



**State of North Carolina
Department of the Secretary of State**

ELAINE F. MARSHALL
SECRETARY OF STATE

November 29, 2006

John K. Tanner, Chief
Voting Rights Section
Civil Rights Division
Voting Section-NWB
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Attn: Yvette Rivera

Re: Submission for Preclearance Under Section 5 of the Voting Rights Act of S.L. 2003-403, Constitutional Amendment Ratified by Referendum Vote

EXPEDITED CONSIDERATION REQUESTED

Dear Mr. Tanner:

The State of North Carolina seeks preclearance of S.L. 2003-403 (Amendment One), an amendment to the North Carolina Constitution that was ratified by a referendum vote in November 2004. See, enclosed submission and attachments. Prior to the enactment of Amendment One, local governments in North Carolina generally could not borrow money secured by a pledge of its taxing powers without approval by a majority of the voters effected. There are some limited exceptions in the State Constitution. Amendment One and the implementing statutory provisions of S.L. 2003-403 create another limited exception that allow local governments to create development financing districts and issue project development debt financing instruments without requiring a bond referendum. It is not entirely clear that S.L. 2003-403 is subject to preclearance requirements under § 5 of the Voting Rights Act. It is possible that the development districts created to finance these bonds could be deemed a pledge of the taxing power requiring a vote of the people; if so, the amendment eliminating the requirement of a vote is arguably a change in voting requirements under § 5.

North Carolina respectfully requests expedited consideration of this submission for preclearance for two reasons. First, a lawsuit has been filed in the United States District Court for the Eastern District of North Carolina alleging that implementation of Amendment One should be enjoined for failure to obtain preclearance. If preclearance is required, the economic development bonds authorized

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by S.L. 2003-403 have no discriminatory or retrogressive effect on minorities in North Carolina. It will conserve judicial resources if the Voting Section either confirms that no preclearance is required or preclears the economic development provisions on an expedited basis.

Second, the date for holding the special 2004 referendum on Amendment One was precleared by the State Board of Elections and, subsequently, a lack of communication among state officials resulted in the potential need for preclearance of the substantive provisions being overlooked. As a further result, anticipation notes have already been issued by one local government. Other local governments are in the final stages of seeking approval of development projects based on which debt financing instruments can be issued, possibly before the end of the year.

Pursuant to statutory authority, this submission is being made by me in my official capacity as the North Carolina Secretary of State. For any additional information or assistance, please contact Tiare Smiley and Alec Peters of the North Carolina Attorney General's Office. Their contact information is included in the enclosed submission.

Sincerely,

A handwritten signature in black ink that reads "Elaine F. Marshall". The signature is written in a cursive, flowing style.

Elaine F. Marshall

Enclosures

**SUBMISSION INFORMATION ON AMENDMENT
ONE (SESSION LAW 2003-403) TO THE NORTH CAROLINA
CONSTITUTION PURSUANT TO 28 C.F.R. PART 51**

The following information is submitted pursuant to 28 C.F.R. Part 51.27 regarding Amendment One to the North Carolina Constitution, Session Law 2003-403.

- (a) Session Law 2003-403, enacted by the General Assembly in August, 2003, provided for the submission of Section 1 of Senate Bill 725 (commonly known as “Amendment One” because it was the first of two amendments on the 2004 ballot) to a vote of the people in the November 2, 2004, statewide general election. S.L. 2003-403, § 24. Amendment One amended Article V of the North Carolina Constitution by adding Section 14, Project Development Financing, and authorized the General Assembly to enact laws creating a method for local units of government to borrow money to finance public improvements associated with private development projects by the creation of development financing districts. So long as no revenues other than the set-aside proceeds from the finance districts are pledged by a local government, the instruments of indebtedness authorized by the provision may be issued without approval by a referendum vote. S.L. 2003-403, § 1. The session law also sets out the statutory provisions governing the implementation of the financing method authorized by Amendment One. S.L. 2003-403, §§ 2 through 21. (A copy of the session law is included as **Attachment 1**.)

