North Carolina Legislation

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A summary
of legislation
in the 2005
General Assembly
of interest to North
Carolina public
officials

Edited by Martha H. Harris

UNC
SCHOOL OF GOVERNMENT

School of Government, UNC Chapel Hill

Established in 1931, the Institute of Government provides training, advisory, and research services to public officials and others interested in the operation of state and local government in North Carolina. The Institute and the university's Master of Public Administration Program are the core activities of the School of Government at The University of North Carolina at Chapel Hill.

Each year approximately 14,000 public officials and others attend one or more of the more than 200 classes, seminars, and conferences offered by the Institute. Faculty members annually publish up to fifty books, bulletins, and other reference works related to state and local government. Each day that the General Assembly is in session, the Institute's *Daily Bulletin*, available in electronic format, reports on the day's activities for members of the legislature and others who need to follow the course of legislation. An extensive Web site (www.sog.unc.edu) provides access to publications and faculty research, course listings, program and service information, and links to other useful sites related to government.

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

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Editor's Preface

Since 1955 the UNC Chapel Hill School of Government's Institute of Government has published periodic summaries of legislation enacted by the North Carolina General Assembly. Initially these summaries were published in special issues of *Popular Government*. Beginning in 1974, however, the Institute began publishing the summaries annually as a separate book, *North Carolina Legislation*.

North Carolina Legislation 2005 is the forty-second of these summaries and deals with newly enacted legislation of interest and importance to state and local government officials. It is organized by subject matter and divided into twenty-six chapters. In some instances, to provide different emphases or points of view, the same legislation is discussed in more than one chapter. Each chapter was written by a School of Government professional staff or faculty member with expertise in the particular field addressed.

The text of all bills discussed in this book may be viewed on the Internet at the General Assembly's Web site: www.ncleg.net. This site also includes a detailed legislative history of all action taken on each bill and, for some bills, a summary of the bill's fiscal impact. Subscribers to the *Daily Bulletin* have Web access to complete digests for every version of each bill from 1987 through the current session, at dailybulletin.unc.edu/.

Albeit comprehensive, this book does not summarize every legislative enactment of the 2005 General Assembly. For example, some important legislation that does not have a substantial impact on state or local governments, such as that involving business regulation or insurance, is not discussed at all. Local legislation, if addressed, often is treated only briefly. Readers who need information on public bills not covered in this book may wish to consult *Summaries of Substantive Ratified Legislation, 2005 General Assembly*, which contains brief summaries of all public laws enacted during the session. This compilation is published by the General Assembly's Research Division and posted on the Internet at the General Assembly's Web site at www.ncleg.net/LegislativePublications/researchdivisio_/summariesofsubs_/. A list of General Statutes affected by 2005 legislation, prepared by the General Assembly's Bill Drafting Division, is online at the same site, at www.ncleg.net/LegislativePublications/billdraftingdiv_/billsslsandncgs_/.

The Institute of Government also publishes a separate report, the *Index of Legislation,* that provides additional information with respect to public and private bills considered in 2005, including (1) status reports for all public bills and resolutions; (2) status reports for all ratified public bills and resolutions, which are arranged by General Statutes chapter or special category; (3) index of public bills, arranged by number; (4) status reports for local bills, arranged by counties affected; (5) index of local bills, arranged by bill number; and (6) chronological listing of all bills (public and local) and

resolutions ratified in 2005. This publication can be purchased through the School of Government Publications Sales Office (telephone: 919-966-4119; e-mail: sales@iogmail.iog.unc.edu; Web: www.sogpubs.unc.edu/books.php?cat=14).

Each day the General Assembly is in session, the Institute's Legislative Reporting Service publishes the *Daily Bulletin*. The *Daily Bulletin* includes summaries written by School of Government professional staff and faculty members of every bill and resolution introduced in the state House of Representatives and Senate; summaries of all amendments, committee substitutes, and conference reports adopted by the House or Senate; and a daily report of all legislative action taken on the floor of both chambers. The *Daily Bulletin* is available by paid subscription, with delivery via fax or e-mail and on the Web. For information about subscriptions, contact the School of Government Publications Sales Office (telephone: 919-966-4119; e-mail: sales@iogmail.iog.unc.edu; Web: www.sogpubs.unc.edu/books.php?cat=14).

Throughout the book, references to legislation enacted during the 2005 session are cited by the Session Law number of the act (for example, S.L. 2005-105), followed by a parenthetical reference to the number of the Senate or House bill that was enacted (for example, S 236). Generally the effective date of new legislation is not noted if it is before the production date of this book. References to the General Statutes of North Carolina are abbreviated as G.S. (for example, G.S. 105-374).

Martha H. Harris

1

The General Assembly

The 2005 General Assembly convened on January 26, 2005, and adjourned on September 2, 2005. This chapter provides an overview of the 2005 session, concentrating on the organization of each house, the difficulties encountered during the session, major legislation enacted, and unfinished business.

The House of Representatives

In the November 2004 election for members of the 2005 North Carolina General Assembly, sixty-three Democrats and fifty-seven Republicans were elected to the House of Representatives. In contrast to the 2003 House membership, which was tied between Democrats and Republicans at 60–60 after Representative Michael Decker's switch to the Democratic Party, the 2005 House Democrats enjoyed a slim majority.

The House convened at noon on January 26, 2005, and James Black was elected Speaker for a fourth term by an overwhelming margin, bringing the historic co-speakership between Representatives Richard Morgan and James Black to an end. However, in an effort to continue some aspects of the power-sharing arrangement used so successfully in the 2003 House, the bill that elected Black as Speaker also created the Office of Speaker Pro Tempore and elected Richard Morgan to that post. Speaker Pro Tempore Morgan was also authorized to appoint chairs to certain committees as designated by the Speaker. Speaker Pro Tempore Morgan often presided over the House during the 2005 session, but less frequently than in the 2003 session. In addition, the divisions among the House Republicans narrowed and they often voted as a bloc on major legislation. Divisions among House Democrats became more pronounced, however, and the so-called business Democrats joined with the Republicans to thwart legislation seen as anti-business, such as the proposed increase in the minimum wage and the prohibition against smoking in restaurants.

The change in the dynamics of the House may have contributed to the delay in the passage of the 2005 budget. The budget was finally ratified on August 11, 2005, six weeks and three continuing budget resolutions after the new fiscal year began on July 1.

The demographics of the 2005 House can be broken down as follows:

- Thirty-two women, three more than in 2003
- Eighty-eight men
- Nineteen African Americans, one more than in 2003
- One Native American
- One representative of Hispanic ancestry

Table 1-1 lists the 2005 House officers.

Table 1-1. Officers of the 2005 House of Representatives

James B. Black, Mecklenburg County, Speaker
Richard T. Morgan, Moore County, Speaker Pro Tempore
Joe Hackney, Orange County, Democratic Leader
Joe Kiser, Lincoln County, Republican Leader
Larry M. Bell, Sampson and Wayne counties, Hugh Holliman, Davidson County, and Marian N. McLawhorn, Pitt County, Democratic Whips
Mitch Gillespie, Burke and McDowell counties, Republican Whip
Denise G. Weeks, Principal Clerk
Robert R. Samuels, Sergeant-at-Arms

The Senate

The Democrats retained a comfortable majority in the 2005 Senate but regained only one of the seven seats lost to the Republicans in 2003. There were twenty-nine Democrats, compared to twenty-eight in 2003, and twenty-one Republicans, compared to twenty-two in 2003. Senator Marc Basnight was unanimously elected the President Pro Tempore of the Senate for a historic seventh term. He continued his practice of appointing Republicans as committee cochairs: Senator John A. Garwood, Committee on Education and Higher Education; Senator Stan Bingham, Health Care Committee; Senator Austin M. Allran, Pensions & Retirement and Aging Committee; and Senator Don East, State Government & Local Government Committee. Senator Fletcher L. Hartsell Jr. was also reappointed chair of the Judiciary II Committee. Following the House's decision in 2003 to ban smoking in the House chamber, the 2005 Senate Rules Committee banned smoking in the Senate chamber.

Seven women served in the 2005 Senate, as in 2003, and seven African Americans served, compared to six in 2003.

The 2005 Senate officers and leadership are shown in Table 1-2.

Table 1-2. 2005 Senate Officers and Leadership

Beverly E. Perdue, Lieutenant Governor, President
Marc K. Basnight, Dare**,** Beaufort, Camden, Currituck, Hyde, Pasquotank, Tyrell, and Washington counties, President Pro Tempore
Charlie S. Dannelly, Mecklenburg County, Deputy President Pro Tempore
Tony Rand, Bladen and Cumberland counties, Majority Leader
Phil Berger, Guilford and Rockingham counties, Minority Leader
Tom Apodaca, Buncombe, Henderson, and Polk counties, Deputy Minority Leader
Jeanne H. Lucas, Durham County, Majority Whip
Jerry W. Tillman, Montgomery and Randolph counties, Minority Whip
Andrew C. Brock, Davie and Rowan counties, Deputy Minority Whip
R. C. Soles Jr., Brunswick, Columbus, and Pender counties, Chair, Democratic Caucus

Phil Berger, Guilford and Rockingham counties, Republican Leader
Janet B. Pruitt, Principal Clerk
Cecil R. Goins, Sergeant-at-Arms

Statistical Comparison

Table 1-3 compares the 2005 session with other odd-year sessions of the past ten years.

