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INSTITUTE of GOVERNMENT
The University of North Carolina at Chapel Hill

Initiative, Referendum, and Recall

Adoptive Families for Black Children

Mediation in Workers' Comp

Legal Standards for Citizen Comment

Greensboro News & Record

Greensboro, N.C., Wednesday, Nov. 8, 1989 C 25 Cents

Vol. 99, No. 312

S&L scandal mounts

Ex-official tells more on senators

By MATT YANCEY

WASHINGTON — Four senators who received $1.3 million in contributions from the owner of the now-defunct Lincoln Savings and Loan Association met with a top federal regulator where one of their number asked him to rescind a rule curtailing Lincoln's risky investments, the former bank board official said Tuesday.

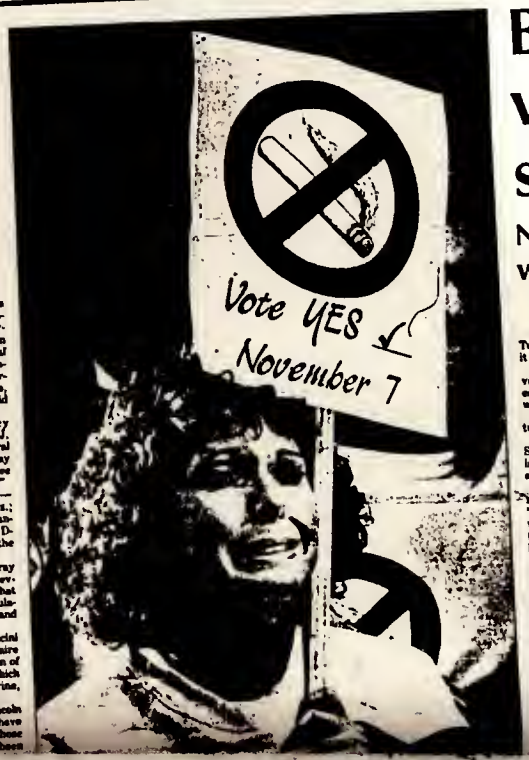
The legislators have said they never made the request of Edwin J. Gray, then chairman of the Federal Home Loan Bank Board. But Gray told the House Banking Committee the denial "simply is not credible."

Gray testified that the four — Sens. Dennis DeConcini, D-Ariz.; John McCain, R-Ariz.; Alan Cranston, D-Calif., and John Glenn, D-Ohio — met with him early on the evening of April 2, 1987.

The other three senators, Gray said, "raised no objection whatsoever" when DeConcini proposed "that I withdraw a duly adopted regulation on behalf of their 'friend' and their contributor."

Gray said the "friend" DeConcini referred to was Phoenix millionaire Charles H. Keating Jr., chairman of American Continental Corp., which had bought the 29-branch Irvine, Calif., savings and loan in 1984.

Federal regulators seized Lincoln last April and said they could have to pay $2 billion to depositors whose [illegible] insured savings had been



Butt out, voters tell smokers

New tough ordinance wins narrow approval

By CATHY GANT

Greensboro voters narrowly adopted a referendum Tuesday that restricts smoking in restaurants and bans it in large retail areas.

Adopted by a 173-vote margin out of a total of 29,809 votes, the ordinance leaves Greensboro with the toughest smoking ordinance in North Carolina — a state where tobacco has long been king.

With all 45 precincts reporting, but in unofficial returns, the ordinance was approved 14,991 to 14,818.

"It was a victory for the Greensboro to Alleviate Smoking Pollution group that propelled the smoking issue to referendum, group spokesman David Hudgins said, as well as a win for the entire city.

"It signals that we are definitely ready for smoking restrictions in Greensboro to protect us," Hudgins said. "I'd just like to say to the tobacco industry that no jobs will be threatened because of the passage. It just means that the community starts to work together to provide a healthier environment for everybody.

"To be out-manned and out-spent by 20-to-1 by the tobacco industry, this is a damned good showing for the citizens of Greensboro," Hudgins said.

The tobacco industry had campaigned heavily against the ordinance, claiming that adopting mandatory smoking policies would jeopardize the jobs of tobacco workers.

Employees of the local Lorillard cigarette-making plant were concerned that adoption of the issue posed a threat to their financial security. Earl Jaggers, president of the Local 317 tobacco workers union that serves Lorillard, said the ordinance could have a snowball effect on other cities.

"It starts here and goes on to other cities in the state, and possibly other states, too," Jaggers said. "The workers do feel that their jobs will be jeopardized.

"We were real concerned with their individual [illegible] at the polls today," Jaggers said. "The real disappointed in the citizens willing to support a company so many high-paying jobs

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PAGE TWELV

Council Action Expected To

In Referendum On Van Nop

No Steps Taken To Sale Monday; Will D

The Van Nopper property, is scheduled to be sold Monday at auction. The council did not announce the sale yesterday, indicating that, so far as it is concerned, the sale will go on. The only method by which the sale could be halted, it appeared last night, would be through a court injunc-

C. R. Wharton, chairman of the Committee for the Preservation of the Van Nopper Property for Public Purposes, was out of town last night and it was not known if any members of the committee planned to seek an injunction. Members of the war memorial commission indicated they had no such plans and took the position that the matter was now one between the preservation committee and the council.

Wording of Motion

Lindley's motion, as later wr ten out by Wilson, city attorn

tition Started For Troutman Recall Election

approached to sign the petition, and verified its content.

Rumors of a petition to build a recall election were reported by several Troutman residents last week. However, those rumors were not verified until this morning.

According to several Troutman citizens, Vernon Reed and Jackie

Several Troutman residents also indicated Danny Poole, owner of Poole's Used Cars in Troutman, was connected with the petition. When

Poole replied. It was after sources have been unwilling to [illegible] about [illegible]

Former Troutman Mayor Jack Massey, who was in Poole's office at the time of the interview, stated "The petition, if there is a petition will be news after it is filed in the

Both Massey and Poole declined to comment on when such a petition might be filed or where a copy might be found.

The petition has apparently arisen from controversy surrounding Mayor Ernest E. "Buddy" Sides' resignation last month. Sides re-

town clerk's office.

The petition has apparently arisen from controversy surrounding Mayor Ernest E. "Buddy" Sides' resignation last month. Sides resigned amidst a heated controversy over cuts in the town's 1988-89 budget.

The town board refused to accept his resignation, and Sides asked the citizens of Troutman to indicate to him what they wanted him to do — resign or stay on the job.

See 'Page 12-A

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POPULAR GOVERNMENT

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INSTITUTE of GOVERNMENT The University of North Carolina at Chapel Hill

Feature Articles

Departments

Karen Tam

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On the cover Over the years, citizens in North Carolina communities have used the ballot box to bring about a variety of changes in ordinances, public policies, and even the membership of elected boards. Illustration by Michael Brady.

Adopting the "Unadoptable":

Anita R. Brown-Graham

"Why would anyone adopt four children after raising six?" This question has undoubtedly been asked many times of Rodger and Rebecca Small. Their answer is simply "[B]ecause we're committed to the society we live in."[1] The Smalls, who are African American, were concerned about the number of black children in extended foster care with no prospects for permanent placements.

The same concern led to the creation of Another Choice for Black Children (hereinafter referred to as Another Choice) in January 1995. Located in Sanford but operating statewide, the private nonprofit agency has set out to break down the barriers to adopting black children and children with other special needs. It gives particular emphasis to children who are older than five years, to sibling groups, and to children who have significant physical or mental health complications. For two years Another Choice has been beating the odds, making adoption placements that were once considered impossible in phenomenal numbers. As of April 1997, the agency had placed 122 children. Of these, 102 were black, 10 white, and 10 biracial.[2] Thirty-one represented sibling groups with as many as five members, and about 80 percent required ongoing special medical care.[3] This article describes the origins of the agency and the operating style that makes it distinctive.

Another Choice has emerged at a time when public rhetoric is calling for an increased emphasis on helping children reach their full potential, especially children from disadvantaged backgrounds. Public policies have begun to follow the rhetoric. These policies seek to enhance the family as the primary unit of communities but recognize that "family" is based on more than mere biology. When biological parents are unable or unwilling to care for their children, the public and private sectors are encouraging others to assume the parental role through adoption.[4] For example, in its last session, the General Assembly amended the adoption laws to make adoptions quicker and less cumbersome (see "Agency Adoptions in North Carolina," page 4). Also, public and private nonprofit adoption agencies are streamlining the adoption process to make it more manageable and therefore more attractive to potential adoptive parents. Federal income tax laws now provide a credit to defray the sometimes considerable costs of adoption. Further, private companies are routinely beginning to offer adoption subsidies and parental leave policies for employees who adopt.

Ruth Amerson (seated at right), director of Another Choice, and two families who have adopted children through the agency. On the left are Joe and Edna Osborne with their five adopted children. (The Osbornes are in the process of adopting two more children.) On the right are Carolyn and Willie Edmonds with their three children, two of whom were adopted.

Photo by Karen Tam

The author is an Institute of Government faculty member who specializes in housing, community development, and public official liability.

One Agency's Success Story

All of this is good news for most of the 40,000 children all over this country who have been legally cleared for adoption (their biological parents' rights having been severed) but remain on waiting lists. For some of those children, however, adoption remains an improbable option. Institutionalization in foster care is their fate.

Who are these "unadoptable children"? They are referred to in the adoption industry as "children with special needs." The special need may exist because the children have significant physical or mental health complications, are older, or are part of a sibling group that wants to be kept together. The special need also may exist simply because the children are black. About 40 percent of the nation's children who are legally free for adoption are black.[5]

The Origins of Another Choice

Another Choice grew out of a statewide network of local councils known as Friends of Black Children. These councils, composed of social workers from public agencies, adopted children, adoptive parents, and other interested members of the respective local communities, joined forces to respond to alarmingly low numbers of adoptions of black children in North Carolina in the early 1980s. Although 40 percent of the state's adoptable children were black, only 16 percent of adoption placements were of black children.[6] Black children tended to wait four to five years longer than other children for permanent placement, and if they were older or part of a sibling group, the likelihood of adoption was bleak.[7]

Agency Adoptions in North Carolina

by Janet Mason

"Adoption" is "the creation by law of the relationship of parent and child between two individuals."[1] In North Carolina, adoption may occur only through a court proceeding and only by complying with precise statutory requirements.[2]

The purposes of the adoption statutes include protecting children from unnecessary separation from their original parents and facilitating the adoption of children by persons who can give them love, care, security, and support.[3]

Prospective adoptive parents begin an adoption proceeding by filing a petition in the district court. The clerk of superior court handles most aspects of most adoption proceedings. However, a district court judge decides contested issues.

Adoptions in North Carolina are governed by Chapter 48 of the North Carolina General Statutes (G.S.). These laws were completely rewritten effective July 1, 1996.[4] The revision was the result of extensive work by the North Carolina General Statutes Commission and is based substantially on the Uniform Adoption Act, making North Carolina laws more similar to the adoption laws of some other states.

G.S. Chapter 48 deals with both "agency placement adoptions," those in which county social services departments or licensed adoption agencies place children, and "independent" or "direct placement adoptions," those in which parents directly place their children. It includes special provisions for the adoption of children by stepparents or former parents and for the adoption of adults. The following questions and answers summarize the provisions of G.S. Chapter 48 relating to agency placement adoptions of children.

Who may adopt a child?

A single adult or a married couple may adopt a child. (For simplicity's sake, however, this summary uses the plural.) One spouse may petition alone if the other spouse is incompetent or if the court waives the requirement that the spouse join in the petition. However, two people who are not married to each other may not adopt a child jointly.

When may a petition for adoption be filed?

A petition for adoption of a child may be filed only after an agency has placed the child with the prospective adoptive parents. Then it must be filed within thirty days. The court, however, may waive the placement requirement and extend the time for filing the petition.

What must occur before a child is placed?

Before an agency may place a child for adoption, the prospective adoptive parents must obtain a "preplacement assessment." This evaluation of the adoptive home and parents must include a finding that the parents are suitable to be adoptive parents, either for a particular child or in general. People who want to adopt a child do not have to identify a particular child before obtaining the assessment, but the assessment must have been completed or updated within the eighteen months before a child is placed with them for adoption.

How can prospective adoptive parents obtain a preplacement assessment?

Either a licensed adoption agency or a county department of social services may do the assessment. Agencies may charge reasonable fees for assessments. However, county departments of social services may charge fees on a sliding scale and must waive them for people who are unable to pay.

Are there any residency requirements?

Prospective adoptive parents may file an adoption petition in North Carolina if they meet either of the following conditions: (1) they are domiciled in North Carolina, and the child has lived in the state from birth or for at least six consecutive months before the petition is filed; or (2) they have lived or been domiciled in North Carolina for six consecutive months before filing the petition.[5]

Where in North Carolina should the petition be filed?

The adoptive parents may file the petition in any county where (1) they reside or are domiciled, (2) the child resides, or (3) the agency that placed the child is located.

Who must consent to the adoption?

Children placed by agencies have usually been freed for adoption through the parents' consent (by relinquishing the child to the agency for adoption) or through a court proceeding to terminate the parents' rights. When either of these actions is final—that is, when the time for revoking consent has expired or when a court order terminating the parents' rights has not been appealed or has been affirmed on appeal—the parents' consent to the adoption is not required. The agency placing the child should ensure that the child is legally free for adoption or should fully inform the prospective adoptive parents of any legal risks or any uncertainties about the child's legal status.

What happens after the petition is filed?

Whenever a petition for adoption of a child is filed, the court must order an agency to prepare a "report to the court" to assist the court in determining whether the proposed adoption is in the child's best interest. The statute includes detailed requirements about the contents of the report and requires that the agency file the report with the court within sixty days of receiving the order unless the court extends the time. For preparing reports, as for conducting preplacement assessments, agencies may charge reasonable fees, but county departments of social services may charge fees on a sliding scale and must waive them for people who are unable to pay.

When is the adoption completed?

If the petition is not contested, the adoption should be completed within six months of the filing of the petition and may be completed without a court hearing. If the petition is contested, the court must hold a hearing within the same six-month period. In either event the court may extend the time. After a final order of adoption is entered, the state will issue a new birth certificate for the child.

Other Relevant Provisions of the 1996 Revision

The 1996 revision of the adoption law also did the following:

- Expanded the list of expenses for which the biological parent may legally be reimbursed to include counseling services related to adoption, ordinary living expenses during pregnancy and for up to six weeks after birth, legal fees, travel, and other administrative expenses.
- Deleted provisions for an "interlocutory decree" (a provisional adoption decree that has the effect of giving the adoptive parents legal custody of the child) but specified who has legal custody of a child between placement for adoption and entry of the final order.
- Allowed fathers but not mothers to give consent to adoption before a child is born.
- Specified different time periods during which parents' consent to adoption is revocable, depending on the age of the child: for children up to three months of age, twenty-one days after it is given; for minors over three months old, seven days.[6] If parents consent to a particular adoptive placement, revoke that consent, then give a second consent to the same placement, the second consent is irrevocable.

Caution

This summary is not a complete description of adoption procedures or adoption law in North Carolina. Readers who have an interest in adopting a child or who have specific questions about law or procedure are encouraged to consult an authorized adoption agency, an attorney, or both.

Notes

1. G.S. 48-1-101(2).

2. The North Carolina Supreme Court, in Lankford v. Wright, No. 308PA96 N.C. LEXIS 594 (N.C. Sept. 5, 1997), recently recognized the doctrine of "equitable adoption." In very narrow circumstances, and for the sole purpose of determining inheritance rights, that doctrine treats a person as if he or she had been adopted even though statutory procedures were not followed. It does not, however, create a legally recognized parent-child relationship.

3. G.S. 48-1-100(b)(1).

4. 1995 N.C. Sess. Laws ch. 457.

5. A person's domicile is his or her place of legal residence. A couple may be domiciled in North Carolina if they have moved here with the intent to remain, even if they have not been here for six months. A couple may be temporarily absent from the place of legal residence but intend to return, without interruption of a required period of domicile. For example, a couple who reside permanently in North Carolina and intend to remain but spend the month of April in Florida would not be precluded from filing an adoption petition in June.

6. For adoption of an adult, consent is revocable at any time before the final order is entered.

The author is an Institute of Government faculty member who specializes in social services and juvenile law.

The difficulties in placing black children in adoptive homes in North Carolina were typical of those experienced nationally. A 1990 survey conducted by the North American Council on Adoptable Children attributed the difficulties to "systemic racism within the procedures, guidelines and management of adoption agencies; prohibitively high adoption fees; and failure to recruit minority families."[8]

Because public agencies must devote many resources and give priority to child protective services, there often is little time for recruiting adoptive parents. When Friends of Black Children formed, there also was a prevailing wisdom that few black families were available to adopt the black children lingering on waiting lists around the state. The local Friends of Black Children councils believed that they could help public agencies recruit adoptive black parents. The local councils resolved to prove that black families would adopt—and they did.

Friends of Black Children's local councils were responsible for finding adoptive homes for about 700 children statewide in seven years. The local councils recruited significantly more adoptive parents than the number of placements, however, and soon became concerned about the number of black families who either withdrew from or were selected out of the adoption process by public agencies before a placement could be made. The local councils later attributed the elimination of disproportionately large numbers of otherwise-qualified black adoptive parents to the training and qualification processes used by public agencies. What was needed was an agency that would show sensitivity to and be flexible with potential families so as not to deter or divert them from adoption. Along with the Youth Advocacy and Involvement Office of the North Carolina Department of Administration, Friends of Black Children created Another Choice for Black Children.

A Different Way of Operating

Another Choice does all the things that conventional adoption agencies do, but it does some of them in a different way. Its recruitment strategy is intense and focused, its services reflect sensitivity and flexibility, and its working style is marked by a spirit of cooperation with the private and public adoption agencies.

Recruitment of Black Adoptive Families

Another Choice refused to accept the notion that black families were not interested in adopting. This notion can be traced to research of questionable methodology in the 1960s.[5] More recent studies dispute such findings, instead suggesting that effective recruitment strategies will yield high numbers of black families eager to adopt.[6] Another Choice's experience supports this later research. At any given time, about fifty qualified black families are on Another Choice's waiting list for training and processing.

