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## NOTES

# **MORE'S THE PITY: *PATMORE V. TOWN OF CHAPEL HILL* AND THE CONTINUING UNCERTAINTY OVER NORTH CAROLINA JUDICIAL CONSTRUAL OF LOCAL AUTHORITY**

HEYWARD EARNHARDT\*

### I. INTRODUCTION

The local governments of North Carolina are responsible for their unique geographical areas, and as such, these governments have the broad authority to enact ordinances for the public good . . . until they do not. The question of how far the ordinances of local governments in North Carolina can veer from the strict letter of law as written by the General Assembly has been a difficult one to answer since the formation of the state. If the polar opposites in construing local authority are broad and narrow interpretations, then the pendulum has experienced a roaming traverse between the two that continues to this day.

The North Carolina Court of Appeals recently faced this issue in *Patmore v. Town of Chapel Hill*.<sup>1</sup> The court upheld a Chapel Hill ordinance that allowed Chapel Hill to fine a district's property owners when more than four cars were parked on a property, regardless of whether the property was inhabited by owners or renters.<sup>2</sup> The court attempted to distinguish the case from the recent North Carolina Supreme Court decision in *Lanvale Properties, LLC v. County of Cabarrus*,<sup>3</sup> a case that raised questions about the limits of local government authority.<sup>4</sup>

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1. 757 S.E.2d 302 (N.C. Ct. App. 2014).

2. *Id.* at 304, 309

3. 731 S.E.2d 800 (N.C. 2012).

4. See Frayda S. Blustein, *Is North Carolina a Dillon's Rule State?*, COATES' CANONS: NC LOCAL GOV'T LAW (Oct. 27<sup>th</sup>, 2012), <http://canons.sog.unc.edu/?p=6894> ("The most recent North Carolina Supreme Court case addressing this subject, however, gives me pause."); C. Tyler Mulligan, *Economic Development Incentives and North Carolina Local Governments: A Framework For Analysis*, 91 N.C. L. REV. 2021, 2029 (2013) ("[R]ecent court decisions have created uncertainty about the role of the broad construction statutes."); Bradley D. Harder, Note, *Reattaching the Severance Argument to*

This case note will examine the current state of North Carolina's case law regarding judicial construal of the extent and boundaries of local government authority. This note will also critique the holding in *Patmore v. Town of Chapel Hill*. Finally, this note will compare the ordinances at issue in *Patmore* and *Lanvale* and discuss the implications of the respective decisions.

## II. THE CASE

*Patmore* arises out of the Town of Chapel Hill's adoption of an amendment to its municipal zoning ordinance.<sup>5</sup> When the zoning ordinance was enacted, the ordinance created multiple zoning districts including a residential area close to UNC-Chapel Hill's campus known as the Northside Neighborhood Conservation District (NNC district).<sup>6</sup> Due to the NNC district's close proximity to the University, it is common for students to rent property and reside in the district.<sup>7</sup> Not surprisingly, for several years the district experienced a problem with over-occupancy, or "rental to a greater number of tenants than bedrooms."<sup>8</sup> In addition to safety concerns, over-occupancy was linked to other community problems such as increased noise complaints, garbage overflow, traffic and parking congestion, and cars parked on front lawns.<sup>9</sup>

Since the zoning ordinance's existing design standards governing the NNC district were not adequately combating the problem of over-occupancy, Chapel Hill sought other means of addressing the problem.<sup>10</sup> Chapel Hill's planning department decided that the number of cars parked on a property provided a reasonable estimate of the number of the property's tenants.<sup>11</sup> Thus, following a public hearing on the matter, Chapel Hill's Town Council adopted an amendment to the zoning ordinance on January 9, 2012 that restricted the number of parked vehicles allowable on a residential property in the NNC district to four vehicles.<sup>12</sup> When a rented prop-

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*Lanvale Properties: Counties' Authority to Impose Non-Monetary Conditions on Housing Developments Affecting School Capacity*, 92 N.C. L. REV. Addendum 120 (2014), <http://nclawreview.org/documents/92/Addendum/harder.pdf> ("But *Lanvale Properties* marks the second time that the court has avoided the rule's interpretive mandate and it increases existing confusion about the rule's application.").

5. *Patmore*, 757 S.E.2d 303.

6. *Id.*

7. *Id.*

8. *Id.*

9. Brief of Defendant-Appellee at 3-4, *Patmore v. Town of Chapel Hill*, 757 S.E.2d 302 (N.C. 2014) (No. COA13-1049), 2013 WL 6516982.