Table 1-3. Statistical Comparisons of Recent Odd-Year Sessions

	1995	1997	1999	2001	2003	2005
Date convened	Jan. 25	Jan. 29	Jan. 27	Jan. 24	Jan. 29	Jan. 26
Date adjourned	Jul. 29	Aug. 28	Jul. 21	Dec. 6	Jul. 20	Sept. 2
Senate legislative days	109	123	101	173	102	126
House legislative days	108	123	103	179	102	125
Senate bills introduced	1,103	1,089	1,175	1,109	1,028	1,184
House bills introduced	1,070	1,245	1,489	1,478	1,340	1,800
Total bills introduced	2,173	2,334	2,664	2,587	2,368	2,984
Session Laws Enacted	546	528	462	519	433	463
Vetoes		0	0	0	2	2
Joint resolutions ratified	15	33	22	36	32	58
Simple resolutions adopted	7	11	24	10	19	26
Total measures passed	568	572	508	565	484	547
% measures passed	26.1%	24.5%	19.0%	21.8%	20.4%	18.3%

Major Legislation Enacted by the 2005 General Assembly

The 2005 General Assembly enacted a number of significant pieces of legislation, some of which are listed here.

Hurricane Relief

S.L. 2005-1 (S 7), enacted within a month of convening, appropriates $247.5 million in relief funds to assist western North Carolina in its recovery from damage caused by Hurricanes Frances and Ivan in September 2004.

State Lottery Act

S.L. 2005-344 (H 1023) establishes the N.C. State Lottery to be overseen by a nine-member N.C. State Lottery Commission. This act is discussed in Chapter 24, "State Government."

Election Law Changes

In response to malfunctioning voting machines and uncertainty over provisional ballots, the 2005 General Assembly enacted the following laws designed to improve elections procedures:

1. S.L. 2005-159 (H 1102) authorizes county boards of elections to count ballots cast at one-stop voting sites at the same time they count other absentee ballots.

2. S.L. 2005-323 (S 223) authorizes the State Board of Elections to certify only voting systems that generate a paper ballot that can be verified by the voter and requires the State Board of Elections to provide for sample hand-to-eye counts of paper ballots or records. The act also establishes a detailed request for proposal process for the purchase of voting systems to be used in the 2006 elections.
3. S.L. 2005-428 (H 1115) revises various voting registration and election day procedures.
4. S.L. 2005-449 (H 1128) amends various campaign finance laws.

These revisions to the state election laws are discussed in Chapter 9, "Elections."

State Superintendent of Public Instruction Race

In addition to the generalized election law changes outlined above, the General Assembly enacted S.L. 2005-3 (S 82), which establishes procedures under which the General Assembly can resolve legislative and executive election contests, a power granted to the General Assembly by Article II, Section 20, and Article IV, Section 5, of the North Carolina Constitution. The General Assembly also enacted S.L. 2005-2 (S 133) to retroactively restore 11,310 out-of-precinct ballots cast in the State Superintendent of Public Instruction race. Both actions culminated in an August 23, 2005, joint session of the General Assembly during which the election dispute was resolved in favor of Ms. June Atkinson.

Court Changes

The General Assembly enacted S.L. 2005-425 (H 650) to authorize the assignment of special superior court judges to hear and decide complex business cases and S.L. 2005-149 (S 321) to authorize persons seventy-two years old or older to request an exemption from jury service. S.L. 2005-67 (H 1015) authorizes superior court clerks to order mediation in any matter over which the clerk has exclusive or original jurisdiction, except for matters brought under G.S. Chapters 45 (Mortgages and Deeds of Trust) and 48 (Adoptions). The General Assembly also enacted S.L. 2005-100 (H 878) establishing the Conference of Clerks of Superior Court. These provisions are discussed in Chapter 6, "Courts and Civil Procedure."

Children and Juveniles

S.L. 2005-194 (H 1346) adopts the Interstate Compact for Juveniles to establish uniform means to regulate the movement of juveniles under court supervision across state lines, effective when adopted by a total of thirty-five states. S.L. 2005-398 (H 1150) rewrites G.S. 7B-602 to require the appointment of "provisional counsel" for every respondent parent when an abuse, neglect, or dependency petition is filed. S.L. 2005-320 (H 801) addresses situations in which (1) both a juvenile court order and a G.S. Chapter 50 order determine the custody of a child or (2) a custody order entered in a juvenile proceeding is intended to be as permanent as a Chapter 50 order and there is no need for the juvenile court to continue to be involved in the matter. These acts are all discussed in detail in Chapter 4, "Children, Families, and Juvenile Law."

Criminal Law Changes

S.L. 2005-130 (H 1209) expands the list of persons from whom DNA samples must be taken to include all persons convicted of sexual battery offenses and makes sexual battery a reportable offense under the sex offender registration program. S.L. 2005-145 (H 822) requires that a jury determine if an aggravating factor is present in an offense, unless the defendant admits to the factor or the presence of the factor is based upon a previous adjudication of delinquency. The act also makes other changes regarding aggravating factors in criminal cases to conform to a recent decision by the U.S. Supreme Court. S.L. 2005-295 (H 1436) adds to the list of aggravating factors for a capital offense the fact that a felony was committed in violation of a valid protective order. S.L. 2005-189 (H 288) increases the penalty for a driver's failure to move over or slow a vehicle in response to an emergency vehicle to a

Class I felony if the driver's actions result in the death of emergency response personnel, a Class 1 misdemeanor if those actions result in property damage over $500 or injury to those persons, and an infraction for all other violations. S.L. 2005-460 (H 217) makes it a Class H felony for a passenger of a vehicle to leave the scene of an accident involving personal injury or death and a Class 1 misdemeanor for the passenger to leave the scene of any reportable accident.

These provisions are discussed in Chapter 7, "Criminal Law and Procedure."

Public Records

The 2005 General Assembly enacted three significant new laws concerning public records. S.L. 2005-414 (S 1048) enacts the Identity Theft Protection Act of 2005, which seeks to protect against identity theft by restricting public access to Social Security account numbers and other personal identifying information. S.L. 2005-332 (S 856) protects the trial preparation materials of government lawyers from public access. S.L. 2005-429 (S 393) concerns public access to records of economic development projects. These acts are summarized in Chapter 20, "Public Records."

Animal Shelters

The Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), amends the definition of "animal shelter" in the Animal Welfare Act to clarify that all of the provisions of the Act apply not only to private shelters but also to those owned, operated, or maintained by or under contract with a local government. The definition of "animal shelter" was also expanded to encompass facilities affiliated with nonprofit organizations devoted to animal rehabilitation. These and other changes relating to animal control are summarized in Chapter 14, "Local Government and Local Finance."

Aedin's Law

S.L. 2005-191 (S 268) requires that petting zoos obtain a permit from the Commissioner of Agriculture and take measures to prevent transmission of diseases from animals to persons visiting the zoos.

Recreation Vehicles Regulation

S.L. 2005-161 (H 702) increases the minimum age for the operation of a personal watercraft from twelve to fourteen. S.L. 2005-282 (S 189) prohibits children under eight years old from driving all-terrain vehicles (ATVs) and provides that children aged eight to fifteen may drive only ATVs with engines smaller than 90 cubic centimeters. The act also imposes safety and equipment standards for operating ATVs and requires that operators born after January 1, 1990, participate in an ATV safety course.

Prison Smoking

S.L. 2005-372 (S 1130) bans the use of tobacco products inside state prisons by inmates, visitors, and employees and calls for a pilot program that would prohibit smoking both inside prison buildings and on prison grounds and make smoking cessation programs available to inmates and staff.

Planning and Development

Legislation in 2005 created the most substantial amendments in decades to the state's planning and development regulation statutes. Two major bills were adopted—S.L. 2005-418 (S 518), An Act to Clarify and Make Technical Changes to City and County Planning Statutes; and S.L. 2005-426 (S 814), An Act to Modernize and Simplify City and County Planning and Land-Use Management Statutes—along with a number of additional bills addressing important land use and development

issues. The changes are discussed in detail in Chapter 5, "Community Planning, Land Development, and Related Topics."

Uniform Trust Code

S.L. 2005-192 (S 679) is a modified version of the Uniform Trust Code that provides a more comprehensive codification of North Carolina trust law.

Coastal Fishing Licenses

During the 2004 session, the General Assembly enacted legislation to implement a new saltwater fishing license. In 2005 the legislature enacted S.L. 2005-455 (S 1126), which renames the license as a "coastal recreational fishing license," increases the cost of short-term nonresident licenses, exempts holders of certain lifetime hunting and fishing licenses purchased before January 1, 2006, from the coastal fishing licensing requirements, and creates special blanket coastal fishing licenses applicable to fishing piers and for-hire recreational fishing boats. These new license requirements are effective January 1, 2007.

