INSTITUTE OF GOVERNMENT
THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

MEMORANDUM

TO: File

FROM: David Lawrence

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SUBJECT: Ex-officio governing board: constitutional issues

The basic plan

The charter commission has adopted a proposal for merger that creates a new kind of governmental entity – the merged city-county; its boundaries are all of Durham county plus those portions of the city of Durham that are outside the county. For technical and political reasons, the proposal continues the corporate existence of both the city and the county. First, the county and city will operate as tax districts within the merged city-county. Some services will be provided only in the county, and only county taxpayers will pay for those services; similarly, some services will be provided only in the city and only city taxpayers will pay for those services. Second, retaining the county and city obviates the need to transfer existing county or city debt to another unit; the continuing corporate entities will remain responsible for their existing debt. Third, retaining the city allows the merged city-county to grow outside of Durham county. If and as the city continues to grow in the future, through annexation, the boundaries of the merged city-county will grow as well.

The merged city-county will be governed by a new governing board, and all employees of the city and county will become city-county employees. There will no longer be separate governing boards for the city and the county; rather, the city-county governing board will be, ex-officio, the governing board for the city and county as well for those occasions (which should be relatively infrequent) when action needs to be taken in the name of the county or city. This new governing board will be elected by all the voters of the city-county. Therefore, the electorate for the governing board that acts for the county will include some people who do not live in the county; and the electorate for the governing board that acts for the city will include some people who do not live in the city. This memorandum explores whether there are any constitutional problems with commission's proposal.

State constitutional law

First, the General Assembly has clear constitutional authority to establish a new kind of governmental entity, the merged city-county. The first paragraph of Article VII, section 1 of the constitution provides 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

this Constitution, may give such powers and duties to counties, cities and towns, and *other political subdivisions* as it may deem appropriate.

The General Statutes include authority to create a broad range of local government entities besides counties and cities, as permitted by the above constitutional language, and the merged city-county is just another kind of entity. Article VII, section 3 of the constitution makes specific provision for merger of counties and cities, and there is nothing in the committee's proposal that is incompatible with the language of that section of the constitution.

Moving on to the governing board arrangement, there is no obvious provision in the state constitution that is violated by such an arrangement. First, the constitution does require that a person be a resident of a precinct in order to vote in elections in that precinct. This provision was the basis for the state supreme court's holding that nonresidents may not be allowed to vote in municipal elections in resort communities. *E.g., Wrenn v. Town of Kure Beach*, 235 N.C. 292. That is not a problem that affects the city-county governing board, however, because the office people are voting for is that new board and not the city or county governing boards.

Second, the constitution does prohibit a person from holding two elective offices at the same time, but that provision is subject to an exception that recognizes ex-officio office holding. That is, it is possible to add the duties of one office to a second office, thus redefining the office, without that constituting double office-holding. When the duties of a second office are added to the first office, that is not two offices; rather it is simply a redefinition of the duties of the first office. This exception is firmly settled in North Carolina law. *See, e.g., McCullers v. Board of Commissioners of Wake County*, 158 N.C. 75, 73 S.E. 816 (1911); *State ex rel. Grimes v. Holmes*, 207 N.C. 293, 176 S.E. 746 (1934).

There is also ample precedent for this kind of arrangement in the state statutes. G.S. Chapter 162A, Article 6, permits the creation of county water and sewer districts. These are separate corporate bodies authorized to provide water or sewer or both, and they are created within a portion of a county. G.S. 162A-89 provides that the county commissioners are the governing body of a county water and sewer district within the county; if a county has more than one such district, the county commissioners would be the governing body of each such district. Similarly, G.S. Chapter 131E, Article 2, Part C, permits the creation of hospital districts. These separate corporate bodies are authorized to provide hospital services to a portion of the county. G.S. 131E-47 makes the board of county commissioners the governing board of the hospital district.

The governing body arrangements for the county water and sewer district and the hospital district are direct models for the arrangements for the merged city-county. With each, there is a basic government corporation that covers a specific geographical area and that government's governing board is elected from that entire geographical area. There is then another government corporation that includes a smaller geographical area, entirely encompassed within the larger area; and the governing board for the larger area is ex-officio the governing board for the smaller corporate entity. County water and sewer districts and hospital districts are essentially tax districts, which is why the county commissioners are their governing boards, and tax districts are essentially what the county and city become within a merged city-county.

