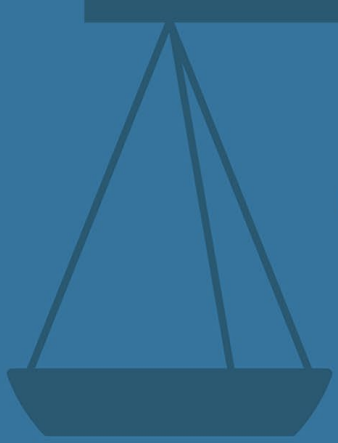
MUNICIPAL LAW NOTES



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Greetings!

Welcome to the newest edition of Municipal Law Notes, a regular publication of the North Carolina League of Municipalities. My name is Baxter Wells, and I am proud to have joined the world-class legal team at the League as Assistant General Counsel. I will be drafting Municipal Law Notes, and I want to be sure that each release is helpful to both legal practitioners and employees in the field. You may notice that some of the summarization of cases present in prior editions has given way for additional analysis and insight into recent decisions by our state and federal appellate courts. It is the goal of Municipal Law Notes to assist practitioners in digesting cases germane to municipal law, in addition to offering unique perspective on how those cases may interact with practical considerations of advising municipal clients.

To this end, I invite any and all constructive feedback on how to improve future volumes of Municipal Law Notes. Is there a case I missed that needs further discussion? Please let me know. Did I say something incorrect, or without the necessary context? Drop me a line. There is no pride in ownership, only in professional service to our great state's cities and towns. I look forward to hearing from you.

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Immunity

Police officers are exempt from the speed limit when apprehending criminals; that has no bearing on waiver of governmental immunity, according to the Supreme Court

Estate of Graham v. Lambert, 898 S.E.2d 888 (2024). Less than a year after joining the Fayetteville Police Department, Officer Lambert is on patrol driving solo, at night, for the first time. A call goes out for Officer Lambert to respond with two other officers to a domestic dispute. He is the farthest away and uses the squad car's laptop to route directions as he drives. No lights, no sirens. Officer Lambert is driving 53 m.p.h. in a 45 m.p.h. zone and leaning towards his laptop when he strikes Mr. Graham who stepped into the road outside of a crosswalk. Mr. Graham dies at the scene.

Mr. Graham's estate sued the City of Fayetteville, the Fayetteville Police Department, and Officer Lambert in his official and individual capacities. The trial court dismissed the police department as an improper party but denied the City's and Officer Lambert's summary judgment efforts to throw out the case on governmental and public official immunity grounds. The City and Officer Lambert appealed. The Court of Appeals reversed the trial court's denial of the City's and Officer Lambert's summary judgment motions. First, Mr. Graham's estate had successfully overcome an assertion of governmental immunity just by pleading that the City had purchased insurance. Second, according to the Court of Appeals, Officer Lambert was due summary judgment in his favor in the individual capacity suit because he had not acted with malice or corruption in striking Mr. Graham, the presence of malice or corruption being an essential element of an individual capacity suit against a public official acting within the scope of their employment. And finally, the intermediate appellate court invoked N.C.G.S. § 20-145, which excuses law enforcement from the speed limit while apprehending criminals unless the officer is reckless in doing so. Because Officer Lambert was not grossly negligent in his actions the night of Mr. Graham's death, the majority of the panel instructed the trial court to enter summary judgment in favor of the City and Officer Lambert. Both parties requested that the Supreme Court weigh in.

The North Carolina Supreme Court opinion in this matter is quite interesting. The tragic facts give way to a concise but fundamental explanation of how governmental immunity impacts state law claims against local governments and officers sued in their official capacities, and how public official immunity impacts suits against officers in their individual capacities. If a practitioner is looking for a complete statement of law on these issues for their written presentations before a trial or appellate court, section III of this opinion is a one-stop shop.

