

# 2022 Legal and Legislative Update

Adam Lovelady & Jim Joyce  
APA-NC Annual Conference  
September 2022



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1

**Coates' Canons NC Local Government Law**

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SEARCH THIS SITE...

**PLANNING AND DEVELOPMENT REGULATION**

**Highlights**

This site focuses on local development regulation in North Carolina, zoning, land subdivision, historic preservation, and other land use highlights of certain opportunities and resources. Follow the category on the side for more complete information.

Note the recently released 2021 Legislative Bulletin.

**Courses and Training**

The School of Government offers a range of courses and training development regulators, from multi-week professional development workshops. While the structure and format of the courses have evolved, content and emphasis on practical knowledge continues. Check out the page for more details.

**Publications and Resources**

Books and Reports on Planning and Development Regulation

**LAND USE LAW**  
David W. Owens  
Third Edition  
in North Carolina

**2021 North Carolina Legislation Related to Planning and Development Regulation**  
Adam Lovelady and Jim Joyce

**CONTENTS**

<ul style="list-style-type: none"> <li>Charter for Local Government Action</li> <li>Comprehensive and Land Use Planning</li> <li>Zoning and Development Regulation</li> <li>Development Ordinance</li> <li>Subdivisions (S.L. 2021-158)</li> <li>Land Use Clarification (S.L. 2021-168)</li> <li>Chapter 160C Technical Corrections (S.L. 2021-169)</li> <li>Historic Preservation (S.L. 2021-177)</li> <li>Manufactured Housing (S.L. 2021-177)</li> <li>Affordable Housing</li> <li>Neighborhood Standard (S.L. 2021-180)</li> <li>Historic Landmark Legislation (S.L. 2021-141)</li> <li>Signs</li> <li>NC2021 Rules (S.L. 2021-175)</li> <li>Signs (S.L. 2021-180)</li> <li>Fees and Exemptions</li> <li>System Development Fees (S.L. 2021-79)</li> <li>Utilities for Schools, Including Charter Schools (S.L. 2021-79)</li> <li>Infrastructure</li> <li>Assessment and Measurement of Streets (S.L. 2021-22, Section 2 and 9)</li> <li>Streets and Local-CAD Streets Infrastructure Budget Bill (S.L. 2021-162)</li> </ul>	<ul style="list-style-type: none"> <li>Agriculture—The Farm Bill (S.L. 2021-76)</li> <li>Protection of Water Supply Watersheds and Coastal Areas</li> <li>Redevelopment in Water Supply Watersheds (S.L. 2021-162)</li> <li>Central Area Management (S.L. 2021-158)</li> <li>Eviction and Substandard Rental</li> <li>Plan Requirements and Single-Family Development (S.L. 2021-157)</li> <li>Eviction and Substandard Fee Changes (S.L. 2021-162)</li> <li>Local Government</li> <li>Statewide Infrastructure Fund (S.L. 2021-165)</li> <li>Stormwater Regulation (S.L. 2021-156)</li> <li>Building and Housing Code Enforcement</li> <li>Building Code Changes Part 1 (S.L. 2021-125)</li> <li>Building Code Changes Part 2 (S.L. 2021-163)</li> <li>Rampage Fee (S.L. 2021-125)</li> <li>Building Fuel and Performance (S.L. 2021-163)</li> <li>Other Related Legislative Proposals</li> <li>Making Middle Housing (H.B. 2021-S. 348)</li> <li>Urban Incentives (H.B. 2021-125)</li> <li>Storm-Form Runoff (H.B. 2021-125)</li> <li>Conditions on Affordable Housing (H.B. 2021-125)</li> <li>Tree Protection (H.B. 2021-125)</li> </ul>
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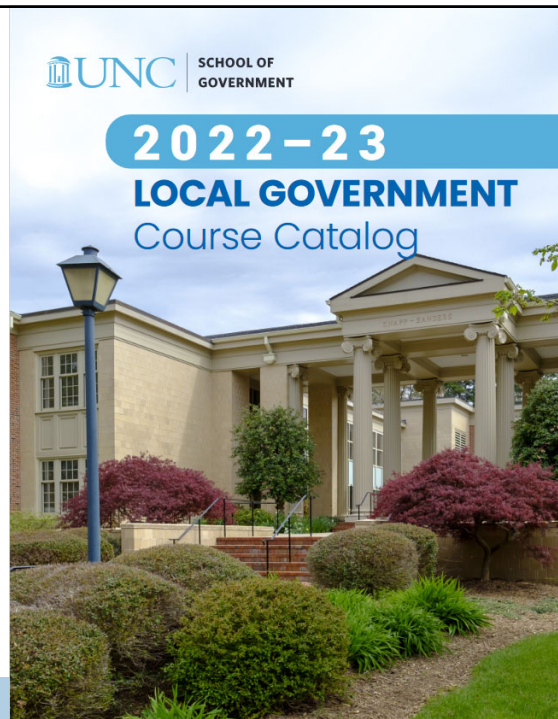
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2

