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Civil Penalties for Ordinance Violations—Specific or Variable?

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One statutory option a city or county has in enforcing its ordinances is to impose a civil penalty on a violator and, if necessary, sue for the penalty in a civil action in the nature of debt. This *Local Government Law Bulletin* considers the question of whether the ordinance being enforced must set out an exact dollar amount for each penalty, to be sued for regardless of circumstances, or whether it may set out a dollar range for penalties [“variable penalties”] and leave to an administrative official or board the decision as to the amount of the penalty in any individual instance.

Based on nineteenth century case law directly considering this question in North Carolina, and on far more modern case law involving civil penalties set by North Carolina state agencies in enforcing state statutes, the answer seems to be as follows:

1. If there is specific statutory authority for enforcing a specific sort of ordinance through variable penalties, a city or county may do so and include variable penalties in the ordinance. There are a few such specific authorizations, identified in the body of this bulletin.
2. But if the only statutory authorization is the general authorization to impose civil penalties as set out in Chapter 153A, Section 123 and Chapter 160A, Section 175 of the North Carolina General Statutes (hereinafter G.S.), the ordinance must set out an exact amount for each penalty.

The remainder of this bulletin explains the reasoning leading to these conclusions.

The Basic Enabling Statutes

The basic statutory authorizations for cities and counties to select enforcement methods for their ordinances are G.S. 160A-175 (cities) and G.S. 153A-123 (counties). Subsection (c) of each statute, in almost identical language, permits the city or county’s governing board to impose civil penalties for violation of an ordinance. Here is the city statute, G.S. 160A-175(c):

> An ordinance may provide that violation shall subject the offender to a civil penalty to be recovered by the city in a civil action in the nature of debt if the offender

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> does not pay the penalty within a prescribed period of time after he has been cited for violation of the ordinance.[1]

Apart from cases on the disposition of the proceeds of penalties, there is very little case law interpreting these statutory provisions, which in their present form date from the early 1970s. But the civil penalty was, for much of the nineteenth century, the only mechanism for enforcing city ordinances. Thus there is a richer case law from that era, and it is to that we first turn.

Nineteenth Century Cases—Penalties Generally

In the nineteenth century, civil suits for statutory penalties were an important method of enforcing state laws, particularly those that regulated public officials' duties or regulated business and commerce. Violation of a statutory requirement of some sort exposed the violator to suit for the statutory penalty. Although some of the statutes provided that such a suit would be brought by the state or by a particular state agency, it was much more common to allow suit by any person willing to go to the trouble of filing it. Under many statutes, if the plaintiff was successful the state received one-half or some other portion of the penalty, causing the suit to be characterized as a *qui tam* suit;[2] under other statutes, a successful plaintiff was allowed to keep the entire penalty.

These suits were brought under the forms of the common law action of debt.[3] Debt as a form of action was generally available when a contract had been breached and the appropriate relief was a specific sum of money. Probably the most common instance was when one party loaned money to a second party and was not repaid; an action of debt was available for the amount of the loan or the unpaid portion of it. The underlying loan contract set the amount of the loan, and it was the plaintiff's task to prove the existence of the contract and the failure of repayment by the defendant. A second common instance of an action of debt arose when a contract provided for specific liquidated damages in the event of breach. Again the plaintiff's task was to prove the contract's existence, including the liquidated damages provision, and then its breach. (Debt as a remedy for a breached contract was contrasted with the common law action of assumpsit, which was the appropriate form of action when a plaintiff sought nonliquidated

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1. The county version, G.S. 153A-123(c), reads as follows:

> An ordinance may provide that violation subjects the offender to a civil penalty to be recovered by the county in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after he has been cited for violation of the ordinance.

2. "[I]f part of the recovery [in a suit for a civil penalty] were given to the State, then the action, although in [the plaintiff's] name, was called a *qui tam* action." Norman v. Dunbar, 53 N.C. 317, 318–19 (1861).

3. The earliest North Carolina example seems to be *Page v. Farmer*, 6 N.C. 288 (1813), which was characterized as "an action of debt on a penal statute." *Id*.

