Winter 1999 • Vol. 64, No. 2

POPULAR GOVERNMENT

INSTITUTE OF GOVERNMENT
The University of North Carolina at Chapel Hill

From Brownfields to Practice Fields

Making a City's Government More Responsive

Criminal Record Checks

Immunity for Local Lawmakers

INSTITUTE of GOVERNMENT

POPULAR GOVERNMENT

Popular Government (ISSN 0032-4515) is published four times a year (summer, fall, winter, spring) by the Institute of Government, CB# 3330 Knapp Building, UNC-CH, Chapel Hill, NC 27599-3330. Subscription: $20.00 per year. Second-class postage paid at Chapel Hill, NC, and additional mailing offices. POSTMASTER: Please send change of address to Institute of Government, CB# 3330 Knapp Building, UNC-CH, Chapel Hill, NC 27599-3330. ♾ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes. ♻ Printed on recycled paper with soy-based ink. Printed in the United States of America.

Popular Government is distributed without charge to city and county officials as one of the services provided by the Institute of Government in consideration of membership dues. The Institute of Government of The University of North Carolina at Chapel Hill has printed a total of 8,200 copies of this public document at a cost of $13,463.32, or $1.64 per copy. These figures include only the direct cost of reproduction. They do not include preparation, handling, or distribution costs.

THE INSTITUTE OF GOVERNMENT of The University of North Carolina at Chapel Hill is devoted to teaching, research, and consultation in state and local government.

Since 1931 the Institute has conducted schools and short courses for city, county, and state officials. Through monographs, guidebooks, bulletins, and periodicals, the research findings of the Institute are made available to public officials throughout the state.

Each day that the General Assembly is in session, the Institute's *Daily Bulletin* reports on the Assembly's activities for members of the legislature and other state and local officials who need to follow the course of legislation.

Over the years the Institute has served as the research agency for numerous study commissions of the state and local governments.

POPULAR GOVERNMENT

Winter 1999 Volume 64, Number 2

INSTITUTE *of* GOVERNMENT The University of North Carolina at Chapel Hill

Feature Articles

Departments

Courtesy HDR Engineering, Inc.

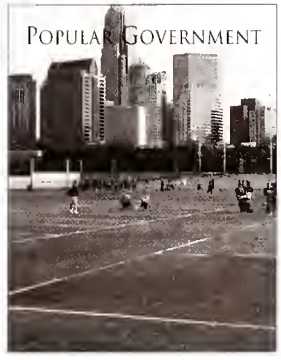
Page 2

Karen Tam

Page 12

Will Owens

Page 30



On the cover Mediation produced agreement to clean up a contaminated scrapyard in Charlotte for use as the Carolina Panthers' practice facilities. It also helped set the stage for North Carolina's new "brownfields" legislation. Photo courtesy of HDR Engineering, Inc. of North Carolina.

Courtesy HDR Engineering, Inc. of North Carolina

Brownfields in

Richard Whisnant

In 1989, vying for a National Football League franchise (which it won in 1993), Charlotte-based Richardson Sports announced that uptown Charlotte would be the location of the new stadium that it hoped to build. The old Smith Metal & Iron site, next door to the stadium property, looked like a good prospect for practice facilities. The city acquired options on it, hoping to lease it for practice facility construction. But environmental problems loomed large. This thirteen-acre tract was contaminated with PCBs (polychlorinated biphenyls), lead, and small amounts of various other hazardous substances.

When the city's intentions for the site became known, neighbors threatened litigation. Three days of mediation among the owner, the neighbors, the city, the state, the U.S. Environmental Protection Agency (EPA), and various private entities produced an agreement for contributions to a $6-million cleanup fund. Today the site houses the Carolina Panthers' practice facilities, pictured on the cover of this issue.

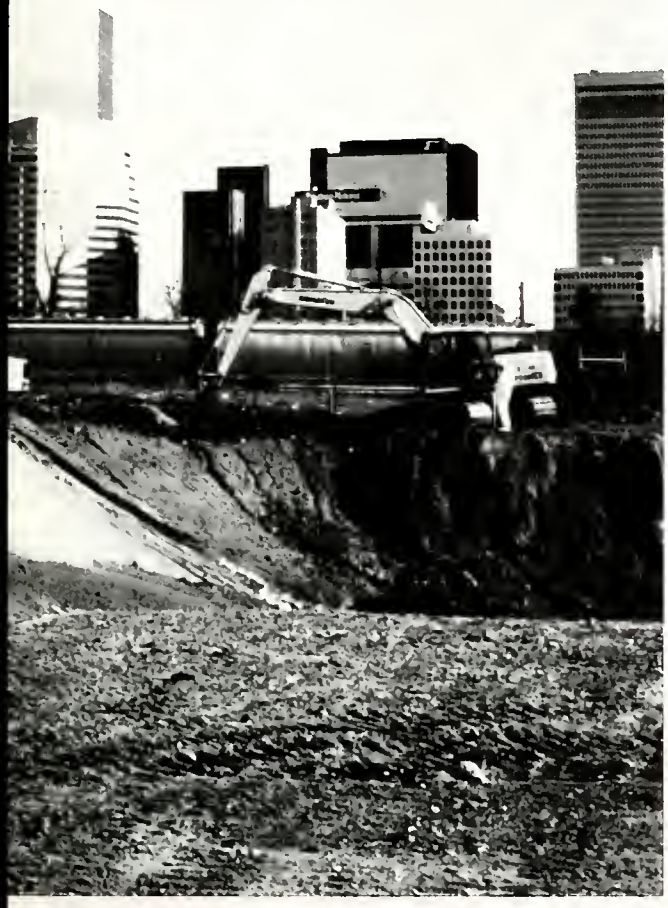
The mediated agreement on the Smith Metal & Iron site helped set the stage for enactment of North Carolina's Brownfields Property Reuse Act of 1997.[1] This article describes the nature of the state's brownfields problem and outlines the features of the new legislation.

Definition of Brownfields

Policy makers are beginning to see that the reuse of brownfields is an important piece of the urban redevelopment puzzle. "Brownfields" are properties that are abandoned, idle, or underused because past activities on them—most often manufacturing—have actually or apparently left behind contamination by hazardous substances. Investment tends to flow away from brownfields. From the mid-1980s until recently, most purchasers of commercial property have viewed environmental contamination as an almost-automatic veto on a deal. This is a problem not just in large urban centers but everywhere there are old manufacturing facilities.

In the context of environmental law, most of the discussion about brownfields centers on legal changes and financing to encourage their reuse. North Carolina's new set of tools and recent federal program changes help make redevelopment of brownfields pos-

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



The site of the Carolina Panthers' practice facilities as cleanup began

a Green State

Policy makers are beginning to see that the reuse of brownfields is an important piece of the urban redevelopment puzzle.

sible. The astute developer and community now may put an abandoned, idle, or underused facility into productive operation and back on the tax rolls, yet avoid passing on environmental liabilities from past problems. Cities as large as Charlotte and as small as Cowpens, South Carolina (population 2,117), are taking advantage of changes in brownfields laws and policies. In fact, some emerging conflicts between brownfields redevelopment and other environmental regulations may make brownfields redevelopment more attractive in less urbanized areas than it is in major metropolitan areas (see "Do Brownfields Redevelopment and Air Quality Mix?" on page 9).

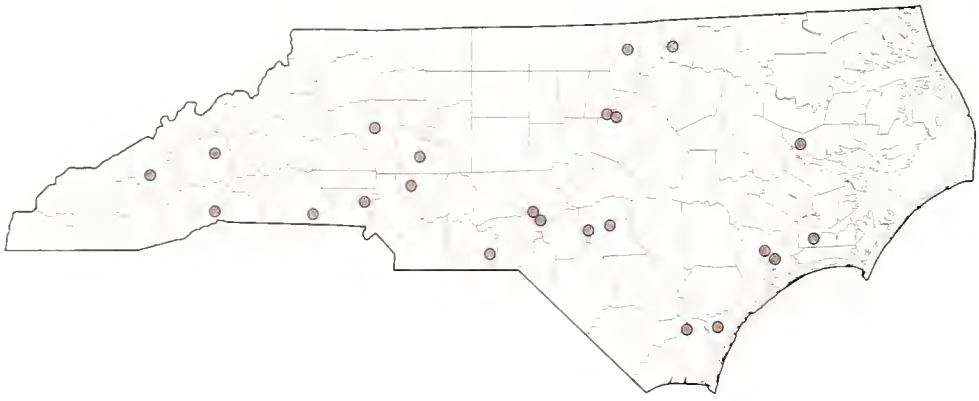
Brownfields policy is important because of "disincentives" (deterrents to redevelopment) created by liability for past disposal of hazardous substances. Both federal and state law shape this kind of liability. The extremely stringent provisions of the federal Resource Conservation and Recovery Act of 1976 (RCRA)[2] and Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)[3] have caused major changes in nearly all commercial real estate transactions. In essence, the purchaser of a property buys some risk of any environmental liabilities on the property, whether or not the purchaser caused them.

The legal problem of strict liability is coupled with the difficulty of cleaning up property that has certain common types of contaminants on it. When substances like industrial solvents are spilled or poured on the ground and make their way into the groundwater, cleaning them up can be very expensive (hundreds of thousands of dollars) and very time-consuming (years of pumping groundwater). Equally important for the commercial real estate transaction is that estimating the cost of cleanup is hard without spending a lot of money just to assess the scope of the problem.

Brownfields in North Carolina

Where does North Carolina rank in the need for brownfields policies? The perception of the state as a mix of rural landscape ("greenfields") and Sunbelt, research-oriented development obscures the extensive role that manufacturing has played in its economy.

Figure 1
North Carolina Sites on the National Priorities List, 1998



North Carolina ranks high on national brownfields-related manufacturing indexes: eighth in the number of toxic releases to the environment,[4] fifth in the number of manufacturing production workers,[5] and first in absolute decrease in the number of farms.[6] Numerous areas in the state, both urban and rural, have had some manufacturing-oriented industrial development since at least the early twentieth century. This history has left a multitude of actual contamination problems and the perception of still more.

North Carolina thus has a split personality in regard to brownfields. One face has a largely rural character, full of green fields and forests—areas that have not had intensive industrial development and are not perceived to be contaminated by hazardous substances of human making. The other face is manufacturing, much of it scattered throughout the same rural areas. Many small towns in North Carolina have a single old manufacturing facility or a small number of them—textile mills, furniture factories, and the like—that may qualify as brownfields.

The actual number of brownfields sites in North Carolina is unknown. One can begin to estimate it, however, by looking at the National Priorities List and the state's official spill database—a list of reported incidents of possible groundwater contamination.

The National Priorities List, maintained by the EPA, includes only the most seriously contaminated properties. North Carolina has fewer than thirty of these (see Figure 1). But on thousands of properties, there has been some report of actual or possible groundwater contamination. State law largely determines the extent of cleanup liabilities for most of these properties. The main state programs that impose cleanup liabilities are the petroleum underground storage tank program, the Oil Pollution and Hazardous Substance Control Act, the inactive sites program, and the state analogues to the federal RCRA and CERCLA programs. The state's spill database lists 14,314 sites.[7] For the number by county as of August 21, 1998, see Table 1. To say that each site is a present or future brownfield would be an exaggeration, but because just the threat of contamination is enough to create a brownfield, it is reasonable to guess that at least a thousand might qualify.

The list includes only sites on which reports have been filed, and there is no general obligation to test property for groundwater contamination. Together these facts suggest that the list of reported incidents underestimates the total number of groundwater-contaminated sites in the state.

The overwhelming majority (91 percent) of incidents listed in the state's spill database are petroleum related (see Figure 2, page 6). Many, if not most, have been reported as a result of requirements to assess and monitor underground storage tanks for petroleum. In addition, since 1988, funds have been provided to reimburse owners and operators for some or all of the cleanup costs resulting from leaking underground storage tanks, if the tanks have been properly assessed and monitored. These funds have served as an incentive for companies to report some releases of petroleum into the groundwater. There is no corresponding incentive to test for and report contamination from nonpetroleum substances. In fact, CERCLA works as a major disincentive for groundwater testing and reporting because of the potential liability that comes with ownership of contaminated land. It is thus quite likely that the state's list of groundwater incidents, large though it is, also greatly underrepresents the number of sites at which hazardous substances other than petroleum are turning properties into brownfields.

The Story of the Brownfields Act

As noted earlier, the mediation agreement reached on redevelopment of the Smith Metal & Iron site helped set the stage for North Carolina's Brownfields Act. This success taught lessons familiar to propo-

Table 1

Reported Incidents of Groundwater Contamination in North Carolina, by County

County	Reported Discharges	County	Reported Discharges	County	Reported Discharges
Alamance	296	Franklin	57	Orange	144
Alexander	32	Gaston	294	Pamlico	29
Alleghany	17	Gates	12	Pasquotank	67
Anson	13	Graham	14	Pender	66
Ashe	33	Granville	85	Perquimans	20
Avery	34	Greene	36	Person	56
Beaufort	104	Guilford	1,296	Pitt	371
Bertie	95	Halifax	98	Polk	24
Bladen	27	Harnett	76	Randolph	213
Brunswick	123	Haywood	110	Richmond	75
Buncombe	435	Henderson	156	Robeson	144
Burke	165	Hertford	96	Rockingham	182
Cabarrus	144	Hoke	24	Rowan	229
Caldwell	151	Hyde	18	Rutherford	107
Camden	23	Iredell	184	Sampson	85
Carteret	121	Jackson	60	Scotland	77
Caswell	37	Johnston	174	Stanley	115
Catawba	247	Jones	21	Stokes	42
Chatham	87	Lee	116	Surry	151
Cherokee	41	Lenoir	156	Swain	26
Chowan	36	Lincoln	68	Transylvania	54
Clay	11	Macon	55	Tyrrell	5
Cleveland	162	Madison	34	Union	169
Columbus	114	Martin	84	Vance	95
Craven	204	McDowell	71	Wake	693
Cumberland	251	Mecklenburg	1,317	Warren	28
Currituck	40	Mitchell	40	Washington	49
Dare	74	Montgomery	42	Watauga	77
Davidson	218	Moore	71	Wayne	191
Davie	46	Nash	212	Wilkes	99
Duplin	111	New Hanover	436	Wilson	161
Durham	400	Northampton	67	Yadkin	53
Edgecombe	123	Onslow	244	Yancey	24
Forsyth	552				

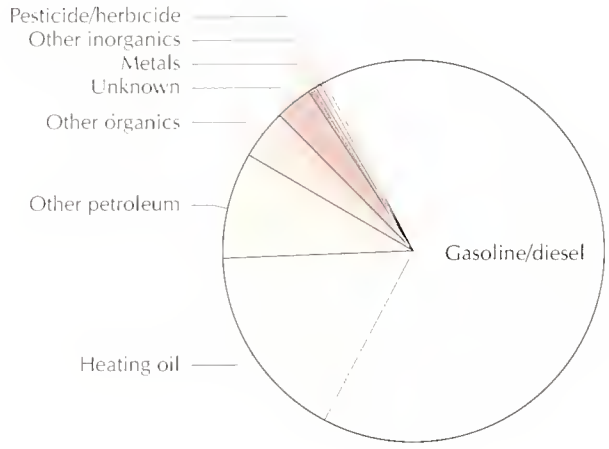
Note: Data are as of August 21, 1998.

nents of alternative dispute resolution: by getting the right people to the table, giving them adequate information, and offering them a neutral, facilitated way to discuss their interests, one sometimes can shape solutions that work for everyone concerned. Some of the same people who participated in the Smith Metal & Iron cleanup, including the key state agency, were ultimately involved in passing the 1997 brownfields legislation.

In 1996 an association representing North Carolina business and industry and some people interested in redeveloping the South End of Charlotte (a group of neighborhoods and a commercial district adjacent to the uptown area) met to discuss possible legislative changes in the state's approach to liability for cleanup. Eventually, representatives of environmental public interest groups and the state environmental regulatory agency joined in the discussion.

The state wanted greater flexibility to reduce the risk of contamination, even if sites could not be cleaned up to standards. State officials realized that many contaminated properties would never be cleaned up if "clean" meant elimination of all contaminants above levels set in the statewide standards. In some cases, achieving those standards is not technically feasible; in other cases the cost of achieving them far outweighs the value of the property. In both cases the net result is that nothing is done unless a solvent

Figure 2
Incidents of Groundwater Contamination in North Carolina, by Type



responsible party can be coerced into cleanup. Most of the time, in North Carolina and elsewhere, the risk remains, unabated.[5]

In the 1997 session of the General Assembly, environmental groups acknowledged the advantages of bringing in new capital to help redevelop currently contaminated sites, as long as the persons actually responsible for the contamination were not "let off the hook." The result was a consensus bill that set a dramatically new direction for cleanups—a rare occurrence in environmental cleanup legislation of the 1990s.

An Overview of the Brownfields Act

The fundamental change brought about by the 1997 brownfields legislation is a negotiated, or contractual, approach to cleanup. Persons who are eligible for the program and wish to buy or sell eligible sites can legally propose cleanup approaches that do not render the site fully "clean" as defined by current state standards. The obligations that persons eligible for the program take on are embodied in a document: the brownfields agreement.

In contrast, the traditional approach to cleanup is kind of a "lookup" process: Assuming that a solvent, motivated, responsible party exists, that party or the state identifies the contaminants on the property, assesses the vertical and horizontal extent of the contamination, and looks up an appropriate cleanup target in the state's standards (usually expressed as a certain mass of contaminants per stated mass of soil or water, or as "parts per million"). The responsible party then searches for an appropriate cleanup technology, installs it, and operates it. All too often, though, somewhere along this standard path, things go awry. And there is never any guarantee that "enough is enough." There is no way to know how much will have to be spent before the site is clean or the effort must be abandoned.

Under the new brownfields approach, in exchange for performance of a set of agreed-on obligations, eligible persons receive liability protection. In other words, the brownfields agreement "caps" their liability. The persons who receive this protection include not only the prospective developer but also contractors and consultants who participate in the cleanup, future owners of the property, future developers and occupiers of the property, successors and assignees of the prospective developer, and lenders or fiduciaries that provide financing for cleanup or redevelopment.

The brownfields agreement has all the appearance of a win-win deal, but there is a potential for losing. Concerned parties to a transaction must consider the consequences of the agreement for the property. Contamination is likely to remain on or under the site, so risk continues. Contamination may be greater or more dangerous than originally believed. In the future the use of the property may change in a way that increases the risk. The agreement itself may limit the use of the property, and the limits may become problematic. Further, the agreement does not preclude claims from adjoining property owners or other private parties, who may assert injury from the contamination. Finally, the agreement does not terminate the liability of parties who are actually responsible for the contamination, and those parties may be compelled to clean up the residual contamination in the future. This cleanup could be disruptive to ongoing activities at the property.

Steps in Reaching an Agreement

There are five basic steps along the road to a brownfields agreement:

Step 1: The state determines whether the site and the prospective developer are eligible.

The prospective developer must meet the definition in G.S. 130A-310.31 (10): in essence, a party who (1) desires to buy or sell a property for development and (2) has no connection to the person or persons who

contaminated the property. Further, the prospective developer must persuade the state of the following:

- That it and its affiliates are in *compliance* with any other brownfields agreements and with federal and state environmental laws
- That there is a *public benefit* to the development commensurate with the liability protection
- That the property is *not an NPL site*—preferably not even a potential NPL site
- That there is *adequate financing, management, and technical expertise* to carry out any needed cleanup and to implement the brownfields agreement
- That the prospective developer and its affiliates are *not in any way responsible* for the contamination

Step 2: The prospective developer proposes a brownfields agreement and shows adequate data to demonstrate that implementation of the agreement will render the site safe.

The form of the agreement is legally flexible, but G.S. 130A-310.32 sets out certain elements to be included:

> A brownfields agreement shall contain a description of the brownfields property that would be sufficient as a description of the property in an instrument of conveyance and, as applicable, a statement of:
>
> (1) Any remediation[9] to be conducted on the property, including:
> a. A description of specific areas where remediation is to be conducted.
> b. The remediation method or methods to be employed.
> c. The resources that the prospective developer will make available.
> d. A schedule of remediation activities.
> e. Applicable remediation standards.
> f. A schedule and the method or methods for evaluating the remediation.
> (2) Any land-use restrictions that will apply to the brownfields property.
> (3) The desired results of any remediation or land-use restrictions with respect to the brownfields property.
> (4) The guidelines, including parameters, principles, and policies within which the desired results are to be accomplished.
> (5) The consequences of achieving or not achieving the desired results.

These requirements are loosely modeled on the win-win agreements promoted by Stephen R. Covey.[10] The notion is that a brownfields agreement can set a framework for protecting the interests of the community, the state, the property developer, and other concerned persons.

The state has developed some forms for documents related to the brownfields agreement. The agreement actually reached on the Campden Square property in Charlotte's South End is a useful model.