## Training Opportunities for Planning

- Planning Board Basics (Legislative Development Decisions)
  - September 29, 1:00-3:30 pm OR October 6, 5:30-8:00 pm
- Board of Adjustment Basics (Quasi-Judicial Development Decisions)
  - October 20, 1:00-3:30 pm OR October 27, 5:30-8:00 pm
- Preservation Commission Basics (Quasi-Judicial Preservation Decisions)
  - December 1, 1:00-3:30 pm
  
- PlanNC Workshop (December)
  
- P&Z 101 (January)
  
- (Planning and Development Regulation (certification course))

## Training Opportunities



# sog.unc.edu/planning

## Caselaw Update



# Short-Term Rentals

Schroeder



7

## Wilmington STR Ordinance

- 400-foot separation between short-term rentals
- cap on the total number of short-term rentals
- registration of short-term rentals (held a lottery for the initial registration)
- one-year amortization period for existing operators to cease operations
- operational and safety requirements (zoning districts, parking standards, posted safety info, no cooking in bedrooms)



8

## Inspections, Permits, and Registration Programs

- prohibit periodic inspections of residential rental properties
- limit fees, permits, and registration requirements for residential rental properties
- limits on IPR programs *do apply* to properties subject to the Vacation Rental Act (short-term rentals)

## 160D-1207 Clarification

- local governments may not “require any owner or manager of rental property to obtain any permit or permission under Article 11 [building codes] or Article 12 [housing codes]. . . to lease or rent residential real property or to register rental property with the local government.”