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damages for breach of a contract.[4]) A third common debt action was when a plaintiff sued for a statutory penalty.[5]

A very important characteristic of the action in debt was that a plaintiff sued for a specific, stated sum of money—a sum certain. If the plaintiff sought recovery within a dollar range or for an indeterminate amount, the action of debt was inappropriate, and the plaintiff would be put out of court.[6] Most statutory penalties were for a specific amount—for example, $100 for a violation of the relevant statutory duty—but occasionally they were a bit less specific. An early usury statute, for example, gave a penalty that was twice the amount of the usurious loan, so that the amount of the penalty depended on the amount of the loan. There was an early bit of uncertainty in the North Carolina cases about whether such a penalty was legitimate inasmuch as the dollar amount of the penalty was not specifically set out in the statute. But the courts quickly were able to fit this sort of penalty into the framework of the action of debt.[7]

Nineteenth Century Cases—Municipal Penalties

For most of the nineteenth century, until the enactment in 1872 of the first version of the statute that is today codified as G.S. 14-4,[8] the only remedies available to a city or town to enforce its ordinances were civil, and the primary remedy was to sue for a civil penalty, set out in the

4. *See e.g.*, Blanton v. Blanton, 40 N.C. App. 221, 252 S.E.2d 530 (1979) ("The action of assumpsit is an action for the recovery of damages for the nonperformance of an oral or simple written contract[.]" *Id*. at 224, 252 S.E.2d at 533).

5. In *Katzenstein v. Raleigh & Gaston Railroad Co.*, 84 N.C. 688 (1881), the court expressed some bewilderment at why a suit for a statutory penalty should follow the common law action of debt, a form of action based on an underlying contract, and explained it this way:

> The learned jurists whose cumulative wisdom formed the common-law system of pleading, which has been characterized by some of its eulogists as the *perfection of reason*, must have had good grounds for classifying penalties among those subjects of action denominated *ex contractu* as distinguished from torts. The only explanation we have been able, in our researches, to meet with on this subject is to be found in 3 Bl. Com., 160. That learned Judge and commentator says: "There are some contracts implied by law. Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath agreed to pay such particular sums of money as are charged on him by the sentence or assessed by the interpretation of the law; for it is a part of the original contract entered into by all mankind, who partake the benefit of society, to submit in all points to the municipal constitutions and local ordinances of that State of which each individual is a member. Whatever, therefore, the law orders one to pay, that becomes instantly a debt which he hath beforehand *contracted* to discharge."

Id. at 695–96.

6. The judges did not always seem to believe in the need for a sum certain. In *Katzenstein v. Raleigh & Gaston Railroad Co.*, 84 N.C. 688 (1881), the court was describing the nature of the common law action of debt and mentioned, with seeming approval, "a penalty imposed by a statute, though the amount is uncertain and is to be fixed by the Court between five and fifty dollars. *Rockwell v. Ohio*, 11 Ohio, 130." *Id*. at 695. There are no North Carolina cases from this period, however, that specifically uphold the validity of a statute or ordinance with a variable penalty.

7. *E.g.*, Dozier v. Bray, 9 N.C. 57 (1822); Dowd v. Seawell, 14 N.C. 185 (1831).

8. Public Laws of North Carolina, 1871–1872, ch. 195.

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ordinance, through an action of debt. Typically the city or town would bring a civil action against the ordinance violator, perhaps initiating it before a justice of the peace or in the town's mayor's court, with the municipality's treasurer[9] or governing board[10] designated as the plaintiff.

It was in this context that the town of Louisburg sought to enforce one of its ordinances in the late 1850s. The ordinance prohibited disorderly conduct and called for any violator to pay a civil penalty of between $1 and $20. The town commissioners brought an action before the magistrate of police (a precursor to the mayor), who imposed a penalty of $3, and on appeal the superior court also gave judgment for $3 (plus costs). In *Commissioners of Louisburg v. Harris*,[11] the North Carolina Supreme Court reversed the judgment and invalidated the ordinance. The court held "that the ordinance in question, is void for uncertainty, and its enforcement is impracticable, according to the settled mode of proceeding in our courts, by reason of its vagueness, in respect to the amount of the penalty."[12] By "uncertainty" the court seems to have meant not that the ordinance was somehow fatally ambiguous in its meaning but that it simply did not establish a sum certain for the amount of the penalty. Cities and towns collected ordinance penalties in actions of debt, and actions of debt required that the amount sought be set out specifically, either in a contract or in a statute or ordinance. Because the town's ordinance set out a range for the penalty, it was not possible for the town to sue for a sum certain, and the action of debt was unavailable. Because the only way the ordinance could be enforced was unavailable, the ordinance was void.

