

# Legislative and Legal Update

North Carolina Planning Conference  
David Owens and Adam Lovelady  
Sept. 13, 2018  
Winston-Salem, NC



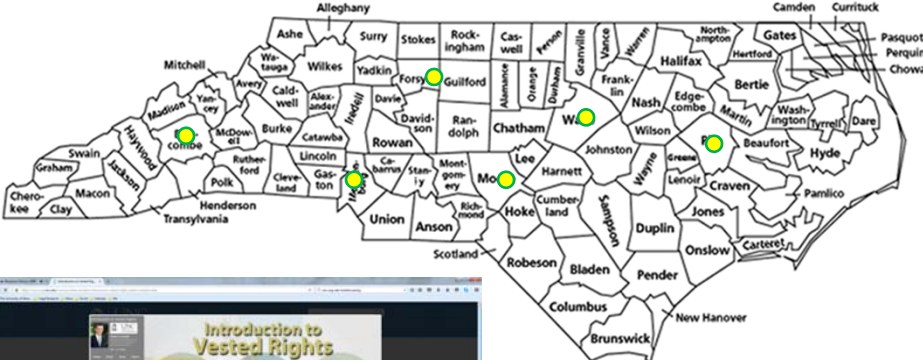
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The collage features several items related to local government law and planning in North Carolina:

- Coates' Canons: NC Local Government Law**: A screenshot of a blog post with navigation links for "About this Blog" and "About the Authors", and a search bar.
- Introduction to Zoning and Development Regulation**: A book cover with a blue and white abstract design, labeled as the "Fourth Edition" by David W. Owens.
- Land Subdivision Regulation in North Carolina**: A book cover with a light blue background, published in 2015 by Adam S. Lovelady.
- Reshaping Suburban Spaces**: A book cover featuring a photograph of a building under construction with a crane, titled "Lessons from North Carolina Cities" by Adam Lovelady, dated September 2016.
- QUASI-JUDICIAL HANDBOOK**: A book cover with a dark background and a large white circular graphic, subtitled "A GUIDE FOR BOARDS MAKING DEVELOPMENT REGULATION DECISIONS" by David Owens and Adam Lovelady.

## Board Training



A map of North Carolina showing all 100 counties. Yellow dots are placed in the following counties: Guilford, Madison, McDowell, and Jones. These dots represent training locations for the Board Training program.



A screenshot of a video player showing a video titled "Introduction to Vested Rights". The video features three people standing in front of a green background with the UNC logo.

- Spring 2019 Quasi-Judicial Workshops
- On-Demand Modules

## 2018 Legislative Bulletin

Link is on SOG's Planning and Development Regulation Microsite:

<https://www.sog.unc.edu/resources/microsites/planning-and-development-regulation>

## 2018 Legislation

### Not Enacted

H 507 – Industry requested zoning changes

S. 419 – NCBA's proposed 160D

Both likely back in 2019

## I. Conditional Zoning Amendments

## Conditional Zoning – 2018 Survey

### Widespread Use

- 57 % use conditional zoning
- 43% use conditional use district zoning

Heavier use by more populous jurisdictions

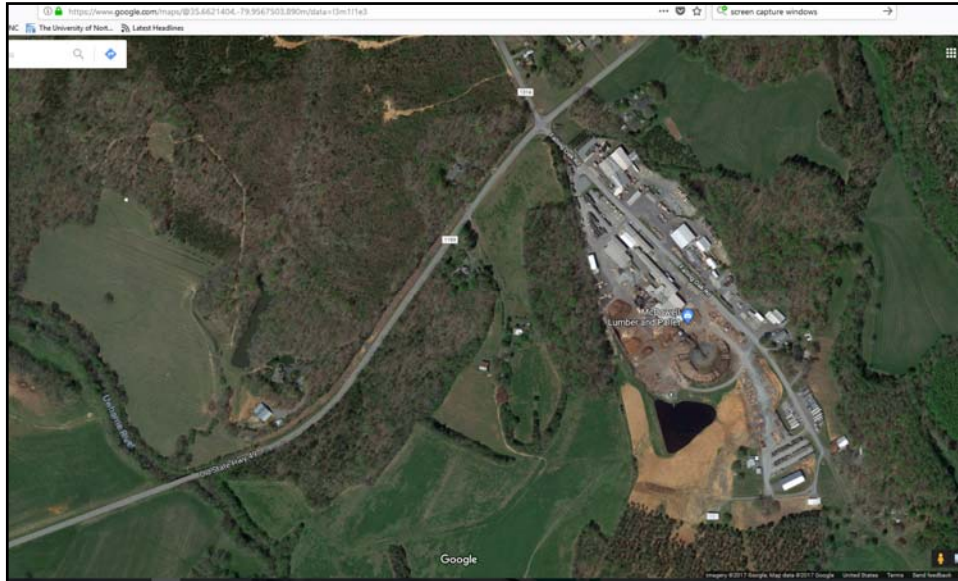
- 77% of cities over 25,000 population use conditional zoning

