

Local Government and Local Finance

This chapter primarily discusses acts of interest to local governments that are not addressed in other chapters of *North Carolina Legislation 2008*. Local officials interested in particular topics should also consult Chapter 4, “Community Planning, Land Development, and Related Topics”; Chapter 7, “Economic and Community Development”; Chapter 8, “Elections”; Chapter 10, “Emergency Management”; Chapter 11, “Environment and Natural Resources”; Chapter 12, “Health”; Chapter 15, “Local Taxes and Tax Collection”; Chapter 16, “Mental Health”; the ABC section of Chapter 17, “Miscellaneous”; Chapter 19, “Public Employment”; Chapter 20, “Public Purchasing and Contracting”; Chapter 24, “Social Services”; and Chapter 25, “State Government Ethics and Lobbying.”

Public Records and Open Meetings

Recreation Records Involving Minors

The basic structure of the public records law in North Carolina is that all government records are open to the public unless a statute specifically exempts a category of records from the right of public access. There are doubtless categories of records that most people would agree ought not to be open to public access that are open, simply because no one has ever thought to ask the General Assembly to exempt that set of records. This session of the General Assembly witnessed the relatively swift introduction and passage of legislation involving such a category. S.L. 2008-126 (S 212), which exempts from the right of public access certain information about minors participating in parks and recreation programs, began as a local bill applicable to one county but was quickly converted to a general law and easily passed in each house of the General Assembly. The protected information is the minor’s name, address, age, date of birth, telephone number, the names of parents or legal guardians and their addresses, and any other identifying information that is listed on an application to

participate in a recreation program or found in other records related to the program. Because the statute does not define *minor*, the general definition found in G.S. 48A-2 presumably applies; the statute defines a minor as anyone not yet 18. New G.S. 132-1.12 does provide that the “county, municipality, and zip code of residence” of each participating minor is a public record, which will require local governments to either create a new record with that information or redact the protected information from a record with the public information.

It should be noted that the statute does not prohibit a government from releasing this information but, rather, simply exempts the information from the usual right of public access. A government may release any or all of the protected information if it wishes to.

Release of Retirement System Records to Employee Organizations

Under the various personnel privacy statutes the home addresses of current and former public employees is not open to public inspection. S.L. 2008-194 (H 545) enacts a small modification of that rule with respect to the mailing addresses of most former public employees. The statute amends five of the personnel privacy statutes—those dealing with state employees, public school employees, community college employees, county employees, and city employees—to permit the Retirement Systems Division of the Department of State Treasurer to disclose the names and addresses of former employees to nonprofit organizations that represent a minimum number of such former employees. The minimum number of members required for release of the names and addresses of former state or public school employees is 10,000 retired employees, while the minimum number required for college, county, or city employees is 2,000 *active* or retired employees.

It might be noted that three of the local government personnel privacy statutes were not amended, those for employees of public health authorities, public hospitals, and water and sewer authorities. Thus, the Retirement Systems Division may not release the names and addresses of former employees of these entities.

Electronic Meetings

Local government attorneys have disagreed as to whether a county or city governing board may allow one or more members to participate in a meeting electronically, such as by telephone. A provision in the open meetings law recognizes and regulates electronic meetings, and a number of attorneys have viewed that provision as authority to hold such a meeting. Others have argued that the open meetings provision is simply intended to protect the public's right to observe official meetings and is not an independent authorization for electronic meetings. The issue is now complicated by enactment of S.L. 2008-111 (S 1631), a local act that specifically authorizes electronic meetings in Hyde County. Although the act specifically provides that it is not to be "construed to affect the validity of actions related to electronic meetings of any other public body," it cannot help but cause some concern about whether the open meetings law provision is in fact sufficient authority to hold an electronic meeting.

There was some effort to make the Hyde County bill into a general law, but the session was ultimately too short to allow that to happen. It may well be, however, that the matter will be taken up again in the 2009 session.

Local Government Police Power

Prohibition on Ordinances

Restricting Newspaper Distribution

The story of S.L. 2008-223 (S 942), which prohibits local governments from enacting or enforcing ordinances that prohibit newspaper distribution, begins in the 2005 General Assembly. G.S. 20-175(d) (S.L. 2005-310) was enacted that year to authorize local governments to enact ordinances restricting or prohibiting persons from standing on any street, highway, or right-of-way (excluding sidewalks) while soliciting or attempting to solicit employment, business, or contributions from vehicle drivers or occupants. The activities of licensees, employees, and contractors of the Department of Transportation (DOT) and of municipalities that are engaged in construction or maintenance or in making traffic or engineering surveys are exempted.

Perhaps in response to questions about the coverage of G.S. 20-175(d), including a concern that it did not allow for local governments to permit certain solicitations while prohibiting others, the statute was amended in 2006 (S.L. 2006-250, Section 7) by the addition of new G.S. 20-175(e).

That subsection, which apparently applies only to cities, permits local governments to grant authorization for persons to stand in, on, or near a street or state highway within the local government's municipal corporate limits in order to solicit charitable (but not other) contributions, as long as certain conditions are met:

- The person seeking authorization must file a written application with the local government no later than seven days before the solicitation is to occur. A separate application must be filed and a separate fee paid (see below) for each event or each day of a multiday event.
- The application must include the date, time, and locations at which the solicitation is to occur as well as the number of solicitors at each location.
- The applicant must provide the local government with advance proof of liability insurance of at least \$2 million to cover damages that may arise from the solicitation. The insurance must provide coverage for claims against any solicitor and agree to hold the local government harmless.
- The local government may, if it wishes, charge a fee for a permit of \$25 or less per day per event.

G.S. 20-175(e) specifies that a local government acting under its provisions does not waive or limit any immunity or create any new liability for itself. It further provides that the issuance of an authorization and the conducting of a solicitation are not considered governmental functions of the local government.

G.S. 20-175(e) also provides that if the event or the solicitors create a nuisance, delay traffic, or create threatening or hostile situations, any law enforcement officer with proper jurisdiction may order the solicitation to cease. Failure to follow a lawful order to cease solicitation is a Class 2 misdemeanor.