Three decades later, in the 1880s, the state supreme court decided a flurry of additional town ordinance enforcement cases that relied and elaborated upon *Harris.* It is important to note that each of these later cases was a criminal case, brought under the predecessor statute to G.S. 14-4, and not a suit by a town for a civil penalty. In each instance, however, the relevant ordinance also exposed the violator to a possible civil penalty, in lieu of or in addition to criminal prosecution. The first of these later cases was *State v. Crenshaw*,[13] brought to enforce an ordinance of the City of Durham that prohibited assaulting or insulting a city officer carrying out his responsibilities. The ordinance provided that a violator was to "forfeit and pay not more than fifty dollars or suffer imprisonment not to exceed one month." Citing *Harris* as directly in point, the state high court held that the ordinance was "void for uncertainty." "It is settled, that penalties such as those prescribed in town ordinances, must be for a definite, fixed sum of money."[14] Later that same term, perhaps the same day, the court decided *State v. Cainan*,[15] which involved a Raleigh ordinance that imposed upon violators "a fine not exceeding five dollars." (All parties to the case understood the word "fine" to refer to a civil penalty.) Again citing *Harris*, as well as *Crenshaw*, the court held this ordinance too was void for uncertainty. In *Cainan* the State argued that even if the civil penalty portion of the ordinance was invalid, the court ought to sever that portion from the remainder of the ordinance and allow a criminal prosecution for violation under the predecessor to G.S. 14-4. This seems a sensible argument. The penalty was no longer the only remedy available for enforcing a city ordinance, and therefore invalidating the penalty did not leave the ordinance without enforcement methods. Nevertheless, the court refused, holding that

9. *E.g.,* Watts v. Scott, 12 N.C. 291 (1827).
10. *E.g.,* Comm'rs of Washington v. Frank, 46 N.C. 436 (1854).
11. 52 N.C. 281 (1859).
12. *Id.* at 283.
13. 94 N.C. 877 (1886).
14. *Id.* at 878.
15. 94 N.C. 883 (1886).

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the criminal statute was only available for ordinances that were valid, and that this ordinance, with its uncertain penalty provision, was not valid. The court did not revisit the language or rationale of *Harris* and simply applied that case's language to the current situation.

Over the next fifteen years, in *State v. Worth* in 1886,[16] *State v. Rice* in 1887,[17] and *State v. Irvin* in 1900,[18] the North Carolina Supreme Court reiterated its conclusion in *Crenshaw* and *Cainan*. The issue has not arisen again at the appellate level in the eleven decades since *Irvin* was decided.

The Modern State Practice with Civil Penalties

In the modern administrative state, a variety of North Carolina state officials and agencies make use of civil penalties in enforcing the statutes placed under their supervision. The typical system in current use at the state level bears little resemblance to the civil penalty system of the nineteenth century and might well be characterized as having discarded the "sum certain" requirement of the nineteenth century cases.

Today's typical state system authorizes a state official, such as the Insurance Commissioner,[19] or a state board, such as the Environmental Management Commission,[20] to impose civil penalties for violations of statutes or regulations supervised by the official or board. Commonly the statute establishes a range within which a specific penalty can be set and lists a number of factors to guide the official or board in deciding upon the penalty in an individual case. A decision by an official or board is normally subject to review under the "contested case" provisions of the North Carolina Administrative Procedure Act and then to appeal to the General Court of Justice. If a case gets that far and results in the affirmation of a penalty, the penalty will be part of the ultimate judgment and can be enforced in the same manner as any other judgment. If a violator does not commence a contested case but nevertheless refuses to pay the penalty, the State may bring an action to collect it.[21] In such an action, the State pleads the official or board's order and moves for recovery. Whether the violation was committed or the penalty was properly set cannot be litigated in the action; that is the purpose of the contested case procedure and the appeal from the official or board's decision to the General Court of Justice.