Then, an admonishment. The Supreme Court instructed the Court of Appeals to reconsider the Estate's argument that the City had waived governmental immunity by possessing insurance

that would cover Officer Lambert's conduct utilizing a summary judgment standard of review. The Court of Appeals panel had initially applied a 12(b)(6) standard, erroneously concluding that Mr. Graham's Estate had survived summary judgment on the issue of governmental immunity by simply pleading that the City had an insurance policy covering Officer Lambert's conduct. But this case reached the summary judgment phase, where the Court of Appeals was supposed to look past the pleadings to see if the parties' forecast of evidence when viewed in a light most favorable to the Estate even supported the existence of insurance, and to what extent that insurance waived governmental immunity.

Next, the opinion sets the record straight on the interplay—or lack thereof—between N.C.G.S. § 20-145 and waiver of governmental immunity. N.C.G.S. § 20-145 excuses law enforcement officers from the speed limit while apprehending criminals so long as the officer is not grossly negligent. As a secondary argument, the Estate had asserted that the statute waived governmental immunity in the event that Officer Lambert's driving was grossly negligent. And the Court of Appeals played along but ultimately rejected the Estate's argument, holding that while his driving might have been negligent, Officer Lambert's actions did not rise to the level of gross negligence found in other cases. But the Supreme Court returned to fundamentals: waiver of governmental immunity must be explicit. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 537-38 (1983). And nothing within § 20-145 implicates governmental immunity, much less the City of Fayetteville's waiver of the immunity through the actions of one of its police officers. The Supreme Court reversed and remanded the case to the Court of Appeals for an analysis of whether the City, and by extension Officer Lambert in his official capacity, had waived governmental immunity by procuring insurance utilizing the summary judgment standard of review. The Court deemed any argument concerning the individual capacity suit against Officer Lamber abandoned, as the Estate's counsel at oral argument stated that only the official capacity suit was before the Court.

This is an opinion to download for several reasons. First, every once in a while, an appellate court in North Carolina will deliver the bar a gold nugget in the form of a comprehensive, even if not exhaustive, restatement of the law in a certain subject matter. The Court's discussion of governmental and public official immunities is just one such nugget when combined with the emergent use of the "cleaned up" parenthetical citation. *See* Laura Graham, *(Cleaned Up) Citations: A Bold New Option to Bluebook Rule 5*, NORTH CAROLINA BAR ASSOCIATION, August 16, 2023 (https://www.ncbar.org/nc-lawyer/2023-08/cleaned-up-citations-a-bold-new-option-to-bluebook-rule-5/). Practitioners, please reach out to the League at legal@nclm.org for a copy of the pertinent language of this opinion edited to utilize the "cleaned up" parenthetical.

Second, this opinion reiterates that a municipality's purchase of insurance only waives immunity if and to what extent a policy actually covers the alleged conduct. This begs the question of what happens when, like a lot of larger municipalities, the City is self-insured for

the first ___ dollars of a claim. The Court of Appeals has consistently answered that question in favor of municipalities, holding that the purchase of an excess liability policy that does not kick in until a self-insured retention ("SIR") is satisfied does not waive governmental immunity. *Hinson v. City of Greensboro*, 232 N.C. App. 204, 213 (2014) (city with $3m SIR); *Ballard v. Shelley*, 257 N.C. App. 561, 566 (2018) (county with $350k SIR); *Magana v. Charlotte-Mecklenburg Bd. Of Educ.*, 183 N.C. App. 146, 149 (2007) (school board with $1m SIR). These cases require that the terms of the policy are unequivocal: the policy applies only after the insured municipality has been found responsible for, and has actually paid to a plaintiff, an amount in excess of the SIR. Because a municipality that could otherwise claim governmental immunity will never be required to pay the SIR, an excess liability policy that only indemnifies a municipality after they have paid an SIR would not operate to waive governmental immunity. *Hinson*, 232 N.C. App. at 212.