Control of Pseudoephedrine Sales

In an effort to reduce the production of methamphetamine in North Carolina, S.L. 2005-434 (H 248) requires that certain pseudoephedrine products be stored behind a pharmacy counter and sold only to persons at least eighteen years old who provide photo identification. The act also limits the amount of pseudoephedrine that can be purchased and requires that pharmacies maintain a record of all pseudoephedrine purchases.

Lobbying Regulation

S.L. 2005-456 (S 612) revises the law that requires lobbyist registration and the reporting of certain lobbying expenditures. The act expands the definition of "lobbying" to include the development of goodwill and requires the filing of monthly expenditure reports. It also imposes the same registration and reporting requirements on lobbyists who solicit members of the executive branch. The act establishes a "cooling-off period," prohibiting former legislators and executive branch officials from becoming lobbyists within six months of leaving office.

Workers' Compensation Reform

S.L. 2005-448 (H 99) establishes a twelve-member Study Committee on Workers' Compensation Benefits. It also revises certain workers' compensation claim procedures and creates a rebuttable presumption that an employee was impaired if a blood or other medical test concludes the employee was intoxicated or under the influence of a controlled substance.

Identity Theft Protection

S.L. 2005-414 prohibits businesses from disclosing Social Security numbers and printing those numbers on identification cards issued by the business. It also requires that upon a consumer request, a credit reporting agency must implement a security freeze on the consumer's credit report. The act limits the use or disclosure of Social Security numbers by state and local government agencies as well.

Alcoholic Beverages

S.L. 2005-277 (H 392) increases the maximum alcohol content of malt beverages from 6 to 15 percent.

Unfinished Business

The final three weeks of the 2005 legislative session were characterized by sporadic legislative activity. Compounding the last-minute hustle and bustle that always heralds session's end, in mid-July President Pro Tempore Basnight halted all Senate committee activity while budget conferees worked. The Senate committees resumed business on August 11 with a few days of marathon meetings and late-night sessions in both houses. Although adjournment seemed imminent, it was not to be; the General Assembly took the week of August 15 off while several members attended a national conference of state legislators in Seattle.

The chaotic late-night meetings and the volume of bills considered in the session's final weeks contributed to the accidental presentation to the Governor of a bill that had not passed the Senate. House Bill 1271, amending auctioneer licensing requirements, was signed and became law as S.L 2005-330. Although a bill was introduced in the Senate to repeal House Bill 1271, the new bill was never acted on.

The push toward adjournment resumed during the week of August 22. An adjournment resolution was introduced in the Senate, setting adjournment for August 24. On August 23 the Senate met from 10 a.m. until 6 a.m. the next day. The House met from noon until 4 a.m. Lengthy recesses punctuated both meetings. When the fog lifted the morning of August 24, the General Assembly had not adjourned—as reported by several local news organizations—and the 2005 session dragged on. Observers declared the lottery dead, and President Pro Tempore Basnight announced that the Senate was finished taking action on bills and would return only to act on the adjournment resolution. Speaker Black, on the other hand, determined that the session's work had not been completed, and the House continued to meet into the following week. The Senate returned on August 30, 2005, and to everyone's amazement, passed the lottery bill in the absence of Republican Senators Garwood and Brown. Upon passage of the lottery bill, the Senate left, only to return on September 2, 2005, when both houses finally passed the adjournment resolution during brief morning meetings.

As in 2003, bills authorizing various studies and making technical corrections were not passed. In addition, several bills important to a number of legislators either did not pass both houses or were simply never brought to a vote. These bills are discussed below.

Studies

For many years the General Assembly has enacted a comprehensive studies bill at the end of the session. The studies selected for inclusion in the bill usually originate in one of two ways: (1) several members believe an issue facing the state deserves a thorough examination or (2) a particular bill is considered too controversial to be brought to a vote, but the subject of the bill is important enough to merit further consideration. The studies bill normally authorizes many studies for the Legislative Research Commission, a standing body of the General Assembly, and others for specially appointed study commissions. During the 2005 session, the studies bills were House Bill 413, which was originally a bill relating to global studies and was replaced with the 2005 Studies Act by a Senate committee substitute adopted August 24, and House Bill 1723. Although the Senate passed the committee substitute for House Bill 413, the House referred the bill to Rules, ending its chances for passage in 2005. House Bill 1723 remained in the Senate and was referred to Rules prior to adjournment. Both bills are eligible for consideration in 2006. Apart from those in the studies bills, several important studies are authorized in other bills that were enacted. These studies are discussed in detail in various chapters throughout this book.

Technical Corrections

Usually one of the last acts passed in every session is a technical corrections bill, the purpose of which is to correct technical errors in previously enacted bills. Such errors may include incorrect statutory references, omitted or extra words, or incorrect effective dates. During the week of August 15, 2005, the leadership of the House and Senate hammered out a compromise technical corrections bill, House Bill 327, which was adopted by the Senate on August 23 as a

committee substitute to the original bill. As with past technical corrections bills, the committee substitute contained numerous substantive provisions in addition to technical amendments. The Senate further amended the bill to add a number of additional substantive provisions, provisions on which the House leadership had apparently not agreed. The House failed to concur in the Senate's version, and the technical corrections bill collapsed under the sheer weight of the nontechnical provisions added during the last week of the session. House Bill 327 is, however, eligible for consideration in 2006.

Death Penalty Study and Moratorium

As in the 2003 session, a bill was introduced directing a study of the death penalty and imposing a two-year moratorium on executions during the period of the study. House Bill 529 was subsequently revised to replace the two-year moratorium on the death penalty with a procedure whereby capital defendants could seek a stay of execution while the study was ongoing. Despite being placed on the House calendar numerous times, the bill was never considered by the full House and remained on the calendar at adjournment. It therefore may not be eligible for consideration during the 2006 session. Speaker Black, however, has indicated that he will appoint a committee to study the death penalty, and any proposed legislation the committee recommends would be eligible for consideration in 2006.

Nonsmoking Areas in Restaurants

House Bill 76 as initially drafted would have prohibited smoking in all public restaurants. The bill was later revised to allow smoking in restaurants, but it required that at least 50 percent of a restaurant's seating capacity be designated as a "no-smoking" area. The bill failed second reading and is ineligible for consideration during the 2006 session.

Same-Sex Marriage

Senate Bill 8 would have required a referendum on an amendment to the state constitution to explicitly provide that the uniting of two persons of the same sex in a marriage, civil union, or domestic partnership would be invalid or not recognized in North Carolina. The bill was never considered by the Senate, but because it proposes a constitutional amendment, it is eligible for consideration in the 2006 session.

In-State Tuition for Illegal Immigrants

House Bill 1183 ignited a controversy during the 2005 session, proposing that illegal immigrants who had received a North Carolina high school diploma and had attended North Carolina schools for at least four consecutive years prior to graduation would be eligible for in-state tuition rates at North Carolina community colleges and public universities. As the result of a public uproar and concerns about the proposal's inconsistency with federal law, the bill lost several cosponsors and was never taken up, making it ineligible for consideration in 2006.

Medical Malpractice Reform

Several bills designed to address various concerns about medical malpractice were introduced. House Bill 1229 would have required that the N.C. Medical Board publish information relating to medical malpractice damages awards in excess of $100,000 and settlements of medical malpractice claims. In addition, both houses saw bills designed to revise malpractice claims procedures (Senate Bill 44, Senate Bill 989, and House Bill 1359). Senate Bill 44 would have limited noneconomic damages payable by any health care institution to $250,000 per claimant ($500,000 per claimant where judgment is issued against more than one institution). Senate Bill 989 would have capped noneconomic damages at $500,000 in the case of death and at $350,000 in other cases. House Bill 1359 would have required that, upon a plaintiff's request, a court conduct a posttrial hearing to determine whether a noneconomic damage award of $250,000 or above is excessive and would have

capped noneconomic damages in malpractice actions at $500,000. These bills were not considered by the committees to which they were assigned and never made it to the floor of the house in which they were introduced. They are therefore ineligible for consideration during the 2006 session.

Immigrant Driver's Licenses

In addition to authorizing eight-year driver's licenses and Internet renewal of licenses, House Bill 267 would have required that driver's licenses issued to a person visiting the United States on a limited duration visa expire upon the expiration of that visa. The bill met the crossover deadline and is eligible for consideration during the 2006 session.

Cell Phones and Driving

House Bill 1104 would have banned the use of handheld cell phones while operating a motor vehicle and imposed a $100 fine for a violation. The bill failed second reading in the House and therefore is not eligible for consideration during the 2006 session.

Violent Video Games

Senate Bill 2 would have prohibited retailers from disseminating certain video games to minors, including those that appeal to a minor's morbid interest in violence or that otherwise are patently offensive to community standards. Violation would be a Class 1 misdemeanor. The bill also would have required that retailers provide a separate viewing area for those videos and that retailers inform customers of the availability of industry video game ratings. Having passed third reading in the Senate before the crossover deadline of June 2, Senate Bill 2 is eligible for consideration during the 2006 session.