At the start the agency carefully selected a name to reflect the priority that it would give to finding adoptive families for black children. Initial publicity included information on Another Choice's purpose and services and a notice that the agency did not charge a fee.

Now, as part of its continuing recruitment strategy, Another Choice widely publicizes its sensitivity to the circumstances of many black families. The agency must follow state guidelines in selecting adoptive parents. Within those guidelines, however, there is room for discretion, and Another Choice exercises that discretion in favor of people who genuinely demonstrate a desire and an ability to care for a child. The agency makes a particular effort to let potential adoptive parents know that there is no arbitrary, predetermined set of criteria on which they will be judged. Adoptive parents do not have to be married, be affluent, own a home, or be members of a specific religion (or any religion) to be approved for placement by Another Choice.

The agency proudly touts to potential adoptive parents its belief that a more conventional agency might have turned down some of the families it has approved. For instance, Ruth Amerson, the effusive director of Another Choice, has said, "A husband may have held several jobs over several years, all the while bringing home a steady paycheck. Some may look at that as instability. We look at it as resourcefulness."

The agency also uses the media to help publicize the number of black children available for adoption. Of the forty children whom it placed during its first year, it found adoptive families for thirteen through the statewide media adoption campaign, "Wednesday's" or "Sunday's Child." This program highlights specific children in print or on television in hopes of sparking a prospective family's interest.

In addition, the local councils of Friends of Black Children continue the recruitment strategies they began before the creation of Another Choice. They now refer their recruits to Another Choice.

But word of mouth often is the best form of publicity, and successful adopters and adoptees have not been shy about referring friends and acquaintances to Another Choice. This informal promotion has been a constant source of referrals over the past three years.

Services

Of course, effective publicity is never enough. To be successful, Another Choice has had to make the process user-friendly for potential adoptive families. The agency guarantees that it will contact potential adoptive parents within seven days of their initial inquiry. The three staff members who conduct personal interviews hold them at times convenient to potential parents. The staff members also hold training sessions at convenient times. As of January 1997, 172 families had completed the eight-week adoption classes.

The agency provides adoption supervision on its placements for one year. That is, agency personnel make site visits and telephone calls to ensure that the placement is going smoothly. When necessary, the agency also provides more extensive post-adoption services. If there is any indication that a placement may be in jeopardy, the agency immediately implements appropriate strategies: visiting the family weekly or even daily; assisting the family in contacting schools and mental health providers; assigning mentors to the adopted children or the adoptive parents; providing respite for the adoptive parents; or supplying transportation for the family to necessary supportive services.

Cooperative Working Relationships with Other Agencies

Another Choice relies heavily on its good working relationships with public and private agencies across the state. It does not take in adoptable children directly. Rather it accepts referrals of available children from agencies that need help in finding adoptive families. So far, referrals have come from about forty public agencies across the state, and Another Choice has made 122 placements in cooperation with these agencies.

Another Choice's working relationships with other agencies depend on its competence and credibility. The agency has established its competence in several ways. It conducts its home studies very carefully. The resulting record of 100 percent placement success speaks for itself. Also, the agency's staff is well trained and experienced. All three full-time staff members

worked with foster care or adoptions in public agencies before joining Another Choice, and two worked with Friends of Black Children. In addition, two are themselves adoptive parents. There are also five part-time staff members. Of the total staff, six have graduate degrees. With the staff's experience and demonstrated dedication to making adoption a viable alternative for children with special needs, the agency enjoys a strong level of support from county departments of social services. In a recent survey conducted by Another Choice, 94 percent of the public agency respondents who had referred children to Another Choice rated their experience as positive.[11]

Funding and Support

Another Choice's annual operating budget is approximately $300,000. Government grants account for most of that amount, the North Carolina Department of Human Resources providing $150,000 per year and the United States Department of Health and Human Services $100,000. Additional funding has come from private foundations, such as the Duke Endowment and the Z. Smith Reynolds Foundation.

In-kind services and small cash contributions donated by individuals across the state often are crucial to Another Choice's continued operation. In October 1995, after the agency had lost its lease, its future looked grim. It could not afford suitable space at market rates. Desperately, Another Choice turned to the local newspaper to publicize its plight. A local funeral director answered the call for help by agreeing to fix up a vacant site for the agency. Other community supporters sent money. In November 1995 Another Choice moved into its new home.

Conclusion

Skeptics wondered whether this agency could accomplish its primary mission of finding suitable adoptive homes for black children. "After all," some said, "black people don't adopt." Another Choice for Black Children was willing to defy that stereotype. The alternative was to have hundreds of black children spend a lifetime in foster care, never having an opportunity to be a permanent member of a family. Another Choice has proven the skeptics wrong. As one adoptive parent put it, "They are more than an agency; they are a ministry working to create new families in North Carolina."[12]

Notes

1. Blake Dickinson, "Family Honored for Giving Home to Foster Children," *Herald-Sun* (Durham), Nov. 4, 1995, A1.

2. One of Another Choice's funding grants requires that at least 60 percent of its placements be of black children. Like most adoption agencies, Another Choice tries to place children in families with the same ethnic and cultural heritage. The recruitment of adoptive black families is therefore critical to its success. However, Another Choice's emphasis on recruiting black families does not mean that it will not consider placing a black child in a white family. [In fact, federal law (the Multi-Ethnic Placement Act) prohibits any agency from basing placement decisions solely on race.]

3. Adoptive parents can receive subsidies ranging from $315 to $400 per month to provide care for adoptees with significant physical or mental health complications.

4. Adoption is not the answer for all children. Too much public agency emphasis on adoption could draw children into a system in which they do not belong. For some, family preservation is possible, and temporary placement out of the home is an appropriate short-term solution. But too much emphasis on family preservation can result in an unwise struggle to keep families together to the detriment of the children.

5. Ruth Amerson, director of Another Choice, interview by author, Jan. 19, 1997.

6. Amerson interview.

7. Amerson interview.

8. Eileen Davis, "Wanted: Families to Adopt," *Black Enterprise* (Nov. 1992): 26.

9. Andrew Billingsley and Jeanne Giovannoni, *Children of the Storm: Black Children and American Child Welfare* (New York: Harcourt Brace Jovanovich, 1972).

10. *See* Leora Neal and Al Stumph, *Transracial Adoptive Parenting: A Black/White Community Issue* (Bronx, N.Y.: Haskett-Neal Publications, 1993), citing Ronne Cook and Andree Sedlak, *Adoptive Services for Waiting Minority and Nonminority Children* (Westat Inc., 1986).

11. "The Surveys Are In," *Another Choice Newsletter* (May 1997): 4.

12. "Kudos to Another Choice," *Another Choice Newsletter* (May 1997): 5.

Initiative, Referendum, and Recall in North Carolina

David M. Lawrence

Developers in a North Carolina city have proposed a huge real estate project within the boundaries of the city's watershed. The project complies with current zoning, and a majority on the council support it, but many citizens are appalled at the threat to the watershed. When they realize the futility of obtaining help from the council, they decide to seek a citizens' vote to force a moratorium on all new development in the watershed until the city's comprehensive plan is rewritten. They soon learn, however, that there is no right to a citizens' vote under North Carolina's general laws. The project goes ahead.

In another city a council member has pleaded guilty to charges of indecent exposure, and citizens throughout the city want him off the council. They expected his guilty plea and conviction automatically to cause his removal. But the crime is only a misdemeanor, and conviction of a misdemeanor does not disqualify a person from holding public office. The council member steadfastly refuses demands from the public and the other council members that he resign. Therefore the citizens seek to recall him from office. But like the citizens seeking a vote on the moratorium, they discover that the action they want to take is not possible under the general laws of the state. They can do nothing to force the council member from office before the end of his term.

In nineteen North Carolina cities, however, and in one school district, citizens may petition to place proposals for ordinances on the local ballot, to recall their elected officials, even to force a popular vote on an ordinance adopted by the governing board. For those units the General Assembly has enacted local legislation that permits the use of one or more of these citizen-initiated procedures of direct governance. This article describes the local acts and communities' experiences under them.[1] The article begins with definitions and a brief history of initiative, referendum, and recall. It then identifies the North Carolina local units in which those powers are available and summarizes the legislative details (and policy choices) of the powers.[2] It concludes with descriptions of the instances in which the powers have been used in the communities in which they are available.[3]

The author is an Institute of Government faculty member who specializes in local government law.

Definitions

"Initiative" is the power of citizens to propose an ordinance (or at the state level, a statute or a constitutional amendment). If the governing board refuses to adopt the proposal, it is put on the ballot in a special election and becomes law if a majority voting in the election approve it. "Referendum" is the power of citizens to force a vote on an ordinance just adopted by the governing board. Only if a majority vote in favor of the ordinance does it go into effect. "Recall" is the power of citizens to force an elected official to stand before the voters before the end of the term to which he or she was elected. If the vote goes against the official, the official immediately loses his or her elected position.

Initiative, Referendum, and Recall across the Nation

Initiative, referendum, and recall first entered American law and politics at the very end of the nineteenth century. In 1898 South Dakota's voters approved a constitutional amendment providing for initiative and referendum at the state level; in the same year both powers became part of the city charter of San Francisco.[4] The idea of initiative and referendum, and of recall, was soon taken up by the Progressive movement, and the movement's success over the next two decades led to the inclusion of the three powers in the constitutions of a sizable minority of states. By 1920 nineteen states had placed initiative powers in their state constitutions, and about half that number had added recall of state officials. Further, a group slightly larger than the latter had authorized recall at the local level by statute.[5] The Progressive movement was largely a western phenomenon, so most of the states constitutionally adopting any of the three powers in this first stage were located west of the Mississippi. None were in the South.[6]

The initial growth of initiative, referendum, and recall nationally ended about 1918, with little expansion during the next forty years. There has been some growth, however, since about 1960. According to a 1989 book, state-level initiative or referendum is available in twenty-six states, and state-level recall in sixteen.[7] In addition, a number of other states provide for these powers at the local level, by statewide legislation.

The merits and the demerits of the powers have been argued since their first enactment almost a century ago, and the arguments are no closer to resolution today than at any time in the past.[8] Among the arguments offered in favor of initiative and referendum are that they (1) reduce the influence of political bosses and special interests in enacting legislation, by permitting direct action by the voters; (2) facilitate the entrance of new ideas into the political arena; (3) increase citizens' participation in government, thereby increasing their interest and reducing their alienation; and (4) improve civic education and lead to a better-informed electorate. The arguments offered in opposition include assertions that initiative and referendum (1) do not reduce the influence of special interests but in fact increase it because of the financial power of such interests to gather signatures and thereby place measures on the ballot and then affect the vote itself through political advertising; (2) (especially initiative) result in poorly drafted legislation and bypass the expertise of legislators and their staffs; and (3) eliminate the opportunities for compromise in developing legislation, giving the voters only the option to vote yes or no on a specific measure. Sometimes opponents also argue (usually privately) that the voters just are not capable of making good decisions.

Among the arguments offered in favor of recall are that it (1) improves popular control over government, ensuring that elected officials will remain responsive to their constituents; (2) increases citizens' interest in government; and (3) permits longer terms for elected officials because voters always have the power to remove an unresponsive or abusive official. The opposing arguments include assertions that recall (1) restrains innovation by elected officials because of their concern about a heated response from voters; (2) may be used for partisan purposes; (3) encourages one-issue voting rather than a consideration of an official's complete range of views and actions; and (4) forecloses investigation and use of more appropriate means of removing elected officials (such as by going to court).

Initiative, Referendum, and Recall in North Carolina

Eight North Carolina cities are subject to provisions in their charters that allow citizens to petition for initiative or referendum, and two other cities are subject to charter provisions that allow initiative alone.[9] Sixteen cities and one school district are subject to local acts, usually charter provisions, that allow

The most successful recall in the state's history occurred in Statesville in 1963—in opposition to integrated swimming pools.


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PETITIONS ASK COUNCIL RECALL ELECTION

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British Police Get Big Break In Record Theft

Piedmont Gets More Senators In Reshuffling

Gary Owens Cites Handling Of Racia Problem In Requ

By ROCKIE HODSON

Petitions asking for a recall election of members of city council are being circulated in

Table 1
Units Subject to Initiative, Referendum, or Recall

Unit	Initiative	Referendum	Recall
Aberdeen			×
Asheville	×	×	×
Cajah's Mountain			×
Carrboro			×
Chapel Hill			×
Chapel Hill–Carrboro Schools			×
Durham			×
Foxfire			×
Greensboro	×	×	×
Lewisville	×	×	
Lumberton	×	×	×
Morganton	×	×	
Pinebluff			×
Raleigh	×	×	×
River Bend	×	×	×
Statesville			×
Troutman			×
Wilmington	×		
Winston-Salem	×	×	×
Wrightsville Beach	×		

for the recall of any elected official in those units. Twenty units altogether are subject to one or more of the powers. Those units and the powers that are in effect in each one are set out in Table 1.

Although each power is broadly comparable across units, there is considerable variation in detail from one unit to another. A brief summary of the differences illustrates the policy choices that are necessary before any of these powers are extended to a local government in North Carolina.

Initiative and Referendum

Actions excluded. In states with widespread availability of initiative and referendum at the local level, a rich case law addresses the kinds of actions normally taken by the governing body that are subject to one or the other power, or both. For example, courts commonly hold that administrative actions, as opposed to legislative actions, are not subject to the two powers. Therefore the voters may not initiate a measure to fire the city manager. There are also rulings that annexations, annual budget ordinances, tax levies, and even zoning ordinances are not subject to the two powers. (There are, as well, decisions reaching opposite conclusions.) In North Carolina, some but not all of the local acts granting initiative or referendum power exclude certain kinds of measures from the power. Most commonly (in six of the ten cities with initiative), they exclude the annual budget ordinance. Two or three (variously) of the local acts also exclude tax levies, setting of salaries, and franchise ordinances. Apart from these few exclusions, however, the acts appear to open to initiative or referendum the full range of actions that may be taken by ordinance. Moreover, there is no example in North Carolina of a court holding that a particular action is not open to initiative or referendum.

Number of signatures required. There is no uniformity among the local acts in the number of signatures required to force an election on an ordinance proposed by petition or adopted by the council and subjected to voter approval. Five of the cities tie the requirement to the number of registered voters, calling for either 10 or 15 percent.[10] The remaining five tie it to the number of persons voting in the last city election, requiring either 25 or 35 percent.

Permissible responses from the governing board. When a city council receives an initiative petition, the local acts give it a relatively short time in which to adopt the proposed ordinance itself, thereby eliminating the need for an election. The shortest period is 15 days, the longest 60. If the council declines to adopt the ordinance, it must schedule an election. The time within which this vote must be held varies considerably: two acts require it to be held within 60 days after the petition is received, three within 90 days, two within 150 days, two within 6 months, and one within one year.

Use of a petitioners' committee. Five of the local acts require the use of a petitioners' committee when initiative or referendum is attempted. Such a committee, to be named in the petition and made up of five signers, is entitled to act for the petitioners as a group. For example, it may seek to amend the petition if the city clerk determines that the number of signers is insufficient, or to withdraw the petition if the city responds with action satisfactory to the committee.

Amendment or repeal of the ordinance. When citizens enact an ordinance through initiative, it becomes another city ordinance, part of the city code. Normally a city council may amend or repeal any ordinance at will, subject at most to certain procedural requirements. But if that council power extended to a citizen-initiated ordinance, the council could nullify citizens' action simply by repealing the ordinance or by amending it beyond recognition. Perhaps because the drafters of the legislation recognized this possibility, four of the local acts permit only the voters to amend or repeal an ordinance enacted through citizen initiative. (The council may initiate an election on

amendment or repeal of such an ordinance, however; no citizen petition is necessary.) The other local acts take the opposite tack. Probably because it would be politically difficult, if not impossible, for the council to amend or repeal an ordinance enacted through citizen initiative, these acts either permit the council to treat such an ordinance like one adopted in the normal manner or say nothing at all about the issue.

Recall

Reasons for recall. In some states an elected official may be recalled only for cause. The petitions submitted in opposition to that official must set out the reasons that recall is sought, and the courts have jurisdiction to determine if the reasons constitute legally adequate cause.[11] Simple disagreement with the views or the policy decisions of an official is not adequate cause in the states with such a requirement. In North Carolina all but three of the local acts establishing a right of recall require the petitions to set out the reasons that recall is sought, but the matter ends there. The acts make no further reference to those reasons, and there appears to be no basis under the acts to deny a petition or to challenge a recall because the grounds are inadequate.

Frequency of recall attempts. One of the arguments made against recall is that it permits harassment of elected officials. No sooner has an official survived one recall election than another petition is presented against her or him. A few of the local acts establishing recall in North Carolina respond to this possibility by giving an elected official a limited protection against it. In the cities subject to these local acts, once an official has survived a recall election, no new petition may be presented against that official for at least six months. In addition, in one city's recall provision, an office holder may be subjected to recall only once during her or his term of office.

A larger number of the local acts, although far from all of them, place limits on when a recall petition may be submitted. Several do not permit submission during (variously) the first three, six, or twelve months of an official's term, apparently reflecting the notion that an official should be given a chance to express his or her views or demonstrate his or her competence before being subject to recall. In addition, five of the local acts prohibit submission during the last six months of an official's term, apparently on the ground that the term will soon be over and the voters will have their opportunity to judge the official if he or she runs for reelection.

Number of signatures required. As with initiative and referendum provisions, the local acts vary considerably in the number of signatures necessary to force a recall election. (Indeed, in some of the cities with both initiative and referendum, and recall, the signature requirement for initiative and referendum is different than it is for recall.) The largest number required is 40 percent of the town's registered voters, applicable in one city. More common is 25 percent of the registered voters, either the current number or the number registered at the time of the last election in the unit. Other local acts require (variously) 15 percent, 10 percent, or 8 percent of registered voters. A slightly different approach is used in four cities, where the number required is 25 percent of the number of persons who actually voted in the most recent city elections. That number is probably comparable to, or even lower than, the number necessary in the units requiring 8 or 10 percent of the registered voters.

Deadline for gathering petitions. Five of the local acts require the sponsors of a recall drive to register their effort with the unit. They then have thirty days to gather the required number of signatures. The remaining local acts contain no such requirement.

