a taking and denial of equal protection) with a petition for writ of certiorari seeking review of denial of subdivision approval under the city's development ordinance. When an applicant has received a permit and benefited thereby, the applicant may not later attack the validity of the ordinance.[14] In *Dobo v. Zoning Board of Adjustment,*[15] the court held that a petitioner cannot raise a constitutional challenge in the course of appealing a zoning officer's interpretation of the ordinance. In these cases, the board of adjustment has no authority to rule on the constitutionality of the ordinance, and the superior court is limited to review of whether the board properly affirmed or overruled the officer's determination.

Because of these limitations, it is appropriate for a plaintiff to bring two separate actions when he or she is both challenging the validity of an ordinance and seeking review of an individual decision pursuant to that ordinance. For example, in *Cary Creek Ltd. Partnership v. Town of Cary,*[16] the town's development ordinance included a riparian buffer requirement. After the plaintiffs were denied a variance from the buffer requirements they brought a declaratory judgment action challenging the validity of the ordinance. The court held that the plaintiff's separate certiorari proceeding challenging

8. Petitions for certiorari for superior court review of quasi-judicial decisions are not the equivalent of a beginning of an action. Garrity v. Morrisville Zoning Bd. of Adjustment, 113 N.C. App. 273, 444 S.E.2d 653, *review denied*, 337 N.C. 692, 448 S.E.2d 523 (1994) (petition for writ of certiorari need not be verified); Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986), *review denied*, 319 N.C. 105, 353 S.E.2d 111 (1987).

9. G.S. 160A-393(g).

10. G.S. 160A-393(g). Answers may also be used to challenge jurisdiction prior to submittal of the record.

11. Some cases have allowed challenges to the validity of a zoning requirement when the ordinance is applied. See, for example, *White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989), a case challenging the denial of a special use permit to establish electrical power to a mobile home. The court concluded that the plaintiff could directly challenge the validity of the ordinance requirement in the suit, provided the action was brought within the appropriate statute of limitations for legislative zoning decisions.

12. 115 N.C. App. 51, 443 S.E.2d 772 (1994). The court has held that the General Assembly may, by local legislation, specifically authorize legislative zoning decisions in an individual jurisdiction to be reviewed in a petition for certiorari. Gossett v. City of Wilmington, 124 N.C. App. 777, 478 S.E.2d 648 (1996).

13. 326 N.C. 1, 11, 387 S.E.2d 655, 661–62, *cert. denied*, 496 U.S. 931 (1990). Grounds for review in the nature of certiorari include reviewing for errors in law and for arbitrary and capricious decisions, so some overlap in issues raised is possible. See also *Guilford County Department of Emergency Services v. Seaboard Chemical Corp.*, 114 N.C. App. 1, 10–11, 441 S.E.2d 177, 182, *review denied*, 336 N.C. 604, 447 S.E.2d 390 (1994), where the court held that the superior court would not have jurisdiction to adjudicate a takings claim in a certiorari review but would have jurisdiction in an original action. There is also the issue of exhaustion of administrative remedies through application for permits and pursuit of available administrative appeals prior to making a constitutional challenge of an ordinance.

14. River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990); Convent of Sisters v. City of Winston-Salem, 243 N.C. 316, 90 S.E.2d 879 (1956); Wake Forest Golf & Country Club, Inc. v. Town of Wake Forest, ___ N.C. App. ___, 711 S.E.2d 816 (2011); Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999); Franklin Rd. Props. v. City of Raleigh, 94 N.C. App. 731, 735, 381 S.E.2d 487, 490 (1989); Goforth Props., Inc. v. Town of Chapel Hill, 71 N.C. App. 771, 323 S.E.2d 427 (1984). If, however, a permit was not actually required, then the permittee can subsequently challenge the enforceability of conditions on that permit. Stegall v. Zoning Bd. of Adjustment, 87 N.C. App. 359, 361 S.E.2d 309 (1987), *review denied*, 321 N.C. 480, 364 S.E.2d 679 (1988). *See also* Buckland v. Town of Haw River, 141 N.C. App. 460, 541 S.E.2d 497 (2000) (authority to impose off-site conditions on subdivision plat approval).

15. 149 N.C. App. 701, 706, 562 S.E.2d 108, 111–12 (2002), *rev'd on other grounds*, 356 N.C. 656, 576 S.E.2d 324 (2003). *See also* 321 News & Video, Inc. v. Zoning Bd. of Adjustment, 174 N.C. App. 186, 619 S.E.2d 885 (2005).

16. ___ N.C. App. ___, 690 S.E.2d 549 (2010).

the variance denial did not deprive the court of subject matter jurisdiction to hear this declaratory judgment action as these two legal actions must be brought separately.

There are also substantial limits on the ability to challenge the validity of an ordinance in the judicial review of an enforcement action. The time to challenge a permit decision or its conditions arises at the time of permit decision, not when it is enforced.[17] If an appeal challenges whether or not there was a violation or whether the particular enforcement remedy is appropriate, an initial appeal must be made to the board of adjustment. The enforcement action may not be collaterally attacked in subsequent judicial actions.[18]

Briefs and Fees

Briefs on appeal must meet all standard requirements, including setting out a full and complete statement of the facts and each argument and stating each question separately with pertinent assignments of error and appropriate references to the record on appeal.[19]

Successful litigants may not recover attorney fees as costs or damages unless that is expressly authorized by statute.[20] Among the statutes allowing for recovery of attorney fees are G.S. 6-19.1, if the court finds that a state agency has acted without substantial justification; G.S.6-21.5, if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party; G.S. 6-21.6, if a city or county has acted outside the scope of its legal authority and the court finds that action was an abuse of discretion; G.S. 19-8, for nuisance abatement actions; G.S. 41A-7, for enforcement actions under the State Fair Housing Act; G.S. 106-804, for enforcement of the Swine Farm Siting Act; G.S. 132-9, for securing disclosure of unlawfully withheld public records or for making a bad faith or frivolous claim regarding public records;[21] and G.S. 143-318.16B, for enforcement of the open meetings law.[22] As there is no statutory authority for such, attorney fees are generally not available in land use litigation.

Rule of Civil Procedure 65(e) does allow an award of damages upon dissolving a temporary restraining order or preliminary injunction. The court in *Schwarz Properties, LLC v. Town of Franklinville*[23] noted that a showing of malice or want of probable cause for the preliminary injunctive relief is not a prerequisite to the award of costs in this context.

When a plaintiff brings a successful action under Section 1983 of U.S. Code Title 42 regarding a violation of constitutional rights, Section 1988 under the same Title allows the prevailing plaintiff to recover attorney fees.[24] If, however, the plaintiff in such an action

17. *See, e.g.*, Town of Pinebluff v. Marts, 195 N.C. App. 659, 663, 673 S.E.2d 740, 743 (2009); Forsyth Cnty. v. York, 19 N.C. App. 361, 364–65, 198 S.E.2d 770, 772, *cert. denied*, 284 N.C. 253, 200 S.E.2d 653 (1973).

18. Cnty. of Durham v. Addison, 262 N.C. 280, 283–84, 136 S.E.2d 600, 603 (1964); State v. Roberson, 198 N.C. 70, 150 S.E. 674 (1929); Appalachian Outdoor Adver. Co. v. Town of Boone, 103 N.C. App. 504, 406 S.E.2d 297 (1991); New Hanover Cnty. v. Pleasant, 59 N.C. App. 644, 297 S.E.2d 760 (1982); City of Elizabeth City v. LFM Enters., Inc., 48 N.C. App. 408, 269 S.E.2d 260 (1980); City of Hickory v. Catawba Valley Machinery Co. II, 39 N.C. App. 236, 249 S.E.2d 851 (1978). See the discussion of the requirement to exhaust administrative remedies below. Also see the discussion of enforcement in Chapter 21.

19. Northwood Homeowners Ass'n v. Town of Chapel Hill, 112 N.C. App. 630, 436 S.E.2d 282 (1993). In *Walsh v. Town of Wrightsville Beach*, 361 N.C. 348, 644 S.E.2d 224 (2007) (per curiam), the town had issued building permits for two single-family beach cottages on an adjacent lot formerly owned by the plaintiff. The plaintiff appealed the staff determination (which had been upheld by the board of adjustment) that the property contained two rather than one buildable lot. The court of appeals, 179 N.C. App. 97, 632 S.E.2d 271 (2006), upheld the trial court's dismissal for failure to include clear references in the record or transcript for the assignment of error and a failure of the appellate brief to reference a clear assignment of error for each question presented. The supreme court reversed and remanded for reconsideration in light of new directions for rules for application of sanctions and discretion in application of rules of appellate procedure. On remand, in an unpublished opinion the court of appeals again upheld the trial court's dismissal, noting that even though the plaintiff owned adjoining property, there had been no allegation of the requisite special damages, and thus the plaintiff had not established standing. 2007 WL 3256669 (N.C. Ct. App. Nov. 6, 2007), *appeal dismissed*, 657 S.E.2d 891 (N.C. 2008).

20. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). *See also* Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001); Cnty. of Hoke v. Byrd, 107 N.C. App. 658, 668, 421 S.E.2d 800, 806 (1992) (county not entitled to attorney fees in an action to enforce junkyard-screening ordinance).

21. In *Quality Built Homes, Inc. v. Village of Pinehurst*, No. 1:06CV1028, 2008 WL 3503149 (M.D.N.C. Aug. 11, 2008), the village was awarded attorney fees for defending a frivolous public records claim. The plaintiff requested certified copies of the zoning amendments and council minutes on the last working day prior to the Christmas holiday. The records were made available the first working day after the Christmas holiday (the plaintiff contended they were not available until the day after the New Year's holiday). The court held that there is no legal right to immediate production and the records were clearly provided in a reasonable time period.

22. For an example of a case awarding attorney fees under such a statutory authorization, see *Table Rock Chapter of Trout Unlimited v. Environmental Management Commission*, 191 N.C. App. 362, 663 S.E.2d 333 (2008) (allowing attorney fees pursuant to G.S. 6-19.1 when state agency decision not to reclassify waters was successfully challenged as being without substantial justification and there were no special circumstances that would make the award unjust). In *Williams v. North Carolina Department of Environment & Natural Resources*, 166 N.C. App. 86, 601 S.E.2d 231 (2004), the court held that it was improper to award attorney fees where a regulatory decision is ultimately overturned by the court but there was conflicting evidence and a difficult factual determination at issue (in this case, determining whether the property included coastal wetlands). The court noted that when a reasonable person could have agreed with the agency, their decision could not be characterized as "without substantial justification."

23. ___ N.C. App. ___, 693 S.E.2d 271 (2010). The plaintiff had sued to invalidate an age restriction in a mobile home regulation and had secured a temporary restraining order (TRO) precluding denial of permits for location of manufactured homes during the litigation. Following a hearing, the trial court dissolved the TRO, allowed the town to revoke permits issued while it was in effect, dismissed the plaintiff's claims, and awarded damages to the town for the costs of defending the matter. The court of appeals upheld the award of costs (equal to the town's liability insurance deductible).

24. *See, e.g.*, Amward Homes, Inc. v. Town of Cary, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (2011). The plaintiff successfully contended that the collection of school impact fees that were

prevails on statutory grounds and the constitutional issues are not addressed, no attorney fees are available.[25]

Parties and Standing

Proper Parties

Care must be exercised in identifying the proper governmental party in a suit challenging a land development regulatory decision.[26]

For a legislative decision, the governmental unit itself, not the governing board or its individual members, is the proper party if the decision is being challenged.[27] If monetary damages are being sought, board members may be sued in their individual as well as their official capacities.[28]

For quasi-judicial decisions, G.S. 160A-393(e) provides that the respondent to the petition for writ of certiorari is the local government, not the individual board making the decision.[29] If the petition for review is brought by the unit of government itself, the respondent is to be the decision-making board. If the petitioner is not the applicant for the decision being contested, the applicant must also be named as a respondent. A petitioner may also name as a respondent any owner or lessee of the property subject to the application if that person participated in the hearing or was the applicant.[30]

When an error is made in identifying proper parties, a complaint may be amended to add the proper parties. However, in *City of Raleigh v. Hudson Belk Co.*,[31] the N.C. Court of Appeals held that the trial court has no responsibility to add a necessary party on its own motion and may properly dismiss a case where the petitioner did not name the proper board as a party and made no request of the judge to do so. Also, a motion to amend the complaint must be made in a timely fashion. In *Piland v. Hertford County Board of Commissioners*,[32] an action challenging a rezoning, the complaint improperly named the board of commissioners rather than the county itself as a defendant. The court held that while the trial court may grant a motion to amend the complaint to amend the name of the proper parties, such an amendment does not relate back to the original filing. Thus if a necessary party is not included prior to the running of the applicable statute of limitations, the suit will be time-barred and this cannot be corrected by the motion to amend.

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not statutorily authorized violated substantive due process, thus entitling recovery of attorney fees and costs (some $368,000 in this case) in addition to a refund of the fees collected.

25. In *Giovanni Carandola, Ltd. v. City of Greensboro*, No. 1:05CV1166, 2007 WL 703333 (M.D.N.C. Mar. 1, 2007), *aff'd per curiam*, 258 F. App'x 512 (4th Cir. 2007), the plaintiffs challenged the city's adult entertainment regulations. The plaintiffs' challenge of the ordinance consisted of two constitutional claims and a third claim contending the city's interpretation of the ordinance was incorrect as a matter of law. The court granted summary judgment for the plaintiffs on the statutory interpretation claim (finding that they were "grandfathered" by the terms of the ordinance). The court held that since the plaintiffs had not prevailed on the two constitutional claims, however, attorney fee awards were not permissible.

26. For the general provisions on parties in civil actions, see G.S. 1-57 to -72.1.

27. In an action challenging a rezoning, the court noted "[u]ndoubtedly, the real party in interest in this case is Hertford County, not the Board of Commissioners." Piland v. Hertford County Bd. of Comm'rs, 141 N.C. App. 293, 296, 539 S.E.2d 669, 671 (2000). G.S. 153A-11 and 160A-11 provide that the county and city are corporate entities to sue and be sued in their own names and the courts have long held that the governmental entity itself is the proper party rather than its officers. Lenoir Cnty. v. Crabtree, 158 N.C. 357, 74 S.E. 105 (1912) (county must sue and be sued in its own name); Young v. Barden, 90 N.C. 424 (1886) (city must be sued in its corporate name). G.S. 1-260 also requires that the N.C. Attorney General be served with a copy of the proceedings in any action alleging the unconstitutionality of an ordinance. *See also* Macon Cnty. v. Town of Highlands, 187 N.C. App. 491, 654 S.E.2d 17 (2007) (holding that neither the county nor individual commissioners were proper parties entitled to challenge the town's methods of computing the number of extraterritorial members to be appointed to the town planning board and board of adjustment).

In federal actions, suit against individuals in their official capacity is equivalent to suit against the governmental entity. Kentucky v. Graham, 473 U.S. 159, 165–67 (1985). Therefore individuals named in their official capacity will be dismissed as parties.

28. See Chapter 21 for a discussion of liability of the governmental unit and individual board members or employees for monetary damages.

29. Prior to the 2009 addition to the statutes of this explicit provision regarding respondents, courts had held the board making a quasi-judicial decision (as opposed to the jurisdiction itself or the individual board members) is a necessary party in a judicial appeal of a quasi-judicial decision. In *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986), which involved an action challenging a zoning officer's interpretation, the court held that the board of adjustment is an independent body, not an agent of the county commissioners, and is hence a necessary party. Likewise, in *City of Raleigh v. Hudson Belk Co.*, 114 N.C. App. 815, 443 S.E.2d 112 (1994), involving an appeal by the city of the board of adjustment's reversal of the zoning officer's interpretation of sign limitations, the city failed to join the board of adjustment as a necessary party and the action was therefore dismissed. *See also In re* Appeal of Harris, 273 N.C. 20, 159 S.E.2d 539 (1968) (statutes providing for judicial review of administrative decisions should be liberally construed to preserve the right of appeal).

30. In an enforcement action seeking injunctive relief regarding an alleged sedimentation and erosion control ordinance violation, the court held that the landowner was a necessary party. Durham Cnty. v. Graham, 191 N.C. App. 600, 663 S.E.2d 467 (2008). The defendant secured a land disturbance permit for a landfill. The county issued a notice of violation alleging more than an acre had been disturbed, the fill had extended into a floodplain, and the sediment had not be contained onsite. The county sought an injunction to compel restoration and compliance with the terms of the permit. Subsequent to the permit and notice of violation, the property changed hands, went into foreclosure, and title was transferred to the lender. The court held that the current owners of the property were necessary parties as their rights to use the property would be affected by an injunction. The court held that lien holders were not necessary parties, nor was the city (which would have to permit the remedial actions being sought).

31. 114 N.C. App. 815, 443 S.E.2d 112 (1994).

32. 141 N.C. App. 293, 539 S.E.2d 669 (2000). The basic rule on relation back is set forth in *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995).

Individual Standing

A suit challenging a land development regulatory decision must be brought by a party with standing, that is, one whose legal rights are affected by the decision.[33] If the plaintiff in a suit challenging a decision does not establish that he or she has standing, the superior court has no subject matter jurisdiction to hear the case. The burden of establishing standing is on the party bringing the action.[34]

The United States Supreme Court in *Lujan v. Defenders of Wildlife* held that the "irreducible constitutional minimum" of standing contains three elements:

1. "injury in fact"-an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
2. the injury is fairly traceable to the challenged action of the defendant; and
3. it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[35]

North Carolina courts generally apply this same basic test.[36]

Legislative Decisions

The basic rule for standing to challenge legislative decisions in state court in North Carolina is set forth in *Taylor v. City of Raleigh*.[37] The court there ruled that challenges to legislative zoning decisions could be brought only "by a person who [had] a specific personal and legal interest in the subject matter affected by the zoning ordinance and who [was] directly and adversely affected thereby."[38] A citizen or a taxpayer may not file a lawsuit as a member of the general public to bring a conceptual challenge to a legislative decision.[39] In *Taylor,* the challenge was brought not by adjoining landowners but by neighbors separated from the rezoned area by a 45-acre buffer area that was not rezoned. The court held that the plaintiffs lacked standing given the "minimal" effect of the rezoning on them. In reaching this conclusion the court considered (1) the modest additional uses allowed in the new district (the change was from R-4 to R-6, which allowed for increased density but not a substantial change in the type of uses); (2) the distance of the rezoned property from the plaintiffs' property (none of the challengers owned adjacent property, the closest piece being one-half mile from the rezoned property); and (3) the manner in which the plaintiffs had participated in the city's consideration of the matter (they had not protested before the lawsuit).[40]

A similar result was reached in *Davis v. City of Archdale.*[41] In this challenge to a rezoning, the court ruled that the alleged diminution of property values due to increased traffic and increased demands on overburdened utilities did not result in "special damages" distinct from those incurred by the rest of the community and that, therefore, the plaintiff had no standing to challenge the rezoning.[42] The use of the special damages test in the *Davis* case was taken

33. "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions." Stanley v. Dep't of Conservation & Dev., 284 N.C. 1, 28, 199 S.E.2d 641, 650 (1973) (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968) (internal quotations omitted)). For general reviews of the law of standing for land use cases, see John D. Ayer, *The Primitive Law of Standing in Land Use Disputes: Some Notes from a Dark Continent*, 55 Iowa L. Rev. 344 (1969); Robert A. Hendel, Note, *The "Aggrieved Person" Requirement in Zoning*, 8 Wm & Mary L. Rev. 294 (1967).