10. *Patmore*, 757 S.E.2d at 303.

11. *Id.*

12. *Id.*

erty is in violation of the regulation, the property owner, rather than the tenants, is cited for the violation.<sup>13</sup>

After the amendment took effect on September 1, 2012, the plaintiffs, both property owners in the NNC district, were cited for violations of the regulation committed by their tenants.<sup>14</sup> Accordingly, on November 27, 2012 the plaintiffs filed a complaint seeking to have the amendment declared void as *ultra vires* and to prevent enforcement on the grounds that the amendment violated due process.<sup>15</sup> After the plaintiffs filed an amended complaint on December 7, 2012, both the plaintiffs and the defendant, the Town of Chapel Hill, filed cross-motions for summary judgment in May 2013.<sup>16</sup> The trial court heard those motions on June 3, 2013, and granted summary judgment in favor of Chapel Hill.<sup>17</sup> The plaintiffs subsequently appealed.<sup>18</sup>

At the Court of Appeals, the plaintiffs put forth three main arguments.<sup>19</sup> In their third argument, the plaintiffs contended that under the North Carolina Supreme Court's recent decision in *Lanvale*, Chapel Hill was not authorized by their general zoning power to enact the zoning amendment at issue in the case.<sup>20</sup> The Court of Appeals adopted a particular interpretation of *Lanvale*, holding that the Supreme Court's holding invalidated the instant ordinance there solely because it was not technically a zoning ordinance.<sup>21</sup> The Court of Appeals held that because *Lanvale* did not actually address local authority to enact valid zoning ordinances, *Lanvale* was not applicable and could not invalidate the zoning amendment at issue in the case.<sup>22</sup>

After the Court of Appeals affirmed the judgment of the trial court on April 1, 2014, the plaintiffs filed a petition for discretionary review to the Supreme Court.<sup>23</sup> However, the Supreme Court denied the plaintiffs' petition.<sup>24</sup>

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13. *Id.*

14. *Id.*

15. *Id.* at 303–04.

16. *Id.* at 304.

17. *Id.*

18. *Id.*

19. *Id.* at 304, 306, 308 (arguing first that the amendment violates substantive due process under Article I, Section 19 of the North Carolina Constitution, and second that the amendment is unauthorized by N.C. Gen. Stat. § 160A-301 under the doctrine of *expressio unius est exclusio alterius*).

20. *Id.* at 308.

21. *Id.* at 308–09.

22. *Id.*

23. *Patmore v. Town of Chapel Hill*, N.C., 757 S.E.2d 302 (N.C. Ct. App. 2014).

24. *Id.*

## III. BACKGROUND

The United States Constitution, while providing a framework for the respective powers of the federal and state governments, does not explicitly provide for the creation of local governments or establish the powers that local governments may exercise.<sup>25</sup> Because local governments are, in effect, “agencies” or “political subdivisions” of the states, they have no inherent powers and derive all authority from the constitutions and legislatures of their respective states.<sup>26</sup> Thus, a state legislature has complete discretion to expand or limit the powers delegated to its local governments provided that the state legislature acts in conformity with its state constitution.<sup>27</sup> Within this framework, states can decide how broadly or narrowly the explicit constitutional and legislative grants of authority to local governments should be construed.<sup>28</sup>

Predictably, the authority delegated to state governments and the manner in which such grants are construed differ from state to state.<sup>29</sup> While states are often classified as being either a “home rule” or a “Dillon’s Rule” state, these designations can be misleading.<sup>30</sup> Home rule is associated with a broad delegation of authority to local governments, and essentially means that a local government has authority over a local matter unless explicitly preempted by state statute.<sup>31</sup> Without home rule, a state does not have authority over a local matter unless authorized by state statute.<sup>32</sup> Dillon’s Rule is not actually the opposite of home rule, but rather a rule of statutory construction.<sup>33</sup> Dillon’s Rule means that a municipality can exercise only those powers “granted in express words,” “necessarily or fairly implied in or incident to the powers expressly granted,” and “essential to the declared ob-

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25. Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 72 POPULAR GOV'T 15 (2006), <http://sogpubs.unc.edu/electronicversions/pg/pgfal06/article2.pdf>.

26. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); Bluestein, *supra* note 25, at 16.

27. *Hunter*, 207 U.S. at 178.

28. See Bluestein, *supra* note 25, at 17 (“Some states have enacted constitutional or statutory provisions that specify the appropriate standard for reviewing the scope of authority granted.”).