How does this modern regulatory system comport with the "sum certain" requirements of the nineteenth century cases?

In one sense the whole system seems quite inconsistent with the earlier cases. A number of the early ordinances allowed the penalty to be set within a dollar range and expected the town's mayor, acting through the mayor's court, to set the specific amount based on the facts of an

16. 95 N.C. 615 (1886).

17. 97 N.C. 421 (1887).

18. 126 N.C. 989, 35 S.E. 430 (1900). In this case one ordinance enacted the regulation in question but did not include any penalty provision. A second ordinance provided for a fine of up to $50 for violation of any city ordinance for which there was no other specific penalty. The court held that the second ordinance was invalid but that the first ordinance could be enforced criminally under the predecessor statute to G.S. 14-4. Dividing the substantive provisions and the penalty provisions into two ordinances saved the validity of the former.

19. *E.g.*, G.S. 58-2-70 (insurance licensure and certification).

20. G.S. 143B-282.1.

21. *See, e.g.,* State *ex rel*. Cobey v. Cook, 118 N.C. App. 70, 453 S.E.2d 553 (1995).

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individual case.[22] That is not substantially different from what the Secretary of Environment and Natural Resources does today. There were no factors set out in the early ordinances for the mayor to use in deciding upon the amount of the penalty, but the absence of those factors was not the reason the courts rejected those variable penalties.

In another sense, though, which may be sufficient, the modern system comports with the nineteenth century cases just fine. Whenever a case actually reaches the judicial system, either through an appeal from an administrative decision or an action by the State seeking to collect the penalty, the penalty has been reduced to a specific amount. It is a sum certain.

Furthermore, the need for a statutory penalty to be a sum certain is not a constitutional need; it was an element of a common law form of action, and certainly the General Assembly may modify the common law. It seems inescapable that the General Assembly has the constitutional power to impose variable penalties for violations of state statutes and regulations and to expect the judicial system to accommodate actions to collect those penalties. So in the end, at the state government level, the issue raised by the nineteenth century municipal ordinance cases probably does not arise.

Nevertheless, a court of appeals case from 1979 seems to endorse the continuing need for penalties to be for a sum certain, although the very odd circumstances of the court's opinion leaves the case's impact quite unclear. The case is *Holley v. Coggin Pontiac, Inc.*,[23] in which the defendant automobile dealership sold a demonstrator vehicle to the plaintiffs, and the vehicle turned out to be a complete lemon. Alleging that the dealership knew the vehicle to be a lemon when the sale was made but made representations to the contrary, the plaintiffs brought suit under G.S. 75-16, an unfair trade practices statute, seeking, among other remedies, treble damages for the harms they suffered. The trial court dismissed the action, in part because it determined that the one-year statute of limitations under G.S. 1-54(2) applied to the case. That statute applies to an action "upon a statute, for a penalty or forfeiture," and the plaintiffs argued that the unfair trade practices statute, in providing for treble damages, was a penal statute.

The court of appeals disagreed and reversed the trial court judgment. One of the reasons given by the court for its conclusion that G.S. 75-16, which provided for the treble damages, was not a penal statute was the juxtaposition of G.S. 75-16 with G.S. 75-15.2, which permitted the Attorney General to enforce the unfair trade practices statutes by suing for a "civil penalty." In the course of distinguishing between the two statutes, the court said this about civil penalties and sums certain:

> To say that the legislative intent to create a penalty must be spelled out is also consistent with the prevailing rule in North Carolina that a penalty must be for a sum certain. We do not go so far as to say in this case that multiple damages can never be

22. Interestingly, this was a method that seems to have been endorsed by John F. Dillon, in his influential treatise on Municipal Corporations:

> The penalties to ordinances are often fixed upon a movable scale; and this would appear to be done under the supposition that they will be enforced, not by a common-law action in the common-law courts to recover the amount of the penalty, but by a complaint or proceeding before the proper municipal magistrate, who will, within the prescribed limits, determine the amount of the fine or penalty to be paid, by reference to the circumstances of the particular case.

2 John F. Dillon, Commentaries on the Law of Municipal Corporations § 636 (5th ed. 1911).

23. 43 N.C. App. 229, 259 S.E.2d 1 (1979).

