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Happy Holidays, public servants ye!

‘Mongst the wassailing and ramracketting, you’ll find our state’s appellate courts bearing gifts of fresh opinions on a flurry of topics impacting our cities and towns. Two interesting tidbits arising from criminal prosecutions touch on the First Amendment’s interaction with council meetings and an accused’s right to access body camera footage to prepare their defense. Yet another opinion takes a contentious condemnation proceeding to task, but do not let the undesirable outcome dampen your cheer—its scope is likely limited to a procedural history and facts unlikely to repeat themselves often. To close the year, I hope this edition assists you in your efforts to counsel and serve your community. But more importantly I hope you have the time to be present in the moment with family and friends. Stay safe, and we will see you in the new year!

Sincerely,

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Law Enforcement Recordings

District Court criminal subpoena does not provide backdoor to body camera footage release

*State v. Chemuti, 2025 N.C. LEXIS 864 *, 2025 WL 2942941*. The defendant was arrested by the Mooresville Police Department for resisting a public officer; a charge that, when unaccompanied by a more serious offense, usually lives and dies in our District Courts. The defendant issued an attorney’s subpoena to the town requesting body camera footage of the

arrest. The town promptly rejected the defendant's request, pointing her instead to North Carolina's custodial law enforcement recording statute (CLEAR) for the proper procedure to obtain the recordings. The defendant sought *ex parte*, and the District Court issued *ex parte*, an order instructing the town to hand over the recordings anyway. The town responded with a motion to quash, which was denied by the District Court. The judge opined that, while the CLEAR statute provided *a* route to obtain the footage, it was just as appropriate for a criminal defendant to obtain the footage for use in their defense via an order from the court handling that matter.

The town appealed the District Court's second order instructing release of the footage, but the Court of Appeals dismissed the appeal after holding that the District Court's order did not impact a substantial right of the town. Not so, says the North Carolina Supreme Court. Allowing the District Court's mandate to issue while a criminal case continued to disposition would force the town to release footage that it would have no power to recapture once final judgment was entered. It is unclear what exactly the town would have a right to appeal in that instance anyway, if anything at all. It is not like the town is a party to the criminal prosecution whose journey through the court system rarely affords outside parties the opportunity to assert their interests. The town had properly established a substantial right in its briefing before the Court of Appeals, and jurisdiction was proper. But instead of sending the case back to the intermediate appellate court, the Supreme Court exercised discretionary review of the District Court's order, noting that "the underlying merits present a question of significant importance to our State's jurisprudence." A welcome recognition of the need for clarity in this arena. Appellate practitioners will recognize that language as a close reproduction of one of the three justifications for allowing discretionary review found in N.C.G.S. § 7A-31(c), which is all the more important now that the appeal by right based upon a dissent was eliminated by S.L. 2023-134.

Interesting here is the defendant's argument about how to split up the various alleyways through the CLEAR statute in order to make a path for her subpoena. According to the defendant, the "pursuant to court order" language in the first sentence of subsection (g) refers to any kind of order from any court. The subpoena issued largely as a matter of course by a District Court judge carries identical water, in the defendant's mind, as the Superior Court's order carefully weighing the eight factors of N.C.G.S. § 132-1.4A(g). The Supreme Court rejected this interpretation.

The Court's opinion reads like a discussion of field preemption. It describes the exhaustive outlay of policy and procedure applied by the General Assembly to the transfer of law enforcement recordings through the CLEAR statute. It is important to note here that the CLEAR statute makes much ado about the difference between "release" and "disclose," and between persons appearing in the footage (or their representatives) and those parties who are absent from the footage. The Supreme Court mentions two routes to obtain release of the footage

here, which was the defendant's ultimate goal. One is available to folks depicted in the recording; they simply get an expedited version of the same process available to any other party. That ambidextrous process requires the requestor to either file a petition or a standalone suit in the Superior Court of any county where the footage was captured. We know this because, as the Supreme Court notes, immediately after the "court order" language cited by the defendant is a directive to go to Superior Court and have the judge assess the eight standards of subsection (g). And the remaining five times the statute instructs a requestor to go to court, the destination is Superior Court.