- (b) Article V, § 4 of the North Carolina Constitution limits the power of the General Assembly, with certain specific exceptions, to authorize local units of government to contract debts through debt instruments secured by a pledge of the local government’s faith and credit and taxing power unless approved by a majority of qualified voters. (A copy of N.C. CONST. art. V, § 4 is included as **Attachment 2**.) Arguably, Amendment One creates an additional exception whereby a local government may pledge its faith and credit under project development financing debt instruments without a referendum vote.

- (c) The North Carolina Constitutional Amendments Publication Commission (composed of Secretary of State Elaine F. Marshall, Chair, Attorney General Roy Cooper and George Hall, Legislative Services Officer, in their official capacities) prepared an official explanation of Amendment One pursuant to N.C. GEN. STAT. § 147-54.8, *et seq.*, as follows:

The amendment would grant North Carolina local governments authority to issue bonds to pay for public improvements associated with private development projects within a defined development district created by the local government. The bonds could be used for public improvements such as streets, water and sewer service, redevelopment, land development for industrial or commercial purposes, airports, museums or parking facilities. Upon passage of this amendment, no additional voter referendum would be necessary to issue these bonds. The bonds would be repaid with the additional property tax revenues that would result from the enhanced property

values on the improved property in those development districts. To ensure enough property tax revenues are generated to repay the bonds, the amendment allows the property owners within the development district to agree to a minimum value at which their property will be assessed for tax purposes. If a majority of voters approves this amendment, it becomes effective immediately upon the certification of its passage.

To the extent the General Assembly and local governments have been limited in borrowing money and increasing local government debt secured by the local government's taxing power unless approved by a majority vote of affected voters, Amendment One allows a local government to borrow money based on a defined financing district without a referendum vote. Under the new provisions, the issuance of the specified project development debt financing instruments is not subject to voter approval.

It can be argued that the financing method provided for by Amendment One and the legislation implementing that provision do not constitute a pledge of the taxing power and the faith and credit of a local government, and thus would not require a vote. The new provisions allow bonds to be issued without a vote so long as only the revenues resulting from the set aside proceeds of the development district are pledged and no revenues that require the issuer to exercise its taxing power are pledged. For this reason, it is not clear that the constitutional amendment "changed" anything requiring a vote of the people. Because the General Assembly sought to make these development debt instruments available to local governments, and in order to assure the validity of constitutional amendment, the State is seeking preclearance so as to alleviate any possible § 5 question.

- (d,e) Pursuant to N.C. GEN. STAT. § 120-30.9D, the Secretary of State is the state official with the responsibility for submitting for preclearance acts of the General Assembly that amend the North Carolina Constitution and that constitute a change affecting voting under § 5 of the Voting Rights Act. The Secretary of State is Elaine F. Marshall, Old Revenue Building, P.O. Box 29622, Raleigh, NC 27626-0622.

This submission is being made on behalf of Secretary Marshall by:

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- (f) Amendment One is a constitutional amendment effective statewide that is being submitted on behalf of the State of North Carolina which has forty (40) counties covered by § 5 of the Voting Rights Act.
- (g) Amendment One was enacted by the North Carolina General Assembly and was ratified by a vote of the qualified voters in the November 2, 2004 General Election.
- (h) Under Article XIII, § 4 of the North Carolina Constitution, an amendment to the Constitution may be initiated by the General Assembly by adopting an act submitting the proposal to the voters for ratification or rejection. (A copy of N.C. CONST. art. XIII, § 4 is included as **Attachment 3.**) Senate Bill 725, which provides for the amendment and the statewide referendum, S.L. 2003-403, § 24, was filed in the General Assembly, processed in committee, and enacted by a three-fifths vote of the members of each house as required by N.C. CONST. art. XIII, § 4. (A copy of the legislative history and votes is included as **Attachment 4.**)
- (i) Session Law 2003-403 was enacted by the General Assembly on August 7, 2003, and approved by the voters in the November 2, 2004 General Election.
- (j) Amendment One became effective upon certification of the election by the State Board of Elections on November 23, 2004. (A copy of the certification of the election is included as **Attachment 5.**)
- (k) The provisions of the Project Development Financing Act have not yet been enforced or administered, with the following exception:

