LOCAL GOVERNMENT AUTHORITY TO IMPLEMENT SMART GROWTH PROGRAMS: DILLON'S RULE, LEGISLATIVE REFORM, AND THE CURRENT STATE OF AFFAIRS IN NORTH CAROLINA

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Local governments in North Carolina have been delegated substantial authority to enact smart growth programs. However, as new management tools are proposed that have not been explicitly authorized by the legislature, judicial construction of the scope of the delegated authority is necessary.

This Article reviews the delegation of authority that has been made and how the courts have interpreted those delegations. For a century the courts properly applied a rule of strict construction, Dillon's Rule, in these reviews. The General Assembly, in 1971, adopted a rule of broad construction for some local government powers, yet the courts have only recently begun to adjust their standard of review. This Article traces this evolution in legislative intent and judicial review and assesses its implications for local government authority to enact various planning, regulatory, and financing measures to implement smart growth programs.

I. SMART GROWTH AND LOCAL GOVERNMENT AUTHORITY

A. Smart Growth

North Carolina has experienced unprecedented population and economic growth in recent years. The state's population has quadrupled in the last century from less than two million in 1900 to almost eight million in 1999. In the past decade alone most of the state's urban areas have experienced population increases exceeding

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ten percent.[1]

This growth has produced tremendous economic prosperity for many portions of the state, but it has been accompanied by unprecedented pressure on the state's natural resources and the ability of local governments to adequately service the growth. All too often growth in the state's metropolitan areas has led to traffic congestion, overcrowded schools, loss of open space and farmland, and water and air quality degradation. Intangible losses are less quantifiable but no less real. The unique character and sense of place that makes towns and cities special is being replaced by a homogenous mix of cookie cutter malls and subdivisions.[2]

In response to these concerns, the demand for smarter and more sustainable growth has arisen. Many elected officials, developers, neighborhood activists, and environmental groups have concluded that state and local governments can and should do a better job of managing growth. While each group has differing points of emphasis for improvements, several broad points of agreement exist. Economic prosperity and growth should continue, but in a way that protects the quality of the environment. Continued growth in new jobs and housing are welcome, but affordable housing, adequate transportation networks, schools, and urban services should accompany that growth.

Local governments in North Carolina and around the country have proposed a wide variety of tools to produce "smarter" growth. Regulations have been proposed to allow, encourage, or mandate standards for new developments that foster more compact development schemes, a richer mix of residential and other land uses, and communities where people are comfortable walking or using mass transit rather than having to rely solely on the automobile. Amending ordinances to allow in-fill development, which makes more effective use of existing community infrastructure and encourages historic preservation and downtown redevelopment rather than continued sprawl, has been proposed. Rather than continually trying to catch up to a demand that outstrips the capacity of overburdened roads, utilities, and schools, adequate public facility ordinances and impact fees are suggested as means of better coordinating development rates and service availability. Affordable housing incentives and mandates have been proposed to increase

1. Official North Carolina population and growth projections are published online. *See* Office of State Planning, *Certified Metropolitan Area Population Estimates & Municipal Growth* (visited June 14, 2000) <http://www.ospl.state.nc.us/demog/>. The state's growth and prosperity is far from uniform however, as some rural areas have little growth and depressed economies. *See id.*

2. For a critique of such homogenization, see, e.g., WILLIAM S. KOWINSKI, THE MALLING OF AMERICA (1985); JAMES HOWARD KUNSTLER, HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE TWENTY-FIRST CENTURY (1996).

economic equity since current growth patterns have not benefited all segments of the community. A host of proposals have been made to protect natural resources as development continues, including mandates for buffers and open space set-asides, creating transferable development rights schemes, and acquisition of various interests in farmland, recreation, and open space areas.

Legislation has been adopted in several states to mandate a variety of local government actions to improve growth management.[3] These include requirements for establishing urban growth boundaries, tying development approval to urban service availability, and mandating state or regional approval of land use plans. In most states, North Carolina included, such legislation has not been enacted. In these states uncertainty exists as to what cities and counties can do within their existing statutory authority to implement smart growth programs. This article addresses the scope of local government authority to implement smart growth programs in the absence of, or in addition to, state smart growth legislation.

B. Local Authority for Smart Growth Programs

In the early days of North Carolina's statehood, relatively few government regulations were in effect regarding growth and development. During the late eighteenth and nineteenth centuries, private nuisance law was used to resolve disputes over noxious land uses. Suits were common regarding the location and operation of millponds, distilleries, stables, cotton gins, grist mills, sawmills, cemeteries, guano factories, freight yards, hospitals, and gasoline filling stations.[4] With increasing population and urbanization, however, came an increasing demand in the early twentieth century for government regulation and management of growth.

While the question of local government's inherent powers has been extensively discussed by academics,[5] the courts in North Carolina have uniformly concluded that municipalities and counties are created by the state and can exercise only those state powers that have been delegated to them by the General Assembly. The state

3. For summaries of various state growth management initiatives, see, e.g., Dennis E. Gale, *Eight State-Sponsored Growth Management Programs: A Comparative Analysis*, 58 J. AM. PLAN. ASS'N. 425 (1992), and Douglas R. Porter, *State Framework Laws for Guiding Urban Growth and Conservation in the United States*, 13 PACE ENVTL. L. REV. 547 (1996).

4. For a review of the development of both private nuisance law and early government regulation of development, see PHILIP P. GREEN, JR., ZONING IN NORTH CAROLINA 5-73 (1952).

5. *See, e.g.,* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); Howard L. McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 299 (1916); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83.

constitution provides that the General Assembly shall provide for the "organization and government" of cities and counties and "may give them such powers and duties . . . as it may deem advisable."[6] Pursuant to this authority, the General Assembly can create[7] and abolish cities and counties.[8] The General Assembly can delegate or revoke such authority as deemed appropriate and may set procedural requirements for the use of delegated authority. While cities and counties in North Carolina do not have constitutional home rule status, as is the case in a majority of states,[9] they do have statutorily provided home rule in the sense of being able to locally select their form of government,[10] management options,[11] and personnel systems.[12] In addition to these organizational and administrative options, cities and counties have also been delegated the broad range of substantive regulatory, taxation, and public enterprise authority discussed below.

In colonial times and in early statehood, municipal government authority in North Carolina was provided by individual city charters and special acts for each municipality rather than by general state

6. N.C. CONST. art. VII, § 1; *see also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) (discussing the continued existence of a municipal corporation and stating that the scope of its authority is a matter of state law, unconstrained by the federal Constitution).

7. *See* Starbuck v. Town of Havelock, 252 N.C. 176, 178, 113 S.E.2d 278, 280 (1960). The court held: "The Legislature has full and complete power to create a municipal corporation. It may determine when and how the corporation comes into existence, the powers which it may exercise, the area in which the corporation may act, . . . and other incidental matters." *Id.*

8. For example, in 1881, the General Assembly provided that, if the town of Fayetteville's debts were not reduced by half by a set date, the future existence of the town as a municipal corporation would be put to the voters. *See* Lilly v. Taylor, 88 N.C. 489, 490-91 (1883). The debt was not reduced, the voters elected to disband the town, and the town as a corporate entity ceased to exist. *See id.* Counties can:

> [P]ossess such corporate powers and delegated authority as the Legislature may deem fit to confer upon them, and such power and authority must be exercised in the way, and only for the purpose prescribed by legislative enactment; and moreover, they are always subject to legislative control, and their powers may be abolished, enlarged, abridged, or modified.

Commissioners of Dare County v. Commissioners of Currituck County, 95 N.C. 189, 191-92 (1886).

9. Some thirty states have constitutional provisions for municipal home rule (though the scope and nature of these delegations vary significantly). *See* 2 EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 4.28 (3d ed. 1999). There is often controversy and the need for judicial interpretation of the scope of local government authority even in states with constitutional home rule. *See* Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 672-74 (1964).

10. *See* N.C. GEN. STAT. §§ 153A-76 to -78, 160A-101 to -111 (1999).

11. *See id.* §§ 153A-81 to -88, 160A-101 to -103, 160A-146 to -159.

12. *See id.* §§ 153A-87 to -89, 160A-162 to -169.

law.[13] Early municipal regulations under this authority were generally limited to issues such as preventing unsafe construction.[14] The general ordinance-making power—the authority to adopt regulations to protect the public health, safety, and welfare—was first delegated to North Carolina cities in 1854.[15] Counties, as a subdivision of state government, existed even earlier, but their role in such local governance evolved later. While several individual counties were granted broad ordinance-making authority earlier, the general ordinance-making power was not delegated to all counties until 1969.[16]

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13. The first town to be chartered in the state was Bath in 1705, followed by Edenton in 1722, Beaufort and New Bern in 1723, and Wilmington in 1760. *See* Charles D. Liner, *The Evolution of Governmental Roles and Responsibilities*, *in* STATE AND LOCAL GOVERNMENT RELATIONS IN NORTH CAROLINA 4 (2d ed. 1995).

> For a hundred and fifty years after the incorporation of the first town in North Carolina, towns were created, extended, or abolished by special acts of the General Assembly; and powers and duties were given and taken away in the same fashion. If every one of them was not a law unto itself, at least it had a set of laws unto itself.

Albert Coates, *The Problem of Private, Local, and Special Legislation and City and County Home Rule in North Carolina*, POPULAR GOV'T, Feb.-Mar. 1949, at 3, 10. For an overview of the evolution of municipalities in North Carolina, see Warren J. Wicker, *Introduction to City Government in North Carolina*, *in* MUNICIPAL GOVERNMENT IN NORTH CAROLINA 3-28 (David M. Lawrence & Warren J. Wicker eds., 2d ed. 1995).

14. In 1740, Edenton was authorized to forbid the use of wooden chimneys in town. *See* 1740 N.C. Sess. Laws ch. 1.

15. *See* 1854 N.C. REV. CODE, ch. 111, § 12. The delegation, sometimes referred to as the general police power, was "to make such by-laws, rules, and regulations for the better government of the town, as they may deem necessary. *Provided* the same be not inconsistent with the provisions of this chapter, or the laws of the land." *Id.* (emphasis in original). The statutes now provide that cities "may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances." N.C. GEN. STAT. § 160A-174(a) (1999).

16. The first county was organized in the state in 1665. The initial attempted grant of general ordinance-making power to the counties was made by 1963 N.C. Sess. Laws ch. 1060, § 1 (codified at N.C. GEN. STAT. § 153-9(55), *repealed by* 1973 N.C. Sess. Laws ch. 822). This statute, however, exempted 48 named counties. *See id.* This was declared to violate the N.C. CONST. art. II, § 29 prohibition of local acts regulating business or trade. *See* High Point Surplus Co. v. Pleasants, 264 N.C. 650, 657, 142 S.E.2d 697, 703 (1965). The court also invalidated a local bill giving a single county authority to regulate poolrooms and dance halls on the same grounds. *See* State v. Smith, 265 N.C. 173, 179, 143 S.E.2d 293, 298-99 (1965). The grant of general police powers to counties was reenacted and made applicable to all counties in 1969 and was upheld by *Whitney Stores, Inc. v. Clark*, 277 N.C. 322, 328-29, 177 S.E.2d 418, 422 (1970). The court refers to this as a "Home Rule" statute, referring to the authority to enact ordinances in the same fashion as cities. *Id.* at 327, 177 S.E.2d at 421. The county general ordinance-making power is codified at N.C. GEN. STAT. § 153A-121(a) (1999). For a general overview of the evolution of county governments in North Carolina, see Joseph S. Ferrell, *Counties and*

The initial grant of additional local authority to regulate specific activities addressed public safety issues, such as the 1905 fire prevention requirement that cities establish restrictions on the location of wooden buildings in downtown areas.[17] The movement to grant local governments authority on a statewide basis rather than through local bills was accelerated in 1917 when the constitution was amended to prohibit local legislation in fourteen designated fields[18] and to require the General Assembly to provide by general law for the organization and financing of local governments.[19] Over the years, local ordinance-making power has been extended to allow regulation of a variety of specific activities, including public health nuisances, junked cars, flea markets, places of amusement, explosive and dangerous substances, noise, emission of pollutants, and commercial activities conducted on Sundays.[20]

Beginning in the 1920s, the North Carolina legislature delegated substantial specific authority to local governments for land use regulation. The first modern land use regulatory tool authorized for use in the state was zoning. Following the adoption of the nation's first comprehensive zoning ordinance by New York City in 1916, the U.S. Department of Commerce actively promoted the concept, publishing and distributing a standard zoning-enabling law that was adopted by most states.[21] Zoning authority was granted to North Carolina cities in 1923[22] and to counties in 1959.[23] A variety

County Governance, *in* COUNTY GOVERNMENT IN NORTH CAROLINA 4-22 (A. Fleming Bell, II & Warren J. Wicker eds., 4th ed. 1998).