Timing of the recall election. If citizens care enough to petition to recall an elected official, they usually want the recall election to take place as soon as possible. The various local acts require the unit's governing board to hold the election within a reasonably short time after it receives the petitions, although there is considerable variation in that short time. Several of the acts, though, contain time requirements that are inconsistent with the demands of holding a special election. Two require the election (or a primary) to be held within 20 days after the petition is received, and one within 30 days. It is hard to understand how the local board of elections can conduct an election on such short notice.[12] More commonly the acts require the unit to hold the election within either 60 days or 90 to 100 days after it receives the petitions.

Types of recall elections. The various local acts call for two types of recall elections. The first limits the question before the voters to whether the named official should be recalled. If a majority vote in favor of recall, a vacancy is created and the governing board fills it by appointment. (Almost all the acts using this form of recall election forbid the governing board from reappointing the person just recalled.) The

second type calls for a special election for the seat held by the named official. In the election anyone (including that official) may run. Whoever finishes first is elected to the remainder of the official's term. Ten of the units with recall use the first type of election, seven the second.

Use of Initiative, Referendum, and Recall in North Carolina

Initiative and Referendum

According to the records of the ten cities with charter authority for initiative or referendum, the power has actually been used in five of them. This section details the fourteen initiative or referendum efforts that resulted in a petition to the city.

Greensboro

Spring 1946. Greensboro was the first North Carolina city actually to use initiative or referendum, and it has used the powers more often than any other city. Its first use was in late spring 1946.[13] After the war, interest had developed in building an auditorium in Greensboro as a war memorial, and the initial plan was to build it on a site on the western side of downtown Greensboro. City elections in 1946, however, brought in a new council that thought the site to be better suited for the natural expansion of commercial development in downtown, and the city began preparations for selling the property. Many citizens disagreed, and a petition was submitted to the council requiring that the property be permanently dedicated to public purposes; the intention was to use the property for a park. Despite the initiative the city continued the process of selling the property. The petitioners eventually secured a court order enjoining the city from completing the sale until the vote could be held. When it came, the vote was against the petition, 1,326 to 1,123, and the council was again free to sell the property.

Fall 1958. The second Greensboro initiative, which came in 1958, involved an issue that was highly charged at the time—fluoridation of the city's water supply.[14] The city had first fluoridated the water supply in 1952. Then in 1954, apparently because of an ensuing controversy, the council placed the issue before the voters, and they voted to take fluoride out of the water supply. In September 1958, proponents of fluoridation submitted petitions to force another citizen vote, to be held at the November elections. A majority of the council, however, adamantly opposed fluoridation, and in early October they voted to reject the petition as inadequate. The council's attorney told them that they were wrong in doing so. In late October so did a superior court judge, who ordered them either to fluoridate or to put the issue on the ballot on November 4, only six days away. After the state supreme court refused to stay the trial court's order, the council reluctantly went along. In the election, though, the voters voted the petition down by a significant margin, 7,441 to 5,023. Greensboro's water remained free of fluoride.

Spring/summer 1989. Greensboro's next experience with initiative and referendum began in spring 1989, when the city council rezoned an 18-acre tract to permit construction of a shopping center.[15] There was an outcry from neighboring property owners. As a result, the city council took the issue up again about a month later. It voted to confirm its initial action. A month after that, the council was presented with petitions demanding that it either reverse its two earlier actions or call a referendum on whether the rezoning should go into effect. (This appears to be the first North Carolina use of the *referendum* power, as opposed to the *initiative* power.) Given the apparent strength of public opposition, the council eventually decided to avoid a referendum and voted instead to reverse the rezoning.

The story did not end there, however. The developer had brought a lawsuit against the petitioners and the city and continued it after the city's final vote. About a year later, the state supreme court decided that the petition was invalid: The charter required that it be presented within thirty days after adoption of the ordinance. It was presented within thirty days after the second vote, which confirmed the first vote, but the court held that it should have been presented within thirty days after the first vote. Because the petition was invalid, so was the council's vote in reaction to it, and the original rezoning was validated.

The story did not end even with the supreme court decision. While the case was pending, the developer's option on the property expired. The developer abandoned the project and moved to another site. No shopping center has yet been built on the original tract.

Fall 1989. Just a few months later, Greensboro was presented with another petition, this one to require the city to adopt an ordinance restricting smoking in restaurants, stores, and other public places.[16] The council responded by adopting an ordinance that restricted smoking in some places, such as elevators, but made restrictions voluntary in others, such as restaurants. This was unsatisfactory to the petitioners, and the

ance voluntary rather than mandatory. Despite the thousands of signatures on the petition, when the vote came, the initiative failed by better than two-to-one, 21,871 votes to 9,585.

Summer 1996 to the present. As this article is being written, still another Greensboro rezoning has led to a referendum petition, and whether the vote will be held will be decided in court. In summer 1996 the city council rezoned a parcel into a conditional-use zone and approved a conditional-use permit for the parcel. The project, a large commercial development, had been controversial from its inception, and opponents quickly gathered a sufficient number of signatures to force a referendum on the rezoning ordinance. The city council, following its usual procedures, had adopted the rezoning—a legislative action—in the same vote with which it had approved the conditional-use permit—a quasi-judicial action. The developer has sued, arguing that the petition in fact seeks to reverse the latter action and that the referendum power does not apply to quasi-judicial actions. Until the courts rule on the matter, neither the project nor the referendum is proceeding.

Raleigh

Summer 1982. Raleigh's first use of its charter initiative procedure occurred in summer 1982, apparently as part of a national movement of people

organize a committee to circulate petitions that would force an election on an ordinance requiring a competitive franchise procedure, and those petitions were presented to the council in late November. Because the council itself was leaning toward seeking other proposals, it quickly approved a process corresponding to the wishes of the petitioners, and again the city avoided the need for a special election.

Winter 1990 to fall 1991. Raleigh's most recent initiative effort involved a controversial road project.[21] In 1988 the city council added a proposed 1.4-mile extension of Western Boulevard to the city's capital improvement program. Many residents of neighborhoods along the proposed extension opposed the project, and in 1989 opponents presented an initiative petition to the city calling for an election on whether or not to block the project. The county board of elections ultimately found that petition to have an insufficient number of signatures, so the next year the opponents tried again, presenting their petition in December 1990. This one had enough signatures, and the council eventually called for a vote to be held along with the October 1991 municipal elections in Raleigh. The proposed ordinance, which would have prohibited construction of the road, was narrowly defeated, by a few hundred votes out of more than 21,000 cast. The road is currently being built.

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matter went to the electorate. The voters approved the ordinance by a razor-thin margin, 14,991 to 14,818.

Fall 1990. The next year another Greensboro rezoning led to a petition demanding that the council either reverse the rezoning or hold a referendum on the question.[17] Although there were apparently a sufficient number of signatures on the petition, the city council rejected it on technical grounds. The charter required that the petition include the text of the ordinance, and the petitioners had included the wrong version of the ordinance. In addition, the petition asked that the city buy the land in question, and the charter prohibited initiative petitions directing the city to expend money. Oddly, given Greensboro's litigious history, the petitioners accepted the council's decision and did not seek to overturn it in court.

Winter 1991. A few months later, in the first months of 1991, the city returned to the question of smoking regulation.[18] One of the principal groups opposing the 1989 anti-smoking initiative had been union workers at local cigarette manufacturing plants. In January 1991 these workers presented the council with petitions signed by more than 28,000 voters seeking to amend the existing ordinance to make compliance voluntary rather than mandatory. Despite the thousands of signatures on the petition, when the vote came, the initiative failed by better than two-to-one, 21,871 votes to 9,585.

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Raleigh

Summer 1982. Raleigh's first use of its charter initiative procedure occurred in summer 1982, apparently as part of a national movement of people concerned about the nuclear arms race.[19] In July of that year, the city received a petition signed by more than 18,000 persons—well more than twice the number necessary—asking for an election to enact an ordinance that would direct the city manager annually to petition the president of the United States to propose a nuclear arms freeze to the Soviet Union. The city council held a public hearing, described in the newspaper as attracting the largest number of speakers in the city's history, and then decided to adopt the ordinance itself rather than pay the expense of a special election on the issue.

Summer/fall 1982. Raleigh's second initiative petition was presented to the council just a few months later.[20] The city's original cable television franchise had expired during summer 1982, and the city had been engaged in a lengthy process of deciding which kinds of services a franchise holder should provide and then negotiating with the existing one. The negotiations, which took place during the fall, did not go well, and the city council and staff were leaning toward opening the process to competing providers, including a local group of investors that was interested in being awarded the franchise. The investor group helped organize a committee to circulate petitions that would force an election on an ordinance requiring a competitive franchise procedure, and those petitions were presented to the council in late November. Because the council itself was leaning toward seeking other proposals, it quickly approved a process corresponding to the wishes of the petitioners, and again the city avoided the need for a special election.

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Wilmington

Summer/fall 1982. Wilmington used the initiative process for the first time in 1982. The petition presented that year demanded that the city amend its zoning ordinance to prohibit coal transfer facilities[22] in light-manufacturing zones.[23] As might be expected, the initiative was triggered by a proposal to place just such a facility on a site zoned in that way. The city recognized that an attempt by the city council to adopt such a change in the zoning ordinance required various public notices and public hearings. Therefore the initiative proposal was channeled through those procedures as well, with the city doing its best to adapt the procedures to the initiative process. Once the vote was held, the voters approved the change by a margin of almost two-to-one, 3,239 to 1,799.

Summer/fall 1984. A second initiative two years later involved possible fraud in the preparation of the petition.[24] In 1984 the city still had a Sunday-closing ordinance in its code, and a petition was presented to the council calling for repeal of the ordinance. The board of elections reported to the council that the petition contained nearly 2,400 signatures, almost 400 more than necessary, but that some 800 signatures did not seem to match those of the named persons on their voter registration cards. Instead of trying to determine the signatures' authenticity, however, the council decided to go ahead with the special election. Two persons whose names appeared on the petitions but who claimed never to have signed them brought suit. After hearing expert testimony that as many as 500 signatures seemed to have been written by only four persons, the court enjoined the vote. Rather than continue the court fight, the proponents decided to generate new petitions. Reportedly paying their workers a dollar per signature, they set up operations at the polling stations during the November election and managed to collect almost 11,000 signatures. When those petitions were presented to the council, its members bowed to the apparent public will and repealed the Sunday-closing law on their own.

Asheville

Winter to summer 1967. Asheville has had one experience with an initiative petition, in 1967. The story began some two years earlier.[25] The city's mountainous terrain made it difficult for many citizens to receive broadcast television, so Asheville was an obvious location for some sort of community antenna television (CATV) system, under which homes would be connected by cable to a large community antenna that could receive good signals from broadcast stations. The Asheville city charter required that the voters approve all franchises awarded by the city. Therefore the city council first tried to bring in CATV through what it called a "lease-license agreement," entered into in 1965 without voter approval. The agreement was quickly attacked as a franchise in disguise, and in January 1967 the state supreme court agreed.

The council and the CATV provider immediately recast their agreement as a franchise and placed it before the voters in a March election. Meanwhile, however, a competitor provider had appeared, and it took the lead in urging the voters to reject the franchise. The effort was successful, the voters rejecting the council's franchise 9,244 to 1,377. The competitor provider then circulated petitions to put its version of a franchise on the ballot, and it forced another election in July. The turnout this time was much smaller, and the franchise, to be granted for thirty-five years, was approved by roughly 3,000 to 1,900.

Morganton

1990/91. Morganton's only use of the initiative power also involved a cable television franchise but with an opposite outcome.[26] In 1986 the existing twenty-year cable television franchise in Morganton expired, and the city exercised its option of not renewing the franchise. Indeed, the city announced its intention to provide cable television itself and not to award any private cable television franchises within the city. The existing operator brought at least two lawsuits against the city, one in federal court and one in state court, but these were eventually unsuccessful. In the later stages of the controversy, after the city had won one lawsuit in the state supreme court, the cable television company caused petitions to be circulated calling for an election on whether to award it a new franchise, in competition with the city's service. The petitions were submitted to the council, and, after further litigation and considerable expense, a vote was held. The voters rejected the ordinance by a three-to-one margin, and Morganton was left to be the sole provider of cable television within the city limits.

Recall

Eight recall efforts in North Carolina have proceeded as far as the presentation of a valid petition to the local governing body. In four of those instances, the elected official resigned when or soon after the

petition was certified as adequate, and no election was necessary. In the remaining four, an election was held, two of which resulted in the recall of one or more governing board members.

The recall efforts divide into two groups: those directed at a single official (or, in one case, two officials) and those directed at an entire board or a majority of it.

Recalls Directed at Individual Officials

Five recall efforts targeted individual governing board members. In four of the situations, the board member or members ultimately resigned, whereas in the fifth he survived the recall election.

Durham, spring/summer 1978. In April 1978, some four months after two new council members took office, it became known that neither of them had paid city taxes for several years and that one of them had not even listed his property for taxes[27] (neither of the two owned his home, so only their personal property was subject to taxation). When both members refused to resign, citizens began a recall effort, which resulted in petitions that were certified as adequate in early July. After unsuccessfully suing to invalidate the petitions, and the recall provisions in the charter as well, both of the council members resigned.[28]

Chapel Hill, summer 1992 to summer 1993. In late summer 1992, a member of the Chapel Hill town council pleaded guilty to not having paid state income or intangibles taxes for several years.[29] Many citizens were outraged and demanded that he resign, as did a majority of the town council, but he steadfastly refused. Chapel Hill did not at that time have any recall provisions in its town charter, but it requested that the 1993 General Assembly add them, which the legislature eventually did. Once the recall provisions became effective, during summer 1993, petitions were circulated, and a petition with a sufficient number of signatures was presented to the town. Not long thereafter, the board member resigned.

Chapel Hill–Carrboro school board, fall 1993 to summer 1994. Shortly after the fall 1993 election for the Chapel Hill–Carrboro school board, the student newspaper at The University of North Carolina at Chapel Hill (UNC–CH) reported that one successful candidate had misrepresented her background and qualifications, claiming to be an enrolled student when that did not appear to be true.[30] The new board member denied the story and then compounded her situation by making additional apparent misrepresentations. The school board refused to undertake to remove her,[31] and she refused to resign. As a result, though, the 1994 General Assembly extended the power of recall to the Chapel Hill–Carrboro school administrative unit, and petition efforts began soon after the legislation became effective in July. A petition with a sufficient number of signatures was received, and the board member resigned before an election became necessary.

Carrboro, fall 1995/winter 1996. A few days before he was due to be sworn into office, a member of the Carrboro board of aldermen newly elected in November 1995 was arrested for driving while intoxicated, driving with a suspended license, and having an expired inspection sticker.[32] The local news media quickly learned that this alderman-elect had had a series of motor vehicle violations in the previous several years, none of which had been known at the time of the election. He apologized for his most recent set of violations but rejected demands from some citizens that he resign before being sworn in. Once he was sworn in, recall efforts quickly began, and a petition with a sufficient number of signatures was soon presented to the town. The board member still declined to resign, the recall election was held, and the voters refused to recall him.

Recalls Directed at an Entire Board or a Majority of It

Interestingly, the three recall efforts against most or all of a board were of the sort in which there is, in effect, a new election. That is, the voters were choosing between the existing office holders and other candidates who filed for their seats.

Greensboro, summer/fall 1927. The first recall effort of this type—and apparently the earliest recall effort in North Carolina—took place in Greensboro in 1927.[33] At that time Greensboro was governed by a six-member council plus the mayor, and the recall was directed at the mayor and three council members. The specific reasons given by the petitioners for recall were (1) the council's grant of a leave of absence to the city manager, who was seriously ill; (2) the council's refusal to dismiss the police chief; and (3) some dissatisfaction with the city's budget. More generally the contest seems to have been over the political direction of the city and its government, with the two major newspapers taking opposite sides.[34] In part the dispute may have been grounded in failed expectations. Most of the former council had been defeated in the city elections a few months before the recall effort, and when the new members continued the policies of the former council, some of the public felt betrayed. Most of their fellow citizens, however, did

not: the four officers were retained in office by a two-to-one margin.

Statesville, spring to fall 1963. The most successful recall effort in the state's history took place in Statesville in 1963.[35] In the aftermath of various court decisions in the 1950s and the 1960s striking down segregated public facilities, Statesville decided to close its municipal swimming pools rather than open them to both races. In May 1963, however, a new council was elected that took a more conciliatory position. Under the council's initiative, a community relations committee was established, the committee met with the city's recreation commission, and the two bodies jointly proposed that the pools be reopened on a desegregated basis. When the council agreed to the proposal, some citizens immediately began an effort to recall the entire six-member council (but not the mayor, who had opposed the council's action). Although there was some public argument about the alleged secretiveness of the council's action (it took place at a meeting held without much public notice), the primary motivation for the recall effort was stated by the local newspaper, a vocal proponent of recall: "A majority of the White people of Statesville do not want integrated swimming pools."[36] The newspaper turned out to be correct: the entire council was recalled, with the closest margin 53% to 47%.

Troutman, summer/fall 1984. In Troutman in summer 1984, the newly elected mayor and some of the newly elected board members had different visions of the town's future, and the town's budget process was lengthy and highly contentious.[37] Once the budget was adopted, the mayor resigned but the board refused to accept his resignation. While he was being entreated to reconsider (he eventually did) citizens began circulating petitions to recall him and the entire five-member board. The grounds for the recall were (1) the poor communication between the mayor and some of the board members and (2) an excessive tax rate (the mayor had proposed 26 cents per $100 of value, the board members 30 cents; they had compromised on 28 cents). Once the petitions were received, one board member chose not to continue on the board, leaving the mayor and four board members facing a recall election. In the election those backing the mayor and his more constrained view of town government prevailed: the mayor and his two closest allies on the board were reelected, and the other two board members were recalled, with mayoral allies being elected in their place.

