

# Legislative and Case Law Update

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## Case Law

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### Sackett v. US EPA (U.S. Supreme Court, May 2023)

- Sacketts start backfilling lot.
- EPA says this is protected wetland; thou shalt restore it.
- Sacketts sued. Many lawyers were paid.



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### Sackett v. US EPA (U.S. Supreme Court, May 2023)

- Core question
  - What wetlands are “waters of the United States” covered by Clean Water Act?
- Old rule – *Rapanos*
  - Either “Adjacent” including those separated by feature OR
  - “Essential nexus”?
- New rule
  - Continuous surface connection
  - Indistinguishable from “water” / difficult to determine where the “water” ends and the “wetland” begins

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**Sackett v. US EPA (U.S. Supreme Court, May 2023)**

- So What:
  - Fewer wetlands will now be protected by the Clean Water Act.
  - Wetlands delineations will be fewer and fewer projects will have concerns about disturbing wetland areas.
  - State regulations can go farther than federal.
    - North Carolina will not (per 2023 farm bill)
    - Can local governments???

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**Fonvielle v. N.C. Coastal Res. Comm'n (NC Court of Appeals, April 2023)**

- Owners and developers applied for CAMA minor permit.
- Petitioners filed for contested case hearing at Coastal Resources Commission, claiming they should have been given notice.
- CRC said they submitted too late and CRC could not hear the case.



Photo: Matt Born / Wilmington Star-News

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**Fonvielle v. N.C. Coastal Res. Comm'n (NC Court of Appeals, April 2023)**

- **Key concept:** Whole record test
  - Applies when findings of quasi-judicial entity are challenged
  - Is there substantial evidence to justify the agency's decision?
    - relevant evidence a reasonable mind might accept as adequate to support a conclusion
- **Decision:** Court deferred to CRC finding of when the appeal period began.
  - Petitioners thus filed too late.

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**Fonvielle v. N.C. Coastal Res. Comm'n (NC Court of Appeals, April 2023)**

- So What?
  - Deadlines matter, especially appeal deadlines.
  - Consider confirming when applications are complete?
  - When evidence conflicts in a quasi-judicial matter, court will defer to board as long as the decision is supported by "substantial evidence" and is not arbitrary and capricious


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**Pope v. Davidson County (NC Court of Appeals, March 2023)**

- SUP for a motocross training center.
- Meeting 1
  - Board informed 4/5 needed
  - Votes: 4-1, 4-1, **3-2**, and 5-0
- Meeting 2
  - Board informed simple majority needed
  - Rescind, reopen, revote



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**Pope v. Davidson County (NC Court of Appeals, March 2023)**

- Petitioners: You can't do that! No taking back your votes.
- Court: Decision to deny was a result of a legal error and the permit should have been granted.
- So What
  - Rules apply even if they are brand new, and even if you are mistaken on the law.
  - It never hurts to confirm procedural rules prior to voting and assure that amendments are implemented timely.

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Legislation

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Infrastructure

- Water
- Sewer
- On-site wastewater

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### S.L. 2023-77, H627, Onsite Wastewater Rules Implementation

- 21 changes to Commission for Public Health on-site wastewater rules (15A NCAC 18E)
  - Design daily flows
  - Authorization application
  - ... and more!
- Parts of S.L. 2023-90 / H628 and sec. 16 of S.L. 2023-55 / S582 also modify health department approval processes

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### S.L. 2023-90 / H628, Amend Onsite Wastewater and Environmental Statutes

- No backing up for septic: No withholding building permit if
  - (a) project does not propose to increase the design daily flow or wastewater strength of the existing system and
  - (b) property owner submits an on-site wastewater existing system inspection exemption affidavit. [Sec. 8]

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### S.L. 2023-90 / H628, Amend Onsite Wastewater and Environmental Statutes

#### New exemptions from required water and sewer connections [Sec. 10]

- From *city-mandated sewer connection*
  - If city sewer system does not have capacity
  - If cost to connect is greater than cost of on-site wastewater
- From *city-mandated water connection*
  - If system will not generate "adequate" water pressure (avg of customers within ¼-mile)
- From *county-mandated sewer connection*
  - Can only require connection to county sewer if the county has adequate capacity

