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Greetings Municipalities,

In this issue: Noah's ark next door, beating around the bush, and appointed board breakups. Before digging in on recent developments in the municipal law world, a special thanks to all of the attorneys that attended the North Carolina Association of Municipal Attorneys' summer conference in Wilmington, N.C. a few weeks ago. It was a fantastic time with many talented presenters, and attendees were able to knock out half of their required continuing legal education credits if they attended all sessions. Information on how to join and pictures of the conference are available here. We hope to see new faces next year!

Sincerely,

Baxter Wells
Assistant General Counsel
North Carolina League of Municipalities
bwells@nclm.org
919.715.2925

Land Use/Fruits of Their Own Labor

Court of Appeals issues stolid win for the concept of zoning

Dunckel v. City of Winston-Salem, 929 S.E.2d 631 (2026). I've had high voltage power line easements in my backyard, even a Walmart loading dock; but never an animal preserve (unless you count the gulls in said loading dock). So imagine Winston-Salem's surprise when a code enforcement investigation based on an anonymous tip revealed a sixty-animal nonprofit sanctuary in a neighborhood zoned R-9 for single family residences. Granted, Fairytale Farm was on a 3.3 acre tract, but smells know no property line, and the several hundred people attending volunteer activities and fundraisers at the property were sure to shatter the residential nature of the neighborhood on occasion. The City informed the property owner that such commercial use was not permitted under the UDO, and that the property owner would need to cease operating the animal sanctuary on the parcel. As a consolation, the property owners could apply for a home occupation permit to conduct the business side of the nonprofit, or they could keep the animals as personal pets—but neither option would allow for large events and other commercial activity. Instead of continuing down the code enforcement route, the property owners ceased operation of the animal sanctuary and filed a declaratory judgment action against the City. The suit alleged that the City's demand violated the property owners' right to operate a business free from unreasonable government interference, a claim hoping to catch a ride on the meteoric Fruits of Their Own Labor Clause jurisprudence coming from our state Supreme Court. The City handedly prevailed at summary judgment.

The Court of Appeals likewise dispensed with the property owner's disregard for generally applicable zoning regulations. The property owner argued that, because the city could not point to any specific harm emanating from the property by virtue of their nonconforming use, the burden imposed on the property owner by the city's enforcement of its UDO—which had remained unchanged as to the property since the owner's purchase in 2017—inherently outweighed any government interest in orderly land development. Instead of enforcing a uniformly applied, statutorily authorized land development regulation in an efficient manner, the City should have to wait until the pernicious effects of a nonconforming use actually presented themselves before taking action. In essence, the property owner's argument would transform any ability to zone into a rolling, parcel-by-parcel justification for imposing a specific use category whenever a violation was detected. Never mind comprehensive plans, the carefully crafted statutory scheme of Chapter 160D, or the North Carolina Supreme Court's longstanding endorsement of the need for zoning "to promote the health, safety, morals and general welfare of the entire community by separating the commercial and industrial districts of the city from those which are set apart for other purposes, such as art galleries, churches, hospitals, libraries, museums, parks, playgrounds, residences, and schools." *Kinney v. Sutton*, 230 N.C. 404, 411 (1949). To the property owner, no harm means all fowl.

The Court of Appeals applied a two-tiered test announced by the state's Supreme Court in *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418 (2024). The *Ace Speedway* test is to be applied when a plaintiff alleges that a government action infringes on their "fundamental right to conduct a lawful business or to earn a livelihood" enshrined in the Fruits of Their Own Labor Clause of Article I, Section 1 of our state constitution. *Howell v. Cooper*, 388 N.C. 71, 80 (2025). Here is the tiered analysis a court will apply if your client allegedly prevents someone from conducting an activity or making money on their property, even when applying mundane health and safety regulations that otherwise pass constitutional muster under the Due Process or Fifth Amendment Takings clauses:

- The first tier asks, is there a proper purpose for the government act? This requires your client to present a justification for their enforcement of an ordinance that not only finds enabling language in statute, but that also has some factual record lending veracity to your client's assertion that it is the true purpose. That is because out of the rapidly expanding application of the Fruits of Their Own Labor Clause comes a new vector for plaintiffs to create issues of material fact. After your client has asserted its reasoning for enacting an ordinance, the plaintiff may put on evidence tending to show an ulterior motive. The court then chooses the actual purpose before moving onto whether that purpose is a proper governmental purpose. This second step of the first question is more germane to municipal practitioners: your client's purpose must advance a public interest or common good, or at least prevent a public harm. Practically speaking, each ordinance your client seeks to enact or enforce will need to answer these two questions in the affirmative:

    - At the time your client acted, is the factual basis supporting the chosen course of action sufficient to survive a plaintiff's post-hoc assertion of an ulterior motive?