Perhaps in further response to the severity of some of the requirements in subsection (e), the 2008 General Assembly amended G.S. 20-175(d) to provide a specific exception to subsections (d) and (e). S.L. 2008-223 prohibits local governments from enacting or enforcing any ordinance that prohibits engaging in the distribution of newspapers on the nontraveled portion of any street or highway (nontraveled portion is not defined; it perhaps includes the road shoulder and the unpaved right-of-way), except when those distribution activities impede the normal movement of traffic on the street or highway.

Unfortunately, creating a special rule for newspaper distribution that does not apply to other types of commercial or charitable solicitation probably exacerbates the constitutional issues already raised by G.S. 20-175(d) and (e). As noted in Chapter 15, "Local Government and Local Finance," of *North Carolina Legislation 2006* (pp. 153–54), some of the

provisions of G.S. 20-175(e) may well be problematic under existing U.S. Supreme Court precedent that recognizes that restrictions on charitable and other solicitation must be consistent with the free speech clause of the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. Soliciting has long been considered protected speech in “traditional public forums,” such as streets and highways, and it generally can be restricted only because of a compelling governmental interest. While traffic safety may be such an interest, any restrictions on solicitation must be reasonable; apply only to the time, place, and manner of the speech; be narrowly tailored to meet the government concern; and leave open adequate alternative channels of communication.

Restrictions on speech in traditional public forums must also be content-neutral; that is, one type of speech must not be treated more favorably than another type. S.L. 2008-223 violates this fundamental principle by creating a special exception for newspaper distribution.

It may well be that some of the specific requirements of G.S. 20-175(e) described above are unconstitutional because of their negative or “chilling” effects on solicitation that is protected speech (see *North Carolina Legislation 2006*, pp. 153–54) and because of their differing treatment of charitable and other soliciting. However, removing one type of solicitation from these restrictions and giving it special status does not solve the potential problem—it only makes it worse.

Street Gang Prevention

The new legislation on street gang prevention, S.L. 2008-214 (H 274), is discussed at length in Chapter 6, “Criminal Law and Procedure.” There is one provision, however, that should be mentioned here. This is a special provision that reverses the usual rules of preemption of local ordinances by state statutes. The usual rule, set out in G.S. 160A-174(b)(6), is that if a local ordinance simply repeats the prohibitions of a state statute, the local ordinance is preempted and may not be enforced. One of the sections of the new North Carolina Street Gang Suppression Act, codified as Article 13A of G.S. Chapter 14, provides that nothing in the Article is to prevent a local government from adopting and enforcing ordinances that are consistent with the new statute and then goes on to provide that if a local ordinance duplicates provisions of the Article, “this Article shall be construed as providing alternative remedies and not as preempting the field.”

The standard preemption rule noted above grows out of a concern that attempting to enforce both a state statute and a local ordinance, with identical provisions, would constitute double jeopardy. It does not appear that the problem goes away simply because the General Assembly declares that the local ordinance is not preempted.

Prohibiting Smoking in Local Government Vehicles

In 2007, the General Assembly enacted legislation that prohibited smoking in most state government buildings and that permitted local governments to enact similar prohibitions for their buildings. This year the legislature amended the 2007 legislation to include state and local government motor vehicles within its terms. S.L. 2008-149 (S 1681) directly prohibits smoking within state government vehicles and authorizes local governments to adopt ordinances that prohibit smoking within their vehicles. The prohibition may be applied to any “passenger-carrying vehicle owned, leased, or otherwise controlled by local government and assigned permanently or temporarily . . . to employees, agencies, institutions, or facilities.”

It is probable that a local government already had the authority to prohibit smoking within its vehicles in its capacity as owner of the vehicles. What this legislation adds is the ability to enforce such a prohibition through the remedies available for ordinance violations. The act becomes effective January 1, 2009.

Annexation

A considerable number of bills were introduced in the 2007 session of the General Assembly proposing changes to the involuntary annexation statutes. None of the bills emerged from committee, but there clearly was interest in reviewing the statutes. At the end of the 2007 session the House of Representatives sought to include an annexation study in the studies bill normally enacted at the end of each session, but the Senate refused to agree to such a study, and the entire studies bill was not enacted. As a result, late in 2007 the Speaker of the House appointed the House Select Committee on Annexation and asked it to report to the 2008 session. The Committee began meeting in January and held several meetings and public hearings; the opponents of involuntary annexation were well represented at both the meetings and the public hearings.

At about the same time, the N.C. Association of County Commissioners (Association) created a committee to review the annexation statutes; the hope was that the committee’s report might be a starting point for negotiations between the Association and the League of Municipalities (League) that could lead to a legislative proposal acceptable to each organization. The committee developed a number of recommendations, but when it came time to prepare its report, it narrowed its recommendation to General Assembly enactment of a moratorium on involuntary annexation, and the recommendation was accepted by the Association’s board of directors. Not long after, the House Select Committee concluded its work by making a comparable recommendation.

Members of the House Select Committee duly introduced legislation to adopt an involuntary annexation moratorium. As introduced, the moratorium was quite broad, prohibiting any involuntary annexation actions—resolutions of consideration, resolutions of intent, or ordinance adoptions—during the period of the moratorium. In addition, it delayed the effective date of any annexation ordinance not yet effective (with the exception of one that was lacking only preclearance by the U.S. Justice Department) until the end of the moratorium. A House committee deleted the prohibition on any annexation-related actions, but they were restored on the House floor and the bill passed the House by a wide majority.

The League strongly opposed the moratorium, pointing out that a temporary annexation moratorium enacted several decades ago in Virginia was still in place. While the League had little success with its arguments in the House, they were effective in the Senate; the bill was never taken up in that body. The Senate did agree, however, to a study of annexation, and that study is included in this session's study bill, S.L. 2008-181 (H 2431).

The act creates the Joint Legislative Study Commission on Municipal Annexation, a twenty-eight-member body appointed by the Speaker and the President Pro Tem. The act authorizes a thorough study of the annexation statutes in North Carolina, but it's not clear how thorough the Commission will be able to be, inasmuch as it is directed to deliver its final report upon the convening of the 2009 General Assembly. What is clear is that annexation will be a legislative issue yet again next year.