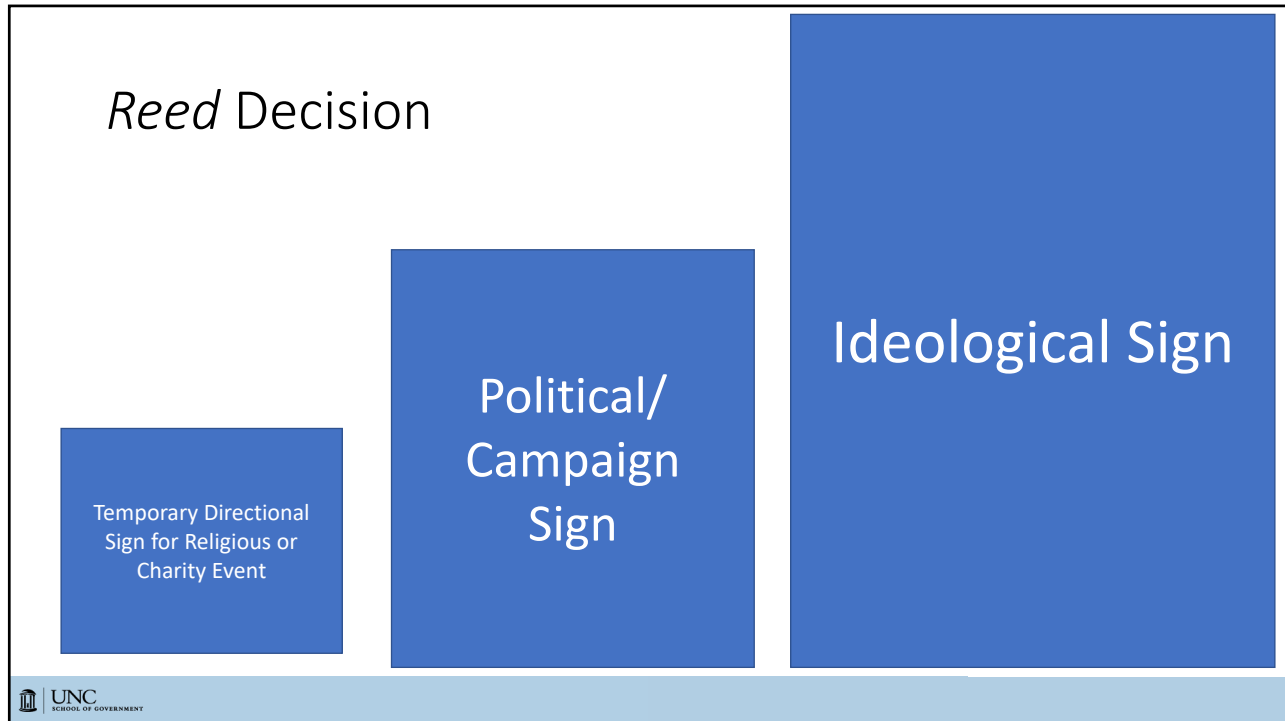
## STR after *Schroeder*

- No registration programs for STRs
- No provisions dependent upon a registration program
- Other Development Regulations Remain
  - Define short-term rental as a land use
  - Apply development standards and operational limits
  - Require development approvals (but not regular registrations)
  - Separation and density caps?

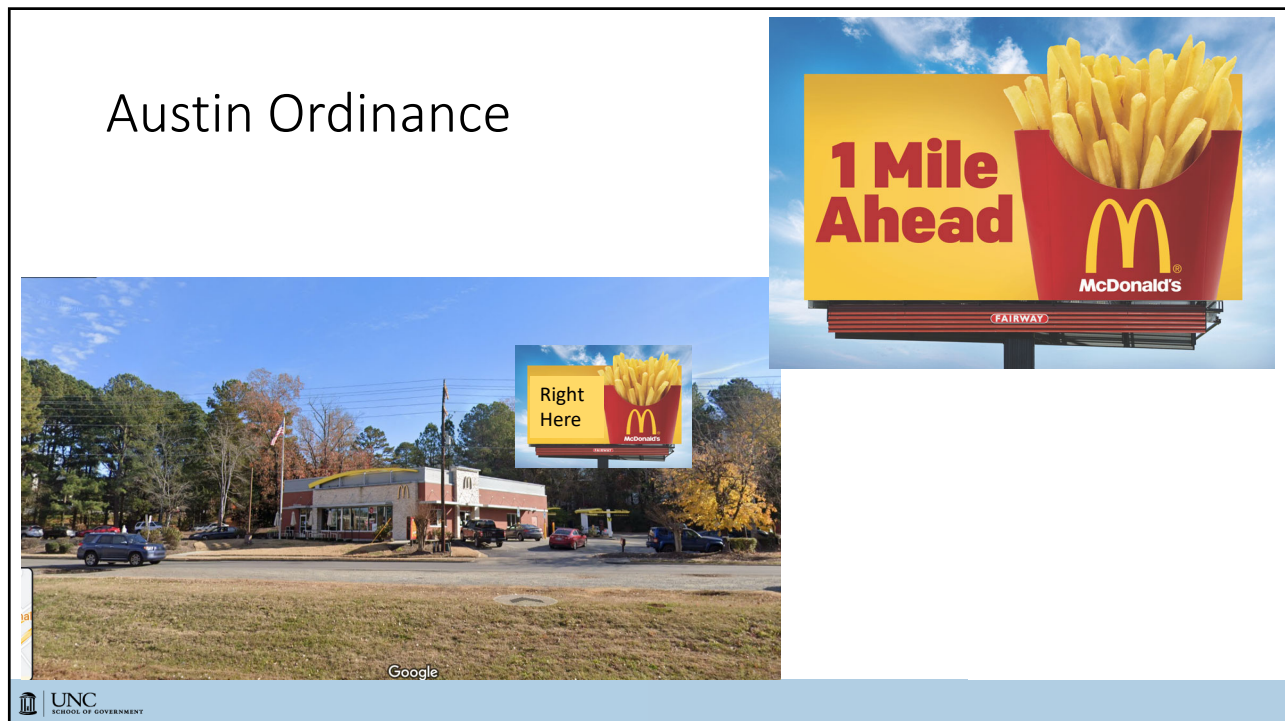
<https://canons.sog.unc.edu/2022/04/short-term-rental-regulations-after-schroeder/>

## Sign Ordinances

Austin  
Clemmons



13



14

## Austin v. Reagan National Advertising

“The message on the sign matters only to the extent that it informs the sign’s relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions.”