    - Does your client's act satisfy the public purpose doctrine we all know and love?

  In this instance, the property owner did not assert that the City's purpose of maintaining the residential nature of a neighborhood to promote the health, safety, and welfare of the residents was improper. Instead, the property owners focused on the second tier by arguing that the City's chosen method of achieving that goal through enforcement of the R-9 zoning classification was unreasonable. More on that below.

- The second tier presents a balancing test meant to establish the reasonableness of the government act. At this stage, the effectiveness of the government's action in achieving the stated public purpose is weighed against the burden imposed on the plaintiff. This "question of degree" is the balancing test described in *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 66 (1988), the case relied upon by the Supreme Court in *Ace Speedway* to describe the second tier of Fruits of Their Own Labor analysis. But the Court in *Ace Speedway* added a phrase not found in the *Poor Richard's* opinion. "Given all the options available to the state. . .," posed the Court, "was it reasonable for the state to choose this approach, with its corresponding benefits and burdens?" *Ace Speedway*, 386 N.C. at 426. This suggests a comparison may be due between the method chosen by your client and other methods available to achieve the same purpose. Whose burden it would be to establish the comparative effectiveness of those methods not chosen remains to be seen, but luckily the Court of Appeals did not take the bait. Instead, the opinion notes that the *Ace Speedway* "test does not require that the means be the best method of achieving the state's goal; rather, the means chosen must be 'reasonably necessary.'" *Dunckel*, 929 S.E.2d at 640.

> The Court of Appeals held that the City's enforcement of the R-9 zoning district on the property owner's admittedly noncompliant use was an entirely reasonable method to accomplish the City's asserted proper purpose. Enforcement certainly burdened the property owner, but the property owner could always go find a *commercially-zoned* property to carry out their *commercial* activity. The City's chosen method of accomplishing its goal was furthermore "very effective" because it completely foreclosed the property owner from altering the residential character of the neighborhood and its impacts on the health, safety, and welfare of the neighbors.

The Court also noted that the property owner's argument "overlooks the fact [they] are still using the property in a commercial manner even if some of the negative impacts are not present based on the factual record before us." *Dunckel*, 939 S.E.2d at 639. This highlights a central misunderstanding, or perhaps misdirection, embedded in the owner's argument. Zoning enforcement is not a placeholder for nuisance law. Zoning is not meant to imbue local government with the *in loco parentis* power to prevent common law trespass. Those are private matters with ample remedies in court. Sure, zoning regulations can go far in dissuading your neighbor from spawning a nuisance through their nonconforming use of their property, and your local government has ample police power to address squalor, traffic, and noise if it so desires. But the purpose of zoning is broader than defending the quiet enjoyment of your neighbors. It informs residents about the view they should expect to see across the street when they leave their front door every morning. It allows for informed business planning: where are my customers likely to reside? Where are my competitors likely to set up shop? Long-term infrastructure projects require the stability of knowing that the parcels served by a pipe, road, or school will only change potential character through a deliberative process of rezoning that itself takes account of the infrastructure both placed and planned.

This expansive nature of zoning reveals the ill-fit of applying the second tier of Fruits of Their Own Labor analysis to zoning regulations. The Court of Appeals noted as much, opining that the City's "enforcement of the UDO is not the same as state action described in other Fruits of Their Labor and Law of the Land cases in which the opinions draw a distinction between government action regulating a business and instances where the government excludes or prohibits individuals from engaging in a business altogether." *Dunckel*, 929 S.E.2d at 640. The City did not enact an ordinance prohibiting animal sanctuaries, but merely undertook its legislative duty to determine where in the corporate limits such an activity would be most appropriate. By pitting the effectiveness of the City's chosen method against the background burden of zoning regulations ever-present for every occupier of property, the *Ace Speedway* test all but ensures each challenge of a UDO will ripen to a question of fact. As to the latter portion of that balancing test, the Supreme Court leaves us with this:

> "The fact that the property in question is more valuable for commercial purposes, such as a restaurant or a public dining-room, than for residential or other

conforming uses is not sufficient of itself to invalidate the pertinent provisions of the ordinance as confiscatory. If the police power is properly exercised in the zoning of a municipality, a resultant pecuniary loss to a property owner is a misfortune which he must suffer as a member of society." *Kinney*, 230 N.C. at 411-12.

