Coates' Canons Blog: Voting Rules, Monuments, and Beehives: Miscellaneous Changes to Local Government Laws

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It is an understatement to say that this year's session of the General Assembly produced legislation of interest to local governments. Some of that legislation has been discussed by my colleagues elsewhere on Coates' Canons. (See, for example, here, here, here, and here.)

This blog post examines a handful of largely unrelated legislative changes that involve local governments in some way. The changes concern the following topics:

- city council voting rules
- chronic violators of overgrown vegetation or nuisance ordinances
- local beehive regulations
- the display and handling of the United States and North Carolina flags
- the removal or relocation of public monuments
- the standard of proof for claims against 911 operators
- oaths of office for county officers
- licensing requirements for closing-out and distress sales
- the preemption of local firearms regulations

Modification to City Council Voting Rules

Session Law 2015-160 (H201) amends G.S. 160A-75 to alter the voting rules for city councils when certain kinds of zoning matters are being considered. Section 160A-75 requires a council member to vote on any matter that comes before the council, unless the member has been excused from voting because either (1) the matter concerns the member's own financial or official conduct or (2) the member is prohibited from voting on the matter under G.S. 14-234 (public contract with direct benefit to the member), G.S. 160A-381(d) (zoning map or text amendment reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member), or G.S. 160A-388(e)(2) (quasi-judicial matter for which the member has a fixed opinion not susceptible to change, undisclosed ex parte communications, a close relationship to an affected person, or a financial interest in the outcome). Prior to the Act, G.S. 160A-75 provided that a council member's failure to vote in any situation other than those just described had to be recorded as an affirmative vote if (1) the member was physically present in the council chamber or (2) the member avoided voting by leaving the chamber without being excused by a majority vote of the remaining members present. This default "yes" rule prevented council members from ever abstaining.

The Act leaves G.S. 160A-75's default "yes" rule in place for all city council votes except for those "taken under G.S. 160A-385," that is, votes to amend or repeal zoning ordinances. Under amended G.S. 160A-75, when the matter in question is a proposed zoning ordinance change initiated on or after August 1, 2015, a council member's unexcused failure to vote must be recorded as an abstention, not as an affirmative vote. This limited exception to the default "yes" rule could make it more difficult for councils to put together the majorities necessary to adopt controversial zoning ordinance changes. It will no longer be possible for a member to supply a vote in favor of such a measure without actually casting a vote in support of it.

The Act does not alter the voting rules for county commissioners, who likewise have a statutory duty to vote on all matters

that come before their respective boards unless excused for a valid reason. G.S. 153A-44. (The grounds for excusing county commissioners are essentially the same as those for excusing city council members.) Unlike G.S. 160A-75, the county voting statute does not declare that a commissioner's unexcused failure to vote must be recorded as an affirmative vote, though some boards of county commissioners have incorporated default "yes" rules into their local rules of procedure.

Annual Notices to Chronic Violators of Public Nuisance Ordinances or Overgrown Vegetation Ordinances

Session Law 2015-246, Sec. 1, (H44) effectively combines G.S. 160A-200, the statute dealing with annual notices to chronic violators of city overgrown vegetation ordinances, and G.S. 160A-200.1, the statute concerning annual notices to chronic violators of city public nuisance ordinances. Prior to the Act, G.S. 160A-200 allowed a city to provide annual notice to a chronic violator of its overgrown vegetation ordinance that, if the individual's property was again found to be in violation of the ordinance, the city would, without further notice during the calendar year in which the notice was provided, remedy the violation and obtain a lien on the property for the expense of corrective action. Section 160A-200.1 gave cities the same authority with respect to chronic violators of their public nuisance ordinances.

Each statute had its own definition of "chronic violator." Pursuant to G.S. 160A-200, a chronic violator was someone who owned property on which the city had taken remedial action under its overgrown vegetation ordinance at least three times in the previous calendar year. Under G.S. 160A-200.1, a chronic violator was a person who owned property for which the city had issued at least three notices of violation in the previous calendar year under any provision of its public nuisance ordinance. The statutes specified similar, but not identical, procedures for providing annual notices to chronic violators.

The Act repeals G.S. 160A-200 and amends G.S. 160A-200.1 to make its notice provisions applicable both to chronic violators of overgrown vegetation ordinances and chronic violators of public nuisance ordinances. A city may now send an annual notice under G.S. 160A-200.1 to a chronic violator of either kind of ordinance informing the individual that, if his or her property is found to be in violation of the ordinance within the same calendar year as the notice, the city will take corrective action without further notice and obtain a lien on the property for the cost of the action.