17. *See* 1905 N.C. Sess. Laws ch. 506, § 8. In the mid-1800s, many cities were authorized by charter to prohibit wooden buildings in certain parts of town as a fire-safety measure. *See id.* In 1905, all incorporated towns in the state were required to establish fire limits. *See* 1905 N.C. Sess. Laws ch. 506, § 7.

18. *See* N.C. CONST. art. II, § 29 (1917). These limitations continue in the current constitution. *See* N.C. CONST. art. II, § 24(a) to (l).

19. *See* N.C. CONST. art. II, § 4 (1917). In the same year, cities were granted the authority to regulate the erection of fences and billboards, the storage of combustible and explosive materials, the removal of dangerous buildings, and the installation of plumbing and electrical facilities. *See* 1917 N.C. Sess. Laws ch. 136.

20. *See* N.C. GEN. STAT. §§ 160A-178 to -198, 153A-125 to -142 (1999).

21. U.S. DEP'T. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1924). The U.S. Supreme Court upheld the basic constitutionality of the zoning concept in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926). By 1937, every state had authorized zoning. *See* SEYMOUR I. TOLL, ZONED AMERICAN 281 (1969). By 1937, 75% of the U.S. population lived in a zoned area. *See* EDWARD M. BASSETT, ZONING 8 (1940); MEL SCOTT, AMERICAN CITY PLANNING SINCE 1890, at 193-94, 249 (1969).

22. *See* 1923 N.C. Sess. Laws ch. 250 (codified at N.C. GEN. STAT. §§ 160A-381 to -392 (1999)). The North Carolina statute closely followed the model act promulgated by the U.S. Department of Commerce. Among the early zoning ordinances adopted in the state were those of Raleigh in 1923; Durham, Greensboro, High Point, and Southern Pines in 1926; Rocky Mount in 1928; Elizabeth City and Fayetteville in 1929; and Winston-Salem in 1930. *See* Kay Haire Huggins, *City Planning in North Carolina, 1900-1929*, 46 N.C. HIST. REV. 377,

of additional general enabling authority has been granted in ensuing years. This includes authority to establish minimum housing codes,[24] adopt airport zoning,[25] regulate development in floodplains,[26] regulate subdivision of land,[27] carry out building inspections,[28] regulate historic districts and landmarks,[29] create community appearance programs,[30] undertake community development,[31] urban homesteading,[32] and downtown development programs,[33] adopt a variety of resource protections measures,[34] and adopt official maps to protect transportation corridors.[35]

Local governments have been delegated substantial authority and latitude in the area of land use planning and intergovernmental coordination. The legislature first provided explicit authority for lo-

395 (1969).

23. *See* 1959 N.C. Sess. Laws ch. 1006 (codified at N.C. GEN. STAT. §§ 153A-340 to -348 (1999)). Several more urban counties had received individual authorization for zoning a decade earlier.

24. *See* 1939 N.C. Sess. Laws ch. 287 (codified at N.C. GEN. STAT. §§ 160A-441 to -450 (1999)) (applying to cities, and later amended to include counties).

25. *See* 1941 N.C. Sess. Laws ch. 250 (codified at N.C. GEN. STAT. §§ 63-30 to -37.1 (1999)).

26. *See* 2000 N.C. Sess. Laws ch. 150 (codified at N.C. GEN. STAT. §§ 143-215.51 to -215.61 (2000)).

27. *See* 1955 N.C. Sess. Laws ch. 1334 (applying to cities); 1959 N.C. Sess. Laws ch. 1007 (codified at N.C. GEN. STAT. §§ 153A-371 to -373, 160A-371 to -376 (1999)) (applying to counties).

28. *See* 1969 N.C. Sess. Laws ch. 1065 (cities); 1973 N.C. Sess. Laws ch. 822 (counties) (codified at N.C. GEN. STAT. §§ 153A-350 to -375, 160A-411 to -438 (1999)). Cities and counties are required to enforce the state minimum building code and may not create additional local building standards. *See* N.C. GEN. STAT. §§ 153A-351, 160A-411 (1999).

29. *See* 1989 N.C. Sess. Laws ch. 706 (codified at N.C. GEN. STAT. §§ 160A-400.1 to -400.14 (1999)) (replacing earlier legislation on historic districts).

30. *See* 1971 N.C. Sess. Laws ch. 896 (codified at N.C. GEN. STAT. § 160A-451 to -455 (1999)).

31. *See* 1975 N.C. Sess. Laws ch. 435 (codified at N.C. GEN. STAT. §§ 153A-376, 160A-456 (1999)). Cities have also had explicit authority to carry out redevelopment programs in blighted areas. *See* 1951 N.C. Sess. Laws ch. 1095 (codified at N.C. GEN. STAT. §§ 160A-500 to -526 (1999)).

32. *See* 1987 N.C. Sess. Laws ch. 464 (codified at N.C. GEN. STAT. § 160A-457.2 (1999)).

33. *See* 1987 N.C. Sess. Laws ch. 619 (codified at N.C. GEN. STAT. § 160A-458.3 (1999)).

34. Local erosion and sedimentation control ordinances were authorized by 1979 N.C. Sess. Laws ch. 1247 (codified at N.C. GEN. STAT. §§ 113A-60, 160A-458 (1999)). Local floodway regulations were authorized by 1979 N.C. Sess. Laws ch. 1247 (codified at N.C. GEN. STAT. §§ 143-215.51 to -215.61, 160A-458.1 (1999)). Mountain ridge protection ordinances were authorized by 1983 N.C. Sess. Laws ch. 676 (codified at N.C. GEN. STAT. §§ 113A-208, 153A-448, 160A-458.2 (1999)). In addition to these enabling provisions, local governments with surface water supply watersheds are required to adopt local watershed protection ordinances. *See* N.C. GEN. STAT. § 143-214.5(d) (1999).

35. *See* 1987 N.C. Sess. Laws ch. 747 (codified at N.C. GEN. STAT. §§ 136-44.50 to -44.53, 160A-458.4 (1999)).

cal government planning in 1919 with the authorization of city planning commissions.[36] Cities and counties may establish one or more planning boards and may assign them broad planning, coordination, and regulatory functions.[37] While there is no general state mandate for comprehensive planning[38] or plan coordination, there is full authorization for voluntary action in this area. Local governments may enter into regional planning commissions or councils of government to undertake cooperative planning efforts,[39] and have the authority to craft individual agreements for coordination or joint action.[40]

Cities and counties are authorized to provide a variety of utilities and other public enterprise functions and to charge reasonable fees for such. These public enterprises can include water provision, sewer, solid waste services, public transportation, parking, airports, and stormwater systems (for cities and counties), and electric power, natural gas, and cable television (for cities).[41] There is substantial authority to acquire interests in land for open space, recreation, and conservation purposes.[42] Local taxing authority is more circum-

36. *See* 1919 N.C. Sess. Laws ch. 23. Greensboro established the state's first city planning commission in 1920, followed by Winston-Salem in 1921 and Raleigh and Durham in 1922. *See* PHILIP P. GREEN, JR., ORGANIZING FOR LOCAL GOVERNMENTAL PLANNING IN NORTH CAROLINA 7-8 (2d ed. 1989). Full time planning staff were first employed by North Carolina cities in the late 1940s. *See id.* County planning boards were first authorized in 1945. *See id.*

37. *See* N.C. GEN. STAT. §§ 153A-321, 153A-322, 160A-361, 160A-362 (1999).

38. The single exception is a mandate that the twenty coastal counties prepare comprehensive plans consistent with guidelines established by the Coastal Resources Commission. *See* N.C. GEN. STAT. §§ 113A-106 to -112 (1999). Commission review and approval of the plans is also required. *See id.* § 113A-106.1. There are also several issue-specific planning mandates. For example, each local government that supplies public water must prepare a water supply plan and submit it to the state. *See id.* § 143-355(l). Municipalities must prepare a plan for city streets, which will be adopted by the city and the state's Department of Transportation. *See id.* § 136-66.2(a).

39. *See* N.C. GEN. STAT. §§ 153A-391 to -398, 160A-470 to -478 (1999).

40. *See* 1975 N.C. Sess. Laws ch. 435 (codified at N.C. GEN. STAT. §§ 153A-376, 160A-464 (1999)). Any unit of local government has broad authority to enter into interlocal agreements with any other unit of local government to jointly exercise any power or function of the units. *See id.*

41. *See* N.C. GEN. STAT. §§ 153A-274, 160A-311 (1999). In addition to utility use fees, cities and counties can also make special assessments on the benefited properties for the capital costs for specified public improvement projects. *See id.* §§ 153A-185, 160A-216.

42. The general authority to acquire any interest in land, for use by cities or counties, is provided by N.C. GEN. STAT. §§ 153A-158 and 160A-240.1 (1999). Additional specific acquisition authority for both cities and counties include: acquisition of interests in land for open space, including the fee, development rights, and conservation easements, *see* N.C. GEN. STAT. §§ 160A-401 to -407; acquisition of agricultural conservation easements for farmland preservation, *see id.* § 106-744; acquisition for parks and recreation, *see id.* § 160A-353; and acquisition to preserve railroad corridors, *see id.* § 160A-498.

scribed. Cities and counties are allowed to levy only specifically authorized taxes, which include property taxes and a modest number of other specialized taxes.[43]

These grants of authority give local governments explicit power to undertake a great deal of planning, regulatory, and public investment activity to implement smart growth programs.[44] But a wide variety of emerging growth management tools are not explicitly mentioned in the state statutes. Can a local government adopt a temporary development moratorium, an adequate public facilities ordinance, traditional neighborhood design standards, affordable housing mandates, transferable development rights schemes, or impact fees?

II. JUDICIAL CONSTRUCTION OF THE SCOPE OF LOCAL AUTHORITY

The precise scope of both the explicit and implied powers of local governments, which determines which of these emerging smart growth tools may be employed without additional state authorization, is determined by the courts. Since cities and counties in North Carolina have no constitutionally based authority,[45] the courts must examine the statutory grants discussed above to determine whether the proposed measure is within the grant of authority or is *ultra vires*.

In North Carolina, judicial interpretation of the scope of local government authority must be analyzed in two contexts. The first is the 1868 to 1971 period when there was a legislative direction for strict construction of the scope of local authority. This century of jurisprudence established a tone for judicial review that continues to influence judicial and local government perspectives. The second is

43. *See id.* §§ 153A-146 to -155, 160A-206 to -215.

44. As Professor Briffault argued, cities and counties may be subordinate to state governments in a constitutional and legal sense, but that hardly means they are powerless in terms of their actual delegated authority and, in fact, they often are able to act in their own local interest without regard to detrimental regional impacts. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 6-15 (1990); *see also* Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 94-104 (1990) (discussing a historical perspective on local authority vis-à-vis central authority).

45. The court's initial decision in *Smith Chapel Baptist Church v. City of Durham*, 348 N.C. 632, 502 S.E.2d 364 (1998) [hereinafter *Smith Chapel I*], *aff'd on reh'g*, *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999) [hereinafter *Smith Chapel II*], discussed *infra* at notes 129-41, pointed to N.C. CONST. art. XIV, § 5, which provides that it is a "proper function" of the state and local governments to protect environmental resources as a source of authority for local action. *See Smith Chapel I*, 348 N.C. at 636, 502 S.E.2d at 367. That decision was superceded by a decision that pointedly did not recognize this constitutional foundation for local authority. *See Smith Chapel II*, 350 N.C. 805, 517 S.E.2d 874.

1971 to the present when there has been a legislative direction for broad interpretation of the scope of local authority. In this second period, the courts have struggled to reconcile a century of precedent with a revised legislative intent. The decisions within both periods are divergent, at times suggesting a results-oriented jurisprudence. For the most part, the decisions reveal the judiciary attempting to faithfully discern an often-ambiguous legislative intent. The following two parts of this Article review the jurisprudence of these periods.