## Conditional Zoning – 2018 Survey

57% of all reported rezonings adopted were to conditional districts

In cities with populations over 25,000, 79% of all rezonings were to conditional districts

32% of jurisdictions report trend to more use of conditional zoning



McDowell v. Randolph County (Dec. 2017)

## McDowell v. Randolph County

- Site plan in previous conditional zoning amended
- Allowed relocation of chemical vat, revise stormwater management, add covers and screening for vat
- Long history of controversy
  - 2005 rezone to industrial invalidated in court
  - 2010 BOA refusal to order removal of some facilities upheld in court

## McDowell v. Randolph County

Need findings, evidence to support site plan amendment?

**NO**

Zoning text amendment presumed valid if any plausible basis

No formal findings required (beyond statement of rationale)

Substantial evidence not required

## McDowell v. Randolph County

Is this illegal spot zoning, like the earlier invalid rezoning to industrial use?

**No**

Zoning classification not changed, only the text of the conditional zone

No map amendment = no spot zoning

## II. Bona Fide Farm Exemption

### Farms and Zoning

Bona fide farm activity has always been exempt from county zoning

Also exempt from city land use regulation if conducted in ETJ

## S.L. 2017-108 (S. 615)

### 2017 Farm Bill

USDA Farm number no longer evidence  
property is a farm

Residence on farm exempt if occupied by  
owner, lessee, or operator of the farm

## S.L. 2017-108 (S. 615)

### Agritourism





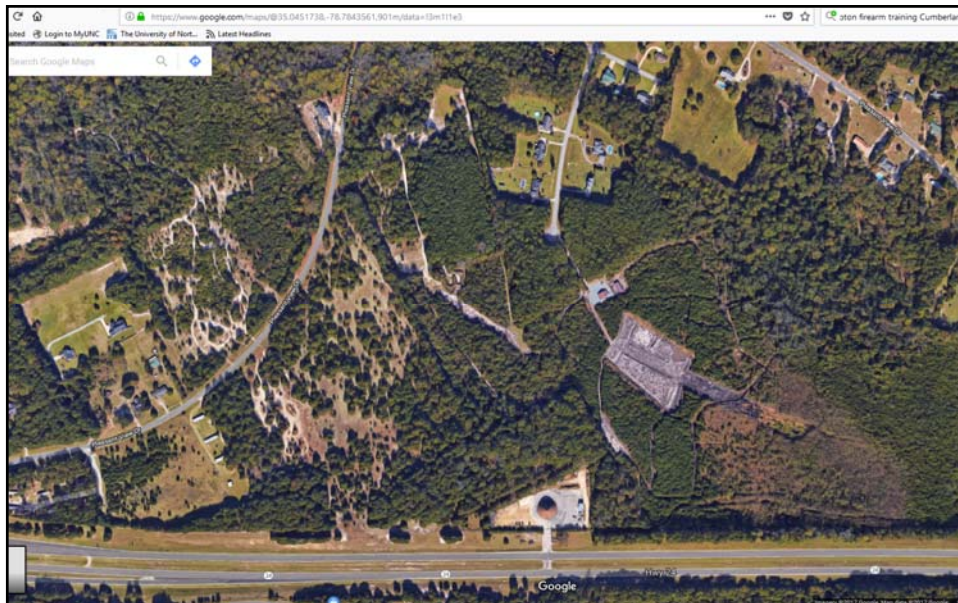
## S.L. 2017-108 (S. 615)

### Agritourism exempt if:

Farm held by person with

1. Qualifying farmer sales tax exemption
2. Enrolled in present use value property tax program

Must remain in qualifying status for three years after agritourism starts



Hampton v. Cumberland County

## Hampton v. Cumberland County (2017)

- 74 acre site, zoned rural residential
- USDA farm id number secured
- 25-yard shooting range installed
- County adopts standards for shooting ranges, which project does not meet
- 100-yard shooting range installed
- Zoning NOV issued

## Hampton v. Cumberland County

- Farm ID sufficient but not conclusive evidence of farm use
- Nonfarm use not exempt from county zoning
- BOA failed to make critical findings of fact regard actual use (commercial use, frequency of use, etc.) that could fit within ordinance exemptions

## Jeffries v. County of Harnett (2018)

- Bona fide farm
- Adds hunting preserve
- Adds shooting ranges, pistol pits, archery towers, classes for concealed carry, etc.
- Neighbors in 2010 ask whether shooting activities are really exempt from county zoning
- County says yes, appeals ensue

Drake  
Landing





## Jeffries v. County of Harnett

Should the 2017 legislation be used in interpreting the law applied in 2010?

