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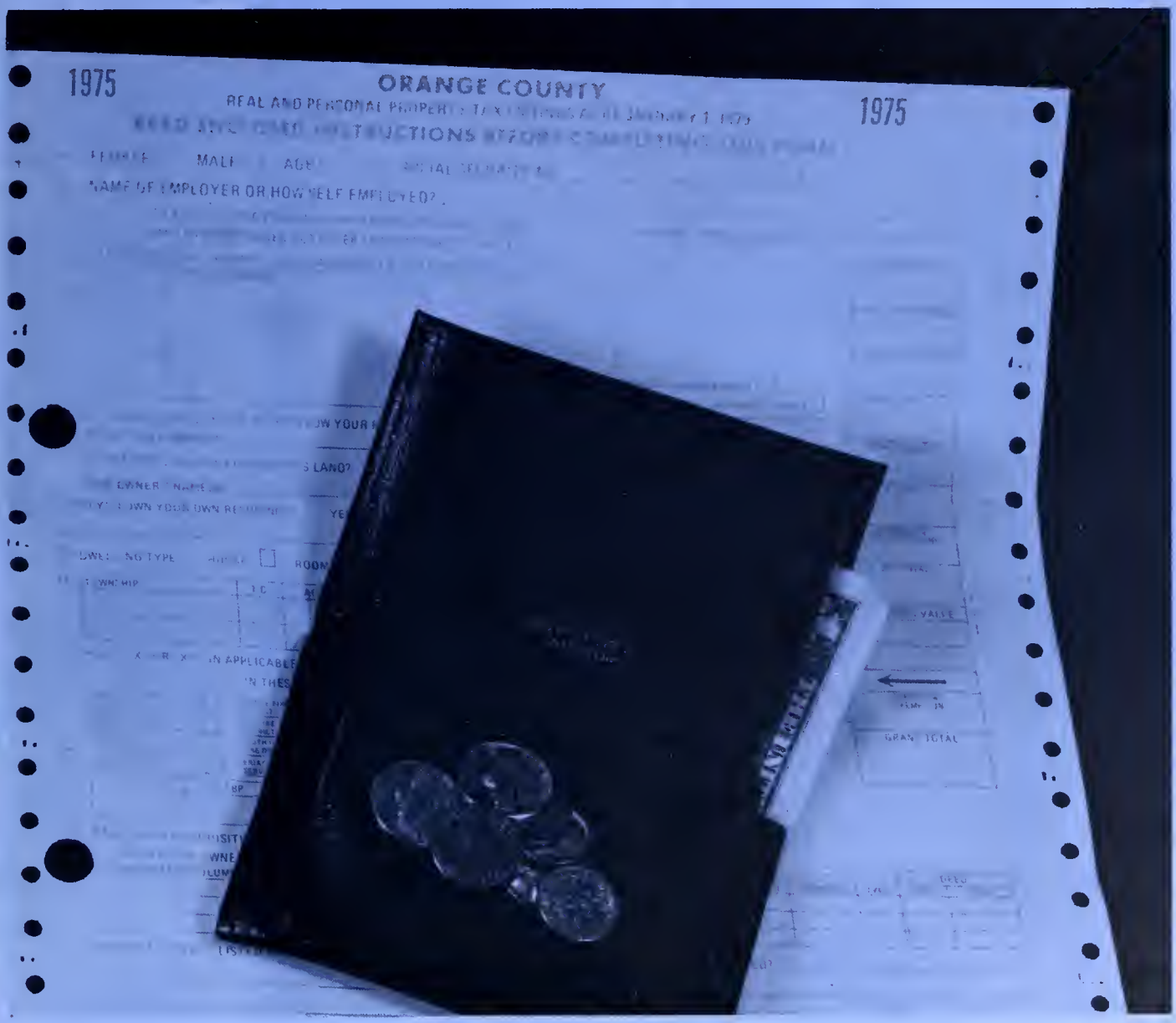

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POPULAR GOVERNMENT

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January is tax-listing month, and this Winter issue is devoted to a number of subjects associated with property taxation. The cover, taken from the Orange County listing form, reflects that interest.

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THE ECONOMICS OF LANDLORD/TENANT REFORM IN SMALLER CITIES

Michael A. Stegman and Howard J. Sumka

PROPOSALS TO MODERNIZE LAWS relating to landlords and tenants are being brought with increasing frequency before state legislatures. Among the more important reasons for this heightened concern are: the dependence of the majority of poor households upon the rental inventory to meet their shelter needs; the increasing inability of families to exercise free choice in their housing decisions because of rapidly rising prices and constraints on mobility and choice within local housing markets; and the growing feeling that these and related problems are due, in part, to the historical imbalance of landlord and tenant bargaining powers. The basis for legislative action in the landlord-tenant arena rests in the state's power to protect the health, welfare, and safety of the citizenry and is typically cast within the context of two basic suppositions. The first is the assumed relationship between substandard housing and a variety of physical, social, and psychological problems. The second is the unequal power position of tenants vis-a-vis their landlords and the archaic law of leases that has institutionalized and legitimized this inequality for hundreds of years. Because poor housing contributes to problems of poor health and because the common law of leases permits certain kinds of landlord practices that may contribute to worsening housing conditions, "it is necessary and appropriate that the state specify certain minimum rights and remedies, obligations and prohibitions for landlords and tenants . . . ."[1]

Rather than approaching landlord tenant reform from a radical perspective in which the basic concept of private property is redefined to eliminate the role of the landlord, most reform measures envision the ideal of a smoothly functioning, freely competitive housing market in which all shelter transactions take place at arm's length. Aware of the fact that should legislative actions cause the private sector to cease serving the shelter needs of the vast majority of lower-income American families, the public sector would have to become the houser of last resort, even the most liberal state legislatures have trod cautiously and pragmatically around the problems of landlord-tenant reform.

Thus, for example, of the more than twenty separate reform measures adopted in the fifteen or so states that have recently taken actions in the landlord-tenant realm, most dealt with such issues as prohibiting: forced entry for purposes of collecting rents due or for accomplishing an eviction;[2] willfully caused interruptions or terminations of utility services in order to accomplish an eviction;[3] retaliatory rent increases and evictions as a penalty for any lawful act of the tenant.[4] In addition, several measures have been enacted to regulate and control the use and disposition of security deposits.[5] These and related measures, including the enactment of legislation embodying the concept of implied warranties of fitness for human habitation in all leases,[6] are bound to be found wanting if their potential impact is to be gauged by reference to any radical model of social change.

Although the basis for landlord-tenant reform actions lies in the general responsibility of the state to preserve and promote the general welfare, the several provisions of the legislation we will discuss are far more direct in their language and generally deal with three related areas of concern:

(1) The maintenance of the physical condition of the rental stock at or above some specified minimum standards;
(2) Conditions under which rents and related payments may be charged and collected by landlords, and paid in full or in part, or withheld by tenants;
(3) The legal, institutional, and procedural framework within which rental transactions shall be negotiated and landlord-tenant relationships defined, including the application of due process and equal protection

1. Article 1, Section 1-102, of *The Model Residential Landlord-Tenant Code,* (American Bar Foundation) by Julian H. Levi, Philip Habutzel, Louis Rosenberg, and James White. See also National Conference of Commissioners on Uniform State Laws, *Uniform Residential Landlord and Tenant Act* (1972).

2. Ch. 322, S 299, Maine General Statutes; Ch. 227, A 2233, New Jersey General Statutes. Cited in *State Laws Enacted in 1971* (Washington: Department of Housing and Urban Development, Office of the General Counsel, 1972), pp. 130, 251.

3. Ch. 240, H 1162, General Statutes of Minnesota, cited in *State Laws Enacted in 1971, op. cit* , p. 63.

4. Public Act 852 S 1330, Connecticut General Statutes; Ch. 1275, S 857, California General Statutes, cited in *State Laws Enacted in 1971,* pp. 63, 81.

5. Ch. 784, H 761, Minnesota General Statutes; Ch. 223, S 904, New Jersey General Statutes; cited in *State Laws Enacted in 1971,* pp. 212, 251.

6. Ch. 481, S 653, Maryland General Statutes, provides an implied warranty of fitness for human habitation in all leases entered into between landlords and tenants in Baltimore City. Cited in *State Laws Enacted in 1971,* p. 176.

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principles to certain rules and regulations commonly promulgated by landlords.

It is within the context of viewing reform as a means of improving and strengthening, rather than supplanting, the private market that we address the issue of modifying existing landlord-tenant law in North Carolina. The organizational framework we employ for our analysis is that provided in the Uniform Residential Landlord Tenant Reform Act (URLTA) adopted by the National Conference on Uniform State Laws in August 1972.[7] The final adoption of URLTA represents an effort by the National Conference of Commissioners to encourage across the several states the uniform adoption of legislation that comprehensively treats landlord-tenant problems.[8] Thus, URLTA implicitly rejects the sporadic and piecemeal approach to landlord-tenant reform that still characterizes most legislative actions in this realm across the country.

In the course of our analyses, frequent reference will also be made to two separate reform measures introduced in the North Carolina General Assembly in its 1974 session. House Bills 596 and 673 were generally referred to respectively as the Landlord and Tenant measures.[9] While these shorthand titles are not intended to bias the reader in favor of one or the other, it is the case that the two acts dealt differently with such issues as the proportion of the rental housing inventory subject to coverage, minimum occupancy standards, and the inclusion of the various due process reforms summarized above. In general, the provisions contained in the Landlord Bill are less restrictive than their counterparts under the Tenant Bill. Although neither measure was enacted, each contains certain provisions of interest and illustrates the potential strengths and pitfalls associated with legislation that favors too strongly one or the other party to a rental agreement.

Contrary to most analyses of landlord-tenant reform measures, our particular interest lies not with the potential impact of proposed legislation on housing conditions and opportunities in major urban centers but in their possible effects on the housing delivery process in nonmetropolitan cities in North Carolina. Unlike many of its northeastern and midwestern neighbors, this state remains dominated by smaller communities.[10] Despite the fact that the population of urban areas in North Carolina grew more than twice as fast as did the entire state during 1960-70, a majority of North Carolinians still live in rural areas. Slightly more than half the urban population resides in metropolitan urbanized areas, and 21 per cent of the population is located in nonmetropolitan urban places with populations of 2,500 to 50,000. Our particular interest focuses on nonmetropolitan cities with populations over 10,000; these cities house about 13 per cent of the state's total population, or 29 per cent of its urban people.

At maximum, a landlord-tenant measure can affect no more than the one-third of the state's households that are renters. The impact would be somewhat greater in urban areas, where 43 per cent of the households are renters, and in the central cities of metropolitan areas, where the figure approaches 47 per cent. More important than the spatial impacts of such a bill would be its likely effects on various socioeconomic groups within the population. While only 30 per cent of the state's white households are renters, fully 55 per cent of North Carolina's households headed by blacks rely on the rental sector to meet their housing needs. Moreover, nonwhite households are more than three times as likely to have incomes below the official poverty level. Thus, while 28 per cent of all renters have poverty-level incomes, the corresponding figure for homeowners is only 14 per cent. Proportionately, then, any landlord-tenant measure will have a heavier impact upon the state's minority population, particularly because of the severe income problems suffered by large portions of this group.

Socioeconomic differences between owners and renters are reflected by the quality and amount of housing they consume. Although 84 per cent of all occupied housing in North Carolina in 1970 had full plumbing facilities, one-third of all occupied rental units and 46 per cent of those occupied by nonwhites had one or more plumbing deficiencies. Similarly, while 7 per cent of the state's housing units were overcrowded, within the rental sector, 10 per cent of all white and 31 per cent of all nonwhite renters were in serious need of additional dwelling space. Rent differences alone between metropolitan and nonmetropolitan areas suggest differences in housing quality and related market phenomena to which landlord-tenant laws must be sensitive. The median statewide rent was $59 a month, slightly below the urban median of $64 and substantially lower than the metropolitan median of $73.

While the effects of landlord-tenant legislation will be felt most strongly in urban areas, substantial numbers of

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7. The URLTA is a revised draft of the *Model Residential Landlord-Tenant Code* cited in Footnote 1. See, Richard E. Blumberg and Brian Q. Robbins, "The Uniform Residential Landlord-Tenant Act: The National Experience," *Housing and Development Reporter*, 1, No. 15 (November 28, 1974), E-1-8.

8. *Ibid.*, E-1.

9. HB 596, entitled Residential Landlord-Tenant Act, was introduced on March 8, 1973; HB 673, The Uniform Residential Landlord and Tenant Act, was introduced into the General Assembly on March 14, 1973.

10. All statistics presented in this section are taken from the following census publications: U.S. Bureau of the Census, *U.S. Census of Population, 1970, Number of Inhabitants, Final Report PC(1)-A35, North Carolina; U.S. Census of Population, 1970, General Social and Economic Characteristics, Final Report PC(1)-C35, North Carolina*, and *U.S. Census of Housing, 1970, General Housing Characteristics, Final Report HC(1)-A35, North Carolina*

renters live in smaller cities outside metropolitan centers and in rural areas. Any landlord-tenant reform bill proposed for North Carolina must be sensitive to the distribution of the state's population, the incidence of housing problems across the state, and the socioeconomic characteristics of renter households who will be most affected by it. We approach the evaluation problem from a social science, rather than from a legal, perspective by attempting to relate key provisions of the respective bills to specific characteristics of both rental housing suppliers and households that depend upon the rental sector to meet their housing needs.

Perhaps not too surprisingly, our analyses indicate that reform measures aimed at improving competitive conditions in the private market are not likely to overcome the major obstacles represented by a highly skewed income distribution, a housing delivery process that has, over the years, become accommodated to that distribution and the economics of housing rehabilitation. We conclude further that basic landlord-tenant reform measures may increase market efficiency and improve housing opportunities for the relatively affluent among nonmetropolitan renters while possibly worsening living conditions for the majority of lower-income tenants. Although our particular geographic concern is nonmetropolitan North Carolina, it is not unlikely that our findings may be applicable to smaller urban communities in other states.

Our essay begins with an analysis of the URLTA and the two pieces of North Carolina legislation—our primary objective being to relate key provisions of the respective measures to particular attributes of the supply and demand sides of the nonmetropolitan market. We will not undertake a section-by-section summary of each act, nor necessarily endorse particular provisions of any of the bills. We will, however, indicate how actual market characteristics relate to various sections of the relevant statutes and analyze the remedies available to noncomplying landlords and tenants under each measure. In the final section, we attempt to identify the most reasonable means of applying the principle of mutuality of obligations given the realities of the marketplace, which make full compliance with this principle all but impossible.

Even though our brief references in the text to particular characteristics of nonmetropolitan communities in North Carolina are sufficient to highlight the points we wish to make, the Appendix to this article contains a more detailed summary of the salient characteristics of the state's nonmetropolitan renters, their housing, and their landlords.[11]

MAINTAINING THE QUALITY OF THE OCCUPIED RENTAL STOCK

Exclusions Under the Respective Acts. Because the URLTA and House Bills 596 and 673 are all concerned with clarifying and protecting landlord and tenant rights, they each exclude from coverage certain kinds of shelter-related transactions that involve neither landlords nor tenants in the conventional sense of these terms. Thus, the URLTA excludes from coverage transactions that involve "residence at public or private institutions where residence is incidental to the provision of some nonhousing-related services; occupancy under a bona fide contract of sale of the dwelling unit where the tenant is effectively the purchaser; residency by a member of a fraternal organization in a structure operated for the benefit of the organization; residence in a hotel or motel or other transient lodgings"; and so forth.[12]

Beyond these kinds of limitations, the URLTA and the Tenant Bill (HB 673) cover all nonowner-occupied dwelling units under their respective provisions. The Landlord Bill, (HB 596), on the other hand, contained two additional exclusions that, if adopted, would have substantially reduced its scope and coverage. First, it specifically excluded "occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes."[13] According to the bill's definition of premises, this exclusion apparently relates to housing occupied by tenant farmers in North Carolina.[14] A more important exclusion, from the standpoint of numbers, is that the bill "would have applied only to residential leases or rental agreements where the residential real property contains five or more dwelling units."[15] The restrictive nature of this latter provision, within the context of the state's nonmetropolitan urban rental housing stock, is evident from the fact that only 8 per cent of the state's nonmetropolitan rental inventory is in multi-family apartment buildings containing five or more units. In fact eight out of ten rental dwellings in these cities are contained in one- or two-family structures. This particular exclusion would apply to 87 per cent of all rental housing units in North Carolina as a whole and to 76 per cent of all rental units inside the state's metropolitan areas.[16]

As important as the proportion of the nonmetropolitan rental stock excluded from coverage under the Landlord Bill is the fact that more than nine out of every ten marginal or poor-quality rental units are also exempted on the basis of the five-or-more units provision. Only 8 per cent of all low-quality rental housing units in nonmetropolitan North Carolina are contained in multi-family

11. The analyses presented here are based on a self-weighting sample of 589 rental dwelling units selected from four nonmetropolitan North Carolina cities through the use of a two-stage stratified cluster design. At the first stage, four cities were selected from the 25 with populations of 10,000 to 40,000; at the second stage, six census enumeration districts were selected from each city. Dwelling units were selected from each second-stage cluster by systematic random sampling from prepared lists of all rental units. The sampled dwellings were owned by 392 landlords, of whom 341 were interviewed. Tenant data were derived from a household interview of 496 occupied units, while housing stock data were obtained from tax-appraisal cards that were secured for each sampled dwelling.

12. URLTA, Article 1, Section 1.202.

13. Section 42A-8(7), HB 596.

14. Section 42A-10, HB 596.

15. Section 42A-7, HB 596.

16. *Census of Housing: 1970*, Final Report HC(1)-B35, Table 35.

structures with five or more dwelling units. We will discuss this matter further in the following section dealing with the habitability provisions of both landlord-tenant bills.

Implied Warranty of Habitability. The concept of habitability is critical to virtually all comprehensive landlord-tenant reform measures. Not only does the word habitability set forth the minimum standard of physical quality that the legislation imposes on all owners of rental housing, but also the significant legal principle of mutuality of obligations, which is at the heart of contract law, revolves around the concept of habitability. Relative to landlord-tenant reform, the principle implies that a lease, like a contract, requires that all parties to the agreement perform in certain specified ways if the agreement is to be legally binding. The tenant is obligated to pay rent only so long as the landlord meets all of his responsibilities—including those implied by the habitability requirement defined in the legislation.

If leases or rental agreements are to be converted from instruments that convey an interest only in land to contracts that detail the mutual and dependent obligations of landlords and tenants in a broader sense, the way in which habitability is defined becomes a critical feature of any proposed reform measure. Essentially, the URLTA and the Tenant Bill, which is a variant of the model code, defined habitability in terms of minimum housing standards as expressed in local codes now in effect.[17] Thus, under the Uniform Code, all rental units covered under the act would have to meet all applicable state or local housing codes to comply with the implied warranty of habitability provision. Failure to comply gives rise under the act to "a valid defense to an eviction for nonpayment of rent and therefore creates an implied right of the tenant to withhold rent payment in the case of substandard housing."[18]

Compared with the URLTA provision, the definition of habitability in the landlord measure (HB 596) was much less restrictive in that minimum standards for equipment and facilities were defined in terms of laws applicable at a prior time.[19] Thus, for example, all other things being equal, a dwelling could be defined as habitable under the landlord measure even though its plumbing or electrical systems failed to meet a particular community's existing minimum housing or health code as long as they conformed to any applicable laws in effect when they were first installed. We return to this point in the concluding section of this article.

Of the four cities included in our study of nonmetropolitan rental housing markets in North Carolina, three have enacted minimum housing codes within the last ten years or so, while the fourth has no housing code but does have a minimum health code.[20] While we do not know the extent of minimum housing and health code coverage among the other urban, nonmetropolitan communities in the state, nor when the existing codes were enacted, it is reasonable to assume that few if any small communities in the state had any codes or ordinances dealing with minimum plumbing, electrical, heating, or structural standards before 1950. In other words, the nearly half of all housing constructed in nonmetropolitan communities before 1950 could be in compliance with substantial portions of the habitability provisions under the Landlord Bill regardless of the extent to which they meet existing minimum housing codes. In all of these dwellings, plumbing, electrical systems, and heating facilities—where provided by the landlord—need not meet any current standards of acceptability if they were first installed before any regulatory legislation was passed. As long as these subsystems perform reasonably well, relative to their operating potential, they satisfy the performance requirements written into the bill. On the basis of its "prior applicable law" provision, the Landlord Bill would exclude from coverage under the habitability section at least half of the occupied nonmetropolitan inventory.

Compliance Rates Under URLTA. The task of estimating likely rates of noncompliance with a rigorously defined habitability standard is more difficult than judging the proportion of the rental stock that would not be covered under a particular section of an act. The URLTA defines habitability largely in terms of minimum housing standards as expressed in existing codes, or with respect to particular structural requirements embodied in the act if existing codes are believed to be too lenient or if no codes exist. Actual noncompliance rates can be determined only from physical inspections of a sample of rental units across market areas. In the absence of any representative inspections-based data, we will estimate the minimum proportion of nonmetropolitan rental housing units in North Carolina that would fail to comply with the habitability provisions of the URLTA by using data gathered from tax-appraisal cards for the dwelling units in our sample and from household responses to several questions in our tenant survey relating to housing conditions.

To obtain a conservative estimate of the proportion of the nonmetropolitan inventory that would be defined as uninhabitable under the "minimum housing code" provision of URLTA, we applied the plumbing-related code standards of the City of Greenville to the dwelling units in our sample. Under this code a dwelling fails to meet standards if it lacks complete bathroom facilities or shares a bathroom with another dwelling unit, lacks a kitchen sink, lacks or has an inadequate supply of hot water, or has plumbing facilities that are not in good working order.[21] Twenty-seven per cent of all nonmetropolitan

17. Article 2, Section 2.104, URLTA; Section 42A-21 HB 673.

18. Blumberg and Robbins, "The Uniform Residential Landlord-Tenant Act," p. E-3.

19. Section 42A-20, HB 596.

20. The three cities with minimum housing codes are Kinston, Statesville, and Greenville. The fourth city, Lexington, has no minimum housing code.

21. An Ordinance Establishing the Housing Code of the City of Greenville, North Carolina, adopted December 3, 1964, as amended by Ordinances No. 327 and 371, p. 7.

rental units fail to meet these plumbing-related standards. Our analyses indicate further that these code problems have a disproportionately higher impact upon the state's nonwhite households. Although only four out of every ten nonmetropolitan tenant households are nonwhite, almost eight out of every ten of the units that fail to meet the code, as defined above, are occupied by nonwhites. The largest proportion of units that fail to meet minimum code standards are single-family units. As a matter of fact, only 3 per cent of all dwellings that fail to meet the plumbing requirements of this code are in multi-family structures containing five or more dwelling units.

Relevant to the more general requirements of the URLTA and the Tenant Bill and the "good working provisions" of the Landlord measure, as many as 26 per cent of all tenants are experiencing certain kinds of structure-specific housing problems that relate to the concept of habitability. One in five families said that loose or falling plaster was a serious problem; one in four indicated that their house was not adequately weather-proofed; and one in five said that their house leaks when it rains. Among other problems noted were weak or broken floors (25%), frequently blown fuses (8%), and rodent infestations (16%). As was the case with plumbing-related deficiencies, nonwhites were much more likely than whites to complain about major problems with the condition of their housing.

A final estimate of housing quality in nonmetropolitan North Carolina was based upon the results of our own evaluation of dwelling-unit condition. Each house included in our sample was photographed and ranked as to condition by three persons, each acting independently. The result of this appraisal, which provides an upper-bound estimate of the portion of the stock that is uninhabitable under the URLTA, is that as much as 17 per cent of the rental inventory is substandard, and another one-third is in marginal condition. Nonwhites are fifteen times more likely than whites to occupy the poorest-quality housing and almost twice as likely to live in marginal units. Conversely, whites are twenty-seven times as likely to live in housing units of superior quality, and four times as likely to live in housing of adequate quality.

In short, on the basis of our analysis, between 25 per cent and 50 per cent of all nonmetropolitan rental housing units in North Carolina would be declared uninhabitable under the URLTA. Indeed, ignoring the five-or-more-units provision of the Landlord Bill for a moment, the most seriously substandard units, which represent 17 per cent of the stock, would be declared unfit even under its modest definition of habitability.

Tenant Right to Terminate and to Repair and Deduct. The URLTA recognizes that the mere existence of an implied warranty of habitability in all leases or rental agreements will no more guarantee the livability of all occupied rental units than does the existence of a local minimum housing code result in eliminating all substandard housing conditions in a given community. The two major provisions of the URLTA relating to tenant remedies for landlord failure to maintain dwellings in habitable condition concern the right of the tenant to terminate the rental agreement after delivery of proper notice and the so-called right to repair and deduct.[22]

Under both the URLTA and the Tenant Bill, if the landlord fails to meet his maintenance responsibilities as detailed in the legislation and:

> the reasonable cost of compliance is less than ($100), or an amount equal to (one-half) the periodic rent, whichever amount is greater, the tenant may recover damages for the breach . . . or may notify the landlord of his intention to correct the condition at the landlord's expense. If the landlord fails to comply within (14) days after being notified by the tenant in writing or as promptly as conditions require in case of emergency, the tenant may cause the work to be done in a workmanlike manner and, after submitting to the landlord an itemized statement, deduct from his rent the actual and reasonable cost or the fair and reasonable value of the work, not exceeding the amount specified in this subsection.[23]

While we recognize the motive behind these provisions and understand how they could provide a reasonable means for satisfying tenant demands for necessary repairs to their dwellings, the fact is that more than 80 per cent of all nonmetropolitan rental units in North Carolina rent for less than $100 a month. Almost half of the units rent for less than $60 a month, including 18 per cent that rent for under $40. Under the repair and deduct provisions, tenants in these dwellings would be permitted to have repairs made that amount to 1½ times the amount of their monthly rent each time they invoked this provision. Although the number of variables to be considered prevented our estimating the frequency with which the repair and deduct provision would likely be invoked, our survey indicates that more than half the nonmetropolitan units renting for less than $40 a month are in very poor condition, while another 36 per cent are of marginal quality. Indeed, almost eight out of every ten units renting for $40-$59 are also in marginal or very poor repair.

Cash Flow and Rehabilitation Potential. It is important to recognize that large numbers of nonmetropolitan rental units cannot be rehabilitated. Among the 17 per cent of all units that are classified as seriously substandard, half are three-room bungalows—so-called shotgun shacks—built on masonry-block piers, with weather-beaten, unpainted clapboard siding. They contain no heating facilities, generally have inadequate wiring, and rent for between $6 and $8 a week. For these and other seriously substandard houses, the only reasonable means of complying with the habitability provisions of either

22. Article 4, Section 4.101, URLTA, and Article 4, Section 4.103, URLTA.

23. Article 4, Section 4.103, URLTA.

landlord-tenant bill would be withdrawal from the market.

Across the inventory as a whole, our cash-flow analysis indicates that, before debt service, the average dwelling unit returns 51 per cent of gross collectible rent, or $413 per year to the owner (Table 1). In general, about 20 cents of every rental dollar is currently allocated to maintenance and repairs, an amount that each of the bills would hope to increase. Although net cash flow averages around half of gross collectibles, relative to value, the annual return is only 4.4 per cent, something less than can be earned in a riskless savings account. Indeed, in the lowest-quality sector, net cash flow as a percentage of value is an only slightly higher 5.3 per cent. Inasmuch as these cash-flow figures include no debt service, it is likely that the cash available to increase maintenance in those units on which mortgages are outstanding is substantially below the figures contained in Table 1. More often than not, however, the problem of increasing maintenance and renovation outlays at the bottom of the market is not one of too little cash flow because of large debt-service demands. Most of these dwellings are owned free and clear. Because of their generally poor original quality, their relatively short economic lives, and the limited incomes of their renter occupants, few lending institutions would be willing to make available the necessary capital to finance the required work.

Assuming that the average owner of substandard housing would be willing, at best, to double his maintenance and repair outlays in order to comply with the habitability provisions of a reform bill, on the average, 40 cents out of every rental dollar would be reinvested in the dwelling. In dollar terms, this would result in the investment of some $328 a year for the average dwelling unit, or an annual increase in maintenance outlays of $164. In the poor-quality stock, a doubling of maintenance and repair expenditures would increase average outlays by $90, and in the marginal stock, by $146. If rents are held constant, the inevitable consequence of doubling repair budgets is a significant shrinking of cash flow. While the effect on the inventory as a whole would be a reduction in cash flow per dwelling of 32 per cent, to $249, the same 32 per cent reduction within the poor-quality stock would reduce average cash flow to $125, and in the marginal stock to $157 a year, or to $13 a month. Whether the added $7 a month invested in the poor-quality stock or the extra $12 a month put back into marginal dwellings would make any substantial differences in housing quality or tenant satisfactions, we cannot say. We can reasonably conclude, however, that a likely increase in maintenance outlays would be something less than a doubling of annual effort; in that event, the probability is high that no significant improvement in quality or satisfactions would result.

Table 1

Average Annual Cash Flow for Nonmetropolitan Rental Housing Units by Quality Level, North Carolina 1972

	Quality Level							
	Medium to High		Marginal		Poor		Total	
Gross Collectible	$ 1,029[a]		$ 640		$ 434		$ 815	
Less:								
Vacancy and Arrears	26	(2.5%)[b]	36	(5.6%)	37	(8.5%)	31	(3.8%)
Effective Income	1,003		604		397		784	
Less:								
Insurance	41	(4.0)	27	(4.2)	19	(4.4)	34	(4.2)
Property Taxes	128	(12.4)	68	(10.6)	33	(7.6)	95	(11.7)
Maintenance and Repairs	196	(19.1)	146	(22.8)	90	(20.7)	164	(20.1)
Net Operating Income Before Management	638		363		255		491	
Less:								
Management[c]	100		60		40		78	
Net Cash Flow Before Debt Service	538	(52.3)	303	(47.3)	215	(49.5)	413	(50.7)
Average Value Per Unit	12,916		6,751		4,025		9,471	
Net Cash Flow as Percentage of Value	4.2%		4.5%		5.3%		4.4%	
N	105		68		28		201	

a. All figures are per dwelling unit.
b. Figures in parentheses are percentage of gross collectible.
c. Computed as 10% of Effective Income and imputed to all units.

THE COLLECTION, CHARGING, AND PAYMENT OF RENT AND RELATED FEES

Before discussing other provisions under which rents and related charges may be collected by landlords or withheld by tenants, we must point out that only 9 per cent of nonmetropolitan rental households have signed leases or rental agreements for their present units. Thus it is likely that in nonmetropolitan communities, at least, any reform measure would affect landlords and tenants more by virtue of its applicability to implied, rather than to written, rental agreements. Relevant to this point are the provisions of each bill regarding terms of tenancy and minimum elapsed time required before landlords may terminate implied rental agreements for nonpayment of rent.

Termination for Nonpayment. In nonmetropolitan communities in North Carolina and perhaps in larger cities as well, relatively large proportions of the least expensive dwelling units are rented on a weekly basis for indefinite periods. Eighteen per cent of all units rent by the week; of these, eight out of ten rent for less than $14 a week and more than half are seriously substandard. In comparison, only 9 per cent of all dwellings for which rent is collected monthly are substandard. Because the dwelling units that are rented by the week are not rooming houses, according to all three bills the implied terms of the rental agreements would be month-to-month; therefore, the provisions for terminating for failure to pay rent would be the same as those that regulate termination periods for tenants who do pay their rents on a monthly basis. Under the URLTA, a landlord may terminate for nonpayment within 14 days after written notice signifying intent to terminate, which implies that a delinquent tenant who pays rent by the week may remain rent-free for as long as two full rent periods before a landlord may terminate the rental agreement. This provision may be unduly restrictive. In contrast, the Landlord Bill recommends a 10-day termination period that, in relation to weekly rents, is more consistent with the 14-day period specified in the URLTA for monthly rents.

Rent-Withholding by Tenants and Landlord Charges for Damages. The delicate balance between the rights and obligations of landlords and tenants is maintained in the URLTA under one provision that permits tenants to withhold some portion of their rent if their landlords fail to provide heat, water, hot water, or other essential services and under another provision that permits landlords to terminate rental agreements or to charge the tenants for the costs of remedying certain tenant-induced breaches relating to the improper care and use of the dwelling unit.[24] With respect to the former, after proper notification to the landlord, a tenant may: procure reasonable amounts of the lacking essential services and deduct their cost from the rent; recover damages based upon the diminution in the fair value of the dwelling unit; or, secure substitute housing for as long as the breach exists, during which time the rent shall abate.[25]

Section 4.202 of the URLTA permits landlords to terminate rental agreements if the tenant does not: maintain his dwelling unit free from debris; keep all plumbing fixtures as clean and sanitary as their condition permits; or properly use and operate all electrical and plumbing fixtures.[26] Should the tenant fail to carry out his responsibilities to care properly for his dwelling, he may be notified by his landlord of the specific breach with which he is being charged and be required to remedy the failure by some specified time. His subsequent failure to act may result in the landlord's terminating the rental agreement and bringing a summary action for possession.

Although neither of the above provisions of the URLTA may appear to warrant specific comment relative to their potential impacts in nonmetropolitan cities in North Carolina, it is nevertheless true that the tenant's prerogative to withhold rent or to secure substitute housing at his landlord's expense is not likely to be as viable an option in the small city as the model code implies. In at least 85 per cent of all units, it is tenants rather than landlords who are responsible for providing and paying for heat and hot water, while 60 per cent of the dwellings, contain no landlord-provided heating sources whatever. In addition, 17 per cent of all nonmetropolitan rental units have no hot-water heaters, and the URLTA exempts from the rent-withholding provision all buildings that are not equipped for the purpose of delivering the essential service.

While we have no specific nonmetropolitan insights to add to the above discussion on landlord rights to seek remedies for particular tenant-induced breaches to the rental agreement, we should note that the URLTA does permit a landlord a particular remedy that has been prohibited in the model lease agreement recently developed by the Department of Housing and Urban Development for use in the Low Rent Public Housing Program. Under the URLTA, a landlord may remedy a tenant's failure and bill him for the cost of cleaning, replacing, or repairing a damaged item, etc., and "the bill shall be treated by all parties as rent due and payable on the next regular rent collection date . . . ."[27] Under the public housing model lease, tenants may also be charged for negligent damage, but the landlord is prohibited from treating such payments due as rent and is obligated to "seek separate legal remedy for their collection."[28]

24. Article 4, Section 4.104, URLTA; Article 4, Section 4.201 URLTA.

25. Article 4, Section 4.104, URLTA.

26. Article 4, Section 4.202, URLTA.

27. Article 4, Section 4.202, URLTA.

28. *Requirements and Recommendations to Be Reflected in Tenant Dwelling Leases for Low-Rent Public Housing Projects,* (Washington, U.S. Department of Housing and Urban Development, Circular RHM 7465.8, Feb. 22, 1971), p. 3.

Security Deposits. Properly included in a discussion of tenant payments for other than rental purposes is the subject of security deposits and the collection, use, and disposition by landlords of such moneys. All three landlord-tenant reform measures under consideration in this paper contain detailed provisions on this matter, and since they differ significantly in content and scope, they warrant individual attention. Perhaps more than in any other instance presented thus far, the URLTA provision represents a reasonable compromise between the very narrowly construed requirements in the Landlord Bill and the extremely broad requirements written into the Tenant Bill.

The Landlord Bill neither places an upper limit on the magnitude of the deposit that may be required nor prohibits the charging of nonrefundable fees at the beginning of the tenancy for cleaning, for keeping pets on the premises, or for other purposes mutually agreed upon by landlord and tenant.[29] Under the Tenant Bill, not only are all nonrefundable charges prohibited but also, if the landlord informs tenants that part or all of the deposit is nonreturnable, the tenant may recover twice the amount of the deposit that the landlord claimed was nonreturnable.[30] Under the Tenant Bill, moreover, no more than one month's rent may be charged as a security deposit. Whenever a landlord owns six or more rental units, all security deposit moneys must be deposited in an interest-earning account. When a tenant terminates his tenancy, he shall receive the full amount of interest earned, less a 1 per cent service charge, less the cost of any actual damages sustained to the dwelling. All moneys owned the tenant, along with an itemized statement of what moneys are being withheld by the landlord, are due the tenant within 14 days after the tenancy ends and the tenant delivers possession. In the Landlord Bill, not only is there no interest-earning requirement, but the landlord has 30 days after termination and delivery of possession by the tenant to give written notice of disposition of the security deposit and to return any amounts due the tenant.

The essence of the URLTA provision is that all security deposits shall be held and administered for the benefit of the tenant and the tenant's claim to such money shall be prior to that of any creditor of the landlord.[31] The provision further limits the amount of the deposit to a maximum of one month's rent but does not require the payment of interest thereon. Landlords are obligated to provide in writing an itemized list of deductions made from security deposits and to return the remainder to the tenant within fourteen days after the rental agreement ends. Failure to do so could constitute a misdemeanor.

In general, it is not anticipated that the security-deposit provisions of any of the bills would have a major impact across nonmetropolitan markets. Fewer than one in five tenants paid any security deposit at all at the commencement of their tenancies. Among those that did, the deposits averaged slightly less than two-thirds of their monthly rent, well below the upper limit contained in either the Tenant or URLTA measures. Furthermore, security deposits are more frequently required for higher-rent dwellings. In fact, the median monthly rent for units for which security deposits were charged is approximately $100, compared with a median of $65 for all nonmetropolitan rental units. Finally, with respect to the interest-earning provisions of the Tenant Bill, more than nine out of ten nonmetropolitan landlords own fewer than six rental units and would thus be exempted from this section of the bill.