Public Comment

4th Circuit upholds public comment rule that prohibits criticizing individual students

Platt v. Mansfield, 162 F.4th 430 (4th Cir. 2025). Several parents attended an October 8, 2024, meeting of the Loudoun County School Board to address recent revelations that a certain student had been permitted to return to the school their own children attended. The issue was that this certain student had recently been arrested for bringing a weapon to school, was accused of committing a sexual assault, and was known to be associated with gang activity. The Board's public-comment period was governed by a policy which prohibited speakers from "targeting, criticizing, or attacking" individual students. As an alternative to expressing those concerns during the public comment period, the policy suggested that those concerns be directed to school system staff in private. At the outset of the public comment period, Chairperson Mansfield reminded speakers of the policy's specific prohibition against targeting individual students. You know, one of those warnings against roughhousing that parents issue to siblings on the way to the playground… good luck. During the meeting, multiple speakers criticized the Board's handling of student safety, including its policies regarding reassignment and school security. In the course of those remarks, several plaintiffs referenced the conduct of a particular student which had been widely covered in the news. Not directly, mind you. The student was never named. Instead, the parents referenced a sexual assault committed by "a student," recalled "the student" who had brought a weapon to school, and lamented that "a student with violent gang affiliations who was arrested" was allowed to return to school. Mansfield interrupted each of these speakers, advising them not to disclose personally identifiable information or to comment on an individual student in a manner inconsistent with the policy. The Chair noted that a name was not necessarily required to constitute reference to a particular student, but that any combination of personally identifiable information that a listener could "link together" would violate the policy.

Despite these warnings, some speakers continued to refer to the student's alleged conduct, prompting additional interruptions and requests that they redirect their comments. Other speakers were permitted to continue after reframing their remarks in more general terms concerning school safety and administrative practices. As the comment period progressed, the exchanges between speakers and the Chair became increasingly contentious. When another speaker continued in that vein despite prior warnings, Mansfield terminated the public-comment period before all registered speakers had an opportunity to be heard. The following day, the Board issued a public statement explaining that it would not permit discussion of specific students in that forum while emphasizing its obligations concerning student privacy. A few parents who had either been interrupted by Chairperson Mansfield or denied the right to speak at all by virtue of the early termination of the public comment period filed an as-applied challenge against the Board's enforcement of what the plaintiffs otherwise conceded could be a viewpoint-neutral policy. The plaintiffs also argued that the policy was unconstitutionally vague, leaving them without clear guidance about when their comments would cross the line. The suit first asked for a temporary restraining order, which the trial court denied after a hearing. The trial court ordered briefing on the subsequent request for a temporary injunction, which was likewise denied after the trial court found the plaintiffs lacked a sufficient likelihood of success on the merits. The plaintiffs appealed.

North Carolina's own Judge Wynn authored the opinion for the 4th Circuit. To set the stage, everyone was on the same page about a few key issues. For one, all parties and the Court acknowledged that the school board meeting was a limited public forum where the government can place restrictions on speech so long as they are reasonable in light of the purpose of the forum, and do not discriminate against a speaker based on their viewpoint. And in keeping with this acknowledgement, the plaintiffs did not challenge the policy as facially discriminatory or patently unreasonable. Instead, plaintiffs cited two purported factual anomalies to argue that the Board applied the policy in a way that discriminated against their viewpoint, namely that a particularly dangerous student should not be welcomed within the halls where their own children were focused on their education. First, asserted the plaintiffs, the Chair did not mention the policy as the basis for each interruption of a speaker and the eventual shuttering of the public comment period altogether. The school board only mentioned the need to vigorously enforce the policy far after the fact as a post-hoc rationalization for silencing their speech, according to the plaintiffs. Second, the plaintiffs noted that Mansfield did not interrupt other speakers when they made similar comments concerning school safety and the Board's policies.

To the plaintiffs' first point, the 4th Circuit acknowledged that the Chair had alluded to general concerns of maintaining decorum and student privacy when interrupting the speakers, and again the next day when the school system issued a statement about the previous night's happenings. But this did not convert the Board's later assertion of the policy into a post-hoc justification for the Chair's action. It was not necessary for the Chair to cite the specific policy number and language when telling each violating speaker to stand down. The Chair explained the policy at the beginning of the public comment period, and each of the concerns raised by the Chair when silencing a speaker directly addressed the underlying prohibition of the policy against targeting, criticizing, or attacking individual students. Being that the Chair was in the middle of presiding over a contentious public comment period, "we decline to flyspeck Mansfield's statements for whether she cited chapter and verse in trying to keep Plaintiffs within the bounds of the Policy." *Platt*, 162 F.4th at 442. Add flyspeck to your vocabulary, and let the Court's discussion here stand for the proposition that your client need not worry about including specific reference to a policy number or verbiage when enforcing public comment rules. Reference to the underlying concerns of the policy will suffice.