34. Neuse River Found. v. Smithfield Foods, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51, *review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

35. 504 U.S. 555, 560–61 (1992). *See also* Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 517 (2007).

36. Marriott v. Chatham Cnty., 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007).

37. 290 N.C. 608, 227 S.E.2d 576 (1976). This case involved a challenge to Raleigh's annexation and rezoning of a 39.89-acre tract. For additional statements of the standing test for legislative zoning decisions, see *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987) (holding that a plaintiff must "produce evidence that he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement" of the ordinance in order to have standing to challenge the constitutionality of a zoning ordinance provision), *Godfrey v. Zoning Board of Adjustment,* 317 N.C. 51, 344 S.E.2d 272 (1986), *Blades v. City of Raleigh,* 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972) ("owners of property in the adjoining area affected by the ordinance" have standing), *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E.2d 325 (1968), *Templeton v. Town of Boone*, ___ N.C. App. ___, 701 S.E.2d 709 (2010), *Musi v. Town of Shallotte*, 200 N.C. App. 379, 684 S.E.2d 892 (2009), and *Village Creek Property Owners' Ass'n v. Town of Edenton*, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

38. *Taylor*, 290 N.C. at 620, 227 S.E.2d at 583. *See also* City of Shelby v. Lackey, 236 N.C. 369, 72 S.E.2d 757 (1952) (holding that if complaint failed to show how "neighbor" would be affected by zoning decision (e.g., whether he or she was town citizen or property owner or what nature of injury was), he or she should not be accepted as party plaintiff); Budd v. Davie Cnty., 116 N.C. App. 168, 171, 447 S.E.2d 449, 451, *review denied*, 338 N.C. 667, 453 S.E.2d 174 (1994) (adjacent and nearby property owner who has easement interest in part of the land being rezoned has standing to challenge rezoning).

39. For example, a challenge to Durham County's initial zoning ordinance brought by a group of citizens before enforcement of that ordinance was dismissed by the state supreme court. Fox v. Bd. of Comm'rs, 244 N.C. 497, 94 S.E.2d 482 (1956). The court ruled that, rather than going forward with building and then challenging the denial, the applicant had to follow procedures for appealing a permit denial to the board of adjustment and then make subsequent judicial appeal. The court found that "[p]laintiffs cannot present an abstract question and obtain an adjudication in the nature of an advisory opinion." *Id.* at 500, 94 S.E.2d at 485. Enactment of the ordinance can be enough in and of itself to create a genuine controversy for standing purposes, as, for example, when an amortization provision is adopted requiring removal of an existing land use.

40. Other states also use multiple factors in assessing standing in this context. *See, e.g.*, Reynolds v. Dittmer, 312 N.W.2d 75 (Iowa Ct. App. 1981) (consider proximity, character of neighborhood, type of zoning change, and statutory rights of notice of hearing).

41. 81 N.C. App. 505, 344 S.E.2d 369 (1986).

42. The court of appeals has noted in dicta that status as an adjoining or nearby owner, even without an allegation of a reduction in property value, might be sufficient to confer standing in a challenge to a legislative zoning decision in a declaratory judgment action. Concerned Citizens of Downtown Asheville v. Bd. of Adjustment, 94 N.C. App. 364, 366, 380 S.E.2d 130, 132 (1989).

from the cases on standing to challenge quasi-judicial zoning decisions.

Thrash Ltd. Partnership v. County of Buncombe[43] involved a facial challenge to the validity of an ordinance regulating multifamily dwellings that established different standards depending on the elevation of the property involved. The court held the plaintiff, who had not filed an application to develop, had standing to challenge the procedures by which the ordinance was adopted. The court noted that the fact that the plaintiff owned land that was subject to the regulations was sufficient for a facial challenge. The court distinguished such a facial challenge to the process of ordinance adoption from a challenge based on a claim that the ordinance was arbitrary or violated equal protection or some other constitutional principle. In the latter situations, known as "as applied" challenges, a particular application of the ordinance would be needed to assert a claim.[44] The court applied this same standing analysis in a companion case to *Thrash*, discussed just above, which challenged the process by which the county initially amended its zoning ordinance to extend it from partial county zoning to countywide coverage.[45] In *Templeton v. Town of Boone*,[46] the court distinguished standing for constitutional challenges from standing for statutory challenges of legislative decisions. For a constitutional challenge, the court held that a plaintiff must show an injury in fact or an immediate danger of injury as a result of enforcement of the challenged ordinance. For a statutory challenge, establishment of ownership of land affected by the challenged ordinance was held to be sufficient for standing.

Quasi-Judicial Decisions

The basic rule for standing to challenge quasi-judicial decisions is similar to the one applicable to legislative decisions, discussed in the preceding subsection, though it has a statutory dimension. G.S. 160A-393(d)[47] defines who can file a petition for writ of certiorari to review a quasi-judicial land use regulatory decision. This section specifies three categories of entities with standing to bring these judicial appeals. The first category covers those who applied for approval or who have a property interest in the project or property subject to the application.[48] This includes all persons with a legally defined interest in the property, including not only an ownership interest but also a leasehold interest, an option to purchase the property, or an interest created by an easement, restriction, or covenant. The local government whose board made the decision being appealed constitutes the second category. The third category of entities able to file a petition for writ of certiorari for review of a quasi-judicial land use regulatory decision includes other persons who will suffer "special damages" as a result of the decision. Included here are both individuals (such as a neighbor who contends the decision will adversely affect his or her property) and qualifying associations.

In a challenge of a special exception granted by Guilford County for a mobile home park the N.C. Supreme Court, in *Jackson v. Guilford County Board of Adjustment,*[49] stated that the following test was to be used for assessing standing in state court for quasi-judicial zoning decisions:

> The mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to

43. 195 N.C. App. 727, 673 S.E.2d 689 (2009). The rules at issue here limited density, the height of buildings, parking standards, road construction, and the area of land disturbance. The ordinance was adopted using the procedures for a general police power ordinance rather than those required for a zoning ordinance. Also see *Amward Homes, Inc. v. Town of Cary*, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (2011), where the court held that builders required to pay a school impact fee upon issuance of a building permit had standing to challenge the authority of the defendant town to impose the fee requirement on the developer of the subdivision involved in the case.

44. Andrews v. Alamance Cnty., 132 N.C. App. 811, 513 S.E.2d 349 (1999) (holding that a landowner had no standing to challenge the constitutionality of a mobile home park ordinance where no site plan or subdivision plat had been filed, no steps had been taken to develop the property, and no permits of any kind had been applied for or denied).

45. Thrash Ltd. P'ship v. Cnty. of Buncombe, 195 N.C. App. 678, 673 S.E.2d 706 (2009).

46. __ N.C. App. ___, 701 S.E.2d 709 (2010). A concurring in part and dissenting in part opinion in this case would have held an allegation of actual or threatened enforcement is only required for an as applied constitutional challenge but not for a facial constitutional challenge.

47. G.S. 153A-345(b) and 160A-388(b) provide that "any person aggrieved" may make appeals to the board of adjustment. These statutes also allow appeals by "an officer, department, board, or bureau" of the city or county involved. G.S. 153A-345(e) and 160A-388(e) provide for service of the decision of the board on "aggrieved parties." Prior to the adoption of G.S. 160A-393, the court held that the provision granting the county authority to appeal to the board of adjustment also provided standing for judicial appeals. Cook v. Union Cnty. Zoning Bd. of Adjustment, 185 N.C. App. 582, 588–89, 649 S.E.2d 458, 464–65 (2007).

48. Prior to adoption of this section in 2009, the law was not entirely clear as to how far this category extended beyond the owner of the fee interest in the property. The state high court held in *Humble Oil & Refining Co. v. Board of Aldermen,* 284 N.C. 458, 202 S.E.2d 129 (1974), that an option holder who had exercised his option subject to the necessary permits being obtained to develop the property had standing to participate in a review of those zoning permits. In *Habitat for Humanity of Moore County, Inc. v. Board of Commissioners of the Town of Pinebluff*, 187 N.C. App. 764, 653 S.E.2d 886 (2007), the ordinance specifically allowed conditional use permit applications and subdivision plats to be submitted by landowners, their agents, or persons who have contracted to purchase the property. The plaintiff organization's director testified at the permit hearing that his group had an option to purchase, and the council found the application to be complete. The court held that this was sufficient to establish standing for the plaintiff to file the application and pursue the appeal. *See also* Cox v. Hancock, 160 N.C. App. 473, 586 S.E.2d 500 (2003) ("prospective vendee" is real party in interest in special use permit application and litigation). Similarly, the state court of appeals had held that a person bound by contract to purchase the land in question also has standing. Deffet Rentals, Inc. v. City of Burlington, 27 N.C. App. 361, 219 S.E.2d 223 (1975). By contrast, the N.C. Supreme Court had held that a mere optionee did not have standing. Lee v. Bd. of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946). Also, in *Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 322 S.E.2d 655 (1984), the appeals court ruled that the estranged wife of a month-to-month lessee whose lease had been terminated had no interest in property sufficient to confer standing to challenge the applicability of a zoning ordinance.

49. 275 N.C. 155, 166 S.E.2d 78 (1969).

> maintain an action, or other legal proceeding, to prevent such use. If, however, the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain such proceeding. . . . If, however, that which purports to be an amendment is, itself, invalid, the prohibition upon the use remains in effect. In that event, the owner of other land, who will be specifically damaged by such proposed use, has standing to maintain a proceeding in court to prevent it.[50]

In a series of cases applying this "special damages" test for standing to appeal quasi-judicial zoning decisions, the courts have held that appellants must present evidence both that they are owners of affected property[51] and that they will suffer special damages distinct from the rest of the community.[52] Mere proximity of land ownership is insufficient.[53] In *Smith v. Forsyth County Board of Adjustment*,[54] an adjacent owner sought to challenge an ordinance interpretation allowing a new church and associated athletic fields. The court held that the plaintiff had failed to establish that she was a "person aggrieved" with standing to appeal to the board of adjustment, as an allegation of mere proximity, absent an allegation of special damages distinct from the community, is insufficient to establish standing. Without standing to appeal to the board of adjustment, the question of standing for judicial review was held to be moot.

It is not necessary to show a negative property value impact in order to establish special damages. In *Mangum v. Raleigh Board of Adjustment*,[55] two adjacent owners and an additional neighboring business owner challenged a special use permit issued for an adult entertainment establishment. The court held that a credible allegation of special damages is necessary to qualify as an "aggrieved person." The court found that allegations of parking, stormwater, and crime problems are sufficient to establish "special damages" and, contrary to suggestions in earlier cases, that a plaintiff is not required to also show that property values would be reduced as a result of the special use permit. Other cases have allowed alleged harms based on traffic and noise to be considered without explicit reference to property value impacts.[56]

The potential for special damages may be established by affidavits or testimony. In *Murdock v. Chatham County*,[57] the plaintiffs alleged in their complaint that they owned land adjoining the larger tract at issue in the case and presented evidence about the adverse impacts on their property from the lights, noise, and stormwater runoff from the site should the project proposed be built. The court held this was sufficient to establish the requisite special damages.[58] Expert testimony about the inappropriateness of a proposed use is also adequate to establish the requisite special damages.

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50. *Id.* at 161, 166 S.E.2d at 82–83 (citations omitted). The opinion implies use of the same standing standard for legislative matters. *See also* Lee v. Bd. of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946).

51. Pigford v. Bd. of Adjustment, 49 N.C. App. 181, 270 S.E.2d 535 (1980), *review denied*, 301 N.C. 722, 274 S.E.2d 230 (1981).

52. Sanchez v. Town of Beaufort, ___ N.C. App. ___, 710 S.E.2d 350 (2011) (neighbor directly across the street from property seeking a certificate of appropriateness from historical commission had special damages based on alleged violation of historic guidelines, loss of waterfront views, and depreciated property value); Cook v. Union Cnty. Zoning Bd. of Adjustment, 185 N.C. App. 582, 649 S.E.2d 458 (2007) (evidence in record showed residents of subdivision adjacent to proposed Wal-Mart would suffer special damages to their property that are unique in character and quantity and distinct from those inflicted on the community at large).

53. Casper v. Chatham Cnty., 186 N.C. App. 456, 651 S.E.2d 299 (2007) (neighboring landowners sought to challenge a conditional use permit for a retail use). Other states split on the question of whether proximity in and of itself is sufficient for standing. *See, e.g.*, Anundson v. City of Chi., 44 Ill. 2d 491, 496, 256 N.E.2d 1, 3–4 (1970) (any adjoining owner has standing); Anderson v. Swanson, 534 A.2d 1286, 1288 (Me. 1987) (abutters with some other allegation of injury have standing); Bryniarski v. Montgomery Cnty. Bd. of Appeals, 247 Md. 137, 145, 230 A.2d 289, 294 (1967) (adjoining and nearby property owners have prima facie special damages); Marashlian v. Zoning Bd. of Appeals, 421 Mass. 719, 721, 660 N.E.2d 369, 372 (1996) (abutters required to receive notice of hearing have a rebuttable presumption that they are persons aggrieved); Kalakowski v. John A. Russell Corp., 137 Vt. 219, 222, 401 A.2d 906, 908 (1979) (statute provides standing for those "in the immediate neighborhood").

54. 186 N.C. App. 651, 652 S.E.2d 355 (2007). *See also* Heery v. Town of Highlands Zoning Bd. of Adjustment, 61 N.C. App. 612, 300 S.E.2d 869 (1983) (showing of special damages distinct from those incurred by the rest of the community required for neighbors' standing to appeal granting of special use permit for multifamily housing). Sarda v. City/Cnty. of Durham Bd. of Adjustment, 156 N.C. App. 213, 575 S.E.2d 829 (2003) (allegation that petitioner resides 400 yards away from paintball playing field that received special use permit is insufficient alone to establish standing absent allegation of special damages); Lloyd v. Town of Chapel Hill, 127 N.C. App. 347, 489 S.E.2d 898 (1997).

55. 362 N.C. 640, 669 S.E.2d 279 (2008). *See also* Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment, ___ N.C. App. ___, 689 S.E.2d 576 (2010) (allowing neighbors standing to intervene on similar grounds).

56. *See* Taylor Home v. City of Charlotte, 116 N.C. App. 188, 447 S.E.2d 438 (1994); Kentallen, Inc. v. Town of Hillsborough, 110 N.C. App. 767, 431 S.E.2d 231 (1993) (allegation that plaintiff is owner of adjoining property is insufficient to confer standing without allegation relating to whether and in what respect that land would be adversely affected). *But see* Piney Mountain Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983) (allegation that members live in affected area and will potentially suffer injury sufficient to confer standing).

57. 198 N.C. App. 309, 679 S.E.2d 850 (2009), *review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010). The plaintiffs also submitted affidavits from an appraiser and a real estate agent stating that the project would make the neighboring properties less attractive to potential purchasers. *See also* McMillan v. Town of Tryon, 200 N.C. App. 282, 287–88, 683 S.E.2d 743, 746–47 (2009) (neighbor's testimony at hearing regarding children walking in the street, impacts of increased stormwater, noise, and traffic were sufficient to establish standing to challenge conditional use permit).

58. *See also* Allen v. City of Burlington Bd. of Adjustment, 100 N.C. App. 615, 397 S.E.2d 657 (1990). In this case a Burlington property owner who objected to a community kitchen and a homeless shelter in his neighborhood was held to have established sufficient special damages through his own testimony.

The court applies a de novo review on a motion to dismiss for lack of standing. In this context the court views the allegations as true and in the light most favorable to the non-moving party.[59]

It is not necessary for those seeking judicial review to have formally intervened in the quasi-judicial hearing.[60]

Courts have applied a more general standing test outside of the zoning arena. In *Marriott v. Chatham County*,[61] the county approved several large developments on tracts adjacent to parcels owned by the plaintiffs without requiring an environmental impact statement. The court held that in order to have standing to challenge the decision on requiring an impact statement, the plaintiffs had to show: (1) injury in fact; (2) that the injury is fairly traceable to the challenged action; and (3) that it is likely the injury will be redressed by a favorable decision.

Courts apply similar rules on standing in challenges to permits under the highly analogous Administrative Procedure Act. In *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*,[62] the state appeals court held that the plaintiff had to allege (1) injury in fact to a protected interest that cannot be considered merged in the general public right, (2) causation, and (3) a proper or individualized form of relief. The court found that injury to aesthetic or recreational interests alone cannot confer standing on an environmental plaintiff as this is within the general public right.

The three-part standing tests enumerated in *Marriott* and *Neuse River Foundation* are substantially similar to the one used by federal courts. The federal standard for standing is set forth in the U.S. Supreme Court opinion in *Lujan v. Defenders of Wildlife*.[63] The Court there held that under Article III of the Constitution a plaintiff must show: (1) an actual, concrete, particularized injury in fact; (2) a causal connection between that injury and the defendant's actions; and (3) a likelihood that the injury can be redressed by a favorable decision in the case. Federal courts also consider prudential standing, asking whether the claim is sufficiently individualized to ensure effective judicial review.[64] Also, in federal court standing must be established for each particular claim raised, as standing to raise one claim does not open the door to raise any claim.[65]

The North Carolina statutes do not explicitly address the impact of jurisdictional boundaries on standing. In *Good Neighbors of South Davidson v. Town of Denton*,[66] the state supreme court took special note of the fact that those complaining of improper spot zoning were located outside of the jurisdiction of the offending town and had no political recourse regarding the challenged legislative zoning decisions. In the quasi-judicial context, the fact that affected property is outside of the jurisdiction of the decision-making jurisdiction has no bearing on whether or not the property will suffer special damages.

A plaintiff may, with good cause, be allowed to amend a defective petition for judicial review to add requisite allegations regarding standing. In *Darnell v. Town of Franklin*,[67] the plaintiff had appeared before the town's board of adjustment and town council (which had final decision-making authority for variances under the town's zoning ordinance) to object to a setback variance for an adjoining property owner. Upon issuance of the variance, the plaintiff filed a petition for writ of certiorari seeking judicial review of the variance decision. The petition stated that the plaintiff was an adversely affected property owner but contained no allegations specifying how the plaintiff was aggrieved by the decision. The town moved to dismiss for lack of subject matter jurisdiction. While that motion was under advisement, the plaintiff sought to amend her pleadings to add specific allegations of harm. The court held that while the initial petition was deficient, the plaintiff had clearly established by her participation in the matter before the town boards that she was affected by the action in a manner distinct from the rest of the community. Therefore the trial court should have allowed her to amend the petition under G.S.1A-1, Rule 15(a).

Standing considerations are complicated where there is a challenge of both a rezoning to a conditional use district and a concurrently issued conditional use permit. In *Village Creek Property Owners' Ass'n, Inc. v. Town of Edenton*,[68] the N.C. Court of Appeals noted that

59. Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008); McMillan v. Town of Tryon, 200 N.C. App. 282, 287–88, 683 S.E.2d 743, 746–47 (2009).