A. The Dillon's Rule Era

Until recent times, North Carolina was a state of rural areas and small towns. In 1850 the state's largest city was Wilmington, which had a population of only 5000. The 1870 census was the first to include a city with a population over 10,000. Prior to 1870, local governments in the state had little need to exercise more than rudimentary functions—basic police and fire responsibilities, a few ordinances to protect public health, and modest street, water, and sewer improvements in the larger towns.[46] Thus, the fact that there are few reported decisions on the scope of local authority prior to the 1870s is not surprising.[47]

In 1872, John F. Dillon published his influential *Treatise on the Law of Municipal Corporations*.[48] Therein, Judge Dillon set forth an influential rule of construction of ambiguous grants of authority to local governments that became known as Dillon's Rule:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words;* second, those *necessarily or fairly implied* in, or incident to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply conven-

46. *See* Warren J. Wicker, *Introduction to City Government in North Carolina*, *in* MUNICIPAL GOVERNMENT IN NORTH CAROLINA 7 (David M. Lawrence & Warren J. Wicker eds., 2d ed. 1995).

47. The few early North Carolina decisions addressing the scope of local authority applied a broad reading to legislative grants of municipal authority. The court, in 1817, invalidated a Fayetteville ordinance that authorized the constable to seize hogs running at large. *See* Shaw v. Kennedy, 4 N.C. (Taylor) 591, 591-92 (1817). However, the court assumed that the power to regulate hogs in a properly framed ordinance was within a 1787 legislative grant of authority to the town to make "any rules and orders which may tend to the advantage, improvement, and good government" of the town. *Id.; see also* Whitfield v. Longest, 28 N.C (6 Ired.) 268, 273-74 (1846); Hellen v. Noe, 25 N.C. (3 Ired.) 493, 499-500 (1843). In a national context, the legal status of cities and the scope of their authority was highly uncertain prior to the 1870s. *See* Williams, *supra* note 5, at 88.

48. JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872).

> ient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[49]

While Dillon's Rule may well reflect underlying judicial assumptions about the appropriate scope of local government authority, it is ultimately a rule of construction. Judge Dillon recognized that it is the intent of the legislative body that must control statutory construction, albeit with a continuing admonition toward strict construction.[50]

The North Carolina legislature first explicitly expressed its intentions regarding the scope of its delegation of authority to local governments in 1868. In legislation organizing county government, the General Assembly provided that "[e]very county is a body politic and corporate, and has the powers specified by statute, or necessarily implied by law *and no other*."[51] Originally, there was not a similar direction on interpretation of city authority in the state's general grant of authority to municipalities. However, in the 1905 recodification of state laws, the same limiting language previously used for counties was applied to cities, with the code providing that municipalities "shall have the powers prescribed by statute, and those necessarily implied by law, *and no other*."[52] Thus, beginning

49. JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS § 55, at 173 (2d ed. 1873) (emphasis in original). While Dillon quotes at length from a 1839 Massachusetts case setting forth these general limitations, *Spaulding v. Lowell*, 40 Mass. (23 Pick.) 71, 74-75 (1839), his rule of strict construction was hardly general and undisputed, though it became such largely on the basis of his influential treatise.

50. Dillon states:

> [T]he fundamental and universal rule . . . is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or fair, reasonable, substantial doubt as to the extent of the power is to be determined in favor of the State or general public, and against the State's grantee.

JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 239 (5th ed. 1911); *see also* City of Asheville v. Herbert, 190 N.C. 732, 735, 130 S.E. 861, 863 (1925) (approving Dillon's views regarding extent of municipality power).

51. 1868 N.C. Sess. Laws ch. 20, § 1 (emphasis added). This authorization was further narrowed in 1876 when the phrase "necessarily implied in such a body" was amended to read "necessarily implied by law." 1876 N. C. Sess. Laws ch. 141, § 1. The revised version was subsequently codified in 1883 N.C. CODE vol. I, ch. 17, § 702. In later code compilations this section became N.C. GEN. STAT. § 153-1, *repealed by* 1973 N.C. Sess. Laws ch. 822. The initial grant of police power to cities did include the limitation that local ordinances not be inconsistent with state law or the law of the land, but this limitation is a preemption limitation, not a rule of narrow construction.

52. 1905 N.C. REV. CODE vol. I, ch. 73, § 2915 (emphasis added). In later revisions this became N.C. GEN. STAT. § 160-1. This provision had not been included in the 1883 code and there was no session law adopted specifically applying this language to city authority. In the history note for the 1905 code, the authority for the provision cited is the county statute.

in 1868 for counties and 1905 for cities, the General Assembly expressed an intention of narrowly granting powers to local governments, justifying a strict judicial construction of the delegation of power to local governments.

Prior to 1890, the North Carolina Supreme Court broadly construed city authority. While the court first cited Dillon's Rule in 1874, in *Smith v. City of New Bern*,[53] it upheld the challenged local action.[54] The city contracted for construction of a public market house, relying for authority on a 1779 local act that granted the city the power of "appointing market places and regulating the same."[55] The court held constructing a market building was fairly implied, noting:

> But if we say they can do nothing for which a warrant could not be found in the language of their charter, we deny them, in many cases, the power of self preservation, as well as many of the means necessary to effect the essential object of their creation—hence they may exercise all the powers within the fair intent and purpose of their creation which are reasonably necessary to give effect to powers expressly granted, and in doing this they must have the choice of means adopted to ends and are not confined to any one mode of operation.[56]

Similarly, in 1875, the court held that a city's general authority to pass laws to abate and prevent nuisances authorized adoption of an ordinance forbidding erection of wooden buildings in particular parts of town.[57]

However, the tenor of judicial review changed in the period from 1890 to 1910. This dynamic period for North Carolina local governments included substantial social and economic transitions. This was the initial period of urbanization in the state, albeit primarily involving the shift from a farm to a small town environment rather than the emergence of large urban areas.[58] The range of local gov-

53. 70 N.C. 14 (1874).

54. *Id.* at 18, 19.

55. *Id.* at 18.

56. *Id.* at 19. The court noted that the precise scope of local government authority evolves with changing situations and needs. *See id.* at 20. Three years later, the court ruled this grant of authority included the power to lease as well as build a market building. *See* Wade v. City of New Bern, 77 N.C. 460, 464 (1877).

57. *See* Privett v. Whitaker, 73 N.C. 554, 557 (1875). Other early cases upholding municipal regulatory authority involved express grants of authority. *See*, *e.g.*, Rose v. Hardie, 98 N.C. 44, 4 S.E. 41 (1887) (sustaining an ordinance prohibiting hogs running at large based on a statute authorizing such if deemed necessary for the better government of the town).

58. The proportion of the state's residents living in incorporated areas nearly tripled in the 1900 to 1920 period alone. *See* Wicker, *supra* note 46, at 13. Eleven percent of the state's residents resided in a city in 1900; this percentage increased to almost thirty percent in 1920. *See id.*

ernment regulation, taxation, and service provision began to grow concomitantly. The state's inexperienced city governments were exercising an expanded role at a time of judicial skepticism about the appropriate level of governmental intervention in private affairs.[59] The period from 1890 to 1910 was also a time of particular political turmoil for North Carolina state and local governments. Race and partisan politics were significant dimensions of the debate regarding the scope of governmental powers. As part of the end of Reconstruction in the state, popular election of county commissioners, which had first been instituted in 1868, was revoked in 1876.[60] The brief ascendancy of Populists and Fusionists in the 1890s brought the restoration of the popular vote for county officials in 1895 and the substantial revision of the charters of many of the state's larger cities. The resultant presence of significant numbers of African-Americans in city governments was a factor in the distrust of local governments by some state-level politicians, and likely influenced some jurists' views of the competency of local governments.[61] Heated elections in 1898 and 1900 returned the Democrats to power and ushered in an era of disenfranchisement of African-Americans and *de jure* racial segregation.

The courts most strictly construed local authority in this period in the area of imposition of taxes and fees. In 1892, the North Carolina Supreme Court upheld the legislative grant of authority to local governments to levy special assessments for public improvements such as streets and utilities, using fairly generous language.[62] The

59. For a discussion of the political and social forces inherent in the laissez-faire capitalism of the time, and its relation to a *Lochnerian* judicial view, see Edwin A. Gere, Jr., *Dillon's Rule and the Cooley Doctrine: Reflections of the Political Culture*, 8 J. URB. HIST. 271, 283-90 (1982); Williams, *supra* note 5, at 90-100.

60. *See* Liner, *supra* note 13, at 5-7. In the colonial period and in early statehood, county officials were appointed. *See id.* at 5. The office of sheriff became an elected post in 1829. *See id.* The Reconstruction Constitution of 1868 provided for direct popular election of county commissioners and a number of other key county offices. *See id.* at 5-7.

61. The white supremacist view of the period was clearly expressed by Professor Hamilton in his 1919 history of the state. J.G. DEROULHAC HAMILTON, 3 HISTORY OF NORTH CAROLINA 275 (1919). He recounts the reemergence of African-American participation in local governance after the 1895 elections and concludes that "[n]o one could contend that negro government was efficient in any sense or that the presence of the negro tended to good government. On the contrary it was in every sense evil." *Id.* The elections of 1898 ushered in an era that effectively ended black participation in most North Carolina local governments. *See id.*

62. *See* City of Raleigh v. Peace, 110 N.C. 32, 41, 14 S.E. 521, 524 (1892). The court noted:

> The power to make such assessments must be clearly authorized by the Legislature, but it is not necessary, and of course not to be expected—indeed, it is scarcely conceivable—that the Legislature should, in conferring authority upon local bodies, specify in minute detail the incidents of the power. The courts generally hold that neces-

following year, however, the court invalidated an assessment for sidewalks in Greensboro.[63] A local act specified a precise method for making sidewalk assessments, which the city did not follow.[64] Rather, the city argued a subsequent general law granting cities power to make assessments for several purposes provided the city latitude in the process of making assessments.[65] The court's mistrust of local governments taxing and assessment powers was explicit[66] as it refused to construe the general authority broadly to supercede the prior local legislation.[67] In 1896, the court held that authority to sell county land did not by implication authorize the county to mortgage the property.[68] In 1897, the court held that legislative authorization for Charlotte to issue bonds to construct a water and sewer system did not by implication authorize imposition of taxes to pay off the bonds.[69]

> sary incidental and subordinate powers pass with the grant of the principal power.

Id. at 40, 14 S.E. at 523 (quotations omitted). The case challenged an assessment to pave Fayetteville Street in downtown Raleigh. *See id*. at 40-41, 14 S.E. at 523-24.

63. *See* City of Greensboro v. McAdoo, 112 N.C. 359, 367-68, 17 S.E. 178, 181 (1893).

64. *See id*. at 363, 17 S.E. at 179.

65. *See id*. at 364-65, 17 S.E. at 180.

66. The *McAdoo* court stated:

> It has been truthfully remarked that this power of making special assessments is at best a dangerous one to entrust to municipalities, and the courts will be slow, in the absence of a purpose clearly manifested on the part of the Legislature, to construe a general power of this character . . . into a repeal of certain existing safeguards with which the law has carefully invested the citizen . . . .

Id.

67. *See id*. at 365, 17 S.E. at 181.

68. *See* Vaughn v. Commissioners of Forsyth County, 118 N.C. 636, 642, 24 S.E. 425, 426 (1896).

69. *See* City of Charlotte v. Shepard & Co., 120 N.C. 411, 415, 27 S.E. 109, 111 (1897). State constitutional limitations of the time required voter approval for the levy of any local tax for purposes other than necessary expenses. *See* N.C. CONST. art. VII, § 7 (1868). For an overview of the substantial early case law on the definition of "necessary expenses," see Albert Coates & William S. Mitchell, *"Necessary Expenses" Within the Meaning of Article VII, Section 7, of the North Carolina Constitution*, 18 N.C. L. REV. 93 (1940). The comparable provision in the current constitution limits contraction of local debt without a vote. *See* N.C. CONST. art. V, § 4. The court soon relented on the question of water and street lights as a "necessary expense," noting:

> In the effort of the courts to check extravagance and to prevent corruption in the government of towns and cities, the judicial branch of government has probably stood by former decisions from too conservative a standpoint, and thereby obstructed the advance of business ideas which would be most beneficial if put into operation; and this conservatism of the courts, outgrown by the march of progress, sometimes appears at a serious disadvantage.

