

Legal and Legislative Update

David Owens &
Adam Lovelady

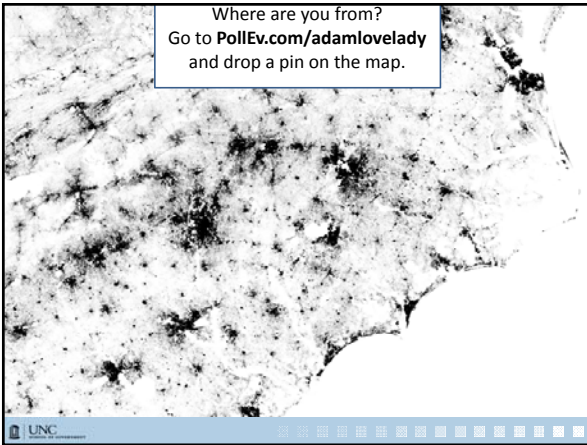
APA-NC Annual Conference
September 2016



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www.sog.unc.edu

Where are you from?
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and drop a pin on the map.

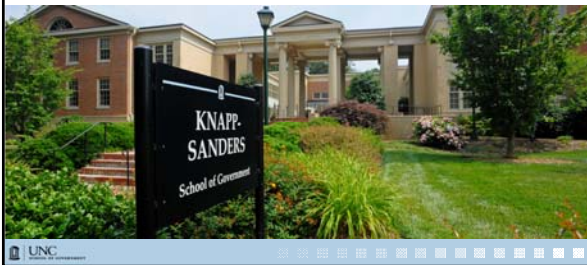


Chapel Hill

- Planning and Zoning Courses
- Local Government Leadership Courses

Regional Workshops

- Subdivision Workshops (Fall 2016)
- Board Workshops (Spring 2017)





tinyurl.com/SOGplanning

**Coates' Canons:
NC Local Government Law**



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Choose three.

1. "Right Place, Wrong Time" (distinguishing admin and quasi-judicial decisions)
2. "Ob-La-Di, Ob-La-Da" (interpreting the ordinance)
3. "Mo' Money, Mo' Problems" (impact fees)
4. "Don't Stand So Close to Me" (standing in quasi-judicial matters)
5. "Signs, Signs, Everywhere a Sign"

Disclaimer

“Right Place, Wrong Time”

Distinguishing Admin and QJ Decisions



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15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

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Decision Type	Ministerial/ Administrative	Quasi-Judicial
Standards		
Example		
Decision-maker		
Note		

Butterworth v. City of Asheville

“those cases where because of the topography of the tract to be subdivided, the condition or nature of adjoining areas, or the existence of other unusual physical characteristics, strict compliance with the provisions of [the] chapter **would cause unusual and unnecessary hardship** on the subdivision of the property by [the] property owner or developer.”

Butterworth v. City of Asheville

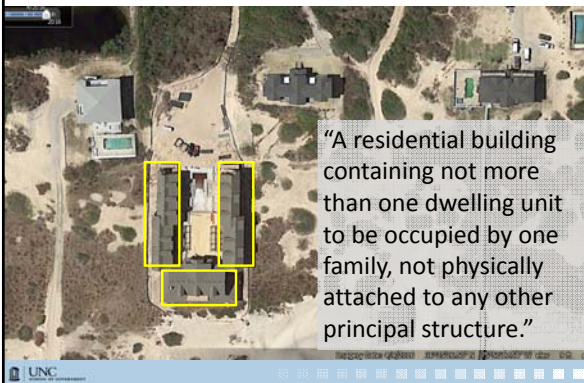
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Administrative Modification

- Allowed with specific, neutral, and objective criteria for such modifications
- Examples
 - a deviation up to ten percent or 24 inches from the approved setback
 - a reduction of no more than 25 percent in the number of parking spaces required

"Ob-La-Di, Ob-La-Da" Interpreting the Ordinance

Is it a single family detached dwelling?