29. *Id.* at 16–17 (discussing differences between states which employ “home rule”).

30. See JESSE J. RICHARDSON JR. ET AL., IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON’S RULE ON GROWTH MANAGEMENT 7 (Washington, D.C.: Brookings Inst., 2003), available at [www.brookings.edu/cs/urban/publications/dillonsrule.pdf](http://www.brookings.edu/cs/urban/publications/dillonsrule.pdf) (“And yet, Dillon’s Rule and home rule states are not polar opposites. No state reserves all power to itself, and none devolves all of its authority to localities.”); Bluestein, *supra* note 25, at 17 (“Although the prevailing notion is that states have either home rule or Dillon’s rule, courts in home rule states sometimes use Dillon’s rule to interpret the scope of local government authority . . . . The presence of home rule authority, however, has not consistently guaranteed deferential review of local authority by the courts.”).

31. Bluestein, *supra* note 25, at 16.

32. *Id.*

33. RICHARDSON JR. ET AL., *supra* note 30, at 7; Bluestein, *supra* note 25, at 15.

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jects and purposes of the [municipal] corporation.”<sup>34</sup> States with Dillon’s rule are associated with a narrow judicial construction of local government authority.<sup>35</sup>

While North Carolina does not have home rule,<sup>36</sup> the state’s approach to judicial interpretation of authority granted to local governments has changed over time.<sup>37</sup> While there are not many reported decisions regarding local authority prior to the 1870s, the general approach in North Carolina favored a broad construal of local authority during that era.<sup>38</sup> However, North Carolina adopted the narrow construction of Dillon’s Rule in the 1870s.<sup>39</sup> This adherence to Dillon’s Rule continued for about 100 years until the General Assembly adopted N.C. Gen. Stat. § 160A-4 (governing municipalities) and N.C. Gen. Stat. § 153-4 (governing counties) (the “broad construction statutes”).<sup>40</sup> N.C. Gen. Stat. § 153A-4 provides:

It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.<sup>41</sup>

In addition, the General Assembly adopted N.C. Gen. Stat. § 160A-177 (governing municipalities) and N.C. Gen. Stat. § 153A-124 (governing counties), which provide that any enumeration of powers in these chapters would not be exclusive nor would it limit a local government’s general authority to enact ordinances.<sup>42</sup> Unfortunately, following the adoption of these statutes, courts have failed to uniformly apply these directives.<sup>43</sup>

34. JOHN F. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* 101–102 (Chicago, James Cockcroft & Co. 1872).

35. See Bluestein, *supra* note 4, at 15 (when used to describe a state, it usually means that local powers are interpreted narrowly in the absence of a legislative directive for a broad interpretation.)

36. Bluestein, *supra* note 4 (“North Carolina is neither a Dillon’s Rule state nor a home rule state.”).

37. See *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 731 S.E.2d 800 (N.C. 2012). (“This Court’s general approach to construing the legislative authority of local governments has evolved over time.”).

38. See David W. Owens, *Local Government Authority to Implement Smart Growth Programs*, 35 WAKE FOREST L. REV. 671, 680 n. 47 (2000) (“The few early North Carolina decisions addressing the scope of local authority applied a broad reading to legislative grants of municipal authority.”).

39. *Lanvale*, 731 S.E.2d at 809 (“[i]n the 1870s this Court adopted a more restrictive approach known as ‘Dillon’s Rule.’”).

40. *Id.*

41. N.C. GEN. STAT. § 153A-4 (2013).

42. N.C. GEN. STAT. § 160A-177 (2013); N.C. GEN. STAT. § 153A-124 (2013) (“The enumeration in this Article or other portions of this Chapter of specific powers to define, regulate, prohibit, or abate acts, omissions, or conditions is not exclusive, nor is it a limit on the general authority to adopt ordinances conferred on counties by G.S. 153A-121.”).