Workers' Compensation Benefits Restrictions

Senate Bill 984 was one of the more controversial bills considered during the 2005 session. The bill would have limited workers' compensation benefits for total and partial incapacity to the lesser of five hundred weeks or the period ending on the date the injured employee turned sixty-five. Senate Bill 984 was referred to the Senate Commerce Committee, and on May 17, hundreds of the bill's opponents besieged the committee's meeting room. The bill was never considered but some of its less controversial provisions were grafted onto House Bill 99 (originally authorizing a forestry license plate), enacted as S.L. 2005-448.

The Governor's Vetoes

Governor Easley vetoed two bills enacted during the 2005 session, one early in the year and one after adjournment. The first was Senate Bill 130. As originally drafted, Senate Bill 130 would have amended the 2004 budget bill to require that the state transfer to Currituck County for $1 the land on which the Currituck County Airport is situated. On March 10, 2005, a House committee substitute was adopted, adding a provision to require that the state convey the Polk Building in Charlotte to Johnson & Wales University for $1. That property transfer was specifically exempted from a statutory provision requiring the approval of land sales by the Governor and Council of State. The Council of State subsequently approved the sale of the Polk Building to Trinity Capital Advisors LLC for $5.25 million, raising the hackles of the House and Senate leadership. On March 25, 2005, the Governor vetoed Senate Bill 130, stating in his veto message that since the property had already been sold, the state could not lawfully sell the land to Johnson & Wales. On March 29 the Senate rereferred the bill to the Judiciary I committee, effectively sustaining Governor Easley's veto.

Eventually another bill transferring the Currituck County Airport land to Currituck County was ratified and signed by the Governor. S.L. 2005-18 (H 1061) provides that the county would pay the state $40,000, representing the legal fees incurred in an attempt in early 2005 to give Currituck County that land.

The second bill vetoed by the Governor was House Bill 706, which would have provided alternatives to the required standard examinations for prospective teachers to demonstrate their qualifications for certification. The bill was intended to make it easier for school systems to hire teachers trained and licensed in other states. The Governor's veto message stated that the bill would reduce North Carolina teaching standards to the lowest in America and restrict the authority of the State Board of Education over teacher certification. After vetoing the bill on September 29, the Governor called the General Assembly back into a special veto session that was held on October 12. As with Senate Bill 130, the General Assembly did not attempt to override the Governor's veto.

The 2006 Session

The adjournment resolution, Res. 2005-58 (S 1184), provides that the regular 2006 session of the General Assembly will convene at noon on May 9, 2006. Only the following may be considered during that session:

- Bills directly affecting the budget for fiscal 2006–07, if they are introduced by May 25, 2006
- Bills introduced in 2005 that passed third reading in the house of introduction by June 2, 2005, and were not unfavorably disposed of in the other house
- Bills implementing recommendations of various study commissions and committees, if they are introduced by May 17, 2006
- Noncontroversial local bills, if they are introduced by May 24, 2006
- Bills making appointments
- Bills authorized for introduction by a two-thirds vote of both houses
- Bills affecting state or local pension or retirement programs, if they are introduced by May 24, 2006
- Bills proposing constitutional amendments
- Resolutions regarding state government reorganization
- Bills disapproving administrative rules
- Adjournment resolutions

The adjournment resolution also provides that blank bills may not be introduced in the House of Representatives during the 2006 session. It authorizes the Speaker or the President Pro Tempore to appoint appropriate committees or subcommittees of their respective houses to meet during the period between sessions to review matters concerning the 2005–07 state budget, prepare reports (including revised budgets), or consider any other matters that the Speaker or the President Pro Tempore deems appropriate. Those committees are prohibited, however, from considering any bill or proposed committee substitute for a bill that originated in the other house. Conference committees are authorized to meet during the period between sessions upon approval of the Speaker or the President Pro Tempore.

Kathleen Edwards

2

The State Budget

This chapter summarizes, in broad outline, the budget process and the fiscal provisions of the 2005–06 state budget. More detailed information regarding budgetary actions that affect specific state departments and agencies is included in some of the chapters that follow.

The Budget Process

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

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

Although the House and Senate appropriations subcommittees usually meet jointly to review the Governor's budget proposals, the House of Representatives and the Senate develop their own respective versions of the state budget. In recent years the House and Senate have alternated from biennium to biennium the responsibility for initially passing an appropriations bill for continuing operations, expansion, and capital improvements for state departments and agencies. In 2005 the Senate was responsible for taking the lead in preparing the budget. It passed an appropriations bill (Senate Bill 622) on May 5, 2005. The House passed its version of Senate Bill 622 on June 16. The Senate refused to concur with the House version, a conference committee was appointed, and lengthy negotiations commenced.

The budget negotiators failed to reach an agreement by June 30, the end of the fiscal year, so stopgap bills were enacted on June 30, July 19, and August 4, each authorizing continuation of state appropriations at the 2004–05 level for a few weeks. The conference committee finally agreed on a

compromise bill, which was adopted by roll-call readings on three separate days in each house in early August. The Current Operations and Capital Improvements Appropriations Act of 2005 became law as S.L. 2005-276 when it was signed by the Governor on August 13, 2005, six weeks after the start of the fiscal year. Budget negotiations apparently continued, however, because just over two weeks later, the General Assembly enacted S.L. 2005-345 (H 320) making extensive modifications to the appropriations act.

There were several reasons budget negotiations lasted almost two months. As in several recent years, the legislative leadership included revenue-raising measures in the same bill as the spending measures, forcing lawmakers to either support the tax and fee increases or go on record as opposing the budget. The differences between the two houses regarding tax increases took weeks to resolve. The Senate supported a higher cigarette tax increase than the House of Representatives; the two eventually compromised on a delayed phase-in of an increase from 5 cents to 35 cents a pack. The Senate budget would have made permanent the "temporary" state half-cent sales tax set to expire July 1, 2005, but the compromise bill extended the tax for only two more years.

The Senate budget would have reduced individual and corporate income taxes and closed a corporate income tax loophole by adopting the "throw-out rule." The compromise bill included none of these measures; neither did it include two proposals from the House budget: to equalize the tax rates on movies and other entertainments and to give an income tax incentive to small businesses that provide employee health insurance.

Two substantive policy issues also created budget gridlock: the authorization of a state lottery and a proposed policy change affecting the UNC system. The House of Representatives had passed a separate bill (House Bill 1023) earlier in the session authorizing a lottery. The Senate held House Bill 1023 in committee but included in its budget bill numerous provisions that would have amended House Bill 1023 to relax restrictions on lottery advertising and change the purposes for which lottery proceeds would be spent. These provisions were the subject of intense negotiation that delayed the budget agreement process. The second substantive issue that complicated budget negotiations was a Senate budget provision that would have given trustees at UNC Chapel Hill and N.C. State University the freedom to set tuition without obtaining the approval of the UNC system Board of Governors. Critics argued that the proposal would undermine the state's unified system of higher education while supporters believed the change was necessary to provide resources to attract top faculty. The Senate dropped the provision after weeks of debate, which included a public statement in opposition of the provision issued jointly by eight former governors and lieutenant governors.

Tax and substantive law provisions were not the only issues preventing a quick compromise on the budget. The House and Senate budget proposals were about $154 million apart on roughly $17 billion in spending, the major differences concerning state employee raises and overall spending levels for public schools and Medicaid. For details of these issues, see the chapters on education, public employment, and social services.

In the middle of budget negotiations, the General Assembly added a provision to its July 19 "continuing resolution," S.L. 2005-201 (H 1631), making appropriations for enrollment increases in public schools, community colleges, and the UNC system. In an unprecedented move the following day, the Governor issued an executive order directing the executive branch to implement programs for which funding had been proposed but not yet appropriated, thus effectively appropriating the money, a power the constitution reserves for the legislature. The General Assembly later appropriated the funds released by the Governor in the executive order.

The 2005–06 Budget

S.L. 2005-276 spends a $681 million revenue surplus from the 2004–05 fiscal year as well as more than $600 million in new or extended taxes and fees. In addition to the tax increases discussed above, S.L. 2005-276 includes higher driver's license and title fees and higher taxes on candy, liquor, and cable and satellite television. The act is 364 pages long, and although most of it deals with the appropriation of funds, much does not. As in recent years, a significant portion of the act consists of

special provisions, which either amend or create substantive law and have little to do with the appropriation of state funds. This practice is widely criticized because the special provisions receive very little scrutiny before becoming law. According to an analysis by legislative staff, the 2005 budget included 1,225 special provisions, compared to 930 in the previous long session in 2003—an increase of 31.7 percent.