60. Cook v. Union Cnty. Zoning Bd. of Adjustment, 185 N.C. App. 582, 591, 649 S.E.2d 458, 466 (2007).

61. 187 N.C. App. 491, 654 S.E.2d 13 (2007), *review denied*, 362 N.C. 472, 666 S.E.2d 122 (2008). The county's subdivision ordinance contained a provision that allowed the planning board to require an environmental impact statement if the development exceeded two acres and the board deemed the statement "necessary for responsible review" due to the nature of the land or peculiarities in the proposed layout of the development. The plaintiffs sought to enjoin development of the property until the county amended its ordinance to provide minimum criteria for when an impact statement would be required and sought a writ of mandamus to compel the county to make these amendments. The court noted that an ordinance allowing an impact statement but providing no minimum criteria for when a statement is required is invalid. Since the ordinance as written is invalid and the court has no authority to order the ordinance amended, there is no likelihood the plaintiff's injury could be redressed by a favorable decision. Therefore the court held that the trial court properly dismissed the action for lack of standing.

62. 155 N.C. App. 110, 574 S.E.2d 48 (2002), *review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). In *County of Wake v. North Carolina Department of Environment & Natural Resources*, 155 N.C. App. 225, 573 S.E.2d 572 (2002), *review denied*, 357 N.C. 62, 579 S.E.2d 386 (2003), the court held that the individual neighbors who initiated the appeal of the permit issuance were aggrieved persons with standing to challenge the permit (they had alleged noise, pollution, landscape changes, and other negative environmental consequences that would interfere with the use and enjoyment of their property), as was the town (due to the impacts on its tax base and planning jurisdiction).

63. 504 U.S. 555, 560–61 (1992).

64. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004).

65. *See, e.g.*, Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 429 (4th Cir. 2007) (standing to challenge lack of time period for decision in sign ordinance does not confer standing to challenge other substantive provisions in sign ordinance).

66. 355 N.C. 254, 559 S.E.2d 768 (2002).

67. 131 N.C. App. 846, 508 S.E.2d 841 (1998).

68. 135 N.C. App. 482, 520 S.E.2d 793 (1999). The court held that the requirement for a specific interest does not include the requirement for

conditional use district rezonings involve two legally distinct decisions—the rezoning decision and the permit decision. While the permit decision is properly challenged in the nature of certiorari, the rezoning decision is properly challenged by a declaratory judgment action. The court ruled that to establish standing, neighbors filing a declaratory judgment action to challenge a rezoning must allege a specific personal and legal interest in the matter and aver that they are directly and adversely affected by the decision.

As for appellate judicial review, only actual parties to litigation may appeal a trial court's decision. In *Duke Power Co. v. Salisbury Board of Adjustment*,[69] the appeals court held that the fact that neighbors were affected by a zoning decision, appeared at the board of adjustment hearing on a variance, and attended the trial court hearing on the matter did not confer upon them a right to appeal the trial court's decision absent their formal intervention in the judicial proceeding.[70]

Associational Standing

It is relatively common for a group, such as a neighborhood association, to seek to initiate or intervene as a party in a judicial challenge to a land use regulatory decision. This scenario presents the question of when the group itself, as distinct from its individual members, can be a party in zoning litigation.[71]

In some situations it is clear that there is no standing for a particular group. An association seeking standing must as a threshold matter establish its legal existence. If the group has been formally incorporated, such as by securing legal status as a nonprofit corporation, it must state that in its complaint.[72] If the group is an unincorporated nonprofit association, it may assert a claim in its name on behalf of its members "if one or more of them have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member or a person referred to as a 'member' by the nonprofit association."[73] If the unincorporated group is not a nonprofit association, it must have recorded a certificate of its activities with the county register of deeds in the county where it operates.[74] Failure to establish the legal existence of the group will result in dismissal of the group as a party.[75]

Also, if none of the individual members of a group have standing, the group does not have standing, as some member of the group must show actual harm in order to be aggrieved.[76]

A variety of zoning cases in North Carolina—some involving legislative zoning decisions and others quasi-judicial decisions—have allowed a group standing if some of its individual members had standing. For example, in *River Birch Associates v. City of Raleigh*,[77] the state's highest court noted that to have standing, the "complaining association or *one* of its members must suffer some immediate or threatened injury."[78] The court stated the general rule for associational standing as follows:

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[79]

However, in a case challenging a rezoning, *Northeast Concerned Citizens v. City of Hickory*,[80] the state court of appeals held that contrary to the general rules on associational standing, since in a zoning context a person must have a specific personal and legal interest

"special damages" as is the case for aggrieved parties seeking review of a quasi-judicial zoning decision by writ of certiorari. *Id.* at 485–86, 520 S.E.2d at 795–96. *See also* McMillan v. Town of Tryon, 200 N.C. App. 228, 683 S.E.2d 747 (2009).

69. 20 N.C. App. 730, 202 S.E.2d 607, *review denied*, 285 N.C. 235 (1974).

70. See, however, *Procter v. City of Raleigh*, 133 N.C. App. 181, 514 S.E.2d 745 (1999), in the discussion of permissive intervention, below.

71. Professor Mandelker notes that while the case law on this point is mixed nationally, the trend is toward granting organizations standing in a representational capacity. DANIEL R. MANDELKER, LAND USE LAW § 8.06 (5th ed. 2003). *See, e.g.*, Tri-Cnty. Concerned Citizens, Inc. v. Bd. of Cnty. Comm'rs, 32 Kan. App. 2d 1168, 95 P.3d 1012 (2004); Douglaston Civic Ass'n v. Galvin, 36 N.Y. 2d 1, 364 N.Y.S.2d 830, 324 N.E.2d 317 (1974).

72. "Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue." G.S. 1A-1, Rule 9(a).

73. G.S. 59B-8(b). *See also* G.S. 1-69.1

74. G.S. 66-68. G.S. 1-69.1(a)(3) requires that the specific location of the recordation of this certificate must be included in the complaint of such an unincorporated association.

75. N. Iredell Neighbors for Rural Life v. Iredell Cnty., 196 N.C. App. 68, 674 S.E.2d 436, *review denied*, 363 N.C. 582, 682 S.E.2d 385 (2009).

76. Concerned Citizens of Downtown Asheville v. Bd. of Adjustment, 94 N.C. App. 364, 380 S.E.2d 130 (1989). *See also* Friends of Lincoln Lake v. Town of Lincoln, 2010 ME 78, 2 A.3d 284 (group has no standing to appeal permit for wind power project where no showing of particularized injury to member of group has been made).

77. 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (emphasis added). *See also* C.C. & J. Enters., Inc. v. City of Asheville, 132 N.C. App. 550, 512 S.E.2d 766, *review dismissed as improvidently granted*, 351 N.C. 97, 521 S.E.2d 117 (1999) (proper to allow an adjoining neighborhood association to intervene, as they had alleged special damages (reduced property values) to qualify as an aggrieved party); Piney Mountain Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983). *See generally* Creek Pointe Homeowners' Ass'n v. Happ, 146 N.C. App. 159, 552 S.E.2d 220 (2001), *review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002).

78. 326 N.C. 100, 130, 388 S.E.2d 538, 555 (emphasis added).

79. *Id.* The N.C. Supreme Court took this standard from *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), and cited with approval *Warth v. Seldin,* 422 U.S. 490 (1975) (while holding no standing for plaintiffs challenging alleged exclusionary zoning of suburb, court noted that standing of one member confers standing on associational group). *See also* Sierra Club v. Morton, 405 U.S. 727 (1972) (if a member of the group suffers harm, the group has associational standing). The standard for associational standing is also discussed, but not decided, in *Wake Cares, Inc. v. Wake County Board of Education*, 190 N.C. App. 1, 9–10, 660 S.E.2d 217, 222–23 (2008), where the court held that the plaintiff association did not attempt to meet any of the standards for associational standing.

80. 143 N.C. App. 272, 545 S.E.2d 768, *review denied*, 253 N.C. 526, 549 S.E.2d 220 (2001). *See also* Landfall Group v. Landfall Club, Inc., 117 N.C. App. 270, 450 S.E.2d 513 (1994).

in the subject matter to have standing, in zoning cases a corporation must either have such an interest itself or *all* of its members/shareholders must have such an interest. Since the record in the case indicated that at most only twelve of the plaintiff nonprofit corporation's 114 members had such an interest, the court held that the plaintiff had no standing. The majority distinguished *River Birch Associates* as setting a general rule on associational standing and applying it to the unfair or deceptive trade practices element of that suit, while contending that zoning cases have a more demanding standing standard.[81] However, the *River Birch Associates* decision involved application of development ordinance requirements (authority to require transfers of required open space to a homeowners' association, effect of preliminary plat approval on dedications and vested rights, dedication of open space as a regulatory taking) and the standing of the association was assumed and not discussed by the court.[82] In contrast, the decision concluded with a holding that the association did not have standing to prosecute the fraud and unfair trade practice claims.[83] The *Northeast Concerned Citizens* concurrence would not have required each member of the association to have individual standing. It suggested using the following factors to determine if an association should have standing:

> (1) the capacity of the organization to assume an adversary position; (2) the size and composition of the organization as reflecting a position fairly representative of the community or interests which it seeks to protect; (3) the adverse effect of the decision sought to be reviewed on the group represented by the organization as within the zone of interests sought to be protected; and (4) whether full participating membership in the representative organization is open to all residents and property owners in the relevant neighborhood.[84]

The N.C. Supreme Court has indicated sympathy with this latter view. In *State Employees Ass'n of North Carolina, Inc. v. North Carolina*,[85] the court of appeals denied associational standing where all members of the group did not have standing. The dissent, largely relying on *River Birch Associates*, would have allowed standing for the association where a member had standing. In a per curiam opinion, the supreme court approved the views set forth in the dissent.[86]

The question of associational standing in appeals of quasi-judicial decisions was clarified in 2009 by the enactment of G.S. 160A-393(d). It provides that neighborhood associations and associations organized to protect and foster the interests of the neighborhood or local area have standing, provided at least one of the members of the association would have individual standing and the association was not created in response to the particular development that is the subject of the appeal.

Intervention

The rules for intervention in a judicial challenge to a quasi-judicial decision are set by G.S. 160A-393(h). The statute provides that Rule 24 of the Rules of Civil Procedure is to be applied, provided the applicant and persons with a property interest in the subject property can intervene as a matter of right and others must demonstrate that they would have had standing to initiate the proceeding.

Rule 24 generally provides that to intervene by right a person must show a statutory right to do so or show: (1) an interest in the property or transaction involved; (2) that disposition of the matter will as a practical matter affect that interest; and (3) that the person's interest is not adequately represented by the existing parties.[87] Rule 24 also provides for permissive intervention. In

81. The *Northeast Concerned Citizens* court concluded in a footnote that the standing requirements laid out in *Taylor v. City of Raleigh* (290 N.C. 608, 227 S.E.2d 576 (1976), discussed in the text above at note 37)—a specific and personal interest in the matter with a direct, adverse effect on the person—set a standing requirement for zoning challenges that is different from and more stringent than more general standards for associational standing in other contexts. *Northeast Concerned Citizens,* 143 N.C. App. at 277 n.1, 545 S.E.2d at 772 n.1.

82. 326 N.C. 100, 128, 388 S.E.2d 538, 554.

83. *Id.* at 129–30, 388 S.E.2d at 555–56.

84. *Northeast Concerned Citizens,* 143 N.C. App. at 280, 545 S.E.2d at 774. The concurring opinion contended that the majority view is contrary to the law on associational standing in other jurisdictions and may have the practical effect of "drastically curtail[ing] North Carolina citizens' ability to challenge zoning changes." *Id.* The quoted proposed standard on associational standing is taken from *Douglaston Civic Ass'n v. Galvin*, 324 N.E.2d 317, 321 (N.Y. 1974).

85. 154 N.C. App. 207, 573 S.E.2d 525 (2002).

86. *State Emps. Ass'n*, 357 N.C. 239, 580 S.E.2d 693 (2003). *See also* N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 357 N.C. 640, 588 S.E.2d 880 (2003) (holding trade association had standing to appeal a determination that new or expanding wood chip mills were excluded from coverage under a general timber products industry permit).

87. Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment, ___ N.C. App. ___, 689 S.E.2d 576 (2010) (allowing intervention by neighbors who alleged impacts from increased traffic, light, and noise would adversely affect the use and enjoyment of their property and adjacent protected waterways). *See generally* Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 648 S.E.2d 830 (2007); High Rock Lake Partners, LLC v. N.C. Dep't of Transp., ___ N.C. App. ___, 693 S.E.2d 361 (2010) (owner of property must be allowed to intervene as real party in interest in challenge to conditions imposed on a driveway permit application made by previous owner who subsequently assigned all rights to the landowner).

In a case decided prior to the adoption of G.S. 160A-393 in 2009, the plaintiff filed suit challenging denial of a conditional use permit for a single-family development. Neighbors sought to intervene in support of the board's denial, alleging that significant traffic increases as a result of a conditional use permit issuance would adversely affect their property values. The neighbors also alleged that the applicant and board intended to settle the suit by issuing the permit and sought a stay to prevent such action pending the outcome of the appeal. The trial court denied the motion to intervene on the basis that the neighbors did not have standing under the "special damages" test, discussed in the text above beginning at note 49 (and on the same day entered a consent judgment reversing the permit denial and remanding the case for further board proceedings). The court held that appellate review was not mooted by the settlement between the plaintiff and the board and that Rule 24 (rather than the special damages or aggrieved person standard) governs intervention in all civil actions. Councill v. Town of Boone Bd. of

Procter v. City of Raleigh Board of Adjustment,[88] neighbors had participated in a board of adjustment case and the board upheld the staff interpretation of the ordinance favored by the neighbors. Given the city's defense of the board decision in the trial court, the neighbors did not seek to intervene. But when the city decided not to appeal an adverse trial court ruling, the neighbors sought to intervene to pursue appellate court review. The trial court rejected the motion to intervene as not timely. The court of appeals reversed, concluding that the extraordinary and unusual circumstances of the case made intervention timely under Rule 24(a)(2). The court found that the neighbors had an interest in the transaction, an alleged practical impairment of that interest, and inadequate representation by the existing parties (and that the city's appeals had been adequate representation prior to the city's decision not to appeal the trial court's adverse ruling).

Statutes of Limitation

In the absence of a statute setting a time limit for challenging the validity of a legislative land use regulatory decision, a provision not included in the original zoning enabling act, courts apply the common law doctrine of laches.[89] This doctrine holds that if a person negligently fails to bring a claim within a reasonable amount of time, the claim will not be allowed if the lapse of time and other circumstances would serve to prejudice the rights of the party against whom the claim is made.

Three decisions in the late 1970s applied this doctrine to judicial challenges of legislative zoning decisions made from two to six years earlier. Two of these cases resulted in the challenges being dismissed, but the third allowed the challenge of a six-year-old rezoning.[90]

To resolve the uncertainty generated by these cases, the General Assembly established statutory timelines for bringing these challenges and has made several modification to those periods. In 1981 the legislature first added an explicit nine-month statute of limitations for challenges of legislative zoning decisions to the zoning enabling statutes. This time period was shortened to two months in 1996.[91] In 2011 the time period to challenge legislative decisions was extended to one year in many instances and as much as three years in others.[92] The statutes of limitation for legislative zoning decisions are codified in the civil procedure portions of the statutes. G.S. 1-54(10) sets the general rule of a one-year statute of limitations to contest the validity of a zoning or unified development ordinance other than some rezonings. The action accrues when the party bringing the action first has standing to do so, provided any challenge to the adoption process must be brought within three years of the challenged adoption. G.S. 1-54.1 sets a two-month statute of limitations for legislative zoning decisions that involve adopting or amending a zoning map or approving a request for a rezoning to a special or conditional use district or a conditional district, with such action accruing upon adoption of the ordinance or amendment. The zoning statutes restate these statutes of limitation and provide that they do not prohibit a party in a zoning enforcement action and persons appealing a notice of violation from raising the invalidity of the ordinance as a defense, provided that any challenge to the adoption process must be brought within three years of the challenged adoption.[93]

In a series of cases the courts have applied this statute to dismiss challenges to the validity of legislative zoning decisions.[94] The municipal provision was first applied in *Sherrill v. Town of Wrightsville Beach*,[95] in which the court held that G.S. 160A-364.1 prohibited a challenge to the validity of a zoning amendment brought more than

Adjustment, 146 N.C. App. 103, 551 S.E.2d 907 (2001). In *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 489 S.E.2d 898 (1997), the court applied the special damages test rather than Rule 24 to determine whether a party could intervene.

88. 133 N.C. App. 181, 514 S.E.2d 745 (1999).

89. Also see the discussion of laches and estoppel in the context of enforcement actions in Chapter 21.

90. In *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976), the court ruled that the challenge was barred by laches because it was filed more than two years after the rezoning, during which time both the city and the landowner had made substantial expenditures in reliance on the rezoning. Similarly, in *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978), a suit initiated in 1975 to challenge the 1969 rezoning of an area from single-family residential to a district that allowed multifamily housing was dismissed. The defendants had spent more than $600,000 and had otherwise materially changed their position in reliance on the rezoning. Therefore the court of appeals held that the suit was barred by laches. By contrast, in *Stutts v. Swaim*, 30 N.C. App. 611, 228 S.E.2d 750, *review denied*, 291 N.C. 178, 229 S.E.2d 692 (1976), a suit initiated in June 1974 to challenge, as illegal spot zoning, the November 1968 rezoning of a 4-acre tract in the town of Randleman's extraterritorial area from single-family residential to a mobile home district was allowed. The court of appeals held that the challenge was not barred by laches because delay in bringing the action was alone insufficient to establish laches. Rather, there had to be an affirmative showing that the delay worked to the disadvantage, the injury, or the prejudice of the defendant. For a discussion of laches in enforcement cases, see Chapter 21.

91. 1996 N.C. Sess. Laws ch. 746. In *Reunion Land Co. v. Village of Marvin*, 129 N.C. App. 249, 497 S.E.2d 446 (1998), the court held that when the statute of limitations changes, plaintiffs must file their action within a reasonable time, but in no event beyond the new statute of limitations (here, within two months of the effective date of this legislative change, October 1, 1996).

92. S.L. 2011-384.

93. G.S. 153A-348(c); 160A-364.1(c).

94. The burden is on the defendant to plead an affirmative defense, including a statute of limitations. G.S. 1A-1, Rule 8(c). If the statute of limitations is raised as a defense, the long-standing and relatively unique rule in North Carolina is that the burden is then on the plaintiff to show that the claim is not time-barred. Lea Co. v. N.C. Bd. of Transp., 308 N.C. 603, 629, 304 S.E.2d 164, 18 (1983); Hooper v. Carr Lumber Co., 215 N.C. 308, 311, 1 S.E.2d 818, 820 (1939); Moore v. Westbrook, 156 N.C. 482, 492, 72 S.E. 842, 847 (1911); Amward Homes, Inc. v. Town of Cary, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (N.C. 2011); Ga.-Pac. Corp. v. Bondurant, 81 N.C. App. 362, 363–64, 344 S.E.2d 302, 304 (1986).