This had been the understanding of municipal practitioners for a time now, as summarized by our colleague Jason Lunsford here. But it is always nice to receive a bright, crystal-clear line from our state's highest court. Full stop: the only way to obtain copies of law enforcement recordings in North Carolina is through the procedures of subsections (f) or (g) of the CLEAR statute. And to reiterate, persons depicted in the recordings have a slight advantage because they get to use a form petition produced by the Administrative Office of the Courts, and get their request moved to the front of the line of court business. This means you may be called into court on much shorter notice when a criminal defendant is hoping to obtain a copy to prepare their defense. But despite those advantages, the judge still reviews the request through the lens of eight standards set forth in N.C.G.S. § 132-1.4A(g).

Want to continue the discussion? Note that the North Carolina Association of Municipal Attorneys' 2026 Summer Conference will feature a panel on this issue, including discussion from practitioners about recording retention policies and utilizing protective orders during discovery. Stay tuned here for forthcoming registration information, and we hope to see you on July 30 - August 1 in Wilmington!

Condemnation

Supreme Court issues rebuke of procedure employed by town during contentious sewer extension; holding likely limited to the facts

Town of Apex v. Rubin, 388 N.C. 236 (2025). The property owner in this case purchased a home in Apex in 2010. A neighboring parcel attracted the attention of a single-family home developer, who in 2012 began the process of preparing the site for the construction of fifty-five homes. After several unsuccessful attempts to purchase a gravity fed sewer easement from the property owner (the economical alternative to building a pumped sewer line around the property owner's tract), the developer approached the town to condemn an easement. The town filed a condemnation action in April of 2015, pursuant to the terms of a development agreement where the developer promised to pay all condemnation costs and indemnify the town. The easement would be used to slip a sewer main along the road frontage underneath

the property owner's driveway, all without conducting active construction on the impacted parcel. Having resisted the introduction of a sewer line when the developer asked, the property owner likewise contested the town's right to take the easement. In the property owner's view, the easement did not serve a public purpose, one of the necessary prerequisites to a town exercising its power of eminent domain. The trial court agreed.

Following a hearing conducted under N.C.G.S. § 136-108, the statute that allows for the determination of all issues other than compensation in condemnation suits, the trial court entered a judgment determining the sewer easement primarily served a private purpose, and that any public benefit was "merely incidental." The order dismissed the town's direct condemnation action. The problem: the town had already installed the sewer line through the easement. Upon satisfying the strictures of N.C.G.S. § 136-104, a condemnor authorized to utilize that statute obtains title to an easement upon filing the condemnation complaint and declaration of taking, and after depositing the town's estimate of just compensation with the court. Having deployed that "quick take" procedure here pursuant to the town's somewhat unique charter authority to utilize Chapter 136 for condemnations, the town reached out to the property owner with plans to begin the project soon. The property owner's attorney responded that they were in the process of gathering documents to contest the town's taking. Prior to the property owner filing an answer, however, the town completed construction of the sewer line utilizing a boring technique that left the surface of the subject parcel undisturbed.

The trial court's dismissal of the town's direct condemnation action meant that the sewer pipe was installed (and soon to be operational) without the town possessing the right to be there. The town filed a motion to reconsider, along with a motion for relief from the trial court's order. Critically, the town did not file its written notice to appeal at this time. The trial court denied the town's motions over four months later, at which point the town filed notice of appeal concerning the trial court's earlier order dismissing the direct condemnation action. The property owner filed a motion to dismiss the town's appeal as untimely. The Court of Appeals agreed, dismissing the appeal because North Carolina courts have repeatedly held judgments impacting title to land in condemnation cases must be immediately appealed. *City of Wilson v. Batten Family, L.L.C.*, 226 N.C. App. 434, 438 (2013). The town's notice of appeal should have been filed within thirty days of the trial court's order dismissing the action, not four months later when the trial court disposed of the follow-up motions.