Step 3: The prospective developer prepares and distributes the required public notice of the agreement.

The public notice provisions of the statute are quite prescriptive about both the contents and the audience. The prospective developer must give notice to all local governments with jurisdiction over the property. This is a safeguard for local governments that might not otherwise know about the prospective development. The prospective developer also must publish a notice in a local newspaper as well as in the *North Carolina Register*.

Step 4: There is a public comment process and possibly a public meeting.

The public comment period must last at least sixty days. During the first half of this time, any person may request a public meeting to be held on the proposed brownfields agreement. The decision whether to hold a public meeting is at the discretion of the Department of Environment and Natural Resources (DENR) and will likely be decided by the director of the Division of Waste Management. Given the stated goals of the brownfields program—to benefit the surrounding community and the public—the director probably will seriously entertain any requests for a public meeting.

Step 5: The prospective developer and the state agree or walk away.

In the end the brownfields process is voluntary on both sides. As with any negotiated agreement, either party is free to walk away until it signs a deal.

Weighing of Costs and Benefits

All parties interested in a brownfields agreement—including, at a minimum, the prospective developer, local governments, adjacent property owners, the owner of the subject parcel, and DENR—should weigh the costs and the benefits before taking a position on a brownfields proposal. Some key questions to consider are these:

- Will the planned reuse of the property benefit anyone other than the prospective developer?

- What is the risk posed by known and unknown residual contamination—the contamination that is not fully cleaned up? How is that risk likely to change in the future? If the risk grows too high for whatever reason, who pays?
- How important are institutional and engineering controls—legal and engineering approaches other than cleanup, such as deed restrictions and fences—to maintaining the site as safe?[11] How likely is it that those controls will be maintained? What happens if they are not?
- Are there adequate data on contamination to judge whether the site can be made safe?
- Are there persons on the property itself or on adjoining properties who may have or may claim injuries from the contamination?
- Is the proposed use of the land consistent with local land-use plans and market realities?
- Is a brownfields agreement truly necessary to redevelopment of the property? What is the likely future of the property if no agreement is reached?
- Is it important to preserve legal rights to sue other people for cleanup costs?[12]

Another consideration is that, given present staffing levels at DENR, a brownfields agreement will add significant and indeterminate time to a real estate transaction. The first agreement, involving Charlotte's Campden Square, took nearly six months from formal proposal to signing. Some of that time was attributable to the learning process and the need to create new documents and policies from scratch. On the other hand, the state was very familiar with the site and the developer.

Determination of Eligibility

G.S. 130A-310.32 governs basic questions of eligibility. Generally the state can give an opinion about eligibility fairly soon after receiving the information required by the statute.

The state has issued a guidance document on eligibility, along with a form affidavit (a sworn statement) that a prospective developer must submit. The form covers the eligibility criteria in G.S. 130A-310.32. Counsel for prospective developers should review the affidavit to determine whether obvious eligibility problems exist.

The definition of "prospective developer" also serves to limit entrance into the program. However, the state has interpreted the definition fairly broadly to include as many parties as possible who did not cause or contribute to the contamination.

The relationship with federal cleanup programs is tricky for one class of properties, those that are not yet on the National Priorities List but might score on the CERCLA hazard-ranking system at a level that would qualify them for the list. Until it is clear whether EPA will assert any jurisdiction over such sites,[13] getting state signoff on a brownfields agreement will be difficult. The corollary is that any site requiring both a state and a federal signoff inherently entails more complexity, and the brownfields agreement process will be time-consuming, at least.

Finally, local opposition to the project may make it difficult, if not impossible, to show the public benefit required under the statute.

Monitoring of Proposed Agreements

As explained earlier, the Brownfields Act calls for fairly extensive public notice and comment procedures. It requires at least three documents: Notice of Intent to Redevelop a Brownfields Property, Summary of the Notice of Intent, and Notice of Brownfields Property. Circumstances may call for a fourth document: Notice of Public Meeting.

The Summary of the Notice of Intent must be published in a newspaper, published in the *North Carolina Register*, and posted at the brownfields site. The full Notice of Intent must be provided to all local governments with jurisdiction over the property. The Notice of Brownfields Property must be filed with the register of deeds and indexed so that it will appear in the chain of title for the property. Thus, when someone does a title search as part of a sale or a purchase of the property, its being a brownfield will be obvious.

Some data on contamination at the site will be included in the Notice of Intent and the Notice of Brownfields Property. Further data may be available in DENR's files.

A sixty-day comment period runs from the last date on which the Summary of the Notice of Intent is published in a newspaper or in the *North Carolina Register*. During the first thirty days, anyone can request a public meeting.

The brownfields agreement documents the commitments that each party makes for a particular site. The statute sets out the elements of a brownfields agreement with some particularity; for a list of them,

see Step 2 under the earlier section "Steps in Reaching an Agreement."

Effective Commenting on Proposed Agreements

In House Bill 1121, which proposed the North Carolina brownfields program, the General Assembly made five findings:[14]

(1) There are abandoned, idle, and underused properties in North Carolina, often referred to as "brownfields", that may have been or were contaminated by past industrial and commercial activities, but that are attractive locations for redevelopment.
(2) The reuse, development, redevelopment, transfer, financing, and other use of brownfields is impaired by the potential liability associated with the risk of contamination.
(3) The safe redevelopment of brownfields would benefit the citizens of North Carolina in many ways, including improving the tax base of local government and creating job opportunities for citizens in the vicinity of brownfields.
(4) Potential purchasers and developers of brownfields and other parties who have no connection with the contamination of the property, including redevelopment lenders, should be encouraged to provide capital and labor to improve brownfields without undue risk of liability for problems they did not create, so long as the property can be and is made safe for appropriate future use.
(5) Public and local government involvement in commenting on the safe reuse of brownfields will improve the quality and acceptability of their redevelopment.

These findings provide a potentially useful ground from which to make comments about a particular proposal. In other words, persons who either support or oppose a particular project should review the proposal to see if it truly addresses the problem and advances the goals set out by the legislature.

G.S. 130A-310.34(d), detailing the procedures for public comment, specifies that DENR "shall give particular consideration to written comment that is supported by valid scientific and technical information and analysis." This places a premium on understanding the monitoring data and the particular environmental and health risks posed by contaminants at the site.

Do Brownfields Redevelopment and Air Quality Mix?

How can government encourage redevelopment of brownfields while tightening air quality standards in the same areas and preventing development when the standards are not met? Mayors and county commissioners around the country have posed this dilemma to the U.S. Environmental Protection Agency (EPA). Both the U.S. Conference of Mayors and the National Association of Counties have noted the linkages between brownfields redevelopment and air standards. In discussing brownfields, Charlotte Mayor Pat McCrory has said,

> We're concerned that the whole EPA strategy with these new air regulations is not consistent with other strategies, especially brownfields. For example, if we don't further invest in brownfields . . . [,] that may, in fact, contradict efforts to control urban sprawl, which will increase air pollution. But, in fact, the new air regulations may encourage suburban sprawl and not encourage in-fill development and the recycling of polluted land which we're attempting to do in Charlotte and Dallas and Chicago and other major urban centers.[1]

New air standards for ozone and fine particulates, as well as standards under consideration for hazardous air pollutants ("air toxics"), will hit urban centers—the places normally associated with brownfields redevelopment—especially hard. Typically these places, with greater development density, more manufacturing, and more cars, have poorer air quality.

In North Carolina, for example, current best guesses are that new ozone standards proposed by the EPA will put much of the Piedmont into "nonattainment" status, meaning that the air quality will not meet the new standards. This status could pose a major obstacle to locating new facilities in the Piedmont that emit air pollution. The state and Piedmont local governments (as well as some mountain local governments) will be searching for ways to improve air quality that fit into the state's plan for complying with the new standards.

North Carolina's experience with brownfields redevelopment and air quality is likely to be very different from that of large urban centers in the Northeast and the Midwest. State experts already know that a major part of the air quality problem across the Piedmont comes from "mobile sources," meaning cars and trucks.[2] For many small Piedmont cities and towns, redeveloping old manufacturing districts—instead of attracting new industries to sites beyond town boundaries—could cut down on the number of vehicle miles traveled and might even allow employees to walk to work, thus also reducing the number of vehicle trips each day. This was the model in the prototypical industrial development of the Piedmont: the textile mill village. In other words, in the Piedmont, at least outside Charlotte, brownfields redevelopment and air quality improvements could work well together by making locations in town—such as old mills—environmentally acceptable for redevelopment.

Notes

1. *See, e.g.,* Comment of Charlotte Mayor Pat McCrory, available at http://www.usmayors.org/USCM/US_Mayor_newspaper/archives/October_15_1997_Volume_64_Issue_18/documents/McCrory_Explains_Mayors_Opposition_to_EPA_s_Air_Plan_102397.html (Sept. 1, 1998).

2. There also are in the state important, large stationary sources of pollutants that form ozone, particularly some electricity-generating plants. But the automobile is a major part of the Piedmont's air quality problem.

The strong support for the Brownfields Act from all quarters rested on a belief that a site receiving liability protection would be supported by the community in which it was located. Local opposition to a project—whether from the surrounding community or from a local government with jurisdiction over the site—is likely to make consummation of an agreement very difficult. The act gives substantial discretion to DENR to decide whether or not to enter into an agreement. DENR's initial guidance documents appear to place a high value on community involvement and support. Any proposed land-use restrictions must be reasonable in light of overall land-use planning for the area.

Related Programs

The 1997 Brownfields Act is one of many efforts to change key aspects of cleaning up contaminated property. Persons interested in the field should be aware of several related programs.

EPA makes grants up to $200,000 for local governments to assess the extent of contamination at brownfields and their potential for reuse.[15] Burlington, Charlotte, Fayetteville, High Point, and Winston-Salem already have won grants under the program, and Wilmington is applying for one in the next round.

EPA has modified its stance on "comfort/status letters" for potential purchasers of brownfields property.[16] These are letters that are supposed to give prospective buyers some level of comfort about the environmental conditions at a property. EPA now will write them for some properties. The letters do not constitute a legally binding covenant not to sue. They do give some level of assurance that EPA has no present interest in a given property.

Further, North Carolina is moving some of its cleanup programs from a statewide approach based on standards to a site-specific approach based on risk. The most-advanced effort is the risk-based priority scheme for cleaning up leaking underground storage tanks for petroleum[17] (which are excluded from coverage under the Brownfields Act) and reimbursing owners for costs. A second important state change is the "other" brownfields bill from 1997. Known by some as the "tanfields" legislation, it allows use of institutional controls such as deed restrictions and contractual obligations to assist cleanups in all state remedial programs.[18] Another new statutory element is the 1997 Dry-cleaning Solvent Cleanup Act.[19] It couples a cleanup approach based on risks at a particular site, as in the brownfields statute, with a reimbursement fund for eligible dry cleaners, much like the existing fund for reimbursing costs to clean up leaks at underground storage tanks for petroleum. Finally, the state continues to pursue creation of a framework that will ensure, across different regulatory programs, more consistent estimates of environmental risks.

Administration of the Program

The Superfund Section of DENR's Division of Waste Management administers the North Carolina brownfields program. DENR staffs it with people who were hired to do other tasks. Thus there will not necessarily be the kind of responsiveness that would be optimal for a program driven largely by the pressures of a fast-paced real estate market.

To compound this problem, the nature of contractual approaches to cleanup is that each site must receive a significant amount of individualized attention. Cleanup of contaminated property always is resource intensive. Given the benefits that a prospective developer can receive from a brownfields agreement and given the burdens that an agreement can place on future use of a site, completion of an agreement will take time.

Summary

In sum, brownfields represent an unanticipated and problematic consequence of the environmental cleanup liability created in the 1970s and 1980s. One might find them in almost any town in North Carolina. For those interested in restoring and reusing these properties—an important need in the attempt to curb urban sprawl—the 1997 North Carolina brownfields legislation creates important new legal tools. The laws are no substitute for economically viable transactions, but they offer the chance to remove some major impediments to property reuse.

For additional information, see the following:

- *DENR brownfields page at http://wastenot.ehnr.state.nc.us/sfhome/brnfld.htm*
- *EPA brownfields page at http://www.epa.gov/swerosps/bf/index.html*

Notes

1. S.L. 1997-357 (H.B. 1121), codified as G.S. 130A-310.30 through -310.40 and scattered provisions of G.S. 130A and 143.

2. 42 U.S.C. §§ 6901–6992k.

3. 42 U.S.C. §§ 9601–9675.

4. See updated details for North Carolina at www.epa.gov/enviro/html/tris/state/north-carolina.html. On the basis of 1994 data, North Carolina ranked ninth in total releases. *See* www.epa.gov/opptintr/tri/fige6.htm. In 1996 North Carolina ranked eighth. *See* www.scorecard.org.

5. Compiled by the author from U.S. Bureau of the Census, *County Data Books*, 1988 ed., available online at http://fisher.lib.virginia.edu/ccdb.

6. Compiled by the author from Census Bureau, *County Data Books*. Data cover 1982–87.

7. Department of Environment and Natural Resources, Division of Water Quality, Incident Management Database (PIRF table) (as of Aug. 21, 1998). The database, which is updated nightly, is available at http://gw.ehnr.state.nc.us/database/gwdata2.htm. It is made up of discharges reported to the DENR regional offices pursuant to G.S. 143-215.85.

8. To the author's knowledge, the only case in the last decade when North Carolina has used its powers under state and federal superfund law to force cleanups through litigation is the Peele case, involving a pesticide dump in Johnston County. *See* North Carolina v. W. R. Peele, Sr. Trust et al., 876 F. Supp. 733 (E.D.N.C. 1995). A variety of practical and legal problems often prevent the state from simply suing some or all of the responsible parties. First, it may be unclear who those parties are. The federal government devotes substantial resources to searching for responsible parties at contamination sites, but North Carolina does not. Second, there may be no responsible parties. Companies dissolve, individuals die, and both companies and individuals move. Often years, sometimes decades, pass from the time a property is contaminated to the time the state discovers the contamination. Third, the state may know who the responsible party is and that party may still exist, but it may lack the resources to pay for a cleanup. Cleaning up contaminated property, especially groundwater, to current standards can cost hundreds of thousands of dollars, sometimes millions, even at sites that on the surface look to be minor facilities. *See, e.g.*, Home Indem. Co. v. Hoechst Celanese Corp., 128 N.C. App. 189, 192, 494 S.E.2d 764, 766 (1998) (costs of environmental investigation, remediation, and cleanup totaled more than $30 million for plant in Salisbury, more than $15 million for nearby landfill); Guilford County Dept. of Emergency Services v. Seaboard Chemical Corp., 114 N.C. App. 1, 441 S.E.2d 177 (1994) (state estimated cost of "several million dollars" to clean up groundwater at Seaboard Chemical site near High Point); *In re* Camel City Laundry Company, 123 N.C. App. 210, 472 S.E.2d 402 (1996) ($500,000 was estimated cleanup cost for dry cleaning facility in Winston-Salem). Fourth, the state has very few attorneys and support staff to pursue cleanup cases. There were no appropriations for additional staff when the brownfields program was created in 1997, and none were proposed in the governor's budget for fiscal year 1998–99.

9. "Remediation" is anything done to solve a contamination problem.

10. *See* Stephen R. Covey, *The Seven Habits of Highly Effective People: Restoring the Character Ethic* (New York: Simon & Schuster, 1989; reprint, 1st Fireside ed., 1990).

11. *See generally* Joseph Schilling, "Designing and Enforcing Institutional Controls for Contaminated Properties: A Primer for Local Governments," *Municipal Lawyer* 39 (March/April 1998): 10–11, 27–29; Christine Gaspar and Denise Van Burik, *Local Government Use of Institutional Controls at Contaminated Sites* (Washington, D.C.: International City/County Management Association, April 1998).

12. *See* 40 U.S.C. § 9607.

13. The connection to EPA in this context is complex, involving state contracts with the agency and overall state relationships with it. The state, of course, does not want to waste time on a project if efforts will not pay off.

14. S.L. 1997-357 (H.B. 1121), codified as G.S. 130A-310.30 through -310.40 and scattered provisions of G.S. 130A and 143. In the General Statutes, the findings appear in an editor's note to G.S. 130A-301.30.

15. *See* "Announcement of Proposal Deadline," *Federal Register* 62 (Oct. 9, 1998): 52720; "Brownfields Showcase Communities," *Federal Register* 62 (Aug. 20, 1997): 44274.

16. "Policy on the Issuance of Comfort/Status Letters," *Federal Register* 62 (Jan. 30, 1997): 4625.

17. S.L 1995-377 (S.B. 1012), Petroleum Underground Storage Tanks—Risk-Based Rules, codified as G.S. 143-215.94V(2)(a).

18. S.L. 1997-394 (S.B. 125), amending G.S. 130A-310.3, -310.8, -310.9(b); 143-215.84, -215.85A, -215.88B.

19. S.L. 1997-392 (H.B. 225), Dry-cleaning Solvent Cleanup Act, adding new Part 6 to G.S. 143-215.104A.

One City's Journey toward More Responsive Government

Laurinburg, North Carolina

Anne S. Davidson and Richard R. McMahon

> "If top management wants to create a vision or set of values for the organization, let them create it and live it out for themselves first—for two years or more. Then let them worry about how to engage others in the vision. Stop enrolling, start embodying."
>
> —Peter Block

In 1991 Peter Block issued this challenge in his classic book, *The Empowered Manager*.[1] To date, few individuals or groups have responded to his call. Instead, organizations often send managers away on three-day retreats to create a vision, a set of values, and a change program. Then the managers come back and attempt to "enroll" employees in the new effort. The managers expect employees to change but not necessarily themselves. Instead of engendering a sense of responsibility and ownership, the approach breeds cynicism. Employees do not commit themselves to something they have had no part in creating.

Chris Argyris, writing in a recent issue of *Harvard Business Review*, asserts that in reality "today's managers have not yet encountered change programs that work."[2] He believes that for all the efforts to empower employees through vision statements, strategic planning, and programs like reengineering and Total Quality Management, little works in the long run. At best, managers and employees alike comply outwardly. Organizations may experience dramatic short-term gains, but fundamentally they do not become more flexible, more responsive to customers, or better able to deal with the complex problems facing society.

One North Carolina local government[3] has accepted Block's challenge. The City of Laurinburg Management Team (see page 14) wants a government that can solve problems well, respond rapidly to citizens' changing expectations, and use resources efficiently. To achieve that, the city needs enthusiastic, creative employees who take ownership of their jobs and responsibility for the success of the entire organization.

The management team has known from the outset that achieving this goal was likely to take a significant amount of time. The two of us, as the team's facilitators, guessed that Block's estimate of two years for bringing about fundamental change in an organization was optimistic. Yet the team committed itself to working with our help for at least two years to see what it could accomplish. This article is the story of our shared journey from March 1996 to June 1998.

We all agree that the journey has just begun. Only now are we starting to see results that affect the whole organization. Yet already we have learned much. Engaging in long-term organization development is not for everyone, but our experience points us in useful directions for creating more responsive local governments that can meet the daunting demands of the times. We invite readers' comments, questions, and challenges to our assertions.

Change in the Face of Stability

Most people riding through Laurinburg, with its wide streets and well-maintained homes and churches, would find it an unlikely place to begin a major organizational change process. This lovely town of close to 16,000 people has been home to important native sons like the late Terry Sanford and Edwin Gill.[4] In 1996 Peter G. (Pete) Vandenberg had managed the city for twenty-six years, serving with only four mayors in that time. Only one department head had fewer than twenty years' experience with the city. City employees believed that they worked for a well-run organization and thought that they served citizens more quickly and efficiently than employees of most other cities did. This attitude engendered much pride.

Department heads working for the city enjoyed a unique freedom from political interference. Council members did not call them or otherwise intrude on nonpolicy issues. The council did not change many items in the manager's recommended budget, nor did the manager alter many of the department heads' requests. Like council members, citizens seldom complained. No one was pushing the city to change; there was none of the sense of urgency or crisis that so often drives change efforts.

But Laurinburg's manager and department heads were staying abreast professionally. In fall 1995, during an International City/County Management Association meeting, Vandenberg toured the Celestial Seasonings manufacturing facility in Boulder, Colorado. He says of that visit,

> I have toured many plants over the years but have never had an experience as positive as was this one. Some of the things which impressed me were the employees' concern for the environment, their knowledge and willingness to adjust for cultural differences, and their use of customers to not only help develop new blends of tea but also name them and design the decorations on the box. . . . We were taken through every part of the plant, encouraged to ask the line-workers any questions, and cautioned about doing anything which could disturb the process or threaten our safety. There were, however, no roped off areas

Opposite, Laurinburg's current management team: (clockwise from bottom left) Robert L. Malloy, Cynthia B. Carpenter, Robert Bell, William A. Riemer (center), Robert Ellis, Peter G. Vandenberg, and Harold Smith.

