Governmental Immunity: Five Issues

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Rex non potest peccare
Respublica non potest peccare?
Governmental Immunity can bar tort (and some related) claims against local gov’ts arising from performance of governmental functions.

- It cannot bar tort claims for injuries arising from proprietary functions.
- It cannot not bar individual capacity claims.

**Issue 1: Classifying local government activities as governmental or proprietary**
Governmental v. Proprietary Functions

- **Governmental function**
  - discretionary, political, legislative, or public in nature
  - performed for public good on behalf of State

- **Proprietary function**
  - commercial or chiefly for private benefit of compact community

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

<table>
<thead>
<tr>
<th>Activity</th>
<th>Governmental</th>
<th>Proprietary</th>
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<tbody>
<tr>
<td>Collection of solid waste for fee within city limits only</td>
<td>✔️</td>
<td></td>
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<tr>
<td>Maintenance of city storm drains</td>
<td>✔️</td>
<td>✔️</td>
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<tr>
<td>Construction of public hospital by county or city</td>
<td>✔️</td>
<td>✔️</td>
</tr>
<tr>
<td>Operation of ABC Store</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Granting franchise to public utility</td>
<td>✔️</td>
<td></td>
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<tr>
<td>Setting public enterprise rates</td>
<td>✔️</td>
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Rhodes v. City of Asheville, 230 N.C. 134 (1949)
Issue 2: Classifying maintenance of local gov’t property as governmental or proprietary

Historic Approach

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


- County building housed both governmental and proprietary activities.
- Plaintiff visited building to pay water bill and fell down front steps, suffering serious injuries.
- Plaintiff sued County for negligence.
NC Supreme Court held County’s maintenance of building was governmental function because:

- Building was used for discretionary, legislative, and public functions only county could perform;
- State law designated locating, supervising, and maintaining of such county buildings as governmental functions.

**G.S. 153A-169**: “The [BOC] shall supervise the maintenance, repair, and use of all county property. . . .”

**Different Outcome If . . .**

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

Meinck v. City of Gastonia, 819 S.E.2d 353 (2018)
Issue 3: Adequately alleging waiver of governmental immunity

General Rule

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

Ways local gov’t may waive Governmental Immunity:

- by engaging in proprietary function,
- by entering into valid contract, or
- by purchasing liability insurance.

No precise formula is necessary to allege waiver.
▪ If complaint alleges proprietary function, no express waiver allegation is required.

▪ If complaint alleges valid contract with local gov’t, plaintiff has adequately alleged waiver as to contract claims.

▪ Waiver is sufficiently pled when complaint alleges, on information and belief, that local gov’t has purchased liability insurance covering plaintiff’s claims.

General Rule

BUT Governmental Immunity often will NOT bar declaratory judgment action that

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

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

“The denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable.”

Current rules under COA case law:

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