

North Carolina Legislation

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A summary
of legislation
in the 2001
General Assembly
of interest to
North Carolina
public officials

Edited by William A. Campbell

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On the covers: The front cover photograph shows the second Capitol building, built in 1840 to replace the first Capitol, which was destroyed by a fire in 1831. The photograph on the back cover and title page shows the current State Legislative Building, designed by Edward Durrell Stone and completed in 1963. Both photographs courtesy of the North Carolina Department of Cultural Resources, Division of Archives and History.

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Editor's Preface

The 2001 edition of *North Carolina Legislation* is the thirty-eighth periodic summary of legislation published by the UNC Chapel Hill School of Government's Institute of Government. From 1955 through 1973 these summaries were published in a special issue of *Popular Government*. Since 1974 the summary has been published annually as a separate publication.

North Carolina Legislation 2001 is a comprehensive summary of legislation enacted by the North Carolina General Assembly. It is intended to cover all legislation of interest and importance to state and local government officials. The book is organized by subject matter and divided into twenty-six chapters. In some instances, to provide different emphases or points of view, the same legislation is discussed in more than one chapter. With two exceptions, School of Government faculty members with expertise in the particular fields wrote each chapter in this book. The two exceptions are Chapter 13, "Information Technology," which was written in part by staff members of the North Carolina League of Municipalities and the North Carolina Association of County Commissioners, and Chapter 25, "State Taxation," which was written by members of the General Assembly's professional staff.

The text of all bills discussed in this book may be viewed on the Internet at the General Assembly's Web site: <http://www.ncleg.net>. This site also includes a detailed legislative history of all action taken on each bill and, for some bills, a summary of the fiscal impact of the bill.

While comprehensive, this book does not summarize every legislative enactment of the 2001 General Assembly. For example, some important topics that do not have a substantial impact on state or local governments, such as business regulation or insurance, are not discussed at all. Local legislation of importance to a single jurisdiction often is given only brief coverage. Readers who need information on public bills not covered in this book may wish to consult *Summaries of Substantive Ratified Legislation, 2001 General Assembly*, which contains brief summaries of all public laws enacted during the 2001 session. That compilation is published by the General Assembly's Research Division and is posted on the Internet at the General Assembly's Web site. A list of General Statutes affected by 2001 legislation, prepared by the General Assembly's Bill Drafting Division, is online at the same site.

The Institute of Government also publishes two separate reports, *Final Disposition of Bills* and the *Index of Legislation*, that provide additional information with respect to public and private bills considered in 2001. These publications can be purchased through the Institute's Publications and Marketing Division (telephone: 919.966.4119; e-mail: sales@iogmail.iog.unc.edu).

Each day that the General Assembly is in session, the Institute's Legislative Reporting Service publishes the *Daily Bulletin*. It includes summaries written by Institute of Government faculty members of every bill and resolution introduced in the state House and Senate, summaries of all amendments and committee substitutes adopted by the House and Senate, and a daily report of all action taken on the floor of both chambers relative to legislation. The *Daily Bulletin* is available by paid subscription, with delivery via U.S. mail, telefax, or the World Wide Web. For information on subscriptions, contact the Institute's Publications and Marketing Division (telephone: 919.966.4119; e-mail: sales@iogmail.iog.unc.edu).

Throughout this book, references to legislation enacted during the 2001 legislative session are cited by the Session Law number of the act (for example, S.L. 2001-54), followed by a parenthetical reference to the number of the Senate or House bill (for example, S 1005) that was enacted. As a general matter, the effective date of new legislation is not noted if it is prior to the production date of this book. References to the General Statutes of North Carolina are abbreviated as G.S. (for example, G.S. 105-374).

William A. Campbell

1

The Legislative Institution

The 2001 General Assembly convened on January 24, 2001, and adjourned on December 6, 2001, almost eleven months later. This chapter provides a brief overview of the 2001 legislative session, describes changes in the organization and rules of the Senate and House, and discusses legislation that affects the General Assembly as an institution.

Overview of the 2001 Legislative Session

The 2001 session was the longest in history, both in terms of calendar days and legislative days. The House met for 179 days and the Senate for 173 days, and the session adjourned after 317 calendar days. The closest competitors are the 1971 and 1989 sessions. In 1971 the General Assembly met for 160 legislative days and 190 calendar days; in 1989 each chamber met for 128 legislative days and the session ran for 213 calendar days. During this year's record-breaking session, 1,478 bills were introduced in the House and 1,109 in the Senate, for a total of 2,587 bills introduced. Of this number, however, 521—or approximately 20 percent—were blank bills, bills with no substantive provisions. Some of these blank bills were subsequently given substance; most, however, were referred to the Rules Committees and were never reported out of those committees. Of this total of 2,587 bills, 650—25 percent—were local bills, bills affecting only one or a few cities or counties. For a comparison of the 2001 session with sessions of the past ten years, see Table 1-1.

The length of a legislative session is usually reflective of the time it takes to complete work on the state budget. (The budget is discussed in Chapter 2.) The 2001 session was exceptionally long because of the time and effort required for the House and Senate to agree on the revenue portion of the budget. The Senate completed its version of the budget on May 29, the House its version on June 27, 2001. Between the latter date and adoption of the conference report on September 21, 2001, most of the work was focused on whether there would be any tax increases and what they would be. Governor Easley helped bring the budget process to a conclusion by, in

September, informing the General Assembly that he would not sign another continuing budget resolution to extend the operations of state government beyond September 28 and that he would veto any budget that did not appear to generate sufficient revenue to be in balance during the second year of the 2001–2003 biennium. The 2001 session was also exceptionally long because of the time required to complete action on the House and Congressional redistricting plans. The conference report on the budget was adopted September 21, the Senate passed its redistricting bill on September 19, but the House did not pass its redistricting bill until November 1. The Congressional redistricting bill was enacted November 28, but then, after further consideration, a different version was enacted December 5.

Table 1-1. Statistical Comparisons among Recent Odd-Year Sessions

	1991	1993	1995	1997	1999	2001
Date convened	Jan. 30	Jan. 27	Jan. 25	Jan. 29	Jan. 27	Jan. 24
Date adjourned	July 16	July 24	July 29	Aug. 28	July 21	Dec. 6
Senate legislative days	99	109	109	123	101	173
House legislative days	106	110	108	123	103	179
Senate bills introduced	966	1,299	1,103	1,089	1,175	1,109
House bills introduced	1,314	1,499	1,070	1,245	1,489	1,478
Total bills introduced	2,280	2,798	2,173	2,334	2,664	2,587
Session Laws enacted	761	563	546	528	462	519
Vetoes				0	0	0
Joint resolutions ratified	30	31	15	33	22	36
Simple resolutions adopted	7	7	7	11	24	10
Total measures passed	798	601	568	572	508	565
% measures passed	35.0%	21.5%	26.1%	24.5%	19.0%	21.8%

Major Legislation Enacted by the 2001 General Assembly

The 2001 General Assembly enacted a number of significant pieces of legislation, some of which are listed below.

- **Capital punishment changes.** The state’s capital punishment laws were the focus of considerable legislative attention. S.L. 2001-346 (S 173) provides that a person convicted of first degree murder who is found to be mentally retarded shall not be sentenced to death, and S.L. 2001-392 (S 109) requests the North Carolina Supreme Court to adopt rules establishing minimum standards for defense attorneys, prosecutors, and judges handling capital cases. Both of these statutes are discussed in Chapter 6, “Criminal Law and Procedure.”
- **Child bicycle safety.** S.L. 2001-268 (H 63) requires children under sixteen to wear an approved helmet when riding a bicycle and special bicycle seats for small children. This act is discussed in Chapter 19, “Motor Vehicles.”
- **District court judges—nonpartisan elections.** S.L. 2001-403 (S 119) provides for the nonpartisan election of district court judges. This law is discussed in Chapter 5, “Courts and Civil Procedure.”
- **Elections modernization.** Several new laws modernize and rationalize numerous election procedures. These changes were largely a result of the problems in Florida during the 2000 presidential election. S.L. 2001-310 (H 34) prohibits the use of butterfly and punch-card ballots; S.L. 2001-353 (S 11) enacts several miscellaneous changes in the election laws; S.L. 2001-374 (S 16) does away with most municipal boards of elections; S.L. 2001-289 (H 31) changes the method of selecting presidential electors in certain circumstances; and S.L. 2001-398 (S 14) changes the procedures for counting and canvassing ballots. These acts are discussed in Chapter 8, “Elections.”

- **Managed health care bill of rights.** S.L. 2001-446 (S 199) significantly expands the rights of patients in HMOs and similar managed care plans. This legislation is discussed in Chapter 11, “Health.”
- **Marriage laws.** S.L. 2001-62 (H 142) extensively revises the state’s marriage laws, dealing with such matters as who may officiate at the marriage ceremony, procedures for the marriage of persons under eighteen, and the correction of errors in a marriage license. This act is discussed in Chapter 3, “Children and Families.”
- **Mental health system reform.** S.L. 2001-437 (H 381) makes extensive changes in the way the state organizes its mental health services. For more information on this significant legislation, see Chapter 18, “Mental Health and Related Laws.”
- **Mortgage brokers and bankers.** S.L. 2001-393 (S 904) imposes extensive regulations on mortgage brokers and bankers, requiring licenses and giving the Commissioner of Banks supervisory authority over these businesses. This act is discussed in Chapter 4, “Community Development and Housing.”
- **Redistricting.** One of the General Assembly’s major tasks this session was the redistricting of Congressional, Senate, and House seats to reflect population shifts shown by the 2000 census. S.L. 2001-479 (H 32) accomplished Congressional redistricting; S.L. 2001-458 (S 798), Senate redistricting; and S.L. 2001-459 (H 1025), House redistricting. All are discussed in Chapter 8, “Elections.”
- **Sales tax authority.** Effective July 1, 2003, S.L. 2001-424 (S 1005), the Appropriations Act, authorizes counties to levy an additional 0.5 percent sales tax. This authorization is discussed in Chapter 16, “Local Government and Local Finance.”
- **Tax increases.** To aid in funding the budget, the General Assembly enacted a temporary increase of \$.005 in the sales tax, to expire June 30, 2003; created an additional 0.5 percent bracket in the individual income tax for higher income taxpayers, to expire December 31, 2003; and provided for several permanent increases in other taxes. These changes are discussed in Chapter 25, “State Taxation.”

Party Composition and Demographics

In the 2001 session the Senate included thirty-five Democrats and fifteen Republicans, the same party balance as in the 1999 session. Five of the senators were women and seven were African-Americans.

The House of Representatives had sixty-two Democrats and fifty-eight Republicans, four more Republicans than in the 1999 session. Twenty-seven women served in the House, eighteen African-Americans, one Native American, and one representative of Hispanic ancestry.

Organization and Rules

Senate Leadership

Senator Marc K. Basnight, of Manteo, was elected to his fifth term as president pro tempore. Senator Tony Rand, of Fayetteville, was elected majority leader. Senator Rand also served as Chairman of the Rules Committee. Senators Aaron W. Plyler, of Monroe, Howard N. Lee, of Chapel Hill, and Fountain Odom, of Charlotte, served as co-chairmen of the Appropriations Committee. Senators John H. Kerr, III, of Goldsboro, and David W. Hoyle, of Gastonia, served as co-chairmen of the Finance Committee. Janet B. Pruitt was reelected principal clerk. Senator Patrick J. Ballantine, Jr., of Wilmington, served as minority leader.

House Leadership

Representative James B. Black, of Matthews, was elected to his second term as speaker. Representative Philip A. Baddour, Jr., of Goldsboro, was elected majority leader. Representative William T. Culpepper, III, of Edenton, served as chairman of the Rules Committee. Representatives Ruth M. Easterling, of Charlotte, Warren C. Oldham, of Winston-Salem, David Redwine, of Shallotte, and Gregory J. Thompson, of Spruce Pine, served as co-chairmen of the Appropriations Committee. Representatives Gordon P. Allen, of Roxboro, Charles F. Buchanan, of Green Mountain, Paul Luebke, of Durham, and William L. Wainwright, of Havelock, served as co-chairmen of the Finance Committee. Reflecting the narrow margin of votes in the House, Representative Thompson, on the Appropriations Committee, and Representative Buchanan, on the Finance Committee, are Republicans. Denise G. Weeks was reelected principal clerk.

Table 1-2. Officers of the 2001 General Assembly

Senate	House
Beverly E. Perdue, President	
Marc K. Basnight, President Pro Tempore	James B. Black, Speaker
Frank W. Ballance, Jr., Deputy President Pro Tempore	Joe Hackney, Speaker Pro Tempore
Tony Rand, Majority Leader	Philip A. Baddour, Jr., Majority Leader
Patrick J. Ballantine, Jr., Minority Leader	N. Leo Daughtry, Minority Leader
Luther Henry Jordan, Jr., Majority Whip	Beverly Earle, Andrew T. Dedmon, Majority Whips
James Forrester, Minority Whip	W. Franklin Mitchell, Minority Whip
Janet B. Pruitt, Principal Clerk	Denise G. Weeks, Principal Clerk
LeRoy Clark, Jr., Reading Clerk	John Young, Reading Clerk
Cecil R. Goins, Sergeant-at-Arms	Robert R. Samuels, Sergeant-at-Arms

Rules

Two changes in the rules in 2001 are of more than technical interest. The Senate modified its Rule 17 on general decorum to prohibit its members from operating wireless telephones, pagers, or laptop computers on the floor during session. This change encountered opposition from some senators who think it would be beneficial to use a laptop computer on the floor. The House modified its Rule 26 to provide that the speaker pro tempore, majority leader, majority whips, and one member designated by the Speaker at the time of the appointments of committee chairmen are ex officio members of every standing committee except the redistricting committees.

General Assembly Staff

The extraordinary length of the 2001 session posed an interesting challenge to the General Assembly in dealing with some of its temporary staff members. Many of the temporary staff members—who work only during the session as legislative assistants to members, in the offices of the principal clerks, and in other positions—are persons who have retired from state service. Such retirees have a limited salary they can be paid annually by a state agency, generally half what they were making at the time of retirement or \$20,000, whichever is greater, plus a cost-of-living adjustment. If they are paid in excess of these limits, they lose their retirement benefits. Because of the length of the session, a number of these employees gave notice that they would have to stop working before adjournment. The General Assembly dealt with this issue in Section 32.21A(a) of

S.L. 2001-424 (S 1005), the Appropriations Act, by providing that the provisions of G.S. 135-3(8)c, which contains the salary limitation, do not apply to temporary employees of the General Assembly.

Legislative Lobbyists

Most state agencies employ at least one person full time as a legislative liaison. During a legislative session, these officials follow legislation and lobby on behalf of their departments. S.L. 2001-424, in Section 6.10, places limitations on these state agency activities. New G.S. 120-47.12(a) provides that no “principal State department” may use state funds to contract with non-state employees to act as lobbyists. It is unclear exactly what state agencies fit within the category of “principal State department[s],” but all state agencies may not be covered. For example, are the universities and community college system excluded because they have their own governing boards and do not answer directly to the Governor or members of the Council of State? New G.S. 120-47.122(b) provides that no more than two officers or employees of each “principal State department” and constituent institution of the University of North Carolina may be registered to lobby the General Assembly or designated as legislative liaisons. It is clear that the universities are included in this limitation but unclear whether the community college system is included as well.

Reports by the Attorney General

Over the past several years, the state’s financial position has been seriously impaired by court decisions finding two North Carolina statutes unconstitutional. (One of these statutes levied a tax on intangible personal property and another levied an income tax on certain beneficiaries of the state’s retirement system.) To obtain ample advance warning of such lawsuits, S.L. 2001-424, in Section 23.11, imposes certain reporting duties on the Attorney General. He is to make a report each April 1 and October 1 to the chairs of the Joint Legislative Commission on Governmental Operations, the chairs of the Appropriations Committees of the Senate and House, the chairs of the Finance Committees of the Senate and House, and the General Assembly’s Fiscal Research Division of any lawsuit challenging a law’s constitutionality and on any case in which more than \$1 million in damages is sought. The Attorney General is also required to report to the same entities and officers within thirty days any final judgment that orders the state to pay \$1 million or more.

Legislative Oversight Committees

Public Assistance Oversight

Since 1997 various agencies have been required to submit reports concerning the Work First Program to the Joint Legislative Public Assistance Commission. S.L. 2001-424, in Section 21.13, abolishes this commission and requires that these reports be made to the Senate Appropriations Committee on Health and Human Services and the House Appropriations Subcommittee on Health and Human Services.

Department of Juvenile Justice and Delinquency Prevention Oversight

S.L. 2001-138 (S 67) amends G.S. 120-70.94 to rename the Joint Legislative Corrections and Crime Control Oversight Committee the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and authorizes this committee to exercise oversight over

the Department of Juvenile Justice and Delinquency Prevention in addition to the other departments listed therein.

Joint Legislative Growth Strategies Oversight Committee

The Studies Act, S.L. 2001-491 (S 166), creates a new Joint Legislative Growth Strategies Oversight Committee (new G.S. 120-70.120 through G.S. 120-70.122). The committee consists of twelve members, six senators and six representatives, and is to address various growth issues. The committee's work is discussed in detail in Chapter 15, "Land Use Regulation, Community Planning, Code Enforcement, and Transportation."

Proposal for Session Limits

The record-setting length of the 2001 session has renewed discussion in the news media and among legislators about whether North Carolina should impose limits on the length of its legislative sessions. Two bills introduced during the 2001 session, S 104 and S 94, propose such limits. Both bills passed the Senate and, at adjournment, remained in the House Rules Committee. Under the terms of the adjournment resolution, they remain eligible for consideration in 2002.

Senate Bill 104 proposes constitutional amendments to be voted on in 2002. These amendments would change the terms of senators and representatives from two to four years and place limits on the length of legislative sessions. Regular sessions in odd-numbered years, beginning in 2003, would be limited to 135 calendar days, with a possible extension of 10 days by joint resolution. Regular sessions in even-numbered years would be limited to 60 calendar days, with a possible 10-day extension as well. The proposed amendment regarding session limits in odd-numbered years further states that "[i]f the General Assembly upon convening of the regular session meets for not more than two consecutive calendar days and then adjourns for not less than 30 days, that period of adjournment shall be excluded from the 135 days."

Senate Bill 94 implements the constitutional amendments proposed by S 104. It would amend G.S. 120-11.1 by changing the convening time of the General Assembly in odd-numbered years to the first Wednesday in December. The amendment proposed in S 104 requires that the December meeting days be counted as part of the 135-day limit.

Reading the amendment to G.S. 120-11.1 alongside the constitutional amendments raises questions about what changes, other than in session length, might occur in the legislative schedule. It seems likely that the General Assembly would convene in December for two days to elect officers and perform other organizational tasks. The Speaker of the House and President Pro Tempore of the Senate would appoint the committees and committee chairs, and members could begin introducing bills. After meeting for two days, both houses would adjourn until February or March—more probably March, because serious work on the budget cannot begin until after the state's first quarter revenue report has been completed and analyzed. During the period from December until February or March, bills would be introduced, referred to committees, and analyzed by General Assembly staff members in preparation for committee hearings. Some committees, probably the Appropriations and Finance committees, would meet during the adjourned period.

When the General Assembly convenes, it would have 135 calendar—not legislative—days to finish its work. This would likely mean more working time for legislators on Mondays, especially for committee meetings, and on Fridays. Friday sessions, now a rarity, would probably become commonplace. In summary, the compressed legislative schedule caused by session limits would remove most of the downtime from the sessions as they currently exist and intensify the work occurring during the available days.

The 2002 Session

Pursuant to the adjournment resolution, Res. 2001-36 (S 1109), the General Assembly will convene at noon on Monday, May 28, 2002. Only the following matters may be considered during that session:

- bills directly affecting the budget for fiscal year 2002–2003, provided they are introduced by June 13, 2002;
- bills introduced in 2001 and having passed third reading in the house of introduction and not unfavorably disposed of in the other house;
- bills implementing recommendations of study commissions or commissions directed to report to the General Assembly, the House Ethics Committee, or the Joint Legislative Ethics Committee, provided such bills are introduced by June 5, 2002;
- noncontroversial local bills, provided these are introduced by June 12, 2002;
- bills making appointments;
- bills authorized for introduction by a two-thirds vote of both houses;
- bills affecting state or local pension or retirement programs, provided these are introduced by June 12, 2002;
- bills proposing constitutional amendments;
- resolutions regarding state government reorganization, memorial resolutions, resolutions disapproving administrative rules, and adjournment resolutions.

Blank bills may not be introduced in the House of Representatives during the 2002 session.

William A. Campbell

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The State Budget

This chapter summarizes in broad outline the fiscal provisions of the 2001–2003 state budget and legislation affecting the development, enactment, and administration of the state budget. More detailed information regarding budgetary actions affecting specific state departments and agencies is included in some of the following chapters.

The Budget Process

North Carolina's state government operates on a fiscal year that runs from July 1 to June 30. During regular sessions in odd-numbered years, the General Assembly adopts a state budget that makes appropriations for each of the following two fiscal years. The General Assembly returns for a short session in even-numbered years to make adjustments to the state budget for the second year of the biennium.

The biennial state budget process begins with the formulation of budget recommendations by the Governor, who, by virtue of the state constitution, is the director of the budget. At the beginning of the first regular session of the General Assembly in each odd-numbered year, the Governor presents to the legislature his comprehensive budget recommendations for the next two fiscal years, including estimates of the amount of revenues available for appropriations, estimates of the appropriations needed to continue existing programs at their current levels, and recommended appropriations for expansion of existing programs, for new programs, and for capital improvements.

Although the House and Senate Appropriations Subcommittees initially meet jointly to review the Governor's budget proposals, the House and Senate each develop their own versions of the state budget. In recent years, the House and Senate have alternated from year to year the responsibility for initially passing a bill making appropriations for continuing operations, expansion, and capital improvements for state departments and agencies during the coming biennium. After the first chamber passes an appropriations bill, the second house revises the bill to reflect its own program priorities and policy considerations, and the differences between the two versions are resolved by conferees appointed by each chamber (or by a smaller group of

appropriations chairs and the leadership of the two chambers). The conference committee report incorporating the budget agreement between the House and Senate must then be adopted by both chambers and submitted to the Governor for approval.

In 2001 the Senate was responsible for taking the lead in preparing the state budget. It passed an appropriations bill (S 1005) on May 31, 2001. The House passed its version of S 1005 on June 28, 2001. The Senate refused to concur in the House version; a conference committee was appointed; and the committee's proposed bill was finally ratified by both chambers on September 21, 2001, nearly three months after the beginning of the fiscal year and nearly four months after passage of the Senate bill. It was signed by Governor Easley on September 26, 2001. The approved bill is S.L. 2001-424.

Although the Executive Budget Act [G.S. 143-15.1(a)] requires the General Assembly to enact a current operations appropriations act by June 15 of odd-numbered years, this was not possible in 2001 because the House and Senate could not agree on a budget before the beginning of the 2001–2002 fiscal year. Instead, the two chambers enacted a series of continuing budget acts that appropriated funds for state departments and agencies at their 2000–2001 levels from July 1 until July 16 (S.L. 2001-250); from July 16 until July 31 (S.L. 2001-287); from July 31 until August 29 (S.L. 2001-322); and from August 29 until September 28 (S.L. 2001-395). This last act was much more than merely an act to continue the budget. For example, it made appropriations for 2001–2002 of block grants for health and human services and natural and economic resources and for additional teachers to reduce kindergarten class sizes, and it enacted tuition increases for community colleges and universities.

The differences between the House and Senate bills that took so long to work out primarily involved where to make budget cuts and how deeply to make them, and whether taxes should be increased (and if so, which ones and by how much). The Senate version contained some drastic cuts in mental health services and education with which the House refused to concur, and the House generally wanted to see a lower increase in the sales tax and a higher increase in the individual income tax rates, if taxes had to be increased at all. It was a difficult task for all concerned because the state's financial situation was the worst it had been since 1991. On the date the General Assembly convened—January 24, 2001—there was a shortfall of approximately \$800 million in the 2000–2001 budget. But it was a financial situation—a crisis, really—that might have been foreseen. In the previous decade, the General Assembly had enacted tax cuts that amounted to 1.3 billion dollars a year, thereby permanently impairing the state's revenue structure. At the same time, it had significantly increased expenditures, especially for education. Also during the decade, the state had to deal with the extraordinary costs of Hurricanes Fran and Floyd and the refunds that had to be made as the result of losing lawsuits over intangibles taxes and taxes on the pensions of retirees. These events, however, should have been foreseen. North Carolina lies squarely in a hurricane zone; therefore, substantial hurricane damage should be anticipated every few years. Most informed lawyers would have predicted—at the time the suits were filed—that the odds were about 80–20 that the state would lose the lawsuit over the constitutionality of the intangibles tax and at least 50–50 that it would lose the suit filed by the retirees. These events could have been dealt with in several ways: rather than cutting taxes, the General Assembly could have increased the amounts appropriated to the contingency and emergency fund and the Savings Reserve Account in anticipation of extraordinary expenses; a temporary surtax could have been added to the sales tax or individual income tax; or bonds could have been issued. None of these measures was pursued, and thus when the state entered a recession in 2000, the unfortunate consequences of a decade of tax cuts yoked with new spending had to be dealt with by a new General Assembly and a new Governor. In an essay, Chancellor James R. Leutze, University of North Carolina at Wilmington, well summarized the situation:

Each time the state goes through this kind of trouble, we react the same way—we radically cut budgets, reduce staffs, withhold pay raises and cut out programs. Then, as always happens, things improve. When things improve, the state cuts taxes, adds major new initiatives and

otherwise acts as though we have been through a unique experience. During my three decades, we have gone up and down this road four times.¹

But the 2001 General Assembly chose not to go down this road again; instead, it made some rather modest cuts in programs and enacted some modest tax increases. Some cuts were made in the Medicaid program by reducing the reimbursements to physicians, but otherwise the program fared very well. Pay levels for public school teachers did not go as far toward reaching the national average as most teachers had hoped, but the budget did include a significant pay increase. The universities lost some nonteaching positions, but they received full funding for enrollment increases, and their overhead receipts for research were not tapped to help balance the budget. The broadest tax increase (0.5 percent) was in the sales tax, and an additional income tax bracket was added for upper income taxpayers. Also, some increases were made in taxes on alcoholic beverages, satellite television services, and certain telephone calls. In other words, there was nothing earthshaking on either the expenditure-reduction or taxation side.

The 2001–2002 Budget

The state budget is supported by four major sources of funding: (1) the General Fund; (2) the Highway Fund and Highway Trust Fund; (3) federal funds (including matching funds, categorical grants, and block grants), and (4) other receipts (such as tuition payments to state universities). The appropriations from these revenue sources, and the revenue sources themselves, are placed in four categories in the budget: (1) General Fund, (2) Highway Fund, (3) Highway Trust Fund, and (4) block grants of federal funds. For 2001–2002, the budget estimates that the following revenues will be available in these funds:

General Fund	\$14,530.0 (billions)
Highway Fund	1,318,690,000
Highway Trust Fund	988,723,000
Block Grants	783,782,668 Health and Human Services 45,000,000 Community Development

From these revenues, the General Assembly made the following current operations appropriations for 2001–2002:

General Fund	\$14,368,256,787
Highway Fund	1,318,690,000
Highway Trust Fund	988,723,000
Block Grants	783,782,668 Health and Human Services 45,000,000 Community Development

The General Fund appropriation is of most interest by far, and when newspaper reporters and others write about a 2001–2002 budget of “14.4 billion dollars,” it is the General Fund to which they are referring, although as can be seen, the total budget is considerably more than that. Of the General Fund appropriations, education and health and human services claim the lion’s share. The appropriation for education—including primary and secondary, community colleges, and the university system—is \$8.3 billion, or 58 percent of the General Fund budget. The appropriation to the Department of Health and Human Services is \$3.4 billion, or 24 percent of the budget. Thus, these two services share 82 percent of the General Fund appropriation.

1. James R. Leutze, *Raleigh News and Observer*, 7 May 2001.

Budget Highlights

The following are some of the highlights of the 2001–2002 budget:

- Mental Health Trust Fund for community based programs—\$47.5 million
- Clean Water Fund—\$40 million
- Savings Reserve Account—\$181 million
- More at Four program—\$6.5 million
- Kindergarten classes limited to 19 students
- 2.6 percent salary increase for teachers
- \$100 for each teacher to purchase school supplies
- \$625 annual salary increase for most state employees
- 2 percent cost of living increase for retirees in the Teachers’ and State Employees’, Judicial, and Legislative retirement systems
- Increase in the state sales tax of 0.5 percent, effective October 16, 2001, and expiring June 30, 2003
- Increase in the individual income tax rate of 0.5 percent for certain higher income taxpayers, effective January 1, 2001, and expiring December 31, 2003
- Sales tax holiday the first weekend of August each year on the purchase of school supplies, clothing, and footwear costing \$100 or less per item, and computers and accessories costing \$3,500 or less per item

Capital Appropriations

The General Assembly made the following appropriations from the General Fund for capital improvement projects in 2001–2002:

Repairs and Renovations Reserve Account	\$125,000,000
Department of Environment and Natural Resources	32,936,000

The Department of Environment and Natural Resources appropriation is to be expended on various water resources projects, the largest of which are deepening the Wilmington harbor (at \$22 million) and maintenance of the Shallowbag Bay channel (at \$2.5 million).

Conference Committee Report

The budget act was accompanied by a conference committee report on the bill, formally designated “Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, dated September 19, 2001.” This is an exceedingly important document because it specifies in detail how the appropriations made in the act are to be allocated and expended. Section 36.2(a) of S.L. 2001-424 provides that the conference committee report is to be used to construe the budget act, is to be considered part of the act, and is to be printed as part of the session laws.

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Children and Families

The General Assembly made changes in 2001 to a variety of statutes affecting the welfare of children and families. This chapter describes legislative actions taken concerning marriage, juvenile court proceedings and juvenile law, adoption, domestic violence, child support, and equitable distribution. Other chapters describing legislation that will have an impact on children and families include Chapter 5, “Courts and Civil Procedure”; Chapter 6, “Criminal Law and Procedure”; Chapter 9, “Elementary and Secondary Education”; Chapter 11, “Health”; Chapter 18, “Mental Health and Related Laws”; Chapter 22, “Senior Citizens”; and Chapter 23, “Social Services.”

Marriage Law Changes

In 1999 the General Assembly authorized the Legislative Research Commission to study North Carolina’s marriage laws. In January 2001, the commission submitted its report, which made recommendations to address eight problem areas. S.L. 2001-62 (H 142), effective October 1, 2001, rewrites various sections of G.S. Chapter 51 to effect changes in each of the eight areas.

Mode of Solemnization

The act amends G.S. 51-1 to broaden the ways in which marriages may be solemnized in North Carolina. Persons authorized to solemnize marriages continue to include (1) an ordained minister of any religious denomination, (2) a minister authorized by a church, and (3) a magistrate. Previously the law also specifically approved marriages performed according to the form and custom of the Society of Friends or the Baha’is, raising constitutional issues in relation to people who wanted to marry in accordance with the custom or form of some other faith. The new law provides that a couple may express their consent to marry in accordance with any mode of solemnization recognized by any religious denomination or by any federally or state recognized Indian Nation or Tribe. As before, the law makes no attempt to define “religious denomination” or “church,” and it requires no registration or other prior authorization of those who perform marriages.

Consent for Minors to Marry

Under prior law, a minor as young as twelve could marry if she was pregnant or had given birth and had the requisite consent. S.L. 2001-62 prohibits marriage in the state by any person under the age of fourteen. It continues the provision allowing a sixteen- or seventeen-year-old to marry with consent, and it specifies that the consent must be from (1) a parent having full or joint legal custody of the minor or (2) a person, agency, or institution having legal custody of or serving as guardian of the minor. S.L. 2001-62 required that the consent be acknowledged before a notary public or signed in the presence of the register of deeds. Section 60 of S.L. 2001-487 (H 338), however, amended S.L. 2001-62 to delete that requirement.

The act provides that a person who is age fourteen or fifteen may marry, but only if:

1. he or she is the mother or putative father of a child, whether born or unborn; and
2. he or she and the other parent of the child have agreed to marry; and
3. there is filed with the register of deeds a certified copy of an order issued by a district court judge authorizing the marriage.

To seek court authorization, a fourteen- or fifteen-year-old who meets the first two criteria must file a civil action in district court, pursuant to a new section, G.S. 51-2A. The court must appoint a guardian ad litem who is an attorney, pursuant to G.S. 1A-1, Rule 17, to represent the best interest of the minor. A conforming amendment to G.S. 7A-451 specifies that compensation of the attorney shall be in accordance with rules promulgated by the Office of Indigent Defense Services. The minor plaintiff must serve a copy of the complaint and summons on his or her mother and father; on any person, agency, or institution that has legal custody of or is serving as a guardian of the minor; and on the attorney who is appointed as the minor's guardian ad litem.

After a hearing, the district court judge may issue an order authorizing the marriage, but only if the court finds as a fact and concludes as a matter of law that:

- the minor plaintiff is capable of assuming the responsibilities of marriage, and
- the marriage will serve the minor's best interest.

The consent of the minor's parent is not required; however, the statute creates a rebuttable presumption that the marriage will not serve the minor's best interest when the parents oppose the marriage. There is no right to appeal the court's order, and if the court denies authorization for the minor's marriage, the minor may not seek the authorization of any court again until at least one year from the entry of the court's ruling. The court does not have authority to authorize marriage by a sixteen- or seventeen-year-old; only the consent of a parent, guardian, or custodian will suffice. Under existing law, however, a sixteen- or seventeen-year-old can petition the district court for a decree of emancipation. If the court grants the decree, under G.S. 7B-3505, the minor can marry without parental consent.

The act clearly characterizes the proceeding filed by a fourteen- or fifteen-year-old as a district court civil action, and it specifies that the minor plaintiff must pay the filing fee for a civil action (unless he or she is allowed to file as a pauper). It is not clear, then, why the act also amends G.S. 7B-200, the jurisdictional section in Subchapter I of the Juvenile Code, to add these proceedings to the list of matters over which the court has exclusive original jurisdiction. Although juvenile proceedings are civil and are in district court, procedurally and administratively they are handled somewhat differently from the way civil court actions are handled.

Geographical Scope of Marriage License

S.L. 2001-62 amends G.S. 51-6 and G.S. 51-16 to delete the requirement that a marriage license be obtained in the county in which the parties intend to marry. Those sections now make clear that the parties may obtain their license from a register of deeds anywhere in the state, then marry anywhere in the state. It will be important for officials who perform marriages to note that sometimes they will be required to return a license to the register of deeds in a county other than the one in which the marriage took place. Section 83 of S.L. 2001-487 makes a conforming amendment to G.S. 130A-110(a) regarding the responsibility of the register of deeds to make monthly reports of marriage information to the state Registrar.

Designation of Race on Marriage License

S.L. 2001-62 amends G.S. 51-16 to make the designation of the parties' race on the marriage license optional rather than mandatory. In addition, it increases from three to more than twenty (including "other") the options available to applicants who do want their race designated on the license.

Responsibilities of Register of Deeds

The act rewrites G.S. 51-8 to require the register of deeds, upon proper application, to issue a marriage license whenever (1) the applicants are able to answer the necessary questions about age, marital status, and intention to marry, and (2) based on the answers, the register of deeds determines that the applicants are authorized under North Carolina law to be married. The register of deeds still may require the applicants to provide supporting documents, but the change in wording suggests that he or she is not required, for example, to determine that an applicant is legally competent.

Application for License by Person Who Cannot Be Present

S.L. 2001-62 adds a new section, G.S. 51-8.2, which creates a procedure to accommodate people who want to marry and are in prison, hospitalized, or unable for some other reason to appear before the register of deeds to apply for a license. The procedure is not available to minors, even if they otherwise are qualified to marry, and it can be used only when one of the two parties is able to appear personally. That person may present an affidavit from the party who is not able to appear. The statute sets out the required contents of the affidavit, including a statement that attached to the affidavit are (1) proof that the person is over eighteen years of age and (2) any required documentation that the party is divorced.

Penalty for Aiding in Obtaining License by Misrepresentation

The law has long made it a misdemeanor to obtain a marriage license by misrepresentation or false pretenses. S.L. 2001-62 rewrites G.S. 51-15 to provide that it is also a misdemeanor to aid and abet another in the commission of that offense. It makes the new offense a Class 1 misdemeanor and changes the original offense from a Class 3 to a Class 1 misdemeanor.

Correction of Marriage Licenses

S.L. 2001-62 rewrites G.S. 51-18.1, which authorizes and provides a procedure for the correction of a name on a marriage application or license, to authorize and provide the same procedure for the correction of any error in an application or license.

Implementation

S.L. 2001-62 requires the Administrative Office of the Courts to develop "any and all forms necessary" for carrying out the act's purposes and to distribute them to the office of the Clerk of Superior Court in each county. That clearly would include forms relating to civil actions filed by fourteen- and fifteen-year-olds seeking judicial authorization to marry. Other "necessary" forms—a new version of the marriage license and an affidavit for people who are unable to appear personally to apply for a license—are not likely to be viewed as the responsibility of the Administrative Office of the Courts.

Special Provisions

In S.L. 2001-62 the General Assembly also amended G.S. 51-1 to provide that regular resident superior court judges may perform marriages; however, that amendment became effective May 19, 2001, and expired May 28, 2001. Two similar special provisions were enacted in S.L. 2001-14 (H 183). That act amended G.S. 51-1 to allow emergency superior court judges to perform marriages between April 13 and April 16, 2001, and to authorize district court judges to do so between June 1 and June 4, 2001. This kind of amendment generally results from a legislator's desire to accommodate a constituent who wants a particular judge to officiate at his or her marriage ceremony. The authorization is accomplished through general, though short term, changes in the law because of the state constitution's prohibition against private laws regarding marriage.

Child Welfare

Juvenile Court Proceedings

S.L. 2001-208 (H 375) makes various changes in Subchapter I of the Juvenile Code, G.S. Chapter 7B, relating to abused, neglected, and dependent juveniles. Originally, the act applied only to actions filed on or after its effective date, January 1, 2002. Section 101 of S.L. 2001-487, however, amended S.L. 2001-208 to provide that (1) provisions relating to relinquishments for adoption apply only to relinquishments executed on or after January 1, 2002, and (2) everything else in the act applies to actions pending or filed on or after January 1, 2002.

In regard to abuse, neglect, and dependency proceedings in juvenile court, the act

1. amends G.S. 7B-602 to require the court to appoint a guardian ad litem, pursuant to Rule 17 of the North Carolina Rules of Civil Procedure (G.S. 1A-1, Rule 17), for any parent who is a minor or whose incapacity is alleged as the basis for a juvenile's dependency. This requirement conforms to one that already exists in proceedings to terminate parental rights.
2. amends G.S. 7B-506(h) to require the court at nonsecure custody hearings (that is, hearings to determine whether a child should remain in custody pending the hearing on the merits) to inquire as to whether paternity is at issue. It also requires the court to make findings about any efforts that have been made to establish paternity and authorizes the court to order specific efforts.
3. amends G.S. 7B-807 to require that the adjudication order be in writing, contain findings of fact and conclusions of law, and be entered (signed by the judge and filed with the clerk) no later than thirty days following the adjudicatory hearing.
4. amends G.S. 7B-905(a), G.S. 7B-906(d), and G.S. 7B-907(c) to require that orders resulting from dispositional hearings, review hearings, and permanency planning hearings be entered within thirty days of the completion of the hearing.
5. amends G.S. 7B-904 to make clear that the court, at a dispositional hearing or subsequent hearing, may order a parent who is able to do so to pay child support when the child is not in that parent's custody.
6. amends G.S. 7B-904 to authorize the court, at a dispositional or subsequent hearing, to order a parent, guardian, custodian, or caretaker who was served with the proper summons to
 - attend and participate in parental responsibility classes;
 - provide transportation for the juvenile to keep appointments for medical, psychiatric, or other treatment if the juvenile remains in or is returned to the home, to the extent the person is able to do so;
 - take appropriate steps to remedy conditions in the home that led or contributed to the juvenile's adjudication or to the court's decision to remove custody from the parent, guardian, custodian, or caretaker.

It also specifically authorizes the court, on its own motion or motion of a party, to issue an order directing a parent, guardian, custodian, or caretaker to appear and show cause why he or she should not be held in civil or criminal contempt for willfully violating an order of the court. This group of changes comes in response to *In re Cogdill*, 137 N.C. App. 504, 528 S.E.2d 600 (2000), in which the court of appeals held that the trial court did not have authority to order a parent to maintain stable employment and housing and contact a child support agency, because the statute did not give the court that authority.

7. amends G.S. 7B-905(c) to authorize a county social services director to suspend temporarily the parental visitation plan for a child in the agency's custody, when the director determines that the plan may not be consistent with the child's health, safety, and best interest. A director who takes this action must file a motion for review promptly.
8. amends G.S. 7B-2901(a) to provide that the juvenile records maintained by the clerk of superior court may be examined and copied, without a court order, by the juvenile, the guardian ad litem, the county department of social services, the juvenile's parent, guardian, or custodian, or the attorney for the juvenile or the parent, guardian, or custodian. This provision corrects an oversight that resulted in the statute's authorizing no one to access the record without a court order.
9. amends G.S. 7B-1001 to require that any notice of appeal be given in writing, deleting the option of giving the notice orally at the end of a hearing.
10. amends G.S. 7B-1003 to provide that pending disposition of an appeal, the juvenile may be returned to the custody of the parent or guardian, with or without conditions, unless the court orders otherwise. This wording change removes a presumption that the child will be returned home.

In regard to voluntary foster care placements, the act amends G.S. 7B-910(c) to require that an initial review hearing be held not more than ninety days after the juvenile is placed in foster care and that another review be held within ninety days after the first review. It also shortens from twelve months to six months the maximum length of time the child may remain in a voluntary placement before the social services department is required to file a petition alleging abuse, neglect, or dependency.

In regard to termination of parental rights, the act

1. rewrites G.S. 7B-907(d) to require the department of social services to initiate a proceeding to terminate parental rights when a child has been placed outside the home for twelve of the last twenty-two months, unless the court finds that one of the statutory exceptions applies. This replaces a provision that required the court to order social services to file a termination petition when a child had been placed for fifteen of the last twenty-two months, unless one of the exceptions applied.
2. amends G.S. 7B-1106(a) to require that a summons be served on the juvenile in every termination proceeding, not just in cases in which the juvenile is twelve or older. Service on the juvenile is to be made on the juvenile's guardian ad litem if one is appointed.
3. amends G.S. 7B-1111(a)(8) to provide that in a termination proceeding based on the parent's alleged commission of one of several specified criminal offenses, the petitioner must establish that ground by proving either (a) the elements of the offense or (b) that a court of competent jurisdiction has convicted the parent of the offense, whether by jury verdict or any kind of plea.
4. amends G.S. 7B-1109(a) to require that a hearing on a termination petition or motion be held within ninety days after it is filed, unless the court orders that it be held at a later time.
5. amends G.S. 7B-1109(e) and G.S. 7B-1110(a) to require that orders resulting from adjudicatory and dispositional hearings be entered within thirty days following completion of the hearing.
6. amends G.S. 7B-1113 to require that any notice of appeal be given in writing and to specify that the juvenile, acting through the juvenile's guardian ad litem if one is appointed, may appeal.

Infant Abandonment

Lamentable and highly publicized instances of newborn infants being killed or abandoned, usually by very young mothers, has led many states to adopt legislation aimed at discouraging other young parents from taking that kind of action. In 1999 the General Assembly considered but did not enact legislation dealing with the abandonment of very young infants. This year the legislature enacted S.L. 2001-291 (H 275), which amends G.S. 7B-500 in the Juvenile Code to (1) allow a parent, within the first seven days of a child's life, to "give" the child to another person; (2) require certain professionals, and allow any other person, to accept physical custody of the child; and (3) set out the responsibilities of the person who receives the child. Under an amendment to G.S. 7B-1111(a), the parent's rights in relation to the infant may be terminated if the parent's abandonment of the infant has lasted for at least sixty consecutive days immediately preceding the filing of a petition to terminate parental rights.

The act amends several criminal statutes to ensure that the parent who avails himself or herself of the authorized procedure will not be criminally liable for doing so. A new section, G.S. 14-322.3, provides that a parent who abandons an infant younger than seven days of age pursuant to G.S. 7B-500 may not be prosecuted for abandonment under G.S. 14-322 or G.S. 14-322.1. The act also amends (1) G.S. 14-318.2 (misdemeanor child abuse) to provide that the parent may not be prosecuted under that section for any acts or omissions related to the care of the infant and (2) G.S. 14-318.4 (felony child abuse) to provide that the parent's abandonment of an infant pursuant to G.S. 7B-500 may be treated as a mitigating factor in sentencing for a conviction under that section for an offense involving that infant.

Amendments to G.S. 7B-500 provide that any adult may, and certain professionals must, accept temporary custody of an infant under seven days of age if a parent delivers the child to the person voluntarily and does not express an intent to return for the child. Those required to accept temporary custody in that circumstance are

- a health care provider (as defined under G.S. 90-21.11) who is on duty or who is at a hospital, a local or district health department, or a nonprofit community health center;
- a law enforcement officer who is on duty or at a police station or sheriff's department;
- a social services worker who is on duty or at a local department of social services;
- a certified emergency medical services worker who is on duty or at a fire or emergency medical services station.

The person who accepts temporary custody of the infant may inquire as to the parents' identities and as to any relevant medical history but also must notify the parent that he or she is not required to provide that information. The person accepting custody must act to protect the child's physical health and well-being and must notify the department of social services or a local law enforcement agency immediately. Anyone who accepts custody of an infant pursuant to these provisions is immune from civil or criminal liability that otherwise might be imposed as a result of the person's actions, as long as the person acts in good faith and the actions do not constitute gross negligence, wanton conduct, or intentional wrongdoing.

The act also amends G.S. 7B-302(a) to require the county department of social services, whenever it receives a report alleging that a child has been abandoned, to (1) initiate an investigation immediately, (2) take appropriate steps to assume custody of the child, and (3) take appropriate steps to obtain a court order allowing the agency to keep custody pending a court hearing. The social services director also must ask law enforcement officials to investigate, using the North Carolina Center for Missing Persons and other national and state resources to determine whether the juvenile is a missing child.

The act includes a requirement that the Division of Public Health in the Department of Health and Human Services develop recommendations for plans to inform the public about these new provisions. The plans must

1. contain information on responsible parenting in addition to information about the act's provisions;
2. target adolescents and young adults;

3. be developed in consultation with law enforcement officials, medical professionals, and representatives of the Department of Public Instruction; and
4. be reported to the General Assembly in a final report by April 1, 2002.

The act became effective July 19, 2001, and applies to acts committed on or after that date.

Social Services and Indian Affairs Collaboration

S.L. 2001-309 (S 715) directs the Division of Social Services in the Department of Health and Human Services (DHHS)—in collaboration with the Commission of Indian Affairs, the Department of Administration, and the North Carolina Directors of Social Services Association—to develop an effective process for accomplishing the following:

1. a relationship between the Division of Social Services and Indian tribes [as set forth in G.S. 143B-407(a)] that will enable tribes, tribal councils, or other tribal organizations to receive reasonable notice of Indian children who are being placed in foster care or for adoption or who otherwise enter the child protective services system, and to be consulted on policies and other matters relating to the placement of Indian children;
2. a process for identifying and recruiting Indian foster parents and adoptive parents;
3. a process for teaching appropriate child welfare workers and foster and adoptive parents the cultural, social, and historical perspective and significance associated with Indian life;
4. identification or formation of Indian child welfare advocacy, placement, and training entities with which DHHS might contract or form partnerships for implementing the act;
5. a valid and reliable process for identifying Indian children within the child welfare system; and
6. identification of the appropriate roles of the state and of Indian tribes, organizations, and agencies to ensure successful means for securing the best interests of Indian children.

Family Foster Homes

G.S. 130A-235 requires the state Commission for Health Services to adopt rules establishing requirements relating to sanitation and well-water testing for institutions and facilities that provide room or board for individuals and for which a license to operate is required. Effective May 24, 2001, S.L. 2001-109 (S 541) and S.L. 2001-487 rewrite the section to exempt single-family dwellings used as family foster homes or therapeutic foster homes from these rules. Foster homes are licensed and regulated by the state Division of Social Services pursuant to rules of the state Social Services Commission. S.L. 2001-487 also amends G.S. 131D-10.2, relating to the licensure of residential child-care facilities, to define *therapeutic foster home* as a “family foster home where, in addition to the provision of foster care, foster parents who receive appropriate training provide a child with behavioral health treatment services under the supervision of a county department of social services, an area mental health program, or a licensed private agency and in compliance with licensing rules adopted by” the Social Services Commission.

Adoption

S.L. 2001-150 (S 499) makes various changes in the adoption laws, effective November 1, 2001. S.L. 2001-208, as amended by S.L. 2001-487, makes several additional adoption-related changes, effective January 1, 2002.

Revocation of Consent

Whenever a parent consents to a child’s adoption or relinquishes a child to an agency for adoptive placement, the law specifies a period of time during which the parent may change his or her mind and revoke the consent or relinquishment. S.L. 2001-150 rewrites G.S. 48-3-608 and

G.S. 48-3-706 to make that time period seven days in all cases. That already was the time limit in cases involving children older than three months of age. The time period when the child was in utero or three months of age or younger, however, was twenty-one days.

Agency Identified Adoptions

S.L. 2001-150 defines *agency identified adoption* as a placement in which an agency has agreed to place the child with a prospective adoptive parent selected by the child's parent or guardian. S.L. 2001-208, as amended by S.L. 2001-487, rewrites G.S. 48-3-203 to deal with situations in which an agency identified adoption cannot be completed. It allows the parent who relinquished the child to revoke the relinquishment within ten days after receiving notice that the adoption cannot be completed. If the parent does not revoke or cannot be located after due diligence and mailing to the parent's last known address, the relinquishment becomes a general relinquishment, authorizing the agency to place the child in a home selected by the agency. This change applies only to relinquishments that are executed on or after January 1, 2002.

Preplacement Assessments

Sometimes adoptive placements occur before the completion of the preplacement assessment of the adoptive parent(s). S.L. 2001-150 adds to G.S. 48-3-307 a requirement that in that circumstance the prospective adoptive parent must file a certificate indicating that he or she has delivered a copy of the preplacement assessment to the parent or guardian who placed the child for adoption.

S.L. 2001-150 rewrites G.S. 48-3-202(b) to authorize the agency that prepares a preplacement assessment to redact, on the copy given to the placing parent or guardian, specified personal information relating to the prospective adoptive parent.

Affidavit of Parentage

G.S. 48-3-206 requires affidavits of parentage in both direct-placement and agency-placement adoptions. S.L. 2001-208, as amended by S.L. 2001-487, rewrites the section to (1) in a direct-placement adoption, allow any "knowledgeable individual" to sign the affidavit if the placing parent or guardian is not available, and (2) in an agency-placement adoption, delete the requirement for the affidavit when the agency acquires custody of the minor through a court order terminating the parent's or guardian's rights. The change becomes effective January 1, 2002.

Release of Identifying Information

The General Assembly approved a significant exception to the rule that agencies must keep confidential any information that would identify the child, the biological parents, or the adoptive parents. S.L. 2001-150 rewrites G.S. 48-9-109 to provide that in agency-placement adoptions, the parent or guardian who places the child for adoption and the adoptive parent(s) may enter into a written agreement consenting to the agency's release of identifying information. The consent must be signed and acknowledged under oath before the adoption takes place, and it must be filed with the court along with the adoption petition.

Advertising

S.L. 2001-150 includes an amendment to G.S. 48-10-101 allowing a person who has a current, favorable preplacement assessment to advertise his or her desire to adopt a child. The

advertisement may be published only in a periodical or newspaper or on radio, television, cable television, or the Internet. It must

- include a statement that the person has a completed preplacement assessment finding the person suitable to be an adoptive parent,
- identify the agency that completed the preplacement assessment, and
- identify the date the preplacement assessment was completed.

The advertisement may state whether the person is willing to provide lawful expenses. Previously, it was lawful for a person to “solicit” a child for adoption, but not to advertise in public media.

Notice vs. Termination of Parental Rights

In regard to agency-placement adoptions, S.L. 2001-150 rewrites G.S. 48-2-402(c) to make clear that the agency or other proper person must file a petition to terminate the parental rights of any “unknown parent or possible parent,” rather than just serving that parent with notice in the adoption proceeding. The act also adds a statement that nothing in the subsection requires an agency or person to file a petition to terminate the parental rights of “any known or possible parent” who has been served in the adoption proceeding with notice pursuant to G.S. 1A-1, Rule 4(j)(1) (personal service or service by registered or certified mail).

Residency of Children in Pre-adoptive Placement

G.S. 115C-366.2 creates several exceptions to the general rule that a child’s right to enroll in school in a particular place depends on the child’s “domicile” or that of the child’s parent or guardian. It provides that the place of the child’s actual “residence” is determinative in the cases of children of college or university students, faculty, or employees; children residing in group homes or foster homes; and children who reside with their legal custodians. S.L. 2001-303 (S 836) adds to this group of exceptions any child who resides in a pre-adoptive home following placement by a county department of social services or a licensed child-placing agency. The change became effective July 21, 2001.

Clerk’s Responsibilities

S.L. 2001-208, as amended by S.L. 2001-487, rewrites G.S. 48-9-102(d) to simplify the clerk’s handling of documents filed in an adoption proceeding. Effective January 1, 2002, it requires the clerk to retain the original petition and final decree and to send all other documents to the state Division of Social Services within ten days after the decree of adoption is entered or after the final disposition of an appeal.

In relation to adult adoptions, the act amends G.S. 48-2-401(d) to authorize the clerk, for cause, to waive the requirement of notice to the adult adoptee’s parent.

I.D. for Adoptee Born in Another Country

S.L. 2001-208 rewrites G.S. 130A-108 to make available from the State Registrar a certificate of identification for an adopted individual who was born in a foreign country and readopted in this state.

Delinquent and Undisciplined Juveniles

Secure Custody

S.L. 2001-158 (H 1083) amends G.S. 7B-1903(b) to allow the court to order secure custody of a juvenile who (1) has demonstrated that he or she is a danger to persons and (2) is charged with a

misdeemeanor in which the juvenile used, threatened to use, or displayed a firearm or other deadly weapon. The act applies to offenses committed on or after December 1, 2001.

Placement in Custody of Department of Social Services

S.L. 2001-208, as amended by S.L. 2001-487, amends G.S. 7B-2503(1) and G.S. 7B-2506(1) to require that any order placing an undisciplined or delinquent juvenile in the custody or placement responsibility of a county department of social services include a finding that the juvenile's continuation in his or her own home would be contrary to the juvenile's best interest. It also requires that the juvenile's placement be reviewed in accordance with G.S. 7B-906, the procedures that apply when the department has custody of abused, neglected, or dependent children. These changes are intended to satisfy requirements under the federal Adoption and Safe Families Act, to protect against the loss of federal funds that pay part of the cost of care for some of these children. The act is effective January 1, 2002, and applies to actions pending or filed on or after that date.

Day Reporting Centers

S.L. 2001-179 (S 876) amends G.S. 7B-2508(c) to provide that ordering a delinquent juvenile to a day reporting center ("supervised day program") is a Level 1 (community) as well as a Level 2 (intermediate) disposition. It also rewrites G.S. 7B-2506(16) to require the court, in deciding whether to order a juvenile to a particular supervised day program, to consider the structure and operations of the program and whether the program will meet the juvenile's needs. These changes became effective October 1, 2001, and apply to offenses committed on or after that date.

Section 8.7 of S.L. 2001-491 (S 166) authorizes the Joint Legislative Education Oversight Committee to study the development of standards for public schools' acceptance of schoolwork performed by suspended students at day reporting centers and other alternative schools.

Teen Court Guidelines

Section 24.8 of S.L. 2001-424 (S 1005) codifies guidelines for teen courts. The new section, G.S. 143B-520, requires all teen court programs administered by the Department of Juvenile Justice and Delinquency Prevention (DJJDP) to operate as community resources for the diversion of juveniles from juvenile court. It directs that a juvenile diverted to the program is to be tried by a jury of other juveniles and that if the jury finds that the juvenile has committed the delinquent act the jury may assign the juvenile to a rehabilitative measure or sanction, including counseling, restitution, curfews, and community service.

S.L. 2001-424 also provides that teen courts may operate as resources for the local school administrative units to handle problems that develop at school but have not been turned over to juvenile authorities. It requires every teen court program that receives state funds (including funds from a local juvenile crime prevention council) to comply with rules and reporting requirements of DJJDP and specifically requires that they report each year on the expenditure of state funds and the number of cases served.

Terminology

S.L. 2001-95 (H 274) deletes the term "training school" from the Juvenile Code (G.S. Chapter 7B) and other statutes and replaces it with the term "youth development center," effective May 18, 2001. The General Assembly rejected the first version of the bill, which would have referred to these facilities as "youth academies." The act also makes various technical corrections relating to juvenile justice terminology.

S.L. 2001-490 (S 68), effective June 30, 2001, rewrites G.S. 7B-1501, the definitional section of Subchapter II of the Juvenile Code, to

1. delete the terms “court counselor” and “intake counselor”;
2. define “intake” as “the process of screening and evaluating a complaint alleging that a juvenile is delinquent or undisciplined to determine whether the complaint should be filed as a petition”; and
3. define “juvenile court counselor” as a person “responsible for intake services and court supervision services to juveniles under the supervision of the chief court counselor.”

It then makes numerous conforming amendments in the Juvenile Code and related statutes, substituting “juvenile court counselor” wherever the term “court counselor” or “intake counselor” appeared.

S.L. 2001-490 also rewrites G.S. 17C-2(3) to make clear that chief court counselors and juvenile court counselors are “criminal justice officers” for purposes of criminal justice education and training standards.

Department of Juvenile Justice and Delinquency Prevention

S.L. 2001-199 (S 7) amends G.S. 143B-544 to provide that, if possible, two members of each local juvenile crime prevention council should be under the age of eighteen, and one of them should be a member of the State Youth Council. It also amends G.S. 143B-556 to add as members of the State Advisory Council on Juvenile Justice and Delinquency Prevention (1) the Attorney General; (2) a person under the age of eighteen who is a member of the State Youth Council, appointed by the Governor; and (3) a person under the age of eighteen, appointed by the Chief Justice of the Supreme Court.

S.L. 2001-138 (S 67) rewrites G.S. 120-70.94, effective July 1, 2001, to authorize the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee (formerly the Joint Legislative Corrections and Crime Control Oversight Committee) to examine the effectiveness of the Department of Juvenile Justice and Delinquency Prevention in carrying out its responsibilities; study the budget, programs, and policies of the department; and report to the General Assembly on any legislation needed to implement recommendations of the committee.

S.L. 2001-490 makes the Secretary of Juvenile Justice and Delinquency Prevention a continuing, ex officio member of the North Carolina Criminal Justice Education and Training Standards Commission. It also rewrites G.S. 143B-516(b) to authorize the secretary to designate persons, as necessary, as state juvenile justice officers, to provide for the care and supervision of juveniles who are placed in the department’s physical custody.

Pilot Alternative Programs for Suspended Students

S.L. 2001-178 (S 71) requires the State Board of Education, in cooperation with the Department of Juvenile Justice and Delinquency Prevention (DJJDP), to establish up to five pilot programs in which local school administrative units place all students who are on short-term, out-of-school suspension in alternative learning programs. The chief court counselor in the judicial district is required to work closely with the pilot unit in developing a plan for alternative learning programs. The unit must also consult other interested parties such as local designees of specified state departments, the local juvenile crime prevention council, parents, other agencies serving juveniles and their families, business leaders, and youth representatives.

The act authorizes the state DJJDP and local juvenile crime prevention councils to use their resources to meet the needs of students in the pilot program. To the extent reasonable and practicable, a pilot unit must ensure that suspended students are in programs or classrooms separate from those in which violent adjudicated offenders are placed. A pilot program may not send suspended students to programs or classrooms in youth development centers, detention centers, or similar facilities. The Department of Public Instruction and DJJDP are required to report to the Joint Legislative Education Oversight Committee by April 15, 2003, and the report must include a recommendation as to whether the program should be instituted statewide.

The act is discussed more fully in Chapter 9, “Elementary and Secondary Education.”

Domestic Violence

S.L. 2001-518 (S 346) amends G.S. 50B-1(a) to expand the circumstances under which a plaintiff can request a civil protection order. The definition of domestic violence is amended to include actions that place “the aggrieved party or a member of the aggrieved party’s family or household in fear of ... continued harassment ... that rises to such a level as to inflict substantial emotional distress.” The definition of harassment is found in G.S. 14-277.3, the statute creating the criminal offense of stalking. Harassment covers a variety of conduct, including communication directed at a specific person in writing or by telephone, fax, or electronic mail that “torments, terrorizes, or terrifies that person and that serves no legitimate purpose.”

S.L. 2001-518 also amends provisions of G.S. 50B-2(c1), which authorize magistrates to enter ex parte civil protection orders under certain circumstances. The amendment provides that a hearing on an ex parte order granted by a magistrate must be held before a district court judge by the end of the next day on which district court is in session in the county in which the action is filed. The amendment deletes the requirement that the hearing before the judge be held within seventy-two hours. The new law also amends G.S. 50B-4.1 to increase the criminal penalties for persons who commit a felony while the felonious conduct is prohibited by a domestic violence civil protection order, as well as for persons convicted three or more times of violating a civil protection order. The increased penalties are discussed in Chapter 6, “Criminal Law and Procedure.”

S.L. 2001-277 (H 643) makes certain communications between victims and agents of rape crisis centers or domestic violence programs privileged. The new law is discussed in Chapter 5, “Courts and Civil Procedure,” and in Chapter 6, “Criminal Law and Procedure.” Also, S.L. 2001-175 (H 665) extends the time period for filing civil actions for assault and for battery from one year to three years. This new law, as well as the budget provisions relating to the funding of domestic violence programs, is discussed in Chapter 5, “Courts and Civil Procedure.”

Child Support

S.L. 2001-237 (H 377) makes several clarifying and administrative changes to the General Statutes pertaining to child support. Unless otherwise indicated, the provisions of the act are effective June 23, 2001. The act

- amends G.S. 50-13.4 to provide specific authority for a judge to order that a responsible parent in a IV-D establishment case perform a job search, if the parent is not incapacitated. The act also specifies that a judge can order the responsible parent to participate in “work activities” as defined in 42 U.S.C. § 607. The activities set out in that federal statute include: (a) private or public sector employment; (b) work experience, if private sector employment is not available; (c) on-the-job training; (d) job search and readiness assistance; (e) community service programs vocational training (not to exceed twelve months); (f) education directly related to employment (only for those parents who have not received a high school diploma or certificate of high school equivalency); (g) satisfactory attendance at a secondary school or study to obtain certificate of high school equivalency (for those who have not completed secondary school or obtained a certificate); and (h) the provision of child care services to an individual who is participating in a community service program.
- amends G.S. 50-13.4(8) and (9) to provide that when arrears are reduced to judgment, the judgment may provide for periodic payment on the total amount owed. The periodic payment provisions are enforceable by contempt.
- amends G.S. 110-132 and -134 to change terminology: a father’s “acknowledgment of paternity” and the mother’s “affirmation of paternity” now both will be called “affidavits of parentage.”
- amends G.S. 110-136.4 to provide that when implementing income withholding in IV-D cases, an employer is to be served with notices in accordance with Rule 5 of the Rules of Civil

Procedure rather than pursuant to Rule 4. Section 72 of S.L. 2001-487 (the Technical Correction Act) amends G.S. 110-136.5(d) to allow Rule 5 service in non-IV-D cases as well. This means that notices may be sent by regular mail rather than by the more formal methods of Rule 4 service of process (registered mail, return receipt requested; or personal delivery by an authorized person).

- amends G.S. 110-139(c1) to clarify that an employer's written verification may be used to establish an obligor's employment and income in enforcement proceedings as well as in establishment and modification proceedings. (Before this amendment, the statute only mentioned establishment and modification proceedings.)
- amends G.S. 50-13.9(b1) to specify that in IV-D cases, the payment records maintained by the local child support enforcement agency shall be admissible in any court action establishing, enforcing, or modifying a child support order. The court must permit the local agent to authenticate the records.
- amends sections of G.S. Chapter 110 to require use of the National Medical Support Notice to notify employers and health care insurers or health care plan administrators of a court order entered pursuant to G.S. 50-13.11 for health benefit coverage in a IV-D case. The new statutes set out the responsibilities of the IV-D agency, the employer, and the health insurers or plan administrators. The provisions specifying responsibilities of the health insurers and plan administrators are not effective until July 1, 2002.

Equitable Distribution

The General Assembly enacted two pieces of legislation affecting the settlement of financial issues between divorcing spouses.

Death of a Party

S.L. 2001-364 (H 1084) amends G.S. 50-20 and 50-21 to specify that pending court claims for the distribution of property between separated spouses do not abate upon the death of one of the parties. The amendments are effective August 10, 2001, and apply to actions pending or filed on or after that date. The amendments reverse in part the decision by the North Carolina Supreme Court in *Brown v. Brown*, 353 N.C. 220 (2000). In *Brown*, the court held that an action for equitable distribution does not proceed in court after the death of a party if the parties were not divorced before the death. According to the supreme court, equitable distribution and divorce are "inextricably linked," and because a divorce action abates upon the death of a party, so should a claim for equitable distribution. The General Assembly responded by amending the equitable distribution statutes to allow a surviving spouse to proceed with a claim for distribution that was filed with the court before the death of the other spouse regardless of whether divorce had been granted. G.S. 50-20(c) is amended to provide that, when one spouse dies while the equitable distribution claim is pending, property passing to the surviving spouse due to the death of the other spouse, as well as a spouse's right to claim an elective share pursuant to estate law, must be considered as factors in a court's determination of how to distribute marital property between the surviving spouse and the estate of the deceased spouse. Conforming changes are made to estate statutes to clarify that a pending equitable distribution action is a claim against the estate of the decedent spouse, and G.S. 29-14 is amended to provide that the elective share of the surviving spouse must be reduced by the value of the property awarded to the surviving spouse in the final equitable distribution judgment.

Mediation of Family Financial Issues

In 1997 the General Assembly authorized the Administrative Office of the Courts to establish a pilot program in which parties to district court actions involving family financial issues may be

required to attend a pretrial mediated settlement conference. As of July 1, 2001, the Administrative Office of the Courts had established pilot programs in ten judicial districts. S.L. 2001-320 (H 668), effective July 1, 2001, amends G.S. 7A-38.4A to allow the program to expand to all districts in the state. The act authorizes all chief district court judges to mandate mediated settlement conferences in any action involving equitable distribution, alimony, child or post-separation support, or claims arising out of contracts between spouses. Other types of settlement procedures may be used with the consent of the parties. A chief district court judge may implement the program by adopting local rules consistent with guidelines promulgated by the North Carolina Supreme Court. The statute requires that all parties, their attorneys, and other persons with authority to settle a claim attend the required settlement conference and authorizes the imposition of sanctions for parties who, without good cause, fail to attend a scheduled conference. A judge may excuse attendance by victims of domestic violence. The cost of the mediated settlement conferences or other settlement procedures is to be shared by the parties.

Related Legislation

Bicycle safety. The “Child Bicycle Safety Act,” which became effective October 1, 2001, establishes helmet and other safety requirements for children under the age of sixteen who operate or are passengers on bicycles. This new law, S.L. 2001-268 (H 63), is discussed in more detail in Chapter 19, “Motor Vehicles.”

Supervising drivers. S.L. 2001-194 (H 78) authorizes grandparents to act as supervising drivers for drivers with limited learner’s permits.

New criminal or delinquent offense. S.L. 2001-360 (S 1081) makes it a Class F felony for a person in the custody of the Department of Juvenile Justice and Delinquency Prevention, a law enforcement officer, or other specified custodians to knowingly and willingly throw, emit, or cause to be used as a projectile bodily fluids or excrement at a state or local government employee while that person is performing his or her duties. The act applies to offenses committed on or after December 1, 2001.

Treatment courts. While the General Assembly did not enact legislation expanding the family court pilot project (H 901), the budget contains a provision authorizing the creation of pilot Family Drug Treatment Court Programs in district court districts 3B (Craven, Pamlico, and Carteret Counties) and 28 (Buncombe County).

Studies

In addition to any studies mentioned above, the General Assembly authorized or required a variety of studies relating to children and families.

Children Receiving Psychotropic Medications

S.L. 2001-124 (S 542) directs the Department of Health and Human Services and the Department of Juvenile Justice and Delinquency Prevention to review the need for a statewide database on the administration of psychotropic medications to children who receive state services while residing in facilities administered by either department. The departments must report their findings and recommendations by January 1, 2002.

Child Abuse/Neglect in Child Care Facilities

S.L. 2001-491, the Studies Act of 2001, authorizes the Legislative Research Commission to study child abuse and neglect in child care facilities. The commission determines which of many authorized studies it will conduct. In determining the nature, scope, and aspects of a study, the commission may consider the bill or resolution that originally raised the issue or proposed the

study. House Bill 456, which did not pass, is cited in the Studies Act as the source of the study of child abuse and neglect in child care facilities. That bill required a study that specifically included:

1. identification of factors that limit the efficiency and effectiveness of investigations of child abuse and neglect in child care facilities;
2. determination of the reasons behind those factors and the impact they have on the safety of children in child care;
3. recommendations on ways to make the investigation of child abuse and neglect in child care facilities more effective and efficient;
4. determination of how the safety of children is impacted by the presence of child care workers who are perpetrators in substantiated cases of child abuse and neglect;
5. recommendations on the need for work-related sanctions against individual child care workers who are perpetrators in substantiated cases of child abuse and neglect; and
6. recommendations on the need for a registry of individuals who are perpetrators in substantiated cases of child abuse and neglect, on who should have access to the registry, and on how the due process rights of the alleged perpetrators should be protected.

The bill also provided for study of issues related to expungement of information from the Central Registry of abuse, neglect, or dependency; whether the Division of Child Development in the Department of Health and Human Services should have access to information in the Central Registry for the purpose of verifying whether a person seeking to be employed in a child care facility has been substantiated for child abuse, neglect, or dependency; and establishment of the most appropriate and cost-efficient appeals process.

Other LRC Studies Relating to Juveniles

Other subjects that S.L. 2001-491 authorizes the Legislative Research Commission to study are listed below (if the study was proposed originally in a bill that did not pass, the number of that bill is in parentheses):

- improving the academic performance of juveniles in education programs in juvenile facilities,
- establishing procedures in the Juvenile Code for juveniles who lack the capacity to proceed in delinquency proceedings (H 138),
- procedures for the commitment of delinquent juveniles and other issues relating to Subchapters II and III of the Juvenile Code (H 277), and
- allowing counties to appeal certain orders in juvenile court (H 1314).

Incest Penalty Study

In S.L. 2001-491 the General Assembly authorized the Sentencing and Policy Advisory Commission to study the current punishments for incest (G.S. 14-178 and G.S. 14-179) to determine whether they are consistent with punishments for other sex offenses and to study the incest statutes' application to acts between related minors. House Bill 1276, which is eligible for consideration in the short session, would amend the criminal statutes regarding incest.

Underage Drinking

S.L. 2001-491 creates a fifteen-member Underage Drinking Study Commission to study matters relating to alcohol consumption by persons under the age of twenty-one, to evaluate current laws, and to recommend changes to reduce underage persons' access to alcohol. The commission must make an interim report to the Joint Legislative Commission on Governmental Operations on or before May 1, 2002, and a final report by December 1, 2002. The Underage Drinking Study Commission terminates upon submission of its final report.

Bills That Did Not Pass

Bills Eligible for Further Consideration

Bills that passed in the House but not the Senate, or vice versa, may be considered further during the 2002 session. These include bills that would

1. amend the definition of *abuse* in both the Juvenile Code and the criminal law to include persistently fabricating or misrepresenting medical illness in the child, by producing or simulating the illness, in order to obtain otherwise unnecessary medical care (H 93);
2. make various changes relating to agency coordination, especially in relation to educational matters, with respect to children in group homes or other out-of-home placements (S 163); and
3. abolish the civil causes of action for criminal conversation (adultery) and alienation of affection. Alienation of affection is a claim for money damages against a third party for breaking up a marriage (H 576).

Bills Not Eligible for Further Consideration

Bills that were introduced but did not pass in either the House or the Senate are not eligible for consideration in the 2002 session. These include bills that proposed amending the Juvenile Code to

1. specify the circumstances under which a social worker could enter a private residence for investigation purposes (H 971);
2. require the court to appoint counsel for a juvenile before the intake evaluation when the juvenile is alleged to have committed an offense that would be a felony if committed by an adult (S 935);
3. establish procedures relating to juveniles who are alleged to be delinquent and who lack, or are alleged to lack, the capacity to proceed (Note above, however, that the Legislative Research Commission is authorized to study this issue. Bills that implement the recommendations of a study commission are eligible for consideration in the short session.); and
4. require that a DNA sample be taken from a juvenile whose case is transferred to superior court (S 95).

Another bill would have rewritten parts of the adoption law, G.S. Chapter 48, to provide for post-adoption privileges in certain circumstances, based on a written agreement between an adopted child's birth relative and the adoptive parent (H 1164).

Senate Bill 1057 would have prohibited the assessment of court costs to plaintiffs filing for a domestic violence civil protection order pursuant to G.S. 50B.

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Community Development and Housing

In 2001, proposed changes to the William S. Lee Quality Jobs and Business Expansion Act dominated the community development legislative agenda. The proposals ranged from eliminating the act to significantly strengthening it. The changes that ultimately were made were fairly moderate; some were designed to either expand or restrict benefits under the act, but most served to clarify various ambiguities.

Community Development

Changes to the Bill Lee Act

The William S. Lee Quality Jobs and Business Expansion Act, enacted in 1996, is now considered the state's main economic development legislation. The act offers tax credits to companies in specifically named industrial classifications that create jobs or invest in machinery and equipment, worker training, research and development, and central offices. For many of the credits, the state is divided into five tiers based on per capita income, unemployment rates, and population growth. The lower the tier designation—that is, the more economically distressed the county—the larger the available tax credit. The General Assembly has sought to bolster or better focus the act in sessions subsequent to the original enactment, and this session was no exception. This year the General Assembly's changes to the act included:

- Modifying the rules governing the tier categorization of two-county industrial parks, making it easier for them to qualify for lower tier status [S.L. 2001-94 (S 538)].

- Directing the Department of Revenue to make the final decision on a company's qualification for tax credits [S.L. 2001-476 (S 748)].
- Extending the carryforward period for the research and development tax credit from five to fifteen years.
- Rewriting industry definitions to clarify that a taxpayer is not considered to be part of an eligible industry classification unless the establishment for which the credits are claimed is part of the taxpayer's primary business.
- Clarifying that the minimum investment threshold applies separately to each establishment's site or location.
- Adjusting the thresholds for the small county exceptions to provide that (1) a county with a population of less than 12,000 (formerly 10,000) and a poverty rate of higher than 16 percent must be designated a tier one county (under the current tier ranking, only Alleghany and Jones counties would be affected), and (2) a county with a population of under 35,000 that would otherwise be designated a tier four or five county must be designated tier three (using 2001 data, this provision affects Alexander, Dare, Davie, Macon, and Transylvania counties).
- Making a customer service center or electronic mail order house located in a tier three county eligible for credits. The credit was previously limited to those establishments that were located in tier one or two counties.
- Giving tax credits to companies that invest at least \$10 million in real estate in a tier one or tier two county and hire at least two hundred workers within two years. This is considered the most significant change made to the act in the 2001 session.
- Reducing the sales tax rate of electricity sold to manufacturers for use at a manufacturing facility from 2.83 percent to .17 percent for industries that use over 1.2 million megawatts per year. This reduction is effective July 1, 2002. Beginning July 1, 2005, a new tax rate structure will be based on annual megawatt hours used in the manufacturing process. Firms using 5,000 megawatts or less in a year will continue paying a sales tax of 2.83 percent on electricity. Firms using over 5,000 and up to 250,000 megawatts annually will be taxed at 2.25 percent; those using over 250,000 and up to 1.2 million megawatts annually will be taxed at 2 percent; and those using over 1.2 million megawatts annually will be taxed at .17 percent. The rate changes allow Alcoa to claim a tax credit for electricity it uses at its plant in Badin. The company contended that the changes were consistent with an agreement that it had made with legislators.

Community Development Training Study

The budget bill, S.L. 2001-424 (S 1005), directs the Department of Commerce to explore the development of a training program for administrators of Community Development Block Grants. The department has contracted with the Institute of Government to conduct the study. Findings and recommendations will be reported to the House and Senate Appropriations subcommittees on Natural and Economic Resources and the Fiscal Research Division of the General Assembly by February 1, 2002.

Governor's Competitive Fund

The General Assembly appropriated \$15 million for the Industrial Recruitment Competitive Fund. This fund, which is commonly referred to as the Governor's Competitive Fund, grants the Governor significant discretion to provide perquisites to employers considering moving their companies to North Carolina. S.L. 2001-424 provided the largest appropriation since the creation of the fund.

Water and Sewer Bonds

S.L. 2001-238 (S 123) amends G.S. 159I-30(a) to authorize local governments to issue special obligation bonds for water supply systems, water conservation projects, water reuse projects, wastewater collection systems, and wastewater treatment works.

Affordable Housing

Mortgage Lending Act

In S.L. 2001-393 (S 904) the General Assembly repealed the laws governing registration of mortgage brokers and bankers (Article 19 of Chapter 53 of the General Statutes) and enacted G.S. 53-243 to require licensure of these professionals. Under the prior law, it was clear that governments providing first mortgage loans were exempt from registration. It was not clear, however, whether governments were exempt from registration when providing second mortgage loan programs.

The new Mortgage Lending Act provides that, except for some exemptions, it is now unlawful to act as a mortgage broker or banker or engage in the business of a mortgage broker or banker without first obtaining a license from the Commissioner of Banking. Governments are specifically exempt from the licensure requirements when providing any mortgage loan authorized by law.

Housing Finance Agency Changes

The Housing Finance Agency was granted greater authority to invest Housing Trust Funds and issue bonds. S.L. 2001-181 (S 311) amends G.S. 122A-11 to expand the classes of securities in which the Housing Finance Agency may invest Housing Trust Fund dollars. In S.L. 2001-185 (S 236), the cap on outstanding bonds for the Housing Finance Agency was increased from \$1.5 billion to \$3 billion.

The General Assembly also enacted S.L. 2001-299 (S 367), which exempts the agency from Administrative Procedure Act requirements when it adopts a qualified allocation plan as required by 26 U.S.C. § 429(m). The changes to G.S. 143-433.9 set forth the following alternative procedure: The agency must publish the proposed plan in the North Carolina Register at least thirty days prior to the adoption of the final plan, notify any person who has applied for the low-income housing credit in the previous year and any other interested parties of the intent to adopt the plan, accept oral and written comments on the proposed plan, and hold at least one public hearing on the plan.

Minimum Housing Ordinances

Last session the General Assembly authorized municipalities located in counties with populations of more than 71,000 to require owners of buildings that have been vacated and closed for a year to either repair or demolish the building [G.S. 160A-443(5a)]. In S.L. 2001-283 (H 307) the legislature clarifies that these provisions are available to any municipality located in more than one county if at least one of the counties has a population of more than 71,000.

Floyd Recovery

Localities that participated in the Hazard Mitigation Grant Program after Hurricane Floyd sought authority this session to allow persons displaced by the federal buyout program to repurchase their homes and move them to another location. S.L. 2001-29 (H 18) allows a county to sell the property back to the property owner as part of a private sale if (1) the property owner

will initially occupy the dwelling, (2) the dwelling is properly repaired in compliance with the North Carolina Building Code, and (3) the sale takes place on or before July 31, 2001.

Public Housing

The General Assembly extended the Local Government Budget and Fiscal Control Act to housing authorities. See Chapter 16, "Local Government and Local Finance," for a detailed discussion about this new law.

Local Affordable Housing Act

S.L. 2001-104 (H 866) authorizes the City of Greenville to require absentee owners of rental property located within the city to authorize an agent residing in Pitt County to accept service of process. The owner must notify the city clerk of the authorized agent's name and address. Owners who live in Pitt County are exempt from the requirements of this law.

Anita R. Brown-Graham

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Courts and Civil Procedure

It was a relatively quiet year for legislation affecting the courts. After the 1990s, in which there was much talk of court reform involving family court, appointment or merit selection of judges, reorganizing the courts into circuits, and other similar efforts, 2001 saw relatively few such ideas finding their way into legislative activity. The most significant bill affecting the administration of the system was S.L. 2001-403 (S 119), which shifted district court elections from partisan to nonpartisan. There were, as usual, a few bills changing judicial district lines, and there were a few bills that would have made significant changes that did not pass this session. Senate Bill 1054, proposing public financing of appellate judicial races, was passed by the Senate very late in the session but was not voted on by the House. The bill would set up a voluntary system for candidates for appellate judgeships in which they could receive public funding for their campaigns, but they would have to agree to fund-raising and spending limits. It is eligible for consideration in the 2002 session.

After an aggressive effort in the late 1990s to come up with a long-term plan to modernize the system's information system, 2001 was a disappointing year. Chief Justice Lake, in his State of the Judiciary address on March 26, noted that

the report of the internationally respected Gartner Group . . . warned of severe, pending problems due to lack of technology in our courthouses across the state. [The legislature's] initial funding has already been used to begin a number of urgently needed and cost-effective programs. I emphasize "to begin" because without additional or at least continuation funding, these programs will falter and fail, thus wasting the investment made to date.

The state budget's difficulties are noted elsewhere in this publication, but one of many effects of the budgetary difficulties was the elimination of funding for court technology improvements.

This chapter will discuss this funding cutback and its effects in more detail and will also describe the significant changes to noncriminal court procedural rules and to statutes regulating

the work of magistrates and the clerks of superior court. Chapter 6 (“Criminal Law and Procedure”) and Chapter 19 (“Motor Vehicles”) also contain information about legislation that affects the courts.

Court Organization and Administration

Budget

The court system’s budget [Section 22, S.L. 2001-424 (S 1005)] for 2001–2003 was included in two categories, judicial operations and indigent defense. This categorization reflects the fact that funds to provide indigent defense services are the responsibility of the Indigent Defense Services Commission, which was established by the General Assembly in 1999. For the current biennium, the court system’s operating budget is \$305.5 million per year and the indigent defense budget is approximately \$70 million. The operating budget was cut by approximately \$3 million per year. The cuts came in many administrative categories such as jury fees, unemployment payments, temporary services, fringe benefit costs, equipment maintenance costs, overtime costs, and lease costs. The cuts also include a reduction in superior court judges’ travel for educational conferences; those judges also receive an annual subsistence allowance to cover their costs when they rotate into out-of-town districts to hold court. In 2000 the amount of overnight travel in which judges were expected to engage was reduced by a significant realignment of the divisions through which they were expected to rotate. The superior court judges’ expenses for educational events will now have to be paid from that annual allowance.

There were also some new positions created. A superior court judgeship that was established for district 4B (Onslow) in the 2000 legislative session was redirected to District 24 (Avery, Mitchell, Watauga, Yancey, and Madison). Effective October 1, 2001, the Governor is authorized to appoint the initial occupant of that judgeship. A vacant, never-filled district judgeship in district 17A (Rockingham) was eliminated, and a new district judgeship was established in District 10, effective January 1, 2002. In addition, a new special superior court judgeship was established effective October 1, 2001, as were new magistrate positions in Columbus and Chowan counties, and a vacant magistrate position was moved from Johnston to Swain County. Two new clerk positions were established—a new deputy in Brunswick and a new assistant in New Hanover, effective July 1, 2001.

The court system prepared a budget requesting \$7 million in additional technology funding for fiscal year 2001–2002 and \$6 million for 2002–2003. The request addressed the items included in the technology plan prepared in the late 1990s at the legislature’s request by the Gartner Group (a private consulting firm selected to prepare the plan). The request would have funded improvements in Internet connectivity, wide-area network security, increased support for the computer services helpdesk, increased field support for court officials using personal computers, the provision of laptops for prosecutors and public defenders, limited use of wireless technology to provide computer network services to courtrooms, improvements in a program to further computerize the civil judgment process, and increased technological support for family courts. None of those items were funded.

The only new funds for the court’s technology initiatives were \$475,000 in 2001–2002 and \$125,000 in 2002–2003 to provide telephone services to new courthouses that are to be completed in those years.

The indigent defense budget was reduced in two instances. The first reflects an increase in the amount collected from criminal defendants who use the indigent defense services system. That increase allowed the General Assembly to reduce the appropriation to the Indigent Defense Services Commission by the amount of the increase (\$750,000 per year). In addition the General Assembly has in recent years earmarked some indigent defense funds for the North Carolina State Bar to support the work of Legal Services of North Carolina (which provides services in civil

matters to poor people in the state). The General Assembly instead earmarked a portion of the court costs to provide that funding and the funding to the commission was reduced by that amount.

The indigent defense budget received an overall increase of around \$3 million. This reflects the increasing costs of providing these services, which are generally required to be provided by the United States Constitution.

District Court Elections

S.L. 2001-403 provides that, beginning in the 2002 election, district court judges will run in nonpartisan elections. District judges will still run in designated seats, so that if there are two vacancies in a single district, there are two separate elections. Superior court judgeships in a district, on the other hand, are filled as a group. If there are two superior court judgeships in a district, there is a single election and the two candidates receiving the most votes are the winners of the election. Since 1998 superior court elections have used the nonpartisan system. Appellate judgeship elections remain partisan.

Vacancies in district judgeships are currently filled by gubernatorial appointments from a list of candidates submitted by the bar of the district in which the vacancy occurs. The current law requires the candidates to be members of the same party as the vacating judge. The new law retains the gubernatorial appointments and local bar nomination of candidates but imposes no requirement of partisanship on the bar nominees. This last change is effective in December of 2002.

Senate Bill 712, which would authorize a vote on a constitutional amendment to increase the terms of district court judges to eight years, was passed by the Senate and will be eligible for consideration by the House in the 2002 session.

Districts

There were several bills that realigned judicial districts this year. Some, like S.L. 2001-333 (S 476) and S.L. 2001-507 (H 1195), are largely technical and move precincts from one superior court district to another. In those bills districts in Wake (District 10), Guilford (District 18), and Forsyth (District 21) were rearranged. Others are more substantive. S.L. 2001-400 (H 844), which applies to the district court district in District 11 (Harnett, Johnston, and Lee), requires a specified number of judges from each of the three counties. It requires that of the eight district judgeships assigned to that district, five must reside in Johnston, two must reside in Harnett, and one must reside in Lee. This bill raised a considerable amount of discussion about whether this county residence requirement is consistent with the provisions of Article IV, Section 10, of the North Carolina Constitution. That section specifies that “[e]very district judge shall reside in the district for which he is elected.” Adding a requirement of residence in a specific county may impose an additional qualification to run for the office of district court in District 11 that is not authorized by the constitution. Adding additional qualifications to hold elective office has in at least one instance been held to be beyond the authority of the General Assembly to impose. *See Moore v. Knightdale Board of Elections*, 331 N.C. 1, 413 S.E.2d 541 (1992).

Civil Procedure

Rules of Civil Procedure

S.L. 2001-379 (H 439) makes numerous changes to the Rules of Civil Procedure as recommended by the Civil Litigation Study Commission created by the 1999 General Assembly. That commission followed on the heels of an earlier Civil Procedure Study Commission that had recommended fifteen changes to the Rules of Civil Procedure to the 1998 General Assembly, only one of which was enacted. The Civil Litigation Study Commission revisited and then

re-recommended some of the changes suggested by the 1998 commission. S.L. 2001-379 changes service of process under Rules 4 and 5 to modernize the statutes. It extends the life of a summons from thirty to sixty days to give more time for the officer or party serving process to effect service. It allows service by reliable private delivery services in addition to the U.S. Postal Service by allowing Rule 4 service by depositing the summons and complaint (addressed to the party to be served) with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2), delivering it to the addressee, and obtaining a delivery receipt. Currently the authorized services are Airborne Express, DHL Worldwide Express, Federal Express, and United Parcel Post. The party using one of these delivery services proves service in the same manner as service by certified mail. The new law also allows service under Rule 5 on a party's attorney by sending the document to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. on a regular business day. If the telefacsimile is received at any time after that, it is deemed completed on the next business day.

S.L. 2001-379 also makes two changes to the discovery rules. It amends Rule 28(c) to provide that a person otherwise disqualified from taking a deposition may take a deposition by videotape if (1) the notice for taking the deposition indicates the name of the person before whom the deposition will be taken and that person's relationship to a party or a party's attorney and (2) the deposition is also recorded by stenographic means by a nondisqualified person. This provision merely allows an attorney's employee to operate the videotape equipment when a deposition is both recorded by videotape and by stenographic means. In order to assure that parties have tried to resolve discovery disputes before necessitating court involvement, the General Assembly amended Rule 37(a) to require a motion to compel discovery to include a certification that the movant, in an effort to secure the information, has in good faith conferred with the person failing to respond to the discovery.

S.L. 2001-379 also modifies Rule 46 to clarify that the rule providing for objections to rulings and orders applies to pretrial rulings and interlocutory orders. It also removes the provision regarding exceptions to jury instructions that conflict in part with Rule 10(b) of the Rules of Appellate Procedure. With regard to temporary restraining orders, Rule 65 is amended to enhance notice by providing that the order may be granted without written or oral notice to the adverse party only if it clearly appears from the specific facts shown that immediate and irreparable damage will result to the applicant before the adverse party can be heard in opposition and the applicant's attorney certifies in writing the efforts that have been made to give the notice and reasons supporting the claim that notice should not be required. This new provision mirrors the current federal rule of civil procedure.

In addition, S.L. 2001-379 amends Rule 63 to expand the circumstances for substitution of a judge when the original judge is not available to perform the duties to complete a case after a verdict has been returned or a trial or hearing has been concluded. The new provision allows another judge to complete the duties, including entry of judgment, if the original judge is unable to perform his or her duties because of resignation, retirement, removal from office, or other reason as well as because of death, sickness, and disability.

In 1995 the General Assembly added subsection (j) to Rule 9, requiring a party bringing a medical malpractice action to have an expert evaluate the case before the complaint is filed and agree to testify in the case that medical malpractice has occurred. The party may file a motion with a resident judge of the county where the cause of action arose to extend the statute of limitations for 120 days in order to comply with this special rule. S.L. 2001-121 (H 434) authorizes additional judges to extend the statute of limitations. These now include resident judges for a district in which venue is appropriate, which includes any county in which any of the plaintiffs or defendants reside, and any presiding judge in the district if a resident judge is not available, able, or willing to consider the motion. However, on October 2, 2001, the North Carolina Court of Appeals, in a two-to-one decision in *Anderson v. Assimos*, ___ N.C. App. ___, 553 S.E.2d 63 (2001), found Rule 9(j) unconstitutional in that it unduly restricts the access to the courts' provision of the state constitution and violates the Equal Protection Clause of the state and federal constitutions. Because of the split decision, the case will go to the North Carolina Supreme Court for final resolution.

In 2000, the General Assembly amended Rule 5 by requiring briefs or memoranda in support of or opposition to a motion seeking final determination of the rights of a party to be served on parties at least two days before the hearing. The purpose of the bill was to eliminate surprise at hearings. Rule 5(d) requires that all papers that must be served on a party be filed with the court. No exception was made for briefs and memoranda, though these had not previously been being filed with the clerk's office. Thus the clerks were required to file these memoranda in the case files even though they were not needed as part of the official file. S.L. 2001-388 (S 951) corrects the problem by amending the rule to provide that briefs and memoranda provided to the judge may not be filed with the clerk of court unless ordered by the judge.

As part of a larger bill dealing with health care insurance, S.L. 2001-446 (S 199) amends Rule 42(b) to provide that upon motion of any party in an action that includes a claim for negligent care against a managed care company, the court must order separate discovery and a separate trial of any claim or counterclaim against a physician or other medical provider.