Fawcett v. Town of Mt. Airy, 134 N.C. 125, 126, 45 S.E. 1029, 1029-30 (1903). Industrial development incentives provide a contemporary example of the de-

Relatively strict construction was also applied in this period to authorization for local government service provision, a question closely related to the financing cases noted above. In 1895, the court held the authority to adopt ordinances "for the better government of the city" did not authorize Raleigh to conduct a fireworks display for its centennial celebration.[70] In 1898, the court held a grant of authority to Washington of the "full power to make by-laws" did not confer authority to buy, erect, and operate an electric light plant or to issue bonds to pay for the plant unless the town complied with the constitutional mandate to submit the tax to the voters.[71] In 1899, the court held a city could not use its general authority to "sell . . . any property, real or personal, belonging to any such town" or to lease property specifically granted by the state to the town for public purposes.[72] In 1900, the court held that while a city did have the

bate regarding the scope of legitimate public purposes. *See generally* Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996) (upholding city use of economic development incentives to private businesses). The statutory authority for local economic development initiatives is reviewed in DAVID M. LAWRENCE, ECONOMIC DEVELOPMENT LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS 39-85 (2000).

70. Love v. City of Raleigh, 116 N.C. 296, 307, 310-11, 21 S.E. 503, 504-05, 506 (1895). The suit was brought to recover damages for an injury suffered during the display. *See id.* at 310-11, 21 S.E. at 503. Since the court held the fireworks display was *ultra vires*, no recovery was allowed. *See id.* at 311, 21 S.E. at 506.

71. Mayo v. Commissioners of Washington, 122 N.C. 5, 6, 29 S.E. 343, 343 (1898), *overruled by* Fawcett v. Town of Mt. Airy, 134 N.C. 125, 45 S.E. 1029 (1903). A spirited dissent by Justice Clark argued that provision of street lighting was a necessary (and thus implied) power of local governments and that the town had discretion in how to carry out that power (through contracting for the service or providing electricity directly). *See id.* at 22, 29 S.E. at 348 (Clark, J., dissenting). The legislature, in 1917, explicitly authorized cities to own and maintain light and waterworks systems. *See* 1917 N.C. Sess. Laws ch. 136. In 1929, the power to extend these services beyond the city limits was made explicit. *See* 1929 N.C. Sess. Laws ch. 285.

72. City of Southport v. Stanly, 125 N.C. 464, 466, 34 S.E. 641, 642 (1899). *Accord* Carstarphen v. Town of Plymouth, 180 N.C. 26, 103 S.E. 899 (1920) (discussing the sale of town hall); Turner v. Commissioners of Hillsboro, 127 N.C. 153, 37 S.E. 191 (1900) (discussing the sale of town commons). Where specific authority for such sales had been granted, they are allowed. *See* Shaver v. Commissioners of Salisbury, 68 N.C. 291 (1873) (discussing the sale of town hall to pay town debt, with acquisition of a smaller, less expensive hall authorized by local act granting power to "acquire, regulate and dispose of a Town Hall"). Rather than a Dillon's Rule case, *Stanly* should be viewed as applying the canon of construction that the more specific enactment controls over the general enactment. The *Stanly* court concluded that, if the legislature had intended to give the city authority to convey interests in lands held in trust for the benefit of the citizenry as opposed to disposing of surplus property, that authority would have been explicitly granted. *Stanly*, 125 N.C. at 467, 34 S.E. at 642. Similarly, in *City of Asheville v. Herbert*, 190 N.C. 732, 130 S.E. 861 (1925), the court cited Dillon's Rule in holding a city's charter, that included a general authorization to sell property, did not authorize the city to dispense with the sale procedures set forth in the general statutes. *See Herbert*, 190 N.C. at 736,

authority to specify the design of connections to its sewer system and could inspect and approve such connections, it could not compel use of city labor and materials for the connection.[73] In 1909, the court held the general authority to make such ordinances as deemed necessary for the government of the city did not include the authority to grant a franchise to a private party to build a gas plant and use city streets for its distribution lines.[74] Where authority was clearly granted, however, the courts gave municipalities wide latitude over how that authority was exercised.[75]

The strict judicial construction of local authority was not as rigorously applied to the regulatory powers of local governments even

130 S.E. at 864. However, as the court explicitly noted, this result is reached through application of other general canons of statutory construction. *See id.* at 736, 130 S.E. at 863-64.

73. *See* Slaughter v. O'Berry, 126 N.C. 181, 185, 35 S.E. 241, 243 (1900). The *Slaughter* court noted that, while the line of demarcation between the city's right to maintain and protect its public works and the rights of individuals is difficult to draw, if the mark were in doubt, it is to be resolved against the city. *Id.* at 184-85, 35 S.E. at 242-43.

74. *See* Elizabeth City v. Banks, 150 N.C. 407, 415-16, 64 S.E. 189, 191-92 (1909). The court was concerned with the city devoting property held in trust for use of all citizens (here, its streets) to a private party without express legislative approval. *See id.* 413, 64 S.E. at 191.

> The wisdom of putting the limitation upon the power of governing boards of towns and cities is apparent. If they be permitted, without express power, known to the people who select them, to grant to persons and corporations franchises over the public streets, the arteries of business, social and community life, it would be to subject them to burdens unwisely or otherwise conferred, limiting and restricting their use by the people for whose benefit they have been laid out and by whose taxes they are maintained.

Id. at 414-15, 64 S.E. at 191. In *State v. Prevo*, 178 N.C. 740, 101 S.E. 370 (1919), the court held that where a state statute makes a classification based on population (here, cities of different populations were authorized to charge differing taxes for motion picture halls), the city has no authority to conduct an independent census but must use official enumerations such as the Federal census. *See id.* at 744-45, 101 S.E. at 372.

75. *See* Tate v. City of Greensboro, 114 N.C. 392, 401-02, 19 S.E. 767, 769 (1894). The general statutes gave the city authority for "keeping in proper repair the streets and bridges of the town in the manner and to the extent they may deem best." *Id.* at 398, 19 S.E. at 768. The court held that this provision gave the city authority to remove the plaintiff's adjacent shade trees. *See id.* at 398-99, 19 S.E. at 768. The court reached the same result regarding removal of trees clogging a public sewer line in *Rosenthal v. City of Goldsboro*, 149 N.C. 128, 134-35, 62 S.E. 905, 908 (1908). That court expressed considerable deference to local legislative judgment in how delegated powers may be carried out: "our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers . . . and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion." *Id.* at 134, 62 S.E. at 908. The deference given when the issue was maintenance of city assets contrasts sharply with the court's insistence on explicit authority when the issue was disposition of city assets.

during the 1890-1910 period that marked the most rigorous application of Dillon's Rule.[76] In a number of the cases the court found the authority for the regulation had been expressly granted, as was the case for ordinances regulating erection of wooden buildings[77] and the location of dance halls.[78] In other instances, the court found the power to regulate specific activities was included within a general grant of authority,[79] such as the authority to "prevent nuisances," authorizing regulation of the location of hog pens, [80] hospitals,[81] and gas stations.[82]

76. While citing Dillon's Rule, many of the cases of this period invalidating local regulations were based on factors other than the scope of delegated authority. *See, e.g.,* State v. Beacham, 125 N.C. 652, 654-55, 34 S.E. 447, 447 (1899) (discussing that state delegation of regulatory authority on health matters to a town board of health preempts city council regulation); State v. Eason, 114 N.C. 787, 795-96, 19 S.E. 88, 90-91 (1894) (discussing the extraterritorial effect for an ordinance will not be implied); State v. Tenant, 110 N.C. 609, 613, 14 S.E. 387, 388 (1892) (invalidating an ordinance without standards to guide regulatory decisions); State v. Webber, 107 N.C. 962, 966, 12 S.E. 598, 599 (1890) (invalidating a bawdy house ordinance because it imposed liability on the property's owner with no requirement of owner's knowledge of any wrongdoing).

77. *See* State v. Johnson, 114 N.C. 846, 848, 19 S.E. 599, 600 (1894). The court noted the authority could be implied from the general welfare clause if not expressly granted. *See id.* Such regulations could also be applied to limit repair of non-conforming wooden buildings. *See* State v. Shannonhouse, 166 N.C. 241, 242-43, 80 S.E. 881, 881-82 (1914); State v. Lawing, 164 N.C. 492, 494-95, 80 S.E. 69, 70-71 (1913). In 1905, the General Assembly not only provided explicit authority for fire limits, but also mandated their adoption. *See* 1905 N.C. Sess. Laws, ch. 506.

78. *See* State v. Vanhook, 182 N.C. 831, 833, 109 S.E. 65, 66-67 (1921).

79. In addition to the general police power, in 1917, the General Assembly specifically authorized local regulation of a variety of activities, including billboards, plumbing and electrical work, storage of combustible materials, dangerous buildings, and other nuisances. *See* 1917 N.C. Sess. Laws ch. 136, subch. V, § 1.

80. State v. Hord, 122 N.C. 1092, 1094-95, 29 S.E. 952, 953 (1898). While acknowledging the authority to regulate businesses that could be a nuisance, but that are not a nuisance per se, the court remained sensitive to possible misuse of such authority. *See, e.g.*, State v. Bass, 171 N.C. 780, 781, 87 S.E. 972, 973 (1916) (finding an ordinance regulating stable location invalid as it was not of uniform application); Barger v. Smith, 156 N.C. 323, 324-25, 72 S.E. 376, 377 (1911) (determining that an ordinance regulating sawmill location must not be applied in a discriminatory fashion).

81. *See* Lawrence v. Nissen, 173 N.C. 359, 362, 91 S.E. 1036, 1037-38 (1917). The court noted that a strong presumption of validity attaches to the reasonableness of ordinances enacted within the scope of delegated authority. *See id.* at 362, 91 S.E. at 1037.

82. *See* Gulf Refining Co. v. McKernan, 179 N.C. 314, 317-18, 102 S.E. 505, 507 (1920) (upholding a Sanford ordinance prohibiting aboveground storage of kerosene or gasoline within 1000 feet of any dwelling). However, in 1926, the court concluded gasoline filling stations were a legitimate business and invalidated an ordinance that required city approval for their location. *See* Bizzell v. City of Goldsboro, 192 N.C. 348, 358-59, 135 S.E. 50, 55 (1926). The grounds for invalidation, however, were not a lack of statutory authority but the fact that the ordinance was not of uniform application and had no standards to guide or

City ordinances regulating more controversial activities, however, received mixed judicial results. Judicial treatment of ordinances adopted to regulate alcohol and aesthetics reveal underlying judicial philosophies that produced sharp divisions on the court in this period. Some justices were particularly concerned with new infringements on individual rights while others were more deferential to the judgement of local elected officials on the means chosen to address emerging urban issues.

Regulation of alcoholic beverages was a point of considerable controversy in this period, leading to both state and local regulation. Judicial review of local ordinances on this subject reflected both a concern with the appropriate scope of local regulatory authority and a concern about the interplay of state and local regulation of the same subject. In 1894, the court held Monroe had the authority, under the city's authority to adopt "regulations for the better government of the town," to enact an ordinance prohibiting persons under the age of twenty-one from entering saloons.[83] However, in 1896, the court invalidated a Marion ordinance enacted under the same grant of authority that prohibited anyone from occupying a bar after hours.[84] The court held that, where substantial rights are af-

limit the city's discretion in making permit decisions. *See id.* at 359, 135 S.E. at 55*; accord* MacRae v. City of Fayetteville, 198 N.C. 51, 55-56, 150 S.E. 810, 812-13 (1929) (invalidating ordinance prohibiting filling stations within 250 feet of residences but exempting existing stations); Burden v. Town of Ahoskie, 198 N.C. 92, 93, 150 S.E. 808, 810 (1929) (invalidating ordinance limiting filling station location but exempting existing stations). The court subsequently upheld ordinances that were uniformly applied. *See* State v. Moye, 200 N.C. 11, 14, 156 S.E. 130, 132 (1930); Town of Wake Forest v. Medlin, 199 N.C. 83, 86, 154 S.E. 29, 31 (1930).

83. State v. Austin, 114 N.C. 855, 856, 19 S.E. 919, 919 (1894). In response to a claim of inconsistency with state law (which prohibited sale of alcohol to minors), the court discerned no inconsistency, holding, "we find it rather a commendable effort on the part of this local legislative body to supplement what the State, by its general legislation, has done to protect the young of the commonwealth." *Id.* at 858, 19 S.E. at 920. Justice Avery vigorously dissented, arguing that, while the legislature could adopt such a restriction, the city had no implied power to do so. *See id.* at 862-63, 19 S.E. at 921-22 (Avery, J., dissenting).

