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Putting Amotion in Motion: Removal of an Elected Official by a Municipal Governing Body for Just Cause

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INTRODUCTION

When an elected official has been sworn into office, and subsequently becomes unfit to hold office or engages in misconduct which could rise to the level of “just cause” for removal from his elected position, a legal question arises regarding the grounds and procedure through which a municipal governing body may legally remove that official from office under North Carolina law. Since North Carolina has no statutory provision outlining the procedure for removal of an elected municipal official for misconduct or lack of fitness to hold office subsequent to election, the answer is found in the common law. This Article will examine the development and application of North Carolina common law addressing the removal of an elected municipal official through the process of “amotion.” Amotion is recognized as an “inherent power” of the governing body of a municipal corporation to remove an elected official for reasonable and just cause due to misconduct or unfitness to hold office.¹

Part I.A summarizes the development of North Carolina common law that establishes amotion as a distinct action and supports its continued validity as a legitimate procedural method for removing an elected official for just cause in a municipal corporate government setting. Part I.B provides a summary of North Carolina common law and statutory provisions distinguishing actions for amotion, those in the nature of *quo warranto*, and those seeking a writ of mandamus, in order to provide a clear understanding of their distinct purposes and applications.

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1. See *State ex rel. Burke v. Jenkins*, 61 S.E. 608, 609 (N.C. 1908) (recognizing that “[t]he power to remove a corporate officer from his office for reasonable and just cause is one of the common-law incidents of all corporations”); *Ellison v. Aldermen of Raleigh*, 89 N.C. 125, 128 (1883) (recognizing that a municipal corporation has the inherent power of amotion, to be exercised by its governing board).

Part II.A of this Article updates the reasoning from the original North Carolina amotion cases with a more recent decision addressing the process of amotion in an area beyond the limited context of municipal officials, and utilizing procedures consistent with the due process concepts of providing notice and an opportunity to be heard. Part II.B provides a discussion of decisions from jurisdictions outside North Carolina that have approved the removal process for elected municipal officials under the laws of their respective states, consistent with due process concepts.

Part III provides practical guidelines for instituting the process of amotion consistent with due process concerns, and for bringing the process of removal of an elected municipal official to a successful conclusion so that it should withstand subsequent certiorari review concerning any potential errors of law.

I. DEVELOPMENT OF NORTH CAROLINA COMMON LAW
ESTABLISHING AMOTION FOR REMOVAL OF AN
ELECTED OFFICIAL FOR JUST CAUSE

The North Carolina General Statutes do not provide any guidance for the removal of municipal officials who are elected by the people. Under section 160A-148(1), municipal managers (i.e., for a city, town, or village) are vested with statutory authority to “appoint and suspend or remove all city officers and employees not elected by the people.”² By implication, municipal managers lack the statutory authority to suspend or remove municipal officials who are elected by the people.³ This is problematic when, after a municipal official is elected and takes office, he engages in misconduct that should warrant removal from office, or when that official otherwise becomes unfit to hold office. The solution is found in North Carolina’s common law, which provides judicial guidance addressing the removal of municipal elected

2. N.C. GEN. STAT. § 160A-148(1) (2007). Section 160A-148 states:

The manager shall be the chief administrator of the city. He shall be responsible to the council for administering all municipal affairs placed in his charge by them, and shall have the following powers and duties:

(1) He shall appoint and suspend or remove all city officers and employees *not elected by the people*, and whose appointment or removal is not otherwise provided for by law, except the city attorney, in accordance with such general personnel rules, regulations, policies, or ordinances as the council may adopt.

Id. (emphasis added).

3. *Id.* § 160A-148(1).

officials through the process of amotion, based upon grounds constituting reasonable and just cause for removal from office.⁴

A. *North Carolina Common Law Establishing Amotion as a Distinct Action*

In order to comprehend and apply the common law process of amotion, it is essential to understand that amotion is a common law action enabling a municipal governing body to remove an elected official for reasonable and just cause. It is an intrinsic right of all corporations, and therefore available to incorporated municipalities. Near the turn of the century, two North Carolina Supreme Court decisions, *Ellison v. Aldermen of Raleigh* and *State ex rel. Burke v. Jenkins*, explicitly recognized and explained the amotion doctrine.⁵

In *Ellison*, the court recognized that a municipal corporation has the “inherent” power of amotion to be exercised by its governing board “to remove a corporate officer from his office for reasonable and just cause.”⁶ The plaintiff, a former city alderman contesting his removal from office, filed an application for a writ of mandamus.⁷ At a board meeting attended by the plaintiff, another aldermen offered a resolution vacating or declaring vacant the plaintiff’s seat on the grounds of his alleged “incompetency” to hold a local office because he simultaneously held an office with the United States Government.⁸ The plaintiff was not allowed an opportunity to be heard or to vote on the matter, and after the resolution passed, he was removed from office.⁹

The *Ellison* court observed that “[t]he power to remove a corporate officer from his office for reasonable and just cause . . . is one of the common law incidents of all corporations.”¹⁰ The court declared that the “power of amotion is incident to a corporation,” and that “this exer-

4. Amotion is distinguished from a challenge to a municipal official’s legal capacity or qualification to hold title to the office, which is brought in the name of the state as an action in *quo warranto* as provided under Chapter 1 of the North Carolina General Statutes. See *id.* §§ 1-514, 1-515, 1-516, 1-522, 1-528.

5. See *State ex rel. Burke v. Jenkins*, 61 S.E. 608, 609 (N.C. 1908) (“The power to remove a corporate officer from his office for reasonable and just cause is one of the common-law incidents of all corporations.”) (citing 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 240 (4th ed. 1890)); *Ellison v. Aldermen of Raleigh*, 89 N.C. 125, 128 (1883) (recognizing that a municipal corporation has the inherent power of amotion to be exercised by its governing board).

6. 89 N.C. at 128.

7. *Id.* at 126-28.

8. *Id.* at 127. The transcript of the resolution was not introduced at trial.

9. *Id.*

10. *Id.* at 129 (citing 1 DILLON, *supra* note 5, § 179) (emphasis added).

cise of inherent corporate authority . . . may be essential to attaining the ends for which the corporation was formed.”¹¹ Furthermore, the court explained, “there can be no serious doubt of the right of a corporate body to vacate the seat of a corporate officer for adequate causes arising subsequent to taking his seat.”¹² Ultimately, the plaintiff was not entitled to a writ of mandamus.¹³ In fact, the plaintiff requested the wrong relief; the appropriate remedy would have been for the plaintiff to file a *quo warranto* action,¹⁴ naming his successor in office.¹⁵ The discussion of amotion was significant, however, because *Ellison* recognized the right of removal of an elected official for cause.¹⁶

State ex rel. Burke v. Jenkins, a 1908 supreme court decision, is another important case recognizing the inherent power of amotion. The decision recognized that “for cause and upon notice,” the “power to remove a corporate officer from his office . . . is one of the common-law incidents of all corporations.”¹⁷ The court explained that

[t]his doctrine . . . has been considered settled ever since Lord Mansfield’s judgment . . . “that there can be no power of amotion unless given by charter or prescription, and the contrary doctrine is asserted that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental.” . . . Such action could not be taken without notice and an opportunity to be heard, except where the officer is removable without cause at the will of the appointing power. . . . Trial by jury is not necessary in a motion from office.¹⁸

Jenkins involved a *quo warranto* action regarding “the right of the town commissioners to remove an official for cause and upon notice.”¹⁹ The plaintiff, who was the town’s elected treasurer, paid a claim against the town despite being forbidden from doing so by the town commissioners.²⁰ The board demanded the return of the money, indicating to the plaintiff that he would be removed from office if he

11. *Id.* (emphasis added) (citations omitted).