43. See *Lanvale*, 731 S.E.2d at 809 (“Our initial application of these provisions to zoning cases was inconsistent.”).

Despite the straightforward language of N.C. Gen. Stat. § 160A-4 and N.C. Gen. Stat. § 153-4, which mandates broad construction, state courts, at times, continued to use Dillon's Rule in construing local government authority.<sup>44</sup> In 1994, the Supreme Court seemingly settled the issue in *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*,<sup>45</sup> holding that, "[t]he proper rule of construction is the one set forth in [N.C.G.S. § 160A-4]."<sup>46</sup> Yet, five years later in *Smith Chapel Baptist Church v. City of Durham*, the Supreme Court ignored the statutory broad construction mandate in favor of a narrow construction.<sup>47</sup> The Court held that "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give [the statute] its plain and definite meaning."<sup>48</sup> Notably, the majority in *Smith Chapel* failed to mention N.C. Gen. Stat. § 160A-4, and earned a thorough rebuke from the dissenting justices.<sup>49</sup> Amidst the backdrop of this continuing inconsistency came the 2012 decision in *Lanvale Properties, LLC v. County of Cabarrus*.<sup>50</sup>

*Lanvale* arose from the County of Cabarrus' adoption of an adequate public facilities ordinance (APFO).<sup>51</sup> The APFO conditioned "approval of new residential construction projects on developers paying a fee to subsidize new school construction to prevent overcrowding in the County's public schools."<sup>52</sup> The plaintiff, a developer in the County, challenged the ordinance on the grounds that the County did not have the authority under its general zoning powers to enact such an ordinance.<sup>53</sup> Ultimately, the North

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44. See *Porsh Builders, Inc. v. City of Winston-Salem*, 276 S.E.2d 443 (N.C. 1981) (applying Dillon's Rule in holding that the city was not authorized to exercise discretion in accepting bids for real estate). See also Bluestein, *supra* note 25, at 19 ("Despite this directive, North Carolina courts have continued intermittently to apply Dillon's rule . . . even though the rule appears to be entirely inconsistent with the more generous standard in the statute. As shown in a recent comprehensive analysis of Dillon's rule in North Carolina, the record of cases is quite mixed.")

45. 442 S.E.2d 45, (N.C. 1994).

46. *Id.* at 50 ("This statute makes it clear that the provisions of chapter 160A and of city charters shall be broadly construed and that grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. We treat this language as a 'legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in Chapter 160A.'") (quoting *River Birch Associates v. City of Raleigh*, 388 S.E.2d 538, 543 (N.C. 1990)).

47. *Smith Chapel Baptist Church v. City of Durham*, 517 S.E.2d 874 (N.C. 1999) (holding that Durham exceeded its authority in imposing fees for stormwater utility programs).

48. *Id.* at 878.

49. *Id.* at 883 (Fryc, J., dissenting) ("N.C.G.S. § 160A-4 and *Homebuilders Ass'n of Charlotte* require us to interpret the applicable public enterprise statutes broadly enough to encompass the City's operation of its SWU and collection of fees.")

50. *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 731 S.E.2d 800 (N.C. 2012).

51. *Id.* at 803.

52. *Id.*

53. *Id.*

Carolina Supreme Court agreed with the plaintiff and held the APFO to be invalid.<sup>54</sup>

The Court issued an extensive opinion that touched on many arguments.<sup>55</sup> After adopting a narrow reading of the definition of zoning, part of the Court's holding was based on its conclusion that the APFO did not technically qualify as a zoning ordinance.<sup>56</sup> The Court held Cabarrus County's APFO did not adequately and explicitly divide the county's territory into districts before regulating land use activities within such districts.<sup>57</sup> Additionally, the Court held that the fees imposed by the county on developers to fund schools were the same type of mandatory "impact fees" that the N.C. Court of Appeals previously struck down on two occasions.<sup>58</sup> The Court pointed out that where the General Assembly had explicitly authorized Orange and Chatham Counties to enact impacts fees, while thrice denying Union County's requests for such authority, the General Assembly had indicated legislative intent for that authority to be excluded from local governments' general grants of power.<sup>59</sup> The Court further held that the APFO interfered with the state's extant system for educational funding.<sup>60</sup>

A vast portion of the holding in *Lanvale* was dedicated to judicial interpretation of local authority.<sup>61</sup> The County contended that it was authorized to enact its APFO under the county's general zoning powers granted by N.C. Gen. Stat. § 153A-121(a), and more specifically N.C. Gen. Stat. § 153A-340(a) and N.C. Gen. Stat. § 153A-341.<sup>62</sup> While these statutes do not explicitly authorize APFOs, the County argued that in conjunction with the broad construction mandate of N.C. Gen. Stat. § 153A-4 (and § 153A-124), the County had implicit authorization under the statutes to enact the APFO.<sup>63</sup> The Court adopted an interpretation of N.C. Gen. Stat. § 153A-4 where it applied "only when our zoning statutes are ambiguous . . . or when its application is necessary to give effect to 'any powers that are reasonably expedient to [a county's] exercise of the power.'"<sup>64</sup> Holding that the lan-

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54. *Id.* at 807.