**YES**

It “clarified” rather than made a “substantial alteration” in the law.

**BUT**

Statute still ambiguous on this issue

## Jeffries v. County of Harnett

Are shooting activities “agritourism”?

**NO**

- 1) Not like the other listed activities (farming, ranching) that are “natural” and involve no land alteration
- 2) Inclusion of “farming” and “ranching” but not “hunting” in list implies left out on purpose
- 3) Not done on farm for its aesthetic “farm or rural” setting

## III. Plan Consistency Statements



## Plan Consistency Statements

Requirement for plan consistency analysis added to statutes in 2005

Plan consistency not required, but analysis is – must “describe” how it is or is not consistent

Substance of statement not subject to judicial review

## S.L. 2017-10 (S. 131)

Revise requirements for plan consistency statements when zoning is amended

Governing board approves one of three statements:

1. Amendment approved, consistent with plan
2. Amendment rejected, inconsistent with plan
3. Amendment approved, inconsistent with plan

## McDowell v. Randolph County

Is citation to three policies enough for plan consistency statement?

Yes

This is not just a conclusory statement –  
cites specific relevant policies in plan

## Experience with Plan Consistency Statements

**Who prepares first draft of consistency statement?**

Applicant

Planning or zoning staff

Local govt. attorney

Planning or governing board member

Start the presentation to see live content. Still no live content? Install the app or get help at [PollEv.com/app](http://PollEv.com/app)

**How often does the board revise the draft consistency statement?**

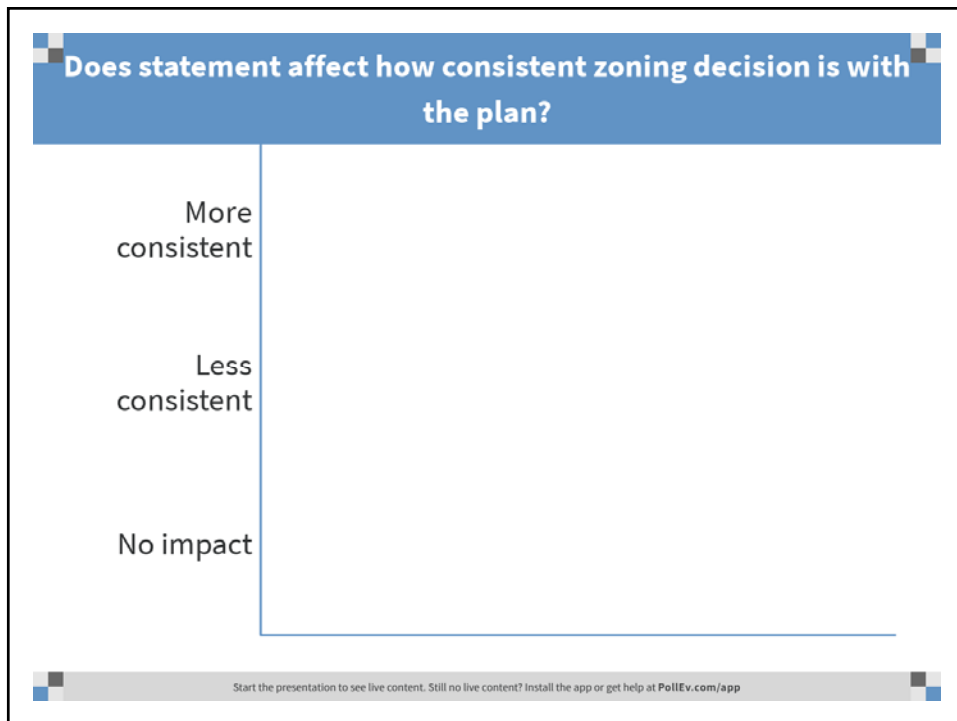
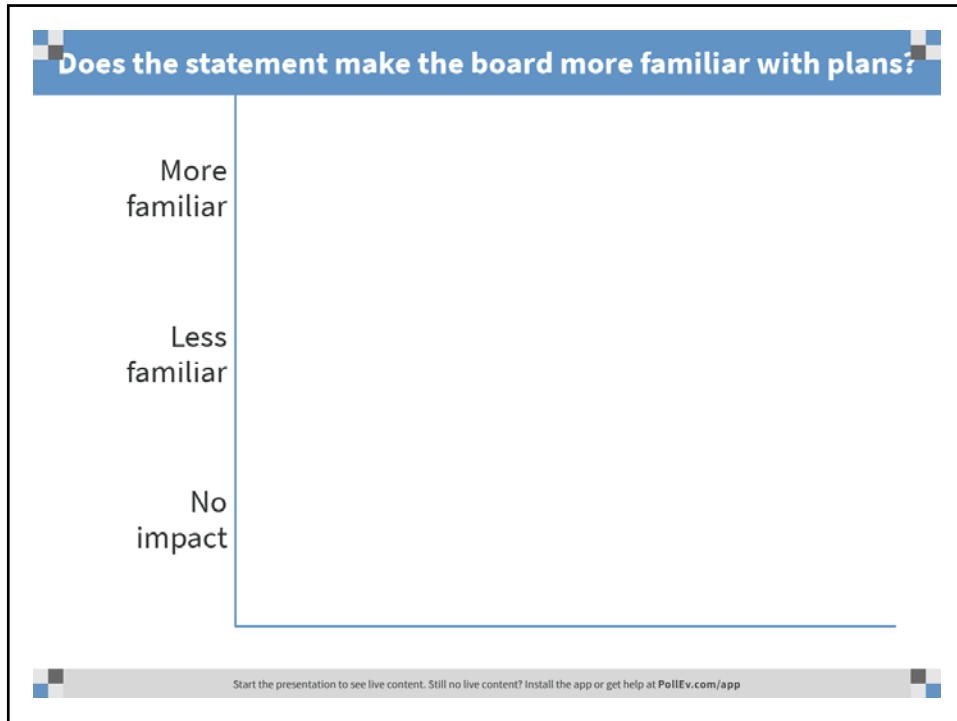
Rarely or never