12. *Id.* at 127 (citing *Rex v. Richardson*, (1756) 1 Burr., 517, 539 (K.B.) (Eng.)).

13. *Id.* at 138.

14. See *infra* Part I.B.1. In *Doyle v. Aldermen of Raleigh*, 89 N.C. 133, 134-36 (1883), a case decided in the same term as *Ellison*, the plaintiff followed the correct procedure for regaining his position by bringing a mandamus claim. For a complete discussion of *Doyle*, see *infra* note 80.

15. *Ellison*, 89 N.C. at 129-33.

16. *Id.* at 128 (emphasis added).

17. *State ex rel. Burke v. Jenkins*, 61 S.E. 608, 609 (N.C. 1908).

18. *Id.* (citations omitted).

19. *Id.* at 608.

20. *Id.*

failed to produce it.²¹ In so doing, the board provided the plaintiff with abundant notice with respect to both the process and circumstances of his potential removal.²² It twice ordered the plaintiff to replace the money in the treasury at a town meeting.²³ The board also adopted and served him with a notice stating that if he failed to refund the money to the town treasury, his office would be declared vacant—but he still refused to obey the order.²⁴ A resolution was adopted requesting him to resign and requiring the tax collector to pay over all collections to the chairman of the finance committee.²⁵ A copy of that resolution was served on the tax collector and the plaintiff.²⁶ The bond tendered by the plaintiff was rejected and returned to him, and the reasons were recorded in the board minutes.²⁷

At a subsequent board meeting, the board voted to remove the plaintiff from office.²⁸ The grounds cited for his removal were numerous: the plaintiff had treated the board with contempt, refused to turn in to the treasury money which was paid contrary to the board's instructions, continuously refused to appear before the board despite repeated requests, and claimed he had the right and authority to exercise his own discretion regarding when and to whom he should pay money.²⁹ The board voted that the plaintiff be suspended for misappropriation of the money and for disobedience of the vote and order of the board.³⁰ The plaintiff brought a *quo warranto* action, naming as defendant the individual who had been elected to replace him as town treasurer.³¹ After the trial court entered judgment for the plaintiff, the defendant filed an appeal.³²

21. *Id.* at 609.

22. *See id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 608-09.

28. *Id.* at 609.

29. *Id.*

30. *Id.*

31. *Id.* The plaintiff was instructed in the board's resolution and unanimous vote to turn over all money, papers, books, documents, and anything of value in his possession connected with his former position as town treasurer. The resolution instructed and commanded the mayor to furnish the plaintiff with a certified copy of the resolution, and to take any further and necessary steps to ensure compliance with the instructions. The plaintiff had notice and was duly notified of the board's meetings, orders, and resolutions. *Id.* at 608-09.

32. *Id.* at 609.

The question on appeal concerned “the right of the town commissioners to remove an official for cause and upon notice.”³³ The supreme court reversed the trial court’s decision, because sufficient cause had been shown for his removal from office based upon misconduct and because he had been given full notice and an opportunity to be heard.³⁴ In reaching its decision, the court emphasized the requirements of “notice given and opportunity to be heard” and “sufficient cause shown” for removal, while also recognizing the important need for municipal commissioners to supervise and control municipal funds. The court explained that

in this case *there was the fullest notice given and opportunity to be heard and sufficient cause shown*. If the town commissioners have not supervision of the town funds, if indeed they are not responsible for an oversight and control of the disbursement thereof, their duties and powers are of small importance.³⁵

Although *Ellison’s* and *Jenkins’* recognition of the intrinsic power of amotion dates back for more than a century, no subsequent cases have undermined these decisions’ validity. Their reasoning is sound and they remain good law.³⁶

A municipal corporation’s inherent power of amotion was also recognized by McQuillin in the original edition of *The Law of Municipal Corporations*, which stated that “[u]nless mentioned in the constitution, municipal officers are corporate officers and not constitutional officers, and the power to remove such officers for just cause, whether so declared in the charter or applicable legislative act or not, is inherent in municipal corporations.”³⁷

33. *Id.*; see also *supra* text accompanying note 18.

34. *Id.*

35. *Id.* (emphasis added).

36. For a decision in which the Supreme Court of North Carolina reviewed the facts and determined that they did not call for amotion from the office of sheriff, see *People ex rel. Worley v. Smith*, 81 N.C. 304, 305-09 (1879) (holding that although it was improper for the commissioners to induct the defendant sheriff into office without his giving all required bonds, he was legally holding office and the defect was subsequently removed by his furnishing of the necessary tax bonds; therefore, the situation did not call for his amotion from the office of sheriff).

37. EUGENE MCQUILLIN, *A TREATISE ON THE THE LAW OF MUNICIPAL CORPORATIONS* § 12.230 (1911). Consistent with McQuillin’s distinction between municipal officers as corporate officers, as distinguished from constitutional officers, this Article does not address the removal of elected *judicial* officials and accompanying concerns arising under the North Carolina Constitution in that context. See, e.g., *Reid v. Mayor & Bd. of Comm’rs of Town of Pilot Mountain*, 85 S.E.2d 872, 873-75 (N.C. 1955) (holding that the town mayor and board of commissioners of Pilot Mountain did not have

In *Stephens v. Dowell*, the supreme court cited the rule established in *Jenkins*, emphasizing the necessity for providing “notice and an opportunity to be heard” before removal of an elected municipal official “for reasonable and just cause.”³⁸ The supreme court emphasized that rather than engaging in any “summary dismissal” of an individual from elected office, it is “a fundamental principle of [North Carolina] jurisprudence” to provide an elected official with “notice and an opportunity to be heard.” The court went on to hold that the plaintiff was improperly removed from office:

The charter of the city of Raleigh provides that “[t]he commissioners of the city of Raleigh shall elect . . . and a clerk of said court.” If the commissioners had a right to remove the clerk they had elected “on account of inattention to duty,” notice and an opportunity to be heard should have been given him. This was not done—he was summarily dismissed and Paul S. Dowell appointed to fill the office, “the change to take effect immediately.” We do not think under the act in which the clerk was elected the commissioners had the authority and power to summarily dismiss him without notice and an opportunity to be heard.³⁹

Although *Dowell* is the most recent North Carolina case specifically using the term “amotion” concerning the removal of a municipal official from office, two recent supreme court decisions have implicitly recognized the continued availability of “corrective action” for “offending officials” including “the removal of those who were elected.”⁴⁰ On issues relating to the public policy in North Carolina against awarding punitive damages against a municipality, a 1982 decision, *Long v. City of Charlotte*, and a 1986 decision, *Jackson v. Housing Authority of the City of High Point*, each state: “Likewise, there is no reason to suppose that corrective action such as discharge of the offending officials who were appointed or *the removal of those who were elected* will occur simply because punitive damages are awarded against the municipality.”⁴¹

power to remove plaintiff as the duly elected judge of the mayor’s court for the town, which was an established court of record inferior to the supreme court).