84. *See* State v. Thomas, 118 N.C. 1221, 1225, 24 S.E. 535, 536 (1896). Justice Avery's opinion strongly suggests doubt that the legislature itself had the power to adopt such a regulation. *See id.* In subsequent cases, the court addressed local regulation of alcohol where the delegation of authority was clearer. The court upheld substantial local regulation of saloons where the legislature had provided explicit authority for regulation. *See* Paul v. City of Washington, 134 N.C. 363, 370-71, 47 S.E. 793, 796-97 (1904). The city charter authorized the city to "regulate, control, tax, license or prevent . . . the sale of spirituous, vinous, or malt liquors." *Id.* at 370, 47 S.E. at 796. During this period, the court's reluctance to find implied authority for business regulations extended beyond the issue of alcohol regulation. In 1902, the court invalidated a Scotland Neck business-closing ordinance as applied to a dry goods store on the same grounds set forth in *Thomas*. *See* State v. Ray, 131 N.C. 814, 817, 42 S.E. 960, 962 (1902).

fected, the grant of authority must be explicit.[85] In 1908, the court invalidated a Morehead City ordinance that regulated beverages containing alcohol, holding that state regulation preempted the field.[86] State law at the time prohibited all "intoxicating" beverages within the affected county, but did not prohibit beverages with very small amounts of alcohol. The court refused to find an implied local authority to address the interstitial area, noting an "invasion of the natural rights and inherent personal liberty of the citizen" must have explicit authorization.[87]

Cases regarding local regulations based on aesthetic concerns also reflect these contrasting judicial philosophies. In 1900, the court, in *State v. Higgs,*[88] held that Raleigh did not have the authority to prohibit all signs hanging over downtown sidewalks. The city contended the authority had been delegated, pointing to sections of its charter authorizing ordinances "necessary for the proper government of the city," authority to "keep clear the streets, sidewalks, and alleys of the city," authority to abate nuisances, and a requirement that all persons maintain sidewalks to allow the "free and safe passage of persons."[89] The court was troubled by any regulation of signs that did not pose a threat to public safety,[90] but invalidated the ordinance on the narrower ground of lack of delegated authority to the city.[91] The court construed the authority to limit signs that blocked free and safe passage as a limitation on the remainder of the grants of authority, applying a form of horizontal preemption that

85. *See Thomas*, 118 N.C. at 1225, 24 S.E. at 535-36. The court employed a similar rationale to invalidate an ordinance mandating residential racial segregation that had been adopted under the authority to "pass any ordinance which they may deem wise and proper for the good order, good government, or general welfare of the city." State v. Darnell, 166 N.C. 300, 301, 81 S.E. 338, 338 (1914). The court noted the right to own, acquire, and dispose of property as one sees fit is among the most fundamental of rights. *See id.* at 304-05, 81 S.E. at 340.

> We simply hold that an act of this broad scope, so entirely without precedent in the public policy of the State and so revolutionary in its nature, cannot be deemed to have been within the purview of the Legislature from the use of the words conferring authority to make ordinances for the general welfare.

Id. at 305, 81 S.E. at 340. A more benign and politically acceptable Sunday closing ordinance, adopted under the same general delegation of authority, was upheld. *See* State v. Burbage, 172 N.C. 876, 878-79, 89 S.E. 795, 796 (1916).

86. *See* State v. Dannenberg, 150 N.C. 799, 801-02, 63 S.E. 946, 948 (1908).

87. *Id.* at 802, 63 S.E. at 948. The state had asked: "But is there not somewhere between the buttermilk of the 'pure in heart' and the brandy of the 'morally stunted' a 'twilight zone' that could be regulated?" *Id.* The court held the entire field preempted. *See id.* at 801-02, 63 S.E. at 948.

88. 126 N.C. 1014, 35 S.E. 473 (1900).

89. *Id.* at 1017, 35 S.E. at 474.

90. "Whether the Legislature could in express terms authorize the city to require the defendant to take down this sign . . . we very much doubt." *Id.* at 1021, 35 S.E. at 475.

91. *See id.*

remains at issue today.[92] The decision can be viewed as reconciling ambiguity by holding the specific provisions of the charter to control the more general. Yet, the court was clearly as interested in limiting governmental regulation as it was in ascertaining the intent of the legislature in making its delegation.[93] Eight years later *Higgs* was overruled. In *Small v. Councilmen of Edenton,*[94] the court upheld an ordinance adopted under the same grants of authority that banned all awnings over sidewalks.[95] The difference in outcome was a decision by the judiciary to defer to local political judgment as to the wisdom and exact scope of aesthetic regulation rather than precluding any local action by finding of a lack of authority to act at all.[96]

92. *See id.* at 1025-27, 35 S.E. at 477.

93. *See id.* at 1021, 35 S.E. at 475. The court stated:

> But it must be kept in mind that the power of the city government is not all that is to be considered in deciding this case. The rights of individual citizens are also to be considered, and they are of equal importance, and probably more in need of the protection of the courts than . . . the city of Raleigh.

Id. at 1025, 35 S.E. at 477. Justice Clark dissented, arguing for a broader reading of local authority:

> The powers of a city government are not restricted to suppressing what is dangerous, but extend to adorning and beautifying the city . . . . Now that there is a spirit springing up in favor of beautifying our cities and towns, it is to be regretted that the cold shadow of a judicial inhibition should fall upon the movement in this State to chill it.

Id. at 1028, 35 S.E. at 478 (Clark, J., dissenting). Clark contended local self-governance called for leaving the question of the precise scope of such regulation to local elected officials, who were subject to correction at the ballot box. *See id.* at 1029, 35 S.E. at 478 (Clark, J., dissenting).

94. 146 N.C. 527, 60 S.E. 413 (1908); *see also* Turner v. City of New Bern, 187 N.C. 541, 122 S.E. 469 (1924) (upholding prohibition of lumber yards in residential section of city, adopted under general authority to adopt ordinances for good governance of the city, to prevent harm to public health, safety, and welfare, and to prevent nuisances; recognizing that aesthetics was also a legitimate (but not sole) justification for the ordinance).

95. *See Small*, 146 N.C. at 529, 60 S.E. at 414-15.

96. *See id.* Chief Justice Clark secured unanimous support for the views expressed in his *Higgs* dissent. He wrote:

> If it [the regulation] does not meet the approval of the citizens of the town, they can secure its repeal by instructing their town council to that effect, or by electing a new board. Such local matters are properly left to the people of a self-governing community, to be decided and determined by them for themselves, and not by a judge or court for them.

Id. at 528, 60 S.E. at 414. The court was not, however, ready to hold that aesthetic concerns alone could be the basis of a municipal ordinance. *See id.* at 528-29, 60 S.E. at 414. While holding that a city had the authority to regulate billboards, the court, in *State v. Whitlock*, 149 N.C. 542, 63 S.E. 123, 124 (1908), invalidated an Asheville ordinance requiring all billboards to be set back from the sidewalk at least two feet more than the height of the sign, holding aesthetic considerations alone could not warrant its adoption. *See id.* at 544-45, 63

North Carolina saw dramatic demographic shifts after World War I. The state's population generally, and its urban population particularly, mushroomed. With the coming of the automobile and economic prosperity, modern patterns of urban and suburban settlement emerged as the state's small town and farm population shifted to an increasingly urbanized setting, particularly in the piedmont crescent stretching from Charlotte to Raleigh. The Progressive Movement of the 1920s ushered in more professional city governance. State standards and oversight of local financial affairs imposed during the Depression[97] helped insure more responsible local governance. These factors are reflected in increased judicial confidence in, and deference to, local governments in the post-1925 period.

Judicial challenges to local government authority were less frequent in the 1925-1971 era. In the area of provision of services, when the principal issue before the court was the scope of delegated authority, the local governments generally prevailed. The court held that the authority of a city to create staff positions as deemed necessary by the council includes the implied authority to abolish such positions,[98] that the power to appoint such city officers as the city council determines necessary includes the authority to appoint a commissioner of police,[99] and that the authority to appoint police officers implies the authority to secure adequate training for them.[100] The court also held that authority to maintain and operate an airport and to confer concessions for airport related services and func-

S.E. at 124. *Small* was distinguished as regulating public property. *See id.* at 545, 63 S.E. at 124. The court did uphold an Asheville ordinance requiring all billboards to be elevated two feet above the ground in *State v. Staples*, 157 N.C. 637, 639-40, 73 S.E. 112, 112 (1911) (citing a fire safety and sanitary justification rather than aesthetics). *See generally* Little Pep Delmonico Restaurant, Inc. v. City of Charlotte, 252 N.C. 324, 113 S.E.2d 422 (1960) (upholding injunction preventing enforcement of ordinance); H. Rutherford Turnbull, III, *Aesthetic Zoning*, 7 WAKE FOREST L. REV. 230 (1971) (discussing problems associated with aesthetic zoning). In 1982, the court joined the national trend of holding aesthetics, in and of itself, to be a legitimate objective of local regulation. *See* State v. Jones, 305 N.C. 520, 530-31, 290 S.E.2d 675, 681 (1982) (upholding a Buncombe County junkyard screening ordinance).

97. *See* 1931 N.C. Sess. Laws ch. 60. The state also assumed responsibility for financing the county highway systems and the public school operating costs during the 1930s.

98. *See* Simmons v. City of Elizabeth City, 197 N.C. 404, 405, 149 S.E. 375, 376 (1929).

99. *See* Riddle v. Ledbetter, 216 N.C. 491, 494, 5 S.E.2d 542, 544 (1939).

100. *See* Green v. Kitchin, 229 N.C. 450, 453-54, 50 S.E.2d 545, 547 (1948). Justice Sam Ervin noted:

> Poets may be born, but policemen must be made. . . . Both the letter and the spirit of these laws reveal that a city or town cannot convert a neophyte into a policeman in the true sense of the word by the simple expedient of investing him with a badge, a billy, a firearm, and a uniform.

Id. at 454, 50 S.E.2d at 548.

tions authorized a city to grant exclusive franchises for airport limousine and taxi service.[101]

The court did hold local governments to be without adequate authority in several taxation, expenditure, and service provision cases in this period.[102] The court held cities have no authority, express or implied, to waive their tort immunity,[103] to establish independent local retirement systems,[104] or to operate ambulance services.[105] However, in most of the successful challenges to local authority in this era, the cases turned on grounds other than the scope of the delegation of authority. The court held a city had no authority to offer a criminal reward, primarily on preemption grounds. [106] The court used a due process rationale to hold that the authority to regulate parking did not, in and of itself, authorize use of parking meters to charge a fee for parking.[107] The court held a city could not construct and operate a hotel on the grounds that such was not a legitimate public purpose.[108] In holding the authority to

101. *See* Harrelson v. City of Fayetteville, 271 N.C. 87, 93-94, 155 S.E.2d 749, 754 (1967).

102. The court, during the 1917 to 1938 period, was amenable to local legislation authorizing special taxes and bonds for local financing of schools and roads and thus narrowly read state constitutional limitations on local legislation. *See* Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. REV. 340, 371-78 (1967).

103. *See* Stephenson v. City of Raleigh, 232 N.C. 42, 47, 59 S.E.2d 195, 199 (1950). The statutes were subsequently amended to allow waiver of tort immunity through the purchase of liability insurance. *See* N.C. GEN. STAT. §§ 153A-435, 160A-485 (1999).

104. *See* Laughinghouse v. City of New Bern, 232 N.C. 596, 599-600, 61 S.E.2d 802, 804 (1950).

105. *See* Moody v. Transylvania County, 271 N.C. 384, 387, 156 S.E.2d 716, 718 (1967). Explicit authority for counties to contract with cities for ambulance services was added to the statutes in 1967, but subsequent to the execution of the contract in question in this case. *See id.* at 386, 156 S.E.2d at 717-18.

106. *See* Madry v. Town of Scotland Neck, 214 N.C. 461, 462-63, 199 S.E. 618, 619 (1938). The court noted there was specific legislation authorizing the Governor to issue rewards and that the duty to apprehend felons was assigned to the state and to counties. *See id.* at 462, 199 S.E. at 619. Since cities had no role in this area, there could be no implied authority to issue rewards. *See id.* at 462-63, 199 S.E. at 619. The court also used preemption grounds to invalidate a Concord ordinance imposing a $25 license fee on taxicabs, noting that general state law limited municipal motor vehicle license fees to one dollar. *See* Cox v. Brown, 218 N.C. 350, 354-55, 11 S.E.2d 152, 154-55 (1940).