## Take-Aways

- Can a sign code distinguish based on the content of the sign’s message? Generally, no.
- So, if the enforcement officer must read the sign to apply the code, is the code automatically content-based? No.
- Can the sign code distinguish between on-premises and off-premises signs? Generally, yes.
- Can the sign code distinguish commercial messages from noncommercial messages? Generally, yes.



## Visible Properties, LLC v. Village of Clemmons

“Determining which zoning provisions apply requires so much cross-referencing it is almost dizzying.”

## Visible Properties, LLC v. Village of Clemmons

- General zoning district                      permitted the sign
- Overlap district                                prohibited the sign
- Sign ordinance                                 permitted the sign
  
- Sign ordinance                                 if there is a conflict, sign ordinance wins
- General ordinance                            if there is a conflict, most restrictive wins

## Ordinance terminology

- “moving and flashing signs”
- “electronic message boards”

## Court's Interpretive Principles

- strive to harmonize provisions and avoid conflicts whenever possible
- construe ambiguous provisions in favor of the free use of land

## Take-Away: Clean Up Your Ordinance

“[Z]oning regulations are not intended to be a system of murky, ambiguous rules where the permitted uses of property ultimately depend on the interpretive discretion of government bureaucracy.”

## Exactions

Mooresville  
Harnett County

## “Exaction”

- “a condition of development permission that requires a public facility or improvement to be provided at the developer’s expense”
- Distinguished from standard regulation
- Always two questions
  - Is it authorized by state statute (Chapter 160D)?
  - Is it constitutional (Nollan/Dolan/Koontz)?

## *Nollan/Dolan* Essential Nexus and Rough Proportionality

The reasonably  
expected impacts of  
the development



The exactions required  
to be provided by the  
developer

## Koontz

- US Supreme Court extended *Nollan/Dolan* to monetary exactions such as “in lieu of” fees

## Anderson Creek Partners v. Harnett County

- County required water and sewer “capacity use fees” as requirement for development approval (\$1,000/unit and \$1,200 per unit, respectively)
- Developer challenged capacity use fee as unconstitutional exaction (under Koontz)
- County argued it was a generally applicable fee, not an exaction at all

## Court Decision

- Impact fees are monetary exactions subject to Nollan/Dolan
- User fees and taxes are not exactions
- Ad hoc v. legislative distinction does not matter
- To be clear, fee may still be authorized . . . County has to prove nexus and proportionality

## Implications

- For water and sewer impact fees, not much . . . System development fee statutes demand nexus and proportionality
- For exactions in general, may be significant implications (case extends and applies Koontz in NC context)
- Concurring opening invites challenge to go further

## TAC Stafford, LLC v. Town of Mooresville

- Developer sought subdivision plat approval for 467 lots on 209 acres
- Town required TIA and any required on-site and off-site improvements
- Required improvements included road improvements 2.3 miles off-site
- Developer could not get right-of-way, town refused to condemn right-of-way, and town denied COs for half of the subdivision

## TAC Stafford, LLC v. Town of Mooresville

- No authority to require off-site transportation improvements
- Town refunds to developer \$100k paid directly to town
- Town pays for developer attorneys fees for exceeding unambiguous authority
- Funds paid to third-party landowners for off-site rights-of-way were not exactions paid to the government
- Remand to determine if funds paid to engineering firm is exaction to be repaid by town

## Other Notable Cases

- **Ashe County v. Ashe County Planning Board**
  - Depending on the facts, an application might not be completed until all materials are submitted.
- **Thompson v. Union County**
  - Don't forget to enter the ordinance and documentation into the court record
- **Schooldev East, LLC v. Town of Wake Forest**
  - "street improvements" did not include bike and ped
  - They actually met the evidentiary standard for denial




## Caselaw Update



## Legislative Top 10





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PLANNING AND ZONING LAW BULLETIN NO. 32 | SEPTEMBER 2022

## 2022 North Carolina Legislation Related to Planning and Development Regulation

Adam Lovelady and Jim Joyce

CONTENTS

I. Checklist for Local Government Actions ...2	VI. Fees and Exactions ...6
II. Comprehensive and Land Use Planning ...3	VII. Local Environmental Regulation ...7
A. Extension for Small Town Land Use Plans ...3	A. Stormwater Fund Reversions ...7
III. Zoning and Development Regulations ...3	B. Flood Resiliency Blueprint Technical Corrections ...7
A. Maximum Parking Space Size ...3	C. CAMA Notice Requirements ...8
B. Historic Landmark Designation ...3	

- <https://www.sog.unc.edu/publications/bulletins/2022-north-carolina-legislation-related-planning-and-development-regulation>

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35

## 10. Designate an Officer to Oversee Building Code Duties

- Section 9 of [S.L. 2022-11](#) (S.B. 372)
- 160D-1102 is amended to require that “[e]very local government shall designate a person responsible for the daily oversight of the local government's duties and responsibilities under G.S. 160D-1104.”