Animal Control

In 2005, the General Assembly passed legislation directing the North Carolina Board of Agriculture to adopt regulations governing euthanasia of animals in shelters, including shelters owned and operated by local governments.¹ The Board approved final euthanasia regulations in February 2008. Shortly thereafter, staff with the Rules Review Commission, a body that must approve the rules before they can go into effect, objected to the rules. The objections related to the Board's statutory authority to directly regulate training and certification requirements for euthanasia technicians. As a result, the rules were withdrawn and reconsidered. The General Assembly responded by enacting Section 2 of S.L. 2008-198 (S 845), which amends the powers of the Board of Agriculture in G.S. 19A-24 to expressly grant the Board the authority to adopt regulations governing training and certification of euthanasia technicians. The legislature made the effective date for this change retroactive to the date the regulations were initially proposed, November 1, 2007.

1. S.L. 2005-276, sec. 11.5.

Nuisance Abatement: Cleanup of Abandoned Manufactured Homes

S.L. 2008-136 (H 1134) creates G.S. Chapter 130A, Article 9, Part 2F, "Management of Abandoned Manufactured Homes." The new law is intended to provide units of local government with the authority, funding, and guidance needed to provide for the efficient and proper identification, deconstruction, recycling, and disposal of abandoned manufactured homes. An "abandoned manufactured home" is a manufactured home or mobile classroom that is both vacant or in need of extensive repair and an unreasonable danger to public health, safety, welfare, or the environment.

The act requires each county to consider whether to implement a program for the management of abandoned manufactured homes, and it provides guidelines for such plans. It authorizes counties that are designated as development tier one or two areas to request a planning grant of up to \$2,500 from the Solid Waste Management Trust Fund to be used to prepare a plan and to identify abandoned manufactured homes. The act also provides that the Department of Environment and Natural Resources is to use up to \$1 million annually from the Trust Fund for the cleanup of such homes.

S.L. 2008-136 appears to provide an additional source of regulatory authority for local governments rather than to replace any existing enabling laws. For example, the section dealing with the process for disposal of abandoned manufactured homes, G.S. 130A-309.114, provides that it does not change the existing authority of a county or a municipality to enforce any existing laws or of any person to abate a nuisance. Also, G.S. 130A-309.118 specifies that the new law is not to be construed to limit the authority of counties or cities under the statutes dealing with planning and regulation of development (Chapter 153A, Article 18, and Chapter 160A, Article 19, respectively).

S.L. 2008-136 becomes effective July 1, 2009, and expires October 1, 2023. More details about various aspects of the new law may be found in Chapter 4, "Community Planning, Land Development, and Related Topics," Chapter 7, "Economic and Community Development," and Chapter 11, "Environment and Natural Resources."

Liability

Public Water Service Warranties

The North Carolina Court of Appeals has held that the sale of water is a sale of goods under the Uniform Commercial Code (U.C.C.). In 2007, the court carried this conclusion a step further by holding that the sale of water was subject to the Code's implied warranty of merchantability, allowing a suit against a town by a dry cleaner who alleged that the town's water

was often filled with impediments that left brown spots or discoloration on garments washed or cleaned by the business.² S.L. 2008-140 (S 1259) reverses the result of the case. The act amends the Drinking Water Act to provide that a public water system regulated under the act “shall not be deemed to provide any warranty [under the Sales provisions of the U.C.C.] including an implied warranty of merchantability or an implied warranty of fitness for a particular purpose.”

The Public Duty Doctrine

S.L. 2008-170 (H 1113), as amended by Section 47 of S.L. 2008-187 (S 1632), deals with the public duty doctrine, a principle of law that states that in many instances where governments and government officials are carrying out their official duties, they are acting on behalf of the public at large, so that there is no liability to particular individuals who may be affected by their actions. While the act is concerned primarily with limiting the applicability of the public duty doctrine as an affirmative defense for certain claims under the State Tort Claims Act, one of its provisions directly applies to local officials. New G.S. 143-299.1A(c) specifies that the new limitations do not apply to units of local government or their officers, employees, or agents. More indirectly, the new law will affect claims under the State Tort Claims Act that involve actions of local officials when they are acting as agents of the state, such as local environmental health specialists enforcing state regulations governing food and lodging sanitation. S.L. 2008-170 became effective October 1, 2008, and applies to claims arising on or after that date.

Transportation

Truck Routes

G.S. 20-115.1(g) permits the Department of Transportation (DOT) to designate the state highway system roads on which trucks are permitted. The subsection has required that the city council agree before DOT designates a truck route on a state system street within a city, but the sentence imposing that requirement has been deleted by S.L. 2008-221 (S 1695), a bill that deals with a variety of motor vehicle–related issues.

Involvement of Counties and Other Local Governments in State Road Projects

S.L. 2008-164 (H 2318) amends G.S. 136-18(39) to authorize DOT to enter into partnership agreements to plan, design, develop, acquire, construct, equip, maintain, and operate highways, roads, streets, bridges, and existing rail as well as properties adjoining existing rail lines. These agreements may be with, among others, “authorized political subdivisions.” Any

contracts for the construction of highways, roads, streets, and bridges that are awarded pursuant to such partnership agreements must comply with the competitive bidding requirements of G.S. Chapter 136, Article 2.

S.L. 2008-164 also adds counties to the authorization already possessed by municipalities to participate financially in private engineering and construction contracts for projects pertaining to streets or highways, if certain requirements are met. The act also gives both municipalities and counties authority to participate financially in private land acquisition contracts for such projects. To qualify, the project must either be (1) the construction of a street or highway on DOT’s adopted Transportation Improvement Plan or (2) the construction of a street or highway on a mutually adopted transportation plan that is designated as a DOT responsibility.

Some of the provisions of a related act, S.L. 2008-180 (H 2314), specify that “local governments,” which primarily means counties and municipalities, are covered by several enabling statutes related to roads that in the past had only applied to municipalities. The statutes affected include:

- G.S. 143B-350(f1)—States that the ability of a local government to pay for a transportation improvement project is not a factor to be considered by the Board of Transportation in its development and approval of a schedule of major state highway improvement projects to be undertaken by DOT under G.S. 143B-350(f)(4).
- G.S. 136-18(27)—Provides for voluntary cost-sharing by local government property owners or highway users in the cost of road maintenance and improvement that benefit the owner or user. The cost-sharing may be through materials, money, or land for right-of-way, as deemed appropriate by DOT. This authority does not apply to toll roads or bridges.
- G.S. 136-44.50, 136-44.52, and 136-44.53—Deal with the adoption and amendment of transportation corridor maps and preparation of the environmental impact study and preliminary engineering work; variances from transportation corridor maps; and advance acquisition of right-of-way within the transportation corridor.
- G.S. 136-66.3 and G.S. 136-98—Provide for local government participation in improvements to the state highway system. County participation in improvements to the state highway system is voluntary, and DOT is not to transfer any of its responsibilities to counties without specific statutory authority.

