Cash Economic Development Incentives
Cash Economic Development Incentives and NC Local Governments

Presentation Outline – Attorneys Conferences

UNC School of Government
Tyler Mulligan
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Analyzing cash incentives – framework at a glance

• Statutory authority
  – Interpreting clawback requirements

• Public purpose – Maready and progeny
  – Net public benefit
    • Employment opportunities
    • Better paying jobs
    • Tax base
    • Diversify economy
  – Competition
  – Strict procedural requirements

• Tax rebates and uniformity of taxation
• Exclusive Emoluments
• Local hiring preferences
• Standing

Drawbacks to the framework

• Case law remains sparse
• No weighting of the components
• No certainty of which components would be emphasized in an opinion
1. **Statutory Authority.** *G.S. 158-7.1* is deceptively broad

1.1. *G.S. 158-7.1(a)*: Counties and cities are authorized to make appropriations for the purposes of:

1.1.1. “aiding and encouraging the location of manufacturing enterprises,”

1.1.2. “making industrial surveys and”

1.1.3. “locating industrial and commercial plants in or near such city or in the county,”

1.1.4. “encouraging the building of railroads or”

1.1.5. “other purposes which, in the discretion of the governing body of the city or of the county commissioners of the county, will increase the population, taxable property, agricultural industries and business prospects of any city or county.”

1.2. *G.S. 158-7.1(b)* provides specific authority for the acquisition, development, and conveyance of property, BUT: “This listing is not intended to limit by implication or otherwise the grant of authority set out in subsection (a) of this section.”

1.2.1. Industrial park (including office use, or “similar industrial or commercial purposes”)

1.2.2. Property and buildings suitable for “industrial or commercial use”

♦ A city may acquire property outside of city limits within counties in which it is located, provided the property will be used by a business that will provide jobs to city residents.

1.2.3. Extension of utilities for “industrial” facilities

1.2.4. Site preparation for “industrial” facilities

1.3. *G.S. 158-7.1(c)* imposes public hearing requirement on appropriations for subsection (b).

1.3.1. No hearing requirement for subsection (a), but careful reading of *Maready* suggests hearing is required. See discussion at § 3.2.1 below.

1.4. *G.S. 158-7.1(d)* permits city or county to “convey or lease interests in property by private negotiation” for no less than the fair market value of the interest.

1.4.1. Subsection (d2) permits “prospective tax revenues or income” over the next 10 years to be taken into account when calculating the consideration for a conveyance of property provided:

1.4.1.1. Governing board determines the conveyance will

♦ “Stimulate the local economy,

♦ promote business, and
♦ Result in the creation of a substantial number of jobs in the county or city that pay at or above the median average wage in the county.”

1.4.1.2. Governing board contractually binds the purchaser to construct promised improvements within five years or “shall reconvey” property to local government.

1.5. G.S. 158-7.1(h), enacted in 2007, appears to require clawbacks in incentive agreements for the occurrence of the following events:

1.5.1. “...creation of fewer jobs than specified in the agreement,
1.5.2. a lower capital investment than specified in the agreement, and
1.5.3. failing to maintain operations at a specified level for a period of time specified in the agreement.”

2. Issues of Statutory Interpretation

2.1. Permissible expenditures. Listed by dissent in Maready v. City of Winston-Salem, 342 N.C. 708, 713 (1996) and quoted in part in Blinson v. State, 186 N.C.App. 328, 336, 651 S.E.2d 268, 275 (2007), app. dismissed and disc. review denied, 362 N.C. 355, 661 S.E.2d 240 (2008) (“The disputed expenditures included several million dollars given directly to private companies, primarily in the form of reimbursement for ‘on-the-job training, site preparation, facility upgrading, and parking.’ In addition, the expenditures included road construction, financing of land purchases, and even spousal relocation assistance.” (citations omitted)).

2.2. Clawbacks

2.2.1. G.S. 158-7.1(h), enacted in 2007, requires clawbacks in incentive agreements. Each “economic development agreement” between business and local government “shall contain provisions regarding remedies for a breach.” These provisions “shall include”:

2.2.1.1. A provision “requiring the recapture of sums appropriated” by the city or county “upon the occurrence of events specified in the agreement.”

2.2.1.2. “Events that would require the city or county to recapture funds would include the creation of fewer jobs than specified in the agreement, a lower capital investment than specified in the agreement, and failing to maintain operations at a specified level for a period of time specified in the agreement.”

2.2.1.3. The word “would” is used in its future conditional tense. As a matter of grammar and usage, the words “would require” and “would include” imply an
unstated condition—an “if” clause that is true in the present, true in the future, or possibly true in the future. That condition is either:

♦  [“if these recapture events happen to be listed in the agreement”] OR
♦  [“if these recapture events occur”]

2.2.1.4. The difficulty with the former interpretation is that it arguably makes the entire sentence merely advisory and unnecessary. It is tautological to state that recapture events listed in an agreement would require recapture when they occur—that is the very definition of recapture events. Interpreted this way, the General Assembly could have omitted the sentence entirely and the statute’s meaning would remain the same. Rules of statutory construction therefore favor the latter interpretation.

♦  The General Assembly knows how to make a list non-limiting or advisory, so why didn’t it do so? For example, see subsection (b): “This listing is not intended to limit by implication or otherwise....”
♦  To interpret as advisory could be viewed as relegating the clause to mere surplusage, violating long-standing canons of statutory interpretation. See, e.g., TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant .... We are reluctant to treat statutory terms as surplusage in any setting.”); Astoria Federal Savings & Loan Ass’n v. Solimino, 501 U.S. 104, 112 (1991) (“statutes should be read to avoid rendering superfluous any parts thereof”); Montclair Township v. Ramsdell, 107 U.S. 147, 152 (1883) (courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”).

2.3. Conflict with other statutes?

2.3.1. Cash grants can be paid to private companies for certain types of capital investment under other statutes, e.g., G.S. 160A-456/153A-376 (as part of a community development program) and G.S. 160A-500 et seq. (within defined redevelopment areas pursuant to Urban Redevelopment Law).
2.3.2. Those statutes authorize grants to be awarded in exchange for capital investment alone, but they are employed in pursuit of other public purposes—such as redevelopment of blighted areas and restoration of low-income neighborhoods—not economic development as described in Maready.

2.3.3. Each of those other statutes is also accompanied by its own set of procedural limitations and requirements, such as the redevelopment authority being confined to designated redevelopment areas and community development activities being directed at low- and moderate-income communities.

2.3.4. If G.S. 158-7.1 is so broad that it authorizes cash grants to any private company to induce capital investment alone, then have the limitations and procedures in those other statutes been rendered meaningless with respect to non-residential development? Would this lead a court to resist such a broad interpretation of G.S. 158-7.1?

3. Public Purpose.


Haugh v. County of Durham, 702 S.E.2d 814, 822, 824 (N.C.App. 2010).

3.1. Net public benefit.

3.1.1. Public purpose generally

3.1.1.1. N.C. Constitution, Article V, Section 2.

♦ (1) Power of taxation. The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

♦ (7) Contracts. The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.”

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♦ “It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public’s as contradistinguished from that of an individual or private entity.” Maready, 342 N.C. at 716 (citing Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968)).

♦ “Is it today a proper function of government…. This explicit recognition of the importance of contemporary circumstances in assessing the public purpose of governmental endeavors highlights the essential fluidity of the concept.” Maready, 342 N.C. at 720.

♦ “… [t]wo guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons.” Maready, 342 N.C. at 722 (citing Madison Cablevision v. City of Morganton, 325 N.C. 634); See also Blinson, 651 S.E.2d at 275; Haugh, 702 S.E.2d at 724.

3.1.2. Net public benefit in Maready, 342 N.C. at 724. The court quotes the final sentence of subsection (a) and then states: “However, it is the natural consequences flowing therefrom that ensure a net public benefit. The expenditures this statute authorizes should create a more stable local economy by…” [Four factors]:

3.1.2.1. providing displaced workers with continuing employment opportunities,

3.1.2.2. attracting better paying and more highly skilled jobs

3.1.2.3. enlarging the tax base, and

3.1.2.4. diversifying the economy.” See also Haugh, 702 S.E.2d at 822, 824.

3.1.3. Maready court has essentially transformed the test from the overbroad language in subsection (a) into a net public benefit test with four factors.

3.1.4. The four factors are boiled down in statements elsewhere in the opinion:

3.1.4.1. Maready, 342 N.C. at 722: “It would be anomalous to now hold that a government which expends large sums to alleviate the problems of its citizens through multiple humanitarian and social programs is proscribed from promoting the
provision of jobs for the unemployed, an increase in the tax base, and the prevention of economic stagnation” (emphasis added). See also Blinson, 651 S.E.2d at 276.

3.1.4.2.  
Maready, 342 N.C. at 727: “The General Assembly thus could determine that legislation such as N.C.G.S. § 158-7.1, which is intended to alleviate conditions of unemployment and fiscal distress and to increase the local tax base, serves the public interest. New and expanded industries in communities within North Carolina provide work and economic opportunity for those who otherwise might not have it. This, in turn, creates a broader tax base from which the State and its local governments can draw funding for other programs that benefit the general health, safety, and welfare of their citizens.” See also Blinson, 651 S.E.2d at 276.

3.1.4.3.  
Maready dissent: In several instances, the dissent describes the majority’s opinion as holding that “simply creating new jobs and increasing the tax base is a public purpose.” The majority neither corrects nor comments upon the dissent’s characterizations.

♦  
“...under the [majority’s holding], I see no grounds for challenging such an expenditure provided that, as a result of such a grant, the company promises to create new jobs, and an increase in the tax base is projected.” Maready, 342 N.C. at 742 (Orr, dissenting).

♦  
Increase in tax base not required? The dissent lists the projected tax base created and the projected new jobs for each of the 24 incentives. All include job creation. One incentive involved training for fifty new employees but no capital investment.

3.1.4.4.  

♦  
“Thus, under Maready, the need to offer economic incentive programs to attract industry that will replace lost jobs is necessarily a public purpose” (emphasis added). Blinson, 651 S.E.2d at 272.

♦  
Public benefits expected from Dell: “creation and maintenance of sustainable jobs”; “substantial number of jobs at competitive wages”; “encourage economic growth”; location of “key suppliers ... in the immediate vicinity”; capital investment with “aggregate taxable value of at least $100 million”;
“expects to create at least 1700 local Qualified jobs”; “job creation, economic diversification and stimulus and training in technology, computer assembly and manufacturing skills...”; “large number of local employees and making a substantial investment in the Project and in the training and development of those employees...” Blinson, 651 S.E.2d at 272-73.

♦ “Plaintiffs' complaint contains no allegations suggesting that the legislative bodies were not acting with a motivation to increase the tax base or alleviate unemployment and fiscal distress. Rather, their complaint focuses exclusively on the various purported benefits provided to Dell. Maready determined, however, that ‘an expenditure does not lose its public purpose merely because it involves a private actor.’” Blinson, 651 S.E.2d at 278 (citation omitted, emphasis added). See also Haugh, 702 S.E.2d at 822.


♦ “Given that the incentives clearly were offered in view of economic development, the first prong of the Madison Cablevision test is satisfied pursuant to our Supreme Court’s holding in Maready. With respect to the second prong of the Madison Cablevision test, as noted in Maready, expenditures ‘should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy.’” Haugh, 702 S.E.2d at 824.

3.2. Strict procedural requirements support public purpose

3.2.1. Maready, 342 N.C. at 724: “The strict procedural requirements the statute imposes provide safeguards that should suffice to prevent abuse.” See also Haugh, 702 S.E.2d at 822.


3.2.1.2. Economic equivalency of conveying property. If no jobs promised, then incentive is economic equivalent of building a shell building or improving property
and conveying local government interest in the property for less than fair market value.

♦ For another example of the “economic equivalency” argument as applied to reimbursements for land costs, see David Lawrence, Economic Development Law, page 107.

3.2.2. Clawbacks required by G.S. 158-7.1(h). See explanation at §2.1.

3.3. Competition as necessary for public purpose

3.3.1. *Maready*, 342 N.C. at 725: “In the economic climate thus depicted, the pressure to induce responsible corporate citizens to relocate to or expand in North Carolina is not internal only, but results from the actions of other states as well.”

3.3.2. *Maready*, 342 N.C. at 726-27: “To date, courts in forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives…. Considered in this light, it would be unrealistic to assume that the State will not suffer economically in the future if the incentive programs created pursuant to N.C.G.S. § 158-7.1 are discontinued.”

3.3.3. *Maready*, 342 N.C. at 727: “As Chief Justice Parker noted in his dissent in Mitchell…. All men know that in our efforts to attract new industry we are competing with inducements to industry offered through legislative enactments in other jurisdictions as stated in the legislative findings and purposes of this challenged Act.”

3.3.4. *Maready*, 342 N.C. at 727: “The potential impetus to economic development [from new and expanded industries], which might otherwise be lost to other states, likewise serves the public interest” (emphasis added). *See also Blinson*, 651 S.E.2d at 276.

3.3.5. Blinson v. State, 186 N.C.App. 328, 651 S.E.2d 268, 271 (2007): “Once the Supreme Court held in Maready that economic incentives to recruit business to North Carolina involve a proper public purpose, it became the role of the General Assembly and the Executive Branch—and not the courts—to determine whether such incentives are sound public policy.”


3.3.6.1. Absence of interstate competition: Plaintiffs attempted to challenge “an incentive for a wholly intrastate relocation.” *Haugh*, 702 S.E.2d at 821. However, the Court of Appeals determined that Durham County was in competition with
California, not Wake County. *Haugh*, 702 S.E.2d at 823. The Court of Appeals does not dismiss the issue of interstate competition, and notes Maready’s discussion of competition with other states:

- "Plaintiffs appear to attempt to distinguish the case sub judice from our holdings in Peacock and Blinson and our Supreme Court’s holding in Maready by framing this as a novel case of *intrastate competition* between adjacent counties and characterizing Durham’s action as a *reward for consummating a plan Nitronex already had conceived and to which it already had committed*. We are not persuaded....” *Haugh*, 702 S.E.2d at 823.

- "We note these economic considerations and estimated investment amounts not to engage in a discussion of the propriety of Durham’s incentives or to pass on whether the public ever will benefit from the incentives offered—for that is not the province of this Court—but to illustrate that the case sub judice is not solely one of intrastate competition between Wake County and Durham. Cf. Maready, 342 N.C. at 727, 467 S.E.2d at 627 (“The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest.”).” *Haugh*, 702 S.E.2d at 823.

- Note: G.S. 132-6(d) specifically permits a local government to withhold local records pertaining to a company’s recruitment when the company has not yet selected a city or county but has announced it will be coming to North Carolina. This appears to acknowledge that intrastate competition between local governments in industrial recruitment is permitted. This apparent statutory acknowledgement will not cure a constitutional defect if, for example, a future court decides that incentives lose their public purpose when North Carolina local governments compete with each other.

3.3.6.2. Not in consideration of public services because already located in Durham.

Plaintiffs alleged that Nitronex already owned property in Durham and therefore was being rewarded for a planned move without competition. However, court determined “notwithstanding the existence of a lease on a partially complete building in Durham, Nitronex’s remaining in North Carolina was not a foregone conclusion.” *Haugh*, 702 S.E.2d at 823.
3.3.7. G.S. 132-1.11 acknowledges instances in which a company selects the state first and then compares local governments like Dell, but that statutory acknowledgement would not cure a constitutional defect, should the court find one.

4. Tax rebates and uniformity in classification of property for taxation

4.1. N.C. Constitution, Article V, Section 2.

4.1.1. (2) Classification. Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

4.1.2. (5) Purposes of property tax. The General Assembly shall not authorize any county, city or town, special district, or other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.

4.2. G.S. 105-380. No taxes to be released, refunded, or compromised.

4.2.1. “The governing body of a taxing unit is prohibited from releasing, refunding, or compromising all or any portion of the taxes levied against any property within its jurisdiction except as expressly provided in this Subchapter.”

4.3. Explanation.

4.3.1. Nomenclature. In North Carolina, cash incentives are customarily described as “cash grants” rather than as “rebates.”

4.3.2. Is it problematic to calculate incentives as a percentage of taxes paid?

4.3.2.1. Maready views “enlarging the tax base” as one of the factors underpinning the public purpose of incentives. The surest way to ensure that incentives do not exceed property taxes collected is to make the cash grants equal to some portion of property taxes paid. Calculating incentives in this way arguably furthers the public purpose articulated in Maready.

♦ Caution: This assumes that the incentive is being offered in exchange for jobs, wage requirements, and other factors unrelated to capital investment. If an
incentive is offered for capital investment alone and is calculated as a percentage of taxes paid, it becomes difficult to distinguish the incentive from a tax rebate or improper tax classification.

Caution: Be wary of pegging incentives to capital investment. Some local governments have been surprised to find out—well after the agreement is signed—that much of the investment was exempted from tax after the fact (e.g., DENR approves exemption for pollution control technology).

4.3.3. When an incentive is offered in exchange for the promise of jobs and continuous operation of a business for a period of years, it resembles a contract for service (namely, operating a business and providing jobs) that is separate and distinct from the property tax revenue generated by capital improvements. In other words, the typical Maready-approved incentive secures more than an increase of the tax base and therefore is never solely about the property taxes being paid.

4.3.4. When an incentive is contingent solely on capital investment, arguably the only public benefit it secures is “enlarging the tax base.” Since the incentive is securing nothing more than capital investment that enlarges the tax base, a fair question is: how is the requested incentive payment meaningfully different from a property tax rebate prohibited by G.S. 105-380 or a classification of property for taxation in violation of Section 2 of Article V of the North Carolina Constitution?

4.3.5. The point being raised here is not an issue of form about whether the incentive is structured as a percentage of the taxes paid—rather, the issue is that the incentive is conditioned solely on increasing the tax base.

5. Exclusive Emoluments

5.1. N.C. Constitution, Article I, Section 32. “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.”

5.2. “In Peacock, this Court held that when legislation is determined to ‘promote the public benefit’ under the Public Purpose Clauses, it necessarily is not an exclusive emolument. As discussed above, the incentives and subsidies provided to Dell are intended to promote the general
economic welfare of the communities involved, rather than to solely benefit Dell, and, accordingly, do not amount to exclusive emoluments.” *Blinson*, 651 S.E.2d at 278.

5.3. “Plaintiffs appear to attempt to distinguish the case sub judice from our holdings in Peacock and Blinson and our Supreme Court’s holding in Maready by framing this as a novel case of intrastate competition between adjacent counties and **characterizing Durham's action as a reward for consummating a plan Nitronex already had conceived and to which it already had committed.**” *Haugh*, 702 S.E.2d at 823.

6. Local hiring preferences

6.1. Implied recognition of the practice in G.S. 158-7.1(b)(2)?
   ♦ “… a city may acquire such property inside the city or, if the property will be used by a business that will provide jobs to city residents, anywhere in the county or counties in which it is located.”

6.2. Statutory authority does not cure constitutional defect (see Eileen Youens blog series on local preferences in contracting at [http://sogweb.sog.unc.edu/blogs/localgovt/?p=3647](http://sogweb.sog.unc.edu/blogs/localgovt/?p=3647)):
   6.2.1. Dormant Commerce Clause
   6.2.2. Equal Protection
   6.2.3. Privileges and Immunities Clause
   6.2.5. Court of Appeals in Haugh noted that Durham incentive agreement with Nitronex included incentive for hiring Durham County residents, but no discussion as the issue apparently was not raised with the court. *Haugh*, 702 S.E.2d at 824.

7. Standing

7.1. As taxpayers suffering an increased tax burden
   7.1.2. **NOT** sufficient for Uniformity of Taxation (Munger describes as “discrimination-based claim”) and Dormant Commerce Clause, as the plaintiffs claims “pertain only to a theoretical injury that might be suffered by other businesses that may attempt to compete with Dell.” *Blinson*, 651 S.E.2d at 274.

7.1.3.1. “Thus, the decisions of the Supreme Court and of this Court with respect to “taxpayer standing” differentiate between (1) actions challenging the constitutional validity of a statute on the grounds that it allows public funds to be dispersed for reasons other than a “public purpose,” in which a taxpayer generally has standing, and (2) actions challenging the constitutional validity of a statute on the grounds that the statute discriminates among classes of persons, in which a taxpayer must show that he belongs to a class that receives prejudicial treatment.” Munger, 689 S.E.2d at 236.

7.1.3.2. With respect to standing to challenge tax exemptions:

♦ Taxpayer standing: “In essence, Plaintiffs argue that, since “[t]he justification of Goldston was simply that the misuse or misappropriation of public money results in a loss of funds available for legitimate public purposes” and since “[t]he same result follows in the government's failure to levy and collect taxes,” “both situations warrant taxpayer standing.” The fundamental difficulty with this aspect of Plaintiffs' argument is that it treats Goldston as having worked a fundamental change in North Carolina standing jurisprudence.” Munger, 689 S.E.2d at 239.

♦ On the basis that tax exemptions are discriminatory. Plaintiffs fail to allege “that the qualifying criteria operate in a discriminatory manner” against similarly situated taxpayers. Even if so alleged, Plaintiffs do not belong to the class prejudiced by the statute. Relying on Blinson, court states that Plaintiffs’ status as “individuals who pay North Carolina sales and use taxes” from which the affected computer manufacturers were exempt is not sufficient for standing to assert discrimination-based claims that pertain only to a theoretical injury that might be suffered by other businesses. Munger, 689 S.E.2d at 242-43.
Cash Economic Development Incentives: Framework for Legal Analysis

Cash Incentives - Overview

- Review broad statutory authority
- Review limitations suggested by case law
- Illustrate framework with hypothetical scenarios
- Haugh (not Munger)
- Drawbacks to the framework
- Inquiry focuses on cash incentives

No jobs, few jobs, retail jobs: Framework for analysis helpful
Local Development Act

G.S. 158-7.1 et seq.

G.S. 158-7.1(a)
Each county and city ... is authorized to make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises ... and locating industrial and commercial plants ... or other purposes which, in the discretion of the governing body ... will increase the population, taxable property, agricultural industries and business prospects of any city or county.

G.S. 158-7.1(b)
- Specific authority for the acquisition, development, and conveyance of property.
  - Industrial park (including office use, or “similar industrial or commercial purposes”)
  - Property and buildings suitable for “industrial or commercial use”
  - Extension of utilities for “industrial” facilities
  - Site preparation for “industrial” facilities
- BUT: “This listing is not intended to limit by implication or otherwise the grant of authority set out in subsection (a) of this section.”
The rest of G.S. 158-7.1

- Public hearing requirements for expenditures pursuant to (b).
- Procedural requirements for conveyance of “interests in real property” held or acquired pursuant to (b). Public hearing required.
- Procedural requirements for calculating alternative forms of consideration for the conveyance of property.
- Clawbacks in incentive agreements.
- *Nothing specifically about cash incentives.*

Which “increase the population, taxable property, agricultural industries and business prospects of any city or county?”

1. Neither
2. Residential development
3. Retail grocery store
4. Both

Local Incentives Case Law

Framework for Evaluating Local Cash Incentives

• Public purpose – *Maready* and progeny
  — Net public benefit
    • Employment opportunities
    • Better paying jobs
    • Tax base
    • Diversify economy
  — Competition
  — Strict procedural requirements
• Tax rebates and uniformity of taxation
• Clawbacks

Review: Public Purpose

Public Purpose – NC Constitution

• N.C. Constitution, Article V, Section 2.
  — (1) Power of taxation. The power of taxation shall be exercised in a just and equitable manner, *for public purposes only*, and shall never be surrendered, suspended, or contracted away.
  — (7) Contracts. The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of *public purposes only*.”
Public Purpose - *Madison Cablevision*

- “[t]wo guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose:
  1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and
  2) the activity benefits the public generally, as opposed to special interests or persons.”
  
  *Madison Cablevision v. City of Morganton, 325 N.C. 634 (1989)*

Public Purpose – *Maready*

Net Public Benefit – Four Factors

- “… it is the natural consequences flowing therefrom that ensure a net public benefit. The expenditures this statute authorizes should create a more stable local economy by — providing displaced workers with continuing employment opportunities, — attracting better paying and more highly skilled jobs — enlarging the tax base, and — diversifying the economy.” (*Maready* at 724)

- *Hough, 702 S.E.2d* at 824 (citing the four factors in analysis of the second prong of the Madison Cablevision test).

Put another way....

- “...N.C.G.S. § 158-7.1, which is intended to alleviate conditions of unemployment and fiscal distress and to increase the local tax base, serves the public interest.

- “New and expanded industries in communities within North Carolina provide work and economic opportunity for those who otherwise might not have it. This, in turn, creates a broader tax base ....”

  *Maready, 342 N.C. at 727.*

  *See also Blincon, 651 S.E.2d at 272, 276, 278 (quoting and paraphrasing Maready)*
**Maready dissent**

- "...theory that since jobs were created and the tax base increased...."
- "...simply creating new jobs and increasing the tax base is a public purpose...."
- "...public purpose if it creates new jobs and increases the tax base...."
- "...assumption that new jobs and a higher tax base...."
- "...under the [majority’s holding], I see no grounds for challenging ... provided that, as a result of such a grant, the company promises to create new jobs, and an increase in the tax base is projected."

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**Minimum number of four factors to convince you that an incentive “ensure[s] a net public benefit?”**

1. One
2. Two
3. Three
4. Four

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**Net Public Benefit**

| "Employment opportunities" for "displaced workers" | ✗ |
| "Better paying and more highly skilled jobs" | ✗ |
| "Enlarging the tax base" | ✗ ✗ |
| "Diversifying the economy" | ✗ |
Public Purpose:
Interstate Competition

Maready and Blinson on Competition
• “...we are competing with inducements to industry offered through legislative enactments in other jurisdictions....” Maready, 342 N.C. at 727
• “The potential impetus to economic development [from new and expanded industries], which might otherwise be lost to other states, likewise serves the public interest.” Maready, 342 N.C. at 727.
• “...the Supreme Court held in Maready that economic incentives to recruit business to North Carolina involve a proper public purpose.” Blinson, 651 S.E.2d at 271.

Haugh: (almost) about competition
• “Plaintiffs appear to attempt to distinguish the case sub judice ... by framing this as a novel case of intrastate competition between adjacent counties .... We are not persuaded....”
• “...the case sub judice is not solely one of intrastate competition between Wake County and Durham.”
• Restated rather than repudiated importance of competition
In the absence of incentives, which might be “lost to other states?”

1. Neither
2. Factory only
3. Office building only
4. Both

Competition

“Might otherwise be lost to other states”

Public Purpose:
Strict Procedural Requirements
Strict Procedural Requirements

- *Maready* court lists the four factors for net public benefit and concludes:
  
  "The *strict procedural requirements* the statute imposes provide safeguards that should suffice to prevent abuse."

  *Maready*, 342 N.C. at 724.

- With apologies to David Lawrence:
  
  - Lawrence rule of beneficial presumption
  - Lawrence rule of economic equivalency

Beneficial Presumption of Public Hearing

- Public hearing prior to awarding incentive to private company gives "presumption of public rather than private benefit."

- The local government "should hold a public hearing, regardless of whether the incentive is authorized by Subsection (a) or Subsection (b)."

- Not necessary for general expenditures, only for those where private benefit requires application of *Maready* public purpose analysis.

  Lawrence, Economic Development Law 98

Economic Equivalent

- Local government reimburses company for company's cost in acquiring site

- "Even though it has not purchased and then conveyed property to a company, the local government is doing the *economic equivalent*..."

- Accordingly, "the local government should still comply with the requirements of Subsection (d2)."

  Lawrence, Economic Development Law 107
Consequence of Economic Equivalent

- Subsection (d2) allows conveyance for less than FMV under certain circumstances.
  - Revenues over 10 years can make up FMV deficit
  - Conveyance must “result in the creation of a **substantial number of jobs** that pay at or above the median average wage....”
  - Board shall **contractually bind purchaser** to construct improvements

Economic Equivalent Corollary

- Incentive for capital investment alone is the economic equivalent of Subsection (b) conveyances (e.g., land or buildings) for less than FMV.
- To hold otherwise elevates form over substance

Developer seeks incentive to develop office building. No jobs promised. Does economic equivalent rule apply?

1. Yes, incentive would be economic equivalent of conveying property (land or structure) for less than FMV.
2. No, economic equivalent rule is valid but does not apply to scenario.
3. No, the economic equivalent rule is not valid
Strict Procedural Requirements

<table>
<thead>
<tr>
<th>Public hearing</th>
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<tbody>
<tr>
<td>Economic equivalent — subsection (b)-(d2) compliance</td>
<td>X</td>
<td></td>
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</table>

Exclusive Emoluments

- N.C. Constitution, Article I, Section 32
- “When legislation is determined to ‘promote the public benefit’ under the Public Purpose Clauses, it necessarily is not an exclusive emolument.” *Blinson*, 651 S.E.2d at 278.