The fund from which most money is appropriated is the General Fund; smaller appropriations for specific purposes are made from the Highway Fund and the Highway Trust Fund. Total General Fund revenues for 2005–06 were estimated at $17.3 billion. The sources making up this total include the following:

Beginning credit balance	$ 472,375,000
Tax revenues	15,417,300,000
Nontax revenues	775,824,517
Adjustments	628,800,316

Many of the adjustments were tax related, including the following:

Streamlined sales tax changes	40,000,000
Extension of 4.5% sales tax rate for 2 years	417,100,000
Application of sales tax to candy	9,800,000
Application of general sales tax rate to cable	10,900,000
Tobacco tax rate changes	118,800,000
Extension of 8.25% individual income tax rate for 2 years	39,800,000
Conforming estate tax to federal sunset	29,100,000
Film industry jobs incentives	(3,500,000)

Appropriations

The General Assembly made the following current operations appropriations for 2005–06:

General Fund	$17,026,260,791
Highway Fund	1,683,010,000
Highway Trust Fund	1,093,230,000

Of the General Fund operating appropriations, education and health and human services claim the lion's share, as has been the case for many years. The appropriation for education—including primary and secondary schools, community colleges, and the university system—is $9.48 billion, or over 55 percent of the General Fund operating budget. The appropriation to the Department of Health and Human Services is $4 billion, or over 23 percent. Thus, these two services account for 79 percent of General Fund operating appropriations.

Capital Appropriations

The General Assembly appropriated $54.9 million from the General Fund for capital improvement projects in 2005–06. The Clean Water Management Trust Fund received full funding of a $100 million annual appropriation mandated by G.S. 143-15.3B.

Budget Highlights

The following are some of the highlights of the 2005–06 budget:

- Clean Water Management Trust Fund—$100 million
- Savings Reserve Account—$199 million
- Repairs and renovations—$125 million

- More at Four program—$16.5 million each year of the biennium for 3,200 additional slots and for an additional $150 per slot for new and existing slots
- Full funding of enrollment growth for public schools, community colleges, and the UNC system
- Public schools—$22.5 million for Disadvantaged Student Supplemental Funding, $20 million in Low Wealth Supplemental Funding, and $100 million (nonrecurring) for ABC bonuses (School-Based Management and Accountability Program)
- Fines and forfeitures—$102.5 million in increased receipts from the Civil Penalties & Forfeitures Fund allocated to public schools through various allotment formulas, supplanting General Fund appropriations for these allotments
- 2.24 percent average salary increase for teachers
- Salary increase for most state employees of the greater of $850 or 2 percent, with an additional 2 percent increase for community college faculty and professional staff
- One-time annual leave bonus of five days for most state employees
- Establishment of a minimum wage of $20,112 for full-time permanent SPA employees and a pro rata amount for part-time employees
- 2 percent cost-of-living increase for retirees in the teachers' and state employees', judicial, and legislative retirement systems
- 2.5 percent cost-of-living increase for retirees in the Local Governmental Employees' Retirement System
- Cigarette tax increase of 25 cents effective September 1, 2005, and an additional 5 cents effective July 1, 2006, with corresponding increases in taxes on other tobacco products
- Continuation until July 1, 2007, of temporary 0.5 percent state sales tax
- Continuation until January 1, 2008, of temporary individual income tax increase of 0.5 percent for certain higher-income taxpayers

Conference Committee Report

S.L. 2005-276 provides that the "Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets . . . shall indicate action by the General Assembly on this act and shall therefore be used to construe this act, as provided in G.S. 143-15 of the Executive Budget Act, and for these purposes shall be considered a part of this act." The report, which was prepared by the Fiscal Research Division of the General Assembly and updated to reflect amendments made to the budget act by S.L. 2005-345, is available on the General Assembly's Web site at: www.ncleg.net/sessions/2005/budget/budgetreport9-8.pdf. This important document specifies in detail how the appropriations made in the act are to be allocated and expended. Each year the Fiscal Research Division also publishes an overview of the budget, which can be found on their Web site at: www.ncleg.net/LegislativePublications/fiscalresearchd_/.

Martha H. Harris

3

Alcoholic Beverage Control

The 2005 session was not an active one in the alcohol beverage control (ABC) law arena. The major bills concerned the amount of alcohol allowed in beer and malt beverages. As is typical, the General Assembly also passed several bills narrowly drafted to respond to one or more particular locales interested in authorizing an election or in allowing alcohol sales without an election.

Alcohol Content of Beer

For many years the maximum amount of alcohol allowed in a malt beverage (beer, lager, malt liquor, ale, or porter) has been set at 6 percent by volume. S.L. 2005-277 (H 392) raises that amount to 15 percent. The bill generated a good deal of discussion. The most vocal proponents of the bill were people interested in drinking specialty beers that are usually brewed in small batches and are significantly more expensive than the beer currently sold in North Carolina. Some opponents expressed concern about increasing alcohol amounts generally, while others worried about the potential negative impacts of allowing a significantly higher alcohol content in the cheaper malt liquors. S.L. 2005-277 requires any malt beverage of more than 6 percent alcohol to be clearly labeled as to the amount of alcohol it contains.

Standards for Issuing Permits

Once a jurisdiction has authorized the sale of alcoholic beverages of a particular kind (beer, wine, mixed beverages, or a combination of these), businesses within the jurisdiction may apply for permits to sell the beverages. These permits are not issued by local governments but by the state ABC Commission. The commission must decide whether the applicant and the location are "suitable." Local governments have no veto power over that decision, although they may make recommendations to the commission, which the commission must consider. S.L. 2005-392 (H 1174) adds some additional factors the commission must consider in determining suitability. The act first extends the definition of "premises" to include all areas over which a permittee has legal control, including any areas outside the facility where the alcohol is sold. Currently an applicant must be in compliance with all fire and building codes; the new act requires that such compliance also be certified by the appropriate local

government. This compliance certificate must indicate whether the location is within an urban redevelopment area, and if so, whether the applicant has been notified of that fact. Licensees in these areas must limit alcohol sales to no more than 50 percent of their total sales. S.L. 2005-392 also requires the commission to consider whether the location of the business would be detrimental to the neighborhood. The commission's inquiry must include, for example, consideration of ABC law violations in the previous twelve-month period by prior permittees related to the applicant and evidence of illegal drug activity, disorderly conduct, or other "dangerous activities" on or about the premises under consideration. Evidence considered for this purpose is admissible under the rules governing administrative hearings under G.S. Chapter 150B (the Administrative Procedure Act). S.L 2005-392 also clarifies that the commission's discretion in issuing or denying permits extends to both the location and the applicant's suitability.

In addition to the new provisions affecting permit issuance, S.L. 2005-392 establishes another instance in which the commission must revoke a permit. The act requires revocation when the commission "finds evidence" that a permittee or one of its employees has been found responsible by a court or the commission on two separate occasions in a twelve-month period of knowingly allowing to occur on licensed premises a violation of laws relating to gambling, disorderly conduct, prostitution, controlled substances, or felony counterfeiting of trademarks. Section 4 of the act specifies that the revocation procedure must comply with G.S. Chapter 150B, but, in an apparent contradiction, Section 5 provides that the procedure should not be treated as a contested case under that chapter.

Sales without Elections

Generally in North Carolina, the sale of alcohol must be authorized by elections in the covered unit of government. The legislature may by general law, however, allow sales without an election. Often the general laws are drafted to cover a specific location or jurisdiction. S.L. 2005-327 (S 974) is an example of such a bill. The act exempts from a general prohibition on sales of alcohol on public school premises the sale of beer and wine at a performing arts center located at a constituent institution of The University of North Carolina if the center's seating capacity does not exceed two thousand. This exemption expires December 31, 2005, and applies only to a wine festival where fifteen or more wineries are exhibiting wines. The event must be sponsored by a nonprofit organization and last no more than two days. S.L. 2005-327 also authorizes the commission to issue permits allowing on-premises sale and consumption of beer and wine in a county-owned facility located adjacent to or separated by a road right-of-way from a municipality where all alcoholic beverages are authorized by law.

Finally, the act also directs the commission to issue a special occasion permit (allowing a host to bring alcohol to a permittee's premises and serve it to guests) to a sports facility occupied by a "major league" professional sports team with suites leased to patrons. Alcohol may be served in the suites in the same manner as if the person leasing the suite were the host of a special occasion, including allowing self-service of alcohol by guests at least twenty-one years old. This special authority does not allow guests to bring alcohol into or remove it from the suite.

Elections

S.L. 2005-336 (H 1416) allows an election authorizing on-premises sales of beer and wine to be conducted by a town if the town is the passenger terminus of a rail line carrying at least sixty thousand passengers per year. Generally beer or wine elections are allowed in cities or towns under specified circumstances, including a requirement that the town either operate an ABC store or have more than five hundred residents.

Recycling of Alcohol Containers

S.L. 2005-348 (H 1518) requires holders of permits to sell alcoholic beverages on premises to provide for the recycling of any recyclable containers sold at retail on the premises. The recycling program must provide for the separation, storage, and collection of the containers. Knowingly disposing of the containers in landfills is prohibited.

Viticulture Programs

Community colleges may provide viticulture programs to educate students about the process of wine making. S.L. 2005-350 (H 1500) allows the colleges to contract for the use of property to grow grapes and to sell some wine products at retail at special winery events, subject to a six-event and twenty-five-case maximum per year.

Wine Tasting and Wine Shop Permits

S.L. 2005-350 further details the regulations applicable to wine tastings conducted by retailers authorized to sell wine. The regulations now specify that the employee supervising the tastings must be at least twenty-one, the employee may not supervise more than three tasting areas with no more than six wines per area, and the tasting may not last more than four hours. Representatives of a winery producing the wine, a wholesaler, or a wholesaler's employee may assist at a tasting by pouring samples or checking identifications.