55. *Id.*

56. *Id.* at 811–13.

57. *Id.* at 813–14.

58. *Id.* at 814.

59. *Id.* at 814–16.

60. *Id.* at 814.

61. *Id.* at 811–13.

62. *Id.* at 808.

63. *Id.* at 808–810.

64. *Id.* at 810 (quoting N.C. GEN. STAT. § 153A-4 (2013)).

guage of N.C. Gen. Stat. § 153A-340(a) and § 153A-341 was unambiguous, the Court declined to apply N.C. Gen. Stat. § 153A-4.<sup>65</sup>

Regarding the second prong of the Court's professed test for N.C. Gen. Stat. § 153A-4, the Court curiously reduced its analysis of whether the APFO was a "reasonably expedient" means of exercising county power to a single footnote commenting on the increasing cost of fees that resulted from the APFO.<sup>66</sup> For these reasons, the Court held that the County did not have the authority to enact its APFO.<sup>67</sup> The Court may have dedicated so little of its opinion to this aspect of the holding in response to a robust dissenting opinion arguing for the *Homebuilders* approach to judicial interpretation of local authority.<sup>68</sup>

Faced with a choice between following *Homebuilders* or *Smith Chapel*, the Court decided, once and for all, that *Smith Chapel* was the controlling law.<sup>69</sup> *Smith Chapel* failed to mention the broad construction statutes, and espoused an approach seemingly contradictory to the stated intent of the General Assembly in N.C. Gen. Stat. § 153A-4 and N.C. Gen. Stat. § 160A-4.<sup>70</sup> However, in *Lanvale*, the Court confirmed that the general approach in *Smith Chapel* was controlling in North Carolina, and explicitly provided the analysis courts should use in construing the State's grant of authority to local governments.<sup>71</sup> Rather than putting an end to the uncertainty in this aspect of the judicial process, the complexity and breadth of *Lanvale* has raised more questions.<sup>72</sup> As Professor Frayda Bluestein from the North Carolina School of Government commented:

The potential impact of the decision is quite broad . . . . [T]he decision's narrow reading of powers that might be implicit in the zoning laws may call into question numerous regulations that are not explicitly outlined in

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65. *Id.* ("Sections 153A-340(a) and 153A-341 express in unambiguous language the General Assembly's intent to delegate general zoning powers to county governments. Thus, section 153A-4 is inapposite in the instant case.")

66. *Id.* at 810 n.8.

67. *Id.* at 810.

68. *Id.* at 818-28 (Hudson, J., dissenting) ("The majority's opinion minimizes the expansive powers that the General Assembly has given counties to oversee and control development and school construction. The opinion overlooks the clear language of the General Statutes in Chapter 153A.")

69. *Id.* at 811 (majority opinion) ("[T]he dissent attempts to brush aside our decision in *Smith Chapel* by referring to the dissenting opinion in that case. Interestingly enough, *Homebuilders* also featured a dissenting opinion . . . . But the existence of a dissenting opinion in our decisions does not undermine the decision's status as binding precedent. The statutes at issue here — section 153A-340(a) and 153A-341 — are clear and unambiguous articulations of county zoning powers. As a result, *Smith Chapel* governs this case no matter how much the dissent wishes otherwise.")

70. *Smith Chapel Baptist Church v. City of Durham*, 517 S.E.2d 874 (N.C. 1999).

71. *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 731 S.E.2d 800, 811 (N.C. 2012).

72. See Bluestein, *supra* note 4.

the laws themselves, but are commonly recognized as being within the legislative intent for land use regulation by local governments.<sup>73</sup>

If the zoning enabling statutes are unambiguous on their face as the *Lanvale* Court held,<sup>74</sup> then the broad construction statutes may never be applied to zoning ordinances unless it “is necessary to give effect to ‘any powers that are reasonably expedient to [a county’s] exercise of the power.’”<sup>75</sup> In light of the *Lanvale* court reducing its analysis of the entire APFO under this test to a single footnote,<sup>76</sup> there is little guidance upon which courts can proceed. Against the post-*Lanvale* backdrop, the *Patmore* case appeared.<sup>77</sup>

