2018 Fundamentals for Municipal Attorneys E-Materials

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UNC SCHOOL OF GOVERNMENT

Fundamentals of Municipal Government

March 22, 2018
Chapel Hill, NC

Thursday, March 22, 2018

8:30 Breakfast

8:45 Introduction to Local Government Law (And How It's Different From The Law Governing Private Entities)
Frayda Bluestein, UNC School of Government

9:45 Introduction to Local Government Finance
Kara Millonzi, UNC School of Government

10:45 Break

11:00 Who is Your Client? Municipal Attorney Ethics
Chris McLaughlin, UNC School of Government

12:00 End of Program/Box Lunch Networking Opportunity

Introduction into Local Government Law Materials

Introduction to Local Government Law

A Different Kind of Client

What can it do?

How does it do it?

- Source and Scope of Authority
- Corporate Nature: Contracting and Taking Action
- Working With Transparency
- Special Rules in Litigation

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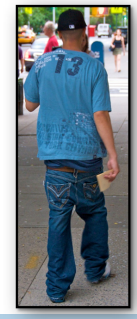
Can a city regulate saggy pants?



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The Structure of Local Government in North Carolina

(This is a story about the power of the state legislature.)

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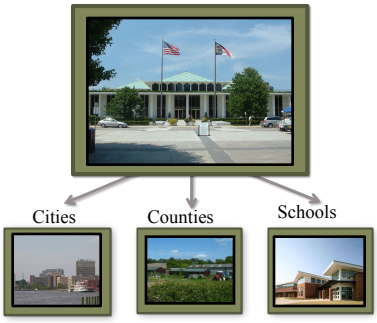
Local Governments Have Limited Powers:
No Inherent Authority

UNC 5

State legislature creates local governments and delegates authority by statutes and local acts



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Practical Reality

You may spend a lot of your time explaining to your board the concept and implications of limited authority.

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Local Acts Augment and Modify State Statutes

- Local Acts
  - Includes city charters and charter amendments
  - Applies to fewer than 15 units
  - May modify a statute for a particular unit
  - May be a freestanding provision
  - Limited by State Constitution (Art. II, Sec. 24) and other provisions that require legislation by "general law"

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Statutes Allow Locally Adopted Charter Changes

City and County

- Governing board size
- Governing board term
- Mode of election
- Method of election
- Forms of government

City Only

- Selection of mayor
- Style of corporation
- Name of unit
- Governing board name

County only

- Selection of Chair

School of Government
Forms of Government Website

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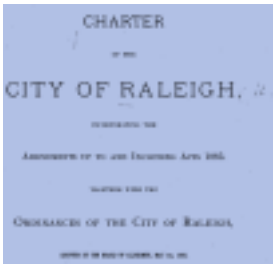
Practical Advice


CHARTER

CITY OF RALEIGH.

Find the current version of the charter

Get to know the charter

Research local acts

Uncover locally adopted charter changes

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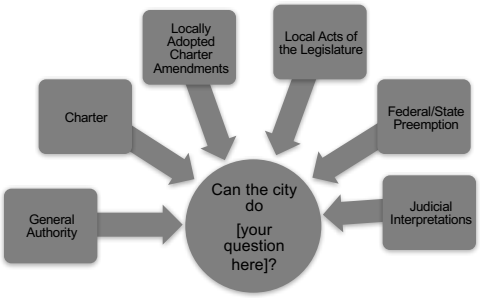
Local Government Authority: The Big Picture



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Local Governments Have Limited Powers
No Inherent Authority

UNC 12

Local Governments Have Many Delegated Powers

UNC 13

Most city authority is optional

- Police
- Fire
- Streets
- Water
- Sewer
- Zoning
- Solid waste collection

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What Must Cities Do?

Building Code Enforcement

"Meaningful services" required to annex. Some major services required to incorporate and to receive state shared funds.

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Most County Functions Are Mandatory

- Law enforcement
- Jail
- Medical examiner
- Court facilities
- Building code enforcement
- Public school support
- Social Services
- Public health
- Mental health
- Deed registration
- Election administration
- Tax assessment

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What Both Cities and Counties May Do

- Fire Protection
- Water
- Sewer
- Solid Waste Collection
- Solid Waste Disposal
- Land Use Regulation
- Libraries
- Hospitals
- Parks and Recreation
- Tax Collection
- Animal Control

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Helpful Tools

State law provides broad authority for interlocal cooperation.

See Chapter 160A, Article 20

An interlocal agreement doesn't confer new authority; obligations must be within the scope of existing authority.

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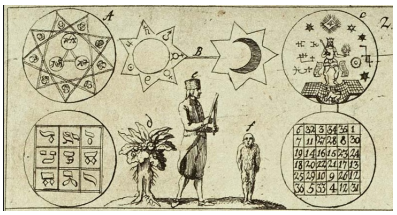
The Art and Science of Divining the Meaning of Statutes



Consider the implications of differences in city/county statutes.
Use dictionary definitions for terms that are not defined.
Beware the implications of local acts.

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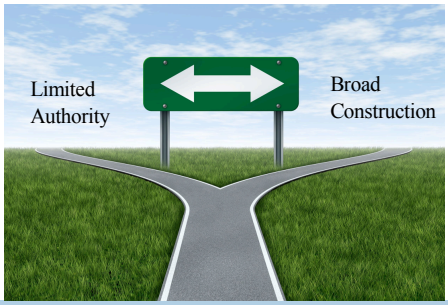
Scope of Authority



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Dillon's Rule

Judge Dillon

A town possesses and may exercise the following powers and no others:
those granted in express words;
those necessarily or fairly implied in or incident to powers expressly granted; and
those essential to the accomplishment of corporate purposes.

Circa 1868

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Dillon's Rule vs. Home Rule

Dillon's Rule

- A rule of judicial interpretation used to determine whether local governments have acted within the scope of their authority.

Home Rule

- A form of legislative or constitutional delegation of authority to local governments.

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Broad Construction

§ 160A-4. Broad construction.

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. (1971, c. 698, s. 1.)

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North Carolina Rule (the latest)

- Broad Construction only applies if the applicable enabling statute is ambiguous.
- If a statute is clear, the court is bound to apply it based on its plain meaning.
- The general ordinance statute (police power) is ambiguous and should be broadly construed.

(*King v. Town of Chapel Hill, 2014)*

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Exercise Caution

When authority is not clear, beware of:

- Anything controversial
- Anything that involves a fee or tax that is not explicitly authorized

Consider seeking a local act

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The Board as A Corporate Client

- Board can only act in a a meeting, properly noticed, a quorum being present.

Polling the Board

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Representing a Board

The governing board has default authority.

Mayors have limited authority.

Board can delegate unless statute requires board action.

Does the Board Have to Approve This?

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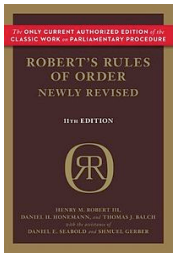
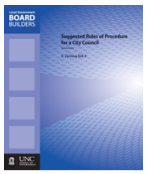
Tools for Keeping Order





Know the Rules!

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~~Binding Future Boards~~ Binding Current and Future Boards

- Actions of one board are binding on the unit, even when the board composition changes.
- Contracts that purport to bind the exercise of discretion on matters that involve fundamental governmental powers are not valid. See Binding Future Boards

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Other Contracting Rules

Authorized purpose: constitutional, statutory

Budgetary authorization (preaudit)

Procedural requirements (bidding requirements for certain contracts)

Conflicts of interest: G.S. 14-234, criminal violation and void contract

Approval procedures: governing board when required, or proper delegation

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Practical Advice

Consider establishing a contract approval process so that you can prevent problems before they occur.

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Litigation

- Municipal clients have advantages in court that are not available in arbitration or mediation:
  - Governmental immunity in tort
  - Application of statutes of limitation
  - No punitive damages against local governments

See Lawrence Bulletin for more on this topic

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Communicating With Your Client

Public records law does not fully recognize the attorney-client privilege

- Exception for communication to the board, about litigation against the unit, for 3 years
- Exception for trial preparation materials
- Subject matter exceptions; personnel, trade secrets, economic development

Closed sessions are allowed to preserve the attorney-client privilege

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We're Here To Help

- School of Government Resources
- Website: sog.unc.edu
- Coates Canons:canons.sog.unc.edu
- Faculty Fields of Expertise
- Publications

Chapter 1

An Overview of Local Government

David M. Lawrence

Under the American federal system, state governments are primarily responsible for all governmental functions not delegated to the federal government by the U.S. Constitution. Each of the fifty state governments has divided responsibility for all activities under its control between itself and its local units of government: cities and towns, counties, townships, school districts, other special districts, and authorities. The pattern of responsibility differs from state to state depending on that state's traditions, circumstances, and political judgments, but the state and one or more units of local government are collectively responsible for most of the governmental activities that affect citizens directly and often, such as the following:

- Administration of the courts
- Airports
- Conduct of elections
- Fire protection
- Law enforcement
- Mental health
- Parks and recreation
- Prisons and jails
- Public education
- Public health
- Public libraries
- Public water supply and distribution
- Recording of documents
- Regulation of land use and development
- Regulation of individual conduct
- Sewage collection and disposal
- Social services
- Solid waste collection and disposal
- Streets and highways

This list is not comprehensive, but it does indicate the scope of responsibilities that are met by state government and the various kinds of local governments.

This material is a chapter from the School of Government publication *County and Municipal Government in North Carolina*, Second Edition.
ISBN 978-1-56011-775-9.

The Primacy of State Government

In North Carolina's governmental system some governmental activities are the responsibility of state government alone, such as regulation of insurance or provision of four-year public colleges and universities. Other activities are provided concurrently or collaboratively by state and local government, activities such as social services, public health, election administration, K-12 education, community colleges, and parks and recreation. Still other activities are provided only by local governments, such as water distribution and sewage collection and disposal, fire protection, and zoning and subdivision regulation. Even with this latter group of activities, however, there is frequently some degree of state supervision or coordination.

The decisions that have created the basic framework for local government in North Carolina, for example, what kinds of local governments there are; how those local governments are created, are structured, and may expand; what activities local governments are permitted to engage in, what activities they are required to engage in; and how they may raise the revenues necessary to pay for it all, have all been made at the state level. One source is the North Carolina Constitution. Although this document is mostly concerned with establishing certain rights guaranteed to the state's citizens and creating the basic structure of state government, it also includes a few provisions that directly affect local government, such as that each county will have an elected sheriff and that certain forms of local government borrowing require voter approval. More important to the day-to-day operations of local government, however, are the many decisions made over time by the North Carolina General Assembly, the entity with the primary constitutional power to structure and modify the provision of governmental activities within the state. In the absence of state constitutional or federal constitutional, statutory, or regulatory restriction, the General Assembly is free under North Carolina's governmental system to create, abolish, and govern cities, counties, and other local governments as it sees fit.[1] As the North Carolina Supreme Court stated in a case involving a county, local governments in this state "are subject to almost unlimited legislative control, except when the power is restricted by constitutional provisions."[2]

A corollary to this primacy of the General Assembly in establishing the system of local government in a state like North Carolina is the understanding the local governments are entities with delegated powers only. Unlike some states, North Carolina is not a *home rule* state, which means that only the General Assembly can empower local governments to act. They have no constitutional capacity to empower themselves in the absence of state legislative action. The mere lack of any prohibition on any specific local government action is not sufficient to allow that action; it must be grounded upon some sort of legislative authorization. It should be stressed, though, that the General Assembly has been generous in its authorizations to local government, and as a result there is ample statutory authority for almost any initiative a local government wishes to take.

The necessary legislative authorizations may take either of two forms: *general laws* that apply statewide or *local or special acts* that pertain exclusively to named counties, cities, or other local government entities.[3] North Carolina General Statutes (hereinafter G.S.) Chapter 160A, which governs the structure and operations of city governments, is an example of a general law; the legislative act creating a particular city, which contains its operating "constitution" or charter, is an example of a local act. One use of local acts is to permit local variation and experimentation. This activity was once denounced by students of government but is now seen as a useful device for exploring new ideas and approaches to government problems, although it occasionally is used by legislators to override decision making by a specific local government. Given this legislative flexibility, any discussion of city or county powers and responsibilities

1. See N.C. Const. art. VII, sec. 1, first sentence: "The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable."

2. Martin v. Comm'rs of Wake Cnty., 208 N.C. 354 (1935).

3. The North Carolina Constitution contains a number of topical limitations on legislative authority to enact local acts. *See, e.g.,* N.C. Const. art. II, sec. 24; art. V, sec. 2(2) and 2(3); and art. VI, sec. 3. N.C. Const. art. XIV, sec. 3, explains some of the constitutional formulations that restrict the enactment of local or special acts.

must always be prefaced with a caution that what is being said about cities or counties in general may not hold true for any particular jurisdiction.

The Current System of Local Government

County and City Governments

The dominant forms of local government in North Carolina are counties and cities. In North Carolina there is no legal distinction between a *city*, a *town*, or a *village*. Each is a *municipality*, and in this state a municipality may call itself by whichever designation it chooses, making that choice in its charter. Although *city* usually refers to a large municipality and *town* or *village* to a small one, there is no requirement that a particular municipality follow that general practice. The *Town* of Cary, for example, is now the seventh largest municipality in the state, while the *City* of High Shoals has a population of less than 700. In this volume *city* refers to municipalities of all sizes, both large and small.

Both counties and cities are general-purpose local governments, which means

- their governing boards are elected by the qualified voters of the county's or city's geographic area.
- they have the power to levy taxes.
- they may regulate conduct through adoption of *ordinances* (this ability is called the police power and is discussed in Chapter 5, "General Ordinance Authority."
- they are authorized and, especially with counties, sometimes required to provide a broad range of services to their citizens.

Although some other types of local governments in the state have at least one of the previously listed characteristics (for example, sanitary district boards and boards of education are elected; boards of health may enact regulations related to health and airport authorities may enact rules governing conduct on airport property; and a wide range of entities from water and sewer districts to hospital authorities provide services), no other local governments combine all of these attributes in the way that counties and cities do. (Types of local governments beyond counties and cities are briefly described at the end of this section.)

Counties and cities historically served very different purposes. Originally, counties were established to serve state purposes, that is, to carry out government on behalf of the state. Sheriffs enforced the state's criminal laws and collected its taxes; registers of deeds recorded the state's deeds and other documents; justices of the peace and clerks of court presided over the lowest rung of the state's judicial system, and the justices established and maintained the state's roads. Over time, counties came to be seen as the local government that provided services that were needed by all citizens, regardless of where they lived. Therefore, as government began to provide statewide public education, public health services, and welfare services, it was counties that were given the responsibility. Cities, by contrast, were created to adopt regulations and provide services more appropriate to built-up or urban areas. Over time, this meant that cities provided water distribution or sewage collection and disposal, solid waste collection, fire protection, recreation, and similar services, and it was cities that first began to regulate land use and development.

Around the middle of twentieth century, citizens living outside cities began to request some of the governmental services characteristic of cities but not of counties. They wanted community water or sewer systems, organized fire protection, and recreational spaces or programs. They wanted to be able to dispose of their trash in some way other than dumping or burning. And they wanted the protection of zoning. The General Assembly's response, over time, was to empower counties to engage in these city-like activities. As a result, although counties continue to serve a crucial role in the provision of state government services, they also have been given the opportunity to provide a range of services almost comparable to those provided by cities. The current authorizations for county and city functions and activities is set out in Table 1.1, below.

TABLE 1.1. Chief Services and Functions Authorized for City and County Government in North Carolina

Services and Functions Authorized for Counties Only

1. Agricultural extension
2. Community colleges
3. County home
4. Court system support
5. Drainage of land
6. Forest protection
7. Juvenile detention homes
8. Medical examiner/coroner
9. Public health
10. Public schools
11. Register of deeds
12. Social services
13. Soil and water conservation

Services and Functions Authorized for Both Cities and Counties

1. Aging programs
2. Air pollution control
3. Airports
4. Alcoholic rehabilitation
5. Ambulance services
6. Animal shelters
7. Armories
8. Art galleries and museums
9. Auditoriums and coliseums
10. Beach erosion control and hurricane protection
11. Bus lines and public transportation systems
12. Civil defense and emergency management
13. Community action
14. Community appearance
15. Community development
16. Drug abuse programs
17. Economic development
18. Fire protection
19. Historic preservation
20. Hospitals
21. Human relations
22. Industrial promotion
23. Inspections
24. Jails
25. Law enforcement
26. Libraries
27. Manpower
28. Mental health
29. National Guard
30. Off-street parking
31. Open space
32. Parks
33. Planning
34. Ports and harbors
35. Public housing
36. Railroad revitalization
37. Recreation
38. Rescue squads
39. Senior citizens' programs
40. Sewage collection and disposal
41. Solid waste collection and disposal
42. Storm drainage
43. Urban redevelopment
44. Veterans' services
45. Water
46. Watershed improvement

Services and Functions Authorized for Cities Only

1. Cable television and communication services
2. Cemeteries
3. Electric systems
4. Gas systems
5. Sidewalks
6. Street lighting
7. Streets
8. Traffic engineering

As general purpose local governments, counties and cities have many similarities, and as the General Assembly has authorized counties to provide many of the services once provided by cities only, those similarities have grown. But there remain important differences between counties and cities.

Geographic Extent

All the land in North Carolina is within one or another of the one hundred counties, and, therefore, all the citizens of North Carolina live in a county. But not all live in a city. The municipal population of the state, as estimated by the State's Office of State Management and Budget, is only slightly more than 55 percent of the total state population.[4] Therefore, as noted above, if there is a local government service that is needed by all the state's citizens, it will almost certainly be one that is provided—probably exclusively—by county government.

Because the state's entire territory is allocated among the one hundred counties, those local governments have no need for any sort of annexation power. Cities do, however, have the capacity to grow territorially, and, therefore, over

4. The Office of State Management and Budget estimated the state's total population as of 2013 as 9,861,952 and estimated the total municipal population in North Carolina on that date as 5,488,775. These estimates are available at the office's website, www.osbm.state.nc.us/ncosbm/facts_and_figures/socioeconomic_data/population_estimates.shtm.

the years the general assembly has given cities various sorts of annexation powers. The current annexation laws are summarized in Chapter 2, "Incorporation, Annexation, and City–County Consolidation."[5]

Authorized Activities

Although in recent years counties have gained authority to provide many of the services traditionally provided by cities, there remain a number of city functions for which there is no comparable county authority, as is set out in Table 1.1, above. That table also demonstrates that there are a number of important county functions that cities are not authorized to provide. As the preceding paragraphs have discussed, these by and large are activities that the general assembly has determined should be provided to all the citizens of North Carolina and, therefore, should be provided by counties, the one form of general purpose local government that covers the entire state. County responsibility for these services is a continuing reminder of the counties' historical role as an agency of state government.

Mandated Activities

As the General Assembly has turned to counties as the instrumentalities to provide certain services over the entire state, it has recognized that its goal of statewide provision of those services cannot be met unless the counties are required to provide the services. Therefore, counties are subject to a number of service mandates, which in total comprise well over half of any county's annual budget. For many of these mandated activities, there is also a substantial degree of state government supervision of county operations. The following are the most important mandated activities for counties:

- Public education
- Social services
- Public health
- Mental health
- Jails
- Sheriff
- Medical examiner
- Support of the court system
- Emergency management
- Register of deeds
- Elections administration
- Building code enforcement
- Tax listing and assessment
- Emergency medical services

By contrast, the only mandated activity for cities is building code enforcement, and many smaller cities meet this obligation by contracting with the county to take responsibility for the function.[6] (Federal law requires that some larger cities engage in stormwater management.)

Governmental Structure

Counties are highly decentralized organizations. Two department heads, the sheriff and the register of deeds, are elected, and several important functions—including public education, community colleges, social services, public health, and mental health—are controlled by elected or appointed boards other than the board of county commissioners. These other boards appoint their own employees and make policy for the entities or county departments under their control.

5. Although most cities are located within only one county, there is no legal reason for that to be so. Rather, city boundaries tend to follow development, which often pays no attention to county lines. There are at least thirty-four different cities in North Carolina that are in two or more counties; one, the city of High Point, is in four counties.

6. Cities that have been incorporated after 1999 are required to provide at least four services from a statutory list of eight in order to receive certain state-shared revenues, N.C. Gen. Stat. § 136-41.2(c), but such cities may choose to forego the revenues and a few have.

In addition, some members of some appointed boards are appointed by persons or entities other than the board of county commissioners.

Cities, on the other hand, are centralized organizations, with almost all employees reporting either to the manager or the governing board. A city manager has a great deal more day-to-day control over city-funded operations than does a county manager over county-funded operations.