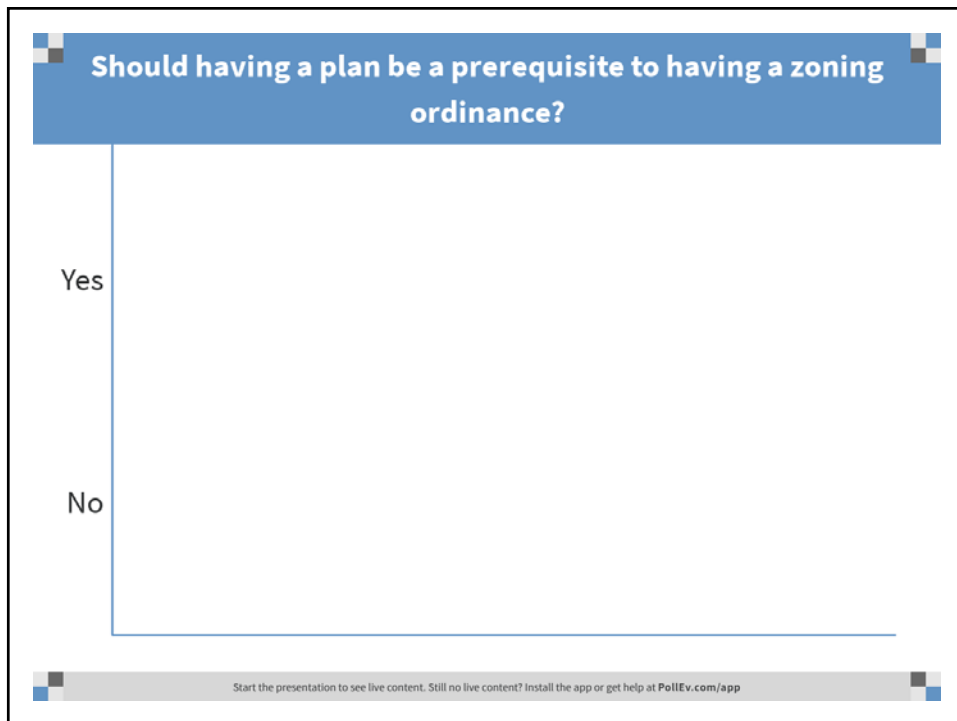
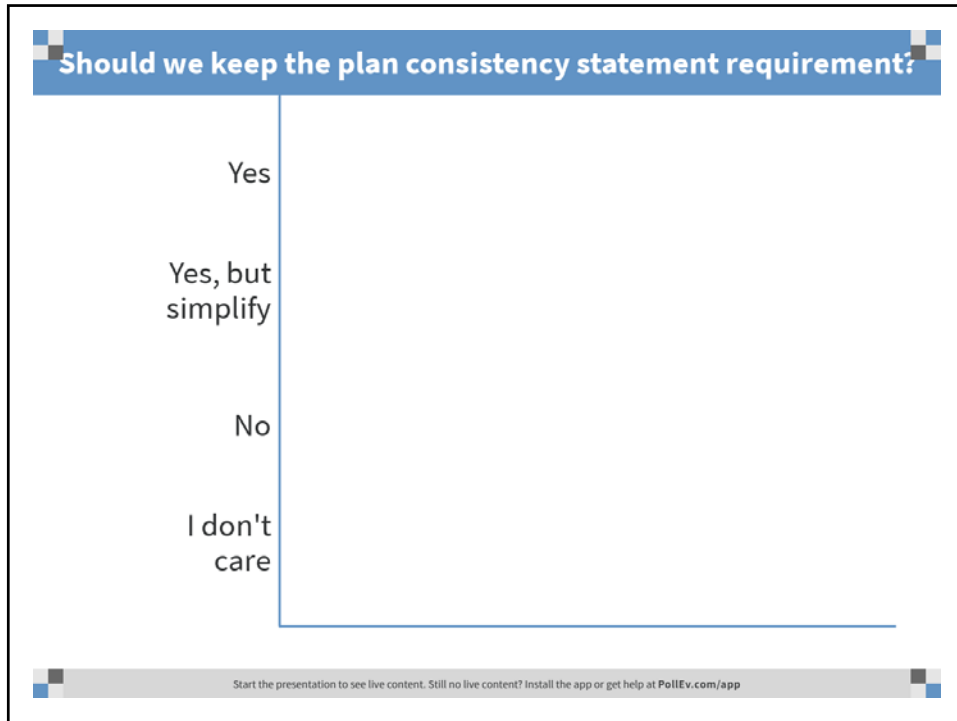
Occasionally

