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Judicial Doctrines That Differentiate Local Governments and Private Persons or Entities

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Attorneys who represent local governments are aware that the courts sometimes treat local governments differently than private individuals or entities, excepting local governments from a rule or procedure that applies to the private sector or applying a special rule to local government that has no counterpart as to the private sector. Many such attorneys, however, are probably not aware of the breadth of this practice and might well be surprised at particular instances. This bulletin attempts to create a comprehensive and annotated catalog of such different or special treatments for the benefit of the attorneys who represent counties, cities, and other types of local government entities. The catalog features exceptions and special rules that are judicially created; it makes no effort to include comparable exceptions or rules created by legislation. Almost all the exceptions and rules are based in the common law; a few are constitutionally based and are included because they might not be obvious or expected from any constitutional text.

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I. Fundamental Doctrines

The first set of doctrines pertain to the fundamental relationship between local governments and the state, and particularly the relationship between local governments and the General Assembly. They are probably based in the North Carolina Constitution, although there is no particular provision of the constitution that can be pointed to as their source. These doctrines have also led to decisions in the federal courts about whether federal constitutional protections apply to local governments—decisions that are very much a matter of federal constitutional law.

A. *Local governments are created by the General Assembly, which has the constitutional power to abolish and merge them, to control their property, and to confer and take away local government powers.*

This doctrine is a first rule for local governments and illustrates most vividly the different status of a public corporation—a local government—as compared to a private corporation. A general statement of this doctrine can be found in many cases decided by the state's appellate courts. Here is an example from the case of *Holmes v. City of Fayetteville*, decided in 1929:

> "[Municipal corporations] are creatures of the Legislature, public in their nature, subject to its control, and have only such powers as it may confer. These powers

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> may be changed, modified, diminished, or enlarged, and, subject to constitutional limitations, conferred at the legislative will. There is no contract between the state and the public that a municipal charter shall not at all times be subject to the direction and control of the body by which it is granted.[1]

An early example of a case decided under this doctrine is *Mills v. Williams*, decided in 1850.[2] In 1846 the General Assembly had created a new county, Polk, out of Henderson and Rutherford counties, and officers had been elected. One of them was Williams, the first sheriff of the new county. In 1848 the General Assembly repealed the legislation creating Polk County (against the wishes, it is said, of a majority of the residents of that area). After the repeal the Rutherford superior court issued an arrest warrant to Williams, as the sheriff of Polk, to arrest Mills in regards to a case arising in Rutherford. After the arrest Mills brought suit in trespass against Williams, claiming that the arrest was illegal inasmuch as there was no Polk County. The trial court gave judgment to the plaintiff, and the North Carolina Supreme Court affirmed. It held that the General Assembly had plenary power over counties and therefore could as easily abolish a county as establish it. In the course of its opinion, the court differentiated as follows between public and private corporations:

> The substantial distinction is this: some corporations are created by the *mere will* of the legislature, there being *no other party interested or concerned.* To this body a portion of the power of the legislature is delegated to be exercised for the public good, and subject at all times to be modified, changed, or annulled.
>
> Other corporations are the result of contract. The legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party.* These two parties make a *contract.* The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. *It is a contract;* and, therefore, cannot be modified, changed, or annulled without the consent of both parties.
>
> So, corporations are either such as are independent of all contract, or such as are the fruit and direct result of a contract.
>
> The division of the State into Counties is an instance of the former. There is no contract—no *second party,* but the sovereign, for the better government and management of the whole, chooses to make the division in the same way, that a farmer divides his plantation off into fields and makes cross fences, where he chooses. The sovereign has the same right to change the limits of Counties, and to make them smaller or larger by putting two into one, or one into two, as the farmer has to change his fields; because it is an affair of his own, and there is no *second* party, having a direct interest.[3]

1. 197 N.C. 740, 746, 150 S.E. 624, 627 (1929).
2. 33 N.C. 558 (1850).
3. *Id*. at 561—62.

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The court decided a municipal counterpart to this case some eighty years later, in *Town of Highlands v. City of Hickory*.[4] The 1931 General Assembly had enacted legislation providing for a referendum to be held in Hickory and in the neighboring towns of Highlands and West Hickory over whether those smaller towns should be annexed by Hickory. The two towns sought to invalidate the legislation and the ensuing referendum, but the trial court upheld both, and the state supreme court affirmed, citing the same doctrine that had prevailed in the Polk County case.

Is there a proprietary exception to this basic doctrine? In 1913 the state supreme court decided *Asbury v. Town of Albemarle*, which articulated an exception to this basic doctrine for the proprietary or private activities of a local government.[5] In 1911 the General Assembly had enacted legislation known as the Battle Act. One provision required that a city or town undertaking to construct a water system purchase any existing private system that operated in the municipality. Albemarle was planning on constructing a public water system, and the plaintiff already operated a small system within the town. He brought suit to require the city to purchase his system, and the trial court overruled the town's motion to nonsuit. The jury subsequently entered a verdict for the plaintiff, and the trial court entered judgment for the plaintiff. The supreme court reversed. It first held that the plaintiff's system did not qualify for the protection offered by the statute: it was organized as a partnership rather than as a corporation, which the statute required, and it was so fragmentary that it could not be considered a qualifying system in any event. Having thereby decided the case, the court nevertheless went on and held the statute itself to be unconstitutional. Alluding to the so-called doctrine of local self-government, apparently first articulated by the famous nineteenth century jurist Thomas Cooley,[6] the court stated that the power of the General Assembly over local governments was not in fact unlimited:

> Our Constitution recognizes municipal corporations and gives the Legislature power to create them, and also confers upon them the right to provide for their necessary expenses. We have held that waterworks, sewerage, and some other public utilities are necessary expenses. We do not think the Legislature can dictate to a municipal corporation the manner in which it may acquire its waterworks any more than it can dictate the kind of engine to be used in pumping the water. The principle of local self-government requires that this of necessity must be left to the sound discretion of the municipal authorities.
>
> "Municipal corporations possess a double character; the one governmental, legislative, or public; the other, in a sense, proprietary or private. *** In its governmental or public character the corporation is made by the state one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. *** But in its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation, or at least not public

4. 202 N.C. 167, 162 S.E. 471 (1932).
5. 162 N.C. 247, 78 S.E. 146 (1913).
6. Cooley articulated the doctrine in the case of *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44 (1871).

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> in the sense that the power of the Legislature over it or the rights represented by it are omnipotent."
>
> In matters purely governmental in character, it is conceded that the municipality is under the absolute control of the legislative power; but, *as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations.*[7]

Is the above italicized statement good law?

There are a number of reasons to think that it may not be. First, the entire section of the opinion dealing with the legislation qualifies as dicta. The court had already held that the plaintiff was not entitled to the protections of the statute and thereby decided the case; it was clearly unnecessary to reach the question of the statute's constitutionality. Second, the quoted passage is based on a legal theory that has been pretty thoroughly discredited. The so-called right to local self-government was most strongly stated in a series of articles appearing in the *Harvard Law Review* in 1900, authored by Amasa M. Eaton, a judge in Rhode Island.[8] Just a decade later, however, Judge Dillon could write, in the last edition of his treatise on local government law:

> It must now be conceded that the great weight of authority denies *in toto*, in the absence of special constitutional provisions, of *any inherent right of local self-government which is beyond legislative control*.[9]

Furthermore, Eaton's articles were refuted as unhistorical and unsound in a later series of articles by Howard L. McBain that appeared in the *Columbia Law Review* in 1916.[10] The combination of Dillon's statement and McBain's article was sufficiently strong that the doctrine of local self-government pretty much disappeared from intellectual debate and, perhaps more importantly, from judicial decision making. Third, perhaps in recognition of the failure of its underlying theory, the *Asbury* case itself has not been the basis of a single North Carolina decision overturning an exercise of legislative control over local government. While the supreme court has not seen fit to formally overrule *Asbury*, both it and the court of appeals essentially limited the earlier case to its facts in twice upholding the so-called Sullivan Acts, which were local acts of the General Assembly significantly interfering with the authority of Asheville to operate its own water system.[11] If *Asbury* had any remaining validity, the two Asheville cases were perfect occasions in which to exercise it; instead, the courts upheld the legislation. Nevertheless, as long as *Asbury* is not explicitly overruled, there remains a slim chance that a later court might resuscitate it and articulate an exception to the basic rule of plenary control of the General Assembly over local government.

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7. 162 N.C. at 252–53, 78 S.E. at 150 (italics supplied, citations omitted).

