Chapter 5

General Ordinance Authority

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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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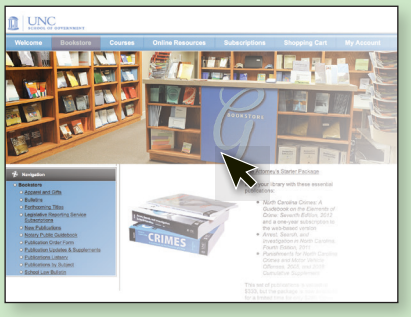

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