Asheville, winter 1993 to spring 1994. Although the petitioners were ultimately unable to obtain a sufficient number of signatures to force a recall election, a six-month effort in Asheville in late 1993 and early 1994 is worth brief mention.[38] After the 1993 city election, the new majority on the Asheville city council forced the resignation of the city manager. Almost immediately citizens supporting the manager began an effort to recall the four council members who had opposed him. Not long after that, allies of those council members began a competing petition drive to recall the two remaining council members, who had supported the manager. The competing drives continued through the spring. The original effort eventually resulted in a sufficient number of signatures to submit to the council, but the second effort did not. Once the petitions were before the council and being checked, however, a large number of those who had signed sought to have their names removed; as a result, the petitions to recall the council members who had opposed the city manager were found to have an insufficient number of signatures.

Observations

The North Carolina experience with initiative, referendum, and recall prompts a number of observations.

Initiative and Referendum

With regard to initiative and referendum, first, across the nation these powers are normally limited to actions that a council takes by ordinance (and often they are not even applicable to all ordinance actions). But in North Carolina, petitions have been received and accepted for measures that a city council normally would not act on by ordinance. In Greensboro one measure was to bar sale of property and direct its use for a park. In Raleigh one measure was to bar a road project, a second measure was to direct the manager to write a letter to the president, and a third measure was to establish the rules under which the city would reauthorize a cable television franchise. Thus the charter provisions have probably resulted in direct voter involvement in issues that in many other states would not be subject to initiative or referendum.

Second, several of the experiences have highlighted the difficulty of fitting an initiative or referendum election into established legal procedures for adopting ordinances. In Wilmington, voters proposed a rezoning,

which is an action that a city council must precede with a number of required procedures, including a public hearing before the council. In that case the city attempted to follow the procedures as best it could, holding the necessary hearing, but when the voters rather than the council are the decision makers, the hearing is clearly not serving the purpose intended. In Asheville and Morganton, voters proposed the grant of CATV and cable television franchises. The general law for franchises, however, requires that a city council adopt a franchising ordinance twice, at separate meetings. Does this mean that the voters must approve the ordinance twice, at separate elections? If use of initiative or referendum becomes more widespread among local units in North Carolina, or more frequent in the cities with those powers, some attention to fitting voter decision making into procedures intended for council decision making will be useful.

Third, the various experiences with initiatives on cable television franchises suggest some truth to the charge that initiatives provide an avenue for special interests to affect governmental decisions. In each of the franchise initiatives, a group or a company interested in providing cable television services within the city was instrumental in organizing and operating the petition campaign and then active in the campaign leading to the citizen vote.

Fourth, the Greensboro effort to repeal the antismoking ordinance demonstrates that a broadly supported petition does not automatically result in a successful vote.

Fifth, it is striking how often initiative or referendum efforts have led to litigation. This is a sign of the passionate issues at stake and perhaps a sign that the charter provisions might not be adequately integrated into the general body of local government law in North Carolina.

Recall

With regard to recall, first, the recall efforts directed at a single elected official were usually triggered by disclosure of some previously unknown information that raised serious questions about that official's character or fitness for office. In contrast, the recalls directed at most or all of a board were triggered by strong citizen dissatisfaction with specific policy decisions taken by the board or the officials in question.

Finally, in the recall efforts directed at a single official, it is noteworthy how often the unknown information about the official became public shortly after she or he took office. If recall is prohibited during the first six or twelve months of a member's term, as is the case in several cities, the citizens will not be able to begin recall proceedings at the very time they are most interested in doing so.

Notes

1. All cities and towns in North Carolina are subject to the power of citizens to propose changes in the structure of the city council and by special election to force the adoption of those changes. N.C. Gen. Stat. §§ 160A-101 through -111 (hereinafter the General Statutes will be cited as G.S.). These citizen powers, which have been used in a considerable number of cities and towns, result in amendments to a city's charter, rather than adoption of ordinances, and they are not the subject of this article.

2. The list of units with initiative, referendum, or recall was developed through a search of the North Carolina Session Laws (or, as they once were called, Private Laws and Public-Local Acts) since 1921. The search was done by Kristen Guillory, a student in the master's degree program in public administration at The University of North Carolina at Chapel Hill (UNC-CH). I am grateful for her work.

3. In assembling the instances in which the three powers have been used in North Carolina, I had the assistance of Mark McDonald, a student in the master's degree program in public administration at UNC-CH. I am grateful for his help. The report is complete to the extent that current officials know about instances or that public records reveal information about them.

4. Joseph F. Zimmerman, *Participatory Democracy: Populism Revived* (New York: Praeger Publishers, 1986), 68.

5. Zimmerman, *Participatory Democracy*, 69; Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Cambridge, Mass.: Harvard University Press, 1989): 126–27.

6. North Carolina, though, did authorize the three powers by statute for one category of city or town. The Municipal Corporation Act of 1917 (1917 N.C. Pub. Laws ch. 136) offered cities and towns four alternative organizational forms, to be adopted by local election: mayor-council with the council elected at large; mayor-council with the council elected by districts; commissioner (with each elected commissioner acting as a full-time department head); and council-manager. The third of these, the commissioner form, included the powers of initiative, referendum, and recall. The options remained in the general law until the adoption of G.S. Chapter 160A in 1971, but by that time no cities or towns in the state were operating under the commissioner form of government, and very few ever had.

Since 1927 sanitary district commissioners have been subject to recall under G.S. 130A-66. There is no evidence, however, that this statute has ever been used.

7. Cronin, *Direct Democracy*, 47.

8. Zimmerman offers a fuller summary of the arguments set out in the next two paragraphs, along with some responses to the criticisms, in *Participatory Democracy*,

89–95, 123–26. Cronin summarizes the arguments against initiative and referendum, and recall, and reflects on their validity, in *Direct Democracy*, 60–89, 142–56.

9. The absence of *referendum* power in the last two cities is probably not meaningful. If citizens in either city are unhappy with a recently adopted ordinance, they can always circulate petitions to adopt an ordinance repealing the ordinance they dislike.

10. G.S. 160A-104, which permits citizens to initiate amendments to a city's charter changing the structure of the city council, also requires signatures from 10 percent of registered voters.

11. *E.g.*, Joyner v. Shuman, 116 So. 2d 472 (Fla. Dist. Ct. App. 1959); *In re* Recall of Pearsall-Stipek, 918 P.2d 493 (Wash. 1996).

12. In addition, absentee ballots, in the cities in which they are used, must be made available thirty days before a special election. G.S. 163-302(b).

13. The account of the 1946 Greensboro initiative is based on articles in the *Greensboro Daily News*, May 3–June 19, 1946.

14. The account of the 1958 Greensboro initiative is based on articles in the *Greensboro Daily News*, Sept. 16–Nov. 5, 1958.

15. The account of the first 1989 Greensboro initiative is based on articles in the *Greensboro Daily News*, July 17–Aug. 8, 1989, and on the reported decision in Sofran Corp. v. City of Greensboro, 327 N.C. 125, 393 S.E.2d 767 (1990).

16. The account of the second 1989 Greensboro initiative is based on articles in the *Greensboro Daily News*, Sept. 28–Nov. 8, 1989.

17. The account of the 1990 Greensboro referendum attempt is based on articles in the *Greensboro Daily News*, Oct. 2–Nov. 9, 1990.

18. The account of the 1991 Greensboro initiative is based on articles in the *Greensboro Daily News*, Jan. 21–Feb. 27, 1991.

19. The account of the first 1982 Raleigh initiative is based on articles in the *News and Observer* (Raleigh), July 7–Aug. 4, 1982.

20. The account of the second 1982 Raleigh initiative is based on articles in the *News and Observer* (Raleigh) over summer and fall 1982, especially Nov. 17–24.

21. The account of the 1990–91 Raleigh initiative is based on articles in the *News and Observer* (Raleigh), Feb. 6, 20, Oct. 4, 9, 1991.

22. These are defined in the ordinance (Wilmington Code § 19-38) as facilities "used for the receiving, storage, shipping or trans-shipping of coal or coke in bulk quantities."

23. The account of the 1982 Wilmington initiative is based on articles in the *Wilmington Star*, June 22–30, 1982, and on a telephone conversation with Thomas Pollard, Wilmington city attorney, Nov. 25, 1996.

24. The account of the 1984 Wilmington initiative is based on articles in the *Wilmington Star*, Aug. 15, Sept. 28, Nov. 2–21, 1984.

25. The account of the 1967 Asheville initiative is based on the opinion in Shaw v. City of Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967), and on articles in the *Asheville Citizen*, March 5–8, July 23–29, 1967.

26. The account of the 1990–91 Morganton initiative is based on the opinion in Madison Cablevision v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989), and on a memorandum from Steve B. Settlemyer, city attorney, to Debbie Ogle, city clerk, Sept. 19, 1996, recounting the events. A copy of the memorandum is on file in the author's office.

27. The account of the 1978 Durham recall efforts is based on articles in the *Durham Morning Herald*, April 21–25, July 4–Aug. 1, Sept. 9, 1978.

28. At the time the Durham recall story began, a third council member also had not paid city taxes for at least three years. This council member had just been appointed, however, and, under the charter procedure, could not be subjected to recall until she had been in office for at least ninety days. The recall proponents had at one time intended to seek her recall as well, but she continued to be supported by the remaining council members, and no separate effort was directed at her. See the newspaper accounts cited in note 27, as well as the *Durham Morning Herald*, Nov. 1, 1978, p. 1A.

29. The account of the 1993 Chapel Hill recall effort is based on articles in the *Chapel Hill News*, July 21–Sept. 26, 1993.

30. The account of the 1994 Chapel Hill–Carrboro recall effort is based on articles in the *Chapel Hill News*, July 6–Aug. 31, 1994, and on a conversation with John McCormick, attorney for the school administrative unit, Dec. 10, 1996.

31. G.S. 115C-39 establishes a procedure under which the superintendent of public instruction may initiate, and the local school board complete, the removal of a school board member.

32. The account of the 1995–96 Carrboro recall effort is based on an article in the *Chapel Hill News*, Nov. 29, 1995, and on my own recollection.

33. The account of the 1927 Greensboro recall effort is based on articles in the *Greensboro Daily News*, Aug. 5–Sept. 27, 1927, and the *Greensboro Patriot* (a semiweekly), July 28–Sept. 1, 1927.

34. The *Daily News* editorialized that the opponents wanted a return to spoils politics, away from the professionalism associated with the manager system. It is risky to rely too much on this newspaper's accounts, however, inasmuch as the mayor, who was being subjected to recall, was the president of the company that published the newspaper. The news stories in the *Daily News* were unremittingly antagonistic to the recall effort. Unfortunately the author was unable to obtain copies of the opposing newspaper, the *Greensboro Record*.

35. The account of the 1963 Statesville recall effort is based on articles in the *Statesville Record & Landmark*, Aug. 12–Sept. 20, 1963.

36. The newspaper seems to have been the primary instigator of the recall effort. Unlike the newspaper in the Greensboro effort described earlier, however, the Statesville newspaper did not make its editorial position evident in its news columns.

37. The account of the 1984 Troutman recall effort is based on articles in the *Statesville Record & Landmark*, July 5–Nov. 7, 1984.

38. The account of the 1994 Asheville recall effort is based on articles in the *Asheville Citizen-Times*, Dec. 16, 1993–July 14, 1994.

Mandatory Mediation in On-the-Job Injury Cases

Stevens H. Clarke

Since the late 1970s, North Carolina has undertaken several pilot projects involving new ways of handling court cases. The projects have included community mediation of neighborhood and interpersonal disputes; court-ordered mediation of child custody disputes; court-ordered arbitration of small (primarily district court) civil cases; and court-ordered mediation of larger superior court civil lawsuits. Among the developers of the projects have been private nonprofit mediation agencies (now represented by the North Carolina Mediation Network), members of the North Carolina Bar Association, and the Administrative Office of the Courts. The General Assembly has supported the projects with enabling legislation and in some instances with funding. Local governments and private groups also have given support. The state court system and local courts have participated by ordering or referring cases to the alternative procedures and by issuing rules concerning their operation. The state's approach has been to plan the projects carefully and then to evaluate them to see whether, and to what degree, they accomplish desired improvements in court efficiency and the quality of justice as perceived by parties to the disputes. *Popular Government* has published several articles about the projects.[1]

The latest project, authorized by the General Assembly in 1993, is a mediation program for workers' compensation cases. This program involves the North Carolina Industrial Commission rather than the courts.

The author is an Institute of Government faculty member who conducts research on alternative methods of dispute resolution connected to the court system.

North Carolina's Workers' Compensation Act is intended to provide quick and reliable compensation to workers for loss of wages and for medical expenses due to accidental injury or occupational disease occurring in the course of their employment, and to limit the liability of their employers. The North Carolina Industrial Commission handles all workers' compensation claims, either disposing of them by hearing and award or approving the settlements agreed on by employers and employees. A settlement is not valid unless the commission approves it as "in the best interest of all parties."[2]

The purpose of the mediation program created in 1993 was to determine whether mediation could (1) help settle workers' compensation cases more efficiently for the parties and (2) save work for the commission, thus freeing its resources to decide cases that could not be settled. The Institute of Government assisted the Industrial Commission in evaluating the program, which began to receive cases in September 1994. This article describes the program and reports the results of the Institute's evaluation.

Procedures in Workers' Compensation Cases

Standard Procedure

In workers' compensation claims, a case becomes "disputed" when an employer denies an injured employee's claim in full or in part and the employee (claimant), the employer, or the insurance company requests a hearing by the commission. Traditionally the standard procedure for handling a disputed claim

has been as follows: The commission puts a disputed case on a hearing calendar in about six months. A single deputy commissioner conducts the hearing, in which the claimant gives evidence concerning her or his injuries and demands. After the initial hearing, the parties have up to 60 days to submit depositions of medical experts and other relevant evidence. The deputy commissioner then has 180 days to issue an opinion disposing of the case, which may include an award of compensation. The parties may request a hearing by the full commission, although such a hearing is rare. At any point in this process, the parties may settle the case subject to the commission's approval. The entire standard procedure may take months or years to reach a conclusion and may involve considerable cost for both sides.

During the 1993–94, 1994–95, and 1995–96 fiscal years, the average number of reported workers' compensation claims per year was 92,211. An average of 5,011 cases per year were disputed, and an average of 2,894 cases per year actually went to hearings.[3]

Procedure in the Mediation Program

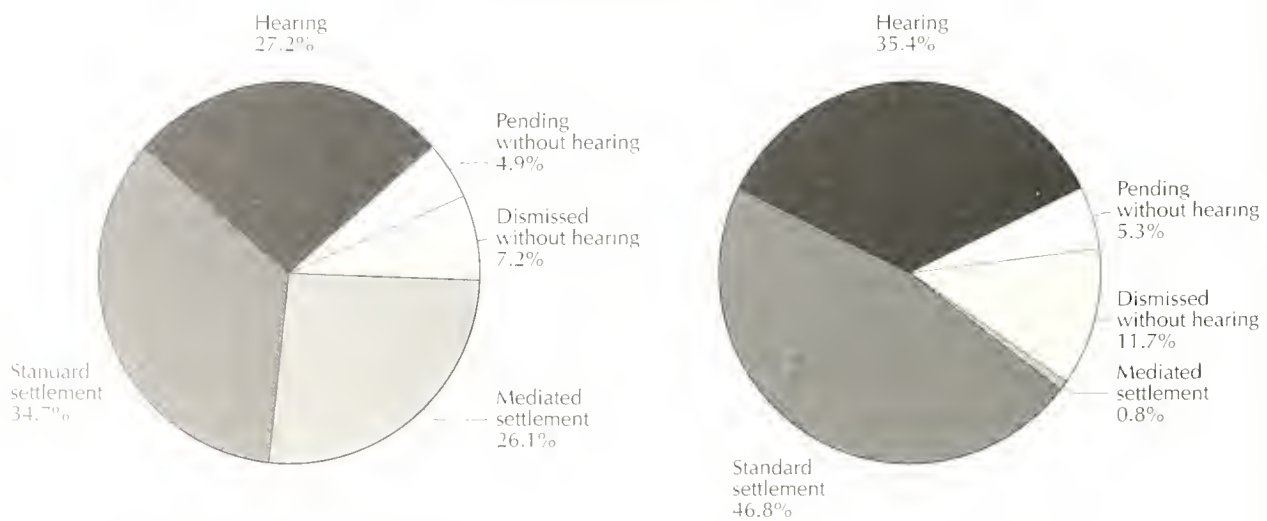
In contrast, the procedure in the mediation program is as follows: Within forty-five to ninety days after a hearing is requested in a case, the commission's mediation coordinator (an experienced attorney who is also a certified, experienced mediator) reviews the file. If the coordinator considers the case appropriate for mediation, he or she orders that it go to mediation within ninety days. The commission may excuse cases from mediation on request of the parties. The parties may settle the case on their own (without a mediator) before the deadline to mediate.

The parties may agree on the selection of a mediator, but if they fail to do so within twenty-one days of the order to mediate, the commission appoints a mediator. Mediators, most of whom are attorneys, must be qualified by (1) being certified for the mediated-settlement conference program (involving general civil cases in superior court) and (2) completing six hours of additional education in the law of workers' compensation. If the commission appoints a mediator, the parties pay the mediator $100 per hour plus a $100 administrative fee. If the parties themselves select a mediator, the fee is negotiable.

Once mediation is ordered, the claimant, the insurance representatives, and the parties' attorneys must attend the mediation sessions unless they settle the case before the mediation deadline. Most mediation sessions last from two to six hours. Mediation may end in (1) a full settlement of the issues, (2) a partial settlement, or (3) an impasse. The commission may impose sanctions on those who fail to attend mediation sessions.