Cover Sheets in Civil Actions

S.L. 2001-388 adds G.S. 7A-34.1 to correct what some attorneys believed to be an unnecessary requirement by the Administrative Office of the Courts to include cover sheets with all filings with the clerk. The new statute provides that a cover sheet is not required in civil actions in filings subsequent to the initial filing if the filing itself contains information that would be required on the cover sheet.

Statute of Limitations

S.L. 2001-175 (H 665) extends the statute of limitations for the intentional torts of assault and battery and false imprisonment to three years instead of one year in order to make it comparable to the statute of limitations in negligence cases. The one-year statute of limitations remains for libel and slander actions.

Motions to Review Decisions to Seal Records or Close Courtrooms

S.L. 2001-516 (H 1284) creates a procedure for news media organizations and others for seeking access to court proceedings or records that have been ordered closed by a court. The statute was passed in response to a decision of the North Carolina Supreme Court, *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 515 S.E.2d 675 (1999), in which the court ruled that news media organizations cannot intervene in court proceedings to assert their right to access court proceedings or records. The statute effectively reverses that decision; it allows the news media to seek access by filing a motion which must be heard and ruled on by the trial court in writing.

The statute also allows for an immediate appeal of a trial court's decision in some cases. If the trial proceeds before the appeal is resolved, however, the appellate court may not retroactively order that closed documents or transcripts of court proceedings be opened.

S.L. 2001-516 does not create new or further restrict the instances in which access is appropriate. *Virmani* approved the closing of court proceedings and the sealing of some records related to a hospital's review of a doctor's fitness to serve on its staff. One finding in the case is that there are instances in which a court may order the closure of court proceedings or records. S.L. 2001-516 simply provides a procedure for news media organizations to challenge such rulings.

S.L. 2001-516 does, however, allow parties to ask a court to order that records used in a trial be treated as confidential, and it allows the party to make the request to the judge in private. If the judge rules that the records must be public, the party then has the choice of making them public or not offering them as evidence.

Domestic Violence Law Changes

On the last day of the session, the General Assembly enacted S.L. 2001-518 (S 346), which made some significant changes in the law regarding domestic violence protection orders. The major changes in the bill affect criminal law pertaining to domestic violence. The special pretrial release rule requiring a judge to determine conditions of pretrial release for the first forty-eight hours after arrest is expanded to include certain felony charges, including rape and sexual offenses, kidnapping, and arson and other burnings. The punishment for violating a protective order is modified as well. Those provisions are discussed in detail in Chapter 6, "Criminal Law and Procedure."

S.L. 2001-518 adds new conduct for which a civil domestic violence protective order may be granted. Effective March 1, 2002, a protective order may be issued if the defendant in the protective order action places the aggrieved party (plaintiff) or a member of the aggrieved party's family or household in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. Harassment is defined in the statute as "knowing conduct, including written or printed communication or transmission, telephone or cellular or other wireless telephonic communication, facsimile transmission, pager messages or transmission, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions, directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." What constitutes "substantial emotional distress" is not defined.

G.S. 50B-2(c1) provides that if a magistrate is authorized by the chief district judge to issue ex parte orders, those orders expire the earlier of seventy-two hours or the end of the next day in which district court is in session in the county. This statute has presented a problem in rural counties where district court is held infrequently and the order expires after seventy-two hours with no opportunity for a judge to issue a new ex parte order. Effective March 1, 2002, S.L. 2001-518 corrects this problem by providing that an ex parte order entered by a magistrate expires by the end of the next day on which the district court is in session in the county. Therefore, the victim will now be protected by the magistrate's ex parte order until a district judge can decide whether to continue the order.

Matters of Particular Interest to Trial Judges

Evidence

In response to a case in Orange County in which a defendant charged with rape subpoenaed the local rape crisis center's records searching for information about the alleged victim's credibility, the North Carolina Coalition Against Sexual Assault and the North Carolina Coalition Against Domestic Violence sought from the General Assembly protection of information gained in assisting victims of sexual assault and domestic violence similar to testimonial privileges granted to physicians, psychologists, and other professionals providing medical treatment. S.L. 2001-277 (H 643) provides that no employee of a domestic violence program or rape crisis center is required to disclose information acquired during the provision of services to a victim in a court proceeding unless the judge compels disclosure after finding that (1) the records or testimony sought contains information relevant and material to factual issues in a civil proceeding or is relevant, material, and exculpatory upon the issue of guilt in a criminal case; (2) the evidence is not sought merely for character impeachment purposes; and (3) the evidence sought is not merely cumulative of other evidence available or already obtained. The statute also requires the party seeking the information to make a sufficient showing that the records are likely to contain information subject to disclosure.

S.L. 2001-152 (S 739) expands the testimonial privilege in G.S. 8-53.6 for doctors, psychologists, and marital family therapists who have provided marital counseling for testifying in

divorce and alimony actions. The new law extends the privilege to licensed psychological associates, licensed social workers, and licensed marriage and family therapists and covers testimony in actions for divorce from bed and board and postseparation support in addition to those for divorce and alimony.

S.L. 2001-115 (H 342) allows the Employment Security Commission to copy official records it is required to keep and provides that these copies are admissible as evidence as the originals would have been if the copies are certified by the commission to be true and accurate.

New Causes of Action

S.L. 2001-62 (H 162) creates a new district court civil action to authorize a child who is fourteen or fifteen years old to marry under certain circumstances. This law is discussed in detail in Chapter 3, “Children and Families.”

S.L. 2001-391 (S 723) adds G.S. 75-20 regulating entities who send unsolicited checks that, if cashed, require the recipient to repay the amount of the check with interest. The new law specifies the disclosures that must be made on the check and on accompanying documents to clearly indicate to the recipient that the check is a solicitation for a loan. A violation of the law is an unfair trade practice.

S.L. 2001-446 creates a new cause of action, effective July 1, 2002, against managed care companies that fail to exercise ordinary care in making health care decisions.

Matters of Particular Interest to Clerks of Court

Estate Matters

Administration of trusts. Several changes affecting clerks of court were made in the estate law. The most significant of these was S.L. 2001-413 (H 1070), which gives clerks original and exclusive jurisdiction over proceedings concerning the internal affairs of trusts. Formerly, clerks had jurisdiction to appoint successor trustees and, depending on the provisions in the trust, jurisdiction over testamentary trustees with regard to bonds and accountings. The new law gives the clerk the same jurisdiction over testamentary and inter vivos trusts that, and in some cases broader jurisdiction than what they have over decedents’ estates. The clerks now have jurisdiction to appoint or remove trustees; to review the fees paid to trustees; to ascertain beneficiaries; and to determine any question arising in the administration or distribution of a trust, including questions of construction and determination of existence of a nontestamentary trust. However, in issues of construction and existence of a trust, the clerk may, on his or her own motion, determine that a superior court judge should hear the matter originally. Proceedings concerning trusts are filed as estate matters and appeals are governed by G.S. 1-301.3.

Special proceedings to exercise control over real property or to sell land to create assets in decedents’ estates. S.L. 2001-413 also intended to modify the law governing administration of decedents’ estates by providing that if a personal representative has filed either a special proceeding to exercise custody and control over real property or to sell land to create assets to pay debts, the personal representative may seek the other remedy in the proceeding already filed without having to file a second special proceeding. However, as actually drafted the act makes no change in the current law, and a future General Assembly will have to correct the drafting error to accomplish the intended result.

Anti-lapse statute. In 1999 the General Assembly rewrote the anti-lapse statute, which directs how property passes if the person inheriting under a will dies before the testator (person making the will). S.L. 2001-83 (H 182) reinstates a provision inadvertently omitted from the 1999 revision regarding devises to a class of persons—for example, “to my nephews and nieces.” It provides that if a member of a class dies before the testator and leaves no issue, that person’s share goes to the other members of the class.

Trust bank accounts. S.L. 2001-267 (H 1098) changes the name of trust bank accounts to “payable on death” (POD) accounts to more clearly reflect their nature. It also specifies who is entitled to the proceeds of these accounts when there are either two or more owners of the account or two or more beneficiaries.

Effect of equitable distribution action on decedents’ estates. S.L. 2001-364 (H 1084) provides that an equitable distribution action that has not been completed before the death of one of the parties does not abate upon the death. This new law’s effect on decedents’ estates is relevant to clerks of court if a spouse dies before a divorce is finalized. If the surviving spouse claims an elective share, the net value of the marital estate awarded in the equitable distribution action is counted as property passing to the surviving spouse, which means that the hearing before the clerk to determine an elective share cannot be conducted until the equitable distribution judgment is entered. If the decedent died intestate, the surviving spouse’s share is determined as if there were no equitable distribution award and then reduced by the net value of the equitable distribution award. In that case, the surviving spouse’s share may be determined before the equitable distribution award, but the share cannot be distributed to the spouse until the equitable distribution action is final. For more information about this new statute, see Chapter 3, “Children and Families.”

Judicial and Execution Sales

Whenever real property is sold at a judicial or execution sale, the sale is not final. Rather it is subject to an upset bid within ten days after the person holding the sale files a report of sale with the clerk. When an upset bid is filed, the clerk orders a new sale and the property must be re-offered for sale at a public auction. In some cases property has been resold numerous times before the bid reaches an amount close enough to fair market value that no other person is willing to raise the bid. The process of resales is cumbersome, time-consuming, and costly since each resale must be advertised in the newspaper. In many cases the expense of the resales consumes much of the additional amount of the bid. In 1993 the General Assembly modified a similar procedure in the foreclosure law to eliminate resales and to provide for rolling upset bid periods. If a person files an upset bid within the ten-day period after the report of sale, a new ten-day period for upset bids begins. A series of upset bids can be filed until no one files a new bid within ten days after the last bid is filed. This rolling upset bid process allows the auction to proceed to the highest bid more quickly and economically. S.L. 2001-271 (S 681) applies this rolling upset bid procedure to judicial and execution sales. However, the procedure differs in two respects from foreclosure sales. First, any interested party may file a motion with the clerk to seek a resale rather than continued rolling bids, and the clerk orders the resale upon a showing of good cause. Second, the clerk must confirm a judicial or execution sale. S.L. 2001-271 applies to judicial sales when the order of sale is issued on or after January 1, 2002, and to executions sales when the execution is issued on or after that date.

Civil Matters

Workers’ comp awards. S.L. 2001-477 (S 881) amends G.S. 97-87 to provide that workers’ compensation awards be indexed and docketed as a judgment by the clerk when a certified copy of the award is filed with the clerk. Current law requires a judge to enter judgment based on the award. If the award provides for periodic payments rather than a sum certain due and payable, the claimant may seek a certificate of accrued arrearages from the Industrial Commission, and that certificate is docketed as a judgment. This new law takes effect June 1, 2002, and applies to awards filed on or after that date.

Filing of unauthorized liens prohibited. S.L. 2001-495 (S 912) is one of two bills enacted by the General Assembly this year to address the problem of the filing of unauthorized liens that tie up real property owned by those against whom the liens are filed. Many of these liens originate in “common law courts,” which are created by groups that believe they are not bound by the laws of the United States and individual states. S.L. 2001-495 prohibits the clerk from indexing and

docketing a claim of lien or any other document purporting to assert a lien on real property unless the document is offered for filing under a statute that provides for indexing and docketing of claims of lien on real property and appears on its face to contain all of the information required by the statute under which it is offered for filing. The clerk may accept the document for filing only but must indicate to the person filing it that it will not be indexed and docketed. S.L. 2001-495 also prohibits the register of deeds from recording a document affecting title that does not comport with a specific statute. A related bill, S.L. 2001-231 (S 257), prohibits fraudulent Uniform Commercial Code filings with the Secretary of State affecting real property.

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Criminal Law and Procedure

The longest legislative session in state history resulted in no major overhauls in the field of criminal law and procedure, but it did reach into many different areas and produced some significant changes. Perhaps the most important legislation concerned the death penalty, with the General Assembly sparing mentally retarded people from the death penalty and allowing prosecutors greater discretion to choose between seeking life imprisonment or death as the punishment for first-degree murder.

Capital Cases

Prosecutorial Discretion

One of the most significant criminal law bills of the session, S.L. 2001-81 (H 1117), was also one of the shortest. It gives prosecutors the discretion to try a first-degree murder case noncapitally—that is, to seek life imprisonment rather than death—regardless of whether any aggravating circumstances exist that might support a death sentence. The act overrides North Carolina Supreme Court decisions holding that prosecutors had to seek the death penalty for first-degree murder if any aggravating circumstances existed. *See* Robert L. Farb, *North Carolina Capital Case Law Handbook* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina, 1996), 22. Under these rulings a prosecutor could reduce a first-degree murder charge to second-degree murder but could not enter into a plea agreement in which the defendant pled guilty to first-degree murder and was sentenced to life imprisonment. New G.S. 15A-2004 gives prosecutors the discretion to accept such a plea, allowing agreement to a sentence of life imprisonment at any time during prosecution of the case.

Under the new statute, if the state wishes to seek the death penalty, it must give notice of its intent to do so by the later of arraignment or the Rule 24 conference (the pretrial conference

required by the General Rules of Practice for the Superior and District Courts). If the state does not give such notice by then, the case may only be tried noncapitally.

The act applies to cases pending on or after July 1, 2001, except that the requirement of giving notice of intent to seek the death penalty does not apply to capital cases in which the defendant was indicted before July 1.

Mental Retardation

Background. In another significant bill concerning the death penalty, the General Assembly prohibited the execution of people who are mentally retarded. New G.S. 15A-2005, enacted by S.L. 2001-346 (S 173), provides that “no defendant who is mentally retarded shall be sentenced to death.”

Bills prohibiting such executions have come before the General Assembly previously and have failed. The act’s passage this session was no doubt aided by the U.S. Supreme Court’s decision to review *McCarver v. North Carolina*, a case raising the constitutionality of executing mentally retarded people. After S.L. 2001-346 passed, the Court vacated its decision to review the case, but it remains concerned about this issue. The same day the Court decided not to hear *McCarver*, it granted review of a Virginia case raising the constitutionality of executing mentally retarded people. *See Atkins v. Virginia*, 122 S. Ct. 24 (2001).

Effective date. S.L. 2001-346 establishes procedures for litigating the issue of mental retardation before, during, and after trial. The provisions governing pretrial and trial proceedings apply to trials docketed to begin on or after October 1, 2001. The provisions governing post-conviction proceedings, which essentially cover defendants who did not have the opportunity to utilize the new pretrial and trial provisions, are effective October 1, 2001, and expire October 1, 2002.

Definition. G.S. 15A-2005(a) places the burden of proving mental retardation on the defendant. He or she must show (1) significantly subaverage general intellectual functioning, defined as an IQ of 70 or less; (2) significant limitations in adaptive functioning in two or more adaptive skill areas, such as communication and self-care; and (3) the existence of both concurrently before the age of eighteen.

Pretrial proceedings. G.S. 15A-2005(c) provides that, on motion of the defendant supported by appropriate affidavits, the court may order a pretrial hearing to determine whether the defendant is mentally retarded. If the state consents, the court must hold a hearing. At this pretrial stage, the defendant has the burden of proving mental retardation by clear and convincing evidence. If the court determines that the defendant is mentally retarded, it must declare the case to be noncapital.

Trial procedure. If the court does not declare the case to be noncapital before trial, the defendant has the right to present the issue of mental retardation to the jury at trial. If the defendant presents evidence of mental retardation as defined by the statute, the court must submit a special instruction on the issue to the jury at sentencing. At that stage of the proceedings, the defendant need only prove mental retardation by a preponderance of the evidence. If the jury finds the defendant to be mentally retarded, the court must impose a sentence of life imprisonment.

If the jury finds that the defendant is not mentally retarded, it then must consider, as under prior law, the existence of aggravating and mitigating circumstances. In making this determination, the jury may consider any evidence of mental retardation even though it may have found that the defendant was not mentally retarded within the meaning of the new statute.

Effect of jury deadlock. If presented with the issue, the jury must decide, one way or the other, whether the defendant is mentally retarded or, more precisely, whether the defendant has met his or her burden of proof on that issue. *See* G.S. 15A-2000(e) (issue of mental retardation must be considered and answered by jury prior to consideration of aggravating and mitigating factors); *see also* *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995) (any issue that is outcome-determinative as to sentence capital defendant will receive must be answered unanimously by jury). What happens if the jury cannot agree? There are two possibilities. If general criminal law principles apply, the court must declare a mistrial with respect to the capital

sentencing proceeding, allowing the state to seek the death penalty at a new capital sentencing hearing. If North Carolina's capital sentencing rules apply, the court must impose a sentence of life imprisonment.

As a general rule, if a jury deadlocks on an issue, the result is a mistrial regardless of whether the state or the defendant bears the burden of proof on the issue. Thus the state may retry a defendant for an offense when the jury deadlocks on whether the state has proved the offense beyond a reasonable doubt. So, too, the defendant is entitled to a retrial if the jury is unable to agree on whether the defendant has proved an affirmative defense for which the defendant has the burden.¹ North Carolina and many other states have modified this rule for capital sentencing proceedings, requiring the court to impose a sentence of life imprisonment when the jury cannot unanimously agree on life or death. G.S. 15A-2000(b) states that “[i]f the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment.” It is unclear whether this rule holds true for the issue of mental retardation. On the one hand, the requirement that the jury be instructed on mental retardation appears in G.S. 15A-2000(b), which continues to provide for a sentence of life imprisonment if the jury cannot unanimously agree on its sentence recommendation. The language and structure of the statute thus lend support to the argument that, consistent with other capital sentencing issues, a deadlocked jury on the issue of mental retardation results in a sentence of life imprisonment. On the other hand, the following provision appeared in the fifth edition of the act but was omitted from later versions: “If the jury cannot, within a reasonable time, unanimously agree as to whether the defendant is mentally retarded, as defined in G.S. 15A-2004, the judge shall impose a sentence of life imprisonment.” (All of the editions of the act can be found on the General Assembly's Web site, <http://www.ncleg.net>.) On the basis of this deletion, one could argue that the General Assembly did not intend to enact the policy reflected in the provision. However, to the extent it is appropriate to use legislative history to interpret statutory language (itself a subject of continuing debate), “rejected-proposal” evidence can be problematic because the reasons for rejection are not always clear. *See generally* William N. Eskridge, Jr., et al., *Legislation and Statutory Interpretation* (2000), 305–7, (“rejected-proposal” evidence tends to be less authoritative than other types of legislative history). In this instance, one could argue that the deleted provision was unnecessary because G.S. 15A-2000(b) already provided for life imprisonment if the jury deadlocked.

Post-conviction proceedings. New G.S. 15A-2006 allows a defendant to file a motion for appropriate relief to seek relief from a death sentence on the ground that the defendant was mentally retarded at the time of the crime. For defendants sentenced to death before October 1, 2001, the motion must be filed on or before January 31, 2001. For trials that were in progress on October 1, 2001, the motion must be filed within 120 days of imposition of a death sentence. The procedures for hearing the motion are in accordance with the procedures for motions for appropriate relief generally. Thus the act gives those currently on death row an opportunity for a hearing before a judge on the issue of mental retardation but does not require a sentencing proceeding before a jury.

1. *See* *People v. Hernandez*, 994 P.2d 354 (Cal. 2000) (trial court erred in sentencing defendant for offense where jury found that state had proved defendant's guilt but deadlocked on whether defendant was insane, an affirmative defense for which defendant had burden of proof; court finds that, when evidence is sufficient to raise jury question, trial court has no authority to enter equivalent of directed verdict for state); *State v. Daniels*, 542 A.2d 306 (Conn. 1988) (in absence of statutory provision requiring life sentence when jury does not unanimously agree on death, new sentencing proceeding was required when jury unanimously found aggravating factor in capital sentencing proceeding but deadlocked on mitigating factors; court holds that jury's inability to agree on mitigating factors was not equivalent of finding that mitigating factors did not exist).

Training and Experience Standards

Effective August 26, 2001, S.L. 2001-392 (S 109) requests the North Carolina Supreme Court to establish minimum standards of training and experience in capital cases for judges, prosecutors, and defense attorneys appointed at state expense. The act suggests that the standards should specify a minimum number of years of legal experience and a minimum amount of felony experience. The rules also may require specialized training in capital case litigation. The act apparently was prompted by growing publicity about the fairness of some capital trials and the caliber of legal representation received by capital defendants.

S.L. 2001-392 also amends G.S. 7A-498.5(c), a part of the Indigent Defense Services Act enacted in 2000, under which the new Commission on Indigent Defense Services is charged with developing standards for improving the quality of legal representation for indigent criminal defendants, including qualification and performance standards for defense counsel in capital cases. The act requires that the qualification and performance standards for capital cases be consistent with any rules adopted by the North Carolina Supreme Court. The commission has already adopted qualification standards (Rules of the Commission on Indigent Defense Services: Part 2, Rules for Providing Legal Representation in Capital Cases), which may be viewed on the Internet at http://www.aoc.state.nc.us/www/public/html/ids_commission.htm. The North Carolina Supreme Court has not adopted any rules of its own yet.

Criminal Offenses

Generally

Terrorism offenses. In the wake of the events of September 11, 2001, the General Assembly created several new offenses, with stiff punishments, for acts of terrorism. Effective for offenses committed on or after November 28, 2001, S.L. 2001-470 (H 1468) adds new article 36B to G.S. Ch. 14 to address nuclear, biological, and chemical weapons of mass destruction (defined in new G.S. 14-288.21).² The act deletes poison gas and radioactive material from current G.S. 14-288.8, which addresses weapons of mass death or destruction in general and provides for lesser punishment.

Under the new article, it is

- a Class B1 felony to knowingly manufacture, possess, transport, sell, purchase, offer to sell or purchase, or deliver such weapons unless the person falls within one of several listed categories (G.S. 14-288.21);
- a Class A felony, punishable by life imprisonment without parole, to injure another through the use of such weapons [G.S. 14-288.22(a)];
- a Class B1 felony to attempt, solicit another, or conspire to injure another by the use of such weapons [G.S. 14-288.22(b)];
- a Class B1 felony to deliver or attempt to deliver such weapons through the mail or through private delivery services [G.S. 14-288.22(c)];
- a Class D felony to make a report, knowing or having reason to know the report is false, that causes any person to reasonably believe that such weapons are located in any place or structure [G.S. 14-288.23(a)]; and
- a Class D felony to conceal, place, or display, with the intent to perpetrate a hoax, any device, object, machine, instrument, or artifact so as to cause any person to reasonably believe that it is such a weapon [G.S. 14-288.24(a)].

2. A companion act, S.L. 2001-469 (H 1472), requires registration of certain biological agents, such as microorganisms shown to produce disease, with the North Carolina Department of Health and Human Services. Effective January 1, 2002, the failure to register such agents is subject to a civil penalty of \$1,000 per day. *See* G.S. 130A-149.

Upon conviction of one of the last two offenses (false report or hoax), the court may order the defendant to pay restitution, including costs and consequential damages from the disruption of normal activities.

The act also amends G.S. 14-17 to make murder caused by the use of such weapons first-degree murder. The amended statute classifies murder by the use of such weapons with murder perpetrated by poison, lying in wait, imprisonment, starvation, or torture.³

School bus offenses. Effective for offenses committed on or after December 1, 2001, S.L. 2001-26 (S 45) increases the penalty for certain offenses involving school buses and creates additional offenses. Revised G.S. 14-132.2(b) and (c) make it a Class 1 misdemeanor, rather than a Class 2 misdemeanor, to enter a school bus after being forbidden to do so or to refuse to leave a school bus on demand. New G.S. 14-132.2(c1) makes it a Class 1 misdemeanor to

- stop, impede, delay, or detain
- any public school bus or public school activity bus
- being operated for public school purposes.

Last, new G.S. 14-288.4(a)(6a) makes it a disorderly-conduct offense, punishable as a Class 2 misdemeanor, to engage in conduct that disturbs the peace, order, or discipline on any public school bus or public school activity bus. The language of this new subsection is parallel to the subsection on disturbing the peace, order, or discipline of a school, G.S. 14-288.4(a)(6), which has been interpreted as requiring more than garden-variety disobedience or misconduct by a student. For a violation to occur, the behavior must have resulted in “substantial interference” with the school’s operation. *See In re Eller*, 331 N.C. 714, 417 S.E.2d 479 (1992).

Larceny of gasoline. Effective for offenses committed on or after December 1, 2001, S.L. 2001-352 (S 278) adds new G.S. 14-72.5 creating a new offense of larceny of motor fuel. This offense was created to deal with “drive-aways”—that is, people who fill up their cars at the gas pump and drive away without paying. A person is guilty of a Class 1 misdemeanor under the new statute if he or she

- takes and carries away
- motor fuel
- valued at less than \$1,000
- from an establishment where motor fuel is offered for retail sale
- with the intent to steal the motor fuel.

The criminal consequences of the new offense track the criminal consequences of regular misdemeanor larceny under current G.S. 14-72, also a Class 1 misdemeanor. A person who steals motor fuel valued at \$1,000 or more is not covered under the new statute but would be guilty of regular felony larceny, a Class H felony under G.S. 14-72. The real impact of the new statute lies in the license consequences for committing the offense, which do not apply to regular larceny. Under new G.S. 20-17(a) and 20-19(g2), a second conviction within seven years results in a ninety-day driver’s license revocation; a third or subsequent conviction within seven years results in a six-month revocation. Under new G.S. 20-16(e2), a judge may issue the person a limited driving privilege for the duration of the revocation.

Emitting of bodily fluids by prisoner. Effective for offenses committed on or after December 1, 2001, S.L. 2001-360 (S 1081) dramatically increases the punishment for certain conduct by in-custody individuals. Under new G.S. 14-258.4, a person is guilty of a Class F felony if he or she

- while in the custody of the Department of Correction, Department of Juvenile Justice and Delinquency Prevention, any law enforcement officer, or any local confinement facility
- knowingly and willfully
- throws, emits, or causes to be used as a projectile
- bodily fluids or excrement

3. Another act, S.L. 2001-500 (S 990), provides that a board of education or superintendent may suspend a student for up to 365 days for engaging in certain conduct related to terrorism, such as threatening an act of terrorism or perpetrating a hoax relating to terrorism.

- at a person who is a state or local government employee
- while the employee is in the performance of his or her duties.

The statute provides that it applies to violations committed inside or outside of a prison, jail, or other confinement facility as long as the person is in custody at the time of the incident.

Creation of this offense was apparently prompted by concerns about the possible transmission of AIDS and other dangerous diseases. Previously, the described conduct could be punished as a simple assault (a Class 2 misdemeanor)—and possibly a more serious assault if the prisoner had a disease that could, in fact, be transmitted by his or her actions. Under the new statute, proof of the dangerousness of the prisoner’s conduct is not required. Thus, although unlikely to transmit a disease such as AIDS, spitting may violate the new statute because saliva may be considered a bodily fluid.

Inadvertent conduct is not covered under the new statute since the prisoner must act knowingly and willfully. Nor is intentional conduct by a prisoner toward another prisoner since the statute requires that the conduct be directed at a state or local government employee.

Assaulting law enforcement or assistance animal. G.S. 14-163.1 has made it a Class I felony to seriously injure or kill a law enforcement animal. Effective for offenses committed on or after December 1, 2001, S.L. 2001-411 (S 646) expands the possible offenses against law enforcement animals and adds to the statute’s coverage “assistance animals” (animals trained to provide assistance to a handicapped person).

The revised statute contains three offense classes. A person commits a Class I felony if he or she

- knows or has reason to know that an animal is a law enforcement agency or assistance animal and
- willfully
- causes or attempts to cause serious physical harm to the animal.

A person commits a Class 1 misdemeanor if he or she satisfies the first two of the above elements and causes or attempts to cause physical harm (as distinguished from serious physical harm) to the animal. A person commits a Class 2 misdemeanor if he or she satisfies the first two elements and harasses, delays, obstructs, or attempts to delay or obstruct the animal in the performance of its duties as a law enforcement or assistance animal.

As under the previous version of the statute, self-defense is a defense to a violation, although the revised statute refers to it as an “affirmative defense.” The General Assembly may have intended by this change to shift to the defendant the burden of proving self-defense. Such an interpretation would mean, however, that the defendant would have a greater burden in cases involving animals than in cases involving self-defense against another person or even a law enforcement officer. *See* John Rubin, *The Law of Self-Defense in North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1996), 184–85 (burden is on state in assault and homicide cases to prove that defendant did not act in self-defense). It may even be inappropriate to place the burden of proof on the defendant in cases in which the animal was acting under the handler’s direction or control. In those circumstances, the state would seem to have the burden of proving that the defendant did not act in self-defense with respect to both the handler and the animal as the handler’s instrumentality. If the statute is interpreted as placing the burden of proof on the defendant, the standard would likely be proof to the jury’s satisfaction, the standard used in other contexts in which the defendant has the burden of proof. *See* John Rubin, *The Entrapment Defense in North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 2001), 78.

Restraining dog in cruel manner. Several statutes address cruelty to animals. The principal statute, G.S. 14-360, forbids cruelty to animals generally. Other statutes deal with specific practices, such as dogfighting (*see* G.S. 14-362.2) and conveying animals in a cruel manner (*see* G.S. 14-363). Effective for offenses committed on or after December 1, 2001, S.L. 2001-411 adds a new animal cruelty statute, G.S. 14-362.3, that makes it a Class 1 misdemeanor for a person to maliciously restrain a dog with a chain or wire grossly in excess of the size necessary to restrain

the dog safely. A person acts “maliciously” if he or she “impose[s] the restraint intentionally and with malice or bad motive.”

Infant abandonment. Effective for acts on or after July 19, 2001, S.L. 2001-291 (H 275) adds new G.S. 14-322.3 to provide that a person may not be prosecuted for infant abandonment for voluntarily delivering an infant under seven days of age to a person designated under G.S. 7B-500, such as a health care provider, social worker, or law enforcement officer. The act also amends two child abuse statutes in light of this change. Amended G.S. 14-318.2 provides that a parent who abandons an infant pursuant to new G.S. 14-322.3 may not be prosecuted for misdemeanor child abuse for any conduct related to the care of the infant. Amended G.S. 14-318.4 provides that abandonment pursuant to new G.S. 14-322.3 may be treated as a mitigating factor in sentencing if the person is convicted of felony child abuse.

Frauds

Fraudulent identification. Effective for offenses committed on or after December 1, 2001, S.L. 2001-461 (S 833), as amended by Section 42 of S.L. 2001-487 (H 338), adds new G.S. 14-100.1 to make the possession or manufacture of a fraudulent identification a Class 1 misdemeanor. A person is guilty of this offense if he or she

- knowingly possesses or manufactures
- a false or fraudulent form of identification (such as a military identification or a picture identification issued by the government)
- for the purpose of deception, fraud, or other criminal conduct.

The new statute also makes it a Class 1 misdemeanor for a person knowingly to obtain a form of identification by the use of false information.

The new statute does not cover the use of false information to obtain a driver’s license or learner’s permit, which continues to be governed by G.S. 20-30(5). The act amends that statute, however, to raise a violation from a Class 2 to a Class 1 misdemeanor, the same class of offense as a violation of new G.S. 14-100.1.

The act also amends G.S. 18B-302(e) to make it unlawful for a person under age twenty-one to enter or attempt to enter a place where alcoholic beverages are sold or consumed by using a fraudulent identification document or an identification document issued to another person. Previously the statute only prohibited an underage person from obtaining or attempting to obtain alcoholic beverages. A violation is a Class 1 misdemeanor pursuant to G.S. 18B-102(b).

Last, the act adds new G.S. 20-37.02 directing the Department of Motor Vehicles (DMV) to establish a system to allow ABC licensees to verify electronically the validity of identifications issued by the DMV. The ABC licensee may use this information only to the extent necessary to verify the validity of the DMV identification. A licensee or employee of a licensee commits a Class 2 misdemeanor by using the information for other purposes or by transferring the information to a third party. The electronic verification system is to be implemented as funds become available.

Fraudulent filings. Under the Uniform Commercial Code (UCC), a person may record a security agreement with the secretary of state reflecting that he or she has a security interest in goods in the possession of another. For example, a company that sells appliances might record a security agreement on a refrigerator on which the buyer is making payments. In recent years individuals and groups with no grounds for filing such security agreements have sought to file them against public officials, such as judges, for purported violations of the individual’s or group’s constitutional rights. S.L. 2001-231 (S 257) adds new G.S. 14-401.19 to make it a Class 2 misdemeanor to present for filing a false security agreement under the UCC. A person is guilty of this new offense if he or she

- presents a record for filing under the UCC
- with knowledge that the record is not related to a valid security agreement or with the intention that the record be filed for an improper purpose, such as to hinder or harass.

The act applies to documents presented for filing on or after December 1, 2001.

A second act, S.L. 2001-495 (S 912), makes it a Class 1 misdemeanor, under new G.S. 44A-12.1, to present for filing to the clerk of court a false claim of lien on real property. That act applies to offenses committed on or after January 1, 2002.

Drug Offenses

Playgrounds and child care centers. Effective for offenses committed on or after December 1, 2001, S.L. 2001-307 (H 1174) and S.L. 2001-332 (S 751) amend G.S. 90-95(e) to provide for increased penalties for violations of G.S. 90-95(a)(1)—which prohibits the manufacture, sale, or delivery of a controlled substance or possession with intent to manufacture, sell, or deliver—in or near a playground in a public park or in or near a child care center.

S.L. 2001-307 adds new G.S. 90-95(e)(10), which makes it a Class E felony for a person twenty-one years of age or older to violate G.S. 90-95(a)(1) on property that is a playground in a public park or within three hundred feet of such property. *Playground* is defined as an outdoor facility intended for recreation and open to the public and having three or more separate apparatuses for the recreation of children, such as swings and slides. The new subsection includes the proviso, contained in other parts of Chapter 90, that the transfer of less than five grams of marijuana for no remuneration does not constitute a delivery in violation of G.S. 90-95(a)(1). Under that proviso, the involved parties are guilty of possession only [under G.S. 90-95(a)(3)] and therefore are not subject to the new enhanced punishment for violations of G.S. 90-95(a)(1) at or near playgrounds.

S.L. 2001-332 amends G.S. 90-95(e)(8), which has made it a class E felony for a person twenty-one years of age or older to violate G.S. 90-95(a)(1) on property used for an elementary or secondary school or within three hundred feet of such property. The amended subsection extends this prohibition to violations at or near licensed child care centers [as defined in G.S. 110-86(3)a.]. The subsection continues to exclude from the definition of delivery a transfer of less than five grams of marijuana for no remuneration.

Changes to controlled substance schedules. Effective June 21, 2001, S.L. 2001-233 (S 543) makes the following changes to the controlled substance schedules in Chapter 90 of the General Statutes. It amends:

- G.S. 90-90(1) to add dihydroetorphine as a Schedule II opiate;
- G.S. 90-90 and 90-91 to shift dronabinol (also known by the trade name Marinol) from Schedule II to Schedule III;
- G.S. 90-91(b) to identify ketamine (sometimes referred to as Special K, a date rape drug) as a Schedule III depressant (ketamine has been a Schedule III controlled substance but has not been identified as a depressant);
- G.S. 90-92(a)(1) to add zaleplon (also known by the trade name Sonata) as a Schedule IV depressant; and
- G.S. 90-92(a)(3) to add modafinil (also known by the trade name Provigil) as a Schedule IV stimulant.

Regulatory Offenses

Taking of sea oats. Effective for offenses committed on or after December 1, 2001, S.L. 2001-93 (S 30) amends G.S. 14-129.2 to make it a Class 3 misdemeanor, punishable by a fine of \$25 to \$200, to dig up, pull up, or take sea oats (*uniola paniculata*) from any public domain or from private land without the consent of the landowner. The act deletes sea oats from the coverage of G.S. 14-129, which had made taking sea oats a Class 3 misdemeanor punishable by a smaller fine (\$10 to \$50) in certain counties only.⁴

4. S.L. 2001-487 (H 338), Section 43, also deletes ginseng from the coverage of G.S. 14-129, effective December 1, 2001. Stealing ginseng remains a crime under G.S. 14-79 (larceny of ginseng), and digging up of ginseng remains unlawful to the extent prohibited by G.S. 106-202.19(a).

Littering. G.S. 14-399 has made it a crime for a person to intentionally or recklessly litter, with the punishment dependent on the amount of material involved. Effective for offenses committed on or after March 1, 2002, S.L. 2001-512 (S 1014) amends the statute to create a separate set of littering offenses that do not require proof of intent or recklessness. All are punishable as infractions rather than as crimes. Thus a person who inadvertently spills or scatters litter is guilty of an infraction unless he or she comes within one of the listed exceptions (for example, accidentally spilling an insignificant amount of material during garbage pickup).

The new littering offenses are punishable as follows:

- if the amount does not exceed fifteen pounds, by up to a \$100 fine and twelve hours of community service and by up to a \$200 fine and twenty-four hours of community service for a subsequent violation;
- if the amount is more than fifteen and less than five hundred pounds, by up to a \$200 fine and twenty-four hours of community service;
- if the amount is more than five hundred pounds, by up to a \$300 fine and community service of not less than sixteen and not more than fifty hours.

Locksmith services. S.L. 2001-369 (H 942) creates a new Chapter 74F in the General Statutes establishing a licensing scheme for people performing locksmith services. As part of these new licensing requirements, the act makes it a Class 3 misdemeanor under new G.S. 74F-3 to perform or offer to perform locksmith services without a license, effective for offenses committed on or after July 1, 2002.

Dispensing prescription drugs. Effective January 1, 2002, S.L. 2001-375 (S 446) amends G.S. 90-85.40(a) and (c) to clarify that it is not a crime for a person who is a pharmacy technician or pharmacy student to dispense or compound prescription drugs if the person is enrolled in an approved pharmacy school and is working under the supervision of a pharmacist.

Mortgage lending. Effective July 1, 2002, S.L. 2001-393 (S 904) repeals Article 19 of G.S. Chapter 53 and replaces it with new Article 19A, which creates a licensing scheme for mortgage brokers and mortgage bankers. New G.S. 53-243.14 makes it a Class I felony to perform mortgage services without a license, with each unlicensed transaction a separate offense.

Unsolicited checks. Effective October 1, 2001, S.L. 2001-391 (S 723) adds new G.S. 75-20 to regulate the distribution of unsolicited checks that, when cashed, obligate the person to repay the amount of the check plus interest and fees. The new statute imposes various requirements on the senders of such checks—for example, the sender must include certain disclosures with the check and must give the recipient the right to cancel the loan by repaying the amount of the check within ten days of cashing it. Violation of the statutory requirements is not a crime but is an unfair trade practice under G.S. 75-1.1, subject to the enforcement and penalty provisions for unfair trade practices.

Conflict-of-interest crimes. S.L. 2001-409 (H 115), as amended by Sections 44-45 of S.L. 2001-487, clarifies and updates several criminal statutes prohibiting public officials from benefiting from contracts with public agencies. The act repeals G.S. 14-236 and 14-237 and incorporates their essential provisions into revised G.S. 14-234. (For a detailed discussion of these provisions, see Chapter 21, “Purchasing and Contracting.”) A violation of the conflict-of-interest provisions remains a Class 1 misdemeanor. The principal parts of the act apply to actions taken and offenses committed on or after July 1, 2002.

Money transmission. Effective November 1, 2001, S.L. 2001-443 (S 890) repeals Article 16 of G.S. Chapter 53 and replaces it with new Article 16A, which creates a licensing scheme for businesses engaged in receiving and transmitting money by wire, facsimile, electronic transfer, or other means. Knowingly and willfully engaging in the business of money transmission without a license is a Class 1 misdemeanor under new G.S. 53-208.26.

Local Bills

Collecting worthless checks without prosecution. Effective May 10, 2001, S.L. 2001-61 (H 7) authorizes district attorneys that have set up programs to collect worthless checks without

criminal prosecution (pursuant to G.S. 14-107.2) to include in such programs acts that would constitute felonies (the highest of which is a Class I felony) as well as misdemeanor offenses. The counties that now have such programs are Bladen, Brunswick, Columbus, Cumberland, Durham, Edgecombe, Nash, New Hanover, Onslow, Pender, Rockingham, Wake, and Wilson.

Fraudulently or unnecessarily obtaining ambulance services. Effective for offenses committed on or after December 1, 2001, S.L. 2001-106 (S 336) adds several more counties to G.S. 14-111.2, which makes it a Class 2 misdemeanor to obtain ambulance services without intending to pay for them, and to G.S. 14-111.3, which makes it a Class 3 misdemeanor to make unneeded requests for ambulance services. The counties added to G.S. 14-111.2, creating a total of fifty counties covered by the statute, are Alamance, Cabarrus, Carteret, Halifax, New Hanover, Onslow, and Pender. Those counties, plus Rockingham County, are added to G.S. 14-111.3, creating a total of twenty-eight counties covered.

Hunting under the influence. S.L. 2001-165 (H 931), effective June 4, 2001, authorizes Orange County to restrict or prohibit hunting with firearms by people who are under the influence of alcohol or other impairing substances or who have any alcohol in their systems. The act also authorizes Orange County to restrict or prohibit hunting within 150 yards of any federal, state, or local government buildings, including those owned by local boards of education. A violation of an ordinance enacted under this authority is a Class 3 misdemeanor and is punishable as provided in G.S. 14-4, which governs the punishment for ordinance violations.

Criminal Procedure

DNA Testing

In the wake of several cases around the country in which DNA tests have exonerated people who were wrongly convicted, the General Assembly passed S.L. 2001-282 (H 884), which deals with several issues relating to DNA testing, including: (1) access to tests and samples, (2) pretrial testing, (3) preservation of samples, (4) post-conviction procedures, and (5) expunction of records. The changes in the first two categories became effective July 13, 2001, and apply to charges brought on or after that date. The changes in the third through fifth categories became effective October 1, 2001, and apply to evidence, records, and samples in the government's possession on or after that date.

Access to tests and samples. New G.S. 15A-267(a) gives criminal defendants the right before trial to DNA analyses performed in connection with the case and to biological material found in certain locations that has not yet been tested. The statute provides that the usual discovery and motion procedures, in G.S. 15A-902 and 15A-952, govern requests for such evidence. The act also amends G.S. 15A-903 to give the defendant the right to obtain certain DNA lab reports.

Pretrial testing. New G.S. 15A-267(c) provides that the court may order the State Bureau of Investigation (SBI) to perform DNA tests and make DNA comparisons before trial if the defendant shows that the biological material to be tested is relevant, that it has not yet been DNA tested, and that testing is material to the defense. The defendant must bear the test costs unless the court has determined that the defendant is indigent.

Preservation of samples. New G.S. 15A-268 requires that, in felony cases, evidence containing DNA material must be preserved. Subsection (a) states that a governmental entity that collects such samples must preserve the evidence as long as a defendant convicted of a felony is incarcerated. Subsection (b) allows the governmental entity to dispose of the samples before the end of that time period pursuant to specified procedures. Among other things, the entity must notify the district attorney of its intent to dispose of the samples, who then must notify the defendant (through the superintendent of the correctional facility where the defendant is housed), the Office of Indigent Defense Services, and the Attorney General. Within ninety days of receiving the notice, the defendant may request, for the reasons specified in the statute, that the material not be destroyed.

What are the consequences if the government fails to preserve biological material as required? Under the U.S. Constitution, the court may dismiss the charges if the defendant shows, among other things, that the government acted in bad faith. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). In light of the statute's strict new requirements, the defendant may not need to show bad faith to obtain relief for a statutory violation.

Post-conviction procedures. New G.S. 15A-269 provides that after conviction a defendant may make a motion to the trial court that entered the judgment for DNA testing of biological evidence. To prevail on the motion, the defendant must show among other things that there is a reasonable probability the verdict would have been more favorable to the defendant if the testing had been conducted. If the defendant is indigent, the court must appoint counsel for a defendant who brings such a motion.

New G.S. 15A-270 requires the court to hold a hearing to evaluate the results of any test ordered under G.S. 15A-269. The statute provides that if the results are favorable to the defendant, the court may vacate the judgment of conviction, discharge the defendant from custody, resentence the defendant, or order a new trial.

Expunction of records. G.S. 15A-146 allows for expunction of records in certain circumstances when charges against a defendant are dismissed or the defendant is found not guilty. That statute is amended to provide that a person entitled to such an expunction is also entitled to expunction of any DNA records or profiles in the state's DNA database (subject to limited exceptions).

New G.S. 15A-148 provides that a defendant is also entitled to expunction of DNA records following (1) a final order of an appellate court reversing and dismissing a conviction for which a DNA analysis was done or (2) receipt of a pardon of innocence.

S.L. 2001-282 also repeals G.S. 15A-266.10, which formerly governed expunction of DNA records.

Other Criminal Procedure Changes

Pretrial release conditions after failure to appear. Effective December 16, 2001, Section 46.5 of S.L. 2001-487 adds new G.S. 15A-534(d1) limiting the discretion of judicial officials who initially set a person's pretrial release conditions after the person has failed to appear in court as required. The new subsection replaces G.S. 15A-540(c), which the act repeals. The old subsection only applied to surrenders by sureties and not to arrests after failures to appear.

Under the new subsection, the judicial official (usually a magistrate) who sets conditions after an arrest or surrender for a failure to appear must impose any conditions recommended by the court in the order for arrest. If the issuing court has not recommended any conditions, the magistrate must set a secured bond that is twice the amount of the previous bond; if no bond amount was previously set, the magistrate must impose at least a \$500 secured bond. The magistrate also must indicate on the release order that the defendant was arrested or surrendered after failing to appear. If the magistrate learns that the defendant has failed to appear on the charges two or more times, he or she must indicate that fact as well.

Warrantless inspections for contagious animal diseases. S.L. 2001-12 (S 779) gives the State Veterinarian and staff greater authority to conduct inspections for contagious animal diseases. The concerns prompting the act's passage are reflected in its caption—an act “to prevent and control an outbreak of foot and mouth disease,” a condition that plagued the cattle industry in Great Britain in early 2001. The act became effective April 4, 2001, and expires April 1, 2003.

Together, new G.S. 106-399.5, revised G.S. 106-401(b), and new G.S. 106-402.1 permit the State Veterinarian to conduct a warrantless inspection of individuals, motor vehicles, and property if the State Veterinarian and Governor determine that there is an imminent threat of a contagious animal disease that has the potential for very serious and rapid spread, is of serious socioeconomic and public health consequence, or is of major importance in the international trade of animals and animal products. The grounds justifying an inspection vary with the subject and purpose of the inspection. For example, if a person or vehicle is traveling within the state, an authorized representative of the State Veterinarian may conduct a warrantless inspection if probable cause

exists to believe that the individual or vehicle is carrying an animal or article capable of introducing or spreading the types of contagious diseases described above. *See* G.S. 106-399.5(3).

Bail bondsmen clarifications. Effective October 1, 2001, S.L. 2001-269 (H 356) modifies several sections of G.S. Chapter 58 to conform it to changes made last year to the bail bondsman provisions in G.S. Chapter 15A. It also revises the definition of accommodation bondsman in G.S. 58-71-1(1) to delete the requirement that such bondsmen be North Carolina residents. This change appears to have no effect, however, because G.S. 15A-531 still imposes residency as a requirement to be an accommodation bondsman, and G.S. 58-71-195 provides that Chapter 15A controls in the event of a statutory conflict.

S.L. 2001-269 also amends: G.S. 58-71-40 to clarify that bail bondsmen may hire unlicensed personnel to perform normal office duties—that is, duties that do not include acting as a bail bondsman or runner; G.S. 58-71-100 to allow, with the approval of the Insurance Commissioner, bail bondsmen who operate from the same location to establish a shared trust account for collateral security that they have received; G.S. 58-71-140 to require professional bondsmen, surety bondsmen, and runners to file an affidavit with the clerk regarding the amount of any premium or collateral security received by the bondsman; and G.S. 58-71-160 to authorize the Insurance Commissioner to deny a license to a professional bondsman who has not complied with a notice of deficiency—that is, a notice that the bondsman’s security deposits with the commissioner have fallen below the required value.

Admissibility of copies of ESC records. S.L. 2001-115 (H 342) amends G.S. 8-45.3 to provide that copies of Employment Security Commission (ESC) records, when certified as true and correct by the commission, are as admissible in evidence as the originals would have been. The act applies to actions pending on or after December 1, 2001.

Victims’ Rights

Effective October 1, 2001, S.L. 2001-433 (H 1154) makes miscellaneous changes to the Crime Victims’ Rights Act (G.S. 15A-830 through 15A-841) and other provisions concerning crime victims.

1. The act expands the definition of custodial agency in G.S. 15A-830(a)(3) to include facilities designated under G.S. 122C-252 for the custody and treatment of people who have been involuntarily committed. As a result of this change, crime victims may request notification from such facilities of the matters described in G.S. 15A-836—for example, notification of the defendant’s release date.

2. Revised G.S. 15A-831 clarifies that only the investigating law enforcement agency need notify the victim of the defendant’s status during the pretrial process. Other entities bear this responsibility thereafter.

3. New G.S. 15A-832.1 requires judicial officials, upon issuing an arrest warrant in certain circumstances, to record and transmit to the clerk of superior court the defendant’s name and the victim’s name, address, and telephone number. The clerk then must transmit this information to the district attorney’s office. This requirement primarily affects magistrates. It applies only when (1) the arrest warrant is for a misdemeanor subject to G.S. 15A-830(a)(7)g (certain domestic violence offenses) and (2) the warrant was based on testimony from the complaining witness rather than from a law enforcement officer. The new requirement does not apply in cases in which a law enforcement officer makes the arrest; in these cases the arresting agency is already responsible for providing the identifying information to the district attorney. The Administrative Office of the Courts (AOC) is required to provide forms for magistrates’ use in discharging this responsibility.

4. G.S. 15A-833 has given victims the right to offer evidence of a crime’s impact if the evidence is otherwise admissible. Amended G.S. 15A-833 allows a law enforcement officer or representative of the district attorney’s office to present such evidence at the request of the victim and with the consent of the defendant.

5. Amended G.S. 15A-835 requires the district attorney's office to provide to the victim, within thirty days of the conclusion of the trial court proceedings, the telephone number of the office to contact in the event the defendant fails to pay any required restitution.

6. Revised G.S. 15A-836 provides that, if the defendant has threatened the victim, the agency that has custody of the defendant must notify the victim of the defendant's escape within twenty-four, rather than seventy-two, hours. The amended statute also requires notice of the defendant's capture, regardless of whether any threats were made, within twenty-four, rather than seventy-two, hours.

7. The act also deals with two provisions that concern victims but are not contained in the Victims' Rights Act. G.S. 148-10.2 has provided that the policy of the Department of Correction (DOC) is to prohibit death row inmates from contacting victims' family members without the family members' written consent. The amended statute requires DOC, at the request of the victim or victim's family, to prohibit an inmate convicted of an offense subject to the Victims' Rights Act [listed in G.S. 15A-830(a)(7)] from contacting the requesting party. The amended statute also directs DOC to develop and impose sanctions against any inmate who violates the no-contact provisions.

The act also adds new G.S. 148-5.1, which directs DOC to make reasonable efforts to house inmates at an out-of-county facility if the victim or an immediate family member requests such confinement for the safety of the victim or family member.

Another act passed this session, S.L. 2001-302 (H 1286), affects crime victims as well. Effective July 21, 2001, it repeals G.S. 15A-835(e), which had required the Conference of District Attorneys to maintain a repository of victims' names, addresses, and other information for use by agencies with responsibilities under the Crime Victims' Rights Act.

Domestic Violence

Domestic violence privilege. S.L. 2001-277 (H 643) creates a new evidentiary privilege for communications involving domestic violence and rape crisis centers, effective for communications made on or after December 1, 2001.⁵ The act and the procedures it contains were apparently adopted in response to efforts by those accused of domestic abuse to obtain information provided by their alleged victims to such centers.

Under new G.S. 8-53.12, communications between a domestic violence or sexual assault victim and an agent of a domestic violence or rape crisis center are privileged. (The new statute defines victim, agent, and center.) No agent may be required to disclose privileged information unless the victim waives the privilege or the court orders disclosure. The privilege terminates on the death of the victim; thus, it would not bar disclosure in homicide cases.

The statute sets forth the circumstances in which a judge may override the privilege and order disclosure. In criminal cases a resident or presiding judge in the district in which the case is pending may order disclosure if the evidence is

1. relevant, material, and exculpatory;
2. not sought for character impeachment purposes; and
3. not merely cumulative of other evidence available to or already obtained by the party seeking disclosure.

The first condition may be difficult for the state to satisfy in cases in which it wants information obtained by the center but the alleged victim is unwilling to waive the privilege—for

5. Two other acts affect evidentiary privileges that may arise in domestic situations. S.L. 2001-487, Section 40, clarifies that the privilege in G.S. 8-53.5 covers licensed marriage and family therapists and that the privilege in G.S. 8-53.7 applies to licensed or certified social workers. S.L. 2001-152 (S 739) expands G.S. 8-53.6 to cover marital counseling by licensed psychological associates, licensed clinical social workers, and licensed marriage and family therapists. The latter privilege applies only in alimony and divorce actions, however, and not in criminal proceedings.

example, in prosecutions for domestic violence in which the alleged victim is no longer willing to cooperate. The evidence the state wants may be *inculpatory*, but the statute requires that the evidence be *exculpatory* for the court to override the victim's privilege.

The second condition may run afoul of a criminal defendant's constitutional right to exculpatory evidence. The U.S. Supreme Court has consistently held that a defendant's right to exculpatory evidence includes evidence that can be used to impeach a witness's character. *See* *Kyles v. Whitley*, 514 U.S. 419 (1995) (exculpatory evidence includes impeachment evidence); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (defendant has right to exculpatory evidence in possession of third party that is otherwise confidential).

The statute sets forth a procedure for determining whether these conditions have been met. Before requiring a center to produce the records for the court's review, the court must find that the party seeking disclosure has made a sufficient showing that the records are likely to contain information that satisfies the statutory conditions. If the party has made such a showing, the court then must order that the records be produced for an *in camera* review—that is, a review in chambers. After the review, the court may order disclosure of those portions of the records that meet the statutory conditions.

Stalking definition and punishment. S.L. 2001-518 (S 346) broadens the definition of and increases the punishment for stalking under G.S. 14-277.3. Effective for offenses occurring on or after March 1, 2002, a person is guilty of stalking if he or she

- willfully
- on more than one occasion
- follows, is in the presence of, or otherwise harasses
- another person
- without legal purpose and
- with the intent either to
 - place the person in reasonable fear for that person's safety or the safety of that person's immediate family or close personal associates, or
 - cause the person substantial emotional distress by placing the person in fear of death, bodily injury, or continued harassment, which in fact causes the person substantial emotional distress.

This definition expands the types of prohibited conduct. Previously, the statute covered following another or being in his or her presence; the revised statute covers harassment as well. *Harassment* is defined as knowing conduct directed at a specific person that torments, terrorizes, or terrifies the person and serves no legitimate purpose. Such conduct may include oral communications (such as telephone calls or voice mail messages), printed communications, and electronic communications (such as faxes or e-mails).

The intent element of the offense is also broader under the revised statute. Previously, a person could be convicted of stalking only if he or she intended to cause death or bodily injury to the other person or intended to cause that person to suffer emotional distress by placing him or her in fear of death or great bodily injury.

A first stalking offense is increased from a Class 1 to a Class A1 misdemeanor. A stalking offense while a court order is in effect prohibiting similar behavior is increased from a Class A1 misdemeanor to a Class H felony. And a second stalking offense is increased from a Class I to a Class F felony, and the time limit on prior convictions is removed.⁶

Interference with emergency communication. Effective for offenses committed on or after December 1, 2001, S.L. 2001-148 (S 1004) modifies the offense of interfering with an emergency

6. Effective the same date as the stalking changes, S.L. 2001-518 (S 346) also amends G.S. 50B-1(a), which lists the grounds on which a person may obtain a civil domestic violence protective order. The revised statute includes as a ground for obtaining such an order *continued harassment* as defined in G.S. 14-277.3, the stalking law. In addition, the act revises G.S. 50B-2(c1) to delete the seventy-two-hour limit on the effectiveness of an *ex parte* protective order issued by a magistrate. The revised statute provides that such an order remains in effect until the end of the next day in which district court is in session.

communication. This offense sometimes arises during incidents of domestic violence, although it is not limited to that context. For example, one party may interfere with another party's efforts to call for help. The amended section, G.S. 14-286.2, increases a violation to a Class A1 misdemeanor; previously, the offense was a Class 1 or 2 misdemeanor depending on the damage or injury caused. The amended section also clarifies that a person who interferes with a communications instrument or other emergency equipment with the intent to prevent an emergency communication—for example, a person rips the phone out of the wall before the other person is able to place an emergency call—is guilty of violating the section. This section, as amended, also includes a more detailed definition of *emergency communication* and a new definition of *intentional interference*.

Confidentiality of voter records. Effective December 1, 2001, S.L. 2001-396 (H 1188) amends G.S. 163-82.10 to allow a registered voter to keep confidential his or her address if the person is protected by a domestic violence protective order. The voter must present a copy of the protective order to the county board of elections with a signed statement that the voter has good reason to believe that the safety of the voter or a member of the voter's family who resides with the voter would be jeopardized if the voter's address were open to public inspection. The voter's address and the signed statement must be kept confidential as long as the protective order remains in effect; however, the voter's name, precinct, and other data in the voter's registration record remain public.

Expansion of 48-hour law to other offenses. Generally, when a person is arrested for a crime in North Carolina, he or she is taken before a magistrate, who sets pretrial release conditions for the person (for example, a secured or unsecured bond). In cases involving certain domestic violence offenses, however, G.S. 15A-534.1 provides that only a judge may set pretrial release conditions within the first forty-eight hours of a person's arrest. Effective for offenses committed on or after March 1, 2002, S.L. 2001-518 adds several offenses to what has become known as the "48-hour law." The revised statute includes any felony in Chapter 14, Articles 7A (rape and other sex offenses), 8 (assaults), 10 (kidnapping and abduction), and 15 (arson and other burnings). As with the offenses already covered by the statute, the defendant must be charged with having committed one of these offenses against his or her spouse or former spouse or against a person with whom the defendant lives or has lived as if married.

By adding these offenses to the 48-hour law, the act may subject them to the strictures of *State v. Thompson*, 349 N.C. 483, 508 S.E.2d 277 (1998). In *Thompson* the defendant was held in custody for forty-eight hours without having pretrial release conditions set, even though court was in session and judges were available to set conditions before forty-eight hours had expired. The court held that this detention violated the defendant's due process rights and that the charges against the defendant had to be dismissed. The only distinction between the offenses dismissed in *Thompson* and the offenses added by the act to the 48-hour law is their relative seriousness—the former were all misdemeanors, the latter all felonies.

Increased punishment for certain violations of DVPOs. G.S. 50B-4.1 has made it a crime, punishable as a Class A1 misdemeanor, for a person to knowingly violate a valid domestic violence protective order (DVPO). Effective for offenses committed on or after March 1, 2002, S.L. 2001-518 revises the statute to increase such a violation to a Class H felony if the person has previously been convicted of three offenses under Chapter 50B.

The revised statute also provides that a person who commits a felony when he or she knows the behavior is prohibited by a valid DVPO is guilty of an offense one class higher than the felony committed. The enhanced punishment does not apply to a person charged with a Class A or B1 felony or a repeat violator charged with the new Class H felony discussed above. The revised statute also provides that for the enhanced punishment to be imposed, the indictment or information charging the felony must allege and a finding must be made that the person knowingly violated the DVPO in the course of committing the felony.

Law Enforcement

Collection of traffic stop statistics. Concerned about possible racial profiling in the stopping of vehicles—that is, the stopping of vehicles based on the race or ethnicity of the drivers or passengers—the 1999 General Assembly amended G.S. 114-10 to require the Division of Criminal Statistics (the Division) to collect information on traffic stops made by state law enforcement officers, such as the North Carolina State Highway Patrol. *See* S.L. 1999-26 (S 76). The 2000 General Assembly amended the statute further, requiring the Division to keep additional information, such as the identity of the officer making the stop, the date the stop was made, the location of the stop, and the agency making the stop. *See* Section 17.2 of S.L. 2000-67 (H 1840).

This session, in Section 23.7 of S.L. 2001-424 (S 1005), the General Assembly again amended G.S. 114-10, requiring the Division to collect the same type of statistics on stops made by local law enforcement officers employed by county sheriffs or county police departments, police departments in municipalities with a population of 10,000 or more, and police departments in municipalities employing five or more full-time sworn officers for every 1,000 people. The changes apply to law enforcement actions occurring on or after January 1, 2002. Another act, S.L. 2001-513 (H 231), Section 9, authorizes the Department of Justice to create up to three positions to implement the new record-keeping requirements.

Release of personnel information. Effective April 16, 2001, S.L. 2001-20 (H 423) creates a limited exception, in the City of Greensboro only, to the confidentiality of disciplinary charges against police officers, a personnel matter that ordinarily must be held in confidence under G.S. 160A-168(c). The act states that the city manager or chief of police may release information about the disposition of disciplinary charges to the Human Relations Commission Complaint Subcommittee and to the person alleged to have been aggrieved by the officer's actions or that person's survivor. The act requires that commission members keep the information in confidence.

Special police officers at mental health hospitals. Effective May 25, 2001, S.L. 2001-125 (S 370) enacts two statutes, G.S. 122C-430A and 122C-430B, authorizing the Secretary of the Department of Health and Human Services to designate one or more special police officers to act as law enforcement officers at Cherry Hospital in Wayne County and Dorothea Dix Hospital in Wake County. These special police officers may arrest a person outside the confines of Cherry and Dix hospitals but within the counties in which the hospitals are located when (1) the person has committed an offense at the hospital for which the officer could have arrested the person and (2) the arrest is made during the person's immediate and continuous flight from the hospital.

Campus law enforcement jurisdiction. Effective August 30, 2001, S.L. 2001-397 (H 972) amends G.S. 116-40.5 to allow the board of trustees of any constituent institution of the University of North Carolina to enter into agreements with boards of other constituent institutions to extend the authority of campus police officers into each other's jurisdiction.

The act also amends the jurisdiction of campus police officers to cover any public road or highway passing through campus property *or* adjoining it. Previously, the statute provided that the road had to pass through *and* adjoin campus property.

Collateral Consequences

Sex Offender Registration

S.L. 2001-373 (S 936) makes several changes to the sex offender registration requirements. Most importantly it creates two new categories of sex offenders and subjects them to the toughest registration requirements, previously reserved for offenders found to be sexually violent predators.

Federal genesis. As with many parts of North Carolina's sex offender registration law, the current changes were prompted by changes in federal law—specifically, the adoption of the Pam Lynchner Sexual Offender Tracking and Identification Act of 1996, which amended the Jacob Wettlering Crimes Against Children and Sexually Violent Offender Registration Act, codified at

42 U.S.C. § 14071. States that fail to implement the minimum federal requirements are subject to a 10 percent reduction in Byrne Formula Grant funds, of which North Carolina receives several million dollars annually. Because federal law underlies the most recent changes, it provides a potential source for interpreting any ambiguities and helps explain the lack of congruence with state law. [For a detailed discussion of the federal provisions, see Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (hereinafter Final Guidelines), as Amended, 64 Fed. Reg. 572 (Jan. 5, 1999).]

New categories. The two new sex offender categories are

- offenders convicted of an “aggravated offense” and
- “recidivists.”

G.S. 14-208.6 defines an *aggravated offense* as any criminal offense in which the sexual act involves vaginal, anal, or oral penetration (1) by use of force or the threat of serious violence against a victim of any age or (2) with a victim who is less than twelve years old. The interplay between these provisions and other aspects of North Carolina's criminal law is not entirely clear. For example, penetration is a requirement for both subcategories of aggravated offense. Penetration is an element of rape under North Carolina law, which involves vaginal intercourse, but it is not an element of some of the acts required for conviction of sexual offense, which involves oral and certain other sex acts. See Robert L. Farb, *North Carolina Crimes: A Guidebook on the Elements of Crime*, 5th ed. (Chapel Hill, N.C.: Institute of Government, The University of North Carolina, 2001), 151. The meaning of *force* or *threat of serious violence* under the first subcategory of aggravated offense is also unclear. Does a conviction of second-degree forcible rape or sex offense, of which force is ordinarily an element, automatically satisfy that requirement? Or, must the defendant be convicted of first-degree rape or sex offense, requiring proof of both force and an aggravating condition such as the use or display of a dangerous weapon? See Final Guidelines, 64 Fed. Reg. 572 [aggravated offense category, and resulting requirement of lifetime registration (discussed below), apply only to “perpetrators of particularly serious offenses,” those comparable to federal offense of aggravated sexual abuse under 18 U.S.C. § 2241 but not offense of sexual abuse under 18 U.S.C. § 2242]. The second subcategory of aggravated offense, which applies only if the victim is under twelve years of age, also does not track North Carolina's crimes of statutory rape and sex offense, which involve victims who are thirteen, fourteen, or fifteen years of age or who are under age thirteen.

Recidivist is defined as a person who has a prior “reportable conviction”—that is, any conviction subject to the registration requirements. Thus a person with a prior conviction for indecent liberties would be considered a recidivist if convicted again of indecent liberties or any other offense subject to the registration requirements. (Crime against nature remains one of the few sexually related offenses that is not subject to any registration requirement.)

Registration requirements. A person who is convicted of an aggravated offense or is a recidivist, as defined above, is subject to the same registration requirements as a person found to be a sexually violent predator. He or she must register for life after being released from prison. If the person fails to comply with the registration requirements, including verifying his or her address every ninety days, the person commits a Class F felony. The registration requirements terminate only if the conviction requiring registration is reversed, vacated, or set aside, or the person receives an unconditional pardon of innocence.

S.L. 2001-373 repeals the additional method of terminating registration previously available to a person found to be a sexually violent predator. Previously, the registration requirement could be terminated after ten years if a court found that the person no longer suffered from a mental abnormality or personality disorder.

The act also modifies the procedure for finding a person to be a sexually violent predator. G.S. 14-208.20 continues to require a study, by a board of experts selected by DOC, of a person alleged to be a sexually violent predator. It also continues to require that two of the board members be experts in the behavior and treatment of sexual offenders. The revised section also provides, however, that one of the board members must be a victims' rights advocate and another

must be a law enforcement representative. No special expertise appears to be required of these additional members.

Other registration changes. The act adds two other categories of individuals subject to registration requirements: nonresident students and nonresident workers. New G.S. 14-208.7(a1) provides that if such a person has a reportable conviction in this state or in his or her state of residence, this person must register with the sheriff of the North Carolina county in which he or she works or attends school.

The act also requires that a person who moves to another state must, within ten days of the move, notify the sheriff of the North Carolina county in which he or she last registered. The sheriff must forward the change of address information to the Division of Criminal Information, which must inform the appropriate state official in the other state of the person's new address.

Effective date. S.L. 2001-373 became effective October 1, 2001, and applies to offenses committed on or after that date. Thus the changes do not apply to individuals already subject to the registration requirements before that date.

Other Collateral Consequences

Expunction of criminal record. In 1999 the General Assembly enacted G.S. 14-113.20 through 14-113.23, which created the offense of financial identity fraud—that is, the use of another person's identification for the purpose of making financial transactions in the other person's name. This session, S.L. 2001-108 (S 262) creates a new section, G.S. 15A-147, providing for the expunction of the record of arrest, charge, and trial of individuals whose identity has been misused under that law or in other circumstances. A person has a right to an expunction under this new statute if (1) the person was named in a criminal charge as the result of another person using the identity of the named person without permission and (2) the charge against the named person is dismissed, a finding of not guilty is entered, or the conviction is set aside. The right to expunction applies whether the charged offense was an infraction, misdemeanor, or felony.

A person may apply for an expunction to the court where the charge was last pending, on a form prepared by the AOC and available from the clerk of court. The district attorney's office is entitled to notice of the application.

If the court grants the application, it must order expunction of the records of the court and all law enforcement agencies and other state and local agencies. The clerk of court must forward a certified copy of the order to the charging law enforcement agency, which must notify the SBI. The SBI, in turn, must notify the Federal Bureau of Investigation. The petitioner is not responsible for the costs of expunging the records. The Division of Motor Vehicles, licensing boards, and insurance companies also must rescind any administrative actions based on the criminal charge, such as any license revocation or insurance points.

S.L. 2001-108 also amends G.S. 15A-146(a), which has authorized a one-time expunction if a charge is dismissed or a finding of not guilty entered. The amended section provides that a person may obtain an expunction if he or she has not previously obtained an expunction (1) under G.S. 15A-146; (2) under G.S. 15A-145, which authorizes expunction of first offenses if committed by youthful offenders; or (3) under G.S. 90-96, which allows expunction of certain drug offenses if the offender successfully completes probation. The effect of this change is to make it clear that a person is entitled to an expunction under G.S. 15A-146 no matter how many expunctions he or she may have received under new G.S. 15A-147, discussed above. Apparently an additional effect is to bar an expunction in other cases following a dismissal or finding of not guilty if the person has already received an expunction under G.S. 15A-145 or G.S. 90-96.

The act became effective October 1, 2001, and applies to charges filed before, on, or after that date.

Criminal history checks. Several acts this session deal with criminal record checks by employers and continue the trend of expanding criminal record checks of applicants for employment. (In response to the expansion that has taken place in previous years, Section 21.2 of

this year's budget act, S.L. 2001-424, requires the Department of Health and Human Services to centralize all record-checking activities related to that department.)

Effective January 1, 2002, S.L. 2001-371 (S 195) adds new G.S. 114-19.11, which allows the North Carolina Board of Nursing to obtain from the Department of Justice the criminal history of any applicant for licensure as a registered nurse or licensed practical nurse. The act also adds new G.S. 90-171.48 requiring such applicants to consent to a criminal history check. Refusing to do so may be grounds for denying a license to an applicant. If the applicant has any convictions, the Board of Nursing may but is not required to deny a license to the applicant after considering certain factors.

G.S. 122C-80(b) has required area mental health authorities to conduct criminal history checks of certain applicants for employment. To do so, area authorities have had to submit a request to the state's Department of Justice. Effective May 31, 2001, S.L. 2001-155 (H 857) amends G.S. 122C-80(b) to allow counties that have access to the Division of Criminal Information data bank to conduct the required criminal history record checks on behalf of area mental health authorities.

Effective for offenses on or after August 17, 2001, S.L. 2001-376 (S 778) adds new G.S. 115C-332 making it a Class A1 misdemeanor for an applicant for public school employment to willfully give false information on an employment application that is the basis for a criminal history check.

This session's only contraction in criminal history checks resulted from a change in federal law. The federal budget act of 1999 (Pub. L. No. 105-277) provided in 28 U.S.C. § 534 that a nursing facility or home health care agency could request the U.S. Attorney General to conduct a criminal history check of job applicants if the job involved direct patient care. In light of this provision, S.L. 2001-465 (S 826) suspends until January 1, 2003, those North Carolina provisions purportedly authorizing greater access to national criminal history information. Effective November 16, 2001, the act provides that, notwithstanding G.S. 131E-265, nursing homes and home care agencies are not required to conduct national criminal history checks for jobs other than those involving direct patient care; and notwithstanding G.S. 131E-265(a1), 131D-40, and 122C-80, contract agencies of nursing homes and home care agencies, adult care homes and their contract agencies, and area mental health authorities are not required to conduct national criminal history checks. The act also directs the Legislative Research Commission to study how federal law affects access to national criminal history information for these entities.

Sentencing and Corrections

Most of the changes in the corrections field appear in the budget act, S.L. 2001-424. Unless otherwise noted, all references are to that act.

Earned time credit for medically and physically unfit inmates. Effective September 26, 2001, Section 25.1 of the budget act adds new G.S. 15A-1355 to allow inmates who are medically or physically unable to engage in work release or other rehabilitative activities to earn credit based on good behavior or other criteria determined by DOC. The amount of credit that such inmates may receive remains subject to structured sentencing rules on maximum possible sentence reductions.

Rate of reimbursement to counties. Section 25.4 of the budget act establishes a rate of \$40 per day as the reimbursement rate to counties for fiscal year 2001–2002 for the cost of housing convicted inmates, parolees, and post-release supervisees awaiting transfer to the state prison system.

Place of confinement for palliative care. G.S. 148-4 has authorized the Secretary of Correction to allow an inmate to leave his or her place of confinement, unaccompanied by a custodian, in specified circumstances—for example, to participate in a training program in the community or to secure a suitable residence for when he or she is released. Effective September 26, 2001, Section 25.9 of the budget act amends G.S. 148-4 to further authorize the

Secretary of Correction to allow an inmate to leave his or her place of confinement to receive palliative care if the inmate is terminally ill or permanently and totally disabled [as defined in new subsection G.S. 148-4(8)] and the secretary finds that the inmate no longer poses a threat to society. Before approving such an arrangement, the secretary must consult with the victim or victim's family.

Compensation for erroneously convicted person. Effective for individuals granted a pardon of innocence on or after January 1, 2001, Section 25.12 of the budget act amends G.S. 148-84 to increase the amount payable to a person who has been granted a pardon of innocence. The act increases the amount payable from \$10,000 to \$20,000 for each year of imprisonment, including pretrial confinement, and increases from \$150,000 to \$500,000 the total amount that may be paid.

Staff reduction at Post-Release Supervision and Parole Commission. Section 25.17 of the budget act directs the Post-Release Supervision and Parole Commission to report to the General Assembly on its staff reduction plans for the 2001–2003 biennium, including its plans for 2002–2003 to reduce at least 10 percent of the staff employed in 2001–2002. The commission must report these plans to the General Assembly by March 1 of each year of the biennium.

Inpatient substance abuse facilities. Effective September 26, 2001, Section 25.19 of the budget act amends G.S. 148-19.1 to exempt from licensure under G.S. Chapter 122C and certificate-of-need requirements under G.S. Chapter 131E inpatient chemical dependency or substance abuse facilities that provide services exclusively to inmates of DOC. If a facility serves both inmates and members of the general public, the portion of the facility that serves inmates is exempt from licensure. If a facility is built without a certificate of need, it may not admit anyone other than inmates until a certificate of need is obtained. The act makes conforming changes to G.S. 122C-22(a) and G.S. 131E-184.

Elimination of IMPACT. Section 25.22(c) of the budget act states that it is the intent of the General Assembly to eliminate the IMPACT boot camp program by June 30, 2003, and that alternative residential programs for offenders be established in the current IMPACT locations. The alternative programs may include youth development centers (formerly called training schools), residential facilities for juveniles, or residential programs for adult offenders under the supervision of the Division of Community Corrections or the Division of Alcohol and Chemical Dependency. The Secretary of Correction and Secretary of Juvenile Justice and Delinquency Prevention must report to the General Assembly by May 1, 2002, on the programs proposed to take the place of IMPACT.

New prison construction. Section 25.24 of the budget act authorizes the construction of three new close-custody prisons in Anson, Alexander, and Scotland counties.

Jail credit for GED classes. G.S. 15A-1340.20(d) has allowed a person convicted of a misdemeanor to earn up to four days of credit per month of imprisonment, to be awarded by DOC if the person is in prison or by the local jail's custodian (sheriff or jail administrator) if the person is housed in a local jail. Effective June 14, 2001, S.L. 2001-200 (S 397) adds new G.S. 162-59.1, which authorizes the custodian of a local jail to allow a person convicted of a misdemeanor to participate in a general education development diploma program (GED program) or other education, rehabilitation, or training program. Amended G.S. 162-60 provides that those who participate in such programs are entitled to a reduction of four days in their term of imprisonment for each thirty days of classes attended. As under prior law, the total amount of credit that a person convicted of a misdemeanor may receive is four days per month of incarceration.

Use of force by private correctional officers. S.L. 2001-378 (S 137) authorizes correctional officers at private correctional facilities in North Carolina operated pursuant to contract with the Federal Bureau of Prisons to use necessary force and make arrests consistent with the laws governing officers employed by DOC. To exercise this authority, private correctional officers must have been certified as correctional officers under G.S. Chapter 17C and must have completed a training program that DOC has determined meets North Carolina standards. The employment policies of the private correctional facility also must meet the minimum standards and practices of DOC. The act is effective August 18, 2001, and expires two years thereafter.

Studies

S.L. 2001-491 (S 166), this year's studies act, authorizes various studies related to criminal law and procedure. The act authorizes the North Carolina Sentencing and Policy Advisory Commission (Sentencing Commission) to study:

- whether the state's habitual felon law needs to be changed;
- whether the penalties for detonation of explosive devices within courthouses and other public buildings should be increased;
- whether the penalties for incest offenses are consistent with the penalties for other sex offenses;
- the state's arson laws and any conforming changes to the medical reporting requirements for burn injuries that result from a criminal act; and
- sentencing for drug offenses.

Pursuant to Section 25.8 of S.L. 2001-424, the Sentencing Commission is also directed to review the state's sentencing laws in view of the projected growth in the prison population by 2010. The Sentencing Commission must report its findings to the General Assembly no later than the convening of the 2002 regular session.

The Studies Act authorizes the Legislative Research Commission to study:

- in the field of criminal law and procedure, consolidation of law enforcement agencies and the authority and regulation of bail bondsmen;
- in the area of domestic violence, confidentiality programs for victims of domestic violence and the establishment of a domestic violence fatality review team; and
- in the juvenile field, procedures for juveniles who lack the capacity to proceed and juvenile commitment procedures.

The Studies Act also sets up a separate study commission, the Underage Drinking Study Commission, to study underage alcohol consumption issues.

John Rubin

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Alcoholic Beverage Control

Very few Alcoholic Beverage Control (ABC) bills were enacted this year, and only two or three of those were of general public interest. However, the trend toward authorizing beverage sales by certain retail establishments without a city or county vote on the issue took a big step forward with the passage of S.L. 2001-130 (H 1143) “regarding the issuance of ABC permits to residential private clubs and sports clubs.”

Residential Private Club and Sports Club Permits

Since the end of prohibition in the 1930s, North Carolina has had a system of local option elections governing the sale of alcoholic beverages. Under G.S. Chapter 18B, no city or county is allowed to have legal sales of beer, wine, spirituous liquor, or mixed beverages without having the issue submitted to the voters. In addition, Section 24, Article II, of the North Carolina Constitution prohibits “local acts regulating trade.” Therefore, this system of local option elections cannot be bypassed by a local act of the North Carolina General Assembly. Over the past decade or so, this has led to numerous public acts that have only local application. Thus, under the provisions of G.S. 18B-1006, ABC permits can be obtained by certain establishments in recreation districts, economic development and tourist districts, interstate interchange economic development zones, national historic landmark districts, and by residential private and sports clubs, without a city or county election.

To meet the permit requirements for a residential private club or sports club, as formerly defined, the establishment had to be in a county that had a population of less than 45,000 with three or four cities that had approved the sales of malt beverages and unfortified wine or satisfied other requirements designed to limit the application of the section to a few localities. S.L. 2001-130 amends G.S. 18B-1006(k) to remove these restrictive limitations, thereby making permits for residential private and sports clubs available statewide. (The counties of Lincoln, Harnett, Davie, Graham, Swain, Yancey, and McDowell were exempted from the act.) Finally, S.L. 2001-130

seems to say that the state ABC Commission may not issue any new ABC permits to a club located within a jurisdiction that votes against the sale of mixed beverages in a referendum conducted on or after September 1, 2001. The exact meaning of this provision will have to await interpretation by the state ABC Commission and perhaps by the courts. This act was effective May 25, 2001.

Wine Permits and Sales

S.L. 2001-262 (S 823) and S.L. 2001-487 (H 338) make several significant changes to the law regulating wine sales and permits. Among these are the following:

1. G.S. 18B-1001 was amended by the creation of a wine tasting permit, which may be obtained by any food business. In addition, the holder of an unfortified winery permit or a wine grower may obtain a special event permit allowing the permittee to give free tastings at trade shows, conventions, shopping malls, and other designated places [G.S. 18B-1114.1(a)].
2. New G.S. 18B-1114.3 was added authorizing a wine producer permittee to ship crops to a "winery inside or outside the state, for the manufacture and bottling of unfortified wine," which may then be shipped back to the producer. The permittee is also authorized to sell wine manufactured from its crops for on- or off-premises consumption, regardless of the results of any local wine election. *See* Section 49, (c), S.L. 2001-487.
3. G.S. 18B-303(a) was amended to allow the purchase of fifty liters (formerly twenty liters) of unfortified wine without a permit. S.L. 2001-262 became effective July 4, 2001, and S.L. 2001-487 became effective December 16, 2001.

Joint ABC Store Operations

G.S. 18B-703, which was enacted in 1981, provides for the merger of local ABC systems. Under this statute, any city governing body or board of county commissioners may merge its ABC system with one or more other cities or counties if the ABC stores in those jurisdictions serve the same general area and the merger is approved by the state ABC Commission in Raleigh. The statute requires that the cities and counties involved in the merger agree upon a formula for the distribution of profits before the merger takes place. S.L. 2001-128 (H 446) adds a new subsection (h) to this statute allowing two or more governing bodies of cities or counties to enter into an agreement allowing one or more stores located within the jurisdictions to be controlled and operated by the local ABC board specified in the agreement, even though the store or stores are located outside the boundaries of the county or municipality of the local ABC board that would be operating them. Issues not addressed by this subsection must be negotiated by the parties, subject to the approval of the state ABC Commission. S.L. 2001-128 became effective May 25, 2001.

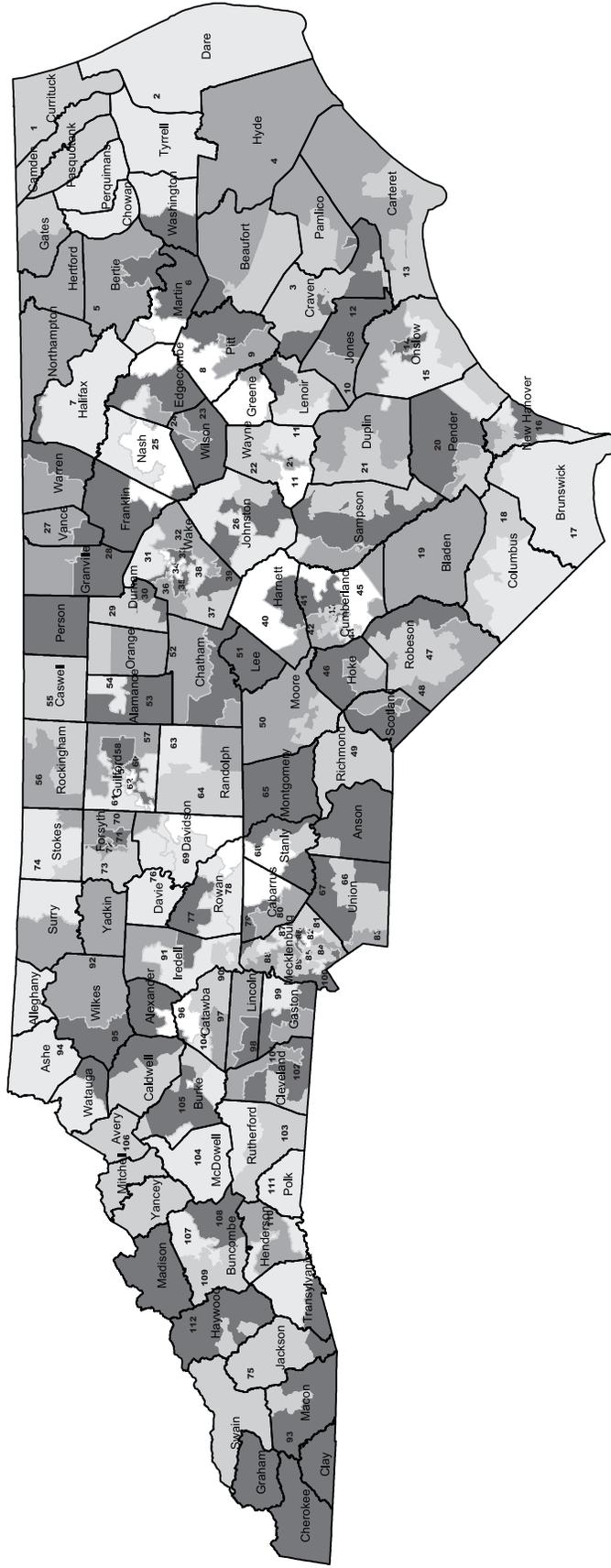
Bills That Failed to Pass

As is the case in most years, several interesting proposals did not receive a favorable committee report or otherwise failed to pass both houses. House Bill 179 would have allowed the state ABC Commission to consider in issuing a permit for the premises whether a prospective permittee was located within 250 feet of a church, public school, or church school. Current G.S. 18B-901(c) allows this factor to be considered only if the establishment is located within fifty feet of the church or school. House Bill 1248, another significant proposal that failed, would have given local governments some authority with regard to the sale of malt beverages in kegs. Under current G.S. 18B-303, a person may not purchase more than eighty liters of malt beverages in cans

or bottles, but there is no restriction on the amount of draft malt beverages in kegs that may be purchased at one time. The proposed act would have authorized ordinances requiring an application for the purchase of the kegs to contain certain information, including the destination of the keg and the name, address, and age of the purchaser.

Ben F. Loeb, Jr.

North Carolina House of Representatives Districts 2001



9

Elementary and Secondary Education

In spite of the state's financial problems, the 2001 General Assembly supported ongoing and new programs to improve student learning and achievement. It appropriated funds for smaller classes in kindergarten, employee bonuses under the ABCs of Public Education Program, and special efforts to assist "highest priority" schools. The General Assembly did not enact major school reform legislation but looked for new approaches to such old problems as the needs of at-risk students, the majority/minority academic achievement gap, and the need to better prepare students for the responsibilities of citizenship.

Student Learning and Achievement

Promotion Decisions

Standardized tests have become the fundamental mechanism for assuring accountability for both schools and students. At the same time, many educators, parents, and others are concerned about the possible negative effects of these tests. Nonetheless, test scores are an increasingly significant factor in decisions to promote or retain thousands of students. G.S. 115C-288(a) authorizes principals to grade and classify pupils, but it does not specify how principals are to make the decision on the appropriate placement of a student in a particular grade level, such as fourth or fifth. Section 28.17 of S.L. 2001-424 (S 1005) imposes new limits on the principal's authority. If a student is already attending a public school, the principal must consider the student's classroom work and grades, scores on standardized tests, and the best educational interests of the child. The principal may not make the decision about the appropriate grade solely on the basis of standardized tests scores, no matter how high they are. And, if a principal's decision to retain a child in the same grade is based partially on the pupil's scores on standardized tests, those test scores must be verified as accurate. The method for verification is not specified, however; nor is the meaning of "accurate."

Although the decision is the principal's, G.S. 115C-45(c)(2), as amended by S.L. 2001-260 (S 532) (discussed in detail below in "Other Student Issues") gives parents a right to appeal the decision to the school board in two situations. First, parents have a right to appeal if they allege a violation of a specified federal law, state law, State Board of Education (State Board) policy, or state rule. Second, parents have a right to appeal if they allege a violation of a local board policy, including any policy regarding grade retention of students. In addition, G.S. 115C-47, as amended by Section 28.17, requires local school boards to adopt policies related to G.S. 115C-45(c) that include opportunities for parents and guardians to discuss decisions to retain a student. This opportunity is available even when the parent or guardian does not have a right to appeal to the school board. However, the law does not specify which school official is to participate in such discussions with the parent.

At-Risk Students

Section 28.17 of S.L. 2001-424 adds new G.S. 115C-105.41, which imposes a responsibility on school units when dealing with students who are not doing well in school. This responsibility is similar to that already imposed by G.S. 115C-105.47, which requires local boards to develop a safe school plan containing procedures for identifying and serving the needs of students at risk of academic failure or of engaging in disruptive or disorderly behavior. Under new G.S. 115C-105.41, school units must identify students "who have been placed at risk for academic failure." Identification may be based on grades, observations, state assessment, and other factors. It must occur as early as it can reasonably be done; waiting for the results of end-of-grade or end-of-course tests is not necessary. The act does not specify how schools are to use this identification. It does, however, require development of a personal education plan with focused intervention and performance benchmarks at the beginning of the school year for any student not performing at least at grade level, as identified by the end-of-grade test. Focused intervention and acceleration activities may include summer school, Saturday school, and extended days. Local school units may not charge for these activities and must provide transportation at no charge for all students for whom transportation is necessary for participation in these activities. Parents should be included in the implementation and ongoing review of personal education plans.

Reading at Grade Level

Under G.S. 115C-105.27, each school must develop a school improvement plan that takes into consideration the school's annual performance goal set by the State Board as part of the School-Based Management and Accountability Program. Section 28.30 of S.L. 2001-424 requires that a school serving kindergarten or first grade students must include a plan for preparing them to read at grade level by the time they enter second grade. In addition, kindergarten and first-grade teachers must notify parents or guardians when their child is not reading at grade level and is at risk of not reading at grade level by the time he or she enters second grade.

Achievement Gap

For many years, educators and legislators, as well as others, have been concerned about the gap in academic achievement between various groups of students. The gap that has received the most attention is that between African-American students and white students. The General Assembly and state and local educators have adopted many measures designed to reduce, and ultimately eliminate, this gap. Gaps between white and other minority students and between

students of different socioeconomic levels also are significant and are the focus of increasing attention.¹

Section 28.30 of S.L. 2001-424 is another step aimed at reducing the achievement gap between subgroups of students. Under Section 28.30, it is the State Board's responsibility to identify the various subgroups, whether based on race, ethnicity, socioeconomic status, or some other criterion. Section 28.20 amends G.S. 115C-105.35, which deals with the annual performance goals under the School-Based Management and Accountability Program. The program focuses on student performance in the basics of reading, mathematics, and communications skills in elementary and middle schools, on student performance in courses required for graduation, and on other measures for high schools required by the State Board. Under the program, schools are held accountable for their students' educational growth. The State Board sets an expected level of growth for each school and, beginning in the 2002–2003 school year, the State Board must include a "closing the achievement gap component" in its measurement of students' educational growth in each school. This component must measure and compare the performance of each subgroup of students in a school's population, as identified by the State Board, to ensure that all subgroups are meeting state standards.

Another strategy to close the gap involves the creation of a local task force to advise and work with the local board of education and school administrators on closing the gap and developing a collaborative plan for achieving that goal. Section 28.30 amends G.S. 115C-12 to require the State Board to adopt a model for local school units to use, at the discretion of the local board, as a guideline for establishment of local task forces on closing the academic achievement gap.

In addition, an amendment to G.S. 115C-12 requires the State Board to report on the numbers of students who have dropped out of school, have been suspended or expelled, or have been placed in an alternative program. The data must be reported in a disaggregated manner (presumably by race) and must be readily available to the public.

The Commission on Improving the Academic Achievement of Minority and At-Risk Students² must determine the extent to which additional fiscal resources are needed to close the academic achievement gap and keep it closed. The commission will terminate when it submits its final report of findings and recommendations to the Joint Legislative Education Oversight Committee and to the General Assembly by January 10, 2003.

Highest Priority Elementary Schools

Under the ABCs Program, the State Board sets an annual expected growth standard for each school and, for some grades, sets levels of student performance to measure whether an individual student is performing at grade level. Although student achievement is improving across North Carolina, a few schools seem to need special assistance to meet their growth standards. In the 1999–2000 school year, there were thirty-seven elementary schools in North Carolina in which more than 80 percent of the students qualified for free or reduced-price lunch and in which no more than 55 percent of the students performed at or above grade level. These are called "highest priority elementary schools"; Section 29.1 of S.L. 2001-424 enacts measures to provide these schools with "the tools needed to dramatically improve student achievement." The budget earmarks \$10.9 million for 2001–2002 and \$12.2 million for 2002–2003 for these schools. Specified amounts must be used (1) to reduce class size in kindergarten through third grade to a maximum of fifteen students; (2) to extend teachers' contracts by five days in 2001–2002 to

1. The ABCs results for the 2000–2001 academic year provide some indication of the size of the gaps. On end-of-grade tests in grades three through eight, 82 percent of white students, 52 percent of African-American students, 59 percent of Latino students, and 60 percent of American Indian students tested at or above grade level. All groups appear to be making progress at an approximately equal rate, but that improvement does not lead to a substantial reduction in achievement gaps. For the full ABCs report, see www.ncpublicschools.org/abcs/.