Partisan versus Nonpartisan

All elected county officials in North Carolina—commissioners, sheriff, and register of deeds—are chosen through partisan elections. Almost all city elected officials, on the other hand, are elected in nonpartisan elections.[7] As a result, county elections are held in even-numbered years, at the same time as statewide and national elections, while city elections are held in odd-numbered years.

Other Types of Local Governments

School Administrative Units

Substantially independent school districts in North Carolina were abolished in 1931. In their place the General Assembly created geographically defined school administrative units overseen by locally elected boards of education with no taxing power. These units are funded by counties and by the state and federal governments. (Elementary and secondary education is discussed in detail in Chapter 45, "The Governance and Funding Structure of North Carolina Public Schools.")

Special Districts and Authorities

Special purpose governments also exist in North Carolina, but they have never been as widely used here as elsewhere in the nation. Generally, *special districts* are special purpose governments with taxing power, and *authorities* are such governments without taxing power. The two most common special districts in the state are the sanitary district and the rural fire protection district. North Carolina also has several types of authorities, the most common being

- housing authorities, created under G.S. Chapter 157.
- water and sewer authorities, created under G.S. Chapter 162A.
- airport authorities, usually created by local act of the General Assembly.

A few authorities are also involved in operating hospitals, public transportation, off-street parking facilities, and a variety of recreational facilities and activities. Many other states make much more extensive use of authorities, especially to operate revenue-producing enterprise activities.

Townships

North Carolina undertook a relatively brief experiment with township government after 1868, the township being a subdivision of the county with independent governmental powers and responsibilities. The experiment was mostly abandoned later in the nineteenth century, although townships remained involved in road construction and maintenance through the 1920s. Unlike some other states, townships exist today in North Carolina only as convenient administrative areas within counties, chiefly for tax-listing and sometimes to provide convenient boundary lines in the drawing of census districts and voting precincts. G.S. 153A-19 allows the board of commissioners to establish, abolish, and name townships, as long as specified procedures are followed.

7. Cities can choose to use partisan elections, but only 7 out of more than 550 of the cities and towns do so.

A Brief History of Local Government in North Carolina

We now turn to a discussion of the history of North Carolina counties, cities, and other local governmental units, followed by a summary of the current characteristics of local government in the state.

Colonial Times through the Civil War

Counties

It was accepted from the earliest days of colonial government in North Carolina that governmental administration could not be efficiently centralized in the colonial capital. Therefore, following the English tradition, the colony established county governments for the local administration of many of the functions of government considered essential throughout the colony: administration of the court system, law enforcement, the conduct of elections, care of the poor, and maintenance of roads. Justices of the peace, as a body or court, administered the county's affairs, exercising both judicial and administrative powers. Independence from England brought no wrenching changes to this system. The county justices of the peace were appointed by the governor to serve at the pleasure of the governor, but in making his appointments the governor relied on recommendations from the General Assembly. Thus, as a matter of practical politics, the members of the legislature from a given county had a powerful voice in the selection of its justices of the peace and, therefore, in its government.

At first the justices appointed the sheriff, the coroner, and the constables; later, these offices were made elective. The sheriff and coroner were from the county at large and the constables from captains' districts (militia-mustering areas). The justices were also responsible for appointing a clerk of court, register of deeds, county attorney, county trustee (treasurer), surveyor, and overseers or wardens of the poor. In sum it was a system with very little direct control by the county's voters.

Cities

In contrast to the county, the colonial and early 1800s North Carolina towns, serving several hundred people, had few functions. They organized a town watch, established a volunteer fire department, built public wells, kept the streets in repair, occasionally (as in Fayetteville and Wilmington) built a town market, and passed ordinances to protect the public health and safety. The early towns supported their activities from fees, charges, fines and penalties, and revenue from the sale of lots.

North Carolina towns remained largely small trading centers and county seats until after 1865. They did not grow with industrialization during the antebellum period, as many northern cities did. Indeed, by 1850 only one North Carolina city, Wilmington, had a population as great as 5,000. As a result, North Carolina cities were a full half-century or more delayed in encountering a demand for such major municipal functions as water systems and paid police departments. Property, poll, and license taxes were introduced around 1800, but tax levies for cities and towns were very small until after the Civil War.

Local Government from 1868 until 1900

The 1868 Reconstruction Constitution of North Carolina attempted a fundamental restructuring of county government. The justices of the peace were restricted to judicial functions, with county government administration transferred to newly constituted—and locally elected—boards of county commissioners. The constitution also added township governments, additional elected officials with limited responsibilities. When the so-called Conservatives regained political power in the 1870s, these constitutional changes were reversed. Township government was essentially abolished, and commissioners were made subservient to the reinstituted justices of the peace.

This arrangement lasted for twenty years. In 1895 the ability of the people to elect commissioners was restored in most counties, and the requirement that the boards' decisions be approved by the justices of the peace was repealed. Popular election of the commissioners was finally restored in all counties in 1905.

The history of city government in this period was more tranquil. Between 1865 and 1900, city water and sewer systems were first introduced, largely through franchised private companies. Public transportation, such as streetcar

systems, was introduced under similar franchises, as were electric and telephone systems. Street lighting first became common. The large cities began to spend a lot of money on paving streets, just as the large counties began to pave the roads that led out from the cities. With the demand for paved streets and utilities came special assessments and water charges. Public health regulations also received an increased emphasis. Schools came to be operated by school districts, with better and more expensive schools in the cities and the towns. Wilmington reached a population of 10,000 in 1870, followed by Asheville, Charlotte, and Raleigh in 1880.

Cities and Counties in the Twentieth and Early Twenty-First Centuries

From 1900 through World War II

The first three decades of the twentieth century continued the growth of North Carolina local government that had begun in the final decades of the nineteenth. Streets and roads were paved as the automobile became commonplace. Water and sewer systems came under public ownership as private companies found it difficult to maintain high-quality systems and still produce a profit. A number of cities acquired their own electric systems. Full-time city police departments were established, and full-time paid fire brigades began to supplement the efforts of volunteer companies. The first building codes were adopted. Public support for city and county libraries began, largely in response to Carnegie Foundation grants-in-aid for library construction. Public health departments were first established by counties.

In the 1920s the statewide system of primary highways connecting county seats and other principal cities and towns was established. Zoning was introduced, and the first county and city managers were appointed. The prosperity of the 1920s encouraged a significant growth of local government.

The Great Depression broke the expansion bubble. All services were cut back, and debt service obligations became a heavy burden. With no one to advise or warn them in marketing their securities, many cities and counties had overextended their obligations and saw their credit ratings drop so low that they had to pay crippling rates of interest; eventually, some faced bankruptcy. Defaults on bond obligations led the legislature to establish the County Government Advisory Commission in 1927 and to give it the supervisory powers necessary to correct the situation. This commission effected a reversal in local government financing. Its successor, the Local Government Commission, remains a bulwark of North Carolina government today. In addition, poor property tax collections threatened continued operation of county road systems and public schools. As a result, the state assumed responsibility for non-city roads in 1931 and for a minimum level of public education in 1933. Independent school districts were abolished.

With all of these changes, state and federal financial aid, virtually unknown until the Great Depression, became a significant source of local government revenue. Federal public works programs built many local government improvements, including the first water and sewer systems in many small towns. Federal aid led to uniform county responsibility for public welfare and encouraged development of health departments.

1945 to the Present

The immediate postwar period was a time of rapid urban growth and a very rapid expansion of local government facilities, first to make up deficiencies left from the depression and later to meet new demands, and there has been steady growth in the decades since. In most of this growth, counties and cities could rely and build upon their existing powers, but there were a number of major episodes of significant expansion in local government powers in the latter half of the twentieth century.

The 1959 General Assembly enacted a number of important pieces of legislation, some of which remains important today. The leading product of 1959 legislation was a city annexation procedure that remained in place until 2011, permitting cities to unilaterally annex areas that had become or were in the process of becoming urban in nature. Thoroughfare planning and land use planning and zoning enabling statutes were also passed in 1959, and both laws still exist in modified form. The thoroughfare statute places joint responsibility for thoroughfare planning and for adoption of a major thoroughfare plan on city councils and the state's Department of Transportation. The planning legislation significantly expanded on the prior powers of cities and counties to plan, zone, and regulate land development, and it provided for increased joint and cooperative activities by city and county governments. Finally, 1959 also saw the beginnings of today's extraterritorial jurisdiction (ETJ) statute that gives cities an ability to regulate development outside

their boundaries. Although smaller cities were not originally given ETJ authority, the extraterritorial jurisdiction law applies statewide today.

In 1967 the General Assembly established a Local Government Study Commission. It operated for six years, successfully proposing significant modernization in the constitutional provisions affecting local government finance, revising and modernizing the basic local government statutes, and transferring important decisions from the General Assembly to county commissioners and city councils. It also continued strengthening legal powers delegated to county government, for example, by extending to counties a general ordinance-making power.

The most significant change in city and county revenues in many years also came in 1967, when Mecklenburg County was authorized to "piggyback" a 1 percent local sales and use tax on the state's general sales tax. The success of this tax in Mecklenburg quickly led to its authorization across the state. Since then, the rate has increased several times, and the tax is levied in all one hundred counties under arrangements by which the proceeds in each county are shared between the county government and the cities within it. The sales and use tax revenues have become especially important to local governments, because the past forty years have also witnessed a significant narrowing of the property tax base by the General Assembly.

The past several decades have seen the continued spread of the council–manager form of city government and the county manager form of county government in North Carolina. Nearly all cities with more than 10,000 citizens and many with lower populations use the council–manager form. About ninety-nine of North Carolina's counties currently have a manager (the number varies slightly from year to year), although the powers of county managers, particularly over hiring and firing, may be restricted by the board of county commissioners in ways that are not possible under the city–manager system. In addition, an elected county commissioner can and sometimes does serve as the county manager. This is forbidden for cities.[8]

Changes have also occurred in local governing bodies and in city and county workforces. There has been some movement to various forms of district election of city council members and county commissioners, although the at-large method retains great popularity. There have also been marked increases in the numbers of women and African Americans elected to city and county offices.

The growth of North Carolina's population and economic changes have created an increasing need for city and county governments to cooperate. Hundreds of cooperative arrangements have developed since 1970, varying from one unit contracting with another to the merger of functions. (See Chapter 11, "Interlocal Cooperation, Shared Services, and Regional Councils," for a more detailed discussion.)

North Carolina Local Government in the National Context

This chapter ends with a summary of important distinctions between North Carolina's current pattern of local government and the patterns commonly found elsewhere. At least nine general distinguishing features can be identified:

1. *Primary state responsibility for financing education and highways.* Two functions for which state and local financial outlays are large—education and highways—are both financed primarily at the state level in North Carolina, and from taxes imposed by the state. All states support these two functions from the state treasury to some extent, but few to the degree that North Carolina does. In most states the local share of financial

8. In the council–manager form of government, the city council makes planning and policy decisions, leaving the day-to-day administration of city affairs to a professional manager. In jurisdictions without a manager, all decisions concerning the city are entrusted to the council. The manager in cities operating under the council–manager plan has statutory hiring and firing authority for all city employees except those appointed directly by the council. Arrangements are more complex in counties, even with a manager, both for the reasons noted in the text and because of the existence of several boards besides the county commissioners with a role in making policy and choosing employees (e.g., the boards of health, mental health, and social services; the board of education; and the board of elections). For more information, see Chapter 3, "County and City Governing Boards"; Chapter 4, "County and City Managers"; and Part 8 describing county budgeting and particular county government functions.

responsibility is much greater, and in almost all states, but not North Carolina, county (or township) governments bear a major portion of the responsibility for roads outside municipalities. Moreover, in North Carolina the property tax is less important in financing these two functions than in the nation at large, because of the major state government responsibility.

2. *Primary county responsibility for areawide, or "human," services at the local level.* A number of major services and functions, especially health, education, and welfare, are needed by people in both rural areas and urban areas. In North Carolina the local responsibility for these services and functions is vested in the county, the one type of unit that covers the entire state, and the county commissioners have limited discretion in whether or how much to fund them. In contrast, in other states these services and functions may be carried out at the state level or vested locally in cities, counties, special districts, or a combination thereof.
3. *Primary city responsibility for the high levels of some services that are needed in urban areas.* Fire protection, law enforcement, solid waste collection, water and sewer services, and street maintenance and improvement are all key city responsibilities in North Carolina, much as they are in many states. However, some states are more likely to use local authorities or special districts to provide water and sewer services, fire protection, and so forth.
4. *County authority to provide urban types of services.* North Carolina counties have extensive authority to provide water and sewer services, solid waste collection and disposal, fire protection, recreation, and other services needed by citizens. (As noted previously, counties still have no authority to build or maintain streets.) A county government may, if it chooses, provide urban types of services throughout the county's unincorporated areas as may be necessary. Counties also frequently cooperate with cities in providing some of these services within city limits (see number 6). In some other states urban functions could be undertaken in unincorporated areas only by forming special districts or authorities.
5. *Extensive city and county authority to regulate and direct urban development.* Both cities and counties in North Carolina are broadly authorized to undertake planning programs and to regulate land use through zoning and subdivision control. Most cities have ETJ with respect to these controls. Local governmental units in other states also have such powers, but not all states grant such broad authority.
6. *Flexibility in city–county and multi-unit arrangements.* Cities and counties in North Carolina also have broad authority to take joint or parallel action or to contract with one another for performance of functions that both are authorized to undertake. Such agreements may range from the joint financing of a water line to the merging of tax collection or other offices.
7. *A model system for major thoroughfare planning.* Under a procedure established in 1959, each municipality and the state's Department of Transportation jointly develop and adopt a major thoroughfare plan for the municipality and its surrounding area. North Carolina's system is a nationally recognized approach that has served as a model for procedures adopted elsewhere.
8. *A state–local revenue system that relies on four main taxes.* The major taxes in North Carolina are the property tax, the general sales tax, the individual and corporate income taxes, and the gasoline tax. The property tax is levied by local governments only, the general sales tax by local and state governments, and the income and gasoline taxes by the state only (although the gasoline tax is shared with cities). Rates for the sales and income taxes are average to high compared to rates for the same types of taxes in some other states, whereas rates for the property tax are low compared with those found in many other places. In terms of responsiveness to the economy, the property tax everywhere tends to lag economic growth more than taxes tied directly to economic activity, such as income and sales taxes. Because the property tax is relatively less important in North Carolina than it is elsewhere, while income and sales taxes have greater significance, North Carolina's total revenue structure tends to be somewhat more sensitive than most states' tax programs to changes, positive or negative, in the economic environment.
9. *Reliance on general-purpose local governments.* At the local level in North Carolina, almost all governmental responsibilities have been vested in city and county governments, two general-purpose types of governmental units. The vast majority of expenditures of local governmental units in North Carolina are also made through

cities and counties. In many other states, special districts, school districts, and authorities are relatively much more important. The result is that North Carolina's urban areas generally do not have the multitude of overlapping units frequently found elsewhere.

Summary

North Carolina's pattern of local government reflects an arrangement that is flexible and provides for much local control. The pattern has resulted in a relatively simple governmental structure, with few types of local government and limited overlapping jurisdictions and with both state and local financing being important. At least three main roles have been defined for local governments in this state.

The first major function of cities and counties is protection of the individual and the public as a whole. They carry out this responsibility through fire services and law enforcement (police and sheriff's departments), ordinances that protect the safety of individuals and the public at large from the acts of other persons, and ordinances that protect the use and value of property.

Local governments are also providers of many other services. Most cities provide a local street system, and some build and operate essential facilities such as electric and gas distribution systems. Counties support school systems and health, mental health, and social services programs. Both cities and counties operate water and sewer systems; collect solid waste; sometimes build and operate airports and auditoriums; and contribute to their citizens' cultural and leisure-time activities by supporting libraries, parks, and recreation programs.

Finally, local governments are a major factor in the continued economic development of the community. Cities, for example, share responsibility with the state for the street and highway system that is the key to effective transportation. Cities, counties, and some independent districts and authorities build and operate the water and sewer systems without which urban development is impossible. Local governments often directly support economic and industrial development bodies, sometimes alone and at other times in cooperation with other local governments. Cities, counties, and in some cases special local authorities provide the civic facilities such as parking, auditoriums, and airports that make an area attractive as an economic center. Local governments help to improve housing. Through all of these activities, local governments are involved in helping to build attractive, convenient, and appealing communities.

Local governments in North Carolina play a major role in providing the services and functions that are needed in an increasingly urbanized state that also contains large rural areas. They are created by the state legislature, and their powers and functions are authorized by that body. Although many North Carolina cities and counties provide similar kinds of services to other jurisdictions of the same type, each city and to a lesser extent each county has considerable flexibility in determining what functions it will undertake and at what level. Within the limitations prescribed by the state legislature and the courts, city councils and boards of county commissioners have discretion to provide the services and functions that will best serve the needs of their communities.

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This chapter updates and revises the previous versions authored by A. Fleming Bell, II, Joseph S. Ferrell, and Warren Jake Wicker. The author is indebted to Professors Bell and Ferrell and to the late Professor Wicker for their work.

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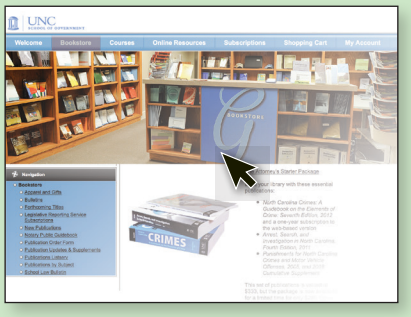

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Chapter 5

General Ordinance Authority

Trey Allen

The general ordinance authority of local governments in North Carolina is synonymous with their general police power. The term "police power" denotes much more than the enforcement of criminal laws.[1] In the American legal system, it refers in the first instance to the sovereign power retained by the states under the United States Constitution "to govern men and things within the limits of [their] dominion."[2] A state exercises its police power whenever it legislates, regardless of whether the law being enacted is "a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits."[3]

The courts understand the police power to encompass anything touching the safety, health, welfare, or morals of the public.[4] While the potential scope of the police power is therefore vast, federal and state constitutional provisions substantially limit its reach. For instance, Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution bar state and local officials from taking an individual's life, liberty, or property without due process of law.[5] Federal statutes and regulations further curtail the states' police power. No state,

1. The word "police" derives from the Latin *politia*, a term the ancient Romans used to refer to the civil administration of government. Santiago Legarre, *The Historical Background of the Police Power*, U. Pa. J. Const. L. 745, 748–49 (2007). *Politia*, in turn, descends from polis, the Greek work for city. *Id*.

2. Thurlow v. Commonwealth of Mass., 46 U.S. 504, 583 (1847) (footnote omitted).

3. *Id*. One influential treatise asserts that the police power's two main attributes are that "it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion." Ernst Freund, *The Police Power, Public Policy and Constitutional Rights*, college ed. (Callaghan & Co., 1904), sec. 3.

4. *E.g.*, City of Concord v. Stafford, 173 N.C. App. 201, 205 (2005) ("The scope of the police power generally includes the public health, safety, morals and general welfare.").

5. While the phrase "due process" does not appear in Article I, Section 19, North Carolina's courts have long construed the phrase "law of the land" in Section 19 to encompass many of the requirements of the Fourteenth Amendment's due process clause. *See* John v. Orth & Paul Martin Newby, *The North Carolina State Constitution*, 2nd ed. (Oxford University Press, 2013), 68–72.

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for example, may relieve employers of their legal obligation under Title VII of the Civil Rights Act of 1964 to refrain from discriminating against job applicants and employees based on race, color, gender, religion, or national origin.[6]

The police power is typically exercised by both the states and their various political subdivisions. The way in which this power is shared varies from state to state, depending on the relevant constitutional and statutory provisions in each jurisdiction. In North Carolina the General Statutes (hereinafter G.S.) delegate a portion of the police power to counties and cities in the form of their general ordinance authority.[7] This chapter explores the sources and scope of that general ordinance authority, including the extent to which local governments may enforce their ordinances through criminal and civil actions. It ends with a brief description of the legal rules concerning the adoption and filing of ordinances in North Carolina.