Last, but certainly not least, the Estate's Hail Mary argument that N.C.G.S. § 20-145 somehow operated to waive governmental immunity if the Estate could establish gross negligence in Officer Lambert's conduct might have been a long shot, but the Court's discussion of the issue frames the limited applicability of that statute as applied to law enforcement operations. The statute's operative language merely states that the speed limit does not apply to law enforcement officers exercising a reasonable degree of care in the apprehension of criminals. Which makes sense given its location amongst the state's robust motor vehicle statutes. But the Supreme Court has interpreted the last sentence of the statute—which instructs that this exemption should not be interpreted to excuse an officer from their reckless disregard for the safety of others—to set a gross negligence standard of care for all personal injury resulting from a police officer's conduct during a pursuit. *Young v. Woodall*, 343 N.C. 459, 462 (1996). This seems to apply to all of the officer's conduct during a pursuit, not just exceeding the speed limit. *Id*. at 463. Even though the Supreme Court has assigned § 20-145 the extra responsibility of establishing a standard of care, the statute cannot overcome the rule that waiver of governmental immunity must be explicit.

Contracts

Court of Appeals case highlights need for tight contract administration

Town of Forest City v. Florence Redevelopment Partners, LLC, 896 S.E.2d 653 (2024). Legal trouble boils below the surface of every contract, no matter how robust, that is not accompanied by equally robust contract administration. In late June of 2018, the Town of Forest City contracted with Florence Redevelopment Partners, LLC, to purchase and renovate a historic mill in town. The contract contained a timeline requiring Florence to inspect the property and provide a Notice of Suitability within 90 days of the contract's effective date. Florence's failure to do so would mean the contract automatically terminated under its own

terms. The contract also included the usual time-is-of-the-essence language and the following non-waiver provision:

> Any failure or delay of Florence or the Town to enforce any term of this Contract shall not constitute a waiver of such term, it being explicitly agreed that such a waiver must be specifically stated in a writing delivered to the other party. . .. Any such waiver by Florence or the Town shall not be deemed to be a waiver of any other breach or of a subsequent breach of the same or any other term.

Florence delivered its Notice of Suitability 28 days late. For more than a year after Florence delivered its Notice of Suitability, the Town and Florence worked together on the terms of the proposed purchase contract, easements and deed restrictions, and generally on planning the development of the mill property. In November of 2020—about two weeks after Florence informed the Town that Florence would need to seek alternative financing after a HUD loan fell through—the Town wrote Florence explaining that it was terminating the development contract "for failure of the conditions precedent to close on the purchase and sale of the property." The Town filed a declaratory judgment action claiming that the contract was void for lack of a pre-audit certificate; and if the contract was not void, it had automatically terminated over a year prior when Florence failed to timely tender the Notice of Suitability; and if the contract had not terminated by its own terms, then Florence breached the contract by failing to close on the property. Florence counterclaimed for breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. The trial court sided with the Town at the summary judgment phase as to most issues, only mooting the Town's first claim that Florence had breached the contract because the trial court simultaneously agreed with the Town that the contract was void for lack of pre-audit certificate. Florence appealed.

The Court of Appeals reversed the trial court on its determination that the contract between the Town and Florence was void for want of a preaudit certificate. Nothing in the contract required the Town to expend money within the fiscal year of the contract's execution, bringing this case under the auspices of *Myers v. Town of Plymouth*, 135 N.C. App. 707, 714 (1999), where the Court of Appeals announced that "a contract that is signed in one year but results in a financial obligation in a later year will not violate" the pre-audit certificate requirement of N.C.G.S. § 159-28. While the Town argued that it *could have* expended money on closing costs in the off chance that the deal closed within the five-day span between the contract's execution and the end of the relevant fiscal year, the Court of Appeals would not "invalidate the contract due to its lack of a pre-audit certificate when the mere possibility of an expense in the first year never in fact resulted in an obligation," quoting *Myers*, 135 N.C. App. at 714.