2. This legislative commission is separate from the Advisory Commission on Raising Achievement and Closing Gaps established by the State Board in 2000. To read about this commission, see www.ncpublicschools.org/closingthegap/.

permit staff development for those who want the extension; (3) to extend contracts for all teachers by ten days in 2002–2003, five of which will be instructional days; and (4) to provide for one additional instructional support position at each school. The state’s teacher allotment category will no longer fund teacher assistants for these schools. Teacher assistants who lose their jobs in the highest priority schools and whose job performance has been satisfactory must be given preferential consideration for vacant teacher assistant positions at other schools.

Section 29.6 specifies that in order for a school to remain eligible for the additional resources, the school must meet the expected growth for each year and must achieve high growth in at least two out of three years, based on the annual performance standards set by the State Board. However, no adjustment in resource allotment will be made until the 2004–2005 school year. The State Board must contract for an evaluation of these initiatives.

Continually Low-Performing Schools

A “continually low-performing school” is defined in new G.S. 105.37A as a school that has received state-mandated assistance and has been designated by the State Board as low performing³ for at least two of three consecutive years. Section 29.3 of S.L. 2001-424 enacts this statute to provide for new efforts to assist these schools. The assistance or intervention that the State Board must provide depends on the number of years a school has been low performing.

If a school has already received assistance and is designated low performing for two consecutive years or for two of three consecutive years, the State Board must provide that school with a series of progressive assistance and intervention strategies. The strategies, such as class size reduction or a longer instructional year, must be designed to improve student achievement and maintain achievement at appropriate levels.

A slightly different response is required for schools that have previously received state-mandated assistance and have been designated by the State Board as low performing for three or more consecutive years or for at least three out of four years. The State Board must provide assistance and intervention through actions that are “the least intrusive actions that are consistent with the need to improve student achievement at each school.” The actions must be adapted to each school’s unique characteristics and take into account other actions designed to improve achievement at the school.

Section 29.5 allocates \$1.81 million for 2001–2002 and \$1.99 million for 2002–2003 for “chronically” low-performing schools. These funds must be used to implement any of the following strategies not previously implemented: reduction of class size in grades four through twelve, extension of teachers’ contracts for five additional days of staff development, and addition of five instructional days to the school year.

Section 29.6 sets class size limits for grades K–5. It also requires the State Board to contract for an evaluation of these initiatives.

Low-Performing Schools’ Improvement Plans

Once the State Board has identified a school as low performing, G.S. 115C-105.37 requires the local superintendent to submit a preliminary plan for addressing the school’s needs to the local school board. Section 29.4 of S.L. 2001-424 adds a requirement that the plan describe how the superintendent and other central office administrators will work with the school and monitor its progress.

3. Low-performing schools are those that fail to meet their expected growth standard and have significantly fewer than 50 percent of their students performing at or about Achievement Level III. In 2000–2001, the State Board assigned a status under the ABCs to 2,157 schools; 30 were low performing. For more information about the ABCs Program, see the DPI Web site at www.ncpublicschools.org.

Students with Limited English Proficiency

The increasing enrollment of students with limited English proficiency (LEP students) presents many challenges to school systems. Section 28.9 of S.L. 2001-424 requires the State Board to develop guidelines for identifying and providing services to LEP students. In addition, the Department of Public Instruction (DPI) must prepare a head count of the number of LEP students by December 1 of each year. Students who score “superior” on the standard English language proficiency assessment instrument may not be included in the head count. Students who are included in the head count must be assessed at least once every three years to determine their level of English proficiency.

Limits on Testing

Many people are concerned about the amount of instructional time spent on testing and about the stress associated with frequent testing. Section 28.17 of S.L. 2001-424, as amended by Section 116 of S.L. 2001-487 (H 338), places limits on the time a school may use for practice tests and the timing of field tests and national tests and on a school’s participation in field tests. Schools may devote no more than two days of instructional time per year to “practice” tests that do not have the primary purpose of assessing current student learning. Students may not be asked to take field tests or national tests during the two-week periods preceding the administration of end-of-grade tests, end-of-course tests, or the school’s regularly scheduled exams. A school may participate in more than two field tests at any grade level during a school year only if the school volunteers to participate in more field tests through a vote of its school improvement team or if the State Board finds that an additional field test must be administered at a school to ensure the reliability and validity of a specific test.

Testing Students with Disabilities

The State Board has adopted policies regarding the testing of children with disabilities. Section 28.17 amends G.S. 115C-174.12 to provide that these policies must provide broad accommodations and alternate methods of assessment consistent with a child’s individualized education program and Section 504 plans. The policies must prohibit the use of statewide tests as the sole determinant of a decision about a child’s graduation or promotion and must provide parents with information about the Statewide Testing Program and the options available to students with disabilities.

Other Student Issues

365-Day Suspension for Reports or Threats of Terrorism

After September 11, 2001, all public entities became concerned about terrorism and bioterrorism. S.L. 2001-500 (S 990) addresses this concern. It adds new G.S. 115C-391(d4) to allow a local board of education or superintendent to suspend for up to 365 days a student who

- makes a false report that there is on educational property or at a school-sponsored curricular or extracurricular activity off educational property any device, substance, or material designed to cause harmful or life-threatening illness or injury to another person;
- intends to perpetrate a hoax and conceals, places, disseminates, or displays any device or other object so as to cause a person reasonably to believe that it is a substance or material capable of causing harmful or life-threatening illness or injury to another person;
- threatens to commit an act of terror or makes a report (knowing or having reason to know the report is false) that there is about to occur or is occurring an act of terror likely to cause serious injury or death, when that threat is intended to cause a significant disruption to the instructional day or a school-sponsored activity or causes that disruption;

- makes a report that there is about to occur or is occurring an act of terror likely to cause serious injury or death, when that report is intended to cause a significant disruption to the instruction day or a school-sponsored activity or causes that disruption; or
 - conspires to commit any of the acts listed above.
- S.L. 2001-500 also amends G.S. 115C-391(e) and G.S. 115C-45(c), as amended by S.L. 2001-260, to provide that a student suspended by the superintendent under new G.S. 115C-391(d4) has an appeal of right from that decision to the board of education.

Suspensions for Bomb Threats or Hoaxes

Section 75 of H 338 (S.L. 2001-487) amends G.S. 115C-391(d3) to authorize the superintendent, as well as the board of education, to suspend for 365 days a student who makes a false report or perpetrates a hoax with a device that could reasonably be believed to be a bomb or other destructive device on educational property or at a school-sponsored curricular or extracurricular activity off educational property. This amendment makes G.S. 115C-391(d3) consistent with 365-day suspensions for weapons under G.S. 115C-391(d1).

Appeals to the Local Board of Education

Formerly G.S. 115C-45(c) provided that “an appeal shall lie from the decision of all school personnel to the appropriate local board of education.” This allowed a student to appeal, for example, his or her failure to be selected for a sports team or a teacher’s decision to reduce credit for homework not handed in on time. Some school boards wanted to be able to limit the appeals they heard, and they now have authority to do so in some situations. Under S.L. 2001-260, all school boards must hear certain student appeals but may decide for themselves whether to hear other kinds of student appeals. All boards may continue to use hearing panels of at least two board members to hear and act on these appeals.

G.S. 115C-45(c), as amended by S.L. 2001-260 and S.L. 2001-500, sets out the circumstances under which a board must hear a student’s appeal. A student has the right to appeal any “final administrative decision” (a decision of a school employee from which no further appeal to a school administrator is available) in three circumstances:

1. The student is disciplined under G.S. 115C-391(c), (d), (d1), (d2), (d3), or (d4);
2. The student alleges that the administrative decision violates a specified federal law, state law, State Board policy, state rule, or local board policy, including policies regarding grade retention of students; or
3. The student is appealing any other decision that by statute specifically provides for a right of appeal to the local board of education and for which there is no other statutory appeal procedure.

After the board hears a student’s appeal of right, the student may appeal the board’s decision to superior court on one or more of the following six grounds:

1. The decision is in violation of constitutional provisions,
2. The decision is in excess of the board’s statutory authority or jurisdiction,
3. The decision was made upon unlawful procedure,
4. The decision is affected by other error of law,
5. The decision is unsupported by substantial evidence in view of the entire record as submitted, or
6. The decision is arbitrary or capricious.

Any student who does not have a right to appeal a final administrative decision to the board may petition the board for a hearing, and the board may grant a hearing regarding any final decision of school personnel. The board must notify the person seeking a hearing whether or not a hearing will be permitted.

S.L. 2001-260 also modifies employees’ rights to appeal to the board. These changes are discussed in the employee section of this chapter.

Discipline Records

S.L. 2001-195 (H 620) addresses the issue of expunging information about a student's suspension or expulsion from school from that student's official record. Under former G.S. 115C-402, the superintendent or designee was required to expunge the notice of suspension or expulsion if the student graduated from high school or was not expelled or suspended during the two-year period after the student returned to school following a suspension or expulsion. Many school officials were concerned that this requirement could leave a school without information it might need to help a student or to adequately document a student's former problems and the school's response to them.

S.L. 2001-195 amends G.S. 115C-402 by changing the circumstances under which a superintendent *must* expunge a student's record. In addition to the requirement of graduation or two years without a suspension or expulsion, G.S. 115C-402 adds three conditions:

1. The student's parent, legal guardian, or custodian, or the student, if the student is at least sixteen years old or is emancipated, requests that the record be expunged;
2. The superintendent or designee determines that the record is no longer needed to maintain safe and orderly schools; and
3. The superintendent or designee determines that the record is no longer needed to adequately serve the student.

However, even if no appropriate person requests that the record be expunged, the superintendent *may* do so if all other criteria are met.

Every local board's policy on student records must include information on the procedure for expungement. In addition, every board must have policies governing student conduct. S.L. 2001-195 amends G.S. 115C-391(f) to require the board to include in these policies information on the expungement procedure. The notice given to students or parents of a suspension of more than ten days or of an expulsion must identify what information will be included in the student's official record and describe the procedure for expunging that information.

Notice of Suspension or Expulsion

Because public school students have a property interest in their education, a student is entitled to some level of due process when the student is suspended or expelled from school. Due process includes both notice of the reason for the suspension or expulsion and notice of the student's opportunity to be heard regarding the alleged misconduct. When a student is expelled or suspended for more than ten days, a student's parent or guardian is entitled to notice of the student's rights. S.L. 2001-244 (S 81) adds new requirements to G.S. 115C-391 about the information given to the parent or guardian. If English is the parent's or guardian's second language, the notice must be written in both English and the parent's or guardian's first language when the appropriate foreign language resources are "readily available." Both versions of the notice must be "in plain language" and "easily understandable."

As noted above, G.S. 115C-391 also requires that a parent or guardian be given notice about information that will be part of a student's official record and about the procedure for expunging that information.

Short-Term Suspension Pilot Program

G.S. 115C-105.20 says, "It is the intent of the General Assembly that the mission of the public school community is to challenge with high expectations each child to learn, to achieve, and to fulfill his or her potential." One impediment to learning and achievement by students suspended from school for misconduct is that they do not have access to the instructional program

during their suspension.⁴ A second concern is that suspended students who are unsupervised during the day may engage in misconduct or criminal activities in the community. In a small step to address these concerns, S.L. 2001-178 (S 71) establishes a pilot program to place students on short-term suspensions (no more than ten days) in alternative learning programs.

The State Board, in cooperation with the Department of Juvenile Justice and Delinquency Prevention, must establish a pilot program for no more than five school units. Each participating unit must develop a plan that provides for the placement of students on a short-term suspension, with limited exceptions. The plan must cover all students, unless the unit decides to exclude some or all students for whom a recommendation for long-term suspension is pending. Also, students with disabilities for whom the alternative placement is inappropriate under the student's individual education plan may not be placed under the plan. Absences from the alternative learning program are subject to local board policies regarding promotion and course credits. If a unit determines that attendance in the alternative learning program is mandatory for eligible short-term suspended students, the compulsory attendance law applies.

Each pilot unit must, to the extent reasonable and practicable, ensure that students are placed in programs or classrooms separate from those in which violent adjudicated offenders are placed. A unit may not assign students to programs or classrooms in training schools, detention centers, or other similar facilities. A pilot unit may contract with nonprofit corporations or other governmental entities to meet the students' needs and assign students to programs administered and staffed in whole or in part by these entities.

Any unit selected for the program may delay implementation until the local school board determines that adequate funds are available from federal, state, and local appropriations and other sources. If a board determines that it does not have adequate funds, the State Board may select another unit for the pilot program.

Dress Codes

S.L. 2001-363 (H 195) amends G.S. 115C-391, which requires local school boards to adopt policies governing student conduct and establishing procedures for suspension, expulsion, or discipline of a student if the student's behavior could result in suspension, expulsion, or corporal punishment. These policies now must include a reasonable dress code for students.

Commercial Use of Student Information

S.L. 2001-500 adds new G.S. 115C-401.1, which is designed to protect the confidentiality of information obtained from students. It prohibits a person who enters into a contract with a board of education or its designee from selling or otherwise using for a business or marketing purpose any personally identifiable information obtained from a student as a result of the contract. Use of the information is permitted only if the student's parent or guardian has given written consent to the use. However, a person seeking such consent may not solicit it by using school personnel or equipment nor do so on school grounds. A violation of this prohibition is a Class 2 misdemeanor. When the defendant is an organization as defined in G.S. 15A-773(c) (a corporation, unincorporated association, partnership, body politic, consortium or other group, entity, or organization), the fine is \$5,000 for the first violation, \$10,000 for a second violation, and \$25,000 for a third or subsequent violation.

Pre-adoption Enrollment

Generally, only students who are domiciled in a school administrative unit have the right to enroll in and attend school in that unit without paying tuition. G.S. 115C-366.2 creates several

4. As a general rule, the federal Individuals with Disabilities Education Act (IDEA) requires schools to offer students with disabilities who are covered by IDEA a free appropriate public education during a suspension of more than ten days but not during short-term suspensions.

exceptions to this general rule. S.L. 2001-303 (S 836) amends G.S. 115C-366.2 by including as an exception any child residing in a pre-adoptive home following placement by a county department of social services or a licensed child-placing agency.

Teen Court

The Department of Juvenile Justice and Delinquency Prevention, pursuant to G.S. 7B-1706(c), administers teen court programs to operate as community resources for juveniles. A juvenile diverted to a teen court program will be tried by a jury of other juveniles. If the jury finds that the juvenile has committed the delinquent act, it may assign the juvenile to a rehabilitative measure or sanction, including counseling, restitution, curfews, and community service. Under new G.S. 143B-520, added by Section 24.8 of S.L. 2001-424, teen court programs also may operate as resources to local school units to handle problems that develop at school but have not been turned over to the juvenile authorities.

Curriculum

History and Geography

Although accountability programs focus on reading, writing, and mathematics, one of the liveliest curriculum topics in the General Assembly was not about any of these subjects. Instead, an initial discussion among educators about possible changes to the history and geography curriculum was the catalyst for a section of S.L. 2001-363. It amends G.S. 115C-81 so that both the standard course of study and the Basic Education Program require students to have two yearlong courses on North Carolina history and geography, one in elementary school and the other in middle school. These courses must include instruction on the contributions of various racial and ethnic groups to North Carolina history and geography and may include up to four weeks of instruction relating to the local area in which students reside.

Social Studies Curriculum

Section 2 of S.L. 2001-363, the Student Citizenship Act of 2001, directs the State Board to modify the social studies curriculum in G.S. 115C-81 so that students will receive instruction on participation in the democratic process and hands-on experience in such participation. Both the middle school and high school social studies curricula must include instruction in civic and citizenship education. The new curricula must be implemented in the 2002–2003 school year.

Character Education

For several years, G.S. 115C-47(h) has given local boards of education the option of requiring schools to teach the character traits of courage, good judgment, integrity, kindness, perseverance, respect, responsibility, and self-discipline. S.L. 2001-363 makes “character education” mandatory. Each local school board must develop and implement character education instruction with input from the local community. The instruction must be incorporated into the standard curriculum, rather than simply tacked on as a separate subject. Instruction should address the traits listed above. Local boards are also encouraged to include instruction on respect for school personnel, responsibility for school safety, service to others, and good citizenship. Character education must

begin with the 2002–2003 school year. However, if a local board determines that it would be an economic hardship to meet that schedule, the board may request an extension from the State Board.

Section 28.36 of S.L. 2001-424 requires the State Board to develop a model character education curriculum, using funds appropriated for character education.

Display of the Ten Commandments

In a provision that may well be challenged as a violation of the Establishment Clause of the First Amendment, S.L. 2001-363 amends G.S. 115C-81 to allow a school board to display on real property it controls “documents and objects of historical significance that have formed and influenced the United States legal or governmental systems and that exemplify the development of the rule of law.” Examples of such documents are listed in the statute and include the Magna Carta, the Mecklenburg Declaration, the Justinian Code, and other documents as set out in G.S. 115C-81(g)(3a), as well as the Ten Commandments. A display may not be limited to documents that contain words associated with a religion. No display may seek to establish or promote religion or to persuade any person to embrace a particular religion, religious denomination, or other philosophy. Any display of a document containing words associated with a religion must be presented in the same manner and appearance generally as other documents and objects in the display. A prominent sign quoting the First Amendment must accompany the documents.

School Operations

School Classifications

S.L. 2001-97 (H 15) amends G.S. 115C-74 to give each local board of education the authority to organize the schools in its administrative unit as the board sees fit. G.S. 115C-75, as amended by S.L. 2001-97, sets out recommended classifications and definitions of elementary, middle, junior high, high, senior high, and union schools.

School Paperwork

In 2000 the General Assembly amended G.S. 115C-307 (duties of teachers) and G.S. 115C-47 (duties of school boards) to reduce unnecessary paperwork for educators. S.L. 2001-151 (S 708) continues this effort. It amends G.S. 115C-12 to require the State Board to adopt policies to ensure that the State Board, the State Superintendent, and the staff of the Department of Public Education do not require local school units to produce unnecessary paperwork. Specifically, local units may not be asked to:

1. Provide information already available on the student information management system or housed within the Department of Public Instruction,
2. Provide the same written information more than once during a school year unless the information has changed during the ensuing period, or
3. Complete forms for children with disabilities that are not essential for compliance with the federal Individuals with Disabilities Education Act (IDEA).⁵

However, the State Board may require information that is available on its student information management system or require the same information twice if the State Board can demonstrate both a compelling need for the information and the lack of a more expeditious manner of getting the

5. Although not specified in S.L. 2001-155, local units may have to complete forms for children with disabilities that are not essential for compliance with the Individuals with Disabilities Education Act but are essential for compliance with other federal statutes, most notably Section 504 of the Rehabilitation Act.

information. The statute does not explain how or to whom the State Board is to make this demonstration.

Kindergarten Class Size

Section 28.44 of S.L. 2001-424 provides that for 2001–2002, the maximum class size limits for kindergarten must be reduced by one. The maximum class size set by the State Board for 2000–2001 was based on an allotment ratio of one teacher for every nineteen students; limits for 2002–2003 are reduced by one, based on an allotment ratio of one teacher for every eighteen students. Local school units may use teacher positions allocated to reduce class size in kindergarten only to hire kindergarten classroom teachers.

Charter Schools

Charter schools operate under a charter application approved by the State Board, and the State Board must approve any material revision to a school’s application. Section 28.26 of S.L. 2001-424 modifies the circumstances under which enrollment growth in a charter school constitutes a material revision. It amends G.S. 115C-238.29D to provide that it is not a material revision of a charter application for a charter school to increase its enrollment annually by up to 10 percent of the previous year’s enrollment or to increase its enrollment in accordance with planned growth set out in the charter application. Enrollment growth above 10 percent that is not in accordance with planned growth in the charter is a material revision of the charter application; the State Board may approve such additional growth only if the conditions in G.S. 115C-238.29D are met.

Conflicts of Interest

S.L. 2001-409 (H 115) repeals G.S. 14-236 and -237 and incorporates the essential provisions of those statutes into an amended G.S. 14-234. This clarifies the coverage of the conflict provisions and creates a uniform standard of conduct for all public officials. This standard and other changes in the law related to construction and purchasing are discussed in detail in Chapter 21, “Purchasing and Contracting.”

Emergency Response Plans

S.L. 2001-500 amends G.S. 115C-47 to authorize local boards of education to adopt emergency response plans relating to incidents of school violence. Emergency response plans are not public records as defined in G.S. 132-1. S.L. 2001-500 also amends G.S. 143-318.11 to allow a public body to meet in closed session to formulate plans by a local board of education relating to emergency response to incidents of school violence.

Construction and Purchasing Law

Changes in school construction law and purchasing law are explained in Chapter 21, “Purchasing and Contracting.”

Transportation and Traffic

Interference with School Buses

School bus safety and adherence to regular bus schedules are important goals. S.L. 2001-26 (S 45) amends two criminal statutes to deal with the problem of persons interfering with the operation of public school buses. G.S. 14-132.2 now provides that a person who unlawfully and

willfully stops, impedes, delays, or detains a public school bus or activity bus being operated for school purposes is guilty of a Class 1 misdemeanor. Willfully trespassing on or damaging a public school bus or activity bus is changed from a Class 2 misdemeanor to a Class 1 misdemeanor. The definition of “disorderly conduct” in G.S. 14-288.4(a) now includes engaging in conduct that disturbs the peace, order, or discipline on any public school bus or activity bus. G.S. 15-1340.23 sets out the punishment for a Class 1 misdemeanor: a fine set by the court and a sentence that ranges from 1 to 120 days of a community, intermediate, or active punishment, depending on the number of the defendant’s prior convictions.

Traffic and School Facilities

Opening a new school or expanding an existing facility affects traffic and safety. Section 27.27 of S.L. 2001-242, which amends G.S. 136-18, facilitates planning for such a change. When any public or private entity acquires land for a new school—and before the entity begins construction of a new school or expands or relocates an existing school—the entity must require information from the Department of Transportation (DOT). Specifically, the entity must request that DOT evaluate the plans and make recommendations to ensure that all proposed access points comply with the criteria in DOT’s policy on street and driveway access. DOT must respond no more than sixty days after the request. However, the entity planning the school is not required to meet DOT’s recommendations.

Bus Accidents

Claims against school employees for accidents involving school buses or school transportation service vehicles are heard and defended under the Tort Claims Act. Under G.S. 143.300.1, the Attorney General is authorized to defend a civil action brought against the driver, transportation safety assistant, or monitor of a public school bus or school transportation service vehicle or school bus maintenance mechanic, as long as certain conditions are met. Section 6.18 of S.L. 2001-424 amends that statute to limit the Attorney General’s authority to defend employees or former employees. The Attorney General must refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the Attorney General determines that:

1. the act or omission was not within the scope and course of employment as a state employee,
2. the employee or former employee acted or failed to act because of actual fraud,
3. defense of the action would create a conflict of interest between the state and the defendant, or
4. defense of the action or proceeding would not be in the best interests of the state.

Studies

Testing

Section 28.17 of S.L. 2001-424 requires the Joint Legislative Education Oversight Committee to study the state’s testing program. Section 28.17 requires the State Board to study the benefits and consider the costs of providing students’ parents or guardians with copies of tests administered to their children under the Statewide Testing Program.

The State Board also must report to the Joint Legislative Education Oversight Committee on its objectives for the Statewide Testing Program and on the program’s implementation. The State Board must provide the committee with an analysis of the current resources allocated to meet the needs of students subject to the student accountability standards and submit recommendations for other resources that would best assist such students in meeting these standards.

Textbook Distribution

Section 28.24 of S.L. 2001-424 directs the State Board to contract for an analysis of the best and most efficient method to manage textbook distribution to local schools.

Children with Disabilities

Section 28.29 directs the Joint Legislative Education Oversight Committee, in consultation with the Department of Public Instruction, to examine state laws governing special education and related services for children with disabilities. The committee must identify and recommend changes needed to bring state law into conformity with the federal IDEA.

Other Studies

Part II of S.L. 2001-491 (S 166) authorizes the Legislative Research Commission to study the reporting of threats of school violence and education programs for juveniles in juvenile facilities. Part VIII of S.L. 2001-491 authorizes the Joint Legislative Education Oversight Committee to study the following issues related to public schools: residential charter schools; teaching personal financial literacy; schoolwork of suspended students; nutrition in public schools; classroom experience for school personnel; science, mathematics, and technology education; low-wealth funding formula; education of students with disabilities; prescription of drugs to children diagnosed with ADD/ADHD; high priority school assistance; caseloads for speech and language pathologists; the performance-based licensure program; advisory membership on State Board of Education; and participation of nonpublic school and home-school students in extracurricular activities in public schools. The Committee is to report to the General Assembly in 2002 or 2003.

Department of Health and Human Services

More at Four Pilot Program

Offering high-quality preschool programs to at-risk children often helps them succeed when they later enroll in school. Section 21.76B of S.L. 2001-424 directs the Department of Health and Human Services (DHHS), in consultation with the Department of Public Instruction, to develop the More at Four Program, a voluntary prekindergarten pilot program. The goal of the program is “to ensure that all children have an opportunity to succeed in kindergarten.” Section 76A allocates \$6.45 million of DHHS’s appropriation for each year of the 2001–2003 fiscal biennium for the development and implementation of this program.

Office of Education Services

Section 21.80(b) of S.L. 2001-424 dissolves the Division of Early Intervention and Education and creates an Office of Education Services within DHHS. The office is responsible for managing the schools for the deaf, the Governor Morehead School for the Blind, and their preschool components. The purpose of the office is to improve students’ academic and postsecondary outcomes and to strengthen collaborative relationships with local education agencies and the State Board.

Closure of School for the Deaf

The Central North Carolina School for the Deaf at Greensboro is being closed. Section 21.81 of S.L. 2001-424 amends G.S. 143B-216.40 by deleting that school from the list of schools for the deaf maintained by DHHS.

Preschool Programs for Deaf Children

Section 21.83 of S.L. 2001-424 ends the state's operation of preschool services for deaf children. Other services must be made available to these children.

Miscellaneous

Appropriations

Section 2.1 of S.L. 2001-424 appropriates to the Department of Public Instruction \$5.88 billion for the 2001–2002 fiscal year and \$5.92 billion for the 2002–2003 fiscal year.

Council on Educational Services for Exceptional Children

G.S. 115C-121 establishes the Council on Educational Services for Exceptional Children, a twenty-three-member advisory council to the State Board. Section 28.29 of S.L. 2001-424 changes the composition of the council and redefines its duties.

Information Security

Section 15.2 of S.L. 2001-424 amends G.S. 147-33.83 by directing the State Chief Information Officer to establish an enterprise-wide set of standards for information technology security. This section is discussed in Chapter 13, "Information Technology." If local school administrative units develop their own security standards that are comparable to or exceed the standards set by the information officer, they may implement their own standards and will not be required to get the State Chief Information Officer's approval before purchasing information technology security.

E-Procurement

Section 15.6 of S.L. 2001-424 deals with the state's electronic procurement program; changes in this program are explained in Chapter 21, "Purchasing and Contracting." Any school unit operating a functional electronic procurement system established before September 1, 2001, may continue to operate that system independently until May 1, 2003, or may opt into the North Carolina E-Procurement Program.

School Employment: Licensure and Professional Development

Superintendents from Fields outside Education

G.S. 115C-271 gives each local board of education the discretion to select the superintendent for that school system, but it directs the State Board of Education to adopt rules establishing qualifications for the selection. Until the enactment of S.L. 2001-174 (S 378), the statute further provided that at a minimum a candidate, in order to be qualified, must have served as a principal in a North Carolina public school or "have equivalent experience." As now amended, the statute provides that the candidate must have been a principal or "have other leadership, management, and administrative experience." Further, the statute now directs the State Board to adopt qualifications "that would qualify a person to serve as a superintendent without having direct experience or certification as an educator."

Standards Board for Public School Administration Abolished

Under the requirements of Article 19A of G.S. Chapter 115C, to be licensed as a public school superintendent, deputy superintendent, associate superintendent, assistant superintendent, principal, or assistant principal, an individual must meet certain educational requirements and must pass the North Carolina Public School Administrator Exam. Prior to enactment of Section 28.25 of S.L. 2001-424, the exam was prepared by the North Carolina Standards Board for Public School Administration (subject to approval by the State Board). The Standards Board administered the exam to all applicants and reviewed the educational qualifications of all applicants. The Standards Board then recommended to the State Board that those who qualified be licensed. As now amended, all references to the Standards Board are removed from the statute. The State Board is now directly responsible for preparing and administering the exam and for passing on the qualifications of all applicants for licensure.

Teacher Licensure Exam in the Second Year of Teaching

G.S. 115C-296(a) directs the State Board to require applicants for teachers' licenses to achieve a prescribed minimum score on a standard examination. S.L. 2001-129 (H 1285) directs the board to permit an applicant to fulfill this requirement before or during the applicant's second year of teaching, provided that the applicant take the exam at least once during the first year of teaching.

Health Certificate Exams by Non-Physicians and Out-of-State Practitioners

G.S. 115C-323 requires that every new employee in a public school system (or returning employee after at least a year's absence) present a certificate certifying that the employee has no mental or physical disease that would impair his or her ability to perform the duties of the job. The statute formerly required that the certificate be prepared by a physician licensed to practice medicine in North Carolina. S.L. 2001-118 (H 608) amends the statute so that it now also permits the certificate to be prepared by a nurse practitioner or physician's assistant licensed in North Carolina or by a physician, nurse practitioner, or physician's assistant licensed in another state if evidence of that licensure appears on the certificate.

Use of Teacher Mentor Funds

Section 28.31 of S.L. 2001-424 specifies that state funds appropriated to provide mentors for teachers during the second year of teaching may be used to provide mentors for teachers whose first year of teaching was in a public school in North Carolina, a public school in another state, or a charter school.

Pilot Program for Full-Time Mentors

Section 28.18 of S.L. 2001-424 directs the State Board to establish a pilot program to permit the Charlotte-Mecklenburg, Winston-Salem/Forsyth, and Wake County school units to use funds allocated for mentors to employ full-time mentors. A teacher or instructional support employee employed to serve solely as a mentor under this program is to receive a payment for each individual, up to fifteen individuals, to whom the mentor is assigned, with the amount of each payment to be the same as the amount received as a salary supplement by a teacher or instructional support person serving as a mentor.

Leave to Work on Licensure

Section 28.19 of S.L. 2001-424 directs the State Board to permit initially licensed teachers to receive up to three days of paid leave during the second year of teaching to work on their performance-based licensure required products or to consult with their mentors. If teachers have not successfully completed the performance-based requirements by their third year, they are to receive up to three days of paid leave to complete all requirements. Teachers may take the paid leave only with the approval of their supervisors. Section 28.19 also directs the State Board to study the teacher mentor program and the performance-based licensure program to determine whether adjustments are needed in either.

Funds for Noninstructional Support May Be Used for Staff Development

G.S. 115C-105.25(b) provides some flexibility to school administrative units in transferring funds among allotment categories. Section 28.22 of S.L. 2001-424 adds a new G.S. 115C-105.25(b)(2a) permitting up to 3 percent of state funds allocated for noninstructional support personnel to be transferred for use in staff development.

Teacher Academy Development Programs

G.S. 116-30.01(a) directs the North Carolina Teacher Academy Board of Trustees to establish a statewide network of high quality, integrated, comprehensive, collaborative, and substantial professional development for teachers. Section 28.28 of S.L. 2001-424 adds a requirement that the network include professional development programs that focus on teaching strategies for teachers assigned to at-risk schools. The new provisions also direct the Teacher Academy to use at least 10 percent of its budget for the 2001–2002 fiscal year to deliver programs for teachers assigned to small classes in kindergarten through fifth grade.

School Employment: Recruiting, Hiring, and Leave

Criminal Records Checks

G.S. 115C-322 permits local boards of education to have access to computerized criminal record histories maintained by the State Bureau of Investigation and the Federal Bureau of Investigation for checking on the criminal histories of employees or applicants for employment. S.L. 2001-376 (S 778) amends the statute to make three changes. First, it adds a provision that an applicant for employment who gives false information on an application that is used for a computerized criminal history check is guilty of a Class A1 misdemeanor. Second, it specifies that the requirement that the local board of education make written findings with respect to how it used the computerized criminal information in a particular circumstance may be delegated to the superintendent. Third, it provides that workdays worked by a probationary teacher while the computerized criminal history check is being conducted count toward the 120 days that a teacher must work in a year for the year to count as one of the four years that must be worked before the teacher may gain tenure, even though the statute says that an employee who works before the criminal record check is complete is employed only “conditionally.”

Hiring Retired Teachers

G.S. 135-3(8)c permits retired teachers and state employees to return to employment without losing the right to payment of their retirement pay; but it subjects them to an earnings cap of 50 percent of the salary of the position and provides that if the person receives more than 50 percent pay, retirement benefits are suspended. A special provision of the statute provides that retired teachers who return to teaching are not subject to the 50 percent limit, but may be paid in full and

still receive their retirement benefits. The statute had formerly required that the retired teacher be retired for at least twelve months before returning. Section 32.25 of S.L. 2001-424 amends the statute to reduce the waiting time to six months. This provision expires June 30, 2003.

Programs to Increase Supply of Teachers

Four initiatives found together in Section 29.2 of S.L. 2001-424 are designed to increase the supply of teachers. The first makes \$1 million available each year of the 2001–2003 biennium for scholarship funds for teacher assistants taking courses that are prerequisites for teacher certification programs. The second makes \$1.5 million available each year of the biennium to provide annual bonuses of \$1,800 to teachers certified in and teaching mathematics, science, or special education in middle or high schools in which 80 percent of students are eligible for free or reduced price lunches or in which 50 percent or more are performing below grade level in algebra and biology. (A provision makes clear that the loss of the bonus because the teacher is reassigned to another school or to another field does not constitute a demotion within the meaning of the Teacher Tenure Act.) The third initiative directs the Joint Legislative Education Oversight Committee to study the effectiveness of providing benefits to part-time teachers as a means to recruit certified teachers. The fourth directs that committee to study the potential effectiveness of increasing the size of the Teaching Fellows Program to improve the supply of qualified teachers. A separate initiative, found in Section 28.43, authorizes the State Board to use up to \$200,000 each year of the biennium to enable teachers who have received national teacher certification or other special recognition to advise the State Board on teacher recruitment and other strategic priorities.

Leaves to Teach in Charter Schools

G.S. 115C-238.29F(e)(3) requires school administrative units to grant extended leaves to teachers who wish to teach in a charter school. The statute previously required the school administrative unit to grant a leave for any number of years requested and to extend a leave at the teacher's request for any number of years requested. S.L. 2001-462 (S 139) amends the statute to provide that the initial request of a teacher is to be granted for one year only and that the administrative unit is not required to grant a request for a leave or an extension to any teacher who has already received such a leave from the unit.

Teaching Opportunities for Military Personnel

S.L. 2001-146 (S 803) directs the Board of Governors of the University of North Carolina, the State Board of Community Colleges, and the Department of Public Instruction to work cooperatively to expand opportunities for military personnel to enroll in and complete teacher education programs prior to their discharge from the military.

School Employment: Pay

Salaries

S.L. 2001-424 sets schedules for the salaries of teachers, school-based administrators, central office administrators, teacher assistants, and other noncertified personnel.

For teachers, the act sets a salary schedule for 2001–2002 that ranges from \$25,250 for a ten-month year for new teachers holding an “A” certificate to \$55,910 for teachers with twenty-nine or more years of experience, an “M” certificate, and national certification. For school-based administrators (meaning principals and assistant principals), the ten-month pay range is from \$32,226 for a beginning assistant principal to \$74,920 for a principal with more than forty years of

experience who serves in the largest category of schools. Of course, many school-based administrators are employed not for ten but for eleven or twelve months, which adds a proportionate amount to their salaries. For central office administrators (meaning assistant superintendents, associate superintendents, directors/coordinators, supervisors, and finance officers), the ten-month range is from \$29,320 to \$70,020; again, many are employed for more than ten months. Teacher assistants and other noncertified personnel received an annual salary increase of \$625.00 per individual.

Instructional Support Personnel

Section 28.11(g) of S.L. 2001-424 amends G.S. 115C-325(a)(6), which contains the definition of *teacher* for the purpose of determining who is covered by the Teacher Tenure Act. Before the amendment, the statute provided that a teacher was anyone who holds a current Class A license, is employed in a permanent full-time position, and (1) teaches or directly supervises teaching, (2) is classified by the State Board as a teacher, or (3) is paid as a classroom teacher. The amendment changes the last element to read “is paid either as a classroom teacher or instructional support personnel.” This change makes it clear that school psychologists, guidance counselors, social workers, speech-language pathologists, and media coordinators are eligible for teacher tenure. Section 28.37 directs the Joint Legislative Education Oversight Committee to study salary differentials for instructional support personnel, considering salary differentials based on degrees and other educational credentials, licensure, and other factors.

Overtime for Teacher Assistant/Bus Drivers

Section 28.42 of S.L. 2001-424 contains a provision specifying that a school employee working as both a teacher assistant and a bus driver (a common combination) who works for a combined total of more than forty hours in a week is to receive overtime compensation at a rate of time-and-a-half. The appropriate compensation is to be paid from the teacher assistant and transportation allotments. If the employee and the school system agree, the employee may use compensatory time off rather than receive overtime pay.

Substitute Teacher Unemployment Insurance

Section 28.42 of S.L. 2001-424 adds new G.S. 96-8(10) providing that no substitute teacher or other substitute school personnel is to be considered unemployed for days or weeks when not called to work unless the individual is a permanent school employee regularly employed as a full-time substitute during the period of time for which the individual requests benefits.

Salaries of Food Service Workers and Custodians

Section 28.34 of S.L. 2001-424 directs the Joint Legislative Education Oversight Committee to study the salaries of food service workers and custodians employed in the public schools and report to the 2002 session of the General Assembly.

School Employment: Grievances and Harassment

Grievances, Appeals, and the At-Will Status of Employees

Former G.S. 115C-45(c) allowed just about anyone to appeal to the local board of education just about any action taken by any school employee. With respect to students, an appeal could be taken, for example, because a student was cut from the basketball team or because a student got a C on a paper. With respect to employees, an appeal could be taken, for example, because a

custodian was transferred to a different school or because a teacher assistant was required to drive a school bus on a fill-in basis. Some school boards wanted to limit such appeals in order to reduce the scope of actions that are automatically appealable. S.L. 2001-260 responds to that desire, amending G.S. 115C-45(c) to limit the kinds of matters that an individual has an automatic right to appeal to the board of education.

With respect to students, matters that are now automatically appealable under amended G.S. 115C-45(c) are discussed above in “Other Student Issues” (p. 93).

With respect to employees, the statute as now amended provides that an appeal to the board of education is automatically available from “any final administrative decision” related to the “terms or conditions of employment or employment status of a school employee.” Does the amended statute in fact limit the kinds of appeals that an employee may automatically take to the board of education? On the one hand, the answer appears to be no, because under the amendment all actions that *relate to the terms or conditions of employment or employment status* are automatically appealable, and that is a very broad range. On the other hand, the answer may to some extent be yes, because the only actions automatically appealable are “final administrative actions.” That is, the decision by a principal to change a custodian’s work hours is not automatically appealable to the board of education, as it was under the old provisions of G.S. 115C-45(c), in districts where the policies of the board of education permitted the custodian to take the appeal first to the superintendent (or other administrative official). Under the amended statute, the appeal to the board is available only after the custodian has exercised all avenues for redress in the administrative chain.

The new provisions of the amended statute go on to say that in the case of employment decisions concerning dismissal, demotion, or suspension without pay, a noncertified employee may appeal the decision of the school board to the superior court. In such an appeal, the dismissed, demoted, or suspended employee may allege that the board’s decision to uphold the dismissal, demotion, or suspension was

- in violation of constitutional provisions,
- in excess of the authority of the board,
- made upon an unlawful procedure,
- affected by other error of law,
- unsupported by substantial evidence in light of the entire record, or
- arbitrary or capricious.

Further, a noncertified employee who is to be dismissed (or demoted or suspended without pay) may, under the new statutory provisions, request (and is then entitled to receive) written notice as to the reasons for the dismissal. This notice is to be provided prior to any hearing before the board.

The combined effect of these provisions is not completely clear. Noncertified school employees—custodians, maintenance workers, bus drivers, teacher assistants, food service workers, secretaries, and others—are at-will employees. Until now, that has meant that they are subject to dismissal, demotion, or suspension for any reason or for no reason at all—as are employees at-will in public and private employment generally—as long as there is not an illegal reason at play, such as race or sex discrimination. Now, however, new G.S. 115C-45(c) provides that an employee at will who is to be dismissed, demoted, or suspended without pay is entitled to (1) a statement of the reasons, (2) a hearing before the board of education, and (3) the right to appeal the decision of the board of education to the superior court on the grounds, among others, that the decision of the board was not supported by substantial evidence or was arbitrary or capricious.

Putting those rights together, the statute could be read as ending employment at will for noncertified public school employees. Whether the courts will read the statute in that way remains to be seen. Two factors argue against such a reading. First, the amended statute itself provides, in its final sentence, that “[t]his subsection shall not alter the employment status of a noncertified employee.” The apparent meaning is that such employees are still employees at will. Second, the entire appeals procedure called for by the amended statute, with first an appeal to the board of

education and then on to the superior court, is premised on the fact that there is a “final administrative action” to be appealed from. Suppose a board of education by policy reserves to itself the authority to make the initial decisions to dismiss, demote, or suspend without pay noncertified employees. In such a case, neither the principal nor the superintendent would have the authority to dismiss a custodian but could only recommend such action to the board of education. This procedure would be cumbersome, but with such a procedure in place it could be said that the superintendent’s recommendation to the board is not a “final administrative action” and that the ultimate action of the board itself in voting to dismiss the custodian is not an action that the custodian can appeal to the board or on to the superior court. In that case, the custodian would have no right at all to a hearing. It is not clear if the General Assembly meant to allow such differential treatment of noncertified employees to depend on whether the local board of education delegates dismissal authority to the superintendent or principal. It will be left to the courts to interpret the statute or to the General Assembly to clarify it.

Sexual Harassment Policy

G.S. 115C-333.5 provides that a school employee may not be disciplined for filing a complaint of sexual harassment unless the employee knew or had reason to believe that the report was false. S.L. 2001-173 (H 1149) amends the statute to add a provision authorizing local boards of education to adopt policies addressing the sexual harassment of employees by students, other employees, or board members. Such policies may set out the consequences of sexually harassing school employees and the procedures for reporting incidents of sexual harassment.

Laurie Mesibov

Robert Joyce

10

Environment and Natural Resources

Most of the environmental and natural resource bills passed by the 2001 General Assembly extend or make incremental changes to existing laws. Major new air quality legislation introduced in the session did not pass.

Agriculture

Foot and Mouth Disease

Early in the 2001 session, the General Assembly addressed the threat of foot and mouth disease by strengthening the powers of the State Veterinarian to respond to imminent threats of foot and mouth disease and other contagious animal diseases. S.L. 2001-12 (S 779). The new law applies to any “contagious animal disease that has the potential for very serious and rapid spread” or other serious consequences as determined by the State Veterinarian (in consultation with the Commissioner of Agriculture and with the approval of the Governor). The expanded powers of the State Veterinarian include the authority to enter private property to examine and test animals, to stop and inspect vehicles transporting animals, to quarantine areas, to prohibit the movement of animals, and to order destruction and proper disposal of infected or exposed animals.

Other Regulatory Measures

Other regulatory legislation enacted this session included:

- S.L. 2001-254 (H 1312), which extends the swine farm moratorium until September 1, 2003, and the Division of Soil and Water Conservation’s swine farm inspection pilot program until September 1, 2002;
- S.L. 2001-326 (S 848), which removes the previous exemption of public livestock markets from permitting requirements for animal waste management systems unless the market has obtained an individual water quality permit under G.S. 143-215.1;

- S.L. 2001-440 (S 312), which specifies that the duty of the Department of Agriculture to regulate anhydrous ammonia installations is limited to fertilizer uses and does not include industrial uses; and
- S.L. 2001-343 (H 1318), which spells out the conditions under which farm machinery dealerships may be terminated by manufacturers or distributors.

Crops

Legislation enacted in 2001 concerning crops included:

- S.L. 2001-488 (H 382), which adopts the scuppernong grape as the state fruit, the strawberry as the state red berry, and the blueberry as the state blue berry;
- S.L. 2001-262 (S 823), which provides for the ABC Commission to issue wine tasting permits, allows wineries to sell imported wine in limited situations, allows small wineries to obtain wine wholesaler permits, and authorizes a wine grower permit to allow growers to have their grapes processed into wine by a winery (annual sales must not exceed 20,000 gallons); and
- S.L. 2001-290 (H 218), which provides for recovery of double damages for intentional injury or destruction of crops, timber, animals, or facilities used in production.

Taxes

Tax legislation enacted in 2001 affecting agriculture included:

- S.L. 2001-514 (H 688), which imposes the sales tax on sales of seed and fertilizer for nonfarm uses and appropriates funds to N.C. State University for a center for turf grass environmental research and to the Department of Agriculture for public education on turf grass research results;
- S.L. 2001-475 (S 970), which raises the cap on funding the Grape Growers Council from \$175,000 to \$350,000 from the proceeds of the North Carolina wine excise tax; and
- S.L. 2001-499 (H 1427), which allows farmer-to-farmer sales of farmland without requiring the seller to pay deferred taxes.

Liability of Soil and Water Conservation Districts and Officials

Legislation concerning the liability of soil and water conservation districts and officials and animal waste management technical specialists is discussed below in the section on “Soil and Water Conservation.”

Miscellaneous

The 2001 Technical Corrections Act [S.L. 2001-487 (H 338)] includes provisions that clarify the criminal penalty for unlawful collection of ginseng. The act also requires the Board of Agriculture to consult with the Joint Legislative Commission on Governmental Operations before entering leases or contracts for improvements at the State Fairgrounds involving estimated revenues of \$100,000 or more.

Soil and Water Conservation

The 2001 General Assembly enacted two laws concerning liability of soil and water conservation districts, supervisors, and employees. These laws had been sought for some years by the districts. The General Assembly also enacted legislation clarifying the powers of the State Soil and Water Conservation Commission.

County Defense of Suits against District Supervisors and Employees

North Carolina counties have long had the authority to defend civil suits against their own officers and employees and to pay civil judgments against them resulting from such suits. G.S. 153A-97, 160A-167. Counties that have been asked to provide these protections to local soil and water conservation district employees have usually done so. Some counties have indicated that they might provide these protections to district supervisors as well, but other counties have been uncertain about their authority to do so, because they were not sure that district supervisors were county officers. S.L. 2001-284 (H 968) eliminates these uncertainties.

S.L. 2001-284 specifically adds district supervisors and local soil and water conservation employees (whether they are technically county or district employees) to the list of those officers and employees who can be defended by the county. The county has the discretion to have such suits defended by the county attorney or to employ special legal counsel or use insurance company attorneys. District supervisors or employees who wish to take advantage of the new law must give pretrial notice to the board of county commissioners of any claim or litigation against them before the claim is settled or a judgment is given.

Small Watershed Project Liability

Early common law decisions imposed a legal duty on landowners to take “reasonable care” to protect business visitors (“invitees”) from being injured while on the landowner’s property. The landowner only owed a legal duty not to intentionally injure nonbusiness visitors, including trespassers and “licensees” (persons on the property by express or implied permission but not on mutual business). For more than two decades there has been a trend in common law decisions to liberalize liability by applying the reasonable care standard to all entrants or at least to licensees as well as invitees. About half of the nation’s state courts have joined this trend, including North Carolina in 1998. (*Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882, applying the reasonable care standard to licensees.)

In a parallel development, more than forty states have enacted statutes that protect rural landowners from liability to people who are injured while hunting, fishing, hiking, swimming, or otherwise recreating on their land without charge. These statutes allow rural landowners to defend liability suits by proving that they did not intentionally injure the people who entered their land without charge. In 1995 North Carolina enacted such a statute, G.S. Chapter 38A, which protects landowners who invite or permit others to use their lands without charge for recreational or educational purposes. The statute probably would protect a private landowner or soil and water conservation district supervisor who helped sponsor a small watershed project and who was sued by an injured recreational or educational user of the project. However, if it happened that the district or a county owned an easement or part of the watershed project property, the district or county could not claim this defense, because G.S. Chapter 38A does not apply to governmental landowners.

Small watershed project sponsors have tried for several years to get legislation enacted that would fill this gap. In 2001, with crucial help from Representative Arlie Culp (a former Soil Conservation Service district conservationist), the General Assembly finally enacted such legislation in S.L. 2001-272 (H 983). The new legislation adopts the text of G.S. Chapter 38A as an amendment to G.S. Chapter 139, the statute dealing with soil and water conservation districts. The new law essentially gives the same protections to districts, supervisors, and other landowners, and it applies only to land associated with watershed improvement projects.

S.L. 2001-272 adds the following sentence: “This statutory rule modifies the common law of North Carolina concerning landowner liability.” This sentence indicates a legislative intent that the new statutory rules—rather than the rules laid down in common-law decisions such as *Nelson v. Freeland*—should govern future liability decisions on this subject.

Technical Specialists and Best Management Practices

Existing legislation authorizes the State Soil and Water Conservation Commission to designate technical specialists who will review and certify animal waste management plans.

S.L. 2001-284 (H 1111) makes it clear that the commission has the authority to develop a program for the approval of these technical specialists and to develop best management practices to be used in the Department of Environment and Natural Resources' (DENR) water quality protection programs. S.L. 2001-284 specifically authorizes the commission to adopt rules that establish criteria for approval of these practices.

Funding

Section 19.2A of the 2001 Appropriations Act [S.L. 2001-424 (S 1005)] allocates \$240,000 for each of the next two fiscal years to support agricultural cost share technical assistance in soil and water conservation districts. This reallocation is designated as permanent, and continuing in subsequent fiscal years unless the General Assembly otherwise directs.

Section 19.12 of the Appropriations Act reallocates funds that were originally allocated in 1995 to the Town Fork Creek Watershed Improvement Project. The reallocations are as follows:

- \$41,680 to Stokes County Water and Sewer Authority for the Germanton Water Project
- \$893,560 to Stokes County Water and Sewer Authority for the Walnut Cove/Industrial Site Connection (with any leftover funds allocated to the Dan River Project)
- \$80,000 to the Stokes County Water and Sewer Authority for the Dan River Project
- \$30,000 to DENR for the Limestone Creek Small Watershed Project in Duplin County
- \$346,640 to DENR for the Deep Creek Small Watershed Project in Yadkin County

Air Quality

Several significant bills relating to air quality were introduced and debated at length. Only S.L. 2001-504 (H 969) passed. S.L. 2001-504 sets fees for the enhanced automobile inspection and maintenance requirements created by S.L. 1999-328 (the debate over these fees had been lingering since 1999). Enhanced inspection of vehicle emissions systems is seen as a way of improving the state's deteriorating air quality.

The new inspection and maintenance fee legislation increases the maximum emissions and safety inspection fee to \$23.50 (effective January 2002) and then to \$23.75 (effective July 2007) and decreases the safety-only sticker fee from \$1.05 to 85 cents. S.L. 2001-504 also modifies the fee distribution formula set out in G.S. 20-183.7(c) and deletes the Highway Trust Fund Repayment Fee. It adds new G.S. 20-183.7(f) and (g) to require inspection stations to post fee information in a highly prescribed manner. The bill also includes enforcement provisions with mandatory penalties for certain stated categories of violations.

Promoted as the "Clean Smokestacks" bill, Senate Bill 1078 (and its equivalent, House Bill 1015) would have required reductions in emissions of nitrogen oxides, sulfur dioxide, and mercury from certain power plants in North Carolina. These fossil-fuel plants are grandfathered (that is, they are out of compliance with current clean air standards but are allowed to remain in operation anyway) under the federal Clean Air Act. The bill passed the Senate by a large majority, but it remained in the House Public Utilities Committee at adjournment. It is eligible for consideration in the 2002 session.

House Bill 1308 would have extended the date for low-sulfur gasoline implementation (mandated in 1999) by at least two years (the current deadline for implementation is 2004). Senate Bill 1037 would have allowed construction of air pollution sources prior to obtaining a permit. Neither of these reductions in air regulation passed both chambers.

Coastal Resources

S.L. 2001-419 (H 1268) provides criteria for exempting some residential construction from coastal buffer requirements. It also allows DENR to condition local Coastal Area Management Act

(CAMA) planning grants on completion of plans and to carry funds for grants forward past the end of the state fiscal year.

S.L. 2001-418 (H 189) authorizes the Coastal Resources Commission to soften its rules on buffers. The new legislation gives the commission temporary rulemaking authority to allow some construction in buffers and to permit some non-water dependent uses next to the water.

Environmental Finance

Bond Proceeds

S.L. 2001-416 (S 247) changes the way in which remaining issues and proceeds of the 1998 Clean Water Bond Act will be handled. It defers the use of proceeds and the issuance of further bonds until after January 1, 2002. The new law reallocates bond proceeds originally designated for use as loans. Those proceeds will become grants to unsewered communities and supplemental grants and will be administered through the Rural Economic Development Center. S.L. 2001-416 also gives the Rural Center some flexibility to reallocate funds between the unsewered and supplemental grant categories and provides administrative funding to the center.

Budget

The Department of Environment and Natural Resources took significant cuts in this difficult budget year, as did all state agencies. However, the cuts were by no means disproportionate to the reductions in state funding at other agencies. In fact, many observers felt that DENR's share was relatively less than expected. One reason, of course, is that after a decade of very close scrutiny and regular reductions in DENR line items, there appears to be little left to cut other than actual program or service delivery. DENR's aggregate funding levels in the appropriations conference report were \$159,072,700 for 2001-2002 and \$158,722,700 for 2002-2003.

Under S.L. 2001-454 (H 1299), DENR is authorized to use \$495,000 in funds each biennial fiscal year from the Noncommercial Underground Storage Tank Fund to administer the underground storage tank program.

Dedicated Funds

The House budget made significant reductions in funding for the Clean Water Management Trust Fund (CWMTF). The House reduced the Senate appropriation to the CWMTF by \$20,000,000 in the first year and by \$40,000,000 in the second year. The conference committee restored the funding levels for CWMTR to \$40,000,000 in 2001-2002 and \$70,000,000 in 2002-2003. Environmental program supporters celebrated the funding of CWMTR as a major victory for the session.

S.L. 2001-114 (H 1108) makes public authorities, as defined in G.S. 159-7, eligible for funding under the Parks and Recreation Trust Fund. The new law applies to a wide variety of local agencies whose budgeting and accounting systems are separate from local governments.

Energy Conservation Revolving Loans

S.L. 2001-338 (H 332) broadens the allowed purposes of state energy improvement loan financing beyond business and commercial interests to local government and the nonprofit sector. It authorizes rulemaking for additional types of energy conservation loans by state-regulated financial institutions. The new legislation also sets the interest rate for energy conservation revolving loans at 3 percent per annum (with certain loans authorized at 1 percent per annum) and increases the maximum term to ten years.

Tax Incentives

S.L. 2001-335 (H 146) changes the treatment of tax credits for partnerships by limiting the amount of credits that can be passed through to partners. The bill was amended to exempt the conservation tax credit program from this change in partnership taxation until tax year 2005. The effect of S.L. 2001-335 on North Carolina's innovative conservation tax credits program would have been to limit the credits on any individual donation of land to \$250,000 for a partnership as a whole, even if there were many individual partners who would each receive only a small amount of tax credit despite having contributed large amounts of capital to purchase land.

Environmental Health

This session, the legislature enacted a variety of laws addressing environmental health issues. These issues ranged from public health authorities, sanitary districts, institutional sanitary requirements, wells, septic tanks, and septage to legal remedies and liability.

Employees of Public Health Authorities

S.L. 2001-92 (S 221) exempts employees of public health authorities from the coverage of the State Personnel Act. It also makes clear that a local public health authority is created by a *joint* resolution of the local board of health and of the board of county commissioners.

Sanitary Districts

S.L. 2001-221 (H 235) empowers sanitary district boards to enter agreements with other sanitary districts or municipal corporations to develop and implement economic development plans. (Sanitary districts already possessed general authority to enter such agreements with a broader group of local governments under the Interlocal Cooperation Act, G.S. 160A-461. The districts, however, did not already have economic development planning authority.) S.L. 2001-221 also contains specific provisions on nonreverting funds and audit responsibilities that are not duplicated in the Interlocal Cooperation Act.

S.L. 2001-301 (H 236) authorizes a sanitary district that contains a municipality, on petition of the municipality, to make a satellite annexation in conjunction with an annexation of the same land by the municipality. The act also addresses differing rates and charges, as well as utility lines in the annexed area that were constructed or are operated by the county.

Sanitary Requirements for Family Foster Homes and Therapeutic Homes

Senate Bill 541 began as a bill to provide for testing and approval of any spring that supplies water to an institution located in a single family home. The bill was rewritten in committee to exempt from sanitation requirements family foster homes and full-time therapeutic homes that provide parent-substitutes in private residences for troubled children and adolescents. The committee rewrite was enacted as S.L. 2001-109.

Wells and Well Contractors

S.L. 2001-113 (H 609) began as a bill to disapprove an October 2000 Environmental Management Commission rule concerning well construction standards. The act was rewritten in committee as a retroactive law establishing separation standards for wells serving single-family dwellings when lot sizes preclude meeting the distances set by rule. Under S.L. 2001-113, setbacks must be the "maximum possible," but no less than twenty-five feet from a watertight sewage or liquid waste collection or transfer facility and fifty feet from septic tanks and drain fields, animal barns, and cesspools or privies.

S.L. 2001-440 makes a number of changes in the Well Contractor Certification Law. The changes

- prohibit offers to work (as well as actual work) by uncertified contractors,
- shorten the time for certificate renewal after expiration,
- increase the maximum civil penalty for violations to \$1000,
- exempt certain older well contractors from continuing education requirements (a provision that expires in seven years), and
- prohibit certification of contractors who have committed certain violations.

Septage Management

S.L. 2001-505 (H 1019) generally revises the septage management law. Among other things, it requires operator training, increases fees for septage management firms, establishes probationary permits for firms that have not operated for two years, provides for temporary tanks and innovative or alternative systems, and provides for twice-a-year inspection of septage land application sites.

Septic Tanks

S.L. 2001-505, which revises the septage management law, also adopts a comprehensive classification system for on-site wastewater systems (septic tank systems). It began as a proposal in the Senate Agriculture/Environment/Natural Resources Committee by a segment of the wastewater equipment industry for legislation to accommodate its products. This proposal inevitably attracted the attention of other segments of the industry and resulted in lengthy markup sessions in committee. A substitute bill emerged that was acceptable to the Division of Environmental Health and to the interested industry groups. The extensive work that produced the new classification system was done by industry spokespersons, state and local environmental health personnel, and George Givens of the Legislative Research Division.

S.L. 2001-505 sets forth a new classification system that defines the following types of on-site wastewater systems:

- *Conventional systems* are traditional septic tanks with gravity flow disposal fields, including nitrification trenches, and “no other appurtenances” (that is, no “bells and whistles”).
- *Experimental systems* and *controlled demonstration systems* are systems approved by DENR for research, testing, or trial use. One difference between these two classifications is that manufacturers may install up to 50 experimental systems for limited trial use and up to 200 controlled demonstration systems. Another difference is that experimental systems may be installed only on lots suitable for conventional systems (including adequate repair areas), but controlled demonstration systems may be installed on unsuitable or provisionally suitable lots if DENR determines that the manufacturer can provide an acceptable alternative method of wastewater treatment.
- *Innovative systems* are systems that have been evaluated by DENR as experimental or controlled demonstration systems or have been evaluated by other states. DENR may approve innovative systems only after published notice, an opportunity for public comment, and suitable findings concerning performance, construction materials, and intended uses. In approving an innovative system, DENR may allow reduction of trench length by more than 25 percent only if the manufacturer provides a minimum five-year performance warranty to each owner or purchaser of the system.

The Commission for Health Services may designate an innovative system as an “accepted system” after five years of general use in North Carolina. (The commission may also designate as accepted systems innovative systems that have been in general use in North Carolina for more than five years and nonconventional systems approved by the commission for general use in specific applications.) An accepted system may be approved for use in applications where a conventional system is unsuitable.

S.L. 2001-505 directs DENR to approve one or more nationally recognized protocols for on-site systems. It also establishes a new fee schedule for review of these systems (ranging from

\$1,000 to \$3,000) and contains a number of transitional provisions for implementation of the new classification system.

Legal Remedies: Civil Penalties and Nuisance Abatement

S.L. 2001-120 (H 837) authorizes a board of county commissioners that exercises the powers of a board of health to enforce local health rules by the imposition of civil penalties (but not as misdemeanors unless specifically declared in the rule). At present, this act applies to Mecklenberg and Wake Counties.

G.S. 160A-193 allows cities a lien for collection of the expenses of a public health nuisance abatement action on the land where the nuisance occurred. S.L. 2001-448 (S 352) expands the coverage of that lien to any other land inside the city or within one mile of the city limits that is owned by the person in default. It also similarly expands the coverage of liens for removal or demolition of unsafe buildings.

Liability

Health departments sought legislation this session to protect environmental health specialists from personal liability for simple negligence in civil suits arising out of their work. The departments made this effort in response to a recent North Carolina Court of Appeals decision holding that specialists are only public employees (who are liable for simple negligence), rather than public officials (who have qualified immunity against civil liability). *Block v. County of Person*, 141 N.C. App. 273, 540 S.E.2d 415 (2000). The health departments' proposal, as summarized in an earlier edition of H 1019, sought statutory recognition of environmental health specialists as public officers with the same status as local building inspectors. House Bill 1019 (5th Edition), Section 3.1, Session 2001, N.C. General Assembly. The proposal also addressed another aspect of the *Block* decision by documenting the established discretionary functions of environmental health specialists. *Block* and other liability cases lay down a two-part test of public officer status: recognition of a position by statute or constitution and performance of "discretionary functions."

The health department proposal received a mixed reaction in Senate Judiciary I. The committee deleted the proposal from H 1019 and instead recommended professional liability insurance coverage—a recommendation that was included in the enacted version of the bill (S.L. 2001-505). Section 3 of the act directs the Public Officers and Employees Liability Insurance Commission to "effect and place professional liability insurance coverage for local health department sanitarians defended by the State" under the North Carolina Tort Claims Act. It also provides that "for insurance purposes only, local health department sanitarians are considered to be employees of the Department of Environment and Natural Resources."

This legislation leaves at least two questions unanswered. First, there is uncertainty in some quarters about the status of the insurance feature of S.L. 2001-505, because the General Assembly failed to provide a supporting appropriation. Second, the impact of S.L. 2001-505 on civil suits against specialists filed in superior court remains uncertain, because specialists who are sued in superior court may be unable to take advantage of the proposed insurance coverage.

Growth/Planning

Several growth and planning-related bills that passed in 2001 have potentially significant environmental consequences. They include S.L. 2001-372 (S 633), which creates a pilot program for revised building codes to assist downtown renovation and reuse; S.L. 2001-266 (S 9), which establishes the Interstate High-Speed Rail Commission; S.L. 2001-239 (S 719), which permits quick-take procedures for Triangle Transit Authority; S.L. 2001-191 (H 910), which authorizes

municipal regulation of clear-cutting by certain municipalities; and S.L. 2001-269 (S 731), which revises the transportation planning process. These bills are summarized in Chapter 15, “Land Use, Community Planning, Code Enforcement, and Transportation.”

Marine Fisheries

Licensing

House Bill 1121 proposed a coastal recreational fishing license. As in each session in recent years, the bill failed to pass.

Management Plans

S.L. 2001-213 (S 202) changes the process for revising fisheries management plans, calling for revision every five years rather than every three years. It also repeals the sunsets on marine fishery licensing statutes, extends the moratorium on issuing new shellfish licenses in Core Sound, and staggers the terms of members of the Marine Fisheries Commission.

Natural and Protected Areas

Parks

S.L. 2001-217 (S 854) codifies changes in the state park system. These include the removal of portions of Jockey’s Ridge State Park and Bushy Lake State Natural Area and other technical and conforming changes. The bill also provides for a referendum on a technical change to the North Carolina Constitution permitting acceptance of property into the state park system by bill rather than by joint resolution.

Wetlands

S.L. 2001-32 (H 702) authorizes Tyrrell County to dispose of wetlands mitigation banking credits.

Permitting

A special provision in the budget bill, S.L. 2001-424, continues DENR’s pilot program to experiment with “one stop permit assistance” in several regional offices. Another provision calls for continued study of DENR permitting processes in the Division of Water Quality, the Division of Coastal Management as it relates to CAMA permits, and the Division of Land Resources as it relates to sedimentation and erosion control plans.

Pollution Prevention

S.L. 2001-144 (S 264) strengthens the mandate to the Department of Administration to develop a model report for all state agencies that is made from recycled paper and printed on both sides of the paper. The act also requires that state publications of historical and enduring value be printed on acid-free paper.

Solid Waste

Littering

S.L. 2001-512 (S 1014) addresses the litter problem in North Carolina in multiple ways. The new legislation makes significant changes to G.S. 14-399, the criminal statute on littering. It also

- adds requirements regarding materials escaping from vehicles,
- gives local governments more specific authority to regulate littering,
- gives direction to boards of elections regarding campaign signs,
- requires reports on enforcement from numerous state agencies,
- directs the Department of Transportation to take steps to reduce litter and aid in cleanups, and
- encourages recycling in numerous ways.

S.L. 2001-512 is the most comprehensive effort to deal with littering ever undertaken by the General Assembly.

Changes to G.S. 14-399. G.S. 14-399 defines the crime of littering and sets forth increasingly severe penalties for illegally disposing of increasingly greater quantities of materials and for disposing of hazardous materials. S.L. 2001-512 amends G.S. 14-399 to establish parallel infractions for the same illegal actions. For example, G.S. 14-399(c) makes littering in an amount not exceeding fifteen pounds a Class 3 misdemeanor punishable by a fine of not less than \$250 or more than \$1,000 for a first offense and the possibility of community service. New G.S. 14-399(c1) makes the same activity an infraction punishable by a fine of not more than \$100 and the possibility of community service. This pattern is continued throughout the statute. An *infraction* is defined by G.S. 14-3.1 as a noncriminal violation of law not punishable by imprisonment. The procedures for disposition of infractions are set out in Article 66, G.S. Chapter 15A. Although all of the protections and procedures that accompany the criminal process do not apply to infractions, the state's burden of proof in establishing responsibility for the violation is still "beyond a reasonable doubt." See G.S. 15A-1114(f). The policy behind enactment of the parallel infractions provisions appears to be that persons charged with an infraction are less likely to contest the charge, because they are not pleading guilty to a crime and the fine is generally smaller. This change means that an officer who charges someone with littering under the statute has a choice of citing the offender under the criminal provisions or under the infraction provisions.

S.L. 2001-512 also makes several other changes to G.S. 14-399. Subsection (b) now provides that if litter is spilled or scattered from a motor vehicle, the operator of the vehicle is presumed to have committed the offense. The scattering or spilling of nontoxic, biodegradable agricultural products or supplies is exempted from this presumption. The act expands this exemption to make clear that it applies to the spilling or scattering of mulch, tree bark, wood chips, and raw logs.

Subsection (i)(3) of G.S. 14-399 formerly contained a long list of law enforcement officers who could enforce the statute. S.L. 2001-512 replaces that list. Under the new law, the statute may be enforced by "law enforcement officer[s] sworn and certified pursuant to Chapter 17C or 17E of the General Statutes, except company police officers as defined in G.S. 74E-6(b)(3)" and by county and municipal employees designated as litter enforcement officers.

Subsection (i)(4) previously excluded from the definition of litter materials such as newspapers and religious tracts that enjoy constitutional protection. S.L. 2001-512 narrows this exclusion to provide that it applies only when the materials are being used or distributed in accordance with their intended uses.

The amendments to G.S. 14-399 became effective March 1, 2002.

Chapter 20 amendments. Effective June 1, 2002, S.L. 2001-512 amends G.S. 20-116(g) to make it clear that the rules regarding the hauling of rock and gravel also apply to sand. That is, a vehicle hauling sand must be securely covered by a tarpaulin or similar covering and must be loaded no higher than six inches below the top of the vehicle's side walls, or the vehicle must be so constructed as to prevent the load from leaking, blowing, or otherwise escaping.

Directions to DOT. S.L. 2001-512 adds new G.S. 136-28.12 to direct DOT, "to the extent practicable," to schedule the removal of litter from highways and highway right-of-ways before mowing right-of-ways. The obvious purpose of this direction is to prevent a bad situation from

becoming worse. The act also adds new G.S. 136-32.3 requiring DOT to place signs on the Interstate Highway System informing motorists of the penalties for littering.

Local government authority. Cities and counties currently have authority to regulate littering under their general powers to manage solid waste. S.L. 2001-512 makes this authority explicit by amending G.S. 153A-136(a) and 160A-185 to provide that counties and cities have authority to regulate the illegal disposal of solid waste, including littering on public and private property, and to enforce such regulations by civil penalties and other remedies. The act also provides that such regulations may be enforced by employees specially appointed as environmental enforcement officers.

Elections provisions. S.L. 2001-512 adds new G.S. 163-22.3 and 163-33.3 to the election laws to require that when a person files a notice of candidacy with the State Board of Elections or the county board of elections—and in certain other circumstances—the appropriate board is to inform the candidate of the provisions regarding the posting of campaign signs.

Reports. S.L. 2001-512 adds new G.S. 147-12(b) to require semiannual (February 1 and August 1) reports to the Governor on the enforcement of the anti-littering laws. The following agencies must file reports: Department of Correction, Department of Transportation, Department of Crime Control and Public Safety, State Highway Patrol, Wildlife Resources Commission, Division of Parks and Recreation, Division of Marine Fisheries, and the Administrative Office of the Courts. The Governor is directed to present a consolidated report to the Environmental Review Commission, the Joint Legislative Transportation Oversight Committee, and the House and Senate Appropriations Subcommittees on Natural and Economic Resources.

Recycling. S.L. 2001-512 enacts several provisions to encourage recycling. It adds new G.S. 115C-47(4) to require local boards of education to encourage recycling in the public schools and authorizes the boards to implement recycling programs in the schools. The act adds new G.S. 130A-309.14(k) to require the Department of Transportation to provide recycling containers at all highway rest areas for aluminum, newspaper, recyclable glass, and plastic bottles. It further amends G.S. 130A-309.14(a)(1) to require recycling containers on each floor of every state office building for the collection of aluminum, newspaper, sorted office paper, recyclable glass, and plastic bottles. The containers for glass, plastic, and aluminum are to be located near trash receptacles.

Demolition Debris Landfills

G.S. 130A-301.2 allows a landowner to dispose of demolition debris on the land on which the debris was generated without obtaining a permit from DENR, if the disposal area is less than one acre and certain other conditions are met. S.L. 2001-357 (S 783) adds to the list of conditions that must be met a requirement that the perimeter of the landfill be at least fifty feet from any stream or river. The act also amends the statute to require that notice of closure of the landfill must be filed with the appropriate board of county commissioners rather than with DENR, and that the board must then forward the closure documents to DENR, along with certification that all of the statutory requirements have been met. This special statutory authority for certain demolition debris landfills was to expire June 30, 2001. S.L. 2001-357 changes the expiration date to September 30, 2003.

White Goods

G.S. 130A-309.82 requires counties to use funds from the white goods tax only for the disposal of white goods. G.S. 130A-309.83 establishes a grants program in the Department of Environment and Natural Resources for white goods management. Both of these provisions were to expire July 1, 2002. S.L. 2001-265 (H 1062) repeals the provisions of Chapter 471 of the 1993 Session Laws that caused these provisions to expire, thereby making them permanent. S.L. 2001-265 also repeals these provisions.

Effective July 1, 2001, G.S. 130A-309.81 allows counties to levy a disposal fee for white goods.

Waste Incineration

S.L. 2001-440 amends G.S. 130A-309.10 to impose additional requirements on the incineration of waste. The new provisions require an applicant for a permit to operate an incinerator to submit a plan to DENR along with the application. The plan must provide for implementation of a program to prevent the incineration of waste that must not be incinerated (including antifreeze and lead-acid batteries), as listed in G.S. 130A-309.10(f1). The plan must also provide for the random visual inspection of at least 10 percent of the waste delivered for incineration, for the training of the inspectors, and for the retention of records of visual inspections. These new requirements do not apply to incinerators that dispose only of medical waste.

Superfund and Inactive Sites Cleanup

Dry Cleaners

S.L. 2001-265 (S 1010) continues the series of legislative attempts to fix the Dry Cleaning Solvent Cleanup Act of 1997. This year's legislation

- moves the effective date of the increase in the tax on dry-cleaning solvent from October 1 to August 1, 2001;
- reenacts a provision dealing with the cleanup of dry-cleaning solvent contamination prior to the full implementation of the state's dry cleaning cleanup program;
- extends the temporary rulemaking power of the Environmental Management Commission with respect to dry cleaners to 2002; and
- makes other changes to conform to the repeal of the sunset on the white goods disposal tax.

Petroleum Discharges and Residual Contamination

S.L. 2001-384 (H 1301) resolves the lingering controversy over the requirement to record in the chain of title notices of contaminated properties that are not cleaned up to unrestricted use standards (the state's "normal" standards for soil and groundwater contamination). The act also creates a new type of recorded notice for residual petroleum contamination. This notice must be filed for properties that use risk-based cleanup approaches that leave residual petroleum contamination above statewide standards. The procedural approach for notice of petroleum contamination is similar to the template created in the Brownfields Property Reuse Act of 1997. However, the act's provision of a separate agreement for "residual petroleum" acknowledges that many (perhaps most) petroleum products degrade over time into less toxic forms, unlike some hazardous substances subject to the more general recording provisions of the Brownfields Act.

Petroleum Discharges and Cleanup Contracts

S.L. 2001-442 (H 1063) establishes partial authorization for DENR to use "pay for performance" contracts in petroleum site cleanup. DENR is allowed to allocate up to 50 percent of the available funds in the Commercial and Noncommercial Underground Storage Tank Funds for performance-based cleanups. This type of cleanup contracting uses set prices and payment periods to give contractors incentives to complete work within budget and on time, and it has been successfully used in Florida and other states. This is another step in the state's attempts to establish cost controls for payouts under its leaking underground storage tank funds. The act authorizes the Environmental Management Commission to develop temporary rules for the program.

Water Quality

Buffers

S.L. 2001-404 (H 1257) creates a surface water identification training and certification program. This represents an attempt to resolve a controversy arising out of the state's recent efforts to protect buffers along streams in nutrient sensitive watersheds, such as the Neuse River. The problem is identifying surface waters (streams, creeks, and so forth) that require buffers. Intermittent streams, by definition, do not always have water in them; thus there is a need to determine which intermittent streams are subject to the buffer requirements. The new law permits certification of local government employees and employees of the Divisions of Water Quality and Forest Resources (including forestry technicians) to make the call on where the "waters of the State" begin and end.

Water Resources

Neuse River Rules

S.L. 2001-361 (H 612) sets an effective date (July 1, 2004) for an Environmental Management Commission rule on withdrawal of water from the Neuse River, unless a later legislature specifically disapproves the rule. This represents an attempt to resolve a dispute between the Town of Wake Forest and the City of Raleigh and other interested parties on the withdrawal of water from the Neuse River below Falls Lake Dam.

Utilities and Energy

Universal Telephone Service Rules

In 1995 the General Assembly made a statutory commitment to the availability of universal telephone service at reasonable rates but left organization and funding to be worked out under rules of the N.C. Utilities Commission. G.S. 62-110(f1). The legislation established interim arrangements beginning in 1995 and contemplated that the commission would adopt final rules by July 1, 2001, including the designation of the utility service provider and funding mechanism (through interconnection rates or otherwise).

S.L. 2001-252 (S 217) delays until July 1, 2003, the deadline for the commission to complete its investigation and final rulemaking.

Regulatory Fees

S.L. 2001-427 (H 232) sets regulatory fees on public utilities to defray the cost of regulation. Each utility under the Utilities Commission's jurisdiction will pay 0.1 percent of its jurisdictional revenues earned during each quarter that begins after July 1, 2001. (The comparable figure last year was 0.09 percent.) Under S.L. 2001-427, the electric membership corporation regulatory fee is \$200,000 for the 2001-2002 fiscal year.

Energy Improvement Program

In 2000 the General Assembly established a business energy improvement program in the Department of Administration (DOA) to promote energy efficiency and conservation in business and industry through low-interest revolving fund loans. S.L. 2001-338 expands the scope of the program by making the loans available to local governments and 501(c)(3) nonprofit organizations. The act designates the State Energy Office within the Department of Administration

as the lead agency. It also extends the maximum loan term from seven to ten years; lowers the annual interest rate from 5 percent to 3 percent (or as low as 1 percent for recycling and renewal projects); and empowers DOA to adopt rules allowing state-regulated financial institutions to provide secured loans.

Petroleum Overcharge Funds

Once again, the 2001 Appropriations Act allocates petroleum overcharge funds accruing to the state from the case of *United States v. Exxon*. Section 7.8 of the act allocates \$1.3 million in fiscal year 2001–2002 to the Weatherization Assistance Program of the Department of Health and Human Services. S.L. 2001-424 (S 1005). The allocations are made out of the Special Reserve for Oil Overcharge Funds. Additional funding for weatherization and heating air repair and replacement is contained in the Low Income Energy Block Grant, Section 5.1(a) of the 2001 Appropriations Act.

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Health

The General Assembly enacted more than forty new laws affecting health during the 2001 legislative session. As usual, the law with the most significant impact on the state's public health system was the Appropriations Act. This was an extremely difficult year for North Carolina's state budget process. Revenue estimates were revised downward several times during the course of the General Assembly's deliberations, anticipated savings did not materialize, and the close scrutiny of budget proposals by bond-rating agencies raised concerns about the state's continuing fiscal soundness. Lawmakers ultimately enacted tax increases as well as significant budget cuts. The state's Department of Health and Human Services (DHHS) sustained reductions in many of its services and programs, including significant cuts in public health programs and in Medicaid. At the same time, significant budget expansions provided additional funds for children to enroll in Health Choice, the state children's health insurance program, and for state agencies to implement the requirements of the federal Health Insurance Portability and Accountability Act (HIPAA).

After many years of debate about managed care reform, lawmakers finally passed significant reform legislation in this session. The new Patients' Bill of Rights authorizes patients to sue managed care organizations for failing to exercise due care in making treatment decisions, establishes a binding procedure for independent review of adverse coverage decisions, and creates a new program to assist patients in exercising their rights under the law. Several additional laws addressed mandatory benefits and other obligations of health insurers to persons enrolled in their plans.

Other significant legislation included an overhaul of the laws governing the state's emergency medical services system, a new set of laws regulating the practice of pharmacy technicians, the creation of a central registry for advance health care directives, and a law granting immunity from liability for health care providers who honor portable do not resuscitate (DNR) orders.

Budget

Public Health

The 2001 Appropriations Act, S.L. 2001-424 (S 1005) cuts the budget for the state Division of Public Health (DPH) by 4.3 percent—nearly \$5 million. To provide for the cut, a number of

public health contracts and programs were eliminated entirely, while others were significantly pared down. Some of the most significant reductions affecting the public health system were the following:

- Funding for the nurse midwifery program was eliminated. This program funded start-up nurse midwifery practices in North Carolina.
- Funding for the Rural Obstetrics Incentive Program was eliminated. The purpose of this program was to encourage physicians in rural areas to provide care for Medicaid patients. The program paid a portion of the malpractice insurance for participating physicians.
- The funding for a number of contracts with other entities that provided various types of public health services was eliminated, including a contract with the Association of North Carolina Boards of Health for local board of health training activities, and contracts with the University of North Carolina School of Public Health for local health services and intensive home visiting programs.
- One million dollars in recurring funds for health promotion activities was eliminated.
- Nine positions within DPH were eliminated.
- Funding for sickle cell program educational counselors was reduced, as was funding for the newborn screening program. In both cases, increased Medicaid receipts to pay for the services are anticipated.
- Funding for the AIDS Drug Assistance Program was reduced by \$1.5 million for the 2001–2002 fiscal year only. This reduction was partially offset by an increase in funding for AIDS treatment in the amount of \$500,000 for each fiscal year of the biennium.

The budget also includes new or additional funding for several public health activities and programs. Among other things, the legislature

- provided \$700,761 in recurring funds for varicella (chicken pox) vaccinations for children,
- provided \$175,000 in recurring funds for the state’s birth defects registry,
- provided \$200,000 in recurring funds to support a centralized system to assist eligible individuals in obtaining prescription drugs at no or low cost through pharmaceutical companies’ programs or initiatives,
- provided \$200,000 in recurring funds to the Alice Aycock Poe Center for Health Education,
- provided \$1 million in nonrecurring funds for the Healthy Carolinians program,
- provided \$400,000 in nonrecurring funds for the Healthy Start Foundation to improve access to prenatal care and reduce poor birth outcomes,
- provided \$200,000 in nonrecurring funds to the state Office of Minority Health to fund activities to reduce disparities in the health status of minorities,
- provided \$100,000 in nonrecurring funds to the Heart Disease and Stroke Prevention Task Force,
- provided \$200,000 in nonrecurring funds to promote the use of folic acid to prevent birth defects, and
- provided \$250,000 in nonrecurring funds to support asthma management, surveillance, and educational activities.

The state budget laws include a number of substantive requirements affecting public health. S.L. 2001-395 (S 61), which was enacted in late August 2001 to authorize continued state expenditures while a final budget had not yet been approved, appropriates funds for health and human services block grants and specifies how some of those funds must be expended. Among other things, the law specifies that \$395,000 from the Preventive Health Services Block Grant must be used to create a position in the Office of the Secretary to enhance activities for HIV/AIDS awareness and education. The prevention activities are to be targeted to the general public and should not augment current programs that target high-risk populations through community-based organizations. The final budget adds to this provision a requirement that DHHS coordinate its HIV/AIDS awareness and educational efforts with the North Carolina AIDS Advisory Council, the North Carolina Minority Health Advisory Council, representatives of faith communities, representatives of nonprofit agencies, and other state agencies. It also requires DHHS to report to the legislature’s Health and Human Services Appropriations Committees by March 15, 2002.

The final budget includes a number of other substantive provisions affecting public health. S.L. 2001-424 enacts the following requirements and changes to public health laws and programs:

- Requires DHHS to control drug utilization in all the prescription drug assistance programs operated by the department. Those programs generally must use generic drugs unless the health care provider indicates on the prescription that a brand-name drug is medically necessary. (There is a limited exception for some antipsychotic and other drugs.) Supplies of prescription drugs must be limited to thirty-four days.
- Expands eligibility for the AIDS Drug Assistance Program. Currently, an individual is only eligible for this program if his or her income is less than 125 percent of the federal poverty level. Beginning July 1, 2002, eligibility for participation will be extended to individuals with incomes up to 200 percent of the federal poverty level.
- Amends G.S. 108A-88, which requires the Secretary of Health and Human Services to notify local officials about state and federal funds expected to be available for certain programs. Previously, the law required the secretary to notify county directors of social services of the amount estimated to be available for social services by February 15 each year. The amended law requires the Secretary to notify social services directors, county commissioners, county managers, and local health directors about funds expected to be available for social services and public health programs.
- Makes health care providers liable for restitution to the state when they negligently permit state-supplied vaccine in their inventory to spoil or become unstable. The state supplies vaccine to health care providers who agree to limit their fees for administering vaccinations and to comply with special reporting requirements.
- Directs DHHS to provide funding for teen pregnancy prevention initiatives targeted to counties that have the highest teen pregnancy rates or meet other criteria.

Health Choice (State Children's Health Insurance Program)

North Carolina Health Choice is the state's program that provides health insurance for children who would otherwise be uninsured because their family incomes are too high for them to qualify for Medicaid but too low to allow them to afford private insurance. Early in 2001, enrollment in Health Choice was frozen because of an anticipated shortfall in funding for the program. The legislature expanded the funding for Health Choice by \$8 million in fiscal year 2001-2002 and by \$12.5 million in fiscal year 2002-2003. In addition, a special provision in the budget law eliminates the waiting period for Health Choice. Previous law required a child to be uninsured for at least sixty days before applying for Health Choice.

Medicaid

Medicaid is a state and federally funded entitlement program that provides payment for health care services for people with low incomes. It is an extremely significant component of the state budget, accounting for more than 10 percent of total state expenditures each fiscal year. The state provided an additional \$460 million for the Medicaid program in fiscal year 2001-2002—a 30 percent increase over 2000-2001. The increase was not enough, however, to cover the program's anticipated costs, so the legislature made several cuts to the Medicaid budget. It reduced provider reimbursement rates and eliminated inflationary increases in those rates. It reduced anticipated expenses for prescription drugs by increasing co-payments, lowering dispensing fees, and requiring the use of generic drugs in most instances. It also reduced or limited reimbursement for certain types of services, such as in-home personal care services.

A significant expansion item in the Medicaid budget provides \$622,000 in fiscal year 2001-2002 and \$1.2 million in 2002-2003 to treat women with breast or cervical cancer.

Another significant expansion item provides additional funding for dental services for Medicaid-eligible children and adults. In November 2000, the state Medicaid program was sued by clients who alleged that the program's reimbursement rates for dental services were so low as

to effectively deny dental care to Medicaid-eligible children and adults, in violation of federal law. A settlement agreement was negotiated in which the state would provide an additional \$7.5 million in Medicaid funding for dental services and would undertake other activities to improve access to dental care. The legislature declined to approve the settlement agreement, however, and instead provided additional funding for Medicaid dental services in the amount of \$1 million for fiscal year 2001–2002 and \$2 million for fiscal year 2002–2003.

The state budget law also includes a number of special provisions with substantive requirements affecting Medicaid. One special provision requires the Division of Medical Assistance (DMA), the state agency that administers Medicaid, to contain costs by reducing the rate of growth of the Medicaid program—but not the rate of growth in the number of persons eligible for the program—to 8 percent or less of the total expenditures in fiscal year 2001–2002. The cost-containment activities may include, but are not limited to, prospective reimbursement methods, incentive-based reimbursement methods, service limits, prior authorization of services, periodic medical necessity reviews, revised medical necessity criteria, and service provision in the least costly settings. Another provision requires DHHS to implement a pharmacy benefits management plan for Medicaid. A third special provision exempts the adoption of new or amended medical coverage policies from the rule-making requirements of the Administrative Procedure Act (APA). Instead, DHHS must publish proposed new or amended policies on its Web site, notify Medicaid providers at least forty-five days before it adopts the proposed policies, and accept oral or written comments during that period. If the proposed policy is modified after the comment period, DHHS must notify providers at least fifteen days before adopting the policy and must accept additional comments during the fifteen-day period.

Health Insurance Portability and Accountability Act

The state budget includes a \$15 million appropriation to a reserve fund to implement the Health Insurance Portability and Accountability Act (HIPAA), a federal law that—among other things—requires health plans, health information clearinghouses, and health care providers to standardize their electronic transactions of health information and to protect the privacy and security of the information. S.L. 2001-424 places the reserve fund in the Office of State Budget and Management and directs that office, in consultation with the state Chief Information Officer and the Secretary of Health and Human Services, to develop a strategic plan to implement HIPAA within the state’s agencies.

Health and Wellness Trust Fund

The Health and Wellness Trust Fund Commission was created during the 2000 legislative session to oversee the distribution of a portion of the funds that North Carolina received in the tobacco settlement (S.L. 2000-147). The Commission must develop criteria for awarding grants to programs and initiatives designed to improve health. A special provision in the 2001 Appropriations Act directs the commission to include criteria that will address the need to expand access to prescription medications for the elderly and disabled.

Other Requirements for DHHS

Several special provisions in the budget law require DHHS to consolidate, centralize, or coordinate activities or programs. These provisions:

- Require DHHS to consolidate its regional, district, field, and satellite offices and to report on anticipated cost savings and efficiencies resulting from the consolidation.
- Require DHHS to centralize its activities relating to the coordination and processing of criminal record checks.

- Establish an Office of Policy and Planning within the Office of the Secretary to coordinate the development of departmental policies, plans, and rules and provide a process for coordinating and reviewing policies before they are disseminated.
- Create an Intervention Services Unit in the Office of the Secretary. The unit will be responsible for planning, monitoring, and conducting data analyses for the purpose of enhancing coordination among preschool education and Smart Start programs as well as activities in the Division of Public Health, the Division of Social Services, and the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services.
- Direct DHHS to implement a centralized system for the development and execution of contracts.
- Direct DHHS to coordinate all family support contracts and activities across divisions.
- Require the Secretary to transfer components of the State Center for Health Statistics and related functions in other departmental divisions in order to centralize the Department's statistical management and analysis functions.

DHHS is also directed to study and report on the feasibility of other consolidations or centralizations. The Department must determine the feasibility of combining all its existing toll-free telephone lines. Another provision requires DHHS, in partnership with local health departments, to determine the feasibility of consolidating all nurse and health educator consultant positions in the Division of Public Health.

Public Health

Public Health Authorities

North Carolina counties have a legal duty to provide public health services within the county. Counties most commonly meet this duty by operating a county health department or participating in a multi-county district health department. In 1997 the General Assembly authorized counties to form single- or multi-county public health authorities, which would be responsible for providing public health services within the county or counties and would be governed by boards with more powers and duties than traditional local boards of health. The act authorizing public health authorities, S.L. 1997-502, specified that single-county public health authorities could be formed by resolution of the board of county commissioners alone, while the formation of multi-county public health authorities required the approval of each county's commissioners and local board of health. S.L. 2001-92 (S 221) amends the Public Health Authorities Act so that a joint resolution of the county commissioners and the local board of health is now required to create a single-county public health authority. The law also exempts employees under the supervision of a public health authority director from the State Personnel Act.

Civil Penalties for Violations of Local Rules

Local boards of health in North Carolina have rule-making authority. Violation of a board's rules is a misdemeanor. Local health rules also can be enforced civilly, through an injunction issued by a superior court. A new law, S.L. 2001-120 (H 837), provides an additional remedy—the imposition of civil penalties—for violations of local health rules in counties in which the board of commissioners has abolished the local board of health and assumed direct control of its activities, pursuant to G.S. 153A-77. If a local rule provides for civil penalties, an individual may not be held criminally liable for violating it unless the rule expressly states that violation is a misdemeanor.

G.S. 153A-77(a) authorizes only the boards of commissioners of counties with populations of 425,000 or more to abolish health boards and act in their place. Currently, only Mecklenburg County operates in this manner; therefore, Mecklenburg is now the only county that may impose civil penalties under this new law.

Disease Reporting

The control of communicable and other diseases is a traditional public health activity that depends in part on private parties making reports of known or suspected cases of illness. S.L. 2001-28 (H 286) clarifies the legal duty of laboratories to report findings suggestive of communicable and selected other diseases to the local health department or state Division of Public Health. Previously, state law established a reporting requirement for “clinical and pathological” laboratories. Under the new law, the words “clinical and pathological” are deleted, thus making clear that the following statutes are applicable to all laboratories:

- G.S. 130A-139, requiring the reporting of certain laboratory findings related to communicable diseases;
- G.S. 130A-144, requiring laboratories to permit local health directors or the state health director to examine, review, and copy records pertaining to communicable disease; and
- G.S. 130A-458, requiring the reporting of certain laboratory findings related to occupational disease and illness.

Bioterrorism

In the fall of 2001, the state’s public health system faced a new challenge: the threat of bioterrorism. Many local health departments were called upon to respond to public fears of anthrax-laced mail, and most participated in various types of bioterrorism preparedness activities. The General Assembly also weighed in on the issue, with three new laws addressing biological and other forms of terrorism.

The first new law to be enacted was S.L. 2001-457 (H 1471), which authorizes the Governor to use up to \$30 million in 2001–2002 from the savings reserve account to implement measures to defend against all forms of terrorism. The law also appropriates \$1.9 million to the Department of Crime Control and Public Safety to address terrorism.