Defining the General Ordinance Authority of Counties and Cities in North Carolina

Sources of the General Ordinance Authority

The North Carolina Constitution declares that the General Assembly "shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by th[e] Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable."[8] This constitutional language endows the General Assembly with almost unbridled power to create, abolish, or merge counties, cities, and other units of local government and to define and limit their authority.[9]

As creations of the legislature, local governments may act only as permitted by statute. The primary grants of power to local governments are found in G.S. Chapters 153A (counties) and 160A (cities). Strictly speaking, practically all of the statutes in Chapters 153A and 160A concern the police power in some manner. The statute conferring zoning authority on cities, for instance, explains that the purpose of zoning is to promote the "health, safety, morals, or the general welfare of the community."[10] The focus here, though, is on the general police power delegated to local governments by the statutory provisions located in Article 6 of G.S. Chapter 153A and Article 8 of G.S. Chapter 160A. (To avoid confusion, Articles 6 and 8 will be referred to collectively hereinafter as the "Police Power Statutes.")

The most important of the Police Power Statutes are G.S. 153A-121 and 160A-174. Together the statutes invest the governing boards of counties and cities with the power to adopt ordinances that define, regulate, prohibit, or abate "acts, omissions, or conditions detrimental to the health, safety, or welfare of [their] citizens" and "the peace and dignity" of their jurisdictions and to "define and abate nuisances."[11] This general ordinance authority is supplemented by other provisions in the Police Power Statutes that expressly authorize local regulation of designated matters, with abandoned automobiles (G.S. 153A-132.2, 160A-303.2), noise (G.S. 153A-133, 160A-184), and sexually oriented businesses (G.S. 160A-181.1) being but three examples.

6. *See* 42 U.S.C. § 2000e-2.

7. Counties and cities are not the only local government entities to which the General Assembly has delegated a portion of its police power. For example, state law grants local boards of health the authority to adopt rules necessary to protect and promote public health. N.C. Gen. Stat. (hereinafter G.S.) § 130A-39(a). The regulatory powers of boards of health are discussed further in Chapter 38, "Public Health."

8. N.C. Const. art VII, § 1.

9. In other words, North Carolina is not a "home rule" state, as that term is commonly understood; its local governments exist by legislative benevolence, not by constitutional mandate. In constitutional home rule states, the existence or powers of at least some of the state's units of local government are spelled out in the state constitution. To change such provisions, a constitutional amendment, rather than simply a legislative act, is required. *See generally* Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule*? 84 N.C. L. Rev. 1983–2030 (2006) (comparing local government authority in home rule states with the powers granted to local governments in North Carolina).

10. G.S. 160A-381(a). Chapter 25 of this publication discusses zoning and other local development measures in detail.

11. *See* G.S. 153A-121(a), 160A-174(a).

Scope of the General Ordinance Authority

It is not always easy to tell whether a particular matter falls within the general ordinance authority. Grave threats to the public health, safety, or welfare are obviously subject to local control unless state or federal law dictates otherwise. The same is true of those matters expressly covered by the Police Power Statutes. Yet reasonable people can disagree over whether any number of other conditions qualify as "detrimental" to the public and, thus, constitute proper objects for local government action. It could be argued, for instance, that G.S. 153A-121 and 160A-174 do not allow local governments to regulate private property solely for the purpose of improving its appearance. The North Carolina Supreme Court, though, has upheld a county ordinance that required junkyards situated near public roads to be surrounded by fencing for purely aesthetic reasons.[12]

To a large degree, the reach of the general ordinance authority depends upon how broadly the courts interpret key terms like "detrimental" and "health, safety, or welfare." A brief review of the judiciary's approaches to questions of local government authority reveals that, while the courts have often narrowly construed statutes granting power to counties and cities, they can be expected to take an expansive view of G.S. 153A-121 and 160A-174 in future cases.

Judicial Approaches to Local Government Power

In 1874 the North Carolina Supreme Court endorsed "Dillon's Rule" for interpreting legislative grants of power to local governments.[13] Named for the Iowa judge who formulated it, Dillon's Rule holds that a local government has only those powers (1) expressly granted to it by the legislature, (2) necessarily or fairly implied in or incident to powers expressly granted, and (3) essential—not simply convenient, but indispensable—to accomplish its declared objects and purposes.[14] Under Dillon's Rule, any reasonable doubt concerning the lawfulness of a challenged action had to be resolved against the local government.

North Carolina's courts applied Dillon's Rule in cases disputing the authority of local governments until the 1970s, often with unpredictable results. Many of the inconsistent outcomes stemmed from judicial attempts to discern whether specific legislative grants of authority "necessarily or fairly implied" certain powers. It is fair to say that the judiciary generally seemed more willing to find implied authority when local governments engaged in historically unremarkable activities than when they embarked upon new, unusual, or controversial endeavors.[15] The courts also tended to disfavor local measures imposing taxes or fees during the Dillon's Rule era.[16]

In 1971 the General Assembly appeared to overrule Dillon's Rule for cities by enacting G.S. 160A-4. This law declares that the provisions of G.S. Chapter 160A "shall be broadly construed and grants of power shall be construed to include any additional and supplemental powers . . . reasonably necessary or expedient to carry them into execution and

12. State v. Jones, 305 N.C. 520, 530, (1982). The *Jones* case articulates a balancing test the courts apply when evaluating the legality of aesthetic regulations. In a nutshell, the court must determine whether the aesthetic purpose to which the regulation is reasonably related outweighs the burdens imposed on the private property owner. *Id*.

13. Smith v. City of Newbern, 70 N.C. 14, 70 (1874).

14. David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 Wake Forest L. Rev. 671, 680–81 (2000) (quoting John F. Dillon, *The Law of Municipal Corporations*, 2nd ed. (1873), sec. 55).

15. *Compare City of Newbern*, 70 N.C. at 14 (emphasis in original) (holding that a law granting the city power to "*appoint[] market places* and regulat[e] the same" implied authority to build a public market house) *with* State v. Gulledge, 208 N.C. 204, 208 (1935) (holding that neither the power "to regulate the use of automobiles" conferred by charter nor the authority "to license and regulate all vehicles operated for hire" and "to make . . . regulations for the better government" delegated by statute granted the city express or implied power to require taxicab operators to file proof of liability insurance in designated amounts). One explanation for the different outcomes in *City of Newbern* and *Gulledge* is that public marketplaces go back at least as far as ancient Greece, whereas at the time of *Gulledge* the requirement that taxicab operators have liability insurance was "a public policy hitherto unknown in the general legislation of the State." 208 N.C. at 208.

16. *See* Owens, *supra* note 14, at 683 (noting that the courts "strictly construed" local authority in the area of taxes and fees during the period between 1890 and 1910). In 1893, for instance, the North Carolina Supreme Court invalidated an assessment for sidewalks in Greensboro. *Id*. at 684 (citing City of Greensboro v. McAdoo, 112 N.C. 359, 367–78 (1893)).

effect." In 1973, by enacting G.S. 153A-4, the legislature endorsed a substantially identical rule of construction for G.S. Chapter 153A.

Although, taken at face value, G.S. 153A-4 and 160A-4 direct the judiciary to interpret the primary county and city statutes broadly, the North Carolina Supreme Court has not uniformly applied this mandate when reviewing the validity of local government actions. In 1994 the court held that a city may charge reasonable fees for regulatory services, such as commercial driveway permit reviews and rezoning reviews, even though no statute expressly authorized the fees in question.[17] In reaching this conclusion, the court opined that G.S. 160A-4 obliged it to construe the grants of power in G.S. Chapter 160A expansively.

Roughly five years later, the state supreme court invalidated both the ordinance establishing the City of Durham's stormwater management program and the fee schedule used to fund the program.[18] While cities had explicit statutory authority to operate stormwater and drainage systems, Durham's stormwater program incorporated components—hazardous waste collection was one—not directly tied to stormwater management. Moreover, G.S. 160A-314(a1) prohibited a city from imposing fees in excess of a stormwater and drainage system's cost. The court ruled that the city had exceeded statutory parameters by including the supplemental components in its stormwater management program and by charging fees to fund those components. The court made this determination without applying G.S. 160A-4 to the statutory provisions at issue in the case, reasoning that the provisions' clear and unambiguous wording eliminated the need for judicial interpretation.

In 2012 the North Carolina Supreme Court struck down an ordinance adopted to reduce the strain of residential development on public school capacity in Cabarrus County.[19] The ordinance permitted the county to deny or conditionally approve a developer's application when a proposed development would exceed unused school capacity. Developers frequently agreed to contribute funds for school expansion in amounts designated by the county in order to have their applications approved.

The court rejected the county's claim that the general zoning power supported the ordinance, even though one purpose of the zoning statutes is to promote the "efficient and adequate provision of . . schools."[20] According to the court, nothing in the "plain language" of the zoning laws allows counties to address inadequate school capacity through developer fees. The court declined to apply G.S. 153A-4 because it saw no need to go beyond the unambiguous wording of the zoning statutes to decide the case.

The apparent reluctance of the state supreme court to apply G.S. 153A-4 and 160A-4 prompted speculation that it remained disposed to rule against local governments in disputes over the lawfulness of ordinances. Prior to 2014, however, the court had not been squarely presented with the question of whether the broad construction mandates in G.S. 153A-4 and 160A-4 extend to the general ordinance authority. The court finally confronted this question in *King v. Town of Chapel Hill*,[21] a case brought by a tow truck operator to challenge the legality of towing and mobile phone ordinances adopted by Chapel Hill's town council. The towing ordinance prohibited the removal of automobiles from non-residential private lots without the vehicle owners' permission unless signs were posted at designated intervals warning that the lots were tow-away zones. It also capped towing and storage fees at amounts set annually by the council and directed towing companies to accept payment by credit card at no extra charge to the owners of involuntarily towed vehicles. The mobile phone ordinance barred individuals 18 years old or older from using mobile phones while driving, on pain of a $25 fine but no driver's license points.

The basic issue before the supreme court was whether the general ordinance authority conferred on cities by G.S. 160A-174 could sustain the towing and mobile phone ordinances. To resolve this issue, the court first had to

17. Homebuilders Ass'n of Charlotte v. City of Charlotte, 336 N.C. 37, 45–47 (1994).

18. Smith Chapel Baptist Church v. City of Durham, 350 N.C. 805, 815 (1999). The high court initially upheld the city's stormwater management program, but then reversed itself after granting the plaintiffs' petition for rehearing. *See id*. at 806; Smith Chapel Baptist Church v. City of Durham, 348 N.C. 632, 639 (1998).

19. Lanvale Props., LLC v. Cnty. of Cabarrus, 366 N.C. 142, 169 (2012).

20. G.S. 153A-341.

21. ____ N.C. ____, 758 S.E.2d 364 (2014).

determine whether G.S. 160A-174 must be interpreted expansively pursuant to G.S. 160A-4. The court explained that it had no choice but to apply G.S. 160A-4 because the police power "is by its very nature ambiguous" and "cannot be fully defined in clear and definite terms."[22] The court then held that, broadly construed, G.S. 160A-174 allows cities to regulate involuntary towing to prevent or mitigate conflicts between the owners of private lots and individuals who park there without permission and between tow truck operators and automobile owners. Turning to the disputed provisions of the towing ordinance, the court found that G.S. 160A-174 was expansive enough to support the ordinance's signage requirements. It further ruled that the town's interest in ensuring that owners have quick and easy access to towed vehicles justified forcing towing companies to take credit cards.

Unlike the signage and form-of-payment provisions, the ordinance's caps on towing and storage fees did not survive judicial scrutiny. The link between the public welfare and the fee caps was too "attenuated" in the court's view for the town to impose the caps without explicit statutory authorization.[23] Additionally, the court expressed concern that the caps would make it impossible for towing companies to recover the costs of complying with the ordinance's other mandates. It even suggested that the caps might violate the constitutional right to enjoy the fruits of one's labor.[24] The court also invalidated the ordinance's prohibition against passing credit card fees on to the owners of involuntarily towed vehicles, describing it as tantamount to a fee cap.

The mobile phone ordinance was struck down in its entirety. State law already prohibited individuals of all ages from texting while driving and barred school bus drivers and individuals under the age of 18 from using mobile phones while driving on public streets or highways.[25] The court regarded these laws as evidence that the General Assembly wanted all regulation of drivers' mobile phone usage to occur at the statewide level.

Impact of King v. Town of Chapel Hill *on the General Ordinance Authority*

The *King* decision could be the North Carolina Supreme Court's most significant treatment of the general ordinance authority. It will have a major impact on future lawsuits alleging that local governments have acted beyond the scope of their police power.

The most important aspect of *King* is its definitive pronouncement that the provisions of G.S. 160A-174, and by implication G.S. 153A-121, must be interpreted broadly. Obviously, the more expansively the general ordinance authority is construed, the more likely a court is to find that an issue falls within the scope of the police power and that the means a local government has chosen to address it are lawful.

Another valuable attribute of *King* is that it provides lower courts with a framework for analyzing whether an ordinance represents a valid exercise of the general ordinance authority. The state supreme court did not consider the lawfulness of the towing ordinance's individual provisions until after it concluded that the police power covers the practice of involuntary towing. Thus, when facing a claim that a local government has acted outside the bounds of G.S. 153A-121 or 160A-174, a court should begin by asking whether the contested ordinance targets a problem within the scope of the police power. So long as the ordinance concerns an activity or condition that threatens the health, safety, or welfare of the public in some way, the answer to this question will probably be yes.[26] If it is yes, the court should then consider whether the requirements imposed by the ordinance are reasonably calculated to deal

22. *King*, ____ N.C. at ____, 758 S.E.2d at 370.

23. *King*, ____ N.C. at ____, 758 S.E.2d at 371. As an example of such statutory authorization, the court pointed to G.S. 160A-304, which permits cities to set the rates charged by taxi cabs. *Id.*

24. *See* N.C. Const. art. I, § 1 (declaring "that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness").

25. *See* G.S. 20-137.3(b) (forbidding mobile phone use by minor drivers); 20-137.4(b) (outlawing the use of mobile phones by persons operating school buses); 20-137.4A(a) (banning drivers from text messaging while operating automobiles).

26. Minor threats to the public welfare can be enough to bring a matter within the police power's reach. Concerns about odor and noise problems, for example, have been held to justify a city's decision to regulate the number of dogs that could be kept per lot. State v. Maynard, 195 N.C. App. 757 (2009).

with the problem.[27] A finding that such requirements are reasonable will typically warrant a ruling in favor of the local government, even if the requirements are extensive. In *King* the signage provision regulated practically every aspect of "Tow Away" signs on nonresidential private lots, including their placement, exact wording, and size.[28] The supreme court nonetheless upheld the signage provision as a "rational attempt" to prevent or mitigate the risks posed by involuntary towing.

Of course, *King* was not a total win for Chapel Hill. The supreme court's rulings against the town highlight a few of the substantial restrictions on the police power of local governments. Although the court stopped short of saying that a county or city may never rely on the general ordinance authority to control the prices charged by companies in transactions to which the local government is not a party, *King* leaves the impression that explicit statutory authorization is usually needed for such action. The court's invocation of the right to the fruits of one's labor is a warning that local governments can violate constitutional rights when they simultaneously increase regulatory burdens on businesses and take steps to limit what the businesses may charge others. Likewise, the invalidation of the mobile phone ordinance reminds local governments that the police power granted by G.S. 153A-121 and 160A-174 is preempted when the General Assembly either expressly or implicitly removes a matter from local control. The principles of preemption and other limitations on the general ordinance authority are discussed in more detail below.

Other Provisions in the Police Power Statutes

G.S. 153A-121 and 160A-174 speak in broad terms, but the Police Power Statutes contain a number of provisions that address local government power over designated matters. Table 5.1 at the end of this chapter contains a partial list of the individual topics covered in the Police Power Statutes alongside the statutes pertaining directly to each.

The cumulative effect of the statutes cited in Table 5.1 is to confer express power on local governments to regulate a hodgepodge of subjects. Several of the statutes, though, establish procedural requirements a county or city must adhere to when exercising its general ordinance authority over certain matters, while others totally exclude some things from the local regulation.

Grants of Specific Authority

The grants of specific authority listed in Table 5.1 include the power to regulate, restrict, or prohibit amplified noises that tend to annoy, disturb, or frighten citizens (G.S. 153A-133, 160A-183); business activities of itinerant merchants and peddlers (G.S. 153A-125, 160A-178); and begging and other canvassing of the public for contributions (G.S. 153A-126, 160A-179). Local governments also have express statutory authority to prohibit the abuse of animals (G.S. 153A-127, 160A-182) and to restrict or prohibit the possession of dangerous animals (G.S. 153A-131, 160A-187). The Police Power Statutes invest counties and cities with the power to regulate places of amusement, such as coffee houses, cocktail lounges, night clubs, and beer halls, so long as their regulations are consistent with any permits or licenses issued by the state's Alcoholic Beverage Control Commission (G.S. 153A-135, 160A-181). Additionally, local governments may restrict or prohibit the discharge of firearms except in defense of persons or property or pursuant to the lawful instructions of law enforcement officials (G.S. 153A-129, 160A-189).

The particular grants of authority in the Police Power Statutes mostly reinforce rather than expand the general ordinance authority bestowed by G.S. 153A-121 and 160A-174. Venomous snakes, for instance, unquestionably pose potential health and safety risks to a city's inhabitants, and consequently, G.S. 160A-174 would allow cities to restrict or ban the possession of such animals, even if Article 8 lacked a "dangerous animals" provision.

On the other hand, merely because a matter is not expressly mentioned in the Police Power Statutes does not mean that local governments are powerless to regulate it under G.S. 153A-121 or 160A-174. G.S. 153A-124 states that the enumeration of specific powers in G.S. Chapter 153A "is not exclusive, nor is it a limit on the general authority [of a county] to adopt ordinances [pursuant to] G.S. 153A-121." Likewise, G.S. 160A-177 provides that the enumeration of specific powers in G.S. Chapter 160A is not a constraint on a city's general ordinance authority.

27. Of course, if an ordinance concerns a matter beyond the reach of the police power, then it is unlawful unless other statutory authority exists for its adoption.

28. *King*, ____ N.C. at ____, 758 S.E.2d at 370–71.

If the specific provisions in the Police Power Statutes do not really expand the general ordinance authority, why did the General Assembly pass them? Several of the statutes were enacted before—some long before—the adoption of the broad construction mandates in G.S. 153A-4 and 160A-4, when the judiciary commonly invoked Dillon's Rule to invalidate local measures. The statute allowing cities to prohibit the abuse of animals, for instance, dates from 1917, while the first version of the statute permitting counties to regulate solid waste (G.S. 153A-136) appeared in 1955. These older provisions could represent a legislative attempt to ensure that local regulation of certain matters would not fall victim to Dillon's Rule.

The legislature has delegated many of the same ordinance powers to counties and cities, but there are differences. Thus, while cities have explicit power under G.S. Chapter 160A, Article 8 to address "the emission or disposal of substances or effluents that tend to pollute . . [the] land" (G.S. 160A-185), no statute in G.S. Chapter 153A, Article 6 expressly grants comparable authority to counties. Similarly, Article 6 contains a provision allowing counties to mandate the annual registration of mobile homes used for living or business quarters (G.S. 153A-138), but Article 8 has no such statute for cities.

How should these disparities be interpreted? It would be a mistake to assume that, just because a provision appears in one article but not the other, the authority to regulate a subject is reserved exclusively to either counties or cities. As explained above, the general ordinance authority extends beyond the individual powers enumerated in the Police Power Statutes. The existence of specific authority could reflect nothing more than a legislative assumption that a problem is more acute in urban or rural areas.

Procedural Requirements

Some Police Power Statutes include procedural requirements that must be followed for ordinances dealing with designated subjects to be valid and enforceable. For example, separate statutes expressly allow a county or city to mandate removal of an off-premises outdoor advertisement that violates an outdoor advertising ordinance, but only after written notice of the intent to require removal has been communicated to the owners of the advertisement and of the property on which the advertisement is situated (G.S. 153A-143, 160A-199). Except in limited circumstances, the same statutes also prevent a local government from ordering the removal of a nonconforming outdoor advertisement without compensating the advertisement's owner. Other statutes explicitly authorize counties and cities to adopt ordinances prohibiting the abandonment of motor vehicles on public and private property and to enforce those ordinances through the removal and disposal of abandoned vehicles, provided the local government takes precise steps to notify the vehicle owners of the removals and to afford them the right to contest the removals at hearings (G.S. 153A-132, 160A-303).

When more than one statute authorizes an action, a local government usually has the choice of proceeding under any or all of them. This principle does not apply, however, when it is clear from the unambiguous text or level of detail in a statute that the General Assembly intended that law to guide local action on a particular matter. A governing board should consult its attorney whenever questions arise about whether to rely on G.S. 153A-121 or 160A-174 or on one of the grants of specific authority in the Police Power Statutes.