From September 1994 through January 1997, 3,380 cases were ordered to mediation, and 1,557 actually underwent the process.[4]

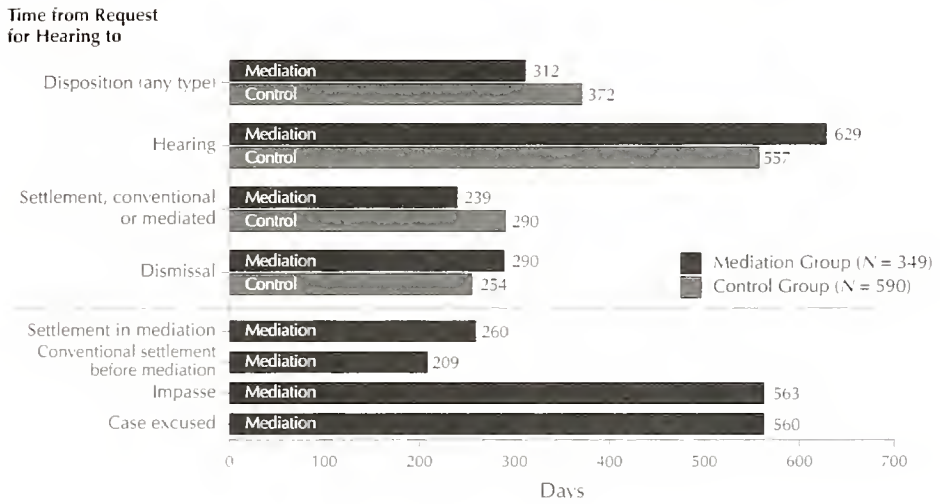
Figure 1
Mode of Disposition, Mediation versus Control Group



Mediation Group (*N* = 349)

Control Group (*N* = 590)

Figure 2
Median Disposition Time (in Days), Mediation versus Control Group



Design of the Evaluation

The Institute of Government's evaluation of the program employed two similar groups of disputed cases: an experimental group of 349 cases ordered to mediation, and a control group of 590 cases excluded from mediation. Both groups were selected at random from all disputed cases filed in 1994.[5] Institute staff followed both groups in official records until June 1996 and compared them to determine the effects of the mediation program. Institute staff also surveyed attorneys and mediators to determine their attitudes toward the program.

Results

Participation in Mediation

Although all the cases in the mediation group were ordered to mediation, just under half (47.6 percent) actually went to mediation. A fourth of the cases were settled before mediation took place, and another fourth were excused from mediation. Of the cases that were actually mediated, two-thirds (64.4 percent) reached settlements in mediation that usually ended the cases, whereas one-third resulted in impasse.

Mode of Disposition

Among the cases ordered to mediation, the program reduced the proportion going to a single-commissioner hearing by approximately one-fourth. This reduction can be seen by comparing the hearing rate in the mediation group (27.2 percent) with that in the control group (35.4 percent) (see Figure 1, previous page). The reduced number of hearings meant a substantial reduction of work for the commission in the affected cases. Also, the program may have reduced time and costs for parties and attorneys (the study did not attempt to measure these variables).

In the mediation group, conventional settlement continued despite the mediation program. In fact, conventional settlement was more common than mediated settlement. In the mediation group, 34.7 percent of the cases were settled conventionally, most without going to mediation first, whereas 26.1 percent were settled in mediation.

Although mediated settlements took the place of hearings in some cases, more often they took the place of conventional settlements. The reduction in the hearing rate attributable to the program, 8.2 percentage points, was about one-third of the percentage of mediation group cases that were settled in mediation (26.1). A larger share, approximately 12.1 percent, would probably have settled conventionally in the absence of the program. This can be inferred from the fact that the rate of conventional settlement in the mediation group (34.7 percent) was 12.1 percentage points less than in the control group (46.8 percent). It is likely that this 12.1 percent ended in mediated settlements rather than hearings. The remainder of the cases that settled in mediation would have reached other dispositions, such as dismissal.

The Case of Mary Sullivan

by Kathy A. Gleason

Mary Sullivan, fifty-eight years old, had worked for Lane Products as a machine operator for ten years. On January 10, 1995, according to her account, a belt came loose on her machine, allowing the pulley mechanism to swing free and strike her right shoulder. No one witnessed this incident. Mary said that though she immediately felt a sharp, burning pain in the shoulder, she went to another machine and worked for six more hours, until she could no longer tolerate the pain. She then reported the incident to her supervisor and went to a hospital trauma center. There hospital personnel observed bruising and a red mark on her right shoulder and diagnosed a torn rotator cuff. The day after the alleged incident, a mechanic inspected the machine and found that a pulley had indeed come off, but he could not determine whether it had come off accidentally during normal operation or had been deliberately removed.

Because of the severity of Mary's injury, she underwent surgery the next day. The orthopedist who did the surgery noted in his records that there was considerable degenerative arthritis in the area and that the tear itself was as bad as any he had ever seen. He believed that Mary would never be able to return to her former job but, if there were no complications, she might be able to return to a light-duty position after a prolonged recovery period followed by a few months of physical therapy. He noted too that a shoulder replacement might be necessary in the future.

In the aftermath of the alleged incident, a coworker of Mary's, speaking in confidence, told a Lane Products manager that Mary deeply resented having been passed over for a raise about nine months earlier. In addition, the coworker said, Mary's husband had recently retired, and the two wanted to buy a motor home and travel around the country. Mary was not going to be eligible to retire with benefits for another six years under Lane Products' retirement plan.

When the manager confronted Mary with this information, she denied it and insisted that her version of the accident was entirely truthful. She also denied that she had had any problems with her shoulder before the accident.

Because there were no witnesses and Mary had worked for six hours after the alleged incident, Lane Products' insurance company denied her claim for workers' compensation. Mary then hired a lawyer, who alleged that the employer and the carrier had wrongfully denied her claim and that she was permanently and totally disabled. The lawyer requested that Mary's case be set for a hearing. Lane Products' attorney filed a response refusing her claim on the ground that her injury was not related to the job. At the same time the attorney requested Mary's medical records.

The medical records indicated that for about three months before the alleged incident, Mary had been seeing her family physician about pain in her right shoulder. This physician had not reached a conclusion regarding the cause of the pain; it might have been due to arthritis or to some kind of injury.

When Lane Products' manager learned that Mary had withheld information about previous problems with her shoulder, he was convinced that her injury had not occurred on the job. He felt that she was trying to use her workers' compensation claim as a ticket to early retirement. When the defense counsel discussed the possibility of a return to work at light duty, the manager angrily said that the company would never take her back. The manager's reaction, relayed to Mary by the defense counsel, added to Mary's feeling of rejection by her employer, and she felt more strongly than ever that she did not want to return.

At this point, there were two paths that Mary's case might take: *standard procedure*, which usually involves settlement but sometimes involves a hearing; and *mediation procedure*.

The author is an attorney who specializes in workers' compensation litigation.

Disposition Time

The program evidently reduced the median time from the request for a hearing to disposition of any type by 60 days—from 372 days in the control group to 312 days in the mediation group (see Figure 2). The median times of settlement in mediation (260 days) and settlement before the mediation deadline (209 days) were both shorter than the median time of settlement in the control group (290 days). In other words, besides speeding up the settlement that occurred in mediation, the program apparently hastened conventional settlement, probably by setting deadlines for mediation.

The program may have lengthened the delay in the cases that went to hearings, perhaps because when mediation occurred, it added a step to the usual process. The median disposition time in cases that went to hearings was considerably longer in the mediation group (629 days) than in the control group (557 days).

Attorneys' and Mediators' Views

Attorneys and certified mediators responding to the Institute's survey generally expressed favorable views

Scenario 1: Standard Procedure

Once the request for a hearing was filed, attorneys for both sides worked long hours preparing for the hearing. For three months there was no communication between them. Then, as the date set for the hearing approached, they began to negotiate. For six months the lawyers exchanged letters and telephone calls, consulting their clients on the next step but never organizing a face-to-face meeting of all the parties. To Mary it seemed that her future was being bargained away with no concern for her as a human being. To the Lane Products manager, it seemed that the parties were haggling over prices, as in a flea market. Initially Lane Products offered to pay Mary $50,500, which was a little more than three years' worth of her weekly wage of $323. At her attorney's suggestion, Mary asked for $168,171, about ten years' wages. Lane Products raised its offer to $70,000, a little more than four years' pay. Mary's attorney advised her to consider this offer, pointing out that she might receive less or nothing at all at a hearing. She decided to accept Lane Products' offer but felt like a loser. She had put in ten years of good work for the company, and all she had to show for it was a lasting, painful disability and an insufficient amount of money, one-fourth of which she had to pay to her attorney. The manager felt that the company had lost by letting a dishonest employee exploit it.

Reaching a settlement probably reduced the cost of litigation for the employer. Although the settlement was not concluded until ten months after the request for a hearing, the time might have stretched to a year and a half or two years, with a considerable increase in legal costs, if the parties had proceeded to a hearing by a deputy commissioner. Nevertheless, Lane Products and its insurance company had no more reason to celebrate than Mary did. The company had spent nearly $10,000 in attorneys' fees, Mary's supervisor and manager had missed time at work during the litigation, and the plant had lost production at various times because of their absence.

Scenario 2: Mediation Procedure

The attorneys agreed to try to resolve the matter in mediation, and they selected a mediator. The mediation session was held about six months after the filing of the request for a hearing, at the office of Mary's attorney. The participants included the attorneys for both sides, Mary, the manager as the representative of Lane Products, and the adjuster for Lane Products' insurance company.

As the mediator opened the session, she reminded Mary, the manager, and the insurance adjuster that this was their opportunity to control the outcome of the case. If a hearing took place, someone would win and someone would lose, and the outcome would be unpredictable. In mediation the goal was to bring the parties to a resolution that would satisfy each side. Mediation, she explained, would enable the parties to examine personal needs and interests and communicate them to the other party. Consideration of needs and interests would have no place in a hearing, nor would it play an important role in conventional negotiation of a settlement, she said.

The mediator also explained that as the session progressed, she might "caucus" (meet separately) with each side. Each side could request that all or part of the information revealed in the caucus not be shared with the other side, and the mediator would honor the request.

The attorneys then presented opening statements summarizing their clients' positions. Mary's attorney made it clear that she was seeking to be compensated for a permanent and total impairment, and the defense counsel was firm that Lane Products did not believe the claim to be compensable. Because of the parties' extreme positions and the possibility of angry confrontations, the mediator decided to caucus with each side.

First, the mediator caucused with the company manager and the adjuster. Tempers were high. The adjuster insisted that this had been a scam from the beginning. Nothing

Continued on next page

of the mediation program. Most respondents thought that mediation reduced the number of hearings, encouraged earlier settlement, and improved the quality of settlement agreements. Defense attorneys were somewhat less favorable than claimants' attorneys and mediators were.

Other Advantages of Mediation

The quantitative data discussed earlier reveal some positive effects of the mediation program, but they do not capture some of the qualitative advantages that mediation can offer in individual cases. "The Case of Mary Sullivan" describes a fictitious but typical claim that was disputed. It illustrates how dramatically the mediation process may differ from a hearing and from conventional negotiation of a settlement as well. Mediators are trained to help the disputing parties consider their real needs and interests, which would be legally irrelevant in a formal hearing and might get short shrift in conventional negotiation of a settlement (because conventional negotiation tends to revolve around strictly legal positions). In Mary Sullivan's case, the mediator helped both Mary and her employer acknowledge how important it was to them that she not return to any job with that employer. The frank

The Case of Mary Sullivan, *continued*

seemed to corroborate Mary's story. No broken parts were found after the alleged incident, no one saw it, and then she tried to hide her previous shoulder problem. The manager chimed in, "We've been good to her for ten years. Sure, she didn't get that raise months ago, but that was during a period of downsizing. We had to let a lot of employees go, but because Mary was a good worker, we kept her on. She never thanked us for that, and now she's complaining about not getting a raise when others were being laid off. No, sir! We're not going to pay for this fiasco, and she will never come back to work for us! If she wins a big amount, word will get out, and others will try and do the same thing. We've got over 1,500 employees, and this kind of thing is contagious!"

The mediator turned to the defense counsel and asked if he could see any problems with his side of the case. The attorney answered that the main problem was that even if Mary had been having a shoulder problem before the alleged incident, she had been working at her job. And the hospital records indicated redness in the area of the right shoulder. At the hearing a deputy commissioner might find that although Mary had had a preexisting problem with her shoulder, the incident at work had aggravated it and rendered it disabling. Her claim might be found compensable.

The mediator then left to meet in another room with Mary and her attorney. When the mediator entered, Mary was crying. "Why don't they believe me?" she asked. "It's true I was having problems before that pulley hit me, but that's what finally messed my shoulder up." Mary went on to complain that she had received only one raise during her ten years with Lane Products. She knew the company was downsizing at the time she was due for a raise, but if there were going to be fewer employees, then she could have gotten at least a small raise. That would have meant a lot to her, and after all those years she had put in for the company, she deserved something. That was the first slap, she said. "But then I had this accident, and they just turned their back on me completely. No one ever came by the hospital or even called to see how I was doing. Then I find out that they think I'm lying. How could they treat me like this?"

The mediator, speaking with the other side's permission, told Mary that the manager had said that she had been kept on because she had done a good job. The mediator also explained that the manager was concerned that some employees might take unfair advantage of a workers' compensation claim.

The mediator asked Mary what plans and goals she had. At this point the attorney said that he wanted his client to be able to speak to the mediator without her remarks being passed on to the other side. The mediator agreed to this confidentiality. Mary told the mediator that she did not want to go back to work for Lane Products. She was too upset about the way they handled her injury. Besides, she said, all they would do if she went back would be to look for a way to fire her. She really wanted to retire and spend more time with her husband, not try to handle a new job that might be too much for her injured shoulder. Also, she wanted to have enough money to buy a motor home.

Having spoken frankly with both sides, the mediator now knew that their needs and interests were unlikely to be considered in a formal hearing but would give each side a strong motivation to settle the case in mediation.

When the mediator went back to the defendants, she learned that having had an opportunity to express their feelings, the manager and the adjuster had started exploring the risks in proceeding to a hearing. The mediator asked the defense counsel what the result would be if a deputy commissioner found that Mary was permanently and totally disabled. He answered, "Given her life expectancy of another nineteen years and a compensation rate of $323.34 a week, the total benefits over her life could be about $319,469. And that doesn't include medical benefits. We have light-duty jobs that she could do, but Lane Products definitely doesn't want her back."

discussion of needs and interests aided in the development of creative solutions to the conflict. For example, the employer agreed to design Mary's settlement so that it would not compromise any Supplemental Security Income (SSI) benefits to which she might be entitled.

Also, mediation provides both the employer and the employee with an opportunity to vent their feelings about the situation. This would be clearly out-of-bounds in a formal hearing. Mediators are trained to listen to and acknowledge expressions of emotions. Their doing so often serves to clear the air and help the parties get down to constructive negotiation.

Conclusion

Despite less than full participation in what was supposed to be mandatory mediation, the workers' compensation mediation program made progress toward its stated goals of resolving cases more quickly and efficiently for the parties and reducing the Industrial Commission's workload.

Whether the program is sufficiently effective is a question for policy makers, not researchers. If policy makers want to improve the program, they might do so by improving participation in mediation. If mediation was ordered in every case, if mediation was ordered

Returning to Mary's side, the mediator learned that Mary too had calmed down and was talking with her attorney. They acknowledged that because her physician was probably going to release her to light duty, she might have to face a return to Lane Products. The attorney mentioned the same figure for a lifetime payout as the defense counsel had but noted that Mary's immediate interest was in settling her case and they were very willing to compromise. "Tell the defendants we'd be willing to accept the lifetime payout reduced to its present value. Let's see . . ." He consulted his calculator. "That would be about $100,000 at 6 percent, compounded monthly at half a percent." Mary's eyes brightened. The mediator asked if the attorney thought that would be a good start in light of the defendants' belief that the case simply was not one of permanent and total disability. The attorney replied that he knew the figure was too high but he had to start somewhere. He agreed, though, to see what the defense had to offer before making that demand. He added one other concern: Mary might receive Supplemental Security Income (SSI) because of her disability, and he wanted to keep any settlement from compromising her SSI benefits.

The mediator then went over to the Lane Products side. She explained the concern that any settlement not affect Mary's SSI benefits, if any. Lane Products' attorney responded, "Tell them we'll pay $50,500. That's a little more than three years' worth of wages. We'll draw up the settlement so that it will not affect her SSI if she qualifies for it. Even if she doesn't get SSI, she can invest the money, and it should carry her well into a time when she'll draw regular Social Security. We'll expect a confidentiality agreement and her resignation as well, and we'll pay all relevant medical bills through today."

The mediator went back to Mary and her attorney with that offer. Although it offended them at first, it began the actual monetary negotiations, and they quickly agreed to both the confidentiality of any agreement and Mary's resignation. While the mediator had been gone, Mary and her attorney had considered what Mary's actual needs would be and had talked about her desire not to return to Lane Products. The attorney also had reminded her that his fee would be a quarter of whatever she recovered. "At $50,500, she's left with only $37,875," he observed. Mary said that even though her husband was retired and had good benefits, they were counting on the proceeds of her settlement to buy a motor home. They had no savings because they had put all three of their kids through college. The $37,875 would not even begin to pay for the motor home they wanted. The attorney quickly added, "Please keep that confidential," then continued, "If they want to approach it that way, tell them Mary will accept $84,068. That's five years of wages and well within reason on this claim. Remind them that even though the doctor says she may be able to return to light duty, the physical therapist's notes document a good effort on her part, yet continued severe pain. Also, her doctor believes that because of the severity of the injury, it probably will require regular follow-ups and maybe a shoulder replacement down the line."

The mediator conveyed the offer, to which the defendants responded somewhat favorably. They realized that it was at least "in the ballpark," though far more than they were ultimately willing to pay.

After a few more caucuses, the parties settled at $70,000, just a little more than four years' worth of wages. Mary's attorney had agreed to reduce his fee to 15 percent so that Mary would net enough to cover most of the expense of a new motor home. Mary was satisfied and relieved. The Lane Products manager was pleased too. Lane Products would have a confidentiality agreement, and Mary would not be coming back. The adjuster understood the risks of going on to the hearing, and though he believed that too much had been spent, he thought that the settlement amount was acceptable given what might have happened at the hearing. The entire mediation took about four hours and cost each side $250 in mediator's fees.

sooner and took place sooner, or if fewer cases were excused from mediation, more cases would be mediated, and more mediated settlements would probably occur. At least some of the additional mediated settlements would displace hearings that would otherwise be held, thereby reducing the commission's caseload and saving its resources for cases that had to have hearings.