S.L. 2001-469 (H 1472) requires DHHS to establish a biological agents registry. The purpose of the registry is to identify the biological agents possessed and maintained by any person in North Carolina and to provide other information that may be important in the event of a communicable disease or law enforcement investigation. The term *biological agents* is defined to include all of the bacteria and viruses that are on the Centers for Disease Control and Prevention’s Category A (highest priority) list of agents likely to be used by bioterrorists, including the bacteria that cause anthrax, botulism, tularemia, and plague and the viruses that cause smallpox and hemorrhagic fevers such as Ebola. Any person who possesses or maintains biological agents must register. Information that is prepared for or maintained in the registry is confidential and not a public record but may be released for the purpose of conducting or aiding in a communicable disease or law enforcement investigation. A person who willfully or knowingly violates the registry law is subject to a civil penalty of up to \$1,000. The person may also be charged with a misdemeanor.¹

Finally, S.L. 2001-470 (H 1468) creates new criminal penalties for the manufacture, possession, or use of biological, chemical, or nuclear weapons. The law is summarized in detail in Chapter 6, “Criminal Law and Procedure.”

Public Health Studies

The 2001 Studies Act, S.L. 2001-491 (S 166), authorizes the Legislative Research Commission to study the following issues related to public health:

- How to improve core and essential public health services in tier one counties
- Capacity to respond to bioterrorism, including the state’s ability to provide laboratory or epidemiological support when bioterrorism is suspected or when there is a question of food supply safety and security

1. All violations of public health laws and rules are punishable as misdemeanors. G.S. 130A-25.

The Studies Act authorizes the Public Health Study Commission to study the following issues:

- Public health impact of hepatitis C
- Improving HIV/AIDS prevention and care programs
- State law and policy pertaining to the treatment of rape victims and health care workers who risk HIV infection through needle-stick injuries

The act authorizes the Environmental Review Commission, in consultation with the Public Health Study Commission, to study the appointment of local health directors; the relationships among local health directors, local boards of health, and boards of county commissioners in the appointment and evaluation of local health directors; and the benefits of extending to all counties the authority of county commissioners under G.S. 153A-77. That statute permits county commissioners in counties with populations of 425,000 or more to abolish their local boards of health and assume direct control of the boards' activities, or to combine public health, social services, and mental health, developmental disabilities, and substance abuse services into a single consolidated human services agency.

The act requires DHHS to study health care disparities and to make recommendations for eliminating disparities and barriers to health care for ethnic and racial minorities.

Finally, the Studies Act authorizes the Joint Legislative Health Care Oversight Committee to study the county share of the cost of Medicaid and to develop strategies to eliminate or equalize county costs and lessen the state's financial burden.

Other Laws of Interest

Public health officials and employees may also be interested in the following new laws, which are summarized in other chapters:

- S.L. 2001-268 (H 63), which requires children who operate or are passengers on bicycles to use appropriate safety equipment, is addressed in Chapter 19, "Motor Vehicles."
- S.L. 2001-291 (H 275), which decriminalizes the abandonment of newborn infants under designated circumstances, is addressed in Chapter 3, "Children and Families."
- S.L. 2001-360 (S 1081), which makes it a felony for an inmate to emit bodily fluids or excrement at a state or local government employee who is performing his or her duties, is addressed in Chapter 6, "Criminal Law and Procedure."
- A number of new laws affecting public health agencies' environmental health programs are summarized in Chapter 10, "Environment and Natural Resources."

Emergency Medical Services

Two new laws make significant changes to North Carolina's emergency medical services (EMS) system. S.L. 2001-220 (H 452) updates and substantially revises the Emergency Medical Services Act (G.S. Chapter 143, Article 56). The law upgrades DHHS's EMS program to a comprehensive statewide EMS system. The comprehensive system addresses the provision of medical services, dispatch and routing of EMS vehicles and personnel, communications related to EMS, and follow-up lifesaving and restorative care as well as injury prevention and wellness initiatives within the community. The legal duty of counties with respect to EMS is clarified by a provision in the new law that requires each county to ensure that EMS services are provided to its citizens.

The North Carolina Medical Care Commission has the legal authority and duty to make rules governing EMS in North Carolina. The commission is authorized to

- establish standards and criteria for the credentialing of EMS agencies, trauma centers, and EMS educational institutions, and standards and criteria for denying, suspending, or revoking those credentials;

- establish standards and criteria for the education and credentialing of EMS personnel, and standards and criteria for denying, suspending, or revoking those credentials;
- establish standards and criteria for data collection as part of the statewide emergency services information system;
- define the practice settings of credentialed EMS personnel;
- establish standards for vehicles and equipment used in the EMS system;
- establish standards for a statewide EMS communications system;
- establish standards and criteria for education and credentialing of persons trained to administer lifesaving treatment to a person who suffers a severe adverse reaction to insect stings; and
- establish standards for the voluntary submission of hospital emergency medical care data (the law does not specify to whom the data would be submitted).

S.L. 2001-220 creates the EMS Disciplinary Committee and charges it with reviewing all disciplinary matters related to credentialed EMS personnel. It also alters the membership of the EMS Advisory Council, a twenty-five-member body that advises the Secretary of Health and Human Services on policy issues regarding the EMS system.

Finally, the new law clarifies the status of records held by the EMS system that contain medical information. New confidentiality provisions specify that medical records and patient-identifiable information maintained by DHHS or EMS providers are confidential and not public records and may only be released under limited circumstances.

Another law, S.L. 2001-210 (H 453), has numerous provisions regulating the EMS system that complement the changes in S.L. 2001-220. S.L. 2001-210 overhauls the statute that regulated ambulances to create a more comprehensive regulation scheme for ambulances, EMS providers (defined as organizations or agencies that provide EMS, not individual persons), and EMS personnel. EMS providers must be licensed and EMS personnel must be credentialed by DHHS. A separate permit from DHHS is required to operate an ambulance. All ambulances must be staffed by credentialed EMS personnel, with the exception of ambulances owned and operated by licensed health care facilities and used solely for transporting patients with known, nonemergency medical conditions to and from scheduled medical appointments.

Health Insurance

Patients' Bill of Rights and Related Laws

Patients' Bill of Rights. Managed care reform has been an issue in the General Assembly for the better part of a decade; however, even though numerous bills were introduced each legislative session, few changes were enacted. This year, a Patients' Bill of Rights was approved and brought about a number of significant changes. Among other things, S.L. 2001-446 (S 199) authorizes patients to sue managed care organizations for failing to exercise due care in making treatment decisions, establishes a binding procedure for independent review of coverage decisions that are adverse to insured persons, and creates a new program to assist patients in exercising their rights under the law. The major provisions of the legislation are described below.

- **External review:** The law requires insurers to establish procedures by which an insured can obtain an independent, external review of noncertification and other adverse decisions. A *noncertification* is a determination by the plan that it will not pay for a health care service because the service did not meet the plan's requirements for medical necessity, appropriateness, health care setting, level of care, or effectiveness or did not meet the prudent layperson standard for coverage of emergency services. In most circumstances, an insured must exhaust the insurer's internal appeal and grievance processes before seeking external review. External review decisions are binding on the insurer and on the insured, except to the extent that the insured has other remedies available under state or federal law.

- **Health plan liability:** The law establishes that managed care entities have a duty to exercise ordinary care when making *health care decisions*, defined as an entity's noncertification decisions that affect the quality of the diagnosis, care, or treatment provided to an insured. Managed care entities may be held liable for harm to insureds proximately caused by the entity's failure to exercise ordinary care. An insured must exhaust all administrative remedies and appeals before filing suit under this provision.
- **Managed Care Patient Assistance Program:** The purpose of this program is to provide information and assistance to individuals enrolled in managed care plans. Among other things, the program must assist managed care plan enrollees with grievance, appeal, and external review procedures. The law does not specify where the program will be located administratively, but it specifies that the program's director will be appointed by the Governor.
- **No financial inducements to withhold care:** The law prohibits managed care plans from financially inducing a health care provider to deny, withhold, limit, or delay medically necessary and appropriate services that are covered by the plan. However, capitation payment plans are expressly permitted, as are bonuses or the withholding of payments based on the aggregate services rendered by the provider.
- **Mandated disclosures:** Health plans are required to disclose drug formularies and lists of restricted access drugs to plan participants and prospective participants. Plans that use provider networks must maintain provider directories that are updated at least once a year and must also supply up-to-date provider information by telephone. Health insurers must provide clear explanations of how benefit amounts for covered services are calculated and how the payment obligations of the plan and the insured are determined.
- **Mandated benefits:** The law requires health plans to cover participation in clinical trials for some patients. Plans must also cover hearing screening tests for newborns.
- **Continuity of care:** The law permits patients who are enrolled in HMOs and have certain ongoing health conditions—such as chronic disabling illness, terminal illness, or pregnancy—to continue receiving care from a health care provider whose contract with the HMO is terminated. The HMO must cover the continued care from the provider for a prescribed transitional period after the contract with the provider ends. The HMO may place some conditions on the continued coverage, including a condition that the provider must accept reimbursement at rates applicable before the start of the transitional period as payment in full.
- **Selection of primary care providers:** The law requires health insurers to have procedures by which an insured with a serious or chronic degenerative, disabling, or life-threatening illness may select a specialist as his or her primary care provider. Insurers must also permit insureds to choose a pediatrician as the primary care provider for a child under the age of eighteen.

Utilization review and grievance procedures. S.L. 2001-417 (H 351) makes several significant changes to the laws governing managed care utilization reviews and grievance procedures. First, it adds to the definition of *noncertification* a determination by an insurer or its utilization review organization that a health care service did not meet the prudent layperson standard for coverage of emergency services. It also clarifies that noncertification includes any situation in which an insurer makes a decision about an insured's condition in order to decide whether a requested treatment is experimental, investigative, or cosmetic, and as a result of that decision, the extent of coverage provided by the health plan is affected.

Second, S.L. 2001-417 clarifies the procedures that must be provided for informal reconsideration of noncertifications. Previous law allowed insurers to establish procedures for informal reconsideration but didn't specify how they were to be conducted. Among other things, the new law requires insurers that permit informal reconsiderations to put those procedures in writing. If, after informal reconsideration, the insurer upholds the noncertification decision, it must notify the insured in writing. If the insurer cannot render an informal reconsideration decision within ten business days after receiving a request for informal reconsideration, it must treat the request as a request for an appeal and follow appeal procedures.

Finally, S.L. 2001-417 clarifies that an insurer need not provide access to its grievance processes for an insured whose noncertification decision was based solely on the ground that the services requested were not covered under the plan, so long as the exclusion of the specific service requested is stated clearly in the certificate of coverage.

Mandated benefits. Two new laws require health insurers to provide coverage for specified benefits. As noted above, the Patients' Bill of Rights (S.L. 2001-446) requires coverage for newborn hearing screenings and certain clinical trials. A separate law, S.L. 2001-116 (S 132), requires health plans to cover colorectal cancer screening examinations and laboratory tests for plan enrollees who are at least fifty years of age, or younger than fifty but at high risk for developing colorectal cancer. The screening that is covered must be in accordance with the most recently published guidelines of the American Cancer Society or the North Carolina Advisory Committee on Cancer Coordination and Control. Laws such as these are known as *mandated benefits* laws. In S.L. 2001-453 (H 1048), lawmakers called for a study of health insurance mandates and imposed a delayed moratorium on new mandates. The law states that legislators shall not mandate additional coverage beyond what is required on June 1, 2003, and that the moratorium on new mandates will expire on July 1, 2005.

Newborn and adopted children. An insurance omnibus bill, S.L. 2001-334 (H 310), makes a number of changes to health insurance plans, including several changes affecting the rights of consumers. The law requires health plans to extend coverage to newborn children without requiring prior notification unless there is an additional premium charge to add the child to the coverage. If there is an additional premium charge, the plan must cover the child from the moment of birth, provided that the child is enrolled within thirty days of birth. Foster and adopted children must be covered with no prior notification required unless there is an additional premium charge. If there is an additional premium charge, the coverage must be from the date of placement in the foster home or placement for adoption, provided that the child is enrolled within thirty days after placement.

New notices required. S.L. 2001-334 also requires insurers to provide certain notices to insureds. HMO group coverage plans must give written notice of premium changes upon receipt of the group's finalized benefits or forty-five days before the effective date of the change, whichever is earlier. Another provision requires insurers to give notice of the status of claims that are under investigation. G.S. 58-3-100(c) requires insurers to acknowledge a claim by making payment, making an offer of settlement, denying the claim, or informing the claimant that the claim is being investigated. The new law provides that if the claim is being investigated, the insurer must send a claim status report within forty-five days, and every forty-five days thereafter until the claim is paid or denied. The report must give details sufficient for the insured to understand why processing of the claim is incomplete and to determine whether the insurer needs additional information.

Other omnibus bill requirements. The omnibus bill enacted the following requirements as well:

- Requires successor group health plans that are contracted within fifteen days of termination of a previous group plan to cover the hospital confinement or pregnancy of a person who is otherwise eligible for coverage under the plan
- Requires a sixty-day period for employees whose employment has been terminated to elect continuing coverage under an employer-sponsored health plan
- Prohibits health insurers from imposing preexisting condition exclusions for conditions diagnosed or treated while the person had qualifying previous coverage, provided that the coverage did not end more than sixty-three days before enrollment for the new coverage
- Provides that persons eligible for Medicare by reason of disability before age sixty-five whose coverage in a managed care plan is terminated through cancellation, nonrenewal, or disenrollment have the guaranteed right to purchase Medicare Supplement Plans A and C from any insurer within sixty-three days

Insurance fiduciaries. A new law addresses the obligations of insurance fiduciaries to insured persons. An *insurance fiduciary* is defined as any person, employer, principal, agent,

trustee, or third-party administrator responsible for the payment of group health or life insurance premiums or responsible for funding a group health plan. Under previous law, insurance fiduciaries were prohibited from causing the cancellation or nonrenewal and consequential loss of coverage to insured persons by willfully failing to pay premiums. S.L. 2001-422 (S 241) adds that an insurance fiduciary may not terminate a group health plan by willfully failing to fund it. An insurance fiduciary must provide written notice of its intention to stop paying premiums or funding a plan at least forty-five days before the termination of the insurance. Willful failure to do so is a Class H felony.

Teachers' and State Employees' Health Plan

Benefits under the Teachers' and State Employees' Comprehensive Major Medical Plan (State Health Plan) were curtailed in this tight budget year. S.L. 2001-253 (S 824) raises required deductibles and authorizes the State Health Plan's Executive Administrator and Board of Trustees to increase deductibles annually by a percentage equal to the percentage increase in the CPI-Medical Index. Certain co-payments for services were increased, as were out-of-pocket maximums for deductibles and co-payments. Prescription drug co-payments were increased and made subject to a separate out-of-pocket maximum. Maximum benefit amounts were set for certain services or products, including cardiac rehabilitation services, therapeutic shoes for persons with diabetes, and other specified conditions. The maximum lifetime benefit amount available under the State Health Plan was increased from \$2 million to \$5 million. The law authorizes the Executive Administrator and Board of Trustees to require prior approval for several services, including varicose vein surgery, botulinum toxin treatments,² and outpatient prescriptions for growth hormone, weight loss drugs, and antifungal drugs for the treatment of nail fungus. Another law, S.L. 2001-258 (H 109), authorizes the State Health Plan to reimburse licensed marriage and family therapists for mental health and chemical dependency services.

G.S. 135-40.12(a)(6) permits laid-off state employees who were employed for twelve months or more before their termination to continue their health coverage on a noncontributory basis for up to twelve months following their termination. G.S. 135-40.12(b)(12) authorizes those employees to continue their coverage after expiration of the twelve months on a fully contributory basis. Section 86(a) of S.L. 2001-487 (H 338), the 2001 Technical Corrections Act, provides that former state employees have ninety days after termination of their noncontributory continuing coverage to elect fully contributory continuing coverage.

S.L. 2001-192 (S 825) exempts contract disputes between the State Health Plan and entities under contract with the plan from the contested case provisions of the Administrative Procedure Act.

Finally, Section 4 of S.L. 2001-516 (H 1284) provides that state health plan contract terms pertaining to reimbursement rates for hospitals, medical care providers, and pharmacy benefit managers are not public records until thirty months after the contract's expiration date.

Other Health Insurance Regulation

Several new laws make miscellaneous changes affecting health insurance. Two laws were enacted in the context of a dispute between the Teachers' and State Employees' Comprehensive Major Medical Plan (State Health Plan) and an HMO with which it had contracted. In February 2001, the HMO WellPath announced its intention to end its coverage for state employees in thirteen North Carolina counties. State officials contended that this was a breach of contract and took actions to force the company to continue the coverage. In the meantime, the General Assembly enacted S.L. 2001-5 (S 168), which authorizes the Insurance Commissioner to issue an order directing an HMO to cease and desist from engaging in any act or practice in violation of

2. The botulinum toxin treatments mentioned in S.L. 2001-253 presumably are those that are known colloquially as "botox" and are often used for cosmetic purposes.

any provision of G.S. Chapter 58 applicable to HMOs. An HMO in receipt of such an order is authorized to seek review of the order in accordance with the state Administrative Procedure Act (APA).

Early in the spring, WellPath and the state entered a consent agreement in which WellPath agreed to continue the coverage until the Office for Administrative Hearings (OAH) or a court made a decision about the contract issue. In May 2001, OAH ruled that WellPath could end its coverage for state employees if it gave thirty days' notice and forfeited a \$500,000 deposit. WellPath subsequently gave notice that it would end coverage for all state employees effective July 1, 2001. The legislature then enacted S.L. 2001-192, which exempts contract disputes between the State Health Plan and entities under contract with the plan from the contested case provisions of the APA. The law also provides that state agencies may apply for declaratory judgments in superior court. The state then filed a lawsuit charging WellPath with breach of contract and unfair and deceptive trade practices. On June 19, 2001, a superior court temporarily enjoined WellPath from changing its coverage of state employees. WellPath ultimately provided coverage for state employees through the end of the contract year.

Although they may have been prompted by the state's dispute with WellPath, neither of the two new laws has a sunset date or any other provision limiting its application to that context.

The credentialing of health care providers by insurance companies is addressed by S.L. 2001-172 (H 1160), which requires health insurers that credential providers for their networks to assess and verify providers' qualifications within sixty days of receipt of a completed provider credentialing application form. The law also requires the Insurance Commissioner to adopt a uniform provider credentialing application form and prohibits insurers from requiring applicants to submit information that is not on the form.

S.L. 2001-297 (H 593) requires health insurers that pay or reimburse the services of licensed professional counselors to make payment either by direct payment to the provider or by reimbursement of the insured.

Health Insurance Studies

The 2001 Studies Act, S.L. 2001-491, authorizes the Legislative Research Commission to study the following issues related to health insurance:

- High-risk health insurance pools
- Insurance availability in beach and coastal areas
- The moratorium on health insurance mandates established in S.L. 2001-453 (summarized above)

Health Care Facilities

Adult and Long-Term Care Facilities

For several years, the legislature has attempted to slow the development of beds in adult care homes in North Carolina. In the past, it has done this by directing DHHS not to approve the addition of any adult care home beds for any home or facility in the state unless certain conditions for exemption from the moratorium were met. This year, the General Assembly enacted S.L. 2001-234 (S 937), which makes adult care homes subject to the state's certificate of need law. In addition, S.L. 2001-234 provides that a person who obtained a license to develop beds in previous years by satisfying the conditions for exemption is no longer authorized to develop the beds unless the person can satisfy criteria indicating that development is already well underway.

S.L. 2001-85 (H 736), as clarified by the 2001 Technical Corrections Act,³ requires adult care homes and nursing homes subject to licensure under G.S. Chapter 131E to post notices about

3. S.L. 2001-487, Section 85 (H 338).

required staffing levels. The notices must enable residents and their family members to ascertain the number of direct care and supervisory staff that are legally required to be on duty for each shift in a given day.

Previous state law required adult care homes with a capacity of seven or more beds to submit audited reports of actual costs to DHHS. S.L. 2001-157 (H 958) adds a new requirement for adult care homes with special care units for patients with Alzheimer's disease or other specified conditions. The new law requires separate cost reports that are specific to the special care unit and that do not average special care costs with other costs. DHHS must use the data from those reports to develop a designated reimbursement system for residents in special care units.

The 2001 Appropriations Act, S.L. 2001-424, includes several special provisions pertaining to adult care homes or long-term care facilities. One provision requires DHHS to implement recommendations that appeared in a state auditor's report regarding adult care home reimbursement rates. Among other things, DHHS must continue its efforts to obtain a federal waiver to pay adult care homes directly for client services and must develop a plan to phase in electronic filing of cost reports. Another provision directs DHHS to develop a system that provides a continuum of long-term care for elderly and disabled individuals.

S.L. 2001-17 (H 193) provides partial or total exclusions from property taxes to adult care homes and nursing homes that meet certain criteria. To qualify, a facility must be nonprofit with tax-exempt income status under state law, must have an active program to generate funds through grants or other means, and must apply all of its revenues toward providing uncompensated goods and services to the elderly and the local community.

Several North Carolina statutes require long-term and adult care facilities to conduct national criminal history checks on prospective employees. However, federal requirements have limited the distribution of national criminal history checks until January 1, 2003. Accordingly, in S.L. 2001-465 (S 826), the General Assembly temporarily suspended the national check requirement for certain long-term care employees. For nursing homes and home care agencies, the requirement of a national criminal history check will apply only to employment positions involving direct patient care. Requirements to conduct the checks for other positions are suspended until January 1, 2003. Requirements for national criminal history checks are also suspended until that date for the following entities: contract agencies of nursing homes and home care agencies; adult care homes and their contract agencies; and area mental health, developmental disabilities, and substance abuse services programs.

S.L. 2001-482 (S 178) directs DHHS to develop an instrument for assessing the quality of care provided by adult care homes. The instrument must address care, services, and physical plant amenities and conditions. The assessments may be conducted by the state or local government.

The 2001 Studies Act, S.L. 2001-491, directs the DHHS Division of Aging to study whether counties should designate local lead agencies to organize a local long-term care planning process.

Finally, S.L. 2001-385 (H 1068) directs DHHS to undertake several studies and other activities relating to the quality of care in long-term care facilities. The Department must

- develop an Adult Care Home Quality Improvement Consultation Program to assist providers in developing quality improvement plans for their facilities,
- develop a Skilled Nursing Facility Quality Improvement Consultation Program to provide similar services for long-term care facilities offering skilled nursing services,
- convene a Skilled Nursing Facility Quality of Standards Work Group to explore alternatives to existing oversight and survey practices, and
- explore methods to improve and reward quality of care in adult care homes. (DHHS must study whether the licensure period and survey period for adult care homes are factors in providing quality care, whether to cap allowable indirect costs for the homes, whether a different approach to setting reimbursement rates should be adopted, and whether aspects of the quality assessment and monitoring process should be changed.)

Hospitals and Ambulatory Surgical Facilities

In June 2000, the North Carolina Court of Appeals held that the state had applied certificate of need law arbitrarily and capriciously when it imposed requirements on an ambulatory surgical facility that planned an expansion and did not impose the same requirements on a hospital planning a similar expansion. The General Assembly responded by enacting a moratorium on the relocation or expansion of ambulatory surgical facilities (S.L. 2000-135). During the 2001 legislative session, the legislature enacted S.L. 2001-242 (S 714), which repeals the moratorium and modifies certificate of need law to apply the same requirements to all operating rooms. The law exempts from its provisions projects that meet two criteria. First, a capital expenditure (or a legally binding obligation for a capital expenditure) exceeding \$50,000 must have been in effect on or before June 23, 2001. Second, the project must reasonably be expected to be completed by December 31, 2002.

S.L. 2001-410 (H 1147) makes several changes to the laws governing hospitals. First, it authorizes a hospital to temporarily increase its bed capacity by up to 10 percent over its licensed capacity by using observation beds for hospital inpatients if the hospital notifies and obtains the approval of the state Division for Facility Services. The temporary increase may not continue for more than sixty consecutive days. Second, the law authorizes the Medical Care Commission to adopt temporary rules setting forth conditions for licensing all levels of neonatal care beds. Finally, it replaces the existing reimbursement schedule for hospitals that treat workers' compensation patients with a provision authorizing the Industrial Commission to set reasonable fees.

Previous law exempted from North Carolina's public records law information maintained by public hospitals that related to competitive health care activities, with the exception of contracts entered by or on behalf of a public hospital. S.L. 2001-516 (H 1284) amends that law to exempt public hospitals' contracts that contain competitive health care information from the public records law. The new law authorizes public hospitals, upon a good faith belief that a contract contains competitive health care information, to redact those portions of the contract before disclosing it. If the entire contract constitutes competitive health care information, the hospital may refuse to disclose it.

Health Care Facilities Studies

The 2001 Studies Act, S.L. 2001-491, authorizes the Legislative Research Commission to study the availability of liability insurance for physicians, long-term care facilities, and hospitals. The act authorizes the Joint Legislative Health Care Oversight Committee to study long-term care aide workforce issues.

Health Care Providers

Physicians

In S.L. 2001-27 (S 118), the legislature amended G.S. 90-18 to clarify that any person who uses the Internet, a toll-free telephone number, or other electronic means to prescribe medication or otherwise practice medicine in North Carolina must be licensed by the North Carolina Medical Board. The law provides an exception for physicians in other states or foreign countries who are contacted by a regular patient for treatment while the patient is temporarily in North Carolina.

Nurses

The North Carolina Board of Nursing was given new means by which to discipline a nurse in S.L. 2001-98 (S 463). The law authorizes the board to place a nurse on probation, to set conditions of probation, and to invoke other disciplinary measures against a licensee that the board deems fit

and proper. The board may reinstate a nurse's license or revoke censure or probation when it finds that the reasons for the disciplinary action no longer exist and that the nurse can reasonably be expected to practice safely and properly.

S.L. 2001-371 (S 195) authorizes the Board of Nursing to require criminal history record checks of persons who apply to practice nursing in North Carolina.

Dentists

S.L. 2001-511 (S 772) authorizes the North Carolina Board of Dental Examiners to regulate the administration and monitoring of outpatient enteral sedation. The new law does not define enteral sedation, but it states that oral premedication administered for minimal sedation shall not be included in the definition. Previously, the board was authorized to set standards only for general anesthesia and parenteral sedation.

Chiropractors

S.L. 2001-281 (H 722) authorizes the Board of Chiropractic Examiners to seek an injunction in superior court to prevent a person from practicing chiropractic without a license in North Carolina.

Pharmacists and Pharmacy Technicians

The legislature enacted a new law requiring pharmacy technicians to be registered and authorizing the North Carolina Board of Pharmacy to establish registration criteria. The law also authorizes the board to discipline pharmacy technicians. S.L. 2001-375 (S 446) defines a *pharmacy technician* as "a person who may, under the supervision of a pharmacist, perform technical functions to assist the pharmacist in preparing and dispensing prescription medications." The law makes it unlawful for any owner or manager of a pharmacy to allow anyone other than a pharmacist to dispense or compound prescription drugs unless that person is a pharmacy technician or a student in a board-approved school of pharmacy and is working under the supervision of a pharmacist. A person employed as a pharmacy technician before January 1, 2002, may register with the board without completing a required training program if the person's pharmacist-manager certifies to the board that the person has the training necessary to serve as a pharmacy technician and the person registers by July 1, 2002.

Another law, S.L. 2001-339 (H 437), clarifies that any entity that delivers or dispenses devices or medical equipment to a user in North Carolina must comply with the registration requirements of the North Carolina Board of Pharmacy, regardless of whether the entity is located in this state. This requirement does not apply to a pharmaceutical manufacturer that is registered with the federal Food and Drug Administration.

Provider Liability

Volunteer providers. G.S. 90-21.16, the "Good Samaritan law," provides qualified immunity to health care providers who volunteer their services at specified health care facilities or to specified patients. Providers who fall within the scope of the law cannot be held liable for injuries or deaths they cause unless it can be shown that the injuries or deaths were caused by gross negligence, wanton conduct, or intentional wrongdoing. S.L. 2001-230 (S 160) extends those liability limitations to additional health care providers. Previously the law applied to volunteer providers providing services at health departments or nonprofit community health centers, volunteer providers providing services in their own offices to patients of health departments or nonprofit community health centers, volunteer providers serving as medical directors of EMS agencies, and retired physicians holding limited volunteer licenses. The new law adds volunteer providers providing services at a nonprofit free clinic facility.

Portable DNR orders. Another new law clarifies the immunity from liability of health care providers who honor portable do not resuscitate (DNR) orders. S.L. 2001-445 (S 703) requires DHHS to develop a portable DNR order form and authorizes physicians to issue a portable DNR order for a patient upon the receipt of proper consent. It provides that no physician, emergency medical professional, hospice provider, or other health care provider may be held criminally or civilly liable for withholding cardiopulmonary resuscitation from a patient in good faith reliance on an original DNR order unless there are reasonable grounds for doubting the validity of the order or the identity of the patient, or the provider has actual knowledge that the order has been revoked. Immunity from liability is also extended to providers who fail to follow portable DNR orders if the provider had no actual knowledge of the existence of the order.

Health Care Provider Studies

The 2001 Studies Act, S.L. 2001-491, authorizes the Legislative Research Commission to study the following issues related to health care providers:

- Impact of licensure and reimbursement requirements for licensed psychological associates on health care and on these practitioners
- Availability of liability insurance for physicians, long-term care facilities, and hospitals

Other Laws

Advance Health Care Directives Registry

North Carolina law authorizes individuals to execute a number of documents that are known collectively as “advance health care directives.” This catchall category includes: declaration of desire for a natural death, health care power of attorney, advance instruction for mental health treatment, and declaration of an anatomical gift. In S.L. 2001-455 (H 1362), the legislature directed the Secretary of State to establish and maintain a statewide, Internet-based central registry for advance health care directives. The new law permits persons who execute advance health care directives to submit those documents and revocations of directives to the Secretary of State for filing in the registry. Each document entered in the registry must be assigned a unique file number and password and must be accessible only to persons who enter both the file number and the password. Advance directives need not be filed with the registry to be valid.

Anatomical Gifts

S.L. 2001-255 (S 1075) makes two substantive amendments to the Uniform Anatomical Gift Act. First, it adds to the definition of *tissue bank* facilities and programs registered with the federal Food and Drug Administration. Second, it authorizes additional persons to perform procedures related to gifts of eye tissue. Under previous law, the only individuals authorized to enucleate eyes were those who had completed coursework and been certified as competent by an accredited school of medicine in North Carolina. S.L. 2001-255 adds to the definition of *qualified individuals* persons who have been certified as competent by an eye bank accredited by the Eye Bank Association of America.

S.L. 2001-481 (S 907) amends G.S. 130A-404(a) to clarify that if an organ, eye, or tissue donor makes a gift in accordance with G.S. 130A-406,⁴ the gift is legally sufficient and additional authority from the donor’s family or estate is neither required nor permitted. The law states that an anatomical gift made in accordance with G.S. 130A-406 may not be revoked upon the donor’s death, nor may the donor’s family or health care agent refuse to honor the gift or thwart the procurement of the donation. S.L. 2001-481 also requires the Division of Motor Vehicles to make

4. G.S. 130A-406 specifies the ways in which individuals may make anatomical gifts.

donor cards available to interested individuals in offices that issue driver's licenses or special identification cards, and it directs the DHHS Division of Public Health to study the establishment of a state donor registry.

Studies

In addition to the studies already noted in this chapter, the 2001 Studies Act, S.L. 2001-491, authorizes the Legislative Research Commission to study the following:

- State medical examiner system
- Naturopathy

The Studies Act authorizes the Joint Legislative Health Care Oversight Committee to study the following:

- Medical services to persons with disabilities
- Several issues associated with the cost and availability of prescription drugs, particularly for elderly or disabled persons

The act authorizes the Joint Select Committee on Information Technology to study a number of issues related to privacy and security, including the privacy and security of medical records, personal health information, and personal insurance information.

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Higher Education

In a 1971 special session, called for that purpose, the General Assembly overhauled the structure for operating the state's four-year institutions of higher education. It merged ten separate degree-granting institutions into the existing sixteen-campus University of North Carolina (UNC), and placed all sixteen under one unified Board of Governors. To that board, the General Assembly gave the complete governing authority for the sixteen-campus university.

Over the years, many have come to see this centralized system of administration as a key element of the university's strength—one informed body with the authority to respond definitively to regional and institutional pressures for new programs or for redistribution of resources. Others have come to view the centralized system as an unnecessarily rigid structure, insufficiently responsive to the unique needs and opportunities of the individual institutions.

In the 2001 session, a proposal to study the thirty-year-old governing structure aroused strong reaction and controversy. All four living former governors of the state spoke out publicly against it, expressing their conviction that the current structure best served the state and that a proposal for study could become an irresistible first step in a process of devolution. In the end, the General Assembly did establish a commission to conduct the study. It was the year's biggest story involving higher education litigation.

The Board of Governors and the Sixteen-Campus System

The call for a study of the governance structure of the university coincided with the filing of a lawsuit that challenged as unconstitutional some of the provisions for selecting the members of the Board of Governors. G.S. 116-6 sets out a procedure by which the House of Representatives and the Senate elect board members as terms expire. The statute previously provided that of the sixteen members elected every two years, at least two must be women, at least two others must be members of a minority race, and at least two others must be members of the political party to which the largest minority of members of the legislature belong. Prevailing legal opinion indicated that some or all of these set-aside provisions for female, racial minority, and political minority seats on the board would not survive the legal challenge embodied in the lawsuit. In response, the General Assembly enacted S.L. 2001-503 (H 1144) amending G.S. 116-6 to eliminate the set-aside provisions. This legislation also amends G.S. 116-7 to eliminate the statute's direction that the legislature, in electing members, is to "tak[e] into consideration the need for representation on

the Board by the different races, sexes, and political parties” and substitutes a direction that “[m]embers shall be selected based upon their ability to further the educational mission of The University through their knowledge and understanding of the educational needs and desires of all the State’s citizens, and their economic, geographic, political, racial, gender, and ethnic diversity.”

The bill changing the selection criteria for the Board of Governors was passed on the final day of the session. In public debate and in debate within the legislative halls, it was associated with the bill calling for a study of the sixteen-campus governing structure. Should there be such a study? If so, exactly what should the subject matter of the study be? How quickly should the study be concluded?

These questions were answered on the final day of the session as well, with the enactment of S.L. 2001-491 (S 166), which creates the UNC Board of Governors Study Commission. The commission is to consist of five members appointed by the Speaker of the House and five appointed by the President Pro Tempore of the Senate. The commission is to “study the method of election or appointment of members of the Board of Governors, the length of members’ terms, the number of terms a member may serve, and the size of the Board of Governors. As part of the study, the Commission may examine the governing boards of other states’ institutions of higher education.” The commission is to make its report to the 2003 session of the General Assembly.

Only time will tell whether the study is the first step toward major change in the system of governance of the sixteen-campus university.

Appropriations and Salaries

The University of North Carolina Current Operations

The Current Operations and Capital Improvements Appropriations Act of 2001 [S.L. 2001-424 (S 1005)] (the budget act) appropriates to The University of North Carolina Board of Governors—for the operation of all UNC campuses and hospitals—\$1,789,335,775 for fiscal 2001–2002 and \$1,797,720,830 for fiscal 2002–2003. In the budget act of 1999, the comparable figures for the two years of the 1999–2001 biennium were \$1,644,244,323 and \$1,656,863,227.

Community Colleges Current Operations

The budget act appropriates to the Community Colleges System Office \$643,695,459 for fiscal 2001–2002 and \$643,195,459 for fiscal 2002–2003. In the budget act of 1999, the comparable figures for the two years of the 1999–2001 biennium were \$579,803,851 and \$591,015,693.

In addition, the budget act (in Section 30.5) appropriates from the Employment Security Commission Training and Employment Account (created in 1999 and found at G.S. 96-6.1) to the System Office \$28,054,298 for fiscal 2001–2002 for equipment and specified industrial training programs including the New and Expanding Industry Program. The budget act amends G.S. 96-6.1 to change the schedules by which employers must make contributions to the Training and Employment Account and to extend the sunset on G.S. 96-6.1 from January 1, 2002, to January 1, 2006. An additional \$7,013,574 is appropriated from the account to the North Carolina Employment Security Commission for the costs of collecting and administering the training and reemployment contribution and for enhanced reemployment services. Finally, Section 30.2 of the budget act allows the Governor to transfer funds from any agency or program funded from the General Fund to the New and Expanding Industry Program to supplement the needs of that program in 2001–2003.

Capital Improvements

The General Assembly in 2001 made no direct appropriations for capital improvements; in 2000, the voters of the state had approved the issuance of bonds in the amount of \$2.5 billion for UNC and \$600 million for the community college system. That bond issuance supports a list of construction projects found in S.L. 2000-3 (S 912). This year's budget act, in Section 31.9, deletes from that 2000 list a \$9.17 million allocation for Comprehensive Renovation and Conversion for Information Technology and Data Processing at UNC Chapel Hill and substitutes for it an Information and Technology Office facility at the same cost. S.L. 2001-463 (S 968) lists projects on ten UNC campuses approved for construction with funds other than General Fund appropriations, such as gifts or self-liquidating indebtedness. The total cost is \$204 million. The single largest approval is for a \$44 million parking and student-support project at UNC-CH.

Salaries

For community colleges, Section 32.11 of the budget act allocates funds for salary increases of \$625 per employee. The State Board of Community Colleges was charged with establishing guidelines for distributing the increases to employees, with the flexibility to use any excess funds for merit increases. For UNC, Section 32.12 similarly allocates increases of \$625 per employee, with the Board of Governors to adopt rules for distributing excess funds, including for merit increases. UNC employees subject to the State Personnel Act received a flat \$625 per person.

Public School Teacher Assistant Scholarship Fund

The budget act, in Section 31.5, adds new G.S. 116-209.35 to establish the Teacher Assistant Scholarship Fund to provide scholarships to public school teacher assistants who are pursuing college degrees to become teachers. To be eligible, an applicant must be employed as a teacher assistant full-time, be enrolled in a degree program at an institution of higher education in North Carolina, and be a resident of North Carolina. The Board of Governors is authorized to adopt needed rules. Of funds appropriated to the Board of Governors, \$1 million is to be allocated to the State Education Assistance Authority for the fund.

Major Construction Law Changes

S.L. 2001-496 (S 914) works great changes in many aspects of the law governing public construction. See Chapter 21, "Purchasing and Contracting," for a complete discussion.

Community College Governance

Budget Flexibility

The budget act provides, in Section 30.1, that a community college may use all state funds allocated to it (except for Literacy Funds and Funds for New and Expanding Industries) for any authorized purpose that is consistent with the college's Institutional Effectiveness Plan. Each college is to include in its plan a section on how funding flexibility allows the college to meet the demands of the local community and to maintain a presence in all previously funded categorical programs. No more than 2 percent systemwide may be transferred from faculty salaries without the approval of the State Board of Community Colleges. In addition, Section 30.7 collapses several specified funding categories into one account for Institutional and Academic Support.

Property Disposal

G.S. 115D-15(a) has required that a board of trustees must get the prior approval of the State Board of Community Colleges before selling, exchanging, or leasing any real or personal property. S.L. 2001-82 (H 410) amends the statute so that it now requires that the college get such prior approval only with respect to *real* property. It may dispose of *personal* property without prior approval, and it may convey a right-of-way or easement for highway construction or utility easement with approval of the Community College System Office, not the state board. A provision in the amended law specifies that Article 12 (“Sale and Disposition of Property”) of G.S. Chapter 160A applies to the college’s disposition of real or personal property.

Capital Budget Development

G.S. 115D-54(b)(4) spells out the procedure for a college to request appropriations for capital outlays and to attain approval of its capital budget. The procedure formerly called for the budget request to be submitted first to the tax-levying authority (meaning, generally, the county commissioners) for their approval or disapproval, then to the college’s board of trustees, and then to the State Board of Community Colleges. As amended, the statute clarifies that it is the trustees who are to submit the proposal to the tax-levying authority and, after approval by that authority, it is the trustees who are to submit the budget to the state board. This statute, and G.S. 115D-55(b), are amended to specify that the state board is to designate a date for submission of the budgets for approval.

Granting Security Interests to Federal Agencies

G.S. 115D-58.1 authorizes the boards of trustees of community colleges to accept federal grants and to enter into contracts with the federal government in carrying out the grants. S.L. 2001-211 (H 938) amends the statute to provide that in the case of a grant from the Economic Development Administration, the board may grant a security interest to the administration in any real property or equipment purchased with the grant.

Umstead Act

G.S. 66-58, generally known as the Umstead Act, makes it unlawful for state agencies to engage in the sale of merchandise in competition with private businesses. The statute contains a number of exceptions, such as the exception for sales at campus stores by public postsecondary educational institutions. S.L. 2001-368 (S 531) adds a new exception providing that it is not a violation of the Umstead Act for a community college to permit the use of its personnel or facilities in support of or by a private business enterprise located on the college campus or in the service area of the college for (1) product testing services, (2) videoconferencing services provided to the public for occasional use, or (3) small business incubators (meaning sites for new business ventures that are in need of the support and assistance of the college and that would likely fail without that support). New G.S. 115D-20(12) adds to the statutory list of powers of boards of trustees the power to authorize such use of college personnel or facilities. For the Umstead Act exception to apply, the trustees must have approved the specific use.

Aid for Maintenance of Plant

Generally speaking, counties are responsible for bearing the financial burden of building and maintaining the physical facilities of the community colleges located within them. G.S. 115D-31.2 provides that if a community college has an out-of-county student head count served on the main campus of the college in excess of 50 percent of the total student head count, then the State Board of Community Colleges is to provide some financial assistance for maintenance of that college’s physical facilities. The budget act, in Section 30.13, amends that statute to specify that each

college that qualifies for these funds is to receive a pro rata amount of the funds appropriated for the purpose.

Audit Standards

S.L. 2001-111 (H 386) adds new G.S. 115D-5(m) directing the State Board of Community Colleges to require auditors of community college programs to use a statistically valid sample size in performing program audits of community colleges.

Fuel Tax Relief

S.L. 2001-427 (H 232) amends G.S. 105-449.88 to add to the list of items to which the excise tax on motor fuel does not apply fuel sold to a community college for its own use.

UNC Governance

In addition to the changes described above with respect to selection of the Board of Governors, several other changes related to UNC governance were enacted.

Budget and Management Flexibility

Section 31.11 of the budget act enacts a new Part 3A (“Management Flexibility for Special Responsibility Constituent Institutions”) of G.S. Chapter 116, new G.S. 116-40.20 through -40.23. The new provisions authorize the UNC Board of Governors to authorize for any special responsibility constituent institution within the university the following elements of “management flexibility”: (1) the trustees of the institution may, on recommendation of the chancellor, appoint and fix the salaries of all vice-chancellors, senior academic and administrative officers, and all employees with tenure; (2) the trustees may recommend to the Board of Governors tuition and fees for program-specific and institution-specific needs without regard to whether an emergency situation exists; and (3) the trustees are to establish policies and rules governing information technology and telecommunications at the institution, including security, software standards, hardware standards, consulting and contracting, and disaster recovery standards. Section 31.11 calls for a campus with the new management flexibility to report to the Board of Governors and the Joint Legislative Education Oversight Committee on any of the newly authorized policies that are adopted before the policies are implemented. The policies become effective at the next meeting of the trustees that is held more than thirty days after the submission of the report.

The same provision in the budget act directs the Joint Legislative Education Oversight Committee to study the issue of whether management flexibility for special responsibility constituent institutions should be expanded to include personnel, property, and purchasing responsibilities.

G.S. 116-30.2 and -30.3 give substantial flexibility in spending to UNC constituent institutions. Section 31.6 of the budget act provides that, despite that flexibility, neither the UNC General Administration nor any of the institutions are to expend General Fund moneys appropriated by the budget act nor General Fund current operations appropriations credit balances remaining at the end of any fiscal year to modify budget reductions imposed by the budget act.

Establishment of Additional Degree Programs

Section 31.10 of the budget act amends G.S. 116-74.21(b) to raise from nine to twelve the permitted number of master of school administration degree programs operated within the UNC constituent institutions and to direct that the three new programs be located at North Carolina

Agricultural and Technical State University, North Carolina Central University, and the University of North Carolina at Pembroke. Section 31.10 also directs the Board of Governors to study the feasibility of establishing a school of pharmacy at Elizabeth City State University and schools of dentistry and engineering at East Carolina University.

School of Science and Mathematics Budget Flexibility

S.L. 2001-449 (S 879) adds new G.S. 116-030.2(b) authorizing the UNC Board of Governors to designate the North Carolina School of Science and Mathematics as a special responsibility constituent institution and to make it eligible for the budget flexibility provisions that come with that designation.

Overhead Receipts Report

Section 31.14 of the budget act directs the UNC Board of Governors to report to the Joint Legislative Education Oversight Committee annually on the amount of overhead receipts for the university and the use of those receipts.

Surplus Property

Section 31.8 of the budget act directs the UNC Board of Governors and the Department of Administration to develop guidelines and methods to expedite the disposition of surplus property by the university.

Arena Authority Conflicts

Part 4 of Article 20 of G.S. Chapter 160A authorizes the General Assembly to create facility authorities to own and operate arenas, coliseums, or other buildings for sports, entertainment, or cultural activities. S.L. 2001-311 (S 690) amends G.S. 160A-480.3(g) to require that the chancellor of the main campus of a UNC constituent institution located in the same county with the facility must, if he is a member, officer, or employee of the facility authority, disclose any interest that he may have in any contract with the facility authority. It is not a violation for the chancellor to participate in discussion or vote on a matter where the matter relates to the interest of the constituent institution.

UNC Police Jurisdiction

G.S. 116-40.5 authorizes the boards of trustees of UNC constituent institutions to establish campus law enforcement agencies. S.L. 2001-397 (H 972) adds new subsection (d) providing that the boards of trustees of institutions with such agencies may enter into joint agreements with one another to extend the law enforcement authority of their campus police officers into each other's campuses.

Teacher Academy Development Programs

G.S. 116-30.01(a) directs the North Carolina Teacher Academy Board of Trustees to establish a statewide network of high-quality, integrated, comprehensive, collaborative, and substantial professional development for teachers. Section 28.28 of S.L. 2001-424 adds a requirement that the network is to include professional development programs that focus on teaching strategies for teachers assigned to at-risk schools. The new provisions also direct the Teacher Academy to use at least 10 percent of its budget for the 2001–2002 fiscal year to deliver programs for teachers assigned to small classes in kindergarten through fifth grade.

North Carolina Progress Board

Section 31.12 of the budget act, in amending G.S. 143B-372.1 through -372.3, makes several changes in the administration of the North Carolina Progress Board. The board has been located administratively at North Carolina State University; the amended statute provides that it may be located at any UNC institution to which it is invited. The amended statute provides that the board is to exercise its powers independently of the institution at which it resides. The amended statute raises the board's membership from twenty-one to twenty-four, adding an additional member of the Senate, an additional member of the House, and an additional member elected by the board itself. The executive director has been appointed by the chancellor of North Carolina State University; the amended statute provides that the appointment is to be made by the Governor. The amended statute encourages the development of Regional Progress Boards, modeled after the statewide board. Finally, the amended statute specifies that the board may engage in consulting activities and that members or employees of the board may receive reasonable fees for consulting work.

Education Cabinet

G.S. 116C-1(b) provides that the North Carolina Education Cabinet is to consist of the Governor, the UNC President, the State Superintendent of Public Instruction, and the President of the Community Colleges System. S.L. 2001-123 (S 735) amends the statute to add the President of the North Carolina Independent Colleges and Universities.

Public School Professional Employee Development Programs Review

G.S. 115C-12(26) has required the State Board of Education, in cooperation with the UNC Board of Governors, to identify and make recommendations regarding meaningful professional development programs for professional public school employees. The budget act, in Section 31.4, rewrites the statute so that it now directs the State Board of Education to (1) identify local needs for professional development for public school employees and recommend strategies, with the strategies being research-based, proven in practice, and designed for data-driven evaluation; and (2) to determine annually whether the programs for professional development provided by the UNC Center for School Leadership Development address the needs of the state and are using strategies recommended by the State Board of Education. Section 31.4 also amends G.S. 116-11(12a) to direct the Board of Governors to submit annually to the State Board of Education a written report that uses data to assess and evaluate the effectiveness of the programs of the center. Finally, Section 31.4 also directs the Joint Legislative Education Oversight Committee to hire an independent consultant to study the programs of the center and related issues and make a report to the committee in 2002.

Students and Academic Programs

Tuition

Section 10 of S.L. 2001-395 (S 61) (the continuing appropriations bill passed to fund operations of state government after the end of the fiscal year and before a full budget bill could be enacted) directed the UNC Board of Governors to increase tuition 9 percent above the rates charged for 2000–2001, to keep in place differentials previously adopted for graduate and professional schools, and to keep in place campus-initiated tuition increases approved by the Board of Governors for 2000–2001. Section 10 also directed the State Board of Community Colleges to raise tuition for community college students enrolled in curriculum programs by \$3.50 per credit hour for up to sixteen credit hours per semester.

UNC Admissions Study

S.L. 2001-312 (H 1246) directs the UNC Board of Governors (in cooperation with the State Board of Education and the State Board of Community Colleges) to study the measures used by UNC institutions in making admissions decisions, remediation placement decisions, and advanced placement decisions. The study is to consider whether to eliminate, continue, or change the emphasis placed on the Scholastic Aptitude Test and the ACT Assessment as a mandatory admission measure. The study is to review incorporating the state's testing program into admission and placement decisions. A final report is due to the Joint Legislative Education Oversight Committee by December 1, 2003.

Youth Attending Community Colleges

S.L. 2001-312 adds new G.S. 115D-1.1 authorizing a student under age sixteen to enroll in a community college if (1) the college determines, based on criteria established by the State Board of Community Colleges, that the student is intellectually gifted and sufficiently mature; and (2) the enrollment is approved by the student's school system, nonpublic school, home schooling instructor, or charter school. This provision expires September 1, 2004.

Community College Apprenticeship Training

Section 30.10 of the budget act transfers the Bureau of Training Initiatives funded by the Worker Training Trust Fund from the Department of Labor to the community college system. The Department of Labor's apprenticeship program is transferred to the community college system as well.

Student Employees

G.S. 95-25.5 sets rules for employment of youth in particular age categories. S.L. 2001-312 adds a new provision to that statute specifying that youths who are enrolled in a college or community college may be employed by the institution—provided the employment is not hazardous—without regard to the otherwise applicable rules.

UNC Student Parking

G.S. 116-44.4(d) authorizes each UNC Board of Trustees to set aside parking lots and other parking facilities on UNC campuses. S.L. 2001-336 (S 627) adds to that statute a requirement that before a permit to park is issued to a student, that student must provide the name of the student's insurance carrier, the insurance policy number, and a certificate that the car is insured at levels required by the state financial responsibility law.

Reciprocal Out-of-State Tuition Waiver Program

The budget act, in Section 31.2, authorizes the Board of Governors to establish a pilot program for participation in the Southern Regional Education Board's Academic Common Market. Under that program, students in participating states may attend programs at public universities in other participating states if those programs are not available in the students' home states and may pay the in-state tuition rate. In the pilot program, the Board of Governors is to select for participation graduate programs that are not likely to be available in other participating states and to permit graduate students from participating states to attend those programs at UNC campuses at North Carolina in-state tuition rates. The pilot established under this authorization is to terminate July 1, 2005.

Community College Student Financial Aid

S.L. 2001-229 (H 431) amends and codifies as new G.S. 115D-40.1 provisions for community college student financial aid that were previously found in the 1999 budget act (S.L. 1999-237). Those provisions establish the Need-Based Assistance Program, expressing the intent of the General Assembly to make financial aid funds available to the neediest students who are not eligible for other financial aid programs that fully cover the required educational expenses of these students. The new statute provides that notwithstanding this intent, up to 10 percent of funds appropriated for Financial Aid Assistance for Community Colleges may be allocated to students who do not qualify for need-based assistance but who enroll in low-enrollment programs that prepare students for high-demand occupations.

Aid to Students Attending Private Colleges and Medical Schools

For a number of years, the General Assembly has provided funds to private colleges in North Carolina that enroll North Carolina undergraduate students. The funds provided have been of two types. First, there has been a payment to the private college of an amount per student for each North Carolina undergraduate enrolled, with that amount to be placed in a separate, identifiable account in the college's budget and to be used to provide scholarship funds for needy North Carolina students. Second, there has been separate payment to the college of a specific amount per student to be credited directly against that student's obligation to the college. In 2000–2001, the amount of the first payment was \$1,100 per student and the amount of the second payment was \$1,800. The budget act for 2001–2002 (in Section 31.1) keeps the payments at those same levels, but it codifies the provisions for the payments—which were previously found in the budget acts year to year—in new G.S. 116-21.1 through -21.4.

Similarly, the General Assembly has for a number of years provided for payments to Wake Forest University and to Duke University for each North Carolina resident attending their medical schools. The payments per student for 2000–2001 were \$8,000 for Wake Forest and \$5,000 for Duke. The budget act for 2001–2002 keeps the payments at the same level, but it also codifies the provisions for the payments, previously found year-to-year in the budget acts, in new G.S. 116-21.5.

Provisions Related to Employees

Optional Retirement Systems

State employees, public school employees, most university employees, and employees of the state's community colleges participate in the Teachers' and State Employees' Retirement System of North Carolina. In the university, administrators and faculty with the rank of instructor or above are eligible to forgo participation in the state retirement system and participate instead in an Optional Retirement System implemented by the Board of Governors. Section 32.27 of the budget act extends that eligibility to employees of the university appointed by either the Board of Governors on recommendation of the UNC President or by the Board of Trustees upon recommendation of one of the chancellors. It also extends eligibility to field faculty of the Cooperative Agriculture Extension Service and to tenure-track faculty in North Carolina State University agriculture research programs.

Section 32.24 of the budget act adds new G.S. 135-5.4 creating a similar Optional Retirement System for community college presidents.

Section 32.24A creates an Optional Retirement Program Study Commission to examine the feasibility and desirability of expanding the optional retirement systems to cover all university employees who are exempt from the State Personnel Act and all community college employees.

Community College Faculty Contracts

The General Assembly, in Section 30.6 of the budget bill, expresses its finding that standardization of the term of contracts of community college faculty members will provide the legislature with the data necessary to make informed decisions regarding faculty salaries and funding for the summer term; it directs the State Board of Community Colleges to convert all faculty contracts to nine-month contracts covering the fall and spring semesters. Supplemental contracts for the summer term may be used for faculty members employed more than nine months.

Community College Faculty Salary Study

Section 30.8 of the budget act directs the Joint Legislative Education Oversight Committee to study discrepancies in community college faculty salaries to determine why salaries at some colleges are above the state average and others are well below it.

UNC Legal Services

Section 23.4 of the budget act directs the Board of Governors to reimburse the Department of Justice for two Attorney II positions to provide legal representation to the University of North Carolina System.

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Information Technology

The General Assembly continued to provide for the increased use of information technology to deliver public services by modifying established purchasing laws to allow for e-procurement and electronic signatures. The responsibilities of the state Chief Information Officer (CIO) were increased, thereby further consolidating information technology (IT) planning, procurement, and management under the auspices of the Office of Information Technology Services.

Electronic Procurement

S.L. 2001-328 (H 1169) makes numerous changes in the local government purchasing statutes. Three changes that relate specifically to information technology are highlighted below. (These and other provisions are discussed in further detail in Chapter 21, “Purchasing and Contracting.”)

The act authorizes the use of electronic advertisements for construction and purchasing contracts at the option of the local government. The use of electronic rather than newspaper advertisement requires governing board approval. The act also clarifies the “minimum time for advertisement” of bid opportunities in newspapers and electronic format.

S.L. 2001-328 adds new G.S. 143-129.8 establishing an optional “request for proposals” procedure for IT goods and services to provide flexibility in procuring these potentially complex contracts. A separate piece of local legislation, S.L. 2001-54 (S 675), authorizes Forsyth County and the City of Winston-Salem to purchase or lease telecommunications, data processing, and data communications equipment, software, supplies, and services on a request for proposals basis.

The act also adds new subsection (c) to G.S. 160A-270, authorizing municipalities to hold electronic auctions of real or personal property.

Several items in the Appropriations Act, S.L. 2001-424 (S 1005), also relate to electronic procurement. Section 27.9(a) authorizes the Department of Transportation to accept bids by electronic means and to issue rules governing the acceptance of these bids. For purposes of this

section, *electronic means* is defined as relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Section 15.6(e) allows The University of North Carolina (UNC) Board of Governors to exempt The University of North Carolina at Chapel Hill (UNC-CH) and North Carolina State University (NCSU) from the North Carolina E-Procurement Service until May 2003 to allow time for a study of the e-procurement system. Section 15.6(f) allows any state entity, local school administrative unit, or community college that was operating an electronic procurement system prior to September 2001 to continue its operation until May 2003. However, each entity must report to the Information Resource Management Commission (IRMC) by January 2002 and annually thereafter of its intent to participate in the e-procurement program.

Section 15.6(d) of the Appropriations Act amends G.S. 143-49 by adding a new subdivision concerning the establishment and maintenance of a procurement card program for use by state agencies, community colleges, the UNC System, and local school administrative units. The Secretary of the Department of Administration is authorized to adopt rules for the program, which should be tightly integrated with the North Carolina E-Procurement Service. NCSU and UNC-CH may use procurement cards consistent with the rules adopted by the secretary, provided that the procurement cards have a purchase limit of \$250 per month.

Uniform Electronic Transactions

S.L. 2001-295 (S 1023) revises legislation passed last year that authorized the use of “electronic signatures” on a voluntary basis in most types of transactions and contracts. This new statute conforms state law to recent federal legislation—the Electronic Signatures in Global and National Commerce Act—and makes clarifying changes to the existing statutes.

The act adds a list of notices and documents for which the statute does not apply. It also provides that the law will not recognize an electronic record transaction as being “in writing” if the electronic record is not capable of being accurately reproduced for later reference by all parties entitled to retain it. The act provides that a consumer transaction will be deemed to have been entered into in North Carolina if the consumer is located in the state and the transaction is subject to a state statute, regulation, or law requiring that information relating to the transaction be provided or made available to the consumer in writing, and such information is created or documented by an electronic record. Other language clarifies when an electronic record is considered received, what constitutes consent to use electronic records, when hard copy documents are required, and when a recording of an oral communication qualifies as an electronic record.

The act also amends Article 40 of Chapter 66 of the North Carolina General Statutes by adding a section that clarifies the conditions under which North Carolina law, as opposed to the laws of a state that has enacted the Uniform Computer Information Transactions Act, can be used in computer information agreements.

Intellectual Property

Section 15.1 of S.L. 2001-424 requires that prior to the transfer of any patentable intellectual property or the release of any state funds to develop patentable intellectual property, the transferring entity shall submit to the Governor, the Joint Legislative Commission on Governmental Operations, and the chairs of the House of Representatives Science and Technology Committee and the Senate Information Technology Committee a written statement describing the value of the intellectual property and the state’s interest in the property. This evaluation should also include information about how the state’s interests are being protected by the transfer as well as assurances that state funds used for the development of the property have not inappropriately benefited any person or entity. This requirement does not apply to the University of North

Carolina or the North Carolina Community Colleges Systems or to their employees. Further, the Board of Science and Technology is directed to study the transfer and use of intellectual property developed with state resources and report to the Governor and the 2002 regular session of the General Assembly.

Electronic Public Records

Four pieces of legislation that passed this session impact the gathering or disclosure of public information that is or is likely to be in electronic format, often on governmental Web sites. S.L. 2001-279 (S 365) allows a board of county commissioners to provide, by resolution, for the electronic listing of business personal property for ad valorem taxes and to extend the time for electronic listing of such property to June 1. The act provides that electronic listings may be signed electronically in accordance with the Electronic Commerce Act and will be considered filed when received in the office of the assessor.

S.L. 2001-473 (S 774) amends G.S. 132-1.1 to stipulate that billing information compiled and maintained by a city or county or other public entity providing utility services in connection with the ownership or operation of a public enterprise is not a public record. This act specifies that it does not limit disclosure by a city or county of billing information useful or necessary to the issue of bonds or other obligations or necessary to maintain the integrity and quality of services or to assist law enforcement or other public safety officers or judicial officers in the performance of their duties.

S.L. 2001-256 (H 998) adds new Article 3F, entitled "State Privacy Act," to G.S. Chapter 143, making it unlawful for any state or local government agency to deny to any individual any right, benefit, or privilege provided by law because of the individual's refusal to disclose his or her social security number. Exceptions occur when (1) the disclosure is required or permitted by federal statute or (2) the disclosure is to a state or local agency whose system of records was in existence and operating before January 1, 1975, and the disclosure was required by statute or regulation adopted prior to that date to verify identity. Agencies that request social security numbers must inform individuals whether the disclosure is mandatory or voluntary, inform them of the authority for the request, and describe what uses will be made of the requested information. (G.S. 143-64.60.)

Finally, in response to the heightened awareness of the dangers of detailed security and infrastructure information being easily available to terrorists, S.L. 2001-516 (H 1284) adds a new section to Chapter 132 of the General Statutes entitled "Sensitive Public Security Information." This section provides that *public records* as defined in Chapter 132 shall not include information containing specific details of public security plans and arrangements or detailed plans and drawings of public buildings and infrastructure facilities. Information relating to the general adoption of public security plans and budgetary information concerning either the implementation of security plans or the construction, renovation, or repair of public buildings and infrastructure remain public records. (G.S. 132-1.6.) This section applies to public records in existence on or after January 4, 2002.

Office of Information Technology Services

A number of special provisions in the budget bill, S.L. 2001-424, affect the finances of the Office of Information Technology Services (ITS). The act provides that ITS must transfer a total of \$10 million from its operating account to the General Fund in three separate payments during fiscal year 2001–2002 [sec. 2.2(i)]. ITS may not increase its rates to offset any reductions required by this act.

Section 15.2 rewrites portions of G.S. 147-33.81–82 to require the state CIO to establish information technology enterprise-wide security standards to maximize the functionality, security,

and interoperability of the state's distributed IT assets. The IRMC and the Joint Legislative Commission on Governmental Operations must approve these standards. As part of creating these standards, the state CIO shall periodically review existing security standards and practices in place among various state agencies to determine whether those standards and practices meet enterprise-wide security and encryption requirements. If a state agency fails to adhere to the established security standards, the state CIO may assume direct responsibility for providing for the IT security for that agency. Any actions taken by the CIO must be reported to the IRMC. Section 15.2 also adds a new subdivision to G.S. 147-64.6(c) requiring the State Auditor to assess, confirm, and report on the security practices of IT systems.

The legislative and judicial branches of state government, the UNC System, local school administrative units, and the North Carolina Community Colleges System are authorized to develop their own security standards.

Section 15.3 of S.L. 2001-424 adds a new subsection to G.S. 143-6 that requires any department, bureau, division, officer, board, commission, institution, or other state agency requesting state funds of more than \$100,000 for the acquisition or maintenance of IT services or equipment to submit to the state CIO, prior to requesting funds, a statement of its needs and other additional information as required by the CIO. The CIO shall then review the statement of needs, certify them, and report to the Governor on their merit and compliance with Article 3D of Chapter 147 of the General Statutes.

Sections 15.4–5 require the Office of the State Controller, the Office of State Budget and Management (OSBM), the Office of Information Technology Services, and the Office of State Personnel to develop common definitions and tracking mechanisms to monitor computer networking and telecommunications costs. In addition, these agencies are instructed to study the use of IT contractors and the feasibility of a pilot program to allow budget flexibility to convert IT contractors to state employees.

Sections 15.7(a)–(d) direct ITS to continue funding the same North Carolina Information Highway (NCIH) sites that received funding from ITS operating cash during fiscal year 2000–2001. The total amount of ITS funding for NCIH sites, for fiscal year 2001–2002 only, is in excess of \$3 million. In addition, ITS is to work with the Department of Community Colleges and the Department of Public Instruction to evaluate the use of the NCIH by schools and to recommend reallocation of funds from schools not using the site. The Appropriations Subcommittee on Education is to review the use of the NCIH and recommend a mechanism for funding the sites beyond year 2001–2002.

Sections 15.8(a)–(b) direct the OSBM to administer reductions in ITS telephone, telecommunications data, and computer data processing expenditure accounts in an amount equal to \$4 million of individual agency General Fund appropriations. Reductions in expenditures are to match rate reductions proposed by ITS.

A separate piece of legislation, S.L. 2001-142 (S 1070), establishes a dispute resolution panel and procedures to assist ITS in the collection of fees related to IT services it provides to state government agencies. The State Auditor is to adopt rules for the dispute resolution process, and the decisions of the panel are to be final in the settlement of all fee disputes that come before it.

Health Insurance Portability and Accountability Act

In this year's budget bill, the General Assembly set aside \$15 million in a reserve fund managed by OSBM to initiate Health Insurance Portability and Accountability Act (HIPAA) implementation. OSBM, in consultation with the state CIO and the Secretary of Health and Human Services, is to develop a strategic plan for state agency compliance. The North Carolina Department of Health and Human Services (DHHS) has had HIPAA compliance project management office in place for two years and has estimated that efforts to comply with federal regulations could approach \$92 million in state funding needs.

OSBM's strategic plan must document HIPAA requirements relative to state agencies, assess the state's administrative and technology systems in light of HIPAA requirements, and develop a time frame and cost analysis for compliance efforts. A number of House and Senate committees, including the Joint Legislative Commission on Governmental Operations and the Legislative Fiscal Research Division, must oversee and approve plans for reserve funds disbursement. Recognizing that specialized technical assistance may be needed to help with DHHS HIPAA compliance efforts, the General Assembly enacted a special budget provision to allow DHHS to establish time-limited positions not subject to the State Personnel Act or the state's salary schedule. These positions would staff HIPAA IT project to prepare for and implement federal requirements for HIPAA medical records privacy standards.

DHHS Automation Efforts

Several special budget provisions direct DHHS automation efforts in the areas of long-term care, childhood immunization, and AIDS/HIV drug assistance. To help create a continuum of long-term care for the elderly and disabled, DHHS may begin development and implementation of a comprehensive data system that tracks long-term care expenditures, services, and consumer profiles and preferences, if the department can identify nonstate funds to be used for this purpose.

State money is set aside for continued development of an automated immunization registry. Funding this registry is an approved use of part of the \$1 million appropriated in each year of the biennium to increase childhood immunization rates. DHHS may also spend up to \$50,000 to implement an AIDS/HIV management information system to track medication cost and utilization data and participant demographics in the department's AIDS Drug Assistance Program (ADAP).

Committee Membership

The 2001 General Assembly expanded, changed, and codified membership on a number of IT committees, beginning with expanded citizen representation on the IRMC. Under S.L. 2001-166 (H 331), House and Senate leaders are to appoint two citizens each to the commission, increased from one each, and as with current law, citizen representatives must have a background in and familiarity with information systems or telecommunications.

S.L. 2001-171 (H 1090) changes membership on the Rural Internet Access Authority (RIAA) by having the president of the Rural Economic Center, rather than the Rural Center's chair, serve as an ex officio member of the authority. The Rural Center houses the RIAA and its staff.

S.L. 2001-359 (S 895) legislatively authorizes the North Carolina Geographic Information Coordinating Council, an advisory intergovernmental body on geographic information systems (GIS) that had previously been authorized by executive act since its inception ten years ago. The Coordinating Council is responsible for GIS strategic planning, resolving GIS policy and technical issues, and overseeing and coordinating GIS efforts among state, federal, and local government and university and private agencies to improve GIS access, quality, efficiency, and use in North Carolina. Up to thirty-five members may serve on the council, including six gubernatorial appointments, three House and three Senate appointments, specific state agency secretaries and council of state members, the president of the UNC System, and local government representatives. The Center for Geographic Information and Analysis staffs the council and its committees.

Finally, a special provision in the budget bill—Section 23.6—amends membership on the Criminal Justice Information Network (CJIN) Governing Board by increasing the Governor's appointments from three to four members, to include an employee of the recently formed Department of Juvenile Justice and Delinquency Prevention.

Section 23.6 also requires the CJIN Governing Board to report to the General Assembly by April 1, 2002, on the board's operating budget, including board expenditures and reserve fund amounts. The board must also present at that time a long-term strategic plan and cost analysis for

statewide implementation of the CJIN, including initial cost estimates of each network component, funding sources to date, completion timetables, and remaining resources needed.

The General Assembly, having eliminated the State Planning Unit through a special budget provision (Section 12.2), moved two of the unit's functional divisions to other state agencies by enacting another special provision, Section 12.3. The Center for Geographic Information Analysis/Geodetic Survey is transferred to the Department of Environment and Natural Resources Division of Land Resources, and the Statewide Floodplain Mapping Unit is transferred to the Department of Crime Control and Public Safety Division of Emergency Management.

Use of 911 Funds Study

In response to a growing number of local bills to expand the use of 911 funds, the General Assembly has authorized the Joint Legislative Utility Review Committee to study clarifying and expanding the use of these local funds [S.L. 2001-491 (S 166), sec. 30.1]. The Review Committee is also authorized to report its findings to the 2002 General Assembly and may also report to the 2003 General Assembly as well.

In 1989 local governments were authorized to enact ordinances to impose a monthly 911 charge that would be used to provide a toll-free number for public safety aid access (G.S. Chapter 62A). The telephone exchange service provider collects the monthly fee from its telephone subscribers and remits the funds monthly to the local government, less an up to 1 percent administrative fee. Chapter 62A of the General Statutes restricts a local government's use of these funds to the "lease, purchase, or maintenance of emergency telephone equipment" to establish a 911 system and to pay the service supplier's 911 rates and its other 911 recurring charges. Further, Chapter 62A specifically prohibits the use of these funds to pay for real estate, cosmetic remodeling of dispatch centers, emergency response staff, and emergency response vehicles.

Local legislation introduced in the 2001 session generally would either eliminate these prohibitions entirely or permit some 911 funds (usually 50 percent) to be used for these expenditure categories, in order to offset some operating expenses. Other uses of these funds were also contemplated; the original version of Senate Bill 589 would have permitted the City of Charlotte to use its 911 funds to establish a nonemergency 311 service.

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Land Records and Registers of Deeds

The 2001 Session of the General Assembly proved to be a momentous one for the registers of deeds. The legislature made sweeping changes to the statutory fees charged by registers in the execution of their duties. The comprehensive fee increases coupled with the creation of a special fund to enhance the use of automation in the registers' offices will better enable registers to handle the increasing technology and complexity involved in real and personal property transactions. The implementation of new recording standards, which for the first time are clear and precise, will further streamline the procedures used by registers of deeds.

Office of the Register of Deeds

Increases in Uniform Fees

Legislation passed this session increases many of the fees that registers of deeds charge. These changes are included in S.L. 2001-390 (H 1073), effective January 1, 2002.

Instruments in general. The new fees for registering or filing all instruments that are not specifically assigned a fee in G.S. 161-10(a) are now \$12 for the first page and \$3 for each additional or partial page. Registers of deeds had charged \$6 for the first page and \$2 for each additional or partial page.

Deeds of trust, mortgages, and cancellations. Previously the charge for recording a deed of trust or mortgage was \$10 for the first page and \$2 for each additional or partial page. Under the new fee structure, these fees have increased to \$12 and \$3 respectively, bringing them in line with the fees charged for recording all other instruments in general. "Multiple instrument" deeds of trust or mortgages continue to incur an additional \$10 fee for each distinct legal instrument

recorded.¹ There continues to be no fee imposed for recording records of satisfaction or for canceling deeds of trust or mortgages by any other means.

Marriage licenses. The fee for issuing a marriage license is now \$50, increased from the previous amount of \$40. The fee for issuing a delayed marriage certificate with one certified copy has increased substantially—from \$5 to \$20. Finally, the new fee to make a correction on a marriage application, license, or certificate and receive one certified copy of any of these documents as corrected is \$10, double the amount of the previous fee.

Plats. The fee for recording a plat remains \$21 per sheet or page. However, the fee to obtain a certified copy of a plat has increased from \$3 to \$5.

Right-of-way plans. The Board of Transportation must now pay \$21 to record the first page and \$5 to record each additional or partial page of an original or amended right-of-way plan and profile sheet. The previous fee was \$5 per recorded plan. This fee change is effective for plans recorded on or after January 1, 2001, the only increase that is retroactively effective.

Registration of birth certificates. The fees charged for processing delayed birth certificates, or birth certificates registered a year or more after the birth, are amended as follows. If a register prepares the papers necessary for the registration of a delayed certificate, but the registration itself will actually occur in another county, the fee for the preparation is now \$10, double its previous amount. When the delayed birth certificate is presented for registration in the other county, the fee for the registration of the certificate and the issuance of one certified copy is also \$10, again double its previous amount. Finally, if the necessary papers are prepared and the delayed birth certificate is registered in the same county, the register of that county charges one fee of \$20 for both services, twice the previous amount of that fee.

Amendments to birth or death records. The fee for amending or correcting a birth or death record has increased from \$2 to \$10.

Legitimations. The fee charged for preparation of documents related to legitimations is now \$10, increased from the previous amount of \$7.

Certified copies of birth certificates, death certificates, and marriage licenses. Under the previous fee schedule, registers charged \$3 for certified copies of birth certificates, death certificates, and marriage licenses. The fee is now \$10 for each certified copy of these records. Registers may continue to waive this fee in issuing certified birth certificates to persons over age sixty-two.

Certified copies of all other instruments. The fee for providing a certified copy of any instrument other than a birth, death, or marriage certificate has increased from \$3 to \$5.

Comparison of copies for certification. The fee for comparing a copy of an instrument to be filed for registration to its original and subsequently certifying it will increase from \$2 to \$5.

Uncertified copies of instruments. The amended statute leaves to the discretion of the register of deeds whether a fee should be charged for uncertified copies of instruments and how much that fee should be. The statute now clarifies, however, that the amounts of any fees to be charged for uncertified copies must be prominently displayed in the office of the register of deeds. G.S. 161-10(a)(11) previously required that these fees be “prominently posted in his office.” The clarification was probably intended either to make the language of the statute more gender neutral, to specify that the fees had to be posted in the register of deeds’ office generally rather than in the register’s own private workspace, or both. The revised provision reiterates that the register of deeds may change these fees according to his or her discretion, but the fees must remain uniform.

Qualification of notary public. The fee for administering the oath of office to a notary public and making the related record entries has increased from \$5 to \$10.

Nonstandard instruments. S.L. 2001-390 adds new G.S. 161-10(a)(19), which establishes a fee of \$25 for the registration or filing of any document that fails to meet the recording standards adopted in G.S. 161-14(b). The new recording standards are discussed below.

1. Under G.S. 161-10(a)(1a) an “instrument” is a distinct legal instrument that would incur the \$10 fee if it were separately executed and acknowledged and could be recorded alone.

Blank or master forms of mortgages. S.L. 2001-390 amends G.S. 47-21 to increase the fee charged for filing, recording, and indexing a blank or master form of mortgage, deed of trust, or other lien-creating document. The previous fee was \$5 per document. The amendment makes the fee the same as that for recording instruments in general—\$12 for the first page and \$3 for each page or partial page thereafter.

Automation Enhancement and Preservation Fund

In addition to raising uniform fees to more appropriate levels for sustaining operations in the registers of deeds' offices, S.L. 2001-390 also creates an Automation Enhancement and Preservation Fund. New G.S. 161-11.3 provides that 10 percent of the fees collected pursuant to G.S. 161-10 and retained by the county must be set aside each year and deposited into this nonreverting fund to finance expenditures on computer and imaging technology for the register of deeds' office.

The Fiscal Research Division prepared a legislative fiscal note to assess the impact of the changes proposed by House Bill 1073. While it was not possible to accurately estimate the amount that would be dedicated to the fund through the 10 percent set-aside, the Fiscal Research Division did estimate that the statewide increase in revenues from the fee increases alone would total approximately \$13.5 million per year.

G.S. 161-11.3 provides that the existence of this fund and the new moneys it generates for automation expenditures are not intended to diminish the obligation of the board of county commissioners to furnish supplies and equipment to the register of deeds' office.

Real Property Records

Recording Standards

S.L. 2001-390 makes significant changes to G.S. 161-14, which deals with the registration of instruments. These changes apply to instruments *executed* on or after July 1, 2002. It is important to note that the determinative date for the recording standards amendments is *not* the date that the document is presented for recording, but the date that the document is executed. This will require registers and their staff members to pay careful attention to the date that an instrument was fully executed² or, if the instrument itself does not contain a date, to the date stated in the acknowledgment.

The first major change to G.S. 161-14 is the addition of the following italicized language to Subsection (a):

“After the register of deeds has determined that all statutory and locally adopted prerequisites for recording have been met, the register of deeds shall immediately register all written instruments presented to him for registration.”

This additional language is critical because it clarifies the authority of registers of deeds to screen for recordability documents presented for registration and to reject those that are not in proper form. The statute now provides that “[t]he register of deeds shall immediately register all written instruments presented to him for registration.” Despite the current existence of local and state prerequisites that must be met before a document can be recorded, the present language seems to imply that any and every document presented to the register of deeds with the appropriate fee must be recorded, whether it is in proper form or not. The new addition to the paragraph makes it clear

2. The term “fully executed” is used here because situations often arise in which documents require multiple signatures. In such cases, the date of execution should be the date that the last signing party signed the document or, if the document does not indicate the date of signing, the date that the acknowledgment was taken.

that the register has both the authority and the duty to ensure that documents presented are in proper form.

S.L. 2001-390 also rewrites G.S. 161-14(b). Currently the recording standards mandated in this section require only that a document presented for registration be reproducible. The revision deletes this somewhat vague measure of recordability and, in its place, articulates very specific criteria that each presented document must meet. Effective July 1, 2002, any instrument presented for registration must:

- be presented on 8½-by-11-inch or 8½-by-14-inch paper,
- have a 3-inch blank margin at the top of the first page and a ½-inch margin on the remaining sides of the first page and on all sides of subsequent pages,
- be typed or printed in black on white paper in a legible font that is not smaller than 10 points in size,
- be printed on one side of the page, and
- indicate the type of instrument it is at the top of the first page.

The new requirements allow blanks to be filled in and corrections to be made manually in pen.

If a document presented for recording does not meet all of these requirements, the register should first collect the new \$25 fee for filing a “nonstandard document.” After this fee has been collected, the register may then record the document and collect the applicable recording fees. Thus, when an instrument does not comply with the new recording standards, the register will collect *two* fees: one for noncompliance and another for the actual recording. The register may at his or her discretion waive the nonstandard document fee under one circumstance. If the document is printed in a font size that is smaller than 10 points, but the register finds that it is still legible, he or she may record the document without charging the nonstandard document fee.

Treatment of Manufactured Homes As Real Property

S.L. 2001-506 (H 253) amends G.S. 105-273(13) by redefining *real property*. Under the previous version of the statute, the terms “real property,” “real estate,” and “land” included a manufactured home if the home was a multisectional residential structure; had the moving hitch, wheels, and axles removed; and was placed upon a permanent enclosed foundation on land belonging to the owner of the manufactured home. S.L. 2001-506 eliminates the requirements that a manufactured home consist of two or more sections and that the permanent foundation be enclosed in order for the home to be classified as real property. Thus a single-section manufactured home, or “single-wide,” can, for tax years beginning on or after July 1, 2002, be considered real property if the owner takes appropriate steps to have it so classified.

S.L. 2001-506 also provides for a new process for registering manufactured housing that qualifies as real property in the real property records of the county where the home is located. The law creates new G.S. 20-109.2, which provides that the owner of a titled manufactured home that qualifies as real property under G.S. 105-273(13) may have the Division of Motor Vehicles (DMV) cancel the certificate of title so that the manufactured home can be registered in the register of deeds’ office. DMV shall cancel the title upon receipt of the surrendered certificate of title and an affidavit which provides (1) the name of the manufacturer of the home and, if applicable, the model name of the home; (2) the vehicle identification and serial numbers of the home; (3) a legal description of the underlying real property (land) and a statement that the land belongs to the owner of the manufactured home; (4) a description of any security interests in the home; and (5) a section for a notation or statement by DMV regarding the surrender and cancellation of the title certificate. Once DMV cancels the title and certifies the affidavit, the original title is returned to the owner, or to the secured party having the first recorded security interest, for filing in the register’s office. The filing in the register’s office is made pursuant to new section G.S. 47-20.6, which requires that the affidavit be indexed on the grantor index in the name of the owner of the manufactured home and on the grantee index in the name of the secured party or lienholder, if any. Once the affidavit has been recorded, the manufactured home is considered an improvement to the real property, and liens which were previously held against only the

manufactured home or only the underlying land are perfected and become liens against both the manufactured home and the underlying land.

S.L. 2001-506 creates new G.S. 47-20.7, which governs the process of registering manufactured housing as real property when there is no certificate of title for DMV to cancel. If a manufactured home has never been titled by DMV or if the title has been previously surrendered, the owner of the home, as an alternative to filing the affidavit prescribed by G.S. 20-109.2, may file in the register of deeds' office a "declaration of intent" to affix the manufactured home to the underlying land. The declaration of intent must provide (1) a description of the manufactured home; (2) the name of the manufacturer of the home and, if applicable, the model name; (3) the serial number of the home; and (4) a statement that the owner intends for the manufactured home to be treated as real property. Thereafter, the manufactured home is considered an improvement to the real property, and liens which were previously held against only the manufactured home or only the underlying land are perfected and become liens against both the manufactured home and the underlying land.

Tax Certification

S.L. 2001-464 (H 108) gives certain counties another "enforcement measure" that should increase property tax collection rates in those counties that choose to implement it. This chapter authorizes the boards of commissioners in twenty-five counties³ to pass a resolution requiring the register of deeds to refuse to accept for registration any deed transferring real property unless the county tax collector has certified that there is no lien against the subject property as a result of delinquent county, municipal, or other taxes the collector is charged with collecting. The authority is established in a new statute, G.S. 161-31. The statute assigns to the board of commissioners the task of prescribing the form that the "certification" must take.

Marriage Laws

S.L. 2001-62 (H 142) makes significant changes and additions to the North Carolina marriage laws. While many of the amended provisions reflect new requirements for marriages involving a minor or minors, several of the amendments alter the duties of registers of deeds in issuing marriage licenses and in performing other record-keeping functions related to marriage. All of these marriage law changes and additions became effective on October 1, 2001.

Registers are often asked who may perform or officiate at a marriage ceremony. Before the new provisions were enacted, qualified officiants included ordained ministers, ministers acting under the authority of their churches, and magistrates. S.L. 2001-62 amends G.S. 51-1 and adds new Section 51-3.2 to provide additional methods for solemnizing marriages. The amendments extend the authority to perform marriages to those acting "[i]n accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe." With respect to solemnization as prescribed by a religious denomination, it is not incumbent upon the register issuing and recording the license to determine what does and does not constitute a "religious denomination." Such matters are more appropriately settled by the religious establishment itself.

Minors' Authority to Marry

The changes that affect the ability of minors to marry are quite substantial. The most important ones relating to the issuance and management of marriage records are as follows:

3. Alleghany, Anson, Beaufort, Cabarrus, Camden, Cherokee, Chowan, Currituck, Forsyth, Graham, Granville, Harnett, Haywood, Jackson, Lee, Madison, Montgomery, Pasquotank, Perquimans, Pitt, Stanly, Swain, Vance, Warren, and Yadkin.

- In order for a marriage license to be issued to a sixteen- or seventeen-year-old applicant, the person, agency, or institution that has legal custody of or serves as guardian for the underage applicant must first provide a written consent to such marriage. The consent must be notarized or signed in the presence of the register of deeds, and it must be filed with the register of deeds.
- Before a marriage license can be issued to a fourteen- or fifteen-year-old applicant, a certified copy of a district court order authorizing the marriage must be filed with the register of deeds. Such marriage licenses shall only be issued when the fourteen- or fifteen-year-old applicant has become or will become a parent and the applicant seeks to marry the other parent of his or her child. Registers must be aware that the court order will only address the capacity of a single underage applicant to marry. If both marriage applicants are under the age of sixteen, each applicant is required to obtain a court order granting him or her the capacity to marry and authorizing the marriage. Likewise, if one applicant is under the age of sixteen and one is between the ages of sixteen and seventeen, the applicant under the age of sixteen will have to file the requisite court order, and the sixteen- or seventeen-year-old applicant will have to file the necessary written consent signed by his or her legal guardian or custodian.
- Marriage licenses may no longer be issued to persons who are thirteen years of age or younger under *any* circumstances, including pregnancy and parenthood. It is unlawful for persons thirteen and under to marry, and no legal custodian or guardian may consent to such a union.

Other changes affecting minors and the marriage laws are discussed in Chapter 3, “Children and Families.”

Authority of Assistant Registers to Issue Licenses

S.L. 2001-62 amends G.S. 51-6 to provide that marriage licenses may now be issued and signed by *assistant* registers of deeds, in addition to registers and deputy registers.

Evaluation of Capacity to Marry

S.L. 2001-62 also adds language to G.S. 51-8 in an attempt to make more objective the register’s task of determining whether applicants have the capacity to marry. The amended section provides that persons applying for a marriage license shall demonstrate this capacity by answering questions about their ages, marital statuses, and intentions to marry. The register of deeds should then rely on the answers given to determine whether a license should be issued to the applicants. Before this change, the law required that the register issue a license for the marriage of two persons “if it appear[ed] that such persons [were] authorized to be married in accordance with the laws of this State.” The prior version of the statute provided little guidance to registers in judging the capacity of parties to be married. Apparently lawmakers intended, by creating these three questions, to introduce more unambiguous standards to a process that involves some amount of guesswork.

Obtaining a License without Personal Appearance

S.L. 2001-62 also creates new G.S. 51-8.2, which allows the issuance of a marriage license even when one of the applicants cannot personally appear before the register of deeds. This provision allows the register to accept an affidavit in lieu of the absent applicant’s personal appearance. The affidavit must be presented by the other applicant for the marriage license when he or she appears before the register. The required format for the affidavit is set forth in G.S. 51-8.2. The affidavit must contain:

- the full name of the absent applicant;
- his or her residential address;
- the applicant’s date of birth, birthplace, and current age;

- the names and birthplaces of the applicant's father and mother and their addresses if they are still living;
- the cause (for example, death, divorce, or annulment) and date of termination of the applicant's last marriage, if applicable; and
- the applicant's social security number, or an affidavit of ineligibility if the applicant does not have a social security number.

The applicant may, if so desired, include on the affidavit information about his or her race and the level of education obtained.

Finally, the applicant must attach to the affidavit (1) documentation that he or she is eighteen years of age or older and (2) documentation of divorce as required by the county of issuance.

Statewide Authority to Marry

The new legislation makes a few changes to the content of the marriage license by amending G.S. 51-16. The first significant change is that, under the new version of the statute, the holders of the marriage license are permitted to celebrate the proposed marriage anywhere within the state of North Carolina. Previously the couple had the authority to marry only in the county in which the license was issued. The license continues to be effective for sixty days from the date of issuance and, as always, must be returned to the county of issuance.

Racial Classification

The legislation also addresses the designation of race on the license. Under the amended provision, the register no longer has to indicate the race of the applicants unless an applicant requests the racial designation. The prior version of the statute gave the register three racial classifications to choose from. The statute now allows the register to select one of twenty-four racial classifications if instructed to do so by an applicant.

Corrections to Marriage Records

Finally, S.L. 2001-62 expands the register's authority to correct marriage records. Before its enactment, registers were authorized to correct only the names of the parties to the marriage. With the passage of the amendments to G.S. 51-18.1, a register of deeds may now correct a marriage record or records containing any incorrect information. In order to make such a correction, the register must first receive

- an affidavit signed by either or both of the applicants for the marriage license and
- affidavits from at least two other persons who know the correct information.

These documents are the same as those required in order for a register to perform a name change under the prior version of the statute.

Uniform Commercial Code

In 2000 the legislature significantly revised Article 9 of the Uniform Commercial Code. S.L. 2001-231 (S 257) makes a few clarifying changes to these revisions. Several of the provisions in the new statute address the filing of fraudulent financing statements in the Secretary of State's office. The act makes no reference to the occurrence of such filings in registers of deeds' offices and provides no method for the prevention or correction of fraudulent filings in local filing offices.

The changes discussed below became effective July 1, 2001.

Terminations of Pre-effective-date Filings

S.L. 2001-231 provides an additional method of terminating financing statements that were filed before July 1, 2001. The statute refers to these financing statements as "pre-effective-date

financing statements” and provides that after July 1, 2001, they may be canceled by filing a termination statement in the office in which they were filed. Cancellation by filing a termination statement may not be used when an “initial financing statement” has been filed in the new filing office to continue the effectiveness of a pre-effective-date financing statement.

The statute also provides that, with respect to statements filed in the register of deeds’ office, cancellation by filing a termination statement is permitted only when the subject financing statement relates to real property (that is, it covers fixtures, as-extracted collateral, or timber to be cut). Apparently, terminating a pre-effective-date financing statement unrelated to real property cannot be accomplished simply by filing a termination statement in the register of deeds’ office.

Duty to Accept Filings

S.L. 2001-231 also clarifies the duties of local filing offices to accept filings. Registers of deeds must continue to accept for filing any record related to real property. Records that do not concern timber to be cut, as-extracted collateral, or fixtures shall not be accepted by registers in the local filing offices, even if such records relate to financing statements previously filed there.

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Land Use, Community Planning, Code Enforcement, and Transportation

Many observers expected an active legislative year in the fields of land use, planning, and transportation. A legislative study commission report on state smart growth issues was due to be presented in 2001, and various growth and development issues were receiving prominent attention from the public and local governments across the state. These issues concern the negative impacts of urban sprawl, farmland preservation, air and water quality protection, natural area acquisition, and the need for more efficient transportation. These concerns did not, however, lead to major statewide legislative initiatives in 2001. Rather, the year was characterized by incremental adjustments to a number of existing statutes and continued experimentation with new ideas and tools through local legislation. Among the more notable changes in state law is a new process for amending the State Building Code, which will now follow the rule amendment process of the state Administrative Procedure Act and increased state requirements for local hazard mitigation, land use, and transportation planning. Individual local governments were also granted new powers regarding tree preservation and greater flexibility in the rehabilitation of existing buildings.

Smart Growth and Planning

Smart Growth Commission

In 1999 the General Assembly created a thirty-seven-member Commission to Address Smart Growth, Growth Management, and Development Issues (sec. 16.7 of S.L. 1999-237). Several subsequent events substantially reduced the resources available to support the work of this commission. Hurricane Floyd struck the state in the fall of 1999, and the state suffered significant budget shortfalls in 2000. The commission did hold a series of public meetings in 2000 and established several work groups to study particular issues and develop recommendations for state action. In January 2001 the commission adopted its recommendations for legislative consideration, but the final commission report was not ready for presentation at the commencement of the 2001 session. Section 16.7 of the 2001 budget bill, S.L. 2001-424 (S 1005), extended the deadline for filing the commission's final report to November 1, 2001.

The Smart Growth Commission report was filed in November 2001. (It is available on the General Assembly's web site at <http://www.ncga.state.nc.us/SmartGrowthReport.pdf>.) The report recommended that planning be required of all municipalities and counties, with varying levels of planning required based on the size of the locality, its growth rate, and the presence of environmentally sensitive areas. All local plans must identify "planned growth areas" and "critical, important, and sensitive areas." For those preparing an intermediate level of planning, comprehensive plans would also be required; those facing the greatest growth pressures would further be required to include multimodal transportation, public facility, cultural resources, and intergovernmental coordination sections in their plans. Access to state funding would be tied to meeting plan requirements. The report also recommended provision of additional resources to support local planning, enhanced tools for local growth management, better coordination of local plans, strengthened regional planning, development of a state smart growth framework, oversight of state decisions related to smart growth, and a requirement that state decisions respect local and regional plans. Additional detailed recommendations were made concerning downtown vitality, open space preservation, and transportation.