Frequently or always

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**If a plan is required to have zoning, should the state mandate regular plan updates?**

Yes

No

Start the presentation to see live content. Still no live content? Install the app or get help at [PollEv.com/app](http://PollEv.com/app)

I. Zoning Enforcement  
II. Permitting Fees and Impact Fees  
III. Sign Updates



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## Statutes of Limitation for Zoning Enforcement



Effective October 1, 2018  
as an affirmative defense  
against a law suit



## Time Limits for Zoning Enforcement

- 5 years to sue if
  - “The facts constituting the violation are known to the governing body, an agent, or an employee of the unit of local government.”
  - “The violation can be determined from the public record of the unit of local government.”
  
- 7 years to sue if
  - “The violation is apparent from a public right-of-way.”
  - “The violation is in plain view from a place to which the public is invited.”

<https://canons.sog.unc.edu/tick-tock-the-clock-is-now-running-for-zoning-enforcement/>

The diagram features a horizontal timeline with a dashed blue line. Above the line, dates are written at an angle: October 15, 2013, October 2014, October 2015, October 2016, October 2017, and October 15, 2018. A solid red vertical line is positioned at the October 15, 2018 date. Below the timeline, there are three main visual elements: a photograph of a parking lot with several cars, a 'NOTICE OF VIOLATION' form from the Department of Building Inspection, and a wooden gavel. The gavel is positioned to the right of the red line, with its head resting on the line.

## Moving forward with zoning enforcement

- Refine the land use ordinance
- Proactive investigation and enforcement
- Staff and board training
- Public records review
- Violation tracking (watch the clock)
- Proactive lawsuits
- Exception for threat to health and safety

## *LeTendre v. Currituck Cty.*



## *LeTendre v. Currituck Cty.*

- Property owners obtained a permit
- Neighbors appealed
- Owners began construction despite the appeal
- The permit was reversed in court
- Owners sought to prevent enforcement of the ordinance against the de-permitted house
  
- Preliminary injunction: Court of Appeals found no claims have likelihood of success

- I. Zoning Enforcement
- II. Permitting Fees and Impact Fees
- III. Sign Updates



## PERMITTING FEES

## Statutes on Development Regulations

- Article 19 of Chapter 160A
  - Part 1 General Provisions
  - Part 2 Subdivision Regulation
  - Part 3 Zoning
  - Part 4 Acquisition of Open Space
  - Part 5 Building Inspection
  - Part 6 Minimum Housing Standards
  - Part 7 Community Appearance Commissions
  - Part 8 Miscellaneous Powers



## § 160A-414. Financial support.

[Cities and counties] shall have power to fix reasonable fees for issuance of permits, inspections, and other services of the inspection department.