Anne S. Davidson is an Institute of Government faculty member who specializes in organization development and change management. Richard R. McMahon is a management consultant and a retired Institute faculty member who specializes in organizational psychology and human behavior. All photographs by Karen Tam.

with nasty signs saying "for liability reasons, no one except employees allowed beyond this point." I left that tour with a sense that Celestial Seasonings was the finest company with the greatest employees in the entire world.

So Vandenberg began to reflect deeply about what creates an exceptional organization.

Earlier William A. Riemer, Laurinburg's director of administration and development, had attended the Institute of Government's Group Facilitation and Consultation course. Since 1990 he had been introducing the city's management team to principles of group effectiveness taught in that program. In 1995–96 Robert Ellis, the treatment plants director, completed the Institute's Municipal Administration course. The team also had worked with a management consultant to develop a vision for the organization, to adopt ground rules for working together more effectively, and to improve the city's pay plan and procedures for performance appraisal.

All these experiences helped move the team forward, but Vandenberg in particular wanted more. Believing that demands on local governments would increase, he sought to create a more adaptable organization focused on being effective in the face of rapid change.

For a number of years, Vandenberg had worked with one of us, McMahon. Vandenberg had heard about a concept of organization development called the "learning organization" (see "What Is a Learning Organization?" on page 16). He discovered that McMahon wanted to work with a city in applying this concept. Vandenberg describes his early 1996 decision to invite McMahon to work with Laurinburg as follows:

> I was intrigued by the learning organization concept and considered this an opportunity to improve my interpersonal relationship skills, particularly in light of my engineering background and training. I also saw it as an opportunity for staff to be better able to communicate and therefore to develop and have a higher level of commitment to organizational goals. Although I had the vague impression that this would ultimately encompass more than staff—that is, the entire organization—I had nowhere near a full comprehension of the magnitude of it, particularly the time it would take and the logistics that would be involved.

Peter S. Vandenberg

Laurinburg Management Team

Our partners in this experiment, the current and former members of the Laurinburg management team, are as follows:

Robert Bell, human resources and safety director
Cynthia B. Carpenter, finance director
Robert Ellis, treatment plants director
Robert L. Malloy, police chief
William A. Riemer, director of administration and development
Harold Smith, director of public works
Peter G. Vandenberg, city manager*
Jack Di Sarno, former personnel director
Phil Robe, former finance director

They have generously granted full permission to share our joint successes and failures. All are open to readers' inquiries about the experiment.

*Vandenberg is retiring as city manager effective December 31, 1998. "Of all my considerations in retiring," he says, "leaving the 'learning organization' has been the most difficult part of the choice." He still will welcome inquiries about the team's work.

The Journey's Start

Creating a Road Map

To date, no known organization fully embodies the learning organization concept, so we had no road map. From our understanding of organization development theory and our years of work with other organizations, we did envision a clear set of sequential but overlapping steps that might move an organization toward productive learning. We based these steps on a series of assumptions. First, the manager and his department heads would change and then lead changes in policies and procedures. Also, redesign of the organization's policies was a necessary condition of fundamental change. Further, change would have to be designed on the shared values and beliefs of the management team. Finally, for the team to learn "deeply" (à la Senge; see page 16), it would need to pair understanding of new ideas with practice at using them in everyday work.

The steps we envisioned for the team and later for the full organization were as follows:

1. Learn fundamental concepts that were part of the learning organization theory and approach.

2. Adopt ground rules for effective group process that were based on a clear set of core values. Ground rules would help team members improve their internal communication and manage conflict effectively.
3. Commit to making all decisions by consensus. This step would be important for team members to take ownership of their decisions and become vested in taking responsibility for the whole organization, not just their departments or divisions. Later, other teams in the organization—middle management groups, work units, and the like—also would use consensus, even though it would be impractical for the organization as a whole to attempt this.
4. Develop by consensus a set of shared values and beliefs. Values and beliefs would be necessary to redesign the organization. They would become a template for judging the adequacy of decisions.
5. Question deeply held assumptions that had led to past ineffectiveness. Without dealing with such assumptions, redesign would not fundamentally change the organization.
6. Redesign policies around the shared values, beliefs, and interests of managers, employees, the council, and citizens. Changes in policy would be essential to have a lasting effect on productivity. This step would begin the full organizational redesign necessary to create a learning organization.
7. Train employees to operate consistently with the learning organization approach. Ultimately the total organization would have to understand and behave consistently with learning organization concepts.
8. Design processes to seek input consistently from citizens, employees, and the council as a foundation for making decisions.
9. Generate new databases to provide valid information about the organization's effectiveness.

Commitment to a new process like this would need to develop over time. Doubts would arise as the team learned more about the effort that this type of change process takes and as it discovered that its old ways of "being effective" often had created worse problems in the long run. Periodic reviews of the team's commitment to the process would have to be designed into the change effort, with a clear understanding that either party to the contract—we or the management team—could terminate the relationship at any time as long as it shared valid information about why it wished to do so.

Reaching an Agreement

In March 1996 McMahon met with Vandenberg and the five department heads who reported directly to him to discuss developing a learning organization. They explored time and resources, particularly the need for regular meetings with two facilitators present. Regular meetings were necessary to sustain learning and provide continuity. The difficulty of mastering the learning organization concepts led McMahon to believe that no one could facilitate this kind of project alone. Subsequently McMahon asked Davidson (then a new Institute faculty member) to serve as cofacilitator.

At a second meeting, the team met Davidson and explored further whether it wanted to embark on the project. During this and the previous meeting, we facilitators also assessed whether we could help Laurinburg become a learning organization.

These two "contracting" meetings were held one week apart. In the interval, team members read articles about the learning organization concept, considered what they had learned in the first meeting, and discussed concerns among themselves.

Despite great uncertainty about where the venture might lead, we and the team decided to go forward. McMahon likened it to going on a jungle exploration with knowledgeable guides: no one knows the territory, but the guides have some useful skills to help the group overcome obstacles and grow from the experience.

Since making this agreement, the management team has met with us twice a month for twenty-eight months, each meeting usually running from 9:00 A.M. until 4:00 P.M. At each critical stage of learning and development, we have reviewed our joint commitment to continue.

Laying the Foundation

The team agreed to start the journey with the steps that we had envisioned. The first step was for managers to study the learning organization concept. Together we identified three important areas of learning: (1) systems thinking; (2) mental models, particularly the concept of moving from a "unilateral control model" to a "mutual learning model";[5] and (3) use of ground rules for group effectiveness.

Systems Thinking

Systems thinking is based on the notion that organizations operate as "a collection of parts which interact with each other to function as a whole."[6] Much like the human body, the parts interacting together can produce something that none can produce operating alone. Moreover, actions taken in one part of a system influence every other part. A man might take aspirin every day for a headache, but in time he would be likely to develop stomach or other health problems. To act systemically, he would need to study the system, discover the cause of the headaches, and evaluate a variety of possible solutions. He would need to go beyond the "quick fix" of alleviating his pain and carefully consider potential side effects of any intervention. In much the same way, an organization must be treated not as a collection of separate mechanical

What Is a Learning Organization?

Peter M. Senge popularized the notion of a learning organization in his 1990 business bestseller *The Fifth Discipline*.[1] "Learning in organizations," he wrote, "means the continuous testing of experience, and the transformation of that experience into knowledge—accessible to the whole organization, and relevant to its core purpose."[2] All organizations learn. They routinely gather information, improve processes, change policies, reorganize structures, and develop new databases to guide future activities. The difference in learning organizations is a focus on learning that changes the deepest level of the organization's culture—its values and beliefs. Senge describes the difference by likening a learning organization to a "great team":

> Looking more closely at the development of such a team, you see that people are changed, often profoundly. There is a deep learning cycle. Team members develop new skills and capabilities which alter what they can do and understand. As new capabilities develop, so too do new awarenesses and sensibilities. Over time, as people start to see and experience the world differently, new beliefs and assumptions begin to form, which enables further development of skills and capabilities. The deep learning cycle constitutes the essence of a learning organization—the development not just of new capacities, but of fundamental shifts of mind, individually and collectively.[3]

The shifts to which Senge alludes lead members of a learning organization to examine the long-term consequences of their behavior, to question the purpose of their actions, and to seek fundamental, enduring solutions to problems rather than continually revising how they do things. This learning demands profound reflection on the gap between the results members intend and the results they get, and their personal contribution to getting an unintended result. For example, members of a learning organization do not assume that they cannot discuss difficult performance problems. Nor do they assume that problems are the employees' fault. They first ask questions like "What in the organization's culture makes it difficult to talk about this issue?" "What did I do that contributed to the other person's behaving ineffectively?" and "What is happening that sustains poor performance and discourages change?"

Organizational learning in this context is not a matter of sending members to classes for training in novel techniques or processes. "Learning is not simply having a new insight or a new idea," Argyris explains. "Learning occurs when we take effective action. . . ."[4] In this view, he says, "action is not simply the discovery of new ideas or the development of new policies; it is the implementation of these ideas or policies and the evaluation of the implementation's effectiveness."[5] In other words, this kind of learning tests ideas and concepts to see if they work. It cannot happen in a three-day program, nor can it occur by simply adapting good ideas from another organization. It involves mastering such talents as the capacity to reflect on assumptions and patterns of behavior, the ability to see how large systems work, and the ability to clarify and behave consistently with deeply held values and aspirations.[6]

Given the difficulty of the task, why would an organization aspire to become a learning organization? Traditional bureaucracies are created to be stable, highly controlled environments reducing variation and producing predictable, uniform results. Normally they change slowly because they are driven by rules, policies, and procedures intended to limit discretion and thus minimize mistakes. Many government organizations (as well as most large private corporations) are highly bureaucratic. There is a clear hierarchy, the focus is on consistency with policy and procedures, and the primary influence process is use of formal authority. A culture develops that is driven by many unwritten rules regarding protocol, hierarchy, who can speak, what can be challenged. Having the kinds of conversations necessary to generate valid information becomes extremely difficult. Critical information is ignored or withheld, and the result is decisions like the O-ring analysis that led to the Space Shuttle Challenger disaster[7] or the small town with only two-story buildings purchasing a $350,000 ladder truck.

Bureaucracies serve people well in times of stability. But their cultures become deeply embedded. As a result, they generally react to external problems rather than anticipating change and designing effective responses to new situations.

The learning organization is based on a different set of assumptions. Its intent is to embody a shared vision and values, continually learn from actions, and more effectively address complex issues. Learning organizations are intended to respond to external demands for change better than bureaucracies do. Further, they are more proactive than bureaucracies in designing their own changes based on a sense of their mission, purpose, and guiding principles. In learning

munity with a clear identity, making all employees feel like parts of a whole; and a tolerance for new ideas, experiments, and "eccentricities that stretched their understanding."[10]

For a summary of some key shifts that characterize the move from a traditional organization to a learning organization, see Table 1.

Policies and procedures are based on rules.	Policies and procedures are based on clearly articulated set of interests.
Focus is on complying with policies and procedures.	Focus is on operating consistently with shared values and beliefs.
Decisions are based on rules and past practice.	Decisions are based on shared values and valid information.
Staff make decisions based on limited data and assumptions.	Staff seek all valid, relevant information. Citizens and customers, as well as employees, become important sources of valid data.
Organizational focus is on stability and predictability.	Organizational focus is on responsiveness and effective change.
Learning is defined as training in new ideas or techniques.	Learning is defined as mastering and applying new ideas, questioning beliefs and assumptions, reflecting on how personal thoughts and actions contribute to achieving or not achieving intended results, and developing ability to redesign behavior to achieve intended consequences.

Notes

1. Peter M. Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (New York: Doubleday, 1990). Senge's ideas about learning organizations are based largely on the work of Chris Argyris and Donald Schon. *See Theory in Practice: Increasing Professional Effectiveness* (San Francisco: Jossey-Bass, 1974) and *Organizational Learning II: Theory, Method and Practice* (Reading, Mass.: Addison-Wesley, 1996).
2. Peter M. Senge, Art Kleiner, Charlotte Roberts, Richard B. Ross, and Bryan J. Smith, *The Fifth Discipline Fieldbook: Strategies and Tools for Building a Learning Organization* (New York: Doubleday, 1994), 49.
3. Senge, Kleiner, Roberts, Ross, and Smith, *The Fifth Discipline Fieldbook*, 18.
4. Chris Argyris, *Knowledge for Action: A Guide to Overcoming Barriers to Organizational Change* (San Francisco: Jossey-Bass, 1993), 3.
5. Argyris, *Knowledge for Action*, 2.
6. Senge, Kleiner, Roberts, Ross, and Smith, *The Fifth Discipline Fieldbook*, 17–47.
7. For a detailed description of how information was ignored and redefined in a way that led to the Challenger disaster, *see* Chun Wei Choo, *The Knowing Organization: How Organizations Use Information to Construct Meaning, Create Knowledge and Make Decisions* (London: Oxford University Press, 1998), chap. 5.
8. Argyris, *Knowledge for Action*, xi.
9. Arie de Geus, "The Living Company," *Harvard Business Review* 75 (March–April 1997): 51–59.
10. De Geus, "The Living Company," 54.

ing a learning organization to a "great team":

> Looking more closely at the development of such a team, you see that people are changed, often profoundly. There is a deep learning cycle. Team members develop new skills and capabilities which alter what they can do and understand. As new capabilities develop, so too do new awarenesses and sensibilities. Over time, as people start to see and experience the world differently, new beliefs and assumptions begin to form, which enables further development of skills and capabilities. The deep learning cycle constitutes the essence of a learning organization—the development not just of new capacities, but of fundamental shifts of mind, individually and collectively.[3]

The shifts to which Senge alludes lead members of a learning organization to examine the long-term consequences of their behavior, to question the purpose of their actions, and to seek fundamental, enduring solutions to problems rather than continually revising how they do things. This learning demands profound reflection on the gap between the results members intend and the results they get, and their personal contribution to getting an unintended result. For example, members of a learning organization do not assume that they cannot discuss difficult performance problems. Nor do they assume that problems are the employees' fault. They first ask questions like "What in the organization's culture makes it difficult to talk about this issue?" "What did I do that contributed to the other person's behaving ineffectively?" and "What is happening that sustains poor performance and discourages change?"

Organizational learning in this context is not a matter of sending members to classes for training in novel technology, and the ability to clarify and behave consistently with deeply held values and aspirations.[6]

Given the difficulty of the task, why would an organization aspire to become a learning organization? Traditional bureaucracies are created to be stable, highly controlled environments reducing variation and producing predictable, uniform results. Normally they change slowly because they are driven by rules, policies, and procedures intended to limit discretion and thus minimize mistakes. Many government organizations (as well as most large private corporations) are highly bureaucratic. There is a clear hierarchy, the focus is on consistency with policy and procedures, and the primary influence process is use of formal authority. A culture develops that is driven by many unwritten rules regarding protocol, hierarchy, who can speak, what can be challenged. Having the kinds of conversations necessary to generate valid information becomes extremely difficult. Critical information is ignored or withheld, and the result is decisions like the O-ring analysis that led to the Space Shuttle Challenger disaster[7] or the small town with only two-story buildings purchasing a $350,000 ladder truck.

Bureaucracies serve people well in times of stability. But their cultures become deeply embedded. As a result, they generally react to external problems rather than anticipating change and designing effective responses to new situations.

The learning organization is based on a different set of assumptions. Its intent is to embody a shared vision and values, continually learn from actions, and more effectively address complex issues. Learning organizations are intended to respond to external demands for change better than bureaucracies do. Further, they are more proactive than bureaucracies in designing their own changes based on a sense of their mission, purpose, and guiding principles. In learning

parts but as an organic system in which actions in one area produce both intended and unintended consequences in others.

One of the most valuable benefits of thinking systemically is recognizing that people's own actions often contribute to consequences for which they blame others. For example, Laurinburg's director of public works was frustrated that employees often gathered at the shop at the end of the day and left before quitting time. Attributing this phenomenon to the employees' laziness, he and his supervisors dealt with it by "giving [the employees] hell every six or eight months." As he came to understand systems thinking, the director started asking what he and others had done to set up the problem. The question switched from "What can we do about employees' laziness?" to "How have we created a system that causes and sustains this kind of behavior?" The answer, he realized, was that

organizations "the search for valid knowledge, a commitment to personal responsibility and stewardship and a dedication to effective action are paramount."[8]

Much evidence indicates that the truly lasting organizations are those that are highly adaptable, not those that focus on stability. In a study of twenty-seven companies in North America, Europe, and Japan that were from 100 to 700 years old, Arie de Geus and his colleagues at Shell Oil found the organizations' distinguishing characteristic to be the ability to manage for change.[9] The organizations shared four "personality traits": conservatism in financing; ability to adapt to changes in the world around them; a sense of community with a clear identity, making all employees feel like parts of a whole; and a tolerance for new ideas, experiments, and "eccentricities that stretched their understanding."[10]

For a summary of some key shifts that characterize the move from a traditional organization to a learning organization, see Table 1.

Table 1

Key Shifts in Becoming a Learning Organization

From . . .	To . . .
Chief executive officer makes most critical decisions.	Critical decisions are shared, as is responsibility for implementing them. Eventually decisions are made at closest level possible to where work is done.
Policies and procedures are based on rules.	Policies and procedures are based on clearly articulated set of interests.
Focus is on complying with policies and procedures.	Focus is on operating consistently with shared values and beliefs.
Decisions are based on rules and past practice.	Decisions are based on shared values and valid information.
Staff make decisions based on limited data and assumptions.	Staff seek all valid, relevant information. Citizens and customers, as well as employees, become important sources of valid data.
Organizational focus is on stability and predictability.	Organizational focus is on responsiveness and effective change.
Learning is defined as training in new ideas or techniques.	Learning is defined as mastering and applying new ideas, questioning beliefs and assumptions, reflecting on how personal thoughts and actions contribute to achieving or not achieving intended results, and developing ability to redesign behavior to achieve intended consequences.

Notes

1. Peter M. Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (New York: Doubleday, 1990). Senge's ideas about learning organizations are based largely on the work of Chris Argyris and Donald Schon. *See Theory in Practice: Increasing Professional Effectiveness* (San Francisco: Jossey-Bass, 1974) and *Organizational Learning II: Theory, Method and Practice* (Reading, Mass.: Addison-Wesley, 1996).

2. Peter M. Senge, Art Kleiner, Charlotte Roberts, Richard B. Ross, and Bryan J. Smith, *The Fifth Discipline Fieldbook: Strategies and Tools for Building a Learning Organization* (New York: Doubleday, 1994), 49.

3. Senge, Kleiner, Roberts, Ross, and Smith, *The Fifth Discipline Fieldbook*, 18.

4. Chris Argyris, *Knowledge for Action: A Guide to Overcoming Barriers to Organizational Change* (San Francisco: Jossey-Bass, 1993), 3.

5. Argyris, *Knowledge for Action*, 2.

6. Senge, Kleiner, Roberts, Ross, and Smith, *The Fifth Discipline Fieldbook*, 17–47.

7. For a detailed description of how information was ignored and redefined in a way that led to the Challenger disaster, see Chun Wei Choo, *The Knowing Organization: How Organizations Use Information to Construct Meaning, Create Knowledge and Make Decisions* (London: Oxford University Press, 1998), chap. 5.

8. Argyris, *Knowledge for Action*, xi.

9. Arie de Geus, "The Living Company," *Harvard Business Review* 75 (March–April 1997): 51–59.

10. De Geus, "The Living Company," 54.

management had ordered employees to come back to the shop as soon as they finished their work. Management did not want anyone to see behavior that he or she might interpret as city employees standing around on the job. Because employees often finished tasks before quitting time but without enough time to set up for another job, they came back to the shop to meet management's interests. The problem was not lazy employees but a management rule and an organizational structure that had created unintended consequences.

Laurinburg has not yet changed the policy about returning to the shop, but it has changed related ones. In situations like this, the solution is sometimes as simple as talking with employees about how they might use their late-afternoon shop time productively—cleaning and restocking trucks, for example. Solving the problem also may require restructuring teams so that they can help one another when they have completed their own assignments. Careful study of the system is necessary to avoid replacing old problems with new ones that are worse. A critical part of systems thinking is taking time to analyze how the system works before acting.

Mental Models

Just as systems thinking creates a new perspective on the organization, understanding mental models creates a new perspective on individual and group behavior. "Mental models" are deeply held internal images of how the world works. They usually are below the holder's level of awareness and must be inferred from his or her behavior. People learn their mental models early in life, and the models shape their behavior. The models are in essence the underlying programs that guide human actions.

Unfortunately most people have two distinct sets of programs: espoused theories and theories in use. "Espoused theories" are how people *say* they will behave—for example, "I'll tell it like it is" or "I'll show respect for others." Yet in potentially embarrassing, risky, or threatening situations, most people actually behave inconsistently with their stated values and beliefs. Further, they are unaware of their inconsistency, even though others usually see the gap clearly. For example, people may say that they are honest with their co-workers, yet they often fail to raise issues in meetings. Then, at lunch with a trusted friend, they may share their doubts, frustrations, and lack of commitment to decisions reached in the meetings. Or an employee may discuss her concerns about a co-worker's performance with everyone in her department except the one person who can fix it—the person engaging in the behavior. This set of programs that guides how people actually behave is their "theories in use."