38. 181 S.E. 629, 632-33 (N.C. 1935).

39. *Id.* (alterations in original).

40. See *Jackson v. Hous. Auth. of High Point*, 341 S.E.2d 523, 529 (N.C. 1986) (Meyer, J., dissenting); *Long v. City of Charlotte*, 293 S.E.2d 101, 114 (N.C. 1982). Note that the decision in *Long* was distinguished on other grounds in *Smith v. City of Charlotte*, 339 S.E.2d 844, 846-49 (1986), among other cases, but the language in *Long* regarding the point cited remains undisturbed.

41. *Jackson*, 341 S.E.2d at 529 (Meyer, J., dissenting) (emphasis added) (citing *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 268-69 (1981)); *Long*, 293 S.E.2d at 114 (same).

B. *North Carolina Law Distinguishing Amotion, Quo Warranto, and Mandamus*

Under North Carolina law, there are several methods for removing an elected municipal official from office,⁴² including but not limited to the common law process of amotion and a statutory action in *quo warranto*.⁴³ It is important to distinguish amotion from other actions originally recognized at common law affecting elected officials, such as *quo warranto* and a writ of mandamus. These actions, which derive their legitimacy from the sovereignty of the state itself, are now statutorily codified, with clearly defined procedures.

In order to provide a clear understanding of the distinctions between actions for amotion, *quo warranto*, and mandamus in terms of their purposes and applications, the following North Carolina cases distinguish among them, although at times the discussions in the various decisions seem to blur their lines of distinction. Note that although cases addressing separate procedures for *quo warranto* and mandamus derive their source of authority differently from amotion, they all reflect similar general due process concerns regarding providing notice and an opportunity to be heard before an elected municipal official may be removed from office.

The process of amotion is closely related to a statutory action in *quo warranto*,⁴⁴ which is brought to challenge an official's title or legal qualification to hold office.⁴⁵ Although amotion and *quo warranto* are both addressed in this Article because it is necessary to distinguish between them and understand the reason for their differences, the primary focus of this Article is on using the process of amotion to remove an elected municipal official from office for just cause.

42. For a review of other potential methods of removing local elected officials from office in North Carolina, and for additional discussion of the distinctions between an action in *quo warranto* and the process of amotion, see David M. Lawrence, *Removing Local Elected Officials From Office in North Carolina*, 16 WAKE FOREST L. REV. 547, 547-61 (1980).

43. N.C. GEN. STAT. §§ 1-514, -515, -516, -522, -528 (2007).

44. *See id.* §§ 1-515, -516.

45. *See, e.g.,* Wooten v. Smith, 59 S.E. 649, 650 (N.C. 1907) (affirming a judgment dismissing an action in *quo warranto* to determine the defendant's rights to simultaneously hold the office of recorder of the City of Charlotte and to act as the public administrator of Mecklenburg County).

1. *Distinctions Between the Process of Amotion and an Action in Quo Warranto*

At common law, amotion referred to the removal of a governing official for cause by the corporation, and *quo warranto* (literally, “by what right”) was originally a writ by which the British Crown could demand that the person toward whom it was directed show cause for exercising some authority.⁴⁶ Later, the English courts developed a private writ.⁴⁷ It is important to distinguish the process of exercising a municipal corporation’s inherent power of amotion from bringing a statutory action in *quo warranto* because the two have distinct purposes and different time frames in which they can be pursued.

With regard to the different purposes of amotion and *quo warranto*, amotion typically focuses on removal of an elected official for “reasonable and just cause” concerning the municipal official’s misconduct or lack of fitness to hold office subsequent to his election.⁴⁸ In contrast, the primary purpose of an action in *quo warranto* is to challenge the official’s title or legal capacity or qualification to hold office.⁴⁹

With regard to the different time frames in which amotion and *quo warranto* can be pursued, the common law process of amotion does not have a strict time limitation and can be pursued at any time after induction into office.⁵⁰ Amotion can address a municipal official’s misconduct occurring at any time relevant to his election, induction into, or serving of his term of office, although it usually relates to misconduct occurring after commencement of a term of elected office.⁵¹ In contrast, the ability to bring a statutory action in *quo warranto* to challenge the issue of legal capacity or qualification to hold elected office is significantly constrained by the time limitation in section 1-522, which not only requires that an action be filed within ninety days after the official’s induction into office, but also requires

46. Amotion was discussed in an old English case decided by Lord Mansfield in *Rex v. Richardson*, (1756) 1 Burr., 517, 539 (K.B.) (Eng.). Edward I issued the first *quo warranto* writs to recover land lost by his father, Henry III.

47. For a discussion of the development of the writ of *quo warranto* in the English courts, see *Newman v. United States ex rel. Frizzel*, 238 U.S. 537, 543-44 (1915).

48. See *State ex rel. Burke v. Jenkins*, 61 S.E. 608, 609 (N.C. 1908) (“The power to remove a corporate officer from his office for reasonable and just cause is one of the common-law incidents of all corporations.”).

49. See N.C. GEN. STAT. §§ 1-515, -516.

50. The process of amotion is not bound by the ninety-day limitation set forth in N.C. GEN. STAT. § 1-522.

51. See *Jenkins*, 61 S.E. at 609; *Ellison v. Aldermen of Raleigh*, 89 N.C. 125, 128 (1883).

actual service of the summons and complaint within the same initial ninety-day period.⁵²

North Carolina's statutory procedure for bringing an action in *quo warranto* to challenge a person's title to a public office or to challenge his legal capacity or qualification to hold office is fairly straightforward as codified under sections 1-514,⁵³ 1-515,⁵⁴ 1-516,⁵⁵ 1-522,⁵⁶ and 1-528,⁵⁷ of the North Carolina General Statutes. A statutory action in *quo warranto* can be brought in the name of the State under

52. See N.C. GEN. STAT. § 1-522.

53. Section 1-514 provides:

The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this Article. To the extent that rules of procedure are not provided for in this Article, the Rules of Civil Procedure shall apply.

Id. § 1-514.

54. Section 1-515 provides:

An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the party offending, in the following cases:

(1) When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,

(2) When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

(3) When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of G.S. 146-39.

Id. § 1-515.