Tax Rebates and Uniformity of Taxation
• N.C. Constitution, Article V, Section 2
  – (2) Classification. Only the General Assembly shall have the power to classify property for taxation....
  – (5) Purposes of property tax. The General Assembly shall not authorize any county, city or town ... to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State....
• G.S. 105-380. No taxes to be released, refunded, or compromised.

Where along the spectrum?

<table>
<thead>
<tr>
<th>Illegal rebate or tax classification</th>
<th>Mready-approved incentives</th>
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<tbody>
<tr>
<td>Rebate</td>
<td>&quot;Grant&quot;</td>
</tr>
<tr>
<td>No promises</td>
<td>Promise capital improvements alone</td>
</tr>
<tr>
<td>Pay taxes</td>
<td>Pay taxes</td>
</tr>
<tr>
<td>&quot;Grant&quot;</td>
<td>&quot;Grant&quot;</td>
</tr>
<tr>
<td>Promise of:</td>
<td>Capital improvements</td>
</tr>
<tr>
<td>Jobs</td>
<td>Jobs</td>
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<tr>
<td>Continuous operations</td>
<td>Continuous operations</td>
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<tr>
<td>Pay taxes</td>
<td>Pay taxes</td>
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<tr>
<td>Expenses reimbursed</td>
<td>Mready-approved incentives</td>
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<tr>
<td>Promise</td>
<td>Maready-approved incentives</td>
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<tr>
<td>Mready</td>
<td>Maready</td>
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<tr>
<td>net public benefit</td>
<td>net public benefit</td>
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</tbody>
</table>

Rebate and Classification: Form or Substance?

• Nomenclature
  – Grant versus rebate
• Method of calculation:
  – % of investment versus % of taxes paid
• Ongoing operations and jobs versus constructing a building
  – Of incentives along spectrum, grant for capital investment alone appears closest in form to a unique tax classification for a particular development.
• Just a restatement of public purpose analysis?
5 years of “grants” for capital improvements alone, no jobs promised. How close to creating a tax classification for the recipient commercial property?

1. Could be viewed as creating an illegal tax classification for property.
2. Possible but can’t be certain.
3. Could not be mistaken for a tax classification.

---

**Tax Rebates and Uniformity**

<table>
<thead>
<tr>
<th>Nomenclature (“Grant”)</th>
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</thead>
<tbody>
<tr>
<td>In exchange for more than just capital investment</td>
<td>✗</td>
<td>✗</td>
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<tr>
<td>In consideration of future public services</td>
<td>✗</td>
<td>?</td>
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</table>

Similar to public purpose / exclusive emoluments analysis.

---

**Clawbacks**

G.S. 158-7.1(h)
Clawbacks and Maready

“The strict procedural requirements the statute imposes provide safeguards that should suffice to prevent abuse.” Maready, 342 N.C. at 724; Hough, 702 S.E.2d at 822.

- Supports economic equivalent rule suggesting compliance with Subsection (d2).
  - Board “must contractually bind purchaser to construct promised improvements”
- But Subsection (h) enacted after Maready. Not a “strict procedural requirement?”

Subsection (h) Clawbacks

- G.S. 158-7.1(h) lists the following clawbacks:
  - “...creation of fewer jobs than specified in the agreement,
  - a lower capital investment than specified in the agreement, and
  - failing to maintain operations at a specified level for a period of time specified in the agreement.”
- Odd language creates uncertainty about application

Interpreting Subsection (h)

- Remedies for breach must be in “each economic development agreement”
- Remedies “shall include” a provision “requiring the recapture of sums appropriated” by the city or county “upon the occurrence of events specified in the agreement.”
- Use of “would” in next sentence muddies interpretation.
Implied Condition in Subsection (h)
• “Events that would require the city or county to recapture funds would include the creation of fewer jobs than specified in the agreement, a lower capital investment than specified in the agreement, and failing to maintain operations at a specified level for a period of time specified in the agreement.”
• Which implied future condition was intended?
  – [“if these recapture events happen to be listed in the agreement”] OR
  – [“if these recapture events occur”]

Subsection (h): Merely Advisory?
• The General Assembly knows how to construct a non-limiting clause (e.g., Subsection (b)).
• Intended to be tautological?
• “It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant …. We are reluctant to treat statutory terms as surplusage in any setting.” TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

Your opinion: Does Subsection (h) require incentive agreements to contain the listed clawbacks?
1. Yes
2. No
3. Uncertain
Clawbacks

Compliance with Subsection (h)  

×

Drawbacks to the Framework

• Case law remains sparse
• No weighting of the components
• No certainty of which components would be emphasized in an opinion

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<tr>
<td>Employment opportunities</td>
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<tr>
<td>Better paying jobs</td>
<td>X</td>
<td>???</td>
</tr>
<tr>
<td>Tax base</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Diversify economy</td>
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<td>X</td>
</tr>
<tr>
<td>Interstate competition</td>
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<td></td>
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<td>Public hearing</td>
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<td>Economic Equivalent</td>
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<td>Tax rebate: more than tax base</td>
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<td>Future public services</td>
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<td>X</td>
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<tr>
<td>Subsection (h) compliance</td>
<td>X</td>
<td>???</td>
</tr>
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</table>
Developments on the Horizon

• Heard around the General Assembly
  – Removing wage requirements
  – Relaxing job requirements
  – Removing subsection (h)
  – No eminent domain for economic development

• Other
  – Local hiring preferences

Questions and Comments

Tyler Mulligan
UNC School of Government
CB#3330, Knapp-Sanders Bldg.
Chapel Hill, NC 27599-3330
919-962-0987
mulligan@sog.unc.edu
Local Government Purchasing and Contracting
Your local government needs to survey a piece of property, and you estimate the cost of the survey to be no more than $500. This isn’t something you need to bid out, is it?

No, in fact, you can’t bid it out. Local governments are required to bid purchases and construction and repair contract costing $30,000 or more. G.S. 143-131 \(^2\) (informal bids), G.S. 143-129 \(^3\) (formal bids). But there’s another statute, G.S. 143-64.31 \(^4\), commonly known as the “Mini Brooks Act” (referring to the “Brooks Act,” the federal law that G.S. 143-64.31 is based on), which requires local governments to use a qualifications-based selection process when hiring architectural, engineering, surveying, or construction-management-at-risk \(^5\) firms—regardless of the contract amount. So even if you’re looking to hire a surveyor for a $500 job, you have to follow the requirements in G.S. 143-64.31, or approve, in writing, an exemption under G.S. 143-64.32.

What is qualifications-based selection?

Qualifications-based selection (QBS) means just what you think it means: you select a firm based on their qualifications. (This is in contrast with bidding, where the emphasis is on price.) So how does this selection process work? There are 3 steps:

1. The statute says you must “announce” your requirements for the service. Unfortunately, the statute doesn’t define the term “announce.” (I imagine someone standing up in their office and declaring in a loud voice: “We need a surveyor!”) But the statute does require good faith efforts to encourage minority participation, so you should employ the same methods you use to encourage minority participation in informal and formal building construction and repair contracts. The idea here is to get as much competition as possible from qualified firms, so think about advertising in trade journals, the newspaper, on your website, and contacting firms directly. The more complex the project is, the broader your search should be. At the same time, if your project is very small, don’t spend more money on “announcing” than you will spend on the project itself! Public entities often use a “request for qualifications” (or RFQ) to solicit qualifications from firms in this step.

2. Select firms qualified based on their “demonstrated competence and qualification for the type of professional services required”—not on price! Although the statute doesn’t spell this out, the idea is to rank the firms (or the top few firms) based on qualifications.

3. Negotiate with the best qualified firm to provide their services at a “fair and reasonable fee.” If you can’t reach an agreement with that firm, then begin negotiating with the next best qualified firm, and so on, until you reach an agreement.

What if we are concerned about cost, or what if we just don’t want to use the QBS process?

G.S. 143-64.32 \(^6\) allows local governments to exempt themselves from the qualifications-based selection process in G.S. 143-64.31 for “particular projects.” This statute requires the local government to exempt itself “in writing,” but doesn’t explain what type of “writing” is sufficient. Many local governments do this in a resolution (you can find a sample resolution here \(^7\)). Others do it by letter to the firm or firms they are considering, and keep a copy for their records (and their auditors). If the estimated fee for the service (not the entire project—just the service) is less than $30,000, you don’t have to give an explanation—you just exempt yourself in writing. If the estimated fee is $30,000 or more, your writing (whatever form it takes) must also state “the reasons [for the exemption] and the circumstances attendant thereto.”
What kind of a justification is sufficient?

The statute doesn’t say what kind of a justification is sufficient, and the courts haven’t weighed in on this yet. My advice is that you should keep in mind the basic principles of fairness, transparency, and getting the biggest bang for your taxpayers’ bucks, and—especially when you’re dealing with public construction—the additional principle of safety! My guess is that local governments most often exempt themselves when they want to consider cost up front, and that seems to me to be a reasonable justification.

A couple of notes

Two important notes:

1. If your project involves federal funding, you probably can’t exempt yourself under G.S. 143-64.32. Check with the agency providing the funds to see if they will allow it first.
2. An unsettled question: does G.S. 143-64.32 allow for a blanket resolution that would exempt all projects with an estimated fee of under $30,000 from the qualifications-based selection process? I don’t think so, but my colleague Fleming Bell disagrees with me, and the North Carolina courts haven’t decided this question yet. The position of the NC Board of Examiners for Engineers and Surveyors (the entity that licenses engineers and surveyors) is that all exemptions (even for those projects with an estimated fee of under $30,000) must be on a project-by-project basis, as you can see from this list of frequently asked questions on the Board’s website.

Fleming discusses qualifications-based selection in more detail on pages 31-33 of Construction Contracts with North Carolina Local Governments, which you can order here.


URL to article: http://sogweb.sog.unc.edu/blogs/localgovt/?p=2565

URLs in this post:

[4] G.S. 143-64.31: http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-64.31.html
[6] G.S. 143-64.32: http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-64.32.html
The ABCs of IFBs, ITBs, RFPs, RFQs, and RFIs

What's the difference between an IFB, and RFP, and an RFQ, and what are they anyway? As I'll explain in more detail in this post, what name you give a solicitation document—the document you use to solicit bids or proposals—is not as important as the process you use to award the contract. And the North Carolina General Statutes usually dictate which process you’re required to use.

The Four Types of Documents

There are four main types of solicitation documents: (1) those used for bidding, where price is the primary factor; (2) those used to request proposals focusing on factors other than price; (3) those used to ask for someone's qualifications; and (4) those used to gather information from potential bidders or proposers before starting the bid or proposal process. I’ll explain below when local governments can use each of these four types of documents.

The First Type: Bids

Under North Carolina law, local governments are required to bid out purchases of “apparatus, supplies, materials, and equipment” (what I like to refer to as “stuff”) costing $30,000 or more, and contracts for construction or repair costing $30,000 or more. (Local policies may require bidding on other types of contracts or for contracts costing less than $30,000.) The bidding statutes, G.S. 143-129[1] (formal bidding) and G.S. 143-131[2] (informal bidding), require that these contracts be awarded to the lowest responsive, responsible bidder. This “award standard” is what distinguishes bidding from other contracting methods. To solicit bids, public entities usually use Invitations to Bid (ITBs) or Invitations for Bids (IFBs). For informal bids or for purchases or construction costing less than $30,000, local governments may also use a request for quotes ("RFQ" – not to be confused with another RFQ: the request for qualifications, discussed below).

The Second Type: Requests for Proposals

North Carolina local governments have the option of using a request for proposal process for the purchase of information technology goods and services (G.S. 143-129.8[3]). This process allows local governments to establish their own evaluation criteria (i.e., evaluating vendors based on how well their product meets your entity’s needs, rather than focusing primarily on price), and award the contract to the vendor “that submits the best overall proposal.” I say that this is an option because if you’re purchasing IT “stuff” that costs $30,000 or more, you can either (1) bid it out (formally or informally, depending on the cost), or (2) use the request for proposal process described in G.S. 143-129.8. On the other hand, if you’re contracting for IT services, those services don’t fall under the bidding laws, so you can either (1) use the request for proposal process described in G.S. 143-129.8, or (2) use any process you want to use, or no process at all (simply selecting the firm you’d like to work with), unless your local policy requires a specific process for the procurement of services. Note that if you’re using grant funding, you must comply with the terms of the grant. (For example, if the grant requires you to bid out IT goods instead of using a request for proposal process, then you have to comply with the grant.)

The North Carolina statutes refer to requests for proposals in two other situations. First, G.S. 143-64.17A requires that all public entities in North Carolina use a request for proposal process for the procurement of guaranteed energy savings contracts (GESCs). The statutes governing GESCs (G.S. 143-64.17 through G.S. 143-64.17K[4] [scroll down to “Part 2. Guaranteed Energy Savings Contracts for Governmental Units”]) set out a specific request-for-proposal process and specific evaluation criteria that must be used for these types of contracts. Second, the statutes allow North Carolina local governments to use a request for proposal process for contracts for the construction, design, operation, and maintenance of solid waste management facilities and sludge management facilities. The statute governing these contracts is G.S. 143-129.2[5]. For more information about
both of these types of contracts (and a summary of all of the procurement laws that apply to North Carolina local governments), take a look at this free bulletin.

As I mentioned above, local governments are not required to bid out services (aside from design services—discussed below). In fact, the General Assembly has decided to let local governments choose how to procure services. Many local governments use requests for proposals to procure services, as a way of seeking competition while considering factors in addition to price. When a local government uses a request for proposals to procure services, the local government decides how the proposals are evaluated, what the timeline is, whether to advertise or not, and whether to open proposals in public or not. In other words, when procuring services, it’s up to each government to decide what process will best balance its needs for (1) good quality services, (2) value, (3) transparency, (4) efficiency, and (5) fairness. (As I mentioned above, if you’re using grant funding, you’ll need to comply with the terms of the grant; if the grant requires a competitive process for awarding contracts for services, you’ll have to comply with those terms.)

So the term “request for proposals” (RFP) covers a range of solicitation documents.

**The Third Type: Qualifications-Based Selection**

**G.S. 143-64.31** (sometimes referred to as the “Mini-Brooks Act” because it’s based on a federal law called the “Brooks Act”) requires local governments to procure architectural, engineering, surveying, or construction-management-at-risk services—regardless of the contract amount—by focusing on qualifications rather than price. (Note that local governments can exempt themselves from this process—I’ve blogged about this here.) So when people solicit these services, they often use a “request for qualifications” (RFQ).

You can also use qualifications-based solicitation (or some variation thereof) for other types of services. Again, since the general statutes don’t require the use of a specific process (or any process) for procuring services, the process you use is up to you (as long as you comply with your local policies or grant terms, if you’re using grant funding).

**The Fourth Type: Information Requests**

Another acronym you may see is RFI—a “request for information.” RFIs are not used to procure goods or services directly, but instead are used to solicit information about purchases or projects you’re planning to procure in the future. For example, if you know you’re going to have to buy some new police cars next year, and it’s been a while since you’ve bid out police cars, you could send out RFIs to several car dealers or manufacturers to find out what new features are available and what models might best meet your needs.

**The Bottom Line**

William Shakespeare really said it best:

“*What’s in a name? That which we call a rose*

*By any other name would smell as sweet.*”

In other words, the substance of the document is more important than what it’s called. If you’re soliciting firms to perform architectural services, your solicitation document must ask for qualifications instead of price, even if you call it an IFB. And if you’re bidding out a $1.2 million construction project, you have to award the contract to the lowest responsive, responsible bidder, even if you call your solicitation document a rose an RFP.
URLs in this post:

[4] G.S. 143-64.17 through G.S. 143-64.17K: http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_143/Article_3B.html
[7] G.S. 143-64.31: http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-64.31.html
Hard times have come to Emerald City, North Carolina. People are out of work, no one is buying or building anything, and it doesn't look like things will get better anytime soon. The Emerald City Council has decided that they need to take action to help out their local businesses, so they decide to pass a local preference policy. Is such a policy legal?

My next few blog posts will focus on local preferences in contracting—that is, when can a North Carolina local government give a preference to a contractor or vendor based on whether the contractor or vendor is “local” or based on whether the contractor or vendor will promise to hire local employees? Although the U.S. Constitution and the North Carolina General Statutes place substantial restrictions on how and when local governments in North Carolina may institute local preferences, carefully worded preferences are permissible in a few limited contexts. This first post will set out some definitions and key questions. In later posts, I'll discuss the answers to those questions.

Defining “local”

So, who is "local," anyway? The first step in defining "local" is to establish the geographic scope of the preference. Does "local" mean your municipality, zip code, county, state, country, or continent (e.g. the North American Free Trade Agreement)? The next step is to determine who will be covered by the preference within that geographic area. Residents of the area? Taxpayers? Companies with a majority of employees living in the area? Companies with a majority of shareholders living in the area? Companies headquartered in the area? Companies with a principal place of business in the area? Companies that have paid state/county/city property taxes on equipment necessary to perform the contract under consideration? Companies headquartered in the area, but only if the company is smaller than a certain size (by number of employees, amount of yearly profits, or some other measure of the company’s size)? How a unit chooses to define “local” will depend on the goals the unit hopes to achieve through its preference policy.

Defining local preferences

What is a “local preference”? Local preferences can be implemented through statutes, regulations, ordinances, and written and unwritten policies. There are three types of local preferences: (1) hiring preferences, which require contractors to hire a certain percentage of local workers; (2) purchasing preferences, which require contractors to use supplies or materials that are made locally (e.g. the *Buy American Act* [1]); or (3) contract award preferences, which give local bidders or proposers an advantage in the award of public contracts.

There is not much variation in the first two types of local preferences—hiring preferences and purchasing preferences. However, there are four major variations in contract award preferences. In one variation, the awarding government applies a specific percentage price increase to bids from non-local bidders, or applies a specific percentage price decrease to bids from local bidders. Because many bids are awarded based on price, this has the effect of giving the local bidders a better chance at winning contracts, even if their bids are higher than their non-local competitors. For example, let’s say Dorothy, Inc., a non-local bidder, is the lowest bidder on an Emerald City construction project with a bid of $1 million. The Wizard, Co., a local bidder, has the next lowest bid, $1,009,000. Dorothy clearly has the lowest bid. However, if Emerald City applies a 5% increase to non-local bids, Dorothy's bid is increased (for purposes of determining which bid is lowest) to $1,050,000, making The Wizard the lowest bidder. And, similarly, if Emerald City applies a 5% decrease to local bids, The Wizard’s bid would be decreased (for purposes of determining which bid is lowest) to $95,8550, again making The Wizard the low bidder.
A second variation is bid price matching, where the awarding government is required to local bidders the opportunity to match the lowest bid if the lowest bidder is a non-local bidder. (An example of this second variation is Governor Purdue’s recent Executive Order 50, which I discussed in an earlier post [2].) Revisiting our Emerald City bid from the previous paragraph, let’s say Emerald City’s new ordinance provides that if the lowest responsive, responsible bidder is non-local, the lowest local bidder whose bid is within 5% of the non-local bidder’s bid must be given the opportunity to match the lowest bidder’s bid. Accordingly, if Dorothy’s bid was $1 million, and The Wizard’s was $1,009,000 (which is within 5% of $1 million), Emerald City’s ordinance would require the City to give The Wizard (the local company) the opportunity to agree to perform the contract for $1 million.

A third variation is a reciprocal preference, where the awarding government is required to apply a percentage increase to non-local bidders’ bids only if the non-local bidder’s jurisdiction applies such a preference. For example, let’s say Kansas (Dorothy, Inc.’s principal place of business) applies a 5% increase to non-local bids. If Emerald City has a reciprocal bid preference, it will apply that same 5% increase to Dorothy’s bids on Emerald City projects. **G.S. 143-59(b)** [3] applies such a preference to state contracts in North Carolina (but not to local government contracts) for “equipment, materials, supplies, and services” costing more than $25,000.

A fourth variation is a tie-bid preference, where the awarding government will award to an in-area bidder when the in-area bidders’ bid and an out-of-area bidder’s bid are equal in price and quality. If Dorothy and The Wizard both bid $1 million for an Emerald City construction project, Emerald City would award the contract to The Wizard, the local company. **G.S. 143-59(a)** [3] applies a tie-bid preference to state contracts (but not to local government contracts) for the purchase of “foods, supplies, materials, equipment, printing or services.”

**Questions to Consider**

If your unit of government is considering implementing a local preference policy, and after you’ve settled on a definition of “local,” you’ll need to consider the following five questions:

1. Is the policy constitutional?
2. Do you have the authority to implement the policy?
3. Does the policy comply with rules applicable to grants?
4. What goals are you trying to achieve through the policy?
5. Will the policy achieve those goals?

My next posts will focus on these five questions. Stay tuned!
Local Preferences in Public Contracting, Part 2

In my last post [1], I talked about the efforts of the City Council of Emerald City, North Carolina, to support its local businesses by adopting a local preference policy. We now rejoin our friends in Emerald City, where the City Council has asked Purchasing Officer Scarecrow to research what goals a preference policy might achieve. (This is number four on the list of “questions to consider” that I provided in my last post—but the answer to this question will provide a necessary context for the answers to the remaining questions.) Scarecrow is now ready to report back to the Council.

Let’s listen in on the Scarecrow’s report...

“The Council stated three goals of this proposed policy during the last Council meeting: first, to reduce local unemployment, second, to support local businesses, and, finally, to increase Emerald City’s tax base. I’ve been putting my new brain to work trying to figure out what our policy would have to do in order to meet these goals, and that’s what I’ll share with you today.

“First, to reduce unemployment, our policy would have to have the effect of creating more jobs for local workers in addition to retaining current jobs held by local workers.

“As for the second goal, supporting local businesses, there are two kinds of ‘support’ that were discussed at last month’s meeting. One is financial support. To achieve this goal, our policy would have to have the effect of directing more money to local businesses. The other type of support is political or moral support. To achieve this goal, our policy would have to have the effect of showing local businesses that we are taking concrete actions to assist them.

“Finally, there’s the goal of increasing Emerald City’s tax base. To achieve this goal, our policy would have to have the effect of increasing property taxes and sales taxes in the City. In other words, the policy would have to encourage people to spend money with local businesses and to buy property in the City.”

Councilman Lion broke in. “There’s a fourth goal, too. I’ve heard that a ‘buy local’ policy will reduce the city’s carbon footprint. It’s the green thing to do, and even I’m not afraid to say that it’s also the right thing to do! This is Emerald City, after all.”

“Thank you for that point, Councilman Lion,” responded Scarecrow. “My new brain tells me that for our policy to meet the goal of reducing the city’s carbon footprint, our policy would have to have the effect of cutting down on transportation costs for the goods and services that the City spends money on. Is that what you mean?” Councilman Lion nodded affirmatively.

Scarecrow turned to the rest of the Council, “So now I’ll close with two questions:

1. Do you agree with my analysis of what our policy will have to do in order to achieve the goals of reducing unemployment, supporting local businesses, increasing the City’s tax base, and reducing our carbon footprint?
2. Are there any other goals that you’d like to achieve through this policy?”

And I’ll close Part 2 by turning those same questions over to you. Please add your comments to this post (note that your comments will not appear until I approve them), or email me directly here [3].

Thank you in advance for participating in this discussion.
Local Preferences in Public Contracting, Part 3

In my last two posts (here [1] and here [2]), I've discussed the efforts of the City Council of Emerald City, North Carolina, to support its local businesses by adopting a local preference policy. Purchasing Officer Scarecrow has just finished reviewing the Council’s goals for the policy: reducing local unemployment, supporting local businesses, increasing Emerald City’s tax base, and reducing the City’s carbon footprint. The Council has asked Scarecrow to give them time to consider his comments so they can determine if there are other goals that they would like to achieve through the local preference policy.

Meanwhile, City Attorney Tin Man is about to present his report to the Council on the legal issues presented by a local preference policy. Tin Man explains that he’ll begin his report by discussing Emerald City’s legal authority to implement a local preference policy. (This is number two on the list of “questions to consider” that I provided in my first post, but will provide a framework for the discussion of questions 1 and 3.) Let’s listen in as Attorney Tin Man begins his report:

"As you know, local governments in North Carolina only have the powers given to them by the State Constitution and the General Assembly. This is not true for every state in the United States. In some states, called ‘home rule’ states, local governments have broad authority to act unless some statute restricts their authority. North Carolina is not a ‘home rule’ state, and that means North Carolina local governments can’t do some things that local governments in some other states can do.

“The types of local preferences we’ve discussed—hiring preferences, purchasing preferences, and contract award preferences—all involve the City’s power to enter into contracts. While the North Carolina General Statutes do give local governments the authority to enter into contracts, the statutes also require that local governments follow specific procedures for awarding certain types of contracts. If a local government enters into one of those contracts without following the specific procedures in the statute, the contract will be invalid. Practically speaking, this means the City couldn’t force a general contractor to complete a construction project based on an invalid contract, or couldn’t force a vendor to deliver equipment purchased through an invalid contract.

“So how does this impact our ability to institute local preferences? Well, North Carolina General Statutes 143-129 [3] and 143-131 [4] require that local governments award formally and informally bid contracts to the lowest responsive, responsible bidder. Formal bidding applies to contracts for the purchase of apparatus, supplies, materials, and equipment costing $90,000 or more and to construction or repair contracts costing $500,000 or more. Informal bidding applies to contracts for the purchase of apparatus, supplies, materials, and equipment costing $30,000 or more but less than $90,000, and to construction or repair contracts costing $30,000 or more but less than $500,000. In other words, any purchase contracts or construction contracts costing $30,000 or more must be awarded to the lowest responsive, responsible bidder.”

“Wait a minute!” exclaims Councilman Lion. “I thought we had to use informal bidding on purchases costing $5,000 or more.”

“That’s right,” agrees Tin Man. “Here in Emerald City, our purchasing policy requires informal bidding on purchases and construction projects costing $5,000 or more, and formal bidding on purchases and construction contracts costing $50,000 or more, which means the City is required to award contracts for purchases and construction projects costing $5,000 or more to the lowest responsive, responsible bidder. The Council may want to reconsider these bidding thresholds after hearing the rest of my report, although there are good reasons for keeping the thresholds where they are.”

Tin Man continues. “When I say that these contracts must be awarded to the lowest responsive, responsible bidder, what do I mean? Well, the ‘lowest’ part is easy. ‘Responsive’ means that the bid matches up with what we’ve asked for in our specifications—that the product we’ve asked for is what
the bidder will provide, for example—and that any legal requirements have been met. For example, if a bid bond is required, and the bidder didn’t provide one, then that bid is not responsive. The term ‘responsible’ addresses the bidder’s ability—considering the bidder’s skill, experience, financial resources, and track record—to perform the contract.

“This means that where a bidder lives or how a contract will affect the City’s unemployment rate or tax base or carbon footprint simply doesn’t figure in to the questions of whether a bid is responsive or whether a bidder is responsible. In other words, let’s say we put out a bid for ruby slippers, and our friend Dorothy from Kansas was the lowest bidder with a bid of $35,000, and an Emerald City company was the next lowest bidder with a bid of $35,100, and they were both bidding ruby slippers that met our specifications, and they both had the skill, experience, financial resources, and track record to perform the contract. In that situation, we would have to award the contract to Dorothy, even though she’s not from Emerald City.”

“But that’s only a difference of $100!” protests Chairwoman Glinda. “Surely if the difference is that small it wouldn’t matter if we awarded the contract to the Emerald City bidder.”

Tin Man shakes his head, "Actually, it would matter. The statutes don’t say we can award to the lowest responsive, responsible bidder unless the next lowest is local and their bid is only a little bit more. It says we must award to the lowest responsive, responsible bidder, period.”

The Council erupts in protests until Chairwoman Glinda manages to bring them to order by pounding her sparkling wand on the table. “Quiet down, quiet down! Please continue, Tin Man.”

"Purchasing Officer Scarecrow will explain the reasoning behind this when he resumes his report. There are good policy reasons for these statutes, but I’ll leave it to him to explain them. I’d like to get back to the issue at hand: the authority we have to institute a local preference policy.

“The bottom line is this: for contracts that must be informally or formally bid, any policy that would require the consideration of factors other than the bid price, the bid’s responsiveness, or the bidder’s responsibility would be outside of our authority. We simply cannot institute local preferences for these types of contracts. But if you think about it, there are lots of contracts we enter into that do not have to be formally or informally bid. Even under our purchasing policy, we’re not required to bid purchases of apparatus, supplies, materials, or equipment costing less than $5,000, and we’re not required to bid construction contracts costing less than $5,000. And then there’s an entire category of contracts that doesn’t have to be bid at all—service contracts.”