Further Tenant Remedies for Noncompliance by Landlords. Although a market-oriented analysis of proposed landlord-tenant reform measures can reasonably focus only upon those dimensions of the legislation that pertain to basic market operations and matters of rents and housing quality, in no way should this limitation imply a diminution in the importance of procedural reforms that may have no direct bearing on prices or dwelling conditions. Indeed, while no provisions of any reform statute would likely win universal support, certain procedural provisions of the URLTA not heretofore discussed should be seriously considered for adoption in North Carolina and other states on moral and ethical grounds alone. Among such provisions of the URLTA are those that declare as unenforceable in the courts all so-called unconscionable clauses in written leases and rental agreements, including such provisions as one that provides for the recovery of attorney's fees from the tenant, a landlord's waiver of personal liability, and repeal of the legal principles of distress and distraint under which landlords may seize the personal goods of delinquent tenants or lock them out of their housing for nonpayment.[32]

An equally important, though far more controversial and complex, provision that logically falls within the realm of procedural safeguards relates to the protection of tenants against so-called retaliatory evictions. Though retaliatory eviction is difficult to define and, perhaps, even more troublesome to prove in practice, most comprehensive reform measures do deal with this subject. Except under certain clearly defined and limited conditions, the Uniform Code prohibits landlords from initiating an action to recover the dwelling unit, demand an increase in rent, or decrease the services to which the tenant has been entitled for one year after:[33]

1. the tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the premises materially affecting health and safety; or

29. All subsequent text references to security deposits in HB 596 are contained in Section 42A-17.

30. All subsequent text references to security deposits in HB 673 are contained in Section 42A-18.

31. Article 2, Section 2.101, URLTA.

32. Article 1, Section 1.303; Article 4, Section 4.205; Article 3, Section 3-403.

33. Article 5, Section 5.101.

2. the tenant has complained to the landlord of a violation under Section 2.104 (which requires the landlord to maintain the premises); or
3. the tenant has organized or become a member of a tenant's union or similar organization.

From the standpoint of improving the quality of the occupied nonmetropolitan rental stock in North Carolina, the procedural remedies that are *available* to tenants under any given reform measure must also be readily *accessible*. While it is not possible to estimate the frequency with which tenants are likely to initiate termination procedures on the basis of material noncompliance by landlord with the rental agreements, we did indicate earlier that many nonmetropolitan tenants are elderly, while others. for a variety of reasons, are not highly mobile. When asked, more than two-thirds of all tenants indicated that they did not know whether the city in which they lived had ever enacted a minimum housing code. This finding alone casts reasonable doubt upon the likelihood that high percentages of aggrieved tenants would invoke many of the remedies that are designed to deal with eliminating landlord-induced housing code violations.

Perhaps the best way of approaching this difficult problem is to examine the characteristics of households that now occupy substandard housing, the group that would most likely be affected by the habitability provisions of any of the statutes thus far discussed. According to our survey, almost 90 per cent of the nonmetropolitan occupants of substandard housing are nonwhite, while 70 per cent have annual household incomes of less than $4,000. Although almost two-thirds of these tenant household heads are in the labor force, approximately 11 per cent are unemployed. Four of every ten families in substandard housing have lived in their present houses for more than five years, and only three in ten have any plans for moving within the next year. Although survey questions dealing with levels of satisfaction are always suspect and difficult to interpret, the fact that half the families in poor housing indicated that they were satisfied with their present houses probably reflects resignation rather than contentment.

In general, most of these families could not be expected to take advantage of the termination provisions of any of the reform measures. The housing alternatives open to them are likely to be few and no better than the housing they now occupy. It is likely that the renters who are moving up economically and can effectively compete for high-quality housing would be the primary beneficiaries of the remedies provided under any of the measures —particularly under the Tenant Bill. It is the higher-income family that pays a security deposit, enters into a written lease or rental agreement, and pays for and expects to receive a comprehensive bundle of housing services—not just physical shelter—in return for its rent. The initiation of termination procedures by a tenant with a good rent-paying record could be sufficient encouragement to a recalcitrant landlord to deliver what he promised to deliver when the tenancy began.

Relevant to the issue of termination provisions and low-income renters, landlords at the bottom of the market do not frequently evict tenants even though under existing law the eviction process is relatively simple. In fact, only 13 per cent of all landlords admitted to ever having evicted a tenant, and a third of all evictions that were admitted had taken place more than five years ago. While this low estimate may be partly a result of the unwillingness of landlords to admit having ever put out a tenant, it is consistent with related analyses that suggest that landlords fare better when their turnover is low. In fact, more than half of all owners who are dissatisfied with their current returns indicated that they would not increase their rents for fear of losing good tenants, even though they believed their rents to be below market level. In short, although low-income tenants are not likely to receive all of the services they would hope for, steady rent-payers may in fact receive more for their money than some would have us believe.

Nevertheless, it is true that the enactment of any landlord-tenant measure could have a substantial regressive impact on the housing market. At worst, a statute designed primarily to improve the living conditions of the lower-income group could result in reducing the supply of low-rent housing at the bottom of the market and a more responsive set of landlords at the top. This possibility does not mean that the effort to modernize landlord-tenant law should be abandoned. Rather, it should influence the way in which the problem is approached in the first place.

CONCLUSIONS

Earlier in this article we acknowledged the argument that the status of tenant is necessarily in fundamental contradiction to man's innate quest for secure shelter, but we noted that few enacted comprehensive reform measures attempt to eliminate the role of the landlord in concept or fact. Rather, these measures seek to increase the welfare of renters by assuring the application of certain principles of due process to the relationships between landlords and tenants, by increasing the competitive bargaining powers of tenants vis-à-vis their landlords, and by establishing a framework within which the rental housing process becomes a series of mutually dependent actions by tenants and landlords.

Within this multi-faceted reform context, it is possible to separate those reform measures that aim to increase the psychological security of tenants and reduce their dependency upon their landlords from those measures that attempt to force landlords to comply with higher absolute maintenance standards than they might otherwise adopt—particularly at the bottom of the market. It is unlikely, for example, that the enactment in North Carolina of the so-called procedural reforms would have

any significant adverse impact on the housing market in nonmetropolitan areas or, for that matter, in metropolitan centers. Such measures as prohibitions against unconscionable lease provisions; restrictions on the amount, use, and disposition of security deposits; the standardization of tenancy terms under implied rental agreements; and prohibitions against retaliatory evictions or rent increases and against curtailment of necessary services to accomplish an eviction could be readily enacted to the benefit of all tenants with no likely reduction in the flow of private funds into the rental housing market. The problem is, however, that provisions such as these do not embody the legal concept most central to landlord-tenant reform measures—namely, the principle of mutuality of obligations, which relates to the joint responsibility of the landlord to maintain his property and the tenant to pay his rent.

Any significant break with the common law that would transform a lease into a mutually binding contract between landlord and tenant must be capable of near universal implementation under the force of law. Consequently, should any reform statute embrace the principle of mutuality of obligations, then the sector of the rental stock to which it is to be applied must be clearly and carefully defined. The problem thus becomes one of covering the largest number of rental transactions possible while assuring adherence to the concept of horizontal equity with respect to the law's application. While this problem is common to reform proposals in jurisdictions other than North Carolina, the three landlord-tenant measures evaluated earlier present relevant contrasts worthy of further discussion.

Under the URLTA and Tenant bills, there can be no adherence to horizontal equity, inasmuch as the habitability provisions of both documents cannot be effectively enforced within large segments of the occupied stock even though all rental transactions are theoretically subject to the mutuality of obligations principle. On the other hand, the Landlord Bill, by virtue of eliminating from coverage some 86 per cent of all occupied rental units, does treat equally all transactions subject to its provisions. From a public-policy standpoint, the problem here is that adherence to the principle of horizontal equity is achieved at the expense of limiting the benefits of the bill to just 14 per cent of all tenants.

Guaranteeing the equal treatment of all similarly situated landlords and tenants requires that the principle of mutuality of obligations, as it relates to habitability standards, be applied across the entire rental stock. In North Carolina, it would probably be best to define habitability in terms approximating those contained in the Landlord Bill, which would exclude from compliance in the most restrictive sense of the term the overwhelming proportion of very low-rent and poorly constructed rental units. This alternative is recommended because the "prior applicable law" principle implies that the scope of the habitability definition would vary directly with the historical efforts of local communities to engage in minimum housing code enforcement programs and inversely with the age of local rental housing inventories.

According to the Landlord Bill, owners of rental housing are required to maintain their rental units in reasonable condition throughout the period of tenancy. Plumbing facilities, wiring, and water supply systems need conform only to applicable laws in effect at the time of original installation, though the bill requires that they be maintained in good working order. If units have no heating systems, for example, and none were required when the building was constructed, they would not have to comply with any heating standards to meet habitability standards but would be subject to other habitability provisions. The ultimate effect of defining habitability in terms of prior applicable laws would be to exempt from compliance with existing minimum housing codes most of the pre-1950 nonmetropolitan rental stock, including more than 90 per cent of all units renting for less than $40 a month, almost 90 per cent of all units without any hot water, 60 per cent of all rental units without complete bathrooms, and 70 per cent of all dwellings built on pier foundations. These dwelling units cannot support rehabilitation capital, and except for the income problems of the tenant households, they would probably not be occupied. Any serious effort to force compliance with habitability requirements of a landlord-tenant law would likely cause owners to withdraw much of the pre-1950 inventory from the market, thus increasing rather than alleviating the housing problems of the poor.

Over time, however, as the older rental stock is withdrawn from the market, as additional communities adopt minimum codes, and as still others increase the performance requirements embodied in their existing housing and occupancy codes, the concept of strongly defined implied warranties of habitability will become firmly institutionalized in rental housing market operations and in landlord-tenant law in North Carolina.

The irony of having to exempt from the law's initial protection that part of our population most in need of its current support suggests that the law is limited in its capacity to eliminate by itself certain inequities that are inherent in our social fabric. To this extent, at least, the legal approach is inherently conservative and oriented toward the status quo. On the other hand, it is unreasonable to oppose meaningful legal reforms either because they will not solve particular problems in the short run or because they will not produce the full long-run impacts many would hope to see. Because the law is limited in its potential to bring about change, it should not bear the full responsibility with which some would like to burden it. Our failure to deal with serious social problems such as the occupancy of substandard housing is a political failing that requires the development of remedial programs and not the creation of legal remedies alone. Legislatures enact laws, but they also appropriate funds. While the enactment of certain legal reforms, in the absence of the

funding necessary to make full compliance possible, may have little redistributive effect, the funding of certain programs in the absence of needed legal reforms may be highly regressive in impact and may further institutionalize evils that already threaten our social order. To this extent, at least, reform of the law of leases is a beginning; the framework for bringing about more meaningful long-run changes will be set. This is all we can reasonably ask the law to do.

Appendix

THE NONMETROPOLITAN RENTAL MARKET

Although most of the public discussion of urban problems centers on metropolitan cities, our brief overview of the population and housing characteristics for the state indicated that much of the impact of landlord-tenant reform will be felt outside these areas. The data we have collected in our field surveys of renter households and their landlords in smaller cities suggest even more strongly that significant housing problems exist outside the major urban centers of North Carolina. This Appendix presents the urban, nonmetropolitan perspective on housing problems in the state.

The North Carolina nonmetropolitan rental housing market is dominated by small, wood-frame, single-family dwellings that account for over 60 per cent of all units. The remainder of the rental stock is almost equally divided among duplexes, single-family conversions, and apartment structures. The mean number of rooms per dwelling is 4.3; a quarter of all units have three or fewer rooms. On the average, each unit contains 1,100 square feet and has a lot size of 7,900 square feet. The rental stock suffers from a number of serious deficiencies in equipment and facilities. Sixty per cent of all units contain no central heating facilities, and 17 per cent have no hot water heaters. While all units contain toilet facilities, almost 30 per cent do not have a complete bathroom, defined as a separate room containing a sink, a tub or shower, and a commode. Consistent with the over-all lack of basic shelter amenities, half of all nonmetropolitan rental structures were rated by tax appraisers as "cheaply constructed," while another 13 per cent were given a "very cheap" rating. Only 37 per cent were judged to be of average quality when constructed. This fact is reflected on the bottom line of the appraisal card where depreciated cash value, or current market value, is recorded. Single-family units averaged in value $4,600, or $3.90 a square foot, while units in duplexes averaged a slightly lower mean value of $4,300. The low value of the stock is further reflected in the median rent of $65 per month; 70 per cent of the units rent for under $80.

The stock is perhaps best described by summary data on age and quality. Almost 47 per cent of the rental units were built 30 or more years ago; about 15 per cent were constructed within the last 10 years. More interesting is the fact that while 45 per cent of the apartment units were built in the last 10 years, over half of the single-family rental houses were built in the early '40s or before. Duplex construction has been continually increasing since about 1950, while the vast majority of converted buildings are pre-World War II.

In an effort to define a concise summary measure of housing quality, we developed an ordinal ranking based on an exterior inspection using photographs taken of each dwelling unit contained in our sample. Four quality classes were established that considered such structural features as exterior construction material and condition and type of foundation. As a rule, newer brick units were classified as high or medium quality; buildings with poorly maintained exteriors, exterior walls out of plumb, broken windows, sagging front porches, and/or pier foundations were ranked as poor. A marginal category captured those units falling between medium and poor and included most single-family conversions. Apartments and converted buildings displayed the least variation in quality. Nearly 90 per cent of the former are ranked as medium to high quality, while over 80 per cent of the latter are marginal or lower. Single-family units, as a group, are the most diverse in terms of quality. While the modal group is "marginal," substantial portions of the single-family stock fall above and below it. Duplexes tend to cluster in the "high" and "marginal" cells; only about 7 per cent are ranked as "poor." The quality distributions are even more revealing in that nearly 80 per cent of the units classified as poor are single-family. Another 14 per cent are conversions, but duplexes and apartments together comprise only 6 per cent of the lowest-quality housing.

The characteristics of nonmetropolitan renter households bear a critical relationship to landlord-tenant reform proposals primarily for two reasons. Our first concern is to identify those households for whom renting is the only real housing alternative and whose housing choices are severely restricted even within the rental sector. The second, and related, issue concerns the ability of household incomes to support increased housing costs that may result from the enforcement of higher housing standards under a reform measure. These concerns tend to overlap, since the poorest households are also those whose housing choices are the most severely constrained.

CHARACTERISTICS OF RENTERS

Nonmetropolitan renters may be usefully classified into five basic cohorts. Approximately 23 per cent of the households are headed by white males under age 35, and a young black male cohort accounts for another 5 per cent of the households. For the former, dependence on the rental stock is likely to be only temporary, while the latter would likely move out of the rental market should they be financially and otherwise able to buy. The poten-

tial to move out of the rental sector for the 18 per cent of the households headed by males—both black and white—between the ages of 35 and 54 is primarily a function of their current income and employment experiences. The two groups least likely to leave the rental stock are households headed by persons 55 or older and households headed by young to middle-aged women. The former account for 33 per cent of the renters, and the latter for 21 per cent. We might note that while households headed by women tend to be large (one-third contain five or more persons), it is the presence of adults other than a spouse and not unusually large numbers of children that accounts for the size of the households. Over-all, only 3 per cent of renter households are large families headed by a black woman, a household type that figures prominently in the metropolitan inner-city market.

While this cohort typology suggests the extent to which nonmetropolitan households are permanent renters, deeper insights can be gained from considering the economic status of these households. More than half of all nonwhite heads of households have had no high school education; only 24 per cent are high school graduates. Among white heads, in contrast, 64 per cent have graduated from high school and nearly 38 per cent have had at least some post-high school education. Unemployment rates are substantially higher for blacks than for whites and for female than for male household heads. While fewer than 1 per cent of all white male heads in the labor force were unemployed at the time of our survey, the corresponding rate for black males was nearly 6 per cent. The incidence of unemployment was 3.6 per cent for white women and a very high 18 per cent for black women. To make matters worse, an additional 14 per cent of all working black female household heads are classified as underemployed—that is, they work only part time, though they wish to hold a full-time job. Sporadic unemployment during the course of a year may be as important to the functioning of the housing market as is a measure of unemployment at a particular point in time. The former relates not only to the magnitude of household income but also to the stability and continuity of income streams. It may well be that periodic unemployment contributes to life styles and rent-paying patterns that prevent certain families from competing for high-quality rental housing and preclude their accumulating savings that would allow them to take on long-term fixed obligations such as home mortgages. Even among white male heads of households in the labor force, over 17 per cent experienced some unemployment during the year. For black males, the figure was nearly 19 per cent, while the rates are somewhat higher for women.

The median black household income of $3,415 is just 56 per cent of that for whites ($6,133). This income differential is the result of both the higher wages earned by white household heads and the higher incidence of white families with more than one wage earner. Despite the fact that 43 per cent of all renter households have incomes below $4,000, only 14 per cent now receive public assistance benefits. One-third of the recipients are elderly; one-third are families with dependent children, and one-third are blind or disabled or receiving benefits for which no program source could be identified.

Although the rental housing market is dominated by households with incomes bordering on poverty, a surprisingly large proportion of nonmetropolitan renters devote less than 15 per cent of their incomes to rent. The median rent-income ratio of approximately .14:1 is the same for whites and blacks, although blacks are more likely to spend more than one-quarter of their incomes for rent. While households in poor-quality housing are more likely to spend over a quarter of their incomes for rent, the fact that 60 per cent of the occupants of the poorer-quality stock spend less than 15 per cent of their incomes on rent reflects a low-rent structure, and suggests, perhaps, that housing is not a high-priority item among substantial numbers of consumers. Alternatively, there may be a latent demand among households for better-quality housing than is now available to them.

Renters are generally mobile, and nonmetropolitan tenants are no exception. Thirty-one per cent moved within the last year, and only one-third lived in the same house five years ago. High mobility rates, however, are almost entirely confined to young, white, upper-income households. Over 53 per cent of black households with incomes below $5,000 have lived in the same house for five years or more; the comparable figure for whites is 47 per cent. On the average, white households have lived in their current residence for 1.5 years, while black households have an average tenure of 3.6 years.

In sum, a substantial portion of nonmetropolitan renters are locked into the rental market by virtue of their low incomes, their unstable employment pattern, or their age and household-composition patterns. In addition, mobility patterns and rent-income ratios suggest that even within the rental sector, housing choice is restricted, particularly for low-income black households.

CHARACTERISTICS OF LANDLORDS

Often the impetus for landlord-tenant reform rests on the firm belief that landlords maintain a monopolistic control over a basic human necessity and use that power to maximize their profits regardless of the cost in human suffering. A number of recent studies that have presented evidence of the cost squeeze and the management problems facing owners of rental housing have begun to debunk that myth. While owners no doubt maintain the upper hand in their relationships with tenants, most have neither the resources nor the malice to support the slumlord stereotype. In the nonmetropolitan city, the typical owner has only 2.5 rental units in his portfolio. The rental investment market is not characterized by active trading; the typical investor acquired his first property 18 years

ago and his last one 11 years ago and has never sold a rental unit.

As one would anticipate in a rental housing market dominated by small-scale owners, more than nine out of ten nonmetropolitan landlords in North Carolina hold individual title to their rental properties. None use the partnership form of ownership, while less than 3 per cent adopted a corporate form. Another 3 per cent of the landlords are executors of estates or trustees to whom the responsibility of operating specific rental units had been legally assigned.

Fifty-five per cent of nonmetropolitan landlords are male. Though the mean age of landlords is 58, one-third of all owners are 65 or older. Female owners are significantly older than males; nearly half of all female owners have reached 65, but only 23 per cent of the male owners have done so. This finding, coupled with the fact that almost twice as many male owners as female owners are under 44 years old, suggests that many women have survived their husbands and are owners through inheritance and not design. Significantly, 16 per cent of all nonmetropolitan landlords are black.

Few landlords are full-time real estate operators and relatively few depend upon their rental housing for significant proportions of their income. When disaggregated by sex, the data indicate that female owners are three times as likely as males to rely heavily upon the cash flow from their rental housing. To a great extent, the relatively low priority of rental income as a component of "necessary household income" is consistent with the small percentage of owners who first acquired rental properties for purposes of supplementing their current incomes. Only 17 per cent were motivated to enter the rental market for this purpose, compared with 11 per cent who were dominated by capital gains concerns. Overwhelming all investment-related motivations, however, is the fact that 40 per cent of the landlords originally entered the market through a decision to rent out a dwelling built or purchased as their primary residence. Included in this 40 per cent are a not inconsequential number of landlords who continue to live in structures that contain at least one rental unit.

Considering the predominance of very small-scale owners in the nonmetropolitan market, a surprisingly high number (28 per cent) contract out the management of their units to professional firms. Almost two-thirds of all nonlocal operators use managers, and 23 per cent of all resident landlords do so. Similarly, higher proportions of female than male owners use management firms, which may be a function of the large numbers of elderly female owners.

In general, the nonmetropolitan landlord is neither highly sophisticated nor well capitalized, although there are indeed exceptions to this proposition. When asked what minimum profit would be required to make a rental housing investment competitive, approximately half of the landlords could not answer the question, while the other half gave widely divergent responses. Of those who did respond to the question, only 40 per cent indicated that they were currently earning at least the minimum return that they felt they ought to be receiving from their properties.

In an effort to organize our own thinking about nonmetropolitan landlords, we assigned each owner whom we interviewed to one of three classes based upon his responses to certain of our questions. Profit-maximizers were defined as landlords who frequently responded to questions in monetary terms and were aware of such concepts as rates of return, alternative investment opportunities, and the like. We defined semi-market operators as those landlords who, while aware of profit implications of various policies and practices, explicitly placed nonprofit objectives above profit motivations in the course of their rental housing business. Nonmarket landlords seemed to pay little attention to the dollars and cents of rental housing investments and took pains to maximize some nonmonetary objectives such as tenant compatibility. Midway through our landlord pretests, however, we realized that this division of the population was not working as we had hoped it would. Some profit-maximizers, for example, were more knowledgeable than others; some claimed to be pursuing profit-maximization objectives but clearly were not. At this point, we added another dimension to each of the three classes that would reflect our subjective judgment of their sophistication. The resultant landlord typology contains six classes. According to this subjective typology, 25 per cent of the owners were profit-maximizers, 42 per cent were semi-market oriented, and 33 per cent maximized nonmarket objectives. About two-thirds of the owners were classified as unsophisticated. Successive stratifications by sex and race brought out statistically significant differences among landlord subpopulations with respect to our subjective estimation of their market motivations and level of market awareness and understanding. In general, higher percentages of white owners than black and male owners than female were judged to be profit-maximizers. Differences based upon sex were stronger than those between the two racial groups. Ignoring market motivations, the data indicate that white owners are more sophisticated than nonwhite, and male operators much more sophisticated than female.

Though the majority of the landlords were classified as unsophisticated in the ways of real estate investment, they generally agreed with the proposition that the government ought to have the right to tell an owner that his property must either be improved or taken off the market. More than seven out of every ten owners supported this notion, while even higher proportions favored requiring all rental housing to have hot running water and complete kitchen and bathroom facilities. Only 52 per cent, however, favored requiring all rental housing to have heating facilities. Inasmuch as most of the poorer-quality housing in the nonmetropolitan market does not contain

central heating facilities or space heaters provided by the landlords but does contain hot running water and kitchen and toilet facilities, many landlords may have been reflecting the actual state of the housing stock in their responses to this question.

In short, the nonmetropolitan rental housing market is characterized by large numbers of small-scale, possibly poorly capitalized and relatively unsophisticated landlords, many of whom are elderly widows who are owners by inheritance and not design. The nonmetropolitan stock is predominantly single-family detached, composed of relatively small dwellings, most of which are not in very good condition. Tenant households are overwhelmingly of working-class background, disproportionately female and elderly, and generally long-term residents of their present dwellings. By and large, they are not upwardly mobile. For most, the rental stock will be the continued source of housing to meet their long-term shelter needs.

Book Review

The Changing Population of the Southeast, by John W. Florin and Richard J. Kopec. Chapel Hill: Department of Geography, University of North Carolina at Chapel Hill, 1974.

This book by two University of North Carolina geographers provides a graphical display of statistics for forty demographic, social, and economic variables for counties in eleven southeastern states. Examples of the variables included are population density, percentage of urban population, dependency ratio, median school years completed, and percentage employed in manufacturing. For each variable a large (19 x 12 inches) map shows each county shaded to represent the value of the variable. Each map is accompanied by a brief explanation of the usefulness and importance of the variable and a brief analysis that includes a comparison of the Southeast with other regions, a description of change within the Southeast, and an analysis of patterns within the southeastern states. The value of each variable is given for each region of the country and for each state but not for each county.

Although the verbal analysis is interesting and useful, the maps are not completely successful in helping the reader to analyze the complex changes that have occurred in the Southeast. Many of the maps resemble random patchwork quilts, with little or no discernible patterns apparent. Those interested in North Carolina growth and change might want to consult other recent publications that use more flexible graphic and tabular presentations, including *North Carolina's Changing Population* by Thomas E. Steahr and *North Carolina Population Trends* by C. Horace Hamilton. Also, one should not overlook the most important source of recent social and economic information about the state, *General Social and Economic Characteristics, North Carolina* from the 1970 Census of Population. —C.D.L.

COMMUNITY APPEARANCE COMMISSIONS: CHAPEL HILL'S EXPERIENCE

Sidney Cohn

In 1971 the North Carolina General Assembly authorized municipalities and counties to establish community appearance commissions to study and analyze the visual problems of the community and to make plans and create programs to "enhance and improve the visual quality and aesthetic characteristics of the municipality or county" (G.S. 160A-452). To this end an appearance commission may establish goals and standards for the community, review and make recommendations on the appearance of governmental buildings, recommend ordinances, seek voluntary compliance with its goals and standards, and educate and promote public interest in its objectives.

While this authorization is new to North Carolina, the planning tool of regulating community appearance has been used for centuries in Western Europe and is becoming quite common in the United States. A recent survey indicates that approximately 925 (35 per cent) of American cities with populations over 25,000 now regulate community appearance, whereas 25 years ago only 30 communities did so and most of their regulation programs dealt exclusively with historic districts.

Since the passage of the North Carolina law authorizing appearance commissions, many of the state's cities and towns have established such commissions. But while the general law was not enacted until 1971, one town, Chapel Hill, had by then already acquired considerable experience with an appearance commission. In 1965, responding to the threat of a "hamburger palace" on the most prominent downtown intersection, the Chapel Hill board of aldermen obtained local legislation from the General Assembly authorizing the establishment of a community appearance commission in Chapel Hill (Ch. 278, SL 1965). The commission was established by the town in that same year.

With the recent proliferation in the state of appearance commissions, an evaluation of Chapel Hill's experiences is particularly timely.

THE CHAPEL HILL COMMUNITY APPEARANCE COMMISSION

The local act for the Town of Chapel Hill is similar to the 1971 general enabling statute, except for one significant difference: The local legislation authorized the town to prohibit erection or alteration of any building or structure or outdoor advertising sign within an area of special control without prior approval by the appearance commission. Although the local enabling legislation authorized broader powers than the general law, the town of Chapel Hill rejected the regulatory power authorized by the local act and instead adopted an ordinance that follows closely the general law. The structure, powers, and scope of the Chapel Hill commission are virtually identical to those of other commissions now being created in the state.

Organization. Since 1967 Chapel Hill's appearance commission has been composed of ten members. Nine members are appointed and the tenth member is the chairman of the community appearance committee of the Chapel Hill Planning Board. The commission has always included at least four design professionals.[1] It has also generally had at least one member with expertise in landscaping and horticulture and one who represents real estate and development interests.

The committee structure of the commission has varied, changing to reflect the commission's priorities. At the outset, standing committees reflected land-use areas of the town. In 1969 the committee structure was revised to include a design review committee, a projects committee, a legislation committee, and a violations committee. Because of increasing concern with landscaping, the design review committee has recently been divided into an architectural review committee and a landscape review committee. The commission appoints ad hoc committees from time to time to act on special problems or projects.

Activities. The current committees reflect the commission's activities: reviewing applications for special-use permits and advising the board of aldermen on the aesthetic and visual appropriateness of the projects proposed; advising the aldermen on revisions to zoning and other ordinances; preparing plans, policies, and standards for its design review activities as well as for inclusion in the zoning ordinance; advising the governing body, the town manager, etc., on violations of the ordinances; and designing, planning, and executing projects to enhance the appearance of the town.

1. The ordinance requires that at least three members have special training or experience in a design profession (Chapel Hill Code § 2-50).

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The Chapel Hill zoning ordinance provides for a significant number of land uses that require special-use permits. The appearance commission reviews and advises the board of aldermen as to the appropriateness of the proposed building and site design and recommends changes in the proposed design that would satisfy the appearance objectives.

Because of increasing problems with an inadequate sign ordinance and outdoor advertising that does not fall within the purview of the special-use permit process, the commission has also engaged in an advisory review of all applications for sign permits. The building inspector submits each such application to the design review committee. The committee transmits its recommendations to the owner or sign manufacturer, or in some cases, meets with the parties involved to try to work out a solution acceptable to the committee and the applicant. (See Fig. 1).

Also at the request of the owners, the commission reviews an increasing number of new building plans. In these cases, requesting review by the commission and accepting the recommended changes are voluntary on the part of the owner.

While the local ordinance permits the commission's design review committee to communicate its findings on applications for special-use permits directly to the governing body, in practice the committee has reported to the full commission, which in turn makes its recommendations to the board of aldermen. Even though it increases the work time of commission members, the practice is desirable because it expands the number of viewpoints taken into account in making the recommendations and enhances the stature of the recommendations.

During the several years that the commission has reviewed building projects and applications for sign permits, many reviews have required three, four, or five review sessions, so that this activity has come to consume the lion's share of commission time at the expense of other important activities. The commission has tried a variety of strategies to reduce this time commitment to review but continues to return to the present format.

Both on its own initiative and on the initiative of the board of aldermen, the commission gives considerable time to preparing new and revised zoning ordinance provisions for recommendation to the aldermen. Typical provisions regulating bulk, density, parking, and land use can be very helpful in achieving appearance objectives; conversely, some provisions can work against these objectives. In identifying and analyzing the visual districts of the town and reviewing building projects, many omissions and dysfunctional characteristics of the town ordinances are discovered. Inevitably, the effort to solve such problems reinforces the need for policies in regard to visual districts.

Much, though not enough, of the commission's efforts goes toward preparing policies and standards for its own review activities as well as toward developing recommendations for new zoning ordinances provisions. Since 1970 the commission has increasingly perceived the need to identify the town's important visual districts and their attributes and to prepare design policies and criteria for new buildings in these districts. To date, only studies of the central business and the historic districts have been accomplished. Further studies have continually been frustrated by the time consumed with project design review and the lack of funds for consultants.

The commission has also developed modest design plans for the development for several areas of the central business district. It uses these as the basis for programming such elements of capital improvement as street trees, benches, litter containers, etc., and as a means for exhorting the private sector to improve its properties in an integrated manner.

The commission also finds itself initiating and executing a variety of beautification projects. Some are projects undertaken as capital improvements by town agencies,

Fig. 1. Billboards are not permitted in the Chapel Hill planning district, which makes a difference. Left, view leaving the edge of the Chapel Hill planning district. Right, view on the same highway within the planning district.

such as tree planting on streets, seating areas, and bus shelters. Other projects—landscaping projects and clean-up campaigns, for instance—are initiated by the commission and carried out by such organizations as the Scouts and garden clubs. Still other projects the commission conducts on a continuing basis—such as an annual sale of indigenous flowering plants and a program of awards to owners and designers of new or renovated buildings, signs, gardens, and so on, that contribute to the town's appearance.

A recent innovation has been the formation of a violations committee. Commissioners increasingly discovered that the sign and litter ordinances were being violated and that projects with special-use permits were not being properly executed. To cope with this situation, a close and valuable working relationship has been developed with the building inspection division, but a commissioner still must inspect every building project reviewed.

Many of the commission's activities require professional design expertise. The commissioners are unable to fulfill all of the needs for design expertise and have used professional consultants to aid in the work. (The consultants are paid with town funds or with profits from the annual plant sale.) In addition, students from the Department of City and Regional Planning at the University of North Carolina at Chapel Hill and the School of Design at North Carolina State University have contributed their services. Even so, the professional expertise available is still inadequate.

BASIC ISSUES IN CONTROLLING AESTHETICS

The desire for beautiful cities and towns seems to fall in the category of "Motherhood, God, and Flag." Any local survey would certainly indicate consensus on beauty as a community goal. However, while people agree on the desire for a visually pleasing environment, they often disagree on (1) the operational definition of good community appearance; (2) the ability of government to foster it; (3) the relative importance of visual control in the context of other conflicting demands; and (4) the legally, politically, and ideologically acceptable means to achieve it. At the heart of much of the controversy is the allegedly subjective nature of aesthetics.

Despite concurrence on the goal, many citizens believe that good community appearance cannot result from government intervention. Some contend that government intervention will result in mediocrity and monotony. Others, particularly many design professionals who have a strong commitment to individuality and creativity, say that such programs will inhibit the advancement of design and will in fact abort some potentially excellent buildings.

Identifying specific values, objectives, and means for implementing community appearance programs usually results in significant and sometimes violent differences of opinion. Questions of building style, color, density, height, the buildings or parts of the city to be included in the program, etc., all raise considerable debate. Even after these questions are resolved, controversy emerges over how to enforce decisions. To many, the goal is not important enough for imposition of any formal sanctions or regulatory power, while others advocate using the full powers of the government to reach the goal. One major issue is whether aesthetics may be regulated under the police power. In the United States, the acceptability of using the police power to achieve aesthetic purposes is becoming increasingly widespread, and can be expected to become more so. However, in North Carolina the courts have not yet spoken to this issue, and the role of the police power in aesthetic control is ambiguous.

Finally, when a community appearance program is established, conflicting concerns—such as the possibility of losing a proposed industrial or commercial building with subsequent loss of economic benefits, and the allocation of community human and financial resources—must be considered.

Even though opinions may vary greatly on setting up a community appearance program, several simple facts continue to confront many Americans: They are dissatisfied with the appearance of their cities and towns; the design and development professions cannot be counted on to improve this situation; and more and more communities are adopting forms of controls to remedy the situation and are finding those controls to be effective. Since no other alternatives to appearance programs are available, it is necessary to devise ways to resolve the controversies inherent in them and improve their effectiveness.

Two major challenges face the local appearance commission: (1) The commission must be able to determine the quality and characteristics of the environment desired, both in general terms and with respect to individual buildings, and must develop the capacity to make sound decisions as to prescriptions for better community appearance. Given the difference in the values of individuals, the impact that the decision will have on the future urban form, the dynamics of urban development, and the nonquantifiable nature of aesthetics, such decisions are obviously difficult and their outcomes uncertain. (2) The commission must find ways to expand its influence over those who control design and development and thereby over the visual quality of the environment. While sound decisions with respect to urban aesthetics are necessary, they are not enough in themselves in the present political and legal context. They must be implemented.

THE SOURCES OF COMMISSION POWER

The general law authorizing North Carolina towns to create appearance commissions does not explicitly give

those towns the power to regulate community appearance. It authorizes commissions to study and create plans, to recommend changes in the zoning and subdivision ordinances, to review public buildings and make recommendations, to execute projects, and to exhort the private sector to improve the quality of its buildings and the environment in general. This authority is limited enough, and on its face can be expected to provide little influence over the urban aesthetic in terms of the quality standards achieved or the scope of the environment affected.

Even if the general enabling statute contained the regulatory powers provided in the local act that authorrized Chapel Hill's appearance commission, the formal powers would still be extremely limited. There are several reasons for this. In Chapel Hill's enabling statute, the General Assembly clearly intended that only the most economically and visually significant areas of the town would be included. It would undoubtedly also intend this restriction to apply in other towns, should broader powers be generally available, simply because a better rationale is thereby supplied for using the police power to maintain controls over aesthetics. But unfortunately, the areas where controls would be applicable under such criteria may not be the most critical in terms of existing visual quality.

Within areas where controls would apply, further limitations would exist. The context for judgment itself would limit control. For the most part, the courts have limited the matters that may appropriately be considered under these regulatory controls to what can be seen from public ways and to the relationship between the building under review and its context. Although what can be seen and the relationship between building and context are related, in newly developed areas or those that are chaotic or monotonous, little context exists as a basis for making evaluations that will foster good building design.

Perhaps the most significant element in limiting an appearance commission's formal powers is the fact that the standards for appropriateness themselves are minimal. The judicial requirement of reasonableness requires that the appropriateness of a building be judged on the basis of the aesthetic standards of the average citizen. As a result, both the extent of the environment being regulated and the standards that can be applied by means of the police power are not adequate to achieve any degree of excellence, and the commission's effective power must come from the extra-legal influence that it can develop.

If an appearance commission wishes to affect the community's appearance significantly, it must use every technique possible to expand its influence over both the environment per se and those who are responsible for the design of the building elements. In short, it needs to develop an integrated guidance system that makes use of all available means to influence development, including advice, regulatory controls, incentives, and the town's capital improvements.