- Start with the Ordinance
- Consider Interpretive Guidance
- Look for Definitions
- Contrast other Definitions
- Give Logical Meaning
- Use the Dictionary
- Consider Intent Language

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The Use Chart

- ordinance permitted uses expressly listed and “other uses that have similar impacts to the listed use.”
- Uses that were not listed and not similar to the listed uses were prohibited.

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Byrd v. Franklin County

- uses not specifically listed are prohibited
- staff treated gun range as “Open Air Games”
- property owner disagreed

Court:

- Zoning is in derogation of private property rights
- Ordinance ambiguity should be resolved in favor of free use of land.
- Unlisted uses are allowed.



Interpreting the Use Chart

- Prohibited uses must be listed
- Unlisted uses should be treated the same as the most nearly similar use
- Ambiguity will be resolved in favor of allowing a use

(Byrd v. Franklin County)



“Mo’ Money, Mo’ Problems” Impact fee authority



Impact Fees: Counties and Authorities



Water and sewer impact fees authorized, but there must be a plan in place for providing the funded service

CB Windswept v. Cape Fear Pub. Util. Auth.

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Impact Fees: Municipalities



Municipalities are authorized to “charge for the contemporaneous use of its water and sewer services—not to collect fees for future discretionary spending”

Quality Built Homes Inc. v. Town of Carthage

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Impact Fees: subdivisions



APFO required fee for police, fire, and park space

Court required repayment with interest

China Grove


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“The ordinance *may* provide that a developer *may* provide funds to the city whereby the city *may* acquire recreational land . . .”

After the subdivision shall not be approved without such reservation. The board of education shall then have 18 months beginning on the date of that approval of the subdivision within which to acquire the site by purchase or by initiating condemnation proceedings. If the board of education has not purchased or begun proceedings to condemn the site within 18 months, the subdivision may use the land as if it were not reserved.

The ordinance may provide that a developer may provide funds to the city whereby the city may acquire recreational land or areas to serve the development or subdivisions, including but not limited to those that may be used to serve areas from one subdivision or development within the immediate area. All funds received by the city pursuant to this paragraph shall be used only for the

Court: This “does not authorize municipalities to charge fees as a condition precedent to subdivision approval.”



§ 160A-372. Contents and requirements of ordinances.


(6) . . . A subdivision control ordinance may provide for the orderly growth and development of the city; for the coordination of transportation networks and utilities within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision or, alternatively, for provision of funds to be used to acquire recreation areas serving residents of the development or subdivisions or areas from one subdivision or development within the immediate area, and rights-of-way or easements for street and utility purposes including the dedication of rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11; and for the distribution of population and traffic in a manner that will avoid congestion and over-crowding and will create conditions that substantially promote public health, safety, and the general welfare.

(7) The ordinance may require a plat be prepared, approved, and recorded pursuant to the provisions of the ordinance whenever any subdivision of land takes place. The ordinance may include requirements that plans show sufficient data to determine readily and accurately on the ground the location, bearing, and length of every street and alley line, lot line, easement boundary line, and other property boundaries, including the radius and other data for curved property lines, to an appropriate accuracy and in conformance with good surveying practice.

(8) The ordinance may provide for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with municipal plans, policies, and standards. To assure compliance with these and other ordinance requirements, the ordinance may provide for performance guarantees to assure successful completion of required improvements. If a performance guarantee is required, the city shall provide a range of options of types of performance guarantees, including, but not limited to, surety bonds or letters of credit, from which the developer may choose. For any specific development, the type of performance guarantee from the range specified by the city shall be at the election of the developer.