“What kinds of service contracts do we enter into?” asks Councilman Lion.

Chairwoman Glinda answers quickly, “I think he’s talking about contracts like accounting contracts, janitorial contracts, consultant contracts, and engineering contracts, right?”

“Almost right,” says Tin Man. “The General Statutes don’t say anything about how we’re supposed to award most service contracts; they leave that up to our discretion. So it’s up to us to decide how to award contracts for accounting services, janitorial services, and consulting services, to use your examples, Chairwoman. But G.S. 143-64.31[^5] requires us to use a qualifications-based selection process for four specific types of services—architectural, engineering, surveying, and construction management at risk services. In other words, to hire an engineer to do engineering work, we have to evaluate engineering firms based on their qualifications—not on price. However, that statute does require us to consider whether a bidder is local when we’re evaluating bidders. It says that we must give a preference to North Carolina bidders—not Emerald City bidders—over a bidder from another state, but only to the extent that the non-North Carolina bidder would be given a preference by their home state. This is called a reciprocal preference. Of course, preferences in other states usually relate to price, and since we can’t consider price in awarding these types of contracts, it’s not clear to me how we’d apply this reciprocal preference.”
"But you’ve told us before that we don’t have to use that qualifications-based process,” interrupts Councilman Lion.

“That’s true,” says Tin Man. “**G.S. 143-64.32** [6] allows local governments to **exempt themselves from the qualifications-based process** [7]. If we do exempt ourselves, I suppose we could use the reciprocal preference, although we wouldn’t have to. And it would only make sense to apply that preference if we decided to consider price instead of awarding the contract outright to a specific firm.

“So, we’re required to use qualifications-based selection to award contracts for design services (unless we exempt ourselves),” concludes Tin Man. “But, as I just said, the General Statutes don’t say anything about how we’re supposed to award other types of service contracts.”

“So you’re saying we can use local preferences for service contracts.” Councilman Lion says hopefully.

“And for purchases and construction contracts costing less than $5,000—or less than $30,000, if we used the thresholds in the statute,” adds Chairwoman Glinda.

“Or what if the General Assembly changes the bidding law to give us the authority to institute local preferences?” asks Councilman Lion, his tail waving in excitement.

“Not so fast,” replies Tin Man. “There’s the Constitution to consider.”

“The Constitution?” asks Chairwoman Glinda. “What does the Constitution have to do with local preferences?”

We’ll hear the Tin Man’s response to this question in my next post. In the meantime, here are some additional reference materials on the topics covered in this blog:

- **A Legal Guide to Purchasing and Contracting for North Carolina Local Governments** [8], by Frayda Bluestein – a comprehensive reference book on local government procurement in North Carolina;
- “**Local Government Purchasing and Contracting Update: Statutory Requirements and Local Policies**” [9], by me – a shorter (free) overview of the bidding laws; and
- “**Understanding the Responsiveness Requirement in Competitive Bidding**” [10], by Frayda Bluestein – a discussion of the concepts of responsiveness and responsibility (also free).

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URL to article: [http://sogweb.sog.unc.edu/blogs/localgovt/?p=3413](http://sogweb.sog.unc.edu/blogs/localgovt/?p=3413)

URLs in this post:

[3] North Carolina General Statutes 143-129: [http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html)
[5] G.S. 143-64.31: http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-64.31.html

[6] G.S. 143-64.32: http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-64.32.html


Local Preferences in Public Contracting, Part 4

This is the fourth installment of a series of posts discussing the efforts of the City Council of Emerald City, North Carolina, to support its local businesses by adopting a local preference policy. (You can find the earlier installments here [1], here [2], and here [3].) In the last post, City Attorney Tin Man gave the City Council an explanation of Emerald City’s legal authority, under North Carolina law, to implement a local preference policy. The Council was happy to hear that North Carolina law would permit local preferences for purchases and construction projects costing less than the informal bidding threshold, and for service contracts, and that—under North Carolina law—the City could enact a local preference policy for other contracts if the General Assembly gave them the authority to do so. But the Tin Man cautioned them that North Carolina law was not the only potential stumbling block to instituting a local preference policy. In this post, we’ll hear what the City Attorney Tin Man has to say about the United States Constitution and local preferences.

“What does the Constitution have to say about local preferences?” asks Council Chairwoman Glinda.

“I’ll get to that in just a minute,” responds Tin Man, “but first I want to quickly review the three general types of local preferences, because this will be important to the rest of our discussion. There are three general types of local preferences: hiring preferences, which require contractors to hire a certain percentage of local workers; purchasing preferences, which require contractors to use supplies or materials that are made locally; and contract award preferences, which give local bidders or proposers an advantage in the award of public contracts.” [I discussed these in the first post in this series, which you can find here [1].]

“OK,” says Tin Man, “so now let's talk about the Constitution. Successful constitutional challenges against local preferences have come out of three constitutional doctrines: the Privileges and Immunities Clause, the Commerce Clause, and the Equal Protection Clause. I’ll start with the Privileges and Immunities Clause, which is found in article IV, section 2 of the Constitution. It says "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

“What does that mean?” asks Cowardly Lion.

“Essentially it means that you can’t treat someone from one state worse than someone from your home state just because of the fact that the person is from a different state,” responds Tin Man. “After all, we’re the United States—the purpose of this clause was to help make us one nation instead of simply a collection of individual mini-nations.”

“So we can’t enact local preferences because of this Privileges thing?” asks Cowardly Lion.

“Well, the courts have said that direct public employment is not a privilege protected by the Clause, so the Privileges and Immunities Clause only comes into play when we're talking about local hiring preferences—not contract award preferences or purchasing preferences,” says Tin Man. “But a carefully drafted local hiring preference should still be OK, as I'll explain in a minute. I hope you’ll let me give you a brief explanation of the Commerce Clause and Equal Protection Clause first.”

“Fine, go ahead,” grumbles Cowardly Lion.

“The Commerce Clause is found in article I, section 8 of the Constitution,” continues Tin Man. “It says that ‘Congress’—not the States—‘shall have the Power . . . to regulate Commerce . . . among the several States.’ And the doctrine of the 'dormant Commerce Clause' or 'negative Commerce Clause' basically says that because Congress has the power to regulate interstate commerce, states and local governments don’t have the power to take actions on their own that burden interstate commerce.”
Glinda cuts in, "So you’re saying we can’t adopt any kind of local preference, because that would burden interstate commerce?"

“No,” says Tin Man. “There’s an exception to the dormant Commerce Clause known as the market participant exception. Under that exception, a state or local government can regulate commerce that the state or local government itself engages in—such as hiring contractors, awarding contracts, and buying goods.”

“Oh, I see,” says Glinda. “And you said there was one more constitutional doctrine to consider?”

“Yes,” says the Tin Man. “That’s the Equal Protection Clause. It’s found in the Fourteenth Amendment, and it says ‘no State shall . . . deny any person within its jurisdiction the equal protection of the laws.’”

“What does that have to do with local preferences?” asks Cowardly Lion, incredulously.

“It does seem like a stretch,” agrees Tin Man, “But the courts have interpreted this language as a check against laws or policies that treat one group of people differently from another group of people. If a law or policy treats groups of people differently because of certain characteristics—like race or religious affiliation—then it’s really difficult for a law or policy to survive a challenge under equal protection. But treating people differently because of where they live or where their business is based is not such a big deal, as long as the reason for the treatment is legitimate, and the law or policy has some rational relationship to that legitimate goal.”

“So what does all of this mean for us?” asks Glinda. “What kinds of preferences are permitted?”

“Well,” responds Tin Man, “it depends on what type of preference we’re talking about.”

**Hiring preferences**

“Hiring preferences are the most problematic,” explains Tin Man, “because they interfere with contracts between private parties—specifically, contracts between a contractor and its subcontractors. After reviewing the cases, I’ve come up with the following criteria for a hiring preference that has the best likelihood of surviving a constitutional challenge:

1. The policy, ordinance, or resolution establishing the preference should be worded to reflect a legitimate interest of the City, such as encouraging local industry, reducing local unemployment, or enhancing the local tax base.

2. The preference should target qualified unemployed resident workers—such as workers that have signed up for unemployment assistance—rather than targeting all residents, regardless of their qualifications or employment status.

3. The preference should establish a goal rather than a quota. In other words, it would require contractors to make good faith efforts to employ resident workers rather than simply rejecting contractors who fail to hire a specific number of resident workers.

“And, fourth, the real challenge: the local hiring goal should be based on data regarding how many jobs on public works projects are given to non-local workers when qualified unemployed resident workers are available to perform those jobs,” Tin Man explains.

“How could we get that data?” asks Cowardly Lion.

“We’d need to work with a consultant,” responds Tin Man, “We don’t have anyone on staff who could come up with that data on their own.”
Cowardly Lion growls softly to himself as the Tin Man continues. "Contract award preferences and purchasing preferences are not as problematic as hiring preferences because they don't interfere with contracts between private parties. I'll discuss contract award preferences next."

**Contract award preferences**

"Here's the criteria I've come up with for a contract award preference that has the best chance of surviving a constitutional challenge:

"1. No criminal penalty must be imposed on a public employee or officer who awards a contract without taking the preference into account.

"2. The percentage preference should be relatively small. Five percent seems to be acceptable, but anything higher than that is more likely to be struck down. A reciprocal preference—that is, one that is only imposed on bidders from states or local governments that have their own local preference, and only imposed to the same extent as that preference—has the best chance of surviving a constitutional challenge. [I discussed these in the first post in this series, which you can find here[^1]]. Also, setting a larger percentage preference for contracts under a certain dollar amount, and a smaller percentage preference for contracts over that amount is a common practice that seems finds favor with courts. For example, if the contract is less than $1 million, you could give a 5% preference to local vendors (up to $50,000), and if the contract is $1 million or more, the preference would only be 2% (to reduce the actual dollars involved).

"Finally, as with a hiring preference, the policy, ordinance, or resolution establishing the contract award preference should be worded to reflect a legitimate interest of the City, such as encouraging local industry, reducing local unemployment, or enhancing the local tax base."

"What about getting data about how contracts awarded to non-local companies hurt Emerald City?" asks Glinda.

"Courts don't look for that data when reviewing contact award preferences," Tin Man replies. "They seem willing to assume that contract award preferences have a plausible relationship to improving the local economy."

**Purchasing preferences**

"There are even fewer restrictions on purchasing preferences," continues Tin Man. "As long as the policy, ordinance, or resolution establishing the preference is worded to reflect a legitimate interest of the City, such as encouraging local industry, reducing local unemployment, or enhancing the local tax base, the preference should survive a constitutional challenge."

**A couple of key points**

"With that said," warns Tin Man, "there are a couple of things to watch out for with all three of these preferences. First, the preference cannot apply to projects funded by federal grants when those grants prohibit the use of geographical preferences."

"Do many federal grants prohibit geographic preferences?" asks Chairwoman Glinda.

"Yes, they do," responds Tin Man. "The prohibition is found in something called the Grants Management Common Rule, which applies to all federal grants, although some grants have specific language that overrides this prohibition on geographic preferences." [You can read more about the Grants Management Common Rule here[^4].]
“And second,” continues Tin Man, “If we ask our legislators to change the bidding laws to authorize us to adopt a local preference, we should ask them to work towards adopting legislation that gives us the authority to adopt such a preference, but does not require us to do so.”

“Is that because of the market participant exception you explained a few minutes ago?” asks Cowardly Lion.

“Exactly,” Tin Man replies. “There’s some question about whether a local government could take advantage of that exception when the preference is imposed at the state level rather than the local government level.”

“Unless you have any questions, that’s it for me,” concludes the Tin Man. “I think Purchasing Officer Scarecrow will be ready to talk with you next about whether a local preference will be able to achieve the goals you discussed earlier.”

[Note: A bulletin is forthcoming which will provide a more detailed discussion of the information presented above, along with case citations.]
Local Preferences in Public Contracting, Part 5

Posted By Eileen R Youens On November 24, 2010 @ 11:24 AM In Purchasing, Construction, Property Transactions | No Comments

This is the fifth installment in a series of posts discussing the efforts of the City Council of Emerald City, North Carolina, to support its local businesses by adopting a local preference policy. (You can find the earlier installments here [1], here [2], here [3], and here [4].) In the last post, City Attorney Tin Man explained the constitutional issues involved in local preferences to the City Council. As we rejoin the Emerald City Council meeting, a short man in a bright green suit has asked Chairwoman Glinda if he can make some remarks to the Council.

“You have 5 minutes,” says the Chairwoman. The man approaches the podium in the center of the room, produces a step stool, steps up on the stool, and pulls the microphone down to bring it closer to his mouth.

“Thank you, Chairwoman Glinda, and thank you, Council, for addressing this very important topic,” says the man. “My name is Green Apple, and I represent the Lollipop Guild. We are against local preferences, and I’d like to explain why.”

“The Lollipop Guild?” interrupts Cowardly Lion. “What are you doing here in Emerald City? I thought the Lollipop Guild was based in Munchkinland!”

“Yes, sir,” replies Green Apple, “but we have chapters in every state throughout the United States, and I represent the North Carolina chapter of the Lollipop Guild. We have one member right here in Emerald City, Ms. Blue Raspberry, and I’m here this evening on her behalf.” He gestures to a petite woman in a bright blue hat sitting in the front row, who smiles cheerily and waves at the council members.

“Fine, fine,” says Cowardly Lion. “Carry on.”

“Thank you, sir,” continues Green Apple. “Now you all know that the Lollipop Guild represents manufacturers of lollipops. However, you may not know that our members are also involved in construction—specifically, the construction of gingerbread houses. This means that our members are affected by all three of the types of preferences that have been discussed here: hiring preferences, contract award preferences, and purchasing preferences.

“Take Ms. Raspberry here—the owner of one of the local businesses you want to help. She’s thrilled when the City buys its lollipops from her. But Emerald City and its contractors are only a small—although important—part of Ms. Raspberry’s business. She also sells to nearby cities and counties, and she’s worried that if Emerald City implements a local preference, many of her other customers will, too. That will mean that she’ll have the advantage when bidding on Emerald City’s contracts, but she’ll be at a disadvantage when bidding on contracts everywhere else.”

“What do you mean?” asks Chairwoman Glinda.

“Ms. Raspberry’s business is an Emerald City business,” responds Green Apple. “So if the Town of Poppy Fields adopts a local preference, they’ll favor their own businesses over Ms. Raspberry’s. And if Munchkinland adopts a local preference, they’ll favor their own businesses over Ms. Raspberry’s. And so on. So even if Ms. Raspberry is offering the best prices for her lollipops, she could end up losing lots of business.”

Ms. Raspberry nods her head emphatically from the front row.
"Not only that," continues Green Apple, "but Ms. Raspberry also has concerns about this preference from her perspective as an Emerald City taxpayer. She’s worried that a local preference policy will mean that the City will end up paying higher prices for goods, services, and construction."

"Why?" Cowardly Lion asks, indignantly.

"If non-local companies realize that they’re at a disadvantage when they compete for Emerald City business, they may stop bidding. It only makes sense to put time and effort into putting a bid together—especially when you’re talking about a large, complicated project—if you know you’re competing on a level playing field. If the odds are stacked against you, and if you know that City policy is actually hostile to non-local businesses, why waste your time? This means that local companies won’t face as much competition, so they’ll be able to win contracts with higher bids. And who will pay for those higher prices? Your taxpayers. Sure, it may only be a couple hundred bucks here, and a couple hundred bucks there, but those hundreds add up."

Chairwoman Glinda, looking thoughtful, breaks in. "Mr. Apple," she says, "I can see why you and Ms. Raspberry are concerned about contract award preferences—that is, a preference to local companies bidding on Emerald City purchases or projects. But what about purchasing preferences or hiring preferences?"

Green Apple nods. "The relationship between contract award preferences and the two issues I’ve mentioned—retaliatory preferences and decreased competition—is certainly a more direct relationship. But purchasing preferences and hiring preferences have the same issues. If you require all of your contractors to buy only Emerald City products, then that means neighboring cities and counties may implement a similar policy, and, again, business owners like Ms. Raspberry won’t be able to supply contractors doing work for those cities or counties. At the same time, local businesses owners will be able to build more profit into their bids, knowing that Emerald City contractors are restricted from purchasing from non-local businesses.

"For hiring preferences, the issue of retaliatory preferences can be even more serious," continues Green Apple. "Local workers won’t be able to work on Emerald City projects year round—they’ll need to be able to find work elsewhere, and if other cities and counties adopt hiring preferences, your Emerald City workers will be in trouble. At the same time, the administrative hassle of verifying residency for all workers will cost the contractors time and money—and they’ll pass those costs along to you.

"I hope you’ll consider what I’ve said before you decide to implement a local preference policy,” concludes Green Apple. “And I thank you for your time.”

"Thank you, Sir," replied Chairwoman Glinda. "You’ve given us a lot to think about. Purchasing Officer Scarecrow is next on the agenda, and we’ll ask him for his thoughts on this, too."

[Green Apple’s arguments were adapted from a publication issued in February of this year by the United States Chamber of Commerce, titled “The Cost of Buy American Mandates on American Jobs: Reviewing the ‘Buy American’ Requirement on the Recovery Act’s Anniversary.” You can find it here.]
Local Preferences in Public Contracting, Part 6

Posted By Eileen R Youens On December 8, 2010 @ 4:12 PM In Community & Economic Development, Purchasing, Construction, Property Transactions | 1 Comment

This is the final post in a series on local preference policies. (Earlier posts can be found here [1], here [2], here [3], here [4], and here [5].) Once again, we find ourselves listening in on the Emerald City Council meeting where the Council is discussing local preference policies. The Council has just heard [5] from Mr. Green Apple, a representative from the Lollipop Guild, about why he dislikes local preferences. The Council had already asked Purchasing Officer Scarecrow to report back to them about whether the preference policies they’ve discussed will achieve the goals they hope to accomplish through those policies, and now they’ve also asked Scarecrow to respond to Green Apple’s comments. Let’s listen in...

“I’ll start by reminding you of the four goals of the proposed policy: reducing local unemployment, supporting local businesses, increasing the tax base, and reducing the city’s carbon footprint,” begins Scarecrow.

“As I said earlier [2], to reduce local unemployment, our policy would have to have the effect of creating more jobs for local workers in addition to retaining current jobs held by local workers. Similarly, to support local businesses financially, our policy would have to have the effect of directing more money to local businesses.” The Council members nod in agreement.

“But,” says Scarecrow, “as we’ve just heard from Mr. Apple, a local preference policy won’t necessarily achieve this goal because we don’t generate enough projects or purchases to keep our local workers employed. They have to be able to work with other towns and counties as well, and if other towns and counties follow our lead, this could result in a disadvantage to our local workers and businesses.”

“But establishing a local preference policy will show our local businesses that we support them!” protests Cowardly Lion.

“I agree completely,” replies Scarecrow. “However, there are other ways that we can show our support for local businesses without risking the disadvantages that may come with a local preference policy. And I’ll get to those in just a minute. I first want to address the last two goals the Council raised: increasing the tax base and reducing the City’s carbon footprint. As I mentioned earlier, to increase the tax base, our policy would have to encourage people to spend money with local businesses in the City. Again, while we may be able to encourage spending of our dollars and our contractor’s dollars with local businesses through a local preference policy, that probably won’t be enough to sustain many of these businesses, and it may end up hurting them if they’re disadvantaged when selling their products and services elsewhere. There are other ways to encourage people to spend money with our local businesses.

“To reduce the City’s carbon footprint,” continues Scarecrow, “our policy would have to help cut down on transportation costs for the goods and services that the City purchases. If we have a preference for products that are manufactured here in Emerald City, we will reduce transportation costs when we purchase those locally manufactured goods. But we’ll need to consider how many goods are manufactured here. We know lollipops are made here, but what about the other goods that we purchase regularly? No one in Emerald City makes computers, for example. We could buy computers from Flying Monkeys, the Emerald City computer store, but Flying Monkeys will have to buy those computers from somewhere outside of Emerald City. That won’t reduce our carbon footprint. Contracting with local companies for services or construction contracts could reduce our carbon footprint if we assume that nonlocal workers would commute back and forth. But again we have to consider whether there are enough qualified and available local workers and companies for us to do business with.”
Chairwoman Glinda interrupts, "Scarecrow, it sounds like you don't think a local preference policy will do much to achieve our goals. But we care deeply about our local businesses and our local workers, and we know they're suffering right now. Are you saying we can't do anything to help them?"

"Not at all, Chairwoman," replies Scarecrow. "There are several things we can do through the Purchasing Department to support local businesses and local workers:

1. Offer regular training to local businesses and local workers about how to do business with Emerald City, including information on how bidding works and where to find contracting opportunities with the City. Or the training could be a general introduction to doing business with governments, to give our local businesses and local workers a leg up when trying to get work with neighboring cities and counties as well.
2. Partner with other public entities or non-profits to provide other assistance to local businesses and local workers, such as mentoring programs that match small businesses with larger, more established businesses.
3. Ease bonding requirements when possible—in other words, we shouldn't require performance or payment bonds when those bonds aren't required by statute or when there isn't a real need for them. It can be difficult for newer or smaller businesses to get bonds.
4. When possible, we should make smaller projects available to local businesses so they can build experience and a good track record.
5. Encourage local businesses to register with the State's [Interactive Purchasing System](#). This will help connect them to public contracting opportunities throughout the State of North Carolina, not just here in Emerald City.
6. Reorganize our website to make bidding opportunities easier to find, and to provide links to the resources I've just mentioned such as opportunities for training and the Interactive Purchasing System.
7. Work with our Economic Development department to encourage Emerald City citizens to support local businesses.

"I'm sure there are other ways to support local workers and businesses, as well," concludes Scarecrow, "we just need to think creatively, and make sure that we remember that we don't lose sight of our primary procurement goals: promoting fairness and transparency, encouraging healthy competition, procuring quality goods and services, and being good stewards of the taxes we use to pay for those goods and services."

"Thank you, Scarecrow," says Chairwoman Glinda. "It's good to know that there are other ways we can help our local businesses. I move that we ask you, TinMan, and our Economic Development Department to develop a plan for supporting our local businesses and local workers based on these suggestions you've made today." The motion passes, and the Chairwoman brings the meeting to a close with a firm tap of her wand.

If you’re interested in an Economic Development perspective on supporting local businesses and local workers, take a look at the School of Government’s [Community and Economic Development blog](#). For example, my colleague [Jonathan Morgan](#) has written a great [post](#) on how local governments can help local businesses to develop and find new markets (domestic and foreign) for their goods and services.

Meanwhile, I hope that you’ll consider commenting on this post (or other posts in the series) with your thoughts, questions, and suggestions about ways local governments support local businesses. I look forward to hearing what you have to say.
Buying Without Bidding: Limits on Three Common Exceptions to the Bidding Laws

Your county needs to buy 5 new law enforcement vehicles costing $30,000 each, and the sheriff tells you that he prefers a specific make and model with certain options. The sheriff also tells you that he knows that a neighboring county recently bought 10 law enforcement vehicles of the same make and model, with the same options. You contact the dealership that sold the vehicles to the other county, and learn that the dealership sold 2008 models to the other county, but is now out of the 2008 models and only has 2009 models. Can you use the piggybacking exception to purchase these vehicles?

There are three exceptions to bidding that allow a local government to purchase apparatus, supplies, materials, or equipment from a vendor who has sold the same items to another public entity, as long as that vendor is willing to offer them to the local government at the same or better prices, terms, or conditions as were given the other public entity. The exceptions are:

- the state contract exception (G.S. 143-129(e)(9) [1]),
- the federal contract exception (G.S. 143-129(e)(9a) [1]), and
- the piggybacking exception (G.S. 143-129(g) [1]).

I am frequently asked about whether use of these exceptions is appropriate when the item the local government wishes to purchase is slightly different than the item purchased by the other public entity. And one of the most common versions of this question is whether a local government can use one of these exceptions to buy vehicles that are a different model year than the vehicle purchased by the other public entity.

In considering these questions, it’s helpful to think about why these exceptions exist. North Carolina law requires bidding for purchases of apparatus, supplies, materials, and equipment costing $30,000 or more. Why is bidding required? The North Carolina Supreme Court has said that the purpose of bidding “is to prevent favoritism, corruption, fraud, and imposition in the awarding of public contracts by giving notice to prospective bidders and thus assuring competition which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of substantial amount of public money.” Mullen v. Town of Louisburg, 225 N.C. 53, 58-59, 33 S.E.2d 484, 487 (1941). However, anyone who has been involved with public bidding knows that bidding can sometimes be inefficient and impractical.

By enacting exceptions to the bidding laws, the General Assembly has offered alternatives to bidding that still preserve the purpose of bidding. With the state contract exception, the federal contract exception, and the piggybacking exception, the General Assembly achieved this goal by allowing local governments in North Carolina to take advantage of a bidding process that was undertaken by another public entity.

Accordingly, when purchasing under these exceptions, a key question is whether the item you want to purchase is similar enough to the item purchased under the contract awarded by the public agency that actually conducted the bid process. Stated another way, would bidding out the item you want to buy result in a different outcome from the bid process conducted by the other agency for the item that agency purchased?

This is an easy question to answer when the item the local government seeks to purchase is identical to the item originally bid. It’s also an easy question to answer when the item the local government seeks to purchase is drastically different from the item originally bid. The hard cases, of course, fall in the gray area in between these two extremes. Adding or subtracting relatively small options on a purchase is probably OK. Purchasing a different model year of a vehicle is probably not OK.
I’ve heard the argument that a newer (or better) model should be considered a “better . . . term or condition” of the type that these exceptions would allow. In my opinion, the “terms and conditions” in these statutory exceptions (which allow use of the exception if the vendor is willing to offer the item at the “same or better prices, terms, or conditions” as were offered under the original contract) refer to the terms and conditions of the contract itself (e.g. more favorable delivery options, better payment terms), not the characteristics of the item purchased. Otherwise, a local government could use these exceptions to purchase an item that is drastically different from the item originally bid—as long as the item purchased by the local government is “better” than the item originally bid. This is clearly not what the General Assembly intended.

There is no hard rule to follow here, so if you’re not sure, it’s always safer to bid rather than use the exception. Remember, if you use an exception inappropriately, the resulting contract will be void. See, e.g., *Hawkins v. Town of Dallas*, 229 N.C. 561, 564, 50 S.E.2d 561, 563 (1948) (“a contract not made in conformity to the statutory requirements is void.”).


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[1] G.S. 143-129(e)(9): [http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html)
Have you heard of U.S. Communities? What about National IPA? Or HGAC? WSCA? TCPN? NJPA? This alphabet soup of organizations (and others like them) can provide North Carolina local governments with purchasing flexibility and efficiency through an exception to the bidding statutes for “competitive bidding group purchasing programs.” This exception, found in G.S. 143-129(e)(3) [1], was added to the formal bidding statute almost 10 years ago [2], but many local governments are still unaware of it. So how does it work?

What is a competitive bidding group purchasing program?

G.S. 143-129(e)(3) defines a competitive bidding group purchasing program as “a formally organized program that offers competitively obtained purchasing services at discount prices to two or more public agencies.” What exactly does that mean? Let’s break it down:

- “Formally organized program”—the statute doesn’t explain what “formally organized” means. But the word “formally” suggests that the program must be more than an ad hoc group of public entities deciding to join in on a couple of contracts together. At the very least, you’d want to see some kind of written document (or series of documents) setting out the purposes of the program, the membership of the program, and the procurement process used by the program.

- “Competitively obtained purchasing services”—the emphasis here is on “competitively obtained.” That is, some type of competitive process must be used by the program. The process does not have to meet all of the statutory requirements for a formal bid under G.S. 143-129, but it must be competitive. Most of these programs use a "lead agency" approach, where one public entity—the lead agency—uses its standard procurement process to award a contract to a vendor who agrees to supply products to all of the public entities participating in the program.

- “Discount prices”—The prices offered through the program have to be discounted from list prices, at least, and are hopefully comparable to the pricing you’d get through a formal or informal bidding process. The idea behind these programs is that vendors will be able to offer deeper discounts to the group of entities participating in the program than to an individual public entity because of the larger sales volume offered through the program.

- “Two or more public agencies”—This part is easy. As long as you can verify that there’s one other public entity participating in the program, you’ve met this requirement. Again, the idea is that the entities participating in the program will get a better deal buying as a group than they would if they entered into contracts individually (because of the increased sales volume). But it can’t be a group of private entities.

How do you know if a program is a “competitive bidding group purchasing program”?