EXPANDING THE COMMISSION'S INFLUENCE

G.S. 160A-452 states: "The Commission . . . shall make careful study of the *visual* problems and needs . . . and shall make any plans and carry out any programs that will . . . enhance and improve the *visual* quality and aesthetic characteristics of the municipality or county." (Emphasis supplied.) The draftsmen used the words "visual" with the specific intent to expand the conventional notion of aesthetics and include within the purview of the appearance commission and the town the behavioral, social, symbolic, and amenity aspects of the perceived environment. Hence the commission is not confined to the limited classical definition and scope of beauty. It may also concern itself with buildings and townscape as they relate to such characteristics as the identity of the town or a neighborhood, the imagability of the city, and feelings of security and orderliness.

Besides expanding the environmental scope, such a definition of "visual" permits decisions based upon social science findings rather than solely on aesthetic judgment. In Chapel Hill, for example, the historic area is being justified as a visual district on this basis. The conventional associations with age, important works of architects, important personages, etc., do not exist in the area. Rather, its status as a visual district is based on a distinct identity and a general visual ambience that many citizens consider highly desirable and worthy of conservation. For similar reasons, the major entries of the town are being considered as possible visual districts.

While the enabling act does not permit the use of the police power to accomplish ends associated primarily with appearance, the possibility of such a use is not entirely precluded. While an appearance commission cannot use the police power to accomplish such ends, the governing body can do so in a limited but important way. Specifically, G.S. 160-A-452 (6) (c) gives an appearance commission the following authority:

> To formulate and recommend to the appropriate municipal planning or governing board the adoption or amendment of ordinances (including the zoning ordinance, subdivision regulations, and other local ordinances regulating the use of property) that will, in the opinion of the commission, serve to enhance the appearance of the municipality and its surrounding areas.

Using Existing Ordinances. As a commission identifies its objectives and implements its program, it quickly becomes aware that the existing ordinances are fraught with requirements that are counterproductive to community appearance. These include not only the more obvious sections of the zoning and subdivision ordinances dealing with bulk, height, setback, and so on, but also sections dealing with demolition, excavation and grading, erosion control, flood plains, etc. These ordinances must be closely scrutinized to eliminate these dysfunctional provisions where they exist. The Chapel Hill Appearance

Commission, for example, is still trying to alter a provision that permits a maximum height of 90 feet in the central business district because events have made it perfectly clear that the citizens desire a 45-foot limit in part of that area.

While some of these ordinances can sandbag objectives associated with appearance, others can be used to foster these objectives. The commission must carefully analyze its objectives and standards and identify which of them can legally be included in the zoning ordinance. Recently, the Chapel Hill commission, for example, was able to make valuable gains through provisions included in a new erosion-control ordinance and modifications to the existing ordinances covering service stations and drive-ins. In the erosion-control ordinance, erosion itself was identified as a visual problem as well as a pollution problem, and appearance provisions were introduced into the ordinance. Many provisions of the new ordinances covering service stations and drive-ins deal directly with the visual problems of autos, merchandise, lighting, advertising, litter, and the general lack of order. Currently the commission is having some success in abating the unkempt quality of many construction projects through a broader interpretation of the town's litter ordinance. By this coordinated approach, the appearance objectives are supported by and congruent with other objectives clearly within the traditional scope of the police power and achieve legal stature.

Through Design Review. Given the commission's powers, its design review function would at first appear to have little significance. This is not the case, however, either in the number and significance of buildings reviewed or in the control exercised over proposed development. Should the municipality's governing body so desire, the appearance program can take on important regulatory dimensions by taking advantage of various review procedures commonly used to regulate development. Most notable among these rapidly growing techniques are planned unit and cluster development provisions and the requirement of variances or special-use permits for exceptional cases under the zoning ordinance. When these techniques are used, the underlying assumption is that the particular land uses requested are themselves not totally harmonious with existing development in many cases for aesthetic and visual reasons, and statutes authorize imposition of "reasonable and appropriate conditions and safeguards" on permits issued. As a result, the inclusion of reasonable visual and aesthetic requirements are viewed as legitimate, particularly as they act to forestall inherent problems.

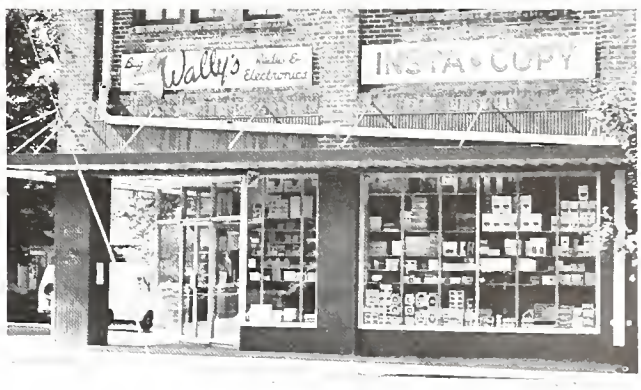
Considerable construction in Chapel Hill requires a special-use permit, including all multi-family housing, drive-in businesses, shopping centers, and unified businesses. Town policy requires that the appearance commission review all of these requests and make recommendations. The board of aldermen reviews these recommendations along with those of the planning board and staff and refuses the permit or grants it with whatever stipulations it deems justified. In an increasing number of cases, the aldermen have specified that the final approval of stipulations for such requirements as a landscape plan shall be granted by the appearance commission.

Another means for expanding influence is by encouraging what the Chapel Hill commission refers to as "complimentary reviews." In such cases, the developer voluntarily submits his project to the commission for its review. This practice seems to be growing for a variety of reasons. Some people come to the commission seeking design advice and service; they are concerned with the appearance of their building and consider this as a free town service. Others submit their plans to the commission to solicit its support. They are aware of past building projects that evoked serious protest and want to have the commission's support should such problems arise.

Last, the commission has requested that the building inspector and the planning staff keep it informed about all buildings or signs that present potential appearance problems even if they do not require review. As a result, the building inspector tries to submit all requests for sign permits to the commission for its review and many buildings are brought to the commission's attention by the planning staff. While these reviews have less impact than those in which stipulations can be specified, the applicants can be influenced through informal means that have important implications for the town's appearance. (See Fig. 2.)

Through Applicants for Building Permits. The commission also needs to expand its influence over the applicants for building permits themselves and thereby bring about changes in the appearance of the buildings. Still, it is obvious that besides the legal and ethical constraints on the forms of influence used, psychopolitical constraints also exist. Forms of influence that may be legally and even ethically acceptable may be psychologically alienating and result in undermining the effectiveness and even the existence of the commission.

Fig. 2. The sign to the right (existing) is two feet high. The sign to the left was proposed as three feet high, as permitted by the ordinance. Discussions with the owner and sign manufacturer resulted in reducing the new sign to the same height as the existing sign.



Three basic types of power can be brought to bear in such situations: (1) *coercive,* i.e., sanctions such as are embodied in the police power; (2) *remunerative,* i.e., bargaining on the basis of valuable material resources; and (3) *normative,* i.e., manipulation through the use of symbolic rewards such as status, prestige, and esteem. The last is believed to be the most effective in achieving cultural goals like community appearance—provided that all of the persons involved share a highly positive view of the program and its goals.

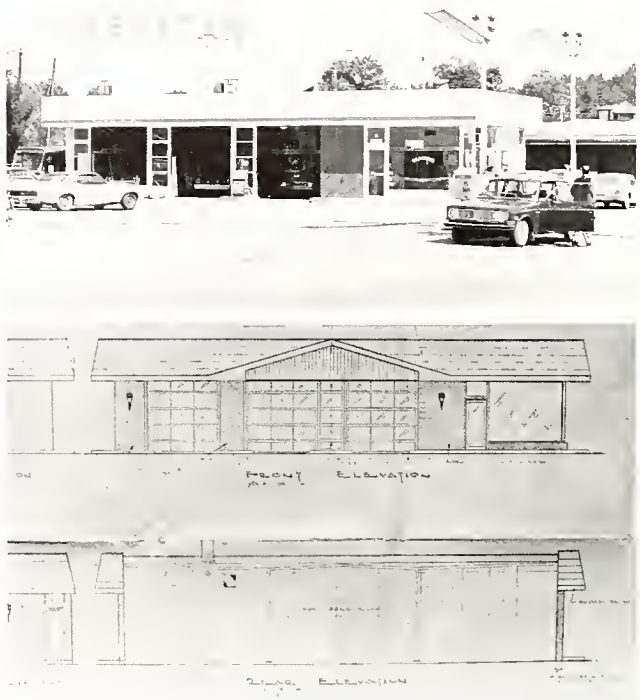
Such unanimity does not always occur. Applicants for building permits range in their orientation to the program from highly positive to highly negative. Since the effectiveness of each type of power varies with the particular form of involvement, the type of power most effective with the applicant's type of involvement should be used. Those who are highly positive in their involvement are best influenced with normative forms of power such as status and prestige reward. Those who are highly alienated by the program for the most part can be influenced only by coercion, i.e., the police power. And those who are essentially neutral to the program tend to be involved in a calculative way and are most effectively manipulated by remunerative or monetary consideration.[2] It is important that the commission quickly identify each applicant's attitude toward the program and try to use the most effective form of power in each case.

Expanding the commission's influence involves using all three types of power and seeking new sources for all. In regard to approaching remunerative or normative involvements, a great deal of the commission's success in expanding its influence depends upon how successful it is in establishing contacts by which those involvements can be used.

Through Professional Expertise. Much of the power that a commission can achieve in remunerative or normative involvements stems from the commissioners' expertise. The respect that many applicants feel for design expertise and professionalism, particularly if it is outstanding, is in itself a potent form of influence over all but the most alienated, and particularly among those who highly favor the commission's objectives. Expertise also embodies knowledge that is a powerful source of influence over those who are ambivalent toward the objectives and have a calculative involvement in the process. In such cases the commission's professional experts can provide valuable design service to the applicant as well as information that he may not have in regard to the project. If the commissioner is highly regarded as a designer, his reputation will be particularly useful with architect-applicants, who will respond favorably to both the reputation and the design advice.

The Chapel Hill commission has tried to recognize this potential power and to use it when possible. It has had some remarkable successes. Architects and their clients have responded favorably to constructive design and technical assistance. In other cases the commission has been able to give the applicants information on the development of an adjacent site or community conditions that ultimately results in a better building and often in financial savings. (This was the case with a Wachovia branch bank, to be discussed later.) The commission has also been able to help architects who are having difficulties resolving problems with their clients. In such cases, the commission's views usually convince the client that the architect is correct. These acts increase the applicants' cooperativeness and the commission's influence. For example, in a current review of a special-use permit for a nonconforming Amoco service station, the company wanted to alter its present facility and sought a variance on several current requirements. The existing building is a straightforward white, steel and glass, flat-roofed service station. The company proposed to change the facade and roof to combine a Williamsburg Colonial facade and roof form with the now fashionable French mansard roof. (See Fig. 3.) In requesting the variances, the company pled financial hardship. The commission believed the existing structure to be aesthetically superior to that proposed, though it recognized the company's desire to reface the walls. It recommended that the major elevational and roof alterations be omitted, resulting in better community appearance and a financial savings to the company. The company's representative quickly recognized the savings to be made in the suggested change and the

Fig 3. Above, existing American Service Station Below, proposed American Service Station.



2. For a full discussion, see Sidney Cohn, "Architectural Controls in Northern Europe: A Comparative Analysis" (doctoral dissertation, University of North Carolina at Chapel Hill, 1968).

possibility of using the commission's imprimatur as leverage to persuade his superiors to revise the plans as suggested.

The commissioners tend to have greatest influence over citizens who share their highly positive involvement in community appearance. However, a staff member with expertise in urban design has several valuable sources of power over applicants who are neutral and for whom the possibility of material rewards is an effective source of influence. The staff member will himself have a degree of calculative involvement in the program. This, in addition to the material rewards he can offer the calculating applicant, makes for an effective relationship—particularly with such applicants as contractors, realtors, and those calculative architects who are continually in contact with the staff. Such a continuing day-to-day relationship over a variety of projects expands the arena of bargaining and the influence of the staff. The staff is also in the position to enforce a variety of other ordinances that provide them with a certain degree of coercive power as well.

Through Citizen Involvement. When the going gets rough over a projected building that will be prominently located and no legal sanctions are available, the most potent source of power in deciding where the building may be placed and what its appearance may be is a vocal and demonstrative citizenry in support of the program's objectives. Many such cases involve large commercial institutions and national chains. Especially with national chains, the first suggestion that the design lacks harmony with the townscape produces cries of moral indignation from the applicant. But when the applicant is faced with indicators that economic sanctions may be imposed by the citizenry, his indignation quickly changes to a calculative orientation. The Chapel Hill commission, using the potential threat of an irate citizenry, has managed to achieve significant changes in several major buildings of national chains. It is also reasonable to conclude that the original indignation expressed by one such firm resulted in its providing a sizable sum for a commission improvement project. In each case of this kind, it has become clear that while the applicants insisted that they could not afford to alter their conventional designs, the threat of public outcry and/or boycotting caused them to compromise.

This mechanism can be illustrated by the active demonstration by Chapel Hill citizens against a building proposed for the North Carolina National Bank a few years ago. The proposed structure, a seven-story bank and office building, was within the height limits of the ordinance but the citizens felt that it was too high in relation to existing buildings by some forty feet. (See Fig. 4.) Since the building met the ordinance requirements and special-use review was not required, the town had no power to reduce the building height. The commission met with the bank representatives and the developer, but to no avail. Following the public announcement of the project, hundreds of Chapel Hillians picketed the existing bank

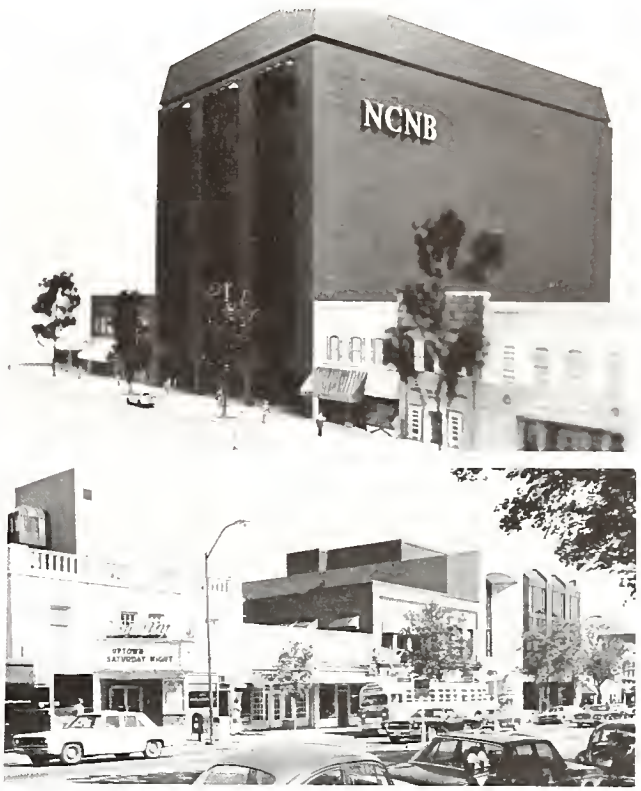


Fig. 4 Above, model of proposed seven-story bank and office building. Below, the three-story bank building as constructed (right of the bus). The six-story office building can be seen in the rear (above the theater)

and thousands signed petitions declaring their intention to remove their funds from the bank should the building be erected as proposed. This action, in conjunction with minor concessions from the town, resulted in the design being altered to conform to the desired height at considerable cost to the developer. It is highly probable that this one act, as precedent, created a significant source of power for the commission that has been used several times since.

The Inherent Power of Extant Plans and Policies. The urban design plans, policies, and criteria themselves provide valuable sources of power in several ways. Their existence can result in an alteration of the orientation or involvement of many applicants. The adoption of an appearance ordinance generates an immediate and predictable response from most persons in the development business: vigorous opposition and alienation. This reaction is only partly due to the substance of the program; in part it is the reaction to any infringement on development rights, and in part it is due to the ambiguousness of the requirements. Alienation can be converted to calculation in some cases, however, when the objectives and require-

ments are specified and the ground rules for performance are clarified.

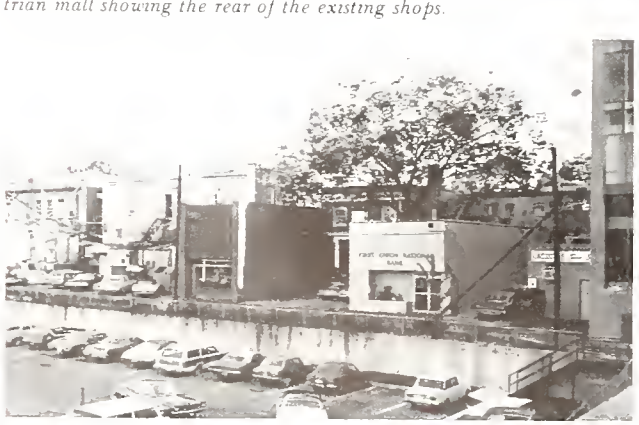
Design plans also can prove useful in dealing with applicants for building permits. The commission has developed "idea" plans for several areas in the CBD showing paving, landscaping, building location, etc. During review, the mere existence of these characteristics in a plan seems to give them credibility, and the applicants more readily accommodate their plans to the suggestions of the review committee.

Early in its existence, the commission hired consultants to develop plans for converting an alley to a pedestrian mall in the middle of a major downtown block. The mall was to provide the interface between a new municipal parking lot and the rear of stores facing the town's major shopping street. The commission hoped that the plans and the designs for the proposed rear shop entrances would encourage the owners to make the desired changes. Many shop owners have already done so, some on their own volition and others through the commission's encouragement. (See Fig. 5.) While not yet complete, the mall continues to develop.

In another case the commission created a landscape plan for a section of the central business district. The plan was adopted by the aldermen as a town policy. Each time the commission reviews a project in the area, it has managed to convince the applicant to implement some aspect of the plan. In some cases it has succeeded in convincing the owners to pave the sidewalks in brick; in others it has merely persuaded them to plant in the right-of-way or on their own property. In one instance, a proposed building clearly deviated from the plan with respect to its location and coverage. When the commission wrote a letter to the applicant outlining the deviation, the application was withdrawn.

Through Educating the Public. These examples make it clear that having a public that is aware of the program and educated to it is a necessary prerequisite to power. While the Chapel Hill commission has never conducted a comprehensive program for educating the public, it views many of its activities as serving this purpose. These activities include such projects as the annual shrub sale, planting of street trees, CBD improvements, and awards program. In addition, the design plans for various areas in town are displayed in key locations, public hearings are held, and members of the commission lecture to a variety of organizations. Such activities not only make the community more aware of the commission and the extant appearance problems but also provide a positive image to counter that sometimes created by the commission's regulatory function.

Fig. 5. View from the municipal parking lot to the proposed pedestrian mall showing the rear of the existing shops.



Through Good Communication. The commission seeks the advice of realtors and developers in plans and policies for visual districts, ordinances, etc. The various chairmen of the commission have from time to time addressed the local realty boards to explain the appearance program and its objectives. Of particular significance is the need to convince realty interests that the commission's work is aimed not at restricting their freedom to develop, but rather at protecting both the environment that makes their vocation viable and the individual buildings that they erect or sell.

The commission has found it desirable to discuss its objectives with several other development groups as well. As it tried to reduce the problems with local projects built by national chains, the commission became convinced that much of the problem lay in the fact that these national interests did not realize that the town had unique visual characteristics and qualities. To this end, the commission sent letters to the presidents of all major national chains describing the town and its community appearance objectives. Similarly, the commission discovered that lending institutions were encouraging their commercial clients to build Williamsburg Colonial-style structures in the town. These lenders believed that the appearance commission demanded this traditional form of architecture. When it learned this, the commission sent letters to the lenders clarifying its position with respect to building styles. The impact of these communications is not yet known, but the commission is optimistic.

Through Setting a Good Example. The town, in its various capital improvement activities must guard against undermining the appearance commission's influence. If the town sets a high standard in its capital improvements, citizens can be expected to respond in kind. On the other hand, if the town does not maintain high standards and particularly if it does not meet the standards it imposes on the private sector, the commission's influence will be diminished. In Chapel Hill, excellent examples have been set in large-scale projects such as the new town hall, the fire stations, the library, and other projects in which the aldermen and the commission have a direct involvement. But in the day-to-day activities of the various departments, situations frequently arise that jeopardize the objectives and influence of the commission—for example, the use of bulk trash containers. The

aldermen, on the commission's recommendation, have frequently added stringent requirements with regard to locating and screening trash containers in commercial and multi-family housing projects. However, the town's departments continue to locate their bulk trash containers with little regard to appearance and with complete disregard for the standards it demands of the private sector. The commission is frequently taunted with these examples by developers whose respect for the town, the commission, and the appearance program has been seriously eroded thereby. It is most important that the town, through its smallest development projects, convey to the community the importance of good design.

IMPROVING THE QUALITY OF DECISIONS

Proper Levels of Decision-making. Appearance programs are like other municipal programs. They resolve problems premised at one extreme on facts and at the other on broad community values. Many decisions made by appearance commissions are related to factors within the purview of other municipal agencies, requiring integration with these factors and sometimes the resolution of conflicts by the governing body. The concern of the appearance commission differs from the concerns of all other agencies, however, in that many of the factors and objectives referred to it are nonquantifiable and the problems require the pervasive use of judgment. As the general statute and the discussion below suggest, this fact makes sound judgment by the commission critically important.

The quality of decisions to be made in an appearance program and indeed the program's political viability and impact depend to a great degree on the commission's and the governing board's ability to assign responsibility for specific kinds of decisions to the proper body. Decisions that involve broad community values and goals must be distinguished from those that are instrumental, involving elements like objectives, principles, and criteria that are essentially based on fact. Decisions involving aesthetic values must be distinguished from those involving community values. This is important for two reasons. First, making decisions about community goals and values or the conflict between appearance and other goals is not a proper function of the appearance commission; that is the responsibility of the governing body. The converse is also true. Decisions about how these goals are to be achieved—that is, decisions related to objectives, aesthetic principles, and standards, etc.—require design expertise and should be made by the commission within the context of the decisions made by the governing body. The legislative body should not substitute its judgment on appearance for the commission's. To do so not only jeopardizes the quality of the decision but destroys the morale and credibility of the commission as well. Similarly, decisions that can be made on the basis of fact require neither design expertise nor collegial judgement and can be effectively made by staff. Ordinances should *require* that decisions of this kind be made and administered by the staff, thereby reducing the commission's workload (see pages 24-25.)[3]

Second, if the commission is to make effective decisions on objectives and how to implement them, the decisions it makes must be based on the decisions about values and goals that have come from the legislative body. This is the only way that the commission's work can be legitimated and the only way that a working relationship can be maintained between the two. Basing its substantive decisions on the legislative body's value decisions permits the commission to achieve greater specificity and clarity in developing objectives and standards and also assures greater consistency in both making these decisions and reviews of design. Such a framework from the governing board has significant value with respect to dealing with both building applicants and the courts, should recourse to the judiciary become necessary.

To do its part, the legislative body must go beyond the bare bones of the enabling act in writing an ordinance. It must articulate the general community values with respect to both the appearance goals involved and general means that are acceptable in achieving them. When the governing body has provided the general framework, the commission can and should create and adopt an urban design plan and a set of policies for the community. The legislative body should adopt these plans and policies to afford some assurance that future decisions made in the context will be supported by the governing body.[4]

Identifying the Critical Attributes. The urban design plan, its policies, guidelines, and criteria should be based on a thorough analysis of the visual, aesthetic, and cultural attributes of the town or city as well as on land-use factors. It seems simple enough to say that because the purpose of an appearance commission is to maintain and enhance community appearance, the community should identify these qualities. Yet this identification seldom occurs. The buildings, landscaping, and other visual elements should be inventoried and the data analyzed to ascertain the assets and deficits of the area. This analysis will permit determinations to be made on which elements and characteristics should be maintained, which should be encouraged to change, and which should be enhanced.

In developing this framework for future review decisions or ordinance provisions, it is not enough simply to evaluate environmental quality. The commission must identify the physical attributes that contribute to the desirable or undesirable qualities. In the Chapel Hill Historic District, for example, a survey of the residents indicated

3. For a more detailed explanation of these relationships, see Cohn, "Architectural Controls in Northern Europe," pp. 16-26, 39-43.

4. For additional commentary, see Robert Weinberg and Henry Fagin, *Planning and Community Appearance* (New York: Regional Plan Association, 1965), and Jonathan Barnett, *Urban Design As Public Policy* (New York: Architecture Record, 1974).

that age of the buildings and architectural quality played a relatively small role in the quality of the area; rather, the quality of maintenance and the landscaping were identified as the most important ingredients. On the other hand, whereas most people thought of the buildings as essentially white, the inventory indicated that a rather broad color spectrum existed and was desirable. In the CBD, building height, high density, commonality of materials, and strong basic horizontal and vertical modules were identified as important features.[5]

Probably most communities will find, as Chapel Hill did, that such analyses will suggest the existence of several areas with different visual and physical characteristics. It is important to identify these areas and consider each as a unique visual district with its own distinctive objectives, policies, design criteria, and ordinance provisions. The enabling legislation that authorized Chapel Hill's appearance commission clearly contemplated the existence of such distinctive areas, and analysis has confirmed it. To date the commission has identified as visual districts the CBD, the historic area, and several entrances to the town. Even these distinctions as visual districts did not suffice, however, when the data were completely analyzed. They indicated that there exist at least three distinct visual districts within the CBD and five within the historic area, each with its own unique visual characteristics, standards, and policies. The commission expects to establish a visual district in the town's eastern commercial area, and no doubt will identify others in the future.

These analyses permit the commission to prepare specific criteria as well as policies and standards for each visual district. From these, ordinance provisions are developed, policies and standards for design review are prepared, and recommendations are made for capital improvements.

Architectural Style. Architectural style inevitably becomes an issue and a focus of the analysis and recommendations. This has been emphasized in Chapel Hill, where many residents and others have the notion that the Hill's architecture is Williamsburg Colonial and believe that the town requires this style of building. (See Fig. 6.) The analysis contradicted this general belief and suggested other policies. The commission concluded that while the traditional style is acceptable in parts of the CBD, it is not necessarily appropriate there or elsewhere. In addition, it believes that contemporary architecture is appropriate anywhere in the town, including the historic district.

Fig. 6. The mythical streetscape image of Chapel Hill

Fig. 7. Above, the traditional prototype bank proposed. Below, the contemporary prototype bank erected. Note the contemporary structures to the left and right, behind. The shopping center to the right was being reviewed simultaneously.

The belief that Chapel Hill's architecture is typically Williamsburg Colonial led the Wachovia Bank and Trust Company to propose erecting its traditional-style prototype in the town's major suburban commercial area. The commission's preliminary analysis had indicated that this style was not appropriate in the area—in part because of existing structures and in part because of plans to erect a major contemporary shopping center nearby. The design review committee told the bank officers about their analyses and conclusions as to the appropriateness of the traditional design in this location and persuaded them to construct the more expensive contemporary building instead. (See Fig. 7.) While the commission believes that its analysis and logic were convincing and therefore instrumental in changing Wachovia's mind, perhaps the experience of NCNB mentioned above lent weight to its arguments.

Recently, Wachovia built a new bank in downtown Chapel Hill.[6] It is unusual, exciting, and contemporary, yet it preserves the existing character of the streetscape. (See Fig. 8.) Both the commission and the American Institute of Architects have given the design an award. Per-

5. For information on survey techniques, see S. Jacobs and B. Jones, "City Design Through Conservation," mimeo (Berkeley: University of California, 1960); P. Spreiregen, *The Architecture of Towns and Cities* (New York: McGraw-Hill, 1965); P. Thiel, "Space-Sequence Notation," *Town Planning Review* (April 1961); Environmental Protection Agency, *Aesthetics in Environmental Planning* (Washington: Government Printing Office, 1973); S. Cohn, Michael Wolfe, and Thomas Norton, *Criteria for the Establishment of Scenic Areas* (Seattle: University of Washington Press, 1963).

6. For a full description, see *The News and Observer* (Raleigh), September 29, 1974.

haps again the earlier experiences with bank buildings were useful in achieving this happy result.

The Problems in Interpreting Plans. While the visual analysis can provide factual information for design review, considerable judgment must still be exercised in many cases. Experience with the process indicates that design expertise greatly contributes to better quality decisions, and the lack of it is a serious handicap. Laymen generally cannot read the architectural plans that must be reviewed, especially when the plans involve complex buildings. Nor can they accurately conceptualize the proposed building, particularly in its context. These limitations lead most nondesigners to focus on trivial problems rather than the important fundamental appearance issues.

Many applications for building permits are accompanied by drawings that are virtually illiterate. Such projects sorely need assistance, both aesthetic and technological. The commission usually suggests that the applicants seek professional design services, but many applicants cannot or will not do so. In such instances the commission attempts to improve the design, and the advice and expertise of its members are indispensable. Such advice is usually readily accepted, especially since it usually results in a better building and often in savings to the owner.

The commission frequently has difficulties with the scope of information and the quality of drawings. While the requirements for the special-use permit application have been expanded to require aerial perspectives, landscape and exterior lighting plans, and so on, the commission usually finds the information inadequate—particularly in describing the building's context. The commission has contemplated requiring photos or drawings of the adjacent environment, but has not yet acted on this proposal. Especially when such plans are not professionally executed, they barely meet the minimal requirements of the ordinance and are only nominally legible. The commission is considering asking that the ordinance be amended to require plans of professional quality.

Working with the Applicant. The commission has found that meeting informally with proponents of new structures before they apply for a permit is very helpful. During this process many details can be worked out to mutual satisfaction. Suggested changes can be made before the design becomes firmly fixed in the mind of the designer or the owner and before much money has been spent. Further, such meetings provide additional opportunity for bargaining to take place between the commission and the applicant. This practice seems to build rapport and understanding, particularly with professionals, since problems can be worked out at the planning level.

Reducing the Need for Judgment. As more complete and comprehensive design policies and standards are developed, the commission's workload can be reduced. When standards are set for specific types of buildings or areas, judgment need not be exercised so often in review, and the judgments that are made can be based more soundly on fact. In some cases these standards can be included in the zoning ordinance itself and thereby elimi-

Fig. 8. New Wachovia Bank building in downtown Chapel Hill. The brick frame of the original harmonious facade was left intact and the new contemporary front recessed behind it. The bench in front of the bank was installed as part of an appearance commission project.

nate the need for commission review—or at least review on certain dimensions of the design. For example, Chapel Hill's new ordinance for service stations eliminates much of the need for concern with screening and landscaping. More work on this ordinance could eliminate the need for judgment entirely, and review could be conducted by competent staff.

White Plains, New York—a town of about 50,000—has specified and made a part of its zoning ordinance all appearance standards for areas outside the CBD. The applications for building permits in those areas that meet the ordinance requirements are approved by the building inspection division as a matter of course. Virtually no judgment is necessary in these cases. Building applications in the CBD, however, are reviewed by an appearance commission that operates much as Chapel Hill's commission does.

Problems in Finding Expertise. Given the need for expertise, in terms of both influence and quality of decisions, the enabling legislation's exhortation that experts serve on the local appearance commission is sound. In Chapel Hill, four or five design experts serve on the Commission at all times. Even so, absences, conflicts of interest, and overcommitment mean that the commission cannot always meet its needs for expertise with respect to plan and ordinance development and at the review sessions. Chapel Hill, while small, has a disproportionate number of professional designers. Furthermore, many of the design faculty and staff of the University of North Carolina live in the community. Without this latter resource, it is doubtful that the commission would find enough expert personnel to serve in its membership. Small towns may well have a problem in this regard, for they are not likely to have such rich resources. Many towns will find it extremely hard to enlist architects and urban designers to the commission. The enabling statute provides no alternative for solving this difficulty except, perhaps, by using an informal advisory committee made up of nonresident experts. Perhaps the General Assembly should eventually be asked to amend the general law to permit nonresidents to sit on these commissions or to permit the regional councils of government to provide the required design expertise for such commissions.

THE YET UNMET CHALLENGE

In nine years, Chapel Hill's Community Appearance Commission has survived and matured. Some close to the commission would quietly add, "Barely!" Nevertheless it has done so, and under the most trying conditions, for during this period the university and the town doubled in size and development and growth became the major problem to what was originally a quiet and static village.

The commission believes that its efforts have had a beneficial effect on Chapel Hill's appearance. All around are positive physical manifestations of its work: trees that have been preserved and trees that have been planted; parking lots and apartments that are screened from public view; harmonious streetscapes; an unusual and excellent building; signs that are simplified and outdoor lighting that no longer blinds the eye. Of even greater importance, perhaps, are the buildings and signs that never became reality and the many citizens who continue to seek the commission's advice and assistance.

Even so, the commissioners are frustrated, as are many others, with the commission's limited performance and effectiveness. Despite its efforts, there is too much evidence of disregard and thoughtlessness with respect to the town's appearance. The effort and the results, though respectable, are inadequate for the many who take pride in the town. So the question still persists, "How do we increase the commission's effectiveness and the community's appearance?"

An alternative now being considered by the town's charter commission would remove the design review function from the appearance commission and place it in the planning board. This possibility, coupled with the appointment of a "city architect" to increase the staff's capacity, has considerable merit in that it would integrate two highly overlapping and related functions. A basic problem exists, however, in that aesthetic goals constantly conflict with nonaesthetic objectives. The success of the program requires an adequate representation of those with highly positive commitment to aesthetics. While a planning board could hold such a commitment, it is unlikely that it would do so. More probably, community appearance would achieve only token representation on such a board. Lacking what appears to be the necessary dialectic between the aesthetic and the pragmatic, a planning board invested with a design-review function does not hold great promise.

For several years the commission has considered asking the board of aldermen to reconstitute the commission, granting it the quasi-judicial powers specified in the state enabling act of 1965. It has not done so for two reasons. Until it clearly identifies its policies and standards and develops its plans completely, it does not judge itself capable of exercising such authority. Further, the ultimate fate of such an ordinance in the North Carolina courts is an open question. Nevertheless, most members of the commission consider such a move to be a desirable and necessary change to be implemented in the near future. While in a sense the commission will have come full circle, it will have earned the right to do so.

DURHAM REJECTS CITY/COUNTY CONSOLIDATION

Warren J. Wicker

IN A REFERENDUM held on September 10, 1974, voters in Durham County rejected a proposed plan to consolidate the governments of the City of Durham and Durham County by a margin of more than 2-1.

Interest in city-county consolidation has a long history in Durham. The first major effort came in 1932, when the first consolidated charter for Durham was drafted. That charter never received enough support to reach the referendum stage. Additional efforts and studies were made during the 1940s and '50s, and the 1959 General Assembly created a special commission that drafted a second charter to consolidate the city and county governments. The referendum on this charter, held on January 28, 1961, was rejected in a county-wide vote of 14,355 to 4,115.

The vote on September 10 was the culmination of a third effort that was started in early 1969 by a committee of the Durham Chamber of Commerce. Over the following two years the committee (whose membership was expanded to represent the full community in 1970) made studies of local governmental arrangements in Durham, concluded that consolidation was desirable, and recommended the establishment of another charter commission. The city and county governing bodies endorsed the proposal to create a charter commission and the General Assembly created the Durham City-County Charter Commission in June of 1971.

The Charter Commission's composition was broadly representative of the Durham community. The chairman, E. K. Powe, an attorney and former member of the state legislature, was appointed jointly by the mayor of Durham and the chairman of the board of county commissioners. The other 41 members of the commission were appointed by 18 different agencies and groups: governing bodies, civic organizations, universities, labor and farm groups, and political parties.

After more than two years of work, the commission approved a proposed charter in February of 1974. Two months later, the 1974 General Assembly enacted the charter to become effective in 1975 if approved by the voters in the referendum that was held.

The Proposed Plan. The proposed government, to be known as "The Government of Durham and Durham County," would have had all the powers of both cities and counties in North Carolina. In a legal sense, the City of Durham would have been abolished and the county government transformed into one with both municipal and county powers.

Both city and county governments now have the council-manager form of government, and the proposed consolidated government would have continued this form.

The chief structural change proposed was in the manner of electing members of the governing board. The five Durham county commissioners are now elected at large, and the twelve city councilmen are all elected at large (as is the mayor), although six councilmen must meet ward residence requirements. The governing body of the proposed government would have been composed of a mayor elected at large and 16 board members elected from single-member districts. The mayor would have been elected to a two-year term and members of the governing board to four-year staggered terms in nonpartisan elections.

The administrative structure would have been left largely to the discretion of the governing board. Various semi-independent boards and commissions were not altered except that a few were enlarged to insure representation from all electoral districts.

The two school systems in the county were to be unaffected, and the powers and duties of the sheriff would have continued unchanged by the charter.

The proposed plan called for the creation of two service districts. Services that would have been provided on a county-wide basis would have been supported from county-wide revenues. The area of the City of Durham would have become an urban service district, and services provided only within that district would have been financed from urban service district taxes and other revenues. In the same fashion, a service that was provided at a higher level within the urban area would have called for proportionately higher support from citizens of the urban area.

The charter also contained provisions (Chapter 9) that would have made illegal in Durham County discrimination by private individuals, firms, and corporations on the basis of race, color, religion, sex, and national origin in the areas of employment, housing, and public accommodations. And in the case of employment, discrimination on the basis of age was also prohibited. In general, the proposed provisions parallel those of existing federal

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legislation. Had the charter been adopted, it would have been the first broad antidiscrimination statute adopted within the state.