Restrictions on Ordinance Authority

A handful of the Police Power Statutes exclude things from the general ordinance authority of local governments. G.S. 153A-145 and 160A-202 collectively prohibit counties and cities from banning cisterns and rain barrel collection systems used to collect water for irrigation purposes. Still other provisions prevent local governments from halting the sale of soft drinks above a particular size (G.S. 153A-145.2, 160A-203).

Some grants of express authority implicitly restrict regulation that is not within the scope of the power granted. For example, by permitting counties and cities to impose curfews on persons under 18 years of age, G.S. 153A-142 and 160A-198 likely signal the legislature's disapproval of local curfews for adults in non-emergency situations.

Exercising General Ordinance Authority

Almost every provision in the Police Power Statutes requires a local government to exercise its general police power "by ordinance." The adoption of an ordinance is therefore usually necessary if a county or city wishes to regulate, restrict, or prohibit something. A few statutes permit a county or city to eliminate threats to public health or safety even in the absence of an ordinance. Those statutes are examined briefly in the "Public Nuisance Abatement" section below.

Territorial Limits of General Ordinance Authority

A county has the option of making an ordinance adopted pursuant to G.S. 153A-121 or another statute in G.S. Chapter 153A, Article 6 applicable to any part of the county not within a city.[29] A city's governing board may adopt a resolution allowing a county police power ordinance to apply inside the city.[30] If the governing board later changes its mind, it may by resolution withdraw its consent to enforcement of the ordinance within its borders. The governing board should promptly inform the county of its withdrawal resolution, as the ordinance will remain in effect inside the city until thirty days after the county receives the notice.

For the most part, a city's police power ordinances apply only within the corporate limits and to any city-owned property or right-of-way outside the city.[31] A city may enforce zoning and other development ordinances inside its corporate limits and within its extraterritorial jurisdiction (ETJ). Depending on a city's population, the ETJ can stretch as far as three miles beyond the corporate limits.[32] (More information about ETJs is available in Chapter 25 of this publication.) When a city chooses to enforce development ordinances in its ETJ, the county's development ordinances no longer apply there, but the county's police power ordinances continue in force. Thus, a county's noise ordinance applies within the ETJ, even though its zoning ordinances do not. Action by either the county or the city may therefore be proper in some circumstances. If, for instance, a dwelling located in the ETJ appears unfit for human habitation, the county might take remedial action under its nuisance ordinance or the city might take steps to have the house repaired or demolished in accordance with its minimum housing standards.

Preemption of Local Ordinances

It is not uncommon for state or federal law to deny local governments the power to regulate matters that would otherwise fall within their general ordinance authority. Local regulation is said to be "preempted" when this occurs.

The essential rules of preemption are codified in G.S. 160A-174(b). Nothing about preemption appears in the text of G.S. 153A-121, but the North Carolina Supreme Court has repeatedly held that G.S. 160A-174(b) applies to a county's exercise of its general ordinance authority.[33] G.S. 160A-174(b) describes six scenarios in which local ordinances are preempted.

- Counties and cities are prohibited from adopting ordinances that violate liberties guaranteed by the state or federal constitution. Thus, if a city council were to ban all religious speech in city parks but allow other categories of speech there, G.S. 160A-174(b) would render its action void as an infringement on the constitutional rights of individuals to free speech and religious liberty.
- Local governments have no power to prohibit acts, omissions, or conditions expressly made lawful by state or federal law. In a 1962 case, the North Carolina Supreme Court invalidated a Raleigh ordinance that absolutely banned the peddling of ice cream from vehicles on city streets. The plaintiff had obtained a privilege license from the state allowing it to peddle its ice cream products, and the supreme court viewed the city's total ban on the practice as an impermissible restriction on conduct approved by the General Assembly.[34]
- Ordinances may not make lawful an act, omission, or condition expressly prohibited by state or federal law. So, because state law criminalizes prostitution, no county or city may legalize prostitution within its borders.

29. G.S. 153A-122.

30. *Id.*

31. G.S. 160A-176.

32. More information about the legal rules concerning the extraterritorial jurisdiction of municipalities may be found in Chapter 25 of this publication

33. *E.g.*, Craig v. Cnty. of Chatham, 356 N.C. 40, 45 (2002) (citation omitted) ("This Court has held that [G.S.] 160A-174 is applicable to counties as well as cities.").

34. E. Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 211–12 (1962).

- Local governments have no power to regulate subjects that state or federal law expressly forbids them to regulate. State law, for example, generally prohibits local governments from adopting ordinances that establish rules for the manufacture, sale, purchase, transport, possession, or consumption of alcoholic beverages which differ from those set forth in G.S. Chapter 18B.[35] (One noteworthy exception to Chapter 18B's prohibition on local regulation is G.S. 18B-300(c), which allows a county or city to regulate or prohibit the possession or consumption of malt beverages or unfortified wine on public streets by persons who are not occupants of motor vehicles and on property owned, occupied, or controlled by the local government.)
- Even when no state or federal law expressly deprives counties or cities of the power to regulate a matter, local governments may not regulate subject(s) for which state or federal statutes clearly evince a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation. In other words, if federal or state laws regarding a subject are sufficiently comprehensive, the courts will assume that the U.S. Congress or the General Assembly meant to remove the matter from local control. In one case, the North Carolina Supreme Court struck down an ordinance designed to regulate large-scale hog farming operations in Chatham County.[36] The plaintiffs argued that comprehensive state-level swine farm laws preempted the local rules. The supreme court agreed, concluding that "North Carolina's swine farm regulations [and the applicable state statutes] are so comprehensive in scope that the General Assembly must have intended that they comprise a 'complete and integrated regulatory scheme' on a statewide basis, thus leaving no room for further local regulations."[37]
- No ordinance may define an offense using the same elements as an offense defined by state or federal law. State law, for instance, already criminalizes various forms of assault, including simple assault, simple assault and battery, and assault inflicting serious bodily injury.[38] Accordingly, counties and cities may not adopt ordinances that prohibit the very same misconduct covered by the assault statutes.

G.S. 160A-174(b) ends with a reminder that the preemption rules ordinarily do not stop local governments from adopting standards of conduct higher than those demanded by federal or state laws. In a case involving a challenge to local obscenity regulations, for example, the North Carolina Supreme Court observed that, "notwithstanding the existence of a general state-wide law relating to obscene displays and publications, a city may enact an ordinance prohibiting and punishing conduct not forbidden by such state-wide law."[39]

Ordinance Enforcement

Local governments have the ability to enforce their ordinances through any or all of the criminal and civil enforcement actions described below. A county or city may pursue criminal and civil enforcement actions against an offender for the same ordinance violation.[40] Moreover, an ordinance may specify that each day's continuing violation is a separate and distinct offense, thus exposing offenders to mounting criminal and civil penalties the longer they remain in violation of the ordinance. The main statutes concerning ordinance enforcement are G.S. 153A-123 and 160A-175.

35. G.S. 18B-100.

36. *Craig*, 356 N.C. at 50.

37. *Id*. The court also struck down board of health regulations and zoning amendments regulating hog farming operations, though for somewhat different reasons.

38. G.S. 14-33(a) (making simple assault and simple assault and battery Class 2 misdemeanors); G.S. 14-32.4 (making it a Class F felony to assault and inflict serious injury on another person).

39. State v. Tenore, 280 N.C. 238, 247 (1972). Of course, a local government may not impose a higher standard of conduct than state or federal law when such law indicates either expressly or by its comprehensiveness that local regulation of a given matter is entirely precluded.

40. *See* Sch. Dirs. v. City of Asheville, 137 N.C. 503, 510 (1905) ("A party violating a town ordinance may be prosecuted by the state for the misdemeanor, and sued by the town for the penalty.")

Criminal Actions

Anyone who violates a county or city ordinance commits a Class 3 misdemeanor and risks a fine of not more than $500.[41] There are two exceptions to this rule. First, if the ordinance regulates the operation or parking of vehicles, a violator is responsible for an infraction rather than a misdemeanor and any fines assessed may not exceed $50.[42] Second, a county or city governing board may expressly provide that the violation of an ordinance will not result in a misdemeanor or infraction or, alternatively, that the maximum punishment will be some number of days or amount of money less than the statutory maximum.[43]

Only a law enforcement officer or person expressly authorized by statute may issue a citation requiring an individual to answer to a misdemeanor charge or infraction.[44] Proving that a criminal misdemeanor has been committed requires local officials to secure the assistance of the district attorney's office to prosecute the crime, and the violation must be proved "beyond a reasonable doubt." Although the potential fine for a Class 3 misdemeanor is relatively small, a person convicted of an ordinance violation has a criminal record. Some local officials prefer to enforce ordinances through criminal actions, reasoning that the threat of a criminal record may help deter ordinance violations.

Civil Actions

Local governing boards have the option of enforcing their ordinances through a variety of civil measures, including civil penalties and court orders directing offenders to comply with particular ordinances. In most cases, such measures cannot be pursued unless the ordinance at issue contains language identifying them as potential methods of enforcement.[45]

Civil Penalties

To impose a civil penalty for an ordinance violation, the ordinance must specify the amount of the penalty to be charged per violation. The local government may pursue payment of the penalty through a civil action against the offender. There is no statutory cap on the amount of civil penalties, but the Eighth Amendment to the U.S. Constitution prohibits civil penalties which are grossly disproportionate to their corresponding offenses.[46] The courts are unlikely to rule that a civil penalty as high as several hundred dollars violates the Eighth Amendment, so long as the penalty is not exceptionally large compared with other civil penalties imposed by the county or city.[47]

Local governments may delegate the power to issue civil citations to personnel who are not law enforcement officers.[48] A county or city may have its attorneys pursue civil penalty actions in superior or district court, depending on the amount of penalty at issue. If the penalty amount is small enough, a local government may use non-attorney employees to seek a judgment against the offender in small claims court. A civil penalty action is one "in the nature of debt," which means that a person found responsible for violating an ordinance with a civil penalty provision owes a debt to the county or city. Furthermore, the standard of proof in civil penalty cases, as in most civil proceedings, is "by a preponderance of evidence," which is a lower burden of proof for the local government than the criminal "beyond a reasonable doubt" standard. All of these factors (who may issue citations, who may bring the action, the lack of a set

41. G.S. 14-4(a). No fine for an ordinance violation may exceed $50 "unless the ordinance expressly states that the maximum fine is greater than fifty dollars." *Id*.

42. An infraction is "a noncriminal violation of law not punishable by imprisonment." G.S. 14-3.1(a).

43. G.S. 153A-123(b), 160A-175(b).

44. David M. Lawrence, "Criminal versus Civil Enforcement of Local Ordinances—What's the Difference?" *Local Government Law Bulletin* No. 130 (UNC School of Government, Dec. 2012), http://sogpubs.unc.edu/electronicversions/pdfs/lglb130.pdf (citing G.S. 15A-302). The practical effect of G.S. 15A-302 is to limit the issuance of such citations to sworn law enforcement officers. *Id*.

45. Rather than include enforcement language in every ordinance, some jurisdictions have "remedies" sections in their codes of ordinances that cross-reference various ordinances and specify which remedies may be applied for violations of each ordinance.

46. David M. Lawrence, "Are There Limits on the Size of Penalties to Enforce Local Government Ordinances?" *Local Government Law Bulletin* No. 128 (UNC School of Government, July 2012), http://sogpubs.unc.edu/electronicversions/pdfs/lglb128.pdf.

47. Lawrence, *supra* note 46.

48. Lawrence, *supra* note 44.

dollar maximum on the penalty, and the evidentiary standard) lead some local officials to prefer civil actions to criminal prosecutions for ordinance violations.

The Setoff Debt Collection Act offers local governments an avenue for recovering civil penalties in excess of $50 without having to resort to litigation.[49] As authorized by the Act, the North Carolina Association of County Commissioners and the North Carolina League of Municipalities have set up the Local Government Debt Setoff Clearinghouse. Provided they give debtors the statutorily mandated notice, counties and cities may submit qualifying debts to the Clearinghouse to be recovered from debtors' state tax refunds or lottery winnings. According to its website, the Clearinghouse has collected more than $210 million for local governments since 2002.[50]

Local officials should not assume that incorporating a civil penalty provision into an ordinance will generate significant revenue for county or city coffers. Pursuant to Article IX, Section 7 of the North Carolina Constitution, the "clear proceeds" of moneys collected for many if not most ordinance violations must go to the public school system(s) of the county in which the local government is situated. See Chapter 45, "The Governance and Funding Structure of North Carolina Public Schools," for more information about the legal principles used to determine when and how much of the moneys collected for ordinance violations are owed to the public schools.

Equitable Remedies

The governing board of a county or city may include language in an ordinance providing for its enforcement through an appropriate equitable remedy. Language of this kind allows the county or city to obtain a court order directing an offender to comply with the ordinance. The offender who ignores such an order risks being held in contempt of court.

Public Nuisance Abatement

A public nuisance is "a condition or activity involving real property that amounts to an unreasonable interference with the health, safety, morals, or comfort of the community."[51] The authority of local governments to define and abate such nuisances is usually exercised through ordinances that prohibit certain conditions or uses of real property. One common example is the overgrown vegetation ordinance, which imposes minimum maintenance requirements on residential or commercial lots.

When a nuisance ordinance is violated, the local government may seek a court order directing the defendant to take whatever steps are necessary to comply with the ordinance, including the closure, demolition, or removal of structures; the removal of items such as fixtures or furniture; the cutting of grass or weeds; or the making of improvements or repairs to the property. If the offender fails to obey the order within the time set by the court, the local government can execute the order and automatically obtain a lien on the property for the cost of execution. The offender may be cited for contempt.

It is sometimes lawful for counties and cities to remedy nuisances without going to court. Indeed, local governments possess statutory authority to deal with dangerous nuisances even when the property owner involved has not actually violated an ordinance. G.S. 153A-140 allows a county "to remove, abate, or remedy everything that is dangerous or prejudicial to the public health or safety," though this authority does not extend to bona fide farms and is sharply limited with regard to other agricultural or forestry operations. For a county to exercise its power under G.S. 153A-140, it must provide the property owner with adequate notice, the right to a hearing, and the right to seek judicial review.

G.S. 160A-193 permits a city to "remove, abate, or remedy everything in the city limits, or within one mile thereof, that is dangerous or prejudicial to the public health or public safety." Consequently, nuisances that threaten the health or safety of the public anywhere within one mile of a city may be addressed by either the county or the city.

Unlike G.S. 153A-140, G.S. 160A-193 declares that the power it confers may be exercised "summarily," that is to say, without affording the property owner notice or a hearing. As interpreted by the North Carolina Court of Appeals,

49. G.S. 105A-1, -16.

50. *See* www.ncsetoff.org/index.html

51. Richard Ducker, "Nuisance Abatement and Local Governments: What a Mess," *Coates' Canons: NC Local Government Law Blog* (UNC School of Government, June 6, 2011), http://canons.sog.unc.edu/?p=4747.

however, G.S. 160A-193 does not authorize a city to demolish a building "without providing notice or a hearing to the owner [unless] the building constitutes an imminent danger to the public health or safety necessitating its immediate demolition."[52]

When a local government eliminates a nuisance pursuant to G.S. 153A-140 or 160A-193, it automatically obtains a lien for the expense of corrective action upon the land or premises where the nuisance occurred. A city also has a lien for the action's cost on any other real property—except a primary residence—owned by the offending property owner inside or within one mile of the city. (The owner can avoid a lien on other property by showing that the nuisance resulted solely from another's conduct).

Dangerous nuisances do not represent the only situations that can lead to local government action without a court order. In the case of an individual who qualifies as a chronic violator of a public nuisance ordinance, the local government may notify the person that, if his or her property is found to be in violation of the ordinance during the calendar year in which notice is given, the county or city will remedy the violation and the cost of corrective action will be a lien upon the property.[53] The same rules apply to chronic violators of a city's overgrown vegetation ordinance.[54]

Adoption and Filing of Local Ordinances

Adoption of Ordinances

Consistent with the notion that ordinances regulate important aspects of citizens' lives, special procedural rules govern the adoption of ordinances in most situations.[55] With certain exceptions, the only time a county's governing board may adopt an ordinance at the meeting at which it is introduced is when all board members are present and vote in favor of the ordinance.[56] If the ordinance passes with anything less than a unanimous vote of all members, the board may adopt the ordinance by majority vote at any time within 100 days of its introduction. For a city's governing board to adopt an ordinance on the date of its introduction, the ordinance must garner an affirmative vote equal to at least two-thirds of the board's membership, excluding vacant seats and not counting the mayor unless the mayor has the right to vote on all questions before the board.[57] (See Chapter 3 of this publication for an in-depth discussion of the voting rules for local governing boards.)

Many people mistakenly assume that a public hearing must be held any time an ordinance is proposed for adoption. In fact, only a few types of ordinances require a public hearing, such as those regulating land use and Sunday business closings.[58]

Filing of Ordinances

With certain exceptions, every ordinance enacted by the governing board of a county or city must appear in either an *ordinance book* or a *code of ordinances*. Local governments are under no legal obligation to post ordinances on their websites, though many do so anyway to improve public access to their ordinances.

52. Monroe v. City of New Bern, 158 N.C. App. 275, 278 (2003). The court also held that, if a city wishes to destroy a dwelling that does not pose an imminent threat to the public, it must follow the procedures set forth in the Minimum Housing Standards statutes (G.S. 160A-441 through -450). *Id*. at 279. Those statutes outline in significant detail the notice and hearing procedures a city has to satisfy prior to the demolition of a dwelling deemed unfit for human habitation.

53. G.S. 153A-140.2, 160A-200.1 (defining a chronic violator as "a person who owns property whereupon, in the previous calendar year, the [local government] gave notice of violation at least three times under any provision of the public nuisance ordinance").

54. G.S. 160A-200 (defining a chronic violator as "a person who owns property whereupon, in the previous calendar year, the municipality took remedial action at least three times under the overgrown vegetation ordinance," *id*. § -200(a)).

55. These procedural rules also apply to most ordinance amendments.

56. G.S. 153A-45.

57. G.S. 160A-75.

58. David Lawrence, "When Are Public Hearings Required," *Coates' Canons: NC Local Government Law Blog* (UNC School of Government, Aug. 21, 2009), http://canons.sog.unc.edu/?p=77.

The primary statutory provisions for ordinance books appear in G.S. 153A-48 and 160A-78, while those for codes reside in G.S. 153A-49 and 160A-77. Some of the county and city rules differ. To avoid confusion, they are considered separately below.

City Ordinance Book

A true copy of each city ordinance must be filed in an appropriately indexed ordinance book. This book is separate from the minutes book and is maintained for public inspection in the city clerk's office. If the city has adopted and issued a code of ordinances, its ordinances need to be filed and indexed in the ordinance book only until they are codified.

City Code of Ordinances

Every city with a population of 5,000 or more must adopt and issue a code of ordinances. A code is a bound or loose-leaf compilation of the local government's ordinances systematically arranged by topic into chapters or articles; it is the local parallel to the North Carolina General Statutes. In requiring larger cities to codify their ordinances, the law assumes that these cities will have so many ordinances that particular ones would be difficult to locate in a simple ordinance book. If a city of under 5,000 people finds itself in that situation, then it too should codify its ordinances.

The code must be updated at least annually unless there have been no changes. It may contain separate sections for general ordinances and technical ordinances, or the latter may be issued as separate books or pamphlets. Examples of technical ordinances are those pertaining to the following:

- building construction
- installation of plumbing and electric wiring
- installation of cooling and heating equipment
- zoning
- subdivision control
- privilege license taxes
- the use of public utilities, buildings, or facilities operated by the city

The governing board also has the option of classifying other specialized ordinances as technical ordinances for code purposes.

A city's governing board may omit from the code classes of ordinances that it designates as having limited interest or transitory value—the annual budget ordinance is one example—but the code should clearly describe what has been left out. The council may also codify certain ordinances pertaining to zoning district boundaries and traffic regulations by making appropriate entries upon official map books permanently retained in the clerk's office or in another city office generally accessible to the public.

The city is free to choose a code-preparation method that meets its needs. One acceptable method would be for the city attorney or a private code-publishing company to prepare the code in consultation with the clerk.

County Ordinance Book

The clerk to the board of commissioners must file each county ordinance in an appropriately indexed ordinance book, with the exception of certain kinds of ordinances discussed in the next paragraph. The ordinance book, kept separately from the minutes book, is stored for public inspection in the clerk's office. If the county has adopted and issued a code of ordinances, it must index its ordinances and maintain them in an ordinance book only until it codifies them.