#### IV. ANALYSIS

##### A. Misapplying *Lanvale*

Due to the similarities between *Lanvale* and *Patmore*, the court in *Patmore* was uniquely situated to answer questions left by *Lanvale*.<sup>78</sup> While *Patmore* involved a municipality and *Lanvale* involved a county, the delegations of zoning authority and the broad construction statutes for municipalities and counties are nearly identical.<sup>79</sup> Both *Lanvale* and *Patmore* involved ordinances adopted purportedly under the general zoning powers delegated to local governments.<sup>80</sup> In both cases, the ordinances purported to regulate in a manner not explicitly authorized by the language of the enabling statutes.<sup>81</sup> Accordingly, both ordinances required implied authorization in order to be valid ordinances. It is no surprise then that the plaintiffs in *Patmore* argued, under *Lanvale*, Chapel Hill lacked authority to enact the

73. *Id.* (“The ruling in *Lanvale* seems to create a rule for North Carolina that is even narrower than Dillon’s Rule.”).

74. *Lanvale*, 731 S.E.2d at 808.

75. *Id.* at 810 (quoting N.C. GEN. STAT. § 153A-4).

76. *Id.* at 808–810.

77. *Patmore*, 757 S.E.2d 302.

78. *Id.*; *Lanvale*, 731 S.E.2d 800.

79. *Patmore*, 757 S.E.2d 302; *Lanvale*, 731 S.E.2d 800. Compare N.C. GEN. STAT. § 160A-381(a) (2013) (“For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances.”), N.C. GEN. STAT. § 160A-383 (2013) (“Zoning regulations shall be designed to promote the public health, safety, and general welfare . . .”), and N.C. GEN. STAT. § 160A-4 (2013) (“the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.”), with N.C. GEN. STAT. § 153A-340(a) (“For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances.”), N.C. GEN. STAT. § 153A-341 (2013) (“Zoning regulations shall be designed to promote the public health, safety, and general welfare . . .”), and N.C. GEN. STAT. § 153A-4 (2013) (“the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.”).

80. *Patmore*, 757 S.E.2d 302; *Lanvale*, 731 S.E.2d 800.

81. *Patmore*, 757 S.E.2d 302; *Lanvale*, 731 S.E.2d 800.

ordinance at issue.<sup>82</sup> However, apparently in an effort to avoid the issue altogether, the N.C. Court of Appeals grossly misapplied *Lanvale*.

In *Patmore*, the N.C. Court of Appeals reduced the entire *Lanvale* decision to a distinction between zoning and subdivision ordinances.<sup>83</sup> The court reasoned that the N.C. Supreme Court only struck down the ordinance in *Lanvale* because it did not technically qualify as a zoning ordinance.<sup>84</sup> As the ordinance at issue in *Patmore* was distinguished as a zoning ordinance, the court posited that *Lanvale* did not apply.<sup>85</sup> While it is true this was one of the grounds on which the Supreme Court based its decision in *Lanvale*, it is patently false to state this was the only aspect of the *Lanvale* holding.<sup>86</sup> In the portions of the *Lanvale* opinion relating to judicial interpretation of local zoning authority, the language explicitly states that the Court's decision is part of the holding.<sup>87</sup> Yet, despite that, the N.C. Court of Appeals inexplicably held the *Lanvale* Court "did not address a local government's authority to enact a *bona fide* zoning ordinance."<sup>88</sup> The plaintiffs in *Patmore* specifically addressed their argument towards an extensive portion of the *Lanvale* decision.<sup>89</sup> Yet the court reached the curious conclusion that this vast section of the opinion was simply dicta.<sup>90</sup> If there was any room for doubt over this, the Supreme Court removed it in *King v. Town of Chapel Hill* when citing to *Lanvale* as a controlling authority on the application of the broad construction statutes.<sup>91</sup>

Even if the N.C. Court of Appeals was correct in its statement that *Lanvale*, "did not change the law governing the requirements for a valid zoning ordinance,"<sup>92</sup> *Lanvale* would still stand as confirmation of the law which was somewhat crudely stated in *Smith Chapel*.<sup>93</sup> That narrower approach to judicial interpretation is precisely what the plaintiffs were requesting.<sup>94</sup> Thus, the court should have examined the ordinance under the judicial analysis espoused in *Smith Chapel* and clarified in *Lanvale*. Instead, the court attempted to dodge the issue by focusing on a different aspect of the

82. *Patmore*, 757 S.E.2d at 308.

83. *Id.* at 308–09.

84. *Id.*

85. *Id.*

86. *Lanvale*, 731 S.E.2d 800.