The Campaign. The pro-consolidation forces were directed by a special committee known as Durham Citizens for One Government under the chairmanship of Floyd Fletcher, a former member of the city council and a retired radio-television executive. The committee was organized in the spring of 1974, but concentrated its efforts in the 90 days before the vote.

Exactly seven weeks before the referendum, on July 23, an organization to oppose the charter was announced. Its chairman was Claude V. Jones, retired city attorney, and it designated itself as the Committee in Opposition to Consolidation As Proposed. The ten members of the committee listed when the announcement was made included representatives of business, civic, and professional groups and members of the Charter Commission.

Both groups used newspaper advertisements extensively and person-to-person and small-group meetings. The proponents organized a speakers bureau and supplied speakers to meetings of neighborhood and civic groups in the weeks before the referendum. The opposition committee's chairman spoke before most of the same groups and in general met almost all of the speaking engagements for the opponents. The local television stations provided news coverage of the activities of each group and arranged debates on the issue by representatives of the two organizations.

Formal endorsement of consolidation came from Durham's mayor, three of the twelve members of the city council, two of the five county commissioners, one state senator, one state representative, the local newspapers, the Junior League, the League of Women Voters, the Board of Directors of the Chamber of Commerce, and the Durham Committee on the Affairs of Black People. Formal opposition was announced by three of the five county commissioners, by eight of the twelve city councilmen, by a number of former local officials, and by the Farm Bureau.

Proponents stressed the need to provide a local government that was more responsible and responsive to all citizens, the greater economy that would result from consolidation, better planning for the needs of citizens and for growth that could come from one government, better planning for the environment, greater equity in extending and financing governmental services, and the end of municipal annexation without representation.

The opposition concentrated on the manner of electing the governing board members. It also claimed that consolidation of the general governments would lead to merger of the school systems. Just three years ago, the voters of the county had decisively defeated a merger of the city school system (largely black) with the county system (largely white). Durham observers report that a fear of school merger was a factor in the opposition of many voters to governmental consolidation. Opponents also stressed the dangers in the antidiscrimination provisions; the prospect of higher taxes; the inappropriateness of the recall, initiative, and referendum provisions of the charter; and the fact that redistricting would be by a separate commission rather than by the governing board.

The Vote. An analysis of the vote suggests that all of these factors could have been important. It also suggests that despite the fact that the formal opposition characterized itself as being opposed only to the plan proposed rather than to consolidation in general, there was also general opposition to the concept of consolidation. For example, in one rural precinct the vote was 60-1 against. And in eight rural precincts an average of 97 per cent of the voters cast their ballots against consolidation. Such overwhelming opposition suggests general objection to the idea of consolidation as well as objections to specific charter provisions.

Approximately 34 per cent of the 56,800 registered voters participated in the election. Relatively speaking, voter turnout was greater in the rural precincts than in the city precincts. Outside the city, the vote was against consolidation in all 14 precincts. Inside the city, consolidation was defeated in 15 precincts and approved by a majority in 14. The vote was as follows:

	Number			Percentage	
	For	Against	Total	For	Against
Inside City	5,201	6,452	11,653	44.6	55.4
Outside City	997	6,672	7,669	13.0	87.0
County-wide	6,198	13,124	19,322	32.1	67.9

Inside the city, the strongest support for consolidation was returned in the black precincts. Seven of the eight predominantly black precincts approved consolidation. The vote in the five most solidly black precincts was 9-1 in favor of consolidation. Voter turnout was lighter in the black precincts, however, than in any of the other precincts. While blacks represent a third of the county's population, they appear to have cast not more than a fifth of the votes in the consolidation referendum.

The other precincts in the city in which consolidation was approved represent white middle-class and upper middle-class areas.

The Future. Immediately after the vote some Durham officials said that the idea of consolidation had not been killed but probably had been put to rest for several years. They expect that another attempt will not be made until after the city annexes more of the fringe area around it and, perhaps, until after the schools are merged. These two steps are seen as probably necessary before a majority of Durham voters will favor city-county consolidation.

ACCURACY AND UNIFORMITY OF PROPERTY TAX ASSESSMENTS IN NORTH CAROLINA

C. Donald Liner

ACCORDING TO NORTH CAROLINA LAW, tax assessors must try to appraise each property according to its "true value in money,"—that is, the price at which the property would sell on the real estate market.[1] Each property must be assessed at this market value, which means that property tax rates must fall on the full appraised market value. Before January 1, 1974, property was assessed at a percentage of appraised market value, according to the officially adopted assessment ratio of the county in which the property was located. The difficulty in estimating the market value of property makes it impossible to appraise each piece of property precisely at actual market value, but equity in taxation requires that appraisals be reasonably accurate and that, if assessments vary from market value, they vary uniformly. For example, it is not equitable to assess one property at 90 per cent of market value and another property at 60 per cent of market value.

One way to test whether North Carolina property has been assessed accurately and uniformly would be to compare assessed value with the actual sales price of property that has been sold on the market. By comparing assessed value with sales price we could determine how much variation there has been in assessments of individual pieces of property in the same city or county or in different counties of the state and how much variation there has been in assessments of different types of property—such as single-family homes, commercial buildings, and vacant lots. Property has been assessed uniformly if there is relatively little variation in the ratio of assessed value to sales price. This test would also indicate the accuracy of appraisals. For example, we could determine how the average ratio of assessed value to sales price corresponds to the official assessment ratio that existed before January 1, 1974, or to 100 per cent of market value as required after that date. Assessments may be uniform even if they are not accurate, however, and it is uniformity, rather than accuracy, that is relevant to the question of equity of assessments.

Fortunately, such a test is possible. Every five years since 1956, the U.S. Bureau of the Census, as part of the Census of Governments, has taken a sample of actual real estate transactions that have occurred within a six-month period in over 2,000 taxing jurisdictions in the United States.[2] The two basic pieces of information collected in the survey are (1) the assessed value of each property, and (2) the sales price at which the property was transferred from one owner to another (efforts are made to eliminate transactions within families and other transactions that might tend to distort the results). An "assessment/sales price ratio" is computed for each property in the sample and expressed as a percentage:

$$\frac{\text{Assessed value}}{\text{Sales price}} \times 100 = \text{assessment/sales price ratio}$$

For example, a house assessed at $4,000 that had been sold for $10,000 would have an assessment/sales price ratio of 40 per cent, meaning that it had been assessed at 40 per cent of its actual market value. If there had been an official assessment ratio of 40 per cent in effect in the county where the property was located, this information would have meant that the property was appraised accurately at 100 per cent of its market value. On the other hand, if there had been an official ratio of 50 per cent, the information would have meant that the property had been underappraised relative to its market value.

Although the absolute value of the assessment/sales price ratio is useful, especially when compared with official assessment ratios, the most important use of assessment/sales price ratios is for evaluating *uniformity* of assessments, as mentioned above. Ideally, the assessment/sales price ratios of all property *within* an assessing jurisdiction would be equal. Unfortunately, for a number of reasons uniformity is likely to be the exception rather than the rule. Perhaps the main reason is that property appraisal is an inexact process at best, and in many states the job falls to inexperienced or overworked appraisers. Another reason is the infrequency of general revaluations, which are required only every eight years in North Carolina. Whatever the reasons, assessment/sales price ratios are likely to vary both within and among tax jurisdictions.

1. N. C. Gen. Stat. § 105-283.

2. The four surveys analyzed in this paper are fully described in the respective Census of Governments publications: U.S. Bureau of the Census, Census of Governments: 1957, Vol. V, *Taxable Property Values in the United States* (1959). Census of Governments: 1962, Vol. II, *Taxable Property Values* (1963). Census of Governments: 1967, Vol. 2, *Taxable Property Values* (1968). Census of Governments: 1972, Vol. 2, *Taxable Property Values and Assessment Sales Price Ratios* (1973). The methods and techniques were generally compatible from one census to another.

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From the assessment/sales price ratio computed for each property in the survey, we can derive several indicators of assessment uniformity. These indicators measure the variation of individual assessment/sales price ratios from the median assessment/sales price ratio. The median ratio is the ratio that is greater than half of the ratios in the jurisdiction and less than half of the ratios in the jurisdiction. To indicate the degree of uniformity of assessments within a city or county, we can compute a "coefficient of intra-area dispersion from the median ratio," which is the percentage by which the various individual ratios vary, on the average, from the median assessment/sales price ratio. To illustrate, let us take five hypothetical 1971 ratios from each of two counties, both having an official assessment ratio of 60 per cent in 1971:

County A		County B	
Ratio	Variation from Median	Ratio	Variation from Median
49.0%	4.0	41.0%	12.0
52.0	1.0	45.0	8.0
53.0	0.0	53.0	0.0
55.0	2.0	58.0	5.0
61.0	8.0	65.0	12.0
	15.0 ÷ 5 = 3.0		37.0 ÷ 5 = 7.4
Median ratio	53.0%		53.0%
Average variation from median ratio	3.0%		7.4%
Coefficient of intra-area dispersion	$\frac{3.0}{53.0} = 5.7\%$		$\frac{7.4}{53.0} = 14.0$

These hypothetical calculations reveal that while property has been underassessed in both counties, assessments are more uniform in County A than in County B. In other words, the assessment ratios vary less from the median ratio in County A than in County B. In County A the average deviation from the median ratio was 5.7 per cent of the median, while in County B it was 14.0 per cent of the median ratio.

A similar indicator measures variation in assessments of single-family residences between different jurisdictions. Called the "coefficient of inter-area dispersion," it is the average deviation of median ratios for individual jurisdictions from the median ratio of all jurisdictions expressed as a percentage of the median ratio of all areas. This indicator is not as useful in North Carolina as it is in other states because of the different official assessment ratios that existed before January 1, 1974.

A third indicator permits us to measure uniformity in assessments between low-priced and high-priced single-family housing within a jurisdiction. This indicator is important because past studies have discovered a tendency for high-priced houses to be underassessed relative to low-priced houses. The "intra-area price-related differential" is computed by dividing the mean ratio for sales of single-family houses by the aggregate assessment/sales price ratio for the same sales (and expressing the ratio as a percentage). A price-related differential exceeding 100 per cent indicates that relatively high-priced houses tend to have lower assessment/sales price ratios than low-priced houses.

In addition to these indicators of uniformity, the mean—or average—assessment/sales price ratio is useful as an indicator of how close appraisals are to official assessment ratios and how appraisals vary with the type of property. For example, a mean ratio of 50 per cent in a county with a official assessment ratio of 60 per cent indicates underappraisal relative to market value.

IN THE FOLLOWING SECTIONS of this article, these indicators are used to analyze uniformity and accuracy of assessments in North Carolina jurisdictions included in the Census of Governments surveys: The results can be summarized as follows:

Accuracy and uniformity of property assessments within the surveyed taxing jurisdictions deteriorated between 1966 and 1971 after improving between 1956 and 1966. The deterioration is apparent from the indicators used to evaluate accuracy and uniformity of assessments within jurisdictions: (1) Although none of the sampled jurisdictions increased or decreased official assessment ratios between 1966 and 1971, mean assessment/sales price ratios were generally lower in 1971 than in 1966 (Table 1). (2) Uniformity in assessment/sales price ratios of individual properties was less in 1971 than in 1966 after consistent improvement between 1956 and 1966 (Table 2). (3) Uniformity in assessing low-priced and high-priced houses also deteriorated between 1966 and 1971 after improving substantially in 1966 (Table 3). Part of the deterioration is undoubtedly due to the fact that many counties had not undertaken a revaluation of property for several years before 1971.

Uniformity of assessments of nonfarm residences was relatively poor in many North Carolina taxing jurisdictions. One suggested standard is that individual assessment/sales price ratios should not deviate on the average more than 20 per cent from the median assessment/sales price ratio in each jurisdiction. In 1971 less than half the sampled jurisdictions in North Carolina met this standard, and over one-quarter had an average deviation of more than 30 per cent (Table 2).

Assessment/sales price ratios of surveyed property were well below official assessment ratios. In jurisdictions that had official assessment ratios in

both 1966 and 1971, the median assessment/sales price ratio expressed as a percentage of the official assessment ratio fell from 80.0 per cent in 1966 to 67.2 per cent in 1971. This decline may be explained in large part by general increases in market values after revaluations.

Low-priced houses were overassessed compared with high-priced houses in most jurisdictions. The assessment/sales price ratio tended to be higher for low-priced houses than for high-priced houses in about 85 per cent of the jurisdictions surveyed in 1971 (Table 3).

Different types of property were not assessed uniformly (Table 4). Over the period of the surveys, 1956 to 1971, different types of property were assessed at different assessment/sales price ratios in a pattern that has not changed. Acreage and farms consistently had lowest aggregate assessment/sales price ratios, about half as large as ratios for commercial and industrial property, which had the highest ratios. Vacant platted lots were also underassessed in comparison with residential, commercial and industrial property. Although farmland and vacant land continue to be underassessed, however, the degree of underassessment has been reduced.

Uniformity among the surveyed jurisdictions in North Carolina apparently declined between 1966 and 1971. Even in 1971, however, North Carolina jurisdictions compared favorably with those of other states when differing official assessment ratios are accounted for (Table 5).

UNIFORMITY BY TYPE OF PROPERTY

Table 4 shows the aggregate assessment/sales price ratio by type of property for all North Carolina properties in the surveyed jurisdictions. The aggregate ratio for all types of property increased substantially between 1961 and 1966. This probably reflects the enactment into law in 1959 of the requirement that, beginning in 1961, counties had to reassess property according to a pre-set schedule and that an official assessment ratio had to be adopted. Before 1961, counties were required to assess property at full market value, but in practice they assessed property at some unofficially set fraction of value.

The pattern of ratios by type of property remained about the same between 1956 and 1971. Commercial and industrial property continued to have the highest ratio, 51.1 per cent, which was just slightly below the 1966 ratio. Acreage and farms had the lowest ratio, 28.8 per cent, but this compared with much lower ratios in previous years. The ratio for vacant platted lots, 35.9 per cent, was also larger than in previous years. Residential nonfarm houses had a 1971 ratio of 44.5 per cent compared with 46.8 per cent in 1966.[3]

Since January 1, 1974, North Carolina jurisdictions have not been allowed to use official assessment ratios. Instead, all property must be assessed at full market value. The Census of Governments survey to be conducted in 1976 should show a further substantial jump in assessment/sales price ratios.

UNIFORMITY WITHIN JURISDICTIONS

The three main measures of assessment uniformity within tax jurisdictions are the median assessment/sales price ratio, the intra-area coefficient of dispersion from the median ratio, and the intra-area price-related differential, all defined above.

Median Assessment/Sales Price Ratios. The distribution of tax jurisdictions by median assessment/sales price ratios is shown in Table 1. Median ratios tended to increase slightly between 1956 and 1961; for example, in 1956 median ratios were below 40.0 per cent in 72 per cent of the sampled jurisdictions, but in 1961, in only 61 per cent. The median ratios increased even more between 1961 and 1966; only 21.7 per cent of the sampled jurisdictions had ratios below 40.0 per cent in 1966. This may be explained partly by the adoption of official assessment ratios by most counties between 1961 and 1966. Although

3. The following table provides a comparison of aggregate assessment/sales price ratios for residential, nonfarm property in North Carolina and neighboring southern states. The ratios in these states must be interpreted according to the legal basis for property assessment in each state. For example, Florida and Kentucky required 100 per cent assessment in 1971, whereas in North Carolina the official assessment ratios varied by county.

Comparison of the 1971 North Carolina Aggregate Assessment/Sales Price Ratio for Residential, Non-farm Property and Equivalent Ratios from Selected Southern States.

State	1971 aggregate assessment/sales price ratio for residential non-farm property	1971 Assessment Basis
Alabama	19.7%	Fair and reasonable market value; 15% official ratio for residential property.
Florida	63.0	Full cash value; 100% official ratio.
Georgia	34.9	Not less than 40% of fair market value.
Kentucky	83.6	Fair cash value; 100% official ratio.
North Carolina	44.5	True value in money; official ratios before January 1, 1974; official ratios varied with county.
South Carolina	4.1	True value in money.
Tennessee	32.5	35% of actual value
Virginia	35.5	Fair market value.

Source: 1972 Census of Governments.

Table 1
Distribution of Sampled Tax Jurisdictions by Median
Assessment/Sales Price Ratio, North Carolina—1956, 1961, 1966, and 1971

Median Assessment/ Sales Price Ratio	1956		1961		1966		1971	
	No. of Jurisdictions	Cumulative Percentage	No. of Jurisdictions	Cumulative Percentage	No. of Jurisdictions	Cumulative Percentage	No. of Jurisdictions	Cumulative Percentage
Less than 15.0	—	0.0	—	0.0	—	0.0	—	0.0
15.0-19.9	3	12.0	3	9.7	—	0.0	—	0.0
20.0-24.9	2	20.0	2	16.1	1	3.0	—	0.0
25.0-29.9	6	44.0	6	35.5	1	6.0	5	12.8
30.0-39.9	7	77.0	8	61.3	5	21.7	17	56.4
40.0-49.9	5	92.0	7	83.9	17	74.9	9	79.5
50.0-or more	2	100.0	5	100.0	8	100.0	8	100.0
	25		31		32		39	

	1956	1961	1966	1971
Median area ratio (percentage)	33.5	36.2	43.1	38.2
Average deviation from median area ratio (percentage)	8.4	10.5	8.9	8.2
Coefficient of inter-area dispersion (percentage)	25	29	21	22
Jurisdictions with official assessment ratios of 50 percent:				
Median ratio (percentage) (no. jurisdictions in parentheses)			43.0 (10)	32.9 (10)
Jurisdictions with official assessment ratios of 60%				
Median ratio (percentage) (no. jurisdictions in parentheses)			47.5 (8)	39.9 (9)

Table 2
Distribution of Sampled Tax Jurisdictions by Intra-area
Coefficient of Dispersion from the Median Assessment/
Sales Price Ratio, North Carolina, 1956, 1961, 1966, and 1971

Intra-area Coefficient of Dispersion:	1956		1961		1966		1971	
	No. of Jurisdictions	Cumulative Percentage	No. of Jurisdictions	Cumulative Percentage	No. of Jurisdictions	Cumulative Percentage	No. of Jurisdictions	Cumulative Percentage
Less than 15.0	1	4.0	2	6.5	19	59.5	3	7.7
15.0-19.9	6	28.0	8	32.3	5	75.1	14	43.6
20.0-29.9	2	36.0	12	71.0	5	90.8	12	74.4
30.0-39.9	6	60.0	4	83.9	3	100.0	9	97.4
40.0-and over	10	100.0	5	100.0	0	100.0	1	100.0
	25		31		32		39	
Mean Coefficient of intra-area dispersion	36.6		24.9		17.7		20.8	

official assessment ratios in surveyed jurisdictions remained the same in 1966 and 1971, the median ratios tended to decline between 1966 and 1971. Fifty-six per cent of the jurisdictions had median ratios below 40.0 per cent in 1971.

These same results are evident in the median area ratios of all sampled jurisdictions. As the lower part of Table 1 shows, the median ratio increased between 1956 and 1966 from 33.5 per cent to 43.1 per cent, and then fell to 38.2 per cent in 1971.

The lower part of Table 1 also shows median ratios for groups of North Carolina tax jurisdictions with official assessment ratios of 50 and 60 per cent in 1966 and 1971.[4] These ratios also indicate lower assessments relative to

4. Not the same jurisdictions in both years.

Table 3
Distribution of Sampled Tax Jurisdictions by
Intra-Area Price-Related Differential, North Carolina, 1956, 1961, 1966, and 1971

Intra-Area Price-Related Differential	1956		1961		1966		1971	
	No. of Jurisdictions	Cumulative Percentage	No. of Jurisdictions	Cumulative Percentage	No. of Jurisdictions	Cumulative Percentage	No. of Jurisdictions	Cumulative Percentage
Less than 95.0	1	4.0	1	3.2	—	0.0	1	2.6
95.0-99.0	5	24.0	3	12.9	17	38.6	5	15.4
100.0-104.9	8	56.0	9	41.9	14	70.5	17	59.0
105.0-109.9	2	64.0	9	71.0	5	81.8	12	90.0
110-119.9	5	84.0	6	90.4	6	95.5	3	97.5
120.0-149.9	3	96.0	2	96.8	2	100.0	—	97.5
150.0 or more	1	100.0	1	100.0	—	100.0	1	100.0
Total	25		31		44		39	

sales prices in 1971 compared with 1966. For example, the median ratio for jurisdictions with official assessment ratios of 50 per cent declined from 43.0 per cent to 32.9 per cent, and the median ratio for jurisdictions with official assessment ratios of 60 per cent fell from 47.5 per cent to 39.9 per cent.

Coefficient of Intra-area Dispersion. Table 2 shows the distribution of intra-area coefficients of dispersion by size. A coefficient of 30.0 per cent means that the average deviation of individual ratios was 30.0 per cent of the median area ratio. The higher the coefficient, the less the uniformity. This indicator shows improvement in uni-

BOOK REVIEW

Property Taxes, Housing, and the Cities, by George E. Peterson, Hadi Madjid, and William P. Apgar, Jr. Lexington: Lexington Books, 1973.

The wide variation in assessment/sales price ratios reported by the Census of Governments has been general knowledge for many years. Many have suspected that the variations are not merely random results of the assessment process but are systematic in that low-cost homes and homes in blighted neighborhoods are overassessed compared with high-cost homes in wealthy neighborhoods. Where this is true, the property tax is more regressive than necessary, and the property tax may contribute to neighborhood blight. A recently published study sponsored by the United States Department of Housing and Urban Development provides evidence that assessment practices in ten large cities have a systematic bias which increases the regressivity and contributes to neighborhood blight.

The study, conducted by Arthur D. Little, Inc., and reported by George E. Peterson and others, was a survey of owners of 420 housing units in four types of neighborhoods: blighted, downward transitional, upward transitional, and stable. The study found that in most of the cities the median effective tax rates on property in blighted and downward transitional neighborhoods was much higher than in stable or upward transitional neighborhoods. In Chicago and Baltimore the sampled property in blighted neighborhoods was taxed at rates ten to fifteen times higher than property in upward transitional neighborhoods. In Detroit, Portland, and San Francisco, however, where efforts had been made to achieve more nearly equal assessment ratios, this bias did not occur.

Unequal assessments were found to contribute to blight and to discourage property improvement. The high effective rates reduced cash flow, thereby reducing the ability of owners to finance improvements, and "locked in" owners of blighted property who could not afford to improve their property and at the same time could not sell it. Although property improvements usually did not result in reassessment, property owners usually believed that improvement would lead to higher assessments and were therefore discouraged from making improvements. Tax rate and assessment increases were found to be more detrimental in blighted and downward transitional neighborhoods because the tax increases could not easily be passed on to renters in these neighborhoods.

Evidence from this study makes a strong case for reform in assessment practices. The authors believe that the crucial role in reform must be played by the states, which should monitor local assessment practices and encourage use of efficient assessment techniques. Assessment procedures were most equitable in Portland and San Francisco, where the state governments have considerable control over local assessment practices. In Oregon the state government can order an independent reappraisal of all local properties if assessment/sales price ratios get too far out of line, and in California the State Board of Equalization makes periodic evaluations of policies and procedures of local assessors' offices and also encourages new appraisal techniques. —CDL

Table 4
Aggregate Assessment/Sales Price Ratios, Based on a Sample of Measurable Sales in a Six-Month Period, North Carolina, 1956, 1961, 1966, and 1971 (aggregate assessed value as a percentage of aggregate sales price of sold properties)

Type of Property	1956	1961	1966	1971
All types	33.8%[1]	30.6%	42.9%	42.6%
Residential (nonfarm)	35.7	36.0	46.8	44.5
Acreage and farms	25.6	20.5	22.0	28.8
Vacant platted lots	33.8	13.8	30.5	35.9
Commercial and industrial	NA [2]	44.1	52.2	51.1

1. Excluding commercial and industrial property.
2. Not available.
Source: Census of Governments.

formity between 1956 and 1966, and then a deterioration in uniformity between 1966 and 1971. For example, the percentage of sampled jurisdictions with a coefficient less than 20.0 per cent increased from 28.0 per cent in 1956 to 32.3 per cent in 1961 and to 75.1 per cent in 1966; but it then fell to 43.6 per cent in 1971. The percentage of jurisdictions with coefficients below 15.0 per cent fell to 7.7 per cent in 1971 from 59.5 per cent in 1966. Of 28 jurisdictions for which comparable data are available, 71.5 per cent had a larger coefficient in 1971 than in 1966; only 28.5 per cent had a smaller coefficient in 1971 than in 1966. This trend is also evident from the mean coefficient of dispersion, also shown in Table 2. The mean coefficient fell from 36.6 per cent in 1956 to 17.7 in 1966, but rose to 20.8 per cent in 1971.

For a few jurisdictions, the Census of Governments computes assessment/sales price ratios in the first and third quartiles in addition to the median ratio. These statistics provide another way of indicating the degree of uniformity in assessments. Table 6 shows these statistics for 1971. For an example of how these data are interpreted, consider Winston-Salem. Half the sampled houses were assessed below the median of 44.2 per cent of sales price, and half were assessed above the median. A fourth of the sampled houses were assessed below the first quartile of 37.3 per cent of sales price, and a fourth were assessed above the third quartile of 51.5 per cent of sale price. Thus, in Winston-Salem there was a fairly large difference in assessment ratios between the 25 per cent of houses in the lowest quartile and the 25 per cent in the highest quartile, though some other areas had a larger differential.

Intra-Area Price-Related Differential. The intra-area price-related differential measures uniformity in assessments of low-priced relative to high-priced single-family houses. A differential of 100 indicates uniformity; higher values indicate relatively low assessment of high-priced houses. Table 3 shows the distribution of the sampled

Table 5
Comparison of the Coefficient of Inter-Area Dispersion from the Median Ratio, North Carolina and Other States, 1956, 1961, 1966, and 1971 (number of states)

State Coefficient of Inter-Area Dispersion from Median Ratio	1956	1961	1966	1971
Less than 10%	0	2	10	12
10-19%	21	25	18	22
20-29%	19	12	4	11
30-39%	5	8	9	3
40-49%	3	1	5	2
50% or more	0	1	4	0
Total	48	49	50	50
Median coefficient	22	25	18	14
North Carolina coefficient	25	29[1]	21[1]	21[1]
Coefficients of N.C. tax jurisdictions with official assessment ratios of				
50%			4.6	8.8
	no. of jurisdictions		(10)	(10)
60%	in parentheses[2]		7.8	15.5
			(8)	(9)
70%			—	7.3
			(2)[3]	(7)

1 These coefficients reflect the differing official assessment ratios adopted by North Carolina counties beginning in 1961
2. The jurisdictions included in 1966 and 1971 are not the same.
3 Insufficient number of jurisdictions to compute coefficient.

North Carolina jurisdictions for the four surveys. The differentials for all four years indicate that in most of the sampled jurisdictions the assessment sales price ratios of high-priced houses tended to be lower than ratios of low-priced houses. In 1971, for example, 84.6 per cent of the sample jurisdictions had differentials of 100 or higher. As with the coefficient of intra-area dispersion, the pattern of price-related differentials indicated a deterioration in uniformity in 1971 after substantial improvement in 1966.

Table 6
Assessment / Sales Price Ratios of Single-Family Nonfarm Residences, Selected Areas, North Carolina, 1971 (percentage of sales price)

	Assessment Ratio		
Jurisdiction	1st Quarter	Median	3rd Quarter
Asheville	43.1%	52.9%	76.4%
Charlotte	44.9	48.1	51.5
Balance of Mecklenburg County	44.0	46.7	50.3
Durham	51.0	57.0	65.5
Balance of Durham County	49.5	54.0	59.8
Fayetteville	29.2	31.0	34.1
Greensboro	41.2	45.3	50.8
High Point (part in Guilford County)	40.2	41.9	47.6
Raleigh	33.1	35.0	41.7
Winston-Salem	37.3	44.2	51.5
Balance of Forsyth County	36.6	40.3	49.0

UNIFORMITY AMONG JURISDICTIONS

How uniform are assessments relative to sales prices among the North Carolina tax jurisdictions included in the surveys? The primary indicator of uniformity between jurisdictions is the coefficient of inter-area dispersion from the median ratio, which was defined above. It is computed only for single-family residences. Table 5 shows the North Carolina coefficients for the four censuses and compares the North Carolina coefficient with the coefficients of other states. The coefficient for North Carolina computed by the Bureau of the Census is misleading, however, because between 1961 and January 1, 1974, in North Carolina, counties were required to adopt official assessment ratios. The ratios adopted varied from 33 1/3 per cent to 100 per cent. Therefore, North Carolina's coefficients for years since 1956 do not accurately indicate the degree of nonuniformity in assessment/sales price ratios among jurisdictions. For a fair comparison to be made, a coefficient must be computed for groups of jurisdictions with the same official assessment ratios. The lower part of Table 5 shows this comparison for groups of jurisdictions large enough for the coefficient to be computed.

North Carolina's 25 per cent coefficient of inter-area dispersion in 1956 indicates relatively poor uniformity among jurisdictions. It means that the median assessment/sales price ratios of the 25 jurisdictions included in the survey varied on the average about 25 per cent from the median assessment/sales price ratio of all the jurisdictions. Thirty out of 47 states for which coefficients were computed—about 64 per cent of the total—had coefficients equal to or lower than 25 per cent. The 1961 coefficient, 29 per cent, indicated even less uniformity; 81 per cent of the states had coefficients lower than North Carolina's. The adoption of official assessment ratios and revaluations after 1961 was associated with an improvement in uniformity between 1961 and 1966, with the coefficient falling to 21 per cent. The 1971 coefficient was unchanged at 21 per cent. As mentioned above, these latter two coefficients are misleading. The 1966 coefficients for jurisdictions with the same official assessment ratios show that these North Carolina jurisdictions compared very favorably with jurisdictions in other states but apparently a deterioration in inter-area uniformity occurred between 1966 and 1971. Jurisdictions with 50 per cent official ratios had a coefficient of 8.8 per cent in 1971, almost double the 1966 coefficient of 4.6 per cent. Jurisdictions with 60 per cent official ratios had a coefficient of 15.5 per cent in 1971 compared with 7.8 per cent in 1966. Since these comparisons involve so few jurisdictions and are based on different jurisdictions, these results should be regarded as suggestive, not conclusive.

CONCLUSION

The property tax has been criticized for many reasons, but perhaps its greatest weakness is the difficulty in making accurate and uniform assessments. Inaccuracy and lack of uniformity in assessments result in inequitable taxation and also deprive local governments of revenue from the property tax base. The analysis presented here indicates that while assessment in North Carolina is perhaps more accurate and uniform than in many other states, there are both considerable room for improvement and, indeed, some serious grounds for concern. Property has generally been assessed well below official assessment ratios; the amount of underassessment is not uniform but varies considerably both within jurisdictions and between jurisdictions; and in most areas low-priced houses tend to be overassessed compared with high-priced houses. Most disturbing of all is the apparent deterioration in assessment uniformity between 1966 and 1971. The shift to 100 per cent assessments in 1974 should put pressure on assessors to appraise all types of property on the same basis and to achieve better accuracy. Unfortunately, whether assessment performance does improve under 100 per cent assessment will not be known until the 1977 Census of Governments is published in 1978. In the meantime, tax justice and revenue adequacy require that local governments continue to improve assessment accuracy and uniformity.

DURHAM MAKES THE MOST OF REVENUE-SHARING

Mark H. Webbink

WITH THE FEDERAL ENACTMENT of general revenue-sharing, the City of Durham, like other North Carolina cities, was faced in the spring of 1973 with deciding how it could best spend the dollars it would be allocated over the next four years. For Durham these funds amounted to $11 million. The demands on the revenue-sharing funds, particularly for capital improvements, were immense—largely because the Durham voters over the last decade had been unwilling to approve the necessary bond issues to finance capital improvements. How Durham went about deciding how to use its revenue-sharing funds provides an interesting study—not only of how to make effective use of revenue-sharing but also of how local political decisions can be effectively made through citizen participation.

The process started in late February 1973, when Durham's city council called several public hearings so that citizens could have a voice in deciding how to spend the city's revenue-sharing allocation. Four hearings were to be held in separate geographical locations in the city. The local news media gave the hearings good publicity, and the hearings were well attended by both residents of the community and representatives of the city government. All told, over 500 citizens turned out for the four nights of hearings, and the mayor and a majority of the city council also attended all meetings.

The large turnout permitted the representatives of the city government to hear what the citizens perceived as the city's needs. Their requests were overwhelming. They included various health-care facilities and clinics; recreation facilities of every description; services for the poor, including the funding of the city's community action agency; street-paving; facilities for senior citizens and the handicapped; improvements of the city's storm sewer system; improved housing conditions; street lighting; a new library; extension of water lines; and training and maintenance facilities for the city's fire department. Of all of these requests, two were dominant—(1) street paving, and (2) recreation facilities.

Very clearly, $11 million would not begin to meet the requests presented at the hearings. Furthermore, there was a second list of requests that had not been presented at the public hearings. This list was presented to the city council shortly after the hearings by City Manager I. Harding Hughes, Jr., and it included such additional needs as (1) a new municipal building, (2) implementation of the city's thoroughfare plan, (3) another major waste-water treatment plant, and (4) a civic convention center. One final capital need, a new sanitary landfill, was already before the city council.

The problem confronting the city council after all of these requests had been presented was how to finance all of the requested improvements with only $11 million in revenue-sharing funds over the next four years. These needs had built up over the last decade, because Durham's voters had not approved several bond issues and the city council had been reluctant to fund the improvements out of current revenues.

For help in trying to solve this problem, the council turned to City Manager Hughes and his administration. In several meetings held over the next two and a half months, Hughes met with his top advisers to tackle the problem. At first the various proposals took a shotgun approach—i.e., let's improve as many areas as possible even if only a little. But, meanwhile, another approach was being developed.

THE PLAN

This proposal came from a hunch by Lew G. Brown, who was then Durham's assistant city manager and is now town manager of Southern Pines. Brown believed that if Durham was to deal effectively with all of the requested capital improvements, the city would inevitably need to issue bonds for them. The question was, "How can you win voter support for a bond issue of the size that would be needed—an amount that most certainly would require an increase in the city's debt-service tax rate of 10 cents per $100 assessed valuation?" His answer was the key that opened the door for Durham's future.

Brown proposed amortizing $10 million in bonds with revenue-sharing money used as a supplement to the debt-service fund. He was able to show that by repaying the bonds heavily during the first few years with revenue-sharing money, within ten years the funds from that same 10 cent debt-service tax rate would be adequate to handle the city's debt-service requirements. With the help of T. L. Amick, who was then Intergovernmental Programs Coordinator, Brown worked out the details of the proposal. Then, under the city manager's direction, the

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total amount of the bonds to be amortized with revenue-sharing funds was raised to $15 million.

But the plan, which Brown and Amick termed Durham's "Program for Progress," was not limited to using revenue-sharing funds to support the debt-service fund. The debt-service fund would require only a supplement of about $2.9 million from revenue-sharing funds to cover the bonds proposed to be issued. The plan was also designed to maximize the usefulness of the more than $8 million in revenue-sharing funds that would not be needed for debt service. The plan had four other parts: (1) the temporary loan of about $2 million to the water and sewer fund for extending water lines into the county, (2) a contribution of $2.9 million toward constructing a new municipal building, (3) $648,367 for "nondeferrable items," and (4) over $4.8 million to be retained as future discretionary money. Thus a total of nearly $25.5 million would become available for financing Durham's current needs.

THE BONDS

The total amount of the bonds for all purposes was to be $17 million. Of this amount, $2 million in water and sewer bonds would be repaid from the water and sewer fund. These bonds were to be used to finance provision of water and sewer services to any street without those services that was to be paved through the street bonds. That left $15 million to be repaid from the debt-service fund. The $15 million in general bond funds could be broken down as follows:

Streets (residential)	$7,100,000
Streets (thoroughfare)	3,000,000
Recreation	4,035,000
Fire-fighting Training Facility	865,000
Total	$15,000,000

It was hoped that the street bonds for residential streets could be used to pave more than half of Durham's remaining unpaved streets. The thoroughfare bonds were to be used to acquire the right of way for improving the city's over-all road system. The recreation bonds were to construct more than 50 tennis courts, create two major city parks and about a dozen neighborhood parks, and improve each of the city's existing recreation facilities. Finally, bonds for the fire-fighting training facility were to construct an adequate facility for training Durham's fire-fighters.

Table I shows an approximation of the City of Durham's debt-service requirements in the spring of 1973 and its ability to meet those requirements. The city's debt-service requirements without the "Program for Progress" bonds did not exceed its revenues. But what if the bonds were approved and sold? If revenue-sharing funds were to be used to help amortize the bonds, they would need to be heavily used in the early years because of the limited life-span of revenue-sharing. How the schedule would look if the bonds were sold and the repayment schedule were loaded on the front end is also shown in the table.

As the table shows, the sale of the bonds would create a deficit of approximately $7,125,000 over the first ten-year period. Some revenues would become available naturally under the plan. These were: (1) over $1.8 million in interest that would be earned on the bond funds before they could be spent, and (2) over $2.4 million from the city's special-assessment sinking fund for streets that would be available from assessments paid on the street improvements carried out under the bonds. This would leave about $3 million to be made up from revenue-sharing funds.