In any event, the town now asserted that the property owner's sole remedy for a sewer pipe installed by the town sans easement was inverse condemnation. According to the town, if the direct condemnation action was dismissed and the town never obtained title, then the town's installation and continuing use of the sewer pipe entitled the property owner to enhanced compensation. Not injunctive relief requiring the town to remove the pipe.

The Supreme Court's opinion is a clear rejection of both the path this case pursued through the trial court, as well as the town's argument that the property owner's sole remedy here was inverse condemnation. Enshrined at N.C.G.S. § 136-111, the remedy of inverse condemnation is reserved for property owners where the government takes their property without filing a condemnation action. A successful inverse condemnation suit requires the government to compensate the property owner for the taking, and pay their costs and attorney's fees. To require the property owner to address the government's taking in this case as an inverse condemnation would present a "heads I win, tails you lose" scenario, according to the Supreme Court. The town could obtain what it wanted all along despite an adjudication that it had not obtained the easement for a public purpose. This would shatter the bedrock elements necessary before the government may seize private property: the taking must be for a public purpose, and the government must pay the owner just compensation.

Instead, with the town's direct condemnation suit dismissed, the town's installation and operation of the sewer line constituted a continuing trespass. This, in turn, empowered the trial court to fashion any remedy it found appropriate to address the trespass, as opposed to just awarding a monetary judgment. The Supreme Court remanded the case with instructions for the trial court to balance the equities in determining a remedy. These equities include how to address the pipe itself, through ordering removal or allowing it to remain accompanied by enhanced compensation for the property owner. The trial court is also to consider the impacts of potential removal on the fifty plus homes served by the sewer line, and whether the town acted in good faith when it installed the line prior to the property owner filing their answer. In short, the trial court has broad discretion in fashioning a remedy here, just so long as that remedy exceeds the value of the taking back when the town filed its condemnation action. As of the date of this article, the case has been received by the Wake County Superior Court but has not been calendared for future hearing.

The Court was unable to reach the trial court's determination that the condemnation did not serve a public purpose, as that issue was not timely appealed. In fact, footnote two of the opinion disclaims any application of this opinion to the question of whether the sewer project actually failed to serve a public purpose. The Court was forced to assume that the condemnation did not serve a public purpose, highlighting the ultimate importance of preserving that issue for appeal. Without either the Court of Appeals or Supreme Court addressing the public purpose question head on, the landscape around the question remains largely unchanged. It is still crucial for your client to establish a clear public purpose behind its use of eminent domain from the outset.

Public Meeting Decorum

Court of Appeals addresses removal of protester from public board meeting

State v. Barthel, 2025 N.C. App. LEXIS 776 *, 2025 WL 3084520. The defendant was convicted of disrupting an official meeting of the Avery County Board of Commissioners after revealing an arms-length banner and t-shirt making a few nonclinical descriptions of the female anatomy while making reference to a commissioner by name. The display included a four-color printing of the commissioner's face, and the bearer's opinion as to the zeal of her performance while in office. The defendant's actions had the effect of tolling the public comment period, as the board's presiding officer had just wrapped explaining the rules and was poised to call the first speaker. A deputy approached the defendant and asked first for him to remove the banner, and then to leave, quickly joined by the presiding officer's duplicative instruction seconds later. The defendant refused, and was arrested in the lobby after being forced out by the deputies. The Court of Appeals vacated the defendant's convictions, holding that the deputy's actions, and by osmosis the presiding officer's demand to leave, infringed on the defendant's otherwise legitimate exercise of his First Amendment rights.

This case suffers from two issues that preclude a wholesale endorsement as the enduring standard for First Amendment law that may apply to decorum at public meetings.