Recent data suggest that participation in mediation has increased somewhat for cases filed after those in the Institute's sample.[6] In the 1995–96 fiscal year, 1,825 cases were ordered to mediation. Of these, 54.1 percent (987 cases) actually went to mediation—a somewhat higher rate than the 47.6 percent measured in the Institute's sample. Those data also suggest that greater participation does not reduce the success of mediation. Of the 987 cases that were mediated, 63.7 percent reached a settlement in mediation, about the same percentage as in the Institute's sample (64.4 percent).

In October 1996 the commission decided to order mediation in every disputed case, as soon as the request for a hearing is filed. (Before this change, the commission had ordered only a random sample of cases to mediation and had excluded cases in which the claimant did not have an attorney.)[7] The new policy may have been prompted to some degree by the preliminary findings of the Institute study suggest-

ing that greater participation in mediation would make the program more effective. More important, the change reflected the commission's own experience with and attitudes toward the program.

After being ordered to mediation, cases still may be excused from doing so. However, the proportion of cases excused seems to have declined. In the Institute's sample (cases filed in 1994 that had been ordered to mediation), 28.4 percent were excused. In cases ordered to mediation in 1995–96, 16.9 percent were excused.[5] The commission's mediation coordinator suggests that the decline reflects a drop in requests to be excused, due to increasing acceptance of mediation on the part of attorneys and litigants.

Institute staff lacked the time and the resources to investigate participants' satisfaction and costs. In the future it may be valuable to survey employers and employees involved in disputed workers' compensation cases to compare their satisfaction with standard settlement, hearing, and mediation, as well as the costs associated with the different processes.

Notes

1. For example, *see* Dee Reid, "Community Mediation Programs: A Growing Movement," *Popular Government* 52 (Winter 1987): 24–28; Stevens H. Clarke, Laura F. Donnelly, and Sara Grove, "Court-Ordered Arbitration," *Popular Government* 55 (Summer 1989): 26–33; Stevens H. Clarke, Ernest Valente, Jr., and Robyn R. Mace, "Mediation of Interpersonal Disputes: Evaluating North Carolina's Programs," *Popular Government* 57 (Spring 1992): 9–20; Stevens H. Clarke, Elizabeth D. Ellen, and Kelly McCormick, "Evaluating Court-Ordered Mediation," *Popular Government* 61 (Fall 1995): 33–40.

2. G.S. 97-82(a); North Carolina Industrial Commission, "Workers' Compensation Rules," N.C. ADMIN. CODE tit. 4, ch. 10A § .0502.

3. State of North Carolina, Office of the State Auditor, *Performance Audit: Workers' Compensation Program Administered by the North Carolina Industrial Commission* (Raleigh, N.C.: OSA, 1997), exhibit 1, p. 6.

4. These data were provided by the Industrial Commission.

5. Certain disputed cases were excluded from the selection process: those in which fewer than forty-five days had elapsed since the request for a hearing was filed; those in which the claimants did not have attorneys; and those that were disposed of before September 17, 1994. The exclusions applied to both the mediation group and the control group.

6. These were unpublished data provided by the Industrial Commission.

7. Also, the commission dropped its policy of not issuing the order to mediate for at least forty-five days after the request for a hearing. However, at the same time, the commission lengthened the time allowed to select a mediator from twenty-one to fifty-five days. These two changes together probably had little effect on the timing of or the participation in mediation.

8. These data were collected by the commission's mediation coordinator.

Local Government on the Internet

NCINFO, a World Wide Web site sponsored by the Institute of Government in conjunction with the North Carolina League of Municipalities and the North Carolina Association of County Commissioners, serves as an electronic information resource to individuals interested in local government in North Carolina. For example, where would you look for the most recent changes to legislation affecting purchasing and contracting? How would you determine whether other city or county managers in North Carolina have developed junked-vehicle ordinances or have model leash laws? What would be the most efficient, effective way to gather this type of information, and to explore, develop, and share strategies?

NCINFO at http://ncinfo.iog.unc.edu

What's New?

The **Technology Needs Assessment Project** (TNAP) Report presents the results of a study conducted in 1996–97 to determine the information technology needs of county government. In addition, the report contains strategies for managing information technology and a directory of resources for meeting those needs. The project was a collaborative effort of the Institute of Government and the North Carolina Association of County Commissioners. The Web address for the full report as well as a summary of the report is **http://ncinfo.iog.unc.edu/tnap**.

LGLaw, a Web site created in concert with the North Carolina Association of County Attorneys, serves as a resource to county and municipal attorneys and includes recent legal developments affecting local governments in North Carolina. Additionally, the site (**http://ncinfo.iog.unc.edu/lglaw/**) provides numerous links to legal resources available on the Internet throughout the nation.

For more information on NCINFO, contact Terry Kale, NCINFO director, via e-mail at kale.iog@mhs.unc.edu or (919) 962-0592.

Public Comment at Meetings of Local Government Boards

Part Two: Common Practices and Legal Standards

A. Fleming Bell, II, John Stephens, and Christopher M. Bass

- Three citizens want time at the next meeting of their local board, but the agenda is full. The board has to work on the budget and discuss how to evaluate the city manager. Does it have to put the citizens on the agenda for the next meeting, or may it delay their appearance until the following meeting?
- A board always has an agenda item for general public comment. With cable television, more and more speakers are playing to the camera. May the board just stop receiving general public comment?
- An angry group of citizens hold up signs and wear large protest buttons during a council meeting. May the council restrict the use of signs in its meeting room? What rights do citizens have to express their opinions nonverbally to the council?

Part One of this article offered general guidelines for constructive communication with concerned citizens at board meetings.[1] Part Two summarizes common practices of North Carolina local governments in receiving citizen comment at board meetings, and it addresses legal issues. Public officials should read both parts so that they understand not only principles of effective communication but also legal requirements and prohibitions.

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Common Practices in Receiving Public Comment

Boards of County Commissioners

A 1996 survey of North Carolina's 100 boards of county commissioners revealed common practices among these units in receiving public comment.[2] Ninety boards responded to the survey. Of these, 60 have a specific place in the regular meeting agenda for public comment; 30 do not. Among the latter, 20 allow the chair to decide whether and when to receive citizen comment; 7 allow comment if the request to speak is made before the meeting and the item is placed on the agenda; and 3 normally take comment at the close of the business meeting.

In 55 counties the commissioners regularly limit how long each speaker may address the board. Several of these counties apply their limits flexibly, however, often allowing speakers to continue and letting the chair decide when to ask a speaker to finish. Twenty-nine counties have no formal limit.

In 22 counties the board typically allows each speaker five minutes, and in 21 counties there is a three-minute limit. Even the counties that normally do not restrict the length of speeches do use limits if the issue is controversial and several people wish to speak. In this instance most counties ask the concerned groups to pick one or more spokespersons and/or limit each speaker to two or three minutes.

Municipal Boards

No formal comprehensive survey has been made of how the boards of municipalities receive citizen comment. Practices vary widely.[3] Most city and town councils have a specific point in the agenda at which they hear citizens, commonly at the beginning or the end of the meeting. They also have a time limit on presentations and may require groups with the same concern to designate one or two spokespersons.

School Boards

The state's school boards use a mix of formal and informal approaches to handling public comment.[4] Most boards have a specific place on the agenda for citizens to speak and a time limit for each speaker. Groups are asked to designate a single spokesperson. Boards usually receive citizens' comments but are not obliged to give an immediate response.

School boards struggle with the problem of allowing citizens' comments while preserving the efficiency and decorum of their meetings. Some of them take comments at the beginning of the meeting. This practice, however, can cause business deliberations to last until late in the evening. But holding citizens' comments until the end of the meeting taxes people's patience and delays their speaking to a time when many board members are weary and eager to conclude the meeting.

Many school boards urge parents and other citizens to pursue complaints through regular channels before they come to the board. For example, boards' policies on public comment note that personnel or confidential matters may not be addressed in public session and that persons with complaints about personnel must follow other specific procedures. Also, boards often have a sign-up list for speakers, with a deadline of up to seven days before the meeting. Some sign-up lists ask prospective speakers to identify the topic of their comment, to state the steps they have already taken to address their concern, and to deposit relevant documents in the board's office before the meeting. A board's practice may occasionally vary from its policies in unusual circumstances.

Planning Boards, Boards of Adjustment, and Other Boards

Zoning decisions and requests for variances of land-use regulations can generate great public interest and comment. Most municipalities and two-thirds of county governments control land use through zoning regulations and site permits. Planning boards and boards of adjustment conduct their business meetings publicly but for different purposes and under different rules. The relationships between planning boards and their governing boards (that is, boards of county commissioners or municipal councils) vary greatly. Some differences are set by state statute. For example, when the twenty coastal counties are revising their comprehensive land-use plans, they must work within rules promulgated by the Coastal Resources Commission for mandated formal citizen-participation programs. Other county planning boards have similar (though not state-mandated) practices for seeking public comment (for example, neighborhood meetings, formal public hearings, and surveys of citizens).

Other local government entities (usually appointive) have varying degrees of influence on local ordinances and regulations. Social services boards; area mental health, developmental disabilities, and substance abuse boards; community or human relations commissions; public housing authorities; and agencies on aging typically have few problems with public comment at their meetings. Public health boards, though, sometimes have drawn citizens' attention on such issues as livestock operations, smoking ordinances, and permits for septic tanks.

Legal Requirements for Public Comment

The legal requirements and practical guidelines that follow should be useful for all the entities discussed in the preceding section.

General Requirements

Anyone may attend and record meetings of local public bodies in North Carolina. This right of access is guaranteed by North Carolina's open meetings law. It also may be inferred from the First and Fourteenth Amendments to the United States Constitution.[5]

is a misdemeanor.

But being able to attend a meeting does not necessarily mean that one may speak at it. In general, local government bodies have no legal obligation to allow members of the public to make comments, to ask questions, or otherwise to participate actively at any particular meeting except during a required public hearing conducted as part of that meeting.[10] However, as discussed later, prohibiting *all* opportunities for citizen comment outside public hearings may go beyond what courts will consider reasonable.

Citizen comment is a necessary part of public hearings[11] because obtaining such input is the very reason for the hearings, whether they are mandated by state statute or voluntarily called by a local board. This article, however, focuses on regular board meetings and boards' discretionary power to allow comment during those meetings at times other than during public hearings. Each board controls its regular meeting agenda, including how items are placed on the agenda, and it may choose to give citizens an opportunity to be included.[12] Boards often require citizens who wish to speak, to specify beforehand the subjects that they plan to discuss. A board has fairly broad discretion to decide what subjects to include on the agenda of a particular regular meeting as long as it does not discriminate among citizens on the basis of their point of view on an issue or single out one citizen for different rules under the First and Fourteenth amendments. To understand these rules, one must start with the "public forum" doctrine developed by the United States Supreme Court.

Although the Supreme Court long followed the view that the government, just like a private landlord, may absolutely exclude speech from its own property, the Court has abandoned this ideology and created a body of public forum law. In doing so, the Court has divided government property and activities into three distinct categories: the "traditional" or "quintessential" public forum, the "designated" public forum (the focus of this article), and the "nonpublic" forum.[13] Different rules govern speech at different times and places on public property, depending on the category into which a location or an activity falls.

The Traditional Public Forum

The Court has defined "traditional" or "quintessential" public forums as places such as streets or parks that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[14] Restrictions on speech in these forums are generally allowed only if they are concerned with the time, the place, or the manner of the speech, rather than its content. The restrictions must be content neutral and

"narrowly tailored to serve a significant government interest," and they must "leave open ample alternative channels of communication."[15]

To exclude a speaker from a traditional public forum—which has as one of its purposes the free exchange of ideas—because of the content of her or his speech, the government must show that a regulation "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end."[16] Regulations subjected to this standard, called the "strict-scrutiny test," rarely survive a court challenge.[17] Similarly, censorship based on the speaker's viewpoint usually is not allowed. The Supreme Court will generally hold that a regulation applicable to a traditional public forum violates the First Amendment when it denies access to a speaker solely to suppress the point of view she or he espouses.[18]

The Designated Public Forum

Whenever a government opens public property other than a traditional public forum for use by the public as a place for expressive activity, it creates a designated public forum, the second category. Many of the standards that apply in this category are similar to those that apply in a traditional public forum. This is so even though the government may not have been required to create the forum in the first place and may later choose to change the open character of the property so that it is no longer a designated public forum.[19]

The Nonpublic Forum

Nonpublic forums, the third category, are not subject to the stringent free-speech requirements that govern traditional and designated public forums. Examples of such forums include meetings of government officials that are not required to be open to the public under the open meetings law, such as meetings solely of professional staff, and closed sessions held during official meetings of public bodies.[20] Most government offices and facilities where day-to-day operations are carried on also are nonpublic forums.[21]

The same space may be used at different times as a designated public forum and a nonpublic forum. For example, a room in city hall may be the scene of a council meeting one evening and the site of a department head meeting the next day. If the council receives public comment during its meeting, a designated public forum exists while the comments are being received. The meeting of department heads, on the other hand, is probably a nonpublic forum.

Board Meetings as Public Forums

Meetings of local government boards bear some resemblance to both traditional and designated public forums. They are like traditional public forums in that space and seats for the public are customarily provided, and public comment and debate often are allowed. But these meetings also resemble designated public forums in that they are held for specified purposes (to conduct the board's business as listed on an agenda). Thus public discussion and active participation are more tightly circumscribed than they would be in a park or another traditional public forum.

One noted First Amendment scholar, William W. Van Alstyne, asserts that local government board meetings fit a description midway between these two types of forums. He suggests that rules for citizen comment in such meetings may be more restrictive than those allowed in traditional public forums but less restrictive than those permitted in certain types of designated public forums.[22] This article adopts a somewhat similar view.

What meetings or parts of meetings of public bodies in North Carolina, then, are designated public forums? In a 1976 Wisconsin case, the United States Supreme Court suggested that any portion of a meeting of a public body that the body opens for public comment is such a forum.[23] The Court noted that Wisconsin's open meetings law requires certain governmental decision-making bodies to hold open meetings. It explained that, although a public body may confine such meetings to specified subjects and may even hold closed sessions, "[w]here [it] has opened a forum for direct citizen involvement," it generally cannot confine participation "in public discussion of public business . . . to one category of interested individuals."[24] In a 1997 case the North Carolina Supreme Court cited the Wisconsin opinion for the idea that "once the government has opened a forum—such as a public meeting—to allow direct citizen involvement, it may not discriminate between speakers based upon the content of their speech."[25]

The decision in the Wisconsin case suggests that any official meeting of a public body covered by this state's open meetings law also may become a designated public forum. If a public body chooses to allow public comment during a portion of its meeting, it subjects that part of the meeting to the rules that apply to designated public forums.[26] Restrictions on speech in designated public forums may be based on either what a speaker has to say—content or view-

point—or when, where, or how the speaker says it—time, place, or manner. Very different rules apply to these two types of restrictions.

Restrictions Based on Content or Viewpoint

As noted earlier, in a traditional public forum, any restriction on speech that is based on content or viewpoint will be strictly scrutinized by the courts and will almost always be found unconstitutional.[27] A similar rule applies in a designated public forum. In that context, although the meeting organizers may sometimes restrict comment to the subjects for which the forum is designated, they must still allow all viewpoints to be heard.

For example, the Second Circuit Court of Appeals has held that once a board decides to take public comment in a particular meeting, it may not discriminate among speakers on the basis of what they have to say on the subject at hand. In *Musso v. Hourigan*,[28] the time that a local board of education had allotted to hear public comment had expired, but the board continued to permit members of the public to speak. A citizen who said something that one board member did not like was silenced and eventually arrested.[29] The court noted that a rational jury could infer that the plaintiff was singled out because of the board member's dislike for what he had to say. If this inference was accurate, said the court, the action against the citizen was an unconstitutional content-based restriction on protected speech.[30] The case points out the risk that a board may run if it fails to follow content-neutral ground rules concerning a citizen-comment period.

Even if a local governing board feels that a person is spreading untruths or arousing hostilities through his or her comments during a meeting, and even if the board members do not like what the speaker has to say, the board probably may not restrict that person's speech because of the content: "[T]he Supreme Court has frequently recognized that the disruptive or disturbing effects of expression are integrally bound up with the very political value of free speech that the first amendment was designed to safeguard and nurture."[31] The only relevant exceptions pertain to obscenity (which legally goes beyond mere profanity)[32] and "fighting words" (which "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed").[33] The Supreme Court has specifically explained that the protections of the First Amendment do not turn on the truth, the popularity, or the social utility of an idea or a belief.[34]

Restrictions on Time, Place, or Manner

The fact that restrictions on speech in designated public forums generally may not be based on what a speaker has to say about a subject does *not* mean that those who attend the meeting may speak freely whenever they wish or on whatever topic they wish. The United States Supreme Court has recognized that a public forum may be created for a limited purpose, such as discussion of certain subjects or use by certain groups.[35]

Restricting a meeting to particular subjects (for example, through the use of an agenda) is permitted as long as the public body is careful to allow all points of view to be presented if and when it hears from audience members about those subjects. That is, local boards may control the conduct of their meetings through the use of reasonable, content-neutral restrictions on the time, the place, and the manner of speech.[36] As Justice Potter Stewart stated in a concurring opinion in the Wisconsin case discussed earlier, "A public body that may make decisions in private has broad authority to structure the discussion of matters that it chooses to open to the public."[37]

Even if a board opens its meeting for general discussion of issues, such as during an open-public-comment period, some subject-matter restrictions are probably permissible. For example, a board might limit comments to subjects that are within its jurisdiction or on which it is competent to act.

On the other hand, the restriction on viewpoint-based regulations means that a governmental body holding a public-comment period may not use an improper reason, such as dislike for a particular speaker's viewpoint, as a basis for adjourning or moving on to the next subject on the agenda. As noted earlier, a local government board may not silence a speaker in such a designated public forum merely because it disagrees with the person's message.