For most people, espoused theories include values like sharing valid information with others and allowing them to make free and informed choices about their behavior. Yet the values embedded in theories in use more often involve avoiding negative feelings, trying to "win" rather than collaborate, achieving unilateral control over situations and people, and acting rationally rather than expressing feelings. These individual theories in use also become group and organizational routines, so engaging in behaviors like disagreeing with the boss or publicly admitting mistakes becomes difficult, if not impossible. Before the Laurinburg team members could have the kinds of discussions necessary to learn from their own behavior, they had to understand how mental models work, begin openly to help one another see their individual theories in use, and together learn how these theories blocked effective decisions.

Ground Rules

To redesign their behavior to be consistent with their espoused theory of mutual learning, the team needed a third discipline, acting consistently with ground rules. "Ground rules" are commitments that group members make to one another about how they will behave. The team already had been introduced to a set of sixteen ground rules developed by Roger Schwarz and published in his book *The Skilled Facilitator*.[8] Because these particular ground rules are designed as strategies for group effectiveness and are consistent with the core concepts of a learning organization, the team agreed to adopt them as its own.

Although the team used all sixteen ground rules, it found the following six to be most important to its development:[9]

- Test assumptions and inferences.
- Share all relevant information.
- Focus on interests, not on positions.
- Explain the reasons behind one's statements, questions and actions.
- Make statements, then invite questions and comments (which the team changed to "Balance advocacy with inquiry").
- Make decisions by consensus.

Consciously using many ground rules simultaneously was very difficult for team members because behaving consistently with the rules was new to a majority of them. The team developed a strategy of concentrating on two or three key ground rules at each meeting until members became skilled in using most of them. Although the team did not sustain this practice after the first year, conscious use of a few ground rules at a time did quickly increase the team's mastery and significantly improve group process.

An Omission: Problem Solving

We conducted training in systems thinking, mental models, and ground rules during the team's first five sessions. Later we realized that we had omitted a fourth important concept, problem solving. As a result, the team got stuck several times because it tried to jump to a solution before defining a problem or to make a decision without agreeing on what interests a good decision would meet. We recommend that groups add mastery of a basic problem-solving model as a basic learning organization skill.

Agreeing on Roles and Expectations

During the initial sessions, Vandenberg and the department heads also outlined a process for our work together and reached important agreements with us. First, the team looked at how it defined itself and determined what changes it needed to make to start becoming a learning organization. This included analyzing who currently met with the team and who might be added, reflecting on the team's unstated norms and ground rules, and agreeing on team members' roles and expectations of one another. For example, the team pointed out that it did not meet regularly and had no clear designation. Sometimes it functioned as a decision-making group; other times it did not. It often had tried to reach consensus, but many times it had reached "false consensus." That is, members would agree to support a course of action without thinking through what support really meant. For some it meant working to implement the team's choice and asking employees to support the choice. For others it meant not "bad-mouthing" the choice. As the reality of support became clearer, decisions would unravel, and the manager would make a final decision. As a result, team members were publicly described as "Pete's boys."

Through defining the team and sharing roles and expectations, the team decided to invite the finance director to become a member, recognizing that he filled an important role in many organizational decisions. The team agreed to meet regularly between facilitated sessions. It developed a written statement of its purpose and membership criteria. Then we and team members agreed on how we would work together—for example, who might place items on the agenda, what the expectations were for completing readings and exercises between sessions, and how we would jointly manage all activities so that neither we nor the team would make unilateral decisions about what to do or how to do it.

A critical element at this stage was an agreement that the team would spend a large part of most sessions working on its actual tasks. During abstract training sessions, groups often do not have difficulty acting consistently with their values and agreements, but when they engage in the complex decisions required by everyday activities, they find it challenging to act consistently. At times we helped the Laurinburg team focus on learning concepts, but our interventions grew from the data of team members' day-to-day work with one another.

We also agreed to share with the team the written "process notes" (perceptions of how the team was doing, diagnoses of problems, thoughts about next steps, etc.) that we prepared after each visit. In other words, we agreed that we would not talk about the team or its members without sharing that discussion with them at some point. This practice was extremely important because it built trust between us and the team. It also encouraged team members to reflect on process issues that arose during their work on tasks. Our modeling (our open sharing of all relevant data), even at the risk of embarrassing individual members, helped the team advance the depth of its openness and its analysis of issues.

Developing Shared Values and Beliefs

The next step for the management team was to reach consensus on a set of values and beliefs. In our view, developing shared values and beliefs is the cornerstone of becoming a learning organization. The values and the beliefs form both a template and a filter for all other decisions.

We have seen many organizations develop inspiring vision statements that then hang on the wall and never inform their decisions, policies, and procedures. The vision of a learning organization is to create an entity that operates consistently with its values and

Exhibit 1

Values and Beliefs for Laurinburg Management Team

The values and beliefs listed below were developed by the Laurinburg Management Team. They serve as our guiding principles for Managing the City of Laurinburg. They describe our future and will be the basis for decisions and actions taken by the management staff of the organization. These common values will make us more effective. They are the foundation for building a sense of team work, clarifying why things are done and promoting general understanding among employees and the public of what is important to us. We believe the following statements should serve as a guide for our actions.

We value:

- Honesty; our actions and communications are free of fraud and deception.
- Collaboration and teamwork.
- People's contributions to our organization and our community.
- Government; the things we do are important.
- People making informed choices, without threat.

We believe:

- All citizens have equal access to and delivery of the services for which they qualify.
- We are responsible stewards of the public trust, including money, property and the environment.
- The council/manager form of government increases the efficiency and effectiveness of the delivery of services.
- We relate to people in a helpful, courteous manner.
- We gather valid information and share all relevant information.
- People work better when they are committed to what they do.
- We employ people based on qualifications and abilities and employ the best possible people.
- Individuals are accountable and responsible for their actions.
- People are rewarded for their work based on its quality, quantity and complexity.
- We have a responsibility to assure that the City has competent employees and to provide opportunities for them to develop to the best of their ability.
- We improve service delivery through innovation and each of us is responsible for taking the risks associated with innovation.
- A sense of humor is an important part of our behavior.
- In taking individual's circumstances into consideration in our actions toward them.

beliefs. To us and to the Laurinburg management team, deeply held, shared values *are* the vision. They replace the lofty vision statements that most management groups develop. The team stated its values and beliefs (see Exhibit 1) the way vision statements are customarily presented—as if they already are true. They represent what the team wants the organization to become. We have found that explicit values and beliefs are much more useful guides for operating and policy decisions than a description of Utopia.

Embedded in the Laurinburg statement are three core values that form the basis of our approach to creating effective organizations: sharing valid, relevant information; making free and informed choices based on valid information; and, by making free and informed choices, generating internal commitment to each choice from those who must implement and support it.[10]

"Sharing valid information" means sharing information in a way that others understand it and can determine for themselves whether it is true. This means, for example, saying where information comes from, indicating how many people have raised a particular concern, and using clearly defined language. Instead of saying, "Some employees are opposed to this policy," a person sharing valid information would give specifics, saying, for example, "I have spoken with Bob, Tim, and Alice in the Public Works Department. Each is concerned that if we implement this policy, citizens will complain about garbage cans rattling in their backyards before 6:00 A.M." "Sharing relevant information" means providing data that support one's position and data that do not. For us, information is not valid until all known information pertinent to the topic under discussion is conveyed. Sharing valid information also requires continuing to seek new information that may either confirm or change a decision.

"Informed" choices are those that people make once they have valid, relevant information. "Free" choices are those that they make without threat, force, or manipulation. After extensive discussion the team agreed that, in a political context, choices are not always free but they can be fully informed. People can decide for themselves if a particular choice will accomplish their objectives. They can do this only when all known relevant information, all consequences, and all restrictions are clear.

People are "internally committed" to a choice when they are willing to take responsibility for it, accept its consequences, and struggle for its success whether or not they are externally rewarded or acknowledged.

Internal commitment does not occur when decisions are imposed rather than chosen.

Developing an understanding of and a commitment to these core values was critical to the Laurinburg management team's development. The team agreed that it would commit itself only to values on which it had consensus. Deciding whether they could fully support a value required team members to practice sharing valid, relevant information. And to do that, team members had to practice their ground rules. It became important, for example, for members to agree on the meaning of "honesty" (a value) and to examine assumptions about why "the council/manager form of government increases . . . effectiveness" (a belief). Each member explored with the team his beliefs, understandings, and concerns, many of which were untested assumptions about what is important to people. Members learned to share their interests—why they thought a value or a belief was important—rather than fighting about whether to include or omit an item. Trying to behave consistently with the three core values and to build other organizational values around that core taught team members how to explain their own reasoning more clearly. At the same time, they learned to open their views genuinely to others' questioning. The very process of developing a set of values and beliefs based on consensus did much to help team members understand one another and engage in dialogue rather than debate.

Organizational Improvements

It still is too soon to tell how becoming a learning organization will affect Laurinburg's productivity. The city is just beginning to figure out how to identify and measure improvement. Yet we and the management team already see significant progress. Team members have grown personally and improved how they relate to one another and make decisions. Each member accepts greater responsibility for the organization as a whole. The team has revised several key policies and procedures to be consistent with its values and beliefs. Department heads individually and the team as a whole share more information with others in the organization and with the council, citizens, and the press.

Developing the Management Team

As noted, the management team reached a critical early decision to make all major decisions affecting the organization by consensus. This essentially changed the level of authority and the responsibility of each member. There was no fallback, such as the city manager making the decisions alone. The only decisions that could go forward were those that each member fully supported.

Equally important, members agreed not to "hold the team hostage" by arbitrarily blocking consensus. If one member had unanswered questions, the team might reach consensus to proceed to the next step and then recheck commitment at various stages of implementation as more relevant data became available.

The move to decision making by consensus was important for three reasons: (1) it is consistent with the values of informed choice and internal commitment, (2) it makes all team members jointly accountable and jointly responsible for decisions, and (3) it assumes that each team member brings a unique blend of knowledge, experience, and interests important to management of the city. Opting for consensus significantly shifts the power base in an organization. A group makes the decisions, not the manager. Like any other member, the manager can block consensus, but decisions no longer come from him or her alone.

In Laurinburg each department head now has a significant influence on all policy decisions. This means that department heads can no longer blame the manager for poor or unpopular decisions. We expect that, as the team becomes more skilled and as more employees are trained in this approach, the team will make fewer decisions about how work is done in the work units. The organizational redesign will create flexible policies allowing units to design their work so that they best meet the interests of their stakeholders.

This shift in responsibility has not been easy. Seeking consensus, particularly on issues as personal as values and beliefs, is time-consuming. The team began developing its statement of values and beliefs on June 12, 1996. It did not complete the statement until September 11, 1996. In the interval the team spent most of five days engaged in the dialogue necessary to reach consensus, and it devoted portions of two more days to clarifying and revising the final version. Admittedly this took more time than it would now because team members were learning to use the core values and ground rules as they discussed the substantive issues. Even so, reaching agreement was arduous. Team members are quick to acknowledge that setting aside time for discussions is essential to creating dialogue rather than argument. But when asked if they have

Contrasting chair arrangements in Laurinburg's Council Chambers reflect the influence of the learning organization project. Before: chairs in rows, all facing manager's podium; after: chairs in circles, signaling the prospect of interaction among all participants.

any reservations about the process to date, most say that their primary concern is the time it has taken and will continue to take.

The team also has struggled with a tendency to defer to Vandenberg and a reluctance to challenge his reasoning. Members have made significant progress in sharing the leadership role fully, but as persons who prefer introversion, they have learned to volunteer their reasons and share their feelings only with great effort. A key to the team's success has been Vandenberg's leadership. He constantly opens his own ideas to questioning by the team and invites members to examine how actions might be inconsistent with their values and beliefs.

Learning from Failures

In many ways the management team may have learned more from trying to behave differently and falling short than from succeeding easily. Keys to becoming a learning organization are taking risks, experimenting, and learning from subsequent reflection on how each person's thoughts and behaviors contributed to success or failure.

Correcting a False Start

When the team completed its values and beliefs statement, for example, it decided that was the time to tell employees what it was doing, relate what a learning organization might look like, share the values and beliefs statement, and invite employees to let department heads know when they fell short of embodying the values and beliefs.

Typically, management communicated information to employees in large-group meetings held in Council Chambers, a rather formal environment that focused attention on the person up front. At most meetings Vandenberg would do all the talking. When he invited questions, only one or two employees would speak up. Then everyone would leave. The managers did not know what the employees had understood, and the employees did not know if they had heard the message clearly. Neither group asked the other. Both operated on the assumption that they knew what the other wanted. They would continue behaving in this manner until mistakes or problems escalated, then they would hold another meeting.

The management team decided that the best way to signal the fundamental change under way was to schedule a series of small-group meetings around the city and to rearrange the seating. The team would ask employees to pick up a chair as they arrived and to sit in a circle wherever they liked. The team members intended to sit among the employees, talk about the learning organization, and invite questions. The team invited us to attend the first session.

We were surprised when we arrived. As usual, the meeting was scheduled in Council Chambers. All the chairs were facing the front in rows. Vandenberg walked briskly to the head of the group and began a thirty-minute presentation. No one stopped him or asked any questions. As he concluded, a couple of the

management team members (who were sitting among the group) added comments. Finally, two brave employees asked brief questions. Then, after an uncomfortable silence, everyone left the room.

Afterward we met with the team. We said that we had some concerns about what had just happened, and we asked members how they felt about this first effort to communicate with the rest of the organization. They replied with comments like "Well, it was okay," "It went about like we predicted," and "That's just how our employees are. They aren't going to ask any questions. We did a good job of telling them about what we are doing anyway." Then we asked why team members had changed the design. They revealed that, on the day before the presentation, they had decided the new approach was too risky: employees might think it silly, and they would be embarrassed. They also thought that employees probably would not participate anyway, so they should do what they were accustomed to doing.

Suddenly team members had a critical insight. By doing what they always had done, they got the same consequences they always had gotten. By proceeding on their untested assumptions about employees' habitual behaviors, they got the opposite of what they intended. This was not because the employees could not or would not change but because team members had tried to protect themselves from threat or embarrassment. They saw the gap between their espoused theory and their theory in use. Just being up front in Council Chambers, Vandenberg said, led him to talk and not ask questions, even though he had stated repeatedly that he wanted employee participation. Other team members did not stop Vandenberg and ask for questions because, in the past, interrupting or questioning the manager in front of a group was not appropriate. Preserving the notion that the manager was right was more important than creating valid information for everyone present.

From that point forward, team members have been better able to learn from gaps between their values and their actions and to redesign their actions. They still have difficulty doing this without our help. One of our observations is that catching your inconsistencies *before you act* is extremely difficult. What team members can do now, however, is stop when we prompt them, figure out how they are being inconsistent, and either redesign their conversation or change a policy or a decision to make it consistent with their values and beliefs.

Team members also openly admit when they make a poor decision or need to change a decision, and they involve employees in the discussion. They redesigned all subsequent discussions with employees about the learning organization, holding them along the lines of the original plan. The result was more open discussion, employees and department heads alike asking questions and sharing concerns. Team members also let the first group of employees know that they thought they had not been effective in that session, and they invited those participants to attend another session. This approach has great potential for changing the level of openness and trust in an organization.

Countering Unintended Consequences

Yet the team still struggles with how it relates to the rest of the organization. One of the important lessons of the experience is to think about and plan carefully how to communicate with employees. Team members deemed it important to focus on their own learning and development before foisting another change process on the rest of the organization. In doing so, they unwittingly decreased their opportunities to share relevant information with the very people who they hope will ultimately share in the process.

As team members became clear about their shared values and started to work with one another at new and deeper levels, they began to spend more time together. After some employees began to complain about the time the team spent "behind closed doors," the department heads realized that they were making up some of the time spent in team meetings by devoting proportionately less time to the people reporting directly to them. This reduced the chance that employees would share problems and concerns with the management team and, in the long run, meant that the team would not have valid information on which to base decisions. Clearly, less communication with the rest of the organization created exactly the opposite of what the team intended and could defeat the whole effort.

The team backed up and thought about how to work more effectively with others while continuing its own development. It now holds meetings at different locations around the city so that more employees have an opportunity to see it meeting and get a sense of what is going on. Team members have held in-depth discussions about how they can model their values and beliefs in working with those who report to them. On occasion they have helped one another design future conversations with employees or critiqued the consistency of one another's efforts. The team has

Exhibit 2

Water and Sewer Extension Policy

On June 17, 1997, Laurinburg City Council adopted the ordinance below (Ordinance No. O-1997-18).

Section 1: Article XX, Amendments, Appendix L, Water and Sewer Extension Policy, of the Laurinburg Unified Development Ordinance, is here amended by deleting the Appendix in its entirety and replacing it with the following:

Appendix L
Water-Sewer Extension Policy

Laurinburg will extend water-sewer service within the City when funds are available (from the city or other sources, and costs are reasonable, and when they:

Improve the water or sewer system or enhance future annexations, or stimulate economic development, or establish or protect territory, or have substantial benefit to citizens inside and outside the city.

The determination of whether or not costs of extending water-sewer service are "reasonable" is in the sole discretion of the city manager, subject to appeal to the city council, which determination shall be final.

Section 2: This ordinance shall be in full force on and after the 1st day of July, 1997.

Guiding Statement
The city may provide water and sewer service to meet the interests of public health and safety, to stimulate economic development, to generate revenues or to respond to citizen requests. We have an obligation to extend these services when citizens want them or to maintain the system. To be responsible stewards, we will consider project feasibility criteria for each extension.

Project feasibility criteria would include the following:
(This list not intended to be absolute)

Cost: is money available, number of customers served as related to cost, variance from average costs, immediate or potential revenue, benefit to the community as related to costs such as jobs or tax base provided, are funds available from other sources (the developer, requesting party, grants, etc.)

Public health & safety: fire protection, water quality, area has contaminated wells, area has failing septic system.

Engineering: is the extension a system requirement or need? is the request feasible?

To encourage development: will the extension encourage quality development inside the city, will the development be annexed or make future annexation easier

Alternative solutions: are there alternative solutions, such as septic tank maintenance service, etc.

discussed ways to let employees know that its meetings are open to observers. It has yet to act on these ideas, however. When it needs particular expertise or firsthand information on a topic, it asks employees to attend, but to date, employees have not participated unless invited. Designing how to share the learning organization process with the whole organization is an important next step that will require overcoming the resistance inadvertently created.

Creating New Policies and Procedures

Among the most successful results of Laurinburg's efforts to date are new policies and procedures designed to be consistent with the team's values and beliefs. The revised policies communicate clearly to employees, citizens, and other stakeholders how the organization differs from a traditional bureaucracy. Crafted with long-term systemic effects in mind, they answer the questions "What are the organization's interests in this area?" and "What are we jointly trying to accomplish?" Instead of setting forth a list of specific rules, the new policies and procedures provide guiding principles to support thoughtful responses to a wide variety of ever-changing situations.

Water and Sewer Extension Policy

The city's new Water and Sewer Extension Policy (Exhibit 2) illustrates this difference. City staff and private developers agreed that the existing policy was lengthy and unwieldy. Decisions required many steps and often seemed arbitrary. One citizen or developer might be denied a relatively short extension, whereas another might be granted a lengthy extension for only one or a few lots. The old evaluation criteria included very specific provisions—for example:

> Each phase of a residential subdivision must contain at least 25 buildable lots. If the development is to be done in phases preliminary plans for the total subdivision must be submitted. However, each phase will be considered separately for funding. If a subdivision is being constructed in phases, the developer may not make an additional application until after certificates of occupancy have been issued for at least 50% of the lots in the current phase.[11]

The provisions were time-consuming to administer and, although important, sometimes did not make sense for a particular project or situation. On the other hand, the written policy did not address a num-

ber of situations at all. These were handled verbally and also inconsistently.

Consistent with its new approach of considering interests and its published belief "in taking individual's circumstances into consideration in our actions toward them," the management team thought about why the city might or might not want to extend service. This resulted in a list of interests the city tries to meet. The new policy, with its Guiding Statement, reflects these interests.

During policy development, team members expressed concern that the new approach would frustrate developers and citizens. Saying yes or no right away would not be as easy. The team agreed, however, that stating the city's intent to extend service whenever possible, along with all the issues to be considered in each situation, was more truthful and more consistent with providing "all citizens [with] equal access to and delivery of the services for which they qualify" than the old system was.

Clearly the new policy makes the staff and the council better stewards of available resources by allowing them to develop agreements that consider long-term plans for the system and situation-specific conditions and resources. The new policy also is shorter and easier to understand.