95. 81 N.C. App. 369, 344 S.E.2d 357, *review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986).

nine months after the rezoning (in this instance, a text amendment deleting duplexes as a permitted use). Similarly, the court held in *In re CAMA Minor Development Permit*,[96] a challenge to a zoning amendment by the town of Bath preventing additional marinas in town waters, that allegations of procedural irregularities regarding public notice and hearings on rezonings had to be brought within nine months of the adoption of the amendment. In *Thompson v. Town of Warsaw*,[97] the court of appeals applied this statute of limitations to bar a challenge to a "variance" issued by the town council that the plaintiffs contended was a de facto rezoning. In *Laurel Valley Watch, Inc. v. Mountain Enterprises of Wolf Ridge, LLC*,[98] the appeals court again applied this statute of limitations to litigation raising the question of whether the zoning map accurately reflected the actual zoning amendment made by the county commissioners. In *Schwarz Properties, LLC v. Town of Franklinville*,[99] the court applied this statute of limitations once again to prevent a challenge to zoning restrictions limiting the age of manufactured housing proposed to be located in the town. In *Templeton v. Town of Boone*,[100] the court applied this statute to a challenge of the procedures followed in adopting steep slope and viewshed protection ordinances incorporated into the town's unified development ordinance.

The county limitations provision was applied in *Baucom's Nursery Co. v. Mecklenburg County*.[101] The court there ruled that an action brought in 1987 to challenge a zoning amendment adopted in 1982 was barred by the nine-month statute of limitations established in G.S. 153A-348.

The municipal statute was applied to extraterritorial zoning in *In re Raynor*,[102] which involved the original adoption of zoning by the town of Garner for part of its extraterritorial jurisdiction in 1982 and a subsequent refusal to rezone the property at issue to a lower-intensity residential district in 1987. The court ruled that the statute of limitations in G.S. 160A-364.1 precluded a challenge to the zoning five years after the action was taken.

For the most part, the two-month statute of limitations does not apply to land use ordinances that are not zoning ordinances. In *Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte*,[103] the court refused to apply the two-month statute of limitations to a challenge of a subdivision ordinance. The court distinguished zoning from subdivision ordinances and applied the more general three-year statute of limitations in G.S. 1-52 to the subdivision ordinance.

An exemption apparently exists for challenges to the adoption of an extraterritorial boundary ordinance under G.S. 160A-360. Although such an ordinance is within Article 19 of Chapter 160A of the General Statutes, it is not a zoning ordinance per se, although a zoning map amendment to zone the extraterritorial area is often considered concurrently with the extraterritorial boundary map. In *Pinehurst Area Realty, Inc. v. Village of Pinehurst*,[104] the court held that a challenge brought two years after the fact based on alleged procedural irregularities in the adoption of an extraterritorial boundary extension and application of zoning to the area was barred by the then-applicable nine-month statute of limitations. In similar fashion, the court in *Potter v. City of Hamlet*[105] applied the two-month statute of limitations to dismiss a challenge brought four years after adoption of an extraterritorial boundary ordinance.

There are a variety of other statutes of limitation that apply to judicial review of other land use regulatory decisions.

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96. 82 N.C. App. 32, 345 S.E.2d 699 (1986).

97. 120 N.C. App. 471, 462 S.E.2d 691 (1995).

98. 192 N.C. App. 391, 665 S.E.2d 561 (2008). In August 2005 the county commissioners met and unanimously approved a rezoning to an industrial zoning district to accommodate a proposed private airport. However, the minutes of the meeting noted that the property had been rezoned to a "residential-resort" district. The plaintiff filed this action in March 2006. The court held that since the evidence clearly supported a conclusion that the property had actually been rezoned to the industrial district in August 2005 and that there was a scrivener's error in the minutes, the two-month statute of limitations to challenge the rezoning ran from August 2005. The court found no evidence that the plaintiff had made any detrimental reliance on the scrivener's error.

99. ___ N.C. App. ___, 693 S.E.2d 271 (2010). The town on January 8, 2008, adopted a zoning provision precluding issuance of permits for location of manufactured homes more than ten years old. In February 2009 the state supreme court issued its decision in *Five C's, Inc. v. County of Pasquotank*, 195 N.C. App. 410, 672 S.E.2d 737 (2009), which invalidated a similar ten-year limitation on manufactured housing. This suit was filed in April 2009. The court held that it was time-barred, however, as it should have been filed no later than March 8, 2008.

100. ___ N.C. App. ___, 701 S.E.2d 709 (2010).

101. 89 N.C. App. 542, 366 S.E.2d 558, *review denied*, 322 N.C. 834, 371 S.E.2d 274 (1988). The court also ruled that to bring an action for actual damages, a plaintiff had to show that the county's government immunity had been waived by the purchase of liability insurance (which was not shown here) and, further, that punitive damages were allowed only if authorized by statute, and no such statute existed in respect to counties in North Carolina. *See also* White v. Union Cnty., 93 N.C. App. 148, 377 S.E.2d 93 (1989) (challenge to mobile home provision in zoning ordinance must be brought within nine months of adoption of regulation).

102. 94 N.C. App. 91, 379 S.E.2d 880, *review denied*, 325 N.C. 707, 388 S.E.2d 448 (1989).

103. ___ N.C. App. ___, 688 S.E.2d 538, *review denied*, 364 N.C. 128, 695 S.E.2d 757 (2010). The court in *Amward Homes, Inc. v. Town of Cary*, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted,* 709 S.E.2d 597 (N.C. 2011), likewise refused to apply the two-month statute of limitations to a school impact fee ordinance, holding that it was adopted under the subdivision ordinance authority (and included in the town's unified development ordinance). The federal court in *FC Summers Walk, LLC v. Town of Davidson*, No. 3:09-CV-266-GCM, 2010 WL 4366287 (W.D.N.C. Oct. 28, 2010), also held that an adequate public facilities ordinance incorporated into a unified development ordinance may be a "development regulation ordinance" as distinct from a "zoning ordinance" subject to the two-month statute of limitations.

104. 100 N.C. App. 77, 394 S.E.2d 251 (1990), *review denied*, 328 N.C. 92, 402 S.E.2d 417 (1991).

105. 141 N.C. App. 714, 541 S.E.2d 233, *review denied*, 353 N.C. 379, 547 S.E.2d 814 (2001). The plaintiff purchased a nonconforming small grocery store in the city's extraterritorial area. After failing to get an ABC permit for off-premise beer sales (denied as an unlawful expansion of a nonconformity) and failing to secure a rezoning, the plaintiff challenged the adoption of extraterritorial jurisdiction some four years earlier on the grounds that the boundary map had not been filed with the county register of deeds. While noting that the city had substantially complied with the notice requirements, the court held that G.S. 160A-364.1 barred the action.

Table 29.2 **Summary of Statutes of Limitation for Land Use Actions**

Time Period	Statute	Coverage
Ten years	G.S. 1-56	Actions for relief not otherwise limited by statute
Six years	G.S. 1-50(a)(3)	Actions to enforce private restrictive covenants
Three years	G.S. 1-52	Liability created by statute; damages related to construction of improvements; personal injury suits
Two years	G.S. 40A-51	Inverse condemnation claims
One year	G.S. 1-54(10)	Validity of ordinance
Two months	G.S. 1-54.1; 153A-348;	Challenges to validity of rezoning
Thirty days	G.S 153A-340, -345(e); 160A-381, -388(e)	Challenges to quasi-judicial zoning decisions (variances, special and conditional use permits, interpretations)

The time period to initiate a judicial challenge of a quasi-judicial zoning decision is set by G.S. 153A- 345(e2) and 160A-388(e2).[106] These statutes provide that appeals to superior court must be made within thirty days of the later of (1) the receipt of a written copy of the decision[107] by aggrieved parties or (2) the filing of the decision in an office designated by the ordinance. If the quasi-judicial decision is mailed but a copy is not filed with the clerk to the board, the period does not begin to run.[108]

In some instances the enabling statutes do not specify a particular time for appeals. This includes the time for making an appeal of an administrative decision to the board of adjustment[109] and the time for filing for judicial review of decisions made under subdivision ordinances, historic district regulations, and other non-zoning land use ordinances. In these instances the appeal must be filed within a reasonable time.[110]

Also, the state inverse condemnation statute, G.S. 40A-51, has a two-year period within which to file a claim.[111] G.S. 1-52 further provides for a general three-year statute of limitations on claims based on liabilities created by statute (unless a particular statute sets a different period) and claims for damages related to the construction or repair of improvements to real property.[112] These different periods are summarized in Table 29.2.

If an owner alleges that the application of a zoning provision has violated his or her constitutional rights,[113] he or she generally may bring suit within three years on that issue alone. In several cases, however, the state court of appeals has concluded that the much shorter nine-month (now two-month) statute of limitations in G.S.160A-364.1 applies to those claims as well.[114] By contrast, the Fourth Circuit has applied the three-year statute of limitations of

106. These statutes apply to quasi-judicial decisions made by a board of adjustment. They would likely also apply to quasi-judicial decisions made by any other board that has been delegated a function of the board of adjustment. G.S. 160A-381(c) and 153A-340(c1) expressly provide that judicial review of special and conditional use permit decisions by a governing board or planning board are also governed by these statutes.

107. The statutes specifically state that it is the "decision of the board" that must be filed and served on the parties. Since the decision must include sufficient findings of fact and conclusions (see Chapter 15 for a further discussion of these requirements), a letter simply noting the outcome of the vote is inadequate. If the formal written decision is not adopted until the minutes of the board meeting are approved, it is likely that this time period does not begin to run until a copy of the minutes is mailed to the parties.

108. Ad/Mor v. Town of S. Pines, 88 N.C. App. 400, 363 S.E.2d 220 (1988).

109. See Chapter 15 for a discussion of the timeliness of appeals to the board of adjustment.

110. White Oak Props., Inc. v. Town of Carrboro, 313 N.C. 306, 327 S.E.2d 882 (1985); Allen v. City of Burlington Bd. of Adjustment, 100 N.C. App. 615, 397 S.E.2d 657 (1990); *In re* Greene, 29 N.C. App. 749, 225 S.E.2d 647, *review denied*, 290 N.C. 661, 228 S.E.2d 451 (1976).

The rule requiring appeals to be filed within a reasonable time was applied to an appeal of a subdivision variance denial in *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 568 S.E.2d 887, 889–90 (2002), and to historic district regulations in *Meares v. Town of Beaufort,* 193 N.C. App. 96, 104, 667 S.E.2d 239, 244 (2008).

111. See, for example, *Robertson v. City of High Point*, 129 N.C. App. 88, 497 S.E.2d 300 (1998), where the court ruled that an inverse condemnation suit alleging damages from an adjacent landfill was barred by this two-year statute of limitations when the damage commenced in October 1993 and the suit was not filed until December 1996 (the court also held that the general three-year statute of limitations also barred claims based on nuisance, negligence, and trespass).

112. In *Dawson v. North Carolina Department of Environment & Natural Resources*, ___N.C. App. ___, 694 S.E.2d 427 (2010), the court refused to apply the three-year statute of limitations regarding negligent construction of improvements to a claim regarding a faulty inspection of land for suitability for septic tanks, as the inspection related to the land rather than any improvement that had actually been constructed.

113. There is no federal statute of limitations for actions alleging a violation of the United States Constitution. In these cases the federal courts apply the relevant state personal injury statute of limitations. Wilson v. Garcia, 471 U.S. 261 (1985); Bireline v. Segondollar, 567 F.2d 260 (4th Cir. 1977).

114. Naegele Outdoor Adver., Inc. v. City of Winston-Salem, 113 N.C. App. 758, 762, 440 S.E.2d 842, 844 (1994), *aff'd*, 340 N.C. 349, 457 S.E.2d 874 (1995); Pinehurst Area Realty, Inc. v. Vill. of Pinehurst 100 N.C. App. 77, 81, 394 S.E.2d 251, 253–54 (1990), *review denied*, 328 N.C. 92, 402 S.E.2d 417 (1991); Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, *review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986). Note, however, that in *Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421, *review denied*, 332 N.C. 147, 419 S.E.2d 571 (1992), the court held that the county had waived the nine-month statute of limitations because it was not raised in its answer nor had the county given notice of it to the plaintiff when it was raised in response to a summary judgment motion.

G.S.1-52(5) for constitutional challenges[115] and has held that there is no statute of limitations for facial challenges.[116] In *Capital Outdoor Advertising, Inc. v. City of Raleigh,*[117] the state supreme court reviewed these conflicting results on applied challenges and observed that the state court of appeals decisions seemed to be "the better reasoned decisions" given the specificity of the statute of limitations explicitly related to legislative zoning decisions. However, since neither the nine-month nor the three-year provision had been met in that case, the court declined to resolve the matter.[118] Thus where the same governmental action may be characterized in several ways, it is unclear which of these statutes will control.

A critical issue with statutes of limitation is when they begin to run. This issue often arises in the context of whether the period begins to run when the contested ordinance is adopted or when it is enforced. In *National Advertising Co. v. City of Raleigh,*[119] a challenge to a five-and-a-half-year amortization provision in Raleigh's zoning ordinance, the Fourth Circuit held that the time limit for bringing the lawsuit (three years, under G.S. 1-52(2), discussed in the text above) commenced with the adoption of the ordinance requirement, rejecting the plaintiff company's contentions that the amortization requirement was a continuing constitutional violation or that the statute of limitations period started to run only at the expiration of the amortization period.[120] State courts have reached the same conclusion in sign amortization cases.[121] However, in *Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte,*[122] a case challenging the validity of a subdivision ordinance, the court held that the limitations period began to run when the plaintiffs learned of the plat approval decision that gave rise to the challenge. In *Amward Homes, Inc. v. Town of Cary,*[123] the court examined the limitations issue in the context of a challenge to the town's authority to impose and collect school impact fees. The court held that the three-year statute of limitations for personal injuries (here, the payment of fees assessed without adequate statutory authority was labeled as such an injury) applied to claims brought under Section 1983 of U.S. Code Title 42 for alleged U.S. Constitutional violations.[124] However, the court held that this period did not begin to run until the fee was paid (rather than when the ordinance was adopted) and that each fee payment acceptance constituted a continuing wrong by the town, so the fee recovery could date back three-years from the filing of the Section 1983 claim.[125] The court also concluded that claims for violation of the state constitution had no adequate state remedy or shorter statutory period of limitation, so the ten-year statute of limitations of G.S. 1-56 was applicable.

Exhaustion of Administrative Remedies

A person must seek any available administrative appeal of a zoning decision as a prerequisite to judicial review.[126] Failure to seek quasi-judicial review of an administrative decision (such as a permit denial or determination regarding nonconformity) precludes judicial

115. Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1162 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). See also *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002), applying the three-year statute of limitations in G.S. 1-52(16) to an environmental justice claim regarding siting of a Wake County landfill.

116. Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158, 1162, 1168 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). *See also* Frye v. City of Kannapolis, 109 F. Supp. 2d 436 (M.D.N.C. 1999) (no statute of limitation for facial First Amendment challenge to adult establishment siting regulations).

117. 337 N.C. 150, 446 S.E.2d 289 (1994).

118. *Id.* at 162, 446 S.E.2d at 296–97.

119. 947 F.2d 1158, *cert. denied*, 504 U.S. 931 (1992). See Chapter 20 for a discussion of amortization.

120. G.S. 1-52(2) has also been held to bar a taking claim based on a septic tank ban to protect water quality. Ocean Acres Ltd. P'ship v. Dare Cnty. Bd. of Health, 707 F.2d 103 (4th Cir. 1983). However, this statute of limitations has been held not to bar an inverse-condemnation action based on continuing overflights of property near a municipal airport. Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970).

121. *See, e.g.*, Capital Outdoor Adver. Co. v. City of Raleigh, 337 N.C. 150, 163–64, 446 S.E.2d 289, 297 (1994).

122. ____ N.C. App. ____, 688 S.E.2d 538, *review denied*, 364 N.C. 128, 695 S.E.2d 757 (2010). The challenged ordinance allowed preliminary plat approval to be made without a hearing and notice to the neighbors. The neighbors contended that adoption of an ordinance without these violated their due process rights. Although the plaintiffs prevailed on the statute of limitations issue, the court held they had no property rights that had been violated.

123. ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (2011).

124. In *South Shell Island Investment v. Town of Wrightsville Beach*, 703 F. Supp. 1192, 1195 (E.D.N.C. 1988), the court also applied the three-year statute of limitations to claims alleging improper impact and tap fees.

125. On the continuing wrong doctrine generally, see *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 178–81, 581 S.E.2d 415, 423–24 (2003), *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina,* 345 N.C. 683, 694–95, 483 S.E.2d 422, 429–30 (1997).

126. Laurel Valley Watch, Inc. v. Mountain Enters. of Wolf Ridge, LLC, 192 N.C. App. 391, 665 S.E.2d 561 (2008) (court was without subject matter jurisdiction to hear complaint against developers for a zoning violation as plaintiff failed to seek zoning administrator's ruling on zoning compliance and then appeal that determination to designated board prior to initiating judicial review); Northfield Dev. Co., Inc. v. City of Burlington, 165 N.C. App. 885, 599 S.E.2d 921, *review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004) (where plaintiff's application for a special use permit was rejected due to an incomplete application, superior court has no subject matter jurisdiction to consider action for damages or for mandamus to compel permit issuance); Town of Garner v. Weston, 263 N.C. 487, 139 S.E.2d 642 (1965); Potter v. City of Hamlet, 141 N.C. App. 714, 541 S.E.2d 233, *review denied*, 353 N.C. 379, 547 S.E.2d 814 (2001) (failure to seek judicial review of board of adjustment finding regarding expansion of nonconformity precludes subsequent collateral attack of that determination); Midgette v. Pate, 94 N.C. App. 498, 380 S.E.2d 572 (1989) (neighbor challenging lack of enforcement of zoning requirement must first secure ruling from administrator and appeal that to the board of adjustment before seeking judicial intervention). *See also* Sunkler v. Town of Nags Head, No. 2:01-CV-22-H(2), 202 WL 32395571 (E.D.N.C. May 17, 2002), *aff'd*, 50 F. App'x 116 (4th Cir. 2002) (failure to appeal zoning enforcement decision to board of adjustment precludes suit alleging negligence of town officials). *See generally*, Note, *Exhaustion of Remedies in Zoning Cases*, 1964 Wash. U. L.Q. 368; Donald C. Scriven, Comment, *Exhausting Administrative and Legislative Remedies in Zoning Cases*, 48 Tul. L. Rev. 665 (1974).

review of that decision.[127] The local government must have made a final decision and all administrative appeals must have been exhausted prior to judicial review. Interlocutory appeals are not allowed.[128]

A person who fails to seek judicial review of a board of adjustment's decision cannot collaterally attack the ruling in a subsequent zoning enforcement action.[129]

There are several situations when an administrative appeal is not required. These are situations where there is no jurisdiction to grant the relief sought at the administrative level. If the constitutionality of a regulation is challenged, administrative remedies are inadequate, as the administrative board has no jurisdiction to grant the relief sought and therefore a futile administrative appeal is not required.[130] If the defendant can establish that the property involved is in fact outside of the geographic jurisdiction of the government purporting to regulate it, there is no jurisdiction for the board of adjustment, and thus no appeal to it is necessary.[131] If no provision for an administrative appeal is made by a particular ordinance, such an appeal is not available and application for it need not be made.[132] Finally, if the jurisdiction refuses to issue a decision that can be appealed to the board of adjustment, judicial review is appropriate.[133]

Granting the approval sought renders judicial review of claims arising under that action moot. Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 286, 291, 517 S.E.2d 401, 404 (1999).