On February 28, 2006, the City of Roanoke Rapids, North Carolina, pursuant to the statutory scheme for the creation of development districts under the provisions enacted in S.L. 2003-403, adopted a resolution to create a development district called the “Carolina Crossroads Music and Entertainment District” (the “Roanoke Rapids District”). On June 8, 2006, in compliance with the North Carolina statutory scheme for the issuance of project development financing instruments, including receipt of approval by The Local Government Commission of North Carolina of such issuance, Roanoke Rapids issued a \$3,785,000 Music and Entertainment District Special Revenue

Bond Anticipation Note, Series 2006 (the “Roanoke Rapids Note”). The Roanoke Rapids Note was issued in anticipation of the issuance of a like amount of Music and Entertainment District Special Revenue Bonds of the City to finance certain improvements within the Roanoke Rapids District. The Roanoke Rapids Note is secured as provided therein, including a pledge of the property taxes levied on the incremental value of property in the Roanoke Rapids District. No bond referendum was held with respect to the issuance of the Roanoke Rapids anticipation note.

The referendum on the proposed constitutional amendment being submitted to North Carolina’s voters was the subject of a preclearance submission by the North Carolina State Board of Elections and the State received preclearance on the referendum itself. (A copy of the preclearance letter for the referendum is included as **Attachment 6**.) However, the substantive change to the North Carolina Constitution that arguably effected a change in voting requirements may have required a separate and detailed submission. Historically, municipalities in the State have relied upon State officials for compliance with the requirements of the Voting Rights Act on substantive changes in voting procedures arising from changes to the North Carolina Constitution. There was an assumption on the part of the City officials that any action that might have been required by federal law was accomplished by State officials. The City acted in good faith reliance that the constitutional amendment and the changes to North Carolina law enacted by S.L. 2003-430 had been enacted in compliance with federal law when the development district was created and the anticipation notes were issued. The bonds themselves have not yet been issued.

- (l) Not applicable.
- (m) The purposes of Amendment One, as stated in the preamble to S.L. 2003-403, include providing another option for local governments in North Carolina to engage in economic development efforts, to attract new industry and to enable North Carolina to be more competitive in attracting private sector job creation and capital investments. This economic development tool, which relies on a detailed review and approval by the Local Government Commission, is a more efficient process for financing development projects than seeking approval by referendum.
- (n) The project development debt instruments authorized by Amendment One may be utilized by economically distressed areas of North Carolina to attract new industry. North Carolina minorities in urban and rural areas of the State would benefit in the same way as all citizens of the State if local governments are successful in engaging in economic development projects authorized by S.L. 2003-403. The legislation was uniformly supported by minority members of the General Assembly. *See* Attachment 4, Roll Call Votes (minority members are circled). Contact information for minority members of the General Assembly who voted in 2003 and who still serve in the Legislature are included as **Attachment 7**.
- (o) An action has been filed in federal court challenging Amendment One under § 5 of the Voting Rights Act and under the equal protection and due process provisions of the State and

federal constitutions. *Bishop v. Bartlett*, C.A. No. 5:06-CV-00462-FL (E.D.N.C.). (A copy of the complaint is included as **Attachment 8**.)

- (p) Amendment One arguably creates an new exception to the general limitation on the power of the General Assembly to authorize local governments to pledge their faith and credit and borrow money secured by debt instruments without a referendum vote. That general limitation is stated in Article V, § 4(2) of the North Carolina Constitution, and is substantively similar to the provisions of Article V, § 4, and Article VII, § 6, of the North Carolina Constitution of 1868, as amended, and as effective prior to the enactment of the Voting Rights Act. (Copies of the relevant provisions from the 1868 Constitution as amended are included as **Attachment 9**.)