107. *See* M.H. Rhodes, Inc. v. City of Raleigh, 217 N.C. 627, 631-32, 9 S.E.2d 389, 390 (1940). The court held that regulation of parking was a legitimate objective of city regulation (and within the scope of delegated authority), but that use of meters to regulate the length of time a car occupied the space was not reasonably related to a legitimate objective. *See id.*

108. *See* Nash v. Town of Tarboro, 227 N.C. 283, 287-88, 42 S.E.2d 209, 212 (1947). The court concluded a hotel was an essentially private business and beyond any reasonable definition of a municipal public purpose. *See id.* at 288, 42 S.E.2d at 213. Similarly, the court held a city has no authority to use tax revenues to support the ordinary expenses of a Chamber of Commerce. *See* Horner

maintain cemeteries and regulate burials did not imply authority to require exclusive use of city staff to place memorial markers, the court was more concerned with the city's attempt to exclude economic competition than scope of authority questions.[109]

There were few challenges to the scope of local regulatory authority in the 1925 to 1971 period. The court held a grant of the authority to regulate the use of automobiles for hire (and the general authority to make regulations for the better government of the city) did not authorize a city to require taxicabs to have liability insurance,[110] and that authority to regulate nuisances does not include authority to prohibit otherwise lawful activities[111] or land uses.[112] The court held the general ordinance-making power authorized the enactment of a county ordinance requiring that all drive-in screens, regardless of content, be screened from view from public roads.[113]

v. Chamber of Commerce, 231 N.C. 440, 446, 57 S.E.2d 789, 793 (1950). Nor does the city have the authority to borrow funds without voter approval to construct a building for the county government. *See* Wilson v. City of High Point, 238 N.C. 14, 23-24, 76 S.E.2d 546, 552-53 (1953). Where there is a specified means of accomplishing the objective (here voter approval of the bonds), it must be used and not circumvented. *See id.* at 24, 76 S.E.2d at 553. While courts are generally deferential to legislative judgment as to what is a public purpose, this is ultimately a judicial determination. *See* Keeter v. Town of Lake Lure, 264 N.C. 252, 261, 141 S.E.2d 634, 641 (1965) (upholding an explicit legislative grant of authority to the town to purchase a lake, sewage line, dam, and electric generating facility).

109. *See* State v. McGraw, 249 N.C. 205, 208-09, 105 S.E.2d 659, 662-63 (1958).

110. *See* State v. Gulledge, 208 N.C. 204, 208, 179 S.E. 883, 886 (1935). The court was concerned with the novelty of the regulation. The court noted that mandatory automobile liability insurance was, at that time, "a public policy hitherto unknown in the general legislation of the State" and to imply that this power was included in the authority to "regulate" would be giving that term a "far more extended and unrestricted scope than we apprehend the Legislature ever had in contemplation." *Id.* at 208, 179 S.E. at 885, 86. The legislature immediately responded with an authorization for municipalities to require liability insurance for taxicabs. *See* 1935 N.C. Sess. Laws ch. 279.

111. *See* State v. Byrd, 259 N.C. 141, 146-47, 130 S.E.2d 55, 60 (1963) (invalidating a Raleigh ordinance totally prohibiting the sale of ice cream from mobile units on any city street or sidewalk). The previous year the court had invalidated a broader ordinance banning all ice cream peddling. *See* Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 212-13, 123 S.E.2d 632, 635 (1962).

112. *See* Town of Conover v. Jolly, 277 N.C. 439, 443-44, 177 S.E.2d 879, 881-82 (1970). The ordinance totally excluded mobile homes from the entire town jurisdiction. *See id.* at 442-43, 177 S.E.2d at 881. The thrust of this decision was subsequently enacted by the General Assembly as a restriction on zoning powers and is codified at N.C. GEN. STAT. §160A-383.1 (1999).

113. *See* Variety Theatres, Inc. v. Cleveland County, 282 N.C. 272, 277-78, 192 S.E.2d 290, 293-94 (1972). An earlier attempt to use the authority to regulate nuisances, as the basis for an ordinance banning the showing of nudity at drive-in theaters, was invalidated in *State v. Furio*, 267 N.C. 353, 358-59, 148 S.E.2d 275, 279 (1966).

B. Post Dillon's Rule Jurisprudence

In 1971, the General Assembly obviated the need for reliance on Dillon's Rule by adopting an explicit statement of intent regarding construction of its delegated authority. In a comprehensive revision and modernization of the state's municipal government statutes, the legislature determined that grants of state power to cities should be broadly rather than strictly construed:

> It is the policy of the General Assembly that the cities of this state should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.[114]

The 1973 modernization and recodification of the county statutes adopted a substantially similar provision for counties at N.C. GEN. STAT. § 153A-4.

These statutes differ from Dillon's Rule in two important respects. First, they replace the general admonition that any doubt about a grant of authority be resolved against the grant with an express direction for broad construction. Second, they change the standard for implied powers from those that are "necessarily or fairly implied" by express grants to those additional and supplementary powers that are "reasonably necessary or expedient" to carry express grants into effect. Where local governments have been authorized to act, the legislature has clearly and unambiguously expressed its intent that these delegations are to be liberally construed.

In addition to these specific directions for a broad construction, the 1971 statutory revision for cities and the 1973 revision for counties also specifically provided that the enumeration of specific regulatory authority should not be deemed to be exclusive or otherwise limit the general authority of cities and counties to adopt ordinances.[115]

The statutory direction for a broad construction of delegated authority does not extend to all local government functions. N.C. GEN. STAT. §§ 153A-146 and 160A-206 provide that counties and cities have the power to impose taxes only "as specifically authorized." Thus, in the area of taxation, the General Assembly has expressed an intention for continued strict construction.

Cases decided after 1971 that interpret the scope of delegated

114. N.C. GEN. STAT. § 160A-4 (1999).
115. *See id.* §§ 153A-124, 160A-177.

authority have not, however, consistently applied a rule of broad construction. In two early cases, both decided in 1981, the supreme court did not consider the revised statement of legislative intention. In the first the court held the general grant of authority for counties to provide social services for the "health, welfare, education, safety, comfort, and convenience" of its citizens did not imply authority to provide medically unnecessary abortions, and without explicit authority to provide the service, county tax funds could not be used to support it.[116] In the second, which involved interpretation of the state's urban redevelopment law, the court simply ignored the change in legislative intention and cited earlier cases directing a strict construction of delegated authority.[117]

It was nearly two decades after its enactment that the shift in legislative intent regarding the interpretation of the scope of delegated local authority became a significant factor in judicial review of a local regulation. In 1990, the court addressed whether a city can require a developer to convey mandated open space to a private homeowners association in *River Birch Associates v. City of Raleigh*.[118] The city asserted authority for this requirement under stat-

116. Stam v. North Carolina, 302 N.C. 357, 361, 275 S.E.2d 439, 442 (1981) (citing N.C. GEN. STAT. § 153A-255). *But see* Bardolph v. Arnold, 112 N.C. App. 190, 194-95, 435 S.E.2d 109, 113 (1993) (upholding local expenditures for lobbying on referenda questions); *Ex rel*. Horne v. Chafin, 62 N.C. App. 95, 98-99, 302 S.E.2d 281, 284 (1983) (upholding local expenditures to lobby state legislature). The court, in *Stam*, cast the issue as the scope of taxation authority, thereby justifying a strict construction. *Stam*, 302 N.C. at 360, 275 S.E.2d at 441. However, the key issue was the use of the funds, not how they were raised. *See id.* at 361, 275 S.E.2d at 442. On the controversial issue of abortion, the court was not willing to infer any discretion on the part of the local government, making the negative inference that if the legislature intended to allow this use, they would have explicitly said so. *See id.* at 363, 275 S.E.2d at 443.

117. *See* Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 553-54, 276 S.E.2d 443, 445 (1981) (holding that the statutory requirement for the sale of redevelopment land to the "highest responsible bidder" conveyed little if any discretion to the city in defining what constituted a responsible bid). The court of appeals also continued to cite a rule of strict construction after 1971, though often deciding the cases on other grounds. *See* Batch v. Town of Chapel Hill, 92 N.C. App. 601, 625-27, 376 S.E.2d 22, 36-37 (1989), *rev'd on other grounds*, 326 N.C. 1, 387 S.E.2d 655 (1990) (holding county authority to regulate septic tanks preempts local consideration of water and sewer issues in subdivision review); Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 252-53, 262 S.E.2d 705, 708 (1980) (ruling that city may not contract away its discretion on street openings); Duke Power Co. v. City of High Point, 22 N.C. App. 91, 102, 205 S.E.2d 774, 781 (1974) (holding state utility regulations preempt city utility franchise regulations). On the other hand, the court did allow local governments flexibility in adapting regulatory tools in novel fashions. For example, in *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988), the court upheld use of the conditional use district zoning concept prior to explicit legislative authorization. *Id.* at 622, 370 S.E.2d at 586.

118. 326 N.C. 100, 108-09, 388 S.E.2d 538, 543 (1990). The court cited N.C. GEN. STAT. § 160A-4 as establishing a policy of broad construction in *Grace Bap-*

utes allowing a municipal subdivision ordinance to require the dedication or reservation of recreation areas serving residents of the immediate neighborhood.[119] The developer contended that since a "dedication" requires conveyance to the public and a "reservation" involves a retained interest by the grantor, there was no authority to require a conveyance to a third party (the homeowners association).[120] The court declined to strictly construe the subdivision enabling statute in this manner and ruled the delegation of power must be broadly construed to carry into effect the legislative intent (here to secure to the residents of the subdivision the benefits of a properly maintained recreation area).[121] The court held the city's regulatory authority to require a dedication or reservation by implication included the authority to compel conveyance of title to a homeowners association.[122]

In *Homebuilders Association of Charlotte v. City of Charlotte*,[123] the court subsequently applied the rule of broad construction in a fee context.[124] The court upheld the imposition of user fees for a variety of city services, including rezonings, special use permits, plat reviews, and building inspections on the grounds that the fees were within the additional and supplementary powers expedient to execution of the city's regulatory powers.[125] The court found that the adoption of N.C. GEN. STAT. § 160A-4 mandates a rule of broad construction rather than continued use of Dillon's Rule.[126] The court rejected the argument that the General Assembly's express authorization of use of general tax revenues mandated their use and held that such horizontal preemption should only be applied if the statute expressly mandates such use.[127] The court concluded the choice of funding this work by tax revenues or, in part, by user fees was a policy choice for local elected officials not a choice mandated by the legislature or to be imposed by the judiciary.[128]

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tist Church v. City of Oxford, 320 N.C. 439, 442-43, 358 S.E.2d 372, 374 (1987), but the authority of the city to adopt the contested ordinance provision (a zoning requirement for paved off-street parking) was not at issue in the case. *See River Birch Assocs.*, 326 N.C. at 107-08, 388 S.E.2d at 542.

119. *See id.* at 109, 388 S.E.2d at 543 (citing N.C. GEN. STAT. § 160A-372).

120. *See id.* at 108-09, 388 S.E.2d at 542-43.

121. *See id.* at 110-11, 388 S.E.2d at 544.

122. *See id.* at 111, 388 S.E.2d at 544.

123. 336 N.C. 37, 442 S.E.2d 45 (1994).

124. *Id.* at 42-43, 442 S.E.2d at 49

125. *See id.* at 46-48, 442 S.E.2d at 51-52.

126. *See id.* at 43-45, 442 S.E.2d at 49-50. The city contended the fees would be authorized even if Dillon's Rule were still applicable. *See id.* The court concluded, "[w]e find it unnecessary to decide that question since we conclude the proper rule of construction is the one set forth in the statute." *Id.* at 44, 442 S.E.2d at 50.

127. *See id.* at 45-46, 442 S.E.2d at 51. This was a critical conclusion of the court, as the court of appeals had invalidated the fees on this basis. *See id.*

128. *See id.* at 47, 442 S.E.2d at 52.