The management team completed its draft of the new policy on December 3, 1996. The next step was to recommend the policy's adoption by the city council. First, however, the team wanted to educate the council about the process underlying the recommendation. Proposing a policy change without explaining the reasoning behind it and without sharing all valid, relevant information would be inconsistent with the team's new values.

So during the Laurinburg council's January 1997 retreat, the city manager and the two of us discussed the learning organization concept with the members and responded to their questions and concerns. The exchange included how the effort might affect the council and how council members might effectively support it. At the conclusion of the discussion, then-mayor William Purcell and each council member indicated their support for the coming year. They agreed to do the following:

- Provide support for training and development of staff
- Keep leadership informed of concerns or complaints they heard and treat complaints as valid, relevant information that might result from incomplete understandings or might indicate a need for the city to change its way of doing things
- Clearly express their concerns about the process and engage in productive discussion regarding those concerns

In reflecting on the process used to develop the new Water and Sewer Extension Policy, the management team realized that it had begun to create a new template for policy formation for the city. At the same time, it recognized that its approach was not yet wholly consistent with its aims. A more consistent approach would build commitment to a new policy through participation by those who would implement and be affected by the policy (for example, citizens and employees).

Employee Orientation

Next, the team attempted to apply its learning about involvement to employee orientation. Supervisors had complained that orientation for new employees was not offered regularly, and they had suggested that they take over orientation rather than wait for the Human Resources and Safety Department to act. The management team recognized that the department heads also had interests in orientation. To have one group or the other take over would not necessarily meet everyone's interests.

The team decided to ask employees to form a group that would redesign orientation. Employees responded that they did not understand why they should be involved. They cared little about what orientation included, just that it took place. The management team then realized that it was imposing involvement on employees. Orientation had no direct effect on how employees did their jobs. Department heads, not employees, had strongly vested interests in the content and the process of orientation. Employees were an important source of information and should be involved at the level of suggesting and reviewing content, not at the level of taking responsibility for the task. The team subsequently took responsibility for redesigning orientation with input from employees.

From this experience we and the team learned an important lesson about empowerment and commitment: Management should not ask employees to participate in decisions in which they have no vested interests or about which they have no relevant information. Nor should management expect employees to take responsibility for tasks they will not implement.

Exhibit 3

Work Hours Policy

Work Hours Policy at Time of Request

Department Heads shall establish work schedules, with the approval of the City Manager, which meet the operational needs of the department in the most cost effective manner possible. (City of Laurinburg Personnel Policies, Article V, Section 1—Work Schedule)

Revised Work Hours Policy (adopted January 23, 1998)

The detailed policy developed by the Management Team (consistent with the general policy of City Council) requires that changes in scheduled work hours meet the following interests:

1. A majority of the employees within the work group need to accept work hours;
2. Work hours should allow citizens to have reasonable access to public services;
3. Service to our citizens should be provided at times that least inconvenience the citizen;
4. Work hours should maintain or increase productivity;
5. The interests of employees should be considered;
6. Work hours should not have a negative impact on:
   (a). Work groups;
   (b). Functional area. This interest deals with situations where a scheduling change for one employee might affect the work of another employee who works for a different supervisor. For example, if Dorothy Eaton and Jack Di Sarno have a simple conversation, and decide that Dorothy will now finish her work day at 4:00 p.m. rather than 5:00 p.m., this will have an affect on Ricky Davis, the Cemetery Supervisor, because Dorothy, who works in the same suite of offices as Ricky, handles most of Ricky's telephone calls;
   (c). Other departments or work crews. Once again, if an employee or group of workers in one department change their schedules it could disrupt the work of co-workers in other department. For example, if the engineering office changes his schedule to 4-10 hour days per week it will limit the access Stacey McQuage has to information about the location of underground utilities;
7. Work schedules shall be consistent with the values and beliefs of the Management Team;
8. Work hours should maintain or improve the level of service to citizens;
9. Scheduling should maintain or improve overall cost effectiveness.

Employees say such requests are "frustrating" and lead to compliance rather than genuine commitment. Determining when and how to involve employees is critical.

Work Hours Policy

Another shift in how the organization works occurred when the management team decided to address a question about work hours. The shift was significant in two ways. First, the issue was not brought to the team by the department head most directly affected. Employees in the Public Works Department wanted more flexible working hours during the summer months. They mentioned this informally to the treatment plants director. Recognizing that this important concern might be shared by or affect other departments, the treatment plants director brought the employees' wishes to the team. There was no attempt to bypass the director of public works; he was fully involved in the discussion and the ensuing decision. Employees simply had not thought to make a formal request of him, and the treatment plants director, with his new understanding of and sense of responsibility for the organization as a system, saw it as appropriate to raise the issue himself.

Second, the team recognized that its role now was not to approve or disapprove work hours but to guide the setting of hours to meet the city's interests. Rather than change existing personnel policies, it added a statement of organizational interests (see Exhibit 3) to guide each department head in helping employees reach agreement about their work hours.

The statement makes clear that work groups have flexibility in setting their work hours. They must consider the interests of employees, others in the organization, citizens, and the management team. The management team will discuss changes, not to approve or deny them but to provide information about whether and how they will affect other work areas and to be certain all interests are met. Policies like this one move an organization away from focusing on rules to focusing on what the organization is trying to accomplish.

Changing Management Procedures

The management team also has changed some of its own procedures.

Hiring

When the city's finance director accepted another job, the team decided to approach hiring differently.

Its aim was a process that would generate as much valid information as possible and enable the team to make an informed choice that each department head and the manager could support. The team assumed that its members could gather better information working together than any individual could working alone. Full support from all team members was important because of the increased level of involvement of each member in key decisions. The emphasis on creating an organization consistent with the team's values and beliefs also made it as important to judge applicants on their potential fit with those standards as on their ability to meet the job's technical requirements.

Working with us, the team designed a process that matched selection criteria both to job demands and to its values and beliefs. The team then developed interview questions carefully designed to elicit information relevant to the selection criteria. To conduct the interviews, team members divided into two panels, each one asking questions about a different set of selection criteria. They trusted each other to gather and share valid data.

Team members reached consensus at each stage of the hiring process: the steps to follow, the selection criteria to use, each member's level of involvement, the questions to ask, and the person to hire. For the first time, the management team, not an individual, decided on a new department head. This level of support has greatly improved the integration of the new department head into the management team and the organization.

Employees also were involved in hiring the new finance director. Applying lessons learned from redesigning orientation, the management team asked employees in the finance department and others who would work closely with the new director how they would like to be involved. Employees chose not to participate in interviews but readily gave information helpful to determining the knowledge and the skills required for the job.

The team spent some time capturing lessons learned in hiring the finance director, revised the process, then used it again to hire a new human resources and safety director. This is the kind of organizational learning fostered by the Laurinburg process.

Budgeting

The team also redesigned the city's budget process. In the past Vandenberg met individually with department heads to review their budget proposals and agree on changes. For the 1997 budget, the team discussed the entire document, council objectives, and ways that department budgets might be mutually supportive in meeting goals. This was consistent with the team's new understanding of the organization as an integrated system.

For the 1998 budget, the team built on its learning from the 1997 experience. Recognizing that each department head had the most valid data for the council about his or her specific area, the team again created a joint budget but also had each department head present information to the council and respond to questions. The result is a budget that is better understood by the council, the department heads, and the manager. It enables each department to support overall organizational goals.

Other organizations have adopted similar processes. The difference in Laurinburg is that management team members communicate in ways that truly create valid information. They are genuinely able to set aside most of the status, ego, and territorial concerns that commonly influence budget decisions.

Future Issues

Laurinburg still faces complex issues in determining whether and how it can become a learning organization. The two of us face issues not only in helping Laurinburg but in determining how to work with other local governments. Following are some critical areas to be addressed:

1. Expanding the process to the rest of Laurinburg's employees will be a challenge in both time and money. Like many small towns, Laurinburg has limited resources. Having a fairly small management team was an advantage in the early stages because it sped learning and hastened consensus, but it will be a disadvantage in the later stages. Key to involving others in the journey toward a learning organization is for department heads to model the basic concepts in their own areas and teach those concepts to others. Yet they also must continue their own learning, track the effectiveness of the process, and attend to daily operations. In coming months the team will try to balance these difficult trade-offs.

2. An important part of expanding the process is increasingly to involve nonmanagement staff in decision making. Doing this requires developing in-house expertise and gradually transferring responsibility and authority beyond the management team.

3. Developing expertise and transferring authority require training for all employees in new ways of thinking. The current language of systems thinking and mental models is not easy to understand. We must develop cases, examples, and terminology that make the concepts easier to grasp.

4. To embody its core values, Laurinburg ultimately will have to redesign its fundamental personnel policies. In a local government environment in which personnel policies emphasize control and regulation, creating a sense of personal accountability and ownership of the organization's mission, goals, and values is nearly impossible. This redesign will be time-consuming and probably difficult.

5. A potential clash also exists with the larger environment in which local governments function. The kind of organization Laurinburg is creating may be at odds with the traditional legal and regulatory framework of cities. For example, policies that encourage employees to take responsibility for their own safety practices may risk employees not following federal safety regulations and the city incurring a large fine. Failing to protect the city against a fine would be inconsistent with being responsible stewards of the public trust. Such tensions probably cannot be resolved in the near term. Thus this organization and others will face dilemmas that require much work with a broad network of professionals and the ability to tolerate fairly high levels of ambiguity.

Lessons Learned

The Laurinburg experience already offers numerous lessons about creating more responsive local governments:

1. Deep, fundamental learning cannot be separated from getting work done. Rich insights occur when training is integrated with doing and reflecting on what happened. This is true both for learning within a group, such as managers testing one another's assumptions and inferences, and for learning within an organization, such as managers and employees together evaluating the effectiveness of each other's actions.

2. Failed attempts may produce more learning than instant successes do. Creating an atmosphere of risk-taking and experimentation is critical. In organizations constantly open to public scrutiny, this can pose a dilemma if the culture does not appreciate or support the experimental nature of the learning process.

3. Values and beliefs supersede vision. Generating a specific vision does not clearly inform daily decisions or guide employees in deciding for themselves. Instead, a commitment to live by a specific set of values accomplishes these goals.

4. Learning cannot be imposed on anyone. A management team can develop values and beliefs only for itself, not for the larger organization. At best, imposition creates compliance. It may generate active resistance.

5. Simply involving employees in decisions does not achieve empowerment and commitment. Involvement has multiple levels, ranging from providing information to taking full responsibility for a task. Commitment comes from matching the level of involvement to the level of interest and responsibility in each decision.

6. Consensus decision making is at the heart of building commitment and establishing joint accountability. Working toward consensus generates valid information; with valid information, people understand their part in implementing decisions and making an organization effective. Consensus transfers a sense of responsibility to those involved; they become willing to be accountable for actions.

7. To support fundamental change, members of an organization must master four major areas: thinking systemically, seeing mental models, behaving consistently with core values and ground rules, and using a shared problem-solving model.

8. Learning for transformation seems to follow a predictable set of stages:

a. Members of the organization who are directly involved in the facilitated change—in Laurinburg, the leadership group—become more effective in sharing relevant information and validating the information they share.

b. Members of the leadership group question their assumptions about what they do and recognize the difference between operating on assumptions and operating on valid information.

c. The leadership group recognizes that it has very limited data to answer many questions that arise when it operates on valid information. It no longer withholds information from important stakeholders such as the council, citizens, and the press. Rather, it begins to appreciate the nature of the partnership it must establish with these groups to become more effective and to make the changes it deems necessary.

d. The leadership group sees how its policies, rules, and structures impede effective service to citizens, particularly when they reflect a need for control, not client and organizational interests. In the process the leadership group realizes that its actions often create the very problems it is trying to avoid.
e. Finally, the leadership group initiates redesign of organizational policies, rules, and structures to be consistent with its core values and beliefs.

9. The process requires outside facilitators who commit themselves to work with the organization over a long period, probably three to five years. For a group to learn to reflect on its own behavior while it engages in that behavior is difficult. Facilitators who have no investment in the outcome can call the group's attention to its behavior at critical junctures.

10. It is time-consuming to create lasting change. Developing a learning organization takes years of hard work and requires a significant commitment of time and energy from key people in the organization. This creates a dilemma in local governments, where the tenure of managers averages 5.9 years.[12] On the other hand, most change strategies based on learning new techniques and then rapidly implementing them are at best successful only in the short run. It is increasingly important to help governments understand the implications and the probable outcomes of the choices they make for change.

Conclusions

We believe that Laurinburg's experience will be useful to other organizations. A number can profit from the lessons about training, focusing on values, and involving employees. Realizing the full value of the Laurinburg process, however, requires a long-term commitment to organization development. Finding resources to help other organizations do this work presents a challenge. As yet, few people are trained in the key concepts, and even fewer have experience facilitating an organization through this process. Becoming a learning organization is long-term, experimental, and very expensive for the average city or county.

We hope that others will join us in thinking about how to help organizations try a process such as that undertaken by Laurinburg. We believe that this work will succeed when local governments build a learning community across the state whose members can share resources. That is a significant challenge. It also is a compelling vision for strengthening all of North Carolina's communities to face the demands of the coming decades.

Notes

1. Peter Block, *The Empowered Manager: Positive Political Skills at Work* (San Francisco: Jossey-Bass, 1987; reprint, 1991), xv (page citation is to reprint edition).

2. Chris Argyris, "Empowerment: The Emperor's New Clothes," *Harvard Business Review* 76 (May–June 1998): 104.

3. The Wake County Library is engaged in a similar process. For more information, contact Richard McMahon, Wake County Library Director Tom Moore, or cofacilitator Becky Veazey of the MAPS Group, Cary, N.C.

4. Sanford, a former Institute of Government faculty member (1941–42, 1947–48), served as state senator (1953–55), governor (1961–65), and U.S. senator (1987–93). Gill served as state treasurer (1953–76) and chair of the Local Government Commission (dates not available).

5. We thank Robert Putnam of Action Design Associates for the use of the terms "unilateral control model" and "mutual learning model" [from *Organizational Learning in Action: A Workshop Presented by Action Design* (Newton, Mass.: Action Design, 1995)]. They provide an accessible description of Chris Argyris's Model I and Model II theories of action. *See, for example,* Chris Argyris and Donald Schon, *Organizational Learning II: Theory, Method and Practice* (Reading, Mass.: Addison-Wesley, 1996).

6. Draper L. Kauffman, Jr., *Systems One: An Introduction to Systems Thinking* (Minneapolis: S. A. Carlton, 1980), 1.

7. For an introduction to mental models, *see* Chris Argyris, "Good Communication That Blocks Learning," *Harvard Business Review* 72 (July–August 1994): 79–81; and Peter M. Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (New York: Doubleday, 1990), 174–204. More in-depth discussion of this topic appears in Argyris and Schon's *Organizational Learning II* and *Theory in Practice: Increasing Professional Effectiveness* (San Francisco: Jossey-Bass, 1974).

8. Roger Schwarz, *The Skilled Facilitator* (San Francisco: Jossey-Bass, 1994).

9. Roger Schwarz, *Ground Rules for Effective Groups, Revised* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1995).

10. For a more complete discussion of these core values, *see* Schwarz, *The Skilled Facilitator,* and the work of Argyris and Schon, particularly *Theory in Practice.*

11. City of Laurinburg Unified Development Ordinance, art. XX, amends., app. L, Water and Sewer Extension Policy (1997).

12. This is the national mean number of years in current position, from the International City/County Management Association's 1996 "State of the Profession" survey. North Carolina's average was 6.7 years. We thank Sebia Clark, ICMA research assistant, for providing the data.

Obtaining Record Checks to Reduce Risk

James C. Drennan

It is the nightmare of many administrators who work with children, elderly persons, or persons with disabilities: An employee or a volunteer harms a client, and examination of the offender's record reveals a conviction for similar conduct earlier. The administrator wonders whether she might have prevented the harm and whether her agency may be liable for damages.

One way that an agency can help prevent harm is by obtaining criminal record checks of employees, applicants for employment, and volunteers. The checks may identify persons potentially unfit for contact with vulnerable populations, and the fact that records are obtained may deter others. Should the agency obtain such records?

There is no simple answer. Many human services agencies routinely obtain record checks of employees, applicants, and volunteers as part of a risk management plan to control their liability and prevent harm to their clients. But obtaining records takes money, time, and effort, all of which probably are in limited supply in most human services agencies. As a result, the decision to obtain record checks almost always involves an agency in assessing its exposure to risk and in weighing the costs and the benefits of this part of its risk management strategy. This article describes the various types of records available in North Carolina and the limitations on access to them.

The author is an Institute of Government faculty member who specializes in nonprofit organization law and court administration.

Types of Records

Generally, criminal record systems are based on either fingerprints or names. Fingerprint-based systems are indexed by assigning a unique number to each set of fingerprints received by the agency maintaining the records. A person may have criminal records under several names, but as long as the fingerprint is attached to the record of conviction, all the records can be matched. Fingerprint-based records are the most dependable because the method of identification itself is very reliable. But they are harder and more expensive to gather and retrieve than records based on names or other identifying information.

Name-based systems use names, dates of birth, Social Security numbers, addresses, and similar information to index criminal histories. Name-based records have the dual problem of aliases (different names used by one person) and duplications (one name used by two or more persons).

Sources of Criminal Histories

North Carolina agencies may have access in varying degrees to five sources that contain all or part of a person's criminal history: Federal Bureau of Investigation (FBI) records, State Bureau of Investigation (SBI) records, court records, a sex offender registry, and driver records.

FBI Records

FBI records cover the entire country, so they are especially helpful in searching for records on people who move around. The FBI receives records of criminal activity from federal agencies and crime and criminal history records from each state.[1] Federal law encourages each state to have a central agency responsible for maintaining criminal histories on those who commit crimes in its jurisdiction. In North Carolina that agency is the SBI, specifically the Division of Criminal Information. Because FBI records are largely derived from the states, they are no better than the records of the state agencies providing the data.

Access to FBI records is not available to the public. It is further restricted to certain types of agencies pursuing particular kinds of purposes. FBI records are based on fingerprints. The fee for a record check

is $24 for an employee or an applicant, $18 for a volunteer. (To either figure, an agency should add $14 because federal law mandates that the SBI conduct a state criminal record check before forwarding a request to the FBI.)

SBI Records

SBI records, which go back to 1937, cover the activities of North Carolina's law enforcement agencies, correction agencies, and state courts.

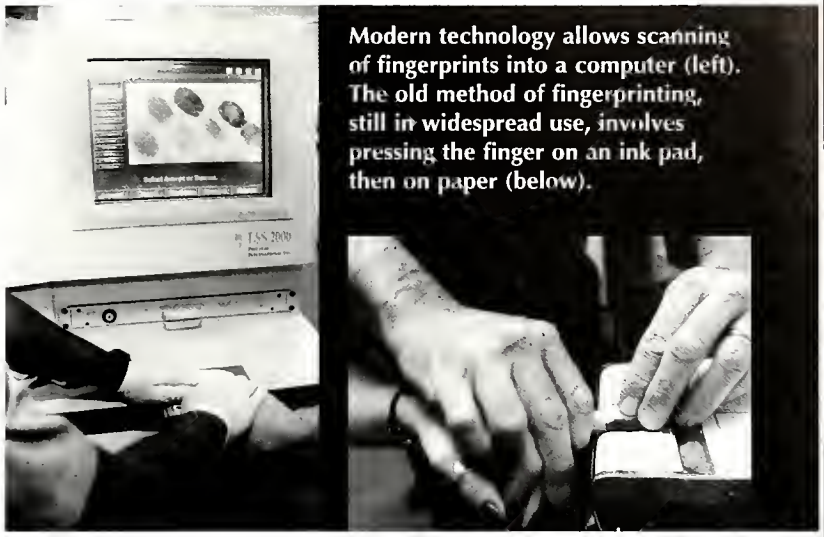
The SBI receives its information from the clerks of superior court in the 100 counties of the state. Generally the clerks send records any time a person is fingerprinted, including instances in which a person is fingerprinted after a charge and then the charge is dismissed or the defendant found not guilty. However, there is no uniform state policy on the extent to which charges and convictions must be reported to the SBI. Instead, Article 86 of Chapter 15A of the North Carolina General Statutes (hereinafter G.S.) directs the senior superior court judge in each judicial district to issue a fingerprint policy specifying the kinds of cases for which fingerprints will be collected and sent to the SBI. Each policy must cover all felony charges and related convictions. Whether to include misdemeanor charges and related convictions is left to the judge promulgating the policy. G.S. 15A-502 prohibits the fingerprinting of persons charged with motor vehicle offenses that are Class 2 or 3 misdemeanors. It also prohibits fingerprinting of most juvenile delinquents.[2]

Like FBI records, SBI criminal history records are not public. Access to them is limited to law enforcement officers and other categories of persons specifically authorized by state statute (this is discussed in more detail later). The fee for an SBI search is $14 for a fingerprint check, $10 for a name check.