The ordinance book need not include transitory ordinances—like the budget ordinance—and certain technical regulations adopted in ordinances by reference, although the law does require a cross-reference to the minutes book (at least for transitory ordinances). If the board of commissioners adopts technical regulations in an ordinance by reference, the clerk must maintain an official copy of the regulations in his or her office for public inspection.[59]

County Code of Ordinances

Counties may, but are not required to, adopt and issue codes of ordinances. A county that has codified its ordinances should update its code annually unless there have been no changes. Counties may reproduce their codes by any method

59. G.S. 153A-47.

that yields legible and permanent copies. A county, like a city, is free to select a code-preparation method that suits its needs.

A county may include separate sections in a code for general ordinances and for technical ordinances, or it may issue the latter as separate books or pamphlets. The governing board may omit from the code classes of ordinances designated by it as having limited interest or transitory value, but the code should clearly describe the classes of ordinances that have been left out. The board may also codify certain ordinances pertaining to zoning areas or district boundaries by making appropriate entries upon official map books permanently retained in the clerk's office or in some other county office generally accessible to the public.

Importance of Filing Ordinances

It is crucial for a local government to file and index or codify its ordinances as required by law. Pursuant to G.S. 160A-79, any ordinance not filed and indexed or codified is unenforceable.

Records Retention Considerations

Records retention schedules promulgated by the North Carolina Department of Cultural Resources mandate that local governments keep official copies of their ordinances permanently.[60] To the extent that they have funds available for the purpose, counties and cities likewise have to create "preservation duplicates" of their ordinances that are "durable, accurate, complete and clear."[61] The department's policy is that those duplicates must be maintained in paper form or on microfilm. Local governments should consult the website of the department's Office of Archives and History for more details concerning the permanent retention of ordinances.[62]

About the Author

Trey Allen is a School of Government faculty member who specializes in the general ordinance authority of local governments and governmental liability and immunity.

This chapter updates and revises previous chapters authored by former School of Government faculty member A. Fleming Bell, II, whose contributions to the field and to this publication are gratefully acknowledged.

60. *See* N.C. Department of Cultural Resources, Records and Retention Schedule: County Management (April 15, 2013), 8 (Standard 1, Item No. 38), www.ncdcr.gov/Portals/26/PDF/schedules/schedules_revised/County_Management.pdf; Records Retention and Disposition Schedule: Municipal (Sept. 10, 2012), 11 (Standard 1, Item No. 49), www.ncdcr.gov/Portals/26/PDF/schedules/schedules_revised/municipal.pdf.

61. G.S. 132-8.2.

62. *See* www.history.ncdcr.gov/.

Table 5.1 Selected Police Power Statutes for Local Governments

Subject Matter	City Statute (G.S.)	County Statute (G.S.)
Solicitation campaigns, flea markets, itinerant merchants	160A-178	153A-125
Begging/panhandling	160A-179	153A-126
Aircraft overflights	160A-180	—
Places of amusement	160A-181	153A-135
Sexually oriented businesses	160A-181.1	—
Abuse of animals	160A-182	153A-127
Explosive, corrosive, inflammable, or radioactive substances	160A-183	153A-128
Noise	160A-184	153A-133
Pollutants or contaminants	160A-185	—
Domestic animals	160A-186	—
Possession or harboring of dangerous animals	160A-187	153A-131
Bird sanctuaries	160A-188	—
Firearms	160A-189	153A-129
Pellet guns	160A-190	153A-130
Sunday closings	160A-191	—
Solid wastes	—	153A-136
Public health nuisance	160A-193	153A-140
Stream-clearing programs	160A-193.1	153A-140.1
Regulation/licensing of businesses, trades, etc.	160A-194	153A-134
Curfews	160A-198	153A-142
Outdoor advertising	160A-199	153A-143
Removal/disposal of abandoned and junked vehicles	160A-303*	153A-132
Abandonment of junked vehicles	160A-303.2*	153A-132.2
Removal/disposal of trash, garbage, etc.	160A-303.1*	153A-132.1
Registration of mobile homes, house trailers, etc.	—	153A-138

**Denotes a provision found outside of the Police Power Statutes.*

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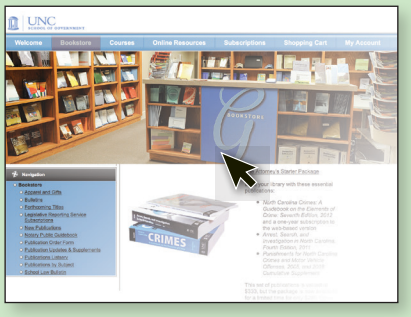

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Judicial Doctrines That Differentiate Local Governments and Private Persons or Entities

David M. Lawrence

Attorneys who represent local governments are aware that the courts sometimes treat local governments differently than private individuals or entities, excepting local governments from a rule or procedure that applies to the private sector or applying a special rule to local government that has no counterpart as to the private sector. Many such attorneys, however, are probably not aware of the breadth of this practice and might well be surprised at particular instances. This bulletin attempts to create a comprehensive and annotated catalog of such different or special treatments for the benefit of the attorneys who represent counties, cities, and other types of local government entities. The catalog features exceptions and special rules that are judicially created; it makes no effort to include comparable exceptions or rules created by legislation. Almost all the exceptions and rules are based in the common law; a few are constitutionally based and are included because they might not be obvious or expected from any constitutional text.

The exceptions and special rules included in this catalog are set out in the following order:

I. Fundamental doctrines
   - A. State control over local government
   - B. Federal constitutional protections inapplicable to local governments
     1. Exception: Standing to challenge state laws
   - C. Need for statutory authority

II. Doctrines involving liens asserted against local government assets
   - A. No execution against local government property
   - B. No attachment or garnishment
   - C. Acting as garnishee
   - D. Laborer and materialmen liens
   - E. Security interests in government property

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III. Doctrines involving local government property and property transactions
  A. Doctrines arising from having the power of eminent domain
    1. Ejectment
    2. Restrictive covenants
  B. Estoppel by deed
  C. Exception: Authority to convey property
  D. Exception: Adverse possession

IV. Doctrines involving local government contracts
  A. Contracting away board discretion
  B. Indemnification contracts
  C. Apparent authority doctrine
  D. Quasi-contract remedies

V. Doctrines arising in the context of litigation involving local governments
  A. Governmental immunity in tort
  B. Application of statutes of limitation
  C. Application of estoppel against local governments
  D. Limitations on consent judgments
  E. No execution against local government property
  F. Punitive damages against local governments
  G. Liability for post-judgment interest

I. Fundamental Doctrines

The first set of doctrines pertain to the fundamental relationship between local governments and the state, and particularly the relationship between local governments and the General Assembly. They are probably based in the North Carolina Constitution, although there is no particular provision of the constitution that can be pointed to as their source. These doctrines have also led to decisions in the federal courts about whether federal constitutional protections apply to local governments—decisions that are very much a matter of federal constitutional law.

A. *Local governments are created by the General Assembly, which has the constitutional power to abolish and merge them, to control their property, and to confer and take away local government powers.*

This doctrine is a first rule for local governments and illustrates most vividly the different status of a public corporation—a local government—as compared to a private corporation. A general statement of this doctrine can be found in many cases decided by the state's appellate courts. Here is an example from the case of *Holmes v. City of Fayetteville*, decided in 1929:

> "[Municipal corporations] are creatures of the Legislature, public in their nature, subject to its control, and have only such powers as it may confer. These powers

> may be changed, modified, diminished, or enlarged, and, subject to constitutional limitations, conferred at the legislative will. There is no contract between the state and the public that a municipal charter shall not at all times be subject to the direction and control of the body by which it is granted.[1]

An early example of a case decided under this doctrine is *Mills v. Williams*, decided in 1850.[2] In 1846 the General Assembly had created a new county, Polk, out of Henderson and Rutherford counties, and officers had been elected. One of them was Williams, the first sheriff of the new county. In 1848 the General Assembly repealed the legislation creating Polk County (against the wishes, it is said, of a majority of the residents of that area). After the repeal the Rutherford superior court issued an arrest warrant to Williams, as the sheriff of Polk, to arrest Mills in regards to a case arising in Rutherford. After the arrest Mills brought suit in trespass against Williams, claiming that the arrest was illegal inasmuch as there was no Polk County. The trial court gave judgment to the plaintiff, and the North Carolina Supreme Court affirmed. It held that the General Assembly had plenary power over counties and therefore could as easily abolish a county as establish it. In the course of its opinion, the court differentiated as follows between public and private corporations:

> The substantial distinction is this: some corporations are created by the *mere will* of the legislature, there being *no other party interested or concerned.* To this body a portion of the power of the legislature is delegated to be exercised for the public good, and subject at all times to be modified, changed, or annulled.
>
> Other corporations are the result of contract. The legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party.* These two parties make a *contract.* The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. *It is a contract;* and, therefore, cannot be modified, changed, or annulled without the consent of both parties.
>
> So, corporations are either such as are independent of all contract, or such as are the fruit and direct result of a contract.
>
> The division of the State into Counties is an instance of the former. There is no contract—no *second party,* but the sovereign, for the better government and management of the whole, chooses to make the division in the same way, that a farmer divides his plantation off into fields and makes cross fences, where he chooses. The sovereign has the same right to change the limits of Counties, and to make them smaller or larger by putting two into one, or one into two, as the farmer has to change his fields; because it is an affair of his own, and there is no *second* party, having a direct interest.[3]

1. 197 N.C. 740, 746, 150 S.E. 624, 627 (1929).
2. 33 N.C. 558 (1850).
3. *Id*. at 561—62.

The court decided a municipal counterpart to this case some eighty years later, in *Town of Highlands v. City of Hickory*.[4] The 1931 General Assembly had enacted legislation providing for a referendum to be held in Hickory and in the neighboring towns of Highlands and West Hickory over whether those smaller towns should be annexed by Hickory. The two towns sought to invalidate the legislation and the ensuing referendum, but the trial court upheld both, and the state supreme court affirmed, citing the same doctrine that had prevailed in the Polk County case.

Is there a proprietary exception to this basic doctrine? In 1913 the state supreme court decided *Asbury v. Town of Albemarle*, which articulated an exception to this basic doctrine for the proprietary or private activities of a local government.[5] In 1911 the General Assembly had enacted legislation known as the Battle Act. One provision required that a city or town undertaking to construct a water system purchase any existing private system that operated in the municipality. Albemarle was planning on constructing a public water system, and the plaintiff already operated a small system within the town. He brought suit to require the city to purchase his system, and the trial court overruled the town's motion to nonsuit. The jury subsequently entered a verdict for the plaintiff, and the trial court entered judgment for the plaintiff. The supreme court reversed. It first held that the plaintiff's system did not qualify for the protection offered by the statute: it was organized as a partnership rather than as a corporation, which the statute required, and it was so fragmentary that it could not be considered a qualifying system in any event. Having thereby decided the case, the court nevertheless went on and held the statute itself to be unconstitutional. Alluding to the so-called doctrine of local self-government, apparently first articulated by the famous nineteenth century jurist Thomas Cooley,[6] the court stated that the power of the General Assembly over local governments was not in fact unlimited:

> Our Constitution recognizes municipal corporations and gives the Legislature power to create them, and also confers upon them the right to provide for their necessary expenses. We have held that waterworks, sewerage, and some other public utilities are necessary expenses. We do not think the Legislature can dictate to a municipal corporation the manner in which it may acquire its waterworks any more than it can dictate the kind of engine to be used in pumping the water. The principle of local self-government requires that this of necessity must be left to the sound discretion of the municipal authorities.
>
> "Municipal corporations possess a double character; the one governmental, legislative, or public; the other, in a sense, proprietary or private. *** In its governmental or public character the corporation is made by the state one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. *** But in its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation, or at least not public

4. 202 N.C. 167, 162 S.E. 471 (1932).
5. 162 N.C. 247, 78 S.E. 146 (1913).
6. Cooley articulated the doctrine in the case of *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44 (1871).

> in the sense that the power of the Legislature over it or the rights represented by it are omnipotent."
>
> In matters purely governmental in character, it is conceded that the municipality is under the absolute control of the legislative power; but, *as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations.*[7]

Is the above italicized statement good law?

There are a number of reasons to think that it may not be. First, the entire section of the opinion dealing with the legislation qualifies as dicta. The court had already held that the plaintiff was not entitled to the protections of the statute and thereby decided the case; it was clearly unnecessary to reach the question of the statute's constitutionality. Second, the quoted passage is based on a legal theory that has been pretty thoroughly discredited. The so-called right to local self-government was most strongly stated in a series of articles appearing in the *Harvard Law Review* in 1900, authored by Amasa M. Eaton, a judge in Rhode Island.[8] Just a decade later, however, Judge Dillon could write, in the last edition of his treatise on local government law:

> It must now be conceded that the great weight of authority denies *in toto*, in the absence of special constitutional provisions, of *any inherent right of local self-government which is beyond legislative control*.[9]

Furthermore, Eaton's articles were refuted as unhistorical and unsound in a later series of articles by Howard L. McBain that appeared in the *Columbia Law Review* in 1916.[10] The combination of Dillon's statement and McBain's article was sufficiently strong that the doctrine of local self-government pretty much disappeared from intellectual debate and, perhaps more importantly, from judicial decision making. Third, perhaps in recognition of the failure of its underlying theory, the *Asbury* case itself has not been the basis of a single North Carolina decision overturning an exercise of legislative control over local government. While the supreme court has not seen fit to formally overrule *Asbury*, both it and the court of appeals essentially limited the earlier case to its facts in twice upholding the so-called Sullivan Acts, which were local acts of the General Assembly significantly interfering with the authority of Asheville to operate its own water system.[11] If *Asbury* had any remaining validity, the two Asheville cases were perfect occasions in which to exercise it; instead, the courts upheld the legislation. Nevertheless, as long as *Asbury* is not explicitly overruled, there remains a slim chance that a later court might resuscitate it and articulate an exception to the basic rule of plenary control of the General Assembly over local government.

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7. 162 N.C. at 252–53, 78 S.E. at 150 (italics supplied, citations omitted).

8. A. Eaton, *The Right to Local Self-Government*, 13 Harv. L. Rev., 441, 570, 638; 14 Harv. L. Rev. 20, 116 (1900).

9. 1 John Dillon, A Treatise on the Law of Municipal Corporations 154 (1911) (italics in original).

10. H. McBain, *The Doctrine of an Inherent Right to Local Self-Government*, 16 Col. L. Rev. 190, 299 (1916).

11. Candler v. City of Asheville, 247 N.C. 398, 101 S.E.2d 470 (1958); City of Asheville v. State, 192 N.C. App. 1, 665 S.E.2d 103 (2008).

B. *The federal constitutional protections embodied in the Contract Clause, the Due Process Clause, and the Equal Protection Clause do not extend to local governments.*

The United States Supreme Court has been well aware of the traditional authority of state legislatures over local government and has held that various provisions of the U.S. Constitution that protect individuals and private entities from certain governmental actions were not intended to override that basic state–local relationship and so do not protect local governments.

Contract Clause. The Supreme Court has on numerous occasions held that the Contract Clause does not protect local governments from legislative actions changing charters or statutes applicable to the governments. Probably the most famous example is *Hunter v. City of Pittsburgh*, in which the Court upheld legislation that permitted Pittsburgh to annex the neighboring city of Allegheny over the opposition of a majority of voters in the latter city.[12] Speaking of local governments, the Court wrote:

> Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.[13]

The Supreme Court has also held that a state legislature may interfere in a contract between a local government and a third party, relieving the third party of some burden imposed by the contract. In *City of Worcester v. Worcester Consolidated Street Railway Company,* the city had granted a franchise to the company, one of the conditions of which was that the company make certain repairs to the city streets in and around its tracks.[14] When the Massachusetts legislature relieved street railways of this burden, the company refused to comply with the franchise, and the city brought suit to force it to do so. The Massachusetts court held for the company, and the U.S. Supreme Court affirmed. The Contract Clause did not protect the city in these circumstances.

There is a suggestion in the *Hunter* case that the Contract Clause might apply to protect a local government in its private or proprietary activities.[15] The Court closed the door on that

12. 207 U.S. 161 (1907).

13. *Id*. at 178–79. *See also, e.g.,*Town of East Hartford v. Hartford Bridge Co., 51 U.S. 511 (1850) (legislature may repeal grant of ferry franchise to local government).

14. 196 U.S. 539 (1905).

15. "It will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal

possibility in 1923, however, in the case of *City of Trenton v. State of New Jersey*.[16] In that case the city was the successor to a private company that held a perpetual legislative charter to withdraw water from the Delaware River without payment of any taxes or fees. When the state attempted to impose such fees on the city, the U.S. Supreme Court held that the city was not protected by the Contract Clause. The Court stated:

> The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. . . . But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the city of Trenton against the state of New Jersey. They do not apply as against the state in favor of its own municipalities.[17]

Due Process. In the *Trenton* case just discussed, the city also argued that its asserted right to withdraw water free from fees and taxes was a property right, protected by the Due Process Clause from legislative interference. The Supreme Court rejected the argument, holding that the same considerations that made the Contract Clause protections inapplicable to local governments also made Due Process Clause protections inapplicable.

Equal Protection. In a case from Newark, New Jersey, involving the same legislation as the *Trenton* case and decided the same day, the Supreme Court held that the Equal Protection Clause does not protect local governments, citing the usual considerations of state–local power.[18] A final note was struck by the Court in the case of *Williams v. Mayor and City Council of Baltimore*, in which the cities of Baltimore and Annapolis challenged a tax exemption granted a street railway by special legislation of the Maryland legislature.[19] The cities argued that the exemption was in some fashion a violation of equal protection, and the Court's response summarizes all of the cases in this section:

> A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.[20]

1. *Exception to common national rule*

Unlike the rule in many states, local governments in North Carolina *do have* standing in most instances to challenge the constitutionality of state legislation.

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corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts (Dill. Mun. Corp. 4th ed. §§ 66 to 66a inclusive, cases cited in note to *State ex rel. Bulkeley v. Williams, 48 L.R.A. 465)*, and it has been held that, as to the latter class of property, the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation." *Hunter*, 207 U.S. at 179.

16. 262 U.S. 182 (1923).

17. *Id*. at 191–92. The position of the U.S. Supreme Court on this issue is further reason to question the continuing validity of the *Asbury* decision, discussed above.

18. City of Newark v. State of New Jersey, 262 U.S. 192 (1923).

19. 298 U.S. 36 (1933).

20. *Id*. at 40.

As a corollary to the doctrines discussed above, the courts in many states deny to local governments the standing to challenge state legislation. The New York court of appeals articulated this rule and the reasons behind it as follows:

> [T]he traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. This general incapacity to sue flows from judicial recognition of the juridical as well as political relationship between those entities and the State. Constitutionally as well as a matter of historical fact, municipal corporate bodies—counties, towns and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents. Viewed, therefore, by the courts as purely creatures or agents of the State, it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants.[21]

This rule, as stated, is inconsistent with the longtime practice in the North Carolina courts. To take just one example, in the *Asbury* case discussed above, the city of Albemarle was obviously given the right to challenge state legislation, and many other examples could be cited. There has been one case in which the North Carolina Supreme Court recognized and followed the common practice in other states of denying standing to local governments to challenge state legislation. That case was *In re Appeal of Martin,* in which the court held that a county could not raise a constitutional challenge to a legislative classification of property for property tax purposes.[22] *Martin* was ignored in later cases, however, and in *Town of Spruce Pine v. Avery County,* the court essentially limited *Martin* to challenges to tax exemptions and classifications.[23] In this state, then, local governments have much the same power to challenge the constitutionality of state legislation as do private individuals and entities, save for certain tax statutes.

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21. City of New York v. State, 655 N.E.2d 649 (N.Y. 1995). Other cases observing this doctrine include *Romer v. Fountain Sanitation District*, 898 P.2d 37 (Colo. 1995); *Town of Canterbury v. Commissioner of Environmental Protection*, 772 A.2d 687 (Conn. Ct. App. 2001); *Florida Department of Agriculture and Consumer Services v. Miami-Dade County*, 790 So. 2d 555 (Fla. Ct. App. 2001); *State ex rel. City of La Crosse v. Rothwell*, 130 N.W.2d 806 (Wis. 1964).

22. "The question whether a state subdivision has standing to contest the constitutionality of a State Statute has produced conflicting decisions in other jurisdictions. But the prevailing view is that a subdivision of the State does not have standing to raise such a constitutional question. Likewise, a majority of jurisdictions which have considered whether a city or county may challenge a tax statute on constitutional grounds answer in the negative. Although these decisions do not articulate a well defined rule of law, much of their reasoning is persuasive." 286 N.C. 66, 73, 209 S.E.2d 766, 772 (1974). The court of appeals relied on *Martin* a few years later in holding that Fayetteville could not challenge the constitutionality of legislation denying it the annexation powers held by other cities. *Wood v. City of Fayetteville*, 43 N.C. App. 410, 259 S.E.2d 581 (1979).