55. Section § 1-516 provides:

When application is made to the Attorney General by a private relator to bring such an action, he shall grant leave that it may be brought in the name of the State, upon the relation of such applicant, upon the applicant tendering to the Attorney General satisfactory security to indemnify the State against all costs and expenses which may accrue in consequence of the action.

Id. § 1-516.

56. Section 1-522 provides:

All actions brought by a private relator, upon the leave of the Attorney General, to try the title to an office must be brought, and a copy of the complaint served on the defendant, *within ninety days after his induction into the office to which the title is to be tried*; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, *that the summons and complaint have not been served within ninety days*, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff.

Id. § 1-522 (emphasis added).

57. Section 1-528 provides:

section 1-515, or by a private person with leave of the State under section 1-516, to challenge a municipal official's legal capacity or qualification to hold office.⁵⁸

An action in *quo warranto* is not the appropriate procedure for challenging all office holders. For example, in *Ledwell v. Proctor*, the supreme court considered an appeal of a *quo warranto* action.⁵⁹ The plaintiff "relator"⁶⁰ sought to be declared the duly elected town alderman for a two-year term, to have the defendant ousted, and to recover all benefits received by the defendant from the elected office.⁶¹ The supreme court ruled that a contestant for public office may not maintain a *quo warranto* action by merely alleging that election returns have shown that he received a majority of the votes cast, without further alleging that the returns have been canvassed, that the canvass has shown and declared him the duly elected candidate, and that a certificate of election was thereby issued to him.⁶²

In *Williams v. Somers*, which involved an action in *quo warranto*, the supreme court considered a case in which a new clerk had been elected clerk of superior court.⁶³ The new clerk timely and properly tendered his bonds and was inducted into office.⁶⁴ The former clerk was present in court at the time, was cognizant of what was occurring, and did not object.⁶⁵ The former clerk surrendered his office and records to the new clerk and retired from his official duties for twelve months.⁶⁶ The court held that the conduct of the former clerk amounted to a surrender of his office to the court, justified the recep-

In any civil action brought to try the title or right to hold any office, when the judgment of the court is in favor of the relator in the action, it is the duty of the court to issue a writ of mandamus or such other process as is necessary and proper to carry the judgment into effect, and to induct the party entitled into office.

Id. § 1-528.

58. *See id.* §§ 1-515, -516.

59. *Ledwell v. Proctor*, 19 S.E.2d 234, 235-36 (N.C. 1942).

60. A "relator" serves as the plaintiff in a *quo warranto* action, claiming that he has a legal right to the office claimed and that it is the duty of the defendant office holder to render it to him. A *quo warranto* action can be filed by a "private relator" upon leave of the Attorney General, or it can be filed by the Attorney General in the name of the State. *See* N.C. GEN. STAT. §§ 1-515, -516.

61. *Ledwell*, 19 S.E.2d at 235.

62. *Id.* at 235-36.

63. *Williams v. Somers*, 18 N.C. (1 Dev. & Bat.) 61, 61-62 (1834).

64. *Id.* at 61.

65. *Id.* at 64.

66. *Id.* at 65.

tion and induction into office of the newly elected clerk, and the office could not thereafter be properly challenged.⁶⁷

In *State ex rel. Barker v. Ellis*, the court of appeals determined that an unsuccessful mayoral candidate had ample opportunity to be heard and was not denied due process by the ninety-day service requirement applicable to a *quo warranto* action.⁶⁸ The unsuccessful candidate filed administrative appeals and direct actions to overturn election results that delayed the mayor's swearing-in.⁶⁹ The unsuccessful candidate waited nearly two months before seeking permission from the Attorney General to institute a private *quo warranto* action and was granted permission to file nearly three weeks before the end of the ninety-day limitation period.⁷⁰ The court held that the time for service of the summons and complaint could not be extended under the North Carolina Rules of Civil Procedure because the requirement that a private *quo warranto* action must be served on the mayor within ninety days of induction into office was prescribed by statute instead of being governed by the rules of civil procedure.⁷¹ Although the specific issue in *Ellis* concerned the inapplicability of the rules of civil procedure to alter the ninety-day service requirement applicable to a *quo warranto* action, the court's ruling also held that the unsuccessful candidate had ample opportunity to be heard and was not denied due process.⁷²

The ninety-day requirement for an action in *quo warranto* was also upheld in *State ex rel. Long v. Smitherman*.⁷³ In *Long*, a private relator filed a *quo warranto* action to determine his right to the office of county sheriff and to challenge the defendant's right and title to the office.⁷⁴ The court held that the action was properly dismissed because the summons and complaint were not filed within ninety days after the defendant's induction into the office of sheriff.⁷⁵

2. *Distinctions Between an Action in Quo Warranto and an Action for Mandamus*

In *Lyon v. Commissioners of Granville County*,⁷⁶ the supreme court distinguished an action in the nature of *quo warranto* from an action

67. *Id.*

68. *State ex rel. Barker v. Ellis*, 547 S.E.2d 166, 167-69 (N.C. Ct. App. 2001).

69. *Id.* at 167.

70. *Id.* at 169.

71. *Id.* at 168.

72. *Id.* at 167-69.

73. *State ex rel. Long v. Smitherman*, 111 S.E.2d 834, 835-36 (N.C. 1960).

74. *Id.* at 834-35.

75. *Id.*

76. *Lyon v. Bd. of Comm'rs of Granville County*, 26 S.E. 929 (N.C. 1897).

for mandamus.⁷⁷ The court held that where a plaintiff sues for an office occupied by another, his remedy is an action in the nature of *quo warranto*.⁷⁸ But “if he sues to be restored to an unoccupied office, his remedy is an action for mandamus, and he must show that he had a present, clear, legal right to the thing claimed and that it is the duty of the defendant to render it to him.”⁷⁹ The court in *Lyon* explained the following distinction between an action in *quo warranto* and an action for mandamus:

When a plaintiff sues for an office occupied by another, *quo warranto* is the proper remedy . . . ; but when the office is vacant by reason of a motion, the remedy is mandamus “Mandamus is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the relator has a present, clear, legal right to the thing claimed, and that it is the duty of the defendant to render it to him.” “It is to be borne in mind that the rule as above stated is applied only in favor of those who are clearly entitled *de jure* to the office from which they have been removed. And when the writ is sought to compel the restoration of one claiming the right to an office, it is not sufficient for him to show that he is the officer *de facto*, but it is also incumbent upon him to show a clear, legal right; and, failing in this, he is not entitled to the peremptory writ.”⁸⁰

77. *Id.* at 930 (“When a plaintiff sues for an office occupied by another, *quo warranto* is the proper remedy . . . but when the office is vacant by reason of a motion, the remedy is mandamus”). Mandamus was another common law prerogative writ that took the form of a remedy.

78. *See id.* at 929 (“Where a plaintiff sues for an office occupied by another, his remedy is an action in the nature of *quo warranto*. If he sues to be restored to an unoccupied office, his remedy is an action for a mandamus, and he must show that he had a present, clear, legal right to the thing claimed, and that it is the duty of the defendant to render it to him.”).