Extending Water Lines

Both the city and county had been interested for some time in extending water lines from the city's facilities into the county to develop a uniform water supply and delivery system for the entire county. But capital was needed to finance such an extension program.

Although bonding provided one means for raising the needed capital, revenue-sharing provided an attractive alternative. By financing the extension program with revenue-sharing funds, the city and county could avoid the interest costs of bonds and yet could repay the city's general revenue-sharing trust fund from current revenues from the water utility and from assessments. This idea, if accepted, would require the appropriation of $2,035,863 from revenue-sharing funds for use in the program, all of which would later be repaid.

New Municipal Building

The City of Durham had long needed a new municipal building. Every city council over the last decade had discussed the subject at one time or another. The problem, again, was financing the effort. In making his recommendation to the city council on how revenue-sharing moneys should be used, the city manager proposed that a new municipal building be built at a cost of $4.8 million. The bulk of the funds for this venture would

Table 1

Durham's Debt-Service Requirements

Fiscal Year	Estimated Revenues (in 000s)	Before "Program For Progress"		After "Program for Progress"	
		Expenditures (in 000s)	Surplus (Deficit) (in 000s)	Expenditures (in 000s)	Surplus (Deficit) (in 000s)
1974	$1,100	$850	$ 250	$1,225	$ (125)
1975	1,125	840	285	2,450	(1,325)
1976	1,150	830	320	2,400	(1,250)
1977	1,050	690	360	2,250	(1,200)
1978	1,175	650	525	2,150	(975)
1979	1,200	625	575	2,075	(875)
1980	1,225	600	625	2,000	(775)
1981	1,250	600	650	1,550	(300)
1982	1,275	575	700	1,450	(175)
1983	1,300	550	750	1,425	(125)
1984	1,325	425	900	1,325	0
1985	1,275	300	975	1,175	100
1986	1,400	275	1,125	1,300	100
1987	1,450	225	1,225	1,250	200
1988	1,500	200	1,300	1,200	300
1989	1,550	175	1,375	1,125	425
1990	1,600	175	1,425	1,050	550
1991	1,650	150	1,500	1,450	200
1992	1,700	0	1,700	1,250	450
1993	1,750	0	1,750	1,150	600
1994	1,800	0	1,800	1,100	700
1995	1,850	0	1,850	100	1,750
1996	1,900	0	1,900	0	1,900

come from two sources: (1) the water and sewer fund, because the operations of that utility would be housed in the proposed building, and (2) revenue-sharing funds.

The total revenue-sharing appropriation for this subject was to be $2,909,076. Approximately $1.3 million was to be appropriated from the water and sewer fund, and the remaining $600,000 would be provided by the debt service fund from surplus revenues received during fiscal year 1973.

Nondeferrable Items

During budget preparations and hearings for fiscal year 1974, the city was confronted with certain expenditures that the city council either wished or felt compelled to make. The largest of these items was the acquisition and development of a new sanitary landfill. This was a large capital item that would not face the city again for several years. For that reason the city council did not feel that an appropriation from current revenues was the best means to finance such a need.

Several other items fell into this same category. They included the expansion of a neighborhood recreation center that was then under construction, construction of a recreation center for aged people by the Durham Housing Authority, additional lavatory facilities at the North Carolina Museum of Life and Science, and the opening of several streets.

Because of the nature of all of these items, the city could finance them directly from the revenue-sharing funds. The total cost of all of the projects would be $648,367.

The "Program for Progress"

This, then, was the "Program for Progress." What initially appeared to be only $11 million in revenue-sharing funds that would be available to the city over the next four years could be stretched to finance projects and programs costing over $25 million without any increase in taxes. The city could now more than double the immediately available money. The total package would look like this:

Bonds	$15,000,000
Nondeferrable Items	648,367
New Municipal Building	2,909,076
City-County Water Extensions	2,035,863
Future Discretionary Money	4,825,257
Total	$25,418,563

And despite all of these proposals, the city still would have left over $4.8 million that was not committed to a specific project.

Presented with such a detailed and systematic plan for meeting the city's needs, the city council voted unanimously to approve it and called for a bond referendum on September 8, 1973.

HOW TO SPEND THE BOND MONEY

During the campaign that led up to the bond referendum, a very crucial question was raised: "Who will decide which streets will be paved and where and what rec-

reation facilities will be constructed?" It became apparent just before the bond vote that the citizens, particularly the Durham Committee on the Affairs of Black People (DCNA), would not be satisfied if these decisions were left to the city council. The DCNA wanted broader representation when these issues were to be decided to insure equitable distribution of the improvements.

To win the support of this group and other concerned citizens, the city council promised the establishment of a Citizens' Bond Committee if the bonds were approved. This committee would be responsible for establishing criteria for choosing which dirt streets would be paved and for recommending what recreation facilities should be constructed and where. This promise by the city council was enough to win majority voter approval of the bonds.

Immediately after the bond vote, the city council consulted various community organizations and prominent citizens and selected the membership of the Citizens' Bond Committee. The make-up of this group was quite interesting: a third of the members were women and half were black. The city council had worked hard to assure balance and representativeness on his committee.

Beginning in early October 1973, the committee worked diligently all through the autumn. Working first on street paving, the committee chose two criteria to judge the need for paving: the footage per dwelling of dirt streets and the traffic count on the streets. With the assistance of the city planning division, all city streets were ranked. The city planning division also gave the committee additional information about the streets to help it decide whether a street should be paved and, if so, with what type of paving.

The result of this work was a list of all the dirt streets that needed to be paved, the type of paving each would receive, and a priority rating based on the two criteria. This listing included 21 miles of streets that would receive standard curb-and-gutter paving and 21 miles of streets that would receive temporary or strip paving, a total of 42 miles.

The committee tackled recreation facilities in a different manner. At its first meeting, the committee received a copy of the Recreation Advisory Committee's 10-Year Capital Improvements Program for Recreation. The Recreation Advisory Committee, an advisory board to the city council on recreation matters, had developed this capital improvements program in conjunction with the city recreation department over the past few years.

Rather than adopting the Recreation Advisory Committee's proposal, the Citizens' Bond Committee used it as a working base. Making additions, corrections, and deletions to the proposal, the committee molded its proposal for recreation improvements. By the middle of January 1974, it had completed this process.

On instructions from the city council, the Citizens' Bond Committee held a hearing on its proposals before bringing them to the city council. The Committee members apparently had done their work well, for only a few changes were requested, almost all of which had been discussed before by the committee. At the city council's first meeting in February 1974, the Citizens' Bond Committee transmitted its proposals to the city council.

SOME OBSERVATIONS

Nearly a year had passed between the time the question of how Durham should use its revenue-sharing funds was raised and the presentation of the Citizens' Bond Committee's final recommendations to the City Council. In the spring of 1973, massive needs had confronted the city council totaling far more than the $11 million in revenue-sharing funds the city had available.

But ingenuity and sound planning had found a way to maximize the assistance that revenue-sharing funds could give in meeting Durham's needs. The plan that was developed called for the sale of $17 million in bonds, $15 million of which would be repaid from the city's debt-service fund. The city would be able to avoid an increase in the debt-service tax rate through the use of revenue-sharing. In effect, the city had turned $11 million of revenue-sharing money into $25.4 million of immediately available funds for general capital improvements, an increase of more than 114 per cent.

And, although the plan had originated within the city administration and had won the approval of the city council, the decision-making had come from all of Durham's citizens. The "Program for Progress" bonds presented such an opportunity that the city council invited the help of the people of Durham in deciding how to spend the money. Given the opportunity to be heard, these people told their city council what they wanted and where they wanted it.

The decision-making process in Durham on how to spend the city's revenue-sharing allocation has been a prime example of what can be accomplished through open decision-making. It stands as a lesson to all public servants in the value of citizen participation in governmental decision-making.

CITIZEN BOARDS—DO THEY SERVE A PURPOSE?

Dorothy J. Kiester

Many people serve on boards; some people serve on many boards. A few people in every community could make a career of attending board meetings if they chose to do so. In fact, there are so many boards and commissions, committees, and task forces that one is tempted to calculate the cost if each member received a flat fee for service and the minimum wage per hour for attending meetings. This is obviously a frivolous thought, but why there are so many boards is a valid question. They must serve some useful purpose or they would not thrive and proliferate as they do.

This article examines in a very general way some reasons for having citizen boards and some patterns by which different kinds of boards function. It assumes a loose definition of a citizen board as a group (three or more) of citizens who serve in a policy-making or advisory role, without salary, as part of the administrative structure of a governmental, charitable, or service organization. The organization usually has a paid executive director with professional training and/or experience to manage its program, though program administration is sometimes the responsibility of the board (more often the "commission," as in some local human relations commissions or in Governor's commissions for various problem areas). The members of the boards of public agencies usually are named by some outside appointing authority; and because the agencies are tax-supported, the boards are considered to have a different kind of accountability to the public from that of private or voluntary organizations. Because of these and other fairly basic differences, voluntary agency boards are not discussed in this article, even though they share many of the problems commonly faced by public agencies.

WHY HAVE A BOARD?

In North Carolina (and throughout the United States), there is both historical and current enthusiasm for citizen control in some measure when agencies of government are created to serve specific needs of the people. This enthusiasm derives in part from the tradition of local government in North Carolina (local units of government have only the powers delegated to them by the General Assembly, and these powers are jealously guarded), and in part it comes from a genuine commitment to the principle of democratic participation in policy-making at the level of the people being served. A wide range of variables influence the pragmatic effectiveness of the latter principle, but the potential for democratic practice is in the system.

In theory, therefore, the chief reasons for having a citizen board are:

(1) To allow for democratic representation of all citizens whose interests are affected by the activities of the organization;
(2) To permit citizen participation in the deliberations leading to policy and program decisions; and
(3) To provide informed linkage between the employees of the organization and the community at large.

In practice, the citizens appointed to the board generally hold social and political philosophies consistent with those of the appointing authority; this does not necessarily mean that all segments of the population will be represented. For some types of organizations it is important that the board be experienced in the areas of agency responsibility; sometimes this requirement can be used as an excuse for not appointing citizens whose interests are likely to be overlooked or ignored if they conflict with the interests of more powerful members of the community.

There are many methods by which board members are selected, ranging from partisan *election* to *designation* by board members of their own successors. Between these two extremes is *appointment* by assorted combinations of local governing bodies, elected or appointed officials with the approval of state or local governing bodies, and other organizations or interest groups specifically authorized to appoint representatives in order to assure a particular range or mix of representation. Terms are usually staggered, and not all appointments are for specified terms. Furthermore, it would be difficult to say that the nature of the organization and its reason for being are major factors in determining the method of board selection. There doubtless was a reason for the choice when a particular method was adopted for any given agency; but in general, methods of board selection and board composition have little consistency. The extent, therefore, to which any one board may exist for "democratic representation of all citizens whose interests are affected" probably depends on how well the appointing authority honors the principle, or on how the electorate votes.

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The "citizen sharing of responsibility for policy and program decisions" is largely a function of the board's composition. If the board is capable and conscientious and has access to the information it needs to make intelligent decisions, it may be fully responsive to the reason for its being. It may not be or have all those things, sometimes through no fault of its own. For example, the executive may be making decisions that the board does not know about, does not understand, or does not later agree with. This situation can become common when the board members do not come to meetings regularly, do not meet often enough, or do not seek to inform themselves on complex issues except as they are given information at the board meetings. Pointing a finger of blame does no good in such a situation, but both executive and board members should consider whether this abdication has occurred and whether they are satisfied that it should be this way.

Board members not infrequently complain that they went to meetings conscientiously for the first few months of their term of office but were never able to figure out what was going on or what purpose their presence served, and that they gradually quit going to meetings they considered a personal waste of time. Whose fault is this? Should the executive be responsible for seeing that each new board member learns fully about the agency and his duties and prerogatives as a member of the board? Or is it the responsibility of the chairman of the board? Should a special committee of the board be designated to perform this orientation service? It is a crucial service, whoever does it, because it is axiomatic that if a board member is to be effective, he must be involved. To be involved he must feel that there is a worthwhile job on the board for him to do, that he is expected by the executive and other board members to do it, and that he will be given such help as he needs in learning how to do it. Even if the only board function is to vote on policy decisions (or recommendations, if the board is purely advisory), this is a job that needs a certain amount of preparation—information, perspective, antecedents, projected results, etc. Some of the preparation will be simply marshaling members' own knowledge; some of it will be finding and evaluating new knowledge regarding the issue at hand. And many boards have committee substructures to facilitate the management of broad and varied concerns, allowing an even more specific arena for the individual board member to become involved.

Functioning as a source of "informed linkage between the employees of an organization and the community at large" is a logical extension of the policy-making function. Serving in this way is a matter of public relations, but it is more than just selling the agency *to* the community; it is also speaking *for* the community in the agency. If board members can bring to the policy-making table a good understanding of how various groups within the community think and feel, the policy formulated is more likely to be acceptable to a variety of groups than if it is reached only on the basis of narrow administrative considerations. If the board represents the community in microcosm, controversial issues can be considered from every angle before decisions are reached, and compromises can be hammered out in the board room instead of in the streets. This is not to suggest that issues should not be openly argued in the streets—only that expensive errors of premature policy decisions can more often be avoided if the points of view being expressed in the streets are brought by fully informed and sympathetic members to the board meetings. The savings in hardship for people adversely affected by an erroneous policy are even more important than the savings in dollars and time.

When board members have participated fully in developing policies and are fully informed about program and procedure, having shared (when appropriate) in their design, they can make convincing interpretations of what the agency or organization is trying to accomplish and can generate support in a way neither the employees of the organization nor the responsible appointing body can do. They can also interpret program and budget to the governing (and appropriating) body more effectively than the paid professionals can do. But this function of interpretation and providing two-way communication can work only if board members are really involved with the agency, and involved enough with some segment of the community to do a fair job of representing the thinking of that group with the board. When board members are uninterested, the agency may be deprived not only of important channels of communication with the community but also of safeguards against the autocratic administration of a program; and the program thus falls far short of its potential for useful service to the community.

BOARD/EXECUTIVE RELATIONSHIPS

The preceding section deals with the variety of methods by which boards are appointed. This section discusses another area of variability: the patterns of board appointment of the agency executive and some possible effects on program administration. The patterns selected for comment here are:

(1) Boards with the chairman designated by the appointing authority;
(2) Boards with the chairman elected by the other members of the board;
(3) Boards with the authority to hire and fire the executive (administrator);
(4) Boards working with an elected chief administrator;
(5) Boards with the administrator hired by the same authority that appoints the board members.

Only in public agencies is the chairman designated by

the appointing body. For example, when the Governor appoints a board, he usually designates the chairman, and in some cases the General Assembly must approve, e.g., the State Board of Education. This system is also usually followed at the county and municipal levels when citizen boards are appointed by the county commissioners or the city council. In practice this method assures that the chairman shares the political philosophy of the appointing authority and can be expected to have the same general understanding of what the agency is supposed to accomplish. Local human relations commissions are a good illustration.

Since the appointing authority in these situations has presumably been elected by a majority of the voting public, it may also be presumed that the designated chairman will attempt to perform according to the majority will. However, this does not necessarily mean that all those for whom the agency service was initially designed will be pleased, especially when the program touches the interests of political and/or social minorities. The philosophical question may then be "Under what circumstances should the wishes of the majority yield to those of the minority?" If the agency in question was created to serve the needs of people who do not normally command much political or economic influence, the democratic principle of responsibility for the well-being of the *total* community may require some balancing of interests and some compromise in program and budget planning that this kind of board may find difficult if not impossible. It therefore seems indicated that a board whose chairman is designated by political appointment is not ideal for agencies created to deal with the problems of social inequities.

When the chairman is elected by other members of the board, chances are good that he will be representative of the point of view of most of the other members and will be considered the person most capable of directing the board's activities. This arrangement could well be much more democratic than having the chairman designated; but it does not necessarily guarantee an effective board, since the choices will still be limited by the appointments to the total board. There is also greater likelihood in this situation that the appointing authority will receive recommendations from the present membership about persons considered qualified for new appointments—which may or may not improve the breadth of representation.

There are three schools of thought about the ideal composition of a board or committee. One contends that the ideal composition is representation of as many different interest groups as possible, i.e., maximum heterogeneity. Another position is that business can be transacted most expeditiously and the objectives of the majority accomplished most efficiently if the board is more or less homogeneous. The third viewpoint is that the ultimate in homogeneity and therefore efficiency is a committee of one, which could perfectly well be the administrator; by this argument, there would be no need for a board. The proponents of broad and mixed representation, therefore, contend that some sacrifice of efficiency may be necessary to accomplish effectiveness in pursuing the objectives of the agency if the cooperation of the people served is in any way necessary to that effectiveness. Clearly, a broadly representative board will not run as smoothly as one in which all members are like-minded; by the same token, a large board is more difficult to manage than a small one. Generally a large board must be divided into committees for real work to be done—whether study, decision, or action—and the chairman has to be well organized to keep this kind of structure operating well. He must be prepared to devote more than just the time spent at board meetings to making it work.

If the board is authorized either by law or by charter to select and hire the executive, it will naturally try to find a person whose philosophical bent is congenial to its own. Beyond this, the excellence of professional qualifications will be governed by such limitations as budget, availability of candidates, promise of tenure, and expectations of working conditions. In general, the better qualified the executive, the more relaxed the working relationship. An executive director who is secure both personally and professionally will not suffer any self-imposed job insecurity. Ideally, this will permit the board and the executive to regard each other as equals with interdependent duties and responsibilities, and with a mutually supportive trust and respect. However, if the executive does not feel comfortable about making administrative decisions without clearing all moves with the board, such authority as he does have will be gradually relinquished to the board, which will come to feel that the executive cannot be trusted to make decisions.

On the other hand, if the board declines to take much responsibility, the partnership can become unbalanced in such a way that the board becomes only a rubber stamp. Many boards drift into this pattern of operation, particularly if their membership changes every few years and the executive goes on forever. Board members can come to feel that if their predecessors did not fire and could not otherwise change an executive who ignores them, then why should they? They may feel that the executive is well entrenched in the community and the hassle would not be worth the effort. But such a position may not agree with what most of the agency's clients would like to have happen. Unwillingness by the board to take what might be controversial action usually means that the board does not take its responsibilities very seriously, or is not very well-informed about how well the agency is accomplishing its statutory purposes, or likes things the way they are. Whichever of these positions obtains, the board is not serving a very useful purpose if all program, policy, and procedure matters are left to the administrator without any board involvement.

Clearly, a strong director and a strong board working well together are necessary if the objectives of the agency are to be most effectively fulfilled; the probability that

this pleasant circumstance will occur seems greatly enhanced if the board can select and hire—and, if necessary, fire—its own chief administrator. However, in some public agencies the administrator is appointed, usually by the same authority that appoints the board, or the board can make recommendations from which the governing body will appoint. A third variation on that theme is the situation in which the board appoints subject to the approval of a higher authority. In general, the board with no authority to hire its own executive also has limited policy-making powers. Most of the operating policies of the agency will be set by statute or by administrative rules and regulations promulgated at the federal and/or state levels. This means that the degree of the local agency's accountability to the local community is limited, and the degree of influence the board can have in how the agency renders services locally will be almost totally a matter of the "atmosphere" it promotes in the local offices. To influence staff in this regard means that board members must care enough to visit the offices frequently and communicate a genuine concern for client well-being that encourages similar attitudes on the part of the staff.

Given this wide a range in patterns of selecting both board and administrator, it seems that there can be few common threads running through the whole fabric of citizen boards as a part of the structure of community services. The situation is even more complex than described up to this point because, to be complete, it should include the arrangement in which an elected administrator works with either an elected or an appointed board—examples are mayors and the State Superintendent of Schools, each representing his own unique working conditions with his boards.

What do these and all other board/executive relationships have in common? One thing is the theory that the community can be better served if there is a combined lay/professional accountability for money spent, programs planned and executed, and general quality of service. In the ideal, the lay representatives of community interests temper the professionals' idealistic aspirations with reality, and the professionals render the services in a technically proficient manner that will accomplish what the board endorses as desirable. They complement each other in arriving at programs of maximum efficiency and effectiveness in achieving the agency's objectives. The ambitions of one are kept in proper balance by the other's awareness of budget limitations, adverse community attitudes, or technical impracticalities.

DOES THE SYSTEM WORK?

If you were a member of the General Assembly, the board of county commissioners, or the city council creating a new agency, would you want the agency to have a citizen board? Probably you would, because it would enable you, from your elected public office, to demonstrate both your concern for meeting a recognized need by creating the agency and your awareness of your constituency by appointing their representatives to the board.

If you were a prospective client of the new agency, would you want it to have a citizen board? Very likely you would because such a board would mean less danger that policies and procedures affecting the agency's services to you would be arbitrary, unilateral decisions or interpretations by the agency's administrator.

If you were the administrator of the new agency, would you want a board? Almost certainly you would so that it could act as buffer and interpreter between staff and community and/or share with you the responsibility for decisions that must be justified to the creating and appropriating authority and to both supporters and detractors in the community.

If you were an average voter of the community about to get a new agency, would *you* want it to have a citizen board? Indeed you would, because the agency would be supported with your tax money, and you would want someone other than those whose jobs depend upon the agency's programs and policies to be making or at least monitoring those policies. No matter your social or political persuasion or the likelihood of your personally receiving services from the agency, you would want your point of view to be represented to the maximum extent feasible in the management of any public agency.

Each of these four "interested parties" would no doubt have expectations of a board different from those of the other three. Individuals within the categories would differ widely in why they wanted a board, dependent upon their views of what the agency should accomplish. They would also hold divergent and often conflicting opinions about how a board should work. But if each, for his own reasons, wants a citizen board, then apparently the system *does* work. Not always well, and seldom to everyone's satisfaction, but that's democracy for you.

EFFECTS OF LITIGATION ON MENTAL RETARDATION CENTERS

H. Rutherford Turnbull, III

IN DISCUSSING THE IMPACT of litigation on mental retardation ("MR") centers, three threshold premises need to be identified, because they have been at the root of the recent litigation affecting institutions for the mentally retarded.

First, there is no body of law commonly called "the law of mental retardation." Instead, there is a body of law known as "mental health law," which contains the law affecting the mentally retarded. The absence of a separate body of law commonly acknowledged as the law of mental retardation is not surprising, for the law affecting the mentally retarded is of very recent origin. It comes principally from the litigation affecting the Partlow State School and Training Center in Alabama,[1] Georgia's mental retardation facilities,[2] New York mental retardation facilities,[3] and other states' institutions.[4] The law of mental retardation is an offshoot of litigation brought on behalf of the mentally ill,[5] but it is developing—and should be recognized—as a discrete body of law itself. Until this development has occurred, however, the law affecting the mentally ill, especially as developed through litigation, will affect—with possibly undesirable results—the treatment of the institutionalized mentally retarded person. The results may be undesirable because the differences recognized by the medical, psychological, and education professions to exist between the mentally ill and the mentally retarded are not yet fully recognized by the lawyers who purport to represent the retarded or by the judges or legislators who grapple with the legal problems of the institutionalized mentally retarded person.[6]

Second, the emerging law of mental retardation has developed in conjunction with three trends: (1) Growing medical knowledge about the etiology of mental retardation and the care, custody, and treatment of the mentally retarded; (2) growing awareness of the political community about the rights of retarded persons; and (3) increased sensitivity of the organized bar to the needs of persons who long have been without advocates.

Third, the law affecting the mentally retarded is significantly affected by the emerging concepts (designated by MR professionals as "ideologies" or "norms") about mental retardation[7] developed by the professionals in mental retardation.[8] One concept says that the retarded person is capable of development. In legal terms, that phrase translates into a rejection of the notion that the retarded in institutions should be given merely custodial care. Another advances "normalization"—that is, a person should be institutionalized, if at all, only in the environment that least restricts his freedom and is most conducive to his maximum development. Still another concept is that if institutionalization is appropriate (even temporarily), accreditation standards must be developed and institutions must comply with them. The final proposition is that the new technologies at the disposal of MR professionals must be applied in ways that are justifiable and intrude as little as possible, and by means that are as "culturally normative" as possible to elicit behavior that is as "culturally normative" as possible, i.e., as conforming to "normal" means and "normal" behavior as possible.

In the foreground of the confusing confluence of the law of the mentally ill and the retarded, the three-pronged law reform movement (medical advances, political pressures, and lawyers' responses) and the emerging norms is the allegation that the constitutional rights of a mentally retarded person who has been placed in an institution have thereby been infringed upon. The claims

1. Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), app. filed *sub nom. Wyatt v. Aderholt*, No. 72-2634 (5th Cir. Aug. 1, 1972). *Wyatt* holds that there is a Fourteenth Amendment due process right to treatment.

2. Burnham v. Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972). *Burnham* holds that there is no Fourteenth Amendment due process right to treatment. It has been consolidated on appeal with *Wyatt*, No. 72-3110 (October 5, 1972).

3. N.Y.A.R.C. v. Rockefeller, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973). *Rockefeller* holds that residents of New York MR Centers have a federal constitutional right to reasonable protection from harm and that although due process may be an element in the right to protection from harm, it does not establish a right to treatment. A subsequent ruling is reserved pending further evidence and argument. 72 Civ. 356, 357, at 2 (May 23, 1973).

4. *See, e.g.*, Welsch v. Likens, 373 F. Supp. 487 (D.C. Minn. 1974). *Welsch* follows *Wyatt* in holding that there is a Fourteenth Amendment right to treatment.

5. *Wyatt*, *supra* note 1, originated as a suit against Bryce Hospital, an Alabama state institution for the mentally ill. 344 F. Supp. at 389, and *supra*, note 1.

6. *Wyatt* makes the distinctions, as does *Welsch* and *Rockefeller*. *But see Welsch*, *supra* note 4 at 493-94, and *Rockefeller*, *supra* note 3, at 764, the courts citing cases that involve the mentally ill, sexual psychopaths, and juvenile delinquents.

7. P. Roos. Basic Facts About Mental Retardation, Legal Rights of the Mentally Handicapped 19, 23-28 (New York: Practicing Law Institute—The Mental Health Law Project, 1973).

8. "Mental retardation professional" means "any person with appropriate training or experience in the field of care for the mentally retarded, including but not limited to psychologists, physicians, educators, social workers, and registered nurses." N.C. Gen. Stat. § 122-36(i).

AUTHOR'S NOTE: Wyatt *has been affirmed (43 L. W. 2208, 5th Circ. Nov. 8, 1974). A further order in* Welsch *holds that, as practiced, seclusion, physical restraints (unless less onerous means of behavior control have failed), and chemotherapy administered withou proper evaluation, monitoring, and supervision) violate the Eighth Amendment's cruel and unusual punishment clause (43 L.W. 2151, D. Minn. Oct. 1, 1974).*

are familiar: when a person is institutionalized, he is denied freedom of movement, association, speech, expression, privacy, and the right to acquire, hold, and dispose of property. In addition, he is said to be subject to involuntary servitude and to cruel and unusual punishment.[9] These claims assert that the retarded are no less human than "normal" or noninstitutionalized persons and therefore no less worthy of constitutional protection; they assert a sameness in spite of differences.

LITIGATION: ITS POSITIVE ASPECTS

It is useful to remember three things about litigation. First, litigation is used as a threat, and the threat of litigation frequently is more productive than litigation itself. Second, litigation is an on-going, expensive, time-consuming, and administratively difficult process. Third, litigation often results in a judgment against the State and its institutions; the judgment is not only administratively difficult to comply with, but also may be expensive to satisfy and perhaps not productive, especially when it demands instant changes rather than well-planned and systematic changes accomplished with reasonable speed.

Some people believe that litigation is the only avenue for change. These people point out that those, including themselves, who want to improve the condition of institutionalized retarded persons have been unable either to effect changes within the MR bureaucracy or, more important, to persuade legislatures to respond to the glaring needs of MR institutions and their residents.[10] They also contend that litigation will create a public awareness of the problems of institutionalized persons and thus produce a groundswell that will impel bureaucratic change and legislative action. They have substantial evidence that tends to support their belief—evidence demonstrating that litigation has positive effects on MR institutions.

North Carolina's Response to Litigation. In North Carolina, for example, pending or threatened litigation[11] led to the creation of the Mental Health Study Commission,[12] the enactment of the Patients' Rights Bill,[13] and partial funding for MR center projects that had been requested legislative session after session but consistently denied by the General Assembly. A limited amount of new money has been provided for the operation of work activities centers on the campuses of the institutions for the mentally retarded, for on-campus employment of the mentally retarded, and for personnel in training and education activities. By no means has the new funding been sufficient to enable the MR centers to meet accreditation standards.

In addition, litigation has led (not by itself, but it has been a primary cause) to an emphasis on deinstitutionalization, the development of accreditation standards, the creation and improvement of community programs such as developmental day-care centers and group homes, and an awareness of other rights of the retarded in such areas as education,[14] sterilization,[15] sexual expression, guardianship, incompetency, commitment,[16] and voting.[17] It has led to the creation of some advocacy systems, both within[18] and outside[19] the institutions themselves. Once rights are established within the institutions, questions are raised whether the rights of persons in the institutions apply as well to noninstitutionalized retarded persons.[20]

9. A catalogue of claims is set forth in the reform-oriented LEGAL RIGHTS OF THE MENTALLY HANDICAPPED (especially in Chapter III), *supra* note 7.

10. *See, e.g.*, Welsch, *supra* note 4, at 497 and 498.

11. N.C.A.R.C. v. North Carolina, C.A. No. 3050, U.S.D.C. (E.D. N.C., filed 1972).

12. Res. 80 (S 702), 1973 S.L. See also Ch. 1422 (1973 S.L., 2nd Sess.), establishing a permanent legislative Commission on Children with Special Needs, and Ch. 1079 (1973 S.L., 2nd Sess.), establishing a Council on Educational Services for Exceptional Children.

13. N.C. GEN. STAT., Ch. 122, Art. 3, Part 2 (Ch. 475, 1973 S.L., and Ch. 1436, 1973 S.L., 2nd Sess.).

14. *See, e.g.*, PARC v. Pa., 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. D.C. 348 F. Supp. 866 (D.D.C. 1972); and N.C.A.R.C. v. North Carolina, *supra* note 8.

15. N.C. GEN. STAT. § 35-36 *et seq.* (Ch. 1281, 1973 S.L., 2nd Sess.).

16. N.C. GEN. STAT. Ch. 122 (Ch. 793 and Ch. 726, 1973 S.L., and Ch. 1408, 1973 S.L., 2nd Sess.).

17. G.S. 163-55 was amended in 1973 (Ch. 793, 1973 S.L.) to remove a disqualification for voting on the grounds that the prospective voter is an idiot or a lunatic.

18. In North Carolina, the Western Carolina Center, for example, has not only several institution-created staff positions filled by "patients' advocates" but also a Human Rights Committee created by the center.

19. The significant advocacy systems are the American Bar Association's Mental Health Commission [*see* Smith, *New Hope for the Mentally Disabled*, 60 A.B.A.J. 909 (1974)], the Mental Health Law Project (New York and Washington, D.C.), and the court-ordered human rights committees created at various MR centers; *see* Wyatt, *supra* note 1.

20. G.S. 122-55.1 (in the North Carolina Patients' Rights Act), extends various rights to "patients" of "treatment facilities." The term "treatment facility" is defined in G.S. 122-36(g) as "any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or mental retardation, any center or facility operated by the State of North Carolina for the care, treatment or rehabilitation of inebriates, and any community mental health clinic or center administered by the State of North Carolina." Although the act obviously intends the rights to be extended to persons confined as residents in state MR Centers, the definition, by including "any community mental health clinic or center administered by the State," can be argued to extend the rights to persons who are not confined as residents but are residents in "the community" and are outpatients at local mental health clinics or centers administered by the state. If this argument prevails, those persons have rights to plans of habilitation and treatment prepared by MR professionals in the centers.

The Federal Response to Litigation. Not only has litigation generally led to the enactment of legislation at the state level, but also the federal government recently has become increasingly active—perhaps for better, perhaps for worse—as a result of court actions. The Vocational Rehabilitation Act of 1973 [21] and the Housing and Community Development Act of 1974,[22] which have tremendous consequences for the retarded, and the activity of the United States Justice Department[23] are only three examples of the federal government's action. When the attention of Congress and the national executive, through the Department of Justice, can be focused on these problems, some good results are bound to occur.

Lawyers' Responses. For the first time, lawyers are becoming heavily involved in matters affecting the care of institutionalized retarded persons. For example, they are helping to design advocacy systems for use within the institution. They give advice before litigation occurs and in order to prevent it. When litigation is threatened, they help negotiate a settlement before litigation. They represent and guide the state through litigation and advise on how to carry out the court order if the judgment is against the institution. Lawyers, particularly those specializing in public law, are uniquely qualified to transfer their advocacy skills and law-reform techniques from one agency, or one subject matter, to another. Thus, for example, it is not unusual for lawyers to deal concurrently with MR professionals and educators, bringing together representatives of discrete units of government who ordinarily would not have been obliged to work jointly but for litigation on the rights of the mentally retarded to education[24] and treatment.[25] Interagency cooperation and communication will eventually help eliminate bureaucratic competition and duplication, service-delivery gaps, and unwise expenditures of public money.[26]

University Responses. Finally, litigation has led to the development of university programs that are helpful to insitutions for the retarded. At the University of North Carolina at Chapel Hill, the Division for Disorders in Development and Learning is very much involved in a deinstitutionalization program with Murdoch Center, a regional MR facility, and with the improvement of the educational services at that institution. In addition, newly created university-based facilities, such as Development Disabilities Technical Assistance Service at UNC-Chapel Hill and the National Center for Law and the Handicapped at the University of Notre Dame Law School—both created largely because of litigation—are deeply engaged in assisting staff at MR centers. It is safe to conclude that litigation is not all bad.

LITIGATION: ITS NEGATIVE EFFECTS

But neither is litigation all good. Like most action, it has had its unintended, unwarranted, unnecessary, undesirable, unproductive, and counterproductive effects.

The Right to Compensation. For example, consider the area of labor (also called peonage, work-therapy, treatment, or recreation, depending on one's point of view or the circumstances surrounding particular cases) by an institutionalized retarded person. A classic case of the counterproductivity of litigation—here, litigation brought to secure payment to retarded persons who perform tasks at an institution[27]—involves a young man at one of North Carolina's MR centers. He is severely afflicted by cerebral palsy and has an I.Q. of 77. He is not so low-functioning as to qualify for work in a sheltered workshop. For many years before the enactment and enforcement of the federal Fair Labor Standards Act, he had pushed a dolly from one building to the other, transporting interdepartmental mail. Now, because he cannot comply with various FLSA requirements, he has been denied the opportunity to push the dolly; he may not work at the institution. Exactly what has he been deprived of? Perhaps he has been denied the right to work; perhaps he has been denied the right to therapy or treatment; and perhaps he has been denied an opportunity for recreation. Certainly he has been denied a sense of self-worth and self-respect. When he, a person who has limited ability but is nevertheless capable and intelligent, understands that he is being required to suffer out his days in enforced idleness, has he been helped or hurt? In response to these problems, most institutions, seeking to avoid litigation, define all activity as work and pay for it; if they do not have funds to pay for it, they do not allow the activity—a result more like the turn of the screw than the turn of the key to open the door of law reform.

The Right to Treatment. The right to treatment[28]—is an area that has produced more questions than the right to work or the right to be paid. Unquestionably, institutional residents have been abused and neglected. This

21. P.L. 93-112, 87 Stat. 355 (1973).

22. S. 3066, Housing and Community Development Act of 1974, signed by the President on August 12, 1974.

23. The United States Justice Department is an intervening plaintiff in suits brought against MR centers in North Carolina and Maryland.

24. *Supra,* note 14.

25. See the cases cited in footnotes 1-4, *supra.*

26. The North Carolina Equal Educational Opportunities Act (Ch. 1293, 1973 S.L., 2nd Sess.) originally proposed a consolidation of all state agencies that furnish services to children into a single department of state government.

27. 20U.S.C. § 201 *et seq*

28. In discussing the "right to treatment," a person who is inclined to be an advocate of the "rights" of the institutionalized mentally retarded person is likewise inclined to assert, wrongly, that there is a settled constitutional right to treatment. It is far from clear that there is such a right. The court in *Wyatt, supra* note 1, found that a federal constitutional right to treatment exists; in *Burnham, supra* note 2, it found that no such right exists. In *Rockefeller, supra* note 3, the court held that a federal constitutional right to protection from harm exists, but found no federal constitutional right to treatment (its analysis of the *Wyatt* decision is commendable). *Welsch, supra* note 4, follows the Wyatt argument. *Wyatt* and *Burnham* have been consolidated on appeal since December 1972; the Fifth Circuit has not yet reached a decision on them. Given the present state of these various cases and their differing approaches to the "rights" of institutionalized retarded persons and the concomitant "duty"

abuse and neglect may have several explanations: institutional staff may have been guilty of simple negligence; they may have been overworked and understaffed; or they may have been guilty of willful or wanton misconduct. In establishing the right to treatment, the courts do not focus so much on simple negligence as on the problems of overwork and understaffing.[29] No concerned person can quarrel with that focus. It can be productive, but it also can be, has been, and probably will be counterproductive unless it is better understood.