The Court of Appeals likewise reversed the trial court on its alternative ruling that the contract had automatically terminated when Florence failed to deliver its Notice of Suitability on or

before the due date contemplated by the contract. While the Town asserted the contract's non-waiver clause required that waiver of this material deadline be reduced to writing, the Court of Appeals noted that any clause of a contract—including the non-waiver clause itself—could be waived "by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived," quoting *42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App 503, 511 (2012). The consistent communication between the Town and Florence progressing the details of the deal for more than a year after the deadline has passed would naturally lead Florence to believe that the Town had waived both the deadline itself and any requirement that modification of the deadline needed to be writing. The trial court erred in ruling in the alternative that the contract had automatically terminated when Florence failed to timely tender its Notice of Suitability.

Having held that the contract was legitimate and had survived automatic termination, the Court of Appeals also discussed the following issues relevant to the case, but which are discussed in more detail in the cases relied upon by the intermediate appellate court. Governmental immunity is waived for breach of contract claims to the extent that a local government executes a valid contract. *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100 (2001). A claim for unjust enrichment does not survive summary judgment when a valid contract exists between the parties. *Atlantic & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 753 (2004). Make sure every argument before an appellate court is accompanied by citation to relevant case law; otherwise, the argument is deemed abandoned. *Fairfield v. WakeMed*, 261 N.C. App. 569, 575 (2018).

No petition for discretionary review has been filed in this case with the Supreme Court of North Carolina, so it has returned to the Rutherford County Superior Court for further proceedings. A few takeaways here:

First, the pre-audit certificate requirement of N.C.G.S. § 159-28 is both a sword and a shield. When a party wishes a contract did not exist because a better offer or counterparty comes along, unsheathe your Lack of Pre-audit Certificate Sword™. When a party fears an imminent breach claim for excessive delay in performance, raise your Lack of Pre-audit Certificate Shield™. That is, only if the contract in question required the municipal party to expend funds in the same fiscal year as the contract's execution, says the Court of Appeals. But does this comport with the spirit of the pre-audit statute? After all, the operative language of N.C.G.S. § 159-28(a1) requires that a pre-audit certificate be affixed to any "written contract or written agreement requiring the payment of money," without regard to when that payment of money occurs. Subsection (a1)'s only reference to the timing of the payment—an indirect reference at that—is the requirement that the pre-audit certificate itself state "that the instrument has been preaudited to assure compliance with subsection (a) of this section." And Subsection (a2) renders a contract void for a violation of *either* Subsection (a) *or* Subsection (a1). Ostensibly,

the Legislature understood the impact of the phrase “in the current fiscal year” when it was included in Subsection (a), but left out of Subsection (a1)’s phrase “written contract or written agreement requiring the payment of money….” *Myers* and its progeny do not explain why the pre-audit certificate requirement of Subsection (a1) is limited to the contract’s fiscal year despite the discussion of fiscal years occurring only in Subsection (a), when a violation of either can render a contract void. Might this be an angle of attack for municipalities or contractors who wish to add additional teeth to the pre-audit statute in the future?

Second, waiver of a non-waiver clause is a thing. If the facts concerning whether waiver has occurred are undisputed, that determination is made by the judge. *Johnson v. Dunlap*, 53 N.C. App. 312, 316 (1981) (citation omitted). If the facts which purportedly demonstrate waiver are disputed, that question is of course left to the factfinder. *42 East, LLC*, 218 N.C. App. at 512. In the instant case, the gravamen of Florence’s argument that the Town had waived the Notice of Suitability deadline relied on the fact that the parties had apparently worked together to advance the deal for more than a year after the deadline. Finding waiver from these undisputed facts was easy for the Court of Appeals. The Court recounted: “After the 23 September 2019 deadline passed, the Town and Florence maintained consistent communication with one another. The parties exchanged emails and phone calls and negotiated matters related to electrical, sewer, and water infrastructure for the Mill, and the Town provided draft term sheets for the Development Agreement.” *Town of Forest City*, 896 S.E.2d at 659. As municipal practitioners know, this may have just been a case of town employees continuing in their best efforts to get the deal to the finish line without realizing that they needed to raise the issue of the missed deadline with their attorney earlier. Add this to the titanic list of reasons that it is best practice to have your client’s employees involve their town attorney with complex deals early and often, even when the deal seems to be advancing without issue.