*All fees collected under the authority set forth in this section shall be used for support of the administration and activities of the inspection department and for no other purpose.*

## § 159-33.1 (S.L. 2018-5)

The finance officer of each unit and public authority shall submit to the secretary on January 1 and July 1 of each year . . . a statement of financial information [including]

. . .

*the total revenues received from building inspections, by type, and the total expenditures paid from all revenues received, by type.*

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

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About this Blog About the Authors Search Search

### Administering Development Regulations and Accounting for Permitting Fees

This entry was posted on September 4th, 2018 and is filed under Accounting, Reporting, Auditing, Administration & Enforcement, Community & Economic Development, Development Fees, Development Finance, Development Finance, Fees, Charges, Penalties, Finance & Tax, General Local Government (Miscellaneous), Land Use & Code Enforcement.

**About the author**  
Adam Lovelady  
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A 2015 North Carolina law requires that fees collected by the local "inspections department" must stay with that department. A 2018 law requires local finance officers to report to the Local Government Commission the revenues and expenditures "from building inspections." The basic statutory language of each rule is straightforward, but in practice the meaning and scope is less clear. The lack of clarity around permitting fees arises from the complicated authority for local governments to administer development regulations. This area of law has overlapping terminology, convoluted statutory structure, and varied local government organization and practices. This blog attempts to shed some light on the topic, but questions remain.

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**BLOG TOPICS**

- [+] Animal Services (12)
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- Development Finance (12)
- [+] Elections (49)
- [+] Emergency Management (10)
- [+] Employment (54)
- [+] Ethics & Conflicts (42)
- [+] Finance & Tax (300)
- Accounting, Reporting, Auditing (5)
- Development Finance (21)
- Fees, Charges, Penalties (18)
- [+] General Local Government (Miscellaneous) (132)

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## Impact Fee Authority

- Quality Built Homes Inc. v. Town of Carthage
  - 3 year statute of limitations applied to challenge of impact fees
- System Development Fees (G.S. 162-213)
  - May be charged for new development by water/sewer providers
  - Standards for analysis and calculation upfront; limits on expenditure
  - Timing for collection
    - Subdivisions: the later of either plat recordation or when water service committed
    - Other development: the earlier of either at time of application for connection of unit or when water service is committed

<https://canons.sog.unc.edu/2018-system-development-fee-law-changes/>

- I. Zoning Enforcement
- II. Permitting Fees and Impact Fees
- III. Sign Updates



## Regulating Signs, Regulating Speech

Heightened scrutiny,  
But some regulations may still apply

Government must have substantial public  
interests

(traffic safety, community aesthetics)

Regulations must be tailored to those interests

(not over-inclusive, not under-inclusive)



## Details Matter

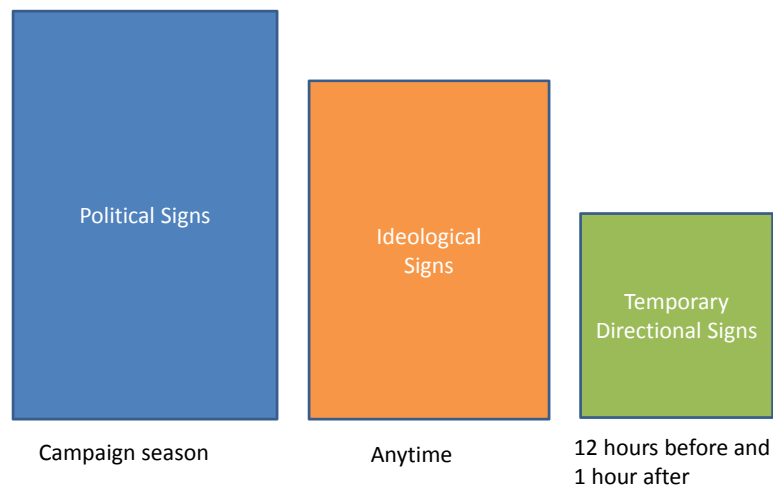
What type of property?

- Government Property
- Private Property

What type of regulation?