For example, the typical staff response to court-ordered standards of care and treatment and to legislatively created patients' rights is to stop giving any treatment whatever in the highly mistaken belief that the professionals' hands have been so tied by the courts that no meaningful treatment can be given or that a right to treatment implies a right to be *not* treated;[30] or the staff may fear being sued and held accountable for the type of treatment that they give, especially if the treatment can be interpreted to violate court or legislative standards. The conventional wisdom nowadays is that it is better not to act than to act, because it is safer. That is especially true in the application of questionable treatment methods, such as aversive therapy,[31] seclusion, [32] isolation,[33] restraint,[34] and chemotherapy.[35]

of the state to such persons, it is highly inaccurate to assert, or even to assume, that a federal constitutional right to treatment has been established.

29. *Wyatt, supra* note 1, at 404-6; *Rockefeller, supra* note 3, at 768-69.

30. It is fashionable for "mental health" lawyers for the plaintiffs in right to treatment cases to maintain that the right to refuse treatment is a derivative of the right to receive treatment. They contend that the right to refuse treatment (1) is supported by the right to be kept free from harm while institutionalized (*N.Y.A.R.C. v. Rockefeller, supra* note 3), and (2) rests on First Amendment grounds (right to religion, speech, association), the nature of the treatment (i.e., how extensive it is [e.g., chemotherapy] or how irreversible it is [e.g., psychosurgery]) being determinative of the First Amendment claim. These arguments have been favorably received; see *Kaimovitz v. Dept. of Mental Health for the State of Michigan*—F. Supp. (N.D. Mich., 1974), a case involving proposed psychosurgery for a mentally ill person. On the other hand, when made as flat assertions of absolute constitutional rights, they simply do not hold water, since they could be disastrously counterproductive, thwarting the more acceptable assertion of a right to be treated. The better part of wisdom is to balance the right to treatment by a right to refuse *certain* kinds of treatment, an approach followed by North Carolina (G.S. 122-55.3 and 55.4). *See Wyatt, supra* note 1, at 400-2, and Table 1.

31. Aversive therapy is designed to extinguish inappropriate behavior (such as self-injurious or aggressive behavior) by subjecting the patient to a mild shock applied immediately after the behavior occurs; the shock is mild (less than 110 v.) and brief (less than a second).

32. Seclusion is designed for the same purposes as aversive therapy and involves putting a person into a room by himself under supervision for specific periods of time as a result of inappropriate behavior.

33. Isolation is the same as seclusion but does not necessarily involve placing the person in a room; it can be accomplished by putting him into an isolated situation (in a corner).

34. Restraint is used to prevent self-injurious or aggressive behavior and involves physical devices such as wrist cuffs.

35. Chemotherapy is the term that describes drug medication used for therapeutic purposes.

The result of potential restraint on prohibited or controversial treatment may be that no treatment at all is given, if the only effective treatment is prohibited or controversial. Another result may be that, since the more difficult cases sometimes require more staff time and usually involve prohibited or controversial treatment, staff time no longer will be devoted to them but rather will be spread equally among all residents. Equalizing the amount of treatment may be an appealing result, but it may hamper the development of some residents who need more staff time than others if they are to develop; it may cause staff to spend time on residents who cannot be more fully developed; and it may impede joint treatment-research efforts. It is not clear that the responses of "no treatment" or "equalized treatment" are warranted responses to the problems of right-to-treatment legislation and litigation.

For the most part, the statutory and judicial restrictions on the types of treatment that can be given to a retarded person (see Table I) are well founded in the sense that they will not seriously impair the staff's ability to treat, habilitate, educate, and develop the retarded person. Many retarded people are not substantially different from "normal" persons in their ability to develop under proper guidance, except that their rate and extent of growth is slower and more limited. For them, it makes sense—indeed it may be constitutionally required—for restrictions to be placed on the types of treatment that staff are entitled to use. But there are some especially intractable cases of retardation, and it is about them and the limitations on the types of treatment that may legally be furnished them that real concern exists.

One of the most vexing aspects of the right to treatment is the misunderstanding by some MR professionals of the rights of both staff and residents in the frequent and difficult cases of residents who are self-abusive or aggressive with respect to other residents or staff. If the staff do not treat such a resident to prevent his abusiveness or aggression, he acquires an opportunity (which he often takes) to injure himself and others. The establishment of patients' rights to treatment cannot be intended to mean that the resident is not to be treated, or that he has a license to break the law by committing an assault on others, or that he has a right to put his own life or body in danger and/or jeopardize the safety of others.

In North Carolina, the only prohibition against physical restraints is carefully phrased to support this conclusion:

> Physical restraints or seclusion of a patient shall be employed only when necessary to prevent danger of abuse or injury to himself or others, or as a measure of therapeutic treatment.[36]

36. N.C. GEN. STAT. § 122-55.3.

Table I

STATUTORY AND JUDICIAL LIMITATIONS ON TREATMENT TECHNIQUES FOR INSTITUTIONALIZED MENTALLY RETARDED PERSONS

The following material indicates which treatment techniques are permitted, restricted, or prohibited under the terms of North Carolina's Patients' Rights Act (G.S. Ch. 122, Article 3, Parts 2 and 3), and under *Wyatt v. Stickney,* 344 F. Supp. 387 (M.D. Ala. 1972), *N.Y.A R.C. v. Rockefeller,* 357 F. Supp. 752 (E.D.N.Y. 1973), and *Welsch v. Likens,* 373 F. Supp. 487 (D. Minn. 1974), the three leading right-to-treatment cases. Except as specifically noted, rights available to adult residents also are available to minor residents of North Carolina's mental retardation facilities. The North Carolina Patients' Rights Act does not define the types of treatment to which it refers; conceivably, a definition may be furnished by reference to *Wyatt, Rockefeller,* and *Welsch.*

1. SECLUSION AND TIME-OUT

•*N C Gen. Stat* § *122-55.3* provides that "[p]hysical restraints or seclusion of a patient shall be employed only when necessary to prevent danger of abuse or injury to himself or others, or as a measure of therapeutic treatment." It requires all instances of restraint or seclusion, and the detailed reasons therefor, to be noted in the patient's records. It also requires each patient who is restrained or secluded to be frequently observed and a record of the observation to be entered into his record

•*Wyatt* (at 400) prohibits seclusion, which is defined as the placement of a resident alone in a locked room. "Legitimate 'time-out' procedures may be utilized under close and direct professional supervision as a technique in behavior-shaping programs."

•*Rockefeller* (at 768) found that violations of the no-seclusion orders of the director of the Willowbrook State School had occurred but did not, in its decree, prohibit seclusion; instead, it ordered that future violations of his commands be punished by contempt-of-court proceedings.

•*Welsch* (at 503 and 504) states: "Several specific practices and conditions currently existing at Cambridge also draw into question the plaintiff's rights under the Eighth Amendment. In particular, there has been evidence of widespread practices of secluding residents in barren 'isolation' rooms without being strictly supervised or monitored. Two cases have considered seclusion for the mentally retarded to be totally impermissible in any form (citations omitted). This is the position taken by the Accreditation Council for Facilities for the Mentally Retarded, composed of several professional organizations that comprise the Joint Commission on Accreditation of Hospitals (citations omitted).

"In other contexts courts also have condemned seclusion practiced in a form comparable to that existing at Cambridge, and they have strictly limited the circumstances and conditions under which it may be employed (citations omitted)."

Welsch does not specifically prohibit seclusion or time-out, merely suggesting that they may violate Fourteenth and Eighth Amendment rights.

2. RESTRAINT

•*N C. Gen. Stat.* § *122-55.4* deals with the matter (see above under "Seclusion").

•*Wyatt* (at 401) provides: "Physical restraint shall be employed only when absolutely necessary to protect the resident from injury to himself or to prevent injury to others. Restraint shall not be employed as punishment, for the convenience of staff, or as a substitute for a habilitation program. Restraint shall be applied only if alternative techniques have failed and only if such restraint imposes the least possible restriction consistent with its purpose.

a. Only Qualified Mental Retardation Professionals may authorize the use of restraints.

(1) Orders for restraints by the Qualified Mental Retardation Professionals shall be in writing and shall not be in force for longer than 12 hours.

(2) A resident placed in restraint shall be checked at least every 30 minutes by staff trained in the use of restraints, and a record of such checks shall be kept.

(3) Mechanical restraints shall be designed and used so as not to cause physical injury to the resident and so as to cause the least possible discomfort.

(4) Opportunity for motion and exercise shall be provided for a period of not less than ten minutes during each two hours in which restraint is employed.

(5) Daily reports shall be made to the superintendent by those Qualified Mental Retardation Professionals ordering the use of restraints, summarizing all such uses of restraint, the types used, the duration, and the reasons therefor.

b. The institution shall cause a written statement of this policy to be posted in each living unit and circulated to all staff members."

•*Rockefeller* does not address the matter.

•*Welsch* (at 503) provides: "Utilization of various forms of physical restraints also may be violative of plaintiffs' Fourteenth and Eighth Amendment rights when employed to control behavior without first attempting less restrictive measures. This view also comports with the position of the Accreditation Council. See Standards for Residential Facilities for the Mentally Retarded The evidence has revealed that a variety of such devices are employed at Cambridge, ostensibly for the self-protection of residents and also attributable to shortages in staff to attend to residents who are otherwise likely to cause harm to themselves or others (citations omitted)." Note that the *Welsch* opinion does not hold that any form of physical restraint does in fact violate constitutional rights.

3. MEDICATION (CHEMOTHERAPY)

•*N C. Gen Stat* § *122-55 6* provides: "Each patient shall have a right to be free from unnecessary or excessive medication with drugs. Such medication shall not be used as punishment or discipline. No medication shall be administered except upon a written order of a qualified physician."

•*Wyatt* (at 400) provides that no medication shall be administered except upon a written order of a physician, that a notation of medication shall be made in the patient's records, that a patient "shall have a right to be free from unnecessary or excessive medication," that medication shall not be used "as punishment, for the convenience of staff, as a substitute for a habilitation program, or in quantities that interfere with the resident's habilitation program." and that certain prescription and procedural safeguards are to be followed.

•*Rockefeller* does not speak to the matter.

•*Welsch* (at 503) states: "Excessive use of tranquilizing medication as a means of controlling behavior, not mainly as part of therapy, may likewise infringe on plaintiffs' (residents') rights under the Fourteenth Amendment." The *Welsch* court again fails to hold that excessive use of tranquilizing drugs administered for behavior-control purposes, not mainly as a part of therapy, does in fact violate constitutional rights.

4. ELECTRIC SHOCK

•*N.C. Gen Stat. § 122-55 6* provides: "Treatment involving electroshock therapy, the use of experimental drugs or procedures, or surgery, other than emergency surgery, shall not be given without the express and informed written consent of the patient if competent, otherwise of the patient and guardian, . . . unless the patient has been adjudicated an incompetent under Chapter 35 of the General Statutes and has not been restored to legal capacity, in which case express and informed written consent of his guardian or trustee appointed pursuant to Chapter 35 of the General Statutes must be obtained. Such consent may be withdrawn at any time by the person who gave such consent."

•*Wyatt* (at 400-1) provides: "Electric shock devices shall be considered a research technique for the purpose of these standards. Such devices shall only be used in extraordinary circumstances to prevent self-mutilation leading to repeated and possibly permanent physical damage to the resident and only after alternative techniques have failed. The use of such devices shall be subject to the conditions prescribed in Standard 24, *supra,* (requiring prior approval of court-created Human Rights Committee) and Standard 29, *infra* (requiring prior approval of court-created Human Rights Committee) and shall be used only under the direct and specific order of the superintendent."

•*Rockefeller* and *Welsch* do not address the matter.

5. NOXIOUS, AVERSIVE STIMULI

•*N C. Gen. Stat Ch. 122, Art 3, Parts 2 and 3* do not address the matter.

•*Wyatt* (at 400) provides: "Behavior modification programs involving the use of noxious or aversive stimuli shall be reviewed and approved by the institution's Human Rights Committee and shall be conducted only with the express and informed consent of the affected resident, if the resident is able to give such consent, and of his guardian or next of kin, after opportunities for consultation with independent specialists and with legal counsel. Such behavior modification programs shall be conducted only under the supervision of and in the presence of a Qualified Mental Retardation Professional who has had proper training in such techniques."

•*Rockefeller* and *Welsch* do not address the matter.

6. EXPERIMENTATION

•*N C. Gen Stat § 122-55 6* prohibits "the use of experimental drugs or procedures" without the consent of the patient, his guardian, or a court-appointed guardian. See above under "Electric Shock."

•*Wyatt* (at 402) provides: "Residents shall have a right not to be subjected to experimental research without the express and informed consent of the resident, if the resident is able to give such consent, and of his guardian or next of kin, after opportunities for consultation with independent specialists and with legal counsel. Such proposed research shall first have been reviewed and approved by the institution's Human Rights Committee before such consent shall be sought. Prior to such approval the institution's Human Rights Committee shall determine that such research complies with the principles of the Statement on the Use of Human Subjects for Research of the American Association on Mental Deficiency and with the principles for research involving human subjects required by the United States Department of Health, Education and Welfare for projects supported by that agency."

•*Rockefeller* and *Welsch* do not address the issue.

7.UNUSUAL OR HAZARDOUS TREATMENT PROCEDURES

•*N C. Gen. Stat. Ch. 122, Art 3, Parts 2 and 3* do not address the matters.

•*Wyatt* (at 402) is the only case on the point: "Residents shall have a right not to be subjected to any unusual or hazardous treatment procedures without the express and informed consent of the resident, if the resident is able to give such consent, and of his guardian or next of kin, after opportunities for consultation with independent specialists and legal counsel. Such proposed procedures shall first have been reviewed and approved by the institution's Human Rights Committee before such consent shall be sought."

8. CORPORAL PUNISHMENT

•*N C. Gen. Stat § 122-55.4* provides: "Corporal punishment shall not be inflicted upon any patient."

•*Wyatt* (at 401) provides: "Corporal punishment shall not be permitted."

•*Rockefeller* and *Welsch* do not address the matter.

9. MISTREATMENT, NEGLECT, ABUSE

•*N C. Gen. Stat. § 122-55.1* declares a state policy "to insure each adult patient of a treatment facility basic human rights. These rights include the right to dignity, privacy, and human care. It is further the policy of the State that each treatment facility shall insure to each patient the right to live as normally as possible while receiving care and treatment." See G.S. 122-55.8 with respect to similar policy for minors.

•*Wyatt* (at 401) provides: "The institution shall prohibit mistreatment, neglect or abuse in any form of any resident." It also requires alleged violations to be reported to the superintendent immediately and a written record of the allegation and of the investigation into it to be made.

•*Rockefeller* holds that residents have a constitutional right to be protected from harm, stating (at 764-65) that "[o]ne of the basic rights of a person in confinement is protection from assaults by fellow inmates or by staff," and that "[a]nother is the correction of conditions which violate 'basic standards of human decency.' " The court recognizes that "there is some imprecision in a test which requires a determination of the harm against which an inmate must be protected, or 'civilized standards of humane decency' or the level of a 'tolerable living environment' or the conditions which 'shock the conscience' of the court." However, these are the standards that have been applied in determining constitutional rights.

•*Welsch* (at 503, citing *Rockefeller*) recognizes that residents have a right to humane and safe living conditions while confined under state authority and that included in that right is "protection from assaults or other harms from fellow residents."

Judicial opinion in the leading cases in the field also includes recognition that the safety of both the resident and others must be preserved.[37]

Aggressive behavior can be prevented in a variety of ways. One way is to apply reasonable force to the perpetrator so that he is restrained from doing what he intends to do, which is to commit a crime. Reasonable force can be applied either by a person in an individual capacity acting in self-defense or by a law enforcement officer in the course of his duty to prevent an assault, a breach of the peace, or any other kind of crime.

Another way is to resort to the criminal justice system. Indeed, some MR staffs have resorted, as a final measure, to swearing out warrants against aggressive residents, thereby invoking the criminal law in self-defense. If the staff are willing to swear out warrants and have such residents arrested, put on trial, and bear the consequences of resort to the criminal justice system, they must be satisfied in advance that such recourse is likely to be productive. It might serve as a lesson to the particular resident or to other residents, if they are able to learn that kind of lesson. But it might achieve nothing more than to deliver the resident to the criminal justice system, with all of its faults—including the likelihood that the corrections systems will not be able to treat the arrested retarded person—and to relieve the staff at the MR center of any further responsibility for treating him.

A third way is to apply physical restraint (which differs from using reasonable force in self-defense in that physical restraint involves putting the resident under restraint with physical devices such as wrist cuffs), or to use such techniques as isolation or drug medication.

The staff and other residents are not required to surrender their rights to self-protection simply because a self-abusive or aggressive resident is entitled to treatment. After all, a person who is self-abusive or committing an assault cannot easily be treated, and neither can his victims; nor can the staff, if they are the victims, provide treatment. Moreover, preventing the aggressive or self-abusive behavior is likely to be compatible with, if not indispensible to, treatment. Refraining from action, therefore, surely is not what is meant by the right to treatment.

What does the right to treatment mean, beyond its definitions? It means that the institutional staff must strike a balance between the right of a resident to receive appropriate treatment and to refuse inappropriate treatment on the one hand, and the right of the staff and the other residents not to suffer at the hands of the resident in question on the other. Where the staff strikes that balance and how they strike it calls for the thoughtful exercise of their professional judgment, a judgment for which they can be held accountable by an independent reviewing authority, normally the courts.

The rights of the resident themselves require a balance to be struck—between his right to receive treatment (a right that is substantially impaired when he is self-abusive or aggressive and can be meaningfully furnished to him only when he is amenable to treatment, i.e., is not being self-abusive or aggressive) and his right to be free from certain kinds of treatment or discipline, such as restraint, isolation, or drug medication (these may be unwarranted in one resident's case but not in another's). This balance is not easily achieved, for courts have enjoined and legislation prohibits certain types of action by the staff, without regard to whether the staff's action is intended to make, or will have the effect of making, the resident more amenable to treatment or is in itself a productive type of treatment. Moreover, treatment may, and almost necessarily will, involve a quantum of discipline, since retarded persons, like "normal" persons, learn not only through practice and rewards for approved behavior but also through repetitive correction of and discipline against inappropriate or disapproved behavior. Thus, correction and discipline are indispensable to treatment, a fact that seems to have escaped most courts and legislators in their zeal to safeguard residents against abuses by the staff or other residents.[38]

Accordingly, in striking a balance between the rights and interests inextricably involved in the right to be treated and the right not to be abused, the staff must take into account, first, the direct commands of a court order or legislative directive (even if the order or directive seems to thwart the resident's opportunity to receive meaningful and productive treatment) and, second, the probability that certain kinds of treatment—including the controversial ones of restraint, isolation, aversive therapy, or drug medication—are more likely than not to produce improvement in the resident's behavior or skills and to safeguard the other residents and staff (so that they can respectively receive and furnish treatment). In making such a judgment, the staff must be careful to be able to document[39] fully the reasons for their conclusion, the probable results (to the affected resident, other residents, and staff) of both furnishing and not furnishing the indi-

37. Wyatt, *supra* note 1, at 401; Rockefeller, *supra* note 3, at 764-65; Welsch, *supra* note 4, at 503.

38. *Wyatt, supra* note 1, at 401, flatly orders that "corporal punishment shall not be permitted," and G.S. 122-55.4 provides that "corporal punishment shall not be inflicted on any patient." Beyond corporal punishment, however, lie fairly sophisticated techniques of habilitation, frequently involving the use of punishment as an integral component, applied by way of treatment modalities that the courts and legislatures have restricted (see Table 1). It is difficult to distinguish between the use of modalities for (1) treatment or habilitation involving only "positive" behavior modification techniques, (2) treatment or rehabilitation involving only negative behavior techniques, (3) treatment or habilitation involving both "positive" and "negative" behavior modification techniques, and (4) punishment that has no behavior-modifying results. It is not surprising, therefore, that the staff members' intention in applying these modalities is difficult to ascertain and can be interpreted in various ways. Nor is it surprising that the courts, in their anxiety about the conditions at MR Centers, tend to prohibit such modalities or to restrict them severely.

39. G.S. 122-55.3 requires documentation if physical restraint or seclusion is used. *Wyatt* (*supra* note 1, at 398-99) requires documentation as well, but on a far more detailed basis.

cated course of treatment, and, when available, the actual results of the course of treatment. If a court order or legislative directive clearly prohibits a particular course of treatment, the prohibition must be obeyed, but the staff should note in the resident's records that they have refrained from that course of treatment because of the external prohibitions, whether they would have followed the prohibited course but for the prohibitions; the reason why; what other courses they are following and why; and what the difference in the treatment, habilitation, education, or development of the resident might have been if the prohibited course could have been followed instead of the remaining alternative(s). Without such documentation, the staff will be hard pressed to justify what they do, and the MR professionals will be without the data they need to overcome the perhaps unduly restrictive limitations on treatment imposed by courts or legislatures.

The right to treatment also means that staff must develop, if they do not already have, a sensitivity to the appropriateness, justifiability, intrusiveness, and extensiveness of the treatment. It means that it is a good thing for the staff to hesitate before engaging in a course of treatment if the hesitation gives an opportunity (which the staff take advantage of) to make a considered judgment about what ought to be done in the best interest of the resident. And it means that a resident has a right to individualized treatment, given only for designated reasons, for a specific time or duration-limited period, subject to independent periodic review, justifiable to reviewing authorities, and therefore governed by a rule that holds the staff to account for their actions.[40]

Troublesome Treatments. The public, quite naturally, is not adequately informed about the types of treatment available for the development of mentally retarded persons, and a considerable communication gap about treatment exists between the lay public, from which judges and legislators are drawn, and the MR professionals. This problem is exacerbated by the MR professionals' use of obscure and euphemistic language. For example, such MR professional terms as "isolation" and "time-out" can be misunderstood to mean prolonged solitary confinement when in fact they refer to short periods when a resident is either confined to a room by himself, under careful supervision, or required to be otherwise isolated from the staff and other residents. Similarly "aversive therapy" refers not to electroconvulsive shock therapy, but to treatment that gives a mild shock (milder than the one caused by a 110-volt current) for less than half a second in order to extinguish certain behavior (usually aggressive or self-injurious).

The reason MR professionals may use obscure and euphemistic language is that they fear unjustifiably adverse reactions from the uninformed public, but the use of such language perpetuates the lack of public understanding rather than remedying it. Until the public knows more than it has known about what is and is not being done and why, it is likely that the law will react unintelligently, believing the worst and prohibiting or restricting isolation or aversive therapy.

Records and Evidence. The fact that institutions are under restraints in using some treatment, or may be restrained, suggests at least two responses. First, the staff must keep detailed, ample records establishing that all other treatments have been attempted and failed or, if not attempted, probably would have failed. Second, they must preserve more than a paper record. Photographs and video tape showing a resident's behavior or condition before, during, and after treatment are likely to be the most vivid justification and proof possible that the course of treatment has been effective in developing the resident's abilities to their highest capacity. The most convincing case that staff can have is a picture of the resident with his head battered open by himself, taken before the staff began a controversial kind of treatment, and another picture showing condition and behavior after the treatment has been applied. Unfortunately, the resources to make such documentation are usually unavailable in institutions.

RIGHT-TO-TREATMENT SPIN-OFFS

Right-to-treatment litigation has had some interesting and worthwhile spin-offs. One is the effort of the institutions at self-reform, institutional avoidance (limiting the availability of the institution to certain kinds of persons), and one form of deinstitutionalization—discharging residents from the institution into the community. Another is the self-evaluation effort conducted by the staff. A related spin-off is the evaluation of the institution or its programs by an independent and objective "visitation" or "ad hoc study" committee.

But right-to-treatment litigation also has had some interesting but doubtful results. One is the legislation enacted by the 1973 North Carolina General Assembly providing that any person voluntarily admitted to an MR

40. G.S. 122-55.5 and -55.6 provide that an "individual written treatment or habilitation plan" shall be developed for each MR Center resident by MR professionals within 30 days after his admission to the Center. *Wyatt*, *supra* note 1, at 396 and 398, imposes the same duty on the staff. An "Individualized written treatment plan setting forth a program which will develop or restore the patient's capabilities" is required by G.S. 122-55.5. G.S. 122-36(j) defines "treatment plan" as "the individual plan of treatment to be undertaken by a treatment facility for a patient's restoration to health." It is curious that G.S. 122-55.5 provides that each patient "shall have that right to treatment including medical care and habilitation, regardless of age, degree of retardation or mental illness," but does not (for want of punctuation) make it crystal clear that "treatment" includes only medical care but not "habilitation" and, concomitantly, that "habilitation" is a right just as "treatment" is. There is no question about the legislature's intent, which was not only to provide a right to treatment *and* habilitation but also to require that plans of treatment or habilitation be developed for persons covered by the Patients' Rights Act. Thus G.S. 122-55 and -55.6 refer to a patient's habilitation or treatment plan.

center must be discharged at any time he delivers a written request for discharge to the staff.[41] If such a person exercises his right to leave the institution and some accident befalls him, the institution and state are not legally responsible or liable; nevertheless, society undoubtedly has a moral obligation to the individual to prevent harm from coming to him. The only way such an obligation can be satisfied when the retarded person has the right to be discharged on his own request is to have him committed involuntarily or adjudicated incompetent, either of which actions is contrary to the principles of normalization, or to restrain him illegally, which is not only a violation of his civil rights but also a criminal offense. In this state, legislation that grants the automatic right of discharge to persons who have voluntarily been committed is a result of litigation brought in other states and threatened here.[42] It is doubtful that the legislation is wisely conceived or an appropriate response to the problem of limiting the restraints placed on an institutionalized mentally retarded resident while at the same time affording him treatment and not impinging upon his civil rights.

CONCLUSION: WELCOMING CHANGE

It is important for professionals in mental retardation to realize, if they do not already, that much of their time and effort in the next several years will be directed toward responding to litigation that demands institutional change. They should not only realize this but accept it and even welcome it. Why they must do so is demonstrated by a brief view of recent constitutional history.

During the last twenty years, court judgments have produced massive change in our society. Schools have been ordered to desegregate. Legislative bodies have been reapportioned. The processes of the criminal justice system—arrest, conviction, and postconviction—have been transformed. Discrimination based on wealth, race, alienage, and lineage has been prohibited, and discrimination based on sex is now being eliminated. All of the major social problems of our time—one way or another and sooner or later—become, instead of merely political or professional problems, legal and constitutional issues. Each of these problems finds its way to court, and the judicial task of resolving the conflict between various claims and interests involved in the conflict is not to be denied on the basis that (1) judges should not be deciding such critical social matters (it is the specific responsibility of the courts to resolve conflicts and they have always done so), or are not qualified to do it (that has never been an accepted objection); (2) another branch of government should do it (the other branches have failed to produce change when it was needed); or (3) litigation is counterproductive (the same can be said about much government activity).

Litigation is a last-ditch action. It stems from the failure to effect change by persuading legislatures and administrators to change. As a last-ditch effort, it is paradoxically, only a door-opener, a catalyst to change by others. It changes the ground rules and procedures by which institutions may operate. Unfortunately, it is not likely to alter the power relationship between the institutions and society on the one hand and the resident or the retarded person on the other. But if, as a result of litigation, legislators and administrators comply with specified standards of care and treatment that are for the most part desirable; if litigation precipitates new programs, new public awareness of the residents' needs, and new professional awareness of the residents' rights; and if litigation draws into the mental retardation field concerned and sensible law reformers, then litigation will be, in historical perspective, laudable, just as many of the changes produced by litigation over the last twenty years in other problem areas now are laudable.

MR professionals need to step back from their initial reaction to litigation, which is likely to be hostile, and momentarily put aside evidence that litigation can be unproductive, counterproductive, and otherwise profitless. They need to put aside these negatives in order to make a much-needed critical evaluation of the immediate and potential long-term effect of litigation. They must ask: What was ordered by the court, what was done in response, how long did it take, how much did it cost, who was benefited and to what extent, who was burdened and to what extent, what difference has litigation made in the life of the residents of the institutions, and what would have occurred in the absence of litigation?

Only when they have the answers to those questions can they fairly appraise the effect of litigation in producing change. And only then will they be able to say whether the law has acquired its greatest power and sanction, the acceptance by the public of the notion that a retarded person is basically worthwhile.

The problem is that MR professionals may never have an opportunity to ask those questions and obtain definitive answers. The reason is probably that their work cannot be stopped in midstream so that answers to the questions can be obtained. Their work is, after all, part of a process of adapting to change (reflected and stimulated by the litigation) in program or service delivery and in attitudes with respect to the retarded. And if the change (stimulated by litigation) produces essentially better institutional care, complaints that litigation is counterproductive, unproductive, unwarranted, unnecessary, and undesirable will be invalid.

41. N.C. Gen. Stat. § 122-56.3 (voluntary discharge).
42. See the cases cited in footnotes 1-4 and 11.

TWO APPROACHES TO THE BUDGET-MAKING PROCESS

A. John Vogt

THE PUBLIC, THE PRESS, AND MANY GOVERNMENT OFFICIALS often view the budget as strictly a fiscal device, that is, as simply the method of financing government for another year. But it is much more than this. The budget provides one of the few opportunities, and for many jurisdictions the only opportunity, to take a look at government activities as a whole and to give agency programs a comprehensive and formal review. Also, the budget establishes a framework of constraints that limit the revenue that government can raise, the amounts it can spend, and what it can attempt to do. The budget also requires that agencies plan their workload and adjust programs to meet changing needs, and it is frequently used to establish new policies or implement major new courses of action. In short, the budget is one of the most important responsibilities exercised by governmental officials.

If the budget per se is of such significance, the process by which it is enacted is equally important. A look at the budget process should help to reveal the degree and nature of coordination among government programs, how key limitations on public activities are drawn, how agencies plan and adjust to new situations, and how many new government programs come into existence.

This article examines the budget process in two North Carolina local government jurisdictions. Specifically, it describes the processes by which the 1974-75 budgets of the City and the County of Durham were prepared and approved and shows how these processes differed markedly in the two jurisdictions. The emphasis in considering these differences is on the nature and sequence of the budget stages followed and the way in which budgetary roles were exercised. The term "stage" here refers simply to the steps followed in the budget process, while "role" denotes the attitudes, strategies, and actions of different officials who participated in the process. Durham is interesting as a site to illustrate the budget process because it is large enough to provide a wide array of budget experiences. Moreover, the contrasts between the city and the county demonstrate two distinct approaches to budgeting.

THE DURHAM SETTING

Durham is one of the older urban and industrial centers of North Carolina. About 100,000—or 70 per cent of the total county population—live in the city. The city's population has grown by about 27 per cent and the county's by 23 per cent since 1960.[1] The major factor in the city's growth has been annexation, while growth in the county has been due largely to an influx of people from beyond the county.

Both the City and the County of Durham operate under the council-manager form of government.[2] The city council has twelve members who are elected to four-year staggered terms. The mayor, who is elected separately, presides at council meetings and votes on all issues. The council appoints the city manager, the city clerk, and the city attorney. The city manager has direct appointive and administrative authority over all departments or agencies. The most important of these are Public Safety, Transportation and Utilities, General Services, Recreation, Administration, Human Relations, and Personnel. The board of county commissioners has five members elected for terms of two years. The board selects the chairman from its own membership and appoints the tax supervisor, the tax collector, and the county manager. The manager is responsible for administering all county affairs not vested in an independent board or commission. The largest county agencies are the county school system, the city school system, and the department of social services. All three are headed by independent boards. Other important county officials or agencies are the sheriff, the register of deeds, the board of health, the mental health officer, the hospital corporation, and the library board.

Property valuation is a good indicator of the ability of a municipality or county to meet public needs. Table I presents assessed valuation for Durham City and County for selected years from 1961-62 to 1973-74. The assessment ratio for Durham was 75 per cent throughout this period. Assessed valuation has increased greatly for both the city and county since 1961-62; the growth has been about the same for both. However, if only the period from 1969-70 to 1973-74 is considered, assessed valuation has grown

1. These population estimates and growth rates are based on data provided by the North Carolina Division of Health Services, Public Health Statistics Section, of the Department of Human Resources.

2. An overview of Durham city and county government appears in *One Government for Durham: Report of the Durham City-County Charter Commission*, 1974 (Durham, N.C.: Durham City-County Charter Commission, 1974), pp. 17-27.

Table 1
Assessed Valuation, Durham City and County
Selected Years, 1960-74
(millions of dollars)

Fiscal Year	City	County
1961-62	$279.5	$ 493.3
1963-64	300.0	544.5
1965-66	315.3	632.7
1967-68	408.4	654.0
1969-70	487.9	800.0
1971-72	523.3	885.7
1973-74	600.5	1,048.0

Sources: For the city, its annual financial reports. County figures were supplied by the Tax Research Staff of the North Carolina Department of Revenue. A revaluation of property occurred on January 1, 1969. The assessment ratio remained at 75 per cent throughout the period covered by the table. All figures include the full assessed valuation of stored agricultural products.

more rapidly in the county than in the city—31 per cent for the county compared with 23 per cent for the city. Another indicator of the fiscal base available to local government is assessed valuation per person. In 1969-70, assessed value per person was $5,100 in the city and $6,000 in the county—a difference of $900. This difference grew to about $1,500 by 1973-74.[3] Thus, the data for 1969-70 and thereafter suggest that the local revenue base, in terms of property valuation, from which the county has to draw is relatively greater than that available to the city. Moreover, since 1970, this base has been expanding more rapidly for the county than for the city.

Revenue or property tax base represents only half of a community's fiscal equation. The other half is the needs that give rise to government programs. Two indicators of these needs over time are growth of the tax rate and increase in outstanding debt. For the City of Durham, the tax rate went from $1.12 per $100 of valuation in 1961-62 to $1.40 per $100 of valuation in 1973-74, an increase of 25 per cent. Actually, all of this occurred during the early and mid-sixties, and the rate has been constant at the $1.40 level since 1968-69.[4] For Durham County, the general county tax rate grew from $.79 per $100 of valuation in 1961-62 to $1.13 per $100 of valuation in 1973-74, an increase of over 40 per cent. Moreover, the largest portion of this increase occurred after 1970.[5] Supplemental tax rates for school purposes throughout the county have not changed significantly since 1961-62.

Outstanding debt has grown by 46 per cent for the city and 86 per cent for the county since 1961-62.[6] Since 1969-70, the city's outstanding debt has dropped from $27.6 million to $23.6 million, while the county's has increased from $20.0 million to $24.9 million.[7] All of this suggests that the pressures for growth in county government services—involving schools, welfare, and public health—have been greater in recent years than the growth pressures for city services—involving public safety, water and sewer, sanitation, and streets. This says nothing about relative response of city and county governments to spending pressures. However, because the governing boards and managers of both jurisdictions exhibit similar philosophies in this regard, this factor has been discounted as being determinative. Thus, although Durham County has a larger and more rapidly expanding revenue base than the city, it also appears to have greater needs or pressures impinging on that base.

DURHAM BUDGETS: MAGNITUDE AND STRUCTURE

Table II summarizes the 1973-74 budgets of the City and the County of Durham. Four aspects of these budgets are interesting from the standpoint of this article: their magnitude, the relative importance of different revenue sources, the distribution of operating expenditures by function, and funding for capital projects.

Table II shows that the county budget is more than a third larger than the city's. However, $13.7 million of the $33.9 million allocated to operating programs is state and federal aid, which county officials consider to be pass-through funds. In other words, the county sees itself as only administering these funds on behalf of the federal and state government and having little to say about how they are used. If these funds are discounted, the city and county budgets are nearly equal, in terms of both operating appropriations and capital projects.

Including this $13.7 million pass-through, the most notable difference between city and county revenues is that the county is much more dependent on federal and state aid than the city. Nearly half of the county operating budget is financed with such aid; but federal and state aid accounts for only about 10 per cent of the city operating budget assuming that the city uses the aid entirely for operating purposes. It is important to note in this regard that federal revenue-sharing for both jurisdictions goes almost entirely to capital projects. Another point to

3. Assessed valuation per person for the city and county was calculated using valuation figures taken from Table 1 and population estimates supplied by the North Carolina State Board of Health (now Division of Health Services, Department of Human Resources), Public Health Statistics Section.

4. See the annual financial reports for the City of Durham.

5. Tax-rate information for the county also appears in the annual financial reports for the City of Durham.

6. Outstanding debt refers to principal only. The percentages are based on 1961-62 debt figures appearing in bond notices of the North Carolina Local Government Commission and 1973-74 debt figures supplied by the fiscal officers of the city and county.

7. The 1969-70 debt figures were taken from bond notices of the North Carolina Local Government Commission.

be made is that revenue for the county's operating programs comes much more from a few sources than revenue for the city's operating programs. Eighty-five per cent of the financing for county operating expenses comes from federal and state aid and the property tax. Assuming that the city allocates all of the revenue it obtains from these sources to its operating budget, these funds would make up 50 per cent of this budget, which is substantial but still far short of the county's 85 per cent level.

Appropriations for operating programs tend more in the county to be devoted to a few major functions than in the city. The major county programs are public schools and social services, and together they make up 75 per cent of the county operating budget. The most important city programs are public safety and water and sewer services; they account for 50 per cent of the city's operating budget. Although the point is not explicitly made in Table II, the major county programs are also the ones in which federal and state aid and influence are quite large. In contrast, the more important city programs—public safety and water and sewer—rely relatively little on outside financing. Moreover, the city exercises an almost exclusive influence in determining their direction.

