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1979 LEGISLATION: SELF-DEALING, FIRE LANES, AND AGRICULTURAL NUISANCES

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THIS LOCAL GOVERNMENT LAW BULLETIN, which is being sent to city and county attorneys, addresses three subjects considered by the 1979 General Assembly that might be of particular interest to attorneys: (1) the new exception to G.S. 14-234, the self-dealing statute, for smaller cities and counties; (2) the attempts to provide specific authority for adopting ordinances that designate fire lanes on private property and for towing vehicles that are parked in those lanes; and (3) the prohibition on enforcing ordinances that make certain agricultural operations nuisances. In each case, this bulletin provides an opportunity for more extended discussion than the Institute's general summary of 1979 legislation can provide.

SELF-DEALING

G.S. 14-234(a) provides, in part:

> If any person appointed or elected a commissioner or director to discharge any trust wherein . . . any county, city or town may be in any manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, . . . he shall be guilty of a misdemeanor.

In recent years, for whatever reason, local officials have become more aware of this statute and of the strict prohibition it establishes. Increased awareness has brought to the forefront a problem that the statute frequently created in smaller counties and cities: A member of the governing board may be the only local supplier of particular commodities needed by the unit. Thus the mayor may own the only hardware store in town, or a commissioner may own the county's only Ford dealership--the source of parts for some of the county's vehicles. The 1979 legislature addressed this problem by

amending G.S. 14-234 to permit exclusion from the statute of certain officials in smaller counties and cities. The amendment was enacted by Chapter 720 (H 237), effective on ratification.

The Three Categories

Chapter 720 establishes a limited, permissive exclusion from G.S. 14-234 for three categories of officials:

1. Persons who hold an elected office of a village, town, or city with a population of 7,500 or less. (The officials of all but 45 cities fall into this category.)
2. Persons who hold an elected office of a county within which there is no incorporated village, town, or city with a population of more than 7,500. (The officials of all but 35 counties fall into this category.)
3. Physicians, pharmicists, and dentists who serve on a county social services board, a local board of health, or an area mental health board when no county within the board's jurisdiction contains an incorporated village, town, or city with a population of more than 7,500.

Two points should be made about these categories. First, except for the health-care professionals, they include only elected officials; appointed officials remain fully subject to G.S. 14-234. Second, the population figures to be used are those of "the most recent official federal census," not the annual estimates of the state's Department of Administration.

The Conditions

If a unit or agency and one of its officials wish to use these new exceptions, a number of conditions and reporting requirements must be met.

First, the undertaking or contract (or series of undertakings or contracts) between the unit or agency and the official must be approved by specific resolution of the governing body of the unit or agency. (For officials in the third category, the appropriate governing body would be the social services board, the health board, or the mental health board--not the board of county commissioners.) The resolution must be adopted in an open meeting and recorded in the body's minutes. Although the statute is silent in this regard, it would seem proper, if desired, to include in the resolution any limitations the governing body may wish to impose--such as limits on the commodities covered or the amounts of individual purchases.

Second, the official involved may not "in his official capacity participate in any way or vote" with regard to an undertaking or contract. Thus he should not participate in either the discussion of or the vote on the resolution authorizing the undertaking or contract or any subsequent discussion or vote on that subject, including the approval for payment of any bill or claim.

Third, the amount of undertakings or contracts with a single official within any 12-month period may not exceed $10,000 for medically related services or $5,000 for other goods and services. Several points are noteworthy regarding these dollar limitations.

A. The limitation applies to any 12-month period and not just to a calendar or fiscal year. Thus, before entering into any undertaking or contract, both the official and the unit or agency should be sure that the amount of that undertaking or contract when added to the total for the previous 12 months does not exceed the limitation.

B. The $10,000 limitation applies to "medically related services," while the $5,000 limit applies to "other goods and services." The juxtaposition of quoted phrases would seem to indicate that medical goods, such as drugs, are subject to the $5,000 limit.