127. State v. Roberson, 198 N.C. 70, 150 S.E. 674 (1929); Ward v. New Hanover Cnty., 175 N.C. App. 671, 625 S.E.2d 598 (2006) (interpretation of terms of permit must be appealed to board of adjustment as prerequisite to judicial review); Grandfather Vill. v. Worsley, 111 N.C. App. 686, 689, 433 S.E.2d 13, 15, *review denied*, 335 N.C. 237, 439 S.E.2d 146 (1993) (failure to appeal notice of violation and civil penalty assessment to board of adjustment waives any right to raise in superior court any defenses to the assessment); Appalachian Outdoor Adver. Co. v. Town of Boone, 103 N.C. App. 504, 406 S.E.2d 297 (1991); Wil-Hol Corp. v. Marshall, 71 N.C. App. 611, 322 S.E.2d 655 (1984); Quadrant Corp. v. City of Kinston, 22 N.C. App. 31, 205 S.E.2d 324 (1974). Also see the discussion of enforcement actions in Chapter 21.

A number of cases involving appeals under the Administrative Procedure Act (APA) have held that a failure to exhaust administrative appeals deprives the courts of subject matter jurisdiction and that judicial appeals are properly dismissed under Rule 12(b)(1). Citizens for Responsible Roadways v. N.C. Dep't of Transp., 145 N.C. App. 497, 550 S.E.2d 253 (2001), *review denied*, 355 N.C. 210, 559 S.E.2d 798 (2002) (failure to seek APA review of finding of no significant impact that obviates need for environmental impact statement bars judicial review); Presnell v. Pell, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979); Bryant v. Hogarth, 127 N.C. App. 79, 83, 488 S.E.2d 269, 271, *review denied*, 347 N.C. 396, 494 S.E.2d 406 (1997); Flowers v. Blackbeard Sailing Club, Ltd., 115 N.C. App. 349, 445 S.E.2d 614 (1995); Leeuwenburg v. Waterway Inv. Ltd. P'ship, 115 N.C. App. 541, 545, 445 S.E.2d 614, 617 (1994); N. Buncombe Ass'n of Concerned Citizens, Inc. v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462 (1990); Porter v. N.C. Dep't of Ins., 40 N.C. App. 376, 253 S.E.2d 44, *review denied*, 297 N.C. 455, 256 S.E.2d 808 (1979). *See also* Barris v. Town of Long Beach, ___ N.C. App. ___, 704 S.E.2d 285 (2010) (trial court has no jurisdiction to hear dispute regarding town improvements within non-exclusive street right-of-way since Coastal Area Management Act permit application was made (and not yet decided or appealed) and administrative appeal under that Act is exclusive remedy).

128. When multiple claims are raised, however, if the trial court enters a final judgment as to a claim and certifies that there is no just reason for delay, that judgment is subject to judicial review. Martin Marietta Techs., Inc. v. Brunswick Cnty., 348 N.C. 698, 500 S.E.2d 665 (1998), *citing* DKH Corp. v. Rankin-Patterson Oil Co., Inc., 348 N.C. 583, 500 S.E.2d 666 (1998).

129. Town of Pinebluff v. Marts, 195 N.C. App. 659, 673 S.E.2d 740 (2009); New Hanover Cnty. v. Pleasant, 59 N.C. App. 644, 297 S.E.2d 760 (1982); City of Elizabeth City v. LFM Enters., Inc., 48 N.C. App. 408, 269 S.E.2d 260 (1980); City of Hickory v. Catawba Valley Mach. Co., 39 N.C. App. 236, 249 S.E.2d 851 (1978). To the extent multiple issues are presented in a subsequent action, collateral estoppel only acts to bar relitigation of those issues that were actually before the board or court previously and were both critical and necessary to the decision. *See, e.g.*, United States v. Town of Garner, 720 F. Supp. 2d 721 (E.D.N.C. 2010) (in case alleging failure to make reasonable accommodation for a group home, court found that collateral estoppel applies only to the parties in the prior matter and only to the issues actually addressed by the board of adjustment).

130. City of Wilmington v. Hill, 189 N.C. App. 173, 657 S.E.2d 670 (2008) (defendant not required to appeal civil penalty to board of adjustment prior to bringing action challenging the constitutionality of the ordinance provision allegedly violated); Meads v. N.C. Dep't of Agric., 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 217, 224, 517 S.E.2d 406, 412 (1999). One may not, however, voluntarily proceed under a statute or ordinance, accept its benefits, and then challenge its constitutionality to avoid its burdens. See the discussion in Chapter 21 regarding estoppel and enforcement.

131. Guilford Cnty. Planning & Dev. Dep't v. Simmons, 102 N.C. App. 325, 401 S.E.2d 659, *review denied*, 329 N.C. 496, 407 S.E.2d 533 (1991). The defendant was denied a permit to construct two chicken houses and subsequently denied a variance for the same, and the variance decision was not appealed. After the defendant began construction the county commenced an enforcement action. The court held that an allegation that the property was not in the county's jurisdiction could be raised as a defense to the enforcement action; however, if the property were found to be in the county, the defendant could not collaterally attack the unappealed board of adjustment decision. In a subsequent proceeding after remand, the court upheld the trial court's determination that the property was not in fact within the county, thus depriving the board of adjustment and the court of subject matter jurisdiction. *See* 115 N.C. App. 87, 443 S.E.2d 765 (1994).

132. Ornoff v. City of Durham, 221 N.C. 457, 20 S.E.2d 380 (1942); State v. Roberson, 198 N.C. 70, 150 S.E. 674 (1929). In *Town of Kenansville v. Summerlin*, 70 N.C. App. 601, 320 S.E.2d 428 (1984), a case involving a permit decision, the court ruled that it was inappropriate to dismiss the defendant's appeal for having failed to make the usually requisite administrative appeal, because the town had not appointed a board of adjustment or designated a body to serve as such. However, because the defendant had produced no evidence to support issuance of the permit and had not applied for a variance, the court held that it was proper to find the defendant in violation of the zoning ordinance. Occasionally there is simply a lack of clarity in the ordinance as to whether appeals are or are not allowed or required. See, for example, *FC Summers Walk, LLC v. Town of Davidson*, No. 3:09-CV-266-GCM, 2010 WL 4366287 (W.D.N.C. Oct. 28, 2010), where the town staff made several determinations about the application of an adequate public facility requirement to different aspects of the plaintiff's development, some of which were appealed to the town council and others were not.

133. Meares v. Town of Beaufort, 193 N.C. App. 49, 62, 667 S.E.2d 244, 253 (2008).

Stays

The zoning statutes specifically provide for stays of enforcement actions pending administrative appeals. G.S. 160A-388(b) and 153A-345(b) provide that an appeal *to* the board of adjustment stays all proceedings in furtherance of the action appealed from (with exceptions provided if the zoning officer certifies that a stay would cause imminent peril to life or property or that the violation charged is transitory in nature and a stay would seriously interfere with enforcement; in these instances, there is no stay unless the board or a court issues a restraining order).

The zoning statute, however, is silent regarding any stays during judicial review. Therefore, once judicial review is sought, there is no automatic stay. A party desiring to preserve the status quo during the pendency of litigation must seek a judicial order to stay action during this period.[134]

If appellate judicial review is sought, there is an automatic stay of the trial court's order, but only until the expiration of time for giving notice of appeal.[135] Voluntary compliance with the trial court's order is permissible even in this time period unless one of the parties secures an injunction to prohibit action. In *Estates Inc. v. Town of Chapel Hill*,[136] the denial of a special use permit was appealed and the trial court subsequently ordered the permit issued. Neighbors who had intervened appealed to the court of appeals, but the town did not join the appeal and issued the permit while the matter was pending before the court of appeals. The court ruled that while the town was not compelled to issue the permit during the period of the automatic stay, it could voluntarily do so absent the intervenors' securing an injunction to prohibit it from doing so. Once the permit was issued, the intervenors' appeal was moot.

Interlocutory Appeals

For appellate review to be in order, the trial court must certify the case for appeal[137] or have entered an order that would both deprive the appellant of a substantial right and result in that right being lost absent appellate judicial review before final disposition of the case.[138]

Several cases have applied this rule in a land development regulation context. In *Hyatt v. Town of Lake Lure*,[139] the plaintiff sued the state and town regarding the town's lake structure regulations. The trial court granted summary judgment in favor of the town but did not rule on the claims against the state. The court noted that at common law there was no appeal of right from a decision of a trial court, and thus an appellant must strictly comply with the statutory provisions setting forth an avenue of appeal. Here a grant of partial summary judgment did not completely dispose of the case, so the court held it to be an interlocutory order that is not subject to appeal. In *Bessemer City Express, Inc. v. City of Kings Mountain*,[140] the city adopted a zoning amendment restricting the location, design, and use of video gaming machines, requiring a conditional use permit for them and amortizing nonconforming operations after a six-month grace period. The plaintiff operators of video game arcades filed a declaratory judgment action contesting the validity of the ordinance and sought and were denied a preliminary injunction to enjoin enforcement. The court held that an appeal of the denial of a preliminary injunction did not affect a substantial right (at the time of appeal the ordinance requiring removal had not taken effect) and in any event their overall business could continue in operation pending resolution of the case on the merits. Similarly, in *City of Fayetteville v. E & J Enterprises*,[141] the court held that the appeal of the denial of a preliminary injunction to prevent city enforcement of a regulation that prohibited topless dancing at a rebuilt nightclub (the original nonconforming topless club had been destroyed in a fire) should be dismissed as interlocutory. The business could operate (and offer non-topless dancing) during the pendency of the case, so the court held that the owner's substantial rights were not affected in a way that would escape review before final judgment in the case. In *Jennewein v. City Council of Wilmington*,[142] the court held that it was premature to seek appellate review of a trial court's order remanding a special use permit decision for a de novo administrative hearing.

134. On appellate review of a trial court's refusal to issue a stay, the standard of review is abuse of discretion. Meares v. Town of Beaufort, 193 N.C. App. 49, 63, 667 S.E.2d 244, 254 (2008) (affirming refusal to grant stay).

135. Rule 62 of the N.C. Rules of Civil Procedure.

136. 130 N.C. App. 664, 504 S.E.2d 296 (1998), *review denied*, 350 N.C. 93, 527 S.E.2d 664 (1999). See below for a further discussion of mootness.

137. N.C. Rule of Civil Procedure 54(b). In *Amward Homes, Inc. v. Town of Cary*, ___ N.C. App. ___, 698 S.E.2d 404 (2010), *review granted*, 709 S.E.2d 597 (N.C. 2011), the court held that the fact that one plaintiff's cause of action was still pending in the trial court did not preclude an appeal where summary judgment had been entered for other plaintiffs and there was "no just reason for delay" under Rule 54(b).

138. G.S. 1-277(a) and 7A-27(d)(1). Goldston v. Am. Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990); State v. Fayetteville St. Christian Sch., 299 N.C. 351, 261 S.E.2d 908, *appeal dismissed*, 449 U.S. 807 (1980). In *High Rock Lake Partners, LLC v. North Carolina Department of Transportation*, ___ N.C. App. ___, 693 S.E.2d 361 (2010), review granted, 709 S.E.2d 597 (N.C. 2011). The court held that an interlocutory order denying a landowner's right to intervene in a suit contesting conditions imposed on a driveway permit could be immediately appealed where the original permit applicant had withdrawn from the project and assigned all its rights to the landowner.

139. 191 N.C. App. 386, 663 S.E.2d 320 (2008). There was no Rule 54(b) certification in the record.

140. 155 N.C. App. 637, 573 S.E.2d 712 (2002).

141. 90 N.C. App. 268, 368 S.E.2d 20 (1988). The case involved Rick's Lounge in downtown Fayetteville.

142. 46 N.C. App. 324, 264 S.E.2d 802 (1980).

Standard of Judicial Review

Legislative Decisions

Courts nationally and in North Carolina give substantial deference to the judgment of elected officials making legislative land use regulatory decisions.

In one of the earliest zoning cases in North Carolina, the court held in *In re Parker*[143] that a zoning ordinance is presumed to be valid and a court must defer to the city council's legislative judgment unless it is clearly unreasonable or abusive of discretion. A zoning ordinance is not invalid unless it clearly "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."[144] The court further held the following:

> When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.[145]

In a more recent zoning case, the court similarly observed, "In reviewing an ordinance to determine whether the police power has be exercised within constitutional limitations, this Court does not analyze the wisdom of a legislative enactment."[146]

Only an action deemed by the court to be oppressive and manifestly abusive of discretion will be overturned. If the action had a "reasonable tendency to promote the public good, it [will be deemed to have] represent[ed] a valid exercise of [the state's police] power, and [it will be] entitled to implicit obedience."[147] When reviewing rezonings, courts "are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body."[148] A governing board's decision not to zone or to rezone a parcel has the same presumption of validity. Such a decision is a policy choice that is left by the courts to the sound discretion of locally elected officials.[149]

The fact that some other formulation of an ordinance could have been adopted and may have also been a reasonable approach to address the issue at hand does not render an ordinance arbitrary or capricious.[150]

The burden is on a challenger to establish the invalidity of a legislative regulatory decision.[151] The courts employ a whole record review to allegations that a legislative decision is arbitrary and capricious.[152] The reviewing court must base its decision on the record before the board rather than taking additional evidence to make a de novo ruling.[153] The board's decision is to be upheld if there is substantial evidence in the record to support it.

In a legislative decision, unlike with quasi-judicial decisions, there is not a formal "record" of evidence as there is a public hearing on the matter rather than an evidentiary hearing. Some of the confusion on this point is semantic, in that courts are applying the same whole-record test to allegations that the decision was arbitrary and capricious and there is some tendency to cite and quote cases involving quasi-judicial decisions in cases addressing legislative decisions. The record for a legislative decision will primarily be

143. 214 N.C. 51, 197 S.E. 706, *appeal dismissed*, 305 U.S. 568 (1938). *See also* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

144. *In re Parker*, 214 N.C. at 55, 197 S.E. at 709 (citations omitted).

145. *Id.* at 55, 197 S.E. at 709. For an earlier case that reached the same result, see *Small v. Councilmen of Edenton*, 146 N.C. 527, 60 S.E. 413 (1908). *See generally* 1 Edward H. Ziegler Jr., Rathkopf's The Law of Zoning and Planning § 5.02 (4th ed. 1998).

146. Grace Baptist Church v. City of Oxford, 320 N.C. 439, 443, 358 S.E.2d 372, 374 (1987) (upholding regulation requiring off-street paved parking). *See also* Town of Atl. Beach v. Young, 307 N.C. 422, 298 S.E.2d 686, *cert. denied*, 462 U.S. 1101 (1983).

147. Marren v. Gamble, 237 N.C. 680, 686, 75 S.E.2d 880,884 (1953). In a decision upholding a Walnut Cove zoning ordinance that prohibited locating mobile homes in certain zoning districts, the court held, "If the enactment and enforcement of the zoning ordinance is rationally related to a legitimate governmental objective," the presumption of validity applies. Duggins v. Town of Walnut Cove, 63 N.C. App. 684, 688, 306 S.E.2d 186, 189, *review denied*, 309 N.C. 819, 310 S.E.2d 348 (1983), *cert. denied*, 466 U.S. 946 (1984). *See also* Currituck Cnty. v. Wiley, 46 N.C. App. 835, 266 S.E.2d 52, *review denied*, 301 N.C. 234, 283 S.E.2d 131 (1980).

148. Zopfi v. City of Wilmington, 273 N.C. 430, 437, 160 S.E.2d 325, 332 (1968).

149. *See, e.g.*, Ashby v. Town of Cary, 161 N.C. App. 499, 588 S.E.2d 572 (2003). The plaintiffs challenged a refusal by the town of Cary to rezone a parcel in an existing commercial area from low-density residential to a business conditional use district. The court affirmed that a conditional use district rezoning decision is a purely legislative decision and is to be overturned only if the record before the town council at the time of the decision demonstrates that the decision had no foundation in reason and bore no substantial relationship to the public health, safety, morals, or welfare. If there is any plausible basis for the decision that has a basis in reason and relation to public safety, the decision must be affirmed.

150. *See., e.g.*, State v. Maynard, 195 N.C. App. 757, 673 S.E.2d 877 (2009). The court upheld an ordinance adopted by Nashville limiting the number of dogs kept on premises within the city. The ordinance limit was two dogs over the age of five months for lots of 30,000 square feet or less, with an additional dog allowed for lots of at least 37,000 square feet. The fact that the town could have chosen to base the regulation on the size or breed of dog did not render the choice actually made irrational.

151. Town of Atl. Beach v. Young, 307 N.C. 422, 426, 298 S.E.2d 686, 690, *cert. denied*, 462 U.S. 1101 (1983); Kinney v. Sutton, 230 N.C. 404, 53 S.E.2d 306 (1949); State v. Maynard, 195 N.C. App. 757, 759, 673 S.E.2d 877, 879 (2009); Nelson v. City of Burlington, 80 N.C. App. 285, 288, 341 S.E.2d 739, 741 (1986).

152. Coucoulas/Knight Props. v. Town of Hillsborough, 199 N.C. App. 455, 457–58, 683 S.E.2d 228, 230 (2009), *aff'd per curiam*, 364 N.C. 127, 691 S.E.2d 411 (2010); Summers v. City of Charlotte, 149 N.C. App. 509, 562 S.E.2d 18, *review denied,* 355 N.C. 758, 566 S.E.2d 482 (2002); Teague v. W. Carolina Univ., 108 N.C. App. 689, 692, 424 S.E.2d 684, 684, *review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993). The courts likewise apply a whole record review to allegations that a quasi-judicial decision was arbitrary and capricious.

153. Kerik v. Davidson Cnty., 145 N.C. App. 222, 551 S.E.2d 186 (2001).

the minutes of the hearing and board member discussions in the meeting in which the decision was made.[154]

A limited exception to the presumption of validity of legislative regulatory decisions exists for spot zoning cases.[155] In these cases the burden is on the government to establish a reasonable basis for the rezoning decision.[156]

Quasi-Judicial Decisions

The courts apply a different, though often also deferential, review to quasi-judicial land use regulatory decisions. This standard for review applies to administrative or ministerial regulatory decisions as well.[157]

In *Harden v. City of Raleigh*,[158] one of the state's first zoning cases, the city staff's denial of a permit for a gasoline filling station in a neighborhood business district was appealed to the board of adjustment and upheld. The court ruled that the board of adjustment decision of the appeal was quasi-judicial. As such, the decision is not to be overturned by the court unless it is shown to be arbitrary.[159]

The zoning enabling statute provides that appeals of quasi-judicial zoning decisions are subject to review by the superior court by proceedings in the nature of certiorari.[160] As the North Carolina Supreme court has noted, in hearing such an appeal, the trial court judge is sitting in an appellate capacity:

> In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported the court's order, but whether the evidence before the town board was supportive of its action. In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board. The trial court, in reviewing the decision of a town board on a conditional use permit application, sits in the posture of an appellate court. The trial court does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.[161]

The trial court is therefore bound by the facts found by the decision-making board, provided they are supported by competent, substantial evidence. The trial court may not make new findings of fact or conduct a de novo review of the evidence as it is the sole province of the decision-making board to weigh the evidence and make determinations of credibility.[162] The trial court may recite, summarize, or synthesize the evidence that was before the decision-making board.[163]

The trail court judge is authorized to review questions of law and legal inference arising on the record. The broad discretionary powers normally vested in a trial judge are absent.[164]

The basic standard for judicial review of quasi-judicial decisions is set forth in *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*[165] and is codified at G.S. 160A-393(k)(1). Courts reviewing quasi-judicial decisions examine the following five questions:

1. Were there errors in law?
2. Were proper statutory and ordinance procedures followed and was decision within statutorily delegated authority?