Probably the most significant difference between the capital portions of the city and county budgets is that while the county budget clearly distinguishes capital revenues and improvements, the city budget does not. This is partly evident from Table II, which shows the delineation between operating and capital items for the city only for appropriations. The breakdown for appropriations is a special estimate provided by city budget officials. A second difference is that in recent years, the county has been relying relatively more heavily than the city on borrowing to finance such projects; the city has tended more to fund them from current revenue. However, the city will soon issue large amounts of bonds for street paving, water and sewer projects, and recreation under its "Program for Progress," which will bring it in line with the county in extent of reliance on bond financing for capital projects.

DURHAM BUDGET PROCESSES: DESCRIPTION OF STAGES

On July 1, 1974, the City and County of Durham enacted their 1974-75 budget ordinances. These enactments were the culmination of the budget process for each, and they ended many months of work by city and county officials.

City Budget Process

Chart 1 outlines the 1974-75 budget process followed by the city. The city budget staff began preparatory work for that process in December 1973, seven months before the budget ordinance was enacted: First, a budget calendar was established in consultation with the city manager.

Table II
1973-74 Budgets for Durham City and County Government
(millions of dollars)

City		County	
Revenue		*Revenue*	
Property Taxes	$ 8.1	Federal and State Aid	$15.8
Water and Sewer Charges	5.9	Property Taxes	13.0
Federal Revenue Sharing	5.2	Other Operating Revenue	5.1
State Shared Taxes	2.5	Total Operating Revenue:	$33.9
Federal and State Aid	2.3		
Bond Proceeds	1.9	Bond Proceeds	$ 6.4
Other Revenue	7.2	Federal Revenue Sharing	3.0
		Other Revenue For Capital projects	1.7
TOTAL REVENUE	$33.1	Total Capital Revenue	$11.1
		TOTAL REVENUE	$45.0
Appropriations		*Appropriations*	
Water and Sewer	$ 5.6		
Public Safety	5.4	Welfare	$16.9
Debt Service	2.1	Public Schools	8.7
Sanitation	1.9	General Government	4.0
Streets and Highways	1.6	Debt Service	2.6
General Administration	1.6	Mental Health	1.0
Other Programs	3.7	Public Health	.7
Total Operating Appropriations	$21.9	Total Operating Appropriations	$33.9
Appropriations for Capital Projects	11.2	Appropriations for Capital Projects	11.1
TOTAL APPROPRIATIONS	$33.1	TOTAL APPROPRIATIONS	$45.0

Source: This table presents the revised 1973-74 budgets. It is based on data supplied by the city budget officer and the county finance director and is condensed from the tables in *One Government for Durham. Report of the Durham City-County Charter Commission, 1974,* (Durham, N C.: Durham City-County Charter Commission, 1974), pp. 21-22, 26-27.

Second, several technical tasks were performed: eight budget forms updated and produced, a budget manual prepared, 1974-75 salaries projected for existing positions, and reports compiled that showed expenditures by agency for two previous years and the first five months of 1973-74. The salary projections and expenditure reports were produced by computer. At the end of December, the budget officer prepared estimates of revenues and likely agency requests for 1974-75 which he used in formulating budget guidelines. The guidelines recognized that a tax increase was likely and they centered upon holding it to a reasonable level. The guidelines were approved by the manager and communicated to agency heads by the budget officer at a meeting in early January. The budget manual and forms were distributed at this meeting.

City agencies then began preparing their budget requests. Their general procedure was first to calculate the cost of maintaining existing activities, considering the effects of inflation, and then to decide where programs could be expanded and what new service needs could be met in 1974-75. For the larger agencies, such as Public Safety, the requests were put together using a formal process involving many levels of the organization. This entailed the formulation of budget needs by supervisors or managers at the operating levels and review and final decision by top agency officials. The smaller agencies prepared their requests much more informally, and nearly all of their requests were submitted in early February. Because the larger agencies took more time to prepare their requests, most of their requests were not submitted until near the end of that month. None of the agencies had to channel their requests through a board. All requests came directly to the budget office. All were submitted in the same format and included narrative explaining agency programs and organization as well as forms detailing the dollar amounts requested.

During January, while the agencies were preparing their requests, the budget staff prepared background information for the budget publications, collected economic data bearing on the revenue projections, and made special studies for the manager. One such study analyzed the likely costs of water and sewer operations over the next several years.

As agencies submitted their requests through February, the budget officer and his staff reviewed the requests line by line, giving particular attention to estimated agency cost for the current year compared with the amount originally budgeted, unusually large increases for specific objects of expenditure, and proposed program expansions or new services. Through this review, the budget staff found errors and items of doubtful need and asked the agencies for corrections or clarifications. Moreover, the budget staff was able to pinpoint those parts of the requests that required further analysis.

By early March all agency requests had been submitted and the initial budget staff review was finished. The budget officer then compiled the requests and updated the revenue projections. He determined that even without a cost-of-living adjustment for city employees, a 31-cent increase in the tax rate would be necessary to fund the requests. This was 30 per cent more than the 1973-74 tax rate based on full valuation.

From mid-March through mid-April, the budget officer conducted hearings at which the agencies explained their requests. The participants were top agency personnel and the budget staff; the manager did not attend. The hearings were important because they gave each agency the opportunity to explain its request and comment on the budget staff's attitude toward it. The hearings also permitted the budget officer and his staff to show agencies the over-all revenue constraints facing the city and explain why some requests were having more difficulty than others. Finally, the hearings allowed the budget staff to delve into the policy decisions and management approaches underlying certain requests. In doing so, the budget staff tended to pose general, city-wide interests and fiscal norms against the service needs or desires advocated by the agencies.

During the hearings and shortly thereafter, the budget officer and his staff analyzed agency requests and formulated recommendations. The analyses used information obtained from the requests and the hearings and data from numerous other sources. Much of this other data pertained to the practices of other North Carolina cities and criteria or standards available from federal or state agencies and professional sources. Most of the analytic attention went to requests for capital outlays, additional positions, program expansions, and new services. As a result of the analysis, the budget office recommendations eliminated $1.5 million from capital outlay requests, about half the new positions, and most proposals for program expansion or start-up of new services. In total, they reduced the requests so that only a 5-cent increase in the tax rate would be necessary, excluding any cost-of-living adjustment for city employees. When all the recommendations were completed, the budget officer notified the agencies of the changes made to their requests.

From mid-April to near the end of May, the budget officer briefed the manager on the agency requests and his own recommendations. In these briefings, the manager paid close attention to additional positions and proposals for program expansion or new services. In effect, he acted as a gatekeeper, giving what turned out to be the determining approval or veto in deciding which new items would be in the budget. He evaluated them not only in terms of objective need but also for conformity with existing policies, felt need in the community, and the likely reactions of the council to them. In making his budget decisions, the manager nearly always upheld the budget officer's recommendations, even though several agencies appealed to him for restoration of deleted items. The final issue that the manager dealt with was the cost-of-living adjustment for city employees. He proposed a 10

per cent adjustment, which added 11 cents to the tax rate. This adjustment plus other changes made by the budget officer and manager produced an over-all rate increase of 17 cents in the manager's proposed budget, a 16 per cent increase over the 1973-74 full value rate.

As the manager reviewed the budget, the agencies prepared statements of objectives to explain what the expenditures in each program were intended to achieve. The statements were reviewed by the budget officer, approved by the manager, and prepared for publication. At the same time, the various sections of the 233-page budget book were being written. Both of these publications, "Objectives Durham '75" and the "Preliminary Annual Budget 1974-75," were finished and ready for printing in the third week of May. Printing took about a week.

On May 30 the budget officer presented the manager's proposed budget to the city council and distributed the budget book and the objectives document. The council immediately referred the budget to its finance committee for review.

The finance committee's review occurred at six meetings during June. Each meeting lasted from four to six hours and was open to the public. They were attended by the six committee members, the mayor, the manager, the budget officer and his staff, top agency personnel, the press, and occasionally members of the public. The review focused on the tax rate increase, the cost-of-living adjustment and merit raises for city employees, and the budget proposed for each agency. The budget officer and manager shared the presentations on revenue and the pay-plan package for 1974-75. For the agency presentations, typically the agency head explained the objectives of his department or office, using the objectives document, and then summarized the expenditures for each objective, using both that document and the budget book. In all but one instance, the agencies supported the manager's recommendations for their budgets, even though the recommendations were usually below what the agencies had originally requested. The questions and concerns of finance committee members during the review centered on setting an acceptable tax rate increase, maximizing reliance on nontax revenue, providing an appropriate pay increase for city employees, keeping the agencies' administrative overhead down, and making sure agency services were meeting existing need and citizen demands. When the committee finished, it had given city activities a comprehensive review and reduced the proposed budget by $640,000, or 8 cents on the tax rate. Most of this reduction—that is, $500,000—came in street paving. The remaining $140,000 was a net figure that included revenue adjustments and offsetting increases and decreases made by the committee.

The finance committee returned the revised budget to the full city council on July 1. The council briefly discussed it, particularly the cost-of-living adjustment, and then announced a previously advertised public hearing. The hearing is a new requirement of the Local Government Budget and Fiscal Control Act and is intended to give the public greater opportunity to participate in the budget process. However, no one from the public chose to speak at the hearing, so the council immediately enacted the 1974-75 budget ordinance.

County Budget Process

Durham County's 1974-75 budget process is outlined in Chart 2. Probably the most noticeable feature of that chart is that the county process did not begin until early to mid-March. In this period, the semiautonomous agencies—such as the county school system and the department of social services, called semiautonomous because their administrative heads report to independent boards—set their own internal procedures for budget preparation into motion. At the same time, the county finance officer, after consulting with the county manager, began preparing reports that showed general fund agency expenditures for 1972-73 and through the first eight months of 1973-74.

In mid-April the manager notified the semiautonomous agencies of the schedule for presenting their budget requests to the board of county commissioners. This was accomplished by a brief letter specifying the dates in May for the presentations. The letter contained no guidelines concerning the appropriate levels or content of the requests, nor was it accompanied by budget forms or instructions. These agencies used their own forms in preparing and presenting their requests. The county finance officer sent a similar notifying letter to the General Fund agencies. It was accompanied by the expenditure reports for the past and current year and the standard county budget form—the county uses only one such form. This letter encouraged the agencies to consider their needs but to "be exact." Otherwise it contained no guidelines. It asked the general fund agencies to submit their requests early in May.

Upon notification from the manager, each semiautonomous agency adjusted its schedule to meet the date for presenting its request to the county board. Most of these agencies put together their requests using a formal process in which managers at the operating levels formulated statements of budget need that were then reviewed and decided upon by top agency officials. The semiautonomous agencies took from four to eight weeks to prepare their requests. When completed, these requests were submitted to the respective agency boards, which made minor adjustments. The requests were then presented to the county commissioners. The presentation format for the requests typically compared the current year's expenses with the amount requested for the budget year. Except for brief explanations of major increases, the requests contained little narrative.

Most general fund agencies or offices are significantly smaller than the semiautonomous agencies, and they required only two to three weeks to prepare their budget requests. In many instances, the requests were prepared by

the agency head himself. All requests from these agencies used the same format, and none contained narrative. All were submitted to the county manager.

In early May, the county commissioners entered the budget process. On each Monday of that month, the semiautonomous agencies presented their requests to the board: social services on the first Monday; health and mental health on the second; the school boards on the third; and miscellaneous agencies on the fourth Monday of May and the first one in June. These five meetings averaged two to three hours in length. They were open to the public and were attended by the county manager, top agency personnel, the press, and occasionally members of the public. Typically, the agency head presented his request, explained the major increases, and answered questions from the board members. The questions ranged from inquiries about items costing as little as $100 to expressions of concern about such broad issues as the educational impact and substantial cost of using teacher's aides in all the first grades of the county and city school systems. No budget decisions were made at these meetings.

By the time the county board had finished these hearings, the finance officer had compiled the requests of the general fund agencies and collected information bearing on revenue projections. The manager put together both sets of requests to arrive at a total of all "askings" and estimated revenues available from existing sources for 1974-75. He then prepared a summary that highlighted the increases contained in the requests and the upward adjustment of the tax rate necessary to finance the increases. This summary was accompanied by a seventy-page budget book that detailed available revenues by source and the requests.

On June 17, the manager presented the summary of available revenue and agency requests and the budget book to the board of commissioners. The crux of the presentation was the revelation that an increase of 42 cents, or nearly 50 per cent in the tax rate, would be necessary to fund the budget. The manager reviewed the major increases, noting new positions and paying close attention to general fund requests that the board had not yet seen. At the end, the board said that a 42-cent increase in the tax rate was unacceptable and directed the manager to make reductions. The chairman told other board members that if they had suggestions for reductions, they should give them to the manager during the next two weeks. The press covered this June 17 meeting and reported the magnitude of the possible tax increase.

With this mandate from the board, the manager spent the final two weeks in June reviewing the requests and seeking reductions in them. In doing so, his approach was to ask the agencies to specify those increases that could be cut "without harming essential services." In several cases the manager suggested a dollar target for reduction and recommended specific cuts to the agency head. However, with only one exception, he avoided imposing any target or cuts and instead sought compromise and consensus. Because of the complicated relationship between general county government and the semiautonomous agencies, the manager himself reviewed all requests from these agencies and conducted all negotiations with them. The manager made the finance officer and the finance officer's assistant responsible for finding ways to cut the requests of the general fund agencies. These officials met with the agency heads to see where reductions could be made and then made recommendations to the manager. In nearly all cases, the manager accepted their recommendations.

When all reductions had been made and the revenue estimates adjusted (upward), the revised budget required only a 7-cent increase in the tax rate. This budget was formally presented to the commissioners on July 1. The manager summarized his proposed deletions, and except for the city school budget, the board had few questions on them. The reductions in the city school budget were discussed at length before the board was satisfied with them. The board chairman then announced the public hearing portion of the meeting, but no one chose to speak. Finally, the board unanimously enacted the 1974-75 county budget ordinance.

BUDGET STAGES AND ROLES: DIFFERENCES BETWEEN THE CITY AND THE COUNTY

The differences between the city and the county approaches to the budget process concern responsibility for coordinating the process; the duration of the process; its formality; the sequence of budget stages followed and the role of the manager; the extent and use of budget analysis and the role of the budget or finance officer; the review by the governing board; and budget documentation.

Responsibility for Coordinating the Budget Process

Responsibility for coordinating the budget process was delegated to the budget officer in the city but it remained with the manager in the county. In the city's budget process, although the manager approved the budget calendar and guidelines, they were the handiwork of the budget officer and his staff and were issued directly to agency heads at a meeting called by the budget officer. This official also estimated city revenues, held hearings at which the agencies explained their requests to him, and on his own made changes to the requests and notified the agencies of them. Moreover, he presented the manager's budget to the city council and coordinated the agency presentations before the council's finance committee.

Quite a different situation prevailed in the county's budget process. Here, the manager issued the notice to the semiautonomous agencies specifying the dates for presenting their requests to the county board, and he reviewed the notice that was sent to the general fund agencies asking them to prepare their requests. He was also responsible for estimating revenues and did much of the calculations for this himself. The manager personally

reviewed the requests of the independent agencies and conducted negotiations with their officials to secure agreement on reductions, and he reviewed and approved each revision recommended by the finance officer in the general fund agencies' requests. Finally, although assisted by the finance officer, he personally prepared the summary of revenues and requests and the summary of proposed reductions and presented and explained them to the county board.

There are at least three interrelated reasons for this difference in responsibility for coordinating the budget process. Most immediately, the city manager has a budget officer and large budget staff to which he can delegate this responsibility; the county manager does not. A deeper reason is that the county process is shorter and much more informal than the city's, and therefore is more amenable to direct coordination by the manager. Third, the county manager is constrained to take more personal responsibility for the budget process than is the city manager. The county manager must work with semiautonomous agencies that report to independent boards and state agencies as well as to him, while the city manager has quite direct authority over departments and offices. Thus, the relationships between the manager and agencies are more difficult to administer in the county than in the city, and the budget process is of such importance that the county manager himself must assume the responsibility for coordinating it while the city manager can afford to delegate this responsibility to an aide.

Duration of Budget Process

The most obvious difference between the city and county budget processes was duration. The city process began informally in December and formally during the first week of January. Although some county agencies began preparing their requests in early March, the county process did not formally begin until mid-April. Thus, the city budget process lasted six to seven months while the county's spanned roughly three months.

One interesting aspect of the budget process that is related to duration is the concentration or dispersal of activity and decisions throughout the process. For the county, June was the most important month in the budget process. More than half of all budget activity, in terms of time and decisions, occurred in this month, including compilation and summary of requests, estimate of revenues, presentation of requests and revenues, revision of requests and production of the documents. Moreover, final review and enactment by the board of commissioners came on July 1, and only preparation of the requests by the agencies and hearings by the board occurred before June. In contrast, the city's budget activity was much more evenly distributed throughout the six to seven months of its process (see Chart 1). The heaviest workload for city budget officials fell from mid-April to the first of June. It was then that reductions by the budget officer were made, the budget documents produced, and the manager's budget presented. However, before this, many important budget tasks had occurred: preparation in December; formulation of requests through January and February; and analysis of requests and hearings with the agencies in February, March, and early April.

These differences between the city and county in duration of the budget process and concentration of activity in certain parts of the process are interesting in light of the fact, that excluding the pass-through federal and state aid, the city and county have budgets of about the same size. Thus, although the county handles at least as much money in its budget as the city, its budget process is much shorter, with much less time available for budget decision-making, than the city's. Factors underlying this difference are: (1) the county manager's belief that decision-making and work associated with the budget process can be accomplished satisfactorily in a few months; (2) the fact that the city has one more decision point—the budget officer—in its process than the county; (3) greater informality of the county budget process.

Formality of Budget Process

The city and county budget processes also differed in formality—the city's process was much more formal, with clear demarcation of stages and responsibilities, than the county's. Chart 1 shows this to some degree. The city's process had a clear beginning point—that is, the preparation of budget material in December and its issuance in early January. No such specific date applied to the county's process; many county agencies simply began preparing their requests, knowing that in time they would be notified of the dates for budget submittal. Also, the steps of the city's budget process were much more clearly delineated than the county's. The city's process had five distinct phases: preparation for the process, formulation of agency requests, review and analysis of requests, preparation of the manager's recommendations, and review and enactment by the council. But in the county, preparation for the process went on simultaneously with the formulation of requests by the semiautonomous agencies, and the presentation of these requests paralleled the preparation of requests for the general fund agencies. Moreover, the manager revised budget requests working very closely with the board of commissioners while the board had the requests before it. The greater formality of the city's process is also evident from the fact that it used a manual, eight forms, and computer-produced data for some of the forms; the county, in contrast, had no manual and only one basic form, and did not use the computer. Finally, the views or positions of officials became more formalized in the city's process than in the county's. All city requests were published; agencies were notified of changes to the requests by the budget officer; and the manager presented the preliminary budget to the city council. In contrast, although the requests of county agencies were published, the finance officer took no formal or open position on them, and it was difficult to distinguish the manager's views from those of the com-

Chart 1

1974-75 BUDGET CALENDAR, CITY OF DURHAM

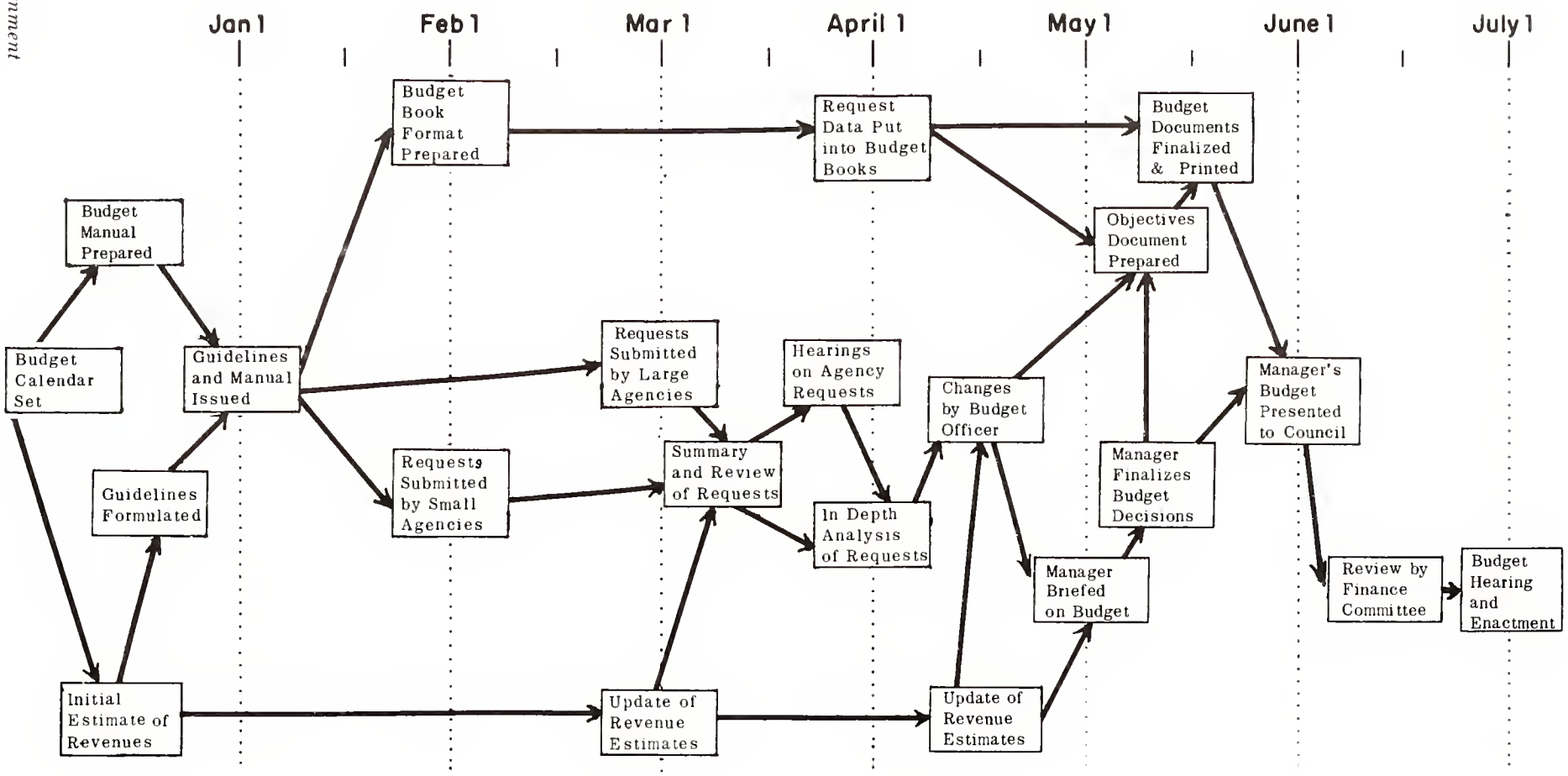
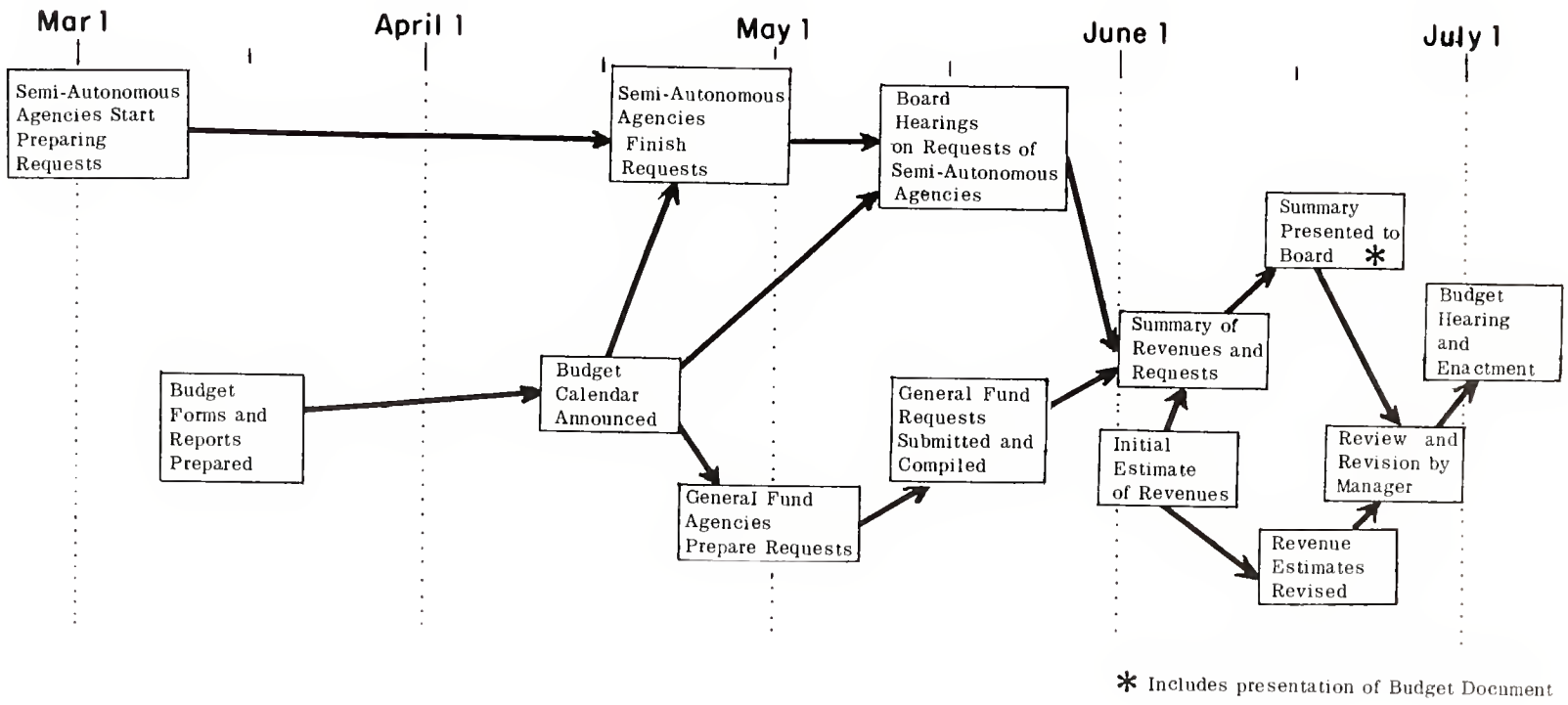


Chart 2

1974-75 BUDGET CALENDAR, COUNTY OF DURHAM



* Includes presentation of Budget Document

missioners or top agency personnel because of the consensus approach that the manager used in reducing the requests.

Why the city budget process is more formal than the county's is hard to say. The most direct reason is probably that the city manager relied on a budget staff to coordinate the budget process while the county manager largely coordinated it himself. Reliance on a professional staff implies formal norms and procedures that otherwise do not typically exist.

More interesting than the factors underlying this difference of formality is an adjunct stemming from it. It is that relationships were characterized by somewhat greater tension in the city's process than in the county's. Because the city budget officer reduced agency requests and formalized these reductions by notifying the agencies, a strain was placed, albeit a manageable one, on the relations between the agencies and the budget office. Moreover, because the manager proposed a formal, preliminary budget requiring a tax-rate increase that was too high in the council's view, manager-council relations were similarly tested. In contrast, reductions in the requests of county agencies were achieved through negotiations between the manager and agency officials, and whatever differences there were initially were not formalized or made public. Moreover, the manager did not commit himself to a particular tax-rate increase until there was consensus among the commissioners on what would be an acceptable increase. In these ways, he avoided open differences between himself and both the agencies and the commissioners; as a result, relationships were less tense and more fluid in the county's process than in the city's.

Sequence of Budget Stages and the Role of Manager

Perhaps the most important difference between the two budget processes concerns the sequence of stages followed in each. Although the stages of the city's process were much more clearly demarcated than the county's, recognizable stages did exist in the latter. The city's major budget steps followed the conventional pattern:

Preparation of Requests—Agencies
Review and Revision of Requests—Budget Officer / Manager
Final Review and Approval—City Council

The county's major stages were:

Preparation of Requests—Agencies
Review of Requests—County Board
Review and Revision of Requests—Manager
Approval—County Board

The key sequential difference between the two processes concerns the occurrence of "Review and Revision of Requests—Manager." In the city's process, this stage fell between "Preparation of Requests—Agencies" and "Final Review and Approval—City Council." In the county's, it occurred after both "Preparation of Requests—Agencies" and "Review of Requests—County Board." Thus, in the city's process, the manager and the budget officer exercised their budget review and recommendation roles at an intermediate point. In contrast, the county manager's review and recommendation, although not the final stage in the budget process, came near the end of it and represented the culmination of changes to the county budget.

The city manager's intermediate position permitted him to initiate policy changes via the budget and to shape and modify the policies that the agencies had incorporated into their requests. The county manager's position at or near the end of the budget process gave him a different role: It was too late for him at that point to initiate policy. The commissioners had already seen the budget and were not disposed to entertain further proposals. Nor did the county manager attempt to effect major changes in the policies contained in agency requests. Especially was this not done with the semiautonomous agencies because the manager would have been stepping into policy spheres that those agencies consider to be their own. Moreover, the manager's two weeks for review and revision was too little time to formulate major alternatives to the agency requests. However, the county manager was not excluded from a policy role in the budget process. The late occurrence of his review and revision role allowed him to react to policy proposals in the budget and have a paramount influence in the final decisions whether to include or exclude them.

A second result of this difference in the occurrence of the managers' review and revision of requests concerns the respective pressures faced by the two managers during the budget process. In the city's process, the intermediate review and recommendation position of the manager put him between two opposing sets of pressures—from the agencies to preserve and upgrade city services, and from the city council to minimize the tax-rate increase. In reviewing agency requests, the city manager was in effect seeking or sanctioning reductions and doing so under agency pressure directed at preserving their increases. After the manager had presented his budget recommendations to the council, his position was different. Here he defended the reduced agency requests as his own in the face of pressure from the council to cut them back further. Thus, although the city manager exercised considerable influence in initiating and shaping policy in the budget, he did so in the midst of countervailing pressures from the agencies and the council. Moreover, he grappled with these pressures on his own. In other words, he acted as a principal or on his own authority in first reducing agency requests and then defending the requests before the council.

The county manager did not face such pressures. Certainly, because the county agencies were seeking one level of services, which required a large tax-rate increase, and the board of commissioners wanted another level, which implied a much lower increase, the manager was forced to find and operate on middle ground. Moreover, he had to review agency requests and revise them downward sub-

stantially. However, since this was done near the end of the budget process, the opposing pressures impinged on each other and the manager was not between them. Thus, his role in review and revision was that of an arbiter, pointing to compromises acceptable to the principals. In doing so, he exercised considerable influence ultimately over what the agency increases were, but because the increases were not his, he did not meet the pressures faced by the city manager. In deleting new items, he was able to point to the board's directive to reduce the tax rate increase, and in approving new items, he argued not as their author, or even proponent, but as an arbiter. Thus, in revising the budget, the county manager was not caught between agency and governing board pressure to nearly the same degree as the city manager.

Analysis and the Role of the Budget or Finance Officer

Another important difference between the two budget processes is the extent to which agency requests were submitted to formal analysis. Such analysis refers to assessment of requests from an objective or at least detached point of view and in terms of criteria pertaining to need, policy desirability, administrative workability, and availability of funds. Budget analysis is typically the responsibility of the central budget or fiscal officer; therefore, in comparing the relative use of budget analysis in the city and county, it is important to know something about the budget or fiscal staff in each.

The city's budget staff is relatively large. It consists of the budget officer; a deputy; three budget analysts; a management information coordinator, who was very active in the budget process; a federal-aids coordinator, who was involved intermittently in the process; and a data processing unit that produced expenditure reports, salary lists, and similar materials for the budget. In contrast, the county finance officer has a very small staff, consisting of six professional and clerical positions, and only the finance officer and a newly appointed assistant were involved in the county budget process.

As noted earlier, while the city budget officer coordinated the city budget process, the county finance officer acted as an assistant to the manager, who coordinated the county budget process. Correspondingly, while the city budget officer and his staff had a very important role in budget analysis, the role of the county finance officer and his assistant in this regard was relatively limited.

Chart 1 shows to some degree the extent of analytic work done by the city budget staff, portraying several analytic steps. First came the summary and initial review of agency requests. Second were the hearings that the budget officer held with the agencies. In preparing for these, the budget staff formulated questions about the need for and alternatives to particular request items. Third was the analysis underlying the recommendations or changes made by the budget officer. Fourth, analysis was involved in formulating revenue estimates. Finally, analysis was a necessary element in preparing for the briefings with the manager and the review by the finance committee.

In contrast, the county finance officer and his assistant did much less analytic work during the budget process. Although they reviewed the requests of the general fund agencies and made recommendations to the manager about which increases to keep and which to drop, they had no analytic assignments in relation to the much larger requests of the semiautonomous agencies. Whereas the city budget staff formulated revenue estimates for review and approval by the city manager, the county finance officer simply supplied the manager with the necessary data so that he could make the estimates. Also, the finance officer and his assistant had little analytic work in relation to the presentation of agency requests to the county board or the various conferences that the manager held with agency personnel on the budget.

Thus, budget decisions by the city manager and the city council had more formal, analytic underpinnings than budget decisions by the county manager and the commissioners. One prime reason for this difference is that analysis by staff attached to the manager's office is more feasible in the city than in the county. While the city manager has a rather direct line of authority over all city agencies, the county manager has little direct authority over the county's semiautonomous agencies. As a result, the city manager can readily send his analytic staff to study the general operations and policy or managerial factors underlying the budget requests of all city agencies, but the county manager can do this only with general fund agencies. In other words, there are more opportunities for budget and other types of analysis by staff attached to the manager's office in the city than the county.

Review by Governing Board

Budget review by the two governing boards differed in two notable respects. First, while the city council delegated the review responsibility to its finance committee, the county board as a whole made the review. Second, formal review by the city's finance committee covered the entire budget and occurred after the manager's recommendations, but the commissioners' formal review covered only the requests from the semiautonomous agencies and happened before the county manager's review and revision. These differences are the result of some rather interesting distinctions in structure and approach between the two boards.

In regard to the difference in location of review responsibility, the city council, with twelve members, is one of the largest local governing boards in North Carolina. It therefore relies on two standing committees to review proposed legislation—finance and public works. Each committee has six members, with the mayor sitting ex officio on each. The finance committee's major responsibility is to review the annual budget and make recommendations on it to the full council. The board of com-

missioners has only five members—few enough that the board as a whole can review as well as enact legislation, including the budget ordinance.

This state of affairs means that requests received a more thorough review in the city's budgeting process than in the county's. This fact was partly a function of time: The finance committee devoted twenty-five hours to the review and covered all requests; in contrast, the commissioners devoted about fifteen hours to formal review and covered the requests of only the semiautonomous agencies. However, this difference does not pertain to the distinction between committee review and full governing board review. What does bear on this difference is that the finance committee's budget review sessions were less formal than the commissioners'. They were shirt-sleeve sessions with much give-and-take discussion among agency personnel, the manager, the budget staff, and committee members. The commissioners' review was much more structured; the presentations and questions were more guarded, and the proceedings were governed by procedural rules. As a result, the finance committee moved more quickly through the requests and further and deeper into them than the county board did.

The two boards' budget reviews also differed in their comprehensiveness and the point of the budget process when the review occurred. The city finance committee reviewed every request. The commissioners' review was not total; they held formal review sessions for the semiautonomous agencies' requests but not for general fund agencies'. These latter agencies were not included in the review because the commissioners felt that the manager knew enough about their requests and had sufficient control over them that formal review by the board was unnecessary. Moreover, the general fund agencies did not involve delicate relationships, as the semiautonomous agencies did, so formal presentation of the requests was less necessary than for the semiautonomous group.

Governing board review came, in the city's budgeting process, *after* the manager's recommendations; and in the county's process, *before* the manager's recommendations. The significance of this has already been explained in the discussion of the differing sequences of budget stages between the two processes. It is repeated here to point out that this difference probably did not affect the relative influence exercised by the city council and the county board over budgetary decisions. In the city's process, council members on the finance committee changed some of the manager's recommendations and thereby had a determining influence on the budget. In the county's process, board members heard the requests from the semiautonomous agencies, studied those from the general fund agencies, and then informed the manager the changes they wanted to make. This indicates that the commissioners' influence over budget decisions was primarily informal; nevertheless, its extent was most probably as great as the more formal influence exercised by council members over city budget decisions.

Budget Documentation

The final notable difference between the two budget processes concerns the extent to which budget publications were used in each. As Charts 1 and 2 show, budget books and documentation had significant importance in the city process but only secondary or minor importance in the county process.

The city published two budget documents as part of the 1974-75 process. One was the budget book per se. This document has 233 pages and gives an almost complete overview of city activities and financing. Two editions were printed during the budget process—the first when the manager submitted his recommendations to the council, and then the final version after the council enacted the budget ordinance. About 100 copies were printed each time, at a total cost of about $1,000.

The city also issued a much briefer document entitled "Objectives Durham '75." It has thirty pages and summarizes the activities of city departments by program and assigns specific objectives and 1974-75 budget figures to subprograms and program elements. The objectives document was presented as part of the manager's recommendations; 500 copies were printed at a total cost of about $2,300.