These provisions of S.L. 2008-164 and S.L. 2008-180 continue a trend begun last year by S.L. 2007-428, an act that, among other things, authorizes but does not require counties to participate in paying the costs of rights-of-way, construction, reconstruction, improvement, or

2. Jones v. Town of Angier, 181 N.C. 121 (2007).

maintenance of roads on the state highway system, under agreement with DOT. S.L. 2007-428 also authorizes a county to acquire land by dedication and acceptance, purchase, or eminent domain and to make improvements to portions of the state highway system, if it uses local funds that have been authorized for this purpose.

Disaster Management

Among the studies mandated by the General Assembly this session is one concerning the enhancement of disaster management capabilities at the county level. Section 20.1 of the Studies Act of 2008, S.L. 2008-181 (H 2431), requires the Division of Emergency Management, in consultation with the N.C. Association of County Commissioners, to study ways and develop plans to increase the capabilities of counties to plan for, respond to, and manage disasters at the local level. Plans that are developed are to include time lines for implementation and estimates of funding needs.

The plans are to address the following items.

1. Mandating, if determined necessary, the establishment and maintenance of emergency management agencies at the county level.
2. Increasing the number of counties employing full-time emergency management coordinators so that every county has such a coordinator available either individually or pursuant to a joint undertaking between two or more counties.
3. Implementing an emergency management certification requirement for all local emergency management coordinators and other essential local emergency management personnel.
4. Developing a model registry for use by counties in (a) identifying persons who are functionally and medically fragile and in need of assistance during a disaster and (b) allocating resources to meet those needs.
5. Establishing a registry program in all counties for functionally and medically fragile persons.

The division is to report the results of its study and provide the plans developed to the chairs of the legislature's Joint Select Committee on Emergency Preparedness and Disaster Management Recovery and the House of Representatives Appropriations Subcommittee and Senate Appropriations Committee on Natural and Economic Resources by December 1, 2008.

Ethics

While most of the ethics and lobbying law changes made this session apply mainly to state government officials and agencies, two provisions of interest to local officials should be noted.

Food and Drink Revisions

One of the exceptions to the ban on the receipt of gifts under the ethics and lobbying laws allows for the giving of food and beverages for immediate consumption in connection with "public events."³ This exception can sometimes be useful to local governments that invite their legislators or other state officials covered by the law to meetings at which food or beverages are provided. Section 79 of S.L. 2008-213 (H 2542) expands and clarifies the coverage of the exception. Under Section 79, there is an exception if food and beverages for immediate consumption are provided in connection with any of the following types of gatherings:

1. An open meeting of a public body, as long as proper notice of the open meeting is given under G.S. Chapter 143, Article 33C (the Open Meetings Law).
2. A gathering of an organization with at least ten or more individuals in attendance open to the general public, as long as a sign or other communication is displayed at the gathering that contains a message reasonably designed to convey to the general public that the gathering is open to the general public.
3. A gathering of a "person or governmental unit" to which one of the following is invited:
 - a. The entire board of which a public servant is a member ("public servant" is a term of art used in defining who is covered by the law);
 - b. At least ten public servants;
 - c. All the members of the House of Representatives;
 - d. All the members of the Senate;
 - e. All the members of a county or municipal legislative delegation;
 - f. All the members of a recognized legislative caucus with regular meetings other than meetings with one or more lobbyists;
 - g. All the members of a committee, a standing subcommittee, a joint committee or joint commissioner of the House of Representatives, the Senate, or the General Assembly; or
 - h. All legislative employees.

3. G.S. 138A-32(e)(1).

For the third exception to apply, either (1) at least ten individuals associated with the person or the governmental unit must actually attend, other than the covered person or legislative employee or the immediate family of the covered person or legislative employee; or (2) all shareholders, employees, board members, officers, members, or subscribers of the person or governmental unit located in North Carolina must be notified and invited to attend.

For purposes of the third exception, “invited” means that written notice from at least one host or sponsor of the gathering containing the date, time, and location of the gathering is given at least twenty-four hours in advance of the gathering to the specific qualifying group listed above. If it is known at the time of the written notice that at least one sponsor is a lobbyist or lobbyist principal, the written notice must also state whether or not the gathering is permitted under G.S. 138A-32(e)(1).

Ethics and Lobbying Laws Study

The second provision that should interest local officials is an evaluation of the current ethics and lobbying laws. Section 15.1 of the Studies Act of 2008, S.L. 2008-181, requires the State Ethics Commission to conduct a study of the implementation and effectiveness of S.L. 2006-201, the State Government Ethics Act. The study is to examine issues related to the administration of the laws created under the act and to identify the areas of the ethics and lobbying process in which public input is needed. Other subjects to be considered are the need for notice to the public of interpretations of the law, the effectiveness of the ethics and lobbying education process, the volume of requests for advice, the adequacy of staffing to meet the needs of the act in a timely manner, and the general perception of the community affected by the act. The study must also assess and identify proposed legislative changes needed to promote and continue high ethical behavior by governmental officers and employees. The commission must consult with the Legislative Ethics Committee (LEC) and is to report its findings and recommendations in writing to the LEC by March 1, 2009.

Revenues

Special Assessments

Article 9 of G.S. Chapter 153A and Article 10 of G.S. Chapter 160A authorize counties and municipalities, respectively, to make special assessments against benefited property within their territorial limits to fund certain public improvement projects.⁴ Local units may levy the assessments

4. Counties have the authority to make special assessments to fund certain projects related to water systems, wastewater systems, beach erosion control, flood and hurricane protection works, watershed improvement, drainage, water resources development, and street lights. G.S. 153A-185; -206. Counties also may fund the local cost of improvements

without a petition except for street and sidewalk improvements.⁵ The assessed amount must be based on one or more of the statutory bases, such as front footage, size of the area benefited, and value added to the property because of the improvement. The governing board may authorize payment of the assessments over a ten-year period. The special assessments may not be levied, however, until the improvement being financed has been completed. The county or municipality must advance its own funds to construct the improvement.