8. A. Eaton, *The Right to Local Self-Government*, 13 Harv. L. Rev., 441, 570, 638; 14 Harv. L. Rev. 20, 116 (1900).

9. 1 John Dillon, A Treatise on the Law of Municipal Corporations 154 (1911) (italics in original).

10. H. McBain, *The Doctrine of an Inherent Right to Local Self-Government*, 16 Col. L. Rev. 190, 299 (1916).

11. Candler v. City of Asheville, 247 N.C. 398, 101 S.E.2d 470 (1958); City of Asheville v. State, 192 N.C. App. 1, 665 S.E.2d 103 (2008).

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B. *The federal constitutional protections embodied in the Contract Clause, the Due Process Clause, and the Equal Protection Clause do not extend to local governments.*

The United States Supreme Court has been well aware of the traditional authority of state legislatures over local government and has held that various provisions of the U.S. Constitution that protect individuals and private entities from certain governmental actions were not intended to override that basic state–local relationship and so do not protect local governments.

Contract Clause. The Supreme Court has on numerous occasions held that the Contract Clause does not protect local governments from legislative actions changing charters or statutes applicable to the governments. Probably the most famous example is *Hunter v. City of Pittsburgh*, in which the Court upheld legislation that permitted Pittsburgh to annex the neighboring city of Allegheny over the opposition of a majority of voters in the latter city.[12] Speaking of local governments, the Court wrote:

> Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.[13]

The Supreme Court has also held that a state legislature may interfere in a contract between a local government and a third party, relieving the third party of some burden imposed by the contract. In *City of Worcester v. Worcester Consolidated Street Railway Company,* the city had granted a franchise to the company, one of the conditions of which was that the company make certain repairs to the city streets in and around its tracks.[14] When the Massachusetts legislature relieved street railways of this burden, the company refused to comply with the franchise, and the city brought suit to force it to do so. The Massachusetts court held for the company, and the U.S. Supreme Court affirmed. The Contract Clause did not protect the city in these circumstances.

There is a suggestion in the *Hunter* case that the Contract Clause might apply to protect a local government in its private or proprietary activities.[15] The Court closed the door on that

12. 207 U.S. 161 (1907).

13. *Id*. at 178–79. *See also, e.g.,*Town of East Hartford v. Hartford Bridge Co., 51 U.S. 511 (1850) (legislature may repeal grant of ferry franchise to local government).

14. 196 U.S. 539 (1905).

15. "It will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal

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possibility in 1923, however, in the case of *City of Trenton v. State of New Jersey*.[16] In that case the city was the successor to a private company that held a perpetual legislative charter to withdraw water from the Delaware River without payment of any taxes or fees. When the state attempted to impose such fees on the city, the U.S. Supreme Court held that the city was not protected by the Contract Clause. The Court stated:

> The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. . . . But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the city of Trenton against the state of New Jersey. They do not apply as against the state in favor of its own municipalities.[17]

Due Process. In the *Trenton* case just discussed, the city also argued that its asserted right to withdraw water free from fees and taxes was a property right, protected by the Due Process Clause from legislative interference. The Supreme Court rejected the argument, holding that the same considerations that made the Contract Clause protections inapplicable to local governments also made Due Process Clause protections inapplicable.

Equal Protection. In a case from Newark, New Jersey, involving the same legislation as the *Trenton* case and decided the same day, the Supreme Court held that the Equal Protection Clause does not protect local governments, citing the usual considerations of state–local power.[18] A final note was struck by the Court in the case of *Williams v. Mayor and City Council of Baltimore*, in which the cities of Baltimore and Annapolis challenged a tax exemption granted a street railway by special legislation of the Maryland legislature.[19] The cities argued that the exemption was in some fashion a violation of equal protection, and the Court's response summarizes all of the cases in this section:

> A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.[20]

1. *Exception to common national rule*

Unlike the rule in many states, local governments in North Carolina *do have* standing in most instances to challenge the constitutionality of state legislation.

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corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts (Dill. Mun. Corp. 4th ed. §§ 66 to 66a inclusive, cases cited in note to *State ex rel. Bulkeley v. Williams, 48 L.R.A. 465)*, and it has been held that, as to the latter class of property, the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation." *Hunter*, 207 U.S. at 179.

16. 262 U.S. 182 (1923).

17. *Id*. at 191–92. The position of the U.S. Supreme Court on this issue is further reason to question the continuing validity of the *Asbury* decision, discussed above.

18. City of Newark v. State of New Jersey, 262 U.S. 192 (1923).

19. 298 U.S. 36 (1933).

20. *Id*. at 40.

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As a corollary to the doctrines discussed above, the courts in many states deny to local governments the standing to challenge state legislation. The New York court of appeals articulated this rule and the reasons behind it as follows:

> [T]he traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. This general incapacity to sue flows from judicial recognition of the juridical as well as political relationship between those entities and the State. Constitutionally as well as a matter of historical fact, municipal corporate bodies—counties, towns and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents. Viewed, therefore, by the courts as purely creatures or agents of the State, it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants.[21]

This rule, as stated, is inconsistent with the longtime practice in the North Carolina courts. To take just one example, in the *Asbury* case discussed above, the city of Albemarle was obviously given the right to challenge state legislation, and many other examples could be cited. There has been one case in which the North Carolina Supreme Court recognized and followed the common practice in other states of denying standing to local governments to challenge state legislation. That case was *In re Appeal of Martin,* in which the court held that a county could not raise a constitutional challenge to a legislative classification of property for property tax purposes.[22] *Martin* was ignored in later cases, however, and in *Town of Spruce Pine v. Avery County,* the court essentially limited *Martin* to challenges to tax exemptions and classifications.[23] In this state, then, local governments have much the same power to challenge the constitutionality of state legislation as do private individuals and entities, save for certain tax statutes.

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21. City of New York v. State, 655 N.E.2d 649 (N.Y. 1995). Other cases observing this doctrine include *Romer v. Fountain Sanitation District*, 898 P.2d 37 (Colo. 1995); *Town of Canterbury v. Commissioner of Environmental Protection*, 772 A.2d 687 (Conn. Ct. App. 2001); *Florida Department of Agriculture and Consumer Services v. Miami-Dade County*, 790 So. 2d 555 (Fla. Ct. App. 2001); *State ex rel. City of La Crosse v. Rothwell*, 130 N.W.2d 806 (Wis. 1964).

22. "The question whether a state subdivision has standing to contest the constitutionality of a State Statute has produced conflicting decisions in other jurisdictions. But the prevailing view is that a subdivision of the State does not have standing to raise such a constitutional question. Likewise, a majority of jurisdictions which have considered whether a city or county may challenge a tax statute on constitutional grounds answer in the negative. Although these decisions do not articulate a well defined rule of law, much of their reasoning is persuasive." 286 N.C. 66, 73, 209 S.E.2d 766, 772 (1974). The court of appeals relied on *Martin* a few years later in holding that Fayetteville could not challenge the constitutionality of legislation denying it the annexation powers held by other cities. *Wood v. City of Fayetteville*, 43 N.C. App. 410, 259 S.E.2d 581 (1979).

23. 346 N.C. 787, 488 S.E.2d 144 (1997).

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C. *Local governments require express legislative authority to act; the absence of legislative prohibition is insufficient.*

A final fundamental distinction between local governments and their private counterparts is that unlike individuals and private entities, local governments need to be able to point to some sort of legislative authority to act. An absence of legislative prohibition is not sufficient to support local government action. There are many cases that turn on this fundamental principle. One intricate example is *High Point Surplus Company, Inc. v. Pleasants*.[24] In 1964 the General Assembly enacted legislation that permitted fifty-two counties to regulate and prohibit Sunday retailing, including Wake County. The legislation permitted the county's ordinance to apply within a city if the city adopted a resolution to that effect. A separate city statute authorized all cities to adopt such ordinances directly. Wake County adopted a Sunday-closing ordinance pursuant to the 1964 legislation, and the city of Raleigh promptly adopted a resolution to make the county's ordinance applicable within the city. The plaintiff brought suit to enjoin enforcement of the ordinance because it would have a significant impact upon the plaintiff's business activities. The trial court sustained a demurrer to the complaint, but the North Carolina Supreme Court reversed.

The court's principal holding was that the 1964 legislation was a local act, because it only applied to fifty-two counties, and that it regulated trade, making it unconstitutional under Article II, Section 24, of the state constitution. Because counties and cities have no independent legislative power but have only that power granted by the state, the county ordinance was therefore invalid. And even though the city could have adopted its own ordinance under constitutional statewide legislation applicable to cities, it had not done so. Rather, it had adopted a resolution pursuant to the unconstitutional legislation, and therefore the county's ordinance could not apply within the city, either.[25]

II. Doctrines Involving Liens Asserted against Local Government Property

The courts have been consistently unwilling to allow local government property to be sold to enforce obligations owed by the local government, unless there is clear statutory authorization. The general notion is that such property is held for the benefit of the entire public and that the public's needs cannot be put at risk through the forced sale of the property. This attitude of the courts has resulted in several specific doctrines.