23. 346 N.C. 787, 488 S.E.2d 144 (1997).

C. *Local governments require express legislative authority to act; the absence of legislative prohibition is insufficient.*

A final fundamental distinction between local governments and their private counterparts is that unlike individuals and private entities, local governments need to be able to point to some sort of legislative authority to act. An absence of legislative prohibition is not sufficient to support local government action. There are many cases that turn on this fundamental principle. One intricate example is *High Point Surplus Company, Inc. v. Pleasants*.[24] In 1964 the General Assembly enacted legislation that permitted fifty-two counties to regulate and prohibit Sunday retailing, including Wake County. The legislation permitted the county's ordinance to apply within a city if the city adopted a resolution to that effect. A separate city statute authorized all cities to adopt such ordinances directly. Wake County adopted a Sunday-closing ordinance pursuant to the 1964 legislation, and the city of Raleigh promptly adopted a resolution to make the county's ordinance applicable within the city. The plaintiff brought suit to enjoin enforcement of the ordinance because it would have a significant impact upon the plaintiff's business activities. The trial court sustained a demurrer to the complaint, but the North Carolina Supreme Court reversed.

The court's principal holding was that the 1964 legislation was a local act, because it only applied to fifty-two counties, and that it regulated trade, making it unconstitutional under Article II, Section 24, of the state constitution. Because counties and cities have no independent legislative power but have only that power granted by the state, the county ordinance was therefore invalid. And even though the city could have adopted its own ordinance under constitutional statewide legislation applicable to cities, it had not done so. Rather, it had adopted a resolution pursuant to the unconstitutional legislation, and therefore the county's ordinance could not apply within the city, either.[25]

II. Doctrines Involving Liens Asserted against Local Government Property

The courts have been consistently unwilling to allow local government property to be sold to enforce obligations owed by the local government, unless there is clear statutory authorization. The general notion is that such property is held for the benefit of the entire public and that the public's needs cannot be put at risk through the forced sale of the property. This attitude of the courts has resulted in several specific doctrines.

24. 264 N.C. 650, 142 S.E.2d 697 (1965).

25. In *High Point Surplus*, the court wrote: "Neither counties nor municipalities have any inherent legislative powers. Counties are instrumentalities and agencies of the State government and are subject to its legislative control; they possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them. A municipal corporation is a creature of the General Assembly, has no inherent powers, and can exercise only such powers as are expressly conferred by the General Assembly and such as are necessarily implied by those expressly given." *Id*. at 654, 142 S.E.2d at 701 (citation omitted).

A. *Local government property is not subject to sale to satisfy a judgment.*

The North Carolina Supreme Court held in 1871 in *Gooch v. Gregory* that the property of a county was not subject to execution to enforce a judgment.[26] In the opinion the court suggested that the rule might be different for a municipality, at least as to its private activities,[27] but that suggestion has been ignored by later courts.[28]

The inability to force an execution sale does not mean that a judgment creditor is without remedy. In the *Gooch* case the court noted that such a creditor could apply to a court for a writ of mandamus to require the local government's governing board to levy a tax sufficient to pay the judgment.[29] During the latter part of the nineteenth century and first decades of the twentieth century, local governments were subject to various constitutional limitations upon the levy of property and other taxes, and the question arose as to what effect those constitutional limitations had upon the rights of a judgment creditor to obtain mandamus. In response, the courts developed rules that (1) the constitutional limitations had to be respected, and therefore a court could not order a tax rate that exceeded the limitations, and (2) once taxes were at the limit, the local government was entitled to first apply its funds to the necessary expenses of government and pay the judgment only if there were any funds remaining.[30] At present, though, there are no constitutional or statutory limitations upon taxes that are likely to bar a mandamus to a local government to levy taxes. When that's the case, the fact that the resulting tax levy might impose hardships upon the citizens of the local government is not a consideration that a court may take into account in deciding whether to grant the writ.[31]

It may be that if a local government holds property in some sort of private capacity—property, that is, that is not being used for any public purpose—then that specific property is subject to execution. The North Carolina Supreme Court seemed to recognize such an exception in a very messy opinion in *Hughes v. Commissioners of Craven County*.[32] In that case, the plaintiff sought to execute a judgment against railroad shares owned by the county, but it is not clear from the opinion whether these shares were an example of property not held for public purposes, nor is it clear what sort of property held today by a local government might fall into that category.

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26. 65 N.C. 142 (1871).

27. "These rules of law are not applicable to a municipal corporation created by a charter which is voluntarily accepted by the corporation for private emolument and advantage. Such corporations are sometimes charged with the performance of public duties, but so far as the grant is for private purposes and advantage they are regarded as private corporations and subject to like liabilities." *Id*. at 143–44.

28. *See* Maryland Cas. Co. v. Leland, 214 N.C. 235, 199 S.E. 7 (1938) ("[T]he property of a municipality necessary to carry on government is not subject to execution." *Id*. at 238, 199 S.E. at 10).

29. It is not clear what the remedy would be if the judgment debtor had no taxing power, such as is true of a local board of education or a water and sewer authority. While the latter might be subject to a mandamus to raise its rates in order to generate moneys to pay a judgment, it is not clear whether any sort of mandamus would be available against a school board.

30. Cromartie v. Comm'rs of Bladen, 85 N.C. 211 (1881).

31. *Maryland Casualty* , 214 N.C. 235, 199 S.E. 7.

32. 107 N.C. 598, 12 S.E. 465 (1890).

B. *Local government property is not subject to attachment or garnishment.*

As a corollary to the exemption of local government property from execution, the courts have uniformly held that local government property cannot be attached or garnished as a result of litigation.[33] There do not appear to be any North Carolina cases on this question, but there is no reason to expect this state's courts to deviate from the uniform rule elsewhere.

C. *It may be that local governments are exempt from acting as garnishees of moneys held for and owed to third parties.*

Although this rule does not involve local government property, it is convenient to take it up in this context. The general rule nationally is that local governments cannot be made to act as garnishees when they hold funds owed to another person or entity. The general rule is summarized as follows in an American Law Report annotation from 1929:

> It has been held with practical unanimity that, in the absence of an express statutory provision, a county cannot be subjected to the process of garnishment. This rule is founded upon public policy, which subjects the interest of the individual to that of the public, and is applied in this class of cases upon the theory that to allow garnishment of a county would work to the inconvenience and detriment of the public service.[34]

The annotation cites a great many cases but none from North Carolina, and in fact there are none from this state directly in point. There is, however, a statement in a 1902 case that is opposed to the general rule quoted just above. The case of *Town of Gastonia v. McEntee-Peterson Engineering Co.* involved the town, an engineering company the town had contracted with to construct town utility facilities, and suppliers to the engineering company. One question was whether the suppliers could garnish moneys held by the town under the construction contract and not yet paid to the engineering company. Although the court ultimately held that garnishment was not possible in this case, it began its discussion of the issue with this statement:

> It is true that, in the case of an ordinary debt owing by a town to a third person, the debt may be garnished. 1 Dill. Mun. Corp. (4th Ed.) § 101.[35]

The North Carolina courts have not returned to this issue, and so we do not know if it is good law, but there is some reason to be skeptical. First, the statement is inconsistent with the great body of law in other states. Second, the statement purports to be based on the fourth edition of Dillon's treatise, but in fact it is inconsistent with what Dillon wrote. Although Dillon himself would have preferred to subject some sorts of moneys held by a government to garnishment, he admitted that the law was in fact otherwise—local governments were not subject to being made to act as garnishees.[36]

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33. P.H.V., Annotation, *Municipal Funds and Credits as Subject to Levy under Execution or Garnishment on Judgment against Municipality,* 89 A.L.R. 863 (1934).

34. E.W.H., *County as Subject to Garnishment Process,* 60 A.L.R. 823 (1929).

35. 131 N.C. 359, 362, 42 S.E. 857, 858 (1902).

36. Here is the entirety of Section 101 of the fourth edition (1890):

> **Garnishment.** Upon similar considerations of public policy, *municipal corporations and their officers* have usually, though not uniformly, been considered *not to be subject*

The General Assembly seems to be unsure itself whether local governments are generally subject to having to act as garnishees. On the one hand, the various retirement statutes provide that a retiree's pension payments, held by state pension systems, are not subject to garnishment—a statement that might be thought unnecessary if state and local governments generally could not be made to act as garnishees. On the other hand, various tax statutes provide that state and local governments are subject to act as garnishees of employee salary obligations in favor of state and local tax collectors. The principal garnishment statute says nothing one way or the other.

D. *Local government owners are not subject to statutory liens that protect workers on and suppliers of construction projects.*

The North Carolina courts have followed the national rule and have held that the statutory lien in favor of laborers on and suppliers of materials for a construction project does not apply to projects to construct public facilities.[37] This rule is the reason that public works statutes direct local government owners to require a payment bond from the general contractor on any such project.[38]

E. *Local governments may not convey a security interest in public property without specific statutory authority.*

In *Vaughn v. Board of Commissioners of Forsyth County,* the North Carolina Supreme Court held that a local government could not convey a security interest in county land to secure a loan made to finance construction of a courthouse on that land.[39] In reaching this conclusion, the court cited the same considerations that led to the rule that local government property was not subject to execution to satisfy a judgment. A few years later the court decided a second case that makes clear that all these rules against forced sale of government property are grounded in the common law and not in the state constitution and therefore could be modified by statute. In *Brockenbrough v. Board of Water Commissioners of City of Charlotte,* the court held that

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> *to garnishment*, although private corporations, equally with natural persons, are liable to this process. The cases on the subject, as respects municipal corporations, are referred to in the note; and it will be seen, on examination, that some of them turn on the construction of particular statutes, and that the judges differ in opinion respecting the policy and expediency of subjecting, upon general principles, such corporations to the process of garnishment. The author's view, where the subject is left entirely open by statute, is, that, on principle, a municipal corporation is exempt from liability of this character with respect to its revenues and the salaries of its officers, but where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives to creditors of natural persons and of private corporations.

John F. Dillon, Commentaries on the Law of Municipal Corporations (4th ed. 1890).

37. *E.g.,* Snow v. Bd. Of Comm'rs of Durham Cnty., 112 N.C. 335, 17 S.E. 176 (1893); Morganton Hardware Co. v. Morganton Graded Sch., 150 N.C. 680, 64 S.E. 764 (1909).

38. N.C. Gen. Stat. (hereinafter G.S.) § 44A-26. In *Noland Co. v. Board of Trustees of Southern Pines School*, 190 N.C. 250, 129 S.E. 577 (1925), the court held that there could be no judgment against the school unit because of the board's failure to obtain the bond required by statute, because to allow such a judgment would be inconsistent with the policy of not allowing execution of judgments against public property.

39. 118 N.C. 636, 24 S.E. 425 (1896).

the General Assembly could by specific statutory authority permit a local government to give a mortgage on property owned or to be owned by the local government.[40] In reliance on this case, the General Assembly has in fact permitted local governments to borrow money under a variety of statutes and secure the loan with a deed of trust on the property.[41]

III. Doctrines Involving Local Government Property

Just as the courts have created doctrines to protect local government property from forced sale, they have also created doctrines that protect local government property—even from the local government itself—in other circumstances. This section reviews those doctrines.

A. *The fact that a local government enjoys the power of eminent domain protects it against certain remedies involving real property, specifically (a) ejectment and (b) injunctions prohibiting violations of restrictive covenants.*

1. *Ejectment*

In *Costner v. City of Greensboro,* the court of appeals held that an action for ejectment may not be brought against a local government for alleged unlawful possession of a street easement, because the city enjoyed the power of eminent domain.[42] Rather, the plaintiff's only remedy was an action in inverse condemnation, in which the recovery would be the value of the property interest involved. The rationale of this decision, which reflects the general rule nationally,[43] is that with the power of eminent domain the government could always condemn the property interest at issue, and therefore it makes no sense to eject the government from that interest. Of course, if the government in question does not have the power of eminent domain with respect to the interest in question, ejectment might well be available.

2. *Restrictive covenants*

In a few states, if a local government acquires property subject to restrictive covenants, the covenants do not apply to the governmental purchaser.[44] The North Carolina courts, however, have rejected that position; they agree with the majority of courts and hold that the covenants continue to apply—at least to the extent that if the local government violates the covenants, it must compensate those protected by them. In *City of Raleigh v. Edwards*, the North Carolina Supreme Court held that restrictive covenants create property interests (not simply contractual rights) in each piece of property benefited by the covenants. Therefore, each owner of a benefited tract was entitled to compensation for the

40. 134 N.C. 1, 46 S.E. 28 (1903).

41. *E.g.,* G.S. 160A-20 (installment financing agreements); G.S. 159I-13e (special obligation bonds); G.S. 159-83(a) (revenue bonds).

42. 37 N.C. App. 563, 246 S.E.2d 552 (1978).

43. *See* M.C. Dransfield, Annotation, *Injunction Against Exercise of Power of Eminent Domain*, 133 A.L.R. 11, 104 (1941).

44. Friesen v. City of Glendale, 288 P. 1080 (Cal. 1930); Ryan v. Town of Manalapan, 414 So. 2d 193 (Fla. 1982); City of Riveroaks v. Moore, 272 S.W.2d 389 (Tex. Ct. Civ. App. 1954).

> loss of that interest when the city condemned a tract for a use not permitted under the covenants.[45]

A subsidiary question arose in a court of appeals case decided a generation later.[46] A school board had purchased a subdivision lot subject to covenants and had begun construction of a use that violated the covenants. When neighboring owners sought to enjoin the construction, the court held that their only remedy was a suit in inverse condemnation for compensation for the loss of the covenant. The court reasoned that because the school board could have condemned the lot for the use in question, it therefore could not be enjoined from making that use of the property. Once again, though, the rationale does not apply when the local government does not have eminent domain power in the specific situation at issue, and perhaps the outcome would be different in that situation as well.

B. *The doctrine of estoppel by deed generally does not apply to local governments.*

The courts have generally been wary about applying various forms of estoppel against local governments, as is discussed in the section below describing doctrines arising in the context of litigation. This general wariness applies, in the property law context, to the doctrine of estoppel by deed. This doctrine generally bars a party to a deed, or that person's privies, from asserting against the other party or parties, or his, her, or their privies, any right or title that is in derogation to the deed; it also bars such a person from denying the truth of any material fact asserted in a deed. For example, if a party gives a deed to land, the doctrine generally estops that person from later claiming still to own the land.

Although by no means the rule everywhere, the majority rule nationally is that the state or a local government is not subject to this sort of estoppel, and North Carolina is generally counted among the states not permitting estoppel by deed against governmental entities.[47] The basis for placing North Carolina among those states is a number of very early cases involving state grants to land. For example, in *Candler v. Lunsford* the two parties were disputing title to a tract of land along the French Broad River.[48] The defendant produced a grant to the tract by the state in 1796 and a clear chain of title from that grant to himself; there was also, however, a grant directly from the state to the defendant in 1834. The plaintiff relied upon a grant made by the state in 1829, and because of the 1834 grant, the plaintiff sought to estop the defendant from denying that the state had held title to the tract in 1829, thus negating the effect of the 1796 grant. The court noted that the state itself could not be estopped in this circumstance and therefore the plaintiff, as the state's privy, also could not be estopped.[49]

A later case extends this refusal to estop the state to a North Carolina local government. In *Washington v. McLawhorn,* Wayne County had instituted tax foreclosure proceedings against a lot owned by the Washingtons, and in 1929 a commissioner conveyed title to the lot to the county.[50] The plaintiffs were the heirs to the Washingtons, and they claimed that the county had

45. 235 N.C. 671, 71 S.E.2d 396 (1952).

46. Carolina Mills, Inc. v. Catawba Cnty. Bd. of Educ., 27 N.C. App. 524, 219 S.E.2d 509 (1975).

47. *See* C.K. Cobb, Annotation, *Estoppel of United States, State, or Political Subdivisions by Deed or Other Instrument,* 23 A.L.R.2d 1419 (1952).

48. 20 N.C. 542 (1839).

49. Comparable cases include *Wallace v. Maxwell*, 32 N.C. 110 (1849) and *State v. Bevers*, 86 N.C. 588 (1882).

50. 237 N.C. 449, 75 S.E.2d 402 (1953).

in fact never considered itself or acted as owner of the lot and had allowed the Washingtons and their heirs to remain in possession. Nevertheless, in the 1940s the city commenced its own tax proceedings against the lot, naming the county (and not the Washington heirs) as defendant, and eventually the county and city foreclosed on the lot and then conveyed title to McLawhorn. The Washington heirs brought a quiet title action and argued that the deed to McLawhorn could not be valid because the county did not in fact own the property. They sought to estop the county and its assigns from presenting the 1929 deed in evidence, arguing that the consequent conduct of the county showed that the deed was not valid. The court disagreed, holding that "[t]he collection of taxes by a county is the exercise of a governmental right, and in the collection of taxes the County of Wayne cannot be estopped under the facts alleged in this action to assert the validity of the title it received to this land by virtue of the deed of Humphrey, Commissioner."[51]

Note that the court in *Washington* pointed out that the county was involved in a "governmental right." Some states do apply the doctrine of estoppel by deed against local governments acting in their proprietary capacity,[52] and the court's usage in *Washington* suggests that such a distinction is possible in North Carolina as well.

There are two common doctrines that do not apply in North Carolina:

C. *The common law requires specific statutory authority to convey property in governmental use, but that rule has apparently been abrogated in North Carolina by statute.*

In the nineteenth and early twentieth century North Carolina joined those states in which the courts held that, absent legislative authority, a local government may not dispose of property currently held in governmental use.[53] At least for those local governments subject to Article 12 of Chapter 160A of the North Carolina General Statutes (hereinafter G.S.)—cities, counties, school boards, and a number of other types of local governments—this bar to disposition has probably been removed in North Carolina by the enactment of G.S. 160A-265.[54]

51. *Id*. at 455, 75 S.E.2d at 407.

52. *See, e.g.,* City of Tarpon Springs v. Koch, 142 So. 2d 763 (Fla. Ct. App. 1962), and City of Corpus Christi v. Gregg, 289 S.W.2d 746 (Tex. 1956).

53. *E.g.,* City of Southport v. Stanly, 125 N.C. 464, 34 S.E. 641 (1899) (town common); Carstarphen v. Town of Plymouth, 180 N.C. 26, 103 S.E. 899 (1920) (town hall).

54. A much fuller account of this doctrine and the attempted legislative correction appears in David M. Lawrence, Local Government Property Transactions in North Carolina 74–78 (2d ed. 2000).

D. *North Carolina law appears to permit adverse possession against local government property, except for public streets and squares.*

In most states the courts have not permitted adverse possession to run against property owned by a local government,[55] but the more recent statements by the North Carolina supreme court have allowed it.[56] G.S. 1-45, though, does specifically deny the possibility of adverse possession against "any part of a public road, street, land, alley, square, or public way."[57]

IV. Doctrines Involving Local Government Contracts

Two doctrines limit the ability of local governments to enter into certain sorts of contracts, while others restrict remedies against local governments by apparent contracting partners.

A. *Local governments may not enter into contracts that contract away the discretion of their governing boards to take certain sorts of actions.*

North Carolina's rule in this area is somewhat different than that followed in many states, although the outcome of litigation will often be the same. In many states local governments may not enter into certain contracts that bind future boards, at least without clear legislative authority. This doctrine employs the familiar governmental-proprietary distinction, limiting governmental contracting power with respect to governmental activities but not with respect to proprietary activities. North Carolina's rule, articulated in the case of *Plant Food Company v. City of Charlotte*,[58] differs from this national rule in two respects. To explain the differences, it will be useful to recount the facts of *Plant Food*.

The company had contracted with the city to remove sewage sludge from city drying beds, paying the city according to a schedule set out in the contract. The contract extended ten years, with an option for either party to extend it another ten years. Within a year or two of the contract's execution, however, a new governing board took control of the city government and sought to negate the contract. When the company sued for breach of contract, the city noted the national rule and argued that sewer services had been held to be a governmental activity in the tort law context and therefore were in this context as well, and that the previous council therefore could not have entered into a contract that bound the present one. The trial court agreed.

On appeal, the North Carolina Supreme Court accepted the dichotomy between proprietary and governmental activities but refused to simply transfer the distinctions made in tort law to this different context. "The true test," according to the court, "is whether the contract itself deprives a governing board, or its successor, of a discretion which public policy demands should

55. R.P. Davis, Annotation, *Acquisition by Adverse Possession or Use of Public Property Held by Municipal Corporation or Other Governmental Unit Otherwise Than for Streets, Alleys, Parks, or Common,* 55 A.L.R.2d 554 (1957).