Federal constitutional law

The federal constitutional issue involves the possibility of what is called vote dilution, and the framework for analysis is the equal protection clause of the Fourteenth Amendment. The issue arises because it can be argued that the votes of those persons actually resident in the city of Durham are unconstitutionally diluted because of the additional voting, for the governing board that acts for the city, by persons who do not live within the city of Durham, or that the votes of residents of Durham county are unconstitutionally diluted because of the additional voting, for the governing board that acts for the county, by persons who are not residents of the county.

In the four decades since the federal courts began seriously to consider various voting arrangements under the equal protection clause, there has been a good number of cases involving claims of vote dilution. All but one of these cases have been decided under a framework of rational basis analysis. That is, if the defenders of the voting scheme can show a rational basis for the voting scheme, it will survive constitutional attack. The exception to this use of rational basis analysis is a Fourth Circuit case involving the voting arrangements for the Robeson county school board, in which the court employed a higher level of scrutiny. *Locklear v. North Carolina State Board of Education,* 514 F.2d 1152 (4th Cir. 1975). This case, and its rationale, is discussed in more detail below.

The federal case that is perhaps most in point to analysis of the charter commission's proposal is *Collins v. Town of Goshen*, 635 F.2d 954 (2nd Cir. 1980). In that case the Town of Goshen, which covers 44 square miles in New York State, created a water district to operate a water system in a small development near the center of the town. The water district was governed by the town's governing board, which was elected by all the town's voters, voting at large. (The Village of Goshen was also located within the town, and its residents voted for both the Village board and the Town board; the village supplied its own water to its residents.) A few residents of the water district challenged the federal constitutionality of the governing arrangement for the district. In an opinion by Friendly, J., the court of appeals upheld the arrangement. The court began by noting that all the federal courts, save the *Locklear* court, that had reviewed vote dilution cases had used rational basis analysis. Employing that basis, the court noted that the town frequently had to dip into town revenues to pay district bills, inasmuch as district residents were often late paying their water bills. This was an adequate rational basis for town control of the district.

The facts of this case are directly analogous to the charter commission's proposal. The governing board for a larger unit (the Town) was ex officio the governing board for a separate, smaller unit (the district), wholly within the larger unit. Some of the voters in the larger unit also elected the board of a second smaller unit (the Village), and the second smaller unit provided the same service as was provided by the first smaller unit.

There are many rational bases that support the charter commission's proposals. The commission has good reasons for continuing the corporate existence of the county and city, especially the existence of the county's and city's debt and the city's ability to annex. But the proposal vests the real power for local government in Durham in the merged city-county, leaving the county and city as little more than tax districts and the county as the geographic electoral district for the sheriff and register of deeds. The commission wished to create a single governmental entity for all the citizens of the city and county, but one with the wherewithal to match tax burdens and services, and the commission proposal does just that. In this respect it is really very little different than the arrangements for a consolidated city-county, which uses one or more service districts to allocate funding responsibilities for services.

A second federal decision that is relevant to this issue is *Cantwell v. Hudnut*, 566 F.2d 30 (7th Cir. 1977), which was a challenge to voting arrangements within Uni-Gov, the merged government in Indianapolis and Marion county, Indiana. The Uni-Gov legislation created a 29-member council, 25 of whose members were elected from districts. The legislation expanded the city to the edges of the county, but left the former city as a special police and fire district. (This district was comparable to a service district under North Carolina law; it was not a separate corporate body.) It also provided that the budget for this district would be approved, and the taxes levied, by a special district council. This council consisted of the four at-large council members, plus the 16 council members whose electoral districts were at least 60 percent within the special police and fire district. (The consolidation left in place a number of existing smaller towns, which had their own police departments; residents of these towns voted for the Uni-Gov council as well as their own councils.) Residents of the special district brought this action challenging the constitutionality of allowing the at-large council members to participate as members of the special council. The court of appeals upheld the arrangement.