24. 264 N.C. 650, 142 S.E.2d 697 (1965).

25. In *High Point Surplus*, the court wrote: "Neither counties nor municipalities have any inherent legislative powers. Counties are instrumentalities and agencies of the State government and are subject to its legislative control; they possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them. A municipal corporation is a creature of the General Assembly, has no inherent powers, and can exercise only such powers as are expressly conferred by the General Assembly and such as are necessarily implied by those expressly given." *Id*. at 654, 142 S.E.2d at 701 (citation omitted).

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A. *Local government property is not subject to sale to satisfy a judgment.*

The North Carolina Supreme Court held in 1871 in *Gooch v. Gregory* that the property of a county was not subject to execution to enforce a judgment.[26] In the opinion the court suggested that the rule might be different for a municipality, at least as to its private activities,[27] but that suggestion has been ignored by later courts.[28]

The inability to force an execution sale does not mean that a judgment creditor is without remedy. In the *Gooch* case the court noted that such a creditor could apply to a court for a writ of mandamus to require the local government's governing board to levy a tax sufficient to pay the judgment.[29] During the latter part of the nineteenth century and first decades of the twentieth century, local governments were subject to various constitutional limitations upon the levy of property and other taxes, and the question arose as to what effect those constitutional limitations had upon the rights of a judgment creditor to obtain mandamus. In response, the courts developed rules that (1) the constitutional limitations had to be respected, and therefore a court could not order a tax rate that exceeded the limitations, and (2) once taxes were at the limit, the local government was entitled to first apply its funds to the necessary expenses of government and pay the judgment only if there were any funds remaining.[30] At present, though, there are no constitutional or statutory limitations upon taxes that are likely to bar a mandamus to a local government to levy taxes. When that's the case, the fact that the resulting tax levy might impose hardships upon the citizens of the local government is not a consideration that a court may take into account in deciding whether to grant the writ.[31]

It may be that if a local government holds property in some sort of private capacity—property, that is, that is not being used for any public purpose—then that specific property is subject to execution. The North Carolina Supreme Court seemed to recognize such an exception in a very messy opinion in *Hughes v. Commissioners of Craven County*.[32] In that case, the plaintiff sought to execute a judgment against railroad shares owned by the county, but it is not clear from the opinion whether these shares were an example of property not held for public purposes, nor is it clear what sort of property held today by a local government might fall into that category.

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26. 65 N.C. 142 (1871).

27. "These rules of law are not applicable to a municipal corporation created by a charter which is voluntarily accepted by the corporation for private emolument and advantage. Such corporations are sometimes charged with the performance of public duties, but so far as the grant is for private purposes and advantage they are regarded as private corporations and subject to like liabilities." *Id*. at 143–44.

28. *See* Maryland Cas. Co. v. Leland, 214 N.C. 235, 199 S.E. 7 (1938) ("[T]he property of a municipality necessary to carry on government is not subject to execution." *Id*. at 238, 199 S.E. at 10).

29. It is not clear what the remedy would be if the judgment debtor had no taxing power, such as is true of a local board of education or a water and sewer authority. While the latter might be subject to a mandamus to raise its rates in order to generate moneys to pay a judgment, it is not clear whether any sort of mandamus would be available against a school board.

30. Cromartie v. Comm'rs of Bladen, 85 N.C. 211 (1881).

31. *Maryland Casualty* , 214 N.C. 235, 199 S.E. 7.

32. 107 N.C. 598, 12 S.E. 465 (1890).

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B. *Local government property is not subject to attachment or garnishment.*

As a corollary to the exemption of local government property from execution, the courts have uniformly held that local government property cannot be attached or garnished as a result of litigation.[33] There do not appear to be any North Carolina cases on this question, but there is no reason to expect this state's courts to deviate from the uniform rule elsewhere.

C. *It may be that local governments are exempt from acting as garnishees of moneys held for and owed to third parties.*

Although this rule does not involve local government property, it is convenient to take it up in this context. The general rule nationally is that local governments cannot be made to act as garnishees when they hold funds owed to another person or entity. The general rule is summarized as follows in an American Law Report annotation from 1929:

> It has been held with practical unanimity that, in the absence of an express statutory provision, a county cannot be subjected to the process of garnishment. This rule is founded upon public policy, which subjects the interest of the individual to that of the public, and is applied in this class of cases upon the theory that to allow garnishment of a county would work to the inconvenience and detriment of the public service.[34]

The annotation cites a great many cases but none from North Carolina, and in fact there are none from this state directly in point. There is, however, a statement in a 1902 case that is opposed to the general rule quoted just above. The case of *Town of Gastonia v. McEntee-Peterson Engineering Co.* involved the town, an engineering company the town had contracted with to construct town utility facilities, and suppliers to the engineering company. One question was whether the suppliers could garnish moneys held by the town under the construction contract and not yet paid to the engineering company. Although the court ultimately held that garnishment was not possible in this case, it began its discussion of the issue with this statement:

> It is true that, in the case of an ordinary debt owing by a town to a third person, the debt may be garnished. 1 Dill. Mun. Corp. (4th Ed.) § 101.[35]

The North Carolina courts have not returned to this issue, and so we do not know if it is good law, but there is some reason to be skeptical. First, the statement is inconsistent with the great body of law in other states. Second, the statement purports to be based on the fourth edition of Dillon's treatise, but in fact it is inconsistent with what Dillon wrote. Although Dillon himself would have preferred to subject some sorts of moneys held by a government to garnishment, he admitted that the law was in fact otherwise—local governments were not subject to being made to act as garnishees.[36]

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33. P.H.V., Annotation, *Municipal Funds and Credits as Subject to Levy under Execution or Garnishment on Judgment against Municipality,* 89 A.L.R. 863 (1934).

34. E.W.H., *County as Subject to Garnishment Process,* 60 A.L.R. 823 (1929).

35. 131 N.C. 359, 362, 42 S.E. 857, 858 (1902).

36. Here is the entirety of Section 101 of the fourth edition (1890):

> **Garnishment.** Upon similar considerations of public policy, *municipal corporations and their officers* have usually, though not uniformly, been considered *not to be subject*

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The General Assembly seems to be unsure itself whether local governments are generally subject to having to act as garnishees. On the one hand, the various retirement statutes provide that a retiree's pension payments, held by state pension systems, are not subject to garnishment—a statement that might be thought unnecessary if state and local governments generally could not be made to act as garnishees. On the other hand, various tax statutes provide that state and local governments are subject to act as garnishees of employee salary obligations in favor of state and local tax collectors. The principal garnishment statute says nothing one way or the other.

D. *Local government owners are not subject to statutory liens that protect workers on and suppliers of construction projects.*

The North Carolina courts have followed the national rule and have held that the statutory lien in favor of laborers on and suppliers of materials for a construction project does not apply to projects to construct public facilities.[37] This rule is the reason that public works statutes direct local government owners to require a payment bond from the general contractor on any such project.[38]

E. *Local governments may not convey a security interest in public property without specific statutory authority.*

In *Vaughn v. Board of Commissioners of Forsyth County,* the North Carolina Supreme Court held that a local government could not convey a security interest in county land to secure a loan made to finance construction of a courthouse on that land.[39] In reaching this conclusion, the court cited the same considerations that led to the rule that local government property was not subject to execution to satisfy a judgment. A few years later the court decided a second case that makes clear that all these rules against forced sale of government property are grounded in the common law and not in the state constitution and therefore could be modified by statute. In *Brockenbrough v. Board of Water Commissioners of City of Charlotte,* the court held that

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> *to garnishment*, although private corporations, equally with natural persons, are liable to this process. The cases on the subject, as respects municipal corporations, are referred to in the note; and it will be seen, on examination, that some of them turn on the construction of particular statutes, and that the judges differ in opinion respecting the policy and expediency of subjecting, upon general principles, such corporations to the process of garnishment. The author's view, where the subject is left entirely open by statute, is, that, on principle, a municipal corporation is exempt from liability of this character with respect to its revenues and the salaries of its officers, but where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives to creditors of natural persons and of private corporations.

John F. Dillon, Commentaries on the Law of Municipal Corporations (4th ed. 1890).