A 1990 case, *Collinson v. Gott*, illustrates the courts' deference to local boards' discretion concerning the organization and the conduct of their meetings, as long as no censorship based on a speaker's point of view is involved. In *Collinson* a person was cut off from speaking and subsequently asked to leave a meeting after he violated a local board's requirement that speakers confine their remarks to the question and avoid discussion of personalities. He sued in federal court.[38] A divided panel of the Fourth Circuit Court of Appeals (which has jurisdiction over North Carolina) held in favor of the board. Although the

judges disagreed about the disposition of the case, they all assumed that a presiding officer has at least some discretion to make decisions concerning the appropriateness of the conduct of particular speakers.[39] A concurring opinion noted that the government has a substantial interest in having its meetings conducted with relative orderliness and fairness: "[O]fficials presiding over such meetings must have discretion, under the 'reasonable time, place and manner' constitutional principle, to set subject matter agendas, and to cut off speech which they reasonably perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner . . . ," even though such restrictions might have some relation to the content of the speech.[40] (The judges disagreed on the extent to which content was or should be considered.)

An earlier North Carolina case, *Freeland v. Orange County*,[41] concerned time limits for public comment and limits on the number of speakers. This case involved a public hearing during a board meeting, but the same or similar principles probably apply to public comments at other times during a meeting. The Orange County Board of Commissioners held a public hearing on a proposed county zoning ordinance, and some five hundred people attended. The chair allocated an hour to each side of the issue (though opponents outnumbered supporters four to one) and allowed each side fifteen minutes more for rebuttal.

When the board later adopted the ordinance, some of the opponents sued, arguing that the ordinance had not been properly adopted—apparently because about two hundred persons who wished to speak at the hearing were not allowed to do so. The North Carolina Supreme Court held in favor of the board of commissioners, declaring that "[t]he contention that the commissioners were required to hear all persons in attendance without limitation as to number and time [was] untenable."[42] It found that the "opponents as well as the proponents were at liberty to select those whom they regarded as their best advocates to speak for them. The General Assembly did not contemplate that all persons entertaining the same views would have an unqualified right to iterate and reiterate these views in endless repetition."[43]

Even though *Freeland* is not specifically a First Amendment case, it teaches that a board may safely impose time limits on comments in public hearings as long as it allows enough time for each viewpoint to be heard. Boards will obviously need to use some judgment in deciding how much time and how many speakers on a subject are "enough." For example, in the *Freeland* meeting, with about 500 people in attendance, the board allowed 31 persons to speak for a total of two and one-half hours.

On the other hand, to return to the opening scenario of the three citizens who wish to discuss an agenda item at a meeting that does not include a public hearing, the board may either not hear them at all or limit each one to a few minutes of comments. Even at public hearings, five- and two-minute limits on individual comments have been upheld.[44]

These and cases from other jurisdictions[45] show that local boards have broad latitude in conducting their meetings in an orderly fashion. Whether a board is restricting the debate to a particular subject or limiting the time allotted for public comment, the court will probably uphold a restriction that is viewpoint neutral as long as it is reasonable. What the court will consider reasonable will depend on the facts in each case.

Discretion in When to Allow Speech

Must opportunities for citizen comment be provided at *all* board meetings? Although there is little case law on the point, the latitude that the courts have given governmental bodies to control the conduct of their meetings through restrictions on the time, the place, and the manner of speech likely includes the discretion to allow public comment in some meetings but not in others.

Returning to the second scenario at the beginning of this article, what about *never* allowing citizen comment except during designated public hearings on particular topics? Nothing in North Carolina's open meetings law or other statutes requires that public comment be allowed at meetings that do not include public hearings. This suggests that the courts might allow such a prohibition.

It is not clear, however, how the courts would rule on possible First Amendment concerns raised by this type of restriction. A court might well find it to be an unreasonable restriction on speech or on the right to petition the government for a redress of grievances. Although governing boards have a significant interest in controlling their meetings, a court might require a local board occasionally to allow people to appear personally and publicly to address their concerns directly to the board and to request some appropriate response to their grievances, as part of this right to petition.[46]

According to the North Carolina Supreme Court, filing written complaints, appearing at disciplinary hearings, and making critical speeches at board meetings all involve petitioning the government for a redress of grievances.[47]

On the other hand, it might be argued that such a restriction is permissible because boards do provide for citizen comment during public hearings, although the hearings—and hence the comment—might be limited to particular subjects. For example, the North Carolina General Assembly's rules do not allow for public comment during its proceedings, but legislative committees occasionally hold public hearings on particular bills. It also might be asserted that a designated public forum, and hence a need to receive public comment, is created only when a board decides it wishes to create one.

Conceivably, then, a local board might decide not to take public comment at any of its meetings except during the portions that are designated as public hearings. But politically astute and legally cautious boards will probably provide at least occasional periods for general public comment or an opportunity for citizens to be placed on the agenda of regular meetings, to avoid both appearing unresponsive (thereby hurting their chances for reelection) and having the legal issue raised.

Other Types of Expressive Activity

What about other types of expressive activities, like carrying signs and wearing buttons, as in the third opening scenario? May restrictions be placed on these behaviors in designated public forums? It is important to realize that the "speech" the First Amendment protects involves more than the spoken word. The United States Supreme Court has recognized that freedom of speech encompasses communication through nonverbal symbols.[48] For example, in *Tinker v. Des Moines Independent Community School District*,[49] the Court upheld the right of high school students to wear black armbands to protest the Vietnam War, stating that this was "the type of symbolic act that is within the Free Speech Clause of the First Amendment."[50] Similarly a concurring opinion in *Smith v. Goguen*[51] explained that "[a]lthough neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the First Amendment. . . ."[52]

The Supreme Court sometimes uses the term "freedom of expression" as a synonym for "freedom of speech," indicating that the scope of constitutional protection extends beyond verbal communication. But not every activity is considered "speech." For actions to be considered expressive, a "speaker" must intend that they communicate.[53] Most symbolic gestures by a citizen during any portion of a local board meeting that has been opened for public comment will be considered expressive conduct under the First Amendment because they will involve an intent to communicate. Included is everything from actually addressing the board to wearing a sticker on one's shirt or carrying a placard.[54]

Because carrying signs and wearing buttons are expressive activities protected by the First Amendment, a board must justify restrictions on them in the same way that it justifies restrictions on verbal speech, and under the same standards. Thus reasonable controls on the time, the place, and the manner of such expression will be allowed.

Suppose a board is concerned that citizens might use signs to strike the opposition or to block the view of others at a meeting. It may impose reasonable restrictions on the size of signs or on signs that are attached to wooden or other solid handles, both to ensure safety and to avoid disruption. Or it may limit the use of signs to certain meetings and not others.

A restriction on what a sign or a button may say about a given subject, on the other hand, will cause difficulties. Comments are generally protected even if they are hostile or vulgar or disagreeable to board members. As noted earlier, censorship of unpleasant messages is a type of restriction that the courts generally do not allow.

May a board prohibit signs entirely in a designated public forum such as the public-comment portion of a meeting? In perhaps the only reported case on this point, Louisiana's supreme court concluded that a local school board could do so.[55] The court upheld the board's rule banning hand-held signs from its office building or any of its rooms. The court explained that the board's rule was content neutral and that the board's interest in orderly and dignified meetings was sufficient to justify this type of restriction on time, place, and manner of expression. The court also noted that there were ample alternative channels for communicating the information, including public-comment times at the board's meetings.[56]

The United States Supreme Court agreed with the Louisiana court's conclusion. Without issuing an opinion, it dismissed an appeal of the Louisiana court's ruling on the ground that the case involved no substantial federal question.[57] Such a dismissal is a

decision on the merits; that is, if the Court had thought that the case raised a significant issue under the First Amendment, it probably would have heard the case. The Supreme Court's dismissal of the appeal suggests that local officials may ban hand-held signs in meeting rooms. A board should be careful, however, to ensure that people have adequate alternative ways to present their views to the board.

Other Constitutional Claims

As local boards decide who may speak in their meetings, they also should take care not to violate the provisions of the federal and state constitutions that require equal protection of the laws.[58] That is, a board must not restrict someone's speech on the basis of an impermissible reason like race, religion, or national origin. And if the board has an open-public-comment period, the equal protection clause may prevent it from allowing to speak only those who wish to address topics favored by the board.

Boards also may have concerns when speakers deal with religious topics. In general, United States Supreme Court cases indicate that people who wish to speak on religious issues will be subject to the same limitations that are placed on others.[59] But a board should be careful not to appear to favor one religion over another. Such favoritism is unacceptable under the establishment clause of the First Amendment, which forbids government from making laws "respecting an establishment of religion."

Summary

Local government boards are free to make reasonable rules governing public comments during their meetings. They may choose to allow comments only at certain times, on certain subjects, or in certain meetings, and they may impose time limits and limits on the number of persons who may address a particular issue. They must take care, however, not to exclude or silence a person because of that person's point of view, what he or she has to say about an issue, or, to some extent, how he or she says it. Boards also may not limit a speaker on the basis of his or her race or religion. During periods of open public comment, boards may limit discussion to subjects within their jurisdiction, but they should not restrict a speaker during such a period simply because his or her subject is not popular with the board. Further, if boards choose to exclude visual expressions of opinion such as signs and banners from their meetings, they should make certain that there are adequate alternative means for communicating ideas to the board.

Helping citizens be involved with their local government is an important role of public officials in a democracy. Becoming knowledgeable about practical ways of encouraging positive discussion with citizens (see Part One of this article) and becoming informed about the legal standards just presented will assist public officials in performing that role.

Notes

1. Part One appeared in *Popular Government* 62 (Summer 1997): 2–14.

2. Susan Moran, "Report on the NC Clerks Survey: Public Addresses to Boards," Pitt County, N.C., April 25, 1996. Moran was Pitt County's public information officer from August 1994 to October 1996. At the time of the survey, the Pitt County Board of County Commissioners was considering how best to receive public comment during its meetings.

3. E. H. ("Woody") Underwood, director of operations and membership services, North Carolina League of Municipalities, telephone conversations with John Stephens, October 1996.

4. Ann McColl, legal counsel, North Carolina School Boards Association, telephone conversation with John Stephens, June 2, 1996.

5. *See generally* Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980), in which the Supreme Court held that, under the First and Fourteenth amendments, the public and the press have a right of access to criminal trials. Some of the reasons that the Court gave for finding such a right of access also may apply to meetings of local government boards. For example, Chief Justice Warren Burger noted that the freedoms of speech and the press and the rights to assemble and to petition the government for a redress of grievances

> share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. . . . "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Free speech carries with it some freedom to listen.

Richmond, 448 U.S. at 575–76 (citation omitted). This freedom to listen and to receive information and ideas is enhanced if proceedings are open.

6. N.C. Gen. Stat. § 143-318.10(a) (hereinafter the General Statutes will be cited as G.S.). The terms "official meet-

ing" and "public body" are defined in G.S. 143-318.10(b) through (d). The main exceptions to the law applicable to local governments are the authorizations for closed sessions, found in G.S. 143-318.11.

7. G.S. 143-318.14(a).

8. G.S. 143-318.14(b).

9. G.S. 143-318.17.

10. For a detailed description of the types of public hearings allowed and required under North Carolina city and county law, see David W. Owens, "Zoning Hearings: Knowing Which Rules to Apply," *Popular Government* 58 (Spring 1993): 26–35.

11. A "public hearing" is a portion of a public meeting specifically devoted to hearing from interested citizens, businesses, and civic groups about a specific subject. At the hearing, governmental officials may offer background information, but the goal is for them to receive information, viewpoints, concerns, questions, and so on from citizens. The public officials generally end the hearing before they take any action.

Under North Carolina law, public bodies must hold public hearings before they act only if they are specifically required to do so by statute or case law. The most common statutory instances for cities and counties involve consideration of various land-related and financial matters. Thus city councils and boards of county commissioners, under G.S. 160A-364 and 153A-323 respectively, must hold public hearings, advertised in a specific way, when they wish to take action adopting, amending, or repealing zoning, subdivision, housing, or other types of ordinances specified in G.S. Chapter 160A, Article 19, or G.S. Chapter 153A, Article 18.

Cities and counties also must give published notice and hold hearings before they may engage in certain types of economic development activities [G.S. 158-7.1(c)], and cities must hold hearings with specified notice before they adopt annexation ordinances [G.S. 160A-31(c), (d); -37(a) through (d); -49(a) through (d); -58.2]. Both cities and counties must advertise and hold public hearings on the annual budget [G.S. 159-12], on proposed general-obligation bond orders (G.S. 159-54, -56, -57), and on installment-financing transactions involving real property [G.S. 160A-20(g)].

12. A different rule applies to agendas of special meetings of local government boards. Special meetings of most boards are called to deal with specific topics, so their agendas are usually set in advance. Although the agendas of special meetings can sometimes be changed, doing so is often difficult. *See, e.g.*, G.S. 153A-40(b) and 160A-71(b)(1), which require all members of a board of county commissioners or a city council, as appropriate, to be present or to sign a written waiver before items may be added to the stated agenda of a special meeting.

13. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

14. *Perry*, 460 U.S. at 45, quoting Hague v. C.I.O., 307 U.S. 496, 515 (1939).

15. *Perry*, 460 U.S. at 45.

16. *Perry*, 460 U.S. at 45, quoting Carey v. Brown, 447 U.S. 455, 461 (1980).

17. *See, e.g.*, *Carey*, 447 U.S. at 455, in which the Court applied the strict-scrutiny test under the equal protection clause of the Fourteenth Amendment (Section 1), as well as under the First Amendment, in a case involving content-based discrimination among types of speech.

18. *See, e.g.*, *Perry*, 460 U.S. at 48–49 (text and n.9), in which the Court assumed that discrimination on the basis of viewpoint is generally forbidden by the First Amendment.

19. *Perry*, 460 U.S. at 45–46.

20. G.S. 143-318.10(a), -318.11. As noted earlier, the open meetings law allows public bodies to close their meetings for certain limited purposes, and the United States Supreme Court has approved the holding of such closed, nonpublic sessions: "Plainly, public bodies . . . may hold nonpublic sessions to transact business." City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175, n.8 (1976).

21. Public property that "is not by tradition or designation a forum for public communication" also is considered to be a nonpublic forum. *Perry*, 460 U.S. at 46. As noted in the text, most government offices and facilities used in daily operations fall into this category. Even though much communication obviously takes place in such locations, citizens have no general right to express themselves in most government-owned facilities unless the facilities are traditional public forums or are serving as designated public forums.

Control over access to nonpublic forums may be based on subject matter. For example, a speaker who wishes to address a topic not encompassed in the intended purpose of a nonpublic forum may be prevented from doing so. Control also may be based on a speaker's identity. For example, if a speaker is not a member of the class of speakers for whose special benefit the nonpublic forum was created, he or she may be kept from speaking. The distinctions drawn must be reasonable in light of the purpose that the nonpublic forum at issue serves. *Perry*, 460 U.S. at 49. But it is not necessary to use the *most reasonable* limitation. Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788, 808 (1985).

22. Letter from William W. Van Alstyne, William R. and Thomas C. Perkins Professor of Law, Duke University, to A. Fleming Bell, II, April 11, 1997. We are grateful to Professor Van Alstyne for his helpful ideas and suggestions concerning this article.

23. *Madison*, 429 U.S. at 174–75.

24. *Madison*, 429 U.S. at 174–75 and nn.6, 8.

25. Moore v. City of Creedmoor, 345 N.C. 356, 369, 481 S.E.2d 14, 22 (1997) (citing *Madison*, 429 U.S. at 176).

26. *See* Devine v. Village of Port Jefferson, 849 F. Supp. 185 (E.D.N.Y. 1994) (holding that open meetings in which public discourse is invited on "matters at hand" are limited public forums for First Amendment analysis).

27. One of the few areas in which the Court has allowed content-based restrictions is pornography and obscenity. *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50 (1976) (concluding that a city's interest in the present and future character of its neighborhoods adequately supported its classification of motion pictures according to their

"adult" content); and Ginsberg v. New York, 390 U.S. 629 (1968) (finding that a state's interest in the well-being of its youth justified a regulation that defined obscene material on the basis of its appeal to minors).

28. Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988).

29. *Musso*, 836 F.2d at 738–39.

30. *Musso*, 836 F.2d at 742–43.

31. Thompson v. City of Clio, 765 F. Supp. 1066, 1072 (M.D. Ala. 1991) (citations omitted).

32. *See, e.g.*, State v. Rosenfeld, N.J. App. Div. (no opinion), *cert. denied*, 283 A.2d 535 (N.J. 1971), *vacated mem. sub nom.* Rosenfeld v. New Jersey, 408 U.S. 901 (1972) [remanded for reconsideration in light of Cohen v. California, 403 U.S. 15 (1971), and Gooding v. Wilson, 405 U.S. 518 (1972)], *vacated per curiam sub nom.* State v. Rosenfeld, 295 A.2d 1 (N.J. App. Div. 1972), *modified and aff'd*, 303 A.2d 889 (N.J. 1973). *Rosenfeld* involved a person who used a profane descriptive adjective four times during his remarks at a public meeting of a local school board held to discuss racial conflicts. He was convicted of violating a statute that, as interpreted by the New Jersey Supreme Court, prohibited indecent words spoken loudly in a public place that were of such a nature as "'to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer.'" The words had to be "'spoken with the intent to have the above effect or with a reckless disregard of the probability of the above consequences.'" *Rosenfeld*, 303 A.2d at 890–91 [quoting State v. Profaci, 266 A.2d 579, 583–84 (N.J. 1970)]. (The lower court did not find Rosenfeld's words to be "fighting words," which the state also prohibited. *Rosenfeld*, 303 A.2d at 892.)

The United States Supreme Court vacated this judgment without expressing an opinion and remanded the case to the Appellate Division of the New Jersey Superior Court. Four justices dissented with opinions. *Rosenfeld*, 408 U.S. at 901. The Supreme Court's vacation and remand order may indicate that the Court probably considered a prohibition on language affecting a hearer's sensibilities to be unconstitutional. In a later opinion in the case, the New Jersey Supreme Court recognized that the statutory provision under which Rosenfeld was convicted was no longer viable under the Supreme Court decisions cited in the remand order. *Rosenfeld*, 303 A.2d at 893, 894–95.

33. *See, e.g.*, *Gooding*, 405 U.S. at 524.

34. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964).

35. *Madison*, 429 U.S. at 175, n.8; *Perry*, 460 U.S. at 46, n.7 [citing *Madison* and Widmar v. Vincent, 454 U.S. 263 (1981)].

