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# Municipal Law Notes

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## Constitutional Law; First Amendment; Gag Orders; Abuse of Discretion; Law Enforcement; Body-Camera Footage

In re Custodial Law Enforcement Recording, ___ N.C. App. ___ (No. COA18-992, Guilford— 8/6/19)

***Holding***— In a case wherein petitioner-City appealed from the trial court's order denying its "Motion to Modify Restrictions" placed on City Council members, which allowed them to view certain recordings from body cameras worn by officers, but which limited their ability to discuss the recordings in a public setting, Court of Appeals holds, "We conclude that, though the restriction does limit the City council members' speech, the trial court did not abuse its discretion in initially placing and later refusing to modify a restriction on release of body-cam footage, as the City officials otherwise had no right to the information. Much like a protective order under Rule 26(c), the discretionary restrictions allowed by Section 132-1.4A seek to protect the interests of those depicted in the information being released. In this case, protecting the reputation and safety of those individuals, as well as safeguarding the administration of justice, presents a substantial government interest for which the trial court's restrictions are no greater than necessary. The City has failed to meet its burden of showing that the trial court abused its discretion in determining that this protection is still not warranted."

***Key Excerpt***— On appeal, petitioner-City argued that the trial court committed error by refusing to remove the gag order. The Court disagreed. The Court stated that in conducting its review, it would first assess the initial validity of the restriction in the Release Orders under the First Amendment.

The Court initially stated, "Our General Assembly has provided that police body-cam footage is neither a public nor a personnel record, [G.S.] 132-1.4A(b) (2016), and that only those depicted in the video and their personal representatives have an absolute right to view the footage, [G.S.] 132-1.4A(c) (2016). The General Assembly also provided that anyone else wanting to view police body-cam footage may not do so unless that individual obtains a court order. [G.S.] 132-1.4A(g) (2016). And '[i]n determining whether to order the release of all or a portion of the recording, in addition to any other

standards [it] deems relevant,' the court must consider the applicability of eight standards in making its decision.... [*Id.*]" The Court observed that the trial court, in its discretion under the statute, deemed it appropriate to place a "condition or restriction" on the release of the body-cam footage to City officials (i.e., that the City officials could only discuss the footage amongst themselves in their official capacities.) The Court further observed that to support the imposition of this gag order, the trial court determined that seven of the eight statutory standards (#1, 2, 3, 5, 6, 7, and 8) were all applicable here. The Court noted, "Specifically, standards #2, 5, 6 and 7 all support the imposition of the gag order. And in its Modification Denial Order, the trial court, in its discretion, denied the City's motion to lift the gag order."

The Court observed that in its principal appellate brief, petitioner-City made no argument that the trial court abused its discretion in the manner it considered or weighed the statutory standards, and that it was the City's burden on appeal to show how the trial court abused its discretion. The Court further observed that petitioner-City instead argued that the gag order impermissibly violated the Council Members' First Amendment rights and otherwise impaired their ability to engage in open government. And the Court disagreed.

The Court determined that the gag order did not violate petitioner-City's First Amendment rights "because the gag order only restricts the council's speech about matters that the council, otherwise, had no right to discover except by the grace of the legislature through a judicial order. Indeed, our General Assembly chose not to make body-cam footage a public record. *See* [G.S.] 132-1.4A(b). In so holding, we are guided by the United States Supreme Court's opinion in Seattle Times Co. v. Rhinehart, in which that Court held that a protective order preventing public disclosure of information learned through discovery in a civil case did not violate the First Amendment. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-37 (1984). In that case, a newspaper was involved in litigation and sought discovery of financial documents from the other party. The trial court allowed the discovery, deeming it relevant to the litigation, but otherwise granted the other party a protective order preventing the newspaper from publishing the information to the public. The newspaper challenged the protective order, contending that it had a First Amendment right to publish the information learned during discovery."

"The Seattle Times Court disagreed, holding that the protective order did not violate the newspaper's First Amendment rights. Essentially, the Court held that where a person only learns of information through judicial compulsion, the court compelling disclosure can place restrictions on the further dissemination of that information, but otherwise cannot generally place restrictions on the dissemination of information learned by other means...."

Determining that the case was similar to Seattle Times, the Court stated, "Specifically, here, the City has no First Amendment right to the body-cam footage, but has been given the right to access the information through a court order. The gag order only prevents the City from disseminating information that it has only learned through the court order. The gag order does not otherwise restrain the City officials from discussing the subject police encounter generally, only from discussing the body-cam footage specifically. Therefore, we conclude that the gag order does not impermissibly infringe on the City's First Amendment rights."

"In the same way, we conclude that the gag order does not impermissibly impair the

City council's ability to perform its official duties. Indeed, the City council members have no right to the information in the first place. The trial court could have denied the request to view the body-cam footage altogether. The City council members are still free to discuss any information about the police encounter learned from other sources with their constituents. Accordingly, we conclude that the trial court did not exceed its authority in imposing the gag order as a condition of access to the body-cam footage."

Judge Berger, concurring by a separate opinion, stated, "I concur with the majority's analysis. However, appellant's constitutional argument was not raised in the trial court. Because appellant presents its First Amendment argument for the first time on appeal, this matter should be dismissed. *See* Powell v. N.C. Dep't of Transp., 209 N.C. App. 284, 296, 704 S.E.2d 547, 555 (2011) ('A constitutional issue not raised at trial will generally not be considered for the first time on appeal.')"

***Synopsis*—** Appeal by petitioner-City from February 2018 order. Affirmed. Judge Dillion wrote the opinion, joined by Judge Zachary. Judge Berger concurred by separate opinion.

## *Nota Bene* (N.B.) Other Recent Decision of Note

**Land Use; Permits; Quasi-Judicial Proceeding; Fair and Impartial Decision-Maker; Recusal; Solar Farm** Dellinger v. Lincoln Cty II., ___ N.C. App. ___ (No. COA18-1080, Lincoln— 7/16/19) (The history of this case is found in Dellinger v. Lincoln Cty. I, 248 N.C. App. 317, 789 S.E.2d 21 (2016) (*see* MLN July 2016, p. 1). (Before the Court a second time, petitioners argued: (1) the denial of their motion to recuse [a Commissioner] equated to a deprivation of their constitutional right to a quasi-judicial proceeding before a fair and impartial decision-maker; and, (2) the Intervenors failed to produce competent, material, and substantial evidence *contra* to overcome their *prima facie* showing of an entitlement to a conditional use permit. "Petitioners clearly demonstrated [the Commissioner's] bias to mandate recusal based upon his actively opposing the application, committing money to the cause of defeating the application for this solar farm, and openly communicating his fixed opposition on this application to others. [The Commissioner] assumed the role of an advocate at the quasi-judicial hearing by presenting ten pages worth of 'condensed evidence' in an attempt to rebut Petitioners' *prima facie* case while also sitting, discussing, and voting on Petitioners' application. The evidence presented by the Intervenors failed to rebut Petitioners' *prima facie* showing of entitlement to a conditional use permit. Because the superior court and Board concluded Petitioners have made a *prima facie* showing on all four conditions, as set forth in the ordinance, we reverse the trial court's order and remand for issuance of Petitioners' conditional use permit." (Appeal by petitioners from May 2018 order. Reversed and remanded. Judge Tyson wrote the opinion, with Chief Judge McGee concurring. Judge Berger concurred in a separate opinion.))