As part of its reasoning, the court made clear that the constitution does not require the existence of a special district council at all. That is, the Indiana legislation could have left decisions for the police and fire district entirely in the hands of the 29-member council and not established this special council for some district decisions. (Leaving such decisions to the general governing board is, of course, how North Carolina law handles decision-making for the various service districts authorized by our state law.) That being the case, the court applied rational basis analysis to the special district council that was established and found plenty of reasons that supported the legislative arrangement. Among other points, the court noted that many nonresidents of the district worked in the district or directly or indirectly owned property in the district and so had a strong interest in the sufficiency of public safety services within the district. The court also mentioned the financial interdependence of the district and the entire Uni-Gov.

The chief difference between this case and the proposal for Durham is that the Uni-gov police and fire district was not a corporate body, while in Durham the city and county continue as separate corporate bodies. But the Seventh Circuit court emphasized that its focus was on the reality of the governmental arrangement. And the reality of the Durham proposal is that the city and county will operate, under the merger, essentially as if they were non-corporate service districts. This case – and the pattern of government in the various merged city-counties that do use service districts – supports the constitutionality of allowing decision-making for a subordinate part of a merged city-county by the governing board of the entire merged government.

Third, a major group of federal cases involves challenges to participation in city elections by nonresident property owners. Nonresident voting has been instituted in a number of states in resort locations, where so much of the property is owned by nonresidents; although such an arrangement has been held to violate the North Carolina state constitution (see above), other state constitutions are more forgiving. The federal cases have unfailingly upheld this kind of nonresident voting against federal constitutional attack. The most recent of these cases is *May v. Town of Mountain Village*, 132 F.3d 576 (10th Cir. 1997). As with the other vote dilution cases, the court analyzed the issues using rational basis analysis, and it found the high percentage of nonresident property ownership in the town to be an adequate basis. Other cases in this group, all of which use rational basis analysis, include *Spahos v. Mayor & Councilmen of Savannah Beach*, 207 F. Supp. 688 (S.D. Ga. 1962), *aff'd per curiam*, 371 U.S. 206 (1962); *Glisson v. Mayor and Councilmen of Town of Savannah Beach*, 346 F.2d 135 (5th Cir. 1965); and *Snead v. City of Albuquerque*, 663 F.Supp. 1084 (D. N.M. 1987), *affirmed* 841 F.2d 1131 (10th Cir. 1987).

Obviously, the charter commission's proposal allows some nonresidents to vote for the governing board that acts for the county and the city who are not property owners in the city or county, and in that way the cases are not directly in point. They are directly relevant though in their choice of level of analysis; again, each relies upon rational basis analysis, and again, I believe there are sufficient rational bases for the commission's decisions to survive this sort of review. The *Spahos* case might be particularly important on this point, inasmuch as the Supreme Court did affirm that judgment, although summarily. That suggests the court approved the level of review. The affirmance came after *Baker v. Carr*, which first applied the equal protection clause to voting arrangements; it did, however, come before *Reynolds v. Sims*, which the court relied on in *Locklear* for its use of a more stringent standard of review than rational basis. For that reason, *Spahos* is not clearly inconsistent with the *Locklear* approach.

The final group of cases involves challenges to county school board elections in a large number of counties, mostly in Alabama. In these counties, a county school board served a portion of the county and one or more city school boards served another portion of the county. Voters within the city school district voted for their own school board and also were allowed to vote for the county school board. Residents of the county school district brought federal vote dilution challenges to these voting arrangements. As noted, a number of these cases have arisen in Alabama, and the Fifth and later the Eleventh Circuits have consistently applied rational basis analysis to the cases. Using that analysis, the courts have upheld the voting arrangements in some counties and overturned them in others, depending on the facts in each particular county. These cases include *Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976) (voting system upheld); *Phillips v. Andress*, 634 F.2d 947 (5th Cir. 1981) (voting system overturned); *Hogencamp v. Lee County Board of Education*, 722 F.2d 720 (11th Cir. 1984) (voting system overturned); and *Sutton v. Escambia County Board of Education*, 809 F.2d 770 (11th Cir. 1987) (voting system upheld).