S.L. 2008-165 (H 1770) provides another avenue for counties and municipalities to make special assessments to fund certain infrastructure projects. It does not alter the existing authority to make special assessments under Article 9 of G.S. Chapter 153A and Article 10 of G.S. Chapter 160A. Instead, it provides supplemental authority for counties and municipalities to use assessments as a financing tool for certain long-term capital projects. The supplemental authority, found in new Article 9A of G.S. Chapter 153A (counties) and new Article 10A of G.S. Chapter 160A (municipalities), overlaps the existing authority with respect to some of the procedural requirements and allowable purposes for which special assessments may be made. It adds new purposes, however, and alters a few of the procedural requirements for approving and making the assessments under the new articles. It also requires counties and municipalities to issue revenue bonds to fund at least a portion of the infrastructure projects and pledge the special assessments as collateral for the bonds.

Under the supplemental authority, both counties and municipalities may make special assessments against certain benefited property to fund the capital costs of the following projects:

- Sanitary sewer systems;
- Storm sewers and flood-control facilities;
- Water systems;
- Public transportation facilities;
- School facilities; and
- Streets and sidewalks.

Before imposing a special assessment, a local unit must receive a petition for the project to be financed by the assessment signed by at least a majority of the owners of real property to be assessed and who

made by DOT to subdivision and residential streets outside municipalities. Municipalities have authority to make special assessments to fund certain projects related to streets, sidewalks, water systems, wastewater systems, storm sewer and drainage systems, beach erosion control, and flood and hurricane protection works. G.S. 160A-216; -238.

5. For such improvements a county must first receive a petition requesting the assessments from 75 percent of the property owners to be assessed, and those who petition must own at least 75 percent of the frontage on the street. In a city the comparable percentages are a majority of the owners and a majority of the frontage.

represent at least 66 percent of the assessed value of all real property to be assessed. The petition must include a statement of the project, an estimate of the cost of the project, and an estimate of the portion of the cost of the project to be assessed.

Once it receives a petition that satisfies the statutory criteria, a local unit must follow the procedural requirements under Article 9 of G.S. Chapter 153A (counties) and Article 10 of G.S. Chapter 160A (municipalities) for approving a special assessment, with the following modifications:

- The governing board is not restricted to the statutory assessment methods set forth in G.S. 153A-186 (counties) and G.S. 160A-218 (municipalities)—it must select a basis upon which to make the assessment that accurately assesses each lot or parcel of land according to the benefits conferred upon it by the project.
- The special assessment may be imposed before the costs of the project are incurred by the unit, based on the governing board's cost estimates. A local government still may have to front a significant portion of the costs of the project, but it does not have to wait until its completion to impose the special assessment on benefitted properties.
- The governing board may authorize the special assessment to be paid in up to thirty annual installments.

Furthermore, the governing board must wait at least ten days after the public hearing on the preliminary assessment resolution before adopting a final resolution. During this time, a petition may be withdrawn if notice of the withdrawal is given in writing to the governing board signed by at least a majority of the owners who signed the original petition and representing at least 50 percent of the assessed value of all real property to be assessed. The governing board may not adopt a final assessment resolution if it receives a timely notice of petition withdrawal.⁶

S.L. 2008-165 also requires local units of government to finance the cost of a project for which an assessment may be made under Article 9A of G.S. Chapter 153A or Article 10A of G.S. Chapter 160A solely from revenue bonds to be repaid from the assessments or from a combination of financing sources that include revenue bonds. The unit may pledge the special assessment revenue as security for the revenue bonds.

Significantly, the legislation authorizes municipalities to impose special assessments and to issue revenue bonds secured by the special assessments to finance the construction of school facilities—providing the only authority for municipalities to fund public schools. Newly enacted G.S. 160A-239.4 also allows a municipality's governing board to "pay the cost of a project for which an assessment may be imposed . . .

6. Note that an action challenging the validity of an assessment for failure to comply with the petition requirement must be commenced within ninety days after publication of the notice of adoption of the preliminary assessment resolution.

solely from revenue bonds to be repaid from the assessments or from a combination of financing sources that include the revenue bonds. Other financing sources include general obligation bonds and general revenues." It is unclear, however, whether this provision affords municipalities the independent authority to appropriate other, unrestricted funds to finance public school construction.

Similarly, the legislation expands existing authority for counties to fund capital projects relating to streets and sidewalks. Again, however, it is unclear whether this authority expands beyond imposing special assessments and issuing revenue bonds secured by the assessment revenue. See G.S. 153A-210.4.

The supplemental special assessment and additional revenue bond authority is only temporary, as it expires on July 1, 2013. The expiration date will not affect the validity of existing assessments as of that date or revenue bonds issued prior to that date.

Medicaid Funding Reform

After years of intense lobbying by counties across the state, the General Assembly enacted comprehensive Medicaid funding reform legislation in the 2007 appropriations act (S.L. 2007-323). The cornerstone of the legislation was the state assuming the counties' Medicaid costs, but the act contained several other provisions that impact county revenue. Specifically, in exchange for the elimination of the counties' Medicaid costs, the legislation temporarily reduced allocations from the Public School Building Capital Fund (PSBCF) in fiscal year 2007–08, and it phased out the counties' authority to levy a one-half-cent local option sales and use tax (local sales tax) beginning in October of 2008. The legislation also required counties to hold municipalities harmless for their loss in local sales tax revenue and required the state to guarantee counties a certain return as a result of the exchange of Medicaid costs for local sales tax revenue (county supplemental payment). Finally, it provided counties with a choice of an additional local option revenue source subject to voter approval.

S.L. 2008-134 (S 1704) makes several changes to the 2007 Medicaid funding reform legislation (2007 legislation).⁷ In addition to a few technical corrections, the legislation modifies the calculation of the municipal hold harmless funds; modifies the calculation of the county supplemental payment funds; and modifies the calculation of the amount of Article 42 proceeds that are explicitly earmarked for public school capital outlay.