37. *E.g.,* Snow v. Bd. Of Comm'rs of Durham Cnty., 112 N.C. 335, 17 S.E. 176 (1893); Morganton Hardware Co. v. Morganton Graded Sch., 150 N.C. 680, 64 S.E. 764 (1909).

38. N.C. Gen. Stat. (hereinafter G.S.) § 44A-26. In *Noland Co. v. Board of Trustees of Southern Pines School*, 190 N.C. 250, 129 S.E. 577 (1925), the court held that there could be no judgment against the school unit because of the board's failure to obtain the bond required by statute, because to allow such a judgment would be inconsistent with the policy of not allowing execution of judgments against public property.

39. 118 N.C. 636, 24 S.E. 425 (1896).

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the General Assembly could by specific statutory authority permit a local government to give a mortgage on property owned or to be owned by the local government.[40] In reliance on this case, the General Assembly has in fact permitted local governments to borrow money under a variety of statutes and secure the loan with a deed of trust on the property.[41]

III. Doctrines Involving Local Government Property

Just as the courts have created doctrines to protect local government property from forced sale, they have also created doctrines that protect local government property—even from the local government itself—in other circumstances. This section reviews those doctrines.

A. *The fact that a local government enjoys the power of eminent domain protects it against certain remedies involving real property, specifically (a) ejectment and (b) injunctions prohibiting violations of restrictive covenants.*

1. *Ejectment*

In *Costner v. City of Greensboro,* the court of appeals held that an action for ejectment may not be brought against a local government for alleged unlawful possession of a street easement, because the city enjoyed the power of eminent domain.[42] Rather, the plaintiff's only remedy was an action in inverse condemnation, in which the recovery would be the value of the property interest involved. The rationale of this decision, which reflects the general rule nationally,[43] is that with the power of eminent domain the government could always condemn the property interest at issue, and therefore it makes no sense to eject the government from that interest. Of course, if the government in question does not have the power of eminent domain with respect to the interest in question, ejectment might well be available.

2. *Restrictive covenants*

In a few states, if a local government acquires property subject to restrictive covenants, the covenants do not apply to the governmental purchaser.[44] The North Carolina courts, however, have rejected that position; they agree with the majority of courts and hold that the covenants continue to apply—at least to the extent that if the local government violates the covenants, it must compensate those protected by them. In *City of Raleigh v. Edwards*, the North Carolina Supreme Court held that restrictive covenants create property interests (not simply contractual rights) in each piece of property benefited by the covenants. Therefore, each owner of a benefited tract was entitled to compensation for the

40. 134 N.C. 1, 46 S.E. 28 (1903).

41. *E.g.,* G.S. 160A-20 (installment financing agreements); G.S. 159I-13e (special obligation bonds); G.S. 159-83(a) (revenue bonds).

42. 37 N.C. App. 563, 246 S.E.2d 552 (1978).

43. *See* M.C. Dransfield, Annotation, *Injunction Against Exercise of Power of Eminent Domain*, 133 A.L.R. 11, 104 (1941).

44. Friesen v. City of Glendale, 288 P. 1080 (Cal. 1930); Ryan v. Town of Manalapan, 414 So. 2d 193 (Fla. 1982); City of Riveroaks v. Moore, 272 S.W.2d 389 (Tex. Ct. Civ. App. 1954).

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> loss of that interest when the city condemned a tract for a use not permitted under the covenants.[45]

A subsidiary question arose in a court of appeals case decided a generation later.[46] A school board had purchased a subdivision lot subject to covenants and had begun construction of a use that violated the covenants. When neighboring owners sought to enjoin the construction, the court held that their only remedy was a suit in inverse condemnation for compensation for the loss of the covenant. The court reasoned that because the school board could have condemned the lot for the use in question, it therefore could not be enjoined from making that use of the property. Once again, though, the rationale does not apply when the local government does not have eminent domain power in the specific situation at issue, and perhaps the outcome would be different in that situation as well.

B. *The doctrine of estoppel by deed generally does not apply to local governments.*

The courts have generally been wary about applying various forms of estoppel against local governments, as is discussed in the section below describing doctrines arising in the context of litigation. This general wariness applies, in the property law context, to the doctrine of estoppel by deed. This doctrine generally bars a party to a deed, or that person's privies, from asserting against the other party or parties, or his, her, or their privies, any right or title that is in derogation to the deed; it also bars such a person from denying the truth of any material fact asserted in a deed. For example, if a party gives a deed to land, the doctrine generally estops that person from later claiming still to own the land.

Although by no means the rule everywhere, the majority rule nationally is that the state or a local government is not subject to this sort of estoppel, and North Carolina is generally counted among the states not permitting estoppel by deed against governmental entities.[47] The basis for placing North Carolina among those states is a number of very early cases involving state grants to land. For example, in *Candler v. Lunsford* the two parties were disputing title to a tract of land along the French Broad River.[48] The defendant produced a grant to the tract by the state in 1796 and a clear chain of title from that grant to himself; there was also, however, a grant directly from the state to the defendant in 1834. The plaintiff relied upon a grant made by the state in 1829, and because of the 1834 grant, the plaintiff sought to estop the defendant from denying that the state had held title to the tract in 1829, thus negating the effect of the 1796 grant. The court noted that the state itself could not be estopped in this circumstance and therefore the plaintiff, as the state's privy, also could not be estopped.[49]

A later case extends this refusal to estop the state to a North Carolina local government. In *Washington v. McLawhorn,* Wayne County had instituted tax foreclosure proceedings against a lot owned by the Washingtons, and in 1929 a commissioner conveyed title to the lot to the county.[50] The plaintiffs were the heirs to the Washingtons, and they claimed that the county had

45. 235 N.C. 671, 71 S.E.2d 396 (1952).

46. Carolina Mills, Inc. v. Catawba Cnty. Bd. of Educ., 27 N.C. App. 524, 219 S.E.2d 509 (1975).

47. *See* C.K. Cobb, Annotation, *Estoppel of United States, State, or Political Subdivisions by Deed or Other Instrument,* 23 A.L.R.2d 1419 (1952).

48. 20 N.C. 542 (1839).

49. Comparable cases include *Wallace v. Maxwell*, 32 N.C. 110 (1849) and *State v. Bevers*, 86 N.C. 588 (1882).

50. 237 N.C. 449, 75 S.E.2d 402 (1953).

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in fact never considered itself or acted as owner of the lot and had allowed the Washingtons and their heirs to remain in possession. Nevertheless, in the 1940s the city commenced its own tax proceedings against the lot, naming the county (and not the Washington heirs) as defendant, and eventually the county and city foreclosed on the lot and then conveyed title to McLawhorn. The Washington heirs brought a quiet title action and argued that the deed to McLawhorn could not be valid because the county did not in fact own the property. They sought to estop the county and its assigns from presenting the 1929 deed in evidence, arguing that the consequent conduct of the county showed that the deed was not valid. The court disagreed, holding that "[t]he collection of taxes by a county is the exercise of a governmental right, and in the collection of taxes the County of Wayne cannot be estopped under the facts alleged in this action to assert the validity of the title it received to this land by virtue of the deed of Humphrey, Commissioner."[51]

Note that the court in *Washington* pointed out that the county was involved in a "governmental right." Some states do apply the doctrine of estoppel by deed against local governments acting in their proprietary capacity,[52] and the court's usage in *Washington* suggests that such a distinction is possible in North Carolina as well.

There are two common doctrines that do not apply in North Carolina:

C. *The common law requires specific statutory authority to convey property in governmental use, but that rule has apparently been abrogated in North Carolina by statute.*

In the nineteenth and early twentieth century North Carolina joined those states in which the courts held that, absent legislative authority, a local government may not dispose of property currently held in governmental use.[53] At least for those local governments subject to Article 12 of Chapter 160A of the North Carolina General Statutes (hereinafter G.S.)—cities, counties, school boards, and a number of other types of local governments—this bar to disposition has probably been removed in North Carolina by the enactment of G.S. 160A-265.[54]

51. *Id*. at 455, 75 S.E.2d at 407.

52. *See, e.g.,* City of Tarpon Springs v. Koch, 142 So. 2d 763 (Fla. Ct. App. 1962), and City of Corpus Christi v. Gregg, 289 S.W.2d 746 (Tex. 1956).

53. *E.g.,* City of Southport v. Stanly, 125 N.C. 464, 34 S.E. 641 (1899) (town common); Carstarphen v. Town of Plymouth, 180 N.C. 26, 103 S.E. 899 (1920) (town hall).

54. A much fuller account of this doctrine and the attempted legislative correction appears in David M. Lawrence, Local Government Property Transactions in North Carolina 74–78 (2d ed. 2000).