You have to do some research to decide (1) if the program is “formally organized,” (2) if the process used by the program is competitive, (3) if the program benefits from “discount prices,” and (4) if there is at least one other public entity participating in the program. I suggest starting your research on the internet (each of the programs listed at the beginning of this post have their own websites), and then following up by calling the program directly to clarify any questions you have. Be sure to save the documentation you use to determine that the program meets the definition of a “competitive bidding group purchasing program”—including pages from the program’s website, or separate documentation you receive from the program—and keep the documents in your bid file.
**When should you use this exception?**

Once you’ve done your research and verified that a program meets the definition of a “competitive bidding group purchasing program,” you’ll also need to verify that the item(s) you want to buy are actually offered through the program, and—if you heard about the program from a vendor trying to get your business—you’ll need to verify that the vendor is authorized to sell those products through the program. If you can't find that information on the program’s website, call or email the program directly.

Then it’s up to you to determine—considering the prices offered, the process used, the money and time that could be saved by avoiding the bidding process, the politics involved with the procurement (e.g., what will your local vendors or your board members say?), and any other relevant facts and circumstances—whether using this exception makes sense. (Or cents.)

Note that if you’re using state or federal funds (including ARRA funds), you should ask the agency providing those funds if you can purchase through a competitive bidding group purchasing program.

**What do I have to do to use the exception?**

The statute[1] doesn’t give any procedures that must be followed to use the competitive bidding group purchasing exception; it simply says that purchases made through these programs are exempt from bidding. So, unless required by your local policies, governing board approval is not required and you don't have to publish notice of your intent to use the exception. All you have to do is contact the program to find out what you have to do to purchase through one of their contracts.

If you’ve had a good experience with a competitive bidding group purchasing program that I didn’t mention above, you are welcome to share that information by commenting on this post.

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The Intersection of the First Amendment and Professional Ethics for Government Attorneys
I. Scope Note

This article answers two questions:

1. What First Amendment rights do government employees possess?
2. How do the North Carolina Rules of Professional Conduct governing attorneys interact with government attorney-employees’ First Amendment rights?

First Amendment protection exists for government employees, but not to the same extent as it does for everyone else. The ability of government employees to exercise their First Amendment rights are limited by their employers’ interest in providing services to the public in an efficient and effective manner. Recent caselaw from the Supreme Court of the United States has further limited the ability of government employees’ to exercise their First Amendment rights by excluding from constitutional protection speech that is within their scope of employment. As a result, the First Amendment no longer protects government employees who complain to their supervisors about misconduct or waste relating to matters that are within their job responsibilities and later suffer negative consequences as a result of those complaints.

Government employees who are also attorneys face additional limitations on their speech due to their professional responsibility obligations under state bar rules. Speech that might otherwise be protected by the First Amendment may be prohibited by an attorney’s duty of confidentiality. Other speech that is required by an attorney’s professional responsibility obligations may fall outside of the First Amendment’s protection. This imperfect overlap between the First Amendment and attorneys’ ethical duties raise two interesting constitutional conundrums that are analyzed at the end of this article.

II. What First Amendment rights do government employees possess?

Until the mid-20th century, public employees possessed minimal First Amendment free speech rights. Governments were free to condition public employment on the near complete waiver of First Amendment rights, a view neatly summarized by Oliver Wendell Holmes when sitting on the Supreme Judicial Court of Massachusetts. “A policeman may have the constitutional right to talk politics, but he has no constitutional right to be a policeman.” McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

Beginning in the 1950s, the Supreme Court began to expand First Amendment protection for government employees. The court first struck down loyalty oaths banning membership in particular political parties and later invalidated statutes that prohibited the hiring of past or...

In 1968, the Supreme Court moved to protect speech other than traditional political activities when it ruled unconstitutional the firing of a public school teacher for publicly criticizing the local board of education’s spending decisions.

[T]he question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.


Pickering provided the first express statement of the Court’s current approach to this issue: public employees do not relinquish their First Amendment rights to comment on matters of public concern simply because they are employed by the government. “A State may not condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.” Connick v. Myers, 461 U.S. 138, 142 (1983).

However, the government’s authority to limit the free expression of its employees remains far greater than its ability to limit the free expression of common citizens.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provisions of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.


Writing for the majority in Garcetti, Justice Kennedy summarized the delicate balancing act currently mandated by the Supreme Court: “to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the
needs of government employers attempting to perform their important government functions.”
547 U.S. at 420.

A. Two Foundational Cases: Connick and Garcetti

Two of the Supreme Court cases cited above deserve extended analysis because of their foundational roles in the evolving government employee First Amendment jurisprudence: Connick v. Myers, 461 U.S. 138 (1983), and Garcetti v. Ceballos, 547 U.S. 410 (2006). Connick firmly established the current test for whether the speech in question touches on a matter of public concern, while Garcetti added a new requirement that the speech be outside of the employee’s job duties to receive First Amendment protection. Both cases involve government attorneys as plaintiffs, making them even more relevant for the purposes of this article.

i. Connick v. Myers

Harry Connick, Sr.—the father of the famous jazz singer and actor—served as the New Orleans district attorney for thirty years. In 1980, he unintentionally laid the groundwork for a seminal Supreme Court decision when he terminated for insubordination one of his assistant district attorneys, Sheila Myers.

Connick had ordered that Myers be transferred to prosecute cases in a different section of criminal court, a move that Myers strongly opposed. After expressing her opinion about the transfer to her supervising attorneys, Myers decided to distribute a questionnaire to her colleagues to learn if they shared her concerns. Early one morning, Myers typed up a questionnaire and distributed it to 15 of her fellow assistant district attorneys. The questionnaire asked for her colleagues’ views on five issues:

- office transfer policy;
- office morale;
- the need for a grievance committee;
- the level of confidence in their supervisors; and,
- whether employees felt pressured to work on political campaigns.

When Connick was informed that Myers was distributing the questionnaire at the office, he immediately fired her. Myers sued under 42 U.S.C. §1983 claiming she was terminated for exercising her First Amendment right to free speech. She prevailed at trial and at the United States Court of Appeals for the Fifth Circuit. The Supreme Court agreed to hear the case and used it to explore the constitutional question at issue in more depth than it had since Pickering 15 years earlier.

In the Court’s view, the key issue to be resolved was whether Myers’ questionnaire constituted speech on a matter of public concern.

When employee expression cannot fairly be considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary
...in the name of the First Amendment... [W]hen a public employee speaks out not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest... a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.

461 U.S. at 146, 147.

Justice Kennedy, writing for the five-justice majority, viewed Myers’ questions as aimed not at helping the public evaluate the performance of a government agency but rather at “gathering ammunition” for a battle with Myers’ supervisors over the transfer. The majority concluded that the general public might have a legitimate interest in only one of the five questions, that dealing with forced participation in political campaigns. But for that question, Myers’ speech was not related to a matter of public concern and therefore was not deserving of First Amendment retaliation protection.

Although the majority conceded that the question involving forced participation in political campaigns might touch upon a matter of concern, they believed that question did so “only in a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy.” 461 U.S. at 154.

Myers’ limited First Amendment interest in that one question was outweighed by Connick’s interest maintaining an effective and successful office, in large part because of the manner, time and place of Myers’ speech. The court accepted Connick’s characterization of Myers’ conduct as causing a “mini-insurrection.” When, like Myers’ questionnaire, the speech at issue occurs in the office during work hours and affects other employees’ ability to conduct their work, the speech is more likely to justify retaliatory action by the employer under the First Amendment.

In the end, the majority rejected Myers’ attempt to “constitutionalize [her] employee grievance” and found that her termination did not violate the First Amendment.

ii. Garcetti v. Ceballos

The Supreme Court did not examine this issue in depth again for nearly 25 years, until it confronted in 2006 a similar case involving another fired district attorney, Richard Ceballos. He worked in Los Angeles for District Attorney Gil Garcetti, the same district attorney who oversaw the prosecution of O.J. Simpson in the mid-nineties.

In 2000, a defense attorney contacted Ceballos about alleged inaccuracies in an affidavit used to obtain a critical search warrant. In accordance with standard office practice, Ceballos investigated the issue and determined that there were serious misrepresentations in the affidavit. He then informed his superiors of his concerns and drafted a memorandum recommending dismissal of the criminal case. After several meetings, Ceballos’ boss decided to proceed with the prosecution. The defense later called Ceballos to testify in an unsuccessful challenge to the search warrant that resulted from the allegedly inaccurate affidavit.
Ceballos claimed that he was transferred and denied a promotion because of his speech about the affidavit. He sued under 42 U.S.C. § 1983 but lost in federal district court on summary judgment when the court concluded that Ceballos’ speech was not protected by the First Amendment because he wrote his memorandum pursuant to his job duties. The Court of Appeals for the Ninth Circuit reversed, finding that the memorandum was worthy of First Amendment protection because it touched upon a matter of public concern—potential government misconduct—and because it did not cause undue disruption of inefficiency in the office of the district attorney.

Again writing for a five-justice majority, Justice Kennedy believed that the controlling factor in the case was the fact Ceballos’ speech was made pursuant to his duties as an assistant district attorney.

Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe upon any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. . . . [T]he First Amendment does not prohibit managerial discipline based on employee’s expressions made pursuant to official responsibilities.

547 U.S. at 421-422, 424. To hold otherwise, wrote Justice Stevens, would be to commit the courts to an overly intrusive role of monitoring all business-related communications throughout local, state and federal government.

Because the majority concluded that Ceballos’ speech did not merit First Amendment protection, the Supreme Court reversed the lower court and found in favor of Garcetti. Interestingly, the Court appeared to base its analysis exclusively on Ceballos’ internal speech to his superiors and co-workers, not on his external speech while testifying in court. Most lower courts that have addressed this issue have determined that testimony in deposition or at trial is deserving of First Amendment protection. See section B(ii) below.

B. Current Five-Part Test

Since Garcetti, lower courts have applied a five-part test to First Amendment free speech claims raised by government employees. Although the order of the first two inquiries sometimes changes, these five questions now control claims similar to those brought by Myers and Ceballos:

1. Did the employee’s speech touch upon a matter of public concern?
2. Was the speech made as part of the employee’s job duties?
3. Did the government take adverse employment action that was substantially motivated by the employee’s speech?
4. Did the government’s legitimate administrative interest in providing efficient and effective services to the public outweigh the employee’s First Amendment rights?
5. Would the government have taken the adverse employment action even in the absence of the protected speech?

If plaintiff produces enough evidence to answer the first three questions affirmatively, then the burden of persuasion shifts to the government for the remaining two questions. If the government fails to satisfy its burden on both questions, then the employee should prevail. See Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009).

i. Did the employee’s speech touch upon a matter of public concern?

Connick makes clear that the speech in question must concern something more than an individual employee’s complaint about his or her job to warrant First Amendment protection. As the Fourth Circuit observed, “A government employee's right to gripe about the conditions of his or her job is protected to the same degree as that of private employees, as only under such condition is efficient government service possible.” Arvinger v. Mayor and City Council of Baltimore, 862 F.2d 75 (4th Cir. 1988)(holding that testimony at grievance hearing concerned only the employees involved in the hearing and not the general public and therefore was not protected by the First Amendment).

Simply put, the First Amendment does not guarantee that all government employees will be treated nicely by their supervisors: “A generalized public interest in the fair or proper treatment of public employees is not enough” to trigger First Amendment protection. Ruotolo v. City of New York, 514 F.3d 184, 190 (2nd Cir. 2008). See also Bell v. City of Philadelphia, 275 F. Appx. 157, 2008 WL 1813163 (3rd Cir. 2008)(an assistant district attorney’s complaints about “abuse” and mistreatment by his colleagues and supervisors did not qualify as a matter of public concern). The mere fact that the public may be interested in hearing about a subject does not automatically make that subject a matter of public concern. Haddon v. Executive Residence at the White House, 313 F.3d 1352, 1360 (Fed. Cir. 2002)(holding that former White House chef’s public comments about First Family’s food preferences, President’s tardiness for dinner, and poor service given to First Family by staff were not matters of public concern).

That said, speech that involves public health and safety, corruption, or unconstitutional discrimination is generally considered to be a matter of public concern even if it is raised in the context of an individual employee’s complaints about his or her working conditions. Consider Jones v. Quintana, ___ F.Supp. 2d ___, 2009 WL 3126544 (D.D.C. 2009), in which the court concluded that a 911 dispatcher’s complaints about a new system for routing 911 calls were aimed at protecting public safety and not simply at protecting the dispatcher’s workload. See also Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009)(complaints by assistant district attorney about supervisor misconduct that negatively affected public finances was matter of public concern); Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996)(allegations of racial discrimination in a public agency always a matter of public concern).

ii. Was the speech made as part of the employee’s job duties?

Garcetti held that speech within the scope of a government employee’s official responsibilities does not warrant First Amendment protection. How should courts make this
determination? Responding to criticism from a dissenting justice in *Garcetti*, Justice Kennedy stated that formal job descriptions should not control this determination.

The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.

*Garcetti*, 547 U.S. at 424-425.

The *Garcetti* inquiry concerns not only the content of the speech but also the medium, venue, and intended audience of the speech. The fact that that the content of an employee’s speech concerned the subject matter of the employee’s duties is “nondispositive.” *Garcetti*, 547 U.S. at 421. Lower courts applying the *Garcetti* framework appear to have developed two general rules, one for *internal* speech and one for *external* speech:

1. Internal speech generally is not protected, unless the speech concerns matters clearly outside the scope of the employee’s job duties. Internal speech includes complaints directed up the employee’s chain of supervisors, even to the agency’s most senior officials, as well as comments made in response to an internal agency investigation.

2. External speech, such as comments to the media, generally is protected regardless of content, unless the employee’s job duties include the type of external speech at issue. Most courts agree that testimony in a civil or criminal judicial proceeding is considered protected external speech, even if the content of that speech is directly related to an employee’s job duties.

Numerous court opinions illustrate these rules in practice:

- Complaints directed to the employee’s chain of supervisors about subject *within* the scope of the employee’s job duties held *unprotected*:
  - *Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008)(complaints made to both the employee’s immediate supervisor and the president of her university division were not protected because the complaints concerned matters within employee’s job responsibilities)
  - *Vila v. Padron*, 484 F.3d 1334 (11th Cir. 2007)(complaints about legal improprieties made by university vice-president/general counsel to university president and board of trustees not protected)
  - *Hill v. Kutztown*, 455 F.3d 225 (3rd Cir. 2006)(town manager’s complaints to town council about alleged harassment by town’s mayor not protected because manager’s official duties included reporting to the council)
- Complaints directed to the employee’s chain of supervisors about a subject outside the scope of employee’s job duties held protected:
  - Jones v. Quintana, ___ F.Supp.2d ___, 2009 WL 3126544 (D.D.C. 2009)(911 dispatcher’s complaints to her supervisors and to the mayor and council about 911 policies protected, because dispatcher’s job duties did not involve policy-making)
  - Wright v. City of Salisbury, ___ F.Supp.2d ___, 2009 WL 2957918 (E.D.Mo. 2009)(police officer’s letter to city council about city’s drunken driving enforcement policies protected, because police officer’s job duties did not include policy-making)

- Comments made in response to internal investigation held not protected:
  - Jackson v. Mecklenburg County, 2008 WL 2982468 (W.D.N.C. July 30, 2008)(holding that allegations made during internal investigation of discrimination not protected because all agency employee’s were expected to cooperate with the investigation as part of their job duties)

- Speech directed outside of employee’s chain of supervisors, including speech made to other government agencies or media, held protected:
  - Andrew v. Clark, 561 F.3d 261 (4th Cir. 2009)(indicating police officer’s release of internal memo to newspaper could constitute protected speech)
  - Casey v. West Las Vegas Independent School District, 473 F.3d 1323 (10th Cir. 2007)(school superintendent’s reports to supervisors and federal agency about problems in the Head Start program not protected because her job duties required such reports, but complaints to state attorney general about open meeting law violations were protected because her job duties did not involve reporting such legal problems to external agencies)
  - Snelling v. City of Claremont, 931 A.2d 1272 (N.H. 2007)(city tax assessor’s comments to media about fairness and potential abuse of city tax system protected, because assessor’s job duties included duty to communicate about tax assessments but not about tax policy in general)

- Speech directed to media by employees whose job duties included speaking to the media held not protected:
  - Nixon v. City of Houston, 511 F.3d 494 (5th Cir. 2007)(police officer’s comments to media while on duty and in uniform at the scene of an accident were part of officer’s job duties, despite the fact that the comments were unauthorized and against the wishes of his superiors)
  - Foley v. Town of Randolph, 601 F.Supp.2d 379 (D.Mass. 2009)(fire chief’s comments at fire scene not protected, despite the fact that the comments focused on the chief’s funding and staffing concerns rather than the fire itself)
Testimony in judicial proceeding held protected:
  o Reilly v. Atlantic City, 532 F.3d 216 (3rd Cir. 2008)(finding that police officer’s testimony in a criminal prosecution of fellow officer was protected, after reviewing caselaw and noting that Garcetti did not address the testimony made by the plaintiff in that case)

iii. Did the government take adverse employment action that was substantially motivated by the employee’s speech?

The definition of “adverse employment action” varies from circuit to circuit. All federal courts generally agree that a public employer clearly violates an employee’s First Amendment rights when it “discharges or ‘refuses to rehire [the] employee,’ or when it makes decisions relating to ‘promotion, transfer, recall, and hiring based on the exercise of that employee’s free speech rights.’” Ridpath v. Board of Governors Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006), quoting Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000).

The Fourth Circuit is one of several that conclude the First Amendment also bars less severe employment actions that “chill” public employee’s free speech rights. “The employee must establish retaliation of some kind—that he was deprived of a valuable government benefit or adversely affected in a manner that, at the very least, would tend to chill his exercise of First Amendment rights.” Goldstein v. Chestnut Ridge Volunteer Fire Department Co., 218 F.3d 337, 352 (4th Cir. 2000)(suspension of volunteer firefighter constituted adverse employment action). In a footnote sometimes dismissed as dicta, the Supreme Court seemingly blessed an expansive definition of “adverse employment action”: “Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights.” Rutan v. Republican Party of Illinois, 497 U.S. 62, 76 n.8 (1990)(internal citations omitted). See also Speigla v. Hull, 371 F.3d 928 (7th Cir. 2004)(transfer to more physically demanding and less-skilled post and unfavorable change in schedule can be adverse employment action even if the employee suffers no loss in pay); Coszalter v. City of Salem, 320 F.3d 968 (9th Cir. 2003)(transfer to occasionally less-pleasant duties and unwarranted disciplinary investigations constitute adverse employment action). But see Benningfield v. City of Houston, 157 F.3d 369 (5th Cir. 1998)(reprimands and false accusation of criminal wrongdoing do not constitute adverse employment actions under First Amendment).

After producing evidence of an adverse employment action, the plaintiff must then demonstrate that the protected speech was a “substantial” or “motivating” factor behind that action. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977). The protected conduct need not be the only or the primary reason for the adverse employment action, but merely one of those reasons. See Speigla, 371 F.3d at 942 (citing unanimity among the circuits on this interpretation).
iv. Did the government’s legitimate administrative interest in providing efficient and effective services to the public outweigh the employee’s First Amendment rights?

This balancing test was first explicitly defined by the Supreme Court in Pickering and further refined in Connick when Justice Kennedy analyzed the competing interests in the one item on Myers’ questionnaire that touched upon a matter of public concern. The government’s “legitimate purpose in promoting efficiency and integrity in the discharge of official duties and to maintain property discipline in the public service” is most at risk when the speech in question occurs in the office and impedes other employees from accomplishing their job responsibilities. Connick, 461 U.S. at 151(internal citations omitted). The Court found that Myers’ First Amendment interest in her intra-office questionnaire was outweighed by the district attorney’s interest in preventing a “mini-insurrection” and maintaining “close working relationships” within the office.

The Fourth Circuit interprets this balancing test to require an analysis of the nature of the employee's position, the context of the employee's speech, and the extent to which it disrupts the Department's activity. McVey v. Stacy, 157 F.3d 271, 278 (4th Cir.1998). When considering these factors, the court looks at whether the speech: “(1) impairs discipline by superiors; (2) impairs harmony among co-workers; (3) has a detrimental impact on close relationships; (4) impedes the performance of the public employee's duties; (5) interferes with the operation of the agency; (6) undermines the mission of the [department]; (7) is communicated to the public or to co-workers in private; (8) conflicts with the responsibilities of the employee within the [department]; and (9) makes use of the authority and public accountability the employee's role entails.” McVey, 157 F.3d at 278 (quoting Rankin v. McPherson, 438 U.S. 378, 388-91 (1987)).

Generally speaking, the more the employee’s job requires “confidentiality, policy making, or public contact, the greater the state’s interest in firing her for expression that offends her employer.” Sheppard v. Beerman, 190 F.Supp.2d 361, 374 (E.D.N.Y. 2002)(internal citations omitted). In Sheppard, the court (perhaps not surprisingly) favored a judge’s interest in maintaining an effective workplace over the First Amendment interest of the judge’s clerk. Because “a law clerk is often privy to a judge’s thoughts and decision-making processes,” the importance of the clerk’s “cooperative and confidential relationship with staff members cannot be overemphasized . . . .” Sheppard, 190 F.Supp.2d at 374.

Two cases involving sarcastic references to assassination attempts nicely demonstrate how the First Amendment balancing test can vary based on level of employment. In Rankin v. McPherson, 483 U.S. 378 (1987), a county typist told her colleague “I hope they get him next time” after learning of the 1981 assassination attempt on President Reagan. Because the typist was a low-level employee with little interaction with the public and no policy-making authority, the court found that her comments did not unduly interfere with her employer’s effective and efficient delivery of public services. Compare that result to the one in Baird v. Cutler, 883 F.Supp. 591 (D. Utah 1995), in which a senior city attorney was demoted after making this snide reference on a local political commentary television show, “Perot thinks everyone is trying to assassinate him. Too bad he’s still alive!” Because the attorney had substantial policy-making authority—in the area of gun control, no less—the court found that his interest in free expression were outweighed by his employer’s interest in controlling its message on important policy issues.
The facts of Braswell v. Haywood Regional Medical Center, 234 Fed.Appx. 47, 2007 WL 1227464 (4th Cir. 2007) provide an excellent example how the Fourth Circuit applies the Pickering balancing test. Braswell, a physician with medical privileges at the local county hospital, sent a letter to a surgeon being recruited to the area ridiculing the county hospital’s assertion that the community could support additional surgeons. After determining that Braswell was the equivalent of a public employee and that his speech touched upon a matter of public concern, the court concluded that Braswell’s First Amendment interest in his letter was outweighed by the hospital’s interest in regulating speech that affected its “core mission.”

To meet the medical needs of Haywood County, the Hospital, like all hospitals in more sparsely populated areas, must devote extra effort to recruiting physicians. Accordingly, the Hospital has a significant interest in preventing staff doctors from interfering with the Hospital's recruiting efforts. The Hospital also has an important interest in maintaining a collegial atmosphere. As stated above, doctors must frequently consult with each other and assist in performing surgeries. Braswell's actions negatively affected his relationship with his colleagues and thus impacted his ability to provide quality care to patients at the Hospital.


v. Would the government have taken the adverse employment action even in the absence of the protected speech?

If the plaintiff produces evidence of an adverse employment action that was based at least in part on the plaintiff’s protected speech, the government can still defeat the First Amendment claim by demonstrating that it would have made the same employment decisions even if the plaintiff had not uttered the speech in question. The court should first ask, “Was the adverse employment action based on both protected and unprotected activities?” If so, the court must then ask, “Would the government still have taken the adverse action if the proper reason alone had existed?” Eng v. Cooley, 552 F.3d 1062, 1072 (9th Cir. 2009).

III. How do the North Carolina Rules of Professional Conduct governing attorneys interact with government attorney-employees’ First Amendment rights?

When attorneys gain admission to the bar and enter into professional relationships with clients, they implicitly agree to restrain their speech on certain issues. A state’s ethical rules governing attorneys cannot trump the First Amendment, of course, but they can create additional limitations on when, where and how a government attorney may engage in certain speech. This section identifies several North Carolina Rules of Professional Conduct ("RPC") regulating attorney speech and analyzes two constitutional conundrums that could arise due to the imperfect overlap between the RPC and the First Amendment as they relate to government attorneys.
A. RPC Rule 1.6: Confidentiality

Attorneys are forbidden to disclose *any* “information acquired during the professional relationship” unless the client provides informed consent. This duty of confidentiality is far broader than the attorney-client privilege. The privilege is an evidentiary rule that covers only communications made in confidence between an attorney and client in the course of giving or seeking legal advice for a non-criminal purpose. See *In re: Miller*, 357 N.C. 316 (2003). In contrast, the duty of confidentiality covers *all* information the attorney learns while working for the client, regardless of source, purpose, or context. The duty of confidentiality is so broad that it could forbid speech by a government attorney that would be protected by the First Amendment under the *Connick/Garcetti* tests. This potential conundrum is discussed in more detail below in section E.

North Carolina’s version of Rule 1.6 does not require attorneys to breach a client’s confidence under any circumstances. However, at least 13 states require disclosure by attorneys to prevent some types of criminal acts, usually those that are likely to cause injury or death. See *The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes*, Susan R. Martyn, Lawrence J. Fox, W. Bradley Wendel (Wolters Kluwer, 2009-2010 ed.).

In North Carolina, attorneys are permitted but not required to disclose a client’s confidential information in seven situations:

1. to comply with the Rules of Professional Conduct, the law or court order;
2. to prevent the commission of a crime by the client;
3. to prevent reasonably certain death or bodily harm;
4. to prevent, mitigate, or rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer's services were used;
5. to secure legal advice about the lawyer's compliance with these Rules;
6. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
7. to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

The sixth exception is most commonly applied in billing and malpractice disputes between lawyers and clients. It may also permit an in-house attorney to share confidential information with his or her personal attorney to determine whether the in-house attorney has an employment law claim against the employer. See *Jacobs v. Schiffer*, 204 F.3d 259 (D.C. Cir. 2000)(holding that First Amendment protects and Rule 1.6 permits conversations between in-house attorney and his personal attorney that involve the in-house attorney’s employer’s confidential information). Whether the in-house attorney could later publicly reveal his employer’s confidential information in support of an employment claim is subject on which courts disagree. See section E below.

B. RPC Rule 1.13: Organization as Client
An attorney representing an organization must put the interests of the organization above the interests of the organization’s individual agents, employees, and officers. This principle applies equally to attorneys to representing private corporations and to those representing governments. For example, an attorney representing a town must disclose to the town council a meeting involving the attorney, the mayor, and other parties despite the mayor’s request that the attorney keep the meeting a secret. N.C. Ethics Op. CPR 154. Similarly, if a newly elected city council member asks the city attorney to describe past conversations with the council, the attorney must get permission from the council as a whole before revealing those conversations. See R.I. Ethics Op. No. 2002-02.

Unlike Rule 1.6, Rule 1.13 requires certain speech on behalf of organizational attorneys. It is possible that a government attorney may be required to speak on subjects and in settings that do not trigger First Amendment protection under Connick/Garcetti, a second potential constitutional conundrum analyzed below in section E.

The obligation to speak under Rule 1.13 is triggered when an attorney representing an organization knows that an employee, officer or agent has acted or will act in a matter related to the attorney’s representation that is likely to cause substantial injury to the organization and is either (i) a violation of a legal obligation to the organization or (ii) a violation of law that could be imputed to the organization. RPC 1.13(b). When such a situation arises, the attorney has an obligation to report the matter up the organization’s chain of command to the “highest authority that can act on behalf of the organization,” unless the lawyer reasonably believes that such internal disclosure is not in the best interests of the organization.

Are the voters the “highest authority” that can act on behalf of a government? Comment 5 to Rule 1.13 appears to rule out that conclusion by observing that an organization’s “highest authority” is generally its “board of directors or similar governing body.” Rule 1.13, Comment 5. If a corporation’s highest authority is not its shareholders, then it seems unlikely that a government’s highest authority could be its voters. For an attorney representing a local government, the highest authority should be the board of county commissioners or town council. For an attorney representing a discrete unit of local government, the highest authority is likely the head of that unit. See N.C. State Bar v. Koenig, 04 DHC 41 (2005)(disciplining attorney representing sheriff’s office for failing to pursue allegations of sexual harassment to a final decision by the highest authority, the sheriff). For an attorney representing the state, the highest authority could be a department secretary, the General Assembly, or the governor, depending on whom the attorney considers to be the client. Rule 1.13, Comment 9.