7. For a complete summary of the 2007 legislation see Kara A. Millonzi and William C. Rivenbark, "Analyzing the Financial Impact of the 2007 Medicaid Funding Reform Legislation on North Carolina Counties," *Local Finance Bulletin* No. 37 (Feb. 2008).

Municipal hold harmless funds. Section 31.16.3(f) of the 2007 legislation enacted G.S. 105-522, which attempted to hold any municipalities incorporated as of October 1, 2008, harmless for the loss of the municipalities' portion of the repealed Article 44 tax revenue. After the change in allocation method of the Article 42 tax proceeds from per capita to point of origin, as of October 1, 2009, some municipalities would not have been held completely harmless for the loss in tax revenue, however. Sections 14 and 15 of S.L. 2008-134 (S 1704) (2008 legislation) amends G.S. 105-522 to correct this error. The following summarizes the municipal hold harmless calculations, as amended by the 2008 legislation:

- As of October 1, 2008, the municipal hold harmless funds are 50 percent of the amount of local sales tax revenue a municipality receives from the Article 40 tax, minus the amount distributed to the municipality in October, November, and December of 2008 under the repealed portion of the Article 44 tax.
- As of October 1, 2009, the hold harmless funds are the amount of local sales tax revenue a municipality receives from the Article 40 tax, plus the difference between 50 percent of the amount of local sales tax revenue a municipality receives from the Article 40 tax and 25 percent of the amount of local sales tax revenue a municipality receives from the Article 39 tax.⁸

County supplemental payment. The state guarantees that each county experience a financial gain of at least \$500,000 each fiscal year as a result of the exchange of Medicaid costs for a portion of the local sales tax revenue. Section 31.16.3(f) of the 2007 legislation enacted G.S. 105-523, which required that if a county's repealed sales tax amount for a fiscal year exceeded the county's hold harmless threshold for that fiscal year, the state would be required to pay the amount of the difference to the county. This calculation did not factor in the additional loss of local sales tax proceeds to the county because of its obligation to hold any eligible municipalities incorporated after October 1, 2008, harmless for the loss of the municipalities' portion of the repealed local sales tax revenue. The 2008 legislation amends G.S. 105-523 to explicitly include the municipal hold harmless amount in the county supplemental payment calculation.

As amended by the 2008 legislation, G.S. 105-523 provides that if a county's repealed sales tax amount *plus its municipal hold harmless amount* for a fiscal year exceeds the county's hold harmless threshold for that fiscal year, the state is required to pay the amount of the difference to the county.

8. For fiscal year 2009–10, the hold harmless amount is reduced by the amount distributed in October, November, and December of 2009 to the municipality under the repealed Article 44 tax.

The 2008 legislation also modifies the calculation of a county's repealed sales tax amount. As of October 1, 2009, a county's repealed sales tax amount is 50 percent of the amount of revenue a county receives from the Article 40 tax minus the amount distributed to the county in October, November, and December 2008 from the repealed portion of the Article 44 tax. As of October 1, 2009, a county's repealed sales tax amount is the amount of revenue a county receives from the Article 40 tax, plus the difference between 50 percent of the amount of local sales tax revenue a county receives from the Article 40 tax and 25 percent of the amount of local sales tax revenue a county receives from the Article 39 tax.⁹

The hold harmless threshold calculation remains unchanged; it is the amount of a county's Medicaid service costs and Medicare Part D clawback payments assumed by the state for the fiscal year minus \$500,000.

Earmark of Article 42 proceeds. The 2007 legislation changed the allocation method of the Article 42 proceeds from per capita to point of origin, as of October 1, 2009. Under G.S. 105-502, 60 percent of the amount of revenue a county receives from the Article 42 tax is earmarked for public school capital outlay purposes or to retire any indebtedness incurred by the county for those purposes. The 2007 legislation did not hold public schools harmless for any loss in any earmarked Article 42 proceeds resulting from the change in allocation method.

The 2008 legislation amends G.S. 105-502 to ensure that a county earmark at least as much money for public school capital outlay as it would have had to earmark had the change in allocation method of the Article 42 proceeds not occurred. Specifically, as of October 1, 2009, it requires a county to use 60 percent of the following for public school capital outlay purposes or to retire any indebtedness incurred by the county for public school capital outlay purposes:

- the amount of revenue the county receives from the Article 42 tax plus
- if the amount allocated to the county under G.S. 105-486 (Article 40 tax) is greater than the amount allocated to the county under G.S. 105-501(a) (Article 42 tax), the difference between the two amounts.

The statutory language, however, creates some confusion as to the amount of revenue that must be earmarked for public school capital outlay because the phrase "allocated to the county" has at least two different potential meanings. The Department of Revenue determines the amount of proceeds from each local sales tax that is due to each county according to either a per capita or a point of origin method and then divides the proceeds among the county and its eligible municipalities according to

9. For fiscal year 2009–10, the repealed sales tax amount is reduced by the amount distributed in October, November, and December of 2009 to the county under the repealed Article 44 tax.

either a per capita or an *ad valorem* distribution method. Thus, “allocated to the county” may refer to the full amount due to the county from each local sales tax, before the proceeds are divided among the county and its eligible municipalities. Alternatively, it may refer to the amount of local sales tax proceeds a county actually receives from each of the taxes—an amount necessarily determined after the division of the proceeds among the county and its eligible municipalities.

A plain language interpretation of this phrase suggests that “allocated to the county” has a specific meaning under G.S. 105-486 and G.S. 105-501(a)—referring to the full amount of local sales tax revenue due to the county before the revenue is divided out among the county and its eligible municipalities.¹⁰ Under this interpretation, though, at least some counties will be required to earmark significantly more revenue for public school capital outlay than they would have been required to earmark had the change in allocation method not occurred. (A few counties may have to earmark more money than they actually receive in Article 42 proceeds.) This interpretation appears contrary to what the legislature intended, which was simply to hold public schools harmless for any loss in earmarked Article 42 proceeds, not to cause counties to have to earmark significantly more revenue for capital school outlay purposes.

The better interpretation, at least in the context of what the legislature was trying to accomplish, is to read the phrase “allocated to the county” in G.S. 105-502(a)(2) as referring to the amount a county actually receives from each of the local sales taxes. That said, it is unclear how a court would interpret this phrase if the amount earmarked by a county for public school capital outlay were to be challenged by its local school administrative unit.