Court Records

The clerk of superior court in each county maintains court records. The primary purposes of this system are to provide court officials with information to use in processing and disposing of cases and to keep a permanent record of court activities, not to document the criminal histories of particular persons. As a result, the system differs from the FBI and SBI systems in two important ways. The first is that the system is name based. (Often, however, it also includes date of birth, Social Security number, or address. Further, increasingly, as clerks of superior court send their reports on the disposition of cases to the SBI, they are attaching fingerprint-based identification numbers.)

Will Owens



Modern technology allows scanning of fingerprints into a computer (left). The old method of fingerprinting, still in widespread use, involves pressing the finger on an ink pad, then on paper (below).

Court records are, with very narrow exceptions,[3] public records, and each county's records are available for inspection in the clerk's office.

That leads to the second difference. The records are meant to aid the court system's work in a particular county. North Carolina has 100 counties, and the extent to which people move around the state to conduct their business, including their criminal business, significantly limits the value of county-based records.

The state's Administrative Office of the Courts maintains a statewide computer system that includes summary information on all kinds of cases, but it is in essence a collection of the 100 counties' records, with each county's data maintained separately. In that system it is technically possible to conduct a statewide name search, which will produce a summary of the activities involving a person matching that name. At present, however, this capability is not available to the public because of a lack of resources to manage the information system adequately. To improve public access to their particular county's court records, many clerk's offices have terminals dedicated to public use. There is no statewide policy on making such terminals available, so an interested person should contact the appropriate clerk's office to determine how to gain access to the records of a particular county.[4]

If no terminals are available to the public or if an agency needs a certified record, the clerk's staff can search the county's records for a specific name. The fee is $5 per name. For such a search, the record produced will cover only the categories that the requesting agency specifies. For example, an agency may request a person's entire record—that is, convictions and charges. Short of that, it may request convictions

Table 1

Organizations Authorized to Request Record Checks by the SBI

Organization[1]	Statutory Authority	People Covered	Authority Mandatory/ Discretionary	State/ National Records[2]	Statutory Specification of Crimes to Check for[3]
Local boards of education	G.S. 115C-332, 114-19.2, -19.3	Applicants; contractors who do work normally done by employees; employees; and volunteers[4]	Discretionary; for applicants and contractors, school board must adopt policy	State only for employees and volunteers; both for applicants and contractors	Yes
Nonpublic schools	G.S. 114-19.2, 114-3	Employees, applicants, and volunteers	Discretionary	State only	No
Department of Health and Human Services	G.S. 114-19.2	Employees, applicants, and volunteers of schools operated by department	Discretionary	State only	No
State Board of Education	G.S. 115C-238.29.K	Charter school board members, employees, and applicants	Discretionary, but State Board must have policy	Both	Yes
Department of Health and Human Services	G.S. 110-90.2, 114-19.3, 114-19.5	Child care providers' employees and applicants in contact with children, and owners of covered facilities; family members over age 15 who are present in family child or nonlicensed child care home when children are present	Mandatory for employees and applicants, discretionary for volunteers	Both for employees and applicants;[5] state only for volunteers	Yes
Department of Health and Human Services	G.S. 131D-10.3A, 114-19.3, 114-19.4	Foster parents, applicants to be foster parents, and adults residing in foster care homes	Mandatory; annual recheck of state record also required	Both	Yes
Nursing homes and home care agencies licensed under G.S. 131E	G.S. 131E-265, 114-19.3	Nursing home employees who don't have occupational licenses and home health care employees who go into homes; volunteers	Mandatory to be employed; discretionary for volunteers	State only	Yes
Adult care homes licensed under G.S. 131D	G.S. 131D-40, 114-19.3	Employees of home and employees of contract agency dealing with home who don't have occupational licenses; and volunteers	Mandatory to be employed; discretionary for volunteers	State only	Yes
Hospice organizations	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No
Child-placing agencies licensed under G.S. 131D and departments of social services	G.S. 114-19.3	Potential adoptive parents	Discretionary	State only	No
Residential child care facilities licensed under G.S. 131D	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No
Department of Health and Human Services	G.S. 114-19.6	Employees and applicants in direct care giving positions, and their supervisors	Discretionary	Both[6]	Yes
Hospitals licensed under G.S. 131E or 122C	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No
Area mental health authorities	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No
Any other organization, profit or nonprofit, that provides direct care and services to children or to sick, disabled, or elderly persons	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No

by name, county, and zip code, and provide names, addresses, photographs, and information about the offenses for which the subjects were convicted.

Driver Records

Driver records are available from the Division of Motor Vehicles. They contain information about convictions for motor vehicle offenses, driver's license sta-

law enforcement agencies, for criminal investigations; and to specified users, for purposes other than criminal investigations.[9] The rules that authorize access reflect a strong desire to protect the privacy of the subjects and a fear that the information in the records will be misused. To permit entities other than law enforcement agencies to have access to these records, a state must satisfy two separate legal steps:[10]

Notes to Table 1

1. In addition, various occupational licensing boards may have access to SBI records for checks of potential licensees. The occupations covered are attorneys, bail bondsmen, private protective services personnel, taxi drivers, and funeral directors. Of those, only the Board of Law Examiners, the entity that licenses attorneys, is authorized to have access to federal records.

2. If access to national criminal history records is authorized, fingerprints must be provided to the SBI because the FBI requires them before it will approve a state's access to federal records for this purpose.

3. In the rows in which this question is answered yes, the statute adopted by the General Assembly lists crimes that are to be considered by the requesting entity in determining if the person's criminal record disqualifies him or her to perform the duties of the position. In the rows in which this question is answered no, the requesting agency is free to determine which criminal offenses are appropriate to consider in assessing a person's fitness for a position.

4. G.S. 115C-332 authorizes record checks of applicants, contractors, and persons hired on a conditional basis pending the receipt of the record check. If a local school board uses this statute, it must adopt a policy uniformly applied for this purpose; it may not make ad hoc determinations. G.S. 114-19.2, however, authorizes the SBI to provide record checks on employees of public schools with the consent of the employee. Only G.S. 115C-332 has received federal approval, so record checks on employees performed under G.S. 114-19.2 are limited to state checks only.

5. For employees and applicants who have lived in North Carolina for the past five years, only a state check is required. For those who have not, a national check is required if the state check does not disqualify the person from serving as a child care provider.

6. For employees and applicants who have not lived in North Carolina continuously for the preceding five years, a national check is required if requested by the department.

		adults residing in foster care homes	also required		
Nursing homes and home care agencies licensed under G.S. 131E	G.S. 131E-265, 114-19.3	Nursing home employees who don't have occupational licenses and home health care employees who go into homes; volunteers	Mandatory to be employed; discretionary for volunteers	State only	Yes
Adult care homes licensed under G.S. 131D	G.S. 131D-40, 114-19.3	Employees of home and employees of contract agency dealing with home who don't have occupational licenses; and volunteers	Mandatory to be employed; discretionary for volunteers	State only	Yes
Hospice organizations	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No
Child-placing agencies licensed under G.S. 131D and departments of social services	G.S. 114-19.3	Potential adoptive parents	Discretionary	State only	No
Residential child care facilities licensed under G.S. 131D	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No
Department of Health and Human Services	G.S. 114-19.6	Employees and applicants in direct care giving positions, and their supervisors	Discretionary	Both[6]	Yes
Hospitals licensed under G.S. 131E or 122C	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No
Area mental health authorities	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No
Any other organization, profit or nonprofit, that provides direct care and services to children or to sick, disabled, or elderly persons	G.S. 114-19.3	Employees, applicants, and volunteers	Discretionary	State only	No

alone. Or it may request only criminal records and receive a report excluding infractions (which include most traffic violations).[5]

The court system's database also includes records on child support, financial matters, and civil actions. The portion of the system dealing with criminal records has been in place for the whole state since the late 1980s. Before that, the clerks kept paper records. These records are still available in each clerk's office, but there is no statewide computer index of them.

Sex Offender Registry

The SBI also maintains a sex offender registry, which is a public record.[6] The law establishing the registry requires that persons released from prison after serving time for certain sex offenses, and persons on probation following conviction of such offenses, register with the sheriff in the county in which they reside (among other obligations). For agencies seeking records, the registry is a readily accessible source of this kind of information. They may check it at no charge in any sheriff's office or on the Internet at www.sbi.jus.state.nc.us/sor. The records are indexed by name, county, and zip code, and provide names, addresses, photographs, and information about the offenses for which the subjects were convicted.

Driver Records

Driver records are available from the Division of Motor Vehicles. They contain information about convictions for motor vehicle offenses, driver's license status, and accidents on which law enforcement officers have completed reports. Congress recently passed legislation prohibiting state licensing agencies from disclosing personal information about drivers.[7] Before that legislation, all material related to a person's driving history was a public record in North Carolina.[8] The legislation does not affect the ability of an employer to obtain a driver record on an employee, an applicant, or a volunteer if the employer requests the record by name and driver's license number.

There is a fee for each record check, as provided by statute. The amount is is $5 for an extract copy, $7 for a certified copy.

Legal Restrictions on Access to Records

As noted, some criminal histories are public. But the records least likely to result in misidentification, those of the FBI and the SBI, are not. Further, federal and state law strictly regulate access to them.

Access to FBI Records

Access to FBI records is limited to federal and state law enforcement agencies, for criminal investigations; and to specified users, for purposes other than criminal investigations.[9] The rules that authorize access reflect a strong desire to protect the privacy of the subjects and a fear that the information in the records will be misused. To permit entities other than law enforcement agencies to have access to these records, a state must satisfy two separate legal steps:[10]

Notes to Table 1

1. In addition, various occupational licensing boards may have access to SBI records for checks of potential licensees. The occupations covered are attorneys, bail bondsmen, private protective services personnel, taxi drivers, and funeral directors. Of those, only the Board of Law Examiners, the entity that licenses attorneys, is authorized to have access to federal records.

2. If access to national criminal history records is authorized, fingerprints must be provided to the SBI because the FBI requires them before it will approve a state's access to federal records for this purpose.

3. In the rows in which this question is answered yes, the statute adopted by the General Assembly lists crimes that are to be considered by the requesting entity in determining if the person's criminal record disqualifies him or her to perform the duties of the position. In the rows in which this question is answered no, the requesting agency is free to determine which criminal offenses are appropriate to consider in assessing a person's fitness for a position.

4. G.S. 115C-332 authorizes record checks of applicants, contractors, and persons hired on a conditional basis pending the receipt of the record check. If a local school board uses this statute, it must adopt a policy uniformly applied for this purpose; it may not make ad hoc determinations. G.S. 114-19.2, however, authorizes the SBI to provide record checks on employees of public schools with the consent of the employee. Only G.S. 115C-332 has received federal approval, so record checks on employees performed under G.S. 114-19.2 are limited to state checks only.

5. For employees and applicants who have lived in North Carolina for the past five years, only a state check is required. For those who have not, a national check is required if the state check does not disqualify the person from serving as a child care provider.

6. For employees and applicants who have not lived in North Carolina continuously for the preceding five years, a national check is required if requested by the department.

1. The legislature must enact a state statute that (a) specifically authorizes the use of FBI records, (b) specifies that only local or state government employees may review the record checks, (c) is not overly broad, (d) identifies the specific category of applicants (that is, the people whose fingerprints agencies will submit to determine whether they have criminal histories) who are covered, and (e) requires that the applicants be fingerprinted.
2. The U.S. Attorney General's Office must review the statute to be sure it meets the criteria just stated. Only when that office grants formal approval of the statute is access authorized.

[After this article was written, Congress passed a law that modifies the preceding requirements.][11]

In the Child Protection Act of 1993 and the Violent Crime Control and Law Enforcement Act of 1994, Congress mandated that states report certain crimes of which children, elderly persons, and persons with disabilities were victims.[12] It also made clear that states may have access to the federal criminal histories of persons who are employed, who seek employment, or who volunteer to serve those populations. The two acts, and the regulations issued to interpret them, do not change the basic requirements for gaining access to federal records—as noted earlier, the state legislature enacting a statute on the subject and the U.S. Attorney General's Office approving the statute. In North Carolina such a statute is in place for employees of or applicants to child care and certain nursing home agencies but not for volunteers serving in those (or any other) fields.

Access to SBI Records

As stated earlier, SBI criminal histories are not public records.[13] But the General Assembly, a local government, or the governor—by statute, by ordinance, or by executive order, respectively—may authorize various types of agencies to have access to SBI records of criminal activity in North Carolina only.[14] (For a list of all the kinds of agencies authorized by statute to search state criminal records and the authority granted to each kind of agency, see Table 1. For information on qualifying for access under one of the statutes, see page 39.)

When the General Assembly enacts statutes granting access to SBI criminal histories, it has a choice: It may authorize access to North Carolina records only, which is a matter completely within its control. Or it also may authorize access to FBI records. (Again, though, the federal government must approve the statutory authorization for it to become effective.) Given that choice, the General Assembly clearly prefers to grant access to state records only. It has passed more than twenty statutes of this kind, only five of which also authorize access to federal records.[15] Most of the statutes permit but do not require a record check. Only two, those covering child care workers and foster parents, require checks of both state and federal records.

Many agencies take advantage of the access that they are granted. In 1992 the SBI conducted about 11,000 fingerprint checks and about 550 name checks (checks in which the requesting party did not provide fingerprints of the person to be checked) for noncriminal purposes. In 1997 it conducted about 80,000 fingerprint checks and about 40,000 name checks.

The increase in requests from 1992 to 1997 was not accompanied by a corresponding increase in staff. Thus it inevitably led to slower checks. As a result, by 1997, noncriminal fingerprint searches conducted by the SBI took almost 120 days, and name searches slightly more than 100 days. If an agency also requested a check of FBI records, that took several additional weeks. In 1998 technological improvements and addition of some staff members enabled the SBI to reduce its backlog significantly and shorten its response time.[16] By August 1998 the turnaround time for fingerprint checks was 22 working days, for name checks, 12 working days.[17]

One of the reasons for the increase in the SBI's workload since 1992 has been the General Assembly's promotion of record checks in one of the most sensitive areas in which records are used—staffing of day care centers. The General Assembly's approach illustrates the policy choices it faces: whether to make a record check mandatory or optional for agencies, how to define the agencies to be covered, whether to include state records only or state and federal records, and whether to specify the kinds of crimes to be checked or leave that to the agencies. The General Assembly's approach also highlights the effect of federal law on its policy choices. The following example focuses on child care workers. (Again, for a list of all kinds of human services agencies authorized to search

state criminal records and the authority granted to each kind, see Table 1.)

Day Care: An Illustration

Many parents fear that the facility providing care for their preschool children will not do its job adequately. Responding to that fear, the General Assembly has sought in recent years to do all it can to keep child abusers from working in such a facility. Meanwhile Governor James B. Hunt's emphasis on preschool education and care led to the creation of the state's Partnership for Children (also known as Smart Start). That program provided significant new funding for preschool care in the state, often using nonprofit agencies. So growing concern and rapidly expanding day care services increased the pressure for the General Assembly to improve the record check system for day care workers.

First, the General Assembly had to decide whether to make record checks discretionary or mandatory. It opted for the latter. Then it had to determine what agencies would be covered. It chose a fairly broad definition: all child care facilities that must be licensed by the state and any nonlicensed facilities that are approved for government funding to provide day care.

The next decision the General Assembly faced was whether to require a check of state records only or to require a check of state and federal records. Given the mobility of Americans, the first option might miss a lot of relevant criminal activity, so the legislature opted for the broader database. But that option led to another choice, posed directly by federal requirements. For an agency to have access to federal records, the recipient of the record must be a government employee. Many, if not most, child care workers are employees of nonprofit or private organizations, who cannot be authorized to see federal criminal records. To comply with federal law, the General Assembly would have to designate a government agency to assume responsibility for examination of the records. It chose to do so.[18]

That duty falls to the Division of Child Development of the Department of Health and Human Services. The division uses an internal review panel to determine if the records show a person to be unfit for work in child care. The only statutory guidance given to the division in making its decision is that it should consider certain specified crimes that bear "upon an individual's fitness to have responsibility for the safety and well-being of children": homicides, sexual offenses, assaults, kidnapping, bombings, offenses against public morality, prostitution, protection of minors offenses, public intoxication, drug possessions, sale of alcohol to minors, and impaired-driving offenses.[19]

The preceding list may not include all the crimes one might think should be considered in that it omits several categories: robbery, larceny, arson, embezzlement, fraud, and most traffic offenses. If crimes in these categories appear in a person's criminal history and are relevant to the Division of Child Development's determination, the legislature will have to address the problem because the legislature listed the crimes that should be considered. For agencies that review records themselves, comprehensiveness is not an issue because the report they receive from the SBI contains all convictions (and possibly some charges that did not result in convictions) in its database for the person checked.

Further, the statutory list may include some offenses that are not always appropriate to consider. Presumably it would keep a person from being declared fit whose conviction was minor, was unrelated to the job sought or held, and occurred many years previously. For example, both of the following persons would have records covered by the list of offenses: (1) a person convicted two years earlier of child molestation while working at a day care center and (2) a person whose job does not include driving a vehicle, who had an impaired driving conviction twenty years earlier at age eighteen. No one would argue that the first person was fit to work in a child care center. But many would contend that the record of the second person did not make him unfit.

That is the kind of assessment the Division of Child Development must make. The solution often is not clear. In statutes covering other kinds of agencies, by contrast, the legislature has provided explicit guidance to the people who make similar determinations. For example, G.S. 114-19.6 allows the Department of Health and Human Services to obtain record checks on employees and applicants. If a check reveals a record, the statute directs the department to consider the following factors in determining whether the conviction is cause to deny an applicant or terminate an employee:

- The level (that is, misdemeanor or felony, and class of felony) and the seriousness of the crime

Table 2

Types and Features of Record Checks

	County Court Record Check	AOC Statewide Record Check	SBI Name Check	SBI Fingerprint Check	FBI Fingerprint Check	Private Contractor Check
Description	Public record Name-based identification County-by-county search All records not documented by fingerprints	Not available to public at this time Name-based identification All counties, on county-by-county basis County clerks began entering records in mid 1980s	Not public record Name-based identification Fingerprint-supported system N.C. statewide check Access limited by state and federal law	Not public record Fingerprint-based identification N.C. statewide check Access limited by state and federal law	Not public record Fingerprint-based identification State and national check Access limited by state and federal law	Public record Name-based identification Criminal records available through public record search Fee—market price
Information Available	Criminal charges in county Criminal convictions in county Some infractions in county Other court activity in county Civil actions in county Final court action in county Certified public records	Only records that have been automated N.C. criminal court files Felonies Misdemeanors Traffic offenses Some infractions Unserved warrants Final court action Defendant and witness court schedule	Records available from 1937 on All felonies since 1982 that were reported by fingerprints Most serious misdemeanors that were reported by fingerprints More than 900,000 people in database Custody information Final court action linked to arrest data Crimes against children, elderly people, and disabled people, and hate crimes since 1997 State and National Wanted Person check	Records available from 1937 on Positive fingerprint identification All felonies since 1982 that were reported by fingerprints Most serious misdemeanors that were reported by fingerprints More than 900,000 people in database Custody information Final court action linked to arrest data Crimes against children, elderly people, and disabled people, and hate crimes fingerprinted since 1997 State and National Wanted Person check	State and federal criminal records reported by fingerprints Positive fingerprint identification Multimillion-person database Records retained until states purge National Wanted Person check	All public record information located and made available
Information Not Available	No positive identification Other counties' records State criminal records Federal criminal records Other states' criminal records	Not all court records available No positive identification Certified public records Other states' criminal records Federal criminal records Some records documented by fingerprints	No positive identification unless fingerprints submitted to verify record Criminal records not reported by fingerprints Certified public records Other states' criminal records Federal criminal records Traffic offenses Local records AOC records	Criminal records not reported by fingerprints Certified public records Other states' criminal records Federal criminal records Traffic offenses Local records AOC records	Criminal records not reported by fingerprints Certified public records Other state and federal records not reported by fingerprints Local records	No positive identification Some records may be fingerprint supported Records not verified by fingerprints State and National Wanted Person check Records more than seven years old[1]

Availability of Check	Available to everyone	Available to most court or justice agencies through terminal access Not available to non-criminal-justice agencies or public at this time	Available to criminal justice agencies with "need to know" and "right to know" for administration of criminal justice (no fee) Available to non-criminal-justice agencies and government agencies if authorized by law Not available to public without statutory approval	Available to criminal justice agencies with "need to know" and "right to know" for administration of criminal justice (no fee) Available to non-criminal-justice agencies and government agencies if authorized by law Not available to public without statutory approval	Available to criminal justice agencies with "need to know" and "right to know" for administration of criminal justice (no fee) Available to local and state government officials if approved by U.S. Attorney General Not available to public	Available to anyone willing to pay for service
Identifiers	Name, age, or date of birth Race, sex, Social Security number, if available	Name, age, or date of birth Race, sex, Social Security number, if available	Name, race, sex, date of birth, place of birth, Social Security number, driver's license number; alias names, dates of birth, Social Security numbers Descriptors: height, weight, skin tone, hair color, eye color	Name, race, sex, date of birth, place of birth, Social Security number, driver's license number; alias names, dates of birth, Social Security numbers Descriptors: height, weight, skin tone, hair color, eye color	Name, race, sex, date of birth, place of birth, Social Security number, driver's license number; alias names, dates of birth, Social Security numbers Descriptors: height, weight, skin tone, hair color, eye color	Name, age, date of birth, or Social Security number

AOC = Administrative Office of the Courts; SBI = State Bureau of Investigation; FBI = Federal Bureau of Investigation
*Fair Credit Reporting Act restriction

- The date of the crime
- The age of the person at the time of the offense
- The circumstances surrounding commission of the crime
- The connection between the criminal conduct and job duties
- The prison, probation, rehabilitation, and employment records of the person since the crime was committed
- Any subsequent criminal history

Although none of those factors dictate a particular result, they offer guidance to the decision makers.