C. To health-care professionals, the phrase "medically related services" apparently is understood to mean only services provided by a physician; it would not, for example, include services provided by a dentist. It is not clear whether the General Assembly intended the language to be so read, but the safer course is to read it narrowly, as a health-care term of art.

D. The dollar amounts seem to refer to the total size of the transaction or transactions and not to the profit or commission made on the transaction by the official.

Reporting Requirements

If an official enters into an undertaking or contract pursuant to Chapter 720, two reporting requirements must be met.

First, the unit's or agency's audited annual financial statements must show the total annual amount of undertakings or contracts with each official.

Second, a list must be posted "in a conspicuous place" in the city or town hall or the county courthouse, as appropriate, for the previous 12 months, (1) showing each official with whom the unit or agency has entered into undertakings or contracts; (2) briefly describing the subject matter of the undertakings or contracts; and (3) showing their total amount. This list must be updated at least quarterly.

Existing Exceptions

G.S. 14-234 already contained a number of exceptions when Chapter 720 was enacted. These exceptions permitted dealings with banks and savings and loan institutions, with public utilities, and with persons who furnish services, facilities, or supplies directly to the needy under public assistance programs. Chapter 720--especially the dollar limitation and the reporting requirements--does not affect these existing exceptions.

FIRE LANES

A number of cities and counties have been concerned about their authority to adopt ordinances designating fire lanes on private property, such as shopping centers and apartment complexes, and to enforce those ordinances by towing vehicles parked in fire lanes. No statute has specifically authorized such

an ordinance, nor has any statute specifically permitted towing. The 1979 General Assembly enacted two bills that affect these concerns, but unfortunately the new laws may not completely solve the problems.

Authority to Adopt Fire Lane Ordinances

Before the 1979 legislative session, the only authority for cities and counties to designate fire lanes on private property was the general authorization to adopt ordinances, G.S. 160A-174 for cities and G.S. 153A-121 for counties. While this was satisfactory to some county and city attorneys, others felt that more specific authority was necessary, mainly because designation of a fire lane does restrict the use made of private property. The General Assembly did provide more specific authority, but it may have created new difficulties.

The new authority is in Chapter 745 (H 1405), which adds identical provisions to G.S. Chapters 153A and 160A. These provisions authorize ordinances that regulate or prohibit "the stopping, standing, or parking of vehicles" in public vehicular areas during specified hours. "Public vehicular areas" is a defined term under the state's motor vehicle law [(G.S. 20-4.01 (32)] and includes such places as the parking lots of hospitals, apartment complexes, shopping centers, and commercial offices. Chapter 745 was principally intended to authorize ordinances to prohibit loitering in these parking lots after closing hours, but the language seems sufficient to authorize fire lane ordinances as well.

The difficulty with this new authority is that it conditions adoption of any ordinance upon a written request for the ordinance from "the owner or person in general charge" of the public vehicular area. Such a condition may make sense for an ordinance prohibiting after-hours loitering, but it makes no sense for one designating fire lanes. Even if the general ordinance-making authority was sufficient to permit fire lane ordinances, this specific authorization, with any conditions it might impose, probably supersedes the general authority. Therefore, such a request may well be necessary before fire lanes may be designated in a particular public vehiclar area.

Authority to Tow Vehicles Parked in Fire Lanes

Two new acts--Chapter 745, just discussed, and Chapter 552 (H 1201)--touch on the authority of units to enforce fire lane ordinances by towing. Chapter 745 provides that the owner of a vehicle parked in violation of an ordinance adopted pursuant to that chapter is deemed to have appointed any appropriate law enforcement officer as his agent for arranging for moving and storing the vehicle. This provision intends to provide the consent of the owner necessary to secure a lien on the vehicle in favor of the person who tows, as required by G.S. 44A-2.

The second act, Chapter 552, adds to G.S. 20-162 a new subsection that prohibits parking in a fire lane designated in a public vehicular area or street. Like Chapter 745, it goes on to deem any law enforcement officer as the vehicle owner's agent for purposes of towing or storage.

Thus two new laws each make provision to assure that a possessory lien will attach to any vehicle towed from a fire lane on order of a law enforcement officer. The difficulty is that neither law grants express authority to tow; rather, each assumes that authority exists elsewhere.