The commission report appeared too late in the 2001 session to allow development and consideration of bills implementing its detailed recommendations. However, the studies bill, S.L. 2001-491 (S 166), did include one important implementing measure. Section 3.1 creates G.S. 120-70.120 to establish the Joint Legislative Growth Strategies Oversight Committee. The committee, consisting of six members each of the Senate and House of Representatives, is directed to examine growth and development issues and to make recommendations to the General Assembly on promoting comprehensive and coordinated local, regional, and state growth planning and investment, specifically including a review of the recommendations of the Smart Growth Commission. The committee is also to study the fiscal relationship between state agencies and the communities in which they are located. The committee is to have a three-year life, expiring on January 16, 2005. A final report is to be made by that date, although the committee is also authorized to make interim reports and legislative recommendations prior to that time.

Planning Incentives

Acts adopted in 2001 concerning emergency management and transportation issues included provisions creating new incentives for local government planning.

S.L. 2001-214 (S 300) revises the state's emergency management laws to provide for an updated system of emergency management during disasters. The law provides for damage assessment following a disaster and establishes three levels of disasters that may be declared by the Governor depending upon the extent of damage (Type I being disasters that do not meet the federal threshold for a presidentially declared major disaster, Type II being disasters that warrant such a presidential declaration, and Type III being those disasters that both warrant a presidential declaration and have a damage level so great as to prompt a special state legislative session). A Type I disaster declaration expires in thirty days; Types II and III, in twelve months. The act

creates a program of state disaster assistance to finance recovery efforts for which federal aid is either unavailable or inadequate. This state assistance program includes both individual assistance (for items such as temporary housing, medical expenses, and housing repair) and public assistance (for items such as debris clearance, repair of roads and bridges, crisis counseling, and public transportation). G.S. 166A-6A(b)(2) provides that local governments are eligible for state public assistance funds only if they have an approved hazard mitigation plan and, for flood damage assistance, are participating in the National Flood Insurance program. These requirements apply to disasters proclaimed after August 1, 2002.

S.L. 2001-168 (S 731), discussed in more detail later in this chapter, requires local adoption of a land development plan within the previous five years as a precondition to state Department of Transportation participation in the development and adoption of mandated local transportation plans.

Zoning and Land Use Regulation

The General Assembly adopted one law of statewide applicability that affects county zoning. S.L. 2001-505 (H 1019), which deals with several aspects of on-site waste management issues, adds G.S. 130A-291.1(g) to provide that production of a crop in association with an approved nutrient management plan that is permitted as a septage land application site shall be considered a bona fide farm purpose and thus exempt from county zoning. In addition, several bills affecting Coastal Area Management Act (CAMA) stream buffer regulations were adopted and are discussed in Chapter 10, "Environment and Natural Resources."

Several notable local bills were also enacted, two of these affecting Mecklenburg County. The City of Charlotte has for many years employed an entirely legislative system of conditional zoning (even though the city termed the zoning districts used in this system "conditional use districts," no conditional use permits were actually issued, and all of the particularized development standards were incorporated into the district regulations). This approach was invalidated by a trial court in April 2000. The city subsequently revamped its procedures and secured local legislation in the 2000 session temporarily authorizing its practice of conditional zoning. In the summer of 2001, the trial court decision was reversed by the court of appeals. *Massey v. City of Charlotte*, 145 N.C. App. 345, 550 S.E.2d 838, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001), held conditional zoning to be permissible under the state's general zoning enabling act. Nonetheless the city sought and obtained local legislation to make permanent its explicit authorization to use conditional zoning. S.L. 2001-276 (H 696) accomplishes this for the seven municipalities in Mecklenburg County, and S.L. 2001-275 (H 695) does the same for the county.

Three other local bills address zoning and land use regulatory authority. S.L. 2001-48 (H 664) adjusts the protest petition statute for the City of Rockingham to provide that rezonings subject to a valid protest petition may be adopted by three-fourths of the voting members of the city council, excluding the mayor. S.L. 2001-382 (S 587) authorizes the City of Durham to require owners of designated historic landmarks, contributing buildings, and all structures and sites within a historic district to maintain their property in good condition. S.L. 2001-429 (S 35) specifies that Swansboro may require sidewalk improvements as part of site plan review under the town zoning ordinance. The studies bill, S.L. 2001-491, authorizes a study of clear cutting and development growth management in Raleigh.

Land Subdivision Control

In the past several years virtually all of the legislation adopted by the General Assembly concerning land subdivision control has taken the form of local legislation, and 2001 was no exception to this trend. Two local acts modify the scope of local subdivision control ordinances by altering the definition of *subdivision* as it applies in those ordinances. S.L. 2001-50 (H 682)

amends existing local legislation (S.L. 1997-246), applicable to Harnett County and its municipalities, that exempted transfers of lots by the subdivider to lineal descendants and ascendants. The new law narrows the exception so that it applies to a one-time division and transfer of land to members of the grantor's immediate family (defined in the act to exclude siblings, nieces, and nephews), requires the lot transferred be for the residential use of the grantee, and limits the entire area of the land to be divided to one acre. S.L. 2001-189 (H 817) applies to Richmond County but not to its municipalities. This act does not expand or amend the exceptions to the scope of ordinance coverage. Instead it defines three subcategories of subdivisions: family subdivisions, minor subdivisions, and major subdivisions. The law apparently allows the county to categorize subdivisions this way if it chooses and to regulate them as it wishes.

A third local act, S.L. 2001-187 (S 533), applies both to Mecklenburg County and to the City of Charlotte. It allows both to amend their respective subdivision control ordinances to designate the location and placement of permanent control markers along property lines in subdivisions, notwithstanding G.S. 39-32.1, an old statute with statewide application that governs the same subject.

Jurisdiction

As in most recent sessions, the General Assembly in 2001 enacted several local bills adjusting the extraterritorial jurisdiction of individual municipalities. S.L. 2001-134 (H 929) grants extraterritorial jurisdiction to Minnesott Beach. A 1977 local act had removed extraterritorial jurisdiction for Pamlico County municipalities with populations under 1,000. The population of each of the county's nine municipalities fell under that level in the 2000 census. S.L. 2001-6 (H 175) adds a specified area to Rockingham's extraterritorial jurisdiction. S.L. 2001-228 (S 535) allows Charlotte to exercise extraterritorial jurisdiction within its "sphere of influence" adopted pursuant to annexation agreements with other Mecklenburg County municipalities. No county approval of the city's extraterritorial jurisdiction is required, but Charlotte must otherwise abide by the normal extraterritorial boundary ordinance amendment provisions of the statutes. This act also provides that the city may not secure jurisdiction over specified property owned by Mecklenburg County.

S.L. 2001-101 (S 651) requires Mount Airy to create a nine-member planning board and a nine-member board of adjustment upon establishing extraterritorial jurisdiction. In each instance five members are to be appointed by the city and four members by the county.

S.L. 2001-52 (H 726) authorizes Dare County to adopt ordinances regulating swimming, personal watercraft operation, surfing, and littering in the Atlantic Ocean and other waterways within the county. Municipalities within the county are given the option of allowing such county ordinances to be applied within the cities.

Building and Housing Code Enforcement

Building Code Subject to APA/Adoption of International Codes

S.L. 2001-141 (S 1036) amends G.S. 143-138, creating important implications for changes to the North Carolina State Building Code. The act makes amendments to the State Building Code subject to the North Carolina Administrative Procedures Act (APA). In so doing it scuttles the old statutory arrangement intended to ensure that code amendments adopted by the Building Code Council became effective only once every three years. One other effect is that building code regulations are now characterized as state administrative rules. The act also removes the restriction that the council may not adopt a code change having a substantial economic impact or that increases the costs of residential housing by at least \$80 per dwelling unit until at least sixty days after a fiscal note has been prepared. However, the requirement that a fiscal note be prepared in

such circumstances remains. The only obvious accommodation the act makes is providing that the only notice that must be published in the North Carolina Register is one advertising a public hearing on a proposed code change (this provision was amended by a subsequent act, discussed below). The council is not required to publish the text of a proposed code change in the Register before adopting it. Similarly, code changes need not be published in the North Carolina Administrative Code.

The primary effect of these changes is to increase the number of steps needed and to lengthen substantially the time period necessary for adopting code changes. Perhaps the most important effect of subjecting code amendments to the APA is that the North Carolina Rules Review Commission will now review each building code regulation. This commission reviews and approves state administrative rules, determining that they are clear and unambiguous and reasonably necessary for a state agency to fulfill its statutory duties. Even if the commission approves a permanent rule, the effective date of the rule is delayed by statute. An approved rule becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least twenty-five days after the commission approved the rule. The Rules Review Commission must make monthly reports to the Joint Legislative Administrative Procedure Oversight Committee concerning all rules that have been approved as well as those that have been returned to agencies during the past month. The APA also provides a procedure for delaying the effective date of a rule if a bill is filed in the General Assembly that would specifically disapprove the rule.

Although the act is not entirely clear on this point, it apparently will not affect revisions to the code adopted before January 1, 2002.

A second act, S.L. 2001-421 (H 355), was adopted by the General Assembly after S.L. 2001-141 became law. S.L. 2001-421 serves as an omnibus bill for the North Carolina Department of Insurance, but it also make a series of minor “clean-up” and conforming changes to G.S. 143-138. It provides that the Building Code Council is required, after all, to publish a notice of a rule-making proceeding in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. It also updates references to those building industry and testing organizations whose standards may be used in adopting code provisions (many of these have become international organizations) and gives the North Carolina Building Code Council express authority to use the standards of such international agencies.

In addition, S.L. 2001-141 includes new provisions governing setup requirements for manufactured homes. These are discussed below.

Manufactured Home Setup Requirements

One source of confusion among some code enforcement officials has been the extent of their duties in regards to the setup of manufactured homes. Manufactured homes are inspected for compliance with standards promulgated by the U.S. Department of Housing and Urban Development (HUD) and are labeled at the manufacturing site by a federally approved inspection agency. Generally speaking, the local building inspector is neither required nor authorized to inspect the manufactured home itself. Electrical, mechanical, and plumbing inspectors do, however, conduct inspections of manufactured homes to ensure that electrical, natural gas, and water supply connections are properly made; that heating, air-conditioning, and ventilation equipment for the unit operates properly; and that waste drain pipes are properly connected to the sewer or septic tank. If decks or storage areas are added to the manufactured homes, they must conform to the Residential Code for One- and Two-Family Dwellings and must be inspected by a certified inspector. However, it has been unclear whether a building inspector may enforce anchoring and tie-down requirements and regulations concerning piers, foundations, steps, and “marriage wall” connections on doublewide units. These standards are not part of the State Building Code but are set forth in the State of North Carolina Regulations for Manufactured/Mobile Homes adopted by the Commissioner of Insurance. S.L. 2001-421 amends G.S. 143-151.8(2) to clarify that although these regulations are still not part of the North Carolina

State Building Code, they can and must be enforced by certified code enforcement officials. The act expands the jurisdiction of code enforcement officials, particularly building inspectors, and has implications for their training and testing as well.

Contracting Out Building Inspection

S.L. 2001-278 (H 598) follows up legislation adopted in 1999 that allowed cities and counties to contract for building inspection services with a private individual or with the employer of such an individual as long as the individual performing the service is a certified code enforcement official. However, to counter fears that “contracting out” would become the norm, the 1999 legislation also specified that contracts for privately provided code enforcement inspections could be entered into only for “specifically designated projects.” It has been unclear whether this language required a local government to list by name specific building projects that could be inspected by a private inspector or whether the contract could designate specific classes of building projects (for example, all buildings requiring a Class III electrical inspection during the following twelve months) that would be so inspected. S.L. 2001-278 removes the ambiguity by deleting the requirement. Now local governments and private parties may negotiate, without limitation, the terms under which inspection services will be provided.

Changes in Municipal Unsafe Building Law

S.L. 2001-386 (S 885) is an important “clean up” act that eliminates some of the ambiguities created in the wake of last year’s changes to the municipal unsafe building statutes (also known as the building condemnation laws). The statutes involved are G.S. 160A-426 through 160A-432, and the changes apply only to cities and not to counties. Legislation adopted in 2000 expanded the power of cities to take enforcement action against vacant or abandoned nonresidential structures that exert blighting influences upon the neighborhood even though they do not meet the traditional “unsafe” standards. However, this legislation also appeared to remove the power of cities to take action against unsafe nonresidential buildings that are neither vacant nor abandoned. S.L. 2001-386 reaffirms that the traditional “unsafe building” condemnation authority may be used against either residential or nonresidential properties. The authority to condemn vacant or abandoned properties thus serves as a supplemental source of power.

The other particularly notable feature of this act allows cities to take action without a court order to remove or demolish nonresidential structures and to impose a lien on properties for the costs of doing so. This power is available with respect to nonresidential properties under a city’s traditional unsafe building condemnation authority. It also is now available for nonresidential structures that qualify as either vacant or abandoned if they have a blighting influence on the neighborhood.

After S.L. 2001-386 was enacted, the General Assembly adopted another bill that amends G.S. 160A-432. S.L. 2001-448 (S 352) allows a city to impose a lien for the unpaid costs of demolition and repair not only on the property that is subject to the action but also on certain other land owned by the person in default. S.L. 2001-448 is discussed below in the section entitled “Appearance and Nuisance Control.”

Pilot Program for Building Rehabilitation

S.L. 2001-372 (S 633) establishes a pilot program for applying new building code standards to the rehabilitation of existing buildings and is intended to help stimulate the revitalization of older commercial areas, particularly downtowns. Once established, the code will apply to the four-year period from January 1, 2002, to January 1, 2006. Perhaps the most extraordinary feature of the act is the interplay between Mecklenburg County and the North Carolina Department of Insurance (NCDI) in the development of the code. For purposes of the act, Mecklenburg County is known as the “local lead organization” (a jurisdiction that currently has a population of over 650,000 that has been approved by the Building Code Council to perform local plan review and

approval). Currently Mecklenburg County is the only local government in the state that meets these criteria. As such, it is authorized under the act to develop, in consultation with NCDOT, a pilot code based on the New Jersey Uniform Construction Code Rehabilitation Subcode. The county has until February 17, 2002, to develop suitable cross-references between the pilot code and various volumes of the existing North Carolina State Building Code and to deliver the cross-referenced code to NCDOT. NCDOT then has thirty days within which to comment on the proposal. NCDOT's comments may address the coordination of the pilot code with existing State Building Code volumes and cross-referencing between the codes but may not call for substantive changes to the standards established in the New Jersey model code. The county is subsequently required to incorporate the suggested comments (revisions). The resulting document then becomes the pilot code.

The pilot rehabilitation code may be adopted not only by Mecklenburg County but also by any city or county whose building inspection departments have been approved by the North Carolina Building Code Council to conduct local plan review and approval in accordance with Section 602.2.3 of the Administrative Volume of the State Building Code. For any local government other than the "lead local jurisdiction," the pilot code becomes effective when its governing board adopts the code and the local government informs NCDOT and Mecklenburg County of that fact.

The pilot code expires for all local governments adopting it on January 1, 2006. In no case, however, may structures or projects built in compliance with the pilot code be required to be retrofitted to come into compliance with the North Carolina State Building Code after the pilot program expires.

The act also directs the lead local jurisdiction (Mecklenburg County) to submit an interim report on the effectiveness of the pilot program to the Building Code Council, NCDOT, and the General Assembly by December 1, 2004, and a final report by April 1, 2006. The report must include statistics on the utilization of the code by participating jurisdictions, analyze administrative and cost issues, recommend whether the pilot program should be extended or made permanent, and, if so, determine whether the code should become part of a statewide code.

Sewer Cleanout

S.L. 2001-296 (H 824) is intended to help alleviate problems associated with backed-up sewer lines on private property. The act amends G.S. 87-10(b1) to impose a new requirement on public utility contractors installing sewer lines for houses and other buildings. These contractors must install, as an extension of the public sewer line, a sewer cleanout at the junction of the public sewer line and the line to the building. The cleanout must terminate at or above the finished grade and be located at or near the property line. The act became effective October 1, 2001, and applies to any installation of sewer lines to houses and other buildings that occurs on or after that date.

Door Locks and Toilets

S.L. 2001-324 (S 817) is an example of a general law that apparently was drafted with a particular property owner in mind but, as written, applies statewide. S.L. 2001-324 concerns Chapter 10 of Volume I of the North Carolina State Building Code, which establishes requirements for automatic door-unlocking mechanisms activated when a smoke, fire, or break-in alarm system is triggered. The act exempts from these requirements certain businesses that sell firearms or ammunition and that also operate a firing range. The exemption applies only if the business has obtained a special door lock permit from the North Carolina Department of Insurance. A business can obtain such a permit if it provides assurances that it will (1) furnish employees with a written facility locking plan and (2) post a sign at each entrance of the building warning that the building is exempt from the door lock requirements of the State Building Code and that after business hours the building will remain locked from the inside even in case of fire.

S.L. 2001-219 (S 342), on the other hand, began its life as a local bill applicable to one specific county. It was revised in such a way that it became a statewide law while still affecting

only that same county. The act essentially allows Gaston County to adopt an ordinance specifying the number of toilets required for buildings used primarily for outdoor sporting events. Such an ordinance may supersede the State Building Code and any other public or local law to the contrary.

Contractor Licensing

S.L. 2001-140 (S 431) makes changes in the types of projects that general contractors with intermediate licenses and limited licenses may undertake. Because general contractors must present satisfactory proof that they are properly licensed before they may qualify for building permits, this new statute has important implications for inspection departments. The holder of an unlimited license may continue to act as a general contractor without restriction as to the value of any single project. However, under the new law, the holder of an intermediate license may act as a general contractor for any single project with a value of up to \$700,000 (up from \$500,000). In addition, the holder of a limited license may now act as a general contractor for any single project with a value of up to \$350,000 (up from \$250,000). These changes became effective May 31, 2001.

Under the terms of S.L. 2001-159 (S 396), the North Carolina State Board of Electrical Contractors is authorized to acquire real property (for a new home office building), to establish a system of staggered license renewals for electrical contractors, and to increase substantially the fees associated with granting or renewing a license or administering an examination.

S.L. 2001-270 (S 395) increases fees for new licenses and license renewals for plumbing and heating contractors and rewrites certain other licensing and examination requirements. In addition, the act changes the scope of the work defined for "heating, group two" and "heating, group three."

Manufactured Homes as Real Property

S.L. 2001-506 (H 253) makes several important clarifying changes to the law as it affects the classification of manufactured homes as real property. Previously a manufactured home was treated as real property for taxation and conveyance purposes if the unit was a multisectioned residential structure; the unit's moving hitch, wheels, and axles were removed; and the unit was situated upon a permanent enclosed foundation on land belonging to the owner of the manufactured home. The new law makes otherwise qualifying single-wide units real property as well and removes the ambiguous requirement that the permanent foundation be enclosed. S.L. 2001-506 makes this change effective with respect to the taxation of such units for taxable years beginning on or after July 1, 2002. The act also requires the owner to surrender the certificate of title to the Division of Motor Vehicles when a unit becomes real property and to file evidence of the surrender of title with the register of deeds. These changes affecting conveyance of title became effective January 1, 2002.

Energy Conservation Pilot Program

S.L. 2001-415 (H 1272) requires state agencies to use life-cycle cost analysis in the construction and renovation of state facilities or state-assisted facilities of 20,000 square feet or more (was, 40,000 square feet or more). The new act clarifies that the cost analysis is to be submitted to the North Carolina Department of Administration (NCDOA) prior to the selection of a design option and the advertising of bids for operation. In addition, the department may require compliance with the project features as suggested by the certified cost analysis. The act also establishes an energy conservation pilot program, administered by NCDOA, to use the "High Performance Guidelines" developed by the Triangle J Council of Governments to evaluate selected state construction projects. For purposes of these guidelines, a *high performing facility* is one that:

- is energy efficient,
- incorporates reusable and renewable resources,
- provides natural lighting,
- is constructed of nontoxic materials,
- requires low maintenance,
- is congruent with the natural characteristics of the site,
- incorporates water conservation measures, and
- causes minimum adverse impacts to the environment.

NCDOA is directed to submit an interim report on the program to the General Assembly by December 15, 2002, and a final report not later than eighteen months after completion of the last project participating in the program.

Studies

Section 2.1(4) of S.L. 2001-491, the Studies Act, authorizes the Legislative Research Commission to study safety requirements in the State Building Code.

Minimum Housing Ordinances

Since 1989 North Carolina law [G.S. 160A-443(5a)] has allowed certain larger cities in the state to demolish boarded-up, deteriorated buildings that have a blighting influence upon a neighborhood. The city must first find that the building owner has abandoned any intention of repairing or improving the structure, and the structure must have remained vacant and closed for at least one year after the city ordered code compliance. Legislation adopted in 2000 expanded this authority to include all municipalities located in counties with a population in excess of 71,000. S.L. 2001-283 (H 307) adjusts G.S. 160A-443(5a) to allow a city to use this authority if the city spills into several counties, only one of which need have a population of over 71,000.

Greenville Service of Process

Building inspectors pursuing building condemnation actions and housing inspectors enforcing minimum housing codes often find it difficult to locate and provide formal notification to the owners of the affected properties. S.L. 2001-104 (H 866) allows the City of Greenville to require owners of rental property within the city to designate someone residing in Pitt County to serve as the owner's agent for purposes of accepting service of process. This information must be supplied on a form supplied by the city clerk, and an owner must notify the clerk of any change in the information within ten days after the change occurs. This new legislation, however, does not apply to owners of rental property who reside in Pitt County.

Transportation

Transportation Planning

Some have heralded S.L. 2001-168 as the first "smart growth" piece of legislation enacted in 2001. Regardless of the hype, the act does revise transportation planning, particularly at the local level. It nudges local governments toward developing more creative solutions to their transportation problems. This legislation affects G.S. 136-66.2, the statute that for decades has directed municipalities to develop street and thoroughfare plans that must be mutually adopted by the city and the North Carolina Department of Transportation (NCDOT). The new law amends G.S. 136-66.2 in the following ways:

- It revises the statute so that it now applies primarily to local governments that are *not* part of a metropolitan planning organization (MPO). This statute complements legislation adopted in

1999 and 2000 that provides for local transportation planning within metropolitan regions (G.S. 136-200 through 136-203).

- It modifies some of the statutory terminology to reflect a desired change in emphasis. The statute now refers to transportation plans and systems rather than simply highway and street plans and systems. Local transportation plans must consider all transportation modes (including transit alternatives and bicycle and pedestrian facilities) and strategies for operating them.
- It now expressly authorizes (but does not compel) counties outside metropolitan areas to develop comprehensive transportation plans in cooperation with NCDOT. Such plans may be mutually adopted by the county and NCDOT. Multiple cities and counties may cooperatively adopt local transportation plans as well.
- It now expressly allows municipalities and metropolitan planning organizations (MPOs) to adopt collector street plans to complement the roadway (highway) elements of the transportation plan. In such a case NCDOT may review the collector street plan but is not required to approve it.
- It stipulates that NCDOT will “participate” in the development and adoption of a transportation plan only if all of the local governments in the planning area have adopted land development plans within the previous five years or are in the process of developing such a plan. Although the elements or features of a “land development plan” are not spelled out in the new law, any of the following qualify: a comprehensive plan, land use plan, master plan, strategic plan, or “any type of plan or policy document that expresses a jurisdiction’s goals and objectives” for the development of land within that jurisdiction.
- It requires that each MPO in the state develop, in cooperation with NCDOT, a comprehensive plan meeting federal planning requirements so that the MPO can qualify for federal transportation financial aid. The MPO plan may include projects that are not included in a financially constrained plan or that will be needed after the horizon year. Local governments within an MPO should note that the MPO takes on the responsibility for developing the plan on a metropolitan-wide basis. For purposes of transportation planning and programming, the MPO represents municipal interests to NCDOT.

School Location and Traffic

Section 27.27 of the Appropriations Act (S.L. 2001-424) addresses the significant traffic problems that can be associated with the location of schools around the state. It directs NCDOT to provide written evaluations of and recommendations concerning school driveway access and operational impacts on the state highway system resulting from the location of schools. The act also directs all public and private school entities that are constructing, relocating, or expanding a school to request from NCDOT written evaluations and recommendations to help ensure that all proposed school traffic access points comply with the state’s street and driveway access policies. The act clarifies that schools are not bound by the NCDOT recommendations.

Municipal Extraterritorial Road Construction

Two acts with similar purposes expand the power of certain cities to spend municipal funds to construct and improve roads outside their city limits. S.L. 2001-261 (S 408) applies only to cities with a population of 250,000 or more according to the last federal census (Charlotte and Raleigh are the only cities that currently meet this criterion). It adds new G.S. 160A-296(a1) to allow those cities to open, widen, extend, build, and acquire the land for streets, sidewalks, alleys, and bridges within their extraterritorial planning jurisdictions. Before making improvements to such streets, however, the city must enter into a memorandum of understanding with NCDOT that NCDOT will provide maintenance for these streets.

S.L. 2001-245 (S 614) is a local act that applies to the named cities of Monroe, Concord, and Charlotte and the towns of Cary and Weddington. It adds new G.S. 160A-296.1 and amends

G.S. 143-350(f)(4) to apply to just those municipalities. It allows these municipalities to construct or contribute toward the cost of roads in areas beyond their respective extraterritorial planning and zoning jurisdictions. The authority applies, however, only to roads owned by the state and maintained by NCDOT.

Rural Roads

S.L. 2001-501 (S 1038) represents an attempt to address the difficulties in qualifying rural roads for public use and includes two rather different initiatives. The first amends G.S. 136-44.7 to compel NCDOT to condemn certain right-of-ways in preparation for certain secondary road paving or maintenance projects. Condemnation is required if (1) one or more property owners have not dedicated the necessary right-of-way; (2) at least 75 percent of the owners of property adjacent to the project and the owners of 75 percent of the road frontage adjacent to the project have dedicated the necessary right-of-way and have provided funds required by NCDOT rule to cover the costs of condemning the remaining property; and (3) NCDOT has tried unsuccessfully, over a period of at least six months, to persuade property owners unwilling to relinquish right-of-ways to do so voluntarily.

The second initiative adds new G.S. 136-96.1 to authorize a new special proceeding that allows a county clerk of court to declare a public right-of-way if the following four conditions are met: (1) the landowners of tracts constituting two-thirds of the road frontage of the land abutting the right-of-way join in the action; (2) the right-of-way is depicted on an unrecorded map, plat, or survey; (3) the right-of-way has been actually open and used by the public; and (4) recorded deeds for at least three separate parcels abutting the right-of-way recite the existence of the right-of-way as a named street or road. The new law does not apply to a right-of-way established by adverse possession or by a cartway proceeding.

County Road Naming

In the past, G.S. 153A-239.1, the statute authorizing counties to name and rename roads, has not expressly authorized the counties to adopt an ordinance setting forth the procedure by which the naming and renaming shall occur. S.L. 2001-145 (S 380) remedies this deficiency by amending the statute to provide for such authority. The new law requires that a notice of the hearing to consider the adoption of a county road-naming-procedure ordinance must be published in a newspaper at least ten days before the date of the hearing. Perhaps more importantly, the new legislation clarifies that names may be initially assigned to new roads when an approved subdivision plat is recorded. Apparently it makes no difference whether the plat is approved by a county or by a city acting within the city's extraterritorial planning jurisdiction—in these cases the procedures set forth in a county road-naming-procedure ordinance do not apply.

Road Transportation Studies

Part III of S.L. 2001-491 authorizes the Joint Legislative Transportation Oversight Committee to study a variety of transportation topics and to report to either the 2002 or the 2003 session of the General Assembly. Among the topics that the committee may study are (1) subdivision roads that do not meet standards for being accepted into the state highway system, (2) transportation funding generally, and (3) NCDOT's payment of the nonbetterment costs of relocating utility lines.

Rail Transportation

There were several legislative developments in 2001 that concern rail transportation. Section 27.4(b) of the Appropriations Act, S.L. 2001-424, allocates \$250,000 for an engineering study of the infrastructure improvements (and their costs) required to provide passenger rail service to western North Carolina on an existing freight rail line owned by Norfolk Southern. Section 27.5(c) of the same act also directs NCDOT to negotiate with Norfolk Southern concerning the use of its

tracks to provide this passenger rail service. NCDOT is to report back to various legislative committees concerning both the engineering study and the negotiations with Norfolk Southern and to do so by January 15, 2002, and every six months thereafter. In addition, Section 27.5(a) of the Appropriations Act allocates \$300,000 to NCDOT to acquire land for a new train station to be built in Asheville's Biltmore Village, south of downtown. Section 27.7 directs NCDOT to report to the Joint Legislative Transportation Committee (JLTC) by February 5, 2002, on the status of the development of the downtown intermodal transportation station in Charlotte. Finally, Section 5.1 of S.L. 2001-491 directs NCDOT to study the feasibility of acquiring rail lines or the rights to use such lines in Forsyth, Guilford, and neighboring counties for a commuter rail service to be operated by the Piedmont Authority for Regional Transportation. NCDOT is to report these findings to the JLTC by May 1, 2002.

The federal government is also entertaining proposals to establish high-speed rail corridors across the country, including the Southeast. In early 2001 the Virginia General Assembly adopted a resolution providing for the creation of the Virginia-North Carolina Interstate High-Speed Rail Commission. The purpose of such a commission is to explore the costs, benefits, and required legislative actions associated with establishing high-speed passenger rail service between Virginia and North Carolina and destinations to the northeast and southeast. In response, the North Carolina General Assembly adopted S.L. 2001-266 (S 9), which provides for the appointment of the six North Carolina members of the commission, three to be appointed by the Speaker of the House and three to be appointed by the President Pro Tempore of the Senate. The act also calls for the Rail Division of NCDOT to provide technical support to the commission and for North Carolina's Legislative Services Officer to assign professional and clerical staff to assist the commission. The commission must report its findings and any recommendations to the Governor and the General Assembly by October 20, 2002. It may also make an interim report upon the convening of the 2002 legislative session, again to both the Governor and the General Assembly.

Eminent Domain

Certain governmental entities (for example, NCDOT) may use the "quick-take" procedure in the exercise of eminent domain. This procedure allows the condemnor to take possession of the property being acquired before (rather than after) the amount of the damage award is finally determined. Two rather different governmental entities that were already allowed to condemn land were authorized by this year's General Assembly to use the quick-take procedure. The first, and more controversial piece of legislation, S.L. 2001-239 (S 719), amends G.S. 40-42(a) to permit a regional public transportation authority to acquire property in this manner. S.L. 2001-73 (H 555) amends the charter of the Halifax Regional Airport Authority (S.L. 1997-275) to allow it to use the quick-take procedure as well.

Infrastructure

Two acts amend state law regarding local provisions of water and sewer. S.L. 2001-238 (S 123) amends G.S. 159I-30 to authorize local governments to issue special obligation bonds for water and wastewater projects. S.L. 2001-416 (S 247) makes several changes regarding state financial support for infrastructure. It delays until January 1, 2002, the issuance of Clean Water Bonds authorized for unsewered community grants, natural gas facilities, or public school building capital improvements. The law withdraws \$71 million in Clean Water Bond proceeds reserved for loans to local governments for water and wastewater projects and reallocates them to grants for unsewered communities (\$35.6 million) and supplemental grants to local governments to match state and federal grants and loans for water and sewer projects (\$35.6 million). The supplemental grants are capped at \$21.5 million for each fiscal year through June 30, 2005. The Rural Economic Development Center, which administers these grants, is further authorized to make reallocations of funds from unsewered community grants to supplemental grants, and vice versa, if the relative

needs warrant such reallocation in a given fiscal year. The act requires the Rural Economic Development Center to file a report each year regarding these grants, including an itemized accounting of expenditures of bond funds and a detailed description of the criteria and award system used in making the grants.

Two acts make modest amendments to the laws governing organization for provision of infrastructure. S.L. 2001-224 (S 432) allows nonprofit water corporations and the state to join water and sewer authorities that have been organized by three or more political subdivisions. S.L. 2001-301 (H 236) creates G.S. 130A-70.1 to allow sanitary districts that include municipalities to annex territory that is also annexed by the municipality and to allow the district to contract with the county to assume a portion of any county indebtedness related to utility lines constructed or operated by the county in such areas.

Three local acts provide Charlotte with additional flexibility and authority concerning infrastructure provision. S.L. 2001-329 (S 405) allows Charlotte to enter into reimbursement agreements with private developers and property owners for design and construction of water, sewer, street, sidewalk, and other associated facilities. S.L. 2001-304 (S 407) allows Charlotte to use expedited condemnation (quick-take) procedures to acquire property for stormwater and public transportation systems. S.L. 2001-248 (S 534) permits Charlotte to enter into contracts with private parties for the provision of storm drainage and public intersection and roadway improvements without complying with the bid laws, provided that in each instance the project cost does not exceed \$175,000.

Appearance and Nuisance Control

Tree Protection

The topics of tree protection and clear-cutting continued to generate controversy in the 2001 General Assembly. In 2000 the towns of Apex, Cary, Garner, Kinston, and Morrisville gained authority to adopt ordinances regulating the planting, removal, and preservation of trees and shrubs [S.L. 2000-108 (H 684)]. Such ordinances, however, had to exclude property to be developed for single-family or duplex residential uses as well as property used for forestry activities conducted according to a forestry management plan. The municipalities believed these exceptions created a sizable loophole they were unequipped to address—namely, that of property owners clear-cutting sites in anticipation of later submitting a development application for the site or selling the land to a developer. In the 2001 session, Cary, Garner, and Morrisville, along with their sister Wake County municipalities of Knightdale and Fuquay-Varina, and the two cities of Durham and Spencer returned to the General Assembly to further clarify and expand their authority in this matter.

S.L. 2001-191 (H 910) expressly authorizes these seven municipalities to create regulations governing the removal and preservation of existing trees and shrubs prior to development within certain buffer zones. The perimeter buffer zone extends up to sixty-five feet along roadways and property boundaries adjacent to developed properties and up to thirty-two feet along property boundaries adjacent to undeveloped properties. The regulations must allow reasonable access onto and within the land they affect. In addition, they must exclude normal forestry activities that either are taxed at present-use value (under the state's program for use-value taxation) or are conducted pursuant to a forestry management plan prepared or approved by a registered forester.

The cities did gain two important additional powers under the act. First, if all or substantially all of the perimeter buffer trees which should have been protected from clear-cutting are removed, and afterward a property owner seeks a permit or plan approval for that tract of land, the city may deny the building permit or refuse to approve the site or subdivision plan for that site for a period of five years following the "harvest." Second, a municipality subject to the act may adopt regulations governing the removal and preservation of specimen or "champion" trees on sites being planned for new development. The application of these specimen or champion tree

regulations is not restricted to the corridors or buffer zones that are subject to the clear cutting restrictions.

All of the powers described above may be employed by the municipality both within its corporate limits and within its extraterritorial planning jurisdiction.

Nuisance Control

The most important nuisance control legislation adopted in 2001 is legislation that may make it easier for cities to enforce liens against an owner of property that is the subject of a nuisance action. S.L. 2001-448 amends G.S. 160A-193 (municipal public health and safety nuisances), G.S. 160A-432 (municipal structures that are unsafe or that have a blighting influence), and G.S. 160A-443 (dwelling units demolished or repaired by local governments under minimum housing ordinances). The act first clarifies that liens imposed by local governments to recover the costs associated with the nuisance that apply to the premises where the nuisance occurred shall have the same priority and be collected as unpaid ad valorem taxes.

The act also provides for a new and more controversial lien to recover costs. Under this new act, the expense of any of these nuisance actions is also a lien on any other real property owned by the person in default that is located within the city or within one mile of the city limits, except for the person's primary residence. This second type of lien is inferior to all prior liens and is collected as a money judgment. There is one important exception to this new type of lien: If the person in default can show that the nuisance was created solely by the actions of another person, the lien is inapplicable.

One local act, S.L. 2001-107 (S 453), extends special powers to the cities of Lexington and Winston-Salem that are already enjoyed by Gastonia, High Point, and Roanoke Rapids. These cities may adopt a property maintenance ordinance dealing with trash, obnoxious weeds, overgrowth, solid waste, and the like. If affected owners fail to comply with the ordinance, the municipality may in certain instances go on the property to perform any work necessary to bring it into compliance with the ordinance (a "self-help" remedy). This statute, however, now applicable to these five cities, allows the use of such a self-help remedy only if the owner is a chronic violator of the ordinance (defined as an owner whose property is subject to remedial action at least three times during the previous calendar year).

Sign Control

The most noteworthy legislation affecting the control of outdoor advertising and other signs is S.L. 2001-383 (S 206). This act adds new Article 11B to G.S. Chapter 136, directing NCDOT to establish a tourist-oriented directional sign (TODS) program. The amended statute authorizes new directional signs for tourist businesses and facilities to be exhibited within the highway right-of-way on certain logo-type "panels." The TODS program applies to highways for which the access is not controlled. It is intended to supplement, not replace, the state's popular logo sign program, which applies to highways that are access controlled.

Tourist-oriented businesses and facilities are defined in the act, must be open to the general public, and must meet all applicable laws concerning public accommodations. NCDOT is directed to adopt program rules reflecting a variety of restrictions and program features. It must establish standards for the signs' size, color, and letter height as specified in the National Manual of Uniform Traffic Control Devices for Streets and Highways. Only one tourist-oriented business or facility may be advertised on each sign panel, and no more than six sign panels may be erected per intersection. A TODS may not be placed "immediately in advance of the business or facility" if the business or facility and its on-premise advertising signs are "readily visible from the roadway." No TODS may be placed more than five miles from the business or facility.

Local governments will be interested to know that the placement of these signs is limited to "rural areas in and around towns or cities with a population of less than 40,000." Perhaps more importantly, no TODS may be placed where prohibited by local ordinance.

The act became effective January 1, 2002.

Littering

S.L. 2001-512 (S 1014), which revises the statutes dealing with littering and the dumping of solid wastes, is discussed in Chapter 10, “Environment and Natural Resources.”

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Local Government and Local Finance

Local Finance

New Sales Tax Revenue and the Reimbursements

The principal preoccupation of cities and counties during the 2001 General Assembly was the state's revenue crisis and its effects on—and opportunities for—local governments. The revenue crisis is discussed at length in Chapter 2, “The State Budget.” The focus of this chapter is the effect of that crisis on local government revenues.

The principal direct effect of the state's difficulties, and of the Governor's efforts to deal with those difficulties, was the Governor's impoundment of the final payment of the so-called reimbursements to local governments for the 2000–2001 fiscal year, a payment of roughly \$95 million statewide. The reimbursements are the various payments the state has made to counties and cities since the mid-1980s in compensation for the loss, through legislative action, of important local government revenue sources. The three major categories of reimbursements compensate local governments for the removal from the property tax base of manufacturers', wholesalers', and retailers' inventories and for the repeal of the intangibles tax. There are also much smaller reimbursements to compensate local governments for the expansion of the so-called homestead exemption, a property tax measure that protects the homes of older and less prosperous citizens, and for the repeal of the sales tax on food stamp purchases. The total annual amount of reimbursements paid to local governments by the state is about \$333.4 million.

The temporary loss of this \$95 million reimbursement payment (the Governor released the money shortly after the beginning of the 2001–2002 fiscal year) made clear to local governments the tenuous nature of this important part of their total revenue structure. The state had terminated payment to local governments of certain state-shared taxes in the early 1990s—again because of state revenue problems—and the Governor's impoundment and the threat that it would be repeated in the current fiscal year reminded many local officials of that earlier episode. In addition, local governments have been unhappy with the reimbursement system for some years, even in good times. The total amount of reimbursements never fully compensated local governments for the

revenues that would have been collected from the repealed taxes or from taxes on the categories of property removed from the tax base. More seriously, there was very little growth built into the reimbursement system; with a relatively minor exception, the amounts of the reimbursements have been fixed and have not grown since their inception. These fixed reimbursement payments contrasted markedly with the growth that would have occurred in the repealed taxes, especially during the vibrant years of the latter 1990s.

Therefore, local governments were particularly open in 2001 to some sort of restructuring of state and local finance in which the local governments would give up the reimbursements in return for authorizations of some combination of new or expanded local taxes that would be adequate to replace the lost reimbursement payments. One proposal that received early local government attention was included in S 1088, introduced by Senator Clodfelter of Mecklenburg County, a former member of the Charlotte city council. Among other things, his bill would have replaced the reimbursements with an additional one-half cent state sales tax, with the proceeds to be distributed to local governments; an additional one-half cent optional local government sales tax; and a new menu of local taxes on meals, hotel and motel occupancy, motor vehicles, and conveyances. A later bill—H 1352, introduced by Representative Hurley of Cumberland County, also a former city official—would have replaced the reimbursements with an optional one-cent local sales tax. This bill more closely presaged the eventual legislation included in the state's appropriations act.

There was a good bit of negotiating between the two houses of the General Assembly and within each chamber, particularly the House, before a state-local revenue package could pass both houses. Thus, a number of proposals were unveiled and then disappeared. The final product, included in the 2001 Appropriations Act [S.L. 2001-424 (S 1005)], essentially trades the reimbursements for a new half-cent local option sales tax, although it takes two years to reach that point. The enacted bill has these components.

State sales tax increase—2001–2003. Effective October 16, 2001, the state sales and use tax was temporarily increased from 4 percent to 4.5 percent, a half-cent increase. The proceeds of this increase will remain with state government and will be used to bolster state revenues during the current economic downturn. While this increase remains in effect, local governments will continue to receive reimbursement payments. The legislation repeals this increase effective July 1, 2003.

Local option sales tax increase—2003 and beyond. Once the temporary state sales tax increase terminates, counties may replace it with an additional local option local government sales and use tax of one-half percent. The earliest time such an increase may take effect is July 1, 2003, the day the temporary state sales tax increase ends. One-half of the proceeds from the new local option tax will be returned to the county of origin in the manner of the original 1 percent local sales tax; the other half will be distributed among the 100 counties on a per capita basis in the manner of the two existing half-cent local sales taxes. Once each half of the proceeds is allocated to a county, it will be divided among the county government and each city and town on the same basis as are the existing local sales taxes.

Reimbursements repeal and state hold-harmless payments—2003 and beyond. Also on July 1, 2003, each of the existing reimbursements will be repealed. The legislation includes provisions, however, that seek to mitigate any adverse effect on local governments: the reimbursements have been replaced with a new sales tax. (A few rural counties had heavy amounts of business inventories and thus large reimbursement payments, which they will not be able to replace solely with sales tax proceeds.) Each year, the Secretary of Revenue is to calculate the amount of proceeds that would be received by each local government from the new half-cent tax if the tax were levied in all 100 counties and then compare that amount with the amount that local government would have received in reimbursements during the 2002–2003 fiscal year. If the amount of calculated sales tax proceeds is less than the amount of the reimbursements, the state will make up the difference. Note, however, that the calculated sales tax proceeds will fully reimburse local governments only if all 100 counties levy the new tax. If fewer than 100 counties levy the tax, the actual amounts received by a local government will usually be less than the calculated amount, and therefore, the state payment received will not fully hold such a government harmless from the repeal of the reimbursements.

Other Measures Generated by the State's Revenue Crisis

Two other bills enacted were directly traceable to the state's revenue crisis. The first involved a temporary amendment to the Local Government Budget and Fiscal Control Act. When local governments adopted their 2001–2002 budget ordinances, there was considerable uncertainty over whether the Governor would release the \$95 million in 2001 reimbursements and whether additional reimbursement payments during the upcoming fiscal year might also be impounded. As a result, a number of local governments adopted budget ordinances on the assumption that the money would not be released or that future payments would not be made, and in some cases, local governments raised property taxes to make up the projected loss in revenue. When the Governor did release the money, the local governments could not adjust their adopted budget ordinances—or at least could not lower their property tax levies because of provisions in the Budget and Fiscal Control Act. The General Assembly responded by including in S.L. 2001-308 (H 42) a one-time authorization that permitted a local government to reduce its property tax levy because it had received additional and unanticipated revenues. The authorization expired October 1, 2001.

In an effort to shore up its own finances, the state is requiring vendors to transmit sales and use tax collections to the state more frequently. Beginning on July 1, 2003, S.L. 2001-427 (H 232) directs the state to pass along this benefit to local governments: the Department of Revenue will distribute local sales taxes collected after that date to counties and cities on a monthly, rather than a quarterly, basis. In return, the act also will require each county to remit to the state on a monthly basis the state's share of the excise tax on conveyances.

Other Local Government Revenues

Telecommunications tax changes. For more than half a century, cities have received a share of the state's utility franchise tax. Originally, and for many years, this tax was levied on electric power companies, natural gas companies, and telephone companies. In 1998 the franchise tax on natural gas companies was repealed and replaced with the piped natural gas tax, with cities receiving a share of the new tax comparable to the amounts they had received under the repealed tax. In this session, the General Assembly repealed the franchise tax on telephone companies, effective January 1, 2002, and replaced it with an increased sales tax on telecommunications services [S.L. 2001-430 (H 571)]. Although the rate of tax on these services will actually go down, the amount of collections should increase, because the new tax will extend to mobile services as well as fixed land lines. Again, cities will receive a share of the new tax comparable to the amounts they had received under the repealed tax.

Henceforth, cities collectively will receive 24.4 percent of the total collections from the new tax (minus \$2,620,948, which is the amount of telephone franchise tax the state has withheld from cities since the mid-1990s). Each city in existence before January 1, 2001, will receive each quarter the same percentage of the new tax that it received from the repealed telephone franchise tax during the last comparable quarter that the earlier tax was still in force. For each city incorporated on or after January 1, 2001, the Secretary of Revenue will determine, using the population of all cities, a per capita amount of tax distributed, and each newer city will receive its per capita amount.

Note an important difference between the distribution pattern for this new tax and the tax it replaced. When a city annexed property under the old tax, its proceeds from the telephone franchise tax would normally increase because it would then receive the taxes levied on services provided within the annexed area. With the new tax, however, except in the case of those cities incorporated after January 1, 2001, an annexation will have no effect on the amount of telecommunications tax received. Each city's percentage share is set based on distributions during 2001, and that percentage will not be affected by changes in city population.

Streamlined sales tax agreement. S.L. 2001-347 (S 144) authorizes the Secretary of Revenue to enter into an agreement with one or more states to provide for a streamlined administration of state and local sales and use taxes. The intention is to simplify these taxes and thereby make it easier to convince Congress to authorize mandatory collection of such taxes on

catalog and Internet vendors. This legislation is discussed more fully in Chapter 25, "State Taxation." One point, however, should be emphasized here. The act adds new G.S. 105-164.64B, effective January 1, 2002, dealing with determining where a taxed sale takes place, and this new provision will have a small effect on the distribution of local government sales and use taxes. Under the new provision, if a sale is over-the-counter, it is characterized as taking place at the business location of the seller. But if the sale involves a delivery, the source of the sale is changed to the location at which the buyer receives the product. The situs of local sales and use transactions has been, in all cases, the business location of the seller. This will change that rule for delivered products, and the change will affect the distribution of the tax proceeds.

Clean Water Bonds reallocation. S.L. 2001-416 (S 247) reallocates some \$71.4 million in proceeds of State Clean Water Bonds from programs that make loans to local governments to programs that make grants to local governments. One-half of the reallocated proceeds are to be used for unsewered community grants and the other half for supplemental grants.

Register of deeds fees/Automation Enhancement and Preservation Fund. G.S. 161-10 establishes uniform fees for county registers of deeds, and almost all the proceeds of these fees have been placed in the county's general fund. S.L. 2001-390 (H 1073) increases the uniform fees somewhat; it also earmarks a portion of the fee revenue held by the county. New G.S. 161-11.3 requires that 10 percent of the fees collected by the register of deeds office pursuant to G.S. 161-10 and retained by the county be placed in a permanent Automation Enhancement and Preservation Fund. The money so earmarked must be used on "computer and imaging technology in the office of the register of deeds." The new statute speaks of a "fund," and it would certainly be appropriate for a county to establish a special revenue fund to account for this money. However, a county also could account for the money through earmarked revenue and expenditure line items in the general fund. The increases, and the earmarking requirement, took effect January 1, 2002.

Disaster assistance grants. S.L. 2001-214 (S 300) makes a number of amendments to the state's emergency management statute (G.S. Chapter 166A), on the recommendation of a special study commission. One part of the act creates a set of rules for state assistance to individuals and local governments that have suffered losses because of a natural disaster. These state funds are intended to supplement any federal funds that might be available.

The act creates new G.S. 166A-6A, which is mainly concerned with setting out what the money may be used for and under what circumstances a local government is eligible for the funds. The act divides states of disaster into three categories, the first of which is defined, in part, as one for which there is no presidential declaration of a disaster. It is only for this first category of disaster that the act permits the distribution of state funds to local governments. The act sets out the criteria that a local government must meet in order to qualify for state funds and then sets out the following permissible uses of the state moneys:

- debris clearance
- emergency protective measures
- roads and bridges
- crisis counseling
- assistance with public transportation needs

Any state grant must be matched with nonstate funds equal to 25 percent of the state grant.

Local Government Borrowing

Special obligation bonds. G.S. Chapter 159I permits local governments to issue special obligation bonds for solid waste projects but for no other purpose. These bonds are secured by any unearmarked source of revenue accruing to the borrowing government, as long as that source of revenue does not result from a tax levied by that government. If money from a borrower-levied tax were pledged to secure the debt, the debt would become a general obligation and would require voter approval.

S.L. 2001-238 (S 123) expands the purposes for which governments may issue special obligation bonds to include

- water supply systems,
- water conservation projects,
- water reuse projects,
- wastewater collection systems, and
- wastewater treatment works.

The listed terms are defined in G.S. 159G-3, which is part of the law authorizing the Clean Water Revolving Loan program, and in S.L. 1998-132, which is the Clean Water Bond authorization. The wastewater terms are generally clear. “Water supply systems” includes all of a local government’s water system, including supply, treatment, and distribution. “Water conservation projects” involve either wastewater or water supply systems and are intended to reduce loss or waste of water in the operation of those systems or to provide more efficient use of water in those systems. “Water reuse projects” involve the actual use or application of treated wastewater in situations that do not require potable water.

At times during its progress through the General Assembly, this act also included authority to finance local confinement facilities with special obligation bonds, but that proposal was dropped before the final enactment of the law.

The Uniform Commercial Code and local government borrowing. In the late 1990s, the Commissioners on Uniform State Laws proposed a substantial revision of Article 9 of the Uniform Commercial Code (U.C.C.), which regulates security interests in personal property. Article 9 had provided that it did not apply to transfers by governments or governmental agencies [G.S. 25-9-104(e)], although it has been common practice for local government security interests entered into pursuant to G.S. 160A-20 to be recorded pursuant to Article 9 in any event. The proposed revision of Article 9, which was accepted by the 2000 General Assembly and which became effective on July 1, 2001, narrowed the exemption for governmental transactions. New G.S. 25-9-109 provided, in its original form, that the article did not apply when another statute expressly governed the creation, perfection, priority, or enforcement of a security interest created by a governmental unit. The nation’s bond attorneys became concerned that this new language created significant difficulties for certain forms of local government debt—especially, in North Carolina, revenue bonds—and they have been seeking modification in the U.C.C. changes. S.L. 2001-218 (S 829) is the North Carolina product of that effort.

The act modifies the definition of *governmental unit* in new G.S. 25-9-102(45) to include entities created to facilitate installment or lease purchase financings—that is, the nonprofit corporations that are normally involved in the issuance of certificates of participation. The act also deletes the uniform provision regarding which governmental obligations are exempt from Article 9 and adds a new provision specifically for North Carolina. This new provision creates a general exclusion from Article 9 for security interests in revenues, rights, funds, or tangible or intangible assets given to secure any form of indebtedness or other payment obligation on borrowed money. It specifically provides, however, that Article 9 does apply to security interests created by a governmental unit in equipment or fixtures.

County/school financing authorization. G.S. 153A-158.1 codifies a number of local acts permitting counties to acquire property for use by their local school systems and allowing school systems and counties to engage in other related activities as part of school financing arrangements. S.L. 2001-76 (H 804) adds five counties to the statute’s coverage, and S.L. 2001-427, Section 7, adds seven more. The number of counties and school systems taking advantage of this statute has grown steadily during the last decade. The statute is now nearly statewide in coverage, applying in 88 of 100 counties.

Energy improvement loans. G.S. Chapter 143, Article 36, Part 3, establishes an energy improvement program within the Department of Administration. The statute authorizes the department to establish a revolving fund for making loans to businesses, with the proceeds to be used for energy-efficient capital improvements. The loans can be up to \$500,000. S.L. 2001-338 (H 332) expands the scope of the program and the entities eligible to borrow money from the

revolving fund, and eligible borrowers now include charitable organizations and local governments.

Henceforth, the program will be able to make secured loans to local governments for energy improvement projects, and the statute sets the interest rate of the loans at 3 percent. In addition, the Department of Administration is authorized to develop and adopt rules under which state-regulated financial institutions will be able to provide secured loans to local governments and other entities under terms and conditions set by the department. Interestingly, local governments are defined to include community colleges and school boards as well as counties, cities, and other political subdivisions.

Financial Administration

Housing authorities exempt from Local Government Budget and Fiscal Control Act. S.L. 2001-206 (S 1056) essentially exempts housing authorities, except for a few cash management sections, from the Local Government Budget and Fiscal Control Act (LGBFCA) and provides an alternative set of budgeting and accounting requirements applicable to authorities. It will be codified in G.S. 159-42 as a new part to Article 3 of G.S. Chapter 159.

Budgeting. The statute requires housing authorities to adopt an annual budget under which estimated revenues and available fund balances equal or exceed estimated expenditures. (Thus, they are not required to have an exactly balanced budget ordinance, as is required of entities subject to the LGBFCA.) There are no expenditure control requirements applicable to this annual budget. The statute requires that the proposed budget be made available for public inspection, that the authority board hold a public hearing on the proposal before adopting the budget, and that the authority give two weeks published notice of the hearing.

The statute then requires an authority to adopt a project ordinance “for those programs which span two or more fiscal years.” Such an ordinance must show an equal amount or more of estimated revenues and fund balances as opposed to estimated expenditures, but again, there is no expenditure control associated with it.

Finance officer. The statute directs each authority to appoint or designate a finance officer, who performs the combined responsibilities of a finance officer and a budget officer under the LGBFCA.

Accounting and financial reporting. The statute directs each authority to comply with appropriate federal requirements on receipt, deposit, investment, transfer, and disbursement of moneys and other assets. It then directs the authority to have its accounts audited annually by a certified public accountant and it regulates the audit engagement contract. Although a copy of the completed audit report is to be filed with the Secretary of the Local Government Commission (LGC), the secretary is not given authority to approve the audit contract or payments under the contract.

Internal control. The LGC is authorized to investigate the internal control procedures of any authority and to require modifications in procedures. Furthermore, the bonding requirements of G.S. 159-29 are extended to the authority finance officer and any other employee handling more than \$100 at any time or having access to authority inventories.

Cash management. The statute directs authorities to comply with the official depository law, except as that law may conflict with federal guidance. It also directs authorities to comply with the daily deposit law and to file semiannual reports with the LGC on deposits and investments. Authorities are permitted to invest available funds pursuant to federal regulations, without regard to the investment rules of the LGBFCA.

Effective date. This part of the act applies to fiscal years beginning on or after October 1, 2001.

S.L. 2001-206 also amends G.S. 159-148, which requires LGC approval of certain financing agreements, thereby recognizing that statute’s applicability to housing authorities. In defining the financings that are subject to LGC approval under the statute, the act provides that the amount obligated for housing authority contracts must be the lesser of \$500,000 or \$2000 per housing unit owned and under active management by the authority.

Single audit supplements. G.S. 159-34(c) regulates the single audit as a matter of state law. It directs that state departments and agencies that provide funds to local governments are to provide the Local Government Commission with documents and compliance standards approved by the State Auditor. S.L. 2001-160 (S 434) makes the LGC itself the approving entity.

Department of Health and Human Services (DHHS) budget guidance. G.S. 108A-88 requires the Secretary of Health and Human Services to notify each county director of social services, before February 15 of each year, of the amount of state and federal moneys the secretary anticipates will be available for social service programs in the upcoming fiscal year. The 2001 Appropriations Act [S.L. 2001-424 (S 1005)] expands the secretary's notification requirements in two ways. First, the notification is to include availability of moneys for public health programs. Second, the notification is to be made to the county manager, the county commissioners, and the county public health director, as well as to the county director of social services.

Local Government

Local Government Annexation, Incorporation, and Merger

Satellite annexations of areas within a city's sphere of influence. One of the standards that a satellite (or noncontiguous) area must meet before it may be annexed by a city is that it must be no closer to some other city than it is to the annexing city. This standard, when combined with an annexation agreement between cities, has sometimes resulted in areas that cannot be satellite annexed by any city. An annexation agreement normally establishes areas—colloquially called *spheres of influence*—in which only one of the participating cities may annex property. If a particular parcel is within City A's sphere of influence but is closer to City B, then City A will not be able to annex that parcel on a satellite basis. And, because the parcel is in City A's sphere of influence, City B will not be able to annex it by any means.

This result led a few cities to obtain local legislation from the General Assembly allowing them to satellite annex parcels within their spheres of influence even if a parcel was closer to another city. The 2001 General Assembly recognized that this was a problem for all cities, and in S.L. 2001-438 (S 210), it expanded to all cities this waiver from the normal standards for satellite annexations. Therefore, if an area is within one city's sphere of influence and may not be annexed by another city that is closer to it, the area may be satellite annexed by the city in whose sphere of influence the property is located.

New incorporations. The 2001 General Assembly approved the possible incorporation of three new cities, each subject to a referendum. The three are Miller's Creek (Wilkes County), Duck (Dare County), and Fairview (Union County). The legislature also authorized a referendum on the merger of the town of Arlington with the town of Jonesville in Surry County. The voters of Miller's Creek turned down incorporation, while Duck's and Fairview's voters approved incorporation, and those of Arlington and Jonesville approved merger.

Purchasing, Contracts, and Property Transactions

Three important acts passed this session affect the rules by which local governments enter into contracts. S.L. 2001-328 (H 1169) makes numerous changes to the primary competitive bidding law, G.S. 143-129; adds a new section to Chapter 143 to authorize a more flexible request for proposals (RFP) procedure for procuring information technology goods and services; and makes several changes to the statutes governing disposal of property by local governments. S.L. 2001-496 (S 914) (various effective dates) substantially expands local governments' authority to enter into building construction and repair contracts with a single contractor rather than entering into separate contracts with multiple contractors. It also authorizes the use of a different building contracting system called *construction manager at risk* and increases the requirements to make "good faith" efforts to encourage participation by certain groups in building contracts. S.L. 2001-

409 (H 115) revises and updates several criminal statutes in the conflicts of interest area, including the venerable G.S. 14-234, which dates from the 1820s and prohibits public officials from benefiting from contracts with the public agencies they serve. All of these acts are discussed in Chapter 21, "Purchasing and Contracting."

Property transactions. Until recently, G.S. 160A-274 had been uniformly interpreted as allowing a governmental unit freely to exchange, lease, buy, sell, and enter into joint use agreements concerning property it owned. In a 1997 court of appeals decision, that power was far more narrowly construed. A provision of S.L. 2001-328 revises G.S. 160A-274(b) to clarify that state and local governments may freely convey property between and among themselves without limitation.

Two other acts affecting property transactions deserve a brief mention. S.L. 2000-239 (S 719) amends G.S. 40A-42(a) to authorize regional public transportation authorities to use "quick-take" condemnation procedures in acquiring land. Under quick-take, title to the property vests in the condemner as soon as the property is condemned, with questions of payment of just compensation being settled later. This act will allow authorities greater latitude in acquiring right-of-ways and other property for projects such as light rail lines.

After Hurricane Floyd, many counties purchased real property affected by the hurricane through the Hazard Mitigation Grant Program. Until July 1, 2001, S.L. 2000-29 (H 18) allowed counties to sell repaired or reconstructed structures affixed or located on such property to their original owners without complying with the property disposal rules of G.S. Chapter 160A, Article 12. The dwelling had to be sold only to the verifiable owner at the time of the hurricane and initially reoccupied by that person, and it had to have been properly repaired in compliance with the state building code.

Access to Meetings and Records

EMS trip tickets. For a number of years, there has been some question about the status under the public records law of the "trip tickets" that emergency medical services (EMS) personnel complete for each call to which they respond. A provision of S.L. 2001-220 (H 452) clarifies the law by making these and related records confidential.

Effective January 1, 2002, new G.S. 143-518 provides that medical records and patient identifiable data compiled and maintained by EMS providers or the Department of Health and Human Services in connection with dispatch, response, treatment, or transport of individual patients, or in connection with the statewide trauma system under G.S. Chapter 131E, Article 7, are strictly confidential. They are not considered public records within the definition of that term in G.S. 132-1, and they are not to be released or made public except in specific cases listed in the statute. Since they are not public records under G.S. Chapter 132, presumably they also are not subject to any requirements governing public records, such as the state's records retention and disposition rules.

G.S. 143-518 also makes strictly confidential the charges, accounts, credit histories, and other personal financial records compiled and maintained by EMS providers or DHHS in connection with the admission, treatment, and discharge of individual patients. Significantly, the statute lists no entities (for example, banks or other creditors) to which this information may be released. If an EMS provider is a department of a local government, however, presumably the local government itself may use the financial information in its own payment collection efforts.

Meetings and records of nonprofit financing corporations. S.L. 2001-84 (S 25) amends a provision of the nonprofit corporations law, G.S. 55A-3-07, to make nonprofit corporations that are organized upon the request of the state for the sole purpose of financing projects for public use subject to the open meetings and public records laws. Such corporations are common in large-scale installment financing arrangements involving certificates of participation, or COPs. (S.L. 2001-84 was adopted as part of a state effort to contract for the construction of three correctional facilities.) While this provision currently applies only to state government, it could easily be adapted to cover local governments as well. Many governmental units participate in G.S. 160A-20 installment financings that involve such corporations.

State Privacy Act. A new law called the State Privacy Act makes it unlawful for any state or local government agency to deny to anyone any right, benefit, or privilege provided by law because of that person's refusal to disclose his or her Social Security account number. The act, S.L. 2001-256 (H 998), is codified at G.S. 143-64.60. The only exceptions are for a disclosure that is required or permitted by federal statute and a disclosure to a state or local agency that maintains a system of records, if the records were in existence and operating before January 1, 1975, and the disclosure was required prior to that date to verify a person's identity. Any state or local agency that requests an individual to disclose his account number must inform the person whether the disclosure is mandatory or voluntary, by what statutory or other authority the number is being requested, and what uses will be made of the number.

Public enterprise billing information. S.L. 2001-473 (S 774) amends G.S. 132-1.1 to make public enterprise billing information not a public record as defined in G.S. 132-1. As in the case of EMS trip tickets, discussed above, this means that such information is not subject to the requirements of the public records law, G.S. Chapter 132, including the state's records retention and disposition rules.

Public enterprises are defined in G.S. 153A-274 and 160A-311 for counties and cities respectively. (The new statute also applies to "other public entit[ies] providing utility services.") They include, for example, water and sewer, electric distribution, and solid waste collection systems. Billing information in connection with the ownership or operation of a public enterprise is defined as "any record or information, in whatever form, compiled or maintained with respect to individual customers by any owner or operator of a public enterprise . . . relating to services it provides or will provide to the customer."

The statute specifies that public enterprise operators may release billing information as necessary (1) with respect to bonds or other obligations associated with the systems, (2) to maintain the integrity and quality of services provided by the systems, and (3) to assist law enforcement, public safety, fire protection, rescue, emergency management, or judicial officers in the performance of their duties. Given the placement of these new provisions in the statute, however, it is probable that a local government may release this information at other times as well. That is, the statute does not prohibit the release of this information but simply makes it exempt from automatic public access.

Sensitive public security information. In the wake of the September 11 tragedy, some officials realized that many public buildings in North Carolina were vulnerable to attack because the building plans and diagrams of infrastructure facilities were readily accessible. S.L. 2001-516 (H 1284), Section 3, adds new G.S. 132-1.6 in response to this concern. Section 132-1.6 removes from the definition of *public records* information containing specific details of public security plans and arrangements or the detailed plans and drawings of public buildings and infrastructure facilities. The statute notes, however, that public records do include information relating to the general adoption of public security plans and arrangements. They also include budgetary information concerning either the authorization or expenditure of public funds to implement those plans and arrangements or for the construction, renovation, or repair of public buildings and infrastructure facilities.

These records, like EMS trip tickets and public enterprise billing information, are removed completely from the public records definition in G.S. 132-1(a). As noted earlier, this means that they are not subject to any requirements governing public records, such as the state's records retention and disposition rules. In all of these cases, it is perhaps questionable whether this result concerning preservation of records was intended by the General Assembly. This provision applies to public records in existence on or after January 4, 2002.

Open meetings proposals. Two significant proposals to amend the open meetings law, G.S. Chapter 143, Article 33C, were introduced this session. Both failed, in large part because of a variety of concerns expressed to numerous legislators by county and city clerks and other local officials. House Bill 514 would have required that all public bodies make recordings of all closed sessions of official meetings. It was defeated on third reading on the House floor. House Bill 1225 would have dramatically reduced the scope of closed sessions that could be held based on the attorney-client privilege exception to the open meetings law. Basically, in cases where the client

was a public body, pending litigation would have been the only subject that could have been discussed under the exception. House Bill 1225 was defeated in a House committee.

Streets and Highways

Transportation planning. S.L. 2001-168 (S 731), discussed in detail in Chapter 15, “Land Use, Community Planning, Code Enforcement, and Transportation,” revises and updates the process in G.S. 136-66.2 for development of coordinated local transportation plans. Four changes of special interest are noted here. Most importantly, the act bases the extent of Department of Transportation (DOT) involvement in transportation plan development on the extent of local land use planning. In addition, S.L. 2001-168 requires that local transportation plans take into consideration all transportation modes, including the street system, transit alternatives, bicycles, and pedestrians. The plans are also required to consider operating strategies and other strategies. As well, comprehensive transportation planning must take place through a metropolitan planning organization, if one exists. Finally, even though counties in North Carolina have not been involved with road maintenance since the 1930s, the act allows each county to develop, with DOT cooperation, a comprehensive transportation plan using “the municipal procedures” (presumably meaning the procedures that municipalities currently follow in developing their transportation plans). These and other provisions of S.L. 2001-168 apply to plans adopted after June 7, 2001, the act’s effective date.

Extraterritorial road improvements in larger cities. S.L. 2001-261 (S 408) amends G.S. 160A-296 to authorize cities with a census population of 250,000 or more to make roadway improvements in their extraterritorial jurisdictions. They may acquire land and open new streets and alleys, as well as improve existing facilities. A city making such improvements must first enter into a memorandum of understanding with the North Carolina DOT for the provision of maintenance.

County road-naming procedures. S.L. 2001-145 (S 380) adds additional formalities to G.S. 153A-239.1(a), the statute that governs how counties assign road names. Most important is a provision specifying that street names must be assigned pursuant to a procedure established by county ordinance. Before the ordinance establishing the procedure to assign or reassign names may be adopted, a public hearing must be held. Notice of the hearing must be published in a newspaper of general circulation in the county at least ten days before the day of the hearing. Finally, counties may initially assign names to new roads by recordation of an approved subdivision plat without following the statutory procedure.

Transporter plates. The provisions of new G.S. 20-79.2(d) allow a county to obtain one “transporter plate” from the state free of charge. Such a license plate is used to transport motor vehicles as part of a county program to receive donated motor vehicles and make them available to low-income individuals. The new statute is set out in S.L. 2001-147 (S 942).

Expanded use of red light cameras. S.L. 2001-286 (S 243) adds the municipalities in Union and Wake Counties, as well as three other cities, to those that may use automatic red light cameras at intersections as a means of catching people who run red lights. Thirteen municipalities were previously covered by the enabling statute, G.S. 160A-300.1, a codified local act. Perhaps reflecting a concern about individuals’ procedural rights, the authorizations in the new law for Wake County’s municipalities and for the city of Concord contain detailed guidelines and procedures. These two new authorizations also prohibit the municipalities from making money on red light tickets by requiring that the *clear proceeds* (defined in the act) from the issued citations go to the schools.

Utilities

Water and sewer authorities. Under the terms of S.L. 2001-224 (S 432), all local governments that join water and sewer authorities after they are created are now prohibited from appointing any authority members (with the exception of one unnamed authority). Authorities are generally established by local governments under G.S. Chapter 162A, Article 3. Previously, one

method (the G.S. 162A-3 method) for establishing authorities allowed local governments that joined the authority after its creation by other local governments to appoint authority members, while the other technique (the G.S. 162A-3.1 method) did not.

S.L. 2001-224 also contains changes to G.S. Chapter 162A, Article 1, that allow two unnamed authorities to have nonprofit water corporations and the State of North Carolina as members. Finally, the act specifies that the creation under G.S. Chapter 162A, Article 1, on or after July 1, 2000, but before June 15, 2001, of any water and sewer authority that would have been permitted under the amended Article 1 is validated and confirmed as to the membership of nonprofit water corporations.

Sewer cleanouts. S.L. 2001-296 (H 824) amends G.S. 87-10(b1) to require public utility contractors constructing residential and commercial sewer lines to install a cleanout at the junction of the public sewer line and each house or building sewer line. (The cleanout provides access to the sewer line for clearing blockages.) The cleanout must be located at or near the property line, must terminate at or above the finished grade, and must be an extension of the public sewer line. This act became effective October 1, 2001, and applies to the installation of residential and commercial sewer lines on or after that date.

Miscellaneous

Public health nuisance abatement liens. Expenses that a city incurs in the abatement of a public health nuisance are a lien on the land or premises where the nuisance occurred. They have the same priority as a tax lien and are to be collected in the same manner. S.L. 2001-448 (S 352) amends G.S. 160A-193 to provide that the expense of the action is also a lien on any other real property (except the person's primary residence) within the city limits or within one mile of the city limits that is owned by the person in default. However, this latter lien is inferior to all prior liens and is to be collected as a money judgment. The new provision does not apply if the person in default can show that the nuisance was created solely by another's actions. S.L. 2001-448 also adds similar provisions to G.S. 160A-432 with respect to removal or demolition of structures violating building laws, and to G.S. 160A-443(6) with respect to repairs, closing, removal, and so forth, of structures violating minimum housing ordinances. These latter provisions are discussed in detail in Chapter 15, "Land Use, Community Planning, Code Enforcement, and Transportation."

Municipal election boards. Most municipal election boards were abolished years ago, with cities generally relying on county boards of elections to conduct their elections for them. S.L. 2001-374 (S 16) eliminates all but four of the remaining city boards. It adds new G.S. 163-280.1 and amends G.S. 163-285 and 163-304 to accomplish this purpose. The only municipalities still conducting their own elections as of January 1, 2002, were Granite Falls, Morganton, Old Fort, and Rhodhiss.

County EMS services. Effective January 1, 2002, counties will have an explicit mandate to ensure that emergency medical services are provided to their citizens. This requirement is found in revised G.S. 143-517 [part of S.L. 2001-220 (H 452)], which updates the emergency medical services act.

Defense of soil and water conservation supervisors and employees. For a number of years, cities and counties have been able to defend their officers and employees and to pay damages resulting from suits against them on account of matters related to their employment or duty. S.L. 2001-300 (H 968), amending G.S. 153A-97 and 160A-167, clarifies that these governmental units may also provide for the legal defense of any soil and water conservation supervisor and any local soil and water conservation employee, whether the employee is a county employee or an employee of a soil and water conservation district. It also clarifies that boards of county commissioners and city councils may appropriate funds to pay claims made or civil judgments made against such supervisors or employees, when the claim is made or the judgment is rendered as damages on account of acts done or omissions made, or allegedly done or made, in the scope and course of the person's employment or duty.

Interference with emergency communication. S.L. 2001-148 (S 1004) will be of special interest to law enforcement and EMS departments. It revises G.S. 14-286.2 to add the offense of

intentionally interfering with a communications instrument, and it updates the penalty for intentionally interfering with an emergency communication. Under the new provision, a person who interferes with a communications instrument or other emergency equipment with the intent to prevent an emergency communication is guilty of a Class A1 misdemeanor. The statute makes it a Class A1 misdemeanor as well for a person intentionally to interfere with an emergency communication, if he or she knows it is an emergency communication and he or she is not also making an emergency communication. A detailed and helpful definition of *intentional interference* has been added to the law, along with an expanded definition of *emergency communication*. S.L. 2001-148 became effective December 1, 2001, and applies to offenses committed on or after that date.

Liens for medical services. S.L. 2001-377 (S 780) should make it easier for local governments involved with health operations to collect some of the medical expenses owed to them by patients who have been awarded damages by third parties. Specifically, it deletes a filing requirement in G.S. 44-49 that was formerly imposed on counties, cities, hospitals, doctors, and others who sought to recover amounts they were owed for treatment and the like by someone who had been awarded damages for personal injury in court or in a settlement. Instead of a claim of lien first having to be filed with the clerk of court within a specified time, the law now specifies that the lien attaches when the person's attorney is given, on request, an itemized statement, hospital record, or medical report for use in negotiating, settling, or trying the personal injury claim and a written notice of the lien claimed. The act also amends G.S. 44-50 to place restrictions on the disbursement of the funds the person received in the lawsuit until the liens have been paid. This act became effective October 1, 2001, and applies to liens perfected on or after that date.

Changes affecting markings and plates for local government vehicles. Section 6.14 of S.L. 2001-424 consolidates and revises two types of laws. It repeals G.S. 14-250 and otherwise revises the statutes dealing with identification markings on county and state vehicles. It also addresses private license plates and driver's licenses that are used with publicly owned vehicles (primarily vehicles involved in undercover law enforcement work). S.L. 2001-424 is discussed in detail in Chapter 19, "Motor Vehicles." Two points of special interest to local governments are noted here.

First, under new G.S. 20-39.1(c), a motor vehicle used by a county for transporting day or residential facility clients of area mental health, developmental disabilities, and substance abuse authorities no longer has to have a permanent license plate that might potentially lead to client embarrassment or to a breach of confidentiality. Instead, the Commissioner of Motor Vehicles may now provide counties with private license plates for publicly owned or leased vehicles used for this purpose. A *private license plate* is one that would normally be issued to a private party and therefore lacks any markings indicating that it has been assigned to a publicly owned vehicle.

Second, new G.S. 20-39.1 creates a category of private license plates called *confidential license plates* that are available to local as well as state and federal law enforcement agencies. These plates are intended for public vehicles that are primarily used for transporting, apprehending, or arresting alleged federal or state lawbreakers in cases where personal safety questions or surveillance or undercover work are involved. The plates have confidential registration files that are not public records within the meaning of G.S. Chapter 132 and therefore are not subject to the requirements of that chapter. The act makes clear that this same records confidentiality rule also applies to fictitious license plate records. Fictitious plates existed under prior law.

Traffic stop data. S.L. 2001-424, Section 23.7, amends G.S. 114-10(2a) to add to those required to compile statistical data concerning their traffic stops county law enforcement officers and municipal law enforcement officers from larger jurisdictions (those employed by police departments either in cities with 10,000 or more people or where there are at least five full-time sworn officers for each 1,000 in population, as determined by the Division of Criminal Statistics of the Department of Crime Control and Public Safety). Only some officers are required to provide the data each year: the division will publish a list by December 1 each year indicating which officers will have to compile the information during the following calendar year.

Significantly, the fifteen items of information to be compiled include information about the race or ethnicity of the persons stopped. Presumably this information is compiled so that possible “racial profiling” can be identified. The data collected on all items is to be reported to the Division of Criminal Statistics.

Data collection will be designed to maintain anonymity for individual local officers. Each officer will have an identification number, and the correlation between numbers and officers’ names will not be a public record.

This section became effective September 26, 2001. However, the Division of Criminal Statistics and local law enforcement agencies had a bit of time to prepare for its implementation, since it only applies to actual law enforcement actions occurring on or after January 1, 2002.

ABC store interlocal agreements and local government special event permits. An act affecting ABC stores and another ABC law change of special interest to local government officials are noted here. Consult Chapter 7, “Alcoholic Beverage Control,” for detailed coverage of this subject.

S.L. 2001-128 (H 446) amends G.S. 18B-703 to permit interlocal operating agreements for ABC stores. Under the act, two or more governing bodies of counties and/or municipalities with ABC systems may enter into a written agreement for one or more of their ABC stores to be controlled and operated by the local ABC board specified in the agreement. Such agreements are subject to the approval of the state ABC Commission.

S.L. 2001-262 (S 823), Section 9, amends G.S. 18B-1002(a)(5) to add local governments to the coverage of this “one-time permit” statute, thereby saving them some money. Permits issued under this provision cost \$50, while comparable permits previously obtained by local governments cost \$400. Under G.S. 18B-1002(a)(5) as amended, a permit to serve wine, beer, and liquor at a ticketed fund-raising event may be issued to a local government. A new permit is needed for each event. Issuance of the permit also allows the issuance of a purchase-transportation permit under G.S. 18B-403 and 18B-404 and the use for culinary purposes of liquor lawfully purchased for use in mixed beverages.

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Local Taxes and Tax Collection

During the 2001 legislative session, the General Assembly tackled a number of different issues concerning property taxation. Most notably, the General Assembly finally addressed the inadequacy of the homestead exclusion for the low-income elderly and the inequity of the blanket exemption for continuing care retirement centers. In addition, the legislature tinkered with several different provisions in the Machinery Act, creating more uniformity in some instances and addressing issues raised in recent court cases in others. Overall, the session was a productive one for property taxation, generating legislation that tied up quite a few statutory loose ends.

Assessment

Listing

Electronic Listing

In 1998 the General Assembly adopted the Electronic Commerce in Government Act [S.L. 1998-127 (H 1356)]. Two years later the Uniform Electronic Transactions Act (S 1266) was enacted and codified as S.L. 2000-152. Clearly the General Assembly has shown an increasing interest in the use of advanced technology for conducting business in North Carolina. In the 2001 session, this interest was further demonstrated in the tax arena by the introduction of electronic listing bills in each house and by the enactment of one of the bills as S.L. 2001-279 (S 365). S.L. 2001-279 amends G.S. 105-304 by adding a provision that would allow boards of county commissioners to pass a resolution permitting taxpayers to list business personal property electronically. *Electronic* is defined in G.S. 66-312(6) as any means “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” S.L. 2001-279 also amends G.S. 105-307 to provide that, if the county has passed such a resolution, the

normal listing period, which runs from January 1 to January 31, may be extended to June 1 for electronic listings.

Reappraisal in a Nonrevaluation Year

S.L. 2001-139 (S 162) makes numerous changes to the Machinery Act. One significant amendment applies to G.S. 105-287(a), which allows tax assessors to reappraise property in a nonrevaluation year under certain circumstances. The new statute adds two new circumstances under which the assessor may perform such a reappraisal. The first occurs when it is necessary to recognize a value increase or decrease resulting from a physical change in the land or improvements made to the subject property. The second occurs when it is necessary to recognize a value increase or decrease resulting from a zoning change for the subject property. It is important to note that S.L. 2001-139 adds language to the statute to clarify that “the reason necessitating a change in the property’s value need not be under the control of or at the request of the owner of the affected property.” This clarification settles a question raised by two recent court decisions. The North Carolina Supreme Court stated in *In re Allred*¹ that the qualifying factors that would trigger a reappraisal under G.S. 105-287(a)(3) “would include, for example, a rezoning, a relocation of a road or utility, or other such occurrence directly affecting the specific property, which falls outside the control of the owner.”² The North Carolina Court of Appeals subsequently relied on this “control of the owner” principle in its decision in *In re Corbett*,³ finding that a change in value resulting from a parcel split was not a qualifying factor within the meaning of G.S. 105-287(a)(3) since the division and transfer of the property was completely within the control of the owner. The statutory language added by S.L. 2001-139 makes it clear that the fact that the property owner initiates the event that causes a change in value is completely irrelevant. For an event to trigger a reappraisal in a nonrevaluation year, it need only be listed among the statutory justifications for doing so.

Treatment of Manufactured Homes As Real Property

S.L. 2001-506 (H 253) amends G.S. 105-273(13) by redefining *real property*. Under the previous version of the statute, the terms “real property,” “real estate,” and “land” included a manufactured home if the home was a multisectional residential structure; had the moving hitch, wheels, and axles removed; and was placed upon a permanent enclosed foundation on land belonging to the owner of the manufactured home. S.L. 2001-506 eliminates the requirements that a manufactured home consist of two or more sections and that the permanent foundation be enclosed in order for the home to be classified as real property. Thus a single-section manufactured home, or “single-wide,” can, for tax years beginning on or after July 1, 2002, be considered real property once the owner has taken appropriate steps to have it so classified. If the home meets all of the criteria of G.S. 105-273(13), the owner *must* take steps to have the property registered as real property. If the home does not meet all of the criteria for real property in G.S. 105-273(13), and the owner does not otherwise have it registered as real property, then it is to be taxed as tangible personal property. Further details regarding the registration process for manufactured housing are provided in Chapter 14, “Land Records and Registers of Deeds.”

Transportation Corridor Maps

S.L. 2001-139 also creates new G.S. 105-296(m), which requires the tax assessor to conduct an annual review of the transportation corridor official maps on file in the register of deeds’ office. The assessor must indicate on city and county tax maps the portion of property lying within a transportation corridor. The new section directs the assessor to tax property within a transportation corridor in accordance with G.S. 105-277.9.

1. 351 N.C. 1, 519 S.E.2d 52 (1999).
2. 351 N.C. at 12, 519 S.E.2d at 58.
3. 138 N.C. App. 534, 530 S.E.2d 90 (2000).

Exemptions and Exclusions

Exemption or Exclusion Application Process

S.L. 2001-139 reorganizes G.S. 105-282.1, which governs the application process for claiming exemption or exclusion from property taxes. As a result of this reorganization, taxpayers will now be required to file an application to claim property tax exclusion under G.S. 105-275(5), which provides an exemption for vehicles given to disabled veterans by the federal government. This property classification was previously exempt from the application requirement. All other classifications that were previously exempt from the application requirement remain exempt; subject property owners do not have to apply to receive these tax exclusions.

Certain exclusions require that the taxpayer file an application for exclusion only once. Once the exclusion has been granted to the property, the taxpayer does not need to apply for exclusion again unless there is a physical change in the property or a change in its use. S.L. 2001-139 adds to the list of “single application” classifications:

- exclusions granted pursuant to G.S. 105-275(41) for works of art owned by the North Carolina Art Society, Inc.;
- exclusion under G.S. 105-277(h) for the property of private water companies;
- the homestead exclusion as provided in G.S. 105-277.1;
- the reduced valuation extended to precious metals used in manufacturing and processing as provided in G.S. 105-277.10;
- the partial exclusion for improvements to brownfields as provided in G.S. 105-277.13;
- exemptions granted pursuant to G.S. 131A-21 for health care facilities undertaken by the North Carolina Medical Care Commission;
- the historic properties exemption governed by G.S. 105-278; and
- the “transfer” of value from a nonprofit homeowners’ association to the individual properties of the members of the association as determined by G.S. 105-277.8.

In addition, S.L. 2001-139 significantly changes G.S. 105-282.1(d) by requiring county tax assessors to forward to the Department of Revenue (DOR) a summary report of the roster of exempted and excluded property in their jurisdictions by November 1 of each year. The statute previously required that the assessor provide DOR a list of only the changes made to the roster. The new provision also requires the assessor to send a copy of the actual roster if DOR requests it. Finally, the provision reiterates the directive given in G.S. 105-296(l) that the assessor conduct an annual review of at least one-eighth of the parcels in the county that are exempted or excluded from taxation. In conjunction with imposing the audit requirement, S.L. 2001-139 also amends both G.S. 105-296(j), which governs audits performed on properties classified for present-use valuation, and G.S. 105-296(l), which governs audits of all other exemptions and classifications, by imposing a sixty-day time limit within which the property owner must provide information requested by the assessor to evaluate a property’s eligibility for a particular exemption or classification. If the property owner fails to provide the requested information within sixty days of the assessor’s written request, the property will lose the applicable classification; in the case of use-value property, deferred taxes will become due and payable immediately. If the property owner subsequently provides the requested information, the assessor must reinstate the classification and refund any deferred taxes that were paid due to the revocation of the classification.

Homestead Exclusion

For several years both taxpayers and tax officials have sought to change the criteria that determine eligibility for the homestead exclusion. The exclusion is intended to provide tax relief to the low-income elderly and to disabled individuals, and, to qualify for it, a taxpayer must have an income at or below the statutory threshold. The qualifying taxpayer then has a certain amount excluded from the valuation when his or her property is appraised for tax purposes. Over the past few years, however, this exclusion has been increasingly ineffective in reaching the population of taxpayers that it was intended to help. One major problem has been that the income threshold of

\$15,000 per year has not been changed in several years, and many taxpayers who greatly need the relief no longer qualify for the exclusion. Another issue has been the skyrocketing real estate values in various parts of the state. In the last decade, unprecedented population growth and a healthy economy have led to dramatic increases in appraised values. As a result, the statutory exclusion amount of \$20,000 has provided increasingly inadequate relief for those who qualify for it, particularly those living in the urban and rapidly growing areas of the state.

With the passage of S.L. 2001-308 (H 42), the General Assembly has taken a step toward making the homestead exclusion an attainable and effective measure of relief for taxpayers who need it. S.L. 2001-308 amends G.S. 105-277.1 by increasing the income eligibility limit from the current level of \$15,000 to \$18,000 for the 2002–2003 tax year. For subsequent tax years, the statute sets the income eligibility limit at the amount for the previous tax year with a cost-of-living adjustment equivalent to any cost-of-living adjustments made for benefits drawn under Titles II and XVI of the Social Security Act. The law provides that DOR bears the responsibility of determining the income eligibility limit each year and that it must do so at least one year before the July 1 beginning the taxable year to which the limit applies. Thus DOR must notify all county tax assessors of the applicable income eligibility limit on or before July 1, 2002, for the 2003–2004 tax year, on or before July 1, 2003, for the 2004–2005 tax year, and so forth.

S.L. 2001-308 also changes the exclusion amount available to a qualifying taxpayer to the greater of \$20,000 or 50 percent of the appraised value of the residence. This change should make a tremendous difference for property owners living in areas with high property values. In addition the statute extends the deadline for filing an application for the exclusion from April 15 to June 1.

Present-Use Valuation

After grappling nearly the entire session with various proposals to reform the present-use valuation program for agricultural, horticultural, and forest land, the legislature enacted a bill that has very little current effect. The new statute does, however, set up a study commission whose work ultimately could result in a complete overhaul of the property tax system in North Carolina. S.L. 2001-499 (H 1427) amends G.S. 105-277.3(b2) so that property having a present-use classification can be transferred to a new owner—even if the new owner does not meet the ownership requirements—as long as he or she acquires the land for the purposes and uses for which it was classified. This amendment makes it possible for farms and forestland to be transferred from one farmer to another without destroying the use-value classification of the land and triggering the deferred taxes, even if the farmers are not relatives. S.L. 2001-499 also amends G.S. 105-277.3(b2) by adding language which makes the new owner in these farmer-to-farmer conveyances liable for the deferred taxes if he or she causes or allows the property to fail to meet a condition or requirement for the use-value classification. Finally, S.L. 2001-499 amends G.S. 105-277.4(c) by adding language that will allow a qualifying tract of land to retain eligibility for deferred status, even if the owner pays the deferred taxes.

The remainder of S.L. 2001-499 is devoted to establishing the Property Tax Study Commission. Specifics on the commission are provided below in the section entitled “Study Commissions.”

Retirement Home Exclusion

This session the General Assembly also addressed the long-standing inequity problem existing in the exclusion for continuing care retirement facilities. S.L. 2001-17 (H 193) begins by limiting the types of retirement home property eligible for exclusion from taxation. G.S. 105-278.6A previously provided that “real and personal property owned by a qualified retirement facility” would not be listed, assessed, or taxed. Effective July 1, 2001, property falling under this exclusion will include only “[b]uildings, the land they actually occupy, additional adjacent land reasonably necessary for the convenient use of the buildings, and personal property” owned by a qualifying retirement facility. This provision should prevent retirement homes from sheltering inordinate amounts of real property from taxation.

Secondly, S.L. 2001-17 amends G.S. 105-278.6A(c) to provide that a retirement facility cannot qualify for total exclusion unless it meets all of the following conditions:

- It is exempt from state income taxation and its operations do not benefit private shareholders.
- All revenues in excess of operating and capital expenses are dedicated to providing goods and services to the elderly and to the local community.
- Upon dissolution of the corporation, the assets of the qualifying retirement facility would revert or be conveyed to a qualifying 501(c)(3).
- It maintains an active charitable gift program that assists the facility in extending services to individuals who could not obtain the services without financial assistance or subsidy.
- It serves all residents regardless of ability to pay, or, in the alternative, it designates at least 5 percent of resident revenue each year to providing charity care to its residents, to community benefits, or both.

S.L. 2001-17 also establishes a partial exclusion for those facilities that meet all conditions for total exclusion but contribute only 1 to 4 percent of resident revenue to charity care. When the retirement facility contributes only 1 percent, it is entitled to an exclusion of 20 percent of its property value. If the contribution is 2 percent of resident revenue, the partial exclusion is 40 percent. The exclusion is 60 percent of the property value for contributing 3 percent of resident revenue for charity care and 80 percent for contributing 4 percent of resident revenue to charity care.

The “charity care” condition is the only new requirement among the conditions listed for exclusion eligibility. It is obviously intended to force retirement facilities to contribute tangibly to their communities before they can obtain any property tax relief. Retirement facilities that refuse to serve indigent persons or designate revenues to providing charity care or community benefits will no longer receive any exclusion of property value for tax purposes.

Board of Equalization and Review

S.L. 2001-139 expands the powers and duties of county boards of equalization and review by creating new G.S. 105-322(g)(5). This new section allows boards of equalization and review to continue to meet after adjournment:

- to hear and decide discovery appeals,
- to hear and decide motor vehicle tax appeals, or
- to hear and decide appeals related to an audit conducted on property classified under the present-use program or under another classification for exclusion or exemption.

Motor Vehicle Taxation

Interest Rate

S.L. 2001-139 amends G.S. 105-330.4(b) by changing the interest rate on unpaid taxes on classified motor vehicles from .75 percent to 2 percent for the first month that the taxes are delinquent. Thereafter the interest accrues at the rate of .75 percent per month until the taxes are paid.

Motor Vehicle Tax Credit

Session Law 2001-406 (H 1431) creates new G.S. 105-330.6(a1), which addresses the situation in which a change in a motor vehicle registration results in double taxation on the vehicle for some period of time. The new section provides that if the registration of a motor vehicle changes for a reason other than for the transfer of the plates to another classified vehicle and if the new tax year begins before the vehicle’s original tax year has expired, the owner of the vehicle may obtain a credit for a proportion of the taxes paid for the original tax year. The proportion is calculated by determining the number of full calendar months remaining in the original tax year as of the first day of the new tax year and dividing it by twelve. The tax assessor grants the credit by issuing a release in the amount of the credit from the tax obligation for the new tax year.

Taxpayers wanting to obtain this credit must apply within thirty days of the due date of the taxes for the new tax year and must give the tax collector information that establishes the original tax year of the vehicle, the amount of taxes paid on the vehicle for that tax year, and the reason for the change in registration.

Refunds for Motor Vehicle Taxes

G.S. 105-330.6 grants releases and refunds to the owner of a motor vehicle when he or she surrenders its registration plates to the Division of Motor Vehicles because the vehicle has been transferred to a new owner or because the owner has moved out of the state and has registered the subject vehicle in a new jurisdiction. S.L. 2001-497 amends this statute by extending the time the taxpayer has to file the application for release or refund from 120 days to one year from the date the plates are surrendered. This change is effective December 5, 2001, and applies for plates surrendered on or after that date.

