

Introduction

A New Statutory Requirement

The 2009 North Carolina General Assembly passed a law requiring all North Carolina cities, counties, local boards of education, unified governments, sanitary districts, and consolidated city-counties to adopt a resolution or policy containing a code of ethics to guide actions by the governing board members in the performance of their official duties as members of that governing board.¹ Each governing board must adopt its resolution or policy by January 1, 2011.

This guidebook is intended to help local elected boards and their staff members develop codes of ethics that meet the statutory requirements. It includes a Model Code with optional provisions as well as commentary and discussion questions that boards are encouraged to use in developing and interpreting their own codes of ethics.

This Guidebook's Approach

The Model Code sets out a comprehensive statement of guiding ethical principles, based on the specific requirements of G.S. 160A-86.² Local government officials will find it useful to return regularly to these principles as they develop and interpret their own code provisions.

The statement of principles is based on the assumption that the public trust can only be preserved if elected officials are serious about their calling and make informed decisions that reflect core ethical principles they hold in common with the citizens they represent.

1. N.C. GEN. STAT. (hereinafter G.S.) § 160A-86. This statute was originally enacted as G.S. 160A-83 by Session Law (S.L.) 2009-403. It was codified by the revisor of statutes as G.S. 160A-86. The law, which took effect January 1, 2010, also requires that all elected local governing board members receive two clock hours of ethics training by January 1, 2011, and again within twelve months of each reappointment or reelection thereafter. See G.S. 160A-87 (G.S. 160A-84 prior to codification). The text of S.L. 2009-403 may be found in Appendix 3.

2. G.S. 160A-86 was originally adopted as G.S. 160A-83. See Note 1 for the explanation of renumbering.

Making such decisions requires the development of skills in ethical policy-making rather than simply the memorization of rules. It also requires understanding the difference between the spirit and the letter of the law. Elected officials must serve as “especially responsible citizens”³ who model ethical behavior in their communities.

The ethical principles outlined in the guidebook are supplemented by a commentary that applies these principles to some specific situations that are likely to occur. Alternative wordings are also provided for many provisions, in recognition that boards will wish to take a variety of approaches in their codes.

The guidebook reflects the fact that one must be realistic about what can and cannot legally be required in codes adopted pursuant to G.S. 160A-86. Some patterns of behavior that might be desirable in board members might only be achieved by the good faith efforts of the individual board members themselves rather than by a code of ethics.

For example, it may be a good idea for board members to inform the public and each other about any financial affairs that may pose conflicts with their public duties. A local governing board, however, simply does not have the power to require its members to provide financial disclosure statements.⁴

In addition, local elected governing boards do not have legal authority to forbid a member from engaging in conduct that reflects poorly on the community. They must rely on persuasion rather than law to encourage the member to behave differently. They should also be willing to listen to the member’s point of view rather than lashing out in a manner that is disrespectful or that may not be based on all of the facts.

The remedies a local board may employ when its code is violated are quite limited under current North Carolina law. The principal response available to a board when one of its members violates its code is to expose the issue and to express its displeasure by adopting a resolution of censure. This resolution can be discussed and approved publicly and incorporated in the board’s minutes as a permanent record that expresses the sentiments of the majority of the board. Such a resolution has no legal effect, however. It is in no way binding on the member who is censured. If the board or any of its members believes that a board member has violated a state criminal statute, the matter may be referred to the local district attorney for possible prosecution. Appendix 1 explains some of the specific

3. Terry L. Cooper, *The Responsible Administrator: An Approach to Ethics for the Administrative Role*, 4th ed. (San Francisco: Jossey-Bass, 1998), 48 (quoting Paul Appleby).

4. The only exception would be if the General Assembly passed a local act granting this power to a particular local government. See also the introductory text to “Optional Section on Censure of Board Members.”

behaviors that local board members should practice in order to avoid violating state statutes dealing with conflicts of interest.⁵

Scope of Local Codes

Under G.S. 160A-86 all North Carolina cities, counties, local boards of education, unified governments, sanitary districts, and consolidated city-counties must, by January 1, 2011, adopt a resolution or policy containing a code of ethics to guide actions by the governing board members in the performance of their official duties as board members. The code must address at least five key board member responsibilities.⁶ These responsibilities reflect concern for ethical principles as well as for the effects of the board members' decisions on others.