87. *Id.* at 808–10 ("Accordingly, we must ascertain whether the plain language of our enabling statutes gives the County implied authority to enact its APFO. We hold that it does not.").

88. *Patmore*, 757 S.E.2d at 309.

89. See Plaintiffs-Appellants' Brief at 13–20, *Patmore v. Town of Chapel Hill*, 757 S.E.2d 302 (2014) (No. COA13-1049), 2013 WL 5776872.

90. *Patmore*, 757 S.E.2d at 308–09.

91. *King v. Town of Chapel Hill*, 758 S.E.2d 364, 369 (N.C. 2014).

92. *Patmore*, 757 S.E.2d at 303.

93. See *supra* text accompanying note 66.

94. See *supra* text accompanying note 84.

*Lanvale* holding.<sup>95</sup> Distinguishing between zoning ordinances and subdivision ordinances would only have been helpful had the ordinance in *Patmore* clearly failed to qualify as a zoning ordinance, in which case it would be void under *Lanvale*. However, with that not being the case, the court erred by not proceeding to analyze the ordinance under the applicable portion of the *Lanvale* holding.

### B. Applying *Lanvale*

It is unclear whether the court of appeals simply misinterpreted *Lanvale*, or sought to avoid the issue altogether. After all, *Lanvale* is a complicated case that did little to simplify the delineation between state and local government authority.<sup>96</sup> What is unfortunate with *Patmore* is that it presented an opportunity to shed light on the questions left unanswered by *Lanvale*, but that opportunity was squandered.

After all, the N.C. Supreme Court, in *Lanvale*, held that the statutes granting counties general zoning powers were unambiguous on their face.<sup>97</sup> As stated above, this conclusion calls into question any zoning regulations that are not explicitly authorized by statute,<sup>98</sup> which is exactly the case in *Patmore*.<sup>99</sup> The county in *Lanvale* was expressly authorized to enact zoning ordinances regulating the “use of buildings, structures, and land for trade, industry, residence, or other purposes,”<sup>100</sup> as well as “the efficient and adequate provision of schools.”<sup>101</sup> In *Patmore*, Chapel Hill was expressly authorized to enact zoning ordinances regulating “overcrowding of land . . . undue concentration of population . . . [and] congestion in the streets.”<sup>102</sup> Since the broad construction statutes cannot be applied to these express grants of authority, can Chapel Hill’s amendment in *Patmore* regulating parking on private property be said to have any less of a tenuous relationship to the language of the enabling statutes than Cabarrus County’s APFO in *Lanvale*?

The statutes do not expressly mention limiting parking on private property any more than the statutes mention conditioning development approval on adequate public school facilities. In fact, proponents would support the

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95. See *supra* text accompanying note 1.

96. See *supra* text accompanying notes 3, 70–73.

97. See *supra* text accompanying note 63.

98. See *supra* text accompanying notes 70–72.

99. *King v. Town of Chapel Hill*, 758 S.E.2d 364, 370 (N.C. 2014) (holding that N.C. GEN. STAT. § 160A-174 (2013), delegating to cities the general powers to enact ordinances, was “by its very nature ambiguous, and its reach cannot be fully defined in clear and definite terms.”).

100. N.C. GEN. STAT. § 153A-340(a) (2013).

101. N.C. GEN. STAT. § 153A-341 (2013).

102. N.C. GEN. STAT. § 160A-383 (2013).

idea that in light of N.C. Gen. Stat § 153A-341's provision for adequate provision of schools,<sup>103</sup> that the APFO possessed more apparent authority than Chapel Hill's parking ordinance. As parking is not explicitly mentioned in the statutes, the broad construction necessary to authorize Chapel Hill's parking ordinance would only apply if it is "reasonably necessary or expedient."<sup>104</sup> Is Chapel Hill's ordinance *more* "reasonably necessary or expedient" than Cabarrus County's APFO? How can a court properly decide when an ordinance is reasonably necessary or expedient? These are the questions that *Lanvale* left unanswered. Moreover, these are questions that *Patmore* failed to address.

For instance, as the state's population continues to rise, counties like Cabarrus County are facing an increasingly urgent problem of finding the necessary funding for educational facilities.<sup>105</sup> Yet, even as the majority in *Lanvale* admitted that the county's APFO was an effective solution, the majority also refused to factor a potential population increase into the single footnote discussion of whether the ordinance was "reasonably expedient."<sup>106</sup> On the other hand, Chapel Hill's ordinance addressed some surplus garbage and traffic in one neighborhood.<sup>107</sup> However, does this mention of garbage and traffic pass the "reasonably expedient" test where Cabarrus County's APFO failed?