- Regulating content of a sign
- Regulating characteristics of a sign
- Commercial v. noncommercial messages

## *Reed v. Town of Gilbert*



## Signs after *Reed*

- Content-neutral regs are generally OK
- Content-based regs are not\*  
\*(specifically non-commercial categories)
- Commercial sign distinctions are generally OK

**CONTENT-NEUTRAL REGS ARE  
GENERALLY OK**

## Valid Content-Neutral Regulations

- Size
- Materials
- Location
- Lighting
- Electronic Message
- Portability
- Public Property
- Number of Signs

## *Peterson v. Vill. of Downers Grove,*

local sign ordinance restricted painted wall signs, location of signs (facing right-of-way), and the number of signs



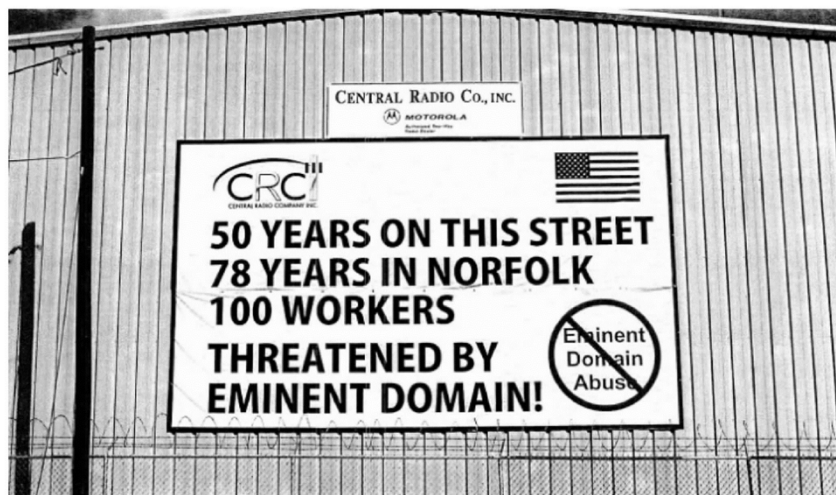
- Ban on wall signs to be content-neutral; it applied to all signs, regardless of content, and there was no evidence that the prohibition was adopted because of disagreement with content conveyed in wall signs.

**CONTENT-BASED REGS ARE NOT OK**

## Central Radio v. City of Norfolk

- Sign ordinance exemptions for
  - any flag or emblem for any nation, state, city, or religious organization.
  - any work of art which did not identify or specifically relate to the product or service

## Central Radio v. City of Norfolk





## Fails Strict Scrutiny

- Governmental interests are not compelling
  - promote the City's physical appearance
  - reduce the distractions, obstructions and hazards to pedestrian and auto traffic
- Tailoring is hopelessly underinclusive
  - the flag of a private or secular organization was “no greater an eyesore” than the flag of a government or religion,
  - No evidence to support threats to traffic safety





**COMMERCIAL SIGN DISTINCTIONS  
ARE GENERALLY OK**



## Even the skeptical courts allow for commercial distinction

“The government may impose stricter regulations on commercial speech than on non-commercial speech.”

Thomas v. Schroer, 248 F. Supp. 3d 868, 877 (W.D. Tenn. 2017)

“[W]e have acknowledged that Reed's holding seems to affect only restrictions of noncommercial speech.”

Auspro Enterprises, LP v. Texas Dep't of Transportation, 506 S.W.3d 688, 706 (Tex. App. 2016),

## Substitution

If your code distinguishes between commercial and noncommercial signage, allow noncommercial content wherever commercial content is allowed.

“Noncommercial messages may be displayed on any sign authorized to display commercial messages.”

## Substitution Can Save the Day

- Geft Outdoor LLC v. Consol. City of Indianapolis & Cty. of Marion, Indiana, 187 F. Supp. 3d 1002 (S.D. Ind. 2016)
- After original ordinance was found to violate Reed, the city added a substitution clause and avoided further challenge

Any legal topics you would like to briefly discuss?

 When poll is active, respond at [PollEv.com/davidowens433](https://PollEv.com/davidowens433)

**Top**

## Alternate Inspections

(160A-413.5, S.L. 2018-29)

2015 law said no local inspection needed for certain building code items:

- Design completed under valid seal of licensed architect or engineer
- Field inspection performed by licensed architect or engineer or person under direct supervision
- Signed written statement from licensed architect or engineer of compliance with the NC Res. Code for 1- & 2-Family Dwellings
- Inspection certification provided by the professional

## Alternate Inspections

(160A-413.5, S.L. 2018-29)

2018 law clarifications

- Applies to building component or element of construction, not systems
- Certification may be provided by electronic or physical delivery;
- City/county must confirm receipt through reciprocal means
- City/county released from liability

## More Inspectors

- Mutual Aid Contracts for Building Inspection (160A-413.6; 153A353.1; S.L. 2018-29)
- Comity (143-151.14; S.L. 2018-29) is already allowed for inspectors from other states; now allowed for inspector certified by the International Code Council; all now required to be in good standing with certifying board and to take short course training in NC within three years;

