Coates' Canons Blog: Repealing Ordinances

By Trey Allen

Article: https://canons.sog.unc.edu/repealing-ordinances/

This entry was posted on November 13, 2015 and is filed under Board Member Powers & Authority, Board Structure & Procedures, General Local Government (Miscellaneous), Ordinances & Police Powers, Quorum & Voting Requirements, Statutory Authority & Construction, Zoning

The Upsette City Council adopted a controversial ordinance limiting the number of dogs and cats per residence. Three of the council's five members lost their seats at the next election to opponents who campaigned on pledges to repeal the pet ordinance. Almost immediately upon taking office, one of the new members introduced a resolution declaring the ordinance repealed. The council voted three-to-two in favor of the resolution, and the mayor, who could vote only in the event of a tie, announced that the resolution had been adopted.

Did the council successfully repeal the pet ordinance?

Probably not. There are solid grounds for thinking that it takes an ordinance to repeal an ordinance.

Courts in many other states have ruled that a city or county governing board cannot repeal an ordinance except through an act equal in dignity to the ordinance's adoption. They have typically understood this standard to mean that an ordinance cannot be repealed except by ordinance, reasoning that resolutions and other forms of board action are inferior in dignity. *See, e.g., American Malleables Co. v. Town of Bloomfield*, 85 A. 167, 169-70 (N.J. 1912) ("There is abundance of authority holding that an ordinance cannot be amended, repealed, or suspended, except by an act of equal dignity. . . . We are of opinion that by the weight of authority a mere resolution will not serve to repeal or modify a duly enacted ordinance, and that to do so necessitates action of like formality to that required for the enactment of the original ordinance."); *Central Realty Corp. v. Allison*, 63 S.E.2d 153, 158 (S.C. 1951) ("'Ordinarily, a municipal ordinance cannot be amended or repealed by a mere resolution. To accomplish that result a new ordinance must be passed." (internal quotation marks omitted)). *See also Miami-Dade Water and Sewer Auth. v. Metro. Dade County*, 503 So.2d 1314 (Fla. Dist. Ct. App. 1987) ("When a legislative body has the power to create by ordinance, it has by implication, the power to amend, modify or repeal by ordinance.").

Influential treatises on municipal law also endorse the principle that an ordinance must be repealed by ordinance. *E.g.*, 6 McQuillin Mun. Corp. § 21:13 (3d ed.) ("A municipal corporation can repeal an ordinance only by an act of equal dignity, that is, by an ordinance, and not by methods not passed and published with the same formality as is required of an ordinance.").

The ordinance repeal cases from other states involve everything from zoning ordinances to personnel ordinances. In one case, for example, Michigan's court of appeals held that a city council could not act by resolution to repeal an ordinance that had increased the salaries of certain city officials because "[i]t is settled that a municipal corporation may only repeal an ordinance by an act of equal dignity and formality." *Lee v. City of Taylor*, 234 N.W.2d 483, 484 (Mich. Ct. App. 1975). In other words, said the court, "[a]n ordinance was necessary to both enact and subsequently repeal th[e] salary increase." *Id*

Why have courts viewed resolutions and other forms of board action as inferior in dignity to ordinance adoption? One reason is that the adoption of an ordinance usually triggers procedural rules that do not apply to other forms of action. For instance, as my colleague Frayda Bluestein has explained in a blog post on ordinance adoption, North Carolina law generally prevents a board of county commissioners from adopting an ordinance on the date of introduction without the unanimous approval of all its members. G.S. 153A-45. The same board may approve a resolution or, with some exceptions, a motion by a simple majority (half plus one) of votes cast at the very meeting at which it is first put forward.

So is repeal-by-ordinance the rule in North Carolina? As far as I can tell, neither the North Carolina Supreme Court nor the North Carolina Court of Appeals has directly addressed the issue. The following considerations, however, lead me to

believe that both courts would likely endorse repeal-by-ordinance:

1. The supreme court has treated the repeal of zoning ordinance amendments as functionally equivalent to the adoption of such amendments. In *Orange County v. Heath*, 278 N.C. 688 (1971), the board of county commissioners voted to repeal a zoning ordinance amendment without first holding a public hearing. At the time, state law mandated public hearings on proposed zoning ordinance amendments, but it said nothing about whether a hearing was a prerequisite to repealing an amendment to a zoning ordinance. (State law now expressly provides that public hearings must precede the adoption, amendment, and repeal of zoning ordinances. G.S. 153A-323(a); 160A-364(a) .) The supreme court invalidated the board's action, explaining that the proposed repeal had triggered the statutory hearing requirements applicable to zoning ordinance amendments. The outcome in *Heath* accords with the court's observation in an earlier case that the adoption, amendment, and repeal of zoning ordinances constitute legislative actions. *In re Markham*, 259 N.C. 566, 569 (1963). It also seems consistent with the principle that an ordinance cannot be repealed except through steps equal in formality to those necessary to adopt it. (Interestingly, the board in *Heath* tried to repeal the zoning ordinance amendment by resolution. Having invalidated the attempt based on the lack of a public hearing, the court did not have to decide whether the board used the correct form of action.)