No statute expressly authorizes towing vehicles improperly parked in a fire lane. Therefore the authority, if it exists, must exist by implication. Although the North Carolina courts seem never to have had occasion to discuss whether the power to tow to enforce parking regulations could be implied from the authority to adopt those ordinances, the courts of several other states have suggested that towing can be done through implied authority. [For example, see Hambley v. Town of St. Johnsbury, 290 A.2d 18 (Vt. 1972), and Edwards v. City of Hartford, 139 A.2d 599 (Conn. 1958).] Such a result seems particularly compelling with fire lanes. The entire purpose of such an ordinance is to keep a lane free for fire equipment, and simply ticketing violators will not achieve that purpose; only towing will. This argument, based on common sense, may be reinforced by the language in Chapters 522 and 745. Deeming a law enforcement officer as agent of the owner for purposes of towing makes no sense if towing is not permitted; thus, it can be argued, the General Assembly understood that towing was impliedly authorized already. In sum, then, while the statutes could have been further clarified, a county or city probably may tow a vehicle illegally parked in a fire lane designated as such by local ordinance.

AGRICULTURAL NUISANCES

Expanding urbanization is a recurrent problem for agricultural users of land. The paradigm case is the hog farmer who has been at one location for many years. At first, he was well out in the country, away from any city or subdivision; but as the years go by and the nearby city grows, he eventually is bordered by one or more subdivisions. And a lot of the new owners do not like the way the hog farmer uses his land. Therefore he might find himself defending a nuisance suit or, if he has been annexed, in violation of the city's ordinance against keeping hogs.

The 1979 General Assembly sought to protect agricultural operations of this sort by enactment of Chapter 202 (H 481), which adds a new Article 57 to G.S. Chapter 106. The act first states that once an agricultural operation has been in place for at least one year, it may not thereafter be held to be a nuisance because of changed conditions in the area around it. This provision seems to prohibit nuisance actions, public or private, against the agricultural use. Second--and of more direct importance to local governments, especially cities--the act declares that any city or county ordinance "that would make the operation [of an agricultural use in place for a year] a nuisance or providing for abatement thereof as a nuisance" is void. This second element of the act deserves further attention.

First, two provisos need to be mentioned. The first permits ordinances to deal with nuisances that result from "the negligent or improper operation" of an agricultural use. This would seem to permit regulation of such uses. Second, the ordinance provisions of the act do not apply to agricultural operations located within a city on the effective date of the act--March 20, 1979. The real effect of this new law, then, will be on agricultural operations annexed in the future.

Second, the statute's definition of "agricultural operation" should be noted. The term "includes, without limitation, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products." It seems to include not just farms but also operations such as poultry-processing plants, stockyards, and slaughterhouses.

The principal question about Chapter 202 is just what ordinances it affects. On its face, it is directed at ordinances that "make the operation of [an agricultural operation] a nuisance." Clearly, if an ordinance states that keeping hogs within the city constitutes a nuisance and is therefore prohibited, that ordinance would be void as to hog-keepers who are annexed after the act's effective date. Few ordinances, however, specifically state that such a usage is a nuisance. Rather, the usual ordinance simply states that it "is unlawful to keep hogs or pigs [or whatever] in the city." Although one can never be sure how a court might interpret a statute, the clear intention seems to be to reach this sort of ordinance as well. A city's power to ban an otherwise lawful use of property from the city would seem to depend on whether that use is a nuisance inside the city. This being so, failure to declare the use a nuisance in the ordinance ought not to affect the validity of the ordinance. This should also be true of the common sort of ordinance that bans certain agricultural uses within a number of feet of residences. Once again, the ban depends on whether the proximity creates a nuisance, and that dependence should void the application of the ordinance.

The effect, then, is to give nonconforming-use status to agricultural uses that have been in place for more than one year, if a city's prohibitory ordinance first applies to them after the effective date of the act. (Despite the statute's language, I do not think that the entire ordinance is void, but simply its application in certain cases.)