10. G.S. 105-486(a) states the following: “County Allocation. The Secretary shall, on a monthly basis, allocate the net proceeds of the additional one-half percent sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer.” Subsection (b) of this statute then requires the Secretary of Revenue to “adjust the amount allocated” to the county by a statutory formula, and subsection (c) directs that “[t]he amount allocated to each taxing county [] be divided among the county and its municipalities in accordance with the method” prescribed by the county commissioners. Similarly, G.S. 105-501(a) states that “[t]he Secretary [of Revenue] must, on a monthly basis, allocate the net proceeds of the additional one-half percent sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Secretary shall then adjust the amount allocated to each county as provided in G.S. 105-486(b). The amount allocated to each taxing county shall then be divided among the county and the municipalities located in the county in accordance with the method” prescribed by the county commissioners.

A separate bill related to the Medicaid funding reform legislation, SB 1951, would have repealed counties’ authority to levy the local land transfer tax. It also would have allowed county commissioners the option of specifying a particular purpose or purposes for expenditure of the proceeds of the quarter-cent Article 46 tax on the ballot put forth to the voters as to whether or not to approve the additional local sales and use tax authority. The bill passed in the Senate but did not make it out of the House Committee on Rules, Calendar, and Operations.

911 Charges

The General Assembly enacted legislation in 2007 establishing a consolidated system for administering both wireline and wireless 911 systems across the state. The act created a 911 Board and authorized it to develop a comprehensive state plan for communicating 911 call information across networks and among public safety answering points (PSAPs)—defined as the public safety agencies that receive incoming 911 calls and dispatch appropriate public safety agencies to respond to the calls. It authorized the 911 Board to levy a monthly service charge of 70 cents on each active voice communications service connection and specified how the proceeds were to be distributed. The legislation directed that, after subtracting administrative costs, 53 percent of the monies remitted by commercial mobile radio service (CMRS) providers be reimbursed to the CMRS providers that comply with certain statutory requirements to cover the actual costs they incur in complying with the requirements of enhanced 911 services. (A CMRS provider is an entity that is licensed by the Federal Communications Commission (FCC) to provide commercial mobile radio service or that resells commercial mobile radio service in North Carolina. CMRS is defined by federal law as an interconnected radio communication service carried on for profit between mobile stations or receivers and land stations and by mobile stations communicating among themselves.) The remaining 47 percent of the monies remitted by CMRS providers and all monies remitted by all other voice communication service providers was to be used to make monthly distributions to primary PSAPs and grants to PSAPs that comply with certain statutory requirements.

S.L. 2008-134 (S 1704) modifies the distribution of the monthly service charge proceeds. Specifically, it amends G.S. 62A-44(b) to eliminate the statutorily prescribed percentages of proceeds that must be remitted to CMRS providers and primary PSAPs. Instead, the act authorizes the 911 Board to set the percentage of the proceeds from the service charge that will be remitted to CMRS providers and primary PSAPs. The Board may adjust the amounts allocated to ensure full cost recovery for CMRS providers and, if there are excess funds, for additional distributions to primary PSAPs.

Additionally, the act makes the following technical changes:

1. It specifies that the Eastern Band of Cherokee Indians is an eligible PSAP.
2. It extends the time period during which the service charge will not apply to prepaid wireless telephone service through the first nine months of the 2009 calendar year.
3. It amends G.S. 62A-46(b) to prohibit the 911 Board from changing the percentage designation of the remaining funds to be distributed to primary PSAPs on a per capita basis more than once per fiscal year (was calendar year).

Supplemental PEG Support

The General Assembly enacted legislation in 2006 replacing the local cable television franchising system with a statewide video service franchising scheme. Among other things, the legislation replaced local revenues from the cable franchise taxes with a distribution of shared state sales tax collections on telecommunications services, video programming services, and direct-to-home satellite services. Under the 2006 legislation, the first \$2 million of the local share of the proceeds from the three taxes was to be distributed to local governments to support local public, educational, or governmental access channels (supplemental PEG channel support). Each local government was eligible to receive \$25,000 (or a prorated amount if the total exceeded \$2 million) for each PEG channel, to a maximum of three channels. As of April 2008, however, local governments had certified more PEG channels than were initially anticipated by the General Assembly.

In response, the General Assembly enacted S.L. 2008-148 (S 1716), which makes two changes to the supplemental PEG channel support provisions. First, it sets out specific requirements to be met by a county or municipality to receive the supplemental PEG channel support funds. Second, it provides for an additional amount of supplement PEG channel support funds to be distributed in a fiscal year (above the \$2 million) under certain circumstances.

PEG channel support requirements. The legislation enacts new G.S. 105-164.44J, which defines a qualifying PEG channel as one that operates for at least ninety days during a fiscal year and that meets the following programming requirements:

1. It delivers at least eight hours of scheduled programming a day.
2. It delivers at least six hours and forty-five minutes of scheduled non-character-generated programming a day.
3. Its programming content does not repeat more than 15 percent of the programming content on any other PEG channel provided to the same county or municipality.

A county or municipality must certify to the Secretary of Revenue by July 15 of each year all of the qualifying PEG channels provided during the previous fiscal year. In fiscal year 2008–09, however, certifications had to be submitted by September 15, 2008, and the distribution of supplemental PEG channel support funds made within seventy-five days of June 30, 2008, will be based on the qualifying PEG channel certification in effect for the prior distribution.

A local government must equally allocate the supplemental PEG channel support funds for the operation and support of each of its qualifying PEG channels. The local unit must distribute the funds to the PEG channel operator (defined as an entity that produces programming for delivery on a PEG channel or provides facilities for the production of programming or playback of programming for delivery on a PEG channel) of the qualifying PEG channel within thirty days of the receipt of the funds or as specified in an interlocal agreement.

Additional supplement PEG channel support funds. If a county or municipality determines that it certified a PEG channel in error, it must submit a revised certification to the Secretary of Revenue and return all supplemental PEG channel support funds distributed to the unit as a result of the error. The Secretary of Revenue must add any returned funds in the prior fiscal year to the amount of supplemental PEG channel support funds available for distribution.