56. See especially *Threadgill v. Wadesboro*, 170 N.C. 641, 87 S.E. 521 (1916), which allowed adverse possession against a town street because the possessor had occupied the land under color of title for 43 years before the enactment of G.S. 1-45. *Threadgill* cites and distinguishes the earlier and inconsistent cases.

57. A much fuller account of the development of North Carolina law on this issue appears in Lawrence, *supra* note 54, 87–89.

58. 214 N.C. 518, 199 S.E. 712 (1938).

be left unimpaired."[59] The court gave a number of examples of the sort of discretionary powers it had in mind: adopting ordinances, laying out and maintaining streets, preserving order, regulating rates, levying taxes, and levying special assessments. If that sort of discretion is not involved, then the contract would not be invalid simply because it extended beyond the terms of office of the original governing board. In the actual case, the court did not find the necessary discretion involved in the Plant Food contract and reversed the trial court; the city was bound by the contract. This narrowing of the range of "governmental" activities is the first respect in which the North Carolina rule differs from the national one.

The second respect in which the North Carolina rule differs from the national one is that it is not simply a limitation on one board's ability to bind its successors. Rather, it applies as much to the present board as the next one. That is, no board may contract to adopt an ordinance or levy a tax, even if the contract will be fully executed during that board's term.[60]

B. *The North Carolina state constitution probably significantly restricts a local government from agreeing to indemnify, or hold harmless, a private person or entity.*

Article V, Section 4(3), of the state constitution restricts a local government's power to lend its credit. The provision reads as follows:

> No county, city or town, special district, or other unit of local government shall give or lend its credit in aid of any person, association, or corporation, except for public purposes as authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon.

If a local government enters into an indemnification agreement, it is in effect agreeing to assume responsibility for specific obligations of another party; it is, in a sense, guaranteeing payment of those obligations.[61] A government entering into an indemnification agreement is subjecting itself to the same kinds of potential future liabilities faced by one that agrees to guarantee payment of private loans, which are clearly within the terms of the constitutional provision. Although there is virtually no case law addressing the effect of loan-of-credit provisions on indemnification agreements, both a Massachusetts court and a Texas court have suggested that such agreements are restricted by loan-of-credit limitations,[62] and at least two state attorneys general have reached the same conclusion.[63]

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59. *Id*. at 520, 199 S.E. at 714.

60. This doctrine is described more fully in David M. Lawrence, *Contracts That Bind the Discretion of Governing Boards*, Popular Government, Summer 1990, at 38–42.

61. If a hold-harmless provision only guarantees that the *promisor* will hold the other party harmless from having to pay the obligations of the *promisor*, the promisor is not guaranteeing obligations of another party, and the constitutional provisions would not apply.

62. *See* Lovering v. Beaudette, 572 N.E.2d 591 (Mass. Ct. App. 1991) and Texas & N.O.R. Co. v. Galveston Cnty., 161 S.W.2d 530 (Tex. Ct. App. 1942).

63. 84-103 Op. Att'y Gen. (Fla. 1984); 96-7 Op. Att'y Gen. (Okla. 1996). A slightly more detailed discussion of the loan of credit provision of the constitution and indemnification agreements is found in David M. Lawrence, Economic Development Law for North Carolina Local Governments 21–22 (2000).

C. *The agency doctrine of apparent authority does not apply to local government contracts as fully as it does to private contracts.*

Under the doctrine of apparent authority a principal can be contractually bound by an agent who does not have actual authority if the principal has acted in a way that led the other party to the contract to reasonably believe that the agent did have such authority.[64] A standard statement of the doctrine is found in *Edgecombe Bonded Warehouse Co. v. Security National Bank*:

> While as between the principal and the agent the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions, such instructions and restrictions do not affect third persons ignorant thereof, and as between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person who, in order to avail himself of rights thereunder, must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by acts of the agent performed in the usual and customary mode of doing such business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority.[65]

The *Restatement of Agency* asserts that the apparent authority doctrine does not apply to governments, including local governments,[66] but such an assertion does not reflect the North

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64. The Restatement of Agency articulates the creation of apparent authority in this way:

> Apparent authority . . . is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.

Restatement (Third) of Agency § 3.03 (2006).

65. 216 N.C. 246, 252–53, 4 S.E.2d 863, 868 (1939).

66. The *Restatement of Agency* asserts as follows:

> The doctrine of apparent authority generally does not apply to sovereigns and entities that have been created by sovereigns to achieve governmental ends. . . . [T]hird parties who deal with national governments, quasi-governmental entities, states, counties, and municipalities take the risk of error regarding the agent's authority to a greater degree than do third parties dealing through agents with nongovernmental principals.

Restatement (Third) of Agency, Comment g. to § 2.03 (2006).

The local government law treatises appear to agree. The McQuillin treatise states that "persons dealing with a municipal corporation through its agent are bound to know the nature and extent of the agent's authority in the manner of the law of agency generally, applying to dealings with both artificial and natural persons." 10 McQuillin Mun. Corp. § 29:4 (3d ed. 1981). The quoted statement is supported by

Carolina case law, at least as it applies to local governments. In several cases the supreme court and the court of appeals have applied the doctrine in cases involving contracts with local governments, and in at least two cases panels of the court of appeals have upheld an agent-negotiated contract over the local government's argument that the agent was without actual authority.[67]

There is an exception to the doctrine of apparent authority, however, that is minor in its application to private contractors but can be highly significant when applied to governmental contractors and that can result in the doctrine not applying to governments in a great number of situations.[68] The North Carolina Supreme Court has noted that the doctrine of apparent authority does not apply when the party dealing with the agent could have determined the limits of the agent's authority by referencing a public record. In *O'Grady v. First Union National Bank*, the agent was acting under a power of attorney that was required by statute to be recorded. Because of that fact, the court refused to apply the doctrine of apparent authority inasmuch as "a third party is deemed to have notice of the nature and extent of the agent's authority."[69] Similarly, many internal policies of local governments are evidenced in documents that are subject to the public records law (unlike comparable documents of a private organization), and such a document might make clear that the agent in question did not have authority to bind the local government. This point is suggested and illustrated by the juxtaposition of two court of appeals cases.

In *Lee v. Wake County* a county employee had filed a workers' compensation claim against the county. The parties entered into a mediated settlement conference, pursuant to Industrial Commission rule, and agreed to a settlement of $750,000 to the claimant. The rules of the Industrial Commission required that the parties to such a conference have authority to bind their principals. Even with public entities the commission's default rule was that the representative have authority to make decisions that were binding on the principal, although the rule acknowledged that with some entities a governmental board might have to approve particular settlements. Wake County refused to honor the settlement agreement because of an alleged county policy that required any settlement of more than $100,000 to go to and be approved by the board of commissioners. When the Industrial Commission agreed with the county, the employee

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citations to several dozen cases from a wide range of states, but there are none from North Carolina. *See also* 2 Aniteau on Local Government Law § 32.93[4] (Sandra M. Stevenson, ed., 2d ed. 2013).

67. Rowe v. Franklin Cnty., 318 N.C. 344, 349 S.E.2d 65 (1996) (contract invalid because other party had actual knowledge of agent's lack of authority); Lee v. Wake Cnty., 165 N.C. App. 154, 598 S.E.2d 427 (2004) (contract valid because no evidence introduced of contrary county policy antedating date of contract). *See* Pritchard v. Elizabeth City, 81 N.C. App. 543, 344 S.E.2d 821 (1986) (contract valid because city agents had apparent authority and therefore city estopped from showing otherwise). In *Community Projects for Students, Inc. v. Wilder*, 60 N.C. App. 182, 298 S.E.2d 434 (1984), the court's opinion might be understood as holding that the doctrine of apparent authority does not apply to local governments: "Neither can plaintiff prevail on the theory of Wilder's apparent authority to obligate defendant Board of Education. Those who deal with public officials are deemed to have notice of the nature and extent of authority of such officials to bind their principal." *Id*. at 183, 298 S.E.2d at 435. To the extent that is a correct understanding of the opinion, the quoted language seems to have been superseded by the later supreme court decision in *Rowe*.

68. Although the national sources cited and quoted above do not mention this exception as the basis for their statements that the doctrine does not apply to governments, it may be that the exception can explain the statements.

69. 296 N.C. 212, 226, 250 S.E.2d 587, 596 (1978).

appealed to the court of appeals. That court reversed, noting that the county sought to prove the county policy through a document that had been adopted by the board of commissioners shortly *after* the county's representative had agreed to the settlement. Because of the chronology, the court held that this was insufficient to show a clear lack of authority on the part of the agent. The document in question seemed to suggest that it was reaffirming an existing policy, but it was the only document introduced and therefore there was no evidence before the court that the policy predated the mediation conference.

Some years earlier the court of appeals had decided *L&S Leasing, Inc. v. City of Winston-Salem*, in which a property owner sought specific performance of an alleged contract to sell land to the city.[70] The city representative who contracted with the plaintiff did not have authority to bind the city, and the city introduced into evidence a city code provision that limited contracting power to the city purchasing agent or to other employees specifically designated by resolution of the governing board. Noting that this internal restriction on the representative's power was a matter of public record, the court held that those contracting with a local government were charged with notice of such a limitation.[71] The only real difference between *L&S Leasing* and *Lee* lies in what was introduced into evidence; if Wake County had introduced its apparent existing policy requiring board approval, *O'Grady* would seem to have required that the contract not be enforced.

It is important to understand the narrow applicability of the apparent authority doctrine, even in those situations in which it might apply to a local government. First, it does not apply when the contract is question is ultra vires; that is, beyond the authority of the government to enter into at all, even through the principal or an actual agent. This is clear from *Rowe v. Franklin County*, the supreme court decision applying the apparent authority doctrine to a local government, in which the court did not reach the apparent authority issue until it first decided that the contract in question was not ultra vires. The court went on to explicitly note, however, that simply because a contract was entered into by an unauthorized agent, that did not make the contract ultra vires.[72] Second, the doctrine does not apply when the contract

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70. 122 N.C. App. 619, 471 S.E.2d 118 (1996).

71. The city's argument structured the case as one about whether the city was estopped to show its agent's lack of authority, but the court of appeals has on several occasions remarked that the apparent authority doctrine and estoppel are two sides of the same coin. *E.g.,* Wiggs v. Peedin, 194 N.C. App. 481, 488, 669 S.E.2d 844, 849 (2008) ("There is virtually no difference between estoppel and apparent authority. Both depend on reliance by a third person on a communication from the principal to the extent that the difference may be merely semantic.") Oddly, in *L&S Leasing,* the contract itself stated that it was contingent upon approval by the City County Utilities Commission, which was not given, but the city apparently did not rely on this fact as a defense but argued a lack of apparent authority.

72. The court stated:

> However, the fact that the trustees had no authority to enter into an enforceable long-term employment contract on behalf of the hospital does not mean that the contract was ultra vires. . . . If a corporation has authority under statute and charter to enter into a particular kind of contract, the fact that an agent of the corporation purports to bind the corporation without permission of the corporation does not make this act ultra vires. It merely makes this particular act one that the corporation has not authorized, even though other such acts by proper corporate agents would be binding on the corporation.

318 N.C. 344, 348–49, 349 S.E.2d 65, 68–69 (1996).

in question was entered into without compliance with mandatory procedural requirements, such as statutorily required competitive bidding.[73] Again, such a contract would not bind the principal even if made by the principal or an authorized agent, and therefore it cannot become binding on the principal through actions of an apparent agent.

D. *Local governments are frequently not subject to quasi-contract remedies.*

In *Smith v. State,* the North Carolina Supreme Court held that the doctrine of sovereign immunity includes an immunity from suit in contract as well as tort, but that the state waives this immunity when it enters into a valid contract.[74] In such a case the courts have full jurisdiction to apply normal contract principles to any dispute arising from the contract. Twenty-two years later, however, the court recognized an important exception to *Smith*, applicable when the plaintiff is relying upon theories of quasi-contract. In *Whitfield v. Gilchrist,* a Charlotte attorney claimed he had been asked by the local district attorney to prosecute two actions to have motels declared public nuisances, that he had successfully done so, but that the district attorney refused to pay him for his services. Because there was apparently no written agreement with the district attorney, the attorney brought suit to recover the value of his services in quantum meruit. The trial court dismissed the suit, the court of appeals reversed, and the supreme court granted discretionary review. In *Whitfield,* the court refused to extend *Smith* to quasi-contract actions; in such actions there is no actual contract but only an implied one. The court would not imply a decision on the part of the state to waive its immunity in the context of a contract that itself was only implicit:

> [W]e will not first imply a contract in law where none exists in fact, then use that implication to support the further implication that the State has intentionally waived its sovereign immunity and consented to be sued for damages for breach of the contract it never entered in fact. Only when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach.[75]

The court of appeals subsequently extended the logic of *Whitfield* to counties in *Archer v. Rockingham County*[76] and to cities in *Eastway Wrecker Service, Inc. v. City of Charlotte*.[77] In those two cases, the court of appeals used the term "sovereign immunity" as the basis for its holdings, implying that sovereign immunity protects local governments as well as the state. In a later decision, however, the supreme court explicitly distinguished between *sovereign immunity*, which protects the state from suit, and *governmental immunity*, which protects local governments from suit.

> Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. Under the doctrine of governmental immunity, a county is

73. *See* Nello L. Teer Co. v. N.C. State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

74. "We hold, therefore, that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976).

75 348 N.C. 39, 42–43, 497 S.E.2d 412, 425 (1998).

76. 144 N.C. App. 550, 548 S.E.2d 778 (2001).

77. 165 N.C. App. 639, 599 S.E.2d 410 (2004).

> immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity. *Meyer v. Walls,* 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citations omitted). These immunities do not apply uniformly. The State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.[78]

The supreme court continued this linguistic precision in the recent case of *Estate of Williams ex rel. Overton v. Pasquotank County Parks & Recreation Department,*[79] in which the court carefully used the term "governmental immunity" throughout the opinion.[80]

The supreme court's emphasis on the distinctions between sovereign immunity and governmental immunity should not have caused any difference in the outcome of the two court of appeals cases extending the doctrine of *Whitfield* to local governments. First, the supreme court has stated on a number of occasions that governmental immunity extends to contract actions as well as those in tort.[81] Second, *Archer*, the county case, involved emergency medical services, while *Eastway*, the city case, involved towing disabled and illegally parked vehicles. Both are almost certainly governmental as opposed to proprietary activities, and so governmental immunity would apply. But if governmental immunity is the basis for denying local government liability in quasi-contract, then logically the governmental-proprietary distinction should apply to quasi-contract actions as well as to tort actions. That is, if a local government that is engaged in a proprietary activity is sued under a quasi-contract theory because of events within that activity, the plaintiff should be able to proceed and obtain quantum meruit relief, just as would be possible against a private defendant. This was just the outcome permitted by the Virginia Supreme Court in a 2012 case.[82]

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78. Evans v. Hous. Auth. of City of Raleigh, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004).

79. 366 N.C. 195, 732 S.E.2d 137 (2012).

80. The court of appeals has tended not to be as precise as the supreme court in this regard. See, for example, *Howard v. Durham County*,___ N.C. App. ___, 748 S.E.2d 1 (2013), in which the county defendant pleaded *sovereign immunity*, which the court then discussed in terms of both *sovereign* and *governmental immunity,* and *M. Series Rebuild, LLC v. Town of Mt. Pleasant*, ___ N.C. App. ___, 730 S.E.2d 254 (2012), in which the court discussed *sovereign* immunity as a defense by the town.

81. *E.g., Evans*, 359 N.C. 50, 602 S.E.2d 668. In *Evans*, the court noted that the defendant housing authority "like other municipal corporations, is entitled to immunity in tort and contract for acts undertaken by its agents and employees in the exercise of its governmental functions, but not for any proprietary functions it may undertake." 359 N.C. at 53, 602 S.E.2d at 670. Courts in other states have made clear that governmental immunity applies to contract claims as well as tort claims. *E.g.,* Watts v. City of Dillard, 670 S.E.2d 442 (Ga. Ct. App. 2008); Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006).

82. Jean Moreau & Assoc., Inc. v. Health Ctr. Comm'n *ex rel*. Cnty. of Chesterfield, 720 S.E.2d 105 (Va. 2012). In Texas, different panels of that state's set of intermediate appellate courts have disagreed as to whether the governmental-proprietary distinction applies in contract actions. *Compare* City of San Antonio *ex rel*. City Public Serv. Bd. v. Wheelabrator Air Pollution Control, Inc., 381 S.W.3d 597 (Tex. Ct. App. 2012), *with* City of Georgetown v. Lower Colo. River Auth., 2013 WL 4516110 (Tex. Ct. App. 2013).

Many states do not permit recovery in quantum meruit against local governments even if there is no claim of immunity. These states take the position that to permit quasi-contract relief in cases of either ultra vires contracts or contracts with procedural flaws would be to undercut the statutory limitations. *See, e.g.*, Baltazar Contractors, Inc. v. Town of Lunenburg, 843 N.E.2d 674 (Mass. Ct. App. 2006). Other

V. Doctrines Especially Related to Litigation

A number of doctrines create special rules that protect local governments from suit, that give local governments greater access to the courts, or that limit the remedies available against local governments. One other doctrine in this section bars local governments from using litigation to give themselves powers not intended by the legislature.

A. *Local government are protected against some tort liabilities by the doctrine of governmental immunity.*

The immediately preceding section discussed governmental immunity to suit in quasi-contract actions. This section briefly describes the far more common (and well-known) application of that immunity to actions in tort. Essentially the courts have declared that if a public employee or official takes some sort of tortious action within the scope of his or her employment or position, the local government *will not* be liable for that action if it was taken within a *governmental* activity of the local government; the local government will be immune from suit. If, however, the action was taken within a *proprietary* activity of the government, the government will be subject to the same rules of liability as any private entity. The distinctions as to which activities are governmental and which proprietary have developed over a couple of centuries of court decisions and do not always seem consistent or even sensible, but the basic distinction and the doctrine of which it is a part are deeply engrained in the law. In the recent case of *Estate of Williams ex rel. Overton v. Pasquotank County Parks & Recreation Department,*[83] the North Carolina Supreme Court attempted to clarify and restate the law of governmental immunity. First, it repeated the point that if an activity is one that can be engaged in *only* by a governmental agency, then the activity is by definition governmental. Admitting, though, that this category seems to be shrinking, the court went on to set out three factors to be considered when an activity is one engaged in both by government and by the private sector:

- Is the service traditionally one that is provided by a governmental entity?
- Is a substantial fee charged for the service provided?
- Does that fee do more than simply cover the operating cost of the service provider?

Finally, the court cautioned against broad categorization, noting that an activity that is generally considered governmental may have certain aspects that are proprietary and vice versa. Obviously, the categorization of particular activities may continue to evolve.

Inasmuch as governmental immunity is a common law construct, it is amenable to legislative change. North Carolina's General Assembly has so far refused to abolish the immunity altogether, but it has authorized counties and cities to waive their immunity through the purchase of insurance,[84] and many governments have done so. Such a waiver, though, requires legislative

states, however, do permit claims for unjust enrichment against local governments. *E.g.*, Tucci v. City of Biddeford, 864 A.2d 185 (Me. 2005).

83. 366 N.C. 195, 732 S.E.2d 137 (2012).

84. G.S. 153A-435 for counties; G.S. 160A-485 for cities.

authorization,[85] and there remain a variety of local special purpose entities without such authorization.[86]

B. *Local governments are not subject to statutes of limitations when the litigation arises in a governmental activity.*

In *Rowan County Board of Education v. United States Gypsum Co.,* the school board in 1983 responded to communications from environmental regulators and removed construction materials from a number of schools because the materials contained asbestos. When the school board brought suit against the company that had manufactured the materials, the company sought to have the suit dismissed because of the statute of limitations; it noted that the materials had been bought between 1950 and 1961, well beyond the running of any applicable limitation. The trial court denied the defendant's motions and eventually entered judgment for the school board, and the court of appeals affirmed, although by a divided panel. The supreme court affirmed, invoking the common law doctrine of *nullum tempus occurrit regi*—"time does not run against the king"—to explain its holding. Noting that earlier cases seemed to follow two opposing lines, the court undertook a full review of this area of the law and concluded that this doctrine remained in effect in North Carolina and, depending on the sort of activity involved, "applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State."[87] The court stated:"If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly includes the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly excludes the State."[88]

Rowan was a case sounding in negligence, fraud and misrepresentation, and breach of implied warranty. Subsequently, the court of appeals held that the doctrine also meant there was no statute of limitations when a local government sought to enforce an ordinance through suit for civil penalties.[89]

C. *In certain circumstances local governments are not subject to estoppel, even when they have received the full benefit from a contract or the other party has relied on the local government's representations.*

Civil litigation. There have been two sorts of situations in which the courts have refused to apply equitable doctrines of estoppel against local governments, particularly in contract disputes. First, if a local government contract or other action is ultra vires—that is, beyond the statutory powers of the local government—the courts refuse to estop the local government from pointing out that fact and thereby invalidating the contract. This is true even if the

85. Stephenson v. Raleigh, 232 N.C. 42, 59 S.E. 195 (1950); Galligan v. Town of Chapel Hill, 276 N.C. 172, 171 S.E.2d 427 (1970).