As for the plaintiffs' complaint that the Board silenced them but not other speakers addressing the same topic, the Court cited the numerous examples of Mansfield allowing speakers to openly criticize the Board on its student safety policy, and only stepping in to stop speakers when they referred to the troubled student's behavior. Speakers were allowed to claim the Board was playing "Russian roulette" with their children, and burying their heads in the sand when it came to public safety. Mansfield only stopped a speaker when the speaker referred to "a student" or "the student" who had engaged in particular behavior which had made the evening news. Furthermore, Chairperson Mansfield was quick to enforce other rules present in the policy, including cutting off other speakers when their allotted time expired and declining to allow a speaker to take the podium after they had missed their name being called the first time. These examples supported the trial court's conclusion that, if anything, the Board enforced its viewpoint-neutral policy consistently, not in a discriminatory fashion as alleged by the plaintiffs. Here, the 4th Circuit thus endorses a public comment policy which prohibits targeting, criticizing, and attacking a generally protected class of people (which all seem to connotate a negative viewpoint), so long as that policy does not prohibit attacking or criticizing the governing body itself. Consistency and restraint by the presiding officer is key. Compare this outcome to the case of *State v. Barthel*, 301 N.C. App. 466 (2025), where our state Court of Appeals sided with a speaker who derailed a public comment period at a county commissioner's meeting after revealing a banner with a shocking comparison between the county clerk and a certain body part. That case was covered in the previous edition of Municipal Law Notes, and the State does not seem to have appealed the case further. The disposition of that case relied more on the timing of the speaker's conduct, followed quickly by a deputy's intervention, followed quickly by the presiding officer's declaration of a disturbance. It was decided prior to this 4th Circuit case, which may have impacted the Court of Appeal's decision had the county's actual policy come under scrutiny. These two cases seem to make up the most current state of the law concerning maintaining decorum and enforcing policies during public comment periods.

Finally, the plaintiffs argued that the policy itself was unconstitutionally vague under the Due Process Clause. This argument failed largely due to the self-defeating nature of the specific arguments asserted by plaintiffs. First, plaintiffs asserted that "target," "criticize," and "attack" each were common words with well-known definitions. A person reading the policy would think that it banned the exact behavior that the Board meant to ban. How this resulted in a conclusion of vagueness was lost on the 4th Circuit. Second, the plaintiffs argued that the policy was merely "borderline" vague because whether a word constituted an attack or criticism was in the eye of the beholder. Extreme cases would obviously constitute attacks to all reasonable observers, but the plaintiffs asserted that there would be close cases that would come down to the individual sensitivities of the presiding officer. However, as the 4th Circuit noted, “the mere fact that close cases can be envisioned does not render a statute vague.” *Platt*, 162 F.4th at 446 (quoting *United States v. Williams*, 553 U.S. 285, 305 (2008)). Furthermore, the cases cited by plaintiffs to support their arguments were First Amendment facial viewpoint discrimination cases which had no bearing on a void-for-vagueness analysis. Again, this case begs a similar question to the outcome in *State v. Barthel*. What would the Court have done if the Board in *Barthel* had shut down a speaker whose banner complimented the county clerk using similar profane language? How would have Chairperson Mansfield reacted if a speaker had stood up to compliment an individual student on their conduct? Would that have constituted targeting the student under the policy in question, or would allowing that speaker to opine have leant additional weight to a viewpoint discrimination argument? Until a case discussing the interplay between a board’s public comment policy and a presiding officer’s interpretation of the policy works its way through the courts with the benefits of both *Barthel* and *Platt*, continue to hammer home the importance of viewpoint-neutral controls on topics discussed, if any, as well as consistent enforcement of policies already on the books.

Appointed Boards

No constitutionally protected property interest in Board of Adjustment seat, says 4th Circuit

Deal v. City of Monroe, 2026 U.S. App. LEXIS 19923, 2026 WL 1965729. Serving on a Board of Adjustment is a largely thankless job. Meetings are unpredictable in length, sometimes fraught with contentious disputes between neighbors, and board members have to apply a quasi-judicial decision-making standard that remains foreign to an unforgiving public. But public servants are public servants, and in the City of Monroe, serving on the Board of Adjustment nets you fifty to seventy-five bucks per meeting. The City’s BOA was established under N.C.G.S. § 160D-302(a), which provides that a council “may” appoint members to a BOA, with each member serving a three-year term. The City’s own code provided that all members of appointed boards “serve at the pleasure of the City Council and may be removed at any time with or without cause.” Kenneth Deal signed up for a term on Monroe’s BOA, was appointed in 2020, and reappointed for a second and final term in 2023. Less than a year later and without notice to Deal, the City Council voted 5-2 to remove him from the BOA at a regular meeting. Deal filed a Section 1983 suit alleging that the Council’s removal violated his procedural due process rights. The trial court granted the City’s summary judgment motion.