79. *Id.*

80. *Id.* at 930 (citations omitted). *Doyle v. Aldermen of Raleigh*, 89 N.C. 133 (1883), the case discussed in *Lyon*, was decided in the same term as *Ellison*. *See supra* Part I (addressing *Ellison*). In *Doyle*, the plaintiff was an elected city alderman who, after taking oath of office and meeting with fellow board members, was removed by a board resolution on the grounds of constitutional “incompetency” to hold office. *See* 89 N.C. at 134. Since there was no successor yet chosen to occupy the vacant position, the plaintiff sought a writ of mandamus to be restored to his office. *Id.* The supreme court determined a writ of mandamus was an appropriate remedy for restoration to his office, reasoning that his appointment from the treasury department of the United States as a night watchman for the city post office did not render him constitutionally ineligible to hold local office simultaneously as a city alderman. *Id.* at 136. The court recognized that prohibition on the holding of two offices was to prevent a single person’s accumulation of multiple offices and places of public trust. *See id.* However, the court did not consider the plaintiff’s night watchman position as holding an office that

In *Rhodes v. Love*, the supreme court further explained the difference between an action in *quo warranto* and an action in mandamus. The plaintiff alleged that he was the duly elected and qualified treasurer of the Lincolnton Graded School Committee Corporation and that the defendant had the books, documents, and papers of the office in his possession but refused to deliver them to plaintiff.⁸¹ The plaintiff sought a mandamus to compel the defendant to turn over the books and records.⁸² The defendant moved to dismiss the action on the ground that the plaintiff's alleged remedy, if at all, would be by *quo warranto* and not by mandamus.⁸³ The trial court in *Rhodes* dismissed the action, and the supreme court affirmed, explaining the difference between a mandamus proceeding and an action in *quo warranto* as follows:

We think the plaintiff has misconceived his remedy. It is evident, from the pleadings, that this is, in substance, an action by two contesting claimants to determine the title to an office and mandamus is not the proper proceeding in such a case. If an office is vacated and the rightful claimant seeks to be inducted into it by the body having jurisdiction of the matter, mandamus will lie to enforce his right, but where the controversy is between two rival claimants, the preferential right of the plaintiff must not only be clear, but it must be so adjudged in an action of *quo warranto*, or rather in an action in the nature of *quo warranto*, and especially is this true where the defendant is in possession of the office under a claim of right in him to hold it and exercise its functions or perform its duties. Although the proceeding may be in the name of the state upon the relation or complaint of a private party, it is none the less personal as to the parties claiming the office; the issue between them being the right to the same.⁸⁴

As shown by the decision in *Rhodes*, an action in mandamus is not the proper proceeding to resolve an action between two claimants who are contesting title to an office. Mandamus will only be appropriate if an office is still vacant and a rightful claimant seeks to be inducted into the office by the proper municipal body. However,

prevented him from also occupying a seat on the city board of aldermen. *Id.* Agreeing with the plaintiff, the court held that because his seat remained vacant, he could obtain a writ of mandamus in order to be restored to his former position. *Id.* at 134-36.

81. *Rhodes v. Love*, 69 S.E. 436, 436 (N.C. 1910).

82. *Id.*

83. *Id.* at 437.

84. *Id.* (citing *State ex rel. Burke v. Comm'rs of Bessemer County*, 61 S.E. 609 (N.C. 1908); *Ellison v. Aldermen of Raleigh*, 89 N.C. 125 (1883); *Brown v. Turner*, 70 N.C. 93 (1874); *Howerton v. Tate*, 66 N.C. 231 (1872)).

where the controversy is between two rival claimants, and the individual defending his right to hold the office is already in possession of the office, the plaintiff challenging the defendant's right to hold the office must file an action in the nature of *quo warranto*.⁸⁵ Even though a *quo warranto* proceeding may be filed in the name of the state upon the relation or complaint of a private party, it is still a personal action concerning each of the parties who are claiming the right to hold the office.⁸⁶

In *State ex rel Freeman v. Ponder*, the supreme court explained the procedure for bringing an action in *quo warranto* to challenge a person's title to a public office or to challenge his legal capacity or qualification to hold office:

The statutes codified as Article 41 of Chapter 1 of the General Statutes prescribe a specific mode for trying the title to a public office. Such relief is to be sought in a civil action. But a private person cannot institute or maintain an action of this character in his own name or upon his own authority, even though he be a claimant of the office. The action must be brought and prosecuted in the name of the state by the Attorney-General; or in the name of the state upon the relation of a private person, who claims to be entitled to the office, or in the name of the State upon the relation of a private person, who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. Before any private person can commence or maintain an action of this nature in the capacity of a relator, he must apply to the Attorney-General for permission to bring the action, tender to the Attorney-General satisfactory security to indemnify the State against all costs and expenses incident to the action, and obtain leave from the Attorney-General to bring the action in the name of the State upon his relation. A single action may be brought against all persons claiming the same office to try their respective rights to the office.⁸⁷

3. *Distinctions Between an Action in Quo Warranto and a Declaratory Judgment Action*

In *Comer v. Ammons*, the court of appeals explained the purpose of an action in *quo warranto* and distinguished it from a declaratory judgment action.⁸⁸ In *Comer*, a registered voter sued several elected district court judges seeking a declaration that the statutes allowing the judges to simultaneously run for superior court and district court

85. *Id.*

86. *Id.*

87. *State ex rel. Freeman v. Ponder*, 67 S.E.2d 292, 298 (N.C. 1951) (citations omitted).

88. *Comer v. Ammons*, 522 S.E.2d 77, 80-81 (N.C. Ct. App. 1999).

judgeships were unconstitutional.⁸⁹ The issue in *Comer* was that sections 163-106 and 163-323, when considered together, created a loop-hole allowing a candidate to run for a superior court seat and another office on the same election day, regardless of the filing periods.⁹⁰

The court of appeals held the statute that codifies the common-law doctrine of *quo warranto* did not apply because the voter was not directly challenging the election or its results, but rather the main thrust of his argument was that the election statutes themselves were unconstitutional.⁹¹ The court upheld the constitutionality of the statutes and affirmed summary judgment in favor of the elected defendant judges.⁹² The significance of the *Comer* decision is that an action in *quo warranto* is not an appropriate procedure to challenge the application of election statutes where the complaining party is not directly challenging an election or its results, but rather is arguing that the election statutes themselves are unconstitutional, which should be addressed in a declaratory judgment action.

II. AMOTION'S APPLICABILITY TO OTHER OFFICIALS IN NORTH CAROLINA AND TO ELECTED OFFICIALS IN OTHER JURISDICTIONS

A. Utilizing Amotion for Removal of Appointed Officials in North Carolina

In *Russ v. Board of Education of Brunswick County*, a 1950 decision, the Supreme Court of North Carolina examined the utilization of amotion in a school board case that did not involve the removal of *elected* municipal officials from office, but did involve the amotion concepts of just cause, notice, and the opportunity to be heard—procedures that are consistent with protecting individual due process rights.⁹³ The court examined the ability of a county board of education to remove an *appointed* member of a school committee and determined that “the statutory proceeding for the amotion of a school committeeman is judicial or quasi-judicial in character, and for that reason an ousted committeeman is entitled to have the action of the county board of education reviewed in the Superior Court.”⁹⁴ The *Russ* court provided an instructive summary regarding what needed to be done by a county board of education during the process of amotion

89. *Id.* at 81.