Had the Court of Appeals in *Patmore* analyzed Chapel Hill's authority to adopt the zoning amendment under the approach from *Lanvale*, it is entirely possible that it would have held the amendment to be a valid exercise of Chapel Hill's general zoning power. While the ordinances in both cases have similarities that necessitate implied authority in order to be valid, there are a myriad of differences upon which the court could have distinguished the cases and reasonably upheld the *Patmore* ordinance under a *Lanvale* analysis.<sup>108</sup> For instance, the fact that the General Assembly expressly granted Chatham and Orange Counties the authority to enact impact fees,

103. N.C. GEN. STAT. § 153A-341.

104. N.C. GEN. STAT. § 160A-4.

105. See Michael F. Roessler, *Public Education, Local Authority, and Democracy: The Implied Power of North Carolina Counties to Impose School Impact Fees*, 33 CAMPBELL L. REV. 239, 240-41 (2011) ("North Carolina is experiencing steady and substantial population growth, particularly in urban and suburban parts of the state . . . . As a result, public schools serving fast-growing communities have seen their facilities pushed far beyond capacity.") (footnotes omitted); See also *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 731 S.E.2d 800, 828 (Hudson, J., dissenting) ("Finally, the majority opinion ignores the increasingly desperate situation of many county governments in North Carolina, which are faced with rising populations, diminishing state funding for schools, and already burdensome property taxes. These county governments will be, by the majority's opinion, deprived of an innovative but statutorily authorized tool to help meet their constitutional obligations regarding education.").

106. *Lanvale*, 731 S.E.2d at 810, 814 n.8 (majority opinion).

107. See *supra* text accompanying note 8.

108. See *supra* text accompanying notes 53-57.

while refusing Union County the same authority on three occasions, could demonstrate legislative intent that express authority is required for impact fees.<sup>109</sup> In fact, courts have historically been more likely to interpret local authority narrowly when it comes to taxes and fees.<sup>110</sup> Unfortunately, the *Lanvale* holding struck down, not only the impact fees, but the entire APFO as well.<sup>111</sup> Whether or not the Court in *Lanvale* erred by not severing the impact fees from the APFO,<sup>112</sup> the broad holding of *Lanvale* is regrettably the current law in North Carolina — law that the court in *Patmore* avoided at all cost. Whether the *Patmore* court would ultimately have held the ordinance to be void or valid, the specific grounds for such a decision would have been enlightening.

#### V. CONCLUSION

In *Patmore*, the N.C. Court of Appeals faced an opportunity to shed light on the lingering uncertainty regarding judicial interpretation of local zoning authority left in the wake of *Lanvale*. However, the court inexplicably ignored a vital swathe of the *Lanvale* holding and issued a decision that attempted to simply avoid the issue entirely. The holding may have been a boon for Chapel Hill who was spared from having to defend its ordinance under the analysis of *Lanvale*. Nonetheless, such a gross misinterpretation of a landmark case can only lead to more uncertainty and the fear of unpredictable results in the future. Any guesses as to why the Supreme Court denied the resulting petition for discretionary review would only amount to speculation, but the denial of an opinion as off base as *Patmore* seems likely to only delay the issue for a time. When the next local zoning ordinance relying on implied authority comes up on appeal, the outcome is anyone's guess.

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109. See *supra* text accompanying note 56.

110. See *Lanvale*, 731 S.E.2d at 809 (explaining that Dillon's Rule was applied more stringently regarding taxes and fees) (citing David F. Owens, LAND USE LAW IN NORTH CAROLINA 22-23 (2d ed. 2011)). See also David F. Owens, *School Impact Fees and Development Regulations: Another Round*, COATES' CANONS: NC LOCAL GOVERNMENT LAW (Oct. 16<sup>th</sup> 2012), <http://canons.sog.unc.edu/?p=6882> (positing that specific statutory authority is still required for taxes and fees).

111. *Lanvale*, 731 S.E.2d at 811.

112. See *id.* at 819–20 (Hudson, J., dissenting) (“By failing to sever the VMP provision, the majority appears to have created a situation in which the county is powerless to delay or deny development applications in light of inadequate school capacity, and now has few choices beyond raising property taxes on existing residents to pay for schools that will serve the new residents who move into the new development.”); Harder, *supra* note 4 (arguing that severance was proper).