The five areas to be addressed are as follows (emphases and comments added):

1. The need *to obey all applicable laws* regarding official actions taken as a board member.

Comment: For example, the member must honor the oath of office, in which the member swore to uphold the constitution and laws.⁷

2. The need *to uphold the integrity and independence* of the board member's office.

Comment: Among other things, this principle requires board members to make decisions based on the public good and not on their desires or considerations of special interests.

3. The need *to avoid impropriety* in the exercise of the board member's official duties.

Comment: Board members are to act as "especially responsible citizens" who are to honor the public trust as they carry out their duties. Their official actions should be above reproach.

5. Federal law imposes further ethical requirements on local governments that receive grants from the federal government. Those requirements are beyond the scope of this guidebook, which is focused on the provisions of G.S. 160A-86. Local officials with federal grants should consult their attorneys as well as reviewing two posts by Eileen Youens of the UNC School of Government published in the School's online blog, *Coates' Canons*. See Eileen Youens, "Protests and ARRA and Bears, Oh My!," *Coates' Canons*, UNC School of Government, October 27, 2009, <http://sogweb.sog.unc.edu/blogs/localgovt/?p=1129>, and "Federal Grants and Contracts Management," *Coates' Canons*, UNC School of Government, November 4, 2009, <http://sogweb.sog.unc.edu/blogs/localgovt/?p=1185&cpage=1#comment-180>. See also the sources cited in those posts, as well as the follow-up questions and Youens's responses.

6. G.S. 160A-86.

7. N.C. Const. art. VI, § 7. The text of the oath is set out in Appendix 3.

4. The need to *faithfully perform* the duties of the office.

Comment: A public official who acts faithfully is one whom others can trust and respect.

5. The need to *conduct the affairs of the governing board in an open and public manner*, including complying with all applicable laws concerning open meetings and public records.

Comment: A public official who is honest, fair, kind, and compassionate and who conscientiously upholds the public trust will honor the spirit as well as the letter of the law. He or she will see openness or transparency as an important part of that responsibility.

The statute leaves local boards a good deal of leeway in deciding what their codes will contain, as long as the code addresses the five topics listed above. The code may be very detailed, or it may be very general. It may describe behavior the board's members and the board as a whole should strive toward or behavior board members should avoid.

Enforcement of Local Codes

As noted earlier, G.S. 160A-86 does not describe or authorize sanctions or other means of enforcing locally adopted ethics codes. Legal action can only be taken if a board member's behavior violates some other law, such as the state's criminal law, the open meetings or public records law, or a common law or constitutional limitation that affects governmental actions.⁸

When a board member does not comply with the code, the rest of the board can do little other than adopting a resolution censuring the member. It is hoped board members will choose to avoid impropriety and obey all applicable laws, but they cannot be forced to do so by the board. The board must rely on voluntary adherence to the code and to other laws.

8. See, e.g., G.S. 14-230 (neglect of duty); G.S. 14-234 (conflicts of interest in contracting); G.S. 14-234.1 (misuse of confidential information); G.S. 143-318.16 to -318.16C (remedy provisions under the open meetings statutes); G.S. 132-9 (remedy provisions under the public records statutes); and 133-32 (gifts and favors). All of these statutes are reprinted in Appendix 3, and some are discussed in Appendix 1. As suggested in the text, constitutional rules such as those governing procedural due process are also relevant, as is the common law governing conflicts of interest generally. Board members may obtain more information about procedural due process and common law conflicts by contacting the board's attorney and the UNC School of Government.

This is not to suggest, however, that codes of ethics should restate existing law that is separately enforceable by the district attorney or other persons. Including such restatements in a local code is redundant and may be confusing to board members and citizens.

An optional section describing procedures for censure is included at the end of the code. In addition, Appendix 1 provides guidelines for behavior that may help board members avoid violation of existing laws relating to conflicts of interest and voting.