90. *Id.*

91. *Id.* at 80-81.

92. *Id.* at 83-84.

93. 59 S.E.2d 589, 590-92 (N.C. 1950).

94. *Id.* at 590.

to effect removal of a school committeeman, specifying that he “shall be given notice of the proceeding, and of the charges against him, and afforded an opportunity to be heard and to produce testimony in his defense,” and that he shall not be removed from office unless the county board of education “determines after a full and fair hearing on the merits that one or more of the specified causes for removal has been established by the evidence.”⁹⁵

In addressing the issue regarding the manner in which an ousted school committeeman can obtain court review of an action by the county board of education in removing him from office, the supreme court observed:

[Section] 1-269 expressly stipulates that “writs of certiorari . . . are authorized as heretofore in use.” It is well settled in this jurisdiction that certiorari is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law. Hence, we conclude that the Superior Court, which is the highest court of original jurisdiction in this State, has the power to review by certiorari the action of a county board of education in removing a school committeeman from his office.

This decision finds full support in well considered cases in other States holding that when a governmental agency has power to remove a public officer only for cause after a hearing, the ouster proceeding is judicial or quasi-judicial in its nature, and may be reviewed by certiorari.⁹⁶

This conclusion is supported by authority generally observing that, “[c]ertiorari will lie to review the act of a governmental agency in removing a public officer when such removal is based on an order entered after a hearing at which the respondent is given an opportunity

95. *Id.* As the supreme court went on to explain,

[t]he law clearly contemplates that any school committeeman against whom the statutory proceeding for removal is brought shall be given notice of the proceeding, and of the charges against him, and afforded an opportunity to be heard and to produce testimony in his defense, and that the county board of education shall not remove him from his office unless it determines after a full and fair hearing on the merits that one or more of the specified causes for removal has been established by the evidence. This being true, the statutory proceeding for the amotion of a school committeeman is judicial or quasi-judicial in character, and for that reason an ousted committeeman is entitled to have the action of the county board of education reviewed in the Superior Court. It is noted, in passing, that the board is required by law to keep minutes of its meetings.

Id. at 590-91 (citation omitted).

96. *Id.* at 591-92 (citations omitted) (original emphasis omitted).

to be heard.”⁹⁷ The context of *Russ* concerned utilization of the process of amotion for removal of an appointed school committeeman, specifically referring to statutory provisions applicable in that particular case under section 115-74,⁹⁸ rather than addressing the removal of an elected municipal official, which is the subject of this Article. Despite these noted differences, it would nevertheless appear that under the guidance expressed by the Supreme Court of North Carolina in *Russ*, utilization of the following procedure would be consistent with affording the same due process concerns reflected in prior amotion cases addressing the proper procedure for removal of an elected municipal official: (1) the official should be given adequate notice of the proceeding and of the charges against him; (2) he should be afforded an opportunity to be heard and to produce testimony in his defense; (3) he should not be removed from office unless it is determined after a full and fair hearing on the merits that reasonable and just cause for removal has been established by the evidence; (4) minutes should be kept of the meetings; and (5) since the proceeding for amotion is judicial or quasi-judicial in character, the ousted municipal official should be entitled to have the action reviewed in superior court.⁹⁹

B. *Decisions from Other Jurisdictions Addressing Removal of Elected Officials*

Cases from jurisdictions outside of North Carolina have approved and utilized the process of amotion or *quo warranto* under the laws of their respective states, while also showing concern for protection of the due process rights of the official removed. As in North Carolina, courts from other jurisdictions have been careful to ensure that the procedure applied during the removal process respects the due process rights of the municipal official removed from his position. The following cases from jurisdictions outside of North Carolina address similar due process concerns and requirements under their respective state common law, statutes, and constitutions.

97. 24 STRONG’S NORTH CAROLINA INDEX 4TH, *Public Officers and Employees* § 33 (2008). *But see* *Stephens v. Dowell*, 181 S.E. 629, 632 (N.C. 1935) (“[W]hen the amotion is allowable only for cause, the soundness of such cause is reviewable by the courts upon a *quo warranto*.”) (citing *State ex rel. Burke v. Jenkins*, 61 S.E. 608, 609 (N.C. 1908)).

98. *Russ*, 59 S.E.2d at 590. Chapter 115 of the North Carolina General Statutes has since been repealed.

99. *See id.* at 590-91.

People ex rel. City of Kankakee v. Morris illustrates the propriety of bringing a *quo warranto* action to remove an elected official from office because the public's interest in maintaining confidence in good government with reputable officials outweighs an individual's privilege to hold office.¹⁰⁰ In *Morris*, the defendant was elected as a municipal alderman in Illinois. A few weeks later, he pleaded guilty to theft under the Illinois Criminal Code for unlawful participation in the Federal food stamp program, for which he was sentenced to eighteen months probation.¹⁰¹ The State filed a *quo warranto* action against the alderman, alleging that his criminal conviction disqualified him from holding office.¹⁰² After both parties filed summary judgment motions, the trial court granted the State's motion and the alderman appealed.¹⁰³ The Appellate Court for the Third District of Illinois held that the alderman could be ousted from office for his felony theft conviction, even though he was sentenced to probation rather than to prison.¹⁰⁴ The court reasoned that

[t]he expectation of attaining or holding public office . . . is a privilege, not a civil right. Neither the right to governmental employment nor the right to hold an elective office is fundamental. We are more concerned with the public interest in good government and confidence in our public officers than defendant's privilege in holding his office. A conviction for an infamous crime destroys the public confidence in an elected official. Removal from office for committing an infamous crime is not a punishment. Rather, it is simply a consequence of the officer's failure to meet a condition imposed on him in furtherance of the public interest in good government.