154. Required statements of rationale that must be adopted for all legislative zoning decisions are discussed in Chapter 11. These statements should provide a starting point in a review of whether a contested decision was arbitrary and capricious. *See, e.g.*, Clear Channel Outdoor, Inc. v. City of St. Paul, 618 F.3d 851 (8th Cir. 2010) (examining a similar required statement in determining a ban on billboard "extensions" or appendages was arbitrary and capricious).

155. See Chapter 12 for a complete discussion of spot zoning.

156. Federal courts apply heightened scrutiny to land use regulations that significantly impact private property rights. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987). Substantial academic comment has been made on whether a shift in the presumption of validity has in fact taken place as well as on the circumstances under which a shift *should* take place. *See, e.g.*, Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*, 23 B.C. Envtl. Aff. L. Rev. 301 (1996); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb. Law. 1 (1992).

157. *See, e.g.*, Nazziola v. Landcraft Props., Inc., 143 N.C. App. 564, 545 S.E.2d 801 (2001) (applying whole record review to ministerial subdivision plat decision alleged to be arbitrary and capricious). In most instances such decisions will reach the court only as quasi-judicial decisions, as an initial administrative appeal of the ministerial decision to the board of adjustment is necessary to exhaust administrative remedies (with subsequent judicial review of the board's decision).

158. 192 N.C. 395, 135 S.E. 151 (1926).

159. "Quasi-judicial functions, when exercised, not arbitrarily, but in subordination to a uniform rule prescribed by statute ordinarily are not subject to judicial control. It is only in extreme cases, those which are arbitrary, oppressive, or attended with manifest abuse, that the courts will interfere." *Id.* at 397, 135 S.E. at 152–53.

160. G.S. 160A-393. For quasi-judicial decisions by the board of adjustment or the planning board acting in the capacity of a board of adjustment, see G.S. 153A-345(e) and 160A-388(e) For governing boards making special and conditional use permit decisions, see G.S. 153A-340 and 160A-381.

161. Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs, 299 N.C. 620, 626–27, 265 S.E.2d 379, 383 (1980). *See also* Powell v. N.C. Dep't of Transp., 347 N.C. 614, 624, 499 S.E.2d 180, 185 (1998).

162. Mangum v. Raleigh Bd. of Adjustment, 196 N.C. App. 249, 260, 674 S.E.2d 742, 750–51 (2009); Ghidorzi Constr., Inc. v. Town of Chapel Hill, 80 N.C. App. 438, 440, 342 S.E.2d 545, 547 (1986). The superior court review is "limited to errors alleged to have occurred before the local board." Tate Terrace Realty Investors, Inc. v. Currituck Cnty., 127 N.C. App. 212, 218, 488 S.E.2d 845, 848, *review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997).

163. Cary Creek Ltd. P'ship v. Town of Cary, ___ N.C. App. ___, 700 S.E.2d 80 (2010); Cannon v. Zoning Bd. of Adjustment, 65 N.C. App. 44, 47, 308 S.E.2d 735, 737 (1983).

164. *In re* Pine Hill Cemeteries, Inc., 219 N.C. 735, 738, 15 S.E.2d 1, 3 (1941). *See also* Humble Oil & Ref. Co. v. Bd. of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974); Jamison v. Kyles, 271 N.C. 722, 157 S.E.2d 550 (1967); Jarrell v. Bd. of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963); Mize v. Cnty. of Mecklenburg, 80 N.C. App. 279, 284, 341 S.E.2d 767, 770 (1986).

165. 299 N.C. 620, 265 S.E.2d 379 (1980).

3. Were due process rights secured (including rights to offer evidence, cross-examine witnesses, and inspect documents)?
4. Was competent, material, and substantial evidence in the record to support the decision?
5. Was the decision arbitrary and capricious?[166]

The court, depending upon which of these issues is being reviewed, applies one of two standards of review.

A *de novo review* is made of alleged errors of law.[167] In these reviews the court is not bound by findings made by the decision-making board. Instead, the court considers the matter anew, as if not considered or decided by the board.[168] This is true both for trial court review and for appellate court review.[169]

If a trial court fails to properly make a de novo review, the appellate court can apply a de novo review anew rather than remanding the case. However, this can only be done if the record on appeal is complete enough to provide the requisite information for the review (such as including all of the relevant ordinance provisions).[170] With appellate review of alleged errors of law, since the appellate court is making a de novo review as well, the standard of review used by the trial court is irrelevant.[171]

A *whole record review* is conducted of allegations that a decision was not supported by the evidence or that the decision was arbitrary and capricious.[172] In these reviews, the board's findings of fact are binding on the reviewing court if they are supported by substantial, competent evidence.[173] Similarly, federal courts "must accord a zoning board's fact finding the same preclusive effect to which it would have been entitled in the state courts when the agency acted in a judicial capacity and the parties had an adequate opportunity to litigate."[174]

If both types of allegations are made, the trial court must delineate which standard was applied to which issue (and apply more than one standard if the issues so require).[175]

While fundamental fairness is required, the strict rules of evidence and procedure can be relaxed, and harmless errors will generally not result in a remand on appeal. Several cases illustrate this rule. In *Durham Video & News, Inc. v. Durham Board of Adjustment,*[176] the court of appeals held that a failure to comply with city rules to provide the petitioner with a copy of the written staff report being provided to the board of adjustment ten days prior to the hearing did not prejudice the plaintiff, as the staff report included only information previously available to the plaintiff or that was already a matter of public record. In *Dockside Discotheque, Inc. v. Board of Adjustment*,[177] the court held that a board's action of conducting an improper closed session to deliberate after all of the evidence had been received was not reversible error.

Deference in De Novo Reviews

A court is not bound by a board's interpretation of the terms of an ordinance, as these are questions of law subject to a de novo review.[178] G.S. 160A-393(k)(2), enacted in 2009, provides that the court making a de novo review of a board interpretation "shall consider the interpretation of the decision-making board, but is not bound by that interpretation, and may freely substitute its judgment as appropriate."

Case law provides some guidance as to the degree of consideration given and the circumstances in which it is appropriate for the

166. *Id.* at 626, 265 S.E.2d at 383.

167. G.S. 160A-393(k)(2).

168. Amanini v. N.C. Dep't of Human Res., 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). However, a degree of deference is applied in some circumstances. See the discussion of deference in de novo reviews, below.

169. *In re* Willis & City of Southport Bd. of Adjustment, 129 N.C. App. 499, 501–02, 500 S.E.2d 723, 726 (1998).

170. Welter v. Rowan Cnty. Bd. of Comm'rs, 160 N.C. App. 358, 585 S.E.2d 472 (2003).

171. Capital Outdoor, Inc. v. Guilford Cnty. Bd. of Adjustment, 355 N.C. 269, 559 S.E.2d 547 (2002) (per curiam, rev'g 146 N.C. App. 388, 552 S.E.2d 265 (2001)).

172. Powell v. N.C. Dep't of Transp., 347 N.C. 614, 623, 499 S.E.2d 180, 185 (1998); ACT-UP Triangle v. Comm'n for Health Servs., 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); Associated Mech. Contractors v. Payne, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996); Thompson v. Bd. of Educ., 292 N.C. 406, 410, 233 .E.2d 538, 541 (1977); *In re* Willis & City of Southport Bd. of Adjustment, 129 N.C. App. 499, 500 S.E.2d 723 (1998); Ballas v. Town of Weaverville, 121 N.C. App. 346, 465 S.E.2d 324 (1996). *But see* Clark v. City of Asheboro, 136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (1999) (stating that the issue of whether there is competent, material, and substantial evidence present in the record is a conclusion of law and subject to de novo review).

173. Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment, 334 N.C. 132, 431 S.E.2d 183 (1993); *In re* Hastings, 252 N.C. 327, 113 S.E.2d 433 (1960); *In re* Pine Hill Cemeteries, Inc., 219 N.C. 735, 15 S.E.2d 1 (1941); Tate Terrace Realty Investors, Inc. v. Currituck Cnty., 127 N.C. App. 212, 218, 488 S.E.2d 845, 849, *review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997). *See also* Mead v. N.C. Dep't of Agric., 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998).

174. AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment, 172 F.3d 307, 314 (4th Cir. 1999).

175. Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 14, 565 S.E.2d 9, 18 (2002); McMillan v. Town of Tryon, 200 N.C. App. 228, 683 S.E.2d 747 (2009); Friends of Mt. Vernon Springs, Inc. v. Town of Siler City, 190 N.C. App. 633, 660 S.E.2d 657 (2008); Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528, *review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000); Vill. Creek Prop. Owners' Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793 (1999); In re Willis & City of Southport Bd. of Adjustment, 129 N.C. App. 499, 502, 500 S.E.2d 723, 726 (1998).

176. 144 N.C. App. 236, 550 S.E.2d 212, *review denied*, 354 N.C. 361, 556 S.E.2d 299 (2001).

177. 115 N.C. App. 303, 444 S.E.2d 451, *review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). *See also* Charlotte Yacht Club, Inc. v. Cnty. of Mecklenburg, 64 N.C. App. 477, 307 S.E.2d 595 (1983).

178. "Under de novo review a reviewing court considers the case anew and may freely substitute it own interpretation of an ordinance for a board of adjustment's conclusions of law." Morris Commc'ns Corp. v. City of Bessemer City Bd. of Adjustment, 365 N.C. 152, ___, 712 S.E.2d 868, ___ (2011) (reversing interpretation of "work" required to be commenced to avoid expiration of sign permit). Ayers v. Bd. of Adjustment, 113 N.C. App. 528, 439 S.E.2d 199 (1994).

court to substitute its judgment. As stated in *MacPherson v. City of Ashville*, "Where an issue of statutory construction arises, the construction adopted by those who execute and administer the law in question is relevant and may be considered. Such a construction is entitled to great consideration."[179] The degree of deference accorded is related to the thoroughness with which the issue was considered by the board, the validity of its reasoning, and the consistency with which it has been applied.[180]

A number of cases have applied some judicial deference to staff and board interpretations of land development regulations.[181] In *P.A.W. v. Boone Board of Adjustment,*[182] the court noted that because the board is "vested with reasonable discretion in determining the intended meaning of an ordinance, a court may not substitute its judgment for the board's in the absence of error of law or arbitrary, oppressive, or manifest abuse of authority."[183] Similar rulings include cases involving board interpretation of the terms "abandon" and "discontinue" as related to nonconformities,[184] interpretation of when renovation constitutes "expansion" of a nonconforming use,[185] interpretation of what constitutes a "group home,"[186] interpretation of what uses were included within the term "government offices and buildings,"[187] interpretation of the term "value" as applied to a damaged nonconforming sign,[188] and interpretation of what constituted a "private" or "commercial" kennel under the terms of the zoning ordinance.[189]

There are limits to what a court will accept. In *Harry v. Mecklenburg County,*[190] the court noted while a zoning administrator's interpretation is entitled to some deference, this should not occur if the interpretation is contrary to the express purpose of the ordinance. Similarly, where the terms of an ordinance are clear and there is no ambiguity, it is improper for either the board or the staff to go beyond those terms in interpreting the ordinance.[191] There are also cases where courts simply accorded no deference at all to board interpretation.[192]

Record on Appeal

If there is an allegation that the evidence did not support a board's decision or that the decision was arbitrary and capricious, the court

179. 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973) (upholding city's determination that applicant for site plan approval was an "owner" within the intent of the ordinance). *See also* Hensley v. N.C. Dep't of Env't & Natural Res., 364 N.C. 285, 698 S.E.2d 41 (2010) (deference to Division of Land Resources, the agency responsible for administering statute, in interpretation of Sedimentation and Erosion Control Act); Darbo v. Old Keller Farm Prop. Owners' Ass'n, 174 N.C. App. 591, 621 S.E.2d 281 (2005) (planning board's long-standing interpretation of ordinance entitled to considerable deference); M.W. Clearing & Grading, Inc. v. N.C. Dep't of Env't & Natural Res., 171 N.C. App. 170, 614 S.E.2d 568, *rev'd in part*, 360 N.C. 392, 628 S.E.2d 379 (2006) (deference accorded Environmental Management Commission's interpretation of controlling statutes); Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998).

180. Brooks v. McWhirter Grading Co., 303 N.C. 573, 581, 281 S.E.2d 24, 29 (1981).

181. For a review of case law interpreting various provisions of North Carolina zoning ordinances, see Chapter 18. The courts also apply this rule in de novo reviews of statutory and administrative rule interpretation under the Administrative Procedure Act. *In re* Broad & Gales Creek Cmty. Ass'n, 300 N.C. 267, 275, 266 S.E.2d 645, 651 (1980) (deference accorded expertise of agency administering a law). In *County of Durham v. North Carolina Department of Environment & Natural Resources*, 131 N.C. App. 395, 507 S.E.2d 310 (1998), *review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999), the court upheld the agency's interpretation of the statutes to distinguish inert debris landfills from sanitary landfills. The court noted the long-standing judicial tradition of deferring to a specialized agency's interpretation of a statute it administers so long as the interpretation is reasonable and is based on a permissible construction of the law. A similar federal rule is set forth in *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

182. 95 N.C. App. 110, 382 S.E.2d 443 (1989).

183. *Id.* at 113, 382 S.E.2d 443 at 444–45.

184. CG & T Corp. v. Bd. of Adjustment, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659 (1992) (upholding interpretation that element of intent not required for "discontinuance" of nonconformity).

185. APAC-Atl., Inc. v. City of Salisbury, ____N.C. App. ____, 709 S.E.2d 390 (2011).

186. Taylor Home of Charlotte v. City of Charlotte, 116 N.C. App. 188, 193, 447 S.E.2d 438, 442, *review denied*, 338 N.C. 524, 453 S.E.2d 170 (1994) (upholding interpretation that some element of rehabilitation was required for qualification as a "group home").

187. Rauseo v. New Hanover Cnty., 118 N.C. App. 286, 454 S.E.2d 698 (1995) (upholding interpretation that a volunteer fire station was a "government building").

188. Whiteco Outdoor Adver. v. Johnston Cnty. Bd. of Adjustment, 132 N.C. App. 465, 513 S.E.2d 70 (1999) (upholding interpretation that "value" of signs meant their initial value).

189. Tucker v. Mecklenburg Cnty. Zoning Bd. of Adjustment, 148 N.C. App. 52, 557 S.E.2d 631 (2001) (upholding interpretation that absent breeding, selling, training, or boarding, a kennel for rescued dogs was not a "commercial kennel").

190. 136 N.C. App. 200, 523 S.E.2d 135 (1999). The court found that the administrator's determination that a pier could be a "principal" use rather than an "accessory" use if it were the only structure on the lot was contrary to the "only logical construction of the Ordinance." *Id.* at 203, 523 S.E.2d at 138. *See also* Koontz v. Davidson Cnty. Bd. of Adjustment, 130 N.C. App. 479, 503 S.E.2d 108, *review denied*, 349 N.C. 529, 526 S.E.2d 177 (1998) (overturning board of adjustment determination that vested rights existed); Ball v. Randolph Cnty. Bd. of Adjustment, 129 N.C. App. 300, 498 S.E.2d 833 (1998) (overturning board determination that remediation of petroleum contaminated soil was an agricultural use).

191. Procter v. City of Raleigh Bd. of Adjustment, 140 N.C. App. 784, 538 S.E.2d 621 (2000) (if there is no ambiguity in ordinance, it is error for board of adjustment to look beyond the language of the ordinance in making its interpretation); Ayers v. Bd. of Adjustment, 113 N.C. App. 528, 439 S.E.2d 199 (1994), *review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994) (apply plain and ordinary meaning of words in interpreting ordinance); Cardwell v. Town of Madison Bd. of Adjustment, 102 N.C. App. 546, 402 S.E.2d 866 (1991) (improper for administrator and board of adjustment to use technical definition of "building" from the building code rather than relying on the zoning code); Riggs v. Zoning Bd. of Adjustment, 101 N.C. App. 422, 399 S.E.2d 149 (1991) (holding zoning administrator and board of adjustment erred in not considering a stormwater system a "structure," ruling that the definition that should be applied (in the absence of a more precise definition in the ordinance) was the natural and recognized meaning of the term).

192. Hayes v. Fowler, 123 N.C. App. 400, 473 S.E.2d 442 (1996) (interpretation of the ordinance is a question of law subject to de novo review by the trial court wherein the court may freely substitute its judgment for that of the board of adjustment).

is limited to reviewing the whole record before the decision-making board to determine if the record supports the board's conclusions. For alleged errors of law, the court undertakes a de novo review.[193]

In either event the superior court is acting in an appellate review capacity and does not take additional evidence.[194] The writ of certiorari does not lie to review questions of fact to be determined outside the record.[195]

The statutory timetables for serving and filing the record on appeal are mandatory and have to be met unless extensions of time are granted.[196] Absent service of the case on appeal, the review on appeal is on the record proper alone.[197]

G.S. 160A-393(i) specifies the content of the record on appeal of quasi-judicial decisions. It provides that the record includes all documents and exhibits submitted to the decision-making board and the minutes of the meetings at which the matter was heard. Any party may request that the record include an audiotape or videotape of the meeting if that is available. Any party may also include a verbatim transcript of the meeting, with the cost of preparation of the transcript being the responsibility of the party choosing to include it. The record must be bound, paginated, and served on all petitioners by the local government within three days of filing it with the court. The court may allow the record to be supplemented with affidavits or testimony regarding standing, alleged impermissible conflicts of interest, and the legal issues of constitutionality or statutory authority for the decision (as these legal issues are beyond the scope of issues that could have been addressed by the original decision-making board).

G.S. 160A-393(j) does allow the trial court to take new evidence in very limited circumstances. These include where the record is not adequate to allow an appropriate determination of standing, alleged conflicts of interest, constitutional violations, or lack of statutory authority.[198]

Mootness

If an ordinance is amended while litigation is pending, the case becomes moot and the appeal is dismissed if the amendment provides the plaintiff the relief sought in the litigation.[199] However, if the amendment does not provide the relief sought by litigation, the claim remains valid and the case is not moot. For example, in *Lambeth v. Town of Kure Beach,*[200] the town denied a permit to widen a driveway based on a long-standing, but unwritten, interpretation of its ordinance. While litigation on the denial was pending, the town amended the ordinance to clearly prohibit the proposed activity. The court held that this did not moot the appeal, as the applicant was challenging the propriety of the denial, and the language of the ordinance at the time of the denial was the legal issue before the court (rather than the amended language). Likewise, the court in *Amward Homes, Inc. v. Town of Cary*[201] held that repeal of an ordinance requiring payment of school impact fees did not moot an action challenging the town's authority to adopt the ordinance and seeking a refund of fees paid. In *Wilson v. City of Mebane Board of Adjustment*,[202] the court held that subsequent amendment of the development ordinance in a way that may have made a project permittable does not moot a challenge to a permit based on the prior ordinance when the only permits that were issued were based on the prior ordinance.