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### S.L. 2023-55 / S673 Wastewater Regulatory Relief Act

- Adopts 15A NCAC 02T .0118 rules regarding sewer line extensions for public wastewater treatment systems nearing 80% capacity
  - Submit evaluation of future demand will be met before exceeding 80%
  - Obtain all permits for expansion before exceeding 90%

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**S.L. 2023-55 / S673 Wastewater Regulatory Relief Act**

- Can exceed permitted capacity if:
  - Have signed contract for expansion of system
  - County has growth rate over 2%/yr or in top 20% fastest growing in State
  - System still meets permitted flow and pollutant discharge limits
- By how much?
  - 110% of existing system capacity
  - IF expansion is within 24 months of completion, can allocate 115%
  - BUT no going over capacity after expansion without DEQ approval

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Agricultural and  
Environmental

The Farm Bill  
Airport sedimentation  
and erosion control

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**S.L. 2023-63 / S582 Farm Bill**

- Expanding / clarifying agriculture definitions [Part I]
  - Income from honey sales can be used to meet the income requirement to be “agricultural” for purposes of present use tax valuation.
  - Recycling turkey brooder litter is a bona fide farm use for purposes of the zoning exemption in G.S. 160D-903
  - Harvesting pine needles and producing biofuel for commercial sale are agriculture

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**S.L. 2023-63 / S582 Farm Bill**

- Farm-related signs can be placed along state highway rights-of-way under similar conditions to commercial and political signs (G.S. 136-32) IF
  - (i) they relate to a bona fide farm and
  - (ii) the sign either advertises the farm or its products or services or provides directions to the farm

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**S.L. 2023-63 / S582 Farm Bill**

- “waters of the State” are restricted to those defined as “waters of the United States.”
- Farm Bill + Sackett = fewer covered wetlands



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**S.L. 2023-63 / S582 Farm Bill**

- “Farm digester systems” only include waste management equipment, gas will be used within 6 months of collection and flared, not vented [Sec. 14]
- Civil penalties for removing timber from riparian buffers cannot exceed the value of the timber removed from the buffer [Sec. 11.1(a)]
- DEQ shall replace the current (12/1/2021) version of General Permit NCG530000 – aquaculture general permit for surface water discharges – with one “substantively identical” to the one that expired March 20, 2021 [Sec. 14.1]



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**S.L. 2023-63 / S582 Farm Bill**

- MANY other things:
  - promoting muscadine grape juice and replacing scuppernong with muscadine as official state fruit
  - modifying timber larceny and prescribed burning laws,
  - establishing a state equine trail in south-central North Carolina,
  - identifying the longleaf pine to represent the pine tree for purposes of North Carolina’s state tree ...

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**S.L. 2023-53 / S240, Permit Choice/Certain Airport Authorities**

- In a county with population greater than 250,000 (Buncombe, Cumberland, Durham, Forsyth, Guilford, Mecklenburg, Wake, and possibly Union),
- Authority can choose local sedimentation and erosion control program instead of State Sedimentation Control Commission.
- Local government must resolve to accept jurisdiction

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Annexation and ETJ	Focused limitations of authority
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Annexation and ETJ – LOCAL Bills	
<p>Maggie Valley (S.L. 2023-99 / H184)</p> <ul style="list-style-type: none"> <li>• Section 1: no ETJ authority</li> <li>• Section 2: no development moratoria</li> <li>• Section 3: down-zoning includes zoning ordinances that include requirements or conditions that hinder development that would otherwise be allowed.</li> </ul>	<p>Leland (S.L. 2023-100 / H267)</p> <ul style="list-style-type: none"> <li>• Suspends all annexation authority for the Town of Leland for petitions executed after 3/1/2023</li> </ul>