S.L. 2005-350 establishes a new category of permit for wine shops. This permit authorizes a wine shop to sell beer and wine at retail for off-premises consumption, conduct wine tastings, and ship beer and wine in closed containers to individuals both in and out of state. A permittee will also be able to conduct regular educational programs for consumers about the selection, serving, and storage of wine and may allow on-premises consumption of wine as part of its classes. No more than 40 percent of the permittee's sales in any thirty-day period may be collected from such on-premises sales, the wine sold must come from opened bottles used in wine tastings, and each serving may be no more than four ounces.

Defenses for Illegal Sales to Minors

S.L. 2005-350 establishes a biometric identification defense to a charge that a retailer illegally sold alcohol or tobacco to a minor. The defense applies when (1) the purchaser uses a biometric identification system showing that his or her age is the minimum age for purchase and (2) the purchaser has previously registered with the seller an approved government identification card giving the purchaser's date of birth and other identifying information.

Lottery Enforcement

One of the most controversial bills considered this session was the state lottery [S.L. 2005-344 (H 1023), as amended by the Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622)]. Part 31 of the act authorizes Alcohol Law Enforcement (ALE) officers to enforce the lottery laws and lodge criminal charges for violations. Although ALE officers have general jurisdiction to enforce all of the state's criminal laws, the General Statutes make the enforcement of certain kinds of criminal laws the first priority for ALE officers. Part 31 of the Lottery Act adds lottery regulation to the list of laws that fall under the specialized jurisdiction of ALE enforcement.

Bills Remaining Eligible for Consideration

House Bill 1048 includes changes to the impaired driving laws recommended by the Governor's Task Force on Driving While Impaired. Provisions within the bill require a person purchasing a keg of beer to obtain a permit and make it a criminal offense for a person under twenty-one to consume any alcoholic beverages. The bill has passed the House of Representatives and is eligible for consideration by the Senate in the 2006 short session.

James C. Drennan

4

Children, Families, and Juvenile Law

The 2005 session of the North Carolina General Assembly addressed a number of issues concerning children and families. This chapter summarizes bills enacted dealing with divorce and marital dissolution proceedings, child custody and support, domestic violence, and juvenile law. Other chapters that may contain legislation of interest regarding children and families include Chapter 6, "Courts and Civil Procedure"; Chapter 7, "Criminal Law and Procedure"; Chapter 10, "Elementary and Secondary Education"; Chapter 12, "Health"; Chapter 13, "Higher Education"; Chapter 16, "Mental Health"; and Chapter 23, "Social Services."

Divorce

Fees to Fund Grants to Centers for Displaced Homemakers

The North Carolina Council for Women within the Department of Administration is authorized by G.S. Chapter 143B, Part 10B, Article 9, to establish centers to assist displaced homemakers and to make grants to those centers. Part 10B defines a *displaced homemaker* as an individual who has worked at home and provided unpaid household services; has been dependent on the income of another, which is no longer available; and is unable to secure gainful employment due to age or lack of training or experience. S.L. 2005-405 (H 1635) makes various changes to Part 10B, including deleting the provision that a person must work at home for at least five years before qualifying as a displaced homemaker. The grants to the centers are funded in part by a fee assessed to all persons filing a court action seeking absolute divorce. Beginning with divorce cases filed on or after October 1, 2005, S.L. 2005-405 increases that fee from $20 to $55.

Resumption of Maiden Name after Divorce

G.S. 50-12 allows a woman to resume her maiden name or a prior husband's surname when a divorce is granted. If the name is not changed in the divorce judgment, the woman can petition the clerk of superior court in the county of her residence for an order of name change. S.L. 2005-38 (H 508) amends G.S. 50-12 to allow a woman to also make the request for a name change to the clerk of the county where the divorce judgment was granted. The amendment applies to requests for name changes filed on or after August 10, 2005.

Child Custody

Parenting Coordinators

Many parents have difficulty sharing parenting responsibilities and cooperating to address the needs of their children during custody litigation or after a custody dispute is settled by the court. As a result the parties often continuously return to court for assistance in dealing with the conflict. In the attempt to reduce the time, expense, and stress of repeated court appearances, courts in several other states have turned to facilitators called "parenting coordinators" to work with parents to resolve many parenting and custody issues without involving the court. S.L. 2005-228 (H 1221), titled "An Act to Establish the Appointment of Parenting Coordinators in Domestic Child Custody Actions," creates new Article 5 in G.S. Chapter 50 (G.S. 50-90 through G.S. 50-100), effective October 1, 2005, to allow and regulate the appointment of parenting coordinators in North Carolina child custody proceedings. The new article authorizes the court to appoint a parenting coordinator in any case with the parties' consent. If the parties do not consent, the court may appoint a parenting coordinator when a custody order is entered if the court decides that (1) the custody case is a *high-conflict case*, as defined in the statute, (2) the appointment of the coordinator is in the best interest of any minor child in the case, and (3) the parties are able to pay the cost of the coordinator. A *high-conflict case* is defined as one in which the parties demonstrate an ongoing pattern of the following:

- Excessive litigation
- Anger and distrust
- Verbal abuse
- Physical aggression or threats of physical aggression
- Difficulty communicating about and cooperating in the care of minor children
- Conditions that, in the court's discretion, warrant the appointment of a parenting coordinator

The parenting coordinator's authority is limited to matters that will aid the parties in accomplishing the following:

- Identification of disputed issues
- Reduction of misunderstandings
- Clarification of priorities
- Exploration of possibilities for compromise
- Development of methods for collaboration in parenting
- Compliance with the court's order of custody, visitation, or guardianship

In addition to facilitating agreements between the parties, a parenting coordinator also may be authorized by the court to decide issues regarding the implementation of a parenting plan when the parties cannot. The parties are bound by the decisions of the coordinator in such cases. However, the parties may request an expedited hearing for the judge to review any decision made by the parenting coordinator.

A coordinator can be appointed only after the court holds an appointment conference during which the court explains the role of the coordinator to the parties and their attorneys; informs the parties of rules regarding communications between the parties, the coordinator, and the court; and determines the financial arrangements concerning the payment of fees to the coordinator.

The court must maintain a list of qualified coordinators, and appointments must be made from that list. To be eligible to be on the list, a person must

- hold a master's or doctorate in psychology, law, medicine, social work, counseling, or a related field;
- have at least five years of related professional postdegree experience;
- hold a current license in his or her area of practice, if applicable; and
- participate in twenty-four hours of training as specified in the statute.

To remain eligible, the coordinator must attend continuing education courses for parenting coordinators.

The court can terminate the coordinator for good cause at any time.

Custody Orders in Juvenile and Civil Proceedings Involving the Same Child

The General Assembly enacted S.L. 2005-320 (H 801), titled "An Act to Establish a Procedure to Resolve the Issue of Conflicting Child Custody Orders; to Clarify the Effect of Terminating Jurisdiction in Certain Juvenile Cases; to Give the Court Authority to Convert a Juvenile Court Custody Order into a Permanent Custody Order under Chapter 50 of the General Statutes; and to Make Technical and Conforming Changes to the Law." The details of this legislation are summarized below in the section entitled "Juvenile Law."

Child Support and Paternity

Responsibilities of the Clerk of Superior Court in Child Support Cases

Effective July 1, 2007, S.L. 2005-389 (H 1375) repeals the provisions of G.S. 50-13.9 that require the clerk of superior court to monitor an obligor's compliance with a child support order entered in a non-IV-D case (that is, a case in which services are not being provided by a state or local child support enforcement agency) and to initiate legal proceedings to enforce non-IV-D child support orders. The act also repeals the provisions of G.S. 50-13.9 that require the clerk to maintain a list of attorneys who are willing to represent obligees in enforcement proceedings in non-IV-D cases and that allow a district court judge to appoint an attorney to represent an obligee in these proceedings and to order an obligor to pay the appointed attorneys' fees under G.S. 50-13.6. The new law, however, allows the clerk or a district court judge, upon affidavit of an obligee, to order a delinquent child support obligor to appear and show cause why he or she should not be held in contempt or subjected to income withholding.

Under the amended statute, the state Child Support Collection and Disbursement Unit will be solely responsible for maintaining all records regarding IV-D and non-IV-D child support payments made through the unit. An obligee in a non-IV-D case may obtain child support enforcement services from a state or local child support enforcement agency by applying for these services and paying an application fee as required by G.S. 110-130.1(a) and federal law. The act, however, does not authorize a chief district court judge to issue an administrative order transferring the enforcement of non-IV-D cases from the clerk to a state or local child support enforcement agency.

Voluntary Acknowledgment of Paternity

Effective December 13, 2005, S.L. 2005-389 repeals the provisions of G.S. 130A-101(f) that created a legal presumption that a man who executes an affidavit acknowledging paternity of a child is the child's natural father. A certified copy of the affidavit, however, remains admissible in a civil action to establish the child's paternity if paternity is properly placed at issue.