Public Records

The Supreme Court of North Carolina clarifies that “any person” means “any person”

In re The McClatchy Company, LLC, No. 29A-23, 2024 N.C. LEXIS 346* (2024). The summer of 2020 tested the limits of public discourse by combining a reckoning on racial justice in America with a paradigm-shifting pandemic, all in an election year that made neighbors turn on each other with social media posts, or signs in the front yard, or excommunication, or even violence. Clashes between law enforcement and demonstrators propelled local journalism to a new form of relevance, and with it came controversy over efforts of journalists to flesh out those stories through the otherwise mundane process of public records requests. Or in this

particular case, a petition for the release of body camera footage from one of these clashes filed by a number of newspapers and reporters before the Alamance County Superior Court.

On 31 October 2020, around 200 people marched downtown Graham as part of the "I Am Change" rally which ended in the street outside of the historic Alamance County Courthouse. Officers moved in to clear the streets of marchers, resulting in clashes between the two. All of this was archived by local journalists, who followed up the original reporting with a petition under N.C.G.S. § 132-1.4A(g) for the release of all body camera footage from the Graham Police Department and Alamance County Sheriff's Office "from the time the first contact was made with marchers, spectators or media . . . until the last member of law enforcement left the scene." That subsection of the statute governing law enforcement recordings states that "any person" may "file an action in the superior court . . . for an order releasing the recording." The petitioners utilized a form AOC-CV-270 produced by the Administrative Office of the Courts for this very occasion. The petition came on for hearing in June of 2021, where the parties argued over the factors contained in N.C.G.S. § 132-1.4A(g) which guide a trial court's decision whether or not to allow a petition under that section. For the media petitioners, the newsworthiness of the event and minimal impact to the privacy interests of those persons captured on video—their conduct being captured in a public place, after all—weighed in favor of release of the recordings. The release would also be unlikely to impact any ongoing court proceedings or prosecutions, as the event had already been extensively covered by the media. The police agencies argued that too much time had passed between the incident and the hearing for the incident to still be newsworthy, especially given the widespread availability of other recordings of the clash. Petitioners' request was also too broad, argued the agencies, and release of the footage would negatively impact both the reputations of those captured on video and potentially the criminal proceedings of those arrested at the march.

The trial court allowed the petition, ordering the law enforcement agencies to release the requested footage to petitioners. In its order, the trial court went factor by factor, finding that some of the factors of section 132-1.4A(g) weighed in favor of release, and a few against, but that most were irrelevant to its decision given the subject of the recording. According to the trial court, which had the opportunity to view all of the footage in chambers prior to the hearing, the fact that release of the footage may reveal sensitive information about those captured on film or negatively impact their reputations was outweighed by the "compelling public interest in the accountability and transparency of law enforcement officers." All of the footage was to be released because the trial court reasoned it was without authority to censor the released footage absent a legislative mandate. Graham timely appealed the trial court's order.