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Other Notable Legislation	Sports Betting
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S.L. 2023-42 / H347, Sports Wagering / Horse Race Wagering
<ul style="list-style-type: none"> <li>• Legal effective January 8, 2024</li> <li>• New Article 9 (“Sports Wagering”) of Chapter 18C</li> <li>• Licensing and regulatory requirements</li> </ul>


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#### S.L. 2023-42 / H347, Sports Wagering / Horse Race Wagering

- What
  - sporting events, portions of sports events, and participant statistics
  - parlays, over-unders, in-game bets, moneyline bets, and several others (but no pari-mutuel)
  - NO: youth sports, injuries or penalties, disciplinary proceedings, replay reviews

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#### S.L. 2023-42 / H347, Sports Wagering / Horse Race Wagering

Where – 2 Categories:

- Sports Facilities:
  - NASCAR tracks that host more than one race per year,
  - Golf tournament hosts where more than 50,000 live spectators are expected, and
  - Home arenas of teams in MLB, MLS, NBA, NFL, NHL, and NWSL
- Places of Public Accommodation (i.e., sportsbooks or betting windows):
  - On the property of the sports facility.
    - Golf tournament sites can have a temporary one if they do not have a permanent one.
  - Up to ONE on other property owned or controlled by the owner or operator of the sports facility
    - ½-mile of a NASCAR or pro team sports facility
    - 1 ½ miles of a golf tournament site.

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#### S.L. 2023-42 / H347, Sports Wagering / Horse Race Wagering

- Horse racing
  - New Article 10 to General Statutes Chapter 18C
  - Allows pari-mutuel wagers on live or simulcast horse races
  - Lottery Commission to adopt rules governing horse racing, including rules regarding bets on simulcast horse races
  - Establishments must be licensed
  - Location restrictions?

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#### S.L. 2023-42 / H347, Sports Wagering / Horse Race Wagering

- Major Events, Games, and Attractions Fund
  - Administered by the Department of Commerce
  - Funded by sports wagering tax
  - Grants to retain or attract “major events” (not necessarily sporting events)
    - (i) occur less than annually
    - (ii) site chosen through a competitive process,
    - (iii) occurs at a sports facility OR sponsored by NASCAR, the LPGA, the PGA, the PGA Tour, or the USGA.

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**S.L. 2023-42 / H347, Sports Wagering / Horse Race Wagering**

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- Fund criteria:
  - Economic activity justifies using State funds;
  - Positive media exposure for the State;
  - Multiple sites considered outside NC;
  - Site within the State selected as sole location;
  - Not held more often than annually;
  - Increase opportunities for employment and strengthen State's economy;
  - Consistent with economic development goals for the State and the area;
  - Necessary to attract or keep event in the State; and
  - Total benefits to State outweigh costs.

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**2023 Legal and Legislative Update**

Jim Joyce & Adam Lovelady  
 NCAZO Summer Conference  
 August 2023

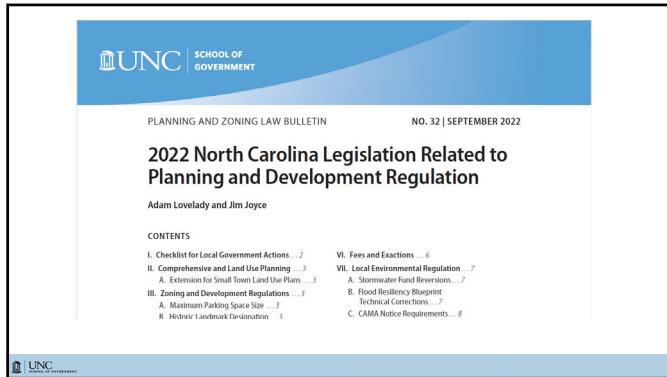
UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

The slide features a dark blue background with a white silhouette of a building with a central tower and steeple, likely a UNC building. The text is white and positioned in the upper left and center.