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> sums certain and therefore can never be penalties, but rather we stress that all penalties must be expressly provided and that this requirement will almost always be met where a penalty for a sum certain is created. However, by providing for a civil penalty *with a sum certain of $5,000* in G.S. 75-15.2, and by not enacting a similar provision for a sum certain in G.S. 75-16, we think that the Legislature meant the former to be a penalty and the latter not to be a penalty.[24]

The opinion also set out G.S. 75-15.2, including purported language that permitted a court to "impose a *civil penalty* against the defendant five thousand dollars ($5,000) (sic) for each violation."[25]

Thus in 1979, a panel of the court of appeals repeated the old learning that a penalty must be for a sum certain. Oddly, though, the court's language doesn't square with the language of the statute it was citing and discussing. Despite the opinion's having set out the statute (albeit in a form that is clearly mangled in some fashion) and stated, in the quotation above, that G.S. 75-15.2 sets a penalty of $5,000, the statute did not in fact set an exact, sum certain, penalty. Rather, as originally enacted and as in effect at the time the opinion was written (and still today), the statute provided for a civil penalty "of up to five thousand dollars." That is, it provided for a variable penalty when it was (mis)quoted by the court, and it continues to do so today. Given this mismatch between the statute as enacted and the statute as quoted and seemingly interpreted in the opinion, the opinion is inexplicable and impossible to rely upon in considering whether the sum certain rule remains in effect, at least at the state level.

May Local Governments Emulate the Modern State Practice and Set Variable Penalties?

But what about local ordinances and penalties? Does the General Assembly's precedent in authorizing variable penalties at the state level mean that local governments can do the same within their local ordinances? Probably not, unless there is quite specific authority to do so.

The first difficulty with such a local practice is the specific language of the two statutes generally authorizing the use of civil penalties. Here again is the language of G.S. 160A-175(c):

> An ordinance may provide that violation shall subject the offender to a civil penalty to be recovered by the city in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after he has been cited for violation of the ordinance.

Although the statute says nothing explicit about variable penalties, it does specify that the penalty is to be recovered "in a civil action in the nature of debt." The nineteenth century cases make clear that the action of debt was only available when the ordinance established a specific amount for the penalty, a sum certain. Therefore, it might be that by specifying that the penalty is to be collected through an action in the nature of debt, the General Assembly indirectly has required that ordinances establish fixed rather than variable penalties.

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24. *Id*. at 242, 259 S.E.2d at 9–10 (citations omitted, emphasis supplied).
25. *Id*. at 238, 259 S.E.2d at 7 (emphasis in original).

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Or does it simply mean only that the local government must sue for a specific amount? That is, is it within the power of a city or county to establish at the local level an administrative system somewhat like the typical state agency system described above? May a local ordinance establish a variable penalty and delegate to an administrative official or agency within the government the authority to set a specific penalty, including in the ordinance factors to be considered by the official or agency when setting a specific penalty?[26] If such a penalty was not paid voluntarily, when the local government brought suit it would do so for a specific amount—the amount set by the official or board—and in that way meet the sum certain requirement. The probable answer is that a local government may set out a variable penalty and leave the determination of the specific amount in a given case to the official or agency when there is some colorable statutory authority for such a system, but that G.S. 153A-123 and G.S. 160A-175 are inadequate in and of themselves to provide that authority. The reason lies in two provisions in the state constitution and how they have been interpreted by the state supreme court.

There was for a time a constitutional issue at the state level about whether the power to set penalties from within a range could be given to an administrative official or agency. In considering that issue, the North Carolina Supreme Court held that setting a penalty, from within a statutory range, is a judicial power,[27] which therefore raised the issue of whether as such it could be delegated to an executive branch official or agency without violating Article IV, Section 1, of the state constitution, which reads as follows:

> The judicial power of the State shall, *except as provided in Section 3 of this Article*, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power of jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.[28]

As the italicized language suggests, this issue was anticipated when the constitution was modernized in the 1960s and 1970s, and the first sentence of Article IV, Section 3, of the constitution, referenced in the excerpt above, now reads:

> The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created.

There was some early concern that giving administrative agencies the power to set penalties from within a range went beyond this constitutional authorization,[29] but that seems now to have been overcome,[30] and the practice is well-established.