Two subsequent decisions in *Smith Chapel Baptist Church v. City of Durham*,[129] however, make clear that the court's explicit rejection of Dillon's Rule in *Homebuilders* has not resolved all questions regarding the scope of municipal authority. These decisions illustrate the continuing difficulty in determining the precise scope of implied powers and reflect the court's reluctance to relinquish close judicial oversight of the extent of implied powers in the area of fees and local government finance. The cases involved challenges to the financing of Durham's comprehensive stormwater management program.[130] The city's program included a physical drainage system and various other non-capital components, including educational programs, guidance manuals, used oil recycling, household hazardous waste collection, and litter enforcement programs.[131] The city assessed fees on all developed property to finance its comprehensive program, with the fees based on the impervious area of the assessed land.[132] Landowners[133] challenged the city's use of these fees rather than general tax revenues to fund the program.[134]

In *Smith Chapel I*, the court initially upheld the city's authority to impose these fees to operate its entire stormwater program.[135] The court held that while the public enterprise statutes did not give the city authority to impose these fees, the authority could be based on the state constitutional provision establishing protection of the environment as a proper function of local governments,[136] with cities having implied supplementary power to impose reasonable fees for program implementation.[137] After rehearing, the court issued a new opinion that superceded this initial opinion.[138] In its second decision, the court held that the language of N.C. GEN. STAT. § 160A-314(a)(1) "clear[ly] and unambiguous[ly]"[139] provided that city

129. *Smith Chapel II*, 350 N.C. 805, 517 S.E.2d 874 (1999); *Smith Chapel I*, 348 N.C. 632, 502 S.E.2d 364 (1998).

130. *See Smith Chapel I*, 348 N.C. at 635-36, 502 S.E.2d at 366-67.

131. *See Smith Chapel II*, 350 N.C. at 814-15, 517 S.E.2d at 880.

132. *See Smith Chapel I*, 348 N.C. at 635, 502 S.E.2d at 366. The program was imposed in response to federal mandates. *See Smith Chapel II*, 350 N.C. at 807-09, 517 S.E.2d at 876-77. Of the six North Carolina municipalities implementing these required comprehensive programs, five (Charlotte, Greensboro, Winston-Salem, Durham, and Fayetteville) treated the program as a utility and imposed utility fees to cover program costs. *See id.* at 810, 517 S.E.2d at 878. The sixth city, Raleigh, elected to use local tax revenues to pay for its program.

133. The plaintiff churches were subject to the utility fee assessment, but exempt from property taxes. *See* N.C. GEN. STAT. § 105-278.3(a) (1999).

134. *See Smith Chapel II*, 350 N.C. at 809, 517 S.E.2d at 876.

135. *See Smith Chapel I*, 348 N.C. at 636-37, 502 S.E.2d at 367.

136. *See* N.C. CONST. art. XIV, § 5.

137. *See Smith Chapel I*, 348 N.C. at 636, 502 S.E.2d at 367. "When a city has the power to regulate activities, it has a supplementary power reasonably necessary to carry that program into effect." *Id.*

138. *See Smith Chapel II*, 350 N.C. at 805, 517 S.E.2d 874.

139. *See id.* at 811, 517 S.E.2d at 878. In dissent, Justice Frye contended the court was taking an "unduly narrow view of the City's authority." *Id.* at

stormwater utility fees are limited to the costs of constructing and operating the physical aspects of a stormwater and drainage system rather than the full cost of maintaining a comprehensive stormwater quality management program.[140] The court refused to apply the rule of broad construction, reasoning that where there was no ambiguity in the statute, the plain meaning rule applied and there was no need for the court to resort to an interpretation, strict or broad.[141]

819, 517 S.E.2d at 883 (Frye, J., dissenting). He noted Dillon's Rule was defunct and argued that under a rule of broad construction, a stormwater "system" could include these ancillary functions as reasonably necessary or expedient aspects of the explicitly authorized system. *Id.* at 819-20, 517 S.E.2d at 883. The failure of the majority opinion to explicitly address the applicability of *Homebuilders* or N.C. GEN. STAT. § 160A-4 has been criticized as adding uncertainty to the law regarding the current status of Dillon's Rule in North Carolina. *See* William A. Campbell, *Stormwater Management Fees and Local Government Powers: The North Carolina Supreme Court Reconsiders Smith Chapel Baptist Church v. City of Durham*, LOCAL GOV'T L. BULL. (Inst. of Gov't, Chapel Hill, N.C.), Sept. 1999, at 4. In *Bowers v. City of High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994), the court refused to allow cities flexibility in defining "base pay" for the purposes of computing retirement benefits for local law enforcement officers. *Id.* at 419-20, 451 S.E.2d at 289-90. *Bowers* is primarily a preemption case as the court held the General Assembly used a specific definition of base pay and intended that all local governments follow this standardized definition. *Id.* at 420-24, 451 S.E.2d at 289-91. The court did not address the rule of broad construction nor consider alternate sources of potential city authority. *Bowers* may well have been colored by the setting of the case; the city was requesting its authority be limited to avoid payment of higher retirement costs. *Id.* at 415, 451 S.E.2d at 286. Greater flexibility was allowed in *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 344 S.E.2d 821 (1986). The *Pritchard* court held municipal authority to fix salaries, when broadly construed, authorizes cities to offer and define vacation leave, discretion to limit its accumulation, and to enter supplemental employment contracts that may extend benefits defined by ordinance. *Id.* at 550-51, 344 S.E.2d at 825-26. For a discussion of the interplay of *Bowers* and *Homebuilders*, see A. Fleming Bell, II, *Dillon's Rule is Dead; Long Live Dillon's Rule!*, LOCAL GOV'T L. BULL. (Inst. of Gov't, Chapel Hill, N.C.), Mar. 1995.

140. *See Smith Chapel II*, 350 N.C. at 815, 517 S.E.2d at 881.

141. *See id.* at 811, 517 S.E.2d at 878. Upon reconvening after the second *Smith Chapel* decision, the legislature emphatically said that it had always intended to allow cities to use either utility fees or tax revenues to finance these programs. *See* 2000 N.C. Sess. Laws ch. 70. That law revised the statutes involved to explicitly provide that stormwater management systems that can be funded through use of utility fees include "any cost necessary to assure that all aspects of stormwater quality and quantity are managed in accordance with federal and State law, regulations, and rules." *Id.* The changes in the city and county statutes were made effective retroactively to July 15, 1989, the date of original adoption of this authority. A floor amendment to delete the retroactive effective date was debated extensively in the House of Representatives. Advocates for retroactivity explained that such was necessary to correct the court's *Smith Chapel* decision regarding the General Assembly's original intentions. This position received broad bipartisan support. An amendment to delete the retroactive effect of the bill was defeated in the House of Representatives by a vote of 22-88. The bill then was adopted by a vote of 95-16. The Senate subsequently adopted the bill on a vote of 39-7 with no debate on its retroactive ef-

In sum, the North Carolina courts have generally recognized, albeit belatedly and inconsistently at times, that Dillon's Rule no longer applies. The courts now employ standard canons of statutory interpretation to resolve ambiguity.[142] As with Dillon's Rule in the past, some of these canons of construction limit local government flexibility and latitude. The plain meaning rule requires the court to give full effect to clear legislative directions.[143] Where the court concludes the legislature has provided specific direction to local governments, that direction must be followed;[144] a local government may not use its general authority or a rule of broad construction to circumvent limitations specifically imposed by statute. A particularly difficult question of interpretation arises when the legislature has provided alternate sources of authority and not addressed the relationship of the two. Where there are two general authorities for action that may be relied upon, the courts have allowed local governments to elect which to use,[145] as related statutes on the same

fect.

142. *See generally* NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.02, at 5-7 (5th ed. 1992) (summarizing various standards of statutory construction and interpretation).

143. *See Smith Chapel II*, 350 N.C. at 812, 517 S.E.2d at 879. Also, extraterritorial authority must be explicitly provided. *See id.* at 814-15, 517 S.E.2d at 880. This provision applies both to the delegation to the local government and the local government's application of delegated authority. *See* State v. Baggett, 133 N.C. App. 47, 49-50, 514 S.E.2d 536, 537-38 (1999) (holding that a county ordinance regulating sexually oriented business locations adopted under the county's general ordinance-making authority could not be applied within the city's extraterritorial jurisdiction without express direction).

144. *See* County of Lancaster v. Mecklenburg County, 334 N.C. 496, 509, 434 S.E.2d 604, 613 (1993) (stating that a county may not delegate decisions required by statute to be made by a "planning agency" to an individual staff member); Vulcan Materials Co. v. Iredell County, 103 N.C. App. 779, 782, 407 S.E.2d 283, 285-86 (1991) (stating that a county adopting a moratorium must follow notice and hearing requirements for land use ordinances).

145. *See, e.g.,* Maynor v. Onslow County, 127 N.C. App. 102, 105, 488 S.E.2d 289, 291-92 (1997) (stating that counties may use either their general ordinance-making power or their zoning authority to regulate the location of sexually oriented businesses); Summey Outdoor Advertising, Inc. v. County of Henderson, 96 N.C. App. 533, 538, 386 S.E.2d 439, 443 (1989) (stating that counties may use either their general ordinance-making power or their zoning authority to regulate outdoor advertising). On the other hand, where one of the asserted authorities provides a substantial level of detail, it may be reasoned that the legislature intended the procedures and limitations of the more specific authorization be followed, a variation of the e*xpressio unius est exclusio alterius* canon. Several commentators have concluded that the negative implication of the *expressio unius* rule is often not factually justified. *See, e.g.,* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 234–35 (1975). Indeed, more often than not, the legislative body simply has not considered the interrelationship of the statutes involved. The willingness of the court in *Bowers* and *Smith Chapel* to imply a legislative intent to limit local governments to a particular authorization may be more indicative of the court's caution than actual legislative direction.

subject should be considered[146] and differences reconciled in a manner that will give effect to both.[147]

With this conflicting array of canons of interpretation, it is tempting to view the resultant conflicting opinions as the product of results-oriented jurisprudence with the political and philosophical bent of the judge determinative of the outcome. This view was a principal critique of Dillon's Rule era jurisprudence,[148] and, in some respects, the two *Smith Chapel* decisions suggest the reemergence of this factor in North Carolina. While neither the facts nor the underlying law changed in the year between the two decisions, the makeup of the court did change, and this change had a substantial impact on the outcome of the case. However, there are often mutually contradictory rules for statutory interpretation, each of which is technically correct, and the temper of the court is an important factor in determining which rules are applied in a given controversy.[149]

III. IMPLICATIONS FOR LOCAL SMART GROWTH PROGRAMS

The substantial delegation of explicit authority to North Carolina local governments to undertake growth management measures gives cities and counties considerable authority to enact smart growth programs. The legislative expression of intent that these delegations be broadly interpreted adds latitude to the range of additional and supplemental powers that may be implied. [150]

146. Related statutes are to be read *in pari materia*. *See, e.g.,* Town of Spruce Pines v. Avery County, 346 N.C. 787, 791-92, 488 S.E.2d 144, 146-47 (1997) (stating that it is appropriate to consider all state water-quality protection statutes in determining the scope and purposes of the water supply watershed protection statute).

147. If the legislature intends to require an election of alternate sources of authority, it should explicitly provide for such and the courts should not lightly imply such (much as repeals by implication are not implied).

148. One critic characterized Dillon's Rule as leading to "arbitrary, outcome-oriented judicial intrusion into local autonomy" that "results in inconsistent outcomes and permits decisions based on the substantive biases of state judges rather than on an informed appraisal of the proper scope of local power." Richard Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, 67 CHI.-KENT L. REV. 1011, 1023-24 (1991). Another critic observed, "because of the nature of most legislation, the [Dillon's Rule] doctrine often forces the Court to assume the quasi-legislative role of interpretation by mere speculation." Comment, *Dillon's Rule: The Case for Reform*, 68 VA. L. REV. 693, 703 (1982). In North Carolina, the contrasting political views of Justice Avery and Justice Clark in the 1890-1920 period are clearly reflected in their opinions on the scope of local authority.

149. "[T]he constellation of the personnel on a particular bench at a particular time plays its important part in urging the court toward a more literal or a more creative selection among the available accepted and correct 'ways' of handling precedent." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statues Are to Be Construed*, 3 VAND. L. REV. 395, 397 (1950).