A review by the Division of Child Development rarely results in a finding of unfitness. In the division's first two years of reviewing, it processed more than 22,000 records and made fewer than 70 findings of unfitness.[20]

When the division does determine that a person is unfit, it notifies the employer and the employee or the applicant of its decision, but it does not reveal the details of the record to either party. That would violate federal law, which prohibits disclosure of federal criminal records. The division may, however, tell the employer that the record check reveals the person to be unsuitable for employment as a child care worker. The employee or the applicant may challenge the accuracy of the result by contacting the SBI to obtain a copy of the record and then either raising his or her concerns about it with the SBI or filing a civil action to contest the finding of unfitness.

Suppose the record check cannot be returned for several months.[21] Many agencies will not be able to function if they must delay hiring decisions until they receive record checks. As a result, they hire people while waiting for the record checks. To address this issue, Division of Child Development regulations require the employer to obtain a check of the local court's criminal records before seeking the SBI record check. Although the day care statute is silent on hiring people while waiting, G.S. 114-19.6, which deals with record checks involving Department of Health and Human Services employees and applicants, allows the department to make conditional offers of employment pending the results of a criminal record check. Any child care agency might adopt that policy.

Steps to Qualify for and Obtain Access to SBI Records

1. An agency must provide proof that it qualifies for access under a specific statute. If the agency is licensed by a government agency (for example, as a health care provider), it must submit a copy of the license. If the agency is not licensed, it must provide some documents showing proof of qualification.
2. The administrator of the agency must make a request on official letterhead. The request should identify the statute under which access is sought and specify who should receive invoices for applicable fees. It also should indicate the names, addresses, and telephone numbers of employees authorized to receive criminal history information from the SBI.
3. The administrator must complete, sign, date, and have notarized a copy of SBI's Access Agreement. The agreement contains detailed information about the obligations of the agency seeking access and specifies the procedures to be followed.
4. When access is authorized, to obtain a record check, the agency must submit a release form signed by the employee, the applicant, or the volunteer on whom it wants a check. If the agency is requesting a fingerprint check, it should provide fingerprints for the person, in a format suitable for analysis by the SBI.

For more information, contact the SBI, DCI/Identification Section, P.O. Box 29500, Raleigh, NC 27626-0500, (919) 662-4500.

Strategies for Managing Risk

An agency required by law to obtain record checks, or one with a policy of using them, should consider pursuing other strategies to reduce its risk while its requests for record checks are being processed. Among those strategies are job assignments that minimize the opportunity for unsupervised contact with vulnerable populations, clear job descriptions and training, reference checks, applications that require specific details about previous job history, and checks of more accessible records.

The most likely source of more accessible records is the local court system. As noted, child care agencies must obtain this kind of record check initially. Other agencies may do so as well. Court records can be very helpful as a component of a risk management system. But knowing their limitations is important. For example, understanding that court records are not fingerprint based, an agency should make a diligent effort to obtain as much other information as possible—address, former addresses, Social Security number, date of birth, and race—to verify that the record it obtains is that of the appropriate person. This approach may minimize the problem of multiple people with the same name. The court records sometimes note aliases used, and that information may help in dealing with people who attempt to hide a record by changing names. For people who have not resided in a particular county for several years, a record check in that county will be of little value. A check of a previous county where the person resided, and its neighboring counties, may be more useful.

Finally, for a fee, some private companies will conduct record checks. Their searches typically draw on court and other public records, but the time an agency saves by not doing the research itself may make the service worth the cost. In dealing with private companies, an agency should know what it is getting. Questions that may be useful to ask are these:

- What is the source of the records the company searches?
- Does the company's search cover the entire state? Does it include all crimes?
- How does the company deal with aliases or people with the same name?
- What time frame does the report cover?
- If the search covers out-of-state offenses, what is the source of the records?

Conclusion

Criminal record checks can be an effective part of an agency's risk management program. All the record systems have limitations (for a summary of their limitations and other significant features, see Table 2). SBI and FBI records are not available to all agencies, and when they are, they are more costly than other records, take longer to obtain, and require fingerprinting of the person to be checked. They also do not include some misdemeanor records. Court records are freely available and cost less to obtain but are limited to a county's records and do not have as reliable a means of identification as the fingerprint-based SBI and FBI records. The sex offender registry and the Division of Motor Vehicles driver records are limited to fairly narrow kinds of conduct, but if those are relevant, the records may be an effective alternative source of information.

Given the options available to an agency interested in using criminal record checks, it should make some judgments about the kinds of records it needs. For example, if a person will have lots of unsupervised contact with vulnerable populations, then spending time and money on SBI or FBI record checks makes sense if they are legally available. Consulting other sources of information in the meantime is advisable because there may be a delay in the receipt of the record. On the other hand, if there is little risk that the employee, the applicant, or the volunteer will have such contact, no checks or minimal local checks may be sufficient. The important thing is to make a conscious choice about the level of risk involved and to adopt a record check policy that does not rely unjustifiably on this practice but takes advantage of its value as a deterrent and a screening device.

Notes

1. Crime records reveal the number of crimes committed or reported, criminal history records the criminal activities of individuals.

2. Effective July 1, 1999, G.S. 7B-2102 authorizes fingerprinting of juveniles ten years of age or older who commit certain serious felonies.

3. Among the records not available for public inspection are juvenile records, G.S. 7A-675; adoption records, G.S. 48A-9-102; and records of involuntary commitment proceedings, G.S. 122C-54.

4. G.S. 7A-109(d) and (e) authorize the Administrative Office of the Courts to contract with other entities to allow third parties to have remote electronic access to court records. The office has not exercised that authority.

5. G.S. 7A-308(a)(20).

6. G.S. 14-208.10.

7. Driver's Privacy Protection Act of 1994, 18 U.S.C.A. § 2721. According to press reports, the legislation was passed to make it more difficult to obtain information about a person's identity and place of residence by using a vehicle registration number.

8. G.S. 20-26.

9. Pub. L. No. 92-544; 28 C.F.R. § 20.33.

10. David Evans, acting assistant director, Criminal Justice Information Services Division, Federal Bureau of Investigation, to All Fingerprint Contributors, letter, July 17, 1995.

11. The Volunteers for Children Act, Pub. L. No. 105-251, codified at 42 U.S.C. §§ 5119(a) and (c), became law on October 9, 1998. It amends the Child Protection Act of 1993 (see note 12) to allow any entity covered by that act (providers responsible for the safety and the well-being of children, elderly persons, and persons with disabilities) to apply for FBI record checks, even if no state statute authorizes the request. The entity must make the request to an "authorized agency of the State" (in North Carolina, the SBI) and follow the other guidelines for requesting national record checks, including having a government official designated by the state review the result of the check. At press time, state officials had made no decisions on how to implement this new law in North Carolina.

12. Child Protection Act of 1993, Pub. L. No. 103-209, 107 Stat. 2490; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. Those laws did not affect the manner in which or the extent to which North Carolina reported criminal records to the FBI because the state already was reporting the crimes specified to the FBI.

13. No state law exempts these records from the state's Public Records Law, G.S. 132-1 through -10, but under federal regulations, disclosure is prohibited, and under the Supremacy Clause of the United States Constitution (art. VI, sec. 2), states are bound by federal law even if a state law would provide a different result.

14. The criteria that a law (a statute, an ordinance, or an executive order) must meet to receive approval for authorizing a particular type of user are that it must specify who is subject to it, require the applicant to provide necessary identification, specify the government agency responsible for implementing it, and identify the criteria that will be used to deny a permit, employment, and so forth. Also, the law should specify its purpose and define in its own body or in another official document any words that are vague or subject to interpretation.

15. Under North Carolina law, the only categories of persons for whom agencies may request an FBI criminal history are public school employees, child care providers, foster parents, direct care givers in Department of Health and Human Services facilities, and charter school board members and employees. See Table 1.

16. The SBI hired temporary workers, authorized large amounts of overtime, and encouraged the use of equipment at the local level to send fingerprints electronically instead of by the traditional fingerprint cards. Stan Lewis, director, Identification Section, Criminal Records Division, SBI, telephone conversation with author, Aug. 28, 1998.

17. Lewis, telephone conversation. Those turnaround times do not include applicants to be child care workers. For more discussion on that issue, see notes 16 and 17 and accompanying text.

18. The applicable provision, G.S. 110-90.2(b), requires federal record checks (in addition to state record checks) for child care providers who have not resided in North Carolina continuously for the last five years.

19. G.S. 110-90.2. Offenses against public morality include incest, crimes against nature, obscenity offenses, indecent exposure, and indecent liberties with children. Protection of minors offenses include child abuse, giving weapons to minors, and unsafe storage of firearms.

20. Anna Carter, Division of Child Development, Department of Health and Human Services, telephone conversation with author, Aug. 7, 1998.

21. In fiscal years 1996–98, the average time for completing record checks for child care workers was more than a year, but in recent months that time has been reduced dramatically. The SBI's goal is to reduce it to no more than two months. Carter, telephone conversation.

Questions I'm Frequently Asked

Do Local Lawmakers Have Legislative Immunity?

Anita R. Brown-Graham

Can members of a city council be held personally liable for issuing an ordinance eliminating an employee's position if the action violates the employee's constitutional rights? In March 1998 the United States Supreme Court said no, at least in some circumstances.

The case was *Bogan v. Scott-Harris*[1] (for more details on the facts and the decisions in the case, see page 42). The plaintiff, Janet Scott-Harris, had complained that her position as director of social services, was eliminated because of racial "animus" (hatred) and in retaliation for disciplinary action that she had taken against a politically well connected employee for repeatedly making racial and ethnic slurs. The Court unanimously held that, even if the plaintiff's allegations were true, the individual members of the city council could not be held personally liable for their constitutional wrongdoing. The Court based its decision on the doctrine of legislative immunity.

The decision has prompted many telephone calls to my office. This article records the questions most frequently asked and my responses.

What is an immunity?

Historically, immunities have served to protect certain classes of people from civil liability for injuries they cause. Such immunities reflect a judgment that, despite unlawful conduct by members of these classes, protecting them serves public policy better than prosecuting them does. The public policy justifications for these immunities include (1) the threat of personal liability deterring good people who are not risk takers from becoming public servants;[2] (2) the threat of personal liability preventing public servants from making difficult decisions necessary to administer the public's business effectively;[3] (3) time-consuming and costly lawsuits threatening the effective functioning of government;[4] and (4) the apparent injustice of subjecting a public servant to liability when the legal obligations of the servant's position require exercising discretion and he or she does so in good faith.[5]

What is legislative immunity?

"Legislative immunity" is a bar, under either state or federal law, to holding a person liable for injuries he or she causes when carrying out a legitimate legislative activity.[6] It is an "absolute" immunity, which means that no matter how extensive the injury or how extreme the conduct, a court may not hold the defendant personally responsible.[7]

Legislative immunity has its roots "'in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries' and was 'taken as a matter of course by those who severed the colonies and founded our Nation.'"[8] "The Federal Constitution, the constitutions of many of the newly independent States, and the common law thus protected legislators from liability for their legislative activities."[9]

The author is an Institute of Government faculty member who specializes in civil liability of public officials and local governments.

The rationale behind legislative immunity is that "[p]rivate lawsuits [from an unfriendly executive branch, a hostile judiciary, or disappointed constituents] threaten to chill robust representation by encouraging legislators to avoid controversial issues or stances in order to protect themselves."[10] According to the courts, the doctrine of separation of powers demands protection of the legislature from the other branches of government.[11] Moreover, if every disappointed constituent could sue his or her legislators for failing to make favorable legislative choices, private civil actions would constantly distract legislators.[12] They would have to divert time, energy, and attention from handling legislative tasks to defending an onslaught of litigation. They could not effectively administer the public's business under such circumstances.

How does legislative immunity protect legislators?

Based on the premise that any restriction on a legislator's freedom undermines the public good,[13] legislative immunity is more than a defense to liability—it is an entitlement to protection from suit. "The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."[14] Thus, as with all absolute immunities, legislative immunity is designed to avoid subjecting government officials to the cost of trial and the burdens of broad-reaching discovery.[15]

Once a person raises immunity as a defense, the court must determine its applicability. If the trial court finds that immunity does not apply, the defendant is entitled to an immediate appeal.[16] If the court finds that immunity does apply, the court must immediately dismiss the lawsuit to the extent that it is directed at the official in his or her personal capacity.[17]

Further, if immunity applies, legislators are privileged from testifying (that is, do not have to testify) regarding their motives in acting in a legislative capacity.[18] So, if defense of a case *requires* the legislators to testify about their legislative conduct and their motives, legislative immunity bars the lawsuit, even if a government entity, rather than the individual legislators, is named as the defendant. The purpose of the doctrine is to prevent legislators from having to testify regarding matters of legislative conduct whether or not they are testifying to defend themselves.[19] In light of the purpose of the doctrine, courts will not permit a plaintiff to get around the doctrine of legislative immunity simply by failing to name individual legislators in their personal capacities.

Legislative immunity is a personal privilege, which means that it can be waived only by the individual legislator.[20] A county, for example, may not *force* a particular legislator to testify about his motive, even if the county is the only defendant.

Which legislators are protected by legislative immunity?

Members of the United States Congress are absolutely immune from liability for legislative activities. The basis of their immunity is the Speech and Debate Clause of the federal Constitution.[21]

In 1951 the United States Supreme Court applied common-law principles to extend the doctrine of legislative immunity to acts of state legislators.[22] Although the Court did not rely on the Speech and Debate Clause, it used the same rationale.[23]

Twenty-eight years later, the Court extended the doctrine further—this time to legislative acts of regional legislators.[24] The Court reasoned that, to the extent that members of regional planning boards function in a capacity comparable to that of members of state legislatures, they should be similarly protected.

As for members of local governing boards, lower federal courts have routinely afforded them absolute immunity while engaged in legislative conduct,[25] although the United States Supreme Court expressly reserved ruling on the issue. The Court finally answered the question in *Bogan* by holding that local legislators are entitled to the same absolute immunity from civil liability that federal, state, and regional legislators enjoy. The Court not only recognized that the rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. It further acknowledged that (1) in local government, where prestige and monetary rewards are comparatively small, the threat of civil liability may deter service more significantly than it does at other levels of government; and (2) deterrents to legislative abuse, including the availability of municipal liability and the electoral process itself, may be greater at the local level than at other levels of government.

Which classes of people, other than legislators, may claim legislative immunity?

Elected lawmakers such as members of a county board of commissioners or a city council are not the only local officials entitled to the protections of legislative

Bogan v. Scott-Harris

In 1987, Fall River, Massachusetts, hired Janet Scott-Harris as the first administrator—and the sole employee—of its newly created Department of Health and Human Services. Scott-Harris, who is African American, allegedly encountered repeated racial hostility from two people at city hall, both of whom are white: Marilyn Roderick, a city council member, and Dorothy Biltcliffe, a well-connected city employee who eventually came under Scott-Harris's direct supervision.

After Scott-Harris became Biltcliffe's supervisor, other employees complained to Scott-Harris that Biltcliffe was yelling at and threatening them, often making derogatory racial remarks. Eventually Scott-Harris filed administrative charges against Biltcliffe for her conduct. Biltcliffe responded with more racial slurs, directed at Scott-Harris.

Within four months of her filing the charges, Scott-Harris's department—and thus her position—was eliminated from the city's budget. Biltcliffe, who had been granted medical leave as soon as she was informed of the charges, returned to work without reprimand after Scott-Harris lost her job.

The Claim

Scott-Harris filed an action under Section 1983 of Title 42 of the United States Code against the city of Fall River, its mayor (Daniel Bogan), the vice-president of the city council (Roderick), and other officials, claiming that elimination of her position was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights in filing the complaint against Biltcliffe. To support her claim, Scott-Harris introduced evidence to the trial court that Biltcliffe had asked several politicians, including Roderick, to help her with the discrimination charges filed by Scott-Harris. As a result of Biltcliffe's requests, Scott-Harris began hearing rumors that her position "was going to take a political hit." The rumors were proven accurate when the city manager confirmed for Scott-Harris that her position was indeed being eliminated, allegedly for financial reasons. Shortly thereafter, the mayor proposed an ordinance to the city council to that effect.

The mayor wrote to the city clerk on March 18, 1991, eliminating Scott-Harris's position effective March 29, even though the city council had not yet acted on his recommendation. The city council's ordinance committee, chaired by Roderick, then approved the mayor's recommendation, and Roderick sent the ordinance to the full council. The city council voted six to two in favor of the ordinance. The only new position in the city's 1992 budget was a second administrative assistant in the Council on Aging, a position filled by Biltcliffe.

According to Scott-Harris, the elimination of her position actually cost the city money. Before the action, Scott-Harris was performing not only the duties of her own job but also, for more than a year, all the day-to-day duties of three vacant positions, with no problems or complaints. All three positions were funded in the fiscal year 1992 budget and were filled shortly after Scott-Harris left. The city saved $46,305 by eliminating Scott-Harris's position. The city then spent $105,205 to fill the three vacant positions.

The Lower Courts' Decisions

The jury found as follows:

1. Scott-Harris proved that the financial reason the defendants gave for elimination of her position was not the true reason.
2. Scott-Harris's "constitutionally protected speech was a substantial or motivating factor" in the decision to eliminate her position.
3. Roderick's vote and the mayor's recommendation proximately caused elimination of her position.

The United States District Court for the District of Massachusetts entered judgment on the jury's verdict for Scott-Harris.

The defendants appealed, contending that members of a city council are protected from personal liability for voting to eliminate a city position. They based their appeal on the doctrine of legislative immunity. The Court of Appeals for the First Circuit rejected the defendants' argument, holding that legislative immunity does not protect individual personnel decisions motivated by racial animus or by retaliation for conduct safeguarded by the First Amendment.

The Supreme Court's Decision

The defendants then appealed to the United States Supreme Court. In a unanimous decision authored by Justice Clarence Thomas, the Supreme Court reversed the First Circuit Court's decision. The Supreme Court held as follows:

1. Local legislators are absolutely immune from suit under Section 1983 for their legislative activities.
2. Absolute legislative immunity attaches to all actions of local officials taken in the sphere of legitimate legislative activity.
3. A court may not consider the subjective motivations of a legislator while he or she is engaged in legitimate legislative activity.
4. When Roderick voted in favor of the ordinance eliminating Scott-Harris's position, she was engaged in a legislative act, for which she was absolutely immune from suit.
5. When the mayor prepared the budget calling for elimination of Scott-Harris's position and signed the ordinance that finalized it, he was performing protected legislative acts.

immunity. The immunity is defined not by the title a person carries but by the function he or she performs. Members of quasi-legislative boards, like members of planning commissions, have been afforded legislative immunity.[26] Appointed officials of the executive branch and some staff of governing boards also may enjoy legislative immunity if they are engaging in a legislative act that would be protected if they were legislators. Therefore, county and city managers or county and city attorneys assisting in the legislative process or serving as aides may be entitled to the defense at times.[27]

For many years the law in the Fourth Circuit, the federal appellate judicial district that includes North Carolina, was that local government entities themselves were entitled to legislative immunity.[28] Now, though, the law is settled that a local government body, as opposed to its individual members, may not properly assert the defense of legislative immunity.[29]

What qualifies as a legitimate legislative activity?

After the court determines that a defendant was generally engaged in legislative activity and therefore may properly claim legislative immunity, it must determine whether the conduct that prompted the plaintiff's complaint involved a legitimate legislative activity. The inquiry is "functional." That is, the court must "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions."[30]

Courts have not confined legislative activity to words spoken in debate. They have included all matters considered integral parts of the deliberative and communicative legislative process, such as voting on legislation,[31] making budgets,[32] taxing,[33] and creating reports.[34] (For specific examples of acts covered and not covered by legislative immunity, see page 45.)