A city that wishes to send an annual notice to a chronic violator *must* send the annual notice by registered or certified mail. It *may* also send the notice by regular mail. (A city that uses service by regular mail *must* post a copy of the notice in a conspicuous place on the affected premises.) If the city uses both registered or certified mail and regular mail, and the registered or certified mail is left unclaimed or refused, service will still be deemed sufficient if the regular mail is not returned to the post office within 10 days after the mailing.

The Act leaves G.S. 160A-200.1's definition of a chronic violator of a public nuisance ordinance unchanged. Interestingly, however, amended G.S. 160A-200.1 does not define the term "chronic violator" with regard to an overgrown vegetation ordinance. Combined with the Act's repeal of G.S. 160A-200, this omission in G.S. 160A-200.1 leaves cities without a statutory definition of chronic violator insofar as overgrown vegetation ordinances are concerned. A city that wishes to send annual notices to chronic violators of its overgrown vegetation ordinance can respond to this absence of statutory guidance in one of three ways:

- It can continue to identify chronic violators of its overgrown vegetation ordinance based on the criteria contained in the now repealed G.S. 160A-200 (*i.e.*, a chronic violator is someone who owns property on which a city took remedial action under its overgrown vegetation ordinance at least three times in the previous calendar year).
- It can take the position that G.S. 160A-200.1's definition of chronic violators of public nuisance ordinances may be applied when the violations at issue involve overgrown vegetation ordinances. This approach would allow the city to classify a person as a chronic violator of its overgrown vegetation ordinance so long as the person owns property for which the city issued at least three notices of violation under that same ordinance during the previous calendar year, even if the city did not take the additional step of mowing the lot. While this approach may be less conservative than the first one, it seems consistent with the legislature's apparent desire to have one set of rules for chronic violators of public nuisance ordinances and chronic violators of overgrown vegetation ordinances.
- It can by ordinance adopt its own definition of chronic violator for purposes of its overgrown vegetation ordinance. Whether cities actually have the authority to adopt such definitions is unclear. A city will probably increase the risk of a legal challenge to its ordinance if it defines "chronic violator" more broadly than the definitions found in the now repealed G.S. 160A-200 or amended G.S. 160A-200.1. Nonetheless, a good argument can be made that, by eliminating the statutory definition, the legislature has afforded cities some flexibility to determine what it means to be a chronic violator of an overgrown vegetation ordinance.

Local Regulation of Beehives

Session Law, Sec. 8, (H44) creates G.S. 106-645, which expressly bars counties from adopting or continuing in effect any ordinances or resolutions that prohibit persons or entities from owning or possessing five or fewer hives.

The new statute allows a city to adopt an ordinance regulating hives, but only if the ordinance (1) permits up to five hives on a single parcel within the city's land use planning jurisdiction and (2) requires the hives to be placed at ground level or securely attached to anchor stands. The statute also provides that such an ordinance may regulate the placement of hives on a parcel, to include setbacks from property lines and between hives. The ordinance may also require the removal of the hive if the owner no longer maintains it or if removal is necessary to protect the public's health, safety, and welfare.

Display and Handling of Federal and State Flags

Session Law 2015-170 (S22) amends G.S. 144-5 to require any state institution or political subdivision (city, county, public school system, or other unit of local government) that displays the United States flag or the North Carolina flag at a government building to handle, display, store, and dispose of the flag in accordance with the federal Flag Code, 4 U.S.C. §§ 1-10. The Flag Code addresses an array of subjects concerning the federal flag, including:

- when the flag may be displayed (4 U.S.C. § 6);
- the manner in which it should be raised or lowered (4 U.S.C. § 6(b));
- how it should be displayed in conjunction with other flags (4 U.S.C. § 7(e)-(f)); and
- when it may be flown at half-staff (4 U.S.C. § 7(m)).

The Act also amends G.S. 144-9 to require the Division of Veterans Affairs in the Department of Administration to accept United States and North Carolina flags that are no longer fit for display from state institutions and political subdivisions. It further directs the Division to make arrangements for the respectful disposal of those flags. The Division and its flag-related responsibilities have been absorbed by the new Department of Military and Veterans Affairs. S.L. 2015-241, Sec. 24.1; S.L. 2015-268, Sec. 7.3(a).