The Court of Appeals majority vacated trial court's order and remanded the case in an opinion which, according to our state Supreme Court, employed reasoning "no party to the litigation had advocated" to "inexplicably read subsection (g) right out of the statute." *In re The*

McClatchy Company, LLC, 2024 N.C. LEXIS 346, 10*, 24*. Following an argument found only in this Court of Appeals opinion, the majority concluded that only the limited persons entitled to *disclosure* in subsection (c) of the statute were entitled to *release* under subsection (g) of the statute, despite those persons already having access to an expedited, less onerous process for release under subsection (f). And despite subsection (f)'s directive that if a petitioner "is not authorized to receive disclosure pursuant to subsection (c) of this section, . . . the petitioner may file an action for release pursuant to subsection (g) of this section." And despite subsection (g)'s instruction "that any person requesting release of a recording may file an action in the superior court in any county where any portion of the recording was made for an order releasing the recording." The Court of Appeals vacated the trial court's order releasing the footage under subsection (g) of N.C.G.S. § 132-1.4A—the subsection petitioners had invoked—and remanded the case to the trial court for findings as to whether the petitioners qualified for release under subsection (c). The original petitioners immediately appealed.

The North Carolina Supreme Court walked step by step through the statutory scheme governing the *disclosure* or *release* of law enforcement recordings, those being two very different outcomes available to two different populations. Subsection (c) of section 132-1.4A allows for the *disclosure* of the recordings to people who would logically be most interested in quick access to law enforcement footage: those whose voice or image were captured in a recording, or their personal representatives in certain circumstances. Disclosure merely entitles the person to view the recording in a controlled environment if allowed by the discretionary, but appealable, decision of the law enforcement agency. Subsections (f) and (g) allow for the *release* of a recording; this means the petitioner gets a copy subject to the limiting instructions of the judge, if any. Those who would have otherwise qualified for disclosure under subsection (c) may obtain a copy of the recording under subsection (f) in an "expedited" process. Anyone who would not have qualified for disclosure under subsection (c) may obtain a copy under subsection (g), which contains slightly more onerous procedural requirements for the applicant than proceeding under subsection (f). Therefore, there was no reason for the trial court to determine whether the petitioners, who had applied for release of the footage under subsection (g), qualified for disclosure under subsection (c) as the Court of Appeals had instructed. Subsection (g) allowed for "any person," including petitioners, to apply for release. And once petitioned, the trial court was correct in weighing those factors of subsection (g) that it found relevant to determine whether release was appropriate.

Both the Supreme Court and Court of Appeals agreed, in outcome at least, that the trial court had sold itself short by determining it lacked the authority to censor or condition the release of the footage. Subsections (f) and (g) of N.C.G.S. § 132-1.4A each allow a judge to "place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate." The Supreme Court remanded the case to provide the trial court an opportunity to place conditions or restrictions on the footage that it deemed prudent, "especially given its

findings that releasing them would reveal highly sensitive personal information and could threaten a person's reputation or safety." *In re The McClatchy Company, LLC*, 2024 N.C. LEXIS 346, 27*.

In addressing the issues in this case, the Court lays out a roadmap for how a municipality should be prepared to respond to a petition for release of law enforcement recordings. First of all, be aware of how your municipality should expect to be served with a petition for the disclosure or release of law enforcement recordings. Municipalities are used to being served through the city manager, city clerk, or its mayor when the municipality is an adversarial party. N.C. R. Civ. Pro. Rule 4(j)(5). In N.C.G.S. § 132-1.4A(g)'s process, the municipality is not necessarily an adversarial party but may have a vested interest in controlling how or when certain footage is released in preparation for a forthcoming direct suit. However, the petitioner must only serve the head of the custodial law enforcement agency, any law enforcement personnel captured in the recording and their agency's head, and the District Attorney with notice of a petition under N.C.G.S. § 132-1.4A(g). Make sure that your municipality's chief knows to be on the lookout for this notice and to involve the city attorney immediately, as the statute also demands that the petition be put on for hearing as soon as is practicable. Actually, N.C.G.S. § 132-1.4A(g) calls for priority handling of any petitions by both the trial and appellate courts. But while that has come to fruition at the trial court level with hearings being scheduled very quickly after the petition is filed, it appears these petitions are taking an average amount of time to get before our state's appellate courts after a petition is heard. See *In re Custodial Law Enforcement Recording*, 383 N.C. 261 (2022) (trial court's order entered Spring of 2018, Court of Appeals opinion published Summer of 2019, Supreme Court decision published Winter of 2022).