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D. *North Carolina law appears to permit adverse possession against local government property, except for public streets and squares.*

In most states the courts have not permitted adverse possession to run against property owned by a local government,[55] but the more recent statements by the North Carolina supreme court have allowed it.[56] G.S. 1-45, though, does specifically deny the possibility of adverse possession against "any part of a public road, street, land, alley, square, or public way."[57]

IV. Doctrines Involving Local Government Contracts

Two doctrines limit the ability of local governments to enter into certain sorts of contracts, while others restrict remedies against local governments by apparent contracting partners.

A. *Local governments may not enter into contracts that contract away the discretion of their governing boards to take certain sorts of actions.*

North Carolina's rule in this area is somewhat different than that followed in many states, although the outcome of litigation will often be the same. In many states local governments may not enter into certain contracts that bind future boards, at least without clear legislative authority. This doctrine employs the familiar governmental-proprietary distinction, limiting governmental contracting power with respect to governmental activities but not with respect to proprietary activities. North Carolina's rule, articulated in the case of *Plant Food Company v. City of Charlotte*,[58] differs from this national rule in two respects. To explain the differences, it will be useful to recount the facts of *Plant Food*.

The company had contracted with the city to remove sewage sludge from city drying beds, paying the city according to a schedule set out in the contract. The contract extended ten years, with an option for either party to extend it another ten years. Within a year or two of the contract's execution, however, a new governing board took control of the city government and sought to negate the contract. When the company sued for breach of contract, the city noted the national rule and argued that sewer services had been held to be a governmental activity in the tort law context and therefore were in this context as well, and that the previous council therefore could not have entered into a contract that bound the present one. The trial court agreed.

On appeal, the North Carolina Supreme Court accepted the dichotomy between proprietary and governmental activities but refused to simply transfer the distinctions made in tort law to this different context. "The true test," according to the court, "is whether the contract itself deprives a governing board, or its successor, of a discretion which public policy demands should

55. R.P. Davis, Annotation, *Acquisition by Adverse Possession or Use of Public Property Held by Municipal Corporation or Other Governmental Unit Otherwise Than for Streets, Alleys, Parks, or Common,* 55 A.L.R.2d 554 (1957).

56. See especially *Threadgill v. Wadesboro*, 170 N.C. 641, 87 S.E. 521 (1916), which allowed adverse possession against a town street because the possessor had occupied the land under color of title for 43 years before the enactment of G.S. 1-45. *Threadgill* cites and distinguishes the earlier and inconsistent cases.

57. A much fuller account of the development of North Carolina law on this issue appears in Lawrence, *supra* note 54, 87–89.

58. 214 N.C. 518, 199 S.E. 712 (1938).

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be left unimpaired."[59] The court gave a number of examples of the sort of discretionary powers it had in mind: adopting ordinances, laying out and maintaining streets, preserving order, regulating rates, levying taxes, and levying special assessments. If that sort of discretion is not involved, then the contract would not be invalid simply because it extended beyond the terms of office of the original governing board. In the actual case, the court did not find the necessary discretion involved in the Plant Food contract and reversed the trial court; the city was bound by the contract. This narrowing of the range of "governmental" activities is the first respect in which the North Carolina rule differs from the national one.

The second respect in which the North Carolina rule differs from the national one is that it is not simply a limitation on one board's ability to bind its successors. Rather, it applies as much to the present board as the next one. That is, no board may contract to adopt an ordinance or levy a tax, even if the contract will be fully executed during that board's term.[60]

B. *The North Carolina state constitution probably significantly restricts a local government from agreeing to indemnify, or hold harmless, a private person or entity.*

Article V, Section 4(3), of the state constitution restricts a local government's power to lend its credit. The provision reads as follows:

> No county, city or town, special district, or other unit of local government shall give or lend its credit in aid of any person, association, or corporation, except for public purposes as authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon.

If a local government enters into an indemnification agreement, it is in effect agreeing to assume responsibility for specific obligations of another party; it is, in a sense, guaranteeing payment of those obligations.[61] A government entering into an indemnification agreement is subjecting itself to the same kinds of potential future liabilities faced by one that agrees to guarantee payment of private loans, which are clearly within the terms of the constitutional provision. Although there is virtually no case law addressing the effect of loan-of-credit provisions on indemnification agreements, both a Massachusetts court and a Texas court have suggested that such agreements are restricted by loan-of-credit limitations,[62] and at least two state attorneys general have reached the same conclusion.[63]

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59. *Id*. at 520, 199 S.E. at 714.

60. This doctrine is described more fully in David M. Lawrence, *Contracts That Bind the Discretion of Governing Boards*, Popular Government, Summer 1990, at 38–42.

61. If a hold-harmless provision only guarantees that the *promisor* will hold the other party harmless from having to pay the obligations of the *promisor*, the promisor is not guaranteeing obligations of another party, and the constitutional provisions would not apply.

62. *See* Lovering v. Beaudette, 572 N.E.2d 591 (Mass. Ct. App. 1991) and Texas & N.O.R. Co. v. Galveston Cnty., 161 S.W.2d 530 (Tex. Ct. App. 1942).

63. 84-103 Op. Att'y Gen. (Fla. 1984); 96-7 Op. Att'y Gen. (Okla. 1996). A slightly more detailed discussion of the loan of credit provision of the constitution and indemnification agreements is found in David M. Lawrence, Economic Development Law for North Carolina Local Governments 21–22 (2000).

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C. *The agency doctrine of apparent authority does not apply to local government contracts as fully as it does to private contracts.*

Under the doctrine of apparent authority a principal can be contractually bound by an agent who does not have actual authority if the principal has acted in a way that led the other party to the contract to reasonably believe that the agent did have such authority.[64] A standard statement of the doctrine is found in *Edgecombe Bonded Warehouse Co. v. Security National Bank*:

> While as between the principal and the agent the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third persons ignorant thereof, and as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person who, in order to avail himself of rights thereunder, must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by acts of the agent performed in the usual and customary mode of doing such business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority.[65]

The *Restatement of Agency* asserts that the apparent authority doctrine does not apply to governments, including local governments,[66] but such an assertion does not reflect the North

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64. The Restatement of Agency articulates the creation of apparent authority in this way:

> Apparent authority . . . is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.

Restatement (Third) of Agency § 3.03 (2006).

65. 216 N.C. 246, 252–53, 4 S.E.2d 863, 868 (1939).

66. The *Restatement of Agency* asserts as follows:

> The doctrine of apparent authority generally does not apply to sovereigns and entities that have been created by sovereigns to achieve governmental ends. . . . [T]hird parties who deal with national governments, quasi-governmental entities, states, counties, and municipalities take the risk of error regarding the agent's authority to a greater degree than do third parties dealing through agents with nongovernmental principals.

Restatement (Third) of Agency, Comment g. to § 2.03 (2006).

The local government law treatises appear to agree. The McQuillin treatise states that "persons dealing with a municipal corporation through its agent are bound to know the nature and extent of the agent's authority in the manner of the law of agency generally, applying to dealings with both artificial and natural persons." 10 McQuillin Mun. Corp. § 29:4 (3d ed. 1981). The quoted statement is supported by

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Carolina case law, at least as it applies to local governments. In several cases the supreme court and the court of appeals have applied the doctrine in cases involving contracts with local governments, and in at least two cases panels of the court of appeals have upheld an agent-negotiated contract over the local government's argument that the agent was without actual authority.[67]

There is an exception to the doctrine of apparent authority, however, that is minor in its application to private contractors but can be highly significant when applied to governmental contractors and that can result in the doctrine not applying to governments in a great number of situations.[68] The North Carolina Supreme Court has noted that the doctrine of apparent authority does not apply when the party dealing with the agent could have determined the limits of the agent's authority by referencing a public record. In *O'Grady v. First Union National Bank*, the agent was acting under a power of attorney that was required by statute to be recorded. Because of that fact, the court refused to apply the doctrine of apparent authority inasmuch as "a third party is deemed to have notice of the nature and extent of the agent's authority."[69] Similarly, many internal policies of local governments are evidenced in documents that are subject to the public records law (unlike comparable documents of a private organization), and such a document might make clear that the agent in question did not have authority to bind the local government. This point is suggested and illustrated by the juxtaposition of two court of appeals cases.