Do citizens who are appointed to boards created under the statutory discretion of a city council have a constitutionally recognized property right to their entire appointed term? The 4th Circuit recognized this as a case of first impression. The panel called upon other cases dealing with alleged entitlements to local government action to hold that no, Deal did not possess a property right in finishing out the remaining two-years-and-change of his term. The question comes down to whether a statute requires a local government to stand up an appointed board, or merely allows a local government to create and appoint members to a board to aid the city in its operations. Here, because N.C.G.S. § 160D-302(a) used the permissive may, allowing but not requiring the City of Monroe to appoint members to the BOA, the City maintained the authority to remove members or even eliminate the board altogether. The 4th Circuit cited its decades-old case of *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992), where a permit applicant was denied a property right to a permit because the governing body retained at least some discretion over its issuance. "Any significant discretion conferred upon a local agency," the Court announced, "defeats the claim of a property interest." Additional support for this view can be found in subpart (b) of § 160D-302, where city councils are authorized to confer the duties of a BOA on the planning board or even the governing board itself as the council sees fit. Further, N.C.G.S. § 160D-310 provides that city councils retain plenary authority to establish their own reasonable procedures for soliciting, reviewing, and making appointments.

One possible monkey wrench in the 4th Circuit's analysis is the plaintiff's reliance on a case from our own state Supreme Court: *Board of Adjustment of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421 (1993). There, the Supreme Court grappled with whether the Town's wholesale elimination of the BOA violated the statute's provision that each member's term should be three years unless a term needed to be shortened from the outset to stagger the terms of each member. Our Supreme Court said no, that because N.C.G.S. § 160A-146 allowed councils to eliminate boards which were not otherwise required by law, Swansboro was free to eliminate its BOA (before standing up an entirely new BOA) without violating the more-specific appointment statute. The 4th Circuit relied on the *Swansboro* case to support its holding that the Council's discretion to create the BOA included the additional power to remove members at will. However, the *Swansboro* case dealt with the elimination of the entire BOA, an act which found independent support in § 160A-146. Furthermore, the Town of Swansboro had eliminated the BOA following notice in the local paper and a public hearing on the matter, a practice which our Supreme Court said "ensure[d] accountability to the public with regard to any such action." *Id*. At 427. Not only that, but the Supreme Court in *Swansboro* specifically stated in dicta that the BOA "terms may not be reduced by the Board of Commissioners as long as that Board of Adjustment is in existence." *Id*. That case was also decided far before the reorganization of our state's local government land use regulation statutes into Chapter 160D, so there remains an open question as to how a state appellate court would address this issue given the fact that the three-year term provision survives to this day.

On Brief

Property Reappraisal Appeals – *In re: Nelson*, 2026 N.C. App. LEXIS 548 *, 2026 WL 1883842. The county conducted a reappraisal of a townhome in 2024, and assessed the land value to be equal to other townhome properties nearby. The problem: the subject parcel was both smaller and noisier than the neighboring townhomes, and had been appraised at a lower comparative value during the previous reappraisal process four years earlier. The property owner disputed the appraised land value with the tax assessor, and was rebuffed. He appealed to the county's Board of Equalization and Review, and lost. His case finally landed before the Property Tax Commission. The property owner represented himself and was the only witness to testify at the hearing. The property owner pointed out the discrepancies between the county's former appraisal and the current, and noted several differences between his property and the comps which had received identical land valuations. The Commission voted 2-1 to dismiss his appeal, citing the property owner's lack of evidence demonstrating application of common appraisal methodology. The Court of Appeals reversed the Commission's dismissal, holding that the property owner's testimony was sufficient to establish arbitrary decision making on behalf of the county despite his lack of appraisal experience. To require a property owner to produce an appraiser's expert opinion would shutter the appeals process to many property owners, when the resident's own testimony could just as easily highlight the county's missteps. Having met his evidentiary burden, the property owner's appeal was remanded to the Commission for further proceedings, including the county's opportunity to establish its basis for valuation. This case stands for the proposition that, like in condemnation proceedings, a property owner's layperson opinion as to the conditions or value of a property can be competent evidence.