The ordinance may provide for the reservation of school sites in accordance with comprehensive land use plans approved by the council or the planning board. In order for the authorization to become effective, before approving such plans the council or planning board and the board of education with jurisdiction over the area shall jointly determine the specific location and size of any school sites to be reserved, which information shall appear in the comprehensive land use plan. Whenever a subdivision is submitted for approval which includes part or all of a school site to be

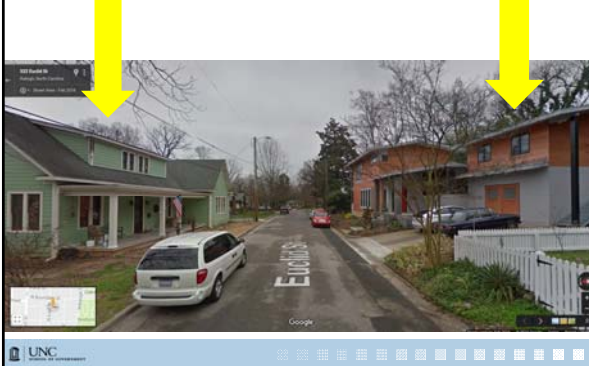
“ . . . alternatively, for provision of funds to be used to acquire recreation areas serving residents of the development . . .”



“Don’t Stand So Close to Me”
Quasi-Judicial Standing




Do THEY have standing to sue about THAT?



Standing for BOA

- Only an “aggrieved party” may appeal
- Must have special damages
 - Proximity is factor, but insufficient
 - Property value is factor, but insufficient
 - Need to show secondary impacts needed
- Superior court has discretion to allow party to supplement the record

(Cherry v. Wiesner)



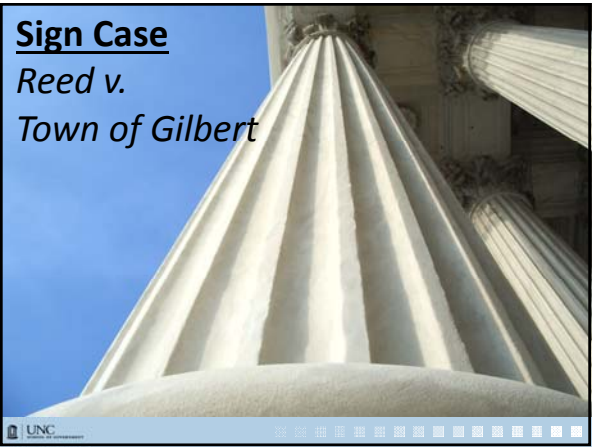
Standing for BOA

- Who decides standing?

(Morningstar Marinas/Eaton Ferry, LLC v. Warren County)







Type of Regulation	Veracity of Court Review
Content-Based	Strict Scrutiny
Content-Neutral	Intermediate Scrutiny

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TRUMP
Campaign season

REPEAL HB2
Anytime

GREEN PARTY MTG SATURDAY
12 hours before and 1 hour after

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Sign Ordinance Warnings

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Stop
Distinguishing non-commercial signs based on content

(limited allowance for signs re: traffic and safety)

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Central Radio v. Norfolk

- Sign permits required
- Exemptions for
 - “flag or emblem of any nation, organization of nations, state, city, or any religious organization,”
 - “works of art which in no way identify or specifically relate to a product or service.”
- Court struck down as content-based




Proceed

Regulating based on

- Size
- Materials
- Location
- Lighting
- Electronic Message
- Portability
- Commercial v. Residential Property
- Number of Signs

Peterson v. Downers Grove

- Content-neutral restrictions upheld
 - Restrictions on painted wall signs
 - Limits on location of signs
 - Limits on size of signs



Caution

(things to check)

- Ordinance justification
- Exemptions
- Substitution Provision
- Commercial v. Noncommercial
- On-Premises v. Off-Premises