The county used only one budget document, which has about seventy pages. It projects revenue for 1974-75 and presents for each agency estimated expenses for the current year, its requests for 1974-75, and either the amount recommended by the manager or the final budget for that year. Organizational breakdown does not go below the agency level, and there is no narrative in the county budget book.

The county book was issued when the manager summarized and presented agency requests to the board. Then, after the board had enacted the budget, it was revised and reissued to show only the final or approved budget. About twenty copies of the first edition were printed and fifty of the second. The printing cost for both was less than $200.

The city's greater reliance on budget publications has at least two explanations: First, its budget process was more formal than the county's, and this characteristic inherently means greater reliance on budget documentation. Second, several years ago the city implemented a program budget format and moved even further in this direction this year with its objectives document. Still, it has retained the line-item format. The two formats, each with its own information requirements, amass a great deal of information. By following both, the budget publications are necessarily long. In contrast, the county basically uses a line-item format, and only information pertinent to that format need be presented. Consequently, the county budget document contains no program or organization narrative and is much shorter and less elaborate than the city's budget publications.

CONCLUSION

The experiences of the governments of the City and the County of Durham in preparing and enacting their 1974-75 budgets illustrate two distinct approaches to budgeting.

The city's budget process can be termed administrative, reflecting considerable structure and relying on leadership that was direct and stressed formal analysis in making budget decisions. The process took a long time, lasting up to seven months with decisions and activity distributed fairly evenly throughout the entire period. A professional budget staff coordinated it. Its stages were clearly demarcated, and the positions of different participants—the agencies, the budget staff, the manager, and the council's finance committee—stood separate from each other, adding somewhat to the tension of the budget process. The manager entered the process at an intermediate stage, initiating some policies and shaping or modifying agency requests so that the budget corresponded to the general directions being pursued by his administration. In doing so, he functioned between pressures from the agencies to maintain requests and pressures from the council to hold down taxes. His principal tool in grappling with these pressures was formal analysis by the budget officer and his staff. The council's finance committee reviewed the entire budget, and considerable effort was given to documenting budget decisions.

This type of administrative budget process reflects in part the manager's rather direct line of authority over city agencies. It is probably also more characteristic of municipal than county government in North Carolina. This is so because in specifying the administrative structure for local functions, the statutes concentrate more authority in managers of municipalities than they do for managers of counties. Finally, because the administrative or professional budget process of the city represents a formalized approach to budgeting, it is more likely to be found in the larger than the smaller government jurisdictions of the state.

Durham County's budget process can be termed coordinative, reflecting flexible structure and relying on indirect leadership that stressed bargaining and consensus to reach budget decisions. It was short, lasting only about three months, and most decisions and activities were compressed into the final month. The manager himself coordinated it. While separate budget stages existed, they overlapped each other. The roles of the different participants were exercised informally; as a result their views on the budget tended to merge into a single position, and relationships among them, while not without strain, went relatively smoothly. Because the manager's review and revision occurred near the end of the process, he was not in a strong position to initiate or formulate budget policies but could react to them, and he exercised what was in effect the final influence for inclusion or exclusion. In reviewing and revising the budget, the manager allowed pressures from agencies to spend and countervailing pressures from commissioners to cut to impinge on each other, and then he acted as an arbiter, pointing out constraints and compromises to settle the differences. In doing so, he primarily used bargaining, pressure, and consensus. Analysis was used only to a limited degree. The commissioners' budget review was selective, focusing on requests from agencies in which relationships were delicate, and documentation was only a secondary concern in the county budget process.

The county's coordinative type of budget process reflects in part the division of responsibility for county functions and the manager's limited authority over the semiautonomous agencies. Because such agencies are found in all North Carolina counties and the authority of the manager or chief executive officer over them is indirect, a coordinative type of budget process is also likely to be found to some degree in other county governments. Last, since this type of budget process represents an informal approach to budgeting, it is more likely to be found in smaller than in larger government jurisdictions.

THE COURTS AND LEGISLATIVE PROCEDURE

Joseph S. Ferrell

ARTICLE II of the North Carolina Constitution includes several provisions concerning procedures to be followed by the General Assembly in enacting laws: each house must keep a journal; members have the right to protest in the journals against legislation they consider injurious to the public or any individual; a majority of members constitute a quorum; one-fifth of the members can force a recorded roll-call vote; each act must contain an enacting clause; bills must be read three times in each house and signed by presiding officers of each house; and certain revenue measures must be enacted by a recorded roll-call vote. Only the latter three provisions have been interpreted by the North Carolina Supreme Court. This article will discuss the current state of the law with regard to those three provisions.

THE ENACTING CLAUSE

Article II, § 21, of the State Constitution provides that "The style of the acts shall be: 'The General Assembly of North Carolina enacts.' " It is not entirely clear why the constitution should be concerned with the precise wording of the enacting clause, or even why an enacting clause should be required at all. None was expressly required by the Constitution of 1776, and the records and debates of the 1868 Convention, which added this requirement, are silent as to the reasons for placing it in the Constitution. Perhaps the framers saw a need to identify a document positively as one intended by the legislature as an enacted law. By requiring that each act open with formal language expressing the intent to enact a law, the possibility that more informal documents might be mistaken for enactments is eliminated. In any event, the North Carolina Supreme Court has held that a document without an enacting clause in substantially the form prescribed by the Constitution will not be recognized by the courts as an act of the General Assembly.[1] The Court has suggested that failure to use the precise formula set out in Article II, § 21, will not invalidate an act,[2] but it has not had occasion to pass on any variant form,[3] since both the cases in which the issue has been raised involved purported legislation with no enacting clause at all.

THE RATIFICATION CERTIFICATE

The Governor of North Carolina does not have the power to veto legislation. The Constitution provides that bills pass into law when they have been read three times in each house of the General Assembly and have been signed by the presiding officers of the two houses.[4] In practice, the presiding officers sign a certificate that appears at the end of the final, official version of the bill.[5] A document that has been thus certified is called an enrolled bill and is deposited with the Secretary of State.[6] The process of certification is called ratification. Without the ratification certificate, a document will not be recognized by the courts as an act of the legislature.[7]

For all purposes except the enacting clause requirement, discussed above, and Article II, § 23, discussed later, the ratification certificate is taken by the courts as conclusive proof that the document in question is an act of the General Assembly and was enacted in strict compliance with the procedures prescribed in the Constitution.[8] Thus, the court will not receive evidence showing that in fact the bill was not passed on three readings in each house.[9] The court has been so clear and definite on this issue that it is virtually certain that a bill ratified by mistake would be held to be an act of the General Assembly even if the journals positively showed that it was defeated on one of its readings.

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1. *In re* Advisory Opinion, 227 N.C. 708 (1947); State v. Patterson, 98 N.C. 660 (1887).

2. *Ibid.*

3. From 1868 to July 1, 1971, the form of the enacting clause was "The General Assembly of North Carolina do enact." The more modern phrasing of the Constitution of 1970 became effective on July 1, 1971, at a time when the General Assembly was still in session. Great care was taken to insure that all acts of the 1971 General Assembly enacted on or before June 30 used the old form of the enacting clause, while those ratified on and after July 1 used the new form.

4. N.C. Const. art II, § 22 (1970). N.C. Const. § XI (1776). N.C. Const. art. II, § 23 (1868).

5. The customary form of the certificate is "In the General Assembly read three times and ratified, this the day of , 19 . (Signature) President of the Senate. (Signature) Speaker of the House of Representatives." The Constitution prescribes no particular form, and therefore the precise wording of the certificate could vary.

6. N.C. Gen. Stat. § 147-39 (1974).

7. Scarborough v. Robinson, 81 N.C. 409 (1879).

8. *E.g.*, State *ex rel.* Dyer v. City of Leaksville, 275 N.C. 41 (1969).

9. Carr v. Coke, 116 N.C. 128 (1895).

REVENUE MEASURES

Article II, § 23, of the North Carolina Constitution prescribes detailed procedures for enacting revenue measures. It applies to any bill that levies a tax, or pledges the faith of the state directly or indirectly for the payment of any debt, or "raises money on the credit of the State," or authorizes a local government to do any of these things. Such bills must be passed on three separate days in each house of the General Assembly; the vote on second and third readings must be taken by roll call; and the names of those voting in the affirmative and in the negative must be recorded in the journal. The ratification certificate is not sufficient proof of compliance with the required procedures. For these bills, the court will look to the journals to determine whether the proper procedures have been followed.

Applicability

Article II, § 23, applies in express terms to bills dealing with the taxing and debt-contracting powers of the state, counties, and cities. The court has held that it also applies to an act delegating the taxing power to townships.[10] Since townships had the power to levy taxes and incur debt when this case was decided, it seems certain that the court would hold the section applicable to special districts and any other political subdivisions of the state that have the power to levy taxes or borrow money.

Scope

(1) *Taxes.* Article II, § 23, clearly applies to any bill that levies a tax. But it is often difficult to determine whether a particular exaction is a "tax." The court has ruled on this question only three times. In *Gallimore v. Town of Thomasville,*[11] the Court held that an act ratifying municipal assessment rolls for street improvements did not impose a tax. Presumably, the basis for this decision was that special assessments are not taxes. The Court in *McLean v. Durham County Board of Elections*[12] held that the filing fee required of candidates for public office is not a tax, and in *North Carolina Turnpike Authority v. Pine Island, Inc.*[13] held that tolls charged for the use of a highway are not taxes.

A tax is usually defined as a forced contribution from an individual or corporation for support of government. A tax always applies uniformly to all persons within the class subject to the tax without regard to the benefits, or lack of them, enjoyed by a particular taxpayer or his property. Usually, but not always, the purpose of levying a tax is to raise revenue. On the other hand, charges made for services rendered by governmental agencies to individuals are not considered taxes, nor are fees charged by public officers for performing special duties. For example, charges for court costs and fees have never been considered taxes even though their purpose is to raise revenue. No rules can be laid down that will permit one to predict with certainty whether a given exaction would be considered a tax within the meaning of Article II, § 23. However, the criteria set out above are useful in arriving at conclusions about types of taxes, fees, and other charges that occur with any regularity in the legislative process.

(2) *Debts.* Sections 3 and 4 of Article V regulate the incurrence of debt by the state and its units of local government. Generally, these two sections forbid the state and units of local government to contract debt without a vote of the people, with several limited exceptions. Article II, § 23, regulates the enactment of laws that "raise money on the credit of the State (or a local government)" or "pledge the faith of the State (or a local government), directly or indirectly, for the payment of any debt." Article II, § 23, does not define what is meant by "debt" or to "pledge the faith" or to "raise money on the credit," but the first two terms are defined in Article V, §3 (3) (with regard to State debt), and Article V, § 4 (5), (with regard to local government debt). "Debt" is defined as a borrowing of money; "a pledge of faith and credit" is defined as a pledge of the taxing power. The Court has not had occasion to determine whether the word "debt" means the same thing in Article II, § 23, as it does in Article V, and the definition paragraphs in Article V, §§ 3 and 4, are careful to limit the definition contained therein to the use of the defined terms in those particular sections of the Constitution.

The definition of debt in Article V was added by a constitutional amendment that revised the entire article, effective July 1, 1973. Before this amendment, the Court had on several occasions construed the word "debt," as used in Article V before the amendment, to mean any contractual obligation whereby the state or a local government becomes bound to pay money to another, except revenue bonds. Whether the court would interpret "debt" or a "pledge of faith and credit" as meaning the same thing in Article II, § 23, as it does in Article V is an open question. It would be perfectly reasonable for the Court to hold that the definition of debt put forward in *Vance County v. Royster*[14] (discussed below), decided before the revision of Article V, still governs the use of that word in Article II, § 23. It would also be reasonable to hold that the new definition should govern throughout the Constitution whenever the word "debt" is used. And it would not be wholly unreasonable for the Court to conclude that "debt" as used in Article II, § 23, has a meaning all its own. In the analysis that follows, the definition of debt

10. Wittkowsky v. Board of Comm'rs., 150 N.C. 90 (1908).
11. 191 N.C. 648 (1926).
12. 222 N.C. 6 (1942).
13. 265 N.C. 109 (1965).
14. 271 N.C. 53 (1967).

advanced in *Vance County v. Royster* is referred to as the old definition and the definition contained in Article V, § 3 (3) and § 4 (5), as the new definition.

(a) *General obligation bonds and notes.* There can be no doubt that a bill authorizing the issuance of general obligation bonds or notes is subject to Article II, § 23, under both the new and the old definitions of debt. That such instruments create a debt is so well understood that the court scarcely discusses the matter.

(b) *Intergovernmental contracts and grants-in-aid.* Three cases decided under Article V, § 3, before the amendment that became effective on July 1, 1973, significantly expanded the scope of the word "debt" as used in Article V, and therefore raise by implication serious questions as to the applicability of Article II, § 23, to certain types of bills heretofore assumed not to be within its purview should the Court rule that the old definition of debt governs that section. In *Yokley v. Clark,*[15] a city and a county entered into a contract obligating each to provide a stated percentage of whatever funds were needed in future years to operate and maintain an airport. This agreement was required as one condition to receiving federal aid for construction of the airport. The court held that the contract was a pledge of the faith and credit of the city and county. Since the source of revenue available to the county and city for meeting their obligations under agreement was not identified, the court ruled that the taxing power was indirectly pledged and a debt therefore created.

In *Horton v. Redevelopment Commission,*[16] the High Point redevelopment commission entered into a written agreement with the federal government under which the federal government agreed to provide two-thirds of the costs of specific redevelopment projects if the other third was provided by local funds. The city and the commission entered into an agreement under which the city agreed to provide funds "from currently available nontax revenues of the City, Revenue Bonds which do not pledge the faith and credit of the City and from (any) other lawfully available source." While the majority opinion did not discuss whether this agreement created a debt, a dissenting opinion took the position that it did.

The dissent in *Horton* was in effect adopted by the Court in *Vance County v. Royster.*[17] In this case, a county entered into an agreement with the federal government whereby it agreed to appropriate funds to operate and maintain an airport from specified nontax revenues, none of which were derived from operation of the airport. The court held that the agreement created a debt of the county and did not fall within the revenue bond exception because the revenues were unrelated to the airport. If these three cases are read together, the Court appeared to be holding that a debt within the meaning of Article V, § 4, was any contractual obligation not funded by current appropriations extending beyond the current fiscal year and secured by either a direct or indirect pledge of the taxing power or a pledge of revenues unrelated to the subject of the agreement. If this is an accurate formulation of the rule, and if the word "debt" in Article II, § 14, is given the old definition, the scope of Article II, § 23, is expanded considerably. Any bill that authorizes the state or local government to make such an agreement authorizes the creation of a debt and must be enacted in compliance with Article II, § 23.

Under the new definition of debt, it is clear that contractual obligations that do not involve a borrowing of money are not subject to Article II, § 23, even though they might pledge the taxing power either expressly or by implication. Even if the court were to hold that a simple contractual obligation pledges the faith and credit of the state or a local government in the sense that tax revenues may be needed to discharge the obligation, it does not follow that Article II, § 23, would be called into play. The precise language of this section speaks of laws that "pledge the faith of the State directly or indirectly *for the payment of any debt.*" Thus Article II, § 23, applies only to bills that create or authorize the creation of a "debt" *and* pledge or authorize the pledging of the state's "faith" for the payment of that debt. Under the new definition of debt, only bills that authorize the state or a local government to borrow money appear to invoke Article II, § 23; it is not invoked by bills that authorize simple contractual obligations, even though they do pledge the state's "faith" —i.e., its power to levy taxes—as a means of raising the money needed to satisfy that obligation.

(c) *Revenue Bonds.* Under the old definition, revenue bonds were not considered to be debts,[18] and acts authorizing them therefore presumably were not subject to Article II, § 23. Under the new definition, revenue bonds are "debt" since they evidence a borrowing of money, but they are not secured by a pledge of the faith and credit. They therefore do not fall within that portion of Article II, § 23, regulating bills that "pledge the faith of the State . . . for the payment of any debt" because they do not "pledge the faith." However, Article II, § 23, opens with the words "No law shall be enacted to raise money on the credit of the State . . . ." This phrase must mean something different from the phrase "or to pledge the faith of the State directly or indirectly for the payment of any debt," since the alternative conjunction is used. An implication can be drawn from the grammar of the sentence that it is possible to raise money on the credit of the state *without* pledging the state's taxing power in the process. If the phrase "to raise money" means to borrow money, and if one draws the suggested implication, the opening phrase of Article II, § 23 can be read as applying to bills that authorize the state to borrow money without pledging the taxing power in security for the loan—and that is a fairly

15. 262 N.C. 218 (1964).
16. 262 N.C. 306 (1964).
17. 271 N.C. 53 (1967).
18. *E.g.*, Williamson v. High Point, 213 N.C. 96 (1938).

accurate description of a revenue bond. The Court has had no occasion to consider whether revenue bond acts are subject to Article II, § 23, but the argument just outlined suggests that the safer course of action is to assume that they are.

(d) *Assumed debt.* Occasionally bills are introduced that require one governmental subdivision to assume the outstanding debts of another. These bills clearly fall within the purview of Article II, § 23.[19]

City Charters and Annexation Acts

Article II, § 23, speaks of bills levying taxes or incurring debt "directly or indirectly." One of the primary powers of a local government is the power to levy taxes. And it is beyond dispute that a bill granting the taxing power to a local government is within the scope of Article II, § 23. Thus it is not surprising that the Court has held that an act creating a new city or town must comply with Article II, § 23, insofar as the city charter delegates the power to tax and incur debt.[20] Failure to comply with roll-call procedures does not invalidate the entire bill, but only those portions delegating the taxing power or authorizing the new city to incur debt.

If a bill creating a new city or town in the first instance must comply with Article II, § 23, what about a bill annexing territory to an already chartered municipality? A convincing argument can be made that the act grants the municipality the power to tax the residents of the annexed areas. But this argument has been rejected by the Court on at least three occasions, and it is well settled that annexation bills need not be enacted under the roll-call procedures.[21] The same is true for an act detaching territory from one county and adding it to another.[22] The Court's reasoning in the annexation cases is that acts adjusting the boundaries of an existing municipal corporation do not grant the taxing power—that power already exists by virtue of the original charter or act creating the county, city, or town. The Court also holds that the taxing and borrowing power resides in the corporation, not in its governing body. Thus, an act abolishing a board of county commissioners and substituting a board of managers in its place need not comply with Article II, § 23.[23] By analogy, no act altering the form of government of an existing county or city need comply.

Every session the General Assembly enacts a number of bills that consolidate and revise the charter of a particular city or town. Does Article II, § 23, apply to charter consolidation acts? It might be argued that the taxing and borrowing power is already lodged in the existing municipal corporation, that the purpose of the act is merely to restate the existing special acts relating to the corporation, and that therefore Article II, § 23, does not apply. While this argument may be appealing, I am not convinced that the Court would accept it. It is true that consolidation acts merely restate existing law, but they also repeal the present laws creating the corporation. There is no gap in the corporate existence, since the repeal and the re-enactment are simultaneous. Nevertheless, the source of the corporation's power to tax and borrow becomes the newly consolidated charter.

Procedures for Levying Taxes and Incurring Debt; Disposition of Proceeds

Article II, § 23, applies only to bills that levy or authorize the levy of a tax or authorize the contracting of a debt. It does not apply to the *procedures* for levying a tax or contracting a debt. Thus, an act requiring voter approval of a bond issue previously authorized by another act need not comply with Article II, § 23.[24] An act providing for the reappraisal of property for property tax purposes is not within the scope of the section.[25] Nor is an act disposing of the proceeds of a bond issue.[26]

MATERIAL AMENDMENT

A revenue bill must be read and passed in each house on three separate days with a recorded roll-call vote on second and third readings. Suppose the bill is amended at some point in its passage through these steps. How does the amendment affect the bill's status under Article II, § 23? The Court has ruled repeatedly that if the bill is amended in a "material" manner, it must be treated as if it were a new bill.[27]

The most difficult question when revenue bills are amended is how to determine whether a given amendment is material. In general, the Court's test is whether the amendment operates to increase the burden on the taxpayers. Obviously, an amendment to a tax bill that increases the tax rate or an amendment to a bond issue bill that increases the amount of bonds that may be issued or the maximum interest rate[28] is material under this test.

Often, however, it is not immediately apparent that an amendment increases the taxpayer's burden. The facts of *Claywell v. Board of Commissioners*[29] are an example. In 1917 there were twelve townships in Burke County. Seven of them—including Morganton Township, which

19. Greensboro v. Guilford County, 209 N.C. 655 (1936).
20. Rodman-Heath Cotton Mills v. Town of Waxhaw, 130 N.C. 293 (1902).
21. Nixon v. City of Asheville, 199 N.C. 217 (1930); Penland v. Town of Bryson City, 199 N.C. 140 (1930); Lutterloh v. City of Fayetteville, 149 N.C. 65 (1908).
22. Commissioners v. Commissioners, 157 N.C. 515 (1911).
23. State *ex rel.* O'Neal v. Jennette, 190 N.C. 96 (1925).
24. Graham County v. W. K. Terry & Co., 194 N.C. 22 (1927).
25. Hart v. Board of Comm'rs., 192 N.C. 161 (1926).
26. Battle v. Lacy 150 N.C. 574 (1908).
27. Frazier v. Board of Comm'rs., 178 N.C. 61 (1919); Guire v. Board of Comm'rs., 177 N.C. 516 (1919); Claywell v. Board of Comm'rs., 173 N.C. 657 (1917); Wagstaff v. Central Highway Comm'n, 174 N.C. 377 (1917); LeRoy v. Elizabeth City, 166 N.C. 93 (1914); Gregg v. Board of Comm'rs., 162 N.C. 479 (1913); Raleigh Savings Bank v. Lacy, 65 S.E. 441 (1909); Commissioners v. Stafford, 138 N.C. 453 (1905); Glenn v. Wray, 126 N.C. 730 (1900).
28. Guire v. Board of Comm'rs., 177 N.C. 516 (1919).
29. 173 N.C. 657 (1917).

included the principal town in the county--had issued township road bonds before 1917. The remaining five townships had no outstanding road bonds. A bill was introduced in the 1917 General Assembly creating a county road commission authorized to issue $300,000 in road bonds. All outstanding township road bonds were to be assumed by the county. On third reading in the Senate, the bill was amended to make it applicable in the seven townships with outstanding road bonds only if approved by the voters in those townships. The amendment was by voice vote and the bill then passed on third reading by roll call. The Court held that this was a material amendment since it potentially withdrew the seven most populous and wealthy townships in the county from liability for taxation to retire the bonds authorized and thus increased the potential burden of taxation on the remaining townships.

In some instances the court has ruled that an amendment is material even though it cannot be demonstrated that an increased burden on the taxpayer will result. An amendment that deleted authority to issue bonds for road construction and substituted authority to levy taxes for that purpose was held material even though the actual tax rate authorized was less than that which would have been required for debt service on the bonds originally authorized.[30] Thus in determining whether an amendment is material, the taxpayer's-burden test, though useful, is not conclusive. Any amendment that alters the key taxing or borrowing aspects of a revenue bill, or that injects taxing or borrowing powers into a bill that originally did not contain them, will probably be held material.

Assuming that an amendment is "material," what are the procedural implications of such a finding? Let us begin the analysis with the sequence of events required for a revenue bill that is not amended. Such a bill passes its first reading upon being introduced and referred to a committee; no formal vote is necessary.[31] The bill is then reported by the committee. If the report is favorable or without prejudice, the bill is placed on the roll-call calendar for second reading. Placing the bill on the roll-call calendar cannot occur earlier than the day after its introduction.[32] When reached on the calendar, the bill is voted upon by roll call, and the ayes and noes are recorded in the journal. If a majority of the votes cast are in the affirmative, the bill remains on the calendar. On the following day, it is voted upon again by roll call and if passed is sent to the other house, where the procedure is repeated. If the bill is passed by the second house without amendment, it is enrolled and ratified and thus passes into law.

The first variation on this basic process to be considered occurs in connection with a committee substitute. Suppose the committee to which the bill is referred wishes to make several amendments that completely revise the bill. Rather than report a series of amendments to be separately adopted by the chamber, the committee may report an entirely redrafted bill as a committee substitute. When the committee reports the bill, it reports the original bill unfavorably and the committee substitute favorably. The original bill is then placed on the unfavorable calendar and is never heard of again.[33] The committee substitute is then before the house. At this point the question is whether the committee substitute shall be adopted. The Senate and House formerly followed different procedures from this point.[34] Before 1969, the Senate routinely adopted the committee substitute when the bill was reported by committee. The bill was then placed on the calendar for second reading on the following day. The House, however, routinely placed the bill on the calendar for the following day. When the bill was reached on the calendar, the first question was whether the committee substitute should be adopted; then the bill was debated and voted upon. If a committee substitute is adopted and passed on second reading on the same day, has it passed "three separate readings . . . on three different days" as required by Article II, § 23? The Court has ruled that it has. A committee substitute does not put the bill back on first reading. It is considered an amendment of the original bill, and the original bill's first reading.[35] Any possible dispute on this question was avoided in 1969 when the House adopted the Sentate procedure and routinely adopted committee substitutes when reported, not when reached on the calendar. This practice has been followed by both houses since that time.

The second variation to be considered occurs when a bill up for second reading is amended in a material manner. Although the question has not been discussed in any of the reported cases, it seems that the amendment itself may be adopted by voice vote. The bill as amended is then put to a roll-call vote, and if it receives a majority of the votes cast, it passes its second reading. As with the committee substitute, the bill need not again be passed on first reading.

The third variation occurs when a bill up for third reading is amended in a material manner. Here, the Court is quite clear that a material amendment puts the bill back on its second reading.[36] The roll-call vote following adoption of a material amendment counts as the second reading of the bill, and the bill must remain on the calendar for third reading on the following day. The amendment process can be repeated an infinite number

30. Township Rd. Comm'n v. Board of Comm'rs., 178 N.C. 61 (1919).

31. State *ex rel* Dyer v. City of Leaksville, 275 N.C. 41 (1969).

32. Storm v. Town of Wrightsville Beach, 189 N.C. 679 (1925).

33. In the Senate, Rule 45 (a) (1974) provides that a bill reported unfavorably shall lie upon the table and may be placed on the calendar by a two-thirds vote. House Rule 38 (1974) allows a motion to remove a bill from the "unfavorable calendar," which requires a two-thirds vote. In practice, no "unfavorable calendar" is kept in either house. A motion to place an unfavorably reported bill on the calendar is extremely rare.

34. The rules of neither house deal with the subject.

35. Edward v. Nash County, 183 N.C. 58 (1922); Brown v. Road Comm'rs., 173 N.C. 598 (1917).

36. Allen v. City of Raleigh, 181 N.C. 453 (1921).

of times. A bill amended on third reading and thus put back on its second reading may be amended again on its third reading on the following day. If the amendment is material, the bill is again put back on its second reading and the whole process is repeated again.

The fourth variation to be considered occurs when a bill introduced in the House is materially amended in the Senate or vice versa. When the bill is returned to the house of origin for concurrence in the amendment, how should it be treated? There are three possible procedures: (1) concurring in the amendment by one roll-call vote; (2) concurring in the amendment by two recorded roll-call votes on two separate days; (3) treating the bill as a new introduction. If the house of origin may not adopt a revenue measure by voice vote, it clearly may not concur by voice vote in a material amendment made in the other house. It is not clear, however, precisely how concurrence should be achieved. If a material amendment made in the house of origin automatically puts a bill back on its second reading, it seems unlikely that concurring in the amendment by one roll-call vote would comply with the Constitution. There is a fairly good argument for the second suggested procedure—concurrence by two roll-call votes on two separate days. If the first reading of a bill never needs repeating in the house of origin regardless of the nature of an amendment, by analogy concurring in a material amendment by two recorded roll-call votes on separate days should be sufficient. The original first reading of the bill could be counted as first reading of the amended bill. But the third suggested procedure—treating the bill as a new introduction—is by far the safest course of action. When a bill is received from the other house for concurrence in a material amendment, it should be placed on the calendar for the following day. If the mere act of introducing a bill in the first instance can be counted as first reading, it seems highly probable that the mere act of receiving the bill for concurrence and placing it on the calendar or referring it to a committee will suffice in the concurrence situation. On the following day, the amendment should be concurred in by roll-call vote, and this process should be repeated on the next day. This procedure is, in fact, now used by both houses.

The final variation occurs in connection with a conference report. When a bill is received from the other house for concurrence in an amendment, the house of origin may either concur or refuse to concur. If the members refuse to concur, the bill is defeated unless a motion is made to appoint conferees. When conferees are appointed, their task is to reach an agreement acceptable to both houses. Adoption of a conference report by both houses enacts the bill, which is enrolled and ratified. In North Carolina practice, conference committees do not compose entirely new bills, although the rules are silent on the subject. Usually, the report recommends that each house accept portions of the disputed matter and recede from its own position to some extent. On rare occasions, a conference report may recommend an amendment not contained in the version passed by either house. If the disputed matter in a revenue bill has to do with its taxing or borrowing aspects, it seems clear that the conference report should be treated by both houses as a new introduction. Receiving the report and placing in on the calendar should count as first reading. On each of the following two days, the report should be adopted by roll-call votes in each house.

PROVING COMPLIANCE WITH ARTICLE II, § 23

In cases challenging legislation under Article II, § 23, the courts will admit only two items of evidence: the enrolled bill, and the journals of the House and Senate. No other evidence is competent to show the circumstances surrounding enactment of the legislation.[37] From the enrolled bill itself, the court will determine whether the act is within the scope of Article II, § 23, whether it contains an enacting clause, and whether it was ratified by the presiding officer of each house. From the journals, the court will determine whether it was passed by each house on three separate days, with a recorded roll-call vote being taken on the second and third readings in each house.

Application of these rules of evidence means that it has ordinarily been impossible to get the question of whether an amendment was material before the court. The journals do not show the text of the bill, and the enrolled bill does not indicate where amendments occurred. In *Frazier*[38] the plaintiff attempted to introduce into evidence the original amendment forms used by the engrossing clerks to prepare the final version of the act. The Secretary of State had collected these documents from the engrossing clerks and had attached them to the enrolled bill with rubber bands. In rejecting this evidence and upholding the act, the Court said

> Where the Journal of either House of the General Assembly shows only that a bill which must be passed in accordance with the provisions of Article II, Section 14, [now Article II, Section 23] in order to be valid as a law, was amended, and does not show the purpose or effect of the amendment, there is no presumption that the amendment was material; on the contrary, there is a presumption that the amendment was immaterial, as affecting the passage of the bill by the General Assembly. The only competent evidence to overcome this presumption is the Journal itself. In the absence of any evidence to be found in the Journal of either House as to the contents of an amendment, adopted and included in a bill to authorize the issuance of bonds or the levying of a tax, it must be taken as a fact that the amendment was immaterial in so far as the passage of the bill and its enactment is concerned.[39]

37. Frazier v. Board of Comm'rs., 194 N.C. 49 (1927).
38. *Id.*
39. *Id.* at 56.

Significantly, *Frazier* is the last reported case dealing with material amendments, and it was decided nearly fifty years ago. Is it then safe to assume that the General Assembly may ignore the procedures of Article II, § 23, in dealing with material amendments to revenue or bond measures because competent evidence cannot be introduced to show the materiality of the amendment? I think not. When *Frazier* was decided, legislative documents were handled in a primitive manner compared with current practice. Even though the evidence in *Frazier* tended to show that the Secretary of State himself had collected the original amendment forms and had attached them to the enrolled act, no officer of the General Assembly had done so and there was no official certification by either of its presiding officers or any other of its officers that the documents produced in court in *Frazier* were in fact authentic. Both houses of the General Assembly now use a computer-based printing, engrossing, and enrolling system, and official files of all amendments and successive engrossments of bills are maintained. In short, there is now little or no basis for drawing a distinction between the trustworthiness of an enrolled bill and a previous version of the same bill maintained in officially sanctioned files.

There is also a second reason for adhering to the procedures of Article II, § 23, in adopting material amendments. Even though the journals do not routinely show the text of amendments, any member has the right to insert matter in the journal so long as it is relevant to the legislative process.[40] If a material amendment were adopted and the bill placed on third reading without again passing its second reading as amended and if a member requested that the text of the amendment be inserted in the journal (which can be done at any time before adjournment), competent evidence as to the effect of the amendment would be available to the court.

There have been a few cases determining to what extent errors in journal entries may be used to attack the validity of legislation within the scope of Article II, § 23. In general, the Court has been quite lenient in overlooking inconsequential errors and even in permitting correction of the journals after the fact. Clerical errors in journal entries will not invalidate an act if it is clear that the bill in question did pass in regular course. For example, an error in the title of the bill in one of the entries is not fatal.[41] In *Tyson v. City of Salisbury,*[42] all of the journal entries carried an incorrect title for the bill in question since the title as written on the bill jacket differed slightly from that on the bill itself. However, in all entries the bill was correctly identified by its number, and there was no possibility of confusion with some other act. The act was upheld.

In *Commissioners v. Farmers Bank,*[43] the Senate's principal clerk had inadvertently neglected to record passage of the bill in question on its third reading in the Senate Journal of the 1907 regular season. The error was discovered after sine die adjournment. At the extra session of 1908, the Senate adopted a resolution correcting the 1907 regular-session journal to show that the bill did pass third reading and to record those voting in the affirmative and the negative. The Court held that the legislature has inherent power to correct its records to make them speak the truth, and the act was upheld. The Court has also held that printer's errors in the printed journal may be rectified by introducing the original documents from which the journal was compiled.[44]

As a result of the overly technical decision in *Debnam v. Chitty,*[45] there have been several cases ruling on precisely how the affirmative and negative votes must be recorded in the journal. In *Debnam* the Court held that failure to record the number of negative votes invalidated a bill even if there were no negative votes. Three years later the case was overruled.[46] In *Debnam,* the journal showed the names of those voting in the affirmative but contained no entry whatever as to negative votes. In *Commissioners v. Trust Co.* the journal showed the names of those voting in the affirmative, and then states "Noes -----." The Court held that where the recorded affirmative votes constitute a majority of the number of members of the house specified by the Constitution, it is not necessary to record the negative votes.[47] However, the names of those voting in the affirmative must be recorded, and an entry that reads only "Ayes 36, noes none" is not sufficient.[48]

EFFECT OF FAILURE TO COMPLY WITH ARTICLE II, § 23

An act within the purview of Article II, § 23, but not enacted according to the required procedures is void insofar as it purports to levy a tax or authorize the contracting of a debt. Suppose the act contains other features not within the scope of Article II, § 23. Is it totally void, or only as to its revenue aspects? The Court has addressed itself to this question in three cases, and the results appear to be out of harmony.

40. Article II, § 18, gives a member the right "to dissent from and protest against any act or resolve which he may think injurious to the public or any individual, and have the reasons of his dissent entered on the journal." This probably confers on a member voting against the bill a constitutional right to insert the text of the amendment as part of his reason for protesting its enactment. Neither the Senate nor the House rules govern insertion of material in the journal. In practice, it is unusual for members to request insertion of matter in the journal, in contrast to the custom in Congress, and insertion of matter irrelevant to a pending or enacted bill is virtually unknown.

41. Lumberton Improvement Co. v. Board of Comm'rs., 146 N.C. 353 (1907).

42. 151 N.C. 468 (1909).

43. 152 N.C. 387 (1910).

44. Wilson v. Markley, 133 N.C. 616 (1903).

45. 131 N.C. 657 (1902).

46. 143 N.C. 110 (1905).

47. *Accord* Leonard v. Board of Comm'rs. 185 N.C. 527 (1923).

48. Commissioners v. DeRossett, 129 N.C. 275 (1901).

In *Rodman-Heath Cotton Mills v. Town of Waxhaw,*[49] the Court held that a city charter not enacted in accordance with Article II, § 23, was ineffective to delegate taxing and borrowing powers but valid as to the other features of the bill. The rationale of the case—that all of the bill duly enacted but not in compliance with Article II, § 23, is operative except those portions specifically subject to Article II, § 23—was extended to a surprising degree in *Russell v. Town of Troy.*[50] In 1903 an act was passed in compliance with Article II, § 23, authorizing the Town of Troy to issue $15,000 in school bonds with a twenty-year maturity to be retired by an annual tax levy of 30 cents on the $100 valuation of property. A bill was introduced in 1911 to increase the amount of bonds authorized, extend the maturity to thirty years, and increase the rate of tax authorized to retire them. The technique employed in drafting the 1911 bill was the familiar one of striking out each figure in the 1903 act and inserting a new one in lieu thereof. The 1911 act was not passed in compliance with Article II, § 23. The Court held that it was invalid insofar as it purported to insert new figures in the 1903 act but was *not* invalid insofar as it struck out the original figures. The result was that no bonds could be issued under either the 1903 or the 1911 acts.

Russell seems to have been overruled *sub silentio* by *Guire v. Board of Commissioners.*[51] The 1919 General Assembly purported to amend a 1917 bond issue act to increase the rate of interest that could be paid by the issuing unit. It used the same drafting technique as the bill involved in *Russell* and was not passed in compliance with Article II, § 23. The Court ruled that the 1919 act was wholly void and did not repeal the 1917 act.

49. 130 N.C. 293 (1902).
50. 159 N.C. 366 (1912).
51. 178 N.C. 39 (1919).

John Coghill. Husband, Father, Civitan Man of the Year, Sunday School Teacher, Church Worker, City League Basketball Coach, High School Baseball Umpire and R.J. Reynolds Leaf Buyer-in-Charge, Multiple Markets.

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