## Pool of State Building Code Inspectors

(143-139.4; S.L. 2018-29)

## Documenting Inspection Requests

- Local department shall maintain record of each inspection request (date and time received, type of inspection, address of inspection, person to whom request directed, name of requestor.
- Local department may inform requestor that inspection cannot be performed within two business days
- Request received after noon deemed to be received the next business day

## DOI Pool of Inspectors

- Department of Insurance to establish a pool of qualified Code-enforcement officials
- If inspection is not completed by local department within two business days of being requested, then the permit holder may make written request to Insurance Commission to complete the inspection
- Submission form specified by statute (identification, permit and timing documentation)

## Prior to assigning a state inspector, Commissioner shall verify:

- Permit holder desires the inspection to be completed
- Local dept received a request for inspection
- Inspection has not been completed (and the reason for lack of inspection)
- Other information deemed relevant

## Process

- Commissioner will inform local inspection department if a free agent inspector will be assigned
- Local department shall provide information regarding outstanding building permits and previously conducted inspections on those (may also provide similar information for other projects by same permit holder or requestor)
- Commissioner will charge a fee; local inspections department will reimburse requestor for fees charged on inspections not complete
- Within one business day of receipt, Commissioner shall forward the free agent inspector's report to the local inspection department, the permit holder, and the requestor (if different from permit holder)
- Local inspection department released from liability



*Murr v. Wisconsin*,  
137 S. Ct. 1933 (2017)



Image from inversecondemnation.com

- Property owner owned two adjoining nonconforming lots
- State and local regulations required merger (the owner couldn't sell a substandard lot)

“What is the proper unit of property against which to assess the effect of the challenged governmental action?”

## Three Factor Test

- ***Treatment under state and local law.***  
How is the land treated under state and local law, especially legitimate restrictions on how the land is bounded and divided?
- ***Physical characteristics.***  
What are the physical characteristics of the land? This may include topography, the physical relationship of distinguishable tracts, and the surrounding human and ecological environment, especially areas that are subject to, or likely to be subject to, environmental regulation (coastal areas, for example).
- ***Value of the subject property.***  
What is the value of the property subject to the regulation, especially with regard to other land holdings? In other words, does the regulated land add value to adjoining commonly held property through increased privacy, recreation space, and natural beauty?

## In this case: one property, no taking

- ***Treatment under state and local law.***
  - merger provision was a legitimate exercise of government power
  - Owners created common ownership after merger regulations
- ***Physical characteristics.***
  - Reasonably treated as one lot
  - Joined on longest edge
  - Topography limits development
  - Adjacent river brings expectation of regulation
- ***Value of the subject property.***
  - Second lot brings increased value from increased privacy and recreation space, as well as improved development options
  - Appraisal cited

## Dissents

- Chief Justice Roberts, joined by Thomas and Alito, would give more weight to state property law and would have remanded for the state court to determine if the lots were legally distinct parcels.
- Justice Thomas also wrote separately, saying the Court should “take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause”
- Justice Gorsuch did not participate

## Dep't of Transp. v. Riddle

COA16-445 (April 18, 2017)



## DOT Statutes on Compensation for a Partial Taking

“the difference between the fair market value of the landowner’s *entire tract* immediately prior to the taking and the fair market value of the remainder immediately after the taking . . . .”

N.C. Gen. Stat. § 136-112(2) (emphasis added)

## Factors for determining “entire tract”

*Barnes v. North Carolina State Highway Comm’n*,  
250 N.C. 378, 384 (1959).

No single rule or principle to determine “unity of lands.”

The factors are

- unity of ownership
- physical unity, and
- unity of use

Emphasis on unity of use.

## In this case

- Court found
  - unity of ownership (except fast food lot)
  - Physical unity (lots are contiguous)
  - No unity of use  
(not an “integrated economic unit”)
  - Lots 2 and 7 were not “reasonably and substantially necessary to the enjoyment of the [other lots].”

## Beroth Oil Co. v. NC Dep't of Transp.

COA17-74 (November 21, 2017)

- Interlocutory appeal denied; NCDOT lacked substantial right at issue to seek immediate review
  - Property interest is typically a substantial right, but NCDOT lacked any property interests at issue
  - Sovereign immunity is typically a substantial right, but the case is past the point of asserting sovereign immunity
- Judge Dillon would have allowed appeal (NCDOT did have a substantial right at issue), but would have denied the request on the merits

# Questions

<https://www.sog.unc.edu/resources/microsites/planning-and-development-regulation>

<https://canons.sog.unc.edu/>



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