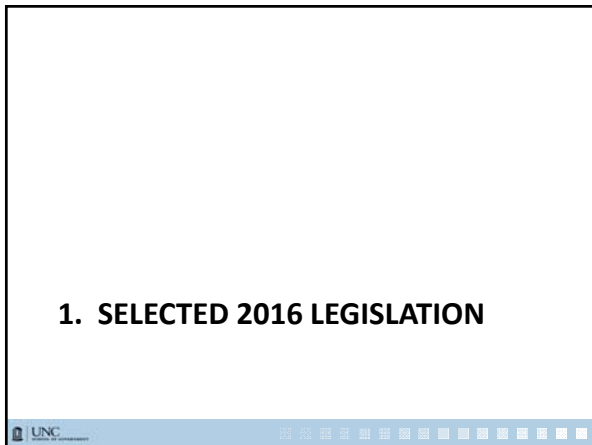
Distinguishing Commercial

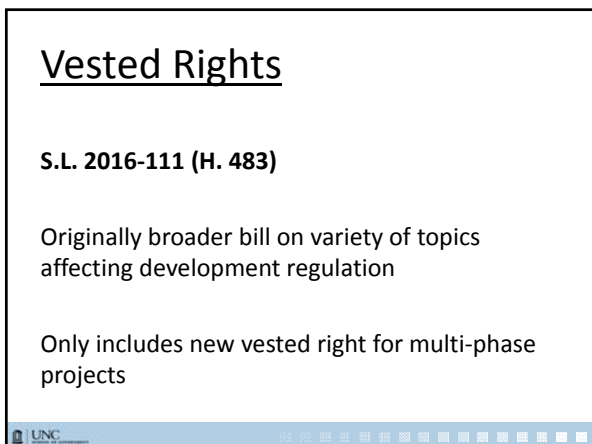
- Peterson v. Downers Grove
- Citizens for Free Speech, LLC v. County of Alameda
- But, contrast Central Radio (“works of art which in no way identify or specifically relate to a product or service”)

On-Premises v. Off-Premises

- Upheld as content neutral
 - Geft Outdoor LLC v Consolidated City of Indianapolis and County of Marion
 - Contest Promotions LLC v City and County of San Francisco
- But found to be content-based
 - Thomas v Schroer







Applicable to
large
multiphase
projects



Multi-phase projects:

- 100 or more acres
- Multiple phases
- Subject to development master plan for all phases
- Includes offering land for public use as condition of master plan approval
- All phases vested for 7 years upon approval of site plan for first phase

Official Maps

Enacted in 1987

Allows cities and NCDOT to file maps
designating future road corridors

No building permits or new subdivisions within
mapped area for three years

Variances allowed if no reasonable use, undue
hardship

Official Maps

Court in Kirby held filing map is exercise of eminent domain rather than police power

Compensation required



Official Maps

S.L. 2016-90 (H. 959)

Rescinds all adopted maps and places one year moratorium on new maps

Directs DOT to study how to balance ROW protection, rights of property owners



Periodic Inspections

S.L. 2016-122 (S. 326)

If safety hazard found in one multifamily unit, can inspect other units for same hazard

Define target areas –

- 1 sq. mile or 5% of area
- Properties blighted

Additional limits on residential rental registration programs



Building Permit Exemptions

S.L. 2016-113 (S. 770)

Work under \$15,000 and consistent with code:

- Replacement of windows, doors, siding, decks
- Replacement of plumbing of same size and capacity
- Replacement of hot water heaters of same energy use if no change in fuel source, venting, piping



Sedimentation Exemptions

S.L. 2016-113 (S. 770)

Clarify broad agricultural exemption
Mulch operations exempted



2. 2016 BILLS NOT ENACTED



Regulatory Reform

Local Development Regulations – S. 303

- Zoning amendment automatically amends plan
- Expand exempted subdivisions
- Three year limit to cite zoning violation
- Expand notice to military bases
- Revise tall building review
- Revise state wind energy permitting



Regulatory Reform

Environmental regulations – H. 593

- Limit on-site stormwater purposes
- Limit stream mitigation
- Relax CAMA controls on temporary erosion control structures and terminal groins
- Revise landfill and solid waste provisions



3. REORGANIZATION OF PLANNING STATUTES: 160D REDUX



160D Proposal

Rewrite of Planning and Development
Regulation Statutes – H. 548 in 2015-16

2017 focus on consolidation, reorganization,
clarification of language, consensus modest
reforms



160D Proposal

Updated, annotated bill draft to be posted soon
to Bar Association and SOG websites

Will email link to bill draft to NCPlan listserve