Collection

Foreclosures

In Rem Executions

S.L. 2001-139 amends G.S. 105-375 by reducing the amount of time that must elapse before execution can be issued on a judgment for taxes in an in rem foreclosure action. Previously tax collectors had to wait six months after docketing the tax certificate before execution could be issued. The new statute reduces this time period to three months. Executions must continue to be issued within two years of the docketing of the tax certificate.

In addition, S.L. 2001-139 imposes the requirement that any notice of a sale conducted pursuant to G.S. 105-375(i) must be sent to the listing owner's last known address and to the current owner by registered or certified mail at least thirty days before the sale date.

Procedures for Judicial and Execution Sales

Collectors, attorneys, and paralegals who deal with enforced collections should be aware of the changes enacted by S.L. 2001-271 (S 681). This new law amends various provisions of Articles 29A and 29B of Chapter 1 of the General Statutes, which govern procedures for tax foreclosure sales. Article 29A concerns judicial sales and applies to mortgage-style foreclosure actions brought under G.S. 105-374. Article 29B governs execution sales and applies to in rem actions implemented pursuant to G.S. 105-375. Because S.L. 2001-271 makes identical changes and additions to both articles, the modifications in sales procedure are discussed generally rather than as they relate to either judicial or execution sales. The changes and additions discussed are effective when the order of sale or the execution is issued on or after January 1, 2002.

S.L. 2001-271 makes important changes to the notice of sale provisions. Conducting a judicial or execution sale currently requires that a notice of sale be posted at the courthouse or some other area designated by the clerk of superior court for at least thirty days before the sale and run in a newspaper of general circulation for at least four successive weeks before the sale. The new statute reduces the time required for posting to twenty days and the time for publication to two successive weeks.

S.L. 2001-271 also creates a "rolling" upset bid process. Previously, if an upset bid was made following a sale or resale of property, the commissioner or sheriff had to reinstitute the sale process by obtaining an order for resale and going through the entire process again. Some cunning taxpayers had learned to take advantage of this system by developing the practice of filing upset bids and then reneging on those bids in order to stymie the sale of their property. S.L. 2001-271 enacts provisions that will curb such abuse and streamline the bid process. These provisions

should ultimately shorten the length of time needed to sell property in a judicial or execution sale. The act also provides that a resale of property will no longer be triggered solely because an upset bid is made. Rather, successive upset bids may be filed. If at any time ten days elapse without the filing of a subsequent upset bid or a motion for resale by an interested party, the rights of the parties to the sale or resale will become fixed. Whoever holds the highest bid or upset bid at that time is obligated to complete the purchase of the property. The amendments allow deposits and compliance bonds posted by upset bidders to be held by the clerk of court to ensure that the bidders follow through and complete sales where they are obligated to do so.

The only circumstance in which a resale will be ordered as a result of an upset bid being filed is when an interested party has filed a motion for resale with the clerk of superior court within ten days after a sale or upset bid and “for good cause.”

Tax Certification

S.L. 2001-464 (H 108) gives certain counties another “enforcement measure” that should increase property tax collection rates in those counties that choose to implement the measure. This chapter authorizes the boards of commissioners in twenty-five counties⁴ to pass a resolution requiring the register of deeds to refuse to accept for registration any deed transferring real property unless the county tax collector has certified that there is no lien against the subject property as a result of delinquent county, municipal, or other taxes that the collector is charged with collecting. The authority is established in a new statute, G.S. 161-31, which also assigns to the board of commissioners the task of prescribing the form that the certification must take.

Collection of Other Liens As Taxes

S.L. 2001-448 (S 352) amends G.S. 160A-193 to give municipalities added ammunition in fighting threats to public health or safety that arise within their jurisdictions. The statute provides that if a city has to remove, abate, or otherwise remedy a public health nuisance and the expense of that action is not reimbursed to the city, the expense will be a lien on the real property where the nuisance occurred. The amendment then provides that such a lien shall have the same priority and be collected in the same manner as unpaid property taxes.⁵ S.L. 2001-448 also extends the nuisance abatement lien so that it applies to any other real property owned by the defaulting party within the city limits or within one mile of the city limits, except for the party’s primary residence. A lien established under this provision, however, is inferior to all prior liens and may only be collected as a money judgment. Also, the lien cannot be extended to other property within the city if the defaulting party can show that the nuisance was wholly attributable to another person’s actions.

Other Important Legislation

State Privacy Act

S.L. 2001-256 (H 998) adds new Article 3F to Chapter 143 of the North Carolina General Statutes. This new article, entitled the State Privacy Act, makes it unlawful as of October 1, 2001, for a state or local government agency to deny any privileges or services to an individual because he or she refuses to disclose his or her social security number. Such denial or refusal of privileges or services is expressly allowed in circumstances where (1) federal law requires the disclosure of

4. Alleghany, Anson, Beaufort, Cabarrus, Camden, Cherokee, Chowan, Currituck, Forsyth, Graham, Granville, Harnett, Haywood, Jackson, Lee, Madison, Montgomery, Pasquotank, Perquimans, Pitt, Stanly, Swain, Vance, Warren, and Yadkin.

5. This expressly alters the terms of G.S. 105-356(a)(1), which provides that the lien for property taxes is “superior to all other liens, assessments, charges, rights, and claims.” Pursuant to the terms of G.S. 160A-193, liens for the abatement of public health nuisances are now of equal dignity with liens for property taxes.

the social security number or (2) the disclosure is being made to a state or local agency and the agency has maintained a system of records at least since January 1, 1975, and a pre-1975 statute or regulation mandated the disclosure of the individual's social security number to verify identity. S.L. 2001-256 further provides that any state or local government agency that requests disclosure of an individual's social security number must inform the individual of whether the disclosure is mandatory or voluntary and of the statutory or other authority under which the agency solicits the disclosure of the number.

Other Local Taxes

Prepared Food and Drink Taxes

S.L. 2001-264 (H 1448) adds new sections to Chapters 153A and 160A of the General Statutes to provide for uniform penalties for local prepared food and drink taxes, also referred to as "meals taxes." New G.S. 153A-154.1 and G.S. 160A-214.1 provide that, effective October 1, 2001, the civil and criminal penalties applicable to state sales and use taxes under Chapter 105 shall also apply to local meals taxes. The new sections apply to every county and city authorized by the General Assembly to levy a local meals tax. The new provisions also give the governing board of the taxing county or city the same authority to waive penalties on local meals taxes that the Secretary of Revenue has to waive the penalties for state sales and use taxes.

Study Commissions

As previously mentioned, S.L. 2001-499 establishes a Property Tax Study Commission, which is charged with the task of investigating and recommending changes to the property tax system. The sixteen-member commission is to include in its study an examination of the various exclusions and exemptions that currently remove property from the tax base and is given specific directives for assessing the present-use value system in particular. The commission is to submit a final written report of findings and recommendations to the 2003 General Assembly but may submit its report as early as the 2002 regular session of the 2001 General Assembly.

Kimberly M. Grantham

Mental Health

This chapter discusses acts of the General Assembly affecting mental health, developmental disabilities, and substance abuse services. Particular attention is given to legislation affecting the public-sector system of services, including area mental health, developmental disabilities, and substance abuse authorities (area authorities), the local governmental entities responsible for providing and contracting for services.

The most important piece of legislation affecting the administration and delivery of services is S.L. 2001-437 (H 381), an Act to Phase In Implementation of Mental Health System Reform at the State and Local Level. With this legislation the General Assembly changes the way area authorities do business, modifies the relationship between area authorities and county government, and creates two new methods for governing and administering services on the local level. In addition, the act directs the Secretary of the Department of Health and Human Services to oversee the consolidation of local programs and to develop a state plan that, among other things, targets services to specific populations.

Perhaps the other legislative enactment with the most significant impact on services is the Appropriations Act. The Department of Health and Human Services' Division of Mental Health, Developmental Disabilities, and Substance Abuse Services lost 89.5 personnel positions and sustained an 8 percent cut—almost \$50 million—in General Fund appropriations for mental health, developmental disabilities, and substance abuse services. At the same time, the legislature established a \$47 million trust fund to be used, among other things, to enhance community-based services and implement the mental health system reform legislation.

Other legislation includes the creation of a central registry for advance health care directives, changes in the requirements for criminal records checks of employment applicants, amendments to the Substance Abuse Professional Certification Act, and a prohibition on the execution of criminal offenders who are mentally retarded.

Mental Health System Reform

The North Carolina General Assembly has taken an increasingly active role in the public system for mental health, developmental disabilities, and substance abuse services. In 1998 and 1999, the General Assembly directed the Office of the State Auditor to coordinate a comprehensive study of the state psychiatric hospitals, area authorities, and other components of

the public system. (Sec. 12.35A of S.L. 1998-212, sec. 11.36 of S.L. 1999-237.) On April 1, 2000, the State Auditor released the “Study of State Psychiatric Hospitals and Area Mental Health Programs,” which reported numerous findings and recommendations related to the governance, financing, organizational structure, and service delivery systems of area authorities and the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. In response the General Assembly established the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services and charged it with developing a Plan for Mental Health System Reform that would provide for systematic, phased-in implementation of changes to the mental health system (S.L. 2000-83). After much study and deliberation by its subcommittees, the Oversight Committee introduced a mental health reform bill intended to address, among other things, such issues as the governance of local service systems, the quality of services, and consumer and family involvement in oversight of the system.

The bill ultimately adopted by the General Assembly, S.L. 2001-437, requires numerous changes to be made to the public system of mental health services. Among its key features, the act requires the Secretary of the Department of Health and Human Services (DHHS) to develop a “catchment area consolidation plan” that reduces the total number of local mental health programs from the current thirty-nine area authorities to twenty programs by January 1, 2007. Further, the secretary must develop and implement a State Plan for Mental Health, Developmental Disabilities, and Substance Abuse Services by December 1, 2001, that, among other things, redesigns the service system to target resources to the most needy in the most integrated community settings possible and moves area authorities away from the role of direct service providers toward the role of “local management entit[ies]” responsible for developing, managing, and monitoring networks of service providers.

By October 1, 2002, all counties must submit a “letter of intent” to DHHS designating one of the following four governmental units through which they will provide services as part of the revamped mental health system: (1) a single-county area authority, (2) a multicounty area authority, (3) a county program, or (4) a multicounty program. The first two methods for administering mental health services, the area authorities, are currently provided for by statute and have been, until now, the exclusive means by which counties could provide these services. The third and fourth entities, both referred to in the new legislation as “county programs,” are new options available to counties for purposes of service administration and delivery. In addition to selecting one of these four models, S.L. 2001-437 requires every county, through an area authority or county program, to develop, review, and approve a “business plan” for the management and delivery of mental health, developmental disabilities, and substance abuse services. The business plan must demonstrate, to the secretary’s satisfaction, the area authority’s or county program’s capacity to operate as a local management entity, capable of providing quality services in an efficient manner in its respective geographic service area. Business plans must be submitted to the secretary by January 1, 2003.

State Plan for Services

S.L. 2001-437 requires state and local government, within available resources,¹ to ensure the availability of “core services” to anyone who needs them. Core services include (1) screening, assessment, and referral; (2) emergency services; (3) service coordination; and (4) at the community level, indirect services such as consultation, prevention, and education. The act further defines *core services* as services “necessary for the basic foundation of any service delivery system” and, in order to improve consumer access to services at the local level, requires the secretary’s State Plan for Mental Health, Developmental Disabilities, and Substance Abuse Services (State Plan) to describe the core services available to all individuals. The act also requires the state, within available resources, to provide funding for services beyond the core services to

1. The act defines *available resources* to mean “State funds appropriated and non-State funds and other resources appropriated, allocated, or otherwise made available for mental health, developmental disabilities, and substance abuse services.”

“targeted populations.”² While the act defines *targeted populations* simply as “those individuals who are given service priority under the State Plan,” the intent of the Oversight Committee that introduced the legislation is that the redesigned system would focus on providing services and support to individuals with the most severe disabilities. In addition to requiring the secretary to develop criteria for identifying targeted populations, the State Plan must provide for or include the following:

- the vision and mission of the state service system;
- the organizational structure of DHHS and its divisions;
- the protection of client rights and consumer involvement in the planning and management of service systems;
- compliance with federal mandates in establishing service priorities;
- service standards;
- implementation of a “uniform portal process,” a set of standardized processes and procedures to ensure that people throughout the state will be able to enter and leave publicly funded services and supports in the same way;
- strategies and schedules for implementing the State Plan that include intersystem collaboration, best practices, technical assistance, outcome-based monitoring, evaluation, and consultation on Medicaid policy with area and county programs, qualified providers, and others designated by the secretary;
- a plan for coordinating the State Plan with the Medicaid State Plan and North Carolina Health Choice;
- a business plan to demonstrate efficient and effective resource management within the service system, including strategies for ensuring accountability for non-Medicaid and Medicaid services; and
- strategies and schedules for implementing a phased-in plan to eliminate disparities in the allocation of state funding among area authorities and county programs by January 1, 2007, including methods for identifying service gaps and ensuring equitable use of state funds to fill those gaps.

In conformity with the act’s other provisions, and to enhance the secretary’s authority over the local service systems, S.L. 2001-437 amends the powers and duties of the secretary to require him or her to:

- Establish a process for the submission, review, and approval or disapproval of business plans submitted by area authorities and county programs.
- Adopt rules specifying the content and format of the business plans.
- Establish comprehensive, cohesive oversight and monitoring procedures and processes that utilize performance measures and report cards to ensure continuous compliance by area authorities, county programs, and all providers of public services with state and federal policy, law, and standards.
- Monitor the compliance of area authorities, county programs, and all providers of public services with their respective business plans; oversee their core administrative functions and fiscal and administrative practices; and monitor outcome measures, consumer satisfaction, client rights complaints, and adherence to best practices.
- Make findings and recommendations based on information collected pursuant to the monitoring and oversight activities and submit them to the applicable area authority board, county program director, board of county commissioners, providers of public services, and Local Consumer Advocacy Offices.
- Adopt rules for the implementation of the uniform portal process.
- Provide counties technical assistance, including conflict resolution services, in the development and implementation of area authority and county program business plans and for other matters, as requested by the county.

2. While the state is responsible for providing funding for services to targeted populations, the act clarifies that both the state and counties must provide matching funds for entitlement program services as required by law.

- Develop accounting methods for calculating county resources expended on public services. These methods should take into account cash and in-kind contributions.
- Adopt rules establishing program evaluation procedures and methods for the management of services.
- Adopt rules regarding federal government requirements for grants-in-aid to area authorities, county programs, or the state.
- Adopt rules for determining “minimally adequate services,” the threshold local programs must meet to avoid enforcement action by the secretary.
- Establish a process for approving area authorities and county programs to provide services directly.
- Sponsor training opportunities in the fields of mental health, developmental disabilities, and substance abuse.
- Enforce and adopt rules for the enforcement of the rights of clients served by state facilities, area authorities, county programs, and providers of public services.
- Prior to any request for approval of the Governor and Council of State to close a state facility, present a plan to the legislature that addresses the impact of the closing.
- Ensure that the State Plan is coordinated with the Medicaid State Plan and North Carolina Health Choice.

Service Provision

Section 1.15 of S.L. 2001-437 limits the authority of county programs and area authorities to provide services directly to clients, requiring these entities to provide services primarily by contracting with other qualified public or private providers. A “qualified public or private provider” is a provider that meets the provider qualifications as defined by rules adopted by the Secretary of DHHS. Only upon approval of the secretary may area authorities and county programs provide services directly. Before approving the direct provision of services, the secretary must take into account the availability of qualified public or private providers as well as the importance of consumer choice, consumer access to services, and fair competition.

In its business plan, each area authority and county program must demonstrate how it will direct the development, maintenance, and oversight of a network of qualified providers of services sufficient to address the needs of the area authority’s or county program’s target populations. The business plan must set forth how gaps in services will be minimized during the transition to the new system, particularly in areas where the current provider network is insufficient.

Local Governance and Administration

In addition to creating two new structures for the governance and administration of local mental health, developmental disabilities, and substance abuse services (the county program and the multicounty program), the mental health reform legislation also modifies the relationship between the area authority and county government in such a way as to increase the county’s role in area authority affairs. To understand these changes, it is necessary first to review the primary features of the present system.

Currently, counties must provide services through an area authority. There are thirty-nine area authorities, fifteen single-county area authorities and twenty-four multicounty area authorities, each serving a designated geographic portion of the state called a “catchment area.” Catchment areas vary widely in geographic size and population. Some cover relatively small populations spread over large rural areas of the state, while others serve large urban populations concentrated in smaller geographic areas. (Because S.L. 2001-437 requires the secretary’s catchment area consolidation plan to reduce the total number of local programs to twenty by January 1, 2007, several of the existing programs will have to merge or otherwise reconfigure their catchment areas in a manner that produces fewer programs with larger catchment areas.)

Each area authority is governed by an area board that exercises specific powers and duties enumerated in the North Carolina General Statutes. These powers and duties include setting service priorities, appointing an area director, establishing a salary plan for area employees,

developing and maintaining an annual budget, preparing fee schedules for services, and entering into contracts necessary for the operation of the area authority.³ The area director appoints and supervises area authority employees, implements area board programs and policies, and administers services in compliance with state law.

Area boards must have between fifteen and twenty-five members, with the size determined by the boards of county commissioners of the counties served by the area authority. In a single-county area, the board of county commissioners appoints the members of the area board. In a multicounty area, each board of county commissioners within the catchment area must appoint one commissioner to the area board; these commissioner members then appoint the remaining area board members. A member may be removed, with or without cause, by the group authorized to make the initial appointment. Area board membership must include statutorily specified representatives, including a person representing the interests of individuals with mental illness, a person representing the interests of individuals with developmental disabilities, a client representing the interests of individuals suffering from alcoholism or other drug abuse, a family member of a client with mental illness, a family member of a client with developmental disabilities, and a family member of a client suffering from alcoholism or other drug abuse.

Like all other local governments and local public authorities, the area authority's budgeting and fiscal management must be administered according to the Local Government Budget and Fiscal Control Act, which prescribes a general system for adopting and administering a budget. Although both single-county and multicounty area authorities are local political subdivisions of the state with the power to exercise independent governing authority on many matters, for purposes of budget and fiscal control a single-county area authority is considered a department of the county in which it is located. Thus, the single-county area authority must present its budget for approval by the county commissioners in the manner requested by the county budget officer, and the area authority's financial operations must follow the budget set by the county commissioners in the county's budget ordinance. By contrast, the multicounty area authority is not a part of the budgeting and accounting system of any county but is responsible for its own budgeting, disbursing, accounting, and financial management, under the direction of a budget officer and a finance officer appointed by the area board.

Changes to the area authority. Currently, the county role in mental health services is limited to a few matters. Specifically, county commissioners appoint and may serve on the area board, appropriate funds for area authority services, possess the authority to purchase and hold title to real property used for providing services, and manage the budget and finances of the single-county area authority. Except for these matters, and depending on how active the commissioner members of the area board are, county government involvement with and attention to mental health services and clients can be minimal. To generate greater county involvement in area authority business, S.L. 2001-437 amends provisions of G.S. Chapter 122C related to personnel and finance. Specifically, the act makes the appointment of the area director subject to the approval of the boards of county commissioners of each county participating in the area authority and requires a county manager and county commissioner to sit on the area director search committee (which must also include a consumer member of the area board and may include a member appointed by the Secretary of DHHS). In matters of budget and fiscal control, the act requires the area authority to submit to the participating board or boards of county commissioners, in a format prescribed by the participating county or counties:

3. In the case of a county with at least 425,000 people, the board of county commissioners may choose a governing body different from the area board. Under G.S. 153A-77, there are two alternatives. The board of county commissioners, by a resolution adopted after a public hearing, may become the governing body for the area authority, in which case the powers and duties of the area board become the responsibility of the board of county commissioners. Mecklenburg County has exercised this option. The second alternative, applicable to counties that operate under the county-manager form of government, allows the board of county commissioners to consolidate the administration and delivery of health services, social services, and area authority services under the control of the county manager and a consolidated human services board. Wake County operates a consolidated human services agency.

- quarterly financial reports;
- quarterly service delivery reports that assess the quality and availability of services within the area authority's catchment area, including the types of services delivered, number of clients served, and services requested but not delivered due to staffing, financial, or other constraints;
- an annual progress report assessing the progress in implementing local service plans, goals, and outcomes; and
- ad hoc reports as requested by the participating boards of commissioners.

In addition to these reports, area authorities must recommend to counties the creation of new services, and multicounty area authorities must provide the area authority's budget and annual audit to the board of county commissioners of each county participating in the area authority. The audit findings must be presented in a format prescribed by the county and read into the minutes of the meeting at which the findings are presented.

Under S.L. 2001-437 boards of county commissioners retain the authority to appoint and remove area board members, and the method of appointment does not change, but the act permits the boards of county commissioners within a multicounty area authority to adopt a resolution setting forth a different method of appointment or allocation of appointment authority. The act also limits the terms of noncommissioner members to two consecutive terms, lowers the minimum number of board members from 15 to 11, and reduces the time permitted for filling vacancies from 120 to 90 days. The requirements for constituent and professional group representation on the area board change only minimally, with one exception: the board of county commissioners may elect to appoint an area board member to fill concurrently more than one category of membership if the member has the qualifications and attributes of all the categories under consideration. Otherwise, when making appointments, counties must take into account sufficient citizen participation, equitable representation of the disability groups, and equitable representation of participating counties. Individuals appointed to the area board must include an individual with financial expertise or a county finance officer, an individual with expertise in management or business, and an individual representing the interests of children. In addition, at least 50 percent of the area board membership must be composed of the following:

- a physician licensed to practice medicine in North Carolina who, when possible, is certified as having completed a residency in psychiatry;
- a clinical professional from the fields of mental health, developmental disabilities, or substance abuse;
- a family member, or an individual from a citizens' organization composed primarily of consumers or their family members, representing the interests of individuals with mental illness;
- a family member, or an individual from a citizens' organization composed primarily of consumers or their family members, representing the interests of individuals in recovery from addiction;
- a family member, or an individual from a citizens' organization composed primarily of consumers or their family members, representing the interests of individuals with developmental disabilities; and
- three openly declared consumers, one with mental illness, one with developmental disabilities, and one in recovery from addiction.

The member of the area board who is the county finance officer or individual with financial expertise must serve on the area board finance committee, and any other finance officers of participating counties in a multicounty area authority may serve on the committee as well.

S.L. 2001-437 grants counties the authority to dissolve, or withdraw from, an area authority upon the determination that the area authority is not operating in the best interests of consumers. No county may withdraw from, however, nor may counties dissolve, an area authority without first demonstrating that continuity of services will be assured and without prior approval of the Secretary of DHHS. Dissolution requires the board of county commissioners of each county constituting the area authority to direct that the area authority be dissolved. Prior to dissolution, the area authority must hold a public hearing with notice published in every participating county at least ten days before the hearing. For a county to withdraw from an area authority, the board of commissioners of the county seeking withdrawal must hold a public hearing with at least ten days

notice. Dissolution or withdrawal can be effective only at the end of the fiscal year in which the action to dissolve or withdraw is taken.

Any budgetary surplus available to an area authority at the time of its dissolution must be distributed to the counties comprising the area authority on the same pro rata basis that the counties appropriated and contributed funds to the area authority's budget during the current fiscal year. The same method of distribution applies when one or more counties decide to withdraw from an area authority. Distribution must be based upon an audit of the area authority's financial records performed in accordance with G.S. 159-34 and conducted by a certified public accountant or an accountant certified by the Local Government Commission to conduct the audit. Funds distributed to a county as a result of withdrawal or dissolution must be placed in the fund balance of the county program or area authority subsequently established or joined by the county. Any liabilities at the time of the dissolution of an area authority must be paid from unobligated surplus funds available to the authority. If these funds are insufficient to satisfy the total indebtedness of the area authority, then the remaining unsatisfied indebtedness will be apportioned to counties on the same pro rata basis that the counties appropriated and contributed funds to the area authority's budget for the current fiscal year.

The county program. In addition to the single-county and multicounty area authority, S.L. 2001-437 permits counties to operate a "county program" for mental health, developmental disabilities, and substance abuse services. Before establishing a county program, the board(s) of county commissioners for the county or counties planning to operate the program must hold a public hearing with notice published at least ten days before the hearing.

Like the area authority, the county program model has both a single-county and a multicounty option. A single-county program is considered a department of the county for all purposes, with a county program director appointed by the county manager. Unlike the single-county area authority, the single-county program is governed by the board of county commissioners, but S.L. 2001-437 requires the board of county commissioners to appoint an advisory committee whose membership must represent many of the same constituent and professional groups represented on the area authority board.

Counties may operate a multicounty program by entering into an interlocal agreement with one or more other counties pursuant to Article 20 of G.S. Chapter 160A. Any interlocal agreement must:

- provide for the adoption and administration of the program budget in accordance with G.S. Chapter 159;
- provide for the appointment of a program director to carry out relevant provisions of G.S. Chapter 122C and duties and responsibilities delegated by the county;
- be designed to serve a targeted minimum population of 200,000 or a targeted minimum number of five counties served by the program;
- comply with the provisions of G.S. Chapter 122C and rules of the Secretary of DHHS and the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services;
- provide for written notification to the Secretary of DHHS prior to its termination;
- provide for the appointment of an advisory committee whose membership conforms to the same requirements for single-county program advisory committees;
- designate a county manager to whom the advisory committee must report; and
- designate the entities authorized to appoint the advisory committee.

Employees appointed by the single-county program director are employees of the county (whereas employees under the direct supervision of an area authority director are employees of the area director). In a multicounty program, employment of county program staff will be as agreed upon in the interlocal agreement.

Some legislative requirements apply equally to county programs and area authorities. Both area authority directors and county program directors must have a master's degree, management experience, and other related experience, unless these qualifications are specifically waived by the Secretary of DHHS. Similarly, county programs must submit to the participating board or boards of county commissioners the same reports (quarterly financial and service delivery reports and an annual progress report) that area authorities are now required to submit.

Implementation of Local System Reform

S.L. 2001-437 provides specific mechanisms for implementing the reform legislation. As discussed above, every county, through an area authority or county program, must develop, review, and approve a business plan for the management and delivery of mental health, developmental disabilities, and substance abuse services. The business plan must include detailed information on how the area authority or county program will meet state standards and abide by the laws and rules for ensuring the quality of services and on the outcome measures to be used for evaluating program effectiveness. The plan must describe how the following core administrative functions will be carried out:

- service planning that, among other things, targets resources to individuals with the most severe disabilities in accordance with the State Plan;
- provider network development;
- service management, including utilization management, case management, and quality management;
- service monitoring and oversight;
- evaluation based on statewide outcome standards and participation in independent evaluation studies;
- financial management and accountability;
- collaboration with other local service agencies, other area authorities and county programs, and the state; and
- facilitation of access to services.

In addition, S.L. 2001-437 requires the business plan to describe :

- how reasonable administrative costs calculated according to state criteria will be achieved;
- how costs or savings anticipated from consolidation will be handled;
- how reinvestment of savings toward services might be achieved;
- how compliance with the secretary's catchment area consolidation plan will be achieved;
- the population base of the catchment area to be served;
- a method to be used to calculate county resources that will reflect cash and in-kind contributions;
- how financial and services accountability and oversight in accordance with the State Plan will be achieved;
- the composition, appointment, and selection process for area boards;
- how local funds will be used for the alteration, improvement, or rehabilitation of real property; and
- other matters as determined by the secretary.

Once the business plan is approved by the board or boards of county commissioners who intend to participate in the area authority or county program, and on or before January 1, 2003, the area authority or county program must submit the plan to the Secretary of DHHS for review and certification. Counties participating in a multicounty area authority or a multicounty program (an interlocal agreement) must jointly submit one plan.

The secretary must review the business plan within thirty days of its receipt. If the plan meets all of the requirements of state law and the standards adopted by the secretary, then the secretary must certify the area authority or county program as a single-county area authority, a multicounty area authority, a single-county program, or a multicounty program. If the secretary determines that changes to the plan are necessary, then he or she must notify the submitting county program or area authority and the applicable participating boards of county commissioners of the changes that need to be made before the proposed program can be certified. The submitting county program or area authority has thirty days from receipt of the secretary's notice to make the necessary changes and resubmit the amended plan to the secretary for review. The secretary must provide any assistance necessary to resolve outstanding issues, and amendments to the business plan must be approved by the participating board or boards of commissioners. Implementation of the business plan must begin within thirty days of certification, and the plan must remain in effect for at least three fiscal years. Each year, in accordance with procedures established by the secretary, each area authority and county program must enter into a memorandum of agreement with the secretary for

the purpose of ensuring that state funds are used in accordance with the priorities expressed in the business plan.

The secretary must complete certification of one-third of the area authorities and county programs by July 1, 2003, another third by January 1, 2004, and the remaining third by July 1, 2004.

Consumer Advocacy Program

As an additional component of reform, Section 2 of S.L. 2001-437 establishes the Mental Health, Developmental Disabilities, and Substance Abuse Consumer Advocacy Program to provide consumers, their families, and providers with the information and advocacy needed to locate services, resolve complaints, address common concerns, and promote community involvement. (*Consumer* is defined to mean an individual who is a client or potential client of public services provided by an area or state facility.) This section is effective July 1, 2002, only if the 2001 General Assembly appropriates funds for that purpose during the 2002 regular session.

The Mental Health, Developmental Disabilities, and Substance Abuse Consumer Advocacy Program is to be established by the Secretary of DHHS, who will also appoint a state consumer advocate as its head. The state consumer advocate, in turn, must establish a Local Consumer Advocacy Program in locations designated by the secretary and appoint a local consumer advocate to administer each of the local advocacy programs. The state consumer advocate must also:

- train and certify local consumer advocates,
- establish procedures for processing consumer complaints,
- coordinate these procedures with local human rights committees and the state protection and advocacy agency,
- establish procedures for advocate access to client records,
- monitor the development and implementation of laws and policies relating to consumers,
- monitor data relating to complaints or concerns about services, and
- identify significant systemic problems and opportunities for improvement and advise the secretary accordingly.

Further, the state advocate must submit an annual report to the General Assembly on the types of problems experienced and complaints reported and include recommendations to resolve identified issues and improve the administration of services.

Section 2 of S.L. 2001-437 authorizes the state advocate and local advocates to receive and resolve consumer complaints, and if complaints cannot be resolved informally, to refer them to the appropriate licensing agency. The local consumer advocate, under the supervision of the state advocacy office, must also:

- assist consumers and their families in obtaining services by providing information, referral, and advocacy;
- assist consumers and their families in understanding their rights in, and remedies available from, the public service system;
- serve as a liaison between consumers and facility staff;
- promote consumer and citizen involvement in addressing issues relating to the public service system;
- visit state, area authority, and county program facilities to review and evaluate the quality of care provided to consumers and then submit these findings to the state consumer advocate;
- report regularly to area authorities, county programs, and boards of county commissioners concerning his or her activities and findings;
- provide training and technical assistance to counties, area boards, and providers on how to respond to consumers and evaluate quality of care and availability and access to services;
- coordinate his or her activities with local human rights committees;
- provide information to the public on mental health, developmental disabilities, and substance abuse issues; and
- perform any other related duties as directed by the state consumer advocate.

Finally, the Secretary of DHHS must establish criteria and operational procedures for the Consumer Advocacy Program and report these to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services by March 1, 2002.

Appropriations

General Fund Appropriations

The Current Operations and Capital Improvements Appropriations Act of 2001, S.L. 2001-424 (S 1005), appropriates from the General Fund to the Department of Health and Human Services' Division of Mental Health, Developmental Disabilities, and Substance Abuse Services (MH/DD/SAS) \$581,394,627 for fiscal year 2001–2002 and \$581,068,627 for fiscal year 2002–2003. Appropriations for the past five fiscal years were \$630.4 million (2000–2001), \$614.3 million (1999–2000), \$564.3 million (1998–1999), \$528.5 million (1997–1998), and \$465.6 million (1996–1997).

Cuts in funding, all recurring, include:

- \$1.5 million to area authorities;
- \$2.9 million to the five state-operated mental retardation centers in accordance with the state's plan to downsize those facilities;
- \$1,326,036 in personnel costs by eliminating 89.5 positions;
- \$571,526 by eliminating the planned neurobehavioral treatment unit for persons with traumatic brain injury at Black Mountain Center;
- \$1,079,242 by transferring responsibility for the Cherry Hospital laundry operations to the Department of Correction Enterprise Industries;
- \$420,982 for the medical/surgical unit at Dorothea Dix Hospital; and
- \$600,055 through the elimination of state appropriations to the Oakview Program, an apartment program for adolescents.

The General Assembly continued the trend of reducing appropriations to the state-operated residential treatment programs for children and adolescents while expanding funding for residential treatment alternatives for children at risk of institutionalization or other out-of-home placement. Specifically, the legislature reduced appropriations for child and adolescent beds in the state psychiatric hospitals and for adolescent beds in the state's Eastern Adolescent Treatment Program in Wilson by a combined \$1,809,118. Increased funding for children's services includes \$4,353,000 (recurring) for direct services to seriously disturbed children and \$326,000 (nonrecurring) for residential services to autistic children. Other expansion funding includes \$1 million (recurring) for housing support and placements for the mentally ill and \$3.5 million in recurring funds to area authorities to be allocated as follows:

- \$200,000 for assertive community treatment teams for non-Medicaid clients;
- \$300,000 for family support activities;
- \$1 million for substance abuse services to special populations; and
- \$2 million to expand detoxification, residential, and outpatient services.

The state budget includes a \$15 million appropriation to a reserve to implement the Health Insurance Portability and Accountability Act (HIPAA), a federal law that—among other things—requires health plans, health information clearinghouses, and health care providers to standardize their electronic transactions of health information and to protect the privacy and security of the information. S.L. 2001-424 establishes the reserve in the Office of State Budget and Management and directs that office, in consultation with the state Chief Information Officer and the Secretary of DHHS, to develop a strategic plan to implement HIPAA within the state's agencies.

Mental Health Trust Fund

Section 21.58 of S.L. 2001-424 amends G.S. Chapter 143 to establish the Trust Fund for Mental Health, Developmental Disabilities, and Substance Abuse Services and Bridge Funding

Needs. The General Assembly appropriates \$47,525,675 (nonrecurring) to the trust fund, an interest-bearing, nonreverting fund in the Office of State Management and Budget. The State Treasurer will be the custodian of the trust fund, and investment earnings credited to the assets of the trust fund must become part of the fund. Moneys in the trust fund must be used solely to meet the service needs of the state and to supplement, not supplant, existing state and local funding. Specifically, the trust fund must be used only to:

- Provide start-up funds and operating support for programs and services that provide more appropriate and cost-effective community treatment alternatives for individuals currently residing in state-operated institutions.
- Facilitate the state's compliance with the United States Supreme Court decision in *Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). (In *Olmstead*, the Court held that the unnecessary placement of individuals with mental disabilities in institutions may constitute discrimination based on disability, in violation of the Americans with Disabilities Act. As a result of the ruling, states risk litigation if they do not develop a comprehensive plan for moving qualified persons with mental disabilities from institutions to less restrictive settings at a reasonable pace.) Money in the Mental Health, Developmental Disabilities, and Substance Abuse Services Reserve for System Reform and *Olmstead*, established last year, is to be transferred to the trust fund.
- Expand and enhance treatment and prevention services so that waiting lists can be eliminated and appropriate and safe services can be provided to clients.
- Provide bridge funding to maintain appropriate client services during transitional periods resulting from facility closings and departmental restructuring.
- Construct, repair, or renovate state mental health, developmental disabilities, and substance abuse facilities.

After consultation with advocacy groups and affected state and local agencies and programs, DHHS must develop a plan for using the moneys from the trust fund. This plan must be consistent with the State Plan for Mental Health, Developmental Disabilities, and Substance Abuse Services. Moneys in the trust fund may be used to establish or expand community-based services only if sufficient recurring funds for this purpose can be identified within DHHS from funds currently budgeted for mental health, developmental disabilities, and substance abuse services.

Funds may not be transferred from the trust fund until the Secretary of DHHS has consulted with the Joint Legislative Commission on Governmental Operations, the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services, and the chairs of the Senate Appropriations Committee on Health and Human Services and the House of Representatives Appropriations Subcommittee on Health and Human Services.

Federal Block Grant Allocations

Section 5.1 of S.L. 2001-424 allocates federal block grant funds for fiscal year 2001–2002. From the Mental Health Services Block Grant, the General Assembly allocated \$5,192,826 (compared to \$4,301,361 in 2000–2001 and \$3,895,179 in 1999–2000) for community-based services provided in accordance with the state's comprehensive plan for services for persons with severe and persistent mental illness. From the same block grant, the legislature appropriated \$2,378,540 for community-based services to children (\$1,898,520 was allocated in 2000–2001) and \$1.5 million for the Child Residential Treatment Services Program, the same amount appropriated in 2000–2001, the first year of the program.

Allocations from the Substance Abuse Prevention and Treatment Block Grant include \$6,839,190 for services for children and adolescents (compared to \$7,216,992 in 2000–2001) and \$14,501,711 (\$542,130 less than in 2000–2001) for alcohol and drug abuse services provided by community-based and state-operated treatment centers. (The latter includes an unspecified amount for tuberculosis services.) To the Child Residential Treatment Services Program, the General Assembly allocates \$700,000 from this block grant, \$300,000 less than the amount allocated in 2000–2001.

From the Social Services Block Grant, which funds several DHHS divisions, the General Assembly allocates \$3,234,601 to MH/DD/SAS and another \$5 million to individuals who are on

the state's waiting list for developmental disability services. These allocations mirror the allocations made in 2000–2001.

From the Temporary Assistance to Needy Families (TANF) Block Grant, MH/DD/SAS receives three allocations: \$3.5 million for substance abuse screening, diagnosis, treatment, and testing of Work First participants; \$1,182,280 for substance abuse services for juveniles; and \$4.5 million to provide regional residential substance abuse treatment and services for TANF women with children.

State Government

Section 21.14 of S.L. 2001-424 directs DHHS to establish an Office of Policy and Planning within the Office of the Secretary to:

- coordinate the development of departmental policies, plans, and rules, in consultation with the divisions of the department;
- create a departmental process for the development and implementation of new policies, plans, and rules;
- develop a departmental process for the review of existing policies, plans, and rules to ensure that they are relevant;
- coordinate and review all departmental policies before dissemination to ensure that they are well coordinated within and across all programs;
- implement ongoing strategic planning that integrates budget, personnel, and resources with the mission and operational goals of the department; and
- review, disseminate, monitor, and evaluate best practice models.

The Director of the Office of Policy and Planning will have the authority to require divisions, offices, and programs within DHHS to conduct periodic reviews of policies, plans, and rules and to recommend to the secretary the repeal, modification, or amendment of those policies, plans, and rules.

Several other special provisions of the budget act require DHHS to consolidate, centralize, or coordinate activities or programs. These provisions:

- Require DHHS to consolidate its regional, district, field, and satellite offices by June 30, 2002, and to report to the General Assembly the anticipated cost savings and efficiencies in service delivery resulting from the consolidation.
- Require DHHS to implement a centralized contracts system including policies and procedures for the development and execution of contracts.
- Establish the Intervention Services Unit within the Office of the Secretary of DHHS. This unit will be responsible for the planning, research, monitoring, and data analysis necessary to enhance coordination among programs and activities related to intervention services. Services to be coordinated include MH/DD/SA services, social services, public health services, preschool education services, and Smart Start services.

S.L. 2001-424 also authorizes DHHS to establish special time-limited positions in the Division of Information Research Management for an information technology project to prepare for and implement the privacy provisions of HIPAA. These positions expire June 30, 2003.

Licensed Professionals

Certified Substance Abuse Professionals

S.L. 2001-370 (S 1062) amends the Substance Abuse Professional Certification Act to add “registrant” to the list of professionals regulated by the North Carolina Substance Abuse Professional Certification Board. *Registrant* is defined, at G.S. 90-113.31(6a), as a “person who has initiated a certification process to become a certified substance abuse counselor or a certified clinical addictions specialist pursuant to this Article and is authorized to provide DWI assessments

pursuant to G.S. 122C-142.1.” Effective April 1, 2002, the licensing board must designate as a registrant an applicant who (1) completes a registration application form and pays the required fee; (2) provides documentation that he or she has received a high school diploma, or the equivalent, and evidence of any baccalaureate or advanced degree he or she has received; (3) provides documentation of three hours of educational training in ethics; (4) signs a form attesting to his or her commitment to adhere to the ethical standards adopted by the board; and (5) signs a supervision contract provided by the board that documents the proposed supervision procedures to be implemented by an approved supervisor.

Registrant status may be maintained for a period of up to five years while the registrant is in the process of completing certification requirements. If at the end of the five-year period a registrant has not obtained certification, he or she may apply to renew the registration for an additional five-year period.

The act also designates as follows the persons qualified to supervise individuals applying for registration or certification as a substance abuse professional:

- A certified clinical supervisor must supervise a clinical supervisor intern.
- A certified clinical supervisor or a clinical supervisor intern must supervise a residential facility director applicant, a clinical addictions specialist applicant, or a substance abuse counselor applicant.
- A certified clinical supervisor, a clinical supervisor intern, a certified clinical addictions specialist, or a certified substance abuse counselor must supervise a registrant who provides DWI assessments.
- A certified prevention consultant with a minimum of three years of professional experience, a certified clinical supervisor, or a clinical supervisor intern must supervise a registrant applying for certification as a prevention consultant.

The foregoing supervision requirements do not apply to persons applying for certification as a certified clinical addictions specialist under G.S. 90-113.41A.

S.L. 2001-370 amends the disciplinary provisions of the certification act to provide that a Class A-E felony conviction must result in immediate suspension of certification or registration for a minimum of one year. The act also sets the maximum fees that may be assessed for applications for, and renewals of, registration and raises the maximum fees that may be charged for certification and renewals of certification.

G.S. 90-113.41B currently provides that a treatment recommendation for persons convicted of driving while impaired must be reviewed and signed by a certified substance abuse counselor, a physician certified by the American Society of Addiction Medicine, or a certified alcoholism, drug abuse, or substance abuse counselor as defined by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services. The act amends this statute to require that the signature on the recommendation be the personal signature of the individual authorized to review the recommendation and not the signature of his or her agent. Further, the signature must reflect that the authorized individual has personally reviewed and approved the recommended treatment.

Licensed Professional Counselors

S.L. 2001-297 (H 593) amends Articles 50 and 65 of G.S. Chapter 58 to provide for direct payment to licensed professional counselors for services covered by health insurance policies and plans. Any person licensed by the North Carolina Board of Licensed Professional Counselors and providing services within the scope of practice of a duly licensed professional counselor is covered by the act.

Physicians

In S.L. 2001-27 (S 118), the legislature amended G.S. 90-18 to clarify that any person who uses the Internet, a toll-free telephone number, or other electronic means to prescribe medication or otherwise practice medicine in North Carolina must be licensed by the North Carolina Medical Board. The law provides an exception for physicians in other states or foreign countries who are contacted by a regular patient for treatment while the patient is temporarily in North Carolina.

Advance Health Care Directive Registry

S.L. 2001-455 (H 1362) amends G.S. Chapter 130A, effective January 1, 2002, to require the Secretary of State to establish and maintain a statewide, on-line, central registry for advance health care directives. The act authorizes persons who execute an advance directive to submit the directive, and any subsequent revocation of the directive, to the secretary for filing in the registry. The failure to register an advance directive with the secretary does not affect the directive's validity, and the failure to notify the secretary of the revocation of a document filed with the registry will not affect the validity of a revocation that meets the statutory requirements for revocation. Documents that may be submitted to the registry include:

- an advance instruction for mental health treatment executed pursuant to Article 3 of G.S. Chapter 122C,
- a health care power of attorney executed pursuant to Article 3 of G.S. Chapter 32A,
- a declaration of a desire for a natural death executed pursuant to Article 23 of G.S. Chapter 90, and
- a declaration of an anatomical gift executed pursuant to Article 16 of G.S. Chapter 130A.

S.L. 2001-455 amends the laws regarding these documents to permit physicians and health care providers to rely upon a copy of a document obtained from the registry to the same extent that they may rely upon the original document.

Documents submitted for registration must be notarized and accompanied by a return address and any required fee. Upon receiving the document the secretary must create a digital reproduction of the document for entry into the registry database, assign a unique file number and password to the document, return the original document to the person who submitted it, and give him or her a wallet-size card with the electronic document's file number and password printed thereon. Upon receiving a revocation of a document that is filed with the registry and that document's file number and password, the secretary must delete the document from the registry database. The fee for filing a document is \$10, except no fee may be charged for filing a revocation.

The secretary is not required to review a document to ensure that it complies with the statutory requirements applicable to it. Entry of a document into the registry does not:

- affect the validity of the document in whole or in part;
- relate to the accuracy or information in the document; or
- create presumption regarding the validity of the document concerning either the accuracy of the information contained in the document or whether the statutory requirements for the document have been met.

Further, the secretary, any agent or person employed by the secretary, and the State of North Carolina are immune from liability for any claims arising out of the administration or operation of the registry, excluding claims for acts of gross negligence, willful misconduct, or intentional wrongdoing.

The registry will be accessible only over the Internet, and a document in the registry must only be accessible if the person attempting to obtain access enters both the file number and password for the document. Documents filed in the registry, file numbers, passwords, and any other information maintained by the secretary pursuant to operating the registry are exempt from the public records law.

Criminal Record Checks

DHHS

Section 21.2 of S.L. 2001-424 requires DHHS to centralize all activities throughout the department relating to the coordination and processing of criminal record checks required by law. The centralization must include the transfer of positions and corresponding funds. The department must report its progress in this effort to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division by January 1, 2002.

Area Authorities

Two bills were enacted that affect criminal record checks conducted on behalf of area authorities. G.S. 122C-80, enacted in 2000, requires area authorities and their contract agencies to condition an offer of employment, if the position applied for does not require the applicant to have an occupational license, on the applicant's consent to a state and national criminal history check when the applicant has been a North Carolina resident for less than five years. When the applicant has been a state resident for five or more years, only a state criminal history check is required. Within five business days of making a conditional offer of employment, the agency must submit to the Department of Justice (DOJ) a request for a criminal history record check with a form signed by the job applicant that demonstrates the applicant's consent to the check and to the use of fingerprints where applicable. G.S. 114-19.10 authorizes DOJ to provide criminal histories from both the state and national repositories of criminal histories and outlines the procedures for agencies to use when requesting a criminal history check.

S.L. 2001-155 (H 857) amends G.S. 122C-80 to permit an area authority to submit its request for a criminal history record check to a county rather than DOJ. A county that has adopted an appropriate local ordinance and has access to the Division of Criminal Information data bank may conduct a state criminal history record check on behalf of an area authority without the area authority having to submit a request to DOJ. In this case the county must commence the record check within five business days of the conditional offer of employment by the area authority.

The second enactment results from a change in federal law. The federal budget act of 1999 (Pub. L. No. 105-277) provided in 28 U.S.C. § 534 that a nursing facility or home health care agency could request the U.S. Attorney General to conduct a criminal history check of job applicants if the job involved direct patient care. In light of this provision, S.L. 2001-465 (S 826) suspends until January 1, 2003, those North Carolina provisions purportedly authorizing greater access to national criminal history information. Effective November 16, 2001, the act provides that, notwithstanding G.S. 131E-265, nursing homes and home care agencies are not required to conduct national criminal history checks for jobs other than those involving direct patient care; and notwithstanding G.S. 131E-265(a1), 131D-40, and 122C-80, contract agencies of nursing homes and home care agencies, adult care homes and their contract agencies, and area mental health authorities are not required to conduct national criminal history checks. The act also directs the Legislative Research Commission to study how federal law affects access to national criminal history information for these entities.

Health Insurance and Related Laws

Patients' Bill of Rights

This session legislation denominated a "Patients' Bill of Rights" by its supporters was approved and made significant changes in the laws affecting health insurers and managed care plans. Among other things, S.L. 2001-446 (S 199) establishes that managed care entities may be held liable for harm to insureds proximately caused by the entity's failure to exercise ordinary care when making the determination not to pay for a health care service because it does not meet the

health plan's requirements for medical necessity, appropriateness, health care setting, or level of care or effectiveness. The legislation also requires insurers to establish a binding procedure for independent review of coverage decisions that are adverse to insured persons and creates a new program to assist patients in exercising their rights under the law. For a detailed discussion of the Patients' Bill of Rights and other laws affecting the obligations of health insurers, see Chapter 11, "Health."

Health Choice (State Children's Health Insurance Program)

North Carolina Health Choice is the state's program that provides health insurance for children who would otherwise be uninsured because their family incomes are too high to qualify the children for Medicaid but too low for the family to afford private insurance. Early in 2001, enrollment in Health Choice was frozen because of an anticipated shortfall in funding for the program. The budget act expands the funding for Health Choice by \$8 million in fiscal year 2001–2002 and \$12.5 million in fiscal year 2002–2003. In addition, a special provision in the budget law eliminates the waiting period for the Health Choice program. Previous law required that a child be uninsured for at least sixty days before applying for Health Choice.

Medicaid

Medicaid is a state and federally funded entitlement program that provides payment for health care services for low-income people. It is an extremely significant component of the state budget, accounting for more than 10 percent of total state expenditures each fiscal year. Further, it accounts for more than one-third of all area authority revenues.

In this session's budget act, the legislature appropriates an additional \$460 million for the Medicaid program for fiscal year 2001–2002—a 30 percent increase over the 2000–2001 appropriation. The increase is not enough, however, to cover the program's anticipated costs, so the legislature also makes several cuts to the Medicaid budget. It reduces provider reimbursement rates and eliminates inflationary increases in those rates. It reduces anticipated expenses for prescription drugs by increasing co-payments, lowering dispensing fees, and requiring the use of generic drugs in most instances. It also requires the Division of Medical Assistance, the state agency that administers Medicaid, to contain costs by reducing the rate of growth of the Medicaid program—but not the rate of growth in the number of persons eligible for the program—to 8 percent or less of the total expenditures in fiscal year 2001–2002. These and other budget provisions affecting Medicaid, including provisions expanding Medicaid funding for certain services, are discussed in Chapter 11, "Health."

Group Homes for Developmentally Disabled Adults

Pursuant to S.L. 2001-209 (H 387), group homes for developmentally disabled adults licensed as adult care homes under Article 1 of G.S. Chapter 131D are now subject to licensure as supervised living facilities for developmentally disabled adults under Article 2 of G.S. 122C. A supervised living facility will be subject to adverse action on a license under G.S. 122C-24 and, at its option, must comply with either the categories of existing rules applicable to group homes for developmentally disabled adults adopted under Article 1 of G.S. Chapter 131D or the categories of existing rules applicable to residential facilities defined at G.S. 122C-3(14)e.

Several other enactments affect adult care homes and concern such matters as reporting requirements, patient notices, the application of the state's certificate of need law, and studies to be conducted by DHHS. These are discussed in Chapter 11, "Health."

No Death Penalty for the Mentally Retarded

New G.S. 15A-2005, enacted by S.L. 2001-346 (S 173), provides that “no defendant who is mentally retarded shall be sentenced to death.” The law places the burden of proving mental retardation on the defendant. He or she must show (1) significantly subaverage general intellectual functioning, defined as an IQ of 70 or less; (2) significant limitations in adaptive functioning in two or more adaptive skill areas, such as communication and self-care; and (3) the existence of both concurrently before the age of eighteen.

Bills prohibiting the execution of persons with mental retardation have come before the General Assembly previously and failed. The act’s passage this session was no doubt aided by the U.S. Supreme Court’s decision to review *McCarver v. North Carolina*, a case raising the constitutionality of executing mentally retarded people. After the act passed, the Court vacated its decision to review the case, but its concern about this issue remains. The same day the Court decided not to hear *McCarver*, it granted review of a Virginia case presenting the constitutionality of executing mentally retarded people. *See Atkins v. Virginia*, 122 S. Ct. 24 (2001).

For a detailed analysis of S.L. 2001-346, see Chapter 6 “Criminal Law and Procedure.”

Other Laws

Database of Children Receiving Psychotropic Medications

Concerned with the increased use of psychotropic medications in the treatment of children, the General Assembly directed DHHS and the Department of Juvenile Justice and Delinquency Prevention to review the feasibility of establishing and maintaining a statewide database containing information on the prescription and administration of psychotropic medications to children who receive state services while residing in state facilities administered by either department. S.L. 2001-124 (S 542) requires the departments, in conducting the review, to consider how the database can be maintained in a manner that protects medical records and other privacy interests as required by state and federal law. By January 1, 2002, the two departments must report their findings and recommendations, including the cost of establishing and maintaining the database in a manner that provides data for analyzing prescription medication usage by and effects on children, to the Joint Legislative Health Care Oversight Committee and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

Cherry Hospital and Dorothea Dix Hospital Security Force

S.L. 2001-125 (S 370) authorizes the Secretary of DHHS to establish security personnel at both Dorothea Dix Hospital and Cherry Hospital to enforce North Carolina laws and DHHS regulations on hospital territory. When acting within hospital territory, these special police officers have the same powers vested in sheriffs. In addition, upon notice of an escape or breach of conditional release from the hospital, these officers may take a patient into custody outside of hospital territory but only within the county in which the hospital is located. In addition, they may arrest a person outside hospital territory but within the county in which the hospital is located when (1) the person has committed an offense at the hospital for which the officer could have arrested the person and (2) the arrest is made during the person’s immediate and continuous flight from the hospital.

Public Official Conflict of Interest

S.L. 2001-409 (H 115) clarifies and updates several criminal statutes prohibiting public officials from benefiting from contracts with public agencies. The act repeals G.S. 14-236 and 14-237 and incorporates their essential provisions into revised G.S. 14-234. For a detailed discussion of these provisions, see Chapter 21, “Purchasing and Contracting.” A violation of the conflict-of-

interest provisions remains a Class 1 misdemeanor. The principal parts of the act apply to actions taken and offenses committed on or after July 1, 2002.

Domestic Violence Privilege

S.L. 2001-277 (H 643) creates a new evidentiary privilege for communications made to domestic violence shelter and rape crisis center personnel, effective for communications made on or after December 1, 2001. This act, described more fully in Chapter 6, "Criminal Law and Procedure," appears to have been adopted in response to efforts by those accused of domestic abuse to obtain information provided to such centers by their alleged victims.

Marital Counseling Privilege

G.S. 8-53.6 prevents physicians, licensed psychologists, and marital and family therapists from disclosing marital counseling information in alimony and divorce proceedings. S.L. 2001-152 (S 739) extends this coverage to licensed psychological associates and licensed clinical social workers.

Inpatient Substance Abuse Facilities Serving Prison Inmates

Section 25.19 of the budget act exempts from licensure under G.S. Chapter 122C, and from certificate-of-need requirements under G.S. Chapter 131E, inpatient chemical dependency or substance abuse facilities that provide services exclusively to inmates of the Department of Correction. If a facility serves both inmates and members of the general public, the portion of the facility that serves inmates is exempt from licensure. If a facility is built without a certificate of need, it may not admit anyone other than inmates until a certificate of need is obtained.

Mark F. Botts

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Motor Vehicles

During the 2001 session, the General Assembly considered more than seventy-five bills dealing with motor vehicles or highway safety. Less than one-third of these were enacted into law, and many of those enacted were of a technical nature of interest primarily to automobile dealers or to government officials who regulate the various aspects of the automotive and trucking industry. This chapter summarizes the motor vehicle legislation that is of general public interest or historical significance.

The most significant motor vehicle legislation this session did *not* deal with impaired driving offenses. In fact, this year's most significant legislation was not even contained in a statewide act, as is the case with almost all motor vehicle law. Instead, it added several additional jurisdictions to local legislation enacted several years ago that authorizes red light enforcement by installing cameras at intersections. Other acts of interest include an increase in the fees for annual vehicle inspections and a bicycle safety act requiring helmets for riders and safety seats for very small passengers. Finally, increasing public concern over persons presenting false identification prompted the General Assembly to amend G.S. 20-7 concerning residency requirements for obtaining a North Carolina driver's license.

Cameras at Intersections

Many motor vehicle accidents take place at intersections, and a substantial number of these happen because one of the vehicles ran through a red light in violation of G.S. 20-158.¹ In 1997 the General Assembly enacted new G.S. 160A-300.1 authorizing Charlotte to install "a traffic control photographic system" and to enforce the provisions of G.S. 20-158 by means of this system (S.L. 1997-216). An ordinance authorized by that act must provide that

1. The owner of the vehicle is responsible for the violation unless he or she can furnish evidence that the vehicle, at the time of the violation, was in the care, custody, or control of another person.

1. For a full treatment of this subject, see Randy J. Harrison, "Smile Red Light Runners . . . You're on Automated Camera," *Popular Government* 66 (Winter 2001): 40.

2. Any violation detected by the traffic control photographic system will be a noncriminal offense for which a civil penalty of \$50 will be assessed. Also, no driver's license points may be assigned to the owner or driver of the vehicle.
3. The owner of the vehicle will be issued a citation that clearly states the manner in which the violation may be challenged.
4. The municipality must institute a nonjudicial administrative hearing procedure to review objections to citations or resulting penalties.

The Charlotte initiative was perceived by many to be a success; and over the next few years several additional cities were added to the provisions of G.S. 160A-300.1, including Fayetteville, Greensboro, High Point, Rocky Mount, Wilmington, Greenville, Lumberton, Chapel Hill, Cornelius, Huntersville, Matthews, and Pineville.

The 2001 General Assembly amended G.S. 160A-300.1 by the addition of a provision mandating that "the duration of the yellow light change interval . . . where traffic photographic systems are in use shall be no less than the yellow light change interval . . . specified in the Design Manual developed by the . . . [N.C.] Department of Transportation." This addition was probably occasioned by complaints from some motorists that the yellow light changed to red more quickly at intersections with photographic systems in place. This act also added additional jurisdictions to the coverage of G.S. 160A-300.1, including Albemarle, Durham, Nags Head, and all municipalities within Union County [S.L. 2001-286 (S 243)].

S.L. 2001-286 also adds new G.S. 160A-300.2 and -300.3, which apply only to Wake County municipalities and the City of Concord, respectively. The new legislation authorizes these municipalities to enforce G.S. 20-158 by means of a traffic photographic system. The validity of this type of legislation is being tested in the courts of California and elsewhere; as of this time, the eventual outcome is uncertain. S.L. 2001-286 became effective July 13, 2001, but its implementation in any jurisdiction requires the adoption of a municipal ordinance.

Impaired Driving Offenses

The only impaired driving legislation enacted in 2001 [S.L. 2001-362 (H 1217)] deals with the vehicle forfeiture provisions added in the late 1990s. Specifically, S.L. 2001-362 addresses three issues that have arisen in the administration of those provisions: late notice to persons holding liens on seized vehicles, the complicated procedure for determining the status of seized vehicles owned by persons alleging that they are innocent owners, and judges' waiving of costs of towing and storage fees. The vehicle forfeiture provisions were added in 1997 to deal with the safety issues posed by persons charged with impaired driving offenses who, at the time of the offense, were driving under licenses that had been revoked due to previous impaired driving conduct. The law directs law enforcement officers to seize vehicles driven by persons subject to the vehicle forfeiture provisions. The law also provides that when the driver of the vehicle is not the owner, that owner may recover the vehicle if he or she can establish that he or she is innocent. To establish innocence, the owner must show that he or she did not know that the defendant had a revoked license, that the defendant drove the vehicle without consent, or that the vehicle was stolen.

Similarly, if the vehicle is one on which there is a lien, the lienholder also has an interest in the vehicle if the conditions of the lien are not being satisfied. For example, if the owner of a vehicle on which there is a lien stops making payment to the lienholder, the lienholder is normally entitled to recover possession of the vehicle. Recovering that possession is more difficult when the state also has a claim to the vehicle under the forfeiture statutes.

Lienholders also face another claim—towing and storage fees—that must be satisfied before they can recover possession. The storage fee is \$10 per day and the towing fee is determined by the local market rates for that service. If there is a substantial delay, the fees can substantially diminish the vehicle's worth. As of September 2001, the average time from seizure to release of a vehicle to a lienholder was seventy days. Including daily fees and towing charges, the fees can easily approach \$1,000. For innocent owners, the average time to release of a vehicle was thirty-

six days, which translates into total fees of around \$500 on average. When a court determines either that an owner was innocent or that a lienholder is entitled to possession, the amount of the fees due can be an obstacle to some people attempting to recover their vehicles, even though they are entitled to do so. In some of those cases, judges have entered orders directing that the vehicles be released without the fees being assessed.

It is this series of issues that S.L. 2001-362 addresses. First, it provides for speedier notice to lienholders that a vehicle on which they hold a lien has been seized. Under existing law, for a lienholder to receive notice, two things have to happen. The seizing officer must first notify the Division of Motor Vehicles (DMV). Previously, an officer had seventy-two hours to do that; S.L. 2001-362 reduces that to twenty-four hours. The DMV must then notify any lienholder of the seizure within forty-eight hours of having received such notice. S.L. 2001-362 retains that requirement but also requires the DMV to notify the lienholder by fax within eight hours (during business hours) if the lienholder has provided the DMV with a fax number. The purpose of the changes is to provide prompt notice to lienholders so that they may act quickly to minimize their economic loss as a result of a seizure.

Innocent owners also must act quickly if they want to minimize the cost of recovering their vehicles, but S.L. 2001-362 approaches that problem differently. Under previous law, an innocent owner had three options for seeking to recover the vehicle before the defendant was tried for the underlying impaired driving offense. First, the owner could recover the vehicle pending a final hearing on the issue by posting a bond and meeting some other requirements. Second, the owner could seek permanent release of the vehicle by petitioning the court for release of the vehicle; if the prosecutor agreed that release was appropriate, the prosecutor could authorize the release of the vehicle. Finally, if the prosecutor declined to release the vehicle, the owner was entitled to a hearing before a judge to determine his or her innocence. S.L. 2001-362 eliminates the final two options and in their place authorizes the clerk of superior court to release a vehicle to an innocent owner. The statute requires the clerk to “consider” the owner’s petition, but there is no notice required by statute to the school board’s attorney or the prosecutor, and there are no statutory provisions specifying the kind of proceeding the clerk must conduct. The only requirement is that the clerk send a copy of his or her order denying or authorizing the release to the school board’s attorney and the prosecutor. The statute does not specify any appeal from the clerk’s order, but it does specify that a clerk’s order denying release may be reconsidered by the judge at any subsequent forfeiture hearing.

The final portion of S.L. 2001-362 deals directly with the fees charged for towing and storing seized vehicles. The fees apply to any seizure under G.S. 20-28.2. In some cases the clerk or the court may conclude that the seizure should never have taken place. Extreme cases include instances in which an owner who is away from home has his or her vehicle stolen and subsequently seized before the owner knows the vehicle is stolen, or cases in which auto repair personnel drive vehicles being repaired in such a manner as to trigger a seizure. In both cases, the owner’s innocence is rarely an issue, but the fees required to release the vehicle may still run to several hundred dollars. In some such cases, courts have ordered the entity holding the vehicle to release it without requiring the fees to be paid.

The entity that stores the seized vehicles is a statewide towing and storage business contracting with the state Department of Public Instruction to provide these services. That contractor is paid solely from the fees collected. In determining who should bear the cost of seizures in cases in which the courts determine that the seizure should not result in a forfeiture of the vehicle to the state, the General Assembly had several options. It could have required the contractor to assume the cost as a cost of administering the contract; it could have raised the fees to cover the loss caused by the waived fees and spread the cost over all the persons with seized vehicles; or it could have compensated the contractor for its expenses in such cases or required the local government or local school system to do so. The legislature chose instead to require the owner determined to be innocent to pay the fees, as owners are required to do in other situations (for example, when a person is arrested for DWI, the vehicle is often towed rather than left in a dangerous place, and that towing is the owner’s responsibility even if the owner is later released because the charge is not supported by the facts of the case). S.L. 2001-362 prohibits the courts

from waiving any fees for towing or storage in any release order that it issues. In all cases, innocent owners must pay the fees to recover their vehicles. If they decline to pay the fees, the seizure law allows the contractor to sell the vehicle when the towing storage fees reach a specified percentage of the value of the vehicle.

Public Vehicular Areas

One element of all motor vehicle infractions and criminal offenses is where they occur. Nearly all such offenses contain an element making them applicable on streets and highways (that is, publicly owned roadways dedicated solely to vehicular traffic; for the precise definition, see G.S. 20-4.01). Virtually none of the offenses apply on private roadways. There is a middle ground, however—public vehicular areas—in which many of the more serious motor vehicle offenses, including impaired driving and reckless driving, may occur. S.L. 2001-441 (S 438) amends the definition of *public vehicular areas*.

Public vehicular areas presently include (1) drives, driveways, roads, alleys, and parking lots on the grounds of hospitals, orphanages, schools, churches, parks, and similar governmental institutions, or on the grounds of commercial establishments providing parking spaces for the public or its customers, or on the grounds of federal institutions; (2) beaches used for vehicular traffic; and (3) roads in private residential subdivisions, even if responsibility for their maintenance has not been assumed by the government. S.L. 2001-441 adds a fourth category: any portion of private property used for vehicular traffic that is designated by the owner as a public vehicular area.

To designate property as a public vehicular area, the owner must register with the Department of Transportation and must post signs in accordance with rules adopted by the department. The Department of Transportation must maintain a registry of public vehicular areas created under this new authority, and it may charge owners up to \$500 to register property with the department. The new definition applies to offenses committed on or after December 1, 2001.

Rules of the Road

Low-Speed Vehicles

S.L. 2001-356 (H 1052) amends G.S. 20-4.01 to add a definition of *low-speed vehicle*. As currently defined by G.S. 20-4.01(27)h, low-speed vehicle means a “four-wheeled electric vehicle whose top speed is greater than 20 mph but less than 25 mph.” New G.S. 20-121.1 requires low-speed vehicles to be: (1) operated only on streets where the posted speed limit is 35 mph or less, (2) equipped with headlights, stoplights, turn signals, parking brakes, rear view mirrors, windshield wipers, and so forth (much like a regular motor vehicle), and (3) registered and insured. Golf carts and utility vehicles, as defined in new G.S. 20-4.01(12a) and (48c), are apparently not included in the definition of low-speed vehicle. S.L. 2001-356 became effective August 1, 2001.

Passing Emergency Vehicles and School Buses

G.S. 20-157 prescribes the duties of a motorist upon the approach of a police, fire, or other emergency service vehicle. S.L. 2001-331 (H 774) adds a new subsection (f) outlining additional duties when a driver is passing a stopped emergency vehicle. If there are two lanes for one direction of travel, then the driver of the passing vehicle should move the vehicle into a lane that is not the nearest lane to a parked emergency vehicle and should continue to drive in that lane until safely clear of the emergency vehicle. If there is only one lane, then the driver of the passing vehicle should slow the vehicle and operate at a reduced speed until completely past the emergency vehicle. This provision became effective October 1, 2001.

S.L. 2001-331 also adds new G.S. 66-207 requiring rental car companies to notify their customers of the law requiring motorists to stop for and not pass stopped school buses that are receiving or discharging passengers. The Division of Motor Vehicles is required to design a written notification in English, French, Japanese, German, and Spanish. This notification may be handed to the customer when he or she presents an International Driver Permit. Or, in the case of rental car companies who operate an airport shuttle, the notice may be posted on the bus. If the company has a counter at which renters pick up documentation, the notice may be posted there. New G.S. 66-207 became effective December 1, 2001.

Leased or Rental Vehicles—Parking Violations

G.S. Chapter 20-162.1 provides that when a vehicle is parked illegally, it constitutes prima facie evidence that it was so parked by the person who is the registered owner as shown by DMV records. This prima facie rule of evidence does not apply to the registered owner of a leased or rented vehicle when the owner can furnish sworn evidence that at the time of the violation, the vehicle was leased or rented to another person. S.L. 2001-259 (H 1342) amends this section to provide that the owner's sworn evidence must be given within thirty days after notification of the violation. If notification is given to the vehicle owner within ninety days after the violation date, the owner must include in the sworn evidence the name and address of the person or company that leased or rented the vehicle. This act became effective June 29, 2001.

Driver's License Law

Proof of Residency

G.S. 20-7 requires as a prerequisite to acquiring a driver's license, learner's permit, or special identification card (used mostly by those who do not drive) that a person be a legal resident of North Carolina. In recent years, there have been numerous complaints that the residency requirement was not being strictly enforced. The 2001 General Assembly addressed this problem by the enactment of new G.S. 20-7(b1) requiring the DMV to adopt rules to implement statutory provisions with respect to proof of residency. These rules must ensure that licensed applicants submit verifiable residency and address information by one of the following:

1. a document issued by an agency of the United States or the government of another nation,
2. a document issued by another state,
3. a document issued by the State of North Carolina or a political subdivision thereof,
4. a preprinted bank or corporate statement,
5. a preprinted business letterhead, or
6. any other document deemed reliable by the DMV.

New G.S. 20-7(b3) lists examples of documents that would meet these requirements, including:

1. a pay stub with the payee's address,
2. a utility bill showing the address of the applicant,
3. a rental contract for an apartment or other dwelling,
4. a receipt for personal property taxes,
5. a receipt for real property taxes,
6. an automobile insurance policy showing the applicant's address,
7. a monthly or quarterly statement from a North Carolina financial institution,
8. a document issued by the Mexican Consulate for North Carolina, or
9. an appropriate document issued by the consulate or embassy of another country.

The General Assembly also amended G.S. 20-7(b1) to provide that the applicant must submit a *valid* Social Security number. Any applicant who does not have a Social Security number (and is

ineligible to obtain one) must swear or affirm that fact under penalty of perjury. In such case, the applicant may provide a valid Individual Taxpayer Identification Number issued by the Internal Revenue Service. The Division of Motor Vehicles is prohibited from issuing an identification card, learner's permit, or driver's license to any applicant who fails to provide either a valid Social Security number or a valid Individual Taxpayer Identification Number. [S.L. 2001-424 (S 1005), sec. 27.10A.] These provisions, which are part of the 2001 Appropriations Act, became effective November 1, 2001.

The legislature amended G.S. 20-37 to require DMV to notify the United States Department of State of any traffic violation involving persons licensed by that department (that is, foreign diplomats). There have been some serious accidents involving diplomats with poor driving records, and this amendment is intended to provide the State Department with information to revoke the license of any drivers with poor records [S.L. 498 (H 110)]. The amendment is effective "as soon as practicable," but no later than January 1, 2003.

Size–Weight–Equipment

Recreational Vehicles

Recreational vehicles, which are popular in North Carolina as well as elsewhere, were not precisely defined prior to this year. S.L. 2001-341 (H 686) adds new G.S. 20-4.01(32a) to define a *recreational vehicle* as one that has its own motor or is towed by another vehicle and is "primarily designed as temporary living quarters for recreational, camping, or travel use." The definition includes (but is not limited to) motor homes, travel trailers, camping trailers, and truck campers. The General Assembly also added a provision to G.S. 20-116(d) limiting recreational vehicles to a maximum length of forty-five feet, excluding bumpers and mirrors. S.L. 2001-341 became effective July 1, 2001.

Vehicle Registration and License Plates

Special License Plates

Special license plates, which originally were intended for vehicles driven by major statewide officeholders, have in recent years become an increasingly popular phenomenon. These plates are currently available to many diverse groups, including former prisoners of war, registers of deeds, and members of square dance clubs. S.L. 2001-40 (S 3) amends G.S. 20-79.4 to add a special plate for Desert Storm Veterans. This plate is issuable to a member or veteran of the armed forces who served during Operation Desert Shield or Operation Desert Storm. The plate will bear the words "Desert Storm Veteran" and a replica of the Southwest Asia Service Medal. This act became effective on April 26, 2001.

Other special plates authorized this year include Audubon of North Carolina, First in Forestry, Military Veteran, Military Wartime Veteran, Save the Sea Turtles, Special Forces Association, U.S. Navy Specialty, The Foundation for Cancer Research, Harley Owners Group, and Rocky Mount Elk Association [S.L. 2001-498 (H 110)].

Dealer Plates

G.S. 20-79 provides for automobile dealer license plates. Unlike regular license plates, these dealer plates may be transferred from one vehicle to another. S.L. 2001-212 (S 91) adds a new sentence to G.S. 20-79(b) providing that a dealer engaged in the alteration and sale of "specialty vehicles" may apply for up to two dealer plates in addition to the number otherwise obtainable under G.S. 20-79. New G.S. 20-4.01(44a) defines *specialty vehicle* as a type of vehicle that has been modified from its original construction for an educational, emergency service, or public safety use. S.L. 2001-212 became effective on June 15, 2001.

Bicycle Safety

Head injuries are the leading cause of disability and death from bicycling accidents, but the risk of injury is significantly reduced for those who wear proper protective helmets. Yet, it is estimated that these helmets are worn by fewer than 5 percent of child bicyclists nationwide. The risk of a head injury or other injury to a small child who is a passenger on a bicycle also could be significantly reduced if the child passenger sat in a separate restraining seat. As a partial solution to these problems, the 2001 General Assembly added new Part 10B to Article 3, G.S. Chapter 20, entitled "Child Bicycle Safety Act" [S.L. 2001-268 (H 63)].

This act makes it unlawful for any parent or legal guardian of a person under age sixteen to knowingly permit that person to operate or to be a passenger on a bicycle without wearing a protective bicycle helmet. It also provides that any person who weighs less than forty pounds or is less than forty inches in height must be properly seated and adequately secured to a bicycle passenger restraining seat. A violation of this act is an infraction punishable by a civil fine of up to \$10, inclusive of all penalties and court costs. In the event of a first conviction only, the fine may be waived upon receipt of proof that the responsible party (parent or guardian) has purchased or otherwise obtained a protective bicycle helmet or restraining seat and intends to use it as required by law. S.L. 2001-268 became effective October 1, 2001.

Annual Vehicle Inspection

The cost for an annual vehicle inspection (and sticker) increased on January 1, 2002, as follows:

1. The cost of a *safety inspection only* remains \$8.25 for the inspection, but the sticker price increased from \$1.00 to \$1.05.
2. The cost of an *emissions and safety inspection* increased from \$17.00 to \$23.50 for the inspection, and from \$2.40 to \$6.50 for the sticker.

[S.L. 2001-504 (H 969)]

Larceny of Motor Fuel

S.L. 2001-352 (S 278) adds new G.S. 14-72.5 providing that any person who takes motor vehicle fuel valued at less than \$1,000 from an establishment where it is sold, with the intent to steal the fuel, is guilty of a Class 1 misdemeanor (larceny of goods with a value of more than \$1,000 is a Class H felony). This act also amends G.S. 20-17 to require revocation of the defendant's driver's license in the event of a second or subsequent conviction of violating G.S. 14-72.5. If the license is revoked, however, a judge may allow the licensee a limited driving privilege for a period not to exceed the period of revocation (which is ninety days for a second conviction). The obvious intent of this act is to discourage motorists from filling up their gas tanks and then driving away without paying. Of course, G.S. 14-72 already makes theft of not more than \$1,000 a Class 1 misdemeanor, so the deterrent effect of the new act (if any) is the license revocation. S.L. 2001-352 became effective December 1, 2001.

Bills That Failed to Pass

As is the case in most sessions of the General Assembly, several interesting motor vehicle proposals were not enacted. These failed bills can be significant because they often reappear a session or so later, sometimes with more support. A few of these bills passed one house in time to be considered further in 2002. Among these were

1. House Bill 495, which would have amended G.S. 20-158(b) to allow vehicles on a one-way street that intersects with another one-way street to make a left turn on a red light after coming to a complete stop and yielding the right-of-way. Right turns on red have

been authorized for many years. A similar proposal was considered last year but failed to get a favorable report from a Senate committee.

2. Senate Bill 961, which would have amended G.S. 20-28(a) to allow the court to decide whether or not a defendant would receive an additional revocation if convicted of driving while license revoked. Under current law, an additional revocation for driving on a revoked license is mandatory.
3. House Bill 600, which would have amended G.S. 20-40 to require the DMV to provide for a system of appointments for the issuance and renewal of driver licenses.
4. House Bill 1120, which would have amended G.S. 20-7 to provide that the DMV may not issue a driver's license to an inexperienced driver (licensed less than three years) without confirming that there is in effect a motor vehicle liability insurance policy covering the applicant.

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Public Personnel

The General Assembly's 2001 session saw few significant changes to North Carolina law affecting state and local government employees. Because of the unexpectedly large budget shortfall, the General Assembly limited state employee annual salary increases to an across-the-board \$625 and increased deductibles and co-payments under the Teachers' and State Employees' Comprehensive Major Medical Plan.

State Employees

Salary and Retirement Benefit Increases

Pursuant to S.L. 2001-424 (S 1005), the 2001 Appropriations Act, neither the Governor nor the Council of State will receive salary increases for either the 2001–2002 or 2002–2003 fiscal year. The Governor's annual salary will remain at \$118,430, while the annual salaries of the members of the Council of State will remain at \$104,523. Similarly, the General Assembly chose not to increase the salaries of appointed state department heads (which will all remain at \$102,119 annually), other executive branch officials, or judicial branch officials for fiscal years 2001–2002 and 2002–2003.

The General Assembly has increased by \$625 the annual salaries of most other state employees, including employees of the judicial branch, General Assembly, University of North Carolina, and Community College System, as well as all SPA state employees. In addition, the Appropriations Act provides a 2 percent cost-of-living retirement allowance increase for retirees in the Teachers' and State Employees' Retirement System (TSERS), the Judicial Retirement System, and the Legislative Retirement System and removes the cap on the amount of sick leave creditable to retirement under TSERS. It also adjusts the employer contribution rates for various state retirement programs. The 2001 Appropriations Act establishes an Optional Retirement Program for eligible employees of the Community College System and amends G.S. 135-58 to provide enhanced retirement benefits for employees of the judicial system. The General Assembly also removed limitations it had previously placed on Legislative Retirement System member benefits for participants who are also eligible for participation in, or are contributing to, any other state-authorized retirement system.

Finally, S.L. 2001-426 (H 1324) includes in the definition of employees eligible to participate in TSERS certain non-citizen visa holders, as required by U.S. Department of Labor regulations.

State Health Plan

As it does every year, the General Assembly appropriated money to both the Teachers' and State Employees' Comprehensive Major Medical Plan (the State Health Plan) and the Reserve for the State Health Plan. S.L. 2001-322 (S 34) appropriates \$36 million from the General Fund to the State Health Plan to be used to fund the plan's 2001–2002 fiscal year cash requirements. S.L. 2001-395 (S 61) appropriates \$114 million from the General Fund and \$7 million from the Highway Fund to the Reserve for the State Health Plan.

In response to budgetary constraints, the 2001 legislative session saw a number of changes to the benefits provided under the State Health Plan, the most significant of which was the increase in the amount of the deductible from \$250 to \$350 per person and from \$750 to \$1,050 per family. Although benefits under the State Health Plan continue to be payable on the basis of 80 percent by the plan and 20 percent by the employee, the maximum out-of-pocket payment required of employees enrolled in the plan has been increased from \$1,000 to \$1,500 per person per fiscal year, with a maximum of \$4,500 per employee/children or employee/family contract. In addition, S.L. 2001-253 (S 824) increases the co-payments for certain types of outpatient prescription drugs. Although the co-payment will remain \$10 for each generic prescription, the co-payment for each branded prescription will increase from \$15 to \$25, the co-payment for each branded prescription with a generic equivalent will increase from \$20 to \$35, and the co-payment for each branded or generic prescription not on the State Health Plan's formulary will increase from \$25 to \$40. No person covered under the State Health Plan will pay more than \$2,500 per year in prescription drug co-payments. Notwithstanding the increase in deductibles and co-payments, the General Assembly did increase the maximum lifetime benefit under the State Health Plan from \$2 million to \$5 million per person.

State Employee Federal Remedy Restoration Act

S.L. 2001-467 (H 898) adds new Article 31D, Section 143-300.35, to Chapter 143. The act waives the state's sovereign immunity for the limited purpose of allowing state employees to sue the state in state and federal court for violations of the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, and the Americans with Disabilities Act. The waiver does not apply to state employees who hold exempt policy-making positions pursuant to G.S. 126-5(d). S.L. 2001-467 also adds a new subsection (11) to G.S. 126.34.1(a) that includes claims of violations of the aforementioned federal statutes among the personnel actions or issues that may be the subject of a contested case before the Office of Administrative Hearings. The act limits the amount that an employee may recover from the state to the amount set forth in G.S. 143-299.2 (currently \$500,000) or the amounts authorized by the applicable federal statute, whichever is less.

State Employee Incentive Bonus Program

The 2001 Appropriations Act makes a number of changes to Article 36A of Chapter 143, which establishes the State Employee Incentive Bonus Program (SEIBP). In lieu of the term "employing unit," Article 36A now speaks of a "participating agency," which G.S. 143-345.20 now defines as

Any State department, agency, or institution, or any local school administrative unit that employs State employees eligible to participate in the State Employee Incentive Bonus Program. The term includes the North Carolina Community Colleges System, The University of North Carolina and its constituent institutions, and charter schools. The term does not include federal or local government agencies.

The 2001 Appropriations Act makes a number of other changes to the SEIBP, including the addition of a new requirement that the amount of savings generated by suggestions made and innovations adopted under the SEIBP not be determined until after the conclusion of a twelve-month implementation period. The General Assembly also provided for the establishment of a SEIBP reserve fund into which savings from Program suggestions are to be deposited and changed the allocation of incentive bonus funds. Twenty percent of the annualized savings/increased revenues realized by the adoption of an SEIBP suggestion will continue to be paid to the suggester as a form of gain-sharing, but where 30 percent of increased savings or revenues were previously divided among the entire group of employees in the participating agency work unit, that 30 percent will now be allocated as follows: 10 percent to the implementing agency for nonrecurring budget items, 10 percent to the Department of Administration for managing the SEIBP, and 10 percent to the Office of State Personnel's state employee training and education fund. The remaining 50 percent of the annual savings/increased revenues will continue to revert to the General Fund for nonrecurring budget items. S.L. 2001-424 also makes changes to the SEIBP suggestion and review process and to the roles of agency coordinator and agency evaluator.

Study of the State Personnel System

The Studies Act of 2001 [S.L. 2001-491 (S 166)] authorizes the Legislative Research Commission to study the State's overall system of personnel administration, including the funding and staffing of the Office of State Personnel, the comprehensive compensation system for state employees, state employee performance evaluation practices and procedures, and whether Chapter 126 of the General Statutes (the State Personnel Act) should be revised based upon recent developments in human resources practices. If the commission chooses to study the State's personnel system, it is to report its findings, together with any recommended legislation, to the 2002 Regular Session of the 2001 General Assembly or the 2003 General Assembly.

State and Local Government Employees

Employment Security Commission Records

S.L. 2001-115 (H 342) amends two sections of the General Statutes governing the retention and reproduction of records of the Employment Security Commission. The General Assembly amended G.S. 8-45.3 to provide specific authorization to the commission to photograph, photocopy, or micro-photocopy its records, and to make admissible in evidence such reproductions when certified by the commission as true and correct copies. G.S. 132-3 was amended to allow the commission to destroy an original record upon order of the Chairman of the Commission when the records have been copied. Records that have not been copied may be destroyed after three years.

Employment Security Law Changes

S.L. 2001-251 (H 343) makes several changes to North Carolina's employment security laws. Most notable is the removal of the sunset provisions of previous sessions' amendments to the employment security laws, specifically S.L. 1997-404, which amended G.S. 96-8(17) to redefine the base period for unemployment benefits and eliminated the one and one-half times test; and S.L. 1999-196, which eliminated the disqualification of individuals for unemployment benefits when the disqualification resulted from a discharge or failure to accept work that was due to the individual's inability to arrange for care of a child or elderly parent (defined by G.S. 96-8 as "undue family hardship").

S.L. 2001-251 makes additional changes to this section of Chapter 96. The definition of *undue family hardship* in G.S. 96-8(10a) now includes situations where the individual seeking

unemployment insurance benefits has been unable to accept a particular shift because of an inability to arrange for the care of a minor child. S.L. 2001-251 removes from G.S. 96-8(10a) the requirement that the minor child be under fourteen years of age. S.L. 2001-251 also adds disabled members of the immediate family to the group for which inability to arrange for care constitutes undue family hardship. In addition, the General Assembly added new subsection (27) to G.S. 96-8 to define *immediate family* as “an individual’s wife, husband, mother, father, brother, sister, son, daughter, grandmother, grandfather, grandson, granddaughter, whether the relationship is a biological, step-, half-, or in-law relationship.”

Of particular interest to government employers who hire students or recent graduates who are seeking experience rather than permanent employment in government will be S.L. 2001-285 (H 334), which amends the definition of *employer* in G.S. 96-8(5) specifically to exclude state and local government employing units that hire interns.

Workers’ Compensation

In 2001 the General Assembly gave employers additional protections against unexpected and arbitrary cancellation of workers’ compensation insurance during the policy term. S.L. 2001-241 (S 468) adds two new sections to Article 36 of Chapter 58 of the General Statutes. New G.S. 58-36-105 prohibits workers’ compensation insurance carriers from canceling workers’ compensation policies before the expiration of the policy term except in certain enumerated instances. These instances include nonpayment of premiums, material misrepresentation or nondisclosure of a material fact in obtaining the policy, substantial breach of contract, increase in risk beyond that reasonably contemplated by the parties at the time the policy was issued, and fraudulent acts against the insurer by the employer. The act also specifies the notice required before an insurer can either refuse to renew a workers’ compensation insurance policy or lower coverage limits, raise deductibles, or raise premium rates.

In S.L. 2001-204 (S 299), the General Assembly also added a new category of employee to those for whom it requires coverage under the Workers’ Compensation Act: authorized pickup firefighters of the Division of Forest Resources of the Department of Environment and Natural Resources.

In addition, S.L. 2001-232 (S 466) amends G.S. 97-38 to increase the total amount of burial expenses compensable by an employer under the Workers’ Compensation Act from \$2,000 to \$3,500.

Local Government Employees

Exemption from the State Personnel Act for Employees of a Public Health Authority

S.L. 2001-92 (S 221) amends G.S. 130A-45.12 and G.S. 125-5 to exempt from the State Personnel Act employees of a public health authority created pursuant to G.S. 130A-45.02. This act does not change the status of employees of either county or district health departments, who remain subject to the State Personnel Act.

Defense of Soil and Water Employees

S.L. 2001-300 (H 968) amends G.S. 153A-97 to explicitly include soil and water conservation supervisors and local soil and water conservation employees among those for whom a county may provide a defense pursuant to G.S. 160A-167. The act also amends G.S. 160A-167 so that it explicitly includes soil and water conservation districts among those local government units authorized to provide a defense for, and/or pay a claim or civil judgment entered against, supervisors or employees in matters arising out of the scope of employment.

Job Protection for Precinct Election Officials

In S.L. 2001-169 (S 716), the General Assembly added a new section, G.S. 163-41.2, to Article 5 of Chapter 163, making it illegal for an employer to discharge or demote an employee because of his or her service as a precinct election official on Election Day.

Local Government Retirement

Local Government Employees' Retirement System (LGERS)

The 2001 Appropriations Act increases the retirement allowance paid to or on account of beneficiaries of LGERS by 1.7 percent and provides some additional, enhanced retirement benefits for local law enforcement officers. S.L. 2001-487 (H 338) removes the cap on the amount of sick leave creditable to retirement under LGERS. In addition, S.L. 2001-435 (H 943) authorized discontinued service retirement allowances for local government employees who are involuntarily terminated as a result of their employer's cessation of operations, dissolution, merger with or acquisition by an unrelated entity, or as a result of a reduction in force. Finally, as it did with TSERS, S.L. 2001-426 amends the definition of an employee eligible to participate in LGERS in order to bring the system in compliance with U.S. Department of Labor regulations.

Charlotte Firemen's Retirement System

S.L. 2001-22 (H 604) amends the act establishing the Charlotte Firemen's Retirement System in a number of ways, the most significant of which are the changes in the definitions of *compensation* and *final average salary*. This act also increases to 4 percent the annual compound interest rate applied to members' contribution balances.

Firemen's Supplemental Retirement Funds

In separate actions, the General Assembly repealed those statutes establishing the Morehead City Firemen's Supplemental Retirement Fund, the Marion Firemen's Supplemental Retirement Fund, the Cary Firemen's Supplemental Retirement Fund, the Gastonia Firemen's Supplemental Retirement Fund, and the Monroe Firemen's Supplemental Retirement Fund, and transferred any moneys remaining in the respective funds to the Board of Trustees of the Local Firemen's Relief Fund of the respective city. In addition, the General Assembly amended the Henderson Firemen's Supplemental Retirement Act to provide for equitable distribution of available funds among the retired members of the Henderson City Fire Department.

Public School Employees

S.L. 2001-173 (H 1149) amends G.S. 115C-335.5 by adding a new section authorizing local school boards to adopt a policy addressing the sexual harassment of school board employees by students, other employees, or school board members. S.L. 2001-118 (H 608) amended G.S. 115C-323 to change the requirements for public school employee health certificates. The General Assembly's 2001 legislation affecting public school employees is discussed in detail in Chapter 9, "Elementary and Secondary Education."

Local Legislation

S.L. 2001-20 (H 423) amends G.S. 160A-168(c), which deals with the confidentiality of personnel files of municipal employees, to add subsection (c)(8), applicable only to the City of Greensboro. The new subsection provides for the release, to the Human Relations Commission Complaint Subcommittee and to any person alleged to have been aggrieved by a police officer's actions, of both the disposition of disciplinary charges against the officer and the facts relied upon in reaching that disposition.

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Purchasing and Contracting

This was a year for updating and modernizing the rules that apply to public contracts. Several groups of individuals who work in and represent public agencies developed legislative proposals to revise the public bidding requirements and the criminal self-dealing statutes with the goal of clarifying these laws and making them better reflect current contracting practices. An effort to provide flexibility in the public construction bidding process resulted in major changes affecting building construction and significant new requirements designed to promote the use of minority contractors and document good faith efforts toward that end. Public agencies now have authority to use single-prime contracting and construction management at risk for major building construction. Local governments (other than local school units) now have authority to use a “request for proposals” process for procuring information technology goods and services and have several new exemptions under which goods may be purchased without bidding. Thresholds for the sealed bidding and other requirements have been significantly increased. These modifications will provide increased flexibility for public agencies, and in some cases, will significantly change how business is done through public contracts in North Carolina.

Building Construction Law Changes

Since 1925 state law has required public agencies to receive bids for major building construction or repair projects using the separate-prime (also called multiple-prime) bidding method. Under this method, contractors in the major trades—general construction, electrical, plumbing, and mechanical (heating, ventilating, and air-conditioning)—must be given the opportunity to bid directly to the public agency. In contrast, under the single-prime bidding method, these contractors would be subcontractors to a general contractor and would not have an independent contractual relationship with the owner. Beginning in 1989, public agencies were given the option of receiving bids under both the single-prime and the separate-prime systems but

were not allowed to receive bids only on a single-prime basis.¹ Under this dual bidding system, the public agency was required to award to the lowest responsible bid or combination of bids for the entire project. If the separate-prime bids were the lowest (in total), the agency was required to award the contract on a separate-prime basis. In 1998, local school units obtained additional flexibility when changes in the law authorized these agencies to receive bids both ways and to award contracts to *either* the lowest responsible single-prime bid *or* the lowest responsible set of separate-prime bidders.² This essentially allowed local school boards to choose the preferred contracting method after receiving bids both ways. This legislation grew out of a proposal generated by a legislative committee focused on education issues, and the bill was not extended beyond school systems in its coverage at that time.

A separate development in the evolution of the building construction bidding requirements was the establishment, in 1995, of a process through which public agencies could petition to the State Building Commission for approval to use an alternative construction method.³ These alternatives included single-prime only, construction management, and design-build construction. Public agencies have obtained approval for numerous projects under this authority. Perhaps most significant, however, was the university system's successful application last year to use the construction management at risk system for several substantial projects to be built using voter-approved bond money for university improvements. Following the university's efforts, a coalition of organizations, including all of the major associations representing public agencies in North Carolina, proposed a revision to the general law to make both the single-prime and the construction management at risk methods available to all public agencies as a matter of general law.