If the issue is not resolved by the organization’s highest authority, then the attorney is permitted but not required to disclose the issue publicly if (i) it involves a clear violation of law and (ii) is likely to cause substantial injury to the organization. Rule 1.13(c). However, the rule limits this public disclosure “to the extent permitted by Rule 1.6.” This clause, which does not appear in the American Bar Association’s model version of the rule, means that North Carolina’s version of Rule 1.13 does not create independent authority for an attorney to disclose information that would otherwise be considered confidential. Unless the issue involves one of the exceptions to the Rule 1.6 duty of confidentiality discussed above, an attorney is not permitted to make a public disclosure under Rule 1.13.
Comment 9 to Rule 1.13 emphasizes the different obligations facing government attorneys as compared to their counterparts who represent private clients. When public business is involved, “a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified.” While this observation suggests that government attorneys have more leeway to make public disclosure under Rule 1.13 than do private attorneys, that suggestion is somewhat negated by North Carolina’s requirement that any disclosure under Rule 1.13 be permitted under Rule 1.6. Comment 9 likely has more weight in jurisdictions that do not tie Rule 1.13 to the specific exceptions in Rule 1.6. But even in North Carolina, government attorneys weighing the option to publicly disclose misconduct under an exception to Rule 1.6 might consider Comment 9 to serve as a finger on the scale in favor of disclosure over confidentiality.

C. Rule 3.3: Client Perjury

Under the Rules of Professional Conduct, the sanctity of the attorney-client relationship is trumped only by the integrity of the judicial process. In North Carolina, the only situation in which an attorney may be obligated to violate the duty of client confidentiality is when the attorney knows that the client or the client’s witness has or will commit perjury or a similar fraud upon the court. Rule 3.3 requires an attorney to take all “reasonable remedial measures, including, if necessary, disclosure to the tribunal” once the lawyer realizes that the client has offered or will offer false material evidence or is engaged in fraudulent activity relating to the proceeding.

Could the obligation to remedy client perjury create a situation similar to that possible under Rule 1.13 in which speech is mandated by the RPC but unprotected by the First Amendment? Probably not. The mandated disclosure of a government client’s perjury to the court by a government attorney would almost certainly be protected under the Connick/Garcetti test. First, the commission of a crime—perjury—by a government official should be considered a matter of public concern. Second, disclosing misconduct to an external agency—in this case, the court—is usually viewed as speech that falls outside of the scope of a government employee’s duties. If so, then the disclosure mandated by Rule 3.3 would be protected by the First Amendment.

D. Rule 8.3: Reporting Professional Misconduct

Attorneys are required to report misconduct by another attorney “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer.” In North Carolina, this category of misconduct includes misappropriation of client funds (89 Disciplinary Hearing Committee 5), deliberate violation of settlement conditions (N.C. Ethics Op. RPC 127), and abuse of the trial calendaring authority by the district attorney (N.C. Ethics Op. RPC 243). Other jurisdictions have found an obligation to report grossly unreasonable fees (N.M. Ethics Op. 2005-02), the use of illegal drugs (Utah Ethics Op. 98-12), and fraudulent notarizations (Ohio State Bar Ethics Op. 02-01).

However, similar to Rule 1.13, the obligation to publicly disclose another attorney’s misconduct is restrained by Rule 1.6. Rule 8.3 does not require or permit the reporting attorney to violate the duty of client confidentiality. Rule 8.3, Comment 3. If reporting other attorney’s
misconduct would involve disclosure of a client’s confidential information, the reporting
attorney should “encourage” the client to consent to the disclosure if such disclosure will not
“substantially prejudice” the client’s interests. If the client refuses to provide consent for the
disclosure, the attorney may not report the other attorney’s misconduct—and the failure to do so
will not be considered a violation of Rule 8.3.

The obligation to report professional misconduct raises the possibility of an attorney
being forced by the RPC to speak without assurance that the First Amendment will protect the
attorney from retaliation from his or her government employer. This constitutional conundrum,
similar to that which can arise under Rule 1.13, is analyzed below.

E. Two Constitutional Conundrums

Unfortunately for government attorneys, the First Amendment and the RPC are not
perfectly aligned. Some speech may be protected by the First Amendment but still lead to
adverse consequences under the RPC. Other speech may be permitted or even required by an
attorney’s ethical obligations but unprotected by the First Amendment. These two conundrums
and their possible ramifications are analyzed below.

i. Speech protected by the First Amendment but prohibited by the RPC

The broad scope of Rule 1.6 means that a government attorney is prohibited by ethical
considerations from speaking about many topics that would be protected by the First
Amendment. Consider this scenario:

Attorney Smith is the recently hired county attorney for Carolina County, whose board of commissioners consists of four Tar Heel Political Party members, including the chair, and three Blue Devil Political Party members. Six months after joining the county, Smith learns that the four Tar Heels on the board routinely meet in private to discuss county business. Smith believes this practice violates state open-meetings law and informs the chair of this view. Despite Smith’s admonitions, the Tar Heels continue to meet secretly. The chair instructs Smith not to reveal these meetings to anyone. Nevertheless, Smith informs the Blue Devils on the board of these meetings and, when that does not stop the practice, Smith discloses these meetings to the local newspaper. Two days after the newspaper calls the chair to ask about these secret meetings, the board votes 4-3 to terminate Smith’s employment.

It seems likely that Smith’s speech to the newspaper would be protected by the First
Amendment under the Connick/Garcetti analysis. The commissioner’s willful violation of state
open-meetings law is clearly a matter of public concern, and Smith’s speech to the newspaper
does not appear to be within the scope of employment for a county attorney. Even if an
employee is expected to respond to media inquiries on certain topics, self-initiated comments to
the media about topics that the employer has demanded the employee keep confidential probably would be considered outside of the scope of that employee’s job duties. See Snelling v. City of Claremont, 931 A.2d 1272 (N.H. 2007) (fact that tax assessor’s job duties included talking to the media on certain tax issues did not mean that all comments to the media by the assessor were within his scope of employment).

However, it seems equally likely that Smith’s speech to the newspaper violates Smith’s duties under the RPC. Public disclosure of a violation of open-meeting laws does not appear to satisfy any of the exceptions to client confidentiality under Rule 1.6. The remedies for a violation of the open meetings are civil in nature, not criminal, meaning the most likely exception, preventing the commission of a crime by the client, would not apply. See N.C.G.S. § 143-318.16 (authorizing injunctive relief for violation of open-meetings laws) and N.C.G.S. § 143-318.16A (authorizing the invalidation of acts by public body in violation of open-meetings laws).

Rule 1.13 offers no help to Attorney Smith either. The county commissioners are the highest authority that can act on behalf of the county, meaning there is no opportunity for Smith to report the matter up the internal chain of command. The rule’s option of reporting the misconduct externally is limited by the attorney’s obligations under Rule 1.6; because no exceptions to the duty of client confidentiality apply, Rule 1.13 does not authorize external disclosure.

Can the county fire Smith for conduct protected by the First Amendment but prohibited by the RPC? The answer must be yes: it is almost unimaginable that a client would have the ability to seek ethical sanctions against an in-house attorney for violating the RPC but would not have the ability to terminate its employment relationship with that attorney.

The most relevant case law on this specific issue appears to be Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1998), which involved the anti-retaliation provisions of Title VII of the federal Civil Rights Act of 1964. The court held that public disclosure of client confidences by an in-house attorney that violated state bar rules justified the termination of the attorney, despite the fact that the disclosures would have been considered “protected activity” under Title VII had they been made by a non-attorney employee. In the court’s view,

[The attorney] took no precautions to preserve the attorney-client relationship and instead acted with thoughtless indiscretion, demonstrating little regard for the ethical obligations inherent in the legal profession. This dereliction of professional duties meant that . . . the trust undergirding the attorney-client relationship was broken and [the attorney] could no longer function in her role as in-house counsel. . . . The ethical precepts of confidentiality and loyalty serve to assure that trust is not misplaced and to shield the employer-client from an abuse of the power that the attorney has acquired as a result of her unique position of confidence. The employer-client’s reasonable expectation that its attorney will abide by the profession’s ethical edicts is thus entitled to great
weight. . . . To forgive a breach [of the duty of confidentiality] by allowing the legal protections sought in this case obviously would have repercussions beyond this one case because such a ruling would carve out a class of individual rights that trump professional ethical considerations and, by extrapolation, could lead to further tolerances with unanticipated consequences to the profession . . . .

Douglas, 144 F.3d at 375. See also Washington v. Davis, 2001 WL 1287125 (E.D.La. 2001)(indicating that principles espoused in Douglas could bar a First Amendment retaliation claim based on speech that violated an attorney-employee’s ethical obligations).
ii. Speech required by the RPC but not protected by the First Amendment

The RPC mandates speech by attorneys in at least three instances:

1. To report serious wrongdoing up the internal chain of command (Rule 1.13);
2. To remedy client perjury or fraud upon the court (Rule 3.3); and,
3. To report another attorney’s serious misconduct if the misconduct can be reported without violating the duty of confidentiality (Rule 8.3).

Will any or all of this mandated speech be protected by the First Amendment? As discussed above, speech mandated by Rule 3.3 would almost certainly be protected by the First Amendment because it will be on a matter of public concern and would likely be outside the scope of the attorney-employee’s duties. The same is not always true of speech mandated by Rule 1.13 or Rule 8.3. Consider this example:

Attorney Jones is the assistant city attorney in charge of preparing the city’s discovery production in a sexual harassment case brought by a former city employee. Halfway through the process, Jones’ boss, the city attorney, orders Jones not to produce several emails sent by the plaintiff’s former supervisor that describe the plaintiff in crude and unflattering sexual terms. Jones objects based on the emails’ obvious relevance to the plaintiff’s claims. The city attorney insists that the emails not be produced and, further, deletes all of the emails from the city’s computer system. After much thought, Jones calls the city manager to raise concerns about the discovery issue. The manager promises to “look into it.”

The city attorney fires Jones immediately after learning of Jones’ call to the manager. Two weeks later, Jones sends a letter to the judge assigned to the case disclosing the alleged destruction of evidence by the city attorney.

Does Jones have a viable First Amendment retaliation claim against the city? Probably not. Jones’ reporting to the city manager of the city attorney’s misconduct was likely required under Rule 1.13, but that does not mean that such speech is automatically protected by the First Amendment under *Connick/Garcetti*. It is true that destruction of evidence by the government in a harassment suit should constitute a matter of public concern. But reporting legal misconduct by a supervisor up the internal chain of command could be considered part of the expected duties of an assistant city attorney. If so, then Jones’ speech to the city manager would not protected by the First Amendment, despite the fact that it was required by the RPC.

Note that Jones was fired before disclosing the city attorney’s to the judge. If the termination had occurred after this public disclosure, the First Amendment would be more likely to offer protection because that reporting could be considered outside of the Jones’ job duties.
Even if the First Amendment offers no protection, Jones still might be able to attack the city’s decision to terminate Jones’ employment through a wrongful discharge claim. Most jurisdictions that have addressed the issue recognize these tort claims by in-house attorneys, even if such claims involve information protected by Rule 1.6. See Crews v. Buckman Laboratories International, Inc., 78 S.W.3d 852 (Tenn. 2002)(permitting wrongful discharge claim by in-house counsel who alleged she was terminated after satisfying state bar ethics obligation of reporting her supervisor’s practice of law without a license); ABA Formal Ethics Op. 01-424 (Model Rules do not prohibit former in-house counsel from suing former employer for wrongful termination and from revealing confidential information necessary to establish claim). However, several jurisdictions have approved these claims with the large caveat that the claims may proceed only if the terminated attorney can prove his or her allegations without violating the duty of client confidentiality. GTE Products Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995)(allowing wrongful discharge claim only if the attorney-employee can prove allegations without violating duty of confidentiality); General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994)(permitting a tort claim for wrongful discharge but warning that attorneys face possible disciplinary action if they breach the attorney-client privilege while pursuing their claims). At least one jurisdiction has effectively barred in-house attorneys from pursuing such claims entirely. Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991)(prohibiting wrongful discharge suit by former in-house counsel because of the potential chilling effect on attorney-client communications).

North Carolina caselaw demonstrates that requiring an attorney-plaintiff to honor the client’s confidentiality while pursuing a wrongful discharge claim may present an insurmountable obstacle to such claims. See Considine v. Compass Group USA, Inc., 145 N.C.App. 314 (2001)(dismissing attorney-employee’s wrongful discharge action for failing to state a claim and, in the view of the dissent, “deny[ing] in-house attorney-employees the ability to allege with particularity their wrongful termination of employment claims” because of fear that they will violate confidentiality duties under Rule 1.6). The ruling in Considine appears to ignore a 2000 ethics opinion from the North Carolina State Bar that concluded an attorney-employee should be able to pursue a wrongful discharge claim by alleging just enough to put the employer on notice of the claim and then obtaining permission of the court to reveal confidential client information in further support of the attorney’s claim. N.C. Ethics Op. 2000-11.

In addition to a wrongful discharge claim, could a North Carolina government attorney bring a statutory whistle-blower claim as a result of a termination based on the attorney’s compliance with state bar rules? Local government attorneys like Jones have no statutory whistle-blower protection in North Carolina, of course. Federal attorneys also lack whistle-blower protection for internal complaints to immediate supervisors and those made in connection with normal employment duties. Garcetti, 547 U.S. at 440. But state government attorneys are protected by N.C.G.S. §126-84 and §126-85 from employer retaliation for the attorneys’ disclosure of government misconduct. Importantly, the statute protects only reports to the employee’s “supervisor, department head, or other appropriate authority,” not disclosure to the media or public generally. Internal reporting required by Rule 1.13 seems to be well within the scope of these statutes. Presumably they would also protect a state government attorney’s decision to report a colleague’s misconduct to the state bar, which is the “appropriate authority” to deal with that issue.
Fire Tax Districts
Funding Fire Services

February 12, 2011
Kara A. Millonzi
millonzi@sog.unc.edu
Fee for Fire Service?

General Property Tax(es)

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| **Rural Fire Protection (Tax) Districts**  
(G.S. Ch. 69, Art. 3A) | **County Fire Service (Tax) Districts**  
(G.S. 153A, Art. 16) |
|---|---|
| Citizens Initiate  
(petition and referendum requirements) | County Board Initiates |
| Part of County Government | Single County Only |
| Municipal Corporation | Can Be Multi-County |
| Maximum Tax Rate  
($0.15 per $100 valuation or  
$0.10 per $100 valuation) | Generally No Maximum Tax Rate |
| Multiple Options for Providing Services | Multiple Options for Providing Services |
| Difficult to Modify or Abolish District | Slightly Less Difficult to Modify or Abolish District |

**Tax District vs. Insurance District?**
3
Change Service Providers?
Who Controls Tax District?
Convert One Type of Tax District to Another?
County Fire Tax Districts

Posted By Kara Millonzi On February 3, 2011 @ 5:23 PM In Finance & Tax | No Comments

Counties and municipalities in North Carolina are not required to furnish (or fund) fire protection services for their citizens, but may local government provide, or contract for the provision of, these services within their units. And, typically that fire protection extends beyond basic fire prevention and suppression services to include, among other things, emergency dispatch services, medical and other response services, and building code enforcement. The types and level of fire services that local governments provide and fund often vary significantly across their territorial boundaries, though. There is no duty of equal service to all properties or citizens within a unit. That means that a local governing board may choose to provide fire services in some areas within its jurisdiction and not in others, or it may choose to provide a higher level of fire services in some areas than in others. Counties, in particular, tend to provide different levels of fire services across their unincorporated territories. This raises questions about how local governments can and should fund the fire services.

Most local governments use general fund revenues, including general property tax revenues, to fund at least a portion of their fire services. In fact, municipalities typically finance all (or almost all) of their fire protection services with general fund revenues. Counties have an additional option. At least under certain circumstances, counties may establish special tax districts to fund fire services. There are actually two different types of tax districts available to fund fire services—rural fire protection districts and county fire service tax districts. The special tax districts allow counties to raise revenue from those property owners who directly benefit (or more directly benefit) from the fire services.

A forthcoming Local Finance Bulletin analyzes the authority for creating the districts and levying the district taxes, as well as the processes for establishing and modifying the districts. It also explores the relationships among the fire tax districts, fire response areas, and fire insurance districts. As a teaser to that broader exposition, this post briefly describes the two types of fire tax districts counties are allowed to establish and highlights the major differences between them.

Rural Fire Protection Districts (G.S. Ch. 69, Art. 3A [1])

Until around the mid-1900s, counties typically did not furnish fire services in their unincorporated territories. Instead, property owners were left to secure their own fire protection. Over time, rural areas became increasingly subject to urban-type development, resulting in pressure on county governments to provide and fund fire protection services in these areas. In recognition of this change, the General Assembly granted counties the authority to establish rural fire protection districts for the purpose of levying a special property tax (rural district tax) to fund the fire services provided in each district.

A county’s governing board may not simply establish a rural fire protection district. It must first receive a petition signed by at least 35 percent of the resident freeholders living within the proposed district. (Although not statutorily defined, the term “resident freeholder” is best understood to require that individuals both have an ownership interest in real property in the proposed district and live in the proposed district.) The proposed district must encompass only territory outside the corporate limits of any municipality (municipal territory may be added later under certain circumstances), but it may include territory that lies in more than one county. G.S. 69-25.1 [1], (If the proposed district falls within more than one county, the petition must be submitted to the boards of county commissioners of all the counties in which the area lies.)

Once a county board of commissioners receives a valid petition, it must call an election within the proposed district on whether or not to establish the district and levy the rural district tax. The statute sets the maximum tax rate at $0.15 per $100 in assessed property valuation in the district. Counties may not accept a petition or hold a referendum that calls for a different maximum rate limit, even if it is lower than $0.15 per $100 valuation. (The previous maximum limit was $0.10 per $100 valuation and some districts are still subject to this limit.)
If a majority of voters participating in the referendum approve the ballot issue, the county board(s) of commissioners may establish the district. The district is a municipal corporation—a separate legal entity from the county or counties in which it lies. The county board(s) of commissioners may serve as the district’s governing board. Alternatively the commissioners may appoint a three-member fire protection district commission (fire commission) to govern the district. Even if a fire commission is appointed, it serves “at the discretion of and under the supervision of the board[s] of county commissioners . . . .” G.S. 69-25.7 [1]. And, by statute, the county board(s) of commissioners are responsible for setting the district tax rate each year (G.S. 69-25.4 [1]) and determining how services are provided in the district (G.S. 69-25.5 [1]).

The county board(s) of commissioners are not required to levy the rural district tax—instead the board is instructed to “levy and collect [the rural district tax] in such amount as it may deem necessary . . . .” G.S. 69-25.4 [1]. With one exception, the rural district tax applies to all real and personal property in the district that is subject to the county’s general property tax(es). The proceeds from the rural district tax must be used to fund fire services that are provided in the district. There are a number of options for service provision. The county may establish a county fire department to serve properties in the district. This option usually is cost prohibitive, though. Instead, the district’s governing board typically contracts with one or more volunteer fire departments or municipal fire departments to provide the fire services (at least the fire prevention and suppression services).

Confusion often arises as to who controls the district—the district’s governing board, the county board(s) of commissioners or the fire department’s governing board. The practical answer is that all three have some degree of control. The county board(s) of commissioners sets the tax rate and determines how services will be provided in the district. The district’s governing board enters into contracts with the fire department to procure the services for the district. The fire department is a contracting agent of the district. As such, its degree of control over service provision is dictated by the contract’s terms. Note, however, that subject to any existing contractual agreements, a county’s board of commissioners may change service providers or the nature of the services that are being provided at any time. See Knotville Volunteer Fire Dept., Inc. v Wilkes County, 85 N.C.App. 598, 355 S.E.2d 139 (1987). A volunteer or municipal fire department does not have a statutory right to continue to serve a particular district, even if the fire department has incurred significant expense (or even borrowed money) to fund operating or capital expenses to serve the district.

There are fairly detailed (and, at times onerous) processes to modify an existing rural fire protection district. See G.S. 69-25.11 [1] And, in order to abolish a rural fire protection district altogether, the county must receive a petition from at least 15 percent of the resident freeholders in the district and then hold a successful referendum authorizing the abolishment. G.S. 69-25.10 [1]. The county board(s) of commissioners may effectively abolish a district without going through this statutory process, though. Because the commissioners determine the rural district tax rate, a county board could simply choose not to levy the tax in any given fiscal year. As discussed below, several counties have taken this approach in recent years in order to switch to funding fire services through the second type of tax district, the authority for which affords county commissioners much more flexibility.

**County Fire Service Districts** *(G.S. Ch. 153A, Art. 16 [2])*

The second type of district that a county may establish to fund fire protection and rescue services is a county service district. A county is authorized to define one or more areas within the county to establish a service district to “finance, provide, or maintain” one or more of a specific list of authorized services, facilities or functions “in addition to or to a greater extent than those financed, provided or maintained for the entire county . . . .” G.S. 153A-301 [2]. This authority stems from an effort by the General Assembly in the mid-1970s to make municipal-type services more widely available to county residents. Among the authorized services for which service districts may be created are “fire protection” and “ambulance and rescue” services. G.S. 153A-301(a)(2) and (7). [2] Unlike a rural fire protection district, a county service district is not a municipal corporation and has no independent authority. It is established and maintained by the county, under the control of the county board of commissioners.
It is much easier to establish a fire service district than to create a rural fire protection district. A county board simply must find that: (1) there is a demonstrable need for providing one or more of the services in the district; (2) it is impossible or impracticable to provide the services on a countywide basis; (3) it is economically feasible to provide the proposed services in the district without unreasonable burdening annual tax levies; and (4) there is a demonstrable demand for the proposed services by persons residing in the proposed district. G.S. 153A-302(a1). In making its determination the board must consider a number of factors, including the resident or seasonal population and population density in the proposed district; the appraised value of property subject to taxation in the proposed district; the present tax rates of the county and any municipalities or other special districts in which the proposed district is located and the ability of the proposed district to sustain the additional taxes necessary to support the proposed district. G.S. 153A-301(a).

After the board makes the appropriate findings, it must hold a public hearing on the proposed creation of the service district. G.S. 153A-302(c).

Once a service district is created, the county board of commissioners may, but is not required to, levy an annual property tax within the district in addition to the property tax or taxes it levies throughout the county (service district tax). G.S. 153A-307. The service district tax applies to all real and personal property in the district that is subject to the county’s general property tax(es). Unlike the rural fire protection district tax, generally there is no specific maximum tax rate limitation for service district taxes. Such taxes are subject to the general aggregate property tax limit of $1.50 per $100 valuation. That means that the district tax, when combined with the county’s general property tax rate(s) and any other service district tax rates, may not exceed $1.50 per $100 valuation, unless the district’s voters have approved the portion of the rate in excess of this limitation. (Under certain circumstances, a county board of commissioners may restrict itself to a lower maximum allowable service district tax rate.)

Revenue generated from the service district tax is specifically earmarked to finance the fire services provided in the district. G.S. 153A-305. As with the revenue generated from a rural fire protection district tax, a county has much flexibility in expending the service district tax proceeds to fund these services. Many counties contract with one or more volunteer or municipal fire departments to furnish at least some of the services. The fire departments are contracting agents of the county. And, subject to any existing contractual terms, a board of county commissioners may change service providers, the nature of the services that are being provided, and the amount appropriated to fund these services at any time.

In order to modify or abolish a county fire service district, a county’s board of commissioners must follow detailed statutory provisions, although most are not as detailed as those governing rural fire protection districts. For example, unless the county has outstanding bonds or notes issued to finance projects in a district, a county’s board may abolish the district by simply adopting a resolution and holding a public hearing. G.S. 153A-306.

Converting Rural Fire Protection District to County Fire Service District

It is not uncommon for a county to have a mix of rural fire protection districts and county fire service districts within its territorial boundaries. What if a county sought to convert one type of district to the other? A county’s governing board usually wants to convert a rural fire protection district to a county fire service district (or transfer property from a rural fire protection district to a county fire service district) because the latter has less statutory restrictions. Both types of districts serve largely the same purpose—namely, they both provide a mechanism to target a county’s taxing power on those property owners who most directly benefit from the expenditure of the tax proceeds. Despite this, there is not an easy process to convert one type of tax district into another type of tax district or to modify the boundary lines between the different types of tax districts.
In fact, territory in a rural fire protection district may not be transferred directly into a county fire service district. There are two methods to accomplish this result indirectly, though. The first option is to abolish the rural fire protection district according to the relevant statutory procedures and then establish one or more county fire service districts, again according to the relevant statutory procedures.

The second option is to overlay one or more county fire service districts over a rural fire protection district. Under the latter option, a county’s board of commissioners could continue to levy the rural fire protection district tax and also levy the county service district tax on real and personal properties that are located in both districts. Alternatively, the governing board could cease levying the rural fire protection district tax and rely only on the service district tax to fund fire services in the area that is encompassed by both districts. Several counties have taken advantage of this second option in recent years. They have ceased levying taxes in their existing rural fire protection districts (without actually abolishing the districts). And they have created a single county fire service district that comprises the entire unincorporated territory in the county. The counties’ governing boards typically allocate the proceeds from the service district tax among the various fire departments that serve different parts of the district according to their individual budgetary needs.
Open Meetings and Public Comment Periods
RESOLUTION FOR ESTABLISHMENT OF POLICY AND PROCEDURES FOR
APPOINTMENTS TO COUNTY BOARDS, COMMISSIONS,
COMMITTEES OR AUTHORITIES

WHEREAS, it is the statutory duty of the Durham County Board of Commissioners, as Governing Body of Durham County, to appoint persons to various boards, commissions, committees, or authorities, to assist in the operation of county government; and

WHEREAS, the Board of Commissioners is desirous of appointing qualified, knowledgeable, and dedicated people to serve on the aforesaid boards, commissions, committees, or authorities, and to that end solicits the interest and participation of the citizens of Durham County in providing information and recommendations to assist the Board of Commissioners in identifying qualified candidates for said appointments; and

WHEREAS, the Board of Commissioners recognizes the need for a policy and procedure to provide for increased public awareness of the appointments to be made from time to time by the Board, to solicit public participation in the submission of names of qualified candidates, to set forth the subsequent steps for the selections of the candidate(s) by the Board, and to insure attendance at meetings; and

WHEREAS, the Board of Commissioners recognizes the need to have a representative sample of the citizens of Durham County serving on the boards, commissions, committees, and authorities; therefore, appointment applications will solicit necessary information to achieve a representative sample of the community.
NOW, THEREFORE, BE IT RESOLVED by the Durham County Board of
Commissioners that:

Section 1. The policy of Durham County governing appointments to the various boards, commissions, committees, or authorities made by the Board of County Commissioners is as follows:

A) Words of the masculine gender mean and include correlative words of the feminine and neuter genders and words imparting the singular number mean and include the plural number and vice versa.

B) Any citizen of Durham County who is eighteen (18) years of age or older is eligible to serve on the appointed boards, commissions, committees, or authorities of the County where such appointment is not prohibited by state statute.

C) All appointments will be made according to the Appointments Statute or Ordinance that created that board, commission, committee, or authority.

D) No citizen of Durham County may serve in more than two appointed positions of Durham County Government unless exempted by nature of the position or otherwise.

E) Unless otherwise stated by statute and excluding public officials serving in ex officio roles, no citizen may serve more than three consecutive terms in any one position. This policy may be waived if the Board of Commissioners determines that it is in the public interest for the individual to be reappointed to the board, commission, committee, or authority, unless such removal is prescribed by statute.
F) If an appointee has absences (excused or unexcused) which constitute more than 50% of the meetings in any calendar year which he or she is required to attend pursuant to his or her appointment, he or she is obligated to resign.

G) The Clerk to the Board will notify the member that he or she is obligated to resign. An unexcused absence is defined as an absence without prior notification to the chairman, secretary, or staff to the boards, commissions, committees, or authorities.

H) Excused absences are defined as absences with proper prior notification indicating legitimate conflicts or other circumstances.

I) For each appointee, the calendar year is counted beginning on the date of appointment.

J) If a member’s absence exceeds these percentages, the Clerk to the Board of County Commissioners should be notified immediately.

K) The clerk to the boards, commissions, committees, or authorities shall be responsible for keeping an attendance record and notifying the Clerk to the Board, who shall in turn notify the Board of County Commissioners when the limit of absences of any appointee has been reached.

L) Property tax listing must be current. County and City taxes must not reflect any delinquencies before an application is submitted. Property taxes must be current both prior to appointment and during the term of the appointment. However, if the appointee’s taxes become delinquent during the term of the appointment, the appointee shall be allowed up to 180 days to bring the property taxes current,
provided the appointee shall have established a repayment plan with the Tax Administrator’s Office.

M) If a member has more than 50% absences (excused or unexcused) or, if the member is delinquent in the listing and/or payment of taxes for which an appeal has not been filed, the Clerk to the Board will notify the Chairman of the Board of County Commissioners. Upon receipt of notification from the Clerk to the Board, the Chairman will notify the member that he or she may be removed from the board, commission, committee or authority. The Commissioners shall consider the board member’s status at a regularly scheduled meeting of the Board of County Commissioners.

Each County Commissioner will have available to him or her a binder containing a list of all County appointments, with the following data provided:

1. The name of the board, commission, committee, or authority and the composition of the board according to the statute.

2. A brief description of its functions.

3. The statute or cause creating the board, commission, committee, or authority and the composition of the board according to the statute.