A felony is infamous when it is inconsistent with commonly accepted principles of honesty and decency, or involves moral turpitude. Defendant's conduct certainly offends commonly accepted principles of honesty and decency. In effect, he attempted to defraud both the Federal and state governments. His conviction renders him infamous, and he is ineligible to hold his office.¹⁰⁵

In *Quinn v. City of Concord*, the Supreme Court of New Hampshire reviewed a case in which a city mayor filed a petition for writ of certiorari in superior court to set aside the action of the city board of alder-

100. See 467 N.E.2d 589, 590 (Ill. App. Ct. 1984).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 591-92.

105. *Id.* (citations and internal quotation marks omitted).

men in removing him from office under the city charter.¹⁰⁶ After the trial court set aside the aldermen's action and reinstated the mayor to his office, the aldermen filed petitions requesting that the supreme court "vacate the decision of the Superior Court and reinstate the decision of the board of alderman."¹⁰⁷ The court held that the hearing before the city aldermen was conducted fairly, that the mayor's action in his official capacity in directing a police officer to file a false report with his superior constituted misconduct in office, and that the trial court could not substitute its judgment for that of the city aldermen regarding whether the misconduct was sufficient to justify the city aldermen's removal of the mayor from office.¹⁰⁸

The decision by the supreme court outlined the procedure that had been followed for the mayor's removal from office.¹⁰⁹ Following the mayor's reported action in his official capacity in directing a police officer to file a false report, the board of aldermen appointed a subcommittee to investigate the incident.¹¹⁰ The subcommittee's report to the full board resulted in a vote to suspend the mayor for misconduct in office until a hearing on a later date.¹¹¹ Upon the mayor's petition, the trial court vacated the suspension order, but the hearing regarding the mayor's removal proceeded as scheduled.¹¹² Prior to the hearing, the board of aldermen delivered a copy of the charges against the mayor to him by mail and in person.¹¹³ The board of aldermen established rules for the conduct of the hearing, during which the mayor was represented by counsel.¹¹⁴ The board of alderman found the mayor guilty of misconduct after a hearing and removed him from office.¹¹⁵

On petition for certiorari, the trial court's review was limited to two questions: "[First,] [w]as Mayor Quinn given a fair hearing before the removal action was taken? [Second,] [d]id the facts on which the charge of misconduct in office was based legally constitute a sufficient cause for removal of the Mayor from office?"¹¹⁶ The trial court ruled

106. 233 A.2d 106, 107 (N.H. 1967).

107. *Id.*

108. *Id.* at 108-10.

109. *Id.* at 107.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

that Mayor Quinn was given a fair hearing but the facts of the case were insufficient to support removing the mayor from office.¹¹⁷

On appeal, the rulings were presented to the supreme court together with complete transcripts of the hearings before the board of aldermen and the trial court.¹¹⁸ The city charter provided that the board of aldermen could remove the mayor from office for prolonged absence, inattention to duty, mental or physical incapacity, incompetency, crime, immorality, or misconduct by vote as long as at least ten aldermen were present.¹¹⁹ The mayor argued that the removal process was unfair due to an alleged conspiracy to extricate him from his office along with allegations of prejudice by a number of aldermen.¹²⁰ His counsel examined nine of the fourteen aldermen before the trial court and other witnesses were also presented to support the charge.¹²¹ After hearing the evidence, the trial court found that the hearing was fair, that all of the aldermen in question were eligible to participate in the proceeding, and that the mayor's opportunity to defend himself was more than adequate.¹²²

The supreme court determined the evidence supported the trial court's findings and rulings. The court observed that the city charter provided the tribunal and prescribed the standards for removal.¹²³ It held that all of the procedures required by the statute were adequate and that the procedures were followed correctly.¹²⁴

Rejecting the mayor's argument of unfairness and prejudice, the court noted that the charter prescribed a tribunal whose members would always be acquainted with the parties and would have some knowledge of the facts.¹²⁵ In this respect, it was different from the ordinary approach of using a judge and jury.¹²⁶ "It has been generally held for example that aldermen are not disqualified from voting on charges because they served on a committee that formulated the charges."¹²⁷ The court stated:

Findings which result from an unfair hearing or a prejudiced tribunal will not be sustained. However, it must be recognized that in this case

117. *Id.*

118. *Id.* at 108.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

the Legislature intended removal proceedings to be conducted by the aldermen who may bring the charge and some of whom may have substantial knowledge of the evidence to be presented, or may have had differences from time to time with the person whose removal is sought.¹²⁸

The court continued:

The Trial Court correctly held that certiorari may not be invoked to review findings of fact and that the Court was limited to an inquiry of law whether the finding or verdict could reasonably be made. Unless the evidence shows that the conclusion could not have been reasonably reached, the action taken will be held valid.¹²⁹

In light of these principles, the supreme court determined that the trial court had been wrong to substitute its judgment for that of the city aldermen, and explained that

[t]he fact that another tribunal might find that the misconduct was not such as to justify removal does not permit a substitution of the judgment of others for that of the board of aldermen where the charter leaves this judgment to them.

The charter states that "The board of aldermen may . . . remove . . . for . . . misconduct in office." Whether or not misconduct is "such misconduct" as to justify removal is therefore left to the aldermen and this court will not disturb their finding that it was.¹³⁰

For these reasons, the petition for writ of supersedeas was dismissed, the petition for writ of certiorari was granted, and the order of the trial court was set aside.¹³¹

The decisions in *Morris* and *Quinn* are consistent with North Carolina decisions holding that if the requisite steps are taken to provide notice and an opportunity for a fair hearing on the merits to ensure that the evidence establishes reasonable and just cause for removal, then elected officials can be removed by a municipal governing body through the process of amotion.

III. SUGGESTED GUIDELINES FOR USING THE PROCESS OF AMOTION TO REMOVE AN ELECTED MUNICIPAL OFFICIAL FROM OFFICE FOR JUST CAUSE

Under North Carolina law, an elected official does not hold a "property interest" *per se* in his current or former position as an

128. *Id.*

129. *Id.* (citations omitted).

130. *Id.* at 110. (citing *Sinkevich v. Nashua Police Comm'n*, 86 A.2d 562 (N.H. 1952)) (second and third alteration in original).

131. *Id.*

elected officer because a public office is not considered to be “private property.”¹³² In *Mial v. Ellington*, the supreme court professed “the wisdom of holding that a public office is not private property, thus preventing the state and its agencies from performing its functions in respect to its internal government” and ensuring municipal officers do not have a property interest in the state’s sovereignty.¹³³

Notwithstanding the rule providing that “a public office is not private property,”¹³⁴ *Jenkins* establishes that an elected municipal official should be given notice and an opportunity to be heard and there should be sufficient cause shown for his removal from office.¹³⁵ The *Corpus Juris Secundum* recognizes the requirement of notice and a hearing in this context as follows:

When the tenure of a municipal officer is at the pleasure of the appointing body, the power to remove may be exercised without notice or hearing. Where the appointment, however, is for a fixed term or during good behavior, or where the removal must be for cause, the power of removal ordinarily can be exercised only on charges preferred, after notice and hearing, with a reasonable opportunity to be heard before the officer or body having the power to remove.¹³⁶

The cases discussed in this Article demonstrate that under North Carolina law, an elected municipal official can be removed for misconduct subsequent to his election if a proper procedure is carried out for his removal, including: giving adequate notice of a scheduled proceeding; providing an opportunity to be heard regarding the charges against the official and to produce testimony in his defense; affording a full and fair hearing on the merits; and documenting the proceedings through recorded minutes. Since the process of amotion is considered to be judicial or quasi-judicial in character, the ousted municipal offi-

132. See *Mial v. Ellington*, 46 S.E. 961, 971 (N.C. 1903).

133. *Id.* The Supreme Court of North Carolina’s decision in *Mial* was cited in *Smith v. State*, 209 S.E.2d 336, 338 (N.C. Ct. App. 1974), for the rule that a public office is not private property and that the Legislature has power to abolish offices created by it. Although the decision in *Smith* distinguished *Mial* on factual grounds because the position which the plaintiff held in *Smith* was not abolished when his cause of action arose, *id.*, the underlying holding in *Mial* remains undisturbed. For another instance in which public employment did not constitute a property interest, see *Disher v. Weaver*, 308 F. Supp. 2d 614, 624–28 (M.D.N.C. 2004) (holding that where a city adopted a city manager form of government giving the city manager the power to remove all city employees, provisions of city’s charter and ordinances providing a fixed term of employment and certain procedures for discharge did not give city police officer a property interest in her job protected by due process).