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36

## 10. Designate an Officer to Oversee Building Code Duties

- Duties and responsibilities under G.S. 160D-1104
  - receipt of applications for permits
  - issuance or denial of permits,
  - necessary inspections in a timely manner,
  - issuance or denial of certificates of compliance,
  - issuance of orders to correct violations,
  - bringing of judicial actions against actual or threatened violations,
  - keeping of adequate records, and any other actions that may be required

## 9. Prepare Financial Report on Permit Fees

Section 9 of [S.L. 2022-11](#) (S.B. 372)

“No later than October 1 of 2023, 2024, and 2025, every local government shall publish an annual financial report on how it used fees from the prior fiscal year for the support, administration, and implementation of its building code enforcement program as required by G.S. 160D-402(d). This report is in addition to any other financial report required by law.”

## 8. Tweaks to Rules for Farm Buildings

- [S.L. 2022-55](#) (S.B. 762)
- Added to G.S. 143-138(b4) exclusion from building code regulation: farm buildings “used primarily for the storage of agricultural commodities or products or storage and use of materials for agricultural purposes.”
  - Regardless of whether it is located on same property as where ag products were produced
  - “Surrounded and adjoined by public ways and yards” at least 60 feet in width
  - Owner must post placard to state “Ag. Exempt”
  - Appears limited to building code (not zoning, sales tax exemption, or present use value program)

## 8. Tweaks to Rules for Farm Buildings

- Bona fide farm exemption clarified to include any “building or structure that is used solely for storage of cotton, peanuts, or sweet[]potatoes, or any byproduct of those commodities.”
- Clarification that documentation at G.S. 160D-903 are sufficient, not necessary
  - (sales tax exemption certificate, property tax listing showing present use valuation, federal Schedule F, or forest management plan) are not the only evidence that can be considered in determining whether property is in bona fide farm use

## 7. Clarify Subdivision Appeals

- [S.L. 2022-62](#) (SB 768)
- Admin decision by staff                      to board of adjustment
- Quasi-Judicial by board                      to superior court in nature of cert.
- Admin decision by board                      to superior court for declaratory relief

## 6. Reduce Fire Access for Small Subdivision

- Amended in 2021, further amended in 2022
- [S.L. 2022-11](#) (S.B. 372), Section 13
- “The [North Carolina Building Code] Council shall not require two or more separate and approved fire apparatus access roads in developments of one- or two-family dwellings where there are fewer than 100 dwelling units.”

## 5. Maximum Size for Parking Spaces

- [S.L. 2022-11](#) (S.B. 372), Section 10
- G.S. 160D-702 amended to state local regs shall not
- “[s]et a maximum parking space size larger than 9 feet wide by 20 feet long unless the parking space is designated for handicap, parallel, or diagonal parking.”

## 4. CAMA Plan Notice Alignment

- [S.L. 2022-43](#) (H.B. 219), Section 5
- G.S. 113A-110(e) amended to align CAMA notice with zoning notice
- Published notice now required 10-25 days before hearing (had been 30 days)

### 3. Extension for Small Town Plans

- [S.L. 2022-75](#) (H.B. 911), Section 10
- July 1, 2022      General Deadline (already passed!!!)
- July 1, 2023      New deadline to for municipalities under 1,500

### 2. ABC Revisions: Social District and Common Area Entertainment Permit

- [S.L. 2022-49](#) harmonizes, clarifies, and tweaks outdoor drinking laws (social districts and common area entertainment permits)
- Common area entertainment permit
  - Authorized in 2019 (S.L. 2019-182, Sec. 19)
  - Applies to common area of commercial property with multiple tenants (shopping centers and the like)
- Social district
  - Authorized in 2021 (S.L. 2021-150, Sec. 20)
  - Applies to a public area delineated by local government
- Similar standards apply to both – delineated area, special containers, etc.