Second, arguing that a petitioner fails to meet some threshold eligibility criteria is futile when a petitioner files for the release of body camera footage under N.C.G.S. § 132-1.4A(g). The Supreme Court has unequivocally held that law enforcement recordings may be released to any person because the statute says that any person may petition for their release. This holding is a hopeful sign in the League's efforts to get the North Carolina Supreme Court to consider the Court of Appeals opinion in *True Homes, LLC v. City of Greensboro*, 898 S.E.2d 52 (2024), where a Court of Appeals panel interpreted the phrase "any lawful authority" to mean only local enabling legislation in the context of system development fees. The League's amicus brief in support of Greensboro's petition for discretionary review argues that "any lawful authority" should include a General Statute enacted by the Legislature, and this opinion signals a willingness by the Supreme Court to correct statutory interpretation errors at the intermediate appellate court when those errors have far-reaching consequences for public bodies.

Last, the statute leaves two main points of contention for a municipal practitioner to argue once a petition is scheduled for hearing: the factors that a trial court weighs in determining whether

release is appropriate, and whether or not to impose any restrictions or conditions upon release. To the first task, municipalities should be prepared to argue any or all of the eight factors explicit in subsection (g) that may be relevant to the release of the footage. But the trial court "must determine in its sound discretion what weight to assign to which standards based on the facts of a particular case." *In re The McClatchy Company, LLC*, 2024 N.C. LEXIS 346, 27*. So an advocate should also be prepared to argue which factors should be assigned greater weight, especially when the facts germane to a particular factor weigh against your position. As for the second point of contention, if a trial court decides that release is appropriate, the side advocating against release has an opportunity to suggest that the trial court include protective conditions on its release. A municipality arguing against release for its own litigation purposes should use this opportunity to shield certain aspects of the footage from release, especially if the footage implicates factors 3-6 of N.C.G.S. § 132-1.4A(g). This opinion suggests that trial courts should seriously consider placing limitations or conditions on release if there are factors that weigh strongly against release. After all, the fact that the trial court found that release of the footage could adversely impact a person's reputation or reveal highly sensitive personal information was a major reason that the Supreme Court remanded this case for the trial court to reconsider whether limitations or conditions should be placed on the release. Having a trial court limit or condition the release of footage that directly impacts ongoing litigation would be a serious consolation for practitioners that do not succeed on the overall effort to prevent release.

Statutory Change Alert

The General Assembly has recently amended the performance guarantee process in Chapter 160D; municipalities should review their UDO bond process

N.C.G.S. § 160D-702; N.C.G.S. § 160D-804.1, N.C.G.S. § 160D-922. Section 702 of Chapter 160D gives municipalities broad authority to require developers to post some form of security ensuring that UDO requirements promised by the developer in exchange for plan approvals are actually constructed to spec. Those performance guarantees, often called bonds, must comply with N.C.G.S. § 160D-804.1, which means, among other things, that the bond may only be collected at or after plat recordation, cannot exceed 125% of the estimated cost of completion of the improvement, and must be released in a "timely manner" after the local government acknowledges completion of the improvement. However, subsection (7) of N.C.G.S. § 160D-804.1 exempts performance bonds for stormwater and erosion control measures from these strictures. This makes sense given that land disturbing activity can begin well in advance of plat recordation. But the version of N.C.G.S. § 160D-922 which becomes in effect on July 1, 2024, states that a developer must be allowed to break ground "once a local government administering an erosion and sedimentation control program approves an erosion and sedimentation control plan for land-disturbing activity at a site," notwithstanding other

development approvals which might need to occur prior to structure construction. This means that municipal planning departments should work with their attorney to ensure that stormwater or erosion control performance bonds are collected, if at all, before or concurrently with approval of the erosion and sedimentation control plan.