150. Local smart growth programs benefit from the judicial presumption of validity accorded local ordinances (provided they pass the threshold inquiry of

Authority to enact a wide range of smart growth techniques falls within the scope of explicit current authorizations. The authority to regulate uses allows zoning ordinances to be amended to allow mixed uses—be it residential uses over commercial storefronts in existing downtowns, or new developments with single-family and multifamily development interspersed with commercial and office uses arrayed in a walkable fashion. The authority to set permissible densities allows zoning to be adjusted to facilitate transit-friendly development, to accommodate reasonable in-fill development for affordable housing, or to provide a density bonus for development that advances legitimate community needs (such as provision of affordable housing or additional open space). The authority to regulate "the percentage of lots that may be occupied, the size of yards, courts and other open spaces"[151] provides authority to require buffers along waterways, to protect important natural areas, and to set requirements that authorize or even mandate clustered development schemes. The authority to set standards for infrastructure in subdivisions allows design standards to be amended to permit neo-traditional neighborhood development, such as requirements for narrower streets, interconnected street layout, and use of sidewalks or alleyways. The authority to regulate development "to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements"[152] provides authority to implement adequate public facility requirements. The authority to provide utility services and to limit their provision beyond corporate limits provides authority for municipal urban service boundaries. The authority to require provision of land and facilities, and payment of fees for infrastructure needs created by new subdivisions, provides authority for reasonable fees for transportation, water, sewer, recreation, and open space needs generated by growth.[153]

adequate authority). *See In re Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938). An ordinance is not to be invalidated unless it is clearly arbitrary, irrational, or has no substantial relation to the public health, morals, safety or welfare. *See id.* If the question is fairly debatable, the ordinance is held valid. *See id.*; *see also* Marren v. Gamble, 237 N.C. 684-85, 75 S.E.2d 880 (1953); Duggins v. Town of Walnut Cove, 63 N.C. App. 684, 688, 306 S.E.2d 186, 189 (1983). However, when an ordinance restricts property rights, restrictions not clearly included within the scope of the ordinance are not to be implied. *See* Yancey v. Heafner, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966).

151. N.C. GEN. STAT. §§ 153A-340(a), 160A-381 (1999).

152. *Id.* §§ 153A-341, 160A-383.

153. *See id.* §§ 153A-331, 160A-314, 160A-372; *see also* South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192, 1206 (E.D.N.C. 1988) (upholding authority to charge impact fee for water and sewer services). *See generally* Atlantic Constr. Co. v. City of Raleigh, 230 N.C. 365, 368-69, 53 S.E.2d 165, 168 (1949) (finding that city can set utility fees in its sound judgment). Federal constitutional limitations require a rational nexus between whatever is exacted from the developer and the impacts of the development and require the amount

The authority to implement a number of additional smart growth management measures can be implied from these explicit grants of authority. The authority to regulate new development implies the authority to enact moratoria of reasonable scope and duration while new regulations are being developed.[154] In other areas there is greater uncertainty about the precise scope of local authority because the statutes are silent on the issue (other than the general ordinance-making authority). Management tools that fall into this category include transfer of development rights programs and use of inclusionary zoning mandates.[155]

Only a few smart growth techniques cannot be employed by local governments in North Carolina without additional legislative authorization. Several situations exist where the legislature has preempted local regulation altogether.[156] For example, in order to have a uniform state building code, no local variation of the state building code is allowed.[157] This preemption of local building codes prevents a city or county from establishing requirements that new construction meet "green building" requirements.[158] The requirement that local taxes be specifically authorized limits the authority to impose impact taxes, real estate transfer fees, or similar innovative methods to fund smart growth initiatives. In addition, new legislation would be required to impose new mandates (such as re-

of the exaction to be roughly proportional to the impact. *See* Dolan v. City of Tigard, 512 U.S. 374, 386-96 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

154. For a review of the authority to enact development moratoria in North Carolina, see David W. Owens, *Land-Use and Development Moratoria*, 56 POPULAR GOV'T 31 (Fall 1990).

155. Zoning regulations are limited to consideration of land use considerations rather than land ownership. *See* Graham Court Assocs. v. Town of Chapel Hill, 53 N.C. App. 543, 551, 281 S.E.2d 418, 422-23 (1981) (finding that city may not require special use permit for conversion of rental apartments to owner occupied condominiums).

156. N.C. GEN. STAT. § 160A-174(b) (1999) expressly codifies a standard preemption limitation on the general ordinance-making powers of cities. Similar restrictions apply to counties by common law.

157. *See* N.C. GEN. STAT. § 143-138(e) (1999). Thus, an individual local government has no authority to impose additional standards, such as requiring sprinkler systems for additional fire safety. *See* Greene v. City of Winston-Salem, 287 N.C. 66, 75-76, 213 S.E.2d 231, 237 (1975). The courts have also held that the state alcoholic beverage control statute preempts local land use decisions regarding the location and operation of facilities with state ABC licenses. *See In re* Melkonian, 85 N.C. App. 351, 360-61, 355 S.E.2d 503, 509 (1987) (invalidating local special use permit denial for tavern); Staley v. City of Winston-Salem, 258 N.C. 244, 248-49, 128 S.E.2d 604, 607-08 (1962) (invalidating local restriction on wine sales in nonconforming restaurant).

158. Several local governments have obtained local legislation authorizing sprinkler requirements. *See* 1998 N.C. Sess. Laws ch. 85 (Wrightsville Beach); 1998 N.C. Sess. Laws ch. 13 (Nags Head); 1997 N.C. Sess. Laws ch. 761 (Carrboro) and ch. 316 (mandating fraternity and sorority house sprinklers in Charlotte, Greensboro, and Raleigh).

quired plan coordination or mandatory regional fair-share housing programs) or new state initiatives, such as tying availability of state funding to local smart growth action or creating inter-local tax base sharing programs.

IV. FUTURE DIRECTIONS

A variety of possible legislative responses are available to met calls for the provision of greater local authority and flexibility in developing smart growth programs. The most direct approach is to provide explicit authority for a broader menu of options for local governments, along with any desired restrictions, thereby placing clear responsibility on local governments for the adoption of smart growth programs.[159]

Another possibility is enactment of legislation authorizing individual local governments to experiment with various smart growth techniques.[160] A number of local governments have taken this approach to resolve uncertainty regarding a variety of growth management initiatives.[161] Recent North Carolina examples include local legislation authorizing impact fees,[162] affordable-housing

159. Ambiguity on the scope of local authority allows both local governments and the state to blame the other for inaction. Another legislative option is to provide greater clarity as to when local governments may choose alternate authorizations. *See, e.g.*, N.C. GEN. STAT. § 160A-181.1 (1999) (providing that cities and counties may regulate the location of sexually oriented businesses through zoning regulations, licensing requirements, or other appropriate local ordinances).

160. This method has long been a common means of addressing a variety of legislative needs. Seventy-four percent of all laws enacted by the North Carolina legislature in 1789 to 1835 were private, local, or special acts. *See* Coates, *supra* note 13, at 3. Constitutional amendments in 1835, 1868, 1916, and 1962 reduced the volume of local and private acts. *See* NORTH CAROLINA LOCAL GOV'T STUDY COMM'N, 1968, REPORT TO THE GOVERNOR OF NORTH CAROLINA AND THE GENERAL ASSEMBLY OF 1969, at 55-68 (1969). The constitutional limitations on local legislation are at N.C. CONST. art. II, § 24.

161. This phenomenon is not recent. A 1949 study of local legislation noted that most of the "legislative intermeddling" of which local governments complained was initiated by requests for special acts by the cities and counties. *See* Coates, *supra* note 13, at 3, 12-13.

162. The local legislation on impact fees, facility fees, capacity charges, and project fees vary in terms of what they may be used to fund and the procedures for calculation and collection. *See* 1991 N.C. Sess. Laws ch. 660 (Dunn); 1989 N.C. Sess. Laws ch. 430 (Knightdale), ch. 502 (Wake Forest), ch. 606 (Zebulon), ch. 607 (Southern Pines); 1988 N.C. Sess. Laws ch. 996 (Rolesville), ch. 1021 (Catawba County); 1987 N.C. Sess. Laws ch. 68 (Wendell), ch. 460 (Chatham and Orange Counties, Pittsboro), ch. 668 (Knightdale, Zebulon), ch. 705 (Hickory), ch. 801 (Cary), ch. 802 (Durham); 1986 N.C. Sess. Laws ch. 936 (Chapel Hill, Hillsborough); 1985 N.C. Sess. Laws ch. 357 (Carrboro), ch. 498 (Raleigh), ch. 536 (Dare County municipalities). For additional information on the implementation of some of these fee programs, see William R. Breazeale, *Raleigh's Facility-Fee Program*, POPULAR GOV'T, Fall 1989, at 2, and Richard D. Ducker, *Using Impact Fees for Public Schools: The Orange County Experiment*, SCH. L.

bonuses,[163] and regulation of tree removal.[164] While a good case can be made that in many instances special legislative authorization is unnecessary, the ease of securing local legislation to resolve uncertain authority leads many local governments to do so.[165] If one jurisdiction secures such authorization, others often seek the same to avoid the negative implication that those without explicit authorization do not have the power to use that tool.

Judicial review of the scope of authority of local governments will continue. The courts must continue to determine on a case by case basis the scope of implied powers. In carrying out these reviews, the legislature has directed that a rule of broad construction should be applied to many delegations of local authority.[166] The courts must also determine when legislation, establishing state level action on an issue, preempts local action and must, furthermore, resolve ambiguity when there are multiple potential sources of authority for a local activity. The determination as to whether cities and counties have been delegated the authority to act in a particular fashion or have flexibility in the way they act should not be dependent on the predilections of a particular court. The question is not whether an activist judiciary—be it sympathetic to or suspicious of local governments—believes a particular power is appropriately delegated. The question before the court is one of legislative in-

BULL., Spring 1994, at 1.

163. *See* 1997 N.C. Sess. Laws ch. 588 (Winston-Salem, Forsyth County); 1991 N.C. Sess. Laws ch. 119 (Wilmington), ch. 246 (Orange County), ch. 503 (Durham city and county). Local governments also frequently seek legislative authorization to change mandated procedures. A recent example is modification in procedures for enforcing nuisance lot ordinances. *See, e.g.*, 2000 N.C. Sess. Laws ch. 33 (High Point chronic violators), ch. 38 (Gastonia chronic violators); 1999 N.C. Sess. Laws ch. 62 (Dallas, Tabor City, and Whiteville), ch. 58 (addressing chronic violators in Roanoke Rapids). Another is the process for demolishing abandoned structures. *See, e.g.*, 1998 N.C. Sess. Laws ch. 26 (Waynesville) and ch. 87 (Eden); 1997 N.C. Sess. Laws ch. 296 (Rocky Mount). After a number of local governments receive individual authorization, the state law is sometimes amended to extend the flexibility to all local governments. An example is the process for sending notices of violation of housing codes. *See, e.g.*, 1997 N.C. Sess. Laws ch. 93 (Conover), ch. 126 (Winston-Salem, Forsyth County), ch. 89 (Greensboro), ch. 160 (Conover, Sanford). In 1997, N.C. GEN. STAT. § 160A-445 was amended to provide similar options to all cities and counties.

164. *See* 2000 N.C. Sess. Laws ch. 108 (authorizing tree ordinances in Apex, Garner, Kinston, and Morrisville).

165. Authorization of some management tools generates substantial interest group opposition even if the authorization is only for individual communities. Local bills authorizing impact fees, real estate transfer fees, and transferable development rights have generated strong opposition in recent legislative sessions.

166. The rule of broad construction only applies to action under N.C. GEN. STAT. §§ 153A and 160A (1999). While these chapters include most delegations of local government authority, other local government activities are authorized elsewhere in the General Statutes.

tent,[167] difficult though it may be at times to ascertain.

The foregoing review of two centuries of legislation and litigation provides several lessons to be considered by architects of smart growth programs. Significant authority for smart growth programs can be found within the bounds of existing legislation. However, the authority to impose taxes and to apply regulations extraterritorially will be strictly construed; where specific procedural limitations have been imposed by the state, they must be followed. Judicial resolution of close questions on the adequacy of delegated authority where innovative growth management tools are being employed will continue to be difficult in the absence of more explicit legislative direction. Despite the repeal of Dillon's Rule, there remain areas where the courts are cautious in implying a legislative delegation of authority to act. These include novel or controversial management tools, regulations significantly affecting fundamental rights or addressing new subject areas for governmental intervention, imposition of substantial fees not closely related to receipt of a direct service or benefit, and use of general authority where more specific delegated authorities are available. While local governments have considerable authority to act in these areas, caution is warranted in the absence of additional legislative reform.

167. *See* State v. Tew, 326 N.C. 732, 738-39, 392 S.E.2d 603, 607 (1990) (citing State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978)); Coastal Ready-Mix Concrete Co. v. Board of Comm'rs, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980).