## 2. ABC Revisions: Common area entertainment permits

- S.L. 2022-49 Changes:
  - New “policy” subsection – we’re allowing open containers to be carried around but no other changes to consumption or possession rules;
  - Expands who can allow customers to bring drinks into their establishments
  - New requirements for type of container; and
  - Defined obligations for customers and for non-permittees who allow customers to bring alcoholic beverages onto their premises.

## 2. ABC Revisions: Social Districts

- S.L. 2022-49 Changes:
  - Clarifies that a local government can create one *or more* social districts
  - New “policy” subsection – we’re allowing open containers to be carried around but no other changes to consumption or possession rules
  - Defines terms and adds obligations for customers and for non-permittees who allow customers to bring alcoholic beverages onto their premises
  - Allows indoor areas to be included
  - City or county can designate another entity to make management and maintenance plans, but plans must ultimately be approved by the local governing body
  - Allows non-permittee businesses to opt in to social district
  - Clarifies that closed containers can be carried through
  - Allows overlap with common area entertainment permit



# 1. State of Emergency Ends

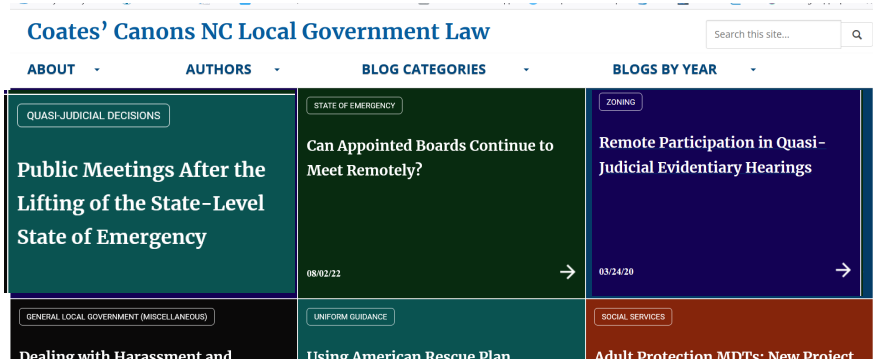
- Permit Extension for “development approvals”
  - Erosion and sedimentation control plan
  - Subdivision approvals
  - Zoning permits
  - Development agreements
  - Building permits
  - Certificates of appropriateness
  
- First: S.L. 2020-3, Section 4.40 (May 4, 2020)
- Second: S.L. 2020-97, Section 3.21 (September 4, 2020)
- Third: S.L. 2021-3, Section 2.21 (March 11, 2021)

# 1. State of Emergency Ends

- State of Emergency lifted effective August 15, 2022

If the development approval's original expiration date was...	...then it expires/expired on ...	Reference
Before March 10, 2020	The original expiration date	<a href="#">S.L. 2020-3, Section 4.40</a>
Between March 10, 2020, and April 1, 2020	Five months after the original expiration date	<a href="#">S.L. 2020-3, Section 4.40</a> ; <a href="#">S.L. 2020-97, Section 3.21</a> . See <a href="#">prior blog</a> for further explanation
Between April 1, 2020, and September 14, 2022	January 12, 2023	<a href="#">S.L. 2021-3, Section 2.21, and lifting of state of emergency</a>
After September 14, 2022 (but issued before September 15, 2022)	January 12, 2023, or original expiration date, whichever is later	<a href="#">S.L. 2021-3, Section 2.21, and lifting of state of emergency</a>
After September 14, 2022 (but not issued until September 15, 2022, or later)	The original expiration date	<a href="#">S.L. 2021-3, Section 2.21, and lifting of state of emergency</a>

# 1. State of Emergency Ends



- <https://canons.sog.unc.edu/2021/07/public-meetings-after-the-lifting-of-the-state-level-state-of-emergency/>
- <https://canons.sog.unc.edu/2022/08/can-appointed-boards-continue-to-meet-remotely/>
- <https://canons.sog.unc.edu/2020/03/remote-participation-in-quasi-judicial-evidentiary-hearings/>

# 1. State of Emergency Ends

## Remote meetings

- Elected board
  - statutory quorum requirements may reasonably be interpreted to require in-person participation by board members
- Appointed board
  - Flexibility for appointed boards to meet remotely as long as that complies with applicable local rules
- Quasi-judicial hearings
  - Flexibility to hold meetings remotely, but heightened *due process* considerations

# Legislative Top 10