After lengthy negotiations that extended to the very last day of this longest-ever legislative session, S 914, proposing significant changes in building construction procedures, was finally ratified by both houses, making significant changes in building construction procedures. Most of these provisions became effective January 1, 2002. The bill also addressed the respective responsibilities of landscape architects and engineers. A summary of the most significant changes in the act, S.L. 2001-496, follows.

Increases in Dollar Thresholds

Many of the requirements for procedures in the public contracting process are based on the dollar value of the project or contract involved. S.L. 2001-496 increased several of these thresholds. Those that trigger the formal bidding process for contracts for construction or repair work, mandated in G.S. 143-129, were increased from \$100,000 to \$300,000. The threshold for formal bidding of contracts for the purchase of apparatus, supplies, materials, and equipment was increased to \$90,000. A bill enacted earlier in the session had increased this figure from \$30,000 to \$50,000. [See S.L. 2001-328 (H 1169), discussed below.] For some small jurisdictions, these thresholds are very high in relation to their budgets and typical contract expenditures. Public agencies are free to use formal bidding even when not required to by statute, either on a case-by-case basis or according to local policy.

The threshold at which specified methods for building construction and requirements for minority participation apply has been set at \$300,000. S.L. 2001-496. This actually represents a decrease in the threshold, which was \$500,000, but with the range of methods now allowed under the law, the statute is less a limitation than an authorization, and the threshold is of less importance.

Performance and payment bonds are required under G.S. 44A-26(a) based on both the size of a construction or repair project and the size of particular contracts. The dollar thresholds under this statute were increased in S.L. 2001-496. Bonds are now required when a project exceeds \$300,000 (increased from \$100,000), for each contract that exceeds \$50,000 (increased from \$15,000).

1. 1989 N.C. Sess. Laws Ch. 480.

2. S.L. 1998-137.

3. 1995 N.C. Sess. Laws Ch. 367, sec. 10.

Performance bonds provide a remedy for the owner in the event that the contractor defaults, and payment bonds provide a remedy for subcontractors who provide labor or materials for a project in the event that they are not paid by the general contractor. A contractor's ability to obtain bonds is also generally considered an indication of financial solvency and is sometimes considered a measure of responsibility in considering a contractor's ability to successfully perform a project. A public agency is free to require bonds for contracts that fall below the statutory thresholds.

S.L. 2001-496 also increased the dollar thresholds that determine when plans and specifications for public projects must be prepared by a registered architect or engineer. Under G.S. 133-1.1, this requirement applies to (1) new construction or repairs involving major structural or foundation changes when the expenditure is \$135,000 or more (increased from \$45,000), (2) repairs not involving structural or foundation changes when the expenditure is \$300,000 or more (increased from \$100,000), and (3) a new category of work "affecting life safety systems" when the expenditure is \$100,000 or more. Subsection (d) of this statute specifies that a certificate of compliance with the building code must be obtained for projects that are not required to be designed by an architect or engineer. A new provision in this subsection provides that the certificate of compliance is not required for any project that does not alter life safety systems and has a projected cost of less than \$100,000.

New Construction Methods Authorized

A major thrust of S.L. 2001-496 was to expand the options available to public agencies in selecting methods for construction of building projects. New subsection G.S. 143-128(a1) now lists five methods from which public agencies may choose: (1) separate-prime bidding, (2) single-prime bidding, (3) dual bidding pursuant to subsection (d1) of the statute, (4) construction management at risk pursuant to G.S. 143-128.1 (described below), and (5) alternative contracting methods authorized by the State Building Commission pursuant to G.S. 143-135.26(9). These options, and the other requirements in G.S. 143-128, apply to projects estimated to cost more than \$300,000. Exceptions for prefabricated buildings have been retained. As described below, changes have been made for some of the existing procedures, and new procedures are established for the new methods authorized.

Separate-Prime Bidding

Procedures for separate-prime bidding are contained in G.S. 143-128(b), and the divisions of work are specified in subsection (a), which is not significantly changed by the new law. The provision allowing work costing less than \$25,000 in one subdivision of work to be a part of the specifications for another subdivision has been deleted.

Single-Prime Bidding

The procedures for single-prime bidding are substantially the same as those that were in place for dual bidding under the prior law. They are set forth in G.S. 143-128(d). Single-prime contractors are required to list on their bids the subcontractors they have selected for work in the four major categories listed above. The new law adds provisions relating to the substitution of subcontractors. The prior law allowed substitution with the approval of the awarding authority for good cause shown. The law now allows a substitution if the contractor determines that the listed subcontractor's bid is nonresponsible or nonresponsive, or if the listed subcontractor refuses to enter into a contract to do the work that is covered by the bid.

Dual Bidding

The dual bidding system is set forth in G.S. 143-128(d1) and is essentially the same system that has been available to local school units since 1998. Agencies selecting this option may choose either the lowest responsible single-prime or the lowest responsible set of separate-prime bidders.

A complicated bid-counting requirement that previously applied to the dual bidding process used by local school units has been removed. (Under former G.S. 143-128(d1), it was necessary to obtain at least one general contractor bid under the separate-prime system in order to meet the three-bid requirement for opening bids.) The law retains, however, the limitation that the amount of a bid submitted by a subcontractor to the general contractor under the single-prime system shall not exceed the amount bid, if any, for the same work that subcontractor would do directly for the public agency under the separate-prime system. The dual bidding system requires a staggered bid opening process under which bids from separate-prime contractors are received *but not opened* one hour before the single-prime bids are received, at which time both sets of bids are opened. This represents a change in the previous version of this subsection that applied to local school units and required a three-hour separation of the receipt of bids.

Construction Management at Risk

Procedures for the construction management at risk construction method are set out in a new statute, G.S. 143-128.1. This law defines construction management services to include "preparation and coordination of bid packages, scheduling, cost control, value engineering, evaluation, preconstruction services, and construction administration." G.S. 143-128.1(a)(1). These services are not otherwise discussed in the statutes and are not subject to specific procedures. Public agencies may use and procure construction management services as they would other consultant services. In contrast, construction management *at risk* services (CM at risk), as defined in the new law, must be procured using the qualification-based selection procedures required for architects, engineers, and surveyors under G.S. 143-64.31. This statute has been modified to expressly cover selection of CM at risk services. A new subsection has also been added to require public agencies to report to the state Department of Administration on the selection and use of CM at risk. The report must include the reasons for the selection, the terms of the contract, a list of all firms considered and their proposed fees, and the form of bidding used. G.S. 143-64.31(b). The formal bidding statute, G.S. 143-129, has also been amended to exempt selection of the CM at risk from its coverage.

Under the construction management at risk system as defined in the new law, the CM at risk (1) provides construction management services for a project throughout the preconstruction and construction phases, (2) is a licensed general contractor, and (3) guarantees the cost of the project. G.S. 143-128.1(2). The statute specifies that the public agency contracts separately (rather than through the CM at risk) for design services on a CM at risk project.

A key aspect of the CM at risk system generally is that the CM selects and contracts directly with the subcontractors. In this respect, it is a form of single-prime contract under which the public agency has only one direct contract, which is with the CM. North Carolina's version of CM at risk, however, imposes specific procedures upon the CM for the selection of subcontractors. The statute defines as *first-tier subcontractors* those contractors who have a contract with the CM. These may include those in the major trades of general construction, electrical, plumbing, and mechanical work, though it may include greater subdivisions of work resulting in more first-tier subcontractors, and it could involve fewer, as determined by the CM on a particular project. The statute requires the CM to use the public advertisement procedures for these first-tier contractors as set forth in G.S. 143-129 (the formal bidding statute). The statute also requires the CM to prequalify these contractors using criteria determined by the public agency and the CM. The statute includes a broad and nonexclusive list of acceptable criteria for prequalification. G.S. 143-128.1(c). The CM is required to submit a plan for compliance with minority contracting goals (discussed below). Bids under this process are opened publicly and the bids are public records once opened. The CM acts a fiduciary of the public agency in handling and opening bids and is

responsible for awarding the contracts to the “lowest responsible, responsive⁴ bidder, taking into consideration quality, performance, the time specified in the bids for performance of the contract, the cost of construction oversight, time for completion, compliance with [minority contracting requirements in] G.S. 143-128.2, and other factors deemed appropriate by the public entity and advertised as part of the bid solicitation.” The public agency may select a different contractor from the one chosen by the CM but must compensate the CM for any increase in cost.

The CM may perform portions of the work only with the approval of the public agency when bidding produces no responsible contractor or in the event of a default if no prequalified replacement can be obtained in a timely manner. The CM is required to provide performance and payment bonds to the public agency under the statutory bonding requirements in Article 3 of Chapter 44A of the General Statutes. Increased thresholds for these bonding requirements are described above.

Alternative Contracting Methods

The procedures for applying to the State Building Commission for alternative contracting methods have not substantially changed under the new law. In practical terms, however, the methods most frequently sought under these procedures, single-prime and construction management, are now generally available to public agencies. Applications for project-specific approval under this method will most likely be for use of the design-build method, which is not explicitly authorized under the general law, or for some modification of the methods now authorized in G.S. 143-128(a1). The act did change the vote required for approval of alternative methods by the State Building Commission from two-thirds to a majority of commission members present and voting. S.L. 2001-496, Section 11; G.S. 143-135.26(9). Local governments seeking authority to modify bidding requirements for particular projects have also continued to use the separate route of obtaining local acts, examples of which are summarized later in this chapter.

Reporting Requirements

Public agencies that use one or more of the methods authorized under G.S. 143-128(a1) are required to report to the Secretary of the Department of Administration on the cost and effectiveness of each method used. Reports are to be filed in a format and containing data as prescribed by the department, but the act requires at least the following information: (1) the method used; (2) the total value of each project; (3) the “bid costs and relevant post-bid costs”; (4) a detailed listing of all contractors and subcontractors used on the project, including identification of whether the contractor was an “out-of-state” contractor; and (5) in cases where an out-of-state contractor was used, the reasons why that contractor was selected. The reports must be filed annually beginning April 1, 2003, and thereafter must be filed in the year in which the project is completed.

Dispute Resolution Requirements

S.L. 2001-496 requires public agencies to establish procedures for dispute resolution on all building construction or repair projects. Each agency is required under G.S. 143-128.1(g) to provide a dispute resolution process, which must include mediation. The law separately requires the State Building Commission to adopt procedures for dispute resolution, and other agencies may use these procedures or may develop their own. The dispute resolution procedures must be available to all the parties involved in the construction project, including the architect, the CM, and the contractors (including all levels of subcontractors), and it must be available for any issue

4. The new law adds the term *responsive* to the standard of award for contracts throughout the competitive bidding statutes in Article 8 of Chapter 143 of the General Statutes. This is not a substantive change, since the requirement that bids be responsive is implicit in the bidding process. *See* Professional Food Services Management v. North Carolina Dep’t of Admin., 109 N.C. App. 265, 426 S.E.2d 447 (1993).

arising out of the “contract or construction process.” The agency is authorized to set a limit not to exceed \$15,000 for the minimum amount in controversy for which the procedures may be used. The statute authorizes the public agency to require the parties to pay part of the cost, but at least one-third of it must be paid for by the public agency if the public agency is a party to the dispute. The agency may require in the contract that a party must participate in mediation before initiating litigation concerning the dispute.

Minority Business Participation Requirements

Since 1989, public agencies subject to G.S. 143-128 have been required to implement a program for promoting the use of minority business enterprises as defined in the statute. The law does not establish set asides or quotas but instead requires agencies themselves to make, and to require of contractors, a good faith effort to use minority businesses in major building construction projects. The statute prohibits the use of race, sex, or other listed characteristics in the award of contracts. The provisions in G.S. 143-128 have been replaced in S.L. 2001-496 with a new statute, G.S. 143-128.2, which contains more specific and stringent requirements for good faith efforts. References in other statutes requiring compliance with the prior good faith efforts provisions in G.S. 143-128(f) have been replaced with references to G.S. 143-128.2. In addition, a more generalized requirement of good faith efforts now applies to contracts for construction or repair work in the informal bidding range (between \$5,000 and \$300,000) and in the selection of architects, engineers, surveyors, and construction management at risk service providers under G.S. 143-64.31. The law continues to prohibit the award of contracts based on race, sex, and the other listed characteristics. A new provision has been added to G.S. 143-135.5 to express the policy of the state not to accept bids or proposals from or to engage in business with any firm that has been held to have unlawfully discriminated on the basis of any of those characteristics in its solicitation, selection, hiring, or treatment of another business.

New Definition of Minority Business

Under the new statute, the definition of minority business (which currently includes listed ethnic minorities and women) has been expanded to include socially and economically disadvantaged individuals or a corporation in which at least 51 percent of the stock is owned by one or more socially and economically disadvantaged individuals. The term *socially and economically disadvantaged individual* is defined by reference to a federal statute, 15 U.S.C. § 637. That law defines socially disadvantaged individuals as “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” 15 U.S.C. § 637(a)(5). Economically disadvantaged individuals “are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business who are not socially disadvantaged.” 15 U.S.C. § 637(a)(6)(A). The federal law provides methods of determining economically disadvantaged status based on the individual’s assets and net worth. A socially and economically disadvantaged business is one that is 51 percent owned by one or more socially and economically disadvantaged individuals, an economically disadvantaged Indian tribe, or an economically disadvantaged Native Hawaiian organization.

Goal Requirements

Since its initial enactment in 1989, the state’s minority contracting program has required state agencies to use a 10 percent goal for participation by minority businesses and has required local governments to develop their own goals. The new law continues the 10 percent goal requirement for the state, but it also expands the applicability of the 10 percent requirement to several new types of projects. Under G.S. 143-128.2(a), the 10 percent goal applies to state building projects,

including projects done by a private entity on a facility to be leased or purchased by the state. The 10 percent goal will also apply to any building project costing \$100,000 to be done by a local government or other public or private entity that receives state appropriations or other state grant funds for the project. This will also apply to projects done by a private entity on a facility to be leased or purchased by a local government unit. The law provides, however, that a local government may apply a different verifiable goal adopted prior to December 1, 2001, if it has a sufficiently strong basis in evidence to justify the use of that goal. For state projects and projects subject to the state goal, the Secretary of the Department of Administration is required to identify specific percentage goals for each category of minority business for each type of contract involved.

The new law restates the existing requirement that local governments adopt verifiable percentage goals and make good faith efforts, which are substantially redefined. An uncodified provision of the act specifically provides that local governments may use goals enacted prior to the effective date of the act.⁵ Legal considerations in establishing goals are discussed below.

Good Faith Efforts

The new law creates specific requirements for both owners and bidders to satisfy the “good faith efforts” obligations. Under subsection G.S. 143-128.2(e), the law delineates the specific steps a public entity must take before awarding a contract. They include developing and implementing a minority business outreach plan, attending prebid conferences, and providing notice to minority businesses at least ten days prior to the bid opening. The statute specifies what information must be included in the notice.

The steps that bidders must take to satisfy the good faith efforts requirement are set out in G.S. 143-128.2(f). This subsection requires the use of a point system to determine whether a sufficient effort has been made. There are ten activities listed in the statute from which bidders may choose in carrying out their obligations under the law, and each activity will be assigned points. The Secretary of the Department of Administration is responsible for adopting rules to establish the points required based on project size, cost, type and other factors the secretary considers to be relevant. The total points required may not exceed fifty, and the secretary must assign at least ten points to each of the ten efforts listed in the statute. The secretary is required to adopt rules to implement this requirement no later than June 30, 2002. Until sixty days following the adoption of those rules, a bidder must show compliance with at least five of the ten efforts in order to comply with the good faith efforts requirement. The statute allows any public agency to require additional efforts in its bid specifications.

Under G.S. 143-128.2(c) all bidders (including first-tier subcontractors on CM at risk projects) must identify on their bids the minority businesses that they will use on the project and the total dollar value of the bid that will be performed by minority businesses. They must also include an affidavit listing the good faith efforts they have made under subsection (f). If contractors intend to perform all of the work with their own forces, they may submit an affidavit to that effect instead of providing the otherwise required information on minority participation and good faith efforts.

After bids are received, the apparent lowest responsible bidder must provide additional information within a time period specified in the bid documents. This bidder must provide either (1) an affidavit describing the portion of the work to be executed by minority businesses, expressed as a percentage of the total contract amount, showing a percentage equal to or more than the applicable goal on the project, or (2) documentation of good faith efforts to meet the goal, “including any advertisements, solicitations, and evidence of other specific actions demonstrating recruitment and selection of minority businesses for participation in the contract.” G.S. 143-128.2(c)(1)(b). The law states that an affidavit showing participation equal to or greater than the applicable goal “shall give rise to a presumption that the bidder has made the required good faith

5. S.L. 2001-496 (S 914), sec. 14(c).

effort.” G.S. 143-128.2(c)(1)(a). Within thirty days after a contract is awarded, the successful bidder must list all identified subcontractors that will be used on the project. Failure to provide the affidavit or documentation required to demonstrate good faith efforts is grounds for rejection of a bid.

The new law adds provisions limiting replacement of subcontractors. This addresses the concern that minority contractors may be used for purposes of obtaining a contract and then substituted with nonminority contractors after the contract is awarded. Under G.S. 143-128.2(d) a subcontractor may not be replaced except (1) when the subcontractor’s bid is determined to be nonresponsive or nonresponsive or the subcontractor refuses to enter into a contract for the complete performance of the work, or (2) with the approval of the public entity “for good cause.” The statute requires that when selecting a substitute subcontractor, the contractor must make and document good faith efforts as required for informal construction or repair contracts under G.S. 143-131(b).

All of the public records created under the requirements of this new section, including good faith efforts documentation, must be maintained for at least three years from the date of completion of the building project. G.S. 143-128.2(i). This requirement supersedes any otherwise applicable rules for record retention for these documents.

Administration, Enforcement, and Reporting

A new statute, G.S. 143-128.3, describes the reporting and administration provisions for the new good faith efforts requirements described above. Public agencies are required to report to the Department of Administration for each building project: (1) the verifiable percentage goal; (2) the minority business utilization achieved, the good faith efforts guidelines or rules used, and the documentation accepted by the public agency from the successful bidder; and (3) the utilization of minority businesses under the various construction methods authorized under G.S. 143-128(a1). (The second and third requirements appear to require some of the same information.) The University of North Carolina and the State Board of Community Colleges must report quarterly, and all other public agencies must report semiannually. The specific format and data required will be determined by the Department of Administration, and the department is required to report the information received to the Joint Legislative Committee on Governmental Operations every six months.

The statute gives the Department of Administration responsibility for overseeing and enforcing compliance with the good faith efforts requirements. If a public agency receives notice from the secretary that it has failed to comply with the statutory requirements on a project, the agency must develop a compliance plan that addresses the deficiencies identified by the secretary. The corrective plan must apply to the current project to the maximum extent feasible, or to subsequent projects. If the public agency fails to file a corrective plan or fails to implement it, the secretary may require consultation with the department on the development of a new plan and may require that the agency refrain from bidding another project without prior review by the department and the Attorney General as to compliance with the plan. The agency may be subject to review of its good faith compliance for a period of up to one year under this remedial provision. These actions may be contested by an aggrieved agency under the Administrative Procedures Act. The Secretary of the Department of Administration is required to report to the Attorney General the failure of a public agency to provide the required data, any false statements knowingly provided to a public agency in an affidavit under G.S. 143-128.2 (agencies are required to notify the secretary of any such false information they receive), and any other information requested by the Attorney General.

Finally, the law requires the secretary to study ways to improve the effectiveness and efficiency of state capital facilities development, minority business participation, and good faith efforts. The statute calls for the secretary to appoint an advisory board to develop recommendations to improve the recruitment and utilization of minority businesses and requires the secretary to adopt rules and guidelines for implementation of the good faith efforts and other

requirements of G.S. 143-128.2. The law also amends the statute governing the powers and duties of the State Building Commission to incorporate rulemaking, oversight, and administration of state projects under the new law.

Good Faith Efforts Requirements for Contracts in the Informal Bid Range

The foregoing requirements all apply to building construction contracts costing \$300,000 or more. Until now there have been no requirements in state law for promoting the use of minority businesses in building construction or repair projects in the informal bidding range. A new provision has been added to the informal bidding statute, G.S. 143-131, requiring public agencies to solicit minority participation for building construction or repair contracts in the informal range (between \$5,000 and \$300,000). The law requires the agency to document its efforts but makes clear there is no requirement to formally advertise for bids. (The informal bidding process allows the public agency to obtain bids in any manner and does not require advertisement, sealed bids, or public bid openings.) Upon completion of the project, public agencies must report to the Department of Administration, Office of Historically Underutilized Business, “all data, including the type of project, total dollar value of the project, dollar value of minority business participation on each project, and documentation of efforts to recruit minority participation.” G.S. 143-131(b).

It seems clear from the language in this provision that the law does not require compliance with the detailed efforts set forth in G.S. 143-128.2 for contracts in the informal range. It is also important to note that the requirements to solicit and document minority participation apply only to *building* construction contracts and not to those involving other types of construction, such as street and utility projects. They also do not apply to purchase contracts. In addition, there is potential for confusion in determining whether the informal good faith efforts in G.S. 143-121(b) rather than the more detailed requirements of 143-128.2 apply. While the informal bidding statute applies to “contracts,” the building construction statutes, G.S. 143-128 and the new 143-128.2, apply to “projects.” It is possible to have a contract that is in the informal bidding range (between \$5,000 and \$300,000) that is part of a project of \$300,000 or more. The best interpretation would appear to be that the informal minority outreach procedures apply when a building construction or repair contract is not part of a project of \$300,000 or more. This means that contracts in the informal range will be subject to the more detailed good faith efforts requirements if they are part of a project that will cost more than \$300,000.

Legal Considerations for Implementation of Minority Contracting Provisions

Programs designed to increase the use of minority-owned businesses on public projects have been subject to challenges in state and federal courts since the United States Supreme Court’s decision in 1989 invalidating the City of Richmond’s program.⁶ As enunciated in that case, programs that create preferences or otherwise use race as a factor in the award of public contracts are subject to strict scrutiny and must be supported by a compelling justification by the government in order to satisfy the constitution’s equal protection requirement. To meet that requirement, many jurisdictions, including several North Carolina local governments and the State of North Carolina, have conducted disparity studies to document the history of discrimination in the construction industry as well as the underutilization of minority businesses by the public agencies themselves. Many local governments in North Carolina, however, have not conducted such inquiries and do not have documentation to support the goals programs that have been in effect pursuant to the requirements of G.S. 143-128(f). While many have argued that the “good faith efforts” requirements under the statute do not create a preference and are thus race neutral, a review of cases decided around the country suggests that if challenged, a decision to reject a bid for failure to meet the good faith efforts requirement would probably be subject to strict scrutiny.

6. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

The new law does not fundamentally change the structure of the minority contracting program in North Carolina, but its increased specificity and mandatory provisions make it both more effective for the purpose it is intended to serve but also, perhaps, more likely to invoke a legal challenge. (Under the prior law, local governments decided independently what constituted a sufficient good faith effort and often did not carefully scrutinize the efforts reported by contractors.) In light of this, local government officials are advised to review the goals they are using and to develop or obtain information about the availability and local utilization of minority contractors in order to establish supportable goals. Public agencies should consider developing separate goals for the different categories of minority firms, as defined under the statute, and for different types of work, since the availability of minority firms varies according to the type of contract involved. Without this evidentiary support and specificity of goals, a program is unlikely to survive a legal challenge. Even though local governments are mandated by state law to comply with the requirements of the statute, they are not insulated from liability since they have the capacity (at least in theory) and the legal obligation to implement the statutory requirements in a constitutional manner.

Public Bidding Procedure Changes

The primary statute that governs public bidding procedures for public agencies, G.S. 143-129, was amended by S.L. 2001-328 (H 1169). The changes clarify ambiguous provisions, create new exceptions to the bidding requirements, provide more options for local administration, and make technical changes. The law also increased the bidding threshold for purchasing, which was increased again in the later-enacted statute described above.

Increase in Bid Threshold

The formal bidding threshold for purchasing apparatus, supplies, materials, and equipment was increased in S.L. 2001-328 from \$30,000 to \$50,000 and was increased again in S.L. 2001-496 to \$90,000, where it now stands. This threshold, contained in G.S. 143-129, applies to each contract (not each item) purchased with public funds and was last increased in 1997. Informal bids required under G.S. 143-131 will, by virtue of the wording of that statute, automatically apply to contracts between \$5,000 and the new formal bid limit of \$90,000. This bid threshold applies only to local government agencies other than local school units. Local school units, community colleges, and state agencies are subject to the requirements in Article 3 of Chapter 143 of the General Statutes as administered by the Department of Administration for contracts to purchase supplies, materials, and equipment.

Advertisement of Bid Opportunities

Contracts that are subject to the formal bidding requirements of G.S. 143-129 must be advertised as required by that statute. Questions of interpretation have arisen due to the wording of the requirement regarding the minimum time for which the advertisement must appear prior to the bid opening. The language in the statute has been changed to make clear that for all contracts that are subject to this requirement, at least seven days must elapse between the date of the advertisement and the date of the bid opening. In many cases public agencies allow significantly more time than the minimum in order to provide ample opportunity for preparation of bids. However, in some cases, including where rebidding is necessary due to insufficient number of bids received, agencies wish to advertise for the minimum time allowed by law. In these cases, the clarification will eliminate ambiguity and provide a clear standard for what is required.

The formal bidding statute was also amended to allow electronic instead of newspaper advertisement if the governing board approves the use of this method.⁷ Prior to this change, public agencies have been free to publicize bidding opportunities through various methods *in addition* to the required newspaper notice. Local governments have commonly provided individual notice by mail to interested bidders. In order to provide broader notice of bidding opportunity, some local governments also have begun to use electronic media, including their own Web sites, the state's Web site,⁸ and services that publicize bidding opportunities electronically at no charge to the public agency. These efforts, though not specifically required or authorized, are legal and practical means to increase competition for public contracts. Indeed, in many cases, they are more likely to generate bids than the mandatory local newspaper advertisement, especially when specialized equipment or large contracts are involved.

Under G.S. 143-129(a), as revised by S.L. 2001-328, a governing board may now authorize the use of electronic advertisement of bidding opportunities *instead* of publication in a newspaper of general circulation in the area. This authorization may be for all contracts that require advertisement under the statute or for particular contracts on a case-by-case basis. Although the statute does not specifically provide for it, it would seem that the governing body could authorize the use of electronic advertisement generally and delegate to a local official the authority to determine which method or combination of methods to use for particular contracts.

The statute does not define what it means to advertise electronically. Most local units will make use of local and other Web sites but could also use e-mail notice and other electronic methods. In determining the means to be used, the local unit should attempt to meet at least two important purposes underlying the advertisement requirements. The first is to obtain competition for the contracting opportunity. This includes making bid information accessible to both large and small contractors, including local vendors as well as those from a broader market. The second is to make available to the citizens in the jurisdiction information about the contracts their government will award. As such, it is recommended that information about bidding and contracting opportunities continue to be made accessible to local citizens, for example, on the local government's Web site or in other physical locations where public notices are regularly posted.

Finally, it is important to note that the new provisions relate only to electronic advertisement of bidding opportunities and do not authorize electronic receipt of bids. Under existing law, bids that are subject to formal bidding must be submitted as sealed bids and must be opened at a public bid opening. Further statutory changes would be necessary to authorize electronic receipt of bids that are in the formal bidding range.

The foregoing changes apply to local school units, community colleges, and state agencies only with respect to contracts for construction or repair work.

New Exceptions to Public Purchasing Requirements

The formal bidding statute contains several exceptions, and several new exceptions were authorized this session. The statute was also reorganized so that most of the exceptions appear in subsection (e) of G.S. 143-129. The wording of the exceptions as contained in subsection (e) makes clear that they apply to both the formal bidding requirements under G.S. 143-129 and the informal requirements under G.S. 143-131. When a contract falls within an exception, there are no procedures that must be followed unless a particular exception requires them. For example, existing exceptions for sole sources [G.S. 143-129(e)(6)] and for previously bid contracts [G.S. 143-129(g), commonly referred to as the "piggybacking" exception] require governing board approval. Contracts made under the new state contract exception, however, do not require board

7. A similar provision was included in the budget as a special provision to authorize the state Department of Transportation to accept electronic bids. S.L. 2001-424 (S 1005), sec. 27.9(a).

8. The bidding statute that governs state contracts, G.S. 143-52, was amended in 1997 to specifically authorize electronic advertisement of bidding opportunities, and the state maintains a Web site on which it advertises bidding opportunities with the state. The state also invites local governments to advertise bidding opportunities on the state Web site as well.

approval unless mandated by locally established procedures. New exceptions enacted in S.L. 2001-328 include purchases from state contracts, purchases of used equipment, and purchases from competitive group purchasing programs. An exception for information technology purchases is discussed in the next section. These exceptions do not apply to local school units, community colleges, or universities or other state agencies that are subject to the purchasing requirements established by the state Department of Administration.

State contract purchases. The state Department of Administration, Division of Purchase and Contracts, establishes state term contracts to serve the needs of state agencies and local school units. These entities are generally required to purchase from state contracts. The division has for many years made state contracts available to local governments and in some cases has established contracts that are primarily used by local governments. The procedures and legal authority for local governments to purchase from state contracts, however, have been unclear. The bidding statute has now been amended to clarify that local governments are not required to comply with formal or informal bidding procedures when purchasing from contracts “established by the State, or any agency of the State.” (This last phrase means, for example, that local governments may purchase under this exception from an agency other than the Department of Administration, such as the Department of Transportation.) This exception is codified as G.S. 143-129(e)(9).

This new exception does not create any obligation on the part of state contractors to extend prices to local governments, although the state could impose such a requirement in particular contracts. A purchase under this exception does not require approval by the state. A local government is not required to commit to purchase from the contract in advance in order to take advantage of the exception. The state may continue to give local governments the opportunity to participate in contracts, entitling them to purchase under those contracts and creating an obligation on the part of the vendor and the local government as parties to the contract.

The new exception for state contract purchases overlaps with the existing exception under G.S. 143-129(g), the “piggybacking” exception. That exception authorizes local governments to purchase without bidding from contractors that have contracted with another public agency within the past year. It is important to recognize that if the previous contract was with the State of North Carolina or any North Carolina state agency, the local government may purchase directly under the new state contract exception without complying with the notice and board approval requirements under subsection (g). Furthermore, the twelve-month limitation in subsection (g) does not apply to state contract purchases. The state contract exception also overlaps with the existing exception for purchases from the state Office of Information Technology [G.S. 143-129(7)], a state agency. There are no procedural requirements that apply to the use of that exception, so there will be no difference between using it and using the new state contract exception.

Purchase of used equipment. Another new exception, codified as G.S. 143-129(e)(10), authorizes the purchase without bidding of used equipment. Under this exception a local unit may, for example, purchase used equipment at a private auction, or may purchase by any other means it deems appropriate, any item of used apparatus, supplies, materials, or equipment. The exception makes clear that remanufactured items, refabricated materials, or demo equipment⁹ are not within its scope. Purchasing officials should generally assume that materials that are sold on the market as new are not covered by this exception.

Competitive group purchasing programs. An existing exception for purchases made through competitive group purchasing programs that only applied to hospitals now applies without limitation to any unit of government to which the bidding requirements apply. This exception has been recodified as G.S. 143-129(e)(3). Group purchasing programs may be organized by public or private entities for the purpose of providing products at discounted prices to their subscribers. They generally offer volume discounts due to the pooling of purchasing power by participating agencies. The needs of the participating agencies are identified, competition is sought, and

9. This provision was added in the Technical Corrections Act, S.L. 2001-487 (H 338), sec. 88. A *demo item* is defined as one that is used for demonstration purposes and is sold by the manufacturer or retailer at a discount.

contracts are awarded from which the participating entities may purchase. Without this exception, purchases from these programs would require separate bidding by North Carolina local governments. The exception does not dictate how the group purchasing system must operate, except that the entity that awards the contracts from which local units purchase must obtain prices competitively when selecting the contractors.

Request for Proposals for Information Technology Contracts

A new statute creates another exception to the bidding requirements that applies to contracts for the purchase of information technology goods and services. Under G.S. 143-129.8, local governments may use a request for proposals (RFP) process for purchasing information technology, defined in G.S. 147-33.81(2) to include “electronic data processing goods and services and telecommunications goods and services, microprocessors, software, information processing, office systems, any services related to the foregoing, and consulting or other services for design or redesign of information technology supporting business processes.” Procurements under this statute must be advertised in the same manner as is required for formal bids under G.S. 143-129(a), including solely by electronic means if authorized under the new provision in that subsection, discussed earlier. The standard for awarding a contract under this statute is more flexible than the existing “lowest responsible bidder” standard for contracts that require bidding. Contracts may be awarded to the submitter of the “best overall proposal,” and the statute requires that factors to be considered in awarding contracts be identified in the RFP.

Another important difference between the new RFP process and the standard bidding procedure is that the RFP provision permits negotiation after proposals are submitted, something that is often desirable to conform the best proposal to the specific needs of the local government. Protections are written into the law, however, to prevent negotiations that undermine the competitive process. Negotiations must not alter the contract beyond the scope of the original proposal in a manner that (1) deprives the proposers or potential proposers of a fair opportunity to compete for the contract, and (2) would have resulted in the award of the contract to a different proposer if the changes had been included in the original RFP.

Finally, the new statute provides that proposals are not subject to public inspection until a contract is awarded. It is important to note that this language does not necessarily protect trade secrets or other information from disclosure at a later time under the public records law. That protection is available under G.S. 132-1.2, but only if the material meets the definition of trade secrets as provided under that law. The protection in the RFP statute simply allows the local government, if it chooses, to refrain from providing copies of the RFPs to the public while they are being evaluated. The local government is free to disclose the material (except for trade secrets that have been properly identified) as it deems appropriate and is required to disclose it once a contract is awarded.

A similar procedure was approved in S.L. 2001-54 (S 675), applicable only to the city of Winston-Salem and Forsyth County.

Miscellaneous Changes in Bidding Laws

In addition to those already discussed, S.L. 2001-328 made numerous other changes of a more technical nature in the competitive bidding statutes.

Bonding requirements. The statute previously required local governments to obtain performance, payment, and bid bonds for all formal bids, but it authorized a waiver of these bonding requirements for contracts for the purchase of apparatus, supplies, materials, or equipment. Many jurisdictions waived the requirements as allowed under the statute, but more often jurisdictions simply failed to obtain the bonds even though no formal waiver was in place. The law now simply eliminates these requirements. Public agencies may still require the bonds at their discretion but need not go through the step of approving a waiver if they are not desired. These bonds remain mandatory and may not be waived for construction or repair contracts in the formal bidding range.

Recording bids in board minutes. The bidding law has for many years required that bids be recorded in the minutes of the governing board. The common practice in local governments, however, is to report to the governing board *a summary* of the bids received, while the bids themselves are retained and discarded in accordance with the state records retention requirements. The law has been revised to eliminate the requirement that bids be recorded in the minutes. If the board acts on the contract [which is required for all contracts in the formal range but can be delegated for purchase contracts in the formal range under G.S. 143-129(a)], a permanent record of the action will be contained in the board's minutes. For all other contracts, records will be retained and discarded in accordance with the records retention rules.

Standard for rejecting bids. The formal bidding statute provides broad authority for the governing board to "reject any and or all proposals" and limits that authority by stating that proposals shall not be rejected "for the purpose of evading the provisions of this Article." G.S. 143-129(b). New language has been added stating that the board can reject proposals for any reason it determines to be in the best interest of the unit, but the existing limitation on rejecting bids is retained. This change emphasizes the unit's potentially legitimate interest in rejecting bids, though questions of interpretation may still arise in particular circumstances when bids are rejected.

Other technical changes. A number of technical changes are also made in this law, some of which are briefly noted here. Changes have been made in the statutory provisions relating to withdrawal of bids for mistake (G.S. 143-129.1) and to negotiations that are allowed when all bids exceed the funds available [G.S. 143-129(b)] to clarify that both of these procedures are available for purchase contracts as well as for construction or repair contracts. The bid withdrawal statute requires that the bidder submit notice of withdrawal within seventy-two hours of the bid opening. This provision has been amended to authorize the public agency to provide in its instructions to bidders for a longer period for submission of a request to withdraw a bid. This change provides the authority for units to include a standard provision in their specifications to extend the period for withdrawal to the beginning of the next business day in the event that the seventy-two-hour period expires on a weekend or holiday. The provision that allows the governing board to delegate authority to award purchase contracts in the formal bid range and to perform other related functions [G.S. 143-129(a)] has been amended to clarify that the delegation can be made to the manager, the chief purchasing official, or both.

School Purchasing

Several changes made this session affect local school purchasing procedures. As noted earlier, the changes in G.S. 143-129, the formal bidding statute, apply to local school units only for contracts for construction or repair work. The changes noted in this section apply to local schools, community colleges, and state agencies, all of which are subject to the purchasing procedures established by the state Department of Administration.

Procurement Cards/E-Procurement

For the past several years, special provisions in the state budget have limited the authority of local school units and state agencies to use procurement cards to obtain goods and services. These cards function like credit cards and are issued for the sole use of the public agency, subject to limitations on amount and type of purchase that are recognized by the issuing financial institution. The state established a pilot program under which a limited number of state agencies, community colleges, universities, and local school units were permitted to use procurement cards. Those not chosen for the pilot program were prohibited from using them. This year, the budget contains a provision that lifts the ban on general use of procurement cards.¹⁰ This special provision also

10. S.L. 2001-424, sec. 15.6.

amends G.S. 143-49, which lists the powers of the Secretary of Administration, to add a new subsection (8) spelling out the secretary's responsibilities with respect to the procurement card program. A provision that would have limited the use of procurement cards to the e-procurement service and imposed a card purchase limit of \$250 for the University of North Carolina at Chapel Hill and North Carolina State University was removed in the Appropriations Technical Corrections Act.¹¹

In addition, the budget special provision establishes a statewide electronic procurement system to be used by state agencies and local school units. The use of the system is intended to be mandatory for these agencies. Exemptions from the use of the state's system are provided for a limited time for units that have previously developed their own systems and for North Carolina State University and The University of North Carolina at Chapel Hill.

Reciprocal Bid Preference

North Carolina does not allow or require in-state preferences for bidders on public contracts. Some states do, however, and this year the legislature enacted a provision to penalize bidders from those states. S.L. 2001-240 (H 3) amends G.S. 143-59 to impose a "reciprocal preference" on bids submitted by nonresident bidders in an amount equal to "the percent of increase, if any, that the state in which the bidder is a resident adds to bids from bidders who do not reside in that state." This requirement becomes effective January 1, 2002, and applies to contracts for equipment, materials, supplies, and services valued at over \$25,000. It applies to state agencies, community colleges, and local school units. The Secretary of the Department of Administration will be responsible for publishing a list of states with in-state preferences and the amount of those preferences for purposes of applying the statute. The requirement does not apply in emergencies and the secretary has discretion to waive it after consultation with the Board of Award.

Miscellaneous Construction Contracting Changes

In addition to the major changes in construction contracting procedures described above, several other changes affecting the construction process were enacted this session.

Landscape Architect Law Changes

The statute governing the practice of landscape architecture has been the subject of an ongoing disagreement between some landscape architects and engineers and their respective regulatory boards, due to the overlap of work that they legally may do. S.L. 2001-496 revised G.S. 89A-1(3) by including within the practice of landscape architecture the performance of services in connection with the development of land areas where "the dominant purpose . . . is the preservation, enhancement or determination of proper land uses, natural land features, ground cover and planting, naturalistic and aesthetic values, the settings, approaches or environment for structures of other improvements, natural drainage and the consideration and determination of inherent problems of the land relating to the erosion, wear and tear, blight or other hazards." The statute was also amended to include a list of specific design elements that may be prepared by a landscape architect. These include: (1) location and orientation of buildings and similar site elements; (2) locations, routing, and design of streets, but not construction plans for major thoroughfares or larger roads; (3) location, routing, and design of public pathways and other travelways; and (4) design of surface or incidental subsurface draining systems, soil conservation, and erosion control measures necessary to an overall landscape plan and site design. The act requires the respective boards to enter into a memorandum of understanding that identifies the areas of overlap or common practice along with a means of resolving disputes concerning the

11. See S.L. 2001-513, sec. 28(b).

standards of practice, qualifications, and jurisdiction of the respective professions. The parties are required to submit a joint report to the legislature by April 30, 2002. The law also authorizes a Legislative Research Commission study of the issue. S.L. 2001-496, Section 12.1(c).

General Construction Changes

A number of small changes were made in various statutes that affect public construction contracts. The statute governing claims on payment bonds, which guarantee payment of laborers and suppliers on public projects, was amended in S.L. 2001-177 (H 1053). As amended, G.S. 44A-27(b) reduces from 180 to 120 the number of days within which the claimant must provide to the contractor written notice of the claim. For general contractors, state law establishes thresholds for the various classifications of licensure. In S.L. 2001-140 (S 431), the thresholds for limited and intermediate licenses were increased to reflect inflation. The project cost limit under G.S. 87-10(a) for an intermediate license was increased from \$500,000 to \$700,000, and the limited license threshold was increased from \$250,000 to \$350,000.

Greater energy efficiency will be required in state projects under various provisions enacted in S.L. 2001-415 (H 1272). This act requires the use of "life-cycle cost analysis" in renovation and construction of public facilities. This analysis evaluates the energy efficiency and cost over the life of the facility or product as part of the design process. The act also establishes a pilot program for the use of "high performance guidelines" developed by the Triangle J Council of Governments to achieve energy conservation in state facilities.

Finally, a number of jurisdictions have obtained local legislation exempting particular projects from the construction bidding requirements. In S.L. 2001-329 (S 405), the City of Charlotte obtained authority to enter into reimbursement agreements with private developers for the design and construction of infrastructure included in the city's capital improvement plan. The act provides that the bidding laws do not apply to the city under these agreements, but the developer must competitively bid the work. The city received separate authority with similar exemptions for storm drainage improvements and intersection and road improvements ancillary to a private land development project. S.L. 2001-248 (S 534). Johnston County obtained an expansion of a previously authorized exception to the bidding requirements for construction of certain schools. S.L. 2001-135 (H 935). The Forsyth County and Stanly County school systems obtained authority to use a repetitive design approach and to negotiate (instead of competitively bid) contracts with single-prime or separate-prime contractors to expedite school construction projects. S.L. 2001-99 (S 401). The Wake County School system obtained authority to solicit bids from prequalified contractors and to use the construction management and design-build methods of construction for school projects until July 1, 2005. S.L. 2001-44. Construction bidding exemptions for particular projects were obtained by Carteret County to convert a former A&P shopping center into a county health and human services building [S.L. 2001-69 (H 856)], by the Village of Pinehurst for the restoration of a historic property [S.L. 2001-66 (H 196)], and by the College of the Albemarle for construction of a multipurpose facility in Elizabeth City [S.L. 2001-66 (H 196)].

Public Records Exception for Security Plans

In response to concerns about maintaining the confidentiality of plans for public security, the legislature has enacted a new exception to the public records law. S.L. 2001-516 (H 1284). A new statute, G.S. 132-1.6, provides that the definition of public records does not include information containing "specific details of public security plans and arrangements or the detailed plans and drawings of public buildings and infrastructure facilities." This provision could apply to plans and specifications used in the bidding process, though it may be difficult to maintain confidentiality in this context since plans are widely made available to potential bidders. A public agency could consider restricting their use and requiring bidders to provide plans only to third parties who intend to participate in the bidding process (such as potential subcontractors).

Disposal of Property

Included in the act that made numerous changes in the purchasing laws, S.L. 2001-328, were several changes in the statutes that govern the sale or other disposal of public property. These laws are contained in Article 12 of Chapter 160A of the General Statutes and apply to cities, counties, local school units, community colleges, and some other types of local governments.¹²

A change in the public auction procedures in G.S. 160A-270 might best be understood as the “E-Bay for public agencies” provision. It adds a new subsection to specifically allow public agencies to conduct electronic auctions for the sale of real or personal property. The governing board may authorize electronic auctions using either a public or a private service. The act requires that notice of the auction be provided in the same manner as for traditional auctions—that is, advertisement in a newspaper of general circulation in the jurisdiction conducting the auction. In the case of an electronic auction, the notice must identify the electronic address at which information about the property to be sold may be found as well as the electronic address where bids may be posted. Although it is unlikely that local governments will abandon the traditional surplus property auction, electronic auctions have proved effective for specialty equipment that has a national or international, rather than a local, market. The state may provide a useful model to local governments considering the use of this method since it currently uses electronic auctions for the sale of surplus property.

Another change in the property disposal laws clarifies local government authority to discard property. S.L. 2001-328 amended G.S. 160A-266 by adding a new subsection (d), which provides that a local government may discard personal property that has no value, remains unsold or unclaimed after the unit has exhausted efforts to sell it using applicable procedures, or poses a potential threat to the public health or safety. Although the authority to dispose of property in these situations may have been implicit, the law is now explicit.

A third change affecting the property disposal laws clarifies the language in G.S. 160A-274(b), with the effect of overruling a North Carolina Court of Appeals decision interpreting that law. The opinion, *Carter v. Stanly County*,¹³ invalidated a conveyance from a county to the state on a very narrow reading of the authority for intergovernmental transactions under the statute. As revised, it is clear that governments have broad authority to convey any type of property interest to other units of government.

Conflicts of Interest

Several criminal laws prohibit public officials from obtaining personal benefit from contracts with the units of government they represent. The importance of these limitations is evident from their presence in the criminal code. Unfortunately, the wording of the existing statutes, some enacted more than 150 years ago, has made them difficult to enforce and has limited their use as a guide to public officials on how properly to conduct their public and private business dealings. This session, the legislature enacted S.L. 2001-409 (H 115), which consolidates, clarifies, and in some respects changes the laws governing conflicts of interest in public contracting. The major changes in the law, most of which take effect July 1, 2002, are summarized below.

The main criminal statute governing conflicts of interest in contracting, G.S. 14-234, generally prohibits public officials from obtaining personal benefit from contracts awarded by the public agencies they represent. An exception in subsection (d1) of that law allows local elected officials and officials appointed to certain local boards to contract with their agencies in small jurisdictions for an amount not to exceed a statutory limit. Taking into account changes in population from the recent census, the legislature amended this exception with the intent that it

12. For more information about disposal of public property and the applicability of statutory procedures affecting these transactions, see David M. Lawrence, *Local Government Property Transactions* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 2000).

13. 125 N.C. App. 628, 482 S.E.2d 9 (1997).

become effective retroactively on April 1, 2001, to increase the population limit that determines which jurisdictions are covered by the exception and to increase the dollar limit for contracts allowed under the exception. (Due to an error in the original bill, and a subsequent error in the technical corrections bill, these changes will become effective April 1, 2002.¹⁴) As revised, the exception will apply to incorporated municipalities with a population of no more than 15,000, counties in which there is no incorporated municipality with a population of more than 15,000, and school districts in counties in which there is no incorporated municipality with a population of more than 15,000. This is an increase from the preexisting population threshold of 7,500. Contracts made under this exception may not exceed within a twelve-month period \$12,500 for medically related services (increased from \$10,000) and \$25,000 for other goods or services (increased from \$15,000).

There are two principal criminal laws governing self-dealing in public contracts—G.S. 14-234 and G.S. 14-236. These laws have different but overlapping provisions prohibiting public officers and employees from benefiting from contracts made by their agencies. G.S. 14-234 has broad application to all types of contracts but only limits interests in contracts that would benefit individuals who are involved in the making of the contract. The precise coverage of the statute is actually somewhat unclear. In contrast, G.S. 14-236 applies only to state agencies and educational and eleemosynary institutions (a narrower scope than in G.S. 14-234) and prohibits interests in contracts for the purchase of “goods, wares, and merchandise” (also narrower than in G.S. 14-234). However, the statute applies to all employees, regardless of their involvement in the making of the contract (here broader than in G.S. 14-234). A third statute, G.S. 14-237, establishes a separate criminal offense for each board member who approves a contract that violates G.S. 14-236.

Effective July 1, 2002, the legislature repealed G.S. 14-236 and -237 and incorporated several of the components of those statutes into a completely revised G.S. 14-234. This change clarifies the coverage of the conflict provisions and creates a uniform standard of conduct for all public officials, whether at the state or local level.

There are three main prohibitions in the statute as revised:

1. Public officials or employees are prohibited from obtaining a direct benefit from any contract in which they are involved on behalf of the public agencies they serve.
2. Even if public officials or employees are not involved in making a contract in which they have a direct benefit, they are prohibited from influencing or attempting to influence anyone in the agency who is involved in making the contract.
3. All public officials and employees are prohibited from soliciting or receiving any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract.

The bill defines *direct benefit* in a manner that incorporates exceptions that exist under the current law. The revision also includes the interest of a spouse in the definition, a change that is more consistent with the intent of the law than is reflected in at least one court decision on the subject.¹⁵

Under the revised law, a person directly benefits from a contract if the person or his or her spouse (1) has more than a 10 percent interest in the company that is a party to the contract, (2) derives any income or commission directly from the contract, or (3) acquires property under the contract. This essentially incorporates the exceptions in section (c1) of the existing statute. The new version, however, takes the approach of defining what a prohibited benefit is, rather than defining only what is not prohibited, which is the approach under the current law.

The revised law also clarifies what it means to be involved in making a contract, which is now defined to include participating in the development of specifications or terms or preparation or award of the contract. It also makes clear that an official is involved in making the contract when the board or commission on which he or she serves takes action on the contract, even if the official

14. See S.L. 2001-487, sec. 44(a).

15. See *State v. Debnam*, 196 N.C. 740, 146 S.E. 857 (1929), holding that a contract by a local school board to purchase goods from the spouse of a school board member did not violate G.S. 14-236.

does not participate. This prevents such officials from benefiting, for example, by not attending a meeting at which a contract from which they would benefit comes up for a vote. The law also prohibits officials from having a direct benefit in contracts they are responsible for administering. A new definition provides that a person is involved in administering a contract if he or she oversees the performance of the contract or has authority to make decisions regarding the contract or to interpret the contract. The statute also specifies that public officials are not involved in making or administering contracts under the statute if they only perform ministerial duties related to the contract.

The other exceptions in the current law are retained and consolidated into one subparagraph (b). A new exception allows public officials to convey property to the agencies they serve under a condemnation proceeding as long as the conveyance is done by court order. Another provides that the spouse of a public officer may be an employee of the unit the public officer serves without being in violation of the law. The law specifies that any time a contract is entered into under an exception, the interested official is prohibited from deliberating or voting on the contract.

A new subsection was added to provide that contracts made in violation of this statute are void, but it allows for limited continuation of a void contract when necessary to prevent harm to the public safety and welfare. The statute gives authority for approval of this limited continuation to the chair of the Local Government Commission (for local agencies) and the state Director of the Budget (for state agencies).

Provisions similar to those contained in the revised G.S. 14-234 have been incorporated into conflicts of interest statutes affecting public hospitals and hospital authorities.

Frayda S. Bluestein

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Senior Citizens

After studying and debating the issue for many years, the General Assembly enacted legislation providing additional property tax relief for low-income elderly or disabled homeowners. This chapter describes that legislation and other new laws affecting senior citizens; state and local aging agencies; long-term care for the elderly; and government programs, assistance, and services for senior citizens.

State and Local Aging Agencies

State Division of Aging

Division of Aging budget. The Current Operations and Capital Improvements Appropriations Act of 2001, S.L. 2001-424 (S 1005), appropriates \$29.5 million in state funding to the Department of Health and Human Services (DHHS) Division of Aging for fiscal year 2001–2002 and 2002–2003.

Division of Aging reorganization. Section 21.33 of S.L. 2001-424 requires the Division of Aging to consolidate its planning and information section with its budget and information section. Savings in nonstate funds realized from reduction in positions must be reallocated to direct services.

Area Agencies on Aging

Consolidation study. Section 21.32 of S.L. 2001-424 directs DHHS to conduct a cost-benefit analysis of possible cost savings and increased efficiencies that might result from reducing the number of area agencies on aging. DHHS must report the results of its study to the General Assembly by March 1, 2002. (There are currently seventeen area agencies on aging in North Carolina.)

State funding for area aging agencies. S.L. 2001-424 reduces state funding to area agencies on aging from \$900,000 to \$700,000 per year (allocated equally among the seventeen area aging agencies).

Long-Term Care

Continuum of Long-Term Care

Section 21.9 of S.L. 2001-424 requires DHHS to develop a system that provides a continuum of long-term care for elderly individuals, disabled persons, and their families. The system must include structures and means for screening, assessment, and care management across long-term care settings; a process for determining outcome measures for long-term care; an integrated data system; relationships with universities to provide policy analysis and program evaluation of long-term care reforms; and other specified components. If nonstate funds are available, DHHS, with the approval of the Office of State Budget and Management, must implement the initial phase of a comprehensive data system for long-term care and develop a long-term care services coordination and case management system to minimize administrative costs, improve access to services, and minimize obstacles to the delivery of long-term care services. DHHS must submit a progress report to the General Assembly by April 15, 2002.

Long-Term Care Planning Local Lead Agency

Section 22.1 of the Studies Act of 2001, S.L. 2001-491 (S 166), requires the DHHS Division of Aging to study whether counties should designate local lead agencies to organize local long-term care planning processes. DHHS must report its findings and recommendations to the North Carolina Study Commission on Aging before the 2003 legislative session.

Quality of Care in Long-Term Care Facilities

S.L. 2001-385 (H 1068) directs DHHS to study methods (other than imposing monetary penalties for deficiencies) for improving and rewarding the quality of care in adult care homes. DHHS must report the results of its study and make legislative recommendations to the General Assembly by March 1, 2002. S.L. 2001-385 also requires DHHS to (1) offer joint training, focusing on frequently cited deficiencies in care, to Division of Facility Services consultants, county department of social services adult home specialists, and adult care home providers; (2) offer similar training for survey team members and nursing home providers; (3) develop an adult care home quality improvement consultation program; (4) establish a skilled nursing facility improvement consultation project; (5) explore alternatives to existing oversight and survey practices that will ensure quality in adult care homes and nursing homes; and (6) study alternative ways of reimbursing adult care homes for the costs of residents residing in special care units. DHHS must report the results of this study to the General Assembly by March 1, 2002.

Section 21.36 of S.L. 2001-424 requires DHHS and the North Carolina Institute of Medicine to continue a special work group to develop and implement criterion-based indicators for monitoring the quality of care in long-term care facilities and programs.

S.L. 2001-482 (S 178) requires DHHS to develop an assessment instrument that will enable adult care home residents and their families to determine the extent to which adult care homes provide quality care. DHHS must report on the development of the assessment instrument to the North Carolina Study Commission on Aging by April 1, 2002, and recommend whether the assessment of adult care homes should be conducted by a state agency or by local governments.

Long-Term Care Staffing

Effective October 1, 2001, S.L. 2001-85 (H 736) requires all licensed adult care and nursing homes to post information that will allow residents, patients, and their families to determine on a daily basis the number of direct care staff and supervisors required to be on duty during each shift.

Long-Term Care Aide Workforce

Section 10.5 of the Studies Act of 2001 (S.L. 2001-491) authorizes the Joint Legislative Health Care Oversight Committee to study workforce issues pertaining to the long-term care aide workforce.

Long-Term Care Criminal Records Checks

S.L. 2001-465 (S 826) (1) suspends until January 1, 2003, the requirements of G.S. 131E-265(a1) and 131D-40 regarding national criminal history checks for employees of adult care homes and contract agencies of adult care homes, nursing homes, and home health agencies; (2) suspends until January 1, 2003, the requirements of G.S. 131E-265(a) regarding national criminal history checks for employees of nursing homes and home health agencies, except for those employees who provide direct care to patients; (3) requires that national criminal history checks under G.S. 131E-265(e) be conducted in accordance with Public Law 105-277; and (4) authorizes the Legislative Research Commission to study how federal law affects the distribution of national criminal history record check information requested for nursing homes, adult care homes, and other agencies and the problems federal restrictions pose for effective and efficient implementation of state-required criminal records checks.

Adult Care Home Rates

Section 21.7 of S.L. 2001-424 directs DHHS to implement four recommendations contained in the State Auditor's performance audit report regarding adult care home reimbursement rates. This section further authorizes the legislature's Fiscal Research Division to contract with an independent consultant to develop a new rate methodology for payments to adult care homes and directs that the consultant's report be submitted to the General Assembly by June 1, 2002. DHHS may not implement an alternative payment procedure for adult care homes without the General Assembly's approval.

Adult Care Home Special Care Units

S.L. 2001-157 (H 958) requires adult care homes that receive State-County Special Assistance or Medicaid payments and have special care units for residents with dementia to submit to DHHS cost reports that identify the costs of their special care units and do not average special care costs with other adult care home costs. S.L. 2001-157 also requires DHHS to develop, based on the data in these cost reports, a designated reimbursement system for residents of special care units, but it prohibits DHHS from implementing this system until it has been reviewed by the General Assembly. DHHS must report its proposed system to the General Assembly by May 1, 2002.

Certificate of Need for Adult Care Homes

S.L. 2001-234 (S 937) (1) extends until December 31, 2001, with some modifications, the moratorium on state approval of additional adult care beds first enacted in 1997; (2) amends G.S. 131E-175 and 131E-176 to require that, effective January 1, 2002, the construction of adult care homes and additional adult care home beds be regulated under North Carolina's certificate of need law; and (3) requires DHHS to make recommendations to the State Health Care Coordinating Council by May 1, 2002, regarding a state medical facilities planning methodology that identifies the persons served by adult care homes and the needs of those persons.

Community-Based Services Provided Through Adult Care Homes

Section 21.54 of S.L. 2001-424 requires DHHS to develop a model project for delivering community-based mental health, developmental disabilities, and substance abuse services through adult care homes that have excess capacity.

Liability Insurance for Long-Term Care Facilities

Section 2.1C of the Studies Act of 2001 (S.L. 2001-491) authorizes the Legislative Research Commission to study issues regarding the availability of liability insurance for long-term care facilities, hospitals, and doctors.

Retirement Facilities' Property Tax Exemption

S.L. 2001-17 (H 193) amends G.S. 105-278.6A to provide a property tax exemption for certain qualified retirement facilities that provide charity care or community benefits. S.L. 2001-17 is discussed in more detail in Chapter 17, "Local Taxes and Tax Collection."

Other Programs, Assistance, and Services for Senior Citizens

Property Tax Exemption for Elderly Homeowners

G.S. 105-277.1 provides financial assistance to low-income elderly or disabled homeowners by exempting part of the value of their homes from the property tax levied by North Carolina counties and municipalities. Under current law, an elderly or disabled homeowner is eligible for the exemption (the first \$20,000 of appraised value of property used as his or her permanent residence) if he or she is a North Carolina resident and his or her income for the preceding calendar year was \$15,000 or less. Under current law, the cost of property tax relief for low-income elderly or disabled homeowners (approximately \$27 million) is divided between local governments (approximately \$19.1 million in lost tax revenues) and the state (\$7.9 million in reimbursements provided to local governments pursuant to G.S. 105-277.1A).

Effective July 1, 2002, S.L. 2001-308 (H 42) amends G.S. 105-277.1 by increasing the income eligibility limit from \$15,000 to \$18,000. Effective July 1, 2003, the income eligibility limit will be adjusted to the nearest \$100 based on annual cost-of-living adjustments used in calculating Social Security and Supplement Security Income benefits. S.L. 2001-308 also changes the amount of the exemption from \$20,000 to \$20,000 or 50 percent of the appraised value of the residence, whichever is greater, and extends the deadline for requesting the exemption from April 15 to June 1 preceding the tax year for which the exemption is claimed. Local governments will bear the entire cost of expanding property tax relief for low-income elderly or disabled homeowners (approximately \$11.8 million in fiscal year 2002–2003).

Effective July 1, 2003, Section 34.15(a)(5) of S.L. 2001-424 repeals G.S. 105-277.1A, which currently requires the state to reimburse local governments for a portion of the property tax revenues (approximately \$7.9 million) they lose due to property tax relief for low-income elderly or disabled homeowners pursuant to G.S. 105-277.1. This, combined with the enactment of S.L. 2001-308, means that local governments will be required to bear the entire cost of providing property tax relief to low-income elderly or disabled homeowners (approximately \$38.8 million in fiscal year 2002–2003).

State-County Special Assistance

State-County Special Assistance payments. Section 21.44 of S.L. 2001-424 increases the maximum State-County Special Assistance payment for elderly or disabled residents of adult care

homes to \$1,091 per month effective October 1, 2001, and to \$1,120 per month effective October 1, 2002.

Special Assistance demonstration project. S.L. 1999-237 established a demonstration project under which Special Assistance payments could be made to up to 400 eligible individuals in in-home living arrangements. Section 21.29 of S.L. 2001-424 allows payments under this demonstration project to be continued through June 30, 2003, in the case of persons who are enrolled in the project as of June 30, 2002, and remain continuously eligible. Payments under the demonstration project may not exceed 50 percent of the payment an individual would receive if he or she resided in an adult care home. Section 21.29 also directs DHHS to apply for a federal waiver extending Medicaid eligibility to persons receiving Special Assistance under the demonstration project. If the waiver is granted, DHHS may not implement the waiver without the General Assembly's approval.

Senior Citizens Centers

Section 21.30 of S.L. 2001-424 provides that state funding for new senior citizens centers may not be provided unless the board of county commissioners in the county in which the new center will be located formally endorses the need for the center, designates a sponsoring agency for the center, and makes a formal commitment to use local funds to support the center's ongoing operations.

Adult Day Care

Adult day care funding. Section 21.47 of S.L. 2001-424 requires the Division of Aging to change the methodology it uses to allocate funding for adult day care to ensure that funds are distributed equitably among service providers and used to serve new clients, not for unused slots.

Adult day care transportation. Effective October 1, 2001, S.L. 2001-90 (H 329) amends G.S. 131D-6(b) to provide that adult day care programs are not required to provide transportation to participants. Programs that choose to provide transportation must comply with rules adopted by the Social Services Commission regarding the health and safety of participants during transport.

Adult day care rates. Legislation (S 167 and H 162) authorizing counties (rather than state agencies) to establish rates for reimbursement for adult day care under the Home and Community Care Block Grant was introduced and passed the Senate and House during 2001. Neither bill was enacted, but both remain eligible for consideration during the 2002 legislative session.

Prescription Drug Assistance

Section 21.88 of S.L. 2001-424 continues the state's prescription drug assistance program and provides \$500,000 per year in state funding for the program. Persons who are age sixty-five or older, have incomes that do not exceed 150 percent of the federal poverty guideline, and suffer from cardiovascular disease or diabetes are eligible for the program.

Section 21.100 of S.L. 2001-424 directs North Carolina's Health and Wellness Trust Fund Commission to develop grant criteria that will enable programs to receive funding to expand elderly or disabled persons' access to prescription drugs.

Section 10.3 of the Studies Act of 2001 (S.L. 2001-491) authorizes the Joint Legislative Health Care Oversight Committee to study ways in which the state might make prescription drug coverage more accessible and affordable for senior citizens.

Public Transportation for the Elderly and Disabled

S.L. 2001-424 appropriates \$1.4 million per year in recurring state funding to the state Department of Transportation for public transportation for the elderly and disabled (a \$500,000 per year increase in funding).

Other Legislation of Interest to Senior Citizens

State and Local Government Retirement

Cost-of-living increase for state and local government retirees. Section 32.22 of S.L. 2001-424 provides a 2 percent cost-of-living increase for most retired state and local government employees covered by the Teachers' and State Employees' Retirement System (TSERS), the Consolidated Judicial Retirement System, the Legislative Retirement System, and the Local Government Employees' Retirement System (LGERS).

Increased local government retirement benefits. Section 32.23 of S.L. 2001-424 increases the retirement benefits of local government employees who are covered by LGERS and who retire on or after July 1, 2001, by increasing the multiplier for full retirement benefits from 1.78 percent to 1.81 percent of average final compensation.

Optional retirement program for the North Carolina Community College system. Effective January 1, 2002, Section 32.24 of S.L. 2001-424 enacts a new statute, G.S. 135-5.4, establishing an optional retirement program for community college employees.

Optional Retirement Program Study Commission. Section 32.24A of S.L. 2001-424 establishes an Optional Retirement Program Study Commission and directs the new commission to examine the feasibility and desirability of extending eligibility under the UNC optional retirement program to include all university employees who are exempt from the State Personnel Act. It also directs the commission to study the feasibility and desirability of establishing an optional retirement program for community college employees. The commission must report the findings of its study to the 2002 General Assembly.

Early retirement for state employees and law enforcement officers. Section 2.1 of the Studies Act of 2001 (S.L. 2001-491) authorizes the Legislative Research Commission to study early retirement for state employees and law enforcement officers.

State contributions to Teachers' and State Employees' Retirement System. In 2001 Governor Easley withheld approximately \$151 million in state contributions to the Teachers' and State Employees' Retirement System (TSERS) in an effort to close a projected \$850 million shortfall in the state's 2000-01 budget. Section 21 of S.L. 2001-513 (H 231) states the legislature's intent to make the state's TSERS contribution for the period between February 28 and June 30, 2001. It is the General Assembly's intent that the payment, including interest, will be made over a five-year period beginning July 1, 2003.

Retired teachers. Before July 1, 2001, G.S. 135-3(8)c provided that a state government retiree's TSERS retirement benefits would not be suspended because of his or her post-retirement earnings as a public school teacher if he or she had been retired and not employed in any capacity (other than as a substitute teacher in a public school) for at least twelve months before returning to work as a teacher. Effective July 1, 2001, through June 30, 2003, Section 32.25 of S.L. 2001-424 amends G.S. 135-3(8)c and 115C-325(a)(5a) to allow a retired teacher to continue receiving his or her full retirement benefits if he or she has been retired and not employed in any capacity (other than as a substitute teacher or part-time tutor in a public school) for at least six months.

PREPARE program. The Office of State Personnel's PREPARE program provided pre-retirement planning assistance to state employees aged fifty or older (or state employees of any age with twenty years of service) and encouraged networking between retired state employees and agencies. Section 13.1 of S.L. 2001-424 abolishes the PREPARE program, but encourages the State Treasurer's office to include the PREPARE model in its delivery of retirement services for state employees and retirees.

Repurchase of withdrawn TSERS service. Section 32.32 of S.L. 2001-424 increases the opportunities for state employees and retirees to repurchase withdrawn years of service under TSERS.

LGERS discontinued service retirement allowance. S.L. 2001-435 (H 943) enacts a new section, G.S. 128-27(a2), authorizing a discontinued service retirement allowance for certain local government employees whose employment is involuntarily terminated due to reduction in force, merger, or other specified circumstances.

Retirement benefits for nonimmigrant aliens. Effective August 1, 2001, S.L. 2001-426 (H 1324) amends the definitions of *employee* and *teacher* in G.S. 128-21 and 135-1 to include nonimmigrant aliens who are otherwise eligible to participate in LGERS or TSERS.

Medicare Supplement and Long-Term Care Insurance

Part X of S.L. 2001-334 (H 360) repeals the sunset provision in G.S. 58-54-45 and amends that section to require insurers to offer Medicare supplement plans A, C, and J to disabled Medicare beneficiaries under the age of sixty-five. Insurers are also required to offer a guaranteed right of enrollment in plans A or C to those beneficiaries whose coverage under a managed care plan has been terminated due to cancellation, nonrenewal, or disenrollment within the past sixty-three days. Part XI of S.L. 2001-334 authorizes the Commissioner of Insurance to adopt temporary rules for Medicare supplement and long-term care insurance when necessary to comply with federal laws and regulations or changes in those laws and regulations.

Administration of Trusts

S.L. 2001-413 (H 1070) rewrites the provisions of Chapter 36A, Article 3, of the General Statutes regarding the resignation, removal, and renunciation of trustees and appointment of successor trustees and enacts a new statute, G.S. 28A-22-10, governing the distribution of assets of an inoperative trust.

Managed Care Patients' Bill of Rights

S.L. 2001-446 (S 199), which enacts a Patient's Bill of Rights for patients covered by managed care plans, is discussed in Chapter 11, "Health."

Advance Health Care Directives Registry

S.L. 2001-455 (H 1362) enacts a new section, G.S. 130A-465, requiring DHHS to establish a central registry for health care powers of attorney, declarations of desire for natural death (living wills), and other advance health care directives. S.L. 2001-455 is discussed in more detail in Chapter 11, "Health."

Portable Do Not Resuscitate Orders

Effective December 1, 2001, S.L. 2001-445 (S 703) enacts a new statute, G.S. 90-21.16, authorizing portable do not resuscitate (DNR) orders that recognize an individual's right to refuse cardiopulmonary resuscitation to avoid loss of dignity and unnecessary pain and suffering.

Guardianship

Legislation to study North Carolina's guardianship statutes (S 179, S 766, and H 246) was introduced, but not enacted, during the 2001 legislative session.

Grandparents As Supervising Drivers

S.L. 2001-194 (H 78) allows a grandparent—as well as a parent or guardian—of an individual who holds a limited learner's permit or driver's license to act as a "supervising driver" under G.S. 20-11.

John L. Saxon

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Social Services

Most of the social services legislation enacted during the 2001 legislative session was included in the Current Operations and Capital Improvements Appropriations Act of 2001. This chapter summarizes the social services provisions included in the state budget and other legislation regarding social services agencies and programs enacted by the 2001 General Assembly, as well as pending social services legislation that may be carried over to the legislature's 2002 session.

Social Services Agencies

Joint Legislative Public Assistance Commission

G.S. 120-225 (enacted in 1997) established the General Assembly's Joint Legislative Public Assistance Commission and required the commission to monitor implementation of the state's Work First program and welfare reform. Section 21.13 of the Current Operations and Capital Improvements Appropriations Act of 2001, S.L. 2001-424 (S 1005), repeals that section and abolishes the commission.

DHHS Budget

The Governor's budget request for the state Department of Health and Human Services (DHHS) was \$3.47 billion for fiscal year 2001–2002 and \$3.73 billion for fiscal year 2002–2003. The General Fund budget approved by the General Assembly, S.L. 2001-424, cuts the base budget for DHHS by \$74.5 million in 2001–2002 and by \$81.6 million in 2002–2003. The department's Division of Child Development absorbed the vast majority of these cuts. S.L. 2001-424 also requires DHHS to eliminate 273 positions within the department. State appropriations to DHHS for Medicaid, social services, health, mental health, and other human services programs constitute almost one-quarter of the state's General Fund budget.

DHHS Office of Policy and Planning

Section 21.14 of S.L. 2001-424 requires DHHS to establish, using existing resources, an office of policy and planning to coordinate the development, implementation, and review of departmental policies, plans, and rules, and to implement strategic planning that integrates budget, personnel, and resources with the department's mission and operational goals.

DHHS Intervention Services

Section 21.18A of S.L. 2001-424 creates the Intervention Services Unit in the Office of the DHHS Secretary. The unit is responsible for planning, research, monitoring, and data analysis to enhance the coordination of programs and activities related to intervention services such as mental health, developmental disabilities, and substance abuse services; social services; public health; preschool education services; and Smart Start services.

Advisory Committee on Family-Centered Services

Section 21.50 of S.L. 2001-424 rewrites G.S. 143B-150.5 and 143B-150.6 and repeals G.S. 143B-150.7, 143B-150.8, and 143B-150.9 to abolish the Advisory Committee on Family-Centered Services.

DHHS Regional Offices and Centralization

S.L. 2001-424 requires the state DHHS to

- consolidate its regional, district, field, and satellite offices across the state by June 30, 2002, and report to the General Assembly with respect to staffing, offices, cost savings, and service delivery (Section 21.1);
- centralize its activities related to coordinating and processing requests for checks of criminal records (Section 21.2);
- study and report to the General Assembly the feasibility of combining all of its toll-free phone lines (Section 21.5);
- implement a centralized contracts system (Section 21.18B); and
- coordinate all family support contracts and activities of DHHS divisions to prevent duplication, promote cost efficiency and effectiveness, and ensure compliance with federal requirements while maximizing federal and state resources (Section 21.18C).

DHHS Administrative Rules

Section 21.10 of S.L. 2001-424 authorizes the recodification of Titles 10 and 15 of the North Carolina Administrative Code to reflect the transfer of functions from the former Department of Health, Environment, and Natural Resources (now, Environment and Natural Resources) to the Department of Health and Human Services. The recodification of these administrative rules will be exempt from the requirements of the state's Administrative Procedure Act and from review by the state Rules Review Commission as long as no substantive changes are made.

Division of Social Services Reorganization

Section 21.49 of S.L. 2001-424 directs the DHHS Division of Social Services to eliminate its local support section and program development branch, to consolidate its resource and information management section and budget operations section, and to consolidate three offices within its economic independence section. In addition to positions eliminated as a result of these organizational changes, S.L. 2001-424 requires the division to eliminate the positions of its ten local program support managers and seven administrative support positions in its regional offices.

Transfer of Human Services Funds

Section 21.11 of S.L. 2001-424 enacts a new statute, G.S. 143-23.3, authorizing the state Director of the Budget (the Governor) to transfer excess funds appropriated for a specific human services program to other human services programs within the state budget.

County Human Services Budget Estimates

G.S. 108A-88 requires DHHS to provide to each county director of social services estimates of the amount of federal and state social services funds that will be available to the county and the amount of county funding that will be required for social services programs during the next fiscal year. Section 21.16 of S.L. 2001-424 amends G.S. 108A-88 to require DHHS to provide budget estimates for social services and public health programs to each county's social services director, public health director, county manager, and board of county commissioners.

Governance of County Human Services Agencies

G.S. 153A-77 authorizes the board of county commissioners in a county with a population in excess of 425,000 (currently Mecklenburg, Wake, and Guilford counties meet this criterion) to assume the powers and duties of a county social services board, local public health board, or area mental health authority, or to establish a consolidated county human services board that exercises most of the powers and duties of those local human services boards. Section 14.2 of the 2001 Studies Act, S.L. 2001-491, authorizes the Environmental Review Commission to examine the benefits of making G.S. 153A-77 applicable to all 100 counties without regard to a county's population.

Social Services Programs

Work First (Temporary Assistance for Needy Families)

State TANF plan and electing counties. Section 21.51 of S.L. 2001-424 approves North Carolina's Temporary Assistance for Needy Families (TANF) state plan for 2001–2003 and designates thirteen counties as “electing” Work First counties—that is, counties that are granted authority to develop and implement local Work First programs without conforming to all the requirements that apply to other (“standard”) counties. These counties are Caldwell, Caswell, Davie, Henderson, Iredell, Lenoir, Lincoln, Macon, McDowell, Randolph, Sampson, Surry, and Wilkes.

Recipient identification system. G.S. 108A-24(1a) and 108A-25.1 required DHHS to establish and maintain a uniform biometric recipient identification system for most Work First, Food Stamp, and Medicaid recipients. Section 21.52 of S.L. 2001-424 repeals this requirement.

Individual development accounts. Section 5.1(aa) of S.L. 2001-424 directs the state Social Services Commission to adopt rules governing individual development accounts for TANF-eligible individuals.

Federal TANF block grant. Section 5 of S.L. 2001-424 appropriates North Carolina's federal TANF block grant of \$373.1 million for cash assistance (\$114.2 million), county block grants (\$92 million), child care subsidies for Work First families (\$26.6 million), children's services, and other programs for needy families.

Work First cash assistance reserve. Section 5.1(v) of S.L. 2001-424 reserves \$11.7 million of North Carolina's federal TANF block grant for Work First cash assistance payments in the event that funds appropriated for cash assistance payments are insufficient. A portion of this reserve (\$2.5 million) may be used for specified programs and activities if DHHS and the Office of State Budget and Management certify that the reserved funds will not be needed for cash assistance payments. Section 33 of S.L. 2001-513 (H 231) provides that DHHS may reduce the

TANF Block Grant appropriations for noncash services made by S.L. 2001-424 if it determines that TANF appropriations for cash assistance payments (including the cash assistance reserve) will be insufficient to provide cash assistance payments to all eligible families in 2001–2002.

Work First study. Section 5.1(g) of S.L. 2001-424 directs the DHHS Division of Social Services to continue its current evaluation of the Work First program regarding “child only” cases and the employment, earnings, barriers to economic self-sufficiency, and utilization of community services by former Work First recipients. DHHS must report its findings to the General Assembly by September 30, 2002.

Cabarrus County Work Over Welfare Program. S.L. 2001-354 (S 113) rewrites S.L. 1998-106 to (1) extend Cabarrus County’s demonstration Work over Welfare Program until September 30, 2003, (2) rewrite some characteristics of the program, and (3) require DHHS to evaluate the program and report to the General Assembly by September 1, 2002.

Medicaid

Medicaid eligibility and services. Section 21.19 of S.L. 2001-424 reenacts the substantive provisions of S.L. 1999-237 relating to Medicaid eligibility, services, and administration. Section 21.19 also allows DHHS (1) to disregard for a period of twelve months the earned income of Medicaid recipients who would otherwise lose their Medicaid eligibility under section 1931 of the federal Social Security Act due to earnings, (2) to provide Medicaid coverage for family planning services to men and women of child-bearing age whose incomes do not exceed 185 percent of the federal poverty guidelines if the federal Centers for Medicare and Medicaid Services approves a waiver allowing these services to be provided under the state’s Medicaid program, and (3) to apply federal transfer of assets policies to excluded “income producing” real property owned by an institutionalized Medicaid applicant or recipient or his or her spouse (estimated cost savings of \$2 million in 2001–2002 and \$3.8 million in 2002–2003). S.L. 2001-424 provides an additional \$500,000 per year in funding for Medicaid’s Community Alternatives Program for Children and additional funding (\$1 million in 2001–2002 and \$2 million in 2002–2003) to increase access to dental services for adults and children covered by Medicaid.

Medicaid cost containment and growth reduction. S.L. 2001-424 reduces the Governor’s proposed budget for Medicaid by \$39.5 million for fiscal year 2001–2002 and \$91.9 million for fiscal year 2002–2003 by implementing a number of cost-containment measures such as managing drug utilization, reducing the dispensing fee for brand-name drugs, increasing the utilization of generic drugs, imposing a daily limit for personal care services, limiting Medicare crossover payments to 95 percent of the Medicare rate, reducing the payment rate for physicians to 95 percent of the Medicare rate, increasing from \$1 to \$3 the co-payment for brand-name drugs, and eliminating new inflationary increases. Section 21.24 of S.L. 2001-424 directs DHHS to reduce the rate of growth of expenditures for Medicaid services (apart from growth related to growth in the number of persons eligible for Medicaid) in fiscal year 2002–2003 to no more than 8 percent of the amount expended in fiscal year 2001–2002 for Medicaid services. In doing this, DHHS may consider changing methods of reimbursement, changing methods of determining inflation factors, recalibrating existing methods of reimbursement, contracting for services, and other recommendations in the May 1, 2001, North Carolina Medicaid Benefit Study. As part of its efforts to contain Medicaid costs, DHHS must establish reimbursement rates that allow efficient Medicaid providers to comply with certification requirements, licensure rules, and other mandated quality or safety standards. DHHS may not change policies regarding the amount, sufficiency, duration, and scope of health care services or regarding authorized Medicaid providers unless it prepares a five-year fiscal analysis documenting the increased costs of these policies and, if the cost of any proposed policy change exceeds \$3 million in any fiscal year, submits the analysis to the legislature’s Fiscal Research Division and to the Office of State Budget and Management.

Section 21.25 of S.L. 2001-424 authorizes DHHS, with the approval of the Office of State Budget and Management, to use up to \$3 million in funds appropriated for Medicaid services for administrative cost-containment activities. Section 21.26 directs DHHS to consider Medicaid program management recommendations contained in the 2001 Medicaid Benefit Study and to

implement a pharmacy management plan. Section 21.28 requires DHHS to analyze all of the optional services provided under North Carolina's Medicaid program, consider cost savings resulting from reduction in or elimination of these services, and consider the impact on client needs and other services resulting from reducing or eliminating these services. DHHS must report the results of this study to the General Assembly by April 1, 2002.

Medicaid medical coverage policy. Section 21.20 of S.L. 2001-424 requires DHHS to adopt medical coverage policies to promote consistency among Medicaid providers. Adoption of these policies is exempt from the rule-making requirements of the state Administrative Procedure Act.

TBI Medicaid waiver. Section 21.28A of S.L. 2001-424 directs DHHS to seek a waiver from the federal Centers for Medicare and Medicaid Services to implement a home and community-based Medicaid waiver for individuals with traumatic brain injury. If the waiver is approved, DHHS must seek the General Assembly's approval before implementing the waiver.

County share of Medicaid costs. Section 10.4 of the Studies Act of 2001, S.L. 2001-491 (S 166) authorizes the Joint Legislative Health Care Oversight Committee to study issues related to the counties' share of Medicaid costs.

State-County Special Assistance

State-County Special Assistance payments. Section 21.44 of S.L. 2001-424 increases the maximum State-County Special Assistance payment for elderly or disabled residents of adult care homes to \$1,091 per month effective October 1, 2001, and to \$1,120 per month effective October 1, 2002.

Special Assistance demonstration project. S.L. 1999-237 established a demonstration project under which Special Assistance payments could be made to up to 400 eligible individuals in in-home living arrangements. Section 21.29 of S.L. 2001-424 allows payments under this demonstration project to be continued through June 30, 2003, in the case of persons who are enrolled in the project as of June 30, 2002, and remain continuously eligible. Payments under the demonstration project may not exceed 50 percent of the payment an individual would receive if he or she resided in an adult care home. Section 21.29 also directs DHHS to apply for a federal waiver extending Medicaid eligibility to persons receiving Special Assistance under the demonstration project. If the waiver is granted, DHHS may not implement the waiver without the General Assembly's approval.

Adult care home reimbursement rates. Section 21.7 of S.L. 2001-424 directs DHHS to implement four recommendations contained in the State Auditor's performance audit report regarding adult care home reimbursement rates. This section further authorizes the legislature's Fiscal Research Division to contract with an independent consultant to develop a new rate methodology for payments to adult care homes and directs that the consultant's report be submitted to the General Assembly by June 1, 2002. DHHS may not implement an alternative payment procedure for adult care homes without the General Assembly's approval.

County share of Special Assistance payments. Section 1(f) of S.L. 2001-385 (H 1068) requires DHHS to study the cost of reducing, over a five-year period, the counties' share of Special Assistance payments for county residents from 50 percent to 25 percent.

Health Choice (State Child Health Insurance Program)

Section 21.22(b) of S.L. 2001-424 amends G.S. 108A-70.18(8) to redefine *uninsured* as "not covered under any private or employer-sponsored comprehensive health insurance plan on the date of enrollment" and to repeal the provisions of that section regarding a waiting period for enrollment. S.L. 2001-424 also provides an additional \$8 million in state funding for 2001-2002 and \$12.5 million for 2002-2003 to increase the Health Choice enrollment to 82,000 children.

Child Support Enforcement

Performance standards for child support agencies. Section 21.53 of S.L. 2001-424 directs DHHS to develop and implement performance standards for state and county child support enforcement offices, including standards related to cost to collection ratio, consumer satisfaction, paternity establishment, orders established, collection of arrearages, location of absent parents, and administrative costs. Once the standards are established, DHHS must monitor the performance of each child support enforcement office, publish an annual report on the performance of child support enforcement agencies, and implement a program to reward exemplary performance. DHHS must submit a report to the General Assembly by May 1, 2002, regarding its progress in developing these performance standards for child support enforcement offices.

State funding for child support enforcement. S.L. 2001-424 appropriates an additional \$1.5 million in recurring state funding for child support enforcement agencies to reduce caseload backlogs in urban counties and an additional \$2 million in recurring funding to offset continued shortfalls in receipts.

National medical support notice and other child support enforcement remedies. S.L. 2001-237 (H 377) makes several changes to the General Statutes pertaining to child support enforcement remedies and implements a federal requirement regarding use of a national medical support notice for enforcement of medical support obligations in child support orders. S.L. 2001-237 is discussed in more detail in Chapter 3, "Children and Families."

Program Integrity Funding

S.L. 2001-424 eliminates state funding (\$2.5 million per year) to county departments of social services for program integrity activities.

Child Protective Services

S.L. 2001-208 (H 375), as amended by S.L. 2001-487 (H 338), and S.L. 2001-291 (H 275) make several changes to North Carolina's Juvenile Code with respect to child protective services and termination of parental rights. These acts are summarized in Chapter 3, "Children and Families."

Foster Care and Adoption Assistance Payments

Section 21.41 of S.L. 2001-424 continues without change the maximum rates, as established by S.L. 1999-237, for state participation in the foster care assistance, adoption assistance, and HIV foster care and adoption assistance programs. Section 21.40 of S.L. 2001-424 allocates \$1.1 million in funding for the Special Children Adoption Fund and requires the Division of Social Services to develop guidelines for awarding funds to enhance adoption and post-adoption services provided by licensed adoption agencies for children who are in foster care or on whose behalf state adoption assistance payments are made. Section 21.42 of S.L. 2001-424 creates a Special Needs Adoption Incentive Fund to provide financial assistance to facilitate the adoption of certain children residing in licensed foster care homes, requires the state Social Services Commission to adopt rules governing the fund, and requires DHHS to report to the General Assembly on the use of the fund by April 1, 2002.

Families for Kids

S.L. 2001-424 reduces state funding for the Families for Kids initiative by \$500,000 for 2001-2002 and 2002-2003.

Child Welfare Pilots

Section 21.46 of S.L. 2001-424 directs the DHHS Division of Social Services to develop and implement an alternative response system of child protection in at least two, but no more than ten, demonstration areas in the state. The plan must provide for an alternative response system in which local departments of social services use family assessment tools and family support principles when responding to selected reports of suspected child neglect. DHHS is required to develop data collection processes to enable the General Assembly to assess the impact of the pilots on child safety, timeliness of response and service, coordination of local human services, cost-effectiveness, and other related issues.

Social Services and Indian Affairs Collaboration

S.L. 2001-309 (S 715) is summarized in Chapter 3, “Children and Families.”

Family Resource Centers

Section 21.48 of S.L. 2001-424 requires DHHS to evaluate the use of federal and state funding allocated to family resource centers, establish performance standards to measure the effectiveness of centers, redirect funding to focus on core services that have a direct impact on strengthening family support, require centers to demonstrate that they have collaborative relationships with related public and private agencies, and report to the General Assembly by May 1, 2002, with respect to these activities.

Intensive Family Preservation Services

Section 21.50 of S.L. 2001-424 requires DHHS to review the Intensive Family Preservation Services Program; to increase the sustainability and effectiveness of the program; to provide services to children and families in cases of abuse, neglect, and dependence where a child is at imminent risk of removal from the home and to children and families in cases of abuse where a child is not at imminent risk of removal; to collect data from agencies that receive funding for these services; to establish performance standards for agencies that receive funding for these services; to make an interim report to the General Assembly by April 1, 2002; and to submit annual reports to the General Assembly.

Child Day Care

Federal block grant funds. S.L. 2001-424 appropriates \$148.3 million in federal Child Care and Development Block Grant funds, \$76.7 million in federal TANF funding, and \$3 million in federal Social Services Block Grant funds for child care subsidies.

Child care allocation formula. Section 21.69 of S.L. 2001-424 establishes a formula (based on county population, number of children under age six living in poverty, and number of working mothers with children under age six) for allocating noncategorical federal and state child care funds other than the 30 percent Smart Start allocation pursuant to G.S. 143B-168.15(g). Section 21.70 of S.L. 2001-424 precludes DHHS from requiring a local match for state child care funds unless federal law requires a local match. S.L. 2001-424 also requires DHHS to study the methodology for allocating child care funds and to report its recommendations to the General Assembly by April 1, 2002.

Child care subsidy eligibility, fees, and rates. Section 21.73 of S.L. 2001-424 sets the eligibility limit for subsidized child care at 75 percent of median income; sets fees of 8 to 10 percent of family income for families who are required to share in the cost of subsidized child care; repeals G.S. 110-109 (authorizing DHHS to establish market rates for child care providers); and revises the payment rates for child care providers. Section 21.73 also provides that noncitizen families who meet all other eligibility conditions but are residing in the state illegally are eligible

for child care subsidies only if the child for whom services is sought (1) is receiving child protective services or foster care services; (2) is, or is at risk of being, developmentally delayed; or (3) is a citizen of the United States.

Dare County Social Services Funding

A 1977 session law, amended in 1995, directs that in Dare County a portion of the gross receipts of the county Alcoholic Beverage Control Board be allocated to the county for use by the department of social services to supplement the operating cost of an out-of-home group care facility for abused, neglected, and dependent children. S.L. 2001-53 (H 727) provides that the department also may use the funds for other child and family services.

Other Legislation of Interest to Social Services Agencies

Infant Abandonment

S.L. 2001-291 is summarized in Chapter 3, “Children and Families.”

Adoption

S.L. 2001-150 (S 499) and S.L. 2001-303 (S 836) are summarized in Chapter 3, “Children and Families.”

Smart Start

Section 21.72 of S.L. 2001-424 limits the administrative costs of local Smart Start partnerships; imposes competitive bidding requirements on the state Partnership for Children and local Smart Start partnerships; imposes local match requirements for Smart Start funding; and requires DHHS to continue to implement a performance-based evaluation system for the Smart Start program. Section 21.75 of S.L. 2001-424 directs DHHS and the state Partnership for Children to implement policies to ensure that Smart Start funds are allocated to child care programs that serve low-income children; to ensure that federal and state funds are allocated to the neediest child care providers with the lowest licensure ratings; to ensure that federal and state funds are allocated to child care programs that serve an adequate number of children eligible to participate in the state child care subsidy voucher program; to eliminate local duplication and increase efficiency in the administration of child care subsidy voucher funds; to compile data on the unduplicated number of children served with federal and state child care subsidy voucher funds; and to ensure timely, accurate, and consistent reporting of information regarding local child care subsidy waiting lists.

Section 21.75 of S.L. 2001-424 also enacts a new section, G.S. 143B-168.12(d), that directs the state Partnership for Children to submit an annual report to the General Assembly; repeals the reporting requirement in G.S. 143B-168.12(a)(9); requires the Partnership to provide information about Smart Start to the General Assembly; requires the Partnership to evaluate the feasibility of developing a revised funding formula that takes into consideration all relevant funding to provide assistance and services to children under age five; repeals G.S. 143B-168.15(f) (authorizing local Smart Start partnerships to carry over funds); provides that unspent 2000–2001 funds revert to the General Fund; and limits the Partnership’s authority to approve local plans that allocate state funding to providers for one-time quality improvements. S.L. 2001-424 also reduced the Governor’s proposed increase in Smart Start continuation funding by \$48.5 million per year.

More at Four

Section 21.76B of S.L. 2001-424 directs the state DHHS, in consultation with the Department of Public Instruction, to develop More at Four—a voluntary prekindergarten pilot program for at-risk four-year-olds. The two departments are required to (1) establish the More at Four Pre-K Task Force to oversee development and implementation of the pilot program; (2) make interim reports by January 1, 2002, and May 1, 2002; and (3) make a final report and recommendations to the 2003 General Assembly.

Drug Offenses at or Near Child Day Care Centers

S.L. 2001-332 (S 751), which increases the criminal penalties for drug offenses committed at or near child day care centers, is discussed in Chapter 6, “Criminal Law and Procedure.”

Adult Day Care

Legislation regarding adult day care funding, transportation, and rates is summarized in Chapter 22, “Senior Citizens.”

Certificate of Need for Adult Care Homes

S.L. 2001-234 (S 937) is summarized in Chapter 22, “Senior Citizens.”

Mental Health Reform

S.L. 2001-437 (H 381) is discussed in Chapter 18, “Mental Health.”

Social Worker Privilege

Effective October 1, 2001, S.L. 2001-152 (S 739) amends G.S. 8-53.6 and 8-53.7 to provide that information obtained by a certified or licensed clinical social worker, licensed psychological associate, or licensed marriage and family therapist during the course of marital counseling is not admissible as evidence in actions for divorce or alimony.