The fact that a successful petitioner or applicant abandons a project after securing a rezoning or zoning permit does not moot an action brought by a neighboring third party to challenge the rezoning or permit issuance.[203] On the other hand, if a permit denial is

193. *In re* Willis & City of Southport Bd. of Adjustment, 129 N.C. App. 499, 500 S.E.2d 723 (1998).

194. Capricorn Equity Corp. v. Town of Chapel Hill, 334 N.C. 132, 431 S.E.2d 183 (1993) (superior court must base review on record presented and may not make additional findings of fact when reviewing board of adjustment decision); Jamison v. Kyles, 271 N.C. 722, 157 S.E.2d 550 (1967) (where there were sufficient facts on the record to support the board of adjustment's findings, the trial court erred in overruling those findings); *In re* Hastings, 252 N.C. 327, 113 S.E.2d 433 (1960) (board of adjustment's findings of fact may not be overturned on judicial review if supported by adequate evidence in the record); Lamar OCI S.C. v. Stanly Cnty., 186 N.C. App. 44, 650 S.E.2d 37 (2007), *aff'd per curiam*, 362 N.C. 670, 669 S.E.2d 322 (2008) (trial court properly denied county's motion to supplement the record with affidavits since in quasi-judicial matters the court may not consider evidence not before the board of adjustment).

195. *In re* Pine Hill Cemeteries, Inc., 219 N.C. 735, 15 S.E.2d 1 (1941).

196. City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978).

197. Thurston v. Salisbury Zoning Bd. of Adjustment, 24 N.C. App. 288, 210 S.E.2d 275 (1974).

198. G.S. 1A-1, Rule 59(4), allows motions for a new hearing if newly discovered material evidence is found which the party making the motion could not have discovered with due diligence and produced at the hearing. Rule 60(b)(2) allows a judgment to be set aside on the same grounds. However, in *Bailey & Associates, Inc. v. Wilmington Board of Adjustment*,___ N.C. App. ___, ___, 689 S.E.2d 576, 588 (2010), the court indicated that this motion needs to be initially made and decided by the board making the decision, as otherwise the trial court would have no record on the issue on appeal.

199. Davis v. Zoning Bd. of Adjustment, 41 N.C. App. 579, 255 S.E.2d 444 (1979). *See generally* State v. McCluney, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972); Prop. Rights Advocacy Group v. Town of Long Beach, 173 N.C. App. 180, 182–83, 617 S.E.2d 715, 717–18 (2005).

200. 157 N.C. App. 349, 578 S.E.2d 688 (2003). In *Meares v. Town of Beaufort*, 193 N.C. App. 96, 100, 667 S.E.2d 239, 241–42 (2008), the court held that repeal of a contested provision in the town's Historic District Guidelines while judicial review was pending did not moot the case, as the board of adjustment had ordered a new hearing on the initial application for a certificate of appropriateness and the applicant was entitled to a decision on the application based on the rules in effect at the time of that initial application. In *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, ___ N.C. App. ___, 689 S.E.2d 576 (2010), the court noted that the express terms of an ordinance amendment adoption can also provide that the amendment applies prospectively only.

201. ___ N.C. App. ___, 698 S.E.2d 404 (2010).

202. ___ N.C. App. ___, 710 S.E.2d 403 (2011).

203. Friends of Mt. Vernon Springs, Inc. v. Town of Siler City, 190 N.C. App. 633, 660 S.E.2d 657 (2008). The court noted that abandonment of the project by the applicant does not provide the relief sought—here invalidation of the rezoning and revocation of the permit. In *Adams v. Village of Wesley Chapel*, 259 F. App'x 545 (4th Cir. 2007), the court held that the plaintiff's sale of the land that was the basis of a constitutional challenge to land use restrictions on the property did not moot the case.

being appealed and the permit is issued while the matter is still on appeal, that action moots the appeal.[204]

Disposition

If a court invalidates a legislative land use regulatory decision, the challenged action is void ab initio.[205] However, even if the legislative action is invalidated, imposition of additional remedies on the landowner may not be imposed unless the landowner (as well as the unit of government involved) was a party to the suit.[206]

G.S. 160A-393(l) addresses the remedies available for consideration by courts in these situations. It provides that a court may affirm or reverse the original decision made by the local government board or may remand it with either instructions or a direction for further proceedings.[207] A remand can be made to correct a procedural record or to make findings of fact based on the existing record. If the court finds the board's decision is not supported by substantial competent evidence in the record or has an error of law, the remand may include an order to issue the approval (subject to reasonable and appropriate conditions) or to revoke the approval. The relief can also include appropriate injunctive orders.

If there is competent, material, and substantial evidence in the record to support findings that all relevant standards have been met and no competent evidence to the contrary, the trial court may order the permit issued without further hearing on remand (conversely, it can order the permit revoked if it is determined it was wrongfully issued).[208] If a permit contains conditions deemed to be improper, the court may order the offending conditions struck and order reissuance of a corrected permit where it is clear that this is the only possible result on remand.[209] Once remanded, appellate judicial review is premature pending resolution of the case on remand.[210]

Since interpretation of the ordinance or statute is a question of law subject to de novo review, in most instances the appropriate judicial disposition of such a matter is an order mandating issuance or denial of the challenged permit. The same is true for an appeal of a ministerial decision that does not involve contested facts.[211]

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204. Carolina Marina & Yacht Club v. New Hanover Cnty. Bd. of Comm'rs, ___N.C. App. ___, 699 S.E.2d 646 (2010). The plaintiff applied for a special use permit to modify an existing commercial marina. The county denied the special use permit, but on appeal the superior court overturned that decision and ordered the permit issued. A neighbor who opposed the project and had intervened in the judicial review appealed that decision to the court of appeals. The county did not join in the appeal. The neighbor unsuccessfully sought a stay of the trial court's order and an injunction to prohibit permit issuance while she pursued the appeal. The county subsequently issued the special use permit. The court held that since the only issue on appeal was the validity of the county's permit denial, subsequent issuance of the permit resolved that matter and made the appeal moot. The same result obtained in *Estates Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 504 S.E.2d 296 (1998), *review denied*, 350 N.C. 93, 527 S.E.2d 664 (1999). The denial of a special use permit was appealed and the trial court subsequently ordered the permit issued. Neighbors who had intervened appealed to the court of appeals, but the town did not join the appeal and issued the permit while the matter was pending before the court of appeals. The court ruled that while the town was not compelled to issue the permit during the period of the automatic stay, it could voluntarily do so absent the intervenors securing an injunction to prohibit it from doing so. Once issued, the intervenors' appeal was moot. For a situation where the court held that judicial review was not made moot by a subsequent permit issuance, see *Councill v. Town of Boone Board of Adjustment*, 146 N.C. App. 103, 551 S.E.2d 907, *review denied*, 354 N.C. 360, 560 S.E.2d 130 (2001). The intervenors had alleged that a settlement of the case was illegal and that the permit was issued pursuant to that consent judgment, so that the issue originally raised was still at issue.

205. Keiger v. Winston-Salem Bd. of Adjustment, 281 N.C. 715, 721, 190 S.E.2d 175, 179 (1972).

206. McDowell v. Randolph Cnty., 186 N.C. App. 17, 649 S.E.2d 920 (2007).

207. Under prior case law, the usual course of action if the court determined the record was insufficient to support the findings was a remand of the case for further hearing by the board. *See, e.g.*, Deffet Rentals, Inc. v. City of Burlington, 27 N.C. App. 361, 219 S.E.2d 223 (1975); Long v. Winston-Salem Bd. of Adjustment, 22 N.C. App. 191, 205 S.E.2d 807 (1974) (remanding case for de novo board proceeding to secure competent evidence). The trial court must rely solely on the grounds for action set forth by the board making the quasi-judicial decision; it is error for the court to substitute or supplement the findings or conclusions made in the administrative proceeding. Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 63–64, 344 S.E.2d 272, 279–80 (1986) (quoting Secs. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947)); Ballenger Paving Co. v. N.C. State Highway Comm'n, 258 N.C. 691, 695, 129 S.E.2d 245, 248 (1963); Guilford Fin. Servs., LLC v. City of Brevard, 356 N.C. 655, 576 S.E.2d 325 (2003), *per curiam, adopting dissent in* 150 N.C. App. 1, 563 S.E.2d 27 (2002).

208. G.S. 160A-393(l)(3). *See also* Stealth Props., LLC v. Town of Pinebluff Bd. of Adjustment, 183 N.C. App. 461, 645 S.E.2d 144, *review denied*, 361 N.C. 703, 653 S.E.2d 153 (2007) (where there is insufficient evidence in the record to support a variance denial and there is evidence to support its issuance, proper course is to remand with instructions to issue the variance); Cumulus Broad., LLC v. Hoke Cnty., 180 N.C. App. 424, 638 S.E.2d 12 (2006); Humane Soc'y of Moore Cnty., Inc. v. Town of S. Pines, 161 N.C. App. 625, 589 S.E.2d 162 (2003); Sun Suites Holdings, LLC v. Town of Garner, 139 N.C. App. 269, 533 S.E.2d 525, *review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000); Clark v. City of Asheboro, 136 N.C. App. 114, 524 S.E.2d 46 (1999); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998), *review denied*, 350 N.C. 93, 527 S.E.2d 664 (1999).

209. Overton v. Camden Cnty. I, 155 N.C. App. 100, 109, 574 S.E.2d 150, 156 (2002). The court cited cases from several other jurisdictions with similar holdings. These include *Belvoir Farms Homeowners Ass'n, Inc. v. North*, 355 Md. 259, 268, 734 A.2d 227, 232–33 (Ct. App. 1999), and *Parish of St. Andrew's Protestant Episcopal Church v. Zoning Board of Appeals*, 155 Conn. 350, 354, 232 A.2d 916, 919 (1967).

210. Jennewein v. City Council of Wilmington, 46 N.C. App. 324, 264 S.E.2d 802 (1980).

211. Clinard v. City of Winston-Salem, 173 N.C. 356, 358, 91 S.E. 1039, 1040 (1917). In this case, after the inspector issued a building permit for an addition to a structure, a question arose as to whether the addition encroached into an alley subject to public use. The inspector revoked the permit until that issue could be resolved. It was eventually determined that there were no public rights to this portion of the alley. The court held that the appropriate remedy was mandamus for issuance of the permit but that there was no liability for monetary damages for the city or the inspector.

Local Government Law Essentials for Judges

Land Use and Zoning Appeals

David Owens
December 8, 2011

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

Coverage --

1. Ordinances used and basic structure of zoning
2. Form of appeal
3. Standing
4. Statutes of limitation
5. Standard of review
6. Disposition

Typical Ordinances

Principally Used:

- Zoning – land uses, development standards
- Subdivision – lot layout, infrastructure
- Building code – state mandated, construction standards
- Housing code – habitability

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Typical Ordinances

Others Commonly Used:
- Sedimentation
- Mobile home parks
- Signs
- Landscaping
- Adult businesses
- Telecommunication towers

- Often combined into "unified development ordinance"

Municipal Zoning

Population	% with Zoning
Under 1,000	69%
1,000 – 4,999	94%
5,000 – 9,999	98%
Over 10,000	100%

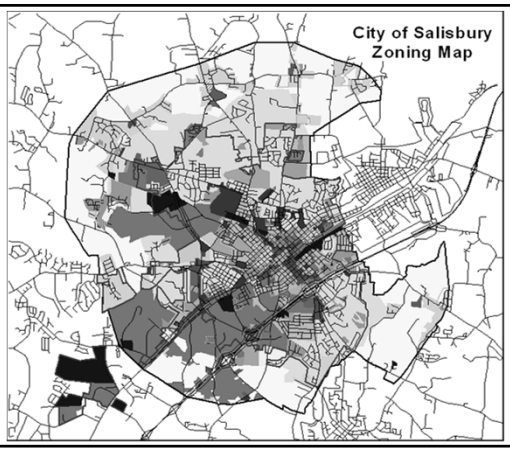
2005 SOG Survey

Zoning Ordinances

Zoning ordinances have 2 parts:

- Text to define standards and procedures
- Map to show location of zoning districts

Both parts are "ordinances" and must follow same process for amendment



Each Zoning Ordinance is Unique

- Each city decides the content of its zoning
- Ordinances vary in:
  - Number and names of zoning districts
  - Use and development restrictions
  - Subject matter covered
- Each community tailors its ordinance to its needs

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Typical Zoning Requirements

- Zoning districts and permitted uses:
  - Uses by right
  - Uses by special or conditional-use permit
- Other development standards:
  - Setbacks
  - Buffers
  - Parking
  - Landscaping
  - Signs
  - Lot access/circulation

Types of Decisions

1) Legislative
2) Quasi-judicial
3) Administrative
4) Advisory

Classification is question of law

Legislative and Quasi-Judicial Zoning Decisions

- Different purposes
- Very different process required
- As both can be done by governing board,
  - Council, applicants and citizens sometimes confuse the two

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Legislative Decisions

- Purpose: Set policy
  Highly discretionary
- Process: Detailed statutory procedures
  - Public hearing
  - Notice of hearing (published, mailed, posted, actual)
  - Planning board referral
  - Statement on rationale

Quasi-judicial Decisions

- Purpose: Apply discretionary standards already in ordinance
- Process: Due process required
  - Formal evidentiary hearing
  - Adequate quality evidence in the record
  - Written findings of fact
  - Rules on impartiality, ex parte evidence, opinion testimony

Typical Allocation of Responsibilities

Type of Decision	Example	Typical Assignment
Legislative	Rezoning	Town Council or County Commissioners
Quasi-judicial	Variance, Appeals, Interpretation	Board of Adjustment
Advisory	Recommendation on rezoning	Planning Board
Administrative	Notice of zoning violation	Staff

Form of Action

- Declaratory judgment: Legislative decisions, constitutionality, validity and construction of ordinance
- Writ of certiorari (GS 160A-393): Quasi-judicial decisions
- Separate actions if both challenged

Standing -- Legislative

Specific personal interest that is directly and adversely affected

1) Facial challenge – specific application not required
2) As applied challenge – application required
3) Constitutional – injury in fact or immediate threat of such required

Standing – Quasi-judicial

GS 160A-393(d) codifies rule

1) Applicants and those with property interest in property subject to application
2) Local government whose board made decision
3) Others with "special damages" / "aggrieved persons"

Standing -- Other

General rule applies

1) Injury in fact – concrete, particularized
2) Causation – fairly traceable to challenged action
3) Redressable – individual relief possible

Statutes of Limitation

30 days	Quasi-judicial decision (from mailing/filing of written decision)
Two months	Zoning map amendment (from date of decision)
One year	Validity of ordinance (accrues when standing acquired, but three year limit to challenge adoption process)

Standard of Review – Legislative Decision

- Presumption of validity
- Tests -- Manifest abuse of discretion, arbitrary and capricious, irrational, no relation to legitimate objective
- Whole record review
- Burden on challenger
- Spot zoning exception – reasonableness required

Standard of Review – Quasi-judicial Decision

De novo review:

1) Errors in law?
2) Within statutory authority and proper procedures followed?
3) Due process observed?

Standard of Review – Quasi-judicial Decision

Whole record review

1) Substantial, competent, material evidence in record to support decision? If so, findings below are binding
2) Arbitrary and capricious?

If multiple types of error alleged, specify and apply applicable standard

Disposition -- Legislative

- Legislative: If invalidated, void ab initio

Disposition -- Quasi-judicial (GS 160A-393(l))

- Procedural error – remand to correct
- Failure to make findings – remand for findings on record unless basis of decision clear or facts undisputed
- Not supported by evidence or error of law – remand with instructions to correct error, including to issue or revoke permit

SUPPLEMENTAL MATERIALS

Planning Jurisdiction

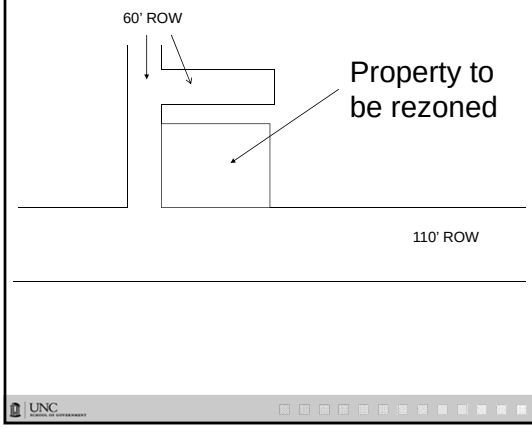
- City jurisdiction includes areas
  - w/in city limits (including newly annexed areas) and
  - outside city limits in ETJ (extraterritorial planning jurisdiction)
- County planning jurisdiction includes areas outside of city jurisdiction

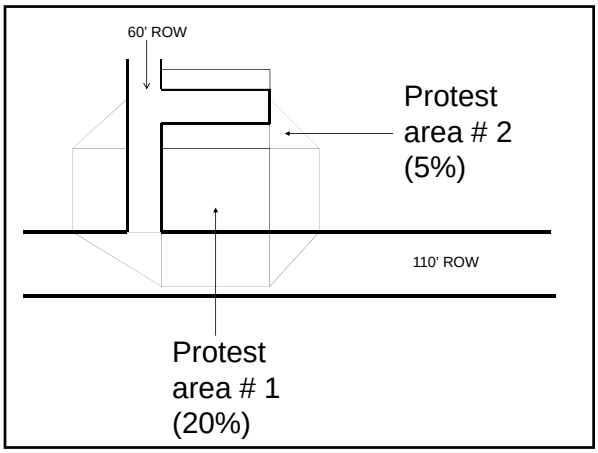
Powers Available to City in ETJ

- Zoning
- Subdivision regs
- Enforcement of State Building Code
- Community development projects
- Acquisition of open space
- Minimum housing code
- Soil erosion and sedimentation control ordinance
- Floodway regulation
- Historic preservation programs

Protest Petition

- 3/4 vote required if valid protest
- Owners of 20% of area being rezoned or 5% of a 100 foot perimeter buffer
- Filed two working days prior to date of hearing
- Signed by owners
- City may require form





Legitimate Considerations in Rezonings

- Impacts on owner, neighbors, public
  (suitability of site for use, impacts on traffic, environment, neighborhood character, utilities, schools, etc.)
- Consistency with all applicable plans and policies
- Consistency with prior and future decisions

Illegitimate Considerations in Rezonings

- Ownership
- Particular attributes/conditions that are not part of requirements for the zone
- Ethnicity, income, "character" of residents

Quasi-judicial Decisions

- Rules apply when there is:
  - Fact finding
  - Standards with judgment/discretion
- Examples:
  - Variances
  - Special/conditional use permits
  - Appeals

Quasi-judicial Decisions

- Adequate record must be before the board at the time of decision
- **Substantial, competent, and material** evidence in the record is *required* for each key factual determination
- Record includes application, supporting documents and exhibits, testimony at hearing (minutes or transcript)

Evidentiary Hearings

- Witnesses
  - All persons offering evidence should be under oath
  - Cross-examination must be allowed – usually in form of questions by board, but also opportunity for other parties
  - Can (and should) limit irrelevant or repetitious testimony

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Evidentiary Hearings

- Evidence
  - Hearsay limited (can accept, but not use as basis for key finding)
  - Opinions only from experts, especially on property value and traffic impacts/public safety (but distinguish factual and opinion testimony)
  - Documents (including photos, maps, studies, letters, etc.) submitted become part of record

Evidentiary Hearings

- Only evidence presented at hearing may be considered -- no ex parte communication with the board is allowed
- Site visits permissible, but avoid discussion with applicant, neighbors, or staff
- Written materials can be submitted and distributed prior to hearing (application, staff reports, documents)

Quasi-judicial Decisions

- Determining the weight of competing evidence a key responsibility of board
- Board must clearly indicate what it believes the facts to be
- Written findings of fact are required, not just conclusions

Quasi-judicial Decisions

- May continue advertised hearing if needed for additional evidence
- Rehearings after decision made -- only allowed if there are changed conditions or a different application
- Precedents -- prior decisions are not legally binding, but are persuasive and should be addressed by the board

Quasi-judicial Decisions

Impartiality required. Prohibits:

- Fixed opinion prior to hearing
- Undisclosed ex parte communication
- Close family, business, or other relationship
- Financial interest in outcome

Spot Zoning

- Legal only if reasonable
- Burden is on government to demonstrate reasonableness

What is “Reasonable”?