In *Lee v. Wake County* a county employee had filed a workers' compensation claim against the county. The parties entered into a mediated settlement conference, pursuant to Industrial Commission rule, and agreed to a settlement of $750,000 to the claimant. The rules of the Industrial Commission required that the parties to such a conference have authority to bind their principals. Even with public entities the commission's default rule was that the representative have authority to make decisions that were binding on the principal, although the rule acknowledged that with some entities a governmental board might have to approve particular settlements. Wake County refused to honor the settlement agreement because of an alleged county policy that required any settlement of more than $100,000 to go to and be approved by the board of commissioners. When the Industrial Commission agreed with the county, the employee

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citations to several dozen cases from a wide range of states, but there are none from North Carolina. *See also* 2 Aniteau on Local Government Law § 32.93[4] (Sandra M. Stevenson, ed., 2d ed. 2013).

67. Rowe v. Franklin Cnty., 318 N.C. 344, 349 S.E.2d 65 (1996) (contract invalid because other party had actual knowledge of agent's lack of authority); Lee v. Wake Cnty., 165 N.C. App. 154, 598 S.E.2d 427 (2004) (contract valid because no evidence introduced of contrary county policy antedating date of contract). *See* Pritchard v. Elizabeth City, 81 N.C. App. 543, 344 S.E.2d 821 (1986) (contract valid because city agents had apparent authority and therefore city estopped from showing otherwise). In *Community Projects for Students, Inc. v. Wilder*, 60 N.C. App. 182, 298 S.E.2d 434 (1984), the court's opinion might be understood as holding that the doctrine of apparent authority does not apply to local governments: "Neither can plaintiff prevail on the theory of Wilder's apparent authority to obligate defendant Board of Education. Those who deal with public officials are deemed to have notice of the nature and extent of authority of such officials to bind their principal." *Id*. at 183, 298 S.E.2d at 435. To the extent that is a correct understanding of the opinion, the quoted language seems to have been superseded by the later supreme court decision in *Rowe*.

68. Although the national sources cited and quoted above do not mention this exception as the basis for their statements that the doctrine does not apply to governments, it may be that the exception can explain the statements.

69. 296 N.C. 212, 226, 250 S.E.2d 587, 596 (1978).

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appealed to the court of appeals. That court reversed, noting that the county sought to prove the county policy through a document that had been adopted by the board of commissioners shortly *after* the county's representative had agreed to the settlement. Because of the chronology, the court held that this was insufficient to show a clear lack of authority on the part of the agent. The document in question seemed to suggest that it was reaffirming an existing policy, but it was the only document introduced and therefore there was no evidence before the court that the policy predated the mediation conference.

Some years earlier the court of appeals had decided *L&S Leasing, Inc. v. City of Winston-Salem*, in which a property owner sought specific performance of an alleged contract to sell land to the city.[70] The city representative who contracted with the plaintiff did not have authority to bind the city, and the city introduced into evidence a city code provision that limited contracting power to the city purchasing agent or to other employees specifically designated by resolution of the governing board. Noting that this internal restriction on the representative's power was a matter of public record, the court held that those contracting with a local government were charged with notice of such a limitation.[71] The only real difference between *L&S Leasing* and *Lee* lies in what was introduced into evidence; if Wake County had introduced its apparent existing policy requiring board approval, *O'Grady* would seem to have required that the contract not be enforced.

It is important to understand the narrow applicability of the apparent authority doctrine, even in those situations in which it might apply to a local government. First, it does not apply when the contract is question is ultra vires; that is, beyond the authority of the government to enter into at all, even through the principal or an actual agent. This is clear from *Rowe v. Franklin County*, the supreme court decision applying the apparent authority doctrine to a local government, in which the court did not reach the apparent authority issue until it first decided that the contract in question was not ultra vires. The court went on to explicitly note, however, that simply because a contract was entered into by an unauthorized agent, that did not make the contract ultra vires.[72] Second, the doctrine does not apply when the contract

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70. 122 N.C. App. 619, 471 S.E.2d 118 (1996).

71. The city's argument structured the case as one about whether the city was estopped to show its agent's lack of authority, but the court of appeals has on several occasions remarked that the apparent authority doctrine and estoppel are two sides of the same coin. *E.g.,* Wiggs v. Peedin, 194 N.C. App. 481, 488, 669 S.E.2d 844, 849 (2008) ("There is virtually no difference between estoppel and apparent authority. Both depend on reliance by a third person on a communication from the principal to the extent that the difference may be merely semantic.") Oddly, in *L&S Leasing,* the contract itself stated that it was contingent upon approval by the City County Utilities Commission, which was not given, but the city apparently did not rely on this fact as a defense but argued a lack of apparent authority.

72. The court stated:

> However, the fact that the trustees had no authority to enter into an enforceable long-term employment contract on behalf of the hospital does not mean that the contract was ultra vires. . . . If a corporation has authority under statute and charter to enter into a particular kind of contract, the fact that an agent of the corporation purports to bind the corporation without permission of the corporation does not make this act ultra vires. It merely makes this particular act one that the corporation has not authorized, even though other such acts by proper corporate agents would be binding on the corporation.

318 N.C. 344, 348–49, 349 S.E.2d 65, 68–69 (1996).

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in question was entered into without compliance with mandatory procedural requirements, such as statutorily required competitive bidding.[73] Again, such a contract would not bind the principal even if made by the principal or an authorized agent, and therefore it cannot become binding on the principal through actions of an apparent agent.

D. *Local governments are frequently not subject to quasi-contract remedies.*

In *Smith v. State,* the North Carolina Supreme Court held that the doctrine of sovereign immunity includes an immunity from suit in contract as well as tort, but that the state waives this immunity when it enters into a valid contract.[74] In such a case the courts have full jurisdiction to apply normal contract principles to any dispute arising from the contract. Twenty-two years later, however, the court recognized an important exception to *Smith*, applicable when the plaintiff is relying upon theories of quasi-contract. In *Whitfield v. Gilchrist,* a Charlotte attorney claimed he had been asked by the local district attorney to prosecute two actions to have motels declared public nuisances, that he had successfully done so, but that the district attorney refused to pay him for his services. Because there was apparently no written agreement with the district attorney, the attorney brought suit to recover the value of his services in quantum meruit. The trial court dismissed the suit, the court of appeals reversed, and the supreme court granted discretionary review. In *Whitfield,* the court refused to extend *Smith* to quasi-contract actions; in such actions there is no actual contract but only an implied one. The court would not imply a decision on the part of the state to waive its immunity in the context of a contract that itself was only implicit:

> [W]e will not first imply a contract in law where none exists in fact, then use that implication to support the further implication that the State has intentionally waived its sovereign immunity and consented to be sued for damages for breach of the contract it never entered in fact. Only when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach.[75]

The court of appeals subsequently extended the logic of *Whitfield* to counties in *Archer v. Rockingham County*[76] and to cities in *Eastway Wrecker Service, Inc. v. City of Charlotte*.[77] In those two cases, the court of appeals used the term "sovereign immunity" as the basis for its holdings, implying that sovereign immunity protects local governments as well as the state. In a later decision, however, the supreme court explicitly distinguished between *sovereign immunity*, which protects the state from suit, and *governmental immunity*, which protects local governments from suit.

> Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. Under the doctrine of governmental immunity, a county is

73. *See* Nello L. Teer Co. v. N.C. State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

74. "We hold, therefore, that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976).

75 348 N.C. 39, 42–43, 497 S.E.2d 412, 425 (1998).

76. 144 N.C. App. 550, 548 S.E.2d 778 (2001).

77. 165 N.C. App. 639, 599 S.E.2d 410 (2004).

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> immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity. *Meyer v. Walls,* 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citations omitted). These immunities do not apply uniformly. The State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.[78]

The supreme court continued this linguistic precision in the recent case of *Estate of Williams ex rel. Overton v. Pasquotank County Parks & Recreation Department,*[79] in which the court carefully used the term "governmental immunity" throughout the opinion.[80]

The supreme court's emphasis on the distinctions between sovereign immunity and governmental immunity should not have caused any difference in the outcome of the two court of appeals cases extending the doctrine of *Whitfield* to local governments. First, the supreme court has stated on a number of occasions that governmental immunity extends to contract actions as well as those in tort.[81] Second, *Archer*, the county case, involved emergency medical services, while *Eastway*, the city case, involved towing disabled and illegally parked vehicles. Both are almost certainly governmental as opposed to proprietary activities, and so governmental immunity would apply. But if governmental immunity is the basis for denying local government liability in quasi-contract, then logically the governmental-proprietary distinction should apply to quasi-contract actions as well as to tort actions. That is, if a local government that is engaged in a proprietary activity is sued under a quasi-contract theory because of events within that activity, the plaintiff should be able to proceed and obtain quantum meruit relief, just as would be possible against a private defendant. This was just the outcome permitted by the Virginia Supreme Court in a 2012 case.[82]

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78. Evans v. Hous. Auth. of City of Raleigh, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004).

79. 366 N.C. 195, 732 S.E.2d 137 (2012).