In addition to modifying the supplemental PEG channel support funding, the legislation also specifies that if a county or municipality imposed subscriber fees during the first six months of fiscal year 2006–07, the unit must use a portion of the remaining funds (after any supplemental PEG channel support funds are distributed) distributed to it for PEG channel operation and support. The amount of funds is the same proportionate amount of the funds that were used for this purpose in fiscal year 2006–07, which was equal to two times the amount of subscriber fee revenue the county or municipality certified that it imposed during the first six months of fiscal year 2006–07.

Finally, the legislation amends G.S. 66-352(a) to provide that if the description of an area to be served described in a notice of a cable franchise includes the area within the boundaries of a municipality, then the area to be served is considered to include any area that is subsequently annexed to the municipality unless the notice limits the area to be served to the boundaries of the municipality on the effective date of the notice.

Short-term Equipment Rentals Tax

Effective for taxable years beginning on or after July 1, 2009, S.L. 2008-144 (S 1852) excludes heavy equipment that is rented or leased on a short-term basis from the property tax base. Heavy equipment is defined as earthmoving, construction, or industrial equipment that is mobile, weighs at least 1,500 pounds, and is either:

1. a self-propelled vehicle that is not designed to be driven on a highway or
2. industrial lift equipment, industrial handling equipment, industrial electrical generation equipment, or a similar piece of industrial equipment.

The definition includes attachments for heavy equipment regardless of the weight of the attachments.

The act instead enacts G.S. 153A-156.1 and G.S. 160A-215.2 authorizing a county and municipality to adopt a resolution imposing a tax of 1.2 percent and 0.8 percent, respectively, on the gross receipts from the short-term lease or rental of heavy equipment by a person whose principal business is the short-term lease or rental of heavy equipment at retail. Gross receipts are subject to a tax imposed by a county if the place of business from which the heavy equipment is delivered is located in that county, and gross receipts are subject to a tax imposed by a municipality if the place of business from which the heavy equipment is delivered is located in that municipality.

If levied, the gross receipts tax proceeds must be remitted to the county or municipal finance officer on a quarterly basis. Payment may be enforced by any remedies available to the local government under G.S. 105, Article 5. The tax may not become effective before January 1, 2009.

The gross receipts tax is expected to generate slightly more revenue for local governments than the property tax on the heavy equipment. The share of total revenue received by individual local governments will vary because the tax proceeds are distributed to counties and municipalities based on where the equipment is rented, whereas the current property tax is paid based on where the equipment is located on January 1 of each year. Also, unlike the property tax on heavy equipment, a unit has a choice as to whether to levy the gross receipts tax on heavy equipment rentals.

Environmental Issues: Solid Waste Tax

The General Assembly enacted legislation in 2007 that authorized the Department of Environment and Natural Resources (DENR) to establish a statewide solid waste management program. Among other things, S.L. 2007-550 directed DENR to impose a \$2-per-ton statewide excise tax on both the disposal of municipal solid waste and construction and demolition debris in any landfill permitted under the state's solid waste management program and the transfer of municipal solid waste and construction and demolition debris to a transfer station permitted under the state's solid waste management program for disposal outside the state. The tax became effective July 1, 2008.

S.L. 2008-207 (H 2530) amends the legislation to alter the distribution method of the excise tax proceeds, specify when payment of the excise tax is due, and provide for a bad debt deduction.

Distribution of excise tax proceeds. The legislation amends G.S. 105-187.63 to provide that 37.5 percent of the excise tax proceeds (after subtracting certain administrative costs) must be distributed to municipalities and counties on a per capita basis—with one-half distributed to municipalities and one-half distributed to counties. For purposes of calculating the per capita amount, the population of a county does not include the population of its incorporated areas. In order to receive a distribution of the excise tax proceeds a municipality or county must provide, and be responsible for the payment of, solid waste management programs and services or the unit must be served by a regional solid waste management authority under G.S. 153A, Article 22. If a municipality or county is served by a regional authority, it must forward the proceeds it receives to that authority.

Payment of excise tax. The legislation amends G.S. 105-187.62 to require payment of the excise tax on a quarterly basis. Payment is due by the last day of the month following the end of a calendar quarter.

Bad debt deduction. The legislation also amends G.S. 105-187.62 to authorize an owner or operator of an authorized landfill to recover any tax paid on tonnage received from a customer whose account is found to be worthless and charged off for income tax purposes. A local government also may recover taxes paid on a worthless account as long as it meets all of the requirements that would have applied were the local government subject to income tax. To recover the excise tax paid, the overall tonnage on which the owner or operator pays tax will be reduced in a calendar quarter by the tonnage for which it was never compensated from the worthless account. If the owner or operator of an authorized landfill subsequently collects on an account that has been declared worthless, any excise tax recovered by the owner or operator must be repaid in the subsequent calendar quarter.

Trust Fund: Swain Settlement Funds

In 1943, flooding from the construction of the Fontana Dam destroyed a road that had been constructed with road bonds assumed by Swain County. The United States Department of the Interior (DOI) and the Tennessee Valley Authority subsequently agreed to compensate Swain County by constructing a new road. The road was never built, and in 2007, the National Park Service concluded that construction of the road would have unacceptable impacts on the natural environment in the Great Smoky Mountains National Park. Swain County and the DOI have instead agreed to negotiate a monetary settlement. S.L. 2008-13 (S 1646) establishes

an irrevocable trust fund under the management of the State Treasurer to consist of proceeds of any payments by the United States under the settlement agreement, other contributions made by Swain County or other entities, and investment income earned by the trust fund.

By majority vote, Swain County's commissioners may request that the Treasurer disburse funds each fiscal year, not to exceed the total interest and investment income earned in the fiscal year. The county may receive a distribution of principal from the trust fund only upon two-thirds approval by the registered voters in the county. The board of commissioners may direct the Swain County Board of Elections to conduct an advisory referendum on the question of whether any portion of the principal of the trust fund should be disbursed to and expended by the county for a particular purpose. The election must be held in accordance with the procedures of G.S. 163-287, and the ballot must disclose the specific purpose proposed for expenditure of the funds. The election may

be held on the same day as any other referendum or election in the county but may not be held within thirty days before or after the day of any other referendum or election.

The settlement funds may not be used to compensate any attorney or agent for services rendered in negotiating the settlement agreement. The funds also may not take the place of or be counted against any other state appropriations or program providing funds or disbursements to Swain County.

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