134. *Mial*, 46 S.E. at 971.

135. *State ex rel. Burke v. Jenkins*, 61 S.E. 608, 609 (N.C. 1908).

136. 62 C.J.S. *Municipal Corporations* § 426 (2008).

cial should be entitled to have the action reviewed in superior court through certiorari review, which should be limited to an inquiry of law regarding whether the findings supporting the removal could reasonably have been made.

The following is a practical procedural guide for municipalities, legal practitioners, and the courts that is consistent with the mutual goal of protecting due process concerns and ensuring a fair and reasonable result. In order to satisfy due process concerns, the long-standing line of motion cases require notice and an opportunity to be heard before an elected municipal official can be removed from office for just cause. Decisions such as *Russ*, which was decided in a non-municipal context, also focus on due process concerns prior to enabling removal of an official from office. Because the overriding concern in both contexts is one of ensuring due process for the official during the removal process, from a jurisprudential standpoint, it makes sense to apply the newer guidelines outlined in *Russ* to the removal of an elected municipal official.

The collective wisdom of the decisions cited above¹³⁷ demonstrates that it is reasonable and prudent to observe and maintain compliance with the following practical procedural guidelines for removal of an elected municipal official for just cause. Please note that these procedural guidelines are only practical *suggestions* by this author and are not *required* under North Carolina law, except to the extent expressly provided by the North Carolina decisions discussed above. Naturally, if a municipality has specific procedures or guidelines already in place under its own charter, by-laws, municipal code, ordinances, rules, or regulations addressing any of these matters, then the municipality should follow them instead.

A. *Give Adequate Notice of the Scheduled Proceeding and Pending Charges*

The municipal official should be given dated and signed written notice of the date, time, and exact location of the scheduled proceeding and the specific charges pending against him. If there is a particular incident giving rise to the pending charges, the notice should provide a clear, concise, and specific description of the date, time, and particular facts surrounding the incident and regarding any violations, improprieties, or breaches of duty alleged to have been committed or

137. *E.g.*, *Russ v. Bd. of Educ. of Brunswick County*, 59 S.E.2d 589 (N.C. 1950); *State ex rel. Burke v. Jenkins*, 61 S.E. 608 (N.C. 1908); *Ellison v. Aldermen of Raleigh*, 89 N.C. 125 (1883).

to have arisen from the incident. If the official is represented by legal counsel in the matter, a complete courtesy copy of the written notice should also be provided to the municipal official's retained legal counsel.

Regarding the manner of service of the written notice, out of an abundance of caution, it is suggested (but not required) that notice be sent by both regular United States mail and by certified mail, return receipt requested, so that the municipality will have documented proof regarding the date of the municipal official's receipt of the written notice. Although written notice by email can serve as a supplemental form of written notice in addition to regular or certified mail, it is not suggested that email serve as the only form of written notice provided. Of course, clear and complete copies should always be kept of all written notice given.

B. Provide Meaningful Opportunity to Be Heard and to Produce Testimony in Defense

The municipal official should be afforded a reasonable and meaningful opportunity to be heard and to gather and produce relevant evidence, to produce testimony and documents in his defense, and to examine and cross-examine witnesses. If the municipality knows the official is represented by legal counsel in the matter, a reasonable time should be allowed prior to the scheduled hearing for the municipal official's counsel to have sufficient time and opportunity to gather and produce relevant documents and evidence, and to prepare for the municipal official's testimony and examination and cross-examination of other witnesses.

The amount of time that should be considered reasonable logically depends upon the nature, extent, and severity of the offense or pending charges. Out of an abundance of caution, notice of at least a few weeks or a month should be given to allow a reasonable time for preparation prior to the scheduled hearing. No particular period of advance notice is required, except as may be provided under the municipality's own procedures or guidelines already in place under its own charter, by-laws, municipal code, ordinances, rules, or regulations.

C. Make Determination Only Following a Full and Fair Hearing on the Merits Regarding Just Cause

The municipal official should not be removed from office unless and until it is determined after a full and fair hearing on the merits that sufficient just cause for removal has been established by the evi-

dence produced at the scheduled hearing. Particular attention should be paid to strict compliance with any voting procedures that might be required under the municipality's charter, by-laws, municipal code, ordinances, rules, and regulations concerning the number of votes required to reach a binding determination at the conclusion of the hearing.

D. Maintain Recorded Minutes of Removal-related Meetings

Recorded minutes should be kept of any meetings leading up to the removal of an elected municipal official from office, with careful attention paid to documenting all steps taken to ensure compliance with customary procedures applicable to and employed by the governing municipal authority. Testimony and arguments presented at the hearing should be recorded in their entirety whenever and however possible to best preserve all testimonial and non-documentary evidence in the event that subsequent certiorari review becomes necessary.

E. Certiorari Review in Superior Court Should Be Limited to Issues of Law

Since the process of amotion is considered judicial or quasi-judicial in character, the ousted municipal official should be entitled to have the action reviewed in superior court through subsequent certiorari review, which should be limited to an inquiry of law regarding whether the finding could reasonably have been made. The inquiry should not extend to a review or substitution of judgment for findings of fact, since the local municipal officials vested with authority for making the determination regarding the factual basis for "just cause" should be individuals who are nearest to the matters of concern as they are occurring at the municipal level.

CONCLUSION

Since there is no statutory provision outlining the procedure for removal of elected municipal officials for subsequent misconduct or lack of fitness to hold office under state law, it is important that municipal officials, practitioners, and the courts become familiar with North Carolina common law addressing amotion as a municipal corporation's inherent power to remove an elected official for reasonable and just cause.

Compliance with the following procedures for removal of an elected municipal official through the process of amotion should ensure a fair and reasonable result: (1) the official should be given

adequate notice of the proceeding and of the charges against him; (2) he should be afforded an opportunity to be heard and to produce testimony in his defense; (3) he should not be removed from office unless it is determined after a full and fair hearing on the merits that reasonable and just cause for removal has been established by the evidence; (4) minutes should be kept of the meetings; and (5) since the process for amotion is judicial or quasi-judicial in character, the ousted municipal official should be entitled to have the action reviewed in superior court through certiorari review, limited to an inquiry of law regarding whether the finding could reasonably have been made.