Removal or Relocation of Objects of Remembrance

Session Law 2015-170 (S22) also enacts G.S. 100-2.1, which prohibits the removal, relocation, or alteration of any monument, memorial, or work of art owned by the state unless the North Carolina Historical Commission approves the action or the action is permissible under the statute's provisions addressing objects of remembrance located on public property.

Section 100-2.1 defines "object of remembrance" as any monument, memorial, plaque, marker, statute, or display of a permanent character commemorating an event, person, or military service that is part of the state's history. The statute prohibits the permanent removal of objects of remembrance from public property, but it allows them to be relocated temporarily or permanently under certain circumstances. In particular, an object of remembrance may be relocated (1) when "appropriate measures" must be taken by the state or political subdivision to preserve the object or (2) when necessary for the construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects.

If the relocation is temporary, G.S. 100-2.1 mandates the return of the object to its previous location within 90 days after the project that led to removal is completed. If the relocation is permanent, the object must be relocated to a place of "similar prominence, honor, visibility, availability, and access." The new site may not be in another jurisdiction, nor may it be a museum, cemetery, or mausoleum unless the object was originally placed in such a location.

Section G.S. 100-2.1 specifies that its provisions *do not* apply to:

- highway markers set up by the Board of Transportation in cooperation with the Department of Environmental and Natural Resources and the Department of Cultural Resources,
- an object of remembrance owned by a private party, if a contract between the private party and the state or political subdivision governs the object's removal or relocation, or
- an object of remembrance that a building inspector or "similar official" has found to pose a threat to the public

safety because of an unsafe or dangerous condition.

Standard of Proof for Claims Against Public Safety Telecommunicators or Dispatchers

Session Law 2015-71 (H352) adds G.S. 99E-56 to the General Statutes. The new statute changes the burden of proof that a plaintiff must satisfy to recover money damages for injuries attributable to the on-the-job acts or omissions of a 911 operator or other public safety telecommunicator or dispatcher who works at a primary public safety answering point (PSAP) or at any public safety agency to which 911 calls are transferred from a primary PSAP so that appropriate public safety agencies can be dispatched. (A PSAP is a "public safety agency that receives an incoming 911 call and dispatches appropriate public safety agencies to respond to the call." G.S. 62A-40(18).)

In most personal injury lawsuits, the plaintiff must prove his or her case by a "preponderance of the evidence." This standard requires the plaintiff to show that it is more probable than not that the defendant's wrongful conduct resulted in the plaintiff's injury. (In other words, the plaintiff has to establish that there is at least a 51% chance that the defendant is responsible for the harm for which the plaintiff seeks compensation.)

Section 99E-56 applies to lawsuits arising from acts or omissions by covered 911 or public safety telecommunicators or dispatchers in the performance of any lawful and prescribed actions pertaining to their assigned duties. The statute requires the plaintiff in such a case to prove his or her claims by "clear and convincing evidence," which the courts have defined as evidence sufficient to create a reasonable certainty that what has been alleged is true. The "clear and convincing evidence" standard is more demanding that the "preponderance of the evidence" standard, though it is less demanding that the "beyond a reasonable doubt" standard that the prosecution must satisfy in criminal cases.

In short, G.S. 99E-56 does not prevent plaintiffs from pursuing personal injury claims based on the alleged on-the-job intentional misconduct or negligence of 911 or other public safety operators or dispatchers, but the statute does make it more difficult for plaintiffs to prevail on such claims.

Filing County Oaths of Office

Effective October 1, 2015, S.L. 2015-24 (H71) amends G.S. 153A-26 to clarify that oaths of office for persons elected or appointed to county offices must be filed with the clerk to the board of county commissioners. Prior to the Act, G.S. 153A-26 simply provided that such oaths were to be filed with "the clerk." The statute's lack of specificity led many to assume that the clerk in question was the clerk of court. This assumption was incorrect. Section 153A-1 defines various terms for purposes of Chapter 153A, the principal statutes for counties. Since its enactment in 1973, G.S. 153A-1 has defined the term "clerk" to mean "the clerk to the board of commissioners" except when a particular statute expressly provides or clearly implies otherwise.

The proper filing of oaths is an important matter. Pursuant to G.S. 14-229, a public officer's failure to take, subscribe, and file the oath of office constitutes a misdemeanor. While there is nothing wrong with filing a duplicate original or copy of a county officer's oath with the clerk of court, doing so is no substitute for filing the oath with the clerk to the board of commissioners. (For more information on filing requirements for oaths administered to local government officers, see the blog post by my colleague David Lawrence available here.)