86. A more detailed examination of governmental immunity and of government liability in general is found in Anita Brown-Graham, *Civil Liability of the Local Government and Its Officials and Employees*, Article 12 *in* County and Municipal Government in North Carolina (2007). A new edition of this School of Government publication is forthcoming in fall 2014.

87. Rowan Cnty. Bd. of Educ. V. U.S. Gypsum Co., 332 N.C. 1, 8, 418 S.E.2d 648, 653 (1992).

88. *Id*. at 9, 418 S.E.2d at 654.

89. City of Greensboro v. Morse, 197 N.C. App. 624, 677 S.E.2d 505 (2009).

other party to the contract has relied upon representations from the local government,[90] or if the local government has received the full benefit of the contract.[91] A typical example is *Bowers v. City of High Point,* in which the court held that the city did not have authority to calculate police officer separation allowances in the way it did and refused to estop the city from pointing out that lack of authority.[92] Thus, even though plaintiffs had retired from the city in reliance on the city's representations as to the amounts of their separation allowances, the city was entitled to reduce those allowances to conform to the enabling legislation.[93]

Second, even if there is clear enabling authority and the other party has relied upon the government's actions pursuant to that authority, the courts will not estop the government from arguing that the enabling authority is in fact unconstitutional. For example, in *Commissioners of Buncombe County v. Payne,*[94] the county had issued bonds in 1875 pursuant to statutory authority and had issued refunding bonds in 1893, pursuant to subsequent statutory authority; the county then paid interest on the bonds for some period of time. Unfortunately, though, the original enabling authority had not been enacted in conformity with the constitutional requirement of roll-call readings on separate days, and the court held that the county was not estopped by having paid interest from pointing that fact out. It held that the bonds were not valid obligations of the county.[95]

Ordinance enforcement. In addition to the cases involving attempted estoppel arguments in civil litigation, the North Carolina Supreme Court has held that a local government cannot be estopped from enforcing its ordinances. In *City of Raleigh v. Fisher,* the defendants had been operating a bakery in a residential zone, in violation of the local zoning ordinance, for more than a decade.[96] When the city belatedly decided to enforce the ordinance against the defendants, they argued that it should be estopped from doing so. They had paid the city's privilege license tax on the business the entire time, and in reliance on the city's acquiescence in their use, they had expended more than $75,000 in improvements to their building. Nevertheless, the court held that there could be no estoppel against the city's enforcement:

> Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an

90. *E.g.,* Moody v. Transylvania Cnty., 271 N.C. 384, 156 S.E.2d. 716 (1967) (plaintiff had contracted to provide ambulance service to county and was continuing to do so; court held that counties do not have authority to enter into such contracts).

91. *E.g.,* Madry v. Town of Scotland Neck, 214 N.C. 461, 199 S.E. 618 (1938) (plaintiff had responded to town's offer of reward for information leading to conviction of murderer of police chief; court held that towns do not have authority to offer rewards.)

92. 339 N.C. 413, 451 S.E.2d 284 (1994).

93. Other cases of this sort include *Jenkins v. City of Henderson*, 214 N.C. 244, 199 S.E. 37 (1938) (ultra vires for city to agree to payments to other party when there is no liability running to that party), and *Burgin v. Smith*, 151 N.C. 561, 66 S.E. 607 (1909) (amount of contract exceeded legislative authorization for the contract).

94. 123 N.C. 432, 31 S.E. 7111 (1898).

95. Other cases of this sort include *Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953) (enabling legislation was unconstitutional local act), and *Debnam v. Chitty*, 131 N.C. 657, 43 S.E. 3 (1902) (enabling legislation not enacted in conformity with constitutional requirements).

96. 232 N.C. 629, 61 S.E.2d 897 (1950).

> acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.[97]

The court of appeals, however, has lessened the force of this holding in at least two later cases. In those cases panels of that court, while accepting that a local government may not be estopped from enforcing an ordinance, held that it still might be barred from enforcement by the doctrine of laches.[98] (It might be recalled that another and later panel of that court held that there is no statute of limitations on a local government's enforcement of its ordinances.)

D. *A local government cannot agree to a consent judgment if the judgment authorizes or requires the government to act beyond its statutory authority.*

This rule is a corollary of the basic doctrine that a local government can only do those things that it has statutory authority to do. Because of that limitation, a government cannot bootstrap beyond its statutory powers through the device of litigation settlement or a consent judgment. In *Union Bank of Richmond v. Commissioners of Town of Oxford,* the town had issued $40,000 of bonds to subscribe to the stock of a railroad and apparently had ceased to pay interest as the bonds required.[99] Some or all of the bonds were held by Union Bank, and it brought suit on the bonds. After a trial, the bank and the town entered into a consent judgment, under which the town agreed to pay $20,000 to the bank. It later, however, refused to comply with the terms of the judgment, arguing that the railroad charter that authorized the original subscription and the accompanying bond issue had not been passed on three separate days in each house as required in the state constitution; the bank responded that this argument was foreclosed by the consent judgment. The court held that the charter had indeed not been enacted in the manner required by the constitution and therefore the original bond issue was invalid and beyond the town's powers. That being so, the town could not avoid its lack of authority through the device of a consent judgment:

> If the commissioners of the town were vested with no authority to create the debt, they certainly could not acquire such power by entering into a consent judgment. The consent judgment entered into by the town authorities could not bind the town to a subscription to a railroad unless the power to subscribe or donate had been legally granted by the legislature. Consent judgments are, in effect, merely contracts of parties, acknowledged in open court, and ordered to be recorded. As such they bind the parties themselves thereto as fully as other judgments; but, when parties act in a representative capacity, such judgments do not bind the *cestuis que trustent* unless the trustees had authority to act; and when (as in the present case) the parties to the action, the town authorities, had, as appears above, no authority to issue the bonds, their honest belief, however great, that they had such power, would not authorize them to acquire such power, and bind the town by consenting to a judgment. It is not a question of a fraudulent judgment, but a void judgment from want of authority to consent to a decree to bind principals (the taxpayers) for whom they had no authority to

97. *Id*. at 635, 61 S.E.2d at 902.

98. Abernathy v. Town of Boone Bd. of Adjustment, 109 N.C. App. 459, 427 S.E.2d 875 (1993); Town of Cameron v. Woodell, 150 N.C. App. 174, 563 S.E.2d 198 (2002).

99. 119 N.C. 214, 25 S.E. 966 (1896).

> create an indebtedness by consenting to a judgment any more than they would have had by issuing bonds.[100]

E. *Local government property held in governmental use is not subject to execution to enforce a judgment.*

This point was covered above in the text accompanying notes 26–32.

F. *In the absence of a statutory provision to the contrary, local governments are not subject to punitive damages.*

In *Long v. City of Charlotte,* the North Carolina Supreme Court joined the large majority of courts that have held that a local government is not subject to punitive damages unless made so by specific statutory provision.[101] The court added that this is a rule that applies to both governmental and proprietary activities of a local government. The court quoted the United States Supreme Court in justifying this doctrine:

> Punitive damages by definition are not intended to compensate the injured party, but rather to *punish* the tortfeasor whose wrongful action was intentional or malicious, and to *deter* him and others from similar extreme conduct. (Citations omitted.) Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort . . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers (emphasis added).[102]

A few years later the North Carolina Supreme Court allowed a statutory exception to this doctrine in circumstances that not all the justices thought adequate. In *Jackson v. Housing Authority of City of High Point,* the plaintiff had brought a wrongful death action against the authority, seeking damages for the carbon monoxide death of a tenant that the plaintiff blamed on faulty maintenance by the authority. Because the wrongful death statute, G.S. 28A-18-2, permits recovery of punitive damages, the court held that such damages could be recovered against the authority. The two dissenters believed that the statutory exception needed to more explicitly include governmental entities than was the case with the wrongful death statute.

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100. *Id*. at 226–27, 25 S.E. at 969. A number of courts in other states have reached the same conclusion: Ad-Ex, Inc. v. City of Chicago, 565 N.E.2d 669 (Ill. Ct. App. 1990) (settlement that purported to change city sign ordinance invalid because city did not follow proper procedures for changing ordinance); PMC Realty Trust v. Town of Derry, 480 A.2d 51 (N.H. 1984) (city may not bargain away discretion regarding zoning through consent judgment). *See also* Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs, 142 F.3d 468 (D.C. Cir. 1991), in which the court held that a North Carolina county could not enter into a settlement that expanded its authority under state law.

101. 306 N.C. 187, 293 S.E.2d 101 (1982).

102. *Id*. at 207, 293 S.E.2d at 114, *quoting* Newport v. Facts Concert Inc., 453 U.S. 247, 266–67 (1981).

G. *Local governments are not required to pay post-judgment interest, at least when the litigation involved a governmental activity, unless a statute specifically requires them to do so.*

In *Yancey v. North Carolina State Highway & Public Works Commission*, the commission had brought and concluded a condemnation action and had offered the landowners the amount set in the judgment. The landowners refused the offer, however, and brought suit for a mandamus ordering the commission to also pay interest on the judgment from the date it was rendered. The trial court sustained the commission's demurrer, and the North Carolina Supreme Court affirmed.[103] The court began by making clear that this case was not about paying interest from the date of the taking up to the time of the judgment but rather about paying interest only after entry of the judgment. It noted that some courts had required state governments to pay such interest, but it declined to follow those courts. Rather, it relied on "the established principle that interest may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so."[104] Any statutory consent must be more than a boilerplate authorization to sue and be sued; there must be some sort of specific mention of the state in the statute permitting or requiring payment of interest, and in this particular case there was none.

Shavitz v. City of High Point is the case that held that the clear proceeds of penalties collected through a city's red-light camera enforcement program were constitutionally required to be paid to the local board or boards of education.[105] The trial court had ordered the city to pay post-judgment interest on the award, and the court of appeals reversed. It noted the outcome of the *Yancey* case and held that the principle of that case should be extended to local governments when they are engaged in governmental activities, adopting the governmental-proprietary distinction set forth in *Rowan County Board of Education v. United States Gypsum Co.* on the applicability of statutes of limitations to local governments.[106] Ordinance enforcement was clearly a governmental activity, and therefore the trial court was in error in ordering the city to pay post-judgment interest.[107]

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103. 222 N.C. 106, 22 S.E.2d 256 (1942).

104. *Id*. at 109, 22 S.E.2d at 259.

105. 177 N.C. App. 465, 630 S.E.2d 4 (2006).

106. See the text accompanying notes 82–84, *supra*.

107. *Accord*, City of Gastonia v. Hayes, 179 N.C. App. 652, 634 S.E.2d 641 (2006) (unpublished). In this last case the court held that G.S. 24-5 did not require the city to pay interest because the statute did not specifically mention the state or local governments.

Introduction into Local Government Finance Materials

N.C. Municipal Finance Primer

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UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

Agenda

- ✓Constitutional Provisions
- ✓"Grants" to Private Entities
- ✓Fiscal Control

"The power of taxation shall be exercised . . . for public purposes only . . ."

N.C. Const. Art. V, Sect. 2(1)

UNC SCHOOL OF GOVERNMENT

Public Purpose?

The city builds a soccer complex and contracts with owner of a major national soccer team to locate to the city and use the complex. Pursuant to G.S. 158-7.1(a), the city agrees to pay the team 75% of its net concessions and parking sales whenever the complex is in use.

UNC

Public Purpose?

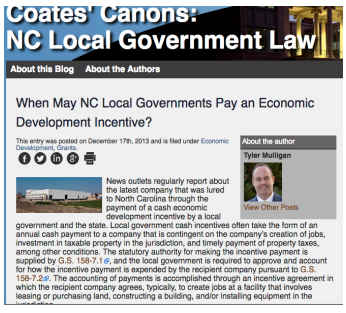
"In short, the face of the agreements themselves reveal a primary public purpose of the City's economic development through use of the Coliseum by a successful, competitive home basketball team. 'Economic development has long been recognized as a proper governmental function.'"

"Here, as in *Maready*, a private party ultimately conducts activities which, while providing incidental private benefit, serve a primary public goal. Despite the Shinn defendants' benefit from the provisions of the agreements which plaintiff has singled out, where the Authority's primary purpose is for the public benefit, the Authority has discretion as to the manner of implementation."

Peacock v. Shinn, 139 N.C.App. 487 (2000)

UNC

But see….



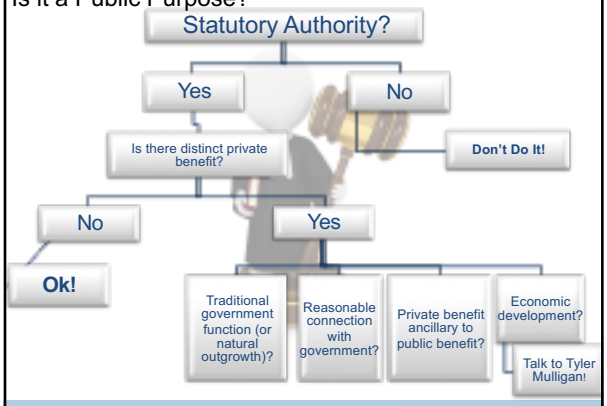
UNC

UNC SCHOOL OF GOVERNMENT

Public Purpose?

High school located in town requests that town board appropriate $1000 to support the high school's new music program.

Is it a Public Purpose?



Contracting with Private Entities

- "A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose **that the city is authorized by law to engage in**."

  G.S. 160A-20.1

  - Enter into actual contract
  - Clearly specify what money can be spent on
  - Require accounting of how money is actually spent

UNC SCHOOL OF GOVERNMENT

- At budget time, the local YMCA approaches the city council for a grant to support its youth programs.
- City council members are considering contracting with a private entity to provide garbage hauling services.
- City hires local company to perform landscaping services at various city parks.
- Rotary Club asks city to become a dues-paying member

UNC

"No person or set of persons is entitled to exclusive or separate emoluments* or privileges from the community but in consideration of public services."

N.C. Const. Art. I, Sect. 32

* A salary, fee, or profit from employment or office.

UNC

Exclusive Emolument?

The county hires a new manager. The county and the new manager enter into an employment contract whereby, among other things, the county agrees to loan the manager $50,000 to make a down payment on a new home located in the county. The loan is to be repaid over a period of 3 years. If the manager is terminated for cause or quits before the expiration of the 3-year period, the loan immediately must be repaid in full.

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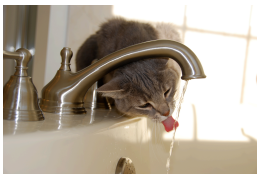
Exclusive Privilege?



A beloved city resident leaves his faucets running all day to accommodate his many cats. He has recently fallen behind on his rather high water bill. The department's normal procedure is to shut off the water and impose a penalty for the delinquency. The city manager feels sorry for the resident and requests that the city's governing board make an exception and waive his outstanding utility fees and late penalties. To a cheering crowd, the board votes unanimously to do so.

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Exclusive Privilege?

City refurbishes city hall and now has furniture that it no longer needs. Board member requests that city donate the furniture to a newly formed charter school in the city.

- G.S. 160A-279 allows conveyances of property to nonprofits, but requires the city to "attach to any such conveyance covenants or conditions which assure that the property will be put to a public use by the recipient entity."
- G.S. 160A-280 allows "donations" of personal property to nonprofits, but should also be interpreted to include this consideration requirement
  - Brumley v. Baxter, 251 N.C. 691 (1945)

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Additional Limitations on Public for Private

"Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated."

N.C. Const. Art. V, Sect. 2

Prohibits:
- local property tax exemptions/exclusions
- property tax abatements

"No [city] shall give or lend its credit in aid of any person, association, or corporation, except for public purposes authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon."

N.C. Const. Art. V, Sect. 4(3)

Prohibits:
- guaranteeing obligations of private entities (including indemnities);
- loaning proceeds of non-voted GO bonds to private entity or using proceeds to acquire stock in private company;
- using non-voted GO bond proceeds to primarily benefit private entities; and
- engaging in certain joint ventures with one or more private entities.

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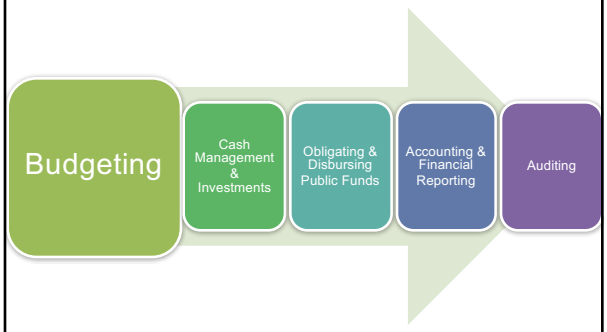
Fiscal Management

What's your board's role?

Local Government Budget & Fiscal Control Act



Statutory Duties

Finance Officer	G.S. 159-25	• Manager or board hires/supervises
Performance Bond	G.S. 159-29	• Board must ensure finance officer has performance bond • Board sets amount of bond • Board must ensure that all other employees/officials covered by blanket bond
Official Depositories	G.S. 159-31 G.S. 159-32	• All moneys must be deposited in official depository • Board designates official depository(ies) • Board may authorize $250 exception to daily deposit requirement • Finance officer audits individual accounts
Investments	G.S. 159-30	• Board may set investment parameters, within statutory limitations
Preaudit/ Disbursement Process	G.S. 159-28	• Board must set expectations of full compliance with processes • Board may approve disbursements that violate statute; board members take on individual liability
Independent Audit	G.S. 159-34	• Board selects and contracts with auditor, subject to LGC approval

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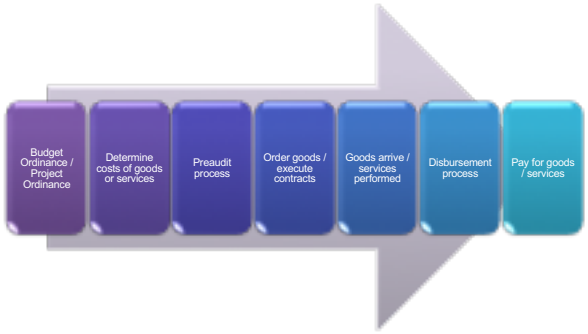
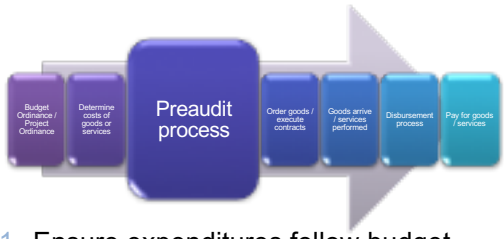
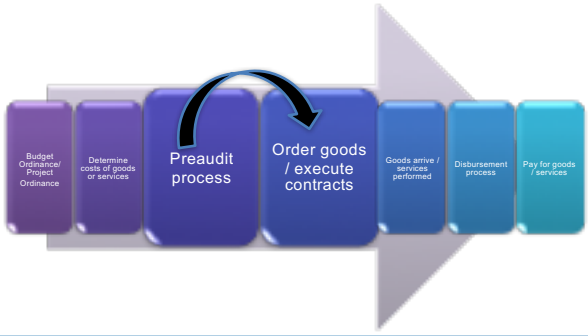
G.S. 159-28





1. Ensure expenditures follow budget
2. Alert vendors/contractors that there is budgetary authority for expenditure



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General Financial Oversight

Finance/Mgmt Personnel	• Segregation of duties • Overlap of duties • Rotation of duties • Vacation use • Training on identifying and reporting red flags
Board Members	• Training on basic financial laws and reports • Regular review of financial reports • Internal audit committee • Setting compliance expectations
Audit	• Follow audit recommendations • Engage auditors to identify additional internal control best practices

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Bedtime Reading

- G.S. 160A-20 (installment financings)
- G.S. 160A-456 (community development)
- G.S. 158-7.1 (economic development)
- G.S. 160A, Art. 16 (public enterprises)

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