80. The court of appeals has tended not to be as precise as the supreme court in this regard. See, for example, *Howard v. Durham County*,___ N.C. App. ___, 748 S.E.2d 1 (2013), in which the county defendant pleaded *sovereign immunity*, which the court then discussed in terms of both *sovereign* and *governmental immunity,* and *M. Series Rebuild, LLC v. Town of Mt. Pleasant*, ___ N.C. App. ___, 730 S.E.2d 254 (2012), in which the court discussed *sovereign* immunity as a defense by the town.

81. *E.g., Evans*, 359 N.C. 50, 602 S.E.2d 668. In *Evans*, the court noted that the defendant housing authority "like other municipal corporations, is entitled to immunity in tort and contract for acts undertaken by its agents and employees in the exercise of its governmental functions, but not for any proprietary functions it may undertake." 359 N.C. at 53, 602 S.E.2d at 670. Courts in other states have made clear that governmental immunity applies to contract claims as well as tort claims. *E.g.,* Watts v. City of Dillard, 670 S.E.2d 442 (Ga. Ct. App. 2008); Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006).

82. Jean Moreau & Assoc., Inc. v. Health Ctr. Comm'n *ex rel*. Cnty. of Chesterfield, 720 S.E.2d 105 (Va. 2012). In Texas, different panels of that state's set of intermediate appellate courts have disagreed as to whether the governmental-proprietary distinction applies in contract actions. *Compare* City of San Antonio *ex rel*. City Public Serv. Bd. v. Wheelabrator Air Pollution Control, Inc., 381 S.W.3d 597 (Tex. Ct. App. 2012), *with* City of Georgetown v. Lower Colo. River Auth., 2013 WL 4516110 (Tex. Ct. App. 2013).

Many states do not permit recovery in quantum meruit against local governments even if there is no claim of immunity. These states take the position that to permit quasi-contract relief in cases of either ultra vires contracts or contracts with procedural flaws would be to undercut the statutory limitations. *See, e.g.*, Baltazar Contractors, Inc. v. Town of Lunenburg, 843 N.E.2d 674 (Mass. Ct. App. 2006). Other

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V. Doctrines Especially Related to Litigation

A number of doctrines create special rules that protect local governments from suit, that give local governments greater access to the courts, or that limit the remedies available against local governments. One other doctrine in this section bars local governments from using litigation to give themselves powers not intended by the legislature.

A. *Local government are protected against some tort liabilities by the doctrine of governmental immunity.*

The immediately preceding section discussed governmental immunity to suit in quasi-contract actions. This section briefly describes the far more common (and well-known) application of that immunity to actions in tort. Essentially the courts have declared that if a public employee or official takes some sort of tortious action within the scope of his or her employment or position, the local government *will not* be liable for that action if it was taken within a *governmental* activity of the local government; the local government will be immune from suit. If, however, the action was taken within a *proprietary* activity of the government, the government will be subject to the same rules of liability as any private entity. The distinctions as to which activities are governmental and which proprietary have developed over a couple of centuries of court decisions and do not always seem consistent or even sensible, but the basic distinction and the doctrine of which it is a part are deeply engrained in the law. In the recent case of *Estate of Williams ex rel. Overton v. Pasquotank County Parks & Recreation Department,*[83] the North Carolina Supreme Court attempted to clarify and restate the law of governmental immunity. First, it repeated the point that if an activity is one that can be engaged in *only* by a governmental agency, then the activity is by definition governmental. Admitting, though, that this category seems to be shrinking, the court went on to set out three factors to be considered when an activity is one engaged in both by government and by the private sector:

- Is the service traditionally one that is provided by a governmental entity?
- Is a substantial fee charged for the service provided?
- Does that fee do more than simply cover the operating cost of the service provider?

Finally, the court cautioned against broad categorization, noting that an activity that is generally considered governmental may have certain aspects that are proprietary and vice versa. Obviously, the categorization of particular activities may continue to evolve.

Inasmuch as governmental immunity is a common law construct, it is amenable to legislative change. North Carolina's General Assembly has so far refused to abolish the immunity altogether, but it has authorized counties and cities to waive their immunity through the purchase of insurance,[84] and many governments have done so. Such a waiver, though, requires legislative

states, however, do permit claims for unjust enrichment against local governments. *E.g.*, Tucci v. City of Biddeford, 864 A.2d 185 (Me. 2005).

83. 366 N.C. 195, 732 S.E.2d 137 (2012).

84. G.S. 153A-435 for counties; G.S. 160A-485 for cities.

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authorization,[85] and there remain a variety of local special purpose entities without such authorization.[86]

B. *Local governments are not subject to statutes of limitations when the litigation arises in a governmental activity.*

In *Rowan County Board of Education v. United States Gypsum Co.,* the school board in 1983 responded to communications from environmental regulators and removed construction materials from a number of schools because the materials contained asbestos. When the school board brought suit against the company that had manufactured the materials, the company sought to have the suit dismissed because of the statute of limitations; it noted that the materials had been bought between 1950 and 1961, well beyond the running of any applicable limitation. The trial court denied the defendant's motions and eventually entered judgment for the school board, and the court of appeals affirmed, although by a divided panel. The supreme court affirmed, invoking the common law doctrine of *nullum tempus occurrit regi*—"time does not run against the king"—to explain its holding. Noting that earlier cases seemed to follow two opposing lines, the court undertook a full review of this area of the law and concluded that this doctrine remained in effect in North Carolina and, depending on the sort of activity involved, "applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State."[87] The court stated:"If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly includes the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly excludes the State."[88]

Rowan was a case sounding in negligence, fraud and misrepresentation, and breach of implied warranty. Subsequently, the court of appeals held that the doctrine also meant there was no statute of limitations when a local government sought to enforce an ordinance through suit for civil penalties.[89]

C. *In certain circumstances local governments are not subject to estoppel, even when they have received the full benefit from a contract or the other party has relied on the local government's representations.*

Civil litigation. There have been two sorts of situations in which the courts have refused to apply equitable doctrines of estoppel against local governments, particularly in contract disputes. First, if a local government contract or other action is ultra vires—that is, beyond the statutory powers of the local government—the courts refuse to estop the local government from pointing out that fact and thereby invalidating the contract. This is true even if the

85. Stephenson v. Raleigh, 232 N.C. 42, 59 S.E. 195 (1950); Galligan v. Town of Chapel Hill, 276 N.C. 172, 171 S.E.2d 427 (1970).

86. A more detailed examination of governmental immunity and of government liability in general is found in Anita Brown-Graham, *Civil Liability of the Local Government and Its Officials and Employees*, Article 12 *in* County and Municipal Government in North Carolina (2007). A new edition of this School of Government publication is forthcoming in fall 2014.

87. Rowan Cnty. Bd. of Educ. V. U.S. Gypsum Co., 332 N.C. 1, 8, 418 S.E.2d 648, 653 (1992).

88. *Id*. at 9, 418 S.E.2d at 654.

89. City of Greensboro v. Morse, 197 N.C. App. 624, 677 S.E.2d 505 (2009).

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other party to the contract has relied upon representations from the local government,[90] or if the local government has received the full benefit of the contract.[91] A typical example is *Bowers v. City of High Point,* in which the court held that the city did not have authority to calculate police officer separation allowances in the way it did and refused to estop the city from pointing out that lack of authority.[92] Thus, even though plaintiffs had retired from the city in reliance on the city's representations as to the amounts of their separation allowances, the city was entitled to reduce those allowances to conform to the enabling legislation.[93]

Second, even if there is clear enabling authority and the other party has relied upon the government's actions pursuant to that authority, the courts will not estop the government from arguing that the enabling authority is in fact unconstitutional. For example, in *Commissioners of Buncombe County v. Payne,*[94] the county had issued bonds in 1875 pursuant to statutory authority and had issued refunding bonds in 1893, pursuant to subsequent statutory authority; the county then paid interest on the bonds for some period of time. Unfortunately, though, the original enabling authority had not been enacted in conformity with the constitutional requirement of roll-call readings on separate days, and the court held that the county was not estopped by having paid interest from pointing that fact out. It held that the bonds were not valid obligations of the county.[95]

Ordinance enforcement. In addition to the cases involving attempted estoppel arguments in civil litigation, the North Carolina Supreme Court has held that a local government cannot be estopped from enforcing its ordinances. In *City of Raleigh v. Fisher,* the defendants had been operating a bakery in a residential zone, in violation of the local zoning ordinance, for more than a decade.[96] When the city belatedly decided to enforce the ordinance against the defendants, they argued that it should be estopped from doing so. They had paid the city's privilege license tax on the business the entire time, and in reliance on the city's acquiescence in their use, they had expended more than $75,000 in improvements to their building. Nevertheless, the court held that there could be no estoppel against the city's enforcement:

> Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an

90. *E.g.,* Moody v. Transylvania Cnty., 271 N.C. 384, 156 S.E.2d. 716 (1967) (plaintiff had contracted to provide ambulance service to county and was continuing to do so; court held that counties do not have authority to enter into such contracts).

