

# Governmental Immunity: Five Issues

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"In North Carolina the law on governmental immunity is clear." *Mclver v. Smith*, 134 N.C. App. 583 (1999).



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***Rex non potest peccare***



***Respublica non potest peccare?***



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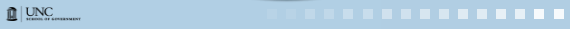
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- Governmental Immunity can bar tort (and some related) claims against local gov'ts arising from performance of governmental functions.
- It cannot bar tort claims for injuries arising from proprietary functions.
- It cannot not bar individual capacity claims.



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**Issue 1: Classifying local government activities as governmental or proprietary**



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### Governmental v. Proprietary Functions

- **Governmental function**
  - discretionary, political, legislative, or public in nature
  - performed for public good on behalf of State
- **Proprietary function**
  - commercial or chiefly for private benefit of compact community

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- “[A]pplication of these flexible propositions of law to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary.” *Koontz v. City of Winston-Salem*, 280 N.C. 513, 528 (1972).

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<u>Activity</u>	<u>Governmental</u>	<u>Proprietary</u>
Collection of solid waste for fee within city limits only	<input checked="" type="checkbox"/>	
Maintenance of city storm drains		<input checked="" type="checkbox"/>
Construction of public hospital by county or city		<input checked="" type="checkbox"/>
Operation of ABC Store		<input checked="" type="checkbox"/>
Granting franchise to public utility	<input checked="" type="checkbox"/>	
Setting public enterprise rates		<input checked="" type="checkbox"/>

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**Estate of Williams v. Pasquotank County, 366 N.C. 195 (2012)**

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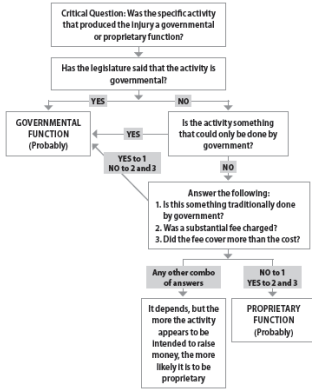
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**Rhodes v. City of Asheville, 230 N.C. 134 (1949)**

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**Issue 2:**  
**Classifying maintenance of local gov't property as governmental or proprietary**

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### Historic Approach

- Unit's liability for injuries caused by **unsafe premises** depended on whether **property** was being used for **governmental** or **proprietary** function.



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### ***Bynum v. Wilson County,*** **367 N.C. 355 (2014)**

- County building housed both governmental and proprietary activities.
- Plaintiff visited building to pay water bill and fell down front steps, suffering serious injuries.
- Plaintiff sued County for negligence.



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- NC Supreme Court held County’s **maintenance of building** was **governmental** function because:
  - Building was used for **discretionary, legislative, and public functions only county could perform**;
  - **State law** designated **locating, supervising, and maintaining** of such county buildings as **governmental** functions.
- **G.S. 153A-169**: “The [BOC] shall supervise the maintenance, repair, and use of all county property. . . .”

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### Different Outcome If . . .



- Mr. Bynum had fallen **inside water department** instead of in common area?
- Building had been used solely for **proprietary** activities?

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**Issue 3: Adequately alleging waiver of governmental immunity**



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**General Rule**

To survive MTD asserting **Governmental Immunity**, complaint must allege waiver.



- Ways local gov't may waive **Governmental Immunity**:
- by engaging in **proprietary function**,
  - by entering into **valid contract**, or
  - by purchasing **liability insurance**.

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- No precise formula is necessary to allege waiver.



**Accuracy Vs Precision**

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- If complaint alleges **proprietary function**, **no express waiver allegation** is required.
- If complaint alleges **valid contract** with local gov't, plaintiff has adequately alleged **waiver as to contract claims**.
- **Waiver** is sufficiently pled when complaint alleges, on information and belief, that local gov't has purchased **liability insurance covering plaintiff's claims**.

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**Issue 4: Impact of Governmental Immunity on Declaratory Judgment Actions**

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**General Rule**

- “[T]he Declaratory Judgment Act does not act as a general waiver of the State’s sovereign immunity.” *Atl. Coast Conference v. Univ. of Md.*, 230 N.C. App. 429, 442 (2013).




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BUT **Governmental Immunity** often will NOT bar **declaratory judgment action** that

- seeks to ascertain rights and obligations owed under **alleged contract** OR
- seeks relief on grounds that local gov't has **exceeded its statutory authority** and **unlawfully invaded or threatened to invade** plaintiff's **personal or property rights**.

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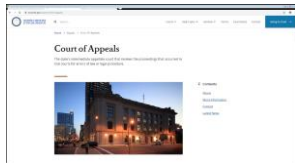
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**Issue 5:**  
**Right to immediate appeal if trial court denies MTD asserting Governmental Immunity**




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- "The denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable." *Richmond Cnty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586 (2013) (internal quotation marks omitted).

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Current rules under COA case law:

- Denial of 12(b)(2) or 12(b)(6) MTD asserting Governmental Immunity is immediately appealable.
- Denial of 12(b)(1) MTD asserting Governmental Immunity is not.




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