First, the opinion must rely on a "cold" record. Well, not necessarily cold, because nowadays we have very helpful body camera footage to aid in truth seeking. But the Court highlighted the deputy being the first person to make contact with the defendant, and hammered that deputy's testimony establishing he had intervened because of what was written on the banner. In the Court's eyes, it was the deputy that caused the disturbance; without their intervention the Court envisions no disturbance occurring at all. The vision cultivated by that sequence of events is accurate but subject to differing interpretation. If you watch the WCNC news report of the encounter—all twenty-two seconds of it—the defendant unfurling the banner, the deputy asking them to step outside, and the presiding officer declaring that the defendant must leave because they caused a disturbance happen in a near simultaneous hoopla on the cosmic timescale. Business was halted and the board's attention was captured by defendant's speech instead of conducting public comment period pursuant to the rules set by the General Assembly and Avery County Board of Commissioners. Here is what the county board's minutes reflect:

> Chairman Phillips read the following:
>
> *The time limit for any comment to the Board is three minutes. Board members are not expected to comment or take any action on matters during public comment. Any individual speaking during public comment shall address the entire Board. Any person who willfully interrupts, disturbs, or disrupts the session will be asked to leave the meeting. If you would like to speak to an agenda item or speak during public comment, you must sign up on the sheet with the clerk. Time limit to speak*

> *to an agenda item is also three minutes. Please silence all cell phones or electronic devices.*
>
> A disturbance happened in the meeting. Chairman Phillips asked for a person to leave the meeting because the person was disrupting the meeting. Chairman Phillips asked law enforcement to have the person leave the meeting.

So, from the board's point of view, everything went according to plan.

Step one, the General Assembly created the framework for a limited public forum, official meetings, establishing two very important guardrails in the process. The General Assembly designated this limited public forum as a disturbance-free zone; that's one guardrail codified in N.C.G.S. § 143-318.17. For the second guardrail, the General Assembly delegated rulemaking authority to local boards to set reasonable rules of decorum for their meetings in N.C.G.S. § 160A-81.1. While that delegation of authority is not at issue here given the Court's review was limited to a criminal conviction under the first guardrail, we cannot assume this opinion will be limited to those facts when applied to future cases. In making all official meetings open to the public and providing for a set time for public comment, our Legislature contemplated that members of the public could come stand before their elected local government and discuss unpleasant if not downright offensive things without repercussion. Verboten, however, was showing up to an official meeting for the purpose of causing a disturbance, for derailing the gratuitous opportunity afforded during official meetings for your neighbors to directly petition their elected officials.

Step two, the Avery County Board of Commissioners facilitated that limited public forum by calling an official meeting and *attempting* to open public comment period where members could come and speak on ostensibly any topic so long as they (1) did not interrupt, disturb, or disrupt the session, (2) limited their speaking time to three minutes, and (3) signed up to speak with the county clerk.

Step three, the defendant stood up and unfurled a banner obviously calculated to cause everyone to stop what they are doing and pay attention to the Look At Me Show now happening in the back of the room.

Step four, both the presiding officer and a deputy providing security recognized the patently disruptive impact of defendant's conduct on the course of the official meeting, prompting them to act. The deputy asked defendant to leave. Perhaps slow to the draw, but without blinking, the presiding officer utilized his authority under the statute to direct defendant to leave the meeting after noting that the defendant had created a disturbance. Deputies arrested the defendant after he completes the last element of the crime by refusing to leave.

Step five, the limited public forum is allowed to continue undisturbed. The board finally opens public comment period. Another citizen, temporarily delayed by the defendant's disruption, takes his place at the podium and speaks directly with his elected leaders about homeless veterans and changing the county's public comment policy. Is that not gorgeous? Patriotic even?