36. Compare the broad grant of authority for the conduct of public hearings in G.S. 153A-52 and 160A-81: "The [board of county commissioners/city council] may adopt reasonable rules governing the conduct of public hearings, including but not limited to rules (i) fixing the maximum time allotted to each speaker, (ii) providing for the designation of spokesmen for groups of persons supporting or opposing the same positions, (iii) providing for the selection of delegates from groups of persons supporting or opposing the same positions when the number of persons wishing to attend the hearing exceeds the capacity of the hall, and (iv) providing for the maintenance of order and decorum in the conduct of the hearing."

37. *Madison*, 429 U.S. at 180 (Stewart, J., concurring).

38. Collinson v. Gott, 895 F.2d 994 (4th Cir. 1990).

39. *See Collinson*, 895 F.2d at 1000, 1005–06, 1011.

40. *Collinson*, 895 F.2d at 1000. Similarly, in Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989), the Eleventh Circuit Court of Appeals found in favor of the mayor and the city council when the mayor rebuked and subsequently removed a citizen from a meeting for speaking on the council's general spending habits instead of the topic at hand. It explained, "[W]e . . . consider the mayor's interest in controlling the agenda and preventing the disruption of the commission meeting sufficiently significant to satisfy" the requirement that a valid regulation of time, place, and manner serve a significant governmental interest. *Jones*, 888 F.2d at 1333.

The court also found that the means employed by the mayor to achieve the stated interest were tailored narrowly enough to meet the "narrow tailoring" requirement for restrictions on time, place, and manner, and that ample alternative channels of communication were available. The citizen could have spoken on general spending policies of the commission during a regular period for public discussion of non-agenda items at the end of the meeting. *Jones*, 888 F.2d at 1333–34.

Another illustrative case, Wright v. Anthony, 733 F.2d 575 (8th Cir. 1984), involved a public hearing at which a speaker, Albert R. Wright, was interrupted after his allotted time of five minutes had elapsed. Wright sued. The court again held in favor of the defendants, United States Representative Beryl Anthony and others, explaining that Representative Anthony's action was not caused by the content of Wright's message and that "the restriction may be said to have served a significant governmental interest in conserving time and in ensuring that others had an opportunity to speak. Thus, it does not appear that the limitation placed on Wright's speech was unreasonable." *Wright*, 733 F.2d at 577. The court also noted that Wright "was not prevented from introducing all of his prepared text into the written record; he was merely prevented from reading all of it aloud." *Wright*, 733 F.2d at 577.

41. Freeland v. Orange County, 273 N.C. 452, 160 S.E.2d 282 (1968).

42. *Freeland*, 273 N.C. at 457, 160 S.E.2d at 286.

43. *Freeland*, 273 N.C. at 457, 160 S.E.2d at 286.

44. *See Wright*, 733 F.2d at 575; *Collinson*, 895 F.2d at 994; respectively.

45. *See, e.g.*, Tannenbaum v. City of Richmond Heights, 663 F. Supp. 995 (E.D. Mo. 1987) (finding in favor of the city when the plaintiff was removed from a city council meeting and arrested for refusing to confine her comments to the citizen-comment portion of the meeting); Kalk v. Village of Woodmere, 500 N.E.2d 384, 388–89 (Ohio Ct. App. 1985) (citation omitted) (holding that "[t]he right to regulate its own meetings and hearing is an inherent part of the [municipal] legislature's power to make decisions, pass laws and, in the instant case, to determine the merits of a complaint lodged against an official of the municipality"); New Jersey v. Smith, 218 A.2d 147 (N.J. 1966) (upholding the conviction of

a person who was removed from a city council meeting and convicted of violating a state statute that prohibited disturbing or interfering with the "quiet or good order" of a place of assembly by noisy or disorderly conduct).

46. Professor Van Alstyne thinks it "a virtual certainty" that a qualified right of this sort will be recognized when a suitable case is presented to the Supreme Court, even though the courts in certain federal district court cases have held to the contrary—*e.g.*, Stengel v. City of Columbus, 737 F. Supp. 1457 (S.D. Ohio 1988); Green v. City of Moberly, 576 F. Supp. 540 (E.D. Mo. 1983). Letter from Van Alstyne to Bell, April 11, 1997 (see note 22).

47. *Moore*, 345 N.C. at 369, 481 S.E.2d at 23. The court also noted that when Moore spoke at the hearings and the meetings, he was using a public forum. *Moore*, 345 N.C. at 369, 481 S.E.2d at 23.

48. *See* Melville B. Nimmer, "The Meaning of Symbolic Speech under the First Amendment," *UCLA Law Review* 21, no. 1 (1973–74): 29.

49. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

50. *Tinker*, 393 U.S. at 505 (citations omitted).

51. Smith v. Goguen, 415 U.S. 566 (1974).

52. *Smith*, 415 U.S. at 589 (White, J., concurring) (citation omitted). *See also* Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (noting that First Amendment rights "are not confined to verbal expression").

53. *See* Wooley v. Maynard, 430 U.S. 705, 713, n.10 and accompanying text (1977).

54. As a practical matter, when items of apparel are concerned, it may be difficult to distinguish between public-comment portions and other parts of a meeting.

55. Godwin v. East Baton Rouge Parish School Bd., 408 So. 2d 1214 (La. 1981), *appeal dismissed for want of a substantial federal question*, 459 U.S. 807 (1982).

56. *Godwin*, 408 So. 2d at 1217–19.

57. *Godwin*, 459 U.S. 807 (1982).

58. U.S. Const. amend. XIV, § 1; N.C. Const. art. I, § 19.

59. When the exercise of freedom of speech involves speech concerning religious matters, the United States Supreme Court will be particularly protective:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872, 881 (1990) (citations omitted). But the Court will balance this notion of protection with the idea that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878–79. Similarly the Supreme Court has stated that "proponents of ideas cannot determine entirely for themselves the time and place and manner for the diffusion of knowledge or for their evangelism. . . ." Jones v. Opelika, 316 U.S. 584, 594 (1942).

Letters

Medical Advance Directives

Dear Ms. King and Ms. Davis:

Thank you for your article in *Popular Government* about advance directives. As public guardian of sixty-three frail people, I am interested in how best to respond to these issues. Would you please elaborate on the proper role of guardians in making this type of difficult decision.

Our local practice is to make a diligent search for close relatives and to give them the opportunity to offer information about the wishes of the patients and to be involved in the DNR [do-not-resuscitate] decision to the extent that they are comfortable. I believe that we do not legally have to do this. Our desire to involve relatives frustrates medical professionals who need a decision *today*. However, it feels like the right thing to do. We try to do unto others as we would have them do unto us. Any guidance would be appreciated.

Sincerely,
Calvin E. Underwood, Jr., Director
Buncombe County Department of Social Services

Dear Mr. Underwood:

Perhaps we can tell you a few things that might be helpful. Guardians, like any other persons legally authorized to make health care decisions on behalf of another, should decide (1) on the basis of what the patient is known to want, or, if this information is not available, (2) according to what the patient would have wanted based on his or her known preferences and values and prior choices, or, if this information is not available, (3) according to the patient's best interests, including not only medical considerations but also the patient's general life history and character and any other relevant personal information that can shed light on what is best for this person under the circumstances.

This means that you as guardian should be doing exactly as you do, attempting to involve family members in the process of gathering information and encouraging them to assist you in making DNR decisions to the extent of their knowledge of the patient and their willingness and availability. This is true even though, as far as we know, you have no legal obligation, in the strict sense, to consult family who do not wish to be decision makers. As you point out, it is the right thing to do, and most scholars in health law and medical ethics, as well as some courts in other states, would agree that the hierarchy of decision-making principles we have laid out in the preceding paragraph is supported by common sense and common law.

Most of the time, medical professionals are sympathetic to the need to gather information from family members. Perhaps the impatience you describe comes from the timing of the DNR inquiry. Physicians often raise the question of DNR only after they have exhausted all aggressive treatment options and have become convinced that DNR is the only medically appropriate decision. The solution for this problem is to raise the issue sooner. We suggest that, if you do not already do so, you begin the process of advance care planning as soon as you assume guardianship of the person. This would permit you to gather information from family before there is a crisis, and to establish lines of communication that can be followed more quickly later, when time is more crucial. In any event you also should begin the advance care planning process with the health care providers in the patient's long-term care facility and at the beginning of any hospitalization, so that the medical consensus about the patient doesn't get too far ahead of your own knowledge and participation as the patient's guardian and advocate.

Further, you should take full advantage of the support available within many facilities, including social work, pastoral care, and ethics committees. They can be very helpful in facilitating communication with medical staff, providing a discussion forum, and ameliorating decision-making conflicts. Finally, you might consider asking your local area health education center to plan some educational programs around these issues that could involve staff from the department of social services, area hospitals and long-term care facilities, and emergency medical services.

All of this is a lot to do, as you well know. We are very pleased to learn that you as public guardian are working so hard and so thoughtfully to do it.

Sincerely,
Nancy M. P. King, J.D.
Arlene M. Davis, R.N., J.D.

Editor's Note: Parts One and Two of the authors' "Advance Directives for Medical Decision Making in North Carolina: Rights, Duties, and Questions" appeared in *Popular Government*'s Spring 1997 issue (pp. 2–11) and Summer 1997 issue (pp. 38–49).

At the Institute

Whitaker Joins IOG

Gordon P. Whitaker, a nationally recognized specialist in public administration, joined the faculty of the Institute of Government July 1 at the same time that The University of North Carolina at Chapel Hill's Master of Public Administration (MPA) program transferred from the Department of Political Science to the Institute.

"Preparing people for public service fits the Institute's mission," Whitaker said. "The program will be on firmer ground."

"Transferring the MPA program to

the Institute is entirely consistent with our traditional mission," said Michael R. Smith, director of the Institute. "It is a fantastic bonus to add Gordon Whitaker to our faculty as a part of the transfer. He is a talented scholar who is firmly committed to public service. We are pleased to have him as a colleague."


Will Owens

Gordon P. Whitaker

The two-year graduate program was started jointly by the Institute and the Department of Political Science in 1966. "The MPA program now has a stable funding base, adequate space, a first-class computer lab, and increased faculty resources," said Stephen Allred, the program's director and an Institute faculty member since 1986.

Allred said he was humbled to be director of a program that included Whitaker, noting that Whitaker taught in the program when Allred was a student.

Whitaker will teach two courses in the MPA program: public management and leadership, and a class on organizational theory. He also will share his expertise in a course on state government and policy, which will enroll mostly future reporters from the UNC-CH School of Journalism and Mass Communication.

In addition to teaching, Whitaker will work on several projects, including a joint undertaking by the North Carolina City/County Managers' Association, the League of Municipalities, the Association of County Commissioners, and other organizations to improve civics education in public schools.

"The Institute can become more involved in helping people of the state understand their role in government," Whitaker said. "Part of that has to do with the kind of education people get about government and public responsibility. We'll also look for ways to encourage adults to think about their role in the community and become actively involved."

Whitaker will be working with leaders of nonprofit organizations to build better collaboration between citizens and government. For example, in a project with the Governor's Crime Commission, Whitaker and others will gather information about after-school programs for grades 6–8. The study is designed to shed light on which activities tend to keep kids in school and out of trouble.

Shortly after joining the Institute, Whitaker was named the 1997 recipient of the International City/County Management Association's Award for Local Government Education for his efforts in promoting public understanding of local government. He is author of *Local Government in North Carolina*, which is widely used in North Carolina's public schools. —*Jennifer Hobbs*

Jenne Teaches in Croatia

Kurt Jenne, an Institute of Government faculty member specializing in public management, recently traveled to Croatia to teach in a program called Democracy in Governance, arranged by the Research Triangle Institute's Center for International Development under contract with the United States Agency for International Development.

"Our approach was definitely not to preach," Jenne said. "I went to discuss what has worked for us under certain circumstances and what they thought might be useful in their system."

Jenne taught two seminars, lasting roughly a day and a half each, in the Croatian cities of Rijeka, on the Dalmatian Coast, and Osjiek, near the Serbian border. Mayors and city council presidents from a variety of municipalities gathered to learn about citizen participation and to share their own experiences.

Jenne met initially with Albert R. Sharp, Jr., former Lincoln County manager and now head of the Research Triangle Institute's municipal mangement program in Zagreb. After some final preparation with Sharp and his staff, they all took the seminar on the road.

"The issues and problems participants talked about were remarkably similar to those that North Carolina governments face," Jenne reported. For example, local authorities in Djakovo closed a street to reroute traffic, only to find parents of school-aged children upset by heavier traffic near their school. "We discussed how citizen participation might help, even after the fact: figure out who has a stake in the matter, get them involved, and determine whether there was a way to meet at least some of everyone's interests."

Jenne began with an introduction to the basic tools. "I took a copy of Scotland County's citizen newsletter, which county manager Scott Sauer had sent me shortly before I left," Jenne explained. "It was a wonderful example of presenting information in a clear, interesting, and usable format. There was such intense interest in it that we ended up making copies of the entire publication for participants to take home."

The discussion progressed to more complex forms of citizen participation, such as strategic planning and "future search," a process in which participants focus on finding common ground amid disparate interests. "A few participants told of instances where they had tried techniques similar to those of future search to tackle really complex problems and had met with surprising success," Jenne said. "That reinforced my notion that future search is a useful approach that people find intuitively sound as a way to solve seemingly intractable problems."

Slides and handouts needed meaningful translation into Croation. Program associate Mirko Mesarić and Sharp's administrative assistant, Marija Sabljak, took on the challenge of translating jargon and technical terms such as "future

search," for which the literal translation held little meaning in Croatian.

Most of Jenne's exploration of the country was in transit, moving to and from seminars. "But I still had a wonderful introduction to Croatia," Jenne said. "I was able to spend time with participants outside the sessions. One of them, Ivan Grdešić, was a professor of public policy at the University of Zagreb. Ivan had taught and traveled extensively in the United States, and he gave me a historical and cultural perspective on his own region, which helped me understand the participants."

Jenne saw first-hand the damage from the war when he traveled into the U.N.-controlled territory around the city of Vukovar, where one of the seminar translators lived. "I felt as if the people of Vukovar had been caught up in a tragedy that even the physical evidence of the conflict did not begin to communicate."

Although problems remain in the zone of conflict, local governments are thriving everywhere else in Croatia.

"Croatian local governments are serious about carving out a role for an active citizenry as they implement democratic self-government," Jenne observed. "The local government officials I met are enthusiastic about citizen participation. They realize that making it work well is a real challenge, but they are very optimistic and very determined."

—Jennifer Hobbs

Awards Honor Campbell and Bell

William A. Campbell, an Institute of Government faculty member specializing in tax law, recently was honored with the creation of an award in his name to be given periodically by the president and board of directors of the North Carolina Tax Collectors' Association (NCTCA). The award recognizes a deserving individual who, like Campbell, has "advanc[ed] the science and the art of property tax collection in North Carolina." The first recipient was Roger C. Cotten, the former tax administrator of Guilford County and now the county's manager.

"Bill Campbell always has been there when we needed him," said Terry Rowland, tax administrator for Cabarrus County and past president of the NCTCA. "I've been in the business over twenty-six years, and out of roughly 100 county tax collectors and several hundred more municipal tax collectors in this state, I've never heard of anyone who didn't receive sound advice from Bill. This award is intended to be the highest honor bestowed on a North Carolina tax collector."

Rowland said Cotten was selected to receive the award because he exemplifies Campbell's teachings. Cotten was recognized for his innovative leadership, his sincere public service, and for achieving, among other goals, a 99 percent tax collection rate since 1978.

"Bill Campbell is so dedicated, it makes life as a tax collector fun," Cotten said. "He is the driving force behind many of our activities. Of all the awards I've received, I most cherish this one."

Speaking of his 99 percent tax collection rate, Cotten noted: "That's the staff. They've built a tradition."

Campbell said of the award: "It's a great honor. I've worked with tax collectors since 1965, and I have very much enjoyed my work with this dedicated group of public servants."

Michael R. Smith, director of the Institute of Government, added: "It is wonderful that the tax collectors have honored Bill with this award. For over thirty years, he has provided excellent assistance to them in a matter-of-fact and modest way."

The award was modeled after the Henry W. Lewis Award, which is given periodically by the North Carolina Tax Assessors' Association for recognition of superior contributions in property tax assessment.

A. Fleming Bell, II, an Institute of Government faculty member specializing in local government law, recently received the Institute Director's Award of Excellence from the International Institute of Municipal Clerks (IIMC). The honor is given annually to a director of an IIMC-recognized institute for clerks.

"The decision was unanimous," said Frank Adshead, director of education for IIMC and member of the committee that reviewed nominations for the award. "Fleming is a true public servant. His interests lie with the people of North Carolina."

Nominations came in from the United States and Canada. Bell's name was submitted by the North Carolina Association of Municipal Clerks.

Bell was recognized for such contributions as teaching, consulting, publications, "sense of humor," and the creation in 1994 of ClerkNet, a Web site with resources for local government clerks.

"The strength and the depth of Fleming's commitment to municipal and county clerks in North Carolina are impressive," said Michael R. Smith, director of the Institute of Government. "His focus always has been on increasing their effectiveness, and he has worked hard to communicate the importance of their work to other officials."

Bell took over direction of the IOG's Clerks' Certification Institute in 1985. Since that time, he has refined and adapted the curriculum to meet the needs of both city and county clerks.

"County and municipal clerks are the hub of the information wheel in government," Bell explained. "Good clerks make sure that records are properly maintained and accessible and that the work of government is done accurately and properly. They answer many questions about the functions and activities of government."

Bell added, "This award is a great honor—especially at this point in my career." *—Jennifer Hobbs*

Off the Press

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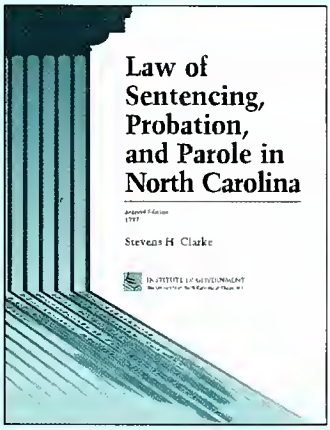

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. . . and at the same time
to preserve the form and spirit of
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—James Madison
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