- Site characteristics – size of tract, topography, utilities, roads, rail, uses, etc.
- Relation to plan – comprehensive plan, small area plans, functional plans
- Degree of change allowed – upsetting expectations
- Balance of benefits and detriments – owner, neighbors, community

Spot Zoning

- Applicable to all CUD and conditional zoning (and small-scale conventional zoning)
- Can apply to rezoning or initial zoning

Conventional Zoning

- Standard rezoning to general use district
- Includes some permitted uses (uses by right)
- May include special/conditional use permits

Contract Zoning

- True bilateral contract with mutual promises made
  -- always illegal
- Quid pro quo renders rezoning invalid

Conventional Zoning

- Rezoning must be based on suitability of land for all potential uses in the district
- *But* knowledge of use not per se improper, provided it is clear all other uses were considered

Conventional Zoning

- Conditions may not be imposed on a rezoning unless applicable to all property in district
- Does not invalidate rezoning, but individual conditions are unenforceable

Conditional Use District Rezoning

- Developed in N.C. in 1980s to avoid illegal contract zoning
- Combines rezoning with conditional use permit

Conditional Use District Rezoning

- Must be requested by owner
- Involves **two** decisions
  - Rezoning to a district with only CUP/SUP, no permitted uses
  - Conditional/special use permit
- May conduct one hearing and make decisions concurrently

Conditional Zoning

- Some local governments averse to combining quasi-judicial process with rezonings, want exclusively legislative process
- Want flexibility for ex parte communication, maximum discretion
- Not possible with conditional/special use *permit*

Conditional Zoning

- Create new, unique zoning district, with individualized standards/site plan made a part of the ordinance standards
- Use approved by courts and allowed by statutes in 2005

Conditional Zoning

- Statute limits conditions to those:
  - Needed for ordinance/plan compliance
  - Impacts reasonably expected to be generated by project
- Require reasonableness analysis for all small-scale rezonings

Moratoria

- Development moratoria allowed on any development approval
- May require public hearing
  - Not required if imminent threat to public heath and safety
  - Hearing with one published notice (7 days in advance) if moratorium is 60 days or less
  - Hearing with two published notices (first 10 days in advance) if moratorium is more than 60 days

Moratoria

- Require written statement prior to adoption on:
  - Reasons needed
  - Why alternatives are inadequate
  - Scope and duration (must be reasonable)
  - Action plan to address reasons for imposition

LOCAL GOVERNMENT LIABILITY

Michael Crowell
UNC School of Government

Local Government Law Essentials for Judges

December 2, 2011

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Liability under federal law

- § 1983
- State government has sovereign immunity, local government may be liable
- Government liability based on policy, custom or inadequate training
- Individual official's liability based on whether knew act was unconstitutional

1. Is it a governmental or proprietary function?
   - Governmental = Immunity
   - Proprietary = Liability
2. Has the county waived immunity?
   - Purchase of insurance = Waiver

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P. Governmental Liability Limitation —

By accepting coverage under this policy, neither the *insured* nor States waive any of the *insured's* statutory or common law immunities and limits of liability and/or monetary damages (including what are commonly referred to as liability damages caps), and States shall not be liable for any *claim* or *damages* in excess of such immunities and/or limits . . . .

P. Governmental Liability Limitation —

By accepting coverage under this policy, neither the *insured* nor States waive any of the *insured's* statutory or common law immunities and limits of liability and/or monetary damages (including what are commonly referred to as liability damages caps), and States shall not be liable for any *claim* or *damages* in excess of such immunities and/or limits . . . .

Public Duty Doctrine

- Duty is owed to public, not to individual
- For local government, the doctrine applies only to law enforcement
  - Is the defendant performing a local function or serving as an agent of the state?
- Public duty doctrine immunity is waived by actual promise to protect

Is the defendant a public official or a public employee?

Public official = qualified immunity

Public employee = no immunity

- Local government can be sued for breach of contract
- Local government liability for tort depends on:
  - Was the employee acting in the scope of employment?
  - Was it a governmental or proprietary function?
  - If it was a governmental function, has the entity waived immunity by purchasing insurance?
  - Does the public duty doctrine apply?
- A public official or employee may be sued individually as well
  - A public official has qualified immunity
  - A public employee has no immunity

BASICS OF LOCAL GOVERNMENT LIABILITY AND IMMUNITY IN NORTH CAROLINA

Michael Crowell
UNC School of Government
November 2011

Federal law

This paper does not address issues related to lawsuits under 42 USC § 1983 for deprivation of federal constitutional or statutory rights. Although the 11th amendment bars federal lawsuits against states, local governments are not considered an arm of the state and are not entitled to immunity from § 1983 actions. *Monell v. NY City Dept. of Social Services*, 436 US 658 (1978). Local governments may be sued for federal constitutional violations traceable to their official policies or customs. Individual local government officers and employees also may be sued under § 1983. Legislative and judicial immunity is available to local public officials exercising those functions. Other public officials may have a qualified immunity/good faith defense which means they are subject to payment of monetary damages only if they knew or should have known that their acts were unlawful. The qualified immunity applies only to public officials, not public employees (the distinction is discussed below in connection with immunity from state tort claims).

The distinction between sovereign immunity and governmental immunity in claims brought under state law

Sovereign immunity is the state's immunity from a lawsuit of any kind unless the state consents to be sued.

Governmental immunity is distinct from sovereign immunity. Governmental immunity applies to local governments, sovereign immunity to the state and its agencies. *Meyer v. Walls*, 347 NC 97 (1997). Governmental immunity is immunity from tort liability only and is based not on sovereign immunity and the "king can do no wrong" concept but instead is based on the policy decision that governmental agencies should not have to pay money damages. *See Moody v. State Prison*, 128 NC 12 (1901).

Court decisions often use the terms interchangeably and treat sovereign immunity and governmental immunity as the same.

The case law is not always consistent on whether sovereign immunity extends to local governments. Some cases suggest it has been waived by enactment of the statutes governing counties (GS 153A-11), cities (GS 160A-11) and public schools (GS 115C-40), all of which refer to those units of government as corporate bodies and say that their governing boards may sue and be sued. *See, e.g., Smith v. State,* 289 NC 303 (1976), and *Meares v. Brunswick County*, 615 F Supp 14 (EDNC 1985). Other cases apply sovereign immunity to local governments without

discussion of those statutes. *See, e.g., Eastway Wrecker Service, Inc., v. City of Charlotte*, 165 NC App 639 (2004), and *Data General Corp. v. County of Durham*, 143 NC App 97 (2001).

Irrespective of sovereign immunity, governmental immunity clearly applies to local governments and may be used as a defense to tort claims, subject to the rules described below.

Claims under state law against the governmental body itself

An action against a government official in that person's official capacity is the same as an action against the governmental body itself. *Meyer v. Walls*, 347 NC 97 (1997).

Breach of contract

There is no immunity from a claim for breach of contract; by entering the contract the governmental body waives immunity and consents to be sued for damages for breach of the contract. *State v. Smith*, 289 NC 303 (1976).

Violation of state constitutional rights

An action may be brought directly under the State Constitution when there is no other adequate state remedy for the violation. *Corum v. University of North Carolina*, 330 NC 761 (1992). While the governmental body may be liable for damages for a claim brought directly under the State Constitution, there is no action for monetary damages against a defendant sued in the person's individual capacity.

The adequacy of the remedy must be realistic in order to bar the constitutional claim. Thus, the existence of a common law action for negligence did not bar constitutional claims against the local board based on the same conduct, because the negligence claim was not a realistic remedy, it could be pursued only if the board had purchased insurance and thereby waived its immunity, and the board had not done so. *Craig ex rel. Craig v. New Hanover County Bd. of Educ.*, 363 NC 334 (2009).

Governmental immunity is not applicable to constitutional violations. *Sale v. Highway Commission*, 242 NC 612 (1955) (taking of property without just compensation); *Corum* (denial of free speech).

Tort claims (for either an intentional tort such as assault or for negligence) against a governmental body for acts or omissions of governmental officials or employees (acting within the scope of employment)

Liability for a proprietary function

If the injury to the plaintiff arises from the governmental employee's performance of a proprietary function, there is no immunity and the

governmental body may be sued for damages. *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 NC 14 (1975).

Determining whether an activity is a governmental or proprietary function is difficult, and the court decisions are not always consistent. *See Sides v. Cabarrus Memorial Hospital*.

Proprietary functions include those activities which are not traditionally performed by a government agency. They tend to be activities which also are performed by the private sector, which benefit a definable category of individuals rather than the general public, and for which a fee is charged. Operation of a golf course would be considered a proprietary function, for example. *Lowe v. Gastonia*, 211 NC 564 (1937). In *Sides* operation of a hospital was considered a proprietary function. The notion of what is proprietary and what is governmental changes over time.

Immunity for a governmental function

If the injury to the plaintiff arises from the government employee's performance of a governmental function, the local government is immune from liability unless it has waived its immunity. *Steelman v. City of New Bern*, 279 NC 589 (1971).

Governmental functions are those traditionally performed by governmental bodies for the benefit of the public at large. As already mentioned, the distinction between proprietary and governmental functions is not always easy to define. Simple examples of governmental functions include the operation of traffic lights, *Hamilton v. Hamlet*, 238 NC 741 (1953), and garbage collection, *James v. Charlotte*, 183 NC 630 (1922); *Broome v. City of Charlotte,* 208 NC 729 (1935). A 911 call center is a governmental function. *Wright v. Gaston County*, 698 SE2d 83 (NC App 2010).

Waiver of immunity from liability for a governmental function

Governmental immunity can be waived, but waiver of immunity is not to be lightly inferred, and statutes waiving immunity are to be strictly construed. *Guthrie v. NC State Ports Authority,* 307 NC 522 (1983).

By statute, boards of county commissioners, city councils and school boards waive governmental immunity by the purchase of insurance, up to the amount of the insurance. The statute for counties is GS 153A-435; for cities is GS 160A-485; and for school boards is GS 115C-42.

A separate statute, GS 160A-485.5 allows cities with a population of 500,000 or more — Charlotte is the only city to qualify — to waive immunity and become subject to the state Tort Claims Act. Claims are

heard in the local superior court rather than at the Industrial Commission. Charlotte has elected to use the GS 160A-485.5 option.

For counties and cities, participation in a government risk pool is considered the purchase of insurance and constitutes waiver of governmental immunity up to the amount of coverage. A governmental risk pool is defined by the insurance statutes and requires that more than one governmental unit participate and share risk. *Lyles v. City of Charlotte*, 344 NC 676 (1996).

The statute governing school boards is worded differently than the statutes for counties and cities, and participation in the NC School Boards Trust or a governmental risk pool is not considered a waiver of immunity. *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 NC App 435 (1996); *Mullis v. Sechrest*, 126 NC App 91 (1997), *rev'd on other grounds*, 347 NC 548 (1998).

Local governments often purchase supplemental insurance and cases on waiver of immunity often depend on a close reading of the wording of the several policies and the limits of their coverage. *See, e.g., Fulford v. Jenkins*, 195 NC App 403 (2009).

Public duty doctrine

Even if a local government has waived immunity through the purchase of insurance, the public duty doctrine may bar recovery. The public duty doctrine says that a governmental body is not liable when law enforcement officers fail to protect an individual from harm. Although the local government may undertake to protect the public at large, the duty of protection does not extent to individuals. With no legal duty to protect the individual, there can be no negligence from the failure to protect.

Although state agencies performing a variety of functions may invoke the public duty doctrine to avoid liability, at the local level the public duty doctrine applies only to claims made against law enforcement agencies for negligence in failing to protect individuals from harm by third parties. *Lovelace v. City of Shelby*, 351 NC 458 (2000); *Wood v. Guilford County*, 355 NC 161 (2002). Earlier cases extending the public duty doctrine to fire protection, animal control, building inspections and other local services were overruled by *Lovelace*. *Hargrove v. Billings & Garrett, Inc.*, 137 NC App 759 (2000); *Willis v. Town of Beaufort*, 143 NC App 106, *disc. rev. denied*, 354 NC 371 (2001).

A local agency may be serving as an agent for the state in performance of a particular function and be entitled to protection of the public duty doctrine for that specific activity. For example, a county health department is an agent of the state Dep't of Environment and Natural Resources for inspection of wastewater treatment systems and thus is protected by the public duty doctrine for that activity. *Murray v. County of Person*, 191 NC App 575 (2008).

An exception to the public duty doctrine, giving rise to liability, is when the law enforcement agency has made an actual promise to protect an individual or when a special relationship has been created in which such protection is expected. *See Multiple Claimants v. NC Dep't of Health and Human Services, Div. of Facility Services, Jails and Detention Services,* 361 NC 372 (2007).

Even with respect to law enforcement, the public duty doctrine is limited in scope. It is a barrier to lawsuits for failure of the law enforcement agency to protect the plaintiff from harm by third parties, but not a barrier to lawsuits for harm caused directly by the agency. It is a barrier to liability for negligence claims, but does not bar liability for intentional torts. It is a barrier to liability for discretionary actions that involve the active weighing of safety interests, but does not bar lawsuits based on failure to comply with mandatory, ministerial requirements. *Smith v. Jackson County Board of Education*, 168 NC App 452 (2005).

The public duty doctrine provides protection from lawsuit for governmental bodies and for officers sued in their official capacity. It is not a barrier to a lawsuit against someone in their individual capacity. *Murray v. County of Person*, 191 NC App 575 (2008).

Dobrowolska claims

If a local government has governmental immunity for a tort claim, and has not waived its immunity by the purchase of insurance, but arbitrarily settles some such claims and not others, the local government may be liable under 42 USC § 1983 for denial of the constitutional rights of due process and equal protection. *Dobrowolska ex rel. Dobrowolska v. Wall*, 138 NC App 1 (2000).

Punitive damages

Punitive damages are not allowed against a governmental body unless specifically authorized by statute. *Jackson v. Housing Authority of City of High Point*, 316 NC 259 (1986); *Long v. City of Charlotte*, 306 NC 187 (1982).

Claims under state law against an individual government official or employee

While governmental immunity protects a governmental body from being held liable for an injury caused by one of its officers or employees, it does not protect the public officer or employee from being held liable individually. *Meyer v. Walls*, 347 NC 97 (1997). Other forms of immunity may protect individuals, however.

The caption of a pleading should indicate whether a person is being sued in the person's official or individual capacity. When the caption or other parts of the pleading fail to specify the capacity in which the person is being sued, the court looks to the relief

sought. Injunctive relief indicates the person is being sued in their official capacity. If the relief sought is monetary damages, the court looks to whether the plaintiff is seeking the payment from the government or from the individual defendant's own pocket. *Mullis v. Sechrest*, 347 NC 548 (1998).

Absolute immunity for legislators and judges

Legislative immunity

Local elected officials, when acting in their legislative capacity, are entitled to the same immunity as legislators, so long as their acts are not illegal acts. *Vereen v. Holden*, 121 NC App 779 (1996); *Scott v. Granville County*, 716 F2d 1409 (4th Cir 1983).

Judicial immunity

Judges are not liable in civil actions for their judicial acts, even when done maliciously and corruptly. *Cunningham v. Dilliard*, 20 NC 485 (1839); *State ex rel. Jacobs v. Sherard*, 36 NC App 60 (1978). The immunity applies even when the judge acts in excess of jurisdiction, but there is no immunity when the judge acts without jurisdiction at all. *Stump v. Sparkman*, 435 US 349 (1978). The immunity does not apply to purely administrative acts of the judge, such as hiring and firing employees. *Forrester v. White*, 484 US 219 (1988).

Judicial immunity applies to non-judges when they are acting in a judicial or quasi-judicial capacity, such as a coroner conducting an inquest, *Gillikin v. United States Fidelity and Guaranty Company of Baltimore, Maryland,* 254 NC 247 (1961); a clerk of court acting as judge of probate, *Martin v. Badgett*, 149 NC App 667, 2002 WL 485187 (2002) (unpublished); or members of a licensing board hearing a complaint, *Mazzucco v. North Carolina Board of Medical Examiners*, 31 NC App 47 (1976).

Boards of county commissioners, city councils and school boards hold a number of different kinds of hearings which would be considered quasi-judicial.

Qualified immunity for public officials

A public official sued individually is not subject to liability unless the official's actions were malicious, corrupt or outside the scope of official duties. *Epps v. Duke University*, 122 NC App 198 (1996).

The qualified immunity applies only to public officials, not to public employees. Generally public officials occupy offices created by statute, take an oath of office, and exercise discretion in performance of their duties. *Pigott v. City of Wilmington*, 50 NC App 401 (1981); *Gunter v. Anders*, 114 NC App 61 (1994).

Elected board members are public officials, *Town of Old Fort v. Harmon*, 219 NC 241 (1941); as are chiefs of police and police officers, *State v. Hord*, 264 NC 149 (1965); the county director of social services, *Hare v. Butler*, 99 NC App 693 (1990); the chief building inspector, *Pigott v. City of Wilmington*, 50 NC App 401 (1981); and superintendents and principals, *Gunter v. Anders*, 114 NC App 61 (1994).

Teachers are public employees, not public officials, and are not entitled to qualified immunity, *Mullis v. Sechrest*, 126 NC App 91 (1997), *rev'd on other grounds*, 347 NC 548 (1998); *Daniels v. City of Morganton*, 125 NC App 47 (1997). Other examples of public employees include street sweepers, *Miller v. Jones*, 224 NC 783 (1944); and social workers, *Hare v. Butler*, 99 NC App 693 (1990).

Defense of local officials and employees and payment of claims against them

The statutes governing counties, cities and public schools all authorize, but do not require, the governing board to provide for the defense of current and former board members, officers and employees against civil or criminal claims based on acts or omissions in the scope of employment. The statutes are GS 153A-97 for counties, GS 160A-167 for cities, and GS 115C-43 for public schools. The officers and employees to whom a county or city's defense may extend are listed in GS 153A-97 and 160A-167, but the list in the latter statute is longer than in the former.

The same statutes allow, but do not require, boards of county commissioners, city councils and school boards to pay civil judgments entered against the same categories of current and former board members, officers and employees. The boards are required to adopt uniform standards stating when such claims will be paid. For school boards, the uniform standards also are to state when the board will pay for the defense of claims.