91. *E.g.,* Madry v. Town of Scotland Neck, 214 N.C. 461, 199 S.E. 618 (1938) (plaintiff had responded to town's offer of reward for information leading to conviction of murderer of police chief; court held that towns do not have authority to offer rewards.)

92. 339 N.C. 413, 451 S.E.2d 284 (1994).

93. Other cases of this sort include *Jenkins v. City of Henderson*, 214 N.C. 244, 199 S.E. 37 (1938) (ultra vires for city to agree to payments to other party when there is no liability running to that party), and *Burgin v. Smith*, 151 N.C. 561, 66 S.E. 607 (1909) (amount of contract exceeded legislative authorization for the contract).

94. 123 N.C. 432, 31 S.E. 7111 (1898).

95. Other cases of this sort include *Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953) (enabling legislation was unconstitutional local act), and *Debnam v. Chitty*, 131 N.C. 657, 43 S.E. 3 (1902) (enabling legislation not enacted in conformity with constitutional requirements).

96. 232 N.C. 629, 61 S.E.2d 897 (1950).

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> acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.[97]

The court of appeals, however, has lessened the force of this holding in at least two later cases. In those cases panels of that court, while accepting that a local government may not be estopped from enforcing an ordinance, held that it still might be barred from enforcement by the doctrine of laches.[98] (It might be recalled that another and later panel of that court held that there is no statute of limitations on a local government's enforcement of its ordinances.)

D. *A local government cannot agree to a consent judgment if the judgment authorizes or requires the government to act beyond its statutory authority.*

This rule is a corollary of the basic doctrine that a local government can only do those things that it has statutory authority to do. Because of that limitation, a government cannot bootstrap beyond its statutory powers through the device of litigation settlement or a consent judgment. In *Union Bank of Richmond v. Commissioners of Town of Oxford,* the town had issued $40,000 of bonds to subscribe to the stock of a railroad and apparently had ceased to pay interest as the bonds required.[99] Some or all of the bonds were held by Union Bank, and it brought suit on the bonds. After a trial, the bank and the town entered into a consent judgment, under which the town agreed to pay $20,000 to the bank. It later, however, refused to comply with the terms of the judgment, arguing that the railroad charter that authorized the original subscription and the accompanying bond issue had not been passed on three separate days in each house as required in the state constitution; the bank responded that this argument was foreclosed by the consent judgment. The court held that the charter had indeed not been enacted in the manner required by the constitution and therefore the original bond issue was invalid and beyond the town's powers. That being so, the town could not avoid its lack of authority through the device of a consent judgment:

> If the commissioners of the town were vested with no authority to create the debt, they certainly could not acquire such power by entering into a consent judgment. The consent judgment entered into by the town authorities could not bind the town to a subscription to a railroad unless the power to subscribe or donate had been legally granted by the legislature. Consent judgments are, in effect, merely contracts of parties, acknowledged in open court, and ordered to be recorded. As such they bind the parties themselves thereto as fully as other judgments; but, when parties act in a representative capacity, such judgments do not bind the *cestuis que trustent* unless the trustees had authority to act; and when (as in the present case) the parties to the action, the town authorities, had, as appears above, no authority to issue the bonds, their honest belief, however great, that they had such power, would not authorize them to acquire such power, and bind the town by consenting to a judgment. It is not a question of a fraudulent judgment, but a void judgment from want of authority to consent to a decree to bind principals (the taxpayers) for whom they had no authority to

97. *Id*. at 635, 61 S.E.2d at 902.

98. Abernathy v. Town of Boone Bd. of Adjustment, 109 N.C. App. 459, 427 S.E.2d 875 (1993); Town of Cameron v. Woodell, 150 N.C. App. 174, 563 S.E.2d 198 (2002).

99. 119 N.C. 214, 25 S.E. 966 (1896).

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> create an indebtedness by consenting to a judgment any more than they would have had by issuing bonds.[100]

E. *Local government property held in governmental use is not subject to execution to enforce a judgment.*

This point was covered above in the text accompanying notes 26–32.

F. *In the absence of a statutory provision to the contrary, local governments are not subject to punitive damages.*

In *Long v. City of Charlotte,* the North Carolina Supreme Court joined the large majority of courts that have held that a local government is not subject to punitive damages unless made so by specific statutory provision.[101] The court added that this is a rule that applies to both governmental and proprietary activities of a local government. The court quoted the United States Supreme Court in justifying this doctrine:

> Punitive damages by definition are not intended to compensate the injured party, but rather to *punish* the tortfeasor whose wrongful action was intentional or malicious, and to *deter* him and others from similar extreme conduct. (Citations omitted.) Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort . . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers (emphasis added).[102]

A few years later the North Carolina Supreme Court allowed a statutory exception to this doctrine in circumstances that not all the justices thought adequate. In *Jackson v. Housing Authority of City of High Point,* the plaintiff had brought a wrongful death action against the authority, seeking damages for the carbon monoxide death of a tenant that the plaintiff blamed on faulty maintenance by the authority. Because the wrongful death statute, G.S. 28A-18-2, permits recovery of punitive damages, the court held that such damages could be recovered against the authority. The two dissenters believed that the statutory exception needed to more explicitly include governmental entities than was the case with the wrongful death statute.

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100. *Id*. at 226–27, 25 S.E. at 969. A number of courts in other states have reached the same conclusion: Ad-Ex, Inc. v. City of Chicago, 565 N.E.2d 669 (Ill. Ct. App. 1990) (settlement that purported to change city sign ordinance invalid because city did not follow proper procedures for changing ordinance); PMC Realty Trust v. Town of Derry, 480 A.2d 51 (N.H. 1984) (city may not bargain away discretion regarding zoning through consent judgment). *See also* Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs, 142 F.3d 468 (D.C. Cir. 1991), in which the court held that a North Carolina county could not enter into a settlement that expanded its authority under state law.

101. 306 N.C. 187, 293 S.E.2d 101 (1982).

102. *Id*. at 207, 293 S.E.2d at 114, *quoting* Newport v. Facts Concert Inc., 453 U.S. 247, 266–67 (1981).

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G. *Local governments are not required to pay post-judgment interest, at least when the litigation involved a governmental activity, unless a statute specifically requires them to do so.*

In *Yancey v. North Carolina State Highway & Public Works Commission*, the commission had brought and concluded a condemnation action and had offered the landowners the amount set in the judgment. The landowners refused the offer, however, and brought suit for a mandamus ordering the commission to also pay interest on the judgment from the date it was rendered. The trial court sustained the commission's demurrer, and the North Carolina Supreme Court affirmed.[103] The court began by making clear that this case was not about paying interest from the date of the taking up to the time of the judgment but rather about paying interest only after entry of the judgment. It noted that some courts had required state governments to pay such interest, but it declined to follow those courts. Rather, it relied on "the established principle that interest may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so."[104] Any statutory consent must be more than a boilerplate authorization to sue and be sued; there must be some sort of specific mention of the state in the statute permitting or requiring payment of interest, and in this particular case there was none.

Shavitz v. City of High Point is the case that held that the clear proceeds of penalties collected through a city's red-light camera enforcement program were constitutionally required to be paid to the local board or boards of education.[105] The trial court had ordered the city to pay post-judgment interest on the award, and the court of appeals reversed. It noted the outcome of the *Yancey* case and held that the principle of that case should be extended to local governments when they are engaged in governmental activities, adopting the governmental-proprietary distinction set forth in *Rowan County Board of Education v. United States Gypsum Co.* on the applicability of statutes of limitations to local governments.[106] Ordinance enforcement was clearly a governmental activity, and therefore the trial court was in error in ordering the city to pay post-judgment interest.[107]

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103. 222 N.C. 106, 22 S.E.2d 256 (1942).

104. *Id*. at 109, 22 S.E.2d at 259.

105. 177 N.C. App. 465, 630 S.E.2d 4 (2006).

106. See the text accompanying notes 82–84, *supra*.

107. *Accord*, City of Gastonia v. Hayes, 179 N.C. App. 652, 634 S.E.2d 641 (2006) (unpublished). In this last case the court held that G.S. 24-5 did not require the city to pay interest because the statute did not specifically mention the state or local governments.

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