Civil Action to Establish Paternity

Effective December 13, 2005, S.L. 2005-389 amends G.S. 49-14(a) to delete the requirement that a *certified* copy of a child's birth certificate be attached to the complaint in a civil action to establish the child's paternity. The amended statute, however, still requires that a copy of the child's birth certificate be attached to the complaint, and failure to do so may render a judgment of paternity void. *See* Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Equitable Distribution

Enforcement of a Judgment against the Estate of a Deceased Spouse

An action for equitable distribution of marital property can be filed at any time after spouses separate and begin to live apart. If either or both spouses die while the action is pending, the action

continues, with the estate of the deceased spouse substituted as a party to the action. In addition, as long as spouses have separated and lived apart before death, an action for equitable distribution can be filed after the death of one or both spouses. Legislation enacted in 2003 clarified that any equitable distribution judgment entered after the death of a spouse or former spouse is a claim against the estate of the deceased party. S.L. 2005-180 (H 804) further clarifies that equitable distribution judgments are seventh in order of payment priority with regard to other claims against the estate.

Consideration of Tax Consequences

G.S. 50-20 authorizes a court to distribute marital property between divorcing spouses in a manner that the court determines equitable. The statute lists a number of considerations the court must take into account in determining what manner of distribution will be equitable in an individual case. One such consideration is the tax consequences to each party of the property distribution. The appellate courts have interpreted this statutory provision to require that courts consider only those tax consequences that will actually occur as a result of the court-ordered distribution. For example, if the court orders that a retirement account be liquidated to pay debts, the court must consider that the party who owns the account will suffer tax penalties and other tax consequences that will reduce the value of the property being distributed. However, the appellate courts have prohibited trial courts from considering potential tax consequences that may arise when and if property distributed to one spouse is sold in the future. For example, if the trial court distributes stock to one party, the court must consider only the date-of-distribution value of the stock; it cannot consider the tax consequences that may result to the spouse receiving the stock when and if that spouse ever sells the stock. S.L. 2005-353 (H 1318) amends G.S. 50-20(c)(11) to provide that the trial court should consider tax consequences "that would have been incurred had the property been sold or liquidated on the date of valuation." However, the new statute also allows the judge to take into account in determining the weight to assign this consideration whether and when such tax consequences are likely to occur. This amendment applies to actions filed on or after October 1, 2005.

Postseparation Support Orders

G.S. 50-16.2A allows a court to order a supporting spouse to pay postseparation support to a dependent spouse when the court finds that the dependent spouse needs financial resources to meet his or her reasonable needs and that the supporting spouse is able to pay the support. The North Carolina Court of Appeals has held that the General Assembly intended that postseparation support be temporary financial support for a dependent spouse, to be awarded when necessary to assist a dependent spouse while that spouse is waiting for a trial court to make a decision on his or her claim for permanent alimony. However, the appellate court has also held that the specific language of the postseparation support statute allows an order for postseparation support to last indefinitely. S.L. 2005-177 (H 923) amends the definition of postseparation support in G.S. 50-16.1A(4) to clarify that postseparation support terminates automatically upon any of the following:

- The date specified in the order
- The entry of an order awarding or denying alimony
- The dismissal of the alimony claim
- The entry of absolute divorce if no claim for alimony is pending
- Termination of postseparation support by reason of cohabitation, reconciliation, or death of a party

In addition, the legislation specifies that an order of postseparation support can be entered at the time a divorce is granted only if a claim for alimony is pending.

The legislation applies to all postseparation support orders issued on or after October 1, 2005.

Family Court

There are currently nine district court districts in the state operating under the family court model: District 5 (New Hanover and Pender counties), 6A (Halifax County), 8 (Lenoir, Green and Wayne counties), 12 (Cumberland County), 14 (Durham County), 20 (Union, Rockingham, Stanly, and Anson counties), 25 (Catawba, Burke and Caldwell counties), 26 (Mecklenburg County) and 28 (Buncombe County). Section 14.18 of the Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), requires that the Administrative Office of the Courts (AOC) study the feasibility of implementing the family court model in District 10 (Wake County). The AOC is to report on the study to the General Assembly by April 1, 2006. In addition, S.L. 2005-356 (H 569) requires that the AOC expand the family court model to additional jurisdictions in the state "as resources allow." That statute also requires the AOC to study the elements of the family court model that can be adopted without additional funding and implement those parts of the model where possible.

Domestic Violence

Concealed Handgun Permits

S.L. 2005-343 (H 1311) amends G.S. 14-415.15(b) to specify that proof of the entry of a civil domestic violence protection order pursuant to G.S. Chapter 50B is evidence of an emergency situation that allows a sheriff to issue to the victim of domestic violence a temporary permit to carry a concealed weapon. The legislation also amends G.S. Chapter 50B to add new G.S. 50B-3(c1). The new provision requires that when a protective order is filed with the clerk of court, the clerk must provide the plaintiff information about the plaintiff's right to apply for a concealed weapon permit. The act is effective October 1, 2005, and applies to protective orders issued on or after that date.

Joint Legislative Committee on Domestic Violence

S.L. 2005-356 creates a sixteen-member legislative committee to "examine, on a continuing basis, domestic violence issues in North Carolina in order to make on-going recommendations to the General Assembly on ways to reduce the incidences of domestic violence and to provide additional assistance to victims of domestic violence." The legislation also requires (1) the AOC to study and review the use of global positioning satellite technology to track criminal offenders and (2) the Department of Correction to study and report on measures the Division of Community Corrections is taking to address the supervision of domestic violence offenders.

Civil Protection Orders and Amendments to Landlord/Tenant Laws

The General Assembly enacted S.L. 2005-423 (S 1029), titled "An Act to Clarify and Enhance the Laws Relating to Domestic Violence, to Enact Laws Regarding Domestic Violence Victims and Tenancy, to Clarify that Failure to File a Counterclaim in a Small Claims Action Does Not Bar the Claim in a Separate Action and to Make Changes to Landlord Tenant Law." The act makes various statutory changes to further enhance protection for domestic violence victims. The legislation does the following:

- Amends G.S. 50B-3(a) to remove the requirement that the court, when entering a civil domestic violence protection order, grant only that relief necessary to effect the cessation of domestic violence. The statute now requires that if the court or magistrate finds that an act of domestic violence has occurred, the court must grant a protection order restraining the defendant from further acts of domestic violence. Other types of relief are left to the discretion of the judge or magistrate.
- Amends G.S. 50B-3(b) to allow civil protection orders to be renewed for a period not to exceed two years (was, one year).

- Amends G.S. 50B-3(c) to require that when a defendant is ordered to stay away from a child's school as a condition of a civil domestic violence protection order, a copy of the order be promptly delivered by the sheriff to the school principal.
- Amends provisions in G.S. Chapter 50B requiring that a defendant found to have committed certain acts of domestic violence surrender all firearms to the sheriff. The new provision allows the court to deny return of weapons to the defendant as long as any criminal proceeding is pending against the defendant.
- Amends G.S. 50-13.1(c) to clarify that all domestic violence between parents, not just spousal abuse, is good cause to waive mandatory child custody mediation. Child custody mediation normally is required whenever parents become involved in a court proceeding dealing with contested claims for child custody and visitation.
- Makes various changes to landlord/tenant statutes in G.S. Chapter 42 to protect victims of domestic violence. The legislation limits circumstances under which a landlord can terminate a victim's lease and allows the victim to request that locks be changed under certain circumstances and to terminate lease agreements when statutory conditions are met. These amendments apply to leases entered into on or after October 1, 2005.
- Amends landlord/tenant and small claims procedure statutes in ways unrelated to domestic violence.

Arbitration and Mediation

Family Financial Mediation

G.S. 7A-38.4A authorizes a chief district court judge to create a program in his or her judicial district to require mandatory mediation in all cases filed concerning equitable distribution, alimony, and child support. Most district court districts in the state have adopted mandatory mediation of these cases by local rule. S.L. 2005-167 (S 806) makes changes to G.S. 7A-38.2 regarding the operation and administration of the Dispute Resolution Commission. This commission administers a program to certify and qualify mediators and other neutrals who work in the state courts. The legislation specifies that certification and rules of conduct for superior court mediators apply to mediators and other neutrals in district court family financial mediation as well. The legislation also makes changes to G.S. 7A-38.1 and G.S. 7A-38.4A dealing with the inadmissibility in court proceedings of information used in negotiations in both settlement conferences and district court mediation. Revisions relating to admissibility of information apply to mediations commenced on or after October 1, 2005.