Courts have been careful, however, not to afford legislative immunity to administrative acts. Administrative acts single out individuals and treat them differently from others similarly situated (that is, in like circumstances). Administrative acts are usually based on facts relating with specificity to particular individuals or situations, such as most employment decisions.[35] Legislative acts, on the other hand, affect similarly situated people in the same way and are based on general facts concerning a policy or a state of affairs, such as most zoning ordinances.[36]

A few examples will illustrate the distinction between administrative and legislative acts. Suppose a city council decides that for fiscal reasons it must eliminate an entire city department. An employee loses his job in the reduction in force and challenges the city's decision in court. The court is likely to dismiss the action because legislative immunity gives the individual council members absolute protection from liability for deciding to eliminate the department. Legislative immunity applies because the decision (1) was based on general facts concerning the city's state of affairs and (2) affected all employees of the department in the same way.

. . . local legislators are entitled to the same absolute immunity from civil liability that federal, state, and regional legislators enjoy.

On the other hand, suppose that a city council directs the manager to fire a single department head, and the department head sues the city council members. The court is unlikely to dismiss the suit on the basis of legislative immunity. Legislative immunity does not apply because the decision (1) was based on specific facts regarding this department head and (2) treated this department head differently from others similarly situated. Unless another immunity applies, the court probably must hear the merits of the case and decide whether the firing violated the law. If the court finds unlawful activity, it will require the individual council members to compensate the plaintiff.

In *Bogan* the plaintiff complained that elimination of her position amounted to no more than a routine personnel decision to fire her. On the basis of the preceding examples, one might think that the Supreme Court would have found that the members of the city council were not entitled to legislative immunity because the firing was an administrative act. Indeed, both the trial court and the Court of Appeals for the First Circuit concluded that, in their decision making, at least one of the council members and the mayor had relied on facts relating to a particular individual and had devised an ordinance that targeted her and treated her differently from other managers employed by the city.

However, the Supreme Court was persuaded by the following facts: Scott-Harris was the sole employee of the Department of Health and Human Services, and the budget ordinance called for elimination of the entire department, rather than hiring or firing of a specific individual. The Court speculated that the

decision might have implications beyond the particular occupant of the office. On the basis of this reasoning, the Court unanimously held that the individual legislators' actions were "undoubtedly legislative." "[T]he ordinance, in substance, bore all the hallmarks of traditional legislation."[37]

. . . a local government body, as opposed to its individual members, may not properly assert the defense of legislative immunity.

At first glance the Court's decision might appear to overrule a recent decision of the Court of Appeals for the Fourth Circuit (which, as noted, governs North Carolina). In that case, *Alexander v. Holden*, a former clerk to the board of county commissioners, Regina Alexander, sued Brunswick County and its commissioners, alleging that elimination of her position from the county's budget was due to racial animus and retaliation for her political affiliation. The court of appeals held that, although most budget decisions are protected legislative activities, in this instance the county commissioners were not protected by legislative immunity. The court relied on the following facts. First, North Carolina law does not permit a board of commissioners to eliminate the position of clerk to the board.[38] Moreover, the board did not actually eliminate the position. It eliminated the salary for the position. At the same time it increased the salary for the deputy clerk's position. It then asked the county manager's secretary to fill the position of deputy clerk, which was in essence the position of clerk, and it created a new administrative assistant position to perform the duties of secretary to the county manager.

The court found that the commissioners had simply replaced one clerk with another in what amounted to a routine personnel decision. Thus the court concluded that the activity involved was administrative, not legislative.

There is some basis for distinguishing *Alexander* from *Bogan*, leaving room to argue that *Alexander* was properly decided. The rule of law seems to be that, to enjoy legislative immunity, council members must actually eliminate a position, not merely terminate the employment of a specific individual. Legislators may not use legislative formalities to shield administrative activities with legislative immunity. Even *Bogan* does not foreclose the court's right to look beyond the formal actions of a governing board to determine whether the activity is truly legislative in substance.

What is clear from *Bogan*, however, is that the court may no longer, as it did in *Alexander*, look into personal motivations to determine whether particular officials are performing legislative functions and therefore entitled to absolute immunity. Whether officials are entitled to absolute immunity is controlled by the functions they were performing when they took the challenged actions[39]—traditionally legislative functions (for which there is absolute immunity) or merely administrative functions (for which there may be only qualified immunity). Under this functional approach, personal motivations are outside the scope of the inquiry.[40]

In what types of lawsuits is legislative immunity available?

Legislative immunity protects legislative activity under both state and federal law unless a plaintiff sues under a statute that expressly abrogates (that is, nullifies) the defense. Such a statute is extremely rare. Therefore the defense is available in the more common actions against legislators, including federal civil rights actions and actions under state tort law.

Trial courts in North Carolina have routinely applied legislative immunity. The North Carolina Court of Appeals, however, did not recognize the doctrine until 1996, in *Vereen v. Holden*.[41] In that case it confirmed that the scope of legislative immunity was the same under both North Carolina and federal law. To date, the North Carolina Supreme Court has not ruled on the issue.

Does legislative immunity mean that a plaintiff will not be compensated for injuries caused by wrongful legislative activity?

No. Legislative immunity applies only to suits against individual legislators personally. In other words, unless a plaintiff seeks compensation from individual legislators, as opposed to the government entity of which they are members, legislative immunity is not at issue. A plaintiff can obtain compensation from a government entity if (1) the plaintiff can overcome any immunities or other defenses that the entity may have and (2) the plaintiff does not need the individual legislators' testimony about their motives in order to state a claim. In most cases, plaintiffs will prefer to sue the government entity because it is likely to have greater financial resources than any individual.

Court Rulings on Legislative Immunity

Examples of Acts Covered

- Voting to enact an ordinance, even if it was subsequently held to be invalid[1]
- Voting to eliminate the police department and to contract with the county sheriff's office to provide police protection[2]
- Voting to place a temporary moratorium on issuing permits for mobile homes[3]
- Investigating the voting eligibility of listed electors and instructing the Board of Registrars to purge certain names from the county voting roll[4]
- Refusing to introduce legislation removing a commissioner from oversight responsibilities after complaints regarding racial discrimination[5]
- Deciding to levy taxes and allocate revenues[6]
- Investigating a law enforcement employee regarding a homicide investigation and releasing the findings in a report[7]

Examples of Acts Not Covered

- Voting to enact an English-only rule for municipal employees[8]
- Withholding sewer service from certain residents after a court had ordered the municipality to provide it[9]
- Unilaterally ordering the firing of supporters of a particular political candidate[10]
- Voting to replace an employee of one race with an employee of another race[11]
- Ordering that a citizen be removed from a city council meeting for speaking out of order during a portion of the meeting devoted to open comments from the general public[12]
- Ordering the county planning commission to delay consideration of a specific building permit[13]

Notes

1. Shoultes v. Laidlaw, 886 F.2d 114 (6th Cir. 1989).
2. Healy v. Town of Pembroke Park, 831 F.2d 989 (11th Cir. 1987). *But see* Donivan v. Dallastown Borough, 835 F.2d 486 (3rd Cir. 1987) ("the abolishment of the local police force, accomplished by vote rather than enactment of an ordinance [as required by state law] was not a proper exercise of council's legislative powers entitling its members to immunity. . . .").
3. Brown v. Crawford County, Ga., 960 F.2d 1002 (11th Cir. 1992).
4. Ellis v. Coffee County Bd. of Registrars, 981 F.2d 1185 (11th Cir. 1993).
5. Yeldell v. Cooper Green Hosp., 956 F.2d 1056 (11th Cir. 1992).
6. Athanson v. Grasso, 411 F. Supp 1153 (D. Conn. 1976).
7. Green v. DeCamp, 612 F.2d 368 (8th Cir. 1980).
8. Gutierrez v. Municipal Court of Southeast Judicial Dist., Los Angeles County, 838 F.2d 1031 (9th Cir. 1988).
9. Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, Va., 865 F.2d 1409 (4th Cir. 1983).
10. Carver v. Foerster, 102 F.3d 96 (3rd Cir. 1996).
11. Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995).
12. Hansen v. Bennett, 948 F.2d 397 (7th Cir. 1991).
13. Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983).

Notes

1. Bogan v. Scott-Harris, __ U.S. __, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998).
2. Wood v. Strickland, 420 U.S. 308, 331 (1975).
3. Barr v. Matteo, 360 U.S. 564, 575 (1959).
4. *Barr*, 360 U.S. at 575.
5. Schuer v. Rhodes, 416 U.S. 232, 240 (1974).
6. Tenney v. Brandhove, 341 U.S. 367 (1951).
7. Note, "A Board Does Not a Bench Make," *Michigan Law Review* 87 (Oct. 1988): 243.
8. *Bogan*, __ U.S. __, 118 S. Ct. at 966, 140 L. Ed. 2d at 79 (internal citation omitted).
9. *Bogan*, __ U.S. __, 118 S. Ct. at 966, 140 L. Ed. 2d at 79.
10. Spallone v. United States, 493 U.S. 265, 300 (1990) (internal citations omitted) (Brennan, J., dissenting).
11. *See* United States v. Johnson, 383 U.S. 169, 181 (1966).
12. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975).
13. *Spallone*, 493 U.S. at 278.
14. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 733 (1980).
15. Mitchell v. Forsyth, 472 U.S. 511 (1985). "Discovery" means "pretrial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial"—for example, depositions and production of documents. *Black's Law Dictionary* 466 (6th ed. 1990).
16. *Mitchell*, 472 U.S. 511.
17. *Mitchell*, 472 U.S. 511.
18. Marylanders for Fair Representation v. Schaefer, 144 F.R.D. 292 (D. Md. 1992).
19. Schlitz v. Virginia, 854 F.2d 43 (4th Cir. 1988).
20. *Schlitz*, 854 F.2d 43.
21. *See* U.S. Const. art. I, § 6, cl. 1 ("for any speech or debate in either house," a senator or a representative "shall not be questioned in any other place").
22. *Tenney*, 341 U.S. 367.
23. Of course, the separation of powers rationale may not apply when a federal court is reviewing the actions of

a state, regional, or local legislative board. *See* United States v. Gillock, 445 U.S. 360, 370 (1980).

24. Lake Country Estate v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

25. *See, e.g.*, Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980).

26. Fralin & Waldron, Inc. v. County of Henrico, Va., 474 F. Supp. 1315, 1320 (E.D. Va. 1979).

27. *See, e.g.*, Aitchison v. Raffiani, 708 F.2d 96, 99–100 (3d Cir. 1983); Suhre v. Board of Comm'rs, 894 F. Supp. 927 (1995).

28. *See* Baker v. Mayor of Baltimore, 894 F.2d 679, 682 (4th Cir. 1990) (holding that city council is entitled to absolute legislative immunity from claim under Age Discrimination in Employment Act); Hollyday v. Rainey, 964 F.2d 1441, 1443 (4th Cir. 1992) (holding that municipality is entitled to absolute legislative immunity from claim under 42 U.S.C. § 1983).

29. Berkely v. Common Council of City of Charleston, 63 F.3d 295 (4th Cir. 1995), *cert. denied*, 516 U.S. 1073, 116 S. Ct. 775 (en banc); Alexander v. Holden, 66 F.3d 62 (4th Cir. 1995).

30. Forrester v. White, 484 U.S. 219, 224 (1988).

31. *See* City of Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976).

32. *Alexander*, 66 F.3d at 65 ("'budgetmaking is a quintessential legislative function'") [quoting Ratree v. Rockett, 852 F.2d 946, 950 (7th Cir. 1988)].

33. Athanson v. Grasso, 411 F. Supp 1153 (D. Conn. 1976).

34. Green v. DeCamp, 612 F.2d 368 (8th Cir. 1980).

35. *See* Scott v. Greenville County, 716 F. 2d 1409, 1422 (4th Cir. 1983).

36. *See Scott*, 716 F. 2d at 1422.

37. *Bogan*, ___ U.S. ___, 118 S. Ct. at 973, 140 L. Ed. 2d at 82.

38. *See* G.S. 153A-111. "The board of commissioners shall appoint or designate a clerk to the board." (The absence of a reference to eliminating the position means that the board may not do so.)

39. *Forrester*, 484 U.S. at 224.

40. *Bogan*, ___ U.S. ___, 118 S. Ct. at 973, 140 L. Ed. 2d at 82.

41. Vereen v. Holden, 127 N.C. App. 205, 487 S.E.2d 822 (1996), *rev. denied*, 347 N.C. 410, 494 S.E.2d 600 (1997).

At the Institute

Institute Receives Award from Bar Association

The American Bar Association's Judicial Division recently gave the Institute of Government its 1998 Judicial Education Award. Faculty member Cheryl Daniels Howell accepted the award on behalf of the Institute at the association's national conference in Toronto in July.

Created in 1981 and presented annually, the award encourages states to address the continuing education needs of special court judges. This year's award recognizes the Institute for its high-quality programs for district court judges and magistrates in North Carolina.

Every year the Institute conducts courses for new district court judges and magistrates, a seminar on a special topic for district court judges, a small claims course for magistrates, and several conferences for both groups. Other Institute faculty who work with personnel in the state's court system include Joan G. Brannon, Stevens H. Clarke, James C. Drennan, Robert L. Farb, Ben F. Loeb, Jr., Janet Mason, John Rubin, and John L. Saxon.

These professors also are readily accessible resources for program participants. "If I or my fellow judges have a question," says A. Elizabeth Keever, "we can call Cheryl or another faculty member, and almost invariably they have heard the question before, have done the research, and can answer within a day." Keever, who is chief district court judge of the Twelfth Judicial District, in Cumberland County, nominated the Institute for the award.

—Jennifer Litzen and Jason Stanek

Karen Tam

Judge A. Elizabeth Keever, who nominated the Institute for the American Bar Association award

Flinspach Begins New Program for School Boards

Susan Leigh Flinspach joined the Institute on September 1 as assistant professor of public management and government. She will build the Institute's capacity to assist local school boards in implementing state-initiated reforms.

"Local school boards now must comply with state mandates to raise standards and promote accountability while meeting community expectations for the schools," Flinspach explains.

Working for Results as a School Board, a one-day workshop held in Chapel Hill on September 25, kicked off the Institute's new program. Both novice and experienced school board members attended.

Other opportunities planned for this year include seminars to be offered around the state on such "hot" topics as establishing standards for teacher tenure, using performance-based budgeting, and reexamining the consequences of student misconduct.

"The Institute is pleased to expand its services for school board members," said Michael R. Smith, director of the Institute, "and Susan is an excellent person to help lead our efforts. She has good training and experience, plus she cares deeply about helping board members improve their schools."

Before joining the Institute faculty, Flinspach served for more than four years as a research analyst for the Chicago Panel on School Policy, where she coauthored research reports and articles about reform of Chicago's schools. Currently she is a doctoral candidate at the University of Chicago, finishing her dissertation on school board operations and board-

Dan Seears/UNC News Service

Susan Leigh Flinspach

superintendent relations. She already holds a doctorate in anthropology from the University of Iowa.

Additional plans for the program include hiring a second faculty member with expertise in organizational management, as well as offering publications, online resources, and consultation with individual boards.

For more information, call Flinspach at (919) 966-4420, or e-mail her at flinspac@iogmail.iog.unc.edu.

—Jennifer Litzen

Fuller Joins Institute

Fayetteville native L. Lynnette Fuller joined the Institute faculty on November 1 as assistant professor of public law and government. She will specialize in public personnel law.

"We are fortunate that Lynne has joined us," said Michael R. Smith, Institute director. "Her experience in employment law is rich and varied, and she combines it with a passionate commitment to serving North Carolina's officials."

Dan Sears/UNC News Service

L. Lynnette Fuller

Fuller received her bachelor's and law degrees from The University of North Carolina at Chapel Hill. Her interest in workplace dynamics dates back to her undergraduate studies in industrial relations. Additionally, while in law school, Fuller clerked with the Equal Employment Opportunity Commission and a law firm specializing in labor and employment law.

Immediately following law school, Fuller worked as a staff attorney for the Legal Aid Society of Northwest North Carolina Inc., in Winston-Salem, where she specialized in employment, landlord-tenant, and consumer law.

In 1995 Fuller went into private practice, representing both employees and management on a wide range of employment and corporate matters, including discrimination charges, workers' compensation claims, wage-and-hour violations, and contractual disputes.

Fuller will teach in the Basics of Public Personnel Law course next spring, as well as in other courses. She also will be a regular contributor to the Institute's *Public Personnel Law Bulletin*.

You may telephone Fuller at (919) 962-5438 or e-mail her at fuller@iogmail.iog.unc.edu.

—Jennifer Litzen

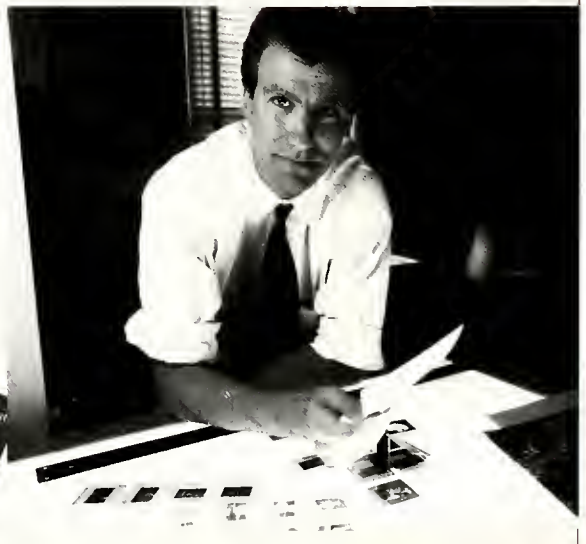
Rubin Becomes Editor of *Popular Government*

With this issue of *Popular Government*, John Rubin, associate professor of public law and government, becomes the editor. Rubin writes, consults, and teaches in the field of criminal law and procedure. He joined the Institute in 1991 after practicing law for several years in Washington, D.C., and Los Angeles.

"I'm excited about the opportunity to work on the magazine," said Rubin. "Anne Dellinger, the editor for the last three years, did an excellent job. I hope to continue the tradition of publishing timely and important articles on the issues facing this state."

Rubin welcomes your comments. You may contact him by telephone at (919) 962-2498, by e-mail at rubin@iogmail.iog.unc.edu, or by letter at the Institute's general address.

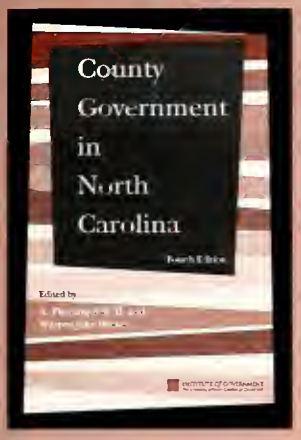
—Jennifer Litzen



Dan Sears/UNC News Service

Covers from four decades of *Popular Government* (left).

Off the Press



County Government in North Carolina

Fourth edition, January 1999

Edited by A. Fleming Bell, II, and Warren Jake Wicker

Please call for price information.

A reference book on county government in North Carolina, with a comprehensive treatment of the legal foundations, organization, and administration of the state's counties. Includes changes in the laws and procedures made by the 1998 session of the North Carolina General Assembly affecting purchasing, social services, education, and other areas. Contains expanded coverage of water and sewer services and new sections on airports, off-street parking, public transportation, aging programs, registers of deeds, and community colleges.

Suggested Rules of Procedure for Small Local Government Boards

Second edition, 1998

A. Fleming Bell, II

$8.50*

A 3.5-inch computer disk of the book is available when five or more books are ordered—limit one disk per order. Disks are not sold separately and are not returnable or refundable.

Discusses general principles of parliamentary procedure that are useful for small governing boards and are often impractical for larger boards. Covers rewritten or modified rules governing agendas, the powers of the chair, citizen participation in meetings, closed sessions, minutes, appointments, and some procedural motions. Also includes new rules dealing with voting by written ballot, ratification of actions, and committees and boards. Contains helpful appendixes that summarize the requirements for the procedural motions permitted under the rules and other procedural statutes.

Handbook for North Carolina County Commissioners

Second edition, 1998

Joseph S. Ferrell

$11.00*

Written especially for candidates for county office and for citizens who want a brief introduction to county government.

Ordering information

Write to the Publications Sales Office, Institute of Government, CB# 3330, UNC–CH, Chapel Hill, NC 27599-3330.

Telephone (919) 966-4119

Fax (919) 962-2707

E-mail to khunt@iogmail.iog.unc.edu

Internet URL http://ncinfo.iog.unc.edu/

Free catalogs are available on request.

*N.C. residents add 6% sales tax

POPULAR GOVERNMENT
(ISSN 0032-4515)
Institute of Government
CB# 3330 Knapp Building
The University of North Carolina at Chapel Hill
Chapel Hill, NC 27599-3330

. . . and at the same time
to preserve the form and spirit of
popular government . . .

—James Madison
The Federalist, No. 10