The second issue complicating further application of this case arises from the fact that the record on appeal was developed during a criminal trial. The Assistant District Attorney prosecuted this case with the goal of obtaining a just conviction, not necessarily with an eye toward protecting the nature of the limited public forum framed by the General Assembly and further facilitated by the county board. The Court of Appeals explained that the government can create a limited public forum, and as the creator, may limit speech within the forum so long as those limits are reasonable and do not discriminate on the basis of viewpoint. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). The deputy testified that he asked the defendant to remove the banner because of "what was written on it," and the State's argument acknowledged that the deputy sought to restrict "inappropriate and offensive language to deploy personal insults." The Court interpreted this as meaning the board would not have ejected the defendant had he complimented the commissioner using the same means and methods. Therefore, the county had engaged in viewpoint discrimination. Additional depositions and discovery intending to establish the reasonableness of the board's actions here may have been able to further tease out an alternative. During oral argument, the State repeatedly drew the Court's attention back to the conduct of the defendant. He unfurled a banner with undeniably shocking language while standing up in the back of the room in conflict with the reasonable rules of decorum that the board had just announced as applying to the public comment period. Even though the effect was to pause the meeting's business, it proved fatal to the State's case that the deputy was the first to intervene. Isn't it possible that the deputy and board would have reacted similarly had the banner contained a compliment using shocking language to refer directly to a commissioner?

In discussing this case with seasoned practitioners, eyebrows raise at the proposition that the government should be able to kick the defendant out of a meeting for using vulgar language. After all, shouldn't the defendant be allowed to stand on the sidewalk in front of town hall and display his same banner proudly without fear of retribution from an embarrassed government? Of course. Should the defendant be allowed to use his three minutes of public comment to criticize public officials by name? Absolutely! But that is not what happened here. Instead, he went for gasps. The defendant played the street preacher blocking the holiday parade from proceeding down a public street. He was the student with a competing bullhorn shutting down the school pep rally. The performer interrupting a speech to promote their upcoming show. In other words, a disruptor of the arguably reasonable framework established by N.C.G.S. § 143-318.17, and applicable to the limited public forum opened by the Avery County Board of Commissioners.

This case may very well receive additional consideration by our state courts in future appeals where the facts are more egregious, because we are not really talking about anything beyond the pale when it comes to expressive acts of protest with this case. We've all seen worse. That further review would provide a party of interest the opportunity to focus their appeal on sharpening the character of the limited public forum here. We will continue to monitor this area for further developments. Until this issue gets before a court again, you can provide additional instruction to the law enforcement officers providing security for your council meetings about the role of the presiding officer in declaring a disruption. Perhaps even a gentle suggestion for the presiding officer to wait for a disruption to shutter the flow of business before making that declaration themselves. But the best way to anchor your council's interaction with the public's First Amendment expression is to have clear, written rules of decorum developed in consultation with a practitioner well versed in First Amendment litigation. The black-letter law on how the government interacts with limited public forums may be understandable, but this case demonstrates that the area is still a minefield. What triggers application of that black-letter law evolves every day, and your council's rules of decorum should avoid rubbing up against those boundaries.

On Brief

Administrative Search Warrants – *State v. Hickman*, 2025 N.C. App. LEXIS 784 *, 2025 WL 3084119. The Court of Appeals vacated a methamphetamine trafficking conviction after Department of Revenue agents relied on a Tax Warrant issued under N.C.G.S. § 105-242 to search the defendant's camper. Those warrants authorize officers to "levy upon and sell the taxpayer's personal property found within the State." To use this warrant to support the conviction would equate to issuing a General Warrant contrary to N.C. Const. art. 1, § 20, according to the Court. This opinion may implicate administrative search warrants issued under N.C.G.S. § 15-27.2 which, while specifically authorizing agents to search a premises, contains a limitation in subsection (f) on using circumstances discovered during the search as evidence. Stay tuned though, as the State has indicated a desire to get this before the Supreme Court as evidenced by their motion to stay application of the opinion.