Conflicts of Interest

S.L. 2001-409 (H 115) substantially rewrites the laws relating to conflicts of interest that arise when public officers or employees benefit from public contracts. These changes are discussed in Chapter 21, “Purchasing and Contracting.”

Government Tort Claims

S.L. 2001-491 authorizes the Legislative Research Commission to study issues related to local government tort liability, state tort liability, the adoption of a local government tort claims act, and the duty to defend government employees. The commission may report to the 2002 regular session of the 2001 General Assembly or to the 2003 General Assembly.

Bills That Did Not Pass

Bills Eligible for Further Consideration

The following bills that passed in the House but not the Senate, or vice versa, may be considered further during the 2002 session.

Law enforcement protection for social workers. If enacted, S 280 would amend the Juvenile Code to require local law enforcement—upon request of the county social services director—to accompany a social services worker to the premises where a child abuse or neglect investigation and evaluation are to take place or where a child is to be taken into custody, if there is an indication of potential risk. Senate Bill 280 passed the Senate on April 25, 2001, and was referred to the House Judiciary II Committee.

Expanded definition of child abuse. House Bill 93, if enacted, would amend the Juvenile Code to expand the definition of child abuse to include cases in which a caretaker or other person persistently fabricates or misrepresents a child's medical illness in order to obtain otherwise unnecessary medical care. An amended committee substitute for H 93 passed the House on April 23, 2001, and was referred to the Senate Judiciary II Committee.

Increased criminal penalty for misdemeanor child abuse. If enacted, H 904 would increase the criminal penalty for misdemeanor child abuse. House Bill 904 passed the House on April 23, 2001, was considered on the Senate floor, and was re-referred to the Senate Judiciary I Committee.

Increased criminal penalties for incest. House Bill 1276, if enacted, would amend North Carolina's criminal statutes regarding incest. A committee substitute for H 1276 passed the House on April 24, 2001. After adopting a second committee substitute, the Senate re-referred the bill to its Judiciary I Committee on July 9, 2001. In another bill that did pass, S.L. 2001-491, the General Assembly authorized the Sentencing and Policy Advisory Commission to study the current punishments for incest (G.S. 14-178 and G.S. 14-179) to determine whether they are consistent with punishments for other sex offenses and to study the incest statutes' application to acts between related minors. Section 7 of S.L. 2001-491 authorizes the commission to report its findings and recommendations to the General Assembly before the convening of the 2002 regular session.

Medicaid coverage of adult day health care services. House Bill 216, if enacted, would direct the state DHHS to submit a draft amendment to the state Medicaid plan to provide Medicaid coverage to adult day health care services. A committee substitute for H 216 passed the House on April 4, 2001, and was referred to the Senate Health Care Committee.

Gaston County Social Services Board. The size and composition of county social services boards and the appointment, qualifications, and terms of county social services board members are determined by Chapter 108A of the General Statutes. In most counties, the county social services board consists of five members—two appointed by the board of county commissioners, two appointed by the state Social Services Commission, and one appointed by the other four social services board members. House Bill 661, if enacted, would allow the Gaston County Board of Commissioners to abolish the county's existing five-member board of social services and replace it with a new social services board consisting of at least five members. Two members of the new county social services board would have to be appointed by the state Social Services Commission. All other matters relating to the size, composition, and membership of the new board, the appointment of social services board members, and the terms of social services board members would be determined by the board of county commissioners. House Bill 661 passed the House of Representatives on April 18, 2001, and was referred to the Senate Committee on State and Local Government.

Bills Not Eligible for Further Consideration

The following bills were introduced in 2001 but did not pass in either the House or the Senate. They are not eligible for consideration in the 2002 session.

Investigation of child abuse and neglect. House Bill 971 would have amended the Juvenile Code to specify the circumstances under which a social worker could enter a private residence for the purpose of investigating a report of child abuse or neglect.

Adoption. House Bill 1164 would have rewritten parts of the adoption law, G.S. Chapter 48, to provide for post-adoption privileges in certain circumstances, based on a written agreement between an adopted child's birth relative and the adoptive parent.

Termination of parental rights based on parent's incarceration. Senate Bill 996 would have amended the Juvenile Code to allow a court to terminate a parent's rights with respect to his or her child if the parent is incarcerated and his or her incarceration will seriously undermine the parent-child relationship.

Foster and adoptive parents' age. House Bill 1228 would have prohibited the use of age as the sole factor in determining whether an adoptive parent or foster parent should be allowed to adopt or provide foster care for a minor.

Work First waiting period. House Bill 933 and Senate Bill 1052 would have authorized the state Social Services Commission to adopt rules that would waive the waiting period for certain people to reapply for cash assistance under the standard Work First Program.

County share of Medicaid costs. Under current law, the state requires counties to pay 15 percent of the nonfederal share of the cost of Medicaid services provided to county residents (approximately 5.5 percent of the total cost). In fiscal year 2000, North Carolina's one hundred counties provided approximately \$213.5 million in county funding for Medicaid services. Several bills to eliminate or reduce the counties' fiscal responsibility for Medicaid were introduced during the 2001 legislative session, but none was reported out of committee. The General Assembly, however, did authorize the Joint Legislative Health Care Oversight Committee to study issues related to county funding of Medicaid. S.L. 2001-491 (S 166), sec. 10.4.

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State Government

Administrative Law

The fraying of consistency in administrative procedures continued in 2001, with numerous bills providing special approaches to temporary rulemaking authority. This proliferation of special approaches is a direct consequence of the increased time required to implement permanent rules as a result of the 1995 changes to the Administrative Procedures Act (APA). Examples of special approaches for temporary rules include S.L. 2001-418 (H 189), which in five of six paragraphs of substantive law provides rulemaking authority that expressly differs from the APA; S.L. 2001-361 (H 612), which provides an alternative approach to the final effectiveness of a rule; and S.L. 2001-113 (H 609), which alters the duration of a temporary rule. There are two lessons to be drawn from these developments. First, the APA is no longer meeting its objective of providing a consistent approach to agency rulemaking. Second, anyone interested in the procedures by which an agency makes rules must now check both the APA and any laws that provide underlying agency authority.

The state's Chief Information Officer received a more direct exemption from APA temporary rulemaking limitations in S.L. 2001-487 (H 338), the Technical Corrections Act. Section 21(g) of that bill sets up temporary rulemaking procedures analogous to, but outside of, the APA scheme, and Section 21(h) adds the Chief Information Officer to the agencies with contested case hearing powers (under Article 3A of the APA) outside the "normal" structure of the Office of Administrative Hearings.

On the other hand, the State Building Code was added to the list of items covered by the APA rulemaking provisions by S.L. 2001-141 (S 1036), and contested cases over the building code were added to the list of cases governed by Article 3A of the APA. At the same time, the bill exempts the Building Code Council from the normal publication requirements for rules under the APA, so the problem of increased inconsistency still applies.

Finally, the legislature acted in S.L. 2001-427 (H 232), the fee bill, to increase its oversight of agency setting and raising of fees. The law now requires an agency that wishes to establish or increase any fee to have either express authorization from the General Assembly for the amount of the fee or general authorization and to consult with the Joint Legislative Commission on Government Operations prior to putting the new fee into effect.

Richard Whisnant

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State Taxation

The changes made in the state tax laws by the 2001 General Assembly were many. Some were technical, but many were substantive and intended in many cases to increase the rates for some taxes and to accelerate the payment of others. This chapter discusses the changes in taxes levied by the state. Legislation affecting local taxes and financial matters is discussed in Chapter 16, “Local Government and Local Finance,” and Chapter 17, “Local Taxes and Tax Collection.”

Tax Administration

Waiver of Penalties

S.L. 2001-87 (H 150) adds a new subsection to G.S. 105-249.2 that prohibits the Secretary of Revenue from assessing any penalties for failure to obtain a business license, failure to file a return, or failure to pay taxes, if the license, return, or taxes are due during the time federal tax-related deadlines are extended because of a presidentially declared disaster. The taxpayer residing or having a business in the affected area is still liable for interest that accrues from the original due date until the date the tax is paid. This proposal codifies the Department of Revenue’s current published penalty policy: the occurrence of a disaster is an automatic reason to waive penalties.

Department of Revenue Collection Procedures

Since 1999, the General Assembly has authorized a pilot program for the collection of tax debts owed by nonresidents and a study of the Department of Revenue’s delinquent collection practices. Project Collect Tax, the Department of Revenue’s initiative to collect at least \$100 million in overdue taxes in the 2001–2003 biennium, is an outgrowth of these efforts. S.L. 2001-380 (S 353) enables the department to execute Project Collect Tax by making the following changes in the tax laws:¹

- It makes permanent the department’s authority to use collection agencies to collect out-of-state tax debts.
- It authorizes the department to use collection agencies to collect in-state tax debts for two years.

1. The General Assembly also appropriated funds for fifty-two new positions in the Department of Revenue and twelve contract positions for Project Collect Tax.

- It imposes a collection assistance fee of 20 percent on all tax debts that remain unpaid for ninety days after they become final.
- It allows the Department to use the receipts from the collection assistance fee to provide the resources needed for Project Collect Tax.

S.L. 2001-380 substitutes a broader debt collection program for the pilot program. Under the new program:

- The Department of Revenue may outsource out-of-state tax debts permanently and may outsource in-state tax debts for two years.²
- The cost of collecting tax debts that are at least ninety days overdue is shifted from the state's general revenues to the delinquent taxpayer, by providing that the taxpayer must pay a collection assistance fee of 20 percent of the overdue tax debt.³

The act provides permanent authority for the Department of Revenue to outsource tax debts as long as it continues its practice of notifying the taxpayer prior to submitting the debt to a collection agency. The taxpayer has thirty days after the notice is sent to pay the tax debt. If the debt remains unpaid at the end of the thirty days, then the debt may be outsourced to a collection agency. The collection agencies that contract to collect tax debts are prohibited from revealing confidential tax information. If a contractor reveals tax information, it is subject to a misdemeanor penalty, its contract is terminated, and it is barred from contracting again for five years. The act also establishes a system under which the cost of collecting overdue tax debts is to be borne by the delinquent taxpayers, not by the taxpayers who pay their taxes on time. The act provides that a collection assistance fee is imposed if the department gives the taxpayer thirty days' notice and the taxpayer does not pay the debt within that period. The thirty-day fee notice may not be mailed until at least sixty days after the final assessment for the tax debt, with the result that the fee applies only to tax debts that remain unpaid for ninety days or more after final assessment. The fee does not apply to a tax debt if the taxpayer entered into an installment agreement within ninety days after the final assessment and remains current with payments under the agreement. In addition, the Secretary of Revenue may waive the fee in other situations to the same extent as if the fee were a penalty. The fee is 20 percent of the overdue tax debt and is a receipt of the department. The proceeds of the collection assistance fee are credited to a special, non-reverting account to be used only for collecting overdue tax debts.⁴ The Department of Revenue may use the fee proceeds to pay contractors for collecting tax debts and to pay the fee charged by the federal government for collecting tax debts by offsetting the debt against the taxpayer's federal income tax refund. The remaining proceeds of the fee may be used for collecting overdue tax debts only pursuant to appropriation by the General Assembly.

The Department of Revenue must report periodically on its debt collection activities to the Joint Legislative Commission on Governmental Operations and to the Revenue Laws Study Committee.⁵ The reports must include a breakdown of the amount and age of tax debts collected by collection agencies on contract, tax debts collected by the Department through warning letters, and tax debts otherwise collected by department personnel. They must also include a long-term collection plan, a timeline for implementing each step of the plan, a summary of steps taken since the last report and the results of those steps, and any other data requested.

The act makes several conforming changes:

2. Section 8 of the act provides that the authority to outsource tax debts owed by North Carolina taxpayers sunsets October 1, 2003. During this two-year period, the department would like to outsource low-priority in-state tax cases to a collection agency. The department anticipates referring income tax assessments with a value of \$25 to \$500 in initial referrals.

3. The act states the General Assembly's findings that the Department of Revenue's cost of collecting overdue tax debts equals or exceeds 20 percent of the tax debts and that the cost of collecting overdue tax debts is currently borne by taxpayers who pay their taxes on time. It also states the General Assembly's intent that the collection assistance fee will pass that cost on to delinquent taxpayers who owe overdue tax debts.

4. The Current Operations and Appropriations Act of 2001, S.L. 2001-424, Section 14D.1, provides that the proceeds of the fee are to be transferred to a separate fund code in the Department of Revenue's budget.

5. The reports must be submitted quarterly beginning November 1, 2001, and semiannually beginning November 1, 2002.

- The state submits some tax debts for collection through the U.S. Department of the Treasury Offset Program. Under prior law, the Department of Revenue imposed a \$15 collection assistance fee on each tax debt collected through the federal Treasury Offset Program. Because this act imposes a collection assistance fee on all overdue tax debts, it repeals the fee that applied to debts submitted to the federal Treasury Offset Program, in order to avoid a double fee.
- It deletes a redundant provision allowing the Secretary of Revenue to contract for debt collection.
- It adds a provision to the tax secrecy law allowing the Secretary of Revenue to provide the necessary information to collection agencies to allow them to identify the taxpayers and the amount of the overdue tax debts to be collected.
- It provides funds to pay debt collectors for debts outsourced in the 2000–2001 fiscal year but not collected until after July 1, 2001. The existing law provided authority to pay debt collectors for outsourced debts during the 2000–2001 fiscal year, but because of the time required to collect tax debts, some debts outsourced during the 2000–2001 fiscal year were not collected until after July 1, 2001. For these debts, this act provides that the debt collector may be paid from the proceeds collected.

Accelerated Payment of Withholding Taxes

Under prior law, those employers liable for less than \$500 a month in employee wage withholding were given the option to pay quarterly. Subsections (a) and (b) of Section 5 of S.L. 2001-427 (H 232) change the \$500 threshold to \$250, so that those employers liable for \$250 to \$500 a month will pay monthly, but employers liable for less than \$250 a month may still choose to pay quarterly. These subsections became effective January 1, 2002, and apply to payments of withheld income taxes made on or after that date.

Accelerated Payment of Sales and Utility Taxes

Section 6 of S.L. 2001-427, effective January 1, 2002, accelerates four tax payment schedules:

- Subsection (a) changes the threshold for paying sales taxes semimonthly from \$20,000 a month to \$10,000 a month. The returns continue to be due monthly.
- Subsection (b) allows the Secretary of Revenue to require sales tax returns to be filed electronically. Semimonthly payers are required to pay by electronic funds transfer.
- Subsections (c) and (e) make the payment schedule for electricity and telephone sales taxes the same as the schedule for regular sales taxes. This requires some of the state's largest utilities to shift from monthly to semimonthly payments of sales taxes owed on electricity and telephone.
- Subsection (f) requires piped gas excise taxes to be paid on a semimonthly schedule rather than on the previous monthly schedule.
- Subsection (h) authorizes the Revenue Laws Study Committee to study the reporting requirements for electric power companies and the method by which the franchise tax on these companies is distributed to cities to determine simpler ways to achieve the goals of the current requirements and distribution method.
- Subsection (g) enforces the requirement for employers to remit withheld state income taxes on an accelerated basis (within three days after the payroll date). Some of these employers had been continuing to send the money in monthly.

Accelerated Payment of Excise Tax on Conveyances

The state levies an excise tax on each deed, instrument, or writing by which any interest in real property is conveyed to another person. The amount of the tax is \$1 on each \$500 of the

consideration or value of the interest or property conveyed. The tax must be paid to the county register of deeds before an instrument may be recorded. One-half of this amount is retained by the county and credited to the county's general fund. The remainder is remitted quarterly to the state. Of the amount remitted to the state, 75 percent is credited to the Parks and Recreation Trust Fund and 25 percent is credited to the Natural Heritage Trust Fund.

Section 14 of S.L. 2001-427 requires that the portion of the tax revenue due to the state must be remitted monthly, as opposed to quarterly. This section becomes effective July 1, 2003, and applies to amounts collected on or after that date. Data are not available to estimate the fiscal impact of this change on the affected funds.

Income and Franchise Taxes

Corporate Compliance with Tax Laws

S.L. 2001-327 (H 1157) makes three corporate tax law changes:

- It clarifies that income from using trademarks in this state is taxable to this state and provides a reporting option for royalty payments between related parties.⁶
- It provides that franchise tax will apply equally to corporate assets held by affiliated limited liability companies (LLCs), so that a corporation cannot avoid paying franchise tax on its assets by transferring them to an affiliated LLC. It also restates the fraud penalty for willful evasion of franchise tax on these assets.⁷
- It piggybacks the federal dividends received deduction for state corporate income tax purposes.⁸

Royalty Reporting Option

S.L. 2001-327 enhances corporate compliance with taxes on trademark income by partially closing a loophole that allows a corporation to avoid North Carolina tax on income from using intellectual property in this state when the corporation transfers the intellectual property to a related company in another state. This provision solves the problem as it relates to trademarks and trade names but does not address other types of intellectual property, such as patents, or other types of intangible assets. The provision is effective beginning with the 2001 taxable year.

The act creates a new statute in the Corporate Income Tax Act addressing trademark payments between related members. It states that royalties received for the use of trademarks in this state are income derived from doing business in this state and thus are subject to North Carolina income tax. Some corporations have argued that an out-of-state investment company's receipt of royalty income from the use of trademarks in this state does not subject the investment company to North Carolina income tax on the royalties. Corporations also have relied on such an argument to create an arrangement to avoid North Carolina tax on their North Carolina income. Consider, for example, a hypothetical corporation that has substantial profits from operating retail stores or manufacturing facilities in North Carolina. As part of its business, it uses trademarks on these stores or on the goods it manufactures. The operating corporation creates a subsidiary in another state and transfers its trademarks to the subsidiary. It therefore owes the subsidiary

6. The Senate initially considered this part of the act in S 1058, introduced by Senator Kerr. It was recommended by the Governor's Loophole Study Commission. The Senate included it as one of its revenue raising items in its budget bill, the third edition of S 1005.

7. The Revenue Laws Study Committee recommended legislation on this issue—S 242 introduced by Senator Dalton. It also was recommended by the Governor's Loophole Study Commission and the Governor. As a result of study and talks during the session, this act addresses the loophole differently. The Senate included this provision as one of its revenue raising items in its budget bill, the third edition of S 1005.

8. The Governor's Loophole Study Commission and the Governor recommended this provision to the General Assembly. The Senate included it as one of its revenue raising items in its budget bill, the third edition of S 1005.

royalties for the use of the trademarks in North Carolina. If the operating corporation is late paying these royalties, it also owes the subsidiary late fees. The operating corporation deducts against its North Carolina income the royalties and late fees it owes the subsidiary. The subsidiary likely pays little or no tax to another state on these receipts because the receipts may be exempt or apportioned away from that state. The subsidiary's receipts are paid back to the operating corporation as dividends but remain free of North Carolina tax because subsidiary dividends are deductible. As a result of this arrangement, although the operating corporation may generate substantial profits from its retail or manufacturing activities in the state, it ends up paying little or no North Carolina tax on these profits by deducting the royalties and late fees it passes through its subsidiary in another state.

S.L. 2001-327 addresses these arrangements by restating that a company's receipts from royalty payments for the use of trademarks in North Carolina are income from doing business in North Carolina. It then provides adjustments to ensure full and fair accountability for this income in the state in which it was earned. In cases where the recipient of the North Carolina royalty income is unrelated to the payer, the recipient is required to pay North Carolina tax on the income. In cases where the recipient and the payer are related, they have an option on how the income is reported to North Carolina. The payer may deduct the North Carolina royalty payments on its North Carolina return while the recipient includes them on its North Carolina return, or the payer may add the royalty payments to its North Carolina income while the recipient deducts them on its North Carolina return.⁹

Franchise Tax on Corporate Affiliated LLCs

S.L. 2001-327 closes a loophole that existed in the state's corporate tax laws. Prior to the enactment of this provision, a corporation could avoid paying franchise tax on its assets by transferring them to an LLC.¹⁰ Under North Carolina law, LLCs are not subject to the franchise tax.¹¹ In 1997 the North Carolina law regarding LLCs was changed to allow for a single-member LLC. This change had the unintended consequence of opening a loophole in North Carolina tax law. It enabled a corporation subject to North Carolina franchise tax to set up an LLC and transfer assets to the LLC in a tax-free transfer.¹² The assets transferred to the LLC would not be subject to the franchise tax. Thus, the corporation could avoid a significant portion of its franchise tax liability without affecting its income tax liability by transferring assets into a wholly owned LLC subsidiary. The act closes this loophole by requiring a corporation to include in its franchise tax base some or all of the assets of an LLC if (1) the corporation is a member of the LLC and (2) the corporation (and/or members of its affiliated group) is entitled to receive 70 percent or more of the LLC's assets upon dissolution. If the corporation is entitled to receive 100 percent of the LLC's assets upon dissolution, the corporation must include 100 percent of the LLC's assets in its franchise tax base. If the corporation is entitled to receive less than 100 percent of the LLC's assets, then the corporation must include in its franchise tax base only that percentage of the LLC's assets that it would be entitled to receive upon dissolution. If a corporation is required to

9. See *Geoffrey, Inc. v. South Carolina Tax Com'n*, 437 S.E.2d 13 (S.C. 1993), cert. denied by U.S. Supreme Court, 114 S. Ct. 50 (1993). The South Carolina Supreme Court held that (1) royalty income of a foreign corporation, obtained from trademark licenses issued to an affiliate, could be taxed without violating due process clause, and (2) tax could be imposed without violating interstate commerce clause.

10. A limited liability company (LLC) is a business entity that is essentially a hybrid of a partnership and a corporation. Like a corporation, an LLC limits the liability of its owners. Like a partnership, an LLC is usually not subject to entity-level taxation.

11. The state franchise tax is among the oldest taxes in North Carolina. It is a tax on S Corporations and C Corporations for the privilege of doing business in the state. The tax rate is \$1.50 per \$1,000 of value of the greatest of (1) apportioned net book value of the corporation; (2) 55 percent of appraised value of real and tangible personal property in North Carolina; or (3) total actual investment in tangible property in North Carolina.

12. S.L. 2001-508 simplified this transfer by permitting the board of directors of a corporation to transfer corporate assets to a wholly owned limited liability company, limited partnership, registered limited liability partnership, or any other unincorporated entity *without the approval of the shareholders*.

include an LLC's assets in its franchise tax base, it is allowed to exclude its investment in the LLC from its franchise tax base. In S.L. 2001-327, the General Assembly stated its intent to apply the franchise tax equally to assets held by corporations and assets held by corporate-affiliated limited liability companies. To this end, the act provides that a taxpayer who fraudulently underpays the franchise tax on assets it transfers to an affiliated LLC is guilty of a Class H felony, the existing law penalty for tax fraud.

The LLC franchise tax provision is effective for taxes due on or after January 1, 2002.

Corporate Subsidiary Dividend Deduction

S.L. 2001-327 repeals North Carolina's dividends received deduction and instead piggybacks the federal law. The act also equalizes the tax treatment of domestic and foreign source dividends by providing that dividends of foreign corporations may be deducted from taxable income to the extent that they are included in federal taxable income.¹³ Adopting the federal approach simplifies tax administration and compliance. To the extent that North Carolina income tax law conforms to federal law, tax administration and compliance are simplified because the taxpayer is required to make fewer adjustments to taxable income in order to calculate state net income. This part of the act became effective beginning with the 2001 tax year.

Prior to this tax law change, a corporation could deduct from its state taxable income all dividends received from corporations in which it owned more than 50 percent of the outstanding voting stock. Under the federal approach, a parent company may continue to receive a 100 percent deduction if it owns 80 percent or more of the stock of a subsidiary. If a parent company owns more than 50 percent but less than 80 percent of a subsidiary, the amount of its deduction is reduced from 100 percent under prior law to 80 percent under this act. If a company owns 50 percent or less of another company, it had no dividends deduction under prior North Carolina law, but under this act it will receive a dividend deduction of 80 percent if it owns 20 percent or more of the company or a dividend deduction of 70 percent if it owns less than 20 percent of the company. Thus, it is likely that some parent companies will gain under the act and some will lose. If a parent company is subject to the federal cap limiting deductible dividends to 70 percent or 80 percent of its taxable income, the limit will reduce the amount it can deduct for North Carolina purposes. The federal deduction is a gross deduction. However, under G.S. 105-130.5(c)(3), the dividend deduction for U.S. companies under North Carolina tax law is net of related expenses. S.L. 2001-427 amends this act to clarify that foreign source dividends must also be net of related expenses and must be treated for state income tax purposes the same as domestic source dividends.¹⁴

This provision is effective for tax years beginning on or after January 1, 2001.

Modification of Partnership Tax Credit

S.L. 2001-335 (H 146) corrects and clarifies the law governing allocation of partnerships' tax credits, so that any dollar amount limitation on a credit allowed to a partnership applies to the total credit. The limited amount is then allocated by the partnership among the partners on a proportional basis. The original bill was a recommendation of the Revenue Laws Study Committee.

Generally, partnerships are treated the same under North Carolina law as under federal law. Both North Carolina and federal law recognize that a partnership is a separate entity. When the partnership is entitled to a tax credit, the partnership allocates the credit among its partners on a proportional basis. The partners can then claim the amount of credit allocated to them. This is done because the partnership itself is not a taxable entity. Under prior North Carolina law, a

13. Under federal law, foreign dividends are generally included in income and the taxpayer is allowed a credit for foreign tax paid.

14. G.S. 105-130.5(c)(3) does not apply to adjustments made under G.S. 105-130.5(a) or (b). Since the deduction for foreign source dividends is contained in G.S. 105-130.5(b), the proviso in G.S. 105-130.5(c)(3) requiring that the expenses be netted does not apply. See also the summary for S.L. 2001-427 (H 232).

partnership that passed an income tax credit through to its partners would be subject to all limitations on the credit, except¹⁵

1. the limitation that the credit may not exceed the amount of the income tax imposed on the taxpayer, and
2. a cap on the otherwise allowable amount of the credit, expressed as a specific maximum dollar amount or a specific percentage of the tax imposed on the taxpayer.

Federal law does not recognize the second of these, the exemption from a specific dollar amount limitation. Additionally, North Carolina law does not recognize such an exemption for S corporations.¹⁶ Thus, this provision of North Carolina law regarding taxation of partnerships was inconsistent with both federal law regarding taxation of partnerships and North Carolina law regarding taxation of S corporations.

S.L. 2001-335 removes the partnership's exemption from the specific dollar amount limitation. This makes North Carolina law consistent with federal law on this point as well as consistent with North Carolina law regarding S corporations. Limited liability companies are treated like partnerships under North Carolina law for income tax purposes. Thus, this change also applies to limited liability companies.

The change affects relatively few tax credits. The following tax credits have specific dollar amount limitations:

- Worker training (G.S. 105-129.11)
- Investing in central administrative office property (G.S. 105-129.12)
- Investing in business property (G.S. 105-129.16)
- Investing in renewable energy property (G.S. 105-129.16A)
- Real property donations (G.S. 105-151.12)
- Conservation tillage equipment (G.S. 105-151.13)
- Construction of a poultry composting facility (G.S. 105-151.25)

S.L. 2001-335 is effective beginning in the 2002 tax year but delays until 2005 the imposition on partnerships and limited liability companies of the dollar amount limitation on the credit allowed for real property donations. The credit for real property donations is allowed when a person makes a qualified donation of an interest in real property that is useful for public beach access, public access to public waters or trails, fish and wildlife conservation, or other similar land conservation purposes. The credit is equal to 25 percent of the fair market value of the donated property interest. To be eligible for the credit, the interest in property must be donated to and accepted by the state, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions under the Internal Revenue Code. The credit amount may not exceed \$250,000.

Taxation of HMOs and Medical Service Companies

Section 34.22 of S.L. 2001-424 (S 1005) imposes a uniform gross premiums tax on Health Maintenance Organizations and on Article 65 corporations. As amended by S.L. 2001-489, the tax rate is 1.1 percent for taxable years beginning on or after January 1, 2003, and 1 percent for taxable years beginning on or after January 1, 2004.¹⁷

Under current law, Article 65 corporations, such as Blue Cross/Blue Shield and Delta Dental Corporation, pay a gross premiums tax of 0.5 percent. HMOs do not pay a gross premiums tax; however, they are subject to the state's corporate income and franchise tax levies. Other insurance providers pay a gross premiums tax of 1.9 percent. Companies that pay a gross premiums tax are automatically exempt from corporate income and franchise taxes. S.L. 2001-424 subjects all

15. All limitations on the tax credit also apply to each partner individually.

16. An S corporation is a business entity that for tax purposes is similar in most respects to a partnership.

17. Originally, the tax rate would have been 0.833 percent for the 2002 tax year and 1 percent for taxable years beginning on or after January 1, 2003. The General Assembly modified the tax rates at the request of the HMO and medical service corporation industry because they had already sent their customers rate notices for the 2002 tax year that did not include the 0.83 percent rate for the 2002 tax year.

insurance carriers to the gross premiums tax in lieu of the state's corporate income and franchise taxes. All fifty states impose a gross premiums tax on insurance companies; twenty-three states extend the tax to HMOs. The extension of the tax base to include gross premiums on insurance contracts issued by HMOs was part of the Governor's recommendation for closing tax loopholes.

Clarification of Changes in Subsidiary Dividend Provisions

Section 10 of S.L. 2001-427 amends S.L. 2001-327 to clarify that foreign source dividends are treated the same for state income tax purposes as domestic source dividends. Under S.L. 2001-327, North Carolina piggybacks the federal dividends received deduction for State corporate income tax purposes. This deduction pertains to dividends of domestic (U.S.) corporations. The federal deduction is a gross deduction, but under G.S. 105-130.5(c)(3) the expenses are required to be netted.

To equalize the tax treatment of domestic and foreign source dividends, S.L. 2001-327 provided in G.S. 105-130.5(b) that dividends of foreign corporations could also be deducted from taxable income to the extent they are included in federal taxable income. Because the deduction for foreign source dividends is contained in G.S. 105-130.5(b), the provision in G.S. 105-130.5(c)(3) requiring that the expenses be netted does not apply. S.L. 2001-427 clarifies that the dividends of domestic and foreign source dividends are to be taxed the same by providing that the deduction for foreign source dividends is also net of related expenses. This section became effective for taxable years beginning on or after January 1, 2001. There is no fiscal impact.

Technical and Clarifying Changes to the Franchise Tax

In 1996, the General Assembly repealed the corporate income tax credit for qualified business investments, effective for investments made on or after January 1, 1997, because it was advised by the Attorney General's Office that the credit unconstitutionally favored businesses headquartered and operating in North Carolina. Prior to its repeal, the corporate income tax credit could have been claimed against the franchise tax, and a reference to this credit was in the franchise tax law. When the corporate credit was repealed, a conforming change to the franchise tax statute was not made. Section 12 of S.L. 2001-427 makes this conforming change. It also adds standard language to the remaining credit referenced in G.S. 105-122(d1)¹⁸ clarifying that the credit is not a refundable tax credit. Section 12 became effective September 28, 2001.

Pass-Through Entity/Housing Tax Credit

S.L. 2001-431 (S 181) amends the low-income housing tax credit in two ways:

- It allows a pass-through entity to allocate the low-income housing credit to any of its owners at its discretion. In effect, it allows developers of low-income housing to sell federal and state low-income housing tax credits to separate investors. The credit amount may not exceed the owner's adjusted basis in the pass-through entity. If the credit is ever forfeited, the forfeiture applies to the owners in the same proportion as the credit was allocated.
- It expands the credit by allowing it to be taken against the gross premiums tax on insurance companies.

The act is effective for taxable years beginning on or after January 1, 2001, and applies to buildings that are placed in service on or after January 1, 2001.

In the Tax Reform Act of 1986, Congress created the Low Income Housing Tax Credit program to fund housing for low- and moderate-income households. Each state receives a limited amount of credit each year. The IRS allocates the per capita low-income housing tax credits to state housing agencies such as the North Carolina Housing Finance Agency (NCHFA). The NCHFA reviews housing project proposals and awards the tax credits to project developers based

¹⁸ A corporation may claim a credit against its franchise tax liability equal to one-half of the amount of excise tax it paid on piped natural gas during the taxable year.

on selection criteria designed to reward projects that will serve the lowest income tenants for the longest periods. The federal credit program requires that the low-income housing be used for that purpose for at least thirty years. If that requirement is not met, all or part of the taxpayer's credit is recaptured.

Prior to S.L. 2001-431, an investment group had to purchase both the state and federal credits. This restriction limited the number of investors able to use the state tax credit primarily to in-state groups. This act allows the state credits to be allocated in a different manner than the federal credits. It allows a pass-through entity to allocate the credit among any of the entity's owners, in the entity's discretion, as long as the amount of credit allocated does not exceed the owner's adjusted basis in the pass-through entity. In effect, the act allows developers of low-income housing to sell federal and state low-income housing tax credits to separate investors. It is similar to the bifurcation or separate sale of federal and state historic tax credits approved in the 1999 Session of the General Assembly in S.L. 1999-381. Most housing finance experts agree that this act will increase the competition for state tax credits and that this competition will affect the price paid for a credit put up for bid. However, there are no data to predict whether these changes will increase the participation of developers in the state credit program. The statutory mandates on the number of rent controlled units in a project appear to prevent the 100 percent utilization of the state tax credit, and this act does not change those restrictions.¹⁹

Under S.L. 2001-431, when an allocation is claimed by a pass-through entity, the pass-through entity and its owners must include a statement with their tax return that shows both the allocations made and the allocation that would otherwise have been required.²⁰ If an owner of a pass-through entity that qualified for the credit disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the federal credit was first claimed, so that the owner's interest is reduced to less than two-thirds of its interest at the time the federal credit was first claimed, the owner must forfeit a portion of the credit. This recapture does not apply if the change in ownership is due to the death of the owner or to a merger or consolidation requiring approval of the members of the taxpayer's pass-through entity to the extent the entity does not receive cash or property in the merger or consolidation. Under existing law, any forfeiture of the credit triggers the taxpayer's liability for all past taxes avoided plus interest. The past taxes and interest are due thirty days after the credit is forfeited.

Pass-Through Entity Allocation Extension

Taxpayers are allowed an income tax credit of 20 percent of the expenses of rehabilitating an income-producing historic structure if the taxpayer qualifies for the federal credit. A pass-through entity may qualify for the rehabilitation credit and pass the credit on to its owners. A pass-through entity is an entity, such as a partnership, a limited liability company, or a Subchapter S corporation, that is treated as owned by individuals or other entities under federal tax law and whose income, losses, and credits are reported by the owners on their state income tax returns. Generally, under North Carolina law, the pass-through entity is required to allocate a tax credit among its owners in the same proportion that other items, such as the federal rehabilitation credit, are allocated under the Internal Revenue Code. In 1999 the General Assembly amended G.S. 105-129.35 to allow a pass-through entity to allocate this particular credit among its owners at its discretion. That change would have expired for taxable years beginning on or after January 1, 2002. S.L. 2001-476 (S 748) extends that provision for an additional two years.

19. All seven projects in tier one and two counties and all six projects in tier three and flood relief counties utilized the 75 percent state tax credit. However, only twelve of the twenty-three projects in tier four and five counties utilized the 25 percent state tax credit.

20. See G.S. 105-131.8 and G.S. 105-269.15.

Sunset on State Ports Tax Credit Extended

S.L. 2001-517 (H 1388) extends the sunset on the state ports tax credit an additional thirty-four months. Before the enactment of this act, the credit expired for tax years ending on or before February 28, 2001. The bill is effective for taxable years beginning on or after March 2, 2000. The bill is effective retroactive to March 2, 2000, so that the availability of the credit remains uninterrupted.

New Individual Income Tax Bracket

Section 34.18 of S.L. 2001-424 adds a new tax bracket that will apply an additional 0.5 percent income tax to certain North Carolina taxable income for three years. Under prior North Carolina law, tax was imposed at the following rates on individuals' North Carolina taxable income (NCTI):

<u>Tax Rate</u>	<u>NCTI married filing jointly</u>	<u>NCTI heads of household</u>	<u>NCTI unmarried individuals</u>	<u>NCTI married filing separately</u>
6.0%	Up to \$21,250	Up to \$17,000	Up to \$12,750	Up to \$10,625
7.0%	Over \$21,250 and up to \$100,000	Over \$17,000 and up to \$80,000	Over \$12,750 and up to \$60,000	Over \$10,625 and up to \$50,000
7.75%	Over \$100,000	Over \$80,000	Over \$60,000	Over \$50,000

This section creates a fourth tax bracket with a marginal tax rate of 8.25 percent on taxable income over \$200,000 for married couples filing jointly, over \$160,000 for heads of household, over \$120,000 for unmarried individuals, and over \$100,000 for married individuals filing separately. This change will affect approximately 2 percent of North Carolina taxpayers. The new bracket will be in effect only for the 2001, 2002, and 2003 tax years.

Reduction of the Marriage Tax Penalty

S.L. 2001-424 reduces North Carolina income taxes on married couples that claim the standard deduction. Section 34.19 of this act increases the standard deduction for married couples from \$5,000 to \$6,000, so that it will be twice that of a single taxpayer. The increase in the deduction is phased in over the 2002 and 2003 tax years. The standard deduction for married persons filing separately is one-half that for a married couple filing jointly, so this act phases it up from \$2,500 to \$3,000 over the 2002 and 2003 tax years. It is estimated that this change will benefit 762,340 couples in tax year 2002.

Roughly 70 percent of North Carolina taxpayers claim the standard deduction. The so-called marriage tax penalty is the result of a tax system that recognizes that a married couple's living expenses are less than the expenses of two single people living separately but more than the expenses of one single person. In addition, if one spouse is not employed full-time, a married couple's income will be less than that of two comparable single people who work full-time but more than that of one single person. The tax law addresses these situations through the tax brackets, the personal exemptions, and the standard deduction. The effect of these tax provisions on couples that marry is that if only one spouse works, the couple experiences a tax reduction; if one spouse earns substantially more than the other, the couple experiences no tax reduction or increase; and if both spouses earn roughly the same amount, the couple experiences a tax increase.

Increase in Tax Credit for Children

The 1995 General Assembly enacted a tax credit of \$60 per child for married couples with dependent children and a family adjusted gross income below \$100,000 and for heads of household with dependent children and a family adjusted gross income below \$80,000. Section

34.20 of S.L. 2001-424 increases the tax credit to \$75 for the 2002 tax year and \$100 for the 2003 tax year. The credit is in addition to the federal and state tax credits or exclusions for child care expenses. The credit is allowed for each dependent child for whom the eligible taxpayer could take a federal personal exemption under section 151(c)(1)(B) of the Internal Revenue Code. That section of the Internal Revenue Code allows an exemption for each dependent child who either is less than nineteen years old at the end of the taxable year or is a student and is less than twenty-four years old at the end of the taxable year. A child is a son, stepson, daughter, or stepdaughter. A dependent child is a child over half of whose support was provided by the taxpayer.

Elimination of Children's Health Insurance Credit

In 1998 the General Assembly enacted a refundable individual income tax credit for certain taxpayers who purchase health insurance for their dependent children. The credit was equal to the amount of premiums paid, up to \$300 for those taxpayers with incomes below 225 percent of the federal poverty level and up to \$100 for those taxpayers with incomes above the 225 percent threshold. Taxpayers who had their health insurance premiums deducted from their income before it was taxed did not qualify for the credit. Taxpayers whose adjusted gross income was higher than \$100,000 (joint return) did not qualify for the credit. Section 34.21 of S.L. 2001-424 repeals this credit, effective for taxable years beginning on or after January 1, 2001.

Sales, Use, and Motor Fuels Taxes

Streamlined Sales and Use Tax Agreement

Part 1 of S.L. 2001-347 (S 144) establishes the Uniform Sales and Use Tax Administration Act and outlines the parameters under which the Secretary of Revenue may enter into the Streamlined Sales and Use Tax Agreement. The purpose of the agreement is to develop a substantially simplified sales tax system that can better accommodate interstate commerce and thereby help equalize the playing field between remote (catalog and Internet) vendors and "Main Street" merchants. The General Assembly enacted many of the provisions codified in Part 1 as the Uniform Sales and Use Tax Administration Act in 1999.²¹ Under the Uniform Sales and Use Tax Administration Act, the Secretary of Revenue may not enter into the Streamlined Sales and Use Tax Agreement unless the agreement requires each state to abide by the following requirements:

- Uniform state rate
- Uniform standards
- Uniform definitions
- Central registration
- No nexus attribution
- Consumer privacy
- Monetary allowances
- State compliance certification
- Local sales and use tax limitations

This part of the act became effective August 8, 2001. It will expire January 1, 2006, unless one of the following occurs: (1) fifteen states have signed the Streamlined Sales and Use Tax Agreement, or (2) states representing a combined resident population equal to at least 10 percent of the national resident population, as determined by the 2000 federal decennial census, have signed the Streamlined Sales and Use Tax Agreement.

21. S.L. 2000-120 took the first step in simplifying and streamlining the sales and use tax collection system for remote and in-state retailers. It authorized the Secretary of Revenue to enter into the Streamlined Sales and Use Tax Agreement and made statutory changes to enable North Carolina to enter the agreement.

The act also simplifies North Carolina's sales and use tax laws by adopting many of the uniform provisions that must be adopted before a state can participate in the Streamlined Sales and Use Tax Agreement. The key features of the Streamlined Sales and Use Tax Agreement include:

- Uniform definitions within tax bases. Legislatures will still choose what is taxable and what is exempt but will use the common definitions.
- Simplified exemption administration for use- and entity-based exemptions. Sellers will be relieved of the "good faith" requirements that exist in current law and will not be liable for uncollected tax. Purchasers will be responsible for incorrect exemptions claimed.
- Rate simplification. States will be responsible for the administration of all state and local taxes and the distribution of the local taxes to the local governments. State and local governments will use common tax bases and will accept responsibility for notice of rate and boundary changes. States will be encouraged to simplify their own state and local tax rates.
- Uniform sourcing rules. The states will have uniform sourcing rules for all property and services.
- Uniform audit procedures. Sellers who participate in one of the certified Streamlined Sales Tax System technology models either will not be audited or will have a limited scope audit, depending on the technology model used.
- Paying for the system. To reduce the financial burdens on sellers, states will assume the responsibility for implementing the Streamlined Sales and Use Tax Agreement.

S.L. 2000-120 made several changes to the sales and use tax statutes in anticipation of the Streamlined Sales Tax Project. These changes included: simplified exemption administration, uniform audit procedures, certification of software and tax collectors, uniform sourcing rules, limitation of local government rate changes to twice a year, and payment by "direct pay certificates." Part 2 of S.L. 2001-347 builds upon this earlier legislation by establishing uniform definitions and uniform sourcing rules. It also begins the process of establishing uniform rates by shifting the 1 percent, \$80 sales tax cap on mill machinery and mill machinery parts and accessories from a sales tax to a privilege tax of the same rate.²² The part of the act that shifts the tax on mill machinery and mill machinery parts and accessories from a sales tax to a privilege tax of the same rate becomes effective January 1, 2006. The remainder of Part 2 of this act became effective January 1, 2002.

Conforming Changes: Uniform Definitions

Sections 2.1 through 2.5 of S.L. 2001-347 add or amend the following definitions to the state's sales and use tax laws: *candy, delivery charges, dietary supplements, food, food sold through a vending machine, purchase price, soft drink, prepared food, retail sale, and sales price*. Sections 2.18 through 2.22 conform the definition of *prepared food* used in the local prepared meals tax acts with the one amended by Section 2.3. Use of the defined terms results in the following changes to the state's sales and use tax laws:

Food exempt from sales tax. S.L. 2001-347, as amended by Sections 3(a) and 3(b) of S.L. 2001-489, maintains the current exemption for foods that may be purchased with food stamps. The food stamp program applies to food purchased for home consumption. The act, as amended, provides that candy, prepared food, and soft drinks are taxed unless they are purchased for home consumption and would be exempt if purchased under the Federal Food Stamp

22. The Streamlined Sales and Use Tax Agreement requires states to have a limited number of sales and use tax rates. The states have until 2005 to simplify their rates.

Program.²³ Alcoholic beverages, dietary supplements, and foods sold through vending machines also continue to be taxed under G.S. 105-164.13B, as amended by S.L. 2001-489.²⁴

Delivery charges. Under the Uniform Sales and Use Tax Administration Act, all delivery charges are included in the sales price of an item and are therefore subject to tax. Under prior N.C. law, delivery charges may or may not have been included as part of the sales price, depending upon where the title to the property passed to the purchaser. Part 2 of S.L. 2001-347 adopts the uniform definition of sales price that includes all delivery charges; therefore, under this act, delivery charges are subject to tax. Section 2.11 repeals the previous law concerning sales tax on freight and delivery transportation charges.

Installation charges. Under the Uniform Sales and Use Tax Administration Act, installation charges are included in the sales price of an item. S.L. 2001-347 includes these charges in the definition of sales price, but Section 2.12 maintains the current exemption by specifically providing that installation charges are exempt from sales and use tax.

Food purchased from vending machines. Under the Uniform Sales and Use Tax Administration Act, food purchased from vending machines is considered food. Prior to the act, North Carolina taxed food purchased from vending machines because it was not considered food for home consumption. However, the state's definition of sales price provided that any tangible item purchased through a vending machine, other than closed container soft drinks or tobacco products, would be taxed at 50 percent of its sales price. Section 2.13 of the act, as amended in Section 3(b) of S.L. 2001-489, provides that food purchased through a vending machine is subject to tax. However, Section 2.12 maintains the 50 percent exemption by specifically listing it as an exemption from the sales and use tax.

Certain deposits. The Streamlined Sales and Use Tax Agreement considers certain deposits on beverage containers and certain deposits on aeronautic, automotive, industrial, marine, or farm replacement parts to be part of the sales price.²⁵ Part 2 of this act adopts the uniform definition of sales price. However it maintains the tax exempt status of these deposits by adding them to the list of items exempt from sales and use tax.

Definition of use. Section 2.6 conforms the definition of *use* for sales and use tax purposes to the definition used in neighboring states. The change in the definition provides that the use tax is applicable to the distribution of direct mail catalogs printed out of state to in-state residents by a business that has nexus with the state. The definition in the act is consistent with the U.S. Supreme Court's decision in *D. H. Holmes v. McNamara*, 486 U.S. 24 (1988).

Conforming Changes: Uniform Sourcing Rules

Section 2.9 of S.L. 2001-347 adopts the sourcing rule established in the Streamlined Sales and Use Tax Agreement. Under prior law, the point of sale of a product was determined by the location of the retailer's business. Under the new act, the point of sale of a product is determined by the location where the purchaser receives the product, as follows:

- If the purchaser receives the product at a business location, then the sale is sourced to that business location.
- If the purchaser receives the product at a location specified by the purchaser and the location is not a business location of the seller, then the sale is sourced to the location where the purchaser receives the product.

23. Section 2.13 of the act arguably broadened the sales tax exemption for prepared foods to include all take-out food items from restaurants and fast food chains and all catered food. These food items are taxable under current law. An exemption for take-out food items would have resulted in a General Fund loss of approximately \$60 million a year.

24. Section 2.2 of the act excluded alcoholic beverages from the definition of food in the Uniform Act. Because local meals tax laws are linked to the sales tax definitions, this language would have inadvertently exempted prepared alcoholic beverages (beer, wine, and mixed drinks) from the local meals taxes.

25. These deposits were not considered part of the definition of *sales price* under the sales and use tax statutes prior to the enactment of this act.

- If the seller does not know the address where a product is received, then the sale is sourced to either the business or home address of the purchaser, the billing address of the purchaser, or the address of the seller.

This sourcing rule does not apply to telecommunications services.²⁶

Sections 2.10, 2.15, and 2.16 provide that the uniform sourcing rule established in Section 2.9 applies to the state use tax and to the local sales and use tax acts.

Conforming Changes: Uniform Rate

The Streamlined Sales and Use Tax Agreement requires a state to have a limited number of sales and use tax rates. The states have until 2005 to simplify their rates. This act begins the process of simplifying North Carolina's rates by exempting mill machinery and mill machinery parts and accessories from the sales and use tax and imposing in its place a privilege tax on these items. The privilege tax rate will be the same as the current sales and use tax rate: 1 percent of the sales price of the machinery, part, or accessory, subject to a maximum tax of \$80. This change in the law means that retailers are not responsible for collecting and remitting the tax. Section 2.8 repeals the current sales and use tax rate of 1 percent and the \$80 tax cap on mill machinery and mill machinery parts and accessories. Section 2.12 adds mill machinery and mill machinery parts and accessories to the list of exemptions from the sales and use tax. Section 2.17 establishes the privilege tax on mill machinery. These changes in Sections 2.8, 2.12, and 2.17 do not become effective until January 1, 2006.

Conforming Changes: Administration of Returns

The Streamlined Sales and Use Tax Agreement provides that a taxpayer is required to file only one return a month. Under prior law, taxpayers who were consistently liable for at least \$20,000²⁷ a month in state and local sales and use taxes were required to pay the tax and file a return twice a month. Section 2.14 provides that the taxpayer must pay the tax owed twice a month, but only needs to file the return once a month. The monthly return must cover both semimonthly payments.

Sales Tax Increase

Section 34.13 of S.L. 2001-424 increases the state sales tax from 4 percent to 4.5 percent, effective October 16, 2001. The tax increase is repealed July 1, 2003. The state sales tax rate was last increased in 1991, from 3 percent to 4 percent.

Sales Tax Holiday

Section 34.16 of S.L. 2001-424 provides that certain purchases made during the first weekend in August of each year are exempt from the state and local sales and use tax, beginning in August 2002. The exempt purchases include the following:

- clothing with a sales price of \$100 or less per item,
- clothing accessories with a sales price of \$100 or less per item,
- footwear with a sales price of \$100 or less per item,
- school supplies with a sales price of \$100 or less per item, and
- computers, printers and printer supplies, and educational computer software with a sales price of \$3,500 or less per item. The term "computer" means a central processing unit and any peripherals sold with it and any computer software installed at the time of purchase.

26. See S.L. 2001-430, as amended by S.L. 2001-424 and S.L. 2001-487, for the tax treatment of telecommunications services.

27. S.L. 2001-427 changes the semi-monthly threshold for remitting sales and use tax from \$20,000 a month to \$10,000 a month.

S.L. 2001-476 makes several technical and conforming changes to the sales tax holiday. The act incorporates definitions from the Streamlined Sales and Use Tax Agreement into the definitions of items eligible for and excluded from the sales tax holiday.

Taxation of Satellite TV and Cable TV

Section 34.17 of S.L. 2001-424 establishes a 5 percent state sales tax on the gross receipts derived from providing satellite TV services. The new tax became effective January 1, 2002. The gross receipts are not subject to the local 2 percent sales tax. Currently, cable TV may be subject to a local franchise tax of up to 5 percent. Satellite TV is not subject to a local franchise tax. This part of the act equalizes the taxation of satellite TV and cable TV by providing that both are subject to a 5 percent tax on their gross receipts, a local tax for cable TV and a state tax for satellite TV. The equalization of the taxation of cable TV and satellite TV was part of the Governor's recommendation for closing tax loopholes.

The state's taxation of entertainment varies depending upon the type of entertainment. S.L. 2001-424 begins taxing two similar types of entertainment at the same rate. However, other forms of entertainment will continue to be taxed differently. For example, live entertainment is subject to a 3 percent gross receipts tax, while movies are subject to a 1 percent gross receipts tax and video rentals are subject to a 6.5 percent state and local sales tax.

Sales and Excise Tax on Spirituous Liquor

Section 34.23 of S.L. 2001-424 imposes a 6 percent sales tax on spirituous liquor, effective December 1, 2001, and reduces the excise tax on spirituous liquor from 28 percent to 25 percent, effective February 1, 2002. Under prior law, mixed beverages were subject to sales tax, but spirituous liquor (liquor sold in ABC stores) was exempt. The statute levying the 28 percent excise tax on liquor sold in ABC stores stated that the excise tax was in lieu of sales tax. This section repeals the sales tax exemption for spirituous liquor and provides that liquor sold in ABC stores is subject to a 6 percent state sales tax, effective December 1, 2001. If the liquor is sold to a mixed beverage permittee or guest room cabinet permittee for resale, the permittee may apply for a certificate of resale under existing law and not be subject to the sales tax. Mixed beverages will continue to be subject to sales tax at a combined state and local rate of 6.5 percent.

The excise tax (reduced in this act to 25 percent) levied on liquor sold in ABC stores is levied on the price of liquor calculated as the sum of the following components:

- the distiller's price,
- the state ABC warehouse freight and bailment charges, and
- a markup for local ABC boards.

No Tax Break for Luxury Cars/No Fire and Rescue Vehicle Tax

Section 34.24 of S.L. 2001-424 deletes the \$1,500 cap on the 3 percent highway use tax on all noncommercial vehicles except recreational vehicles.²⁸ It also exempts from the highway use tax fire trucks and rescue vehicles owned by volunteer fire departments and volunteer rescue squads. To qualify for the exemption, the volunteer fire department or rescue squad must not be a part of a unit of local government, must have no more than two paid employees, and must be exempt from state income tax under G.S. 105-130.11. The vehicles that may be exempt from the tax are: an emergency services vehicle, a fire truck, a pump truck, a tanker truck, a ladder truck used to suppress fire, and a four-wheel drive vehicle intended to be mounted with a water tank and hose and used for fighting forest fires. An ambulance is not a Class A or B commercial vehicle and so

28. This act removed the \$1,500 cap on all noncommercial vehicles. S.L. 2001-497 (H 72) reinstated the \$1,500 cap for recreational vehicles that are not subject to the \$1,000 cap. A *recreational vehicle* is defined as "a motorized or towable vehicle that combines transportation and temporary living quarters for travel, recreation, and camping."

would be subject to the full 3 percent tax if it were not exempted by this section. The remaining fire and rescue vehicles would be considered Class A or Class B commercial vehicles and would be subject to the \$1,000 maximum highway use tax if not exempted by this act. These changes became effective for certificates of title issued on or after October 1, 2001.²⁹

Sales Tax on Certain Electricity

Section 17 of S.L. 2001-476, as amended by S.L. 2001-487 (H 338), reduces the sales tax on electricity sold to manufacturers. Currently, electricity that is sold to a manufacturer for use at a manufacturing facility and that is separately metered or measured is subject to the sales and use tax at a rate of 2.83 percent. Most other sales of electricity are taxed at the rate of 3 percent. Section 17 enacts a new tax rate schedule that will apply to all manufacturers, based on the volume of electricity used annually. Beginning January 1, 2002, each taxpayer will pay one rate on electricity throughout the year. The rate will be based initially on actual usage the previous year or, in the case of a new manufacturer, estimated usage for the current year. At the end of the year, if the taxpayer has used a volume of electricity that qualifies the taxpayer for a different rate, the taxpayer will be eligible for a refund of excess taxes paid or liable for a deficiency. Beginning on January 1, 2002, manufacturers who use more than 900,000 megawatt-hours of electricity annually will pay a rate of 0.17 percent, while all other manufacturers will continue to pay a rate of 2.83 percent. Beginning July 1, 2005, the following rate schedule goes into effect:

Megawatt-hours used annually	Rate
5,000 or less	2.83%
Over 5,000 and up to 250,000	2.25%
Over 250,000 and up to 900,000	2.0%
Over 900,000	.17%

This section also clarifies that electricity does not “enter into” or become a component part of tangible personal property that is manufactured and is not an accessory to equipment.

Section 15 of the act requires the Revenue Laws Study Committee to review the taxation of electricity and piped natural gas used by manufacturers.

Exemption for Newspapers Sold in Vending Machines

S.L. 2001-509 (S 400), effective January 1, 2002, exempts all sales of newspapers through vending machines from sales and use tax. Confusion had arisen about the tax status of newspapers sold through vending machines at convenience stores, shopping areas, and malls. This act simplifies the taxation issue by exempting all sales of newspapers sold through vending machines.

Tax Revenue for Turfgrass Research

S.L. 2001-514 (H 688), effective February 1, 2002, imposes the 6.5 percent state and local sales tax on seeds and fertilizers sold to nonfarmers.³⁰ Prior to the enactment of this act, fertilizers used for agricultural purposes and seeds were not subject to state or local sales tax. The General Assembly enacted this exemption when primarily farmers used these items. Today, nonfarmers purchase an increasing volume of these items.

The act appropriates \$700,000 from the General Fund for turfgrass research and education for each of the two fiscal years in this biennium. Of this amount, \$600,000 is appropriated to The University of North Carolina to be allocated to North Carolina State University (NCSU). The

29. This effective date was amended by S.L. 2001-489 (H 748) so that it did not apply to certificates of title issued as a result of a purchase made before October 1, 2001, or made pursuant to a contract entered into or awarded before October 1, 2001.

30. The Governor’s Loophole Study Commission and the Governor recommended this provision to the General Assembly. The Senate included it as one of its revenue raising items in its budget bill, the third edition of S 1005.

remaining \$100,000 is appropriated to the Department of Agriculture and Consumer Services for the purpose of educating the public on the results of the research conducted by the Center for Turfgrass Environmental Research and Education at NCSU.

Motor Fuels Tax

S.L. 2001-205 (S 967) clarifies information sharing, provides a procedure for fuel tax refunds using third party credit cards, modifies refunds for kerosene used for certain nonhighway purposes, and makes technical changes. Section 1 of the act makes an exception to the tax secrecy law to allow the Department of Revenue to provide identifying information about motor carriers whose licenses have been revoked. The information can be provided only to the administrator of a national criminal justice system that serves as an information clearinghouse for use only by criminal justice agencies and public safety organizations. The Department of Revenue currently participates in such a system, the State On-Line Enforcement Network (STOLEN). Sharing information about motor carriers whose licenses have been revoked will promote cooperative efforts under the International Fuel Tax Agreement (IFTA), an agreement between taxing jurisdictions to assist each other in the collection and administration of taxes paid by interstate motor carriers on their use of motor fuel. Under the IFTA, a motor carrier declares one member jurisdiction to be its base jurisdiction for registering vehicles for purposes of the road taxes and reporting the taxes due to all the member jurisdictions. The base jurisdiction then collects the road taxes payable to every member jurisdiction and remits the taxes collected to the appropriate jurisdictions. By centralizing the payment and collection of road taxes, the IFTA greatly simplifies the payment of road taxes by motor carriers and the collection of road taxes by the member jurisdictions.

Sections 3 through 5 of the act establish a procedure for administering tax refunds on fuel sold to an exempt entity that uses a third-party exempt credit card to purchase the fuel. This legislation became effective October 1, 2001. Under existing law, an entity whose use of motor fuel is exempt from tax may obtain a refund of the tax it pays on fuel. In the alternative, a person who sells motor fuel to an exempt entity may obtain a refund of the tax it pays on the fuel if it does not pass the tax on to the exempt entity. The prior law also specified that a supplier may issue a card or code to the exempt entity that enables the entity to purchase motor fuel at retail without paying the tax. The supplier is liable if such a card is issued to an entity whose use of fuel is not exempt. The exempt entity is liable if it uses the card to purchase fuel for a purpose other than an exempt purpose. The prior law did not cover a third situation: a credit card company, rather than the supplier, issues the exempt card. When the exempt entity uses the exempt card to purchase motor fuel, the seller does not charge the entity for the tax but subsequently bills the credit card company for the entire sale, including the tax. The credit card company pays the seller and seeks a refund of the tax from the state. Section 3 of S.L. 2001-205 provides that the credit card company may obtain a refund of the tax in this situation. Section 4 of the act provides that the credit card company is responsible for determining that the entity to which the card is issued is exempt. It also provides that the credit card company is liable if the card is issued to an entity that is not exempt. Section 5 of the act authorizes the Secretary of Revenue to require a credit card company to file a bond if the secretary determines after an audit that a bond is necessary to assure collection of tax due pursuant to the audit.

Sections 6 and 7 of the act expand the situations in which a monthly rather than an annual refund is allowed for motor fuel tax paid on kerosene. This legislation became effective October 1, 2001. Under existing law, if a person purchases tax-paid fuel and uses it for a nonhighway purpose, the person can obtain an annual refund of the fuel tax (less the applicable sales tax). In addition, a distributor may obtain a monthly refund for fuel tax it pays on kerosene it dispenses into an end user's storage facility that contains fuel used only for heating. This monthly refund is not net of applicable sales tax, but the distributor collects and remits sales tax on the sale to the end user. Section 6 of the act adds two more exempt purposes to the distributor's monthly refund: drying crops and manufacturing. Heating, drying crops, and manufacturing are the same three purposes designated in the statute allowing dyed (untaxed) diesel fuel to be stored in

containers installed in a manner that makes it improbable that the fuel can be used for any purpose other than those three. Section 7 makes a technical change to the diesel fuel storage statute to cross-reference the purposes listed in the kerosene statute.

Mulch Blower Fuel Tax Refunds

S.L. 2001-408 (H 170) allows a commercial vehicle that delivers and spreads mulch and similar materials, and that uses a power takeoff to deliver or unload the materials, to receive a partial annual refund of the motor fuel taxes paid on the fuel consumed by the vehicle. The act applies to fuel consumed on or after January 1, 2001.

Community College Fuel Tax Exemption

Section 9 of S.L. 2001-427 exempts community colleges from paying the motor fuels tax, effective January 1, 2002.

Telecommunications Taxes

S.L. 2001-430 (H 571), as amended by S.L. 2001-424 and 2001-487, simplifies the collection of telecommunications taxes by (1) combining multiple tax rates into one uniform rate equal to 6 percent,³¹ (2) broadening the tax base by eliminating exemptions for interstate calls and for telephone membership corporations, (3) taxing prepaid phone cards at the point of sale instead of at the point of use, (4) adjusting the tax on the gross receipts from pay phones, (5) setting a call center tax cap of \$50,000 a year, and (6) replacing the 3.09 percent franchise tax distribution to municipalities with a distribution of 18.26 percent of the new revenue total (less the previous freeze amount).

Prior to this act, the General Assembly had not revised the tax structure for telecommunications since 1987. Since that time, changes in the telecommunications industry that were not contemplated by the 1987 tax law changes have occurred. Under former law, two taxes applied to telecommunications services. The applicability of the tax varied depending upon the identity of the provider and the type of service. One of these taxes was a gross receipts franchise tax equal to 3.22 percent of the gross receipts derived by the provider for the provision of local telecommunications services. The second tax was a sales tax. The rate of sales tax varied from 3 percent for local telecommunications to 6.5 percent for intrastate long-distance calls (that is, toll telecommunications services or private telecommunications services that both originate from and terminate in the state). By definition, the taxes did not apply to interstate long-distance calls. Telephone membership corporations had been exempt from the sales tax on telecommunications for many years, and coin-operated pay telephone calls, where the call is paid for by a coin, were exempted from the sales tax in 1998.

Under the prior law, cities received a distribution of part of the tax revenue equal to 3.09 percent of the gross receipts franchise tax that was collected from sales of local telecommunications service within the city, subject to a freeze deduction and a hold-harmless provision. Cities did not receive a percentage of the sales tax revenues. This distribution became increasingly complicated to administer. The advent of cellular phones made the task of deciding to which city a call is attributable very difficult.

During the 1990s, prepaid calling cards became increasing popular and easy to use. They could be purchased at retail stores and other places. However, unlike most items sold in the stores where the cards were most often purchased, prepaid calling cards were not taxable as tangible personal property under the state and local sales tax laws. Because the card represented a

31. This act originally set the uniform rate at 4.5 percent. Section 34.25(a) of S.L. 2001-424 changed the uniform rate to 6 percent.

telecommunications service, the gross receipts franchise tax and the telecommunications sales tax were imposed on the air time, and the tax rate differed depending on the type of call. To levy the tax correctly, telephone companies had to track the minutes used and the types of calls placed by the cardholders.

S.L. 2001-430 addresses some of the difficulties in the existing tax structure in the following ways:

- It taxes prepaid telephone calling arrangements as personal property at the point of sale.
- It applies one tax at one rate to telecommunications services.
- It taxes all telecommunications services equally by eliminating exemptions for interstate telecommunications service, coin-operated telephone calls, and telephone membership corporations.
- It establishes a sourcing rule for mobile telecommunications.
- It preserves the revenue stream to cities while simplifying the distribution formula.

Sections 1 and 6 of S.L. 2001-430 add definitions for use in telecommunications taxation. The definition for *prepaid telephone calling arrangement* is consistent with the definition used in other states. Many of the definitions are similar to the ones previously used in G.S. 105-120. The act defines the new terms *service address* and *mobile telecommunications service*. Those definitions are consistent with the definitions in the federal Mobile Telecommunications Sourcing Act and in the draft legislation being developed by a working group established by the National Conference of State Legislatures. Section 2 repeals the definition of *utility* from the sales tax statutes because it is no longer needed. With the separate taxation of telecommunications and piped natural gas, the only industry remaining in the definition of utility is electricity. The act rewrites the sales tax statutes pertaining to electricity so that the term is not needed (Sections 3, 7, and 8). Section 4 originally set a uniform tax rate of 4.5 percent for all telecommunications services except prepaid telephone calling arrangements. The 4.5 percent rate was chosen as a revenue-neutral rate for the General Fund. Section 34.25(a) of S.L. 2001-424 changed the uniform rate to 6 percent. Section 5 taxes prepaid telephone calling arrangements as personal property at the point of sale and identifies the point of sale. Consequently, it sets the tax rate for prepaid calling arrangements at the general state rate plus the applicable local rates.

Section 6 is the heart of the act. It sets forth the taxation of telecommunications as follows:

- It adopts a sourcing rule for mobile telecommunications service that is substantially the same as the sourcing rule in the federal Mobile Telecommunications Sourcing Act. Mobile telecommunications service is considered to have been provided in this state if the customer's service address is in this state. A service address for mobile telecommunications service may be determined by the provider based upon the customer's telephone number, the mailing address to which the bills are sent, or a street address provided by the customer.
- It addresses the taxation of telecommunications service that is bundled with a service that is not taxable. In those cases, a proportion of the gross receipts from the total charges are taxable based on the unbundled price of each service or on an allocation of revenue to each service.
- It taxes all telecommunications service, including interstate telecommunications service and service provided through a telephone membership corporation. When the General Assembly last changed the telecommunications tax laws in 1987, it was unclear whether states could constitutionally tax interstate telecommunications. However, in 1989, the U.S. Supreme Court removed this uncertainty in *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, when it held that states can tax interstate telecommunications.
- It replaces the 3.22 percent franchise tax on local telecommunications and the 3 percent and 6.5 percent sales taxes on local telecommunications with a uniform gross receipts sales tax on telecommunications.
- It eliminates the tax exemption for telecommunications service provided by public coin-operated pay telephones and paid for by coin (see Section 4). It excludes from tax the receipts from the sale of pay telephone service because the provider pays the sales tax on its purchase of those services.
- It taxes interstate private lines as follows:

- 100 percent of the charge imposed at each channel termination point in this state,
 - 100 percent of the charge imposed for the total channel mileage between each channel termination point in this state, and
 - 50 percent of the charge imposed for the total channel mileage between the first channel termination point in this state and the nearest channel termination point outside this state.
- It caps the tax on call centers at \$50,000 a year. The cap applies to a person who purchases interstate telecommunications service that originates outside the state and terminates in this state and who has a direct pay permit issued by the Secretary of Revenue. A direct pay permit authorizes the holder to purchase telecommunications service without paying tax to the seller and authorizes the seller not to collect any tax on a sale to a permit holder. The permit holder pays the tax directly to the Department of Revenue (Section 9).

Section 10 establishes a new distribution formula that replaces the 3.09 percent distribution to cities from the telephone gross receipts franchise tax with a distribution from the sales tax on telecommunications service established under this act. The new distribution formula eliminates the need for telephone companies to separately track and report local versus other calling services. It also eliminates the need for telephone companies to determine where wireless calls fall in the local/nonlocal mix of calls. Under the new distribution formula, each quarter the Secretary of Revenue must first deduct from the net amount of the tax to be distributed to the cities the amount of \$2,620,948. This is the amount by which the distribution to the cities of the gross receipts franchise tax on telephone companies was required to be reduced in fiscal year 1995–1996. After the required deduction, the secretary must distribute the remaining net tax proceeds to the cities. Cities incorporated before January 1, 2001, will receive a proportionate share based on the amounts they received from the gross receipts franchise tax on telephone companies. Cities incorporated on or after January 1, 2001, will receive a per capita share.

Section 11 of S.L. 2001-430 makes a conforming change to the local franchise tax distribution formula by eliminating references to the gross receipts franchise tax on telephone companies and by clarifying that the freeze deduction applies only to the receipts attributable to electric power companies and natural gas companies. Section 12 repeals the 3.22 percent gross receipts franchise tax on telephone companies. The tax is repealed because it is merged into the uniform tax on telecommunications services established in this act. Sections 13 and 14 conform the local sales tax statutes by adding prepaid telephone calling arrangements to the local sales tax base. Section 15 requires the Department of Revenue to report to the Revenue Laws Study Committee in October 2003 and October 2007 on the amounts collected under this act and on the distributions made to cities. The department, in consultation with the League of Municipalities, may recommend changes to the distribution formula. Sections 16 and 17 preserve the prohibition on county and city taxes on telecommunications services that is now contained in G.S. 105-120(d). Section 18, as amended,³² requires the Utilities Commission to reduce the rates set for telecommunications services to reflect the repeal of G.S. 105-120 and the resulting liability of local telecommunications companies for the new uniform sales tax. The North Carolina Supreme Court upheld the Utilities Commission's authority under its rulemaking procedure to reduce rates to reflect a tax reduction that affects an industry uniformly. *State ex rel. Utility Commission v. Nantahala Power & Light Company*, 326 N.C. 190 (1990). Section 19 directs the Revenue Laws Study Committee to recommend to the 2002 Session of the General Assembly any changes necessary to conform North Carolina's tax laws with the federal Mobile Telecommunications Sourcing Act.

32. Section 119 of S.L. 2001-487 amended Section 18 of this act to clarify that the Utilities Commission has some flexibility in lowering rates, rather than being limited to lowering only basic local line rates by the exact amount of the reduced tax burden.

Changes to the Bill Lee Act

The William S. Lee Quality Jobs and Business Expansion Act (the Bill Lee Act) was enacted in 1996, effective beginning with the 1996 tax year with a 2002 sunset. The Bill Lee Act is a package of state tax incentives and has been modified in each subsequent year. The incentives are primarily in the form of tax credits for investment in machinery and equipment and real property, for job creation, for worker training, and for research and development. Counties are divided into five economic distress tiers based on the unemployment rate, per capita income, and population growth of the county. For many of the credits, the lower the tier of a county, the more favorable the incentive.

S.L. 2001-476, as amended by S.L. 2001-487, makes the following changes to the Bill Lee Act.

Eligible Business Rules and Definitions

Sections 1 and 6 of S.L. 2001-476 make numerous clarifications and changes to the definitions regarding *eligible businesses* under the Bill Lee Act. Section 1(a) clarifies that a taxpayer is eligible for a credit under the Bill Lee Act only if the primary business of the taxpayer is an eligible business under that act. There had been some confusion on the part of taxpayers as to whether a taxpayer whose primary business was not an eligible business but who nonetheless engaged in eligible business activities at a specific location was eligible for credits under the Bill Lee Act. This clarification is consistent with the interpretation of the Bill Lee Act by the Department of Revenue.³³ This is a clarifying amendment and does not change existing law.

Section 1(a) of S.L. 2001-476 became effective when it became law, November 29, 2001. Section 1(b) amends the definitions to remove the requirements regarding primary business. Section 6(a) moves these requirements to the eligible business statute, G.S. 105-129.4(a). Section 1(b) also amends the definition of *data processing* by splitting it into two definitions, *computer services* and *data processing*, and restricting it so that in order for a taxpayer to be engaged in one of these activities, the services must be provided primarily to entities that are not related entities of the taxpayer.³⁴ In addition, Section 1(b) provides a new definition of data processing that does not explicitly refer to the NAICS definition. Section 1(b) is effective for taxable years beginning on or after January 1, 2001.

Section 6(a) amends G.S. 105-129.4(a), effective for taxable years beginning on or after January 1, 2001, to relax the eligible business requirements as follows:

- Computer services. The law is expanded to allow a taxpayer to qualify for credits if the taxpayer has an establishment whose primary activity is in computer services. Under previous law, a taxpayer was eligible for a credit for this industry only if the primary business of the taxpayer was in that industry.
- Electronic mail order house. The law is expanded to allow a taxpayer to qualify for credits if the taxpayer has an establishment whose primary activity is an electronic shopping and mail order house. Under previous law, a taxpayer was eligible for a credit for an electronic mail order house only if the primary business of the taxpayer was an electronic shopping and mail order house.
- Warehousing. Under previous law, a taxpayer was engaged in warehousing only if the primary business of the taxpayer was warehousing. S.L. 2001-476 expands the definition to include a taxpayer whose primary business is not an eligible business if the taxpayer has an establishment whose primary activity is warehousing and that establishment meets each of the following conditions:
 - The establishment is located in an enterprise tier one, two, or three area.
 - The establishment is at a site separate from other subdivisions of the taxpayer.

33. G.S. 105-264 imposes the duty of interpreting the tax laws upon the Secretary of Revenue.

34. Section 1(b) incorporates the definition of *related entity* found in G.S. 105-130.7A.

- The establishment serves at least twenty-five establishments in at least five different counties in one or more states.
- Multiple businesses. S.L. 2001-476 expands the law to allow a taxpayer to claim credits under the Bill Lee Act if the taxpayer's primary business is manufacturing, warehousing, or wholesale trade and the jobs, investment, or activity with respect to which a credit is claimed are used in any of those types of business. Under previous law, a taxpayer could claim a credit under the Bill Lee Act only if the jobs, investment, or activity with respect to which a credit was claimed were used within the primary business of the taxpayer.

In each of these cases, it has been argued that a taxpayer whose primary business is in another industry might nonetheless engage in significant activities in one of these areas. Section 6(a) allows such a taxpayer to be eligible for credits under the Bill Lee Act.

Tier Designation Formula Change

Section 3 of S.L. 2001-476 makes two changes to the tier designation formula. In general, counties are divided into five economic distress tiers based on the unemployment rate, per capita income, and population growth of the county. In 1999, the General Assembly amended the tier designation formula to give a more favorable tier designation to certain lower-population counties. Under previous law there were three exceptions for lower-population counties:

1. A county with a population of less than 10,000 and more than 16 percent of its population below the federal poverty level was designated an enterprise tier one area.
2. A county with a population of less than 50,000 and more than 18 percent of its population below the federal poverty level was given a tier designation one level lower than it otherwise would have received.
3. A county with a population of less than 25,000 could not be designated higher than an enterprise tier three area.

This act increases the population thresholds that are used in items one and three, above, from 10,000 to 12,000 and from 25,000 to 35,000, respectively. The Department of Commerce reports that the counties that are affected by the first change are Alleghany and Jones. The counties affected by the second change are Alexander, Dare, Davie, Macon, and Transylvania. This section became effective when it became law on November, 29, 2001, and applies to tier designations that are made on or after that date.

Call Centers

In 1999 the General Assembly amended the Bill Lee Act so that certain call centers (electronic mail order houses and customer service centers) were eligible for credits under the Bill Lee Act. Section 6 of S.L. 2001-476 expands the number of taxpayers eligible for credits under the Bill Lee Act by including customer service centers and electronic mail order houses located in enterprise tier three areas. This change is effective for taxable years beginning on or after January 1, 2001.

Clarification of Expiration of Credits

In 2000 the General Assembly amended the Bill Lee Act to clarify that if a taxpayer ceased to engage in an eligible business, credits under the Bill Lee Act would expire and the taxpayer would not be allowed to take any further installments of the credit. Expiration of a credit, however, does not prevent a taxpayer from taking any carryforwards of previous installments of the credit. In several instances, an eligible business is defined not only by industry type, but also by the number of jobs created or the enterprise tier designation of the location. It was not entirely clear what the effect would be on a taxpayer's credits if the taxpayer was still involved in an eligible industry, but the number of employees dropped below the applicable threshold or the enterprise tier designation of the location rose above the applicable threshold. Section 6 of this act clarifies that credits under

the Bill Lee Act expire if the number of jobs at a central administrative office drops below 40 or if the number of jobs at an electronic mail order house drops below 250. Section 6 further clarifies that a change in the tier designation of the location of a customer service center or an electronic mail order house does not result in expiration of the credits. These changes became effective when the act became law, November 29, 2001. Section 6 also clarifies the period of time during which a central administrative office may meet the requirement that it create at least forty jobs.

Wage Standard

In order for a taxpayer to be eligible for the credits under the Bill Lee Act, jobs must meet the applicable wage standard. Section 6 of S.L. 2001-476 makes several changes to the wage standard test. First, this act clarifies that the average wage of all jobs at the facility must exceed the applicable average weekly wage in order for the taxpayer to be eligible for the credit for investing in machinery and equipment, the credit for research and development, the credit for investing in central office and aircraft facility property, and the credit for substantial investment in other real property.³⁵ Second, this act changes the wage standard test for the credit for worker training and the credit for creating new jobs. For those two credits, the average wage of the jobs for which the credit is claimed *and* the average wage of all jobs at the facility must exceed the applicable average weekly wage.

Safety and Health and Environmental Eligibility Amendments

Section 5 of S.L. 2001-476 makes changes to the safety and health program eligibility requirement under the Bill Lee Act. Previously, a taxpayer was ineligible for a credit under the Bill Lee Act if the taxpayer had any outstanding violations under the Occupational Safety and Health Act or had had any serious violations of that act in the past three years. Section 5 of S.L. 2001-476 changes this standard in two ways. First, the new standard focuses only on citations that have become final orders. Second, instead of looking for “serious” violations the new standard looks for “willful serious” violations or the “failure to abate serious” violations. The new standard makes more taxpayers eligible for credits under the Bill Lee Act. Section 5 is retroactive to taxable years beginning on or after January 1, 2000.

Section 6 of this act also changes the reporting procedures for the safety and health eligibility requirement and for the environmental impact requirements. Under previous law, the Department of Commerce had to report to the Department of Labor those taxpayers who claimed to meet the safety and health eligibility requirement, and the Department of Labor could audit those taxpayers randomly. Section 6 of S.L. 2001-476 provides that the Department of Labor must now report to the Department of Revenue those employers who have final orders that would make them ineligible for credits. Similarly, under previous law, the Department of Commerce had to report to the Department of Environment and Natural Resources (DENR) those taxpayers who claimed to meet the environmental impact eligibility requirements, and DENR could perform random audits. Section 6 of the act provides that DENR must now report to the Department of Revenue those persons who have pending or final determinations that would disqualify them from claiming credits.

Extended Carryforward Periods

The Bill Lee Act credits may not exceed 50 percent of the tax against which they are claimed. This limitation applies to the cumulative amount of credit claimed by the taxpayer, including carryforwards. As a general rule, any unused portion of a credit may be carried forward five years. Previously, the Bill Lee Act provided three exceptions that allowed longer carryforwards. Those three exceptions were

35. This is a new credit created by this act and is discussed in more detail below.

1. Any unused portion of a credit with respect to a large investment may be carried forward for twenty years. A *large investment* is one where an eligible business purchases or leases, and places in service within a two-year period, \$150 million worth of one or more of the following: real property, machinery and equipment, or central office or aircraft facility property.
2. Any unused portion of a credit with respect to the technology commercialization credit may be carried forward for twenty years. The General Assembly created the technology investment credit in 1999 as an alternative to the 7 percent credit for investing in machinery and equipment. The credit applies only to investments in machinery and equipment used in production that is based on technology licensed from a research university. The investments must be located in a tier one, two, or three county, must equal at least \$10 million during the taxable year, and must total at least \$100 million over a five-year period.
3. Any unused portion of a credit may be carried forward for ten years if the Secretary of Commerce certifies that the taxpayer will purchase or lease, and place in service in connection with an eligible business within a two-year period, at least \$50 million worth of one or more of the following: real property, machinery and equipment, or central office or aircraft facility property. If the taxpayer fails to make the level of investment certified within the two-year period, the taxpayer forfeits the enhanced carryforward period.

Section 7 of S.L. 2001-476 creates two additional exceptions that allow longer carryforwards. Under this act, any unused portion of a credit with respect to research and development under G.S. 105-129.10 may be carried forward for fifteen years. Additionally, any unused portion of a credit for substantial investment in other property³⁶ under G.S. 105-129.12A may be carried forward for twenty years. These changes are effective for taxable years beginning on or after January 1, 2002, and apply to credits that are first claimed on or after that date.

Statute of Limitations

Section 7 of S.L. 2001-476 establishes a statute of limitations so that Bill Lee Act credits cannot be taken more than six months after the deadline for filing the tax return (including extensions) on which they are claimed. This change is effective beginning with the 2001 tax year. In general, an overpayment may be refunded only if the discovery or the written request for a refund is made within three years of the date set by statutes for filing the return or within six months of the date of the overpayment, whichever is later.

Bill Lee Act Credit Applications, Fees, and Reports

Under previous law, to claim a credit under the Bill Lee Act, a taxpayer had to provide with the tax return the certification of the Secretary of Commerce that the taxpayer met all of the eligibility requirements with respect to each credit that the taxpayer claimed. Section 8 (among other sections) of S.L. 2001-476 eliminates the requirement that a taxpayer must obtain the certification of the Secretary of Commerce in order to claim a Bill Lee Act credit. The Department of Commerce will continue to establish enterprise tier and development zone designations and will make written determinations regarding the requirements for development zone projects, large investments, the investment amount for enhanced carryforwards, and the investment amount for the new credit for substantial investment in other property. As amended by S.L. 2001-489, this change is effective for business activities occurring on or after January 1, 2002, and for business activities occurring before January 1, 2002, for which no application has been filed with the Department of Commerce by January 1, 2003. For business activities occurring before January 1, 2002, for which an application is filed with the Department of Commerce before

36. This is a new credit created by this act and is discussed in more detail below.

January 1, 2003, special interim procedures are used. The taxpayer must file an application with the Department of Commerce and pay any applicable fees. The Department of Commerce will not make any determination regarding eligibility for the credits and will not issue a certification, but will instead mark the application as paid and return it to the taxpayer. The taxpayer must then submit the marked application to the Department of Revenue with the relevant tax return. The fees will be divided between the two departments as under previous law. These interim procedures were put into place as the result of a compromise between the Department of Commerce and the Department of Revenue. Since the Department of Commerce's role in certification was being eliminated, it wanted to end all association with certification as soon as possible. The Department of Revenue needed the interim period because it had no feasible way to collect the fees during 2002. Taxpayers must still pay the fee that is currently due with the application, but under this act the fee must be submitted to the Department of Revenue with the tax return for the year in which the taxpayer engaged in the eligible activity. The fee may be paid late, however, as long as it is paid before the credit is claimed.

Under Section 6 of S.L. 2001-476, a taxpayer may seek an advisory ruling from the Secretary of Revenue regarding the taxpayer's eligibility for a credit. Such a ruling will help the taxpayer determine in advance whether a planned activity will qualify for a credit. This change became effective beginning with the 2002 taxable year.

Section 9 of S.L. 2001-476 changes the requirement that taxpayers report the number of development jobs that are filled by residents of development zones. This requirement now applies only to jobs located in development zones. This change became effective beginning with the 2002 taxable year.

Machinery and Equipment Credit Changes

Section 10 of S.L. 2001-476 clarifies how the minimum investment threshold applies to taxpayers who invest in more than one tier. The threshold varies depending on the enterprise tier where the machinery and equipment are placed in service. Previous law stated that if machinery and equipment were placed in service in more than one area, the threshold applied separately to each area. The Department of Revenue interpreted "area" to mean "enterprise tier area." Section 10 of this act clarifies that the threshold applies separately to each of the taxpayer's establishments rather than to each enterprise tier area. An *establishment* is generally a site or location. Section 10 became effective for machinery and equipment placed in service on or after January 1, 2002.

Central Office or Aircraft Facility Property Credit

Section 12 of S.L. 2001-476 removes a provision regarding the expiration of the credit for investing in central office or aircraft facility property. Under previous law, the credit for investing in central office or aircraft facility property expired if the total number of people employed at the taxpayer's central office or aircraft facilities statewide decreased by forty or more. This provision applied only to the credit for investing in central office or aircraft facility real property—the other credits under the Bill Lee Act were not affected by a decrease of forty or more employees. Section 12 removes this provision. However, as is clarified in Section 6 of S.L. 2001-476, the credit for investing in central office or aircraft facility property expires if the number of employees at the office or facility falls below 40. Section 12 is effective for taxable years beginning on or after January 1, 2001.

New Credit for Substantial Investment in Other Property

Section 13 of S.L. 2001-476 creates a new credit under the Bill Lee Act for substantial investment in other real property. This credit is modeled upon the existing credit for investment in central office or aircraft facility property. There are, however, some notable differences between the two credits. In order for the taxpayer to claim the credit for substantial investment in other property, the Secretary of Commerce must make a written determination that the taxpayer is

expected to invest at least \$10 million in real property at a certain location within a three-year period and that the location will create at least 200 new jobs within two years of the time that the property is first used in an eligible business. In contrast, there is no minimum investment amount for the credit for investing in central office or aircraft facility property. For both credits, the taxpayer may begin to claim the credit once the property is first used in an eligible business. The amount of the credit for substantial investment in other property is equal to 30 percent of the eligible investment amount and must be taken in installments over a seven-year period. There is no ceiling on the amount of the credit. In contrast, the credit for investing in central office or aircraft facility property is equal to 7 percent of the eligible investment amount and has a ceiling of \$500,000. The credit for substantial investment in other property expires if the number of people employed at the location falls below 200. As mentioned earlier, the carryforward period for the credit for substantial investment in other property is twenty years, whereas the carryforward period for the credit for investment in central administrative office or aircraft facility property is the standard five years. A taxpayer may not claim both the credit for substantial investment in other property and the credit for investing in central office or aircraft facility property with respect to the same property. Conforming changes related to this new credit were made in several other sections of the act. This credit is effective for taxable years beginning on or after January 1, 2002, and applies to property first used in an eligible business on or after that date.

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Wildlife and Boating Regulation

Historically, a great deal of North Carolina's wildlife and boating law has been contained in local acts that apply only to a particular county or other area, rather than in general statewide laws. This pattern was continued this year, with the General Assembly enacting only one public act dealing with wildlife. No public bills concerning boating regulation were introduced during the 2001 session, and the one public wildlife act dealt primarily with license fees for nonresidents. The local enactments mostly concern familiar subjects such as hunting seasons and bag limits.

Hunting and Fishing License Changes

S.L. 2001-91 (S 888) amends several sections of North Carolina's game and fish law, effective July 1, 2001. Most of these changes have to do with increasing fees for nonresident hunting and fishing licenses as follows:

1. The fee for a nonresident state hunting license increased from \$40 to \$60 for a season license and from \$25 to \$40 for a six-day license [G.S. 113-270.2(c)].
2. A nonresident bear/wild boar hunting license will now cost \$125; prior law provided for a bear license alone for \$100 [G.S. 113-270.3(b)].
3. Fees for nonresident big game hunting licenses increased from \$40 to \$60 for a season license, and from \$25 to \$40 for a six-day license [G.S. 113-270.3(b)].
4. The cost of a nonresident hunting and fishing guide license increased from \$10 to \$100 [G.S. 113-270.4]. A resident license still costs \$10.
5. A nonresident commercial special device fishing license will now cost \$200 instead of \$100 [G.S. 113-272.2].

S.L. 2001-91 also amends G.S. 113-270.1C(b) to provide that a person applying for a "lifetime combination hunting and fishing license for disabled residents" may apply for the fishing

privileges only, which include the right to fish in public mountain trout waters. S.L. 2001-91 became effective July 1, 2001.

Local Acts

As is the case in just about every session, most wildlife and boating legislation consisted of local acts. The local bills enacted in 2001 are listed below in alphabetical order by county.

Beaufort and Hyde Counties

S.L. 2001-19 (H 306) removes the sunset provision from S.L. 1997-132, which was originally June 1, 1999, and was later extended to June 1, 2001. The original act, which now has no expiration date, eliminated bag limits on the hunting or trapping of foxes and raccoons. It also authorized the use of snares when trapping fur-bearing animals. S.L. 2001-19 became effective April 16, 2001.

Bertie County

S.L. 2001-367 (H 402) adds several provisions that go beyond the prohibitions of the North Carolina game and fish law as contained in G.S. Chapter 113. Among other things, this act makes it unlawful to

1. hunt, take, or kill any wild animal or bird (or attempt to do so) with the use of firearms or bow and arrow, from, on, across, or over the roadway or right-of-way of any public road, street, or highway in the county;
2. possess a firearm or bow and arrow outside the passenger compartment of a vehicle while on the roadway or right-of-way, unless the person is the owner or lessee of the land abutting the right-of-way;
3. hunt or possess a firearm or bow and arrow on the land of another without the permission of the landowner or lessee; or
4. take deer from any vessel in the Roanoke River above the U.S. Highway 17 bridge, whether the vessel is under power or not.

This act is enforceable by law enforcement officers of the State Wildlife Commission, sheriffs and deputy sheriffs, and other peace officers with general subject matter jurisdiction. A violation of any above-listed provision is a Class 3 misdemeanor. S.L. 2001-367 became effective October 1, 2001.

Buncombe-Biltmore Forest

S.L. 2001-156 (H 875) directs the Wildlife Resources Commission to consult with and assist the Town of Biltmore Forest in determining an effective method of reducing its deer population. The town's deer problem probably results from its location adjacent to the Biltmore Estate, where deer have been in abundant supply for decades. The Wildlife Commission is required to report its progress to the 2002 Session of the General Assembly. This act became effective on May 31, 2001.

Caldwell County

S.L. 2001-67 (H 794) prohibits the discharge of a firearm across the right-of-way of any public road . . . *but only when done for the purpose of target practice*. The discharge of a firearm for hunting does not appear to be prohibited. This act, which is a Class 3 misdemeanor, is enforceable by wildlife officers, sheriffs and deputy sheriffs, and other peace officers with general subject matter jurisdiction. S.L. 2001-67 became effective October 1, 2001.

Carteret County-Cedar Point

S.L. 2001-65 (H 172) makes it unlawful to operate a vessel at greater than a “no-wake” speed on the waters of the Intracoastal Waterway within the corporate limits of the Town of Cedar Point or within the town’s extraterritorial jurisdiction. This act, which became effective May 14, 2001, is enforceable under G.S. 75A-17 as if it were a provision of Chapter 75A (“Boating and Water Safety”). A violation is a Class 3 misdemeanor.

Martin County

S.L. 2001-64 (H 159) provides that the season established by the Wildlife Commission for taking bear in Martin County shall apply to the entire county. Although the exact reason for this legislation is not apparent, it may have to do with a current commission rule that limits open seasons for bear to only part of the county. This act became effective May 14, 2001, and expires December 31, 2001.

Orange County

S.L. 2001-165 (H 931) provides that Orange County may regulate and prohibit hunting with firearms by persons under the influence of alcohol or other impairing substance, as well as by those having *any* blood alcohol concentration (as measured by an alcosensor). In addition, the county may regulate and prohibit hunting within 150 yards of any federal, state, or local government building, including those owned or leased by a board of education. A violation of an ordinance enacted under the authority of this act is a Class 3 misdemeanor. S.L. 2001-165 became effective on June 4, 2001.

Richmond County

S.L. 2001-133 (H 903) establishes a season for taking foxes with “box-type traps” from January 2 through January 31 of each year. The season bag limit is thirty foxes, which may be either gray, red, or a combination. This act, which became effective October 1, 2001, applies only to that portion of Richmond County located north of U.S. Highway 74 and west of U.S. Highway 1.

Wake County

S.L. 2001-164 (H 891) makes it unlawful for any person to shine a light intentionally upon a deer or to sweep a light in search of deer from half an hour after sunset to half an hour before sunrise. This act is enforceable by wildlife officers, sheriffs and deputy sheriffs, and other peace officers with general subject matter jurisdiction. A violation is a Class 3 misdemeanor. S.L. 2001-164 became effective October 1, 2001.

Ben F. Loeb, Jr.