No License Requirement for Closing-Out and Distress Sales

Article 17, Chapter 66 of the General Statutes places certain restrictions on closing-out and distress sales. For purposes of these restrictions, a "closing-out sale" is any sale "advertised, represented or held forth under the designation of 'going out of business,' 'discontinuance of business,' 'selling out,' 'liquidation,' 'lost our lease,' 'must vacate,' 'forced out,' 'removal,' or any other designation of like meaning." G.S. 66-76. The term "distress sale" encompasses "all sales in which it is represented or implied that going out of business is possible or anticipated." *Id.*

The restrictions in Article 17 appear calculated to prevent a business from luring customers onto its premises by falsely advertising that it is going out of business or in danger of going of business. For example, Article 17 forbids a business that is contemplating a closing-out sale to order any goods or merchandise for the purpose of selling them during the sale. G.S. 66-78. Presumably, the thought behind this restriction is that a business on the brink of insolvency has no good reason to increase its inventory.

Session Law 2015-103 (H836) repeals G.S. 66-77, a provision in Article 17 that directed any person wanting to hold a closing-out or distress sell to obtain a license from the clerk of the municipality in which the sale was to be held or, if the sale was to occur in an unincorporated area, from the officer designated by the board of county commissioners. The person had to submit an application to the clerk or designated officer and pay a fee of $50 in order to obtain the license. The clerk or designated officer was not to issue the license unless he or she was satisfied, based on the application, that the person planned to conduct a sale consistent with what was to be advertised.

The repeal of G.S. 66-77 leaves persons free to conduct closing-out and distress sales without first obtaining local licenses. The Act does not expressly repeal any other provisions in Article 17, but it is unclear whether or to what extent some of them remain in force following the demise of G.S. 66-77. For instance, G.S. 66-79 bars anyone conducting a closing-out sale from selling goods or merchandise as damaged unless the goods or merchandise were described and inventoried as damaged in the license application. Following the repeal of G.S. 66-77, however, no such application is required.

Preemption of Local Government Firearms Authority

Session Law 2015-195 (H562) amends numerous firearms laws, but the focus here is on its preemption of local government authority to regulate firearms. Both city councils and boards of county commissioners have some statutory authority to restrict or prohibit the discharge of firearms. G.S. 153A-129; 160A-189. Section 14-409.40 of the General Statutes, though, expressly denies local governments the power, unless otherwise permitted by statute, to regulate “in any manner” the possession, ownership, storage, transfer, sale, purchase, licensing, or registration of firearms.

The Act amends G.S. 14-409.40 to specify that counties and municipalities also lack any authority to regulate the “taxation, manufacture, [or] transportation” of firearms. It further amends the statute to provide that any person adversely affected by an ordinance, rule, or regulation adopted or enforced in violation of G.S. 14-409.40 may seek a judicial declaration that the city or county has acted unlawfully and a court order barring the city or county from continuing to violate the statute. An individual who establishes that he or she has been adversely affected by an ordinance, rule, or regulation adopted or enforced in violation of G.S. 14-409.40 may obtain actual damages. The court must award attorney’s fees and court costs to the prevailing party in any action brought under G.S. 14-409.40.

Links

- canons.sog.unc.edu/?p=8264
- canons.sog.unc.edu/?p=8250
- canons.sog.unc.edu/?p=8248
- canons.sog.unc.edu/?p=8233
- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2015-2016/SL2015-160.html
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160a-75
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-234
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-381
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-388
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153a-44
- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2015-2016/SL2015-246.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-200
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-200.1
- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2015-2016/SL2015-170.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=144-5
- www.law.cornell.edu/uscode/text/4/chapter-1

- www.law.cornell.edu/uscode/text/4/6
- www.law.cornell.edu/uscode/text/4/7
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=144-9
- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2015-2016/SL2015-241.html
- www.ncleg.net/Sessions/2015/Bills/House/PDF/H259v3.pdf
- www.history.ncdcr.gov/nc-hist-com.htm
- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2015-2016/SL2015-71.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=62a-40
- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2015-2016/SL2015-24.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-26
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-229
- canons.sog.unc.edu/?p=772
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_66/Article_17.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_66/GS_66-76.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_66/GS_66-78.html
- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2015-2016/SL2015-103.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=66-77
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=66-79
- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2015-2016/SL2015-195.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-129
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-189
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-409.40