A comparable administrative practice at the local government level, however, has not been judicially approved (or disapproved), and a review of the relevant cases regarding state-level administrative agencies suggests that such a practice at the local level needs greater authority

26. A list of such factors is probably necessary to avoid due process or improper delegation problems.
27. State *ex rel.* Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968).
28. N.C. Const. art. IV, § 1.
29. *Lanier*, 274 N.C. 486, 164 S.E.2d 161.
30. In the Matter of Appeal from Civil Penalty, 324 N.C. 373, 379 S.E.2d 30 (1989); State *ex rel.* Cobey v. Cook, 118 N.C. App. 70, 453 S.E.2d 553 (1995).

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than the basic power to impose civil penalties set out in G.S. 153A-123 and G.S. 160A-175. Look again at the language in Article IV, Section 3: "The *General Assembly* may vest in administrative agencies established pursuant to law such judicial powers . . ." The language of the section is not limited to state administrative agencies, so that the General Assembly certainly may vest judicial powers in local administrative agencies as well as state administrative agencies. But it appears that it is the General Assembly that must do the vesting—not local governing boards. That strongly suggests that there must be some colorable statutory language that shows that the General Assembly has vested, or at least authorized local governing boards to vest, judicial powers in an administrative official or agency (or has specifically authorized variable penalties to enforce a category of local ordinance). That is certainly the pattern with those local administrative agencies that have traditionally been recognized as holding quasi-judicial powers. Boards of adjustment have explicit statutory authority to exercise quasi-judicial powers in a variety of circumstances,[31] and boards of equalization and review have explicit authority to exercise quasi-judicial powers in taxpayer appeals.[32] Therefore, it appears that before a local government may provide in an ordinance for variable civil penalties, with the specific amount of individual penalties in specific cases being set by an administrative official or board, there must be some fairly explicit statutory authorization for vesting that power with the official or board. Are there any such authorizations?

The answer is yes, with respect to a number of environmental regulatory programs. One example is the Sedimentation Pollution Control Act of 1973.[33] The act provides for combined state and local government enforcement of its provisions and grants specific statutory authority for local governments to impose civil penalties within a variable range.[34] Comparable authority, in somewhat different form, is found in G.S. 143-215.6A(j):

> Local governments certified and approved by the [Environmental Management] Commission to administer and enforce pretreatment programs pursuant to G.S. 143-215.3(a)(14), stormwater programs pursuant to G.S. 143-214.7, or riparian buffer protection programs pursuant to G.S. 143-214.23 may assess civil penalties for violations of their respective programs in accordance with the powers conferred upon the Commission and the Secretary in this section, . . .

Because section 215.6A authorizes both the Environmental Management Commission and the Secretary of the Department of Environment and Natural Resources to set specific penalties from within a statutory range, subsection (j) authorizes local governments to do so as well for the listed programs.

A third sort of statutory authority is found in G.S. 143-215.112, which authorizes creation of local air pollution control programs. G.S. 143-215.112(d)(1a) permits local assessment of "civil penalties under G.S. 143-215.114A," and the latter section expressly sets out a variable range for

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31. G.S. 153A-345 and G.S. 160A-388.

32. G.S. 105-322.

33. G.S. 113A-50 *et seq*.

34. G.S. 113A-64(a)(1) and (2). Subsection (a) makes any person who violates the statute or a local ordinance adopted pursuant to the statute "subject to a civil penalty. The maximum civil penalty for a violation is five thousand dollars ($5,000)." "The Secretary or a local government that administers an erosion and sedimentation control program approved under G.S. 113A-60 shall determine the amount of the civil penalty."

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penalties. In addition, subsection (d)(1a) expressly sets out the factors the local entity is to consider "in determining the amount of the penalty."

Unless a city or county can point to an authorization of the sort summarized just above, it would be reliant upon G.S. 160A-175 or G.S. 153A-123 as authority for variable penalties, and it is likely a court would conclude that those two statutes were insufficient. First, each statute makes reference to collection of penalties through a civil action in the nature of debt, which as has been noted is probably encumbered by the sum certain element of that sort of action. And second, neither statute contains any language remotely like the sorts of explicit authorizations for variable penalties summarized immediately above.

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