2. The North Carolina Court of Appeals has turned to *American Jurisprudence*, an important summary of the law, for guidance in a case involving the alleged repeal of an ordinance. In *Harrell v. Whisenant*, 53 N.C. App. 615 (1981), the plaintiff challenged the city manager's termination of his employment as police chief. The manager had fired the plaintiff pursuant to a section of the city code which specified that the police chief served at the manager's pleasure. The plaintiff argued that the city council had implicitly repealed that section of the code when it adopted a subsequent code provision establishing procedural and substantive rights for the city's permanent employees. In upholding the trial court's dismissal of the plaintiff's lawsuit, the court of appeals relied heavily on the criteria for repeal-by-implication set out in *American Jurisprudence*. (Under those criteria, a later ordinance implicitly repeals an earlier one only if (1) the two ordinances are irreconcilable or (2) the later ordinance is clearly intended to be a substitute for the earlier.)

The court's reliance on *American Jurisprudence* matters here because *American Jurisprudence* also says the following: "A municipal ordinance can be amended or repealed only by an ordinance enacted by the body that originally passed the ordinance. It cannot be repealed or modified by a resolution, contract, order, motion, or by a void ordinance." 56 Am. Jur. 2d Municipal Corporations, Etc. § 357. It seems improbable that the court of appeals would follow *American Jurisprudence* on repeal-by-implication but reject its stance that a board must act by ordinance to repeal an ordinance, especially since court decisions from many other states agree that repeal-by-ordinance is the rule.

3. Allowing boards to repeal ordinances by resolutions or other inferior forms of action could lead to undesirable results. This becomes clear when the voting rules for the adoption of ordinances are considered. State law bars a city council from adopting an ordinance unless a majority of all council members not excused from voting support it. G.S. 160A-75. (If the vote occurs on the date of introduction, a two-thirds majority is usually required for adoption.) Suppose that a six-member city council with a mayor who votes only in case of a tie adopts a noise ordinance on a four-to-two vote. At the council's next regular meeting a month later, three of the four members who supported the noise ordinance are home with the flu. The three remaining members and the mayor constitute a quorum under G.S. 160A-74, so the council is still able to conduct business. One of the council members opposed to the noise ordinance moves to repeal it. The council votes two-to-one in favor of the motion.

If an ordinance can be repealed by resolution or motion, then the two members in the majority at the second meeting have successfully repealed the noise ordinance that four of their colleagues adopted just a month earlier. The majority can re-adopt the ordinance, but not without again mustering the votes necessary for ordinance adoption under G.S. 160A-75. If repeal-by-ordinance is the rule, however, the vote to repeal the noise ordinance has failed for lack of a sufficient majority. I suspect that our courts would refrain from endorsing an approach that would make it possible for a minority of members to repeal an ordinance approved by a majority of a board's total membership.

4. The city and county ordinance statutes declare that their provisions apply to the adoption of an ordinance and to "any action having the effect of an ordinance." G.S. 153A-45; 160A-75. The full or partial repeal of an ordinance can have the impact of ordinance adoption in certain situations. As *Heath* suggests, for instance, the partial repeal of a zoning ordinance can alter property classifications in a manner equivalent to the adoption of a new zoning ordinance.

In light of the points discussed above, I think the safe course of action for a local governing board is to assume that the repeal of an ordinance must be accomplished by ordinance. A couple of important practical consequences flow from that assumption, the first of which has to do with voting. If repeal-by-ordinance is the rule, then a vote to repeal an ordinance must comply with the statutory voting rules for ordinance adoption.

The second consequence concerns public hearings. A number of city councils and county boards routinely hold public hearings before they adopt ordinances of any kind, but no statute directs them to hold public hearings on all proposed ordinances. Whether a hearing is statutorily required depends on the ordinance's subject matter. (My colleague David Lawrence has written a blog post that lists many of the local government actions that may not be undertaken without public hearings.) A city council may adopt a noise ordinance, for example, without first conducting a public hearing because the statute authorizing such ordinances does not impose a hearing requirement. *See* G.S. 160A-184. As noted previously, though, state law specifically dictates that public hearings precede the adoption of zoning ordinances. In my view, when an ordinance may be adopted without a public hearing, its repeal likewise may occur without a hearing. On the other hand, when a public hearing must precede the adoption of an ordinance, a hearing should probably be held prior to its repeal.

Links

- canons.sog.unc.edu/?p=7969
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-45
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-323
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-364
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-75
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-74
- canons.sog.unc.edu/?p=77
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-184