4. The total number of members and length of terms of office.

5. The names of current members, the number of terms each has served, and the date of his or her original appointment.
6. The regular meeting day, time and location, if determined.

7. The date(s) on which appointments should be made.

Section 2. The procedures of Durham County for filling vacancies for appointed positions should be as follows:

A) Notification of available appointments

1. A current list of upcoming appointments to County boards, commissions, or authorities shall be kept in the Office of the Clerk to the Board and shall be furnished to any person or group on request.

2. A list of available positions and the date by which names should be submitted will be published in the Herald Sun, the News & Observer, the Carolina Times, or any other newspaper having general circulation throughout the County that the Board may specify from time to time, once a week for two weeks beginning two weeks in advance of the deadline for submitting applications. The Clerk to the Board may alternate the publication of the available positions in different newspapers from week to week as the Board of Commissioners directs. The name, phone number, website, and address of the Clerk to the Board shall be provided in the advertisement to obtain more information.

3. A list of available positions stating terms of office, requirements for office, duties of positions, and the date by which names should be submitted will be
placed on the Durham County Website beginning two weeks in advance of the deadline for submitting applications.

4. Twenty-five (25) days prior to the expiration of the terms, a notice will be mailed to each person who is eligible for reappointment requesting an indication of his or her interest in continuing to serve. If an individual is not eligible for reappointment, he or she will be notified and given the reason for being ineligible.

5. The Chairman of the Board of Commissioners or his designee will be responsible for carrying out the above notification procedures.

6. If, because of policy or otherwise, an individual is unable to be reappointed, that person will be sent a Letter of Appreciation by the Chairman of the Board of Commissioners at the expiration of his or her term, thanking the person for past services rendered.

B). Selection Process

1. At least twelve (12) days prior to the appointments by the Board of County Commissioners, all applications for a particular position must be in the hands of the Clerk to the Board. The Clerk will check each applicant for eligibility and recheck any prior applicants, if any.

2. A copy of the applications submitted together with the prior applications, if any, shall be sent to all Commissioners at least ten (10) days prior to the meeting at
which action will be taken. Those candidates who are ineligible will be noted and the reasons for ineligibility given.

3 a. When the advertising or readvertising of positions for boards, commissions, committees, etc., does not produce within the time frame prescribed the necessary number of qualified persons to fill the vacancies indicated, the Board of County Commissioners on its own initiative will name the appointees.

b. When vacancies and positions appointed pursuant to this policy occur prior to the expiration of the term of office, the Board of County Commissioners shall appoint a person to serve the remainder of the term in accordance with the procedures outlined herein.

C) Notification of Appointment

The Chairman of the Board of County Commissioners shall prepare a letter of notification of appointment or non-appointment to the applicants and a copy to the affected board, notifying each of the appointment or non-appointment.

D) Applications

All applications received shall be retained for at least one (1) year and considered if a vacancy occurs during that time period. Applications shall be kept on file for all active appointees. These will be treated as public records and made available upon request for the cost of copying.
Public Comment at Meetings of Local Government Boards

Part One: Guidelines for Good Practices

John Stephens and A. Fleming Bell, II

Being in the public eye as a governmental official—county commissioner, town councilor, school board member, or citizen member of a health, planning, or similar government board—brings with it the joys and the tribulations of dealing with citizens and citizen groups in public meetings. It may seem that citizens come to a meeting only when they want to demand action on a problem. Board members want to be responsive to citizens’ concerns, but, as responsible stewards, they must constantly keep in mind the general public good. In addition, they must conduct the board’s business in ways prescribed by law. Nevertheless, governmental officials need feedback from the community and therefore should welcome citizens’ comments and complaints.

This two-part article addresses public comment at regular meetings of local government bodies in North Carolina. Public officials need to understand what the law requires government boards to do and forbids them to do as they listen to citizens. Public officials also need to understand the principles of good communication and effective management of meetings. Part One of this article addresses how boards can foster positive exchanges with citizens. It reports on an Institute of Government survey of how North Carolina governmental units provide information about the government, including details on how citizens may speak at board meetings, and it applies general guidelines on citizens’ comments to three particularly difficult situations that can arise when citizens address local government boards. Part Two, which will appear in the next issue of Popular Government, will discuss the law on public forums and free speech. It also will report on the ways in which municipal and county boards and boards of education typically receive citizens’ comments.

Local government bodies, both elected and appointed, are always on the hot seat for several reasons beyond their control. First, they are more accessible than state and federal officials. Even if local policies and practices are guided by rules set in Raleigh or Washington, citizens who dislike those policies and

The authors are Institute of Government faculty members. John Stephens specializes in dispute resolution; A. Fleming Bell, II, specializes in local government law.
practices may take out their resentment on local officials. Second, most citizens perceive that local government has a more direct impact on their day-to-day concerns than either the state or the federal government. Most decisions affecting schools, law enforcement, solid waste disposal, roads, recreation, land use, and human services are made at the local level, and they directly touch the lives of people. While state and federal bodies gain attention for large—even global—issues, they usually act at some distance from the daily concerns of citizens, with little immediate effect on the nitty-gritty matters like garbage collection, youth violence, or traffic congestion. Third, citizens tend to come to board meetings only when they are riled up about something—only when something has gone wrong in their lives that they think can be helped by a particular action by their local board.

Today citizens are increasingly disenchanted with governmental performance, but it appears that Americans have greater confidence in their local officials to “deal with problems facing their communities” than they do in state or federal government. Moreover, confidence in local government appears to be holding steady, while confidence in the problem-solving capabilities of some religious organizations, nonprofit groups, and local media has declined markedly in recent years.

Unfortunately, citizens’ confidence even in local government is low. Only 24 percent of respondents in a national poll said they had “a great deal” or “quite a lot” of confidence in local government’s ability to deal with problems facing their community, but 44 percent had a high confidence in their local schools to handle problems. Churches and voluntary organizations also received higher “confidence scores” than local government.

The only general public-opinion figures for North Carolina local government are more than fifteen years old. In 1980, 58 percent of citizens rated the performance of their mayor as excellent or satisfactory; 12 percent said it needed improvement; and 25 percent said the performance of their city council or board of county commissioners needed improvement. In a Southern Focus poll covering several southeastern states that was conducted in spring 1995, nearly 40 percent believed that local government was doing an “excellent” or “good” job. Another 40 percent rated local government performance as “fair,” and 14 percent said it was “poor.”

Thus citizens who come to a meeting of a local public board may be skeptical about stating their concerns and sharing their ideas. Many North Carolina public officials lament that they hear only from the citizens dissatisfied with local government, and citizens at public meetings may doubt that they will be understood or have any impact on the problem they face. It seems critically important for boards to know both how the law says they must behave toward citizens at board meetings and how they can make participation by citizens as constructive as possible.

Public officials should recall that public comment is only one indication of how citizens perceive the fairness and the receptivity of their government. A recent study by the Institute of Government identified such factors as “fairness,” “citizen influence,” and “a problem-solving approach” as criteria by which citizens measure the quality of their government. The study showed a significant gap between what citizens expected in terms of their ability to influence board decisions and what they actually received in terms of response.

Whatever the size of the community, local boards need to find ways of ascertaining the concerns of people who do not come to public meetings. Why do they not come? Are the board’s regular business meetings scheduled at such a time that family and job obligations prevent people from attending hearings and board meetings? There will always be a few vocal people who easily express themselves at government board meetings. Perhaps a balance needs to be achieved between these ready speakers and other citizens by especially encouraging participation by the citizens who do not usually state their views. Given the negative feelings many citizens have about public officials and the workings of governmental agencies, a special effort to secure citizens’ comments may have a long-term benefit for the community. Improved citizen participation at board meetings may yield important information for board members and help educate the entire community.

**Encouraging Constructive Public Comment**

**Making Information Available**

Keeping the citizens informed about the local government is an important step in maintaining a cooperative relationship with the public. Last year the Institute of Government surveyed local governments about how they communicate with their citizens. Dozens of public information officers and clerks from school districts, counties, and municipalities shared their informational brochures and policy statements.
The following paragraphs describe some of the ways in which North Carolina local governments provide information for their constituents.

Davidson County’s board of education has an easy-to-read brochure welcoming citizens, describing board meetings, explaining how to express concerns, and presenting brief biographies of the five-member board. The brochures of both the Davidson County school board and the Guilford County commissioners include a useful diagram of the seating arrangement and the names of the board and the staff.

The Clinton city schools include a one-page summary of information for citizens in their systemwide activity calendar. A section titled “Do you have a question?” encourages parents to seek information and to share their concerns with teachers and principals on most matters. A chart lists twenty-five common topics—bus transportation, student health program, students’ special needs, and so on—and indicates two contact people for each subject by position or name. The Clinton schools’ grievance policy clearly describes, first, how to seek direct negotiation of difficulties and then how to bring a grievance to the board.

Rocky Mount has a very complete directory of city boards, commissions, and committees, most of which are open for citizen comment and membership. It briefly explains the responsibilities and the membership of each public body—from mayor and council to the inspection services advisory committee—and then lists the names, addresses, and telephone numbers of all members, their length of service, and the dates on which their terms expire. It also states when a board member is ineligible for reappointment.

Newton’s brochure reports the meeting schedules of the board of aldermen and ten other boards and commissions, and gives departmental telephone numbers. The brochure also gives information on tax rates and municipal utilities.

Guilford County’s brochure notes that while members of some boards must have specific skills or training, the board of county commissioners “desire to reflect a broad participation in appointments [to boards and commissions], including male and female citizens, persons from all geographic areas of the County, and persons representing diverse racial and age groups.”

The Chapel Hill–Carrboro school board’s informational brochure notes its desire to enable people with various disabilities to participate in board meetings.

Possibly reflecting its rapid growth, Cary offers a brochure that focuses on the process for commenting on rezonings, development plans, and changes to the unified development ordinance. The town council’s agendas for all regular meetings contain a “public speak-out” item that allows comments on any topic, whether or not it is on the agenda. The time limit for speakers is five minutes each.

Some local government boards briefly summarize their last meeting before they formally approve the minutes of that meeting. The Stokes County board of education provides a one-page summary of board action and other events at the meetings even if there was no formal board action on a topic. Its general brochure includes photographs and short biographies of the five board members and the superintendent, and notes that there is a regular public-comment period at each meeting. Summaries of meetings, quickly prepared and easily distributed, can help citizens stay informed.

Some government units produce brochures that explain their budgets. Guilford County’s summary of appropriations and revenues for its $360 million budget includes tax rates by jurisdiction—county, city or town, and fire district. The county also produces a monthly calendar of meetings of all local governing boards, municipal as well as county.

Using telecommunications technology, High Point displays the schedule for its council meetings on a cable television bulletin board and places the council’s agendas on its Internet home page. The home page includes information on the city’s budget, revenues, and expenditures. A printed brochure welcomes High Point citizens and visitors to the city council meeting, encourages participation, and describes how to address the board. The brochure states the time limits for speakers, notes the need for speakers to give their name and address, and asks them to be courteous and succinct. It also describes the difference between ordinances, resolutions, and motions; states the conditions for going into closed session; and explains the quasi-judicial actions the council takes on property matters.

What Is “Constructive”?

Most public boards strive for balance on citizens’ participation at regular business meetings. Since the meetings concern “the public’s business,” gaining citizens’ remarks and responses to questions is an essential part of keeping government open to the public. On the other hand, the meetings must be controlled so that the board can conduct its business in an orderly fashion and make timely decisions in order to meet legal, budgetary, and programmatic needs.

Within the legal requirements and prohibitions (to
be discussed in Part Two), there are several ways public bodies can handle citizens' comments during meetings. What does contribute to encouraging input that will be productive in the eyes of citizens and public officials? This section presents five general guidelines for creating a productive atmosphere at meetings and then specific steps to be taken before, during, and after the meeting. A later section of this article deals with ways of handling the difficult situations that may arise during the citizens' comment period of a board meeting.

First, determining what are “constructive” comments from the public is not a strictly objective exercise. Many citizens approach this question by asking, “Do I agree with it? Did I get what I want? Did the board act the way that I think is best?” Focusing on a specific result is understandable if one assumes that “constructive” = “what is positive for me.” But this approach can overshadow other important ways for judging productive exchanges between citizens and public bodies.

Public boards want to conduct well-structured, efficient meetings in which speakers use calm, civil language. But some citizens or citizen groups may believe that dramatic, emotionally charged speech will emphasize the depth of their concerns and help persuade the board to adopt their point of view. Sometimes such language is not a deliberate choice: strong emotions can grow out of perceived threats to a person’s health or safety and from feelings of unfair treatment. Since citizens offer their views at board meetings with the aim of persuading those in power to act in a particular way, some people may think that a confrontational style will be most effective: after all, “the squeaky wheel gets the grease.” Furthermore, much of today’s television entertainment and news coverage highlights how confronting, shouting, and even bullying make people take one seriously and help one get one’s way. If “constructive” is judged only in a win-lose, support-oppose context, someone is likely to feel pressured, overlooked, or defeated.

There are other ways to judge what is constructive in receiving citizens’ remarks. It takes both citizens and board members to encourage constructive participation and to create a productive forum. How things happen in a meeting can be as important as what things happen. Some components of constructive citizen-board interaction are whether

- the nature of a problem is clarified, even though there may be different perspectives on the causes and the consequences of the situation;
- options for responding to citizens’ concerns are created or explained (including legal, financial, or other constraints on potential solutions);
- in the end, citizens and public officials all believe that they have received respect.

Obviously, not all of these characteristics can be easily accomplished through a two-minute citizen presentation and a brief response from the board. These standards for creating constructive public comment go beyond a single presentation or meeting and should be built into a larger design of improving government services to citizens and businesses and involving citizens in public issues.

Although the following practical steps focus on how to receive public comment and promote a positive atmosphere, it is important to remember the interactive nature of public comment and board action in building citizens’ confidence in government.

**Fostering a Productive Exchange**

What can be done in a regular business meeting to support constructive interchanges? Some small, simple steps can help citizens feel welcome and respected while increasing the likelihood that their remarks will be viewed as constructive by public officials. These steps can be modified to fit the level of formality of a meeting or the general style of the jurisdiction. In some smaller municipalities and more rural counties, where the citizens may well be neighbors or acquaintances, a personal style may be more appropriate than the formal ideas that follow.

One important component for constructive exchanges is information. Public bodies need to make information available to citizens and convey information on a continuing basis in ways that are easily understood. Knowing how to give and receive information effectively is important for public officials who want to create a productive exchange with citizens. The following tips for providing information focus on organization and communication skills:

**At the Beginning of the Meeting and Earlier**

Have copies of the agenda and other important materials available for people in the audience. This step helps reduce the inevitable gap between the information available to the board members and the
staff about the subjects being discussed, and the information available to citizens.

Provide an information sheet about the conduct of regular business meetings. A simple brochure can help welcome people and give them guidelines for appropriate and timely public comment. The information sheet also should list other ways for citizens to make their views and concerns known. It should explain what people can do when there is insufficient time in the meeting for everyone to comment or when they want to add to their oral presentations (by using the comment sheet and similar vehicles that are provided at the meeting; see the later section on having a comment sheet available).

Prepare a question-and-answer sheet. Citizens are learning about the workings of local government as they observe and make comments. As part of the information brochure or as a separate document, answers to Frequently Asked Questions (FAQs) should be readily available. The FAQ sheet should address:

- board meeting days and times;
- the point in the agenda at which general public comment is welcome;
- other ways of contacting staff or elected officials (for example, office hours, telephone numbers, and addresses for written comments);
- the budget process (including at what point comment from citizens will help determine spending priorities);
- the responsibilities and the meeting dates of other public bodies whose work is related to the board that is holding the meeting (for example, for town and city councils, their planning board or transportation board; for boards of county commissioners, the health board or the social services board. Information on school boards, economic development committees, public safety boards, mental health advisory commissions, and area agencies on aging also could be included as a way to inform citizens about services and about opportunities to participate in government);
- whom to contact on common concerns about land use, animal control, and areas of neighborhood conflict like noise, animals, and parking;
- what can and cannot be handled in a public meeting (that is, the limits for public discussion of personnel and legal issues).

Have a comment sheet available. Many people fear speaking in public. A comment sheet circulated throughout the audience allows citizens to share their views without having to speak in front of a large group. The sheet can be useful for citizens who simply have questions for a board or the board’s staff. It can also be used to solicit the citizens’ views on specific topics.

The Institute of Government survey suggests that no North Carolina jurisdiction offers a general comment sheet. Example 1 shows a possible format. Many local governments have sign-up sheets that ask citizens...
to identify their concern and to indicate whether others have the same concern. Some jurisdictions have produced flyers describing a grievance procedure. For example, school boards provide a brochure that explains how problems between a parent and a teacher or a principal may be resolved. A comment sheet helps citizens who come to a board meeting as members of a group that can have only one or two spokespersons address the board. They can add relevant information or points that they feel are very important but were not sufficiently covered by their spokesperson(s). The sheet also can be useful for a citizen who merely wants to ask a question of the board or the staff. Since having to reply to these comments might become burdensome for the staff, perhaps a pilot period should be used to test the utility of the comment sheets.

The board should periodically assess whether its policies and practices on citizen participation are working well. Usually such an assessment happens only when a problem arises. A specific controversy may cause the board to evaluate its general procedures, but the controversy may unduly focus attention on one particularly troublesome meeting. Even when things are going well, regularly reviewing how citizens’ input is dealt with can reveal new opportunities for more effective meetings.

During the Meeting

The following steps will help the board encourage public participation while moving meetings along smoothly. See pages 10–13 for ways of handling three difficult situations.

Identify which topics are of interest to which members of the audience. Many jurisdictions have either an advance-notice requirement for placing a citizen’s concern on the board’s agenda or a sign-up sheet for general comments. Still, if the audience is relatively small, it can be useful to ask citizens individually which agenda items are of interest to them, or to call for a show of hands on each item. The presiding official should confirm whether the interested people wish to speak or prefer to observe before deciding whether they want to comment. Quickly determining which topics are of interest to the audience will help the board structure the meeting and apportion time for public comment. At the beginning of the meeting, the audience should be told whether public comment will be taken during the board’s discussion of a particular agenda item or at some other point in the meeting.

Announce the limits on public comment. If the agenda provides a specific time for public comment, the chair or another board member should open the period by describing what issues can and cannot be handled during this part of the meeting (for example, that personnel matters may not be discussed in public). Even if written material is available on how citizens should address the board, an oral summary of those rules by the presiding person will help set the tone. Citizens should be reminded of the available agendas, fact sheets about local government, and comment sheets for providing supplementary input to the board. Drawing attention to the comment sheet can be especially useful for gathering comments from a large group of citizens.

Estimate when topics of interest will be considered. If the board takes comments on agenda items one by one, it should estimate when the topic of interest to a particular group will be considered. Such an estimate will allow citizens to relax or leave the room, if necessary, without fearing that they will miss the discussion of their item.

Provide background information. For each topic, and especially for a subject clearly of interest to several people in the audience, the issues involved, the relevant information, and past actions regarding the matter should be summarized. Although such a review may be repetitive for board members, it can help citizens understand the context of the matter before the board. Citizens often say, “I never heard of this before. Why do you have to decide so quickly?” Summarizing how an issue or a problem came to the board’s attention, what steps have been taken to investigate the situation, and what legal, budgetary, or practical requirements guide the board’s judgment on the options may correct misinformation and provide a better basis for citizens to speak to the choices that the board can control.

This process can help improve the way information about the working of the board and important public issues is shared with concerned citizens. While public notice in a newspaper may be all that the law requires, placing information in libraries, community centers, grocery stores, or other locations frequented by citizens may be more effective. Radio announcements or call-in shows also may be useful.

Listen actively. So, after all this preparation and preliminary information, the first citizen begins to talk. The board members can sit back and relax, right? Yes and no. How they listen may be as important as what a citizen hears them say before or after his or her comment. Listening effectively can be difficult when board members want to review material or talk quietly with one another about the next item on the agenda.
Even quiet paper-shuffling could suggest that a board member is not listening or not taking the speaker’s views seriously.

There are three facets to active listening:

1. Maintaining eye contact. This practice shows the listener’s interest by focusing on the speaker. Staring is inappropriate, but catching the speaker’s eye as she or he speaks communicates a great deal to that person.

2. Being aware of body posture. Although crossing one’s arms may be comfortable or a natural reaction in a cold room, this gesture can imply disagreement with the speaker’s views. Similarly, leaning back can imply a distant or judgmental stance toward what the citizen is saying. Such a posture may be more comfortable, but sitting squarely or leaning forward slightly will silently say, “I’m listening.”

Nodding one’s head is another nonverbal way of encouraging a speaker to continue. That gesture shows interest, but it can be misinterpreted. Although it is intended to mean “I am listening,” some people might interpret the gesture as “I am agreeing with you [the speaker].”

3. Providing verbal feedback. In a busy meeting, the presiding person may prefer just to thank a speaker for her or his comment, ask whether other board members have a question or a comment for the speaker, and move on to the next speaker. If not every board member has understood the speaker’s remarks . . . well, too bad: there are other things to do tonight. Unfortunately, such haste may undercut the effort to provide a constructive atmosphere for citizens’ comments. Even if time is short, summarizing the speaker’s comments and assuring the citizen that the board understands his or her position are important components of active listening, especially when board members may disagree with the speaker’s views. The board chair could make the summary for each speaker, or this task could be rotated among the board members from meeting to meeting.

An effective summary includes the emotional dimension of a citizen’s concern. (See Example 2.) Is the person frustrated, confused, angry, or upset? Acknowledging a speaker’s emotions or values, in addition to the substance of what the person says, shows understanding of her or his complete message. The chair can summarize the speaker’s emotions, even when he or she strongly disagrees with the substance of the remarks, by making it clear that the opinion expressed is the speaker’s—for example, “So you feel that . . .” “You believe . . .” “Your view is that . . .” “How you see it is . . .”

It is sometimes difficult to judge which feelings a person is conveying in his or her statement. People show different levels of emotion and expressiveness depending on the situation, their personal traits, or their cultural background. They can be angry and yet speak in a quiet, inexpressive voice—or they can shout and gesture. On the other hand, someone speaking loudly may simply be excited or unaware that his or her voice is raised. The summaries should try to acknowledge the speaker’s emotions, but board members should be prepared to correct their impressions of a citizen’s feelings or underlying concerns.

Example 2: Summaries of a Speaker’s Content and Emotion

MS. JORDAN, A CITIZEN:

“Thank you, Madam Chairman. I’m Dorinda Jordan. I live at 4522 Cool Spruce Avenue in the Tall Trees neighborhood. I’m really concerned about people speeding on my street. There are a lot of children in the neighborhood, and I think it’s dangerous. All the time I see people racing up my street and barely missing my children and my neighbors’ children on their bikes and skateboards. I think that having a police car along the road would slow people down. It wouldn’t have to be there all the time, just during times when kids are out. This would make a big difference to me and my neighbors. I hope we can have greater police visibility to slow down those speeders and make our neighborhood safer. Thank you.”

Three Possible Summaries

Summary 1: “Ms. Jordan, you want us to stop speeders in your area, but that means we have to decrease patrols in other parts of the city.”

This is a poor summary because it is too brief and implies that satisfying the speaker’s concern will hurt others.

Summary 2: “Ms. Jordan, your main concern is to increase police patrols in your neighborhood, the Tall Trees subdivision, and to slow down traffic passing through. Is this correct?”

This summary is better, but it does not capture the emotions behind Ms. Jordan’s concern.

Summary 3: “Ms. Jordan, you’re fearful that your child and other children could get hurt by drivers exceeding the speed limit in your neighborhood, the Tall Trees subdivision. So you are requesting increased police patrols to slow down the traffic. Is this correct?”

This summary is best because it reflects both the content and the emotion of Ms. Jordan’s statement and is checked for accuracy.
Be careful in saying what will be done about a concern or a complaint. A citizen who hears that the matter will be “investigated” can interpret that phrase as meaning that “the problem will be fixed.” Occasionally it may be better to say not only what will be done but also what will not be done until more information is gathered, other people are contacted, or a particular deadline for the board passes. Of course, nothing should be promised that cannot be done with reasonable certainty.

It is equally important to be clear about when things will happen. “We’ll get back to you” can mean different things. A citizen may expect a call in one or two days, while the board member may intend that a letter be sent or that the staff be allowed time to investigate the situation and provide a full response in a week or more.

When possible, the citizen should be directed to a neighborhood council, an advisory group, or a planning or budget process that is appropriate to the kind of comment or issue she or he raised. A comment sheet will allow citizens to get their views on paper and also to know whom to contact.

Thank each speaker for his or her views. This obvious courtesy is easy to forget when there are many speakers or when a speaker’s comments are critical of the board. Showing appreciation for a citizen’s views, especially when one or more board members may disagree with them, helps build credibility in the citizen’s eyes.

After the Meeting

When the meeting is over, the board should clarify what follow-up steps are needed in responding to citizens’ comments and who will respond. Even if it is the manager or a department head who replies to the concern, the board should be clear about when the response will be made and whether it wants a copy of any written reply. Follow-up steps could include contacting the citizen after she or he receives a written response or has talked with the appropriate official. Following up not only ensures that commitments are honored but also helps determine whether the citizen considers the response to be effective.

Handling Difficult Situations

The preceding guidelines will be useful at all times, but what about really tough situations like the following?

Situation 1: A speaker talks on multiple topics and continues past the formal or informal time limit.

Occasionally a speaker goes on and on and thereby causes a problem for the board, which has a whole agenda to get through. In such a situation, simply showing that the board has heard and understands the citizen’s comments can sometimes help keep the comments focused and bring them to a close. The chair can always cut off a speaker, especially when a time limit has been announced, but doing so can upset the speaker. Other approaches should be tried before the chair uses that option, as follows:

1. **Summarizing.** (See Example 3.) If the speaker is talking about several topics, the chair can volunteer to summarize the points made so far. In general, a speaker should not be interrupted, but breaking in to summarize a rambling presentation is one way to show that the speaker is being heard. Sometimes it can also prompt the speaker to return to his or her most important point.

2. **Clarifying what the speaker seeks.** This task may be difficult, since the person’s comments may range from complaints about situations beyond the board’s jurisdiction to general criticism about government rules, spending, or responsiveness.

3. **Acknowledging the person’s goals and feelings.** Even when the board disagrees with the speaker’s opinion or argument or is unable to address the citizen’s concern, recognizing the person’s frustration, anger, or anxiety may help provide relief for someone with many apparently disconnected concerns.

4. **Clarifying how a citizen can have her or his concern addressed.** (See Example 4.) Individuals and groups often believe that it is entirely up to the board or its staff to solve the problems they bring before the board. But as the board clarifies what a speaker wants, it can suggest perhaps several ways of addressing the problem. Pointing out several options helps people...
understand that their concerns have been heard and that they do indeed have influence.

5. “Reality-checking.” When a speaker asks for a particular action, the board can help that person understand that it may not be able to grant the request by reminding him or her that there may well be serious objections from other citizens if it does so.

6. **Reminding the speaker.** The board should again state its time limits for public comment and (when appropriate) which matters can and cannot be discussed publicly. The speaker should be asked to understand the board’s need to address other agenda topics or give other citizens a chance to speak.

7. **Offering the speaker a way to be more involved.** Perhaps the board can connect the speaker with a group—among the community’s many formal and informal committees, task forces, neighborhood associations, and other organizations—that addresses at least one of the person’s complaints.

But some speakers may still continue past the time limit, or repeat points, or bring up new topics. At that point, telling them they must stop is appropriate. Still, treating such people firmly but courteously shows respect for them and helps build confidence throughout the community in its local government boards.

**Situation 2: A large group of people attend, express strong views and feelings, and demand action.**

The presence of a large group of angry citizens can be stressful for board members. This kind of gathering can be anticipated when the issue is important, when the number of pre-meeting telephone calls increases, or when group leaders say they are organizing their supporters to attend the meeting and press their concerns. How should an agitated group like this be handled?

It is important to allow extra time at the meeting for this kind of situation. By reconsidering which business is essential and which agenda items it can handle quickly or defer, the board can sometimes revise the agenda to accommodate the group(s) of citizens who wish to share their views on an important issue.

One option is to allow a single speaker to address the full board, followed by small-group discussions with one or two board members in each group. When a single speaker presents the group’s concerns before the full board and audience, everyone can hear the same general concerns and information. Often agitated citizens’ groups gain some degree of satisfaction simply by venting their feelings in an official setting. The board can help to accommodate this desire by suggesting that the group have a few high-energy, articulate people speak on the group’s behalf.