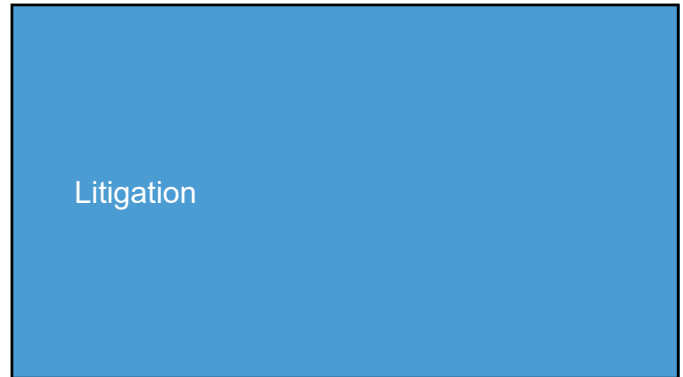
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The image is a screenshot of a website titled 'Coates' Canons NC Local Government Law'. The website has a blue header with the UNC School of Government logo. The main content area is white with a blue sidebar on the left containing various article titles like 'The Most Common Oaths of Office Officers', 'Can Appoint Street Vendors', 'N.C.'s COVID-19 State of Emergency to End National Public Health Emergency is Over', and 'Dialing 911 Through a Government Employee'. The main content area has sections for 'Planning and Development Regulation', 'Highlights', 'Courses and Training', and 'Publications and Resources'. A large, semi-transparent book cover for 'LAND USE LAW' by David W. Owens, Third Edition, is overlaid on the right side of the screenshot. The book cover is green and white with the title in large, bold letters.

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### Exaction Reminders

- "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)?

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

The reasonably  
expected impacts of  
the development

The exactions required  
to be provided by the  
developer

*Koontz* extended *Nollan/Dolan* to monetary exactions such as "in lieu of" fees  
*Anderson Creek* extended that to other development/impact fees

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## Zander v. Orange County

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## Zander v. Orange County \_\_ N.C. App. \_\_ (2023)(COA22-691)

- County had local legislation for school impact fee
  - Specified process for adoption and improvements to be funded
  - Ordinance had details about refunds
- Plaintiffs challenged for failure to adhere to process
  - Court found process acceptable (dissent disagreed)
- Plaintiffs challenged for lack of authority
  - Court found portion of fee to be beyond authority (buses and consultant fees)
- Plaintiffs challenged for failure to refund pursuant to ordinance
  - Court interpreted the refund as compliant (dissent disagreed)

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## So what?

- Process details matter
- Substantive authority matters
- Definitions matter
- Especially when we are talking about fees!

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## Epcon Homestead, LLC v. Town of Chapel Hill

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## Epcon Homestead, LLC v. Town of Chapel Hill 62 F.4th 882 (4th Cir. 2023)

- 2014 - developer's predecessor obtained special use permit with a condition to pay a \$800,000 fee in lieu of affordable housing
- 2015 - Epcon purchased the development
- 2017-2019 - Epcon began paying installments for the fee-in-lieu
- 2019 - Epcon sued to recover fees under state and federal claims

Key Question: "For plaintiffs challenging the constitutionality of a land-use condition, when does their Section 1983 claim accrue?"

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## Epcon Homestead

- Epcon: taking did not occur until developer was compelled to pay
- Court points to *Koontz* (cognizable harm when condition is imposed)
- Epcon argues this is continuing wrong under *Quality Built Homes*
- Court distinguished the 1983 constitutional claim (accrued at the original condition) from the lack of state authority claim (continuing wrong allows new accrual with each harm)
- "a plaintiff's cause of action accrues, and the limitations period commences, when the plaintiff knows or has reason to know of his injury (hence, the 'standard rule')."