The sole exception to this pervasive use of rational basis analysis is a 1975 Fourth Circuit case involving the voting arrangements for the Robeson county school board. *Locklear v. North Carolina State Board of Education*, 514 F.2d 1152 (4th Cir. 1975). At the time of the decision, Robeson county had six separate school administrative units, each with its own school board. Members of the five city school boards were elected exclusively by voters residing within the appropriate school administrative unit. Seven of the eleven members of the county school board, however, were elected by all the voters of the county; the other four were elected solely by voters from within the county administrative unit. In a suit brought by voters who lived in the county unit, the court required that the state (which was the defendant in the case) demonstrate a compelling state interest in order to justify this vote dilution. When the state was unable to do so, the court invalidated the voting arrangement.

That the Fourth Circuit used a more stringent level of review 25 years ago in the *Locklear* case does not mean, however, that it would use that level today in a challenge to the charter commission's proposal, and my judgment is that it would in fact use a rational basis level of analysis. I reach this conclusion for four reasons.

First, the Fourth Circuit's approach has clearly been repudiated by every court to approach these issues since that time. Several of these courts have acknowledged the *Locklear* decision and have refused to follow it. *E.g.*, *Phillips v. Beasley*, 78 F.R.D. 207 (N.D. Ala. 1978 [three-judge court]); *Collins v. Town of Goshen*, 635 F.2d 954 (2nd Cir. 1980). In those circumstances, a current panel of the Fourth Circuit might adopt the approach taken by other courts.

Second, there is in practice little difference in the approaches between the *Locklear* court and the Fifth and Eleventh Circuit courts that reviewed comparable arrangements in Alabama. Those courts found some of the voting arrangements unable to survive rational basis analysis, and the *Locklear* facts are quite similar to the facts in the cases that struck down the Alabama arrangements. So the *Locklear* outcome could be upheld without having to uphold the *Locklear* court's method of analysis.

Third, although the Supreme Court has not decided a vote dilution case of this sort, there is some foundation in other Supreme Court cases for adopting a rational basis analysis in these kinds of cases. In discussing the proper level of scrutiny in a dilution case, the California court of appeals summarized the various federal cases and noted that using "a strict scrutiny approach may hamper the creation of innovative local government units. Many of the rational basis cases cite to the passage from *Avery [v. Midland County*, the case that extended reapportionment rules to local governments] which states:

> 'This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform strait jacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems.'"

Bjornestad v. Hulse, 281 Cal. Rptr. 548, at 562-63 (Cal. Ct. App. 1991).

In addition, the 1978 Supreme Court decision in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) adds support to the use of rational basis analysis. (*Holt* was decided *after* the Fourth Circuit decision in *Locklear*.) *Holt* involved a challenge to the "police jurisdiction" granted by Alabama law to cities over 6000. In an extraterritorial area extending 1.5 miles from the boundaries of such a city, the city had general authority to extend city ordinances and to levy license taxes in an amount up to one-half the in-city rate. A number of residents of such an area brought suit, arguing that subjecting them to the regulatory and taxing power of the city, without allowing them to vote for the city council, violated their equal protection rights. The Supreme Court rejected the plaintiff's argument that strict scrutiny was the appropriate level of analysis, saying that the cases in which strict scrutiny had been required involved restrictions on the right to vote of persons resident in the governmental unit in question and that those cases were not relevant in this context. Therefore, the Court applied rational basis analysis to the issue and upheld the Alabama arrangements. In *Holt*, nonresidents were subjected to governmental regulation and taxation and not allowed to vote at all, and the Court held that strict scrutiny was unnecessary because there were no restrictions on the voting powers of residents. In the charter commission's proposal, nonresidents are arguably allowed to vote, but again there are no restrictions on the voting powers of residents. So here too, strict scrutiny should be unnecessary.

Finally, the facts in *Locklear* are sufficiently different from the commission's proposal that a court could apply rational basis analysis to the commission's proposal without having to abandon *Locklear*. In *Locklear*, residents of one school unit voted for their own school board and then voted for another unit's school board; the second school board had almost no role in providing education for the residents of the first school unit. In the commission's proposal, nonresidents of the city, or the county, respectively, vote for a governing board that operates as the governing board of the city and county. But that governing board is very much involved in the local government operations that affect every person entitled to vote for the board. It is, after all, the governing board of the city-county, and each person voting for the governing board is a voter of the city-county.