The small-group approach has several advantages. Assigning a team of one or two board members to meet with each of several sets of citizens allows the board to hear from more people. This technique also promotes an informal give-and-take between board members and citizens that can be very productive. The conversation in these small groups should begin with the board member(s) listening and making sure that the group members all have a chance to express their views. The board member(s) should summarize the concerns and clarify those that are most important. Then they all can discuss whether the board needs other information in order to act, and they also can explore potential solutions. Finally, the full board should reconvene, with board members reporting on the concerns and the possible solutions discussed in the small groups. It is also appropriate at this time to raise whatever concerns board members have about the citizens’ demands and how they relate to the legal, financial, or other constraints the board faces.

Depending on the specific situation (for example, what the nature of the issue is, who is affected, and whether the situation involves great risk), it may be necessary to agree on some short-term steps and schedule another meeting devoted solely to the problem. This meeting might take the form of a public

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**Example 4: A Way to Help a Citizen Consider More than One Solution (drawing on the information in Example 2)**

“Ms. Jordan, your concern is that people are driving too fast through your neighborhood and endangering children. Let me suggest some other possible ways to address your concern. One way could be to have police cruisers in the area at particular times, as you suggest. Another is for more visible crossing guards at either end of the street, since going and coming from school places the greatest number of children on the street. A third option would be to involve the Neighborhood Blockwatch group and ask parents and other adults to be on the sidewalk to watch the children at certain times of the day. A fourth option is to have the transportation department check on traffic flow and see whether the timing of traffic signals around your neighborhood contributes to people driving too fast down your street. What do you think about these other possible solutions? Do you have other suggestions?”
hearing; it might lead to the formation of an advisory group; or it might result in some other approach.

Situation 3: A speaker verbally attacks or insults one or more board members.

Probably the most difficult situation a board member can face is a personal attack in a public setting. Sometimes the line between defending a policy or a decision and defending oneself is very thin. Personal attacks must be dealt with, but as constructively as possible. The presiding officer, while acknowledging the person’s underlying concern, should tell the offending speaker that she or he has crossed the line of acceptable speech. Still, the board needs to remember that unless the person is using obscene language or “fighting words,” the speaker’s remarks attacking one or more board members, while uncomfortable to the board, are probably constitutionally protected free speech. (The legal limits on protected free speech will be examined in Part Two of this article.)
Five strategies can be helpful in this situation:

1. **Taking a deep breath.** This old piece of advice still makes good sense. Harsh personal criticism causes stress. Stress automatically causes the body to bring up its defenses. Muscles tighten, palms become sweaty, and breathing rate increases. These physiological changes are natural, understandable, and useful in preparing for fight or flight. But unless the speaker threatens physical harm and the board member actually wants to flee, the body’s reaction may cause the board member’s verbal response to be unnecessarily defensive. Taking the time to breathe deeply helps counteract the fight-or-flight syndrome and focuses attention on analyzing what the person is saying rather than on immediately defending oneself.

2. **Summarizing.** (See Example 5.) One way to disarm an upset person is to summarize his or her strong, critical views. The target board member will not agree with the speaker, but summarizing the remarks so as to reflect the depth and the strength of the speaker’s feelings will help the board member control his or her own emotions. If possible, another board member should make the summary, for two reasons. First, the board member being criticized or attacked gains more time to prepare a response. Second, summarizing helps determine whether the attack arose from a perceived malfeasance on the part of the entire board or on the part of only one board member.

3. **Asking for clarification.** Agitated people often speak in generalizations: “You’re all crooks!” “You don’t listen to people!” Asking for specific examples may produce a more fruitful exchange than trying to reply to general statements.

4. **Expressing one’s own feelings.** (See Example 5.) No one likes being attacked and put on the defensive, and the target board member should say so in a direct, controlled fashion. The reply may help the board re-focus on how best to conduct the public’s business.

5. **Examining the speaker’s main concerns.** Setting aside the unpleasantness of the speaker’s remarks, the board may want to explain its decision-making process if that process is relevant to the angry citizen’s concerns. Finally, it may wish to consider whether to open the matter at issue for further discussion at this or a later meeting.

**Summary**

People on public boards—elected representatives in powerful city, county, and school positions and citizens who serve on less visible committees—face citizens’ comments and criticism in many public meetings. Encouraging citizens to share their views in a constructive way helps rebuild trust in public institutions. Limited resources and state and federal rules may constrain what North Carolina local governments can do to respond to criticism and requests from their citizens. Part Two of this article will address the specifically legal concerns about free speech and acceptable ways to limit public comment. While much is being made about state and national efforts to regain civility in public affairs, local government board members are on the front lines of improving civic engagement in their communities. Helping citizens—including harsh critics—feel welcomed and valued is an important way to create and maintain trust in public service and preserve its legitimacy.

**Notes**

1. This article concerns comment during the portions of public meetings that are not designated as public hearings. By “public meetings” we mean official gatherings of North...
Carolina local government boards. Under the open meetings law, most official actions of such boards must take place in meetings that are open to the public; that is, anyone may attend and observe. But public meetings typically have a predetermined agenda that may or may not provide for comments from non–board members.


4. Between 1990 and 1994, confidence in religious institutions fell from 57 percent to 40 percent; in voluntary groups, from 54 percent to 37 percent; and in local media, from 34 percent to 24 percent. Benest, “Serving Customers.”


7. We thank all of the local and state government officials who replied to our survey. Their materials have been added to the Institute of Government library.


10. Although designed for training young people to be mediators, a useful checklist for listening effectively is “Are You an Effective Communicator?” in Peer Mediation Conflict Resolution in Schools (Program Guide), by Fred Schrumpf, Donna Crawford, and H. Chu Usadel (Champaign, Ill.: Research Press, 1991), 55.

Public Comment at Meetings of Local Government Boards

Part Two: Common Practices and Legal Standards

A. Fleming Bell, II, John Stephens, and Christopher M. Bass

Three citizens want time at the next meeting of their local board, but the agenda is full. The board has to work on the budget and discuss how to evaluate the city manager. Does it have to put the citizens on the agenda for the next meeting, or may it delay their appearance until the following meeting?

A board always has an agenda item for general public comment. With cable television, more and more speakers are playing to the camera. May the board just stop receiving general public comment?

An angry group of citizens hold up signs and wear large protest buttons during a council meeting. May the council restrict the use of signs in its meeting room? What rights do citizens have to express their opinions nonverbally to the council?

Part One of this article offered general guidelines for constructive communication with concerned citizens at board meetings. Part Two summarizes common practices of North Carolina local governments in receiving citizen comment at board meetings, and it addresses legal issues. Public officials should read both parts so that they understand not only principles of effective communication but also legal requirements and prohibitions.

Common Practices in Receiving Public Comment

Boards of County Commissioners

A 1996 survey of North Carolina’s 100 boards of county commissioners revealed common practices among these units in receiving public comment. Ninety boards responded to the survey. Of these, 60 have a specific place in the regular meeting agenda for public comment; 30 do not. Among the latter, 20 allow the chair to decide whether and when to receive citizen comment; 7 allow comment if the request to speak is made before the meeting and the item is placed on the agenda; and 3 normally take comment at the close of the business meeting.

In 55 counties the commissioners regularly limit how long each speaker may address the board. Several of these counties apply their limits flexibly, however, often allowing speakers to continue and letting the chair decide when to ask a speaker to finish. Twenty-nine counties have no formal limit.
In 22 counties the board typically allows each speaker five minutes, and in 21 counties there is a three-minute limit. Even the counties that normally do not restrict the length of speeches do use limits if the issue is controversial and several people wish to speak. In this instance most counties ask the concerned groups to pick one or more spokespersons and/or limit each speaker to two or three minutes.

Municipal Boards

No formal comprehensive survey has been made of how the boards of municipalities receive citizen comment. Practices vary widely. Most city and town councils have a specific point in the agenda at which they hear citizens, commonly at the beginning or the end of the meeting. They also have a time limit on presentations and may require groups with the same concern to designate one or two spokespersons.

School Boards

The state's school boards use a mix of formal and informal approaches to handling public comment. Most boards have a specific place on the agenda for citizens to speak and a time limit for each speaker. Groups are asked to designate a single spokesperson. Boards usually receive citizens' comments but are not obliged to give an immediate response.

School boards struggle with the problem of allowing citizens' comments while preserving the efficiency and decorum of their meetings. Some of them take comments at the beginning of the meeting. This practice, however, can cause business deliberations to last until late in the evening. But holding citizens' comments until the end of the meeting taxes people's patience and delays their speaking to a time when many board members are weary and eager to conclude the meeting.

Many school boards urge parents and other citizens to pursue complaints through regular channels before they come to the board. For example, boards' policies on public comment note that personnel or confidential matters may not be addressed in public session and that persons with complaints about personnel must follow other specific procedures. Also, boards often have a sign-up list for speakers, with a deadline of up to seven days before the meeting. Some sign-up lists ask prospective speakers to identify the topic of their comment, to state the steps they have already taken to address their concern, and to deposit relevant documents in the board's office before the meeting.

A board's practice may occasionally vary from its policies in unusual circumstances.

Planning Boards, Boards of Adjustment, and Other Boards

Zoning decisions and requests for variances of land-use regulations can generate great public interest and comment. Most municipalities and two-thirds of county governments control land use through zoning regulations and site permits. Planning boards and boards of adjustment conduct their business meetings publicly but for different purposes and under different rules. The relationships between planning boards and their governing boards (that is, boards of county commissioners or municipal councils) vary greatly. Some differences are set by state statute. For example, when the twenty coastal counties are revising their comprehensive land-use plans, they must work within rules promulgated by the Coastal Resources Commission for mandated formal citizen-participation programs. Other county planning boards have similar (though not state-mandated) practices for seeking public comment (for example, neighborhood meetings, formal public hearings, and surveys of citizens).

Other local government entities (usually appointive) have varying degrees of influence on local ordinances and regulations. Social services boards; area mental health, developmental disabilities, and substance abuse boards; community or human relations commissions; public housing authorities; and agencies on aging typically have few problems with public comment at their meetings. Public health boards, though, sometimes have drawn citizens' attention on such issues as livestock operations, smoking ordinances, and permits for septic tanks.

Legal Requirements for Public Comment

The legal requirements and practical guidelines that follow should be useful for all the entities discussed in the preceding section.

General Requirements

Anyone may attend and record meetings of local public bodies in North Carolina. This right of access is guaranteed by North Carolina's open meetings law. It also may be inferred from the First and Fourteenth Amendments to the United States Constitution.
The open meetings law specifies that, with certain limited exceptions, each official meeting of a public body is open to the public and any person is entitled to attend such a meeting. It also provides that any person may photograph, film, tape-record, or otherwise reproduce any part of a meeting required to be open. Further, the law permits the open portions of meetings to be broadcast on radio or television.

The only restrictions on this right of public access relate to keeping order in the meeting. Thus, under the open meetings law, a board may regulate the placement and the use of photographic, filming, recording, and broadcasting equipment in order to prevent undue interference with the meeting. But it must allow the equipment to be placed within the meeting room in a way that permits the intended use, and it may not declare the equipment’s ordinary use to be undue interference. In certain instances a board may require that equipment and personnel be pooled.

In addition, a board may take action if someone disrupts its meeting. Willfully interrupting, disturbing, or disrupting an official meeting and then refusing to leave when directed to do so by the presiding officer is a misdemeanor.

But being able to attend a meeting does not necessarily mean that one may speak at it. In general, local government bodies have no legal obligation to allow members of the public to make comments, to ask questions, or otherwise to participate actively at any particular meeting except during a required public hearing conducted as part of that meeting. However, as discussed later, prohibiting all opportunities for citizen comment outside public hearings may go beyond what courts will consider reasonable.

Citizen comment is a necessary part of public hearings because obtaining such input is the very reason for the hearings, whether they are mandated by state statute or voluntarily called by a local board. This article, however, focuses on regular board meetings and boards’ discretionary power to allow comment during those meetings at times other than during public hearings. Each board controls its regular meeting agenda, including how items are placed on the agenda, and it may choose to give citizens an opportunity to be included. Boards often require citizens who wish to speak, to specify beforehand the subjects that they plan to discuss. A board has fairly broad discretion to decide what subjects to include on the agenda of a particular regular meeting as long as it does not discriminate among citizens on the basis of their point of view on an issue or single out one citizen for different treatment from all others. Many boards also set aside a time in the meeting for comment from citizens about topics of interest to them, with little limitation on subject matter.

Free Speech and the “Public Forum” Doctrine

All public bodies must be concerned about freedom of speech and other rights of those who participate in their meetings. The First Amendment to the United States Constitution, which is applied to state and local governments through the Fourteenth Amendment, requires that government make no law abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. Freedom of speech and the press and the right to petition the government can have an effect on meetings of public bodies. Over the years, courts have fashioned rules to balance the right and the responsibility of public bodies to organize their meetings and conduct those meetings in an orderly manner, against individuals’ rights under the First and Fourteenth amendments.

To understand these rules, one must start with the public forum doctrine developed by the United States Supreme Court.

Although the Supreme Court long followed the view that the government, just like a private landlord, may absolutely exclude speech from its own property, the Court has abandoned this ideology and created a body of public forum law. In doing so, the Court has divided government property and activities into three distinct categories: the traditional or quintessential public forum, the designated public forum (the focus of this article), and the nonpublic forum. Different rules govern speech at different times and places on public property, depending on the category into which a location or an activity falls.

The Traditional Public Forum

The Court has defined traditional or quintessential public forums as places such as streets or parks that have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Restrictions on speech in these forums are generally allowed only if they are concerned with the time, the place, or the manner of the speech, rather than its content. The restrictions must be content neutral and...
narrowly tailored to serve a significant government interest, and they must leave open ample alternative channels of communication.\textsuperscript{15}

To exclude a speaker from a traditional public forum which has as one of its purposes the free exchange of ideas because of the content of her or his speech, the government must show that a regulation is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end.\textsuperscript{16} Regulations subjected to this standard, called the strict-scrutiny test, rarely survive a court challenge.\textsuperscript{17} Similarly, censorship based on the speaker’s viewpoint usually is not allowed. The Supreme Court will generally hold that a regulation applicable to a traditional public forum violates the First Amendment when it denies access to a speaker solely to suppress the point of view she or he espouses.\textsuperscript{18}

The Designated Public Forum

Whenever a government opens public property other than a traditional public forum for use by the public as a place for expressive activity, it creates a designated public forum, the second category. Many of the standards that apply in this category are similar to those that apply in a traditional public forum. This is so even though the government may not have been required to create the forum in the first place and may later choose to change the open character of the property so that it is no longer a designated public forum.\textsuperscript{19}

The Nonpublic Forum

Nonpublic forums, the third category, are not subject to the stringent free-speech requirements that govern traditional and designated public forums. Examples of such forums include meetings of government officials that are not required to be open to the public under the open meetings law, such as meetings solely of professional staff, and closed sessions held during official meetings of public bodies.\textsuperscript{20} Most government offices and facilities where day-to-day operations are carried on also are nonpublic forums.\textsuperscript{21}

The same space may be used at different times as a designated public forum and a nonpublic forum. For example, a room in city hall may be the scene of a council meeting one evening and the site of a department head meeting the next day. If the council receives public comment during its meeting, a designated public forum exists while the comments are being received. The meeting of department heads, on the other hand, is probably a nonpublic forum.

Board Meetings as Public Forums

Meetings of local government boards bear some resemblance to both traditional and designated public forums. They are like traditional public forums in that space and seats for the public are customarily provided, and public comment and debate often are allowed. But these meetings also resemble designated public forums in that they are held for specified purposes (to conduct the board’s business as listed on an agenda). Thus public discussion and active participation are more tightly circumscribed than they would be in a park or another traditional public forum.

One noted First Amendment scholar, William W. Van Alstyne, asserts that local government board meetings fit a description midway between these two types of forums. He suggests that rules for citizen comment in such meetings may be more restrictive than those allowed in traditional public forums but less restrictive than those permitted in certain types of designated public forums.\textsuperscript{22} This article adopts a somewhat similar view.

What meetings or parts of meetings of public bodies in North Carolina, then, are designated public forums? In a 1976 Wisconsin case, the United States Supreme Court suggested that any portion of a meeting of a public body that the body opens for public comment is such a forum.\textsuperscript{23} The Court noted that Wisconsin’s open meetings law requires certain governmental decision-making bodies to hold open meetings. It explained that, although a public body may confine such meetings to specified subjects and may even hold closed sessions, “where [it] has opened a forum for direct citizen involvement, it generally cannot confine participation in public discussion of public business . . . to one category of interested individuals.”\textsuperscript{24} In a 1997 case the North Carolina Supreme Court cited the Wisconsin opinion for the idea that “once the government has opened a forum such as a public meeting to allow direct citizen involvement, it may not discriminate between speakers based upon the content of their speech.”\textsuperscript{25}

The decision in the Wisconsin case suggests that any official meeting of a public body covered by this state’s open meetings law also may become a designated public forum. If a public body chooses to allow public comment during a portion of its meeting, it subjects that part of the meeting to the rules that apply to designated public forums.\textsuperscript{26} Restrictions on speech in designated public forums may be based on either what a speaker has to say content or view-
point or when, where, or how the speaker says it time, place, or manner. Very different rules apply to these two types of restrictions.

Restrictions Based on Content or Viewpoint

As noted earlier, in a traditional public forum, any restriction on speech that is based on content or viewpoint will be strictly scrutinized by the courts and will almost always be found unconstitutional. A similar rule applies in a designated public forum. In that context, although the meeting organizers may sometimes restrict comment to the subjects for which the forum is designated, they must still allow all viewpoints to be heard.

For example, the Second Circuit Court of Appeals has held that once a board decides to take public comment in a particular meeting, it may not discriminate among speakers on the basis of what they have to say on the subject at hand. In Musso v. Hourigan, the time that a local board of education had allotted to hear public comment had expired, but the board continued to permit members of the public to speak. A citizen who said something that one board member did not like was silenced and eventually arrested. The court noted that a rational jury could infer that the plaintiff was singled out because of the board member's dislike for what he had to say. If this inference was accurate, said the court, the action against the citizen was an unconstitutional content-based restriction on protected speech. The case points out the risk that a board may run if it fails to follow content-neutral ground rules concerning a citizen-comment period.

Even if a local governing board feels that a person is spreading untruths or arousing hostilities through his or her comments during a meeting, and even if the board members do not like what the speaker has to say, the board probably may not restrict that person's speech because of the content: The Supreme Court has frequently recognized that the disruptive or disturbing effects of expression are integrally bound up with the very political value of free speech that the First Amendment was designed to safeguard and nurture. The only relevant exceptions pertain to obscenity (which legally goes beyond mere profanity) and fighting words (which have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed). The Supreme Court has specifically explained that the protections of the First Amendment do not turn on the truth, the popularity, or the social utility of an idea or a belief.

Restrictions on Time, Place, or Manner

The fact that restrictions on speech in designated public forums generally may not be based on what a speaker has to say about a subject does not mean that those who attend the meeting may speak freely whenever they wish or on whatever topic they wish. The United States Supreme Court has recognized that a public forum may be created for a limited purpose, such as discussion of certain subjects or use by certain groups.

Restricting a meeting to particular subjects (for example, through the use of an agenda) is permitted as long as the public body is careful to allow all points of view to be presented if and when it hears from audience members about those subjects. That is, local boards may control the conduct of their meetings through the use of reasonable, content-neutral restrictions on the time, the place, and the manner of speech. As Justice Potter Stewart stated in a concurring opinion in the Wisconsin case discussed earlier, a public body that may make decisions in private has broad authority to structure the discussion of matters that it chooses to open to the public.

Even if a board opens its meeting for general discussion of issues, such as during an open-public-comment period, some subject-matter restrictions are probably permissible. For example, a board might limit comments to subjects that are within its jurisdiction or on which it is competent to act.

On the other hand, the restriction on viewpoint-based regulations means that a governmental body holding a public-comment period may not use an improper reason, such as dislike for a particular speaker's viewpoint, as a basis for adjourning or moving on to the next subject on the agenda. As noted earlier, a local government board may not silence a speaker in such a designated public forum merely because it disagrees with the person's message.

A 1990 case, Collinson v. Gott, illustrates the courts deference to local boards discretion concerning the organization and the conduct of their meetings, as long as no censorship based on a speaker's point of view is involved. In Collinson a person was cut off from speaking and subsequently asked to leave a meeting after he violated a local board's requirement that speakers confine their remarks to the question and avoid discussion of personalities. He sued in federal court. A divided panel of the Fourth Circuit Court of Appeals (which has jurisdiction over North Carolina) held in favor of the board. Although the
judges disagreed about the disposition of the case, they all assumed that a presiding officer has at least some discretion to make decisions concerning the appropriateness of the conduct of particular speakers.39 A concurring opinion noted that the government has a substantial interest in having its meetings conducted with relative orderliness and fairness: [O]fficials presiding over such meetings must have discretion, under the reasonable time, place and manner constitutional principle, to set subject matter agendas, and to cut off speech which they reasonably perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner . . . , even though such restrictions might have some relation to the content of the speech.40 (The judges disagreed on the extent to which content was or should be considered.)

An earlier North Carolina case, Freeland v. Orange County,41 concerned time limits for public comment and limits on the number of speakers. This case involved a public hearing during a board meeting, but the same or similar principles probably apply to public comments at other times during a meeting. The Orange County Board of Commissioners held a public hearing on a proposed county zoning ordinance, and some five hundred people attended. The chair allocated an hour to each side of the issue (though opponents outnumbered supporters four to one) and allowed each side fifteen minutes more for rebuttal.

When the board later adopted the ordinance, some of the opponents sued, arguing that the ordinance had not been properly adopted apparently because about two hundred persons who wished to speak at the hearing were not allowed to do so. The North Carolina Supreme Court held in favor of the board of commissioners, declaring that [t]he contention that the commissioners were required to hear all persons in attendance without limitation as to number and time [was] untenable. 42 It found that the opponents as well as the proponents were at liberty to select those whom they regarded as their best advocates to speak for them. The General Assembly did not contemplate that all persons entertaining the same views would have an unqualified right to iterate and reiterate these views in endless repetition. 43

Even though Freeland is not specifically a First Amendment case, it teaches that a board may safely impose time limits on comments in public hearings as long as it allows enough time for each viewpoint to be heard. Boards will obviously need to use some judg-

Discretion in When to Allow Speech

Must opportunities for citizen comment be provided at all board meetings? Although there is little case law on the point, the latitude that the courts have given governmental bodies to control the conduct of their meetings through restrictions on the time, the place, and the manner of speech likely includes the discretion to allow public comment in some meetings but not in others.

Returning to the second scenario at the beginning of this article, what about never allowing citizen comment except during designated public hearings on particular topics? Nothing in North Carolina’s open meetings law or other statutes requires that public comment be allowed at meetings that do not include public hearings. This suggests that the courts might allow such a prohibition.

It is not clear, however, how the courts would rule on possible First Amendment concerns raised by this type of restriction. A court might well find it to be an unreasonable restriction on speech or on the right to petition the government for a redress of grievances. Although governing boards have a significant interest in controlling their meetings, a court might require a local board occasionally to allow people to appear personally and publicly to address their concerns directly to the board and to request some appropriate response to their grievances, as part of this right to petition.46
According to the North Carolina Supreme Court, filing written complaints, appearing at disciplinary hearings, and making critical speeches at board meetings all involve petitioning the government for a redress of grievances.47

On the other hand, it might be argued that such a restriction is permissible because boards do provide for citizen comment during public hearings, although the hearings and hence the comment might be limited to particular subjects. For example, the North Carolina General Assembly’s rules do not allow for public comment during its proceedings, but legislative committees occasionally hold public hearings on particular bills. It also might be asserted that a designated public forum, and hence a need to receive public comment, is created only when a board decides it wishes to create one.

Conceivably, then, a local board might decide not to take public comment at any of its meetings except during the portions that are designated as public hearings. But politically astute and legally cautious boards will probably provide at least occasional periods for general public comment or an opportunity for citizens to be placed on the agenda of regular meetings, to avoid both appearing unresponsive (thereby hurting their chances for reelection) and having the legal issue raised.

Other Types of Expressive Activity

What about other types of expressive activities, like carrying signs and wearing buttons, as in the third opening scenario? May restrictions be placed on these behaviors in designated public forums? It is important to realize that the speech the First Amendment protects involves more than the spoken word. The United States Supreme Court has recognized that freedom of speech encompasses communication through nonverbal symbols.48 For example, in Tinker v. Des Moines Independent Community School District,49 the Court upheld the right of high school students to wear black armbands to protest the Vietnam War, stating that this was the type of symbolic act that is within the Free Speech Clause of the First Amendment. 50 Similarly a concurring opinion in Smith v. Goguen51 explained that [a]lthough neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the First Amendment. . . . 52

The Supreme Court sometimes uses the term freedom of expression as a synonym for freedom of speech, indicating that the scope of constitutional protection extends beyond verbal communication. But not every activity is considered speech. For actions to be considered expressive, a speaker must intend that they communicate.53 Most symbolic gestures by a citizen during any portion of a local board meeting that has been opened for public comment will be considered expressive conduct under the First Amendment because they will involve an intent to communicate. Included is everything from actually addressing the board to wearing a sticker on one’s shirt or carrying a placard.54

Because carrying signs and wearing buttons are expressive activities protected by the First Amendment, a board must justify restrictions on them in the same way that it justifies restrictions on verbal speech, and under the same standards. Thus reasonable controls on the time, the place, and the manner of such expression will be allowed.

Suppose a board is concerned that citizens might use signs to strike the opposition or to block the view of others at a meeting. It may impose reasonable restrictions on the size of signs or on signs that are attached to wooden or other solid handles, both to ensure safety and to avoid disruption. Or it may limit the use of signs to certain meetings and not others. A restriction on what a sign or a button may say about a given subject, on the other hand, will cause difficulties. Comments are generally protected even if they are hostile or vulgar or disagreeable to board members. As noted earlier, censorship of unpleasant messages is a type of restriction that the courts generally do not allow.

May a board prohibit signs entirely in a designated public forum such as the public-comment portion of a meeting? In perhaps the only reported case on this point, Louisiana’s supreme court concluded that a local school board could do so.55 The court upheld the board’s rule banning hand-held signs from its office building or any of its rooms. The court explained that the board’s rule was content neutral and that the board’s interest in orderly and dignified meetings was sufficient to justify this type of restriction on time, place, and manner of expression. The court also noted that there were ample alternative channels for communicating the information, including public-comment times at the board’s meetings.56

The United States Supreme Court agreed with the Louisiana court’s conclusion. Without issuing an opinion, it dismissed an appeal of the Louisiana court’s ruling on the ground that the case involved no substantial federal question.57 Such a dismissal is a
decision on the merits; that is, if the Court had thought that the case raised a significant issue under the First Amendment, it probably would have heard the case. The Supreme Court’s dismissal of the appeal suggests that local officials may ban hand-held signs in meeting rooms. A board should be careful, however, to ensure that people have adequate alternative ways to present their views to the board.

Other Constitutional Claims

As local boards decide who may speak in their meetings, they also should take care not to violate the provisions of the federal and state constitutions that require equal protection of the laws.58 That is, a board must not restrict someone’s speech on the basis of an impermissible reason like race, religion, or national origin. And if the board has an open-public-comment period, the equal protection clause may prevent it from allowing to speak only those who wish to address topics favored by the board.

Boards also may have concerns when speakers deal with religious topics. In general, United States Supreme Court cases indicate that people who wish to speak on religious issues will be subject to the same limitations that are placed on others.59 But a board should be careful not to appear to favor one religion over another. Such favoritism is unacceptable under the establishment clause of the First Amendment, which forbids government from making laws respecting an establishment of religion.

Summary

Local government boards are free to make reasonable rules governing public comments during their meetings. They may choose to allow comments only at certain times, on certain subjects, or in certain meetings, and they may impose time limits and limits on the number of persons who may address a particular issue. They must take care, however, not to exclude or silence a person because of that person’s point of view, what he or she has to say about an issue, or, to some extent, how he or she says it. Boards also may not limit a speaker on the basis of his or her race or religion. During periods of open public comment, boards may limit discussion to subjects within their jurisdiction, but they should not restrict a speaker during such a period simply because his or her subject is not popular with the board. Further, if boards choose to exclude visual expressions of opinion such as signs and banners from their meetings, they should make certain that there are adequate alternative means for communicating ideas to the board.

Helping citizens be involved with their local government is an important role of public officials in a democracy. Becoming knowledgeable about practical ways of encouraging positive discussion with citizens (see Part One of this article) and becoming informed about the legal standards just presented will assist public officials in performing that role.