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## PEM Entities, LLC v. County of Franklin

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## PEM Entities LLC v. Cnty. of Franklin, 57 F.4th 178 (4th Cir. 2023)

- 2005: Preliminary Subdivision Plan included a note that "This development will be served by Franklin County water and sewer to be installed by the developer."
- 2019: Water & Sewer Allocation Ordinance
- 2021: developer claimed right to water and sewer was taken

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## Court Ruling

- Developer lacked final permit upon which to establish vested rights
- (and even if there was a final permit, the note about water and sewer was not an unlimited allocation)

## 2023 Legislation

## Transient Occupancy (S.L. 2023-5 (SB53))

- Chapter 42 (Landlord-Tenant Law) does not apply to transient occupancies and that transient occupancy agreements do not create tenancy or residential tenancy unless expressly stated in the agreement
- Transient occupancy: "an accommodation by an inn, hotel, motel, recreational vehicle park, campground, or similar lodging to the same guest or occupant for fewer than 90 consecutive days."

## Abandoned Vessels (S.L. 2023-27, S465)

- Counties already had authority, now cities get the same
- Municipalities may regulate abandonment of vessels in navigable waterways and to remove and dispose of abandoned vessels

## Solar Decommissioning (S.L. 2023-58, H130)

- Projects over 2 megawatts
- Requirement to decommission upon cessation
  - Disconnect
  - Remove equipment (dispose and/or recycle)
  - Restore property
- Registration, updated every five years
- Decommissioning plan submitted to DEQ
- Financial assurance to complete decommissioning
- Local government and private contracts may be more stringent

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## Building Code Changes

- Temporary Movie Sets (S.L. 2023-91 (H.B. 782))
  - Exempt from use and occupancy classification
  - No fire code inspection
- Elevators in Residential Rental Accommodations (S.L. 2023-68 (H.B. 608)) technical changes

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## House Bill 488

Awaiting veto override

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## Residential Code Council (HB488)

- 13 members, appointed by General Assembly and Governor
- Review and consider revisions and updates to Residential Code (including trades)
- Hear appeals from the Residential Code (including trades)

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### Scope of Residential Code (HB488)

- North Carolina State Building Code: Residential Code for One- and Two-Family Dwellings
- Expanded to include three-family (triplex) and four-family (quadplex) dwellings

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### Energy Conservation Standards (HB488)

- Prevent new rules
- New Residential Code Council to review and amend North Carolina Energy Conservation Code, the North Carolina Fuel Gas Code, and the North Carolina Mechanical Code

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### Other Building Code Changes (HB488)

- Threshold Amount for Building Permits and General Contractors (move up to \$40,000)
- No Routine Sheathing Inspections (except where ultimate wind speed is greater than 140 mph)
- Single residential permit (no more than one building permit for simultaneous projects at the time)

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### Private Driveway Standards (HB488)

- Driveway construction standards no more stringent than NCDOT
- Must accept designs signed and sealed by engineer to meet vehicular and fire apparatus requirements (developer disclosure to buyers)
- Applies to "new privately owned driveways, parking lots, and driving areas associated with parking lots within a new development or subdivision that the developer designates as private and that are intended to remain privately owned after construction."
- Does not limit local government or NCDOT authority "to regulate private roads, driveways, or street connections to a public system, or to regulate transportation and utilities."

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## Infrastructure and Environment (HB488)

- Developer chooses fee calculation for erosion and sedimentation
- Local govts transfer stormwater permits same as DEQ
- Local gov cannot charge for maintenance of private stormwater (but may require owner to hold funds for maintenance up to 10% of construction cost)

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## Legislative Watchlist

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## Worth Watching

- Budget Bill
- H600, Regulatory Reform (in Conference)

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## In Rules Committees

- H850, Licensing Board/Contractors and Inspectors (in Sen. Rules Cmte)
- S675, Land Use Clarification and Changes (in House Rules Cmte)
- H579, Sedimentation Act & Other Environmental Changes (in Sen. Rules Cmte)
- H132, Govt Agencies/ Delivery of Permits (in Sen. Rules Cmte)
- H451, Noncontiguous Expansion of MSDs. (in Sen. Rules Cmte)
- S145 Continuing Care (in House Rules Cmte)
- H603 Temporary Event Venues (in Sen. Rules Cmte)


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Other Themes

- Affordable Housing
- Short Term Rentals
- Casinos/Sports Betting . . . Video Gaming Terminals
  - H512, Forgivable Loans/HBCU Supplemental Funding



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