Notes

2. Susan Moran, Report on the NC Clerks Survey: Public Addresses to Boards, Pitt County, N.C., April 25, 1996. Moran was Pitt County’s public information officer from August 1994 to October 1996. At the time of the survey, the Pitt County Board of County Commissioners was considering how best to receive public comment during its meetings.
5. See generally Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980), in which the Supreme Court held that, under the First and Fourteenth amendments, the public and the press have a right of access to criminal trials. Some of the reasons that the Court gave for finding such a right of access also may apply to meetings of local government boards. For example, Chief Justice Warren Burger noted that the freedoms of speech and the press and the rights to assemble and to petition the government for a redress of grievances share a common core purpose of assuring freedom of communication on matters relating to the functioning of government... [The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. Free speech carries with it some freedom to listen. Richmond, 448 U.S. at 575–76 (citation omitted). This freedom to listen and to receive information and ideas is enhanced if proceedings are open.
6. N.C. Gen. Stat. / 143-318.10(a) (hereinafter the General Statutes will be cited as G.S.). The terms official meet-
local governments are the authorizations for closed sessions, and "public body" are defined in G.S. 143-318.10(b). The main exceptions to the law applicable to local governments are the authorizations for closed sessions, found in G.S. 143-318.11.

7. G.S. 143-318.14(a).
8. G.S. 143-318.14(b).

10. For a detailed description of the types of public hearings allowed and required under North Carolina city and county law, see David W. Owens, Zoning Hearings: Knowing Which Rules to Apply, Popular Government 58 (Spring 1993): 26—35.

11. A public hearing is a portion of a public meeting specifically devoted to hearing from interested citizens, businesses, and civic groups about a specific subject. At the hearing, governmental officials may offer background information, but the goal is for them to receive information, viewpoints, concerns, questions, and so on from citizens. The public officials generally end the hearing before they take any action.

Under North Carolina law, public bodies must hold public hearings before they act only if they are specifically required to do so by statute or case law. The most common statutory instances for cities and counties involve consideration of various land-related and financial matters. Thus city councils and boards of county commissioners, under G.S. 160A-364 and 153A-323 respectively, must hold public hearings, advertised in a specific way, when they wish to take action adopting, amending, or repealing zoning, subdivision, housing, or other types of ordinances specified in G.S. Chapter 160A, Article 19, or G.S. Chapter 153A, Article 18.

Cities and counties also must give published notice and hold hearings before they may engage in certain types of economic development activities [G.S. 158-7(c)], and cities must hold hearings with specified notice before they adopt annexation ordinances [G.S. 160A-31(c), (d), -37(a) through (d); -49(a) through (d); -58.2]. Both cities and counties must advertise and hold public hearings on the annual budget [G.S. 159-12], on proposed general-obligation bond orders (G.S. 159-54, -56, -57), and on installment-financing transactions involving real property [G.S. 160A-20(g)].

12. A different rule applies to agendas of special meetings of local government boards. Special meetings of most boards are called to deal with specific topics, so their agendas are usually set in advance. Although the agendas of special meetings can sometimes be changed, doing so is often difficult. See, e.g., G.S. 153A-40(b) and 160A-71(b)(1), which require all members of a board of county commissioners or a city council, as appropriate, to be present or to sign a written waiver before items may be added to the stated agenda of a special meeting.

15. Perry, 460 U.S. at 45.
17. See, e.g., Carey, 447 U.S. at 455, in which the Court applied the strict-scrutiny test under the equal protection clause of the Fourteenth Amendment (Section 1), as well as under the First Amendment, in a case involving content-based discrimination among types of speech.
18. See, e.g., Perry, 460 U.S. at 48—49 (text and n.9), in which the Court assumed that discrimination on the basis of viewpoint is generally forbidden by the First Amendment.
20. G.S. 143-318.10(a), -318.11. As noted earlier, the open meetings law allows public bodies to close their meetings for certain limited purposes, and the United States Supreme Court has approved the holding of such closed, nonpublic sessions: Plainly, public bodies . . . may hold nonpublic sessions to transact business. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175, n.8 (1976).
21. Public property that is not by tradition or designation a forum for public communication also is considered to be a nonpublic forum. Perry, 460 U.S. at 46. As noted in the text, most government offices and facilities used in daily operations fall into this category. Even though much communication obviously takes place in such locations, citizens have no general right to express themselves in most government-owned facilities unless the facilities are traditional public forums or are serving as designated public forums.

Control over access to nonpublic forums may be based on subject matter. For example, a speaker who wishes to address a topic not encompassed in the intended purpose of a nonpublic forum may be prevented from doing so. Control also may be based on a speaker's identity. For example, if a speaker is not a member of the class of speakers for whose special benefit the nonpublic forum was created, he or she may be kept from speaking. The distinctions drawn must be reasonable in light of the purpose that the nonpublic forum at issue serves. Perry, 460 U.S. at 49. But it is not necessary to use the most reasonable limitation. Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788, 808 (1985).

22. Letter from William W. Van Alstyne, William R. and Thomas C. Perkins Professor of Law, Duke University, to A. Fleming Bell, II, April 11, 1997. We are grateful to Professor Van Alstyne for his helpful ideas and suggestions concerning this article.
24. Madison, 429 U.S. at 174—75 and nn.6, 8.
26. See Devine v. Village of Port Jefferson, 849 F. Supp. 185 (E.D.N.Y. 1994) (holding that open meetings in which public discourse is invited on matters at hand are limited public forums for First Amendment analysis).
27. One of the few areas in which the Court has allowed content-based restrictions is pornography and obscenity. See, e.g., Young v. American Mini Theatres, 427 U.S. 50 (1976) (concluding that a city's interest in the present and future character of its neighborhoods adequately supported its classification of motion pictures according to their...
adult content); and Ginsberg v. New York, 390 U.S. 629 (1968) (finding that a state’s interest in the well-being of its youth justified a regulation that defined obscene material on the basis of its appeal to minors).

30. Musso, 836 F.2d at 742–43.
32. See, e.g., State v. Rosenfeld, N.J. App. Div. (no opinion), cert. denied, 283 A.2d 535 (N.J. 1971), vacated mem. sub nom. Rosenfeld v. New Jersey, 408 U.S. 901 (1972) [remanded for reconsideration in light of Cohen v. California, 403 U.S. 15 (1971), and Gooding v. Wilson, 405 U.S. 518 (1972)], vacated per curiam sub nom. State v. Rosenfeld, 295 A.2d 1 (N.J. App. Div. 1972), modified and aff’d, 303 A.2d 889 (N.J. 1973). Rosenfeld involved a person who used a profane descriptive adjective four times during his remarks at a public meeting of a local school board held to discuss racial conflicts. He was convicted of violating a statute that, after introducing all of his prepared text into the written record; he was merely prevented from reading all of it aloud. The court again held in favor of the defendants, United States Representative Beryl Anthony and others, explaining that Representative Anthony’s action was not caused by the content of Wright’s message and that the restriction may be said to have served a significant governmental interest in conserving time and in ensuring that others had an opportunity to speak. Thus, it does not appear that the limitation placed on Wright’s speech was unreasonable. Wright, 733 F.2d at 577. The court also noted that Wright was not prevented from introducing all of his prepared text into the written record; he was merely prevented from reading all of it aloud. Wright, 733 F.2d at 577.
33. See, e.g., Gooding, 405 U.S. at 524.
35. Madison, 429 U.S. at 175, n.8; Perry, 460 U.S. at 46, n.7 [citing Madison and Widmar v. Vincent, 454 U.S. 263 (1981)].
36. Compare the broad grant of authority for the conduct of public hearings in G.S. 153A-52 and 160A-81: The [board of county commissioners/city council] may adopt reasonable rules governing the conduct of public hearings, including but not limited to rules (i) fixing the maximum time allotted to each speaker, (ii) providing for the designation of spokesmen for groups of persons supporting or opposing the same positions, (iii) providing for the selection of delegates from groups of persons supporting or opposing the same positions when the number of persons wishing to attend the hearing exceeds the capacity of the hall, and (iv) providing for the maintenance of order and decorum in the conduct of the hearing.
37. Madison, 429 U.S. at 180 (Stewart, J., concurring).
39. See Collinson, 895 F.2d at 1000, 1005–06, 1011.
40. Collinson, 895 F.2d at 1000. Similarly, in Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989), the Eleventh Circuit Court of Appeals found in favor of the mayor and the city council when the mayor rebuked and subsequently removed a citizen from a meeting for speaking on the council’s general spending habits instead of the topic at hand. It explained, [W]e . . . consider the mayor’s interest in controlling the agenda and preventing the disruption of the commission meeting sufficiently significant to satisfy the requirement that a valid regulation of time, place, and manner serve a significant governmental interest. Jones, 888 F.2d at 1333.

The court also found that the means employed by the mayor to achieve the stated interest were tailored narrowly enough to meet the narrow tailoring requirement for restrictions on time, place, and manner, and that ample alternative channels of communication were available. The citizen could have spoken on general spending policies of the commission during a regular period for public discussion of non-agenda items at the end of the meeting. Jones, 888 F.2d at 1333–34.

Another illustrative case, Wright v. Anthony, 733 F.2d 575 (8th Cir. 1984), involved a public hearing at which a speaker, Albert R. Wright, was interrupted after his allotted time of five minutes had elapsed. Wright sued. The court held in favor of the defendants, United States Representative Beryl Anthony and others, explaining that Representative Anthony’s action was not caused by the content of Wright’s message and that the restriction may be said to have served a significant governmental interest in conserving time and in ensuring that others had an opportunity to speak. Thus, it does not appear that the limitation placed on Wright’s speech was unreasonable. Wright, 733 F.2d at 577. The court also noted that Wright was not prevented from introducing all of his prepared text into the written record; he was merely prevented from reading all of it aloud. Wright, 733 F.2d at 577.
42. Freeland, 273 N.C. at 457, 160 S.E.2d at 286.
43. Freeland, 273 N.C. at 457, 160 S.E.2d at 286.
44. See Wright, 733 F.2d at 575; Collinson, 895 F.2d at 994; respectively.
45. See, e.g., Tannenbaum v. City of Richmond Heights, 663 F. Supp. 995 (E.D. Mo. 1987) (finding in favor of the city when the plaintiff was removed from a city council meeting and arrested for refusing to confine her comments to the citizen-comment portion of the meeting); Kalk v. Village of Woodmere, 500 N.E.2d 384, 388–89 (Ohio Ct. App. 1985) (citation omitted) [holding that the right to regulate its own meetings and hearing is an inherent part of the [municipal] legislature’s power to make decisions, pass laws and, in the instant case, to determine the merits of a complaint lodged against an official of the municipality ]; New Jersey v. Smith, 218 A.2d 147 (N.J. 1966) (upholding the conviction of
a person who was removed from a city council meeting and convicted of violating a state statute that prohibited disturbing or interfering with the quiet or good order of a place of assembly by noisy or disorderly conduct).

46. Professor Van Alstyne thinks it a virtual certainty that a qualified right of this sort will be recognized when a suitable case is presented to the Supreme Court, even though the courts in certain federal district court cases have held to the contrary e.g., Stengel v. City of Columbus, 737 F. Supp. 1457 (S.D. Ohio 1988); Green v. City of Moberly, 576 F. Supp. 540 (E.D. Mo. 1983). Letter from Van Alstyne to Bell, April 11, 1997 (see note 22).

47. Moore, 345 N.C. at 369, 481 S.E.2d at 23. The court also noted that when Moore spoke at the hearings and the meetings, he was using a public forum. Moore, 345 N.C. at 369, 481 S.E.2d at 23.


50. Tinker, 393 U.S. at 505 (citations omitted).


54. As a practical matter, when items of apparel are concerned, it may be difficult to distinguish between public-comment portions and other parts of a meeting.


56. Godwin, 408 So. 2d at 1217–19.


58. U.S. Const. amend. XIV, / 1; N.C. Const. art. I, / 19.

59. When the exercise of freedom of speech involves speech concerning religious matters, the United States Supreme Court will be particularly protective:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Employment Div., Dept of Human Resources of Ore. v. Smith, 494 U.S. 872, 881 (1990) (citations omitted). But the Court will balance this notion of protection with the idea that an individual’s religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. Smith, 494 U.S. at 878–79. Similarly the Supreme Court has stated that proponents of ideas cannot determine entirely for themselves the time and place and manner for the diffusion of knowledge or for their evangelism. . . . Jones v. Opelika, 316 U.S. 584, 594 (1942).
North Carolina has no statute dealing specifically with the crime of trespass on property owned by the government, and there is hardly any North Carolina case law on the subject. Nevertheless, general principles of the law of trespass, and case law from other jurisdictions, establish that the crime of trespass may be applied to government-owned property. This paper offers a short summary of the law.

1. The crime of trespass may be committed on public property as well as on private property.
   a. “The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” Adderley v. State of Florida, 385 U.S. 39, 47 (1967). In Adderley the Supreme Court upheld the trespass conviction of protestors who refused to leave jail grounds when ordered by the sheriff. There was no evidence that the sheriff was motivated by any reason other than wanting to preserve the grounds for jail use.
   b. “There is little doubt that in some circumstances the Government may ban the entry on to public property that is not a ‘public forum’ of all persons except those who have legitimate business on the premises.” United States v. Grace, 461 U.S. 171 (1983).
   c. The North Carolina Court of Appeals in In re S.M.S., ___ N.C. App. ___, 675 S.E.2d 44 (2009), upheld a male juvenile’s adjudication of delinquency for second-degree trespass based on his entry into the girls’ locker room. The court treated the case the same as trespass on privately-owned property which is open to the public, giving no particular significance to the fact that the property was government-owned. Using that analysis the court found that the defendant had sufficient notice that he was not authorized to be in the locker room.
      i. In State v. Winston, 45 N.C. App. 99 (1980), the defendant was charged with unlawful entry into a building under the breaking and entering statute, not trespass, but the court’s reasoning about consent is useful for trespass cases. The charge against the defendant was based on entry into an assistant clerk’s office in the county courthouse. The court held that because the office generally was open to the public the defendant had implied consent to enter and, therefore, could not be convicted of unlawful entry. The significance of the case for trespass on government-owned property is that often the initial entry to the property will be lawful, and a crime will be committed only after the person is instructed to leave.

2. The public is not entitled to access to property just because the property is owned by the government.
   a. “It is settled law that ‘the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.'” Hemmati v. United

b. “It is axiomatic that mere public ownership of property does not permit access. Defense installations, taxing authority offices, and scores of other publicly owned facilities are routinely off-limits for citizens without prior arrangement. Even other facilities, such as parks, may provide for a conditional entry requiring the payment of a fee, for example.” State v. Occhino, 572 N.W.2d 316, 319-20 (Minn. Ct. App. 1998). The defendant in Occhino was convicted of trespass after refusing to leave the desk area of the police department as ordered by the officer in charge. Occhino had become disruptive and was interfering with the officer’s performance of her duties.

c. The North Carolina Court of Appeals rejected the respondent’s argument in In re S.M.S., supra, “that he was lawfully permitted to enter the girls’ locker room because it was located on school property, which is open to the public.”

3. A person who becomes disruptive or threatening or interferes with the intended use of government-owned property can be ordered to leave, and charged with trespass for refusing, even though the property normally is open to the public.

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b. In Hemmati v. United States, supra, the defendant lawfully entered a United States senator’s office but was asked to leave, and was subsequently convicted of trespass for refusing. Hemmati was asked to leave because he had been disruptive in the past, a staff assistant was feeling frightened, and Hemmati would not explain the reason for his visit.

c. In Turney v. State, 922 P.2d 283 (Alaska Ct. App. 1996), the court said that the defendant could be charged with trespass after refusing to leave courthouse grounds when ordered to do so because his shouting through a bullhorn was disrupting court proceedings. The defendant’s conviction was reversed, however, because the order to leave was for a different occasion than the one charged in the trespass case.

d. Although a state university campus is generally open to the public, campus security officers may charge a person with trespass when he has been banned from campus because of threats to a student. Souders v. Lucero, 196 F.3d 1040 (9th Cir., 1999). “Whatever right he [defendant] has to be on campus must be balanced against the right of the University to exclude him. The University may preserve such tranquility as the facilities’ central purpose requires. See Laurence H. Tribe, American Constitutional Law 690 (1980). Not only must a university have the power to foster an atmosphere and conditions in which its educational mission can be carried out, it also has a duty to protect its students

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by imposing reasonable regulations on the conduct of those who come onto campus.” At 1045.

4. First Amendment concerns must be taken into account in trespass on public property. Some government property may be placed off limits to any political demonstration or activity, while other property may be considered a public forum and must accommodate free expression activities. Even if the property is a public forum, however, the government may place reasonable time, place and manner restrictions on the use of the property, and a user who violates those restrictions may be charged with trespass.

   a. The fact that property is government owned does not make it a public forum. Hemmati v. United States, supra. Nor does the fact that the public is given access to the property by itself create a public forum. “Publicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.” United States v. Grace, 461 U.S. 171, 177 (1983).

      i. “[T]he Supreme Court has held that there are some areas in which the Government may absolutely prohibit the exercise of First Amendment rights. Jails, for instance, may be put off limits to parades and other political demonstrations. Adderly v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). The area surrounding a courthouse may be similarly immunized. Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (’Cox II’). Libraries, schools, and hospitals have been occasionally referred to by the Supreme Court as other areas which the state may shield from the clamor of political demonstrations. See Gregory v. Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (Black, J., concurring at 118)(1969). Wildlife sanctuaries, botanical gardens, and similar recreational facilities are probably still others.” Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F.Supp. 575, 583 (D.C.), aff’d, 409 U.S. 972 (1972).

      ii. The state may prohibit picketing at or near a courthouse. Cox v. Louisiana, 379 U.S. 559 (1965). “There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create.” At 562.

      iii. G.S. 14-225.1, similar to the Louisiana statute upheld in Cox v. Louisiana, prohibits picketing, parading or using a sound truck or like device within 300 feet of a courthouse or the residence of a judge, juror, witness or prosecutor, with the intent to interfere with the administration of justice or influence a judge, juror, etc.

   b. A ban on all political speeches and demonstrations may be enforced on traditionally restricted government property, such as a military base, even if portions of the property are open to the public. Greer v. Spock, 424 U.S. 828 (1976). “[I]t is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.” At 838.

      i. “Military bases generally are not public fora, and Greer expressly rejected the suggestion that ‘whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a ‘public forum’ for purposes of the First Amendment.’” 424 U.S.

ii. The military base does not become a public forum just because it invites the public to an open house. “Nor did Hickham [Air Force Base] become a public forum merely because the base was used to communicate ideas or information during the open house.” *Albertini*, supra, at 686.

c. Some government-owned property by its nature is a public forum and must be open to First Amendment expression. “[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely. . . .” *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1967).

i. While the building and grounds of the United States Supreme Court might not be a public forum, the public sidewalks bordering those grounds are no different than other public sidewalks and must be open for expressive activity. *United States v. Grace*, supra.

ii. The Capitol Grounds must be open for First Amendment activity. *Jeannette Rankin Brigade*, supra.

d. Even if government property is a public forum, however, the government may impose reasonable time, place and manner restrictions on that activity, and violators may be charged with trespass or disorderly conduct. “Even in areas clearly ‘public’ it has long been settled that governments may reasonably regulate the times, places, and manner in which the rights of free speech, assembly, and petition are exercised.” *Jeannette Rankin Brigade*, supra, at 584.

i. A rule against overnight sleeping was a reasonable National Park Service regulation as applied to a demonstration at the national Mall and Lafayette Park in Washington. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). While demonstrators against homelessness were entitled to a Park Service permit to establish a symbolic tent city at those locations, the rule barring camping in the parks was a reasonable regulation intended to serve the substantial interest in maintaining the parks in an attractive and intact condition and did not impose an undue burden on the demonstrators’ free speech rights.

ii. Even if a demonstrator was entitled to exercise free speech rights on the White House grounds, he could be ordered to leave and charged with trespass for refusing to leave at the posted noon closing hour. *Leiss v. United States*, 364 A.2d 803 (D.C. Ct. App., 1976). The closing hour was a reasonable restriction to preserve the order, efficiency and privacy needed for the use of the White House for its intended purposes.

e. The restrictions on the time, place and manner of First Amendment activity at a public forum may be communicated in any manner that reasonably informs the user of the restriction.

i. The restrictions may be incorporated into published regulations. See, e.g., *Clark v. Community for Creative Non-Violence*, supra.

ii. “A fence, a gate, or any other barrier which controls public access to property gives notice to persons that they do not have a legal right to

iii. The restriction on hours of use may be communicated by posting it on a sign.  *See, e.g., Leiss v. United States, supra.*

iv. The restriction may be communicated by a guard (*e.g.*, *Leiss, supra*), an administrative assistant in charge of the property (*e.g.*, *Hemmati, supra*), the officer on duty in charge of the office at the time (*e.g.*, *Occhino, supra*), or other person with authority over the property.

5. In some jurisdictions trespass on government property requires proof of different elements or has different remedies than trespass on private property. Examples are:

   a. In the District of Columbia, trespass on government-owned property requires proof of an additional element, that the person lacks a legal right to be on the property.  *See Hemmati v. United States, supra; Leiss v. United States, supra; United States v. Powell, supra.*  Cases from the District of Columbia, therefore, often involve a discussion of the means by which the prosecution establishes that the person had no right to be on the property.  *See, for example, United States v. Powell,* and its discussion of the use of gates or fences or barricades to prove that element.

   b. In Alaska, a person may be barred permanently from private property but not from public property.  The Alaska court says its law is the same as New York's on this issue.  *See Turney v. State, supra.*  The opinion notes that some government agencies obtain civil injunctions to bar individuals from entering government property for unauthorized purposes, and that some jurisdictions have statutes allowing officials to bar individuals from returning to specified facilities.

6. While North Carolina does not have a statute generally addressing trespass on government-owned property, there are a variety of crimes concerning activities on certain kinds of government property. Among those are:

   a. G.S. 14-130, erecting a building on state-owned land or removing timber without permission.
   b. G.S. 14-132, disorderly conduct in public buildings and facilities, including committing a nuisance near a public building or facility.
   c. G.S. 14-225.1, picketing a courthouse (see the discussion above).
   d. G.S. 14-288.4(a)(3), seizing a building or facility of a public or private educational institution.
   e. G.S. 14-288.4(a)(4), refusing to vacate a building or facility of a public or private educational institution upon a lawful order to do so.
   f. G.S. 14-288.4(a)(5), blocking ingress or egress or otherwise interfering with the functioning of a building of a public or private educational institution after being forbidden to do so.
TRESPASS ON GOVERNMENT-OWNED PROPERTY

Michael Crowell
UNC School of Government
May 2010

North Carolina has no statute dealing specifically with the crime of trespass on property owned by the government, and there is hardly any North Carolina case law on the subject. Nevertheless, general principles of the law of trespass, and case law from other jurisdictions, establish that the crime of trespass may be applied to government-owned property. This paper offers a short summary of the law.

1. The crime of trespass may be committed on public property as well as on private property.

   a. “The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” Adderley v. State of Florida, 385 U.S. 39, 47 (1967). In Adderley the Supreme Court upheld the trespass conviction of protestors who refused to leave jail grounds when ordered by the sheriff. There was no evidence that the sheriff was motivated by any reason other than wanting to preserve the grounds for jail use.

   b. “There is little doubt that in some circumstances the Government may ban the entry on to public property that is not a ‘public forum’ of all persons except those who have legitimate business on the premises.” United States v. Grace, 461 U.S. 171 (1983).

   c. The North Carolina Court of Appeals in In re S.M.S., ___ N.C. App. ___, 675 S.E.2d 44 (2009), upheld a male juvenile’s adjudication of delinquency for second-degree trespass based on his entry into the girls’ locker room. The court treated the case the same as trespass on privately-owned property which is open to the public, giving no particular significance to the fact that the property was government-owned. Using that analysis the court found that the defendant had sufficient notice that he was not authorized to be in the locker room.

      i. In State v. Winston, 45 N.C. App. 99 (1980), the defendant was charged with unlawful entry into a building under the breaking and entering statute, not trespass, but the court’s reasoning about consent is useful for trespass cases. The charge against the defendant was based on entry into an assistant clerk’s office in the county courthouse. The court held that because the office generally was open to the public the defendant had implied consent to enter and, therefore, could not be convicted of unlawful entry. The significance of the case for trespass on government-owned property is that often the initial entry to the property will be lawful, and a crime will be committed only after the person is instructed to leave.

2. The public is not entitled to access to property just because the property is owned by the government.

   a. “It is settled law that ‘the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.’” Hemmati v. United

b. “It is axiomatic that mere public ownership of property does not permit access. Defense installations, taxing authority offices, and scores of other publicly owned facilities are routinely off-limits for citizens without prior arrangement. Even other facilities, such as parks, may provide for a conditional entry requiring the payment of a fee, for example.” State v. Occhino, 572 N.W.2d 316, 319-20 (Minn. Ct. App. 1998). The defendant in Occhino was convicted of trespass after refusing to leave the desk area of the police department as ordered by the officer in charge. Occhino had become disruptive and was interfering with the officer's performance of her duties.

c. The North Carolina Court of Appeals rejected the respondent's argument in In re S.M.S., supra, “that he was lawfully permitted to enter the girls' locker room because it was located on school property, which is open to the public.”

3. A person who becomes disruptive or threatening or interferes with the intended use of government-owned property can be ordered to leave, and charged with trespass for refusing, even though the property normally is open to the public.

a. In State v. Occhino, supra, the defendant was convicted of trespass for refusing to leave a police desk area. “The jury evidently concluded that Occhino lawfully entered the police desk area, but his unruly and disruptive behavior terminated that right. Officer Pauly, who was the person in charge, rightfully and lawfully ordered him to leave.” Occhino, at 319.

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4. First Amendment concerns must be taken into account in trespass on public property. Some government property may be placed off limits to any political demonstration or activity, while other property may be considered a public forum and must accommodate free expression activities. Even if the property is a public forum, however, the government may place reasonable time, place and manner restrictions on the use of the property, and a user who violates those restrictions may be charged with trespass.

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      iii. G.S. 14-225.1, similar to the Louisiana statute upheld in Cox v. Louisiana, prohibits picketing, parading or using a sound truck or like device within 300 feet of a courthouse or the residence of a judge, juror, witness or prosecutor, with the intent to interfere with the administration of justice or influence a judge, juror, etc.

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iii. The restriction on hours of use may be communicated by posting it on a sign. See, e.g., Leiss v. United States, supra.

iv. The restriction may be communicated by a guard (e.g., Leiss, supra), an administrative assistant in charge of the property (e.g., Hemmati, supra), the officer on duty in charge of the office at the time (e.g., Occhino, supra), or other person with authority over the property.

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   f. G.S. 14-288.4(a)(5), blocking ingress or egress or otherwise interfering with the functioning of a building of a public or private educational institution after being forbidden to do so.
Public Records
Citizen Information

The county has created an electronic newsletter and has invited citizens to sign up to receive information about pending public issues and activities. A local business has requested a copy of all the email addresses of citizens who have signed up to received electronic notice under the new program.

Must the county provide the emails?
May the county prohibit the business from using the information to solicit citizens?
Citizen Information

The local newspaper wants an electronic copy of all emails between commissioners and citizens regarding a pending economic development project. In order to protect the private email addresses of citizens, the commissioners prefer to provide the emails on paper.

What do you advise?

Citizen Information

The county’s new Facebook page was a real step forward in citizen engagement efforts…until a disgruntled former employee began to post insulting and false statements about the county manager.

Can these posts be deleted?
Are the comments on Facebook and the “tweets” on the Twitter site public records?
Must they be archived?
Employee Information – What’s Public?

• Salary history for all current and former employees for the past 10 years.
  _____ Yes _____ No

• Reasons for recent suspension of public works director.
  _____ Yes _____ No

New Records/Information that is Public – Effective Oct. 1, 2010

• Date and amount of each increase or decrease in salary
• Date and type of each promotion, demotion, transfer, suspension, separation, or other change in position classification
• Date and general description of reasons for each promotion
New Records/Information that is Public – Effective Oct. 1, 2010

• If the disciplinary action was a dismissal, a copy of the written notice of the final decision…setting forth the specific acts or omissions that are the basis of the dismissal.

Employee Information – What’s Public?

• General description of reasons for January 1, 2011 promotion of assistant county manager to manager.

      _____ Yes      _____ No

• Copy of written notice stating reasons for Jan.1, 2011 dismissal of former county manager – Does the county have to create?

      _____ Yes_______ No ______Time Will Tell
Coates’ Canons – Related Blog Posts

- Attorney General Opinion on Personnel Privacy Changes-Hot Off The Press
- Is Metadata a Public Record? Case Law Update
- Waiting for Interpretations of the New Personnel Privacy Provisions: What Options Do Local Governments Have?
- Citizen Participation Information as Public Record
- Free Speech Rights in Government Social Media Sites
- Coates’ Canons: Search here for other local government law topics of interest