Family Law Arbitration

The 1999 General Assembly enacted the Family Law Arbitration Act, G.S. 50, Article 3, to authorize and encourage people to enter into binding agreements to arbitrate issues arising from marital separation or divorce. The legislation recognized arbitration as "an efficient and speedy means of resolving these disputes." The 2005 General Assembly made several technical and procedural changes to the Arbitration Act in S.L. 2005-187 (H 1319). All changes apply to agreements made on or after October 1, 2005. The legislation

- adds a provision to prohibit parties from waiving by agreement certain requirements contained in the Arbitration Act;
- adds a new section to the act to clarify notice requirements relating to the initiation of an arbitration proceeding;
- clarifies that the arbitrator decides whether an agreement to arbitrate is enforceable and allows an arbitration to continue when a judicial proceeding challenging the arbitration is pending, unless the court orders otherwise;
- adds a new section to the act to specify the disclosure requirements for arbitrators;
- rewrites provisions in the act dealing with the consolidation of separate arbitration proceedings involving the same parties;

- amends various sections of the act to provide that agreements between the parties regarding the details of the arbitration proceeding be reduced to writing; and
- adds a provision to the act to allow a court to order that awards or judgments entered pursuant to the arbitration proceeding be sealed, resealed, or redacted for good cause.

Juvenile Law

Response to Abuse and Neglect Reports; Appeal of "Responsible Individual" Designation

Two acts make substantial changes in the Juvenile Code, G.S. Chapter 7B, relating to responses by social services departments to reports of abuse, neglect, and dependency; allowing limited access to information the state maintains about persons determined to be responsible for a child's abuse or neglect; and establishing a procedure for appealing and seeking expunction of a determination of responsibility. See "Assessment Response to Reports of Abuse, Neglect, and Dependency," discussing S.L. 2005-55 (H 277), and "'Responsible Individuals' List, Appeal and Expunction Procedures," discussing S.L. 2005-399 (H 661), in Chapter 23, "Social Services."

Provisional Counsel for Parents

S.L. 2005-398 (H 1150) rewrites G.S. 7B-602 to require the appointment of "provisional counsel" for every respondent parent when an abuse, neglect, or dependency petition is filed. Either the summons or an attached notice must notify the parent of the appointment. At the first court hearing in the case, the court must confirm the appointment unless the parent does not appear at the hearing, does not qualify for appointed counsel, has retained counsel, or waives the right to counsel. In any of those instances, the court must dismiss the provisional counsel. The court may reconsider a parent's eligibility and desire for appointed counsel at any point in the juvenile proceeding. The act applies to petitions and actions filed on or after October 1, 2005.

Guardians ad Litem for Parents

G.S. 7B-602 and G.S. 7B-1101 require the appointment of a guardian ad litem for a respondent parent when (1) a child is alleged to be dependent or the dependency ground for termination of parental rights is alleged and (2) the parent's inability to care for the child is alleged to be due to mental illness, mental retardation, substance abuse, or a similar cause or condition. S.L. 2005-398 rewrites G.S. 7B-602 and replaces these provisions in G.S. 7B-1101 with a new section, G.S. 7B-1101.1, setting out new provisions for the appointment of a guardian ad litem for a parent in an abuse, neglect, dependency, or termination of parental rights proceeding. For petitions or actions filed on or after October 1, 2005, the court on its own motion or motion of a party may appoint a guardian ad litem for a parent if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot act adequately in his or her own interest. As rewritten, G.S. 7B-602 refers specifically to appointment "pursuant to G.S. 1A-1, Rule 17." New G.S. 7B-1101.1 does not, but in every other respect the provisions are identical and no indication exits that the omission is significant. The court may not appoint the parent's attorney to serve as guardian ad litem. Communications between the parent or the parent's attorney and the parent's guardian ad litem are privileged and confidential to the same extent as attorney-client communications. Both sections specifically authorize the guardian ad litem to

- help the parent enter consent orders, if appropriate;
- facilitate service of process on the parent;
- assure that necessary pleadings are filed; and
- assist the parent and the parent's attorney, if requested by the attorney, in ensuring that procedural due process requirements with respect to the parent are met.

There is no requirement that the guardian ad litem be an attorney. In the past, however, courts have typically appointed attorneys to serve in this role, since no other obvious pool of candidates for appointment exists.

The act does not address whether some or all of these provisions also should apply if the court makes findings about the possible incompetence or diminished capacity of a guardian or custodian who is the respondent in an abuse, neglect, or dependency proceeding. If the provisions simply clarify the operation of G.S. 1A-1, Rule 17, in these cases, the identity of the party should not matter. If, instead, they are intended to give parents additional protections because these cases involve the constitutionally protected rights of parents, a court would have to discern what Rule 17 requires with respect to parties who are not parents.

Time Limits

For petitions and actions filed on or after October 1, 2005, disposition hearings in abuse, neglect, and dependency cases must take place immediately following the adjudication hearing and be concluded within thirty days after the adjudication hearing. S.L. 2005-398 adds this requirement to G.S. 7B-901, which heretofore has not addressed the timing of disposition hearings.

S.L. 2005-398 also creates a procedure the court must follow when an order required by statute to be entered within thirty days after a hearing is not entered within that time period. In that circumstance the "clerk of court for juvenile matters" must schedule another hearing in the matter for the first session of court scheduled for hearing juvenile matters following the thirty-day period. The purpose of this subsequent hearing is to "determine and explain" the reason for the delay and obtain any needed clarification regarding the contents of the order. The order in question must be entered within ten days after this hearing. These provisions are added to G.S. 7B-807(b) (adjudication orders), -906(d) (review hearing orders), -907(c) (permanency planning hearing orders), -1109(e) (adjudication orders in termination proceedings), and -1110(a) (disposition orders in termination proceedings). Failure to include the provision in G.S. 7B-905(a) (disposition orders in abuse, neglect, or dependency proceedings) probably was an oversight.

Notice of Change in Child's Placement

S.L. 2005-398 rewrites G.S. 7B-905 to require a county department of social services having custody or placement responsibility for a child to notify the child's guardian ad litem about any change in the child's placement. Generally the department must notify the guardian ad litem of its intent to change a child's placement. When an emergency makes such notification impossible, the department must notify the guardian ad litem or attorney advocate within seventy-two hours after changing the child's placement unless local rules require notification sooner. The provision applies to petitions and actions filed on or after October 1, 2005.

Appeals

S.L. 2005-398 substantially rewrites provisions in Subchapter I of the Juvenile Code regarding appeals for actions and proceedings filed on or after October 1, 2005. The new legislation reorganizes and rewrites provisions about who may appeal orders in these cases. G.S. 7B-1002, as rewritten, gives that right to (1) the juvenile, acting though a guardian ad litem, either already appointed pursuant to G.S. 7B-601 or appointed by the court pursuant to G.S. 1A-1, Rule 17, for purposes of the appeal; (2) a county department of social services; (3) a parent, guardian, or custodian who is not a prevailing party; and (4) a party who sought but failed to obtain termination of parental rights. The statute continues to omit caretakers, who also may be named as respondents in some proceedings.

More significantly, the act rewrites G.S. 7B-1001 to provide that only the following orders may be appealed:

- An order finding absence of jurisdiction
- An order that determines the action and prevents a judgment from which appeal might be taken
- An initial order of disposition and the adjudication order on which it is based
- Any order, other than a nonsecure custody order, that changes legal custody of a juvenile
- An order under G.S. 7B-507(c) to cease reunification efforts (but only if the issue is properly preserved for appeal, as described below)
- An order that terminates parental rights or denies a motion or petition to terminate parental rights

By referring to "initial" orders of disposition, the change omits from the list orders resulting from review and permanency planning hearings unless these orders are covered by another category, such as review orders that change custody or order the cessation of reunification efforts.

For all appealable orders other than those ceasing reunification efforts, notice of appeal must be given in writing within thirty days after entry and service of the order—a change from the ten-day period that previously applied.

A party may give notice to preserve the right to appeal an order ceasing reunification efforts either in open court or in writing within ten days after the hearing at which the court orders that reunification efforts cease. The party giving notice may make a detailed offer of proof as to any evidence the court excluded or refused to consider. A guardian or custodian who would like to appeal an order ceasing reunification efforts may do so immediately. A parent, however, may appeal an order ceasing reunification efforts only

- when the parent appeals a later order terminating the parent's rights, the parent has properly preserved the right to appeal the order ceasing reunification efforts, and that order is assigned as error in the appeal of the termination order; or
- if no petition or motion for termination of the parent's rights is filed "within 180 days of the order" ceasing reunification efforts.

The act states that notice of appeal from an order under G.S. 7B-507(c) ceasing reunification efforts shall be given in writing by a proper party. For a guardian or custodian who may appeal the order "immediately," the act states no time limit. It is unclear whether the thirty-day period for appealing other orders applies or the time limit described above for giving notice to preserve the issue for appeal applies. The act is silent with respect to a juvenile's appeal of an order ceasing reunification efforts.

In every appeal the attorney, if there is one, representing an appealing party must sign the notice of appeal and may give notice of appeal only when the client, after the conclusion of the proceeding, has given the attorney direct instructions to do so. When a juvenile appeals, the notice of appeal must be signed by the guardian ad litem attorney advocate.

S.L. 2005-398 addresses the authority of the trial court while an appeal in an abuse, neglect, or dependency proceeding is pending—an issue addressed by the court of appeals and the supreme court and about which advocates involved in these cases have very different views. Given the time an appeal typically takes, there is no obvious resolution that both serves the parents' interest in meaningful and timely appellate review and reflects the Juvenile Code's emphasis on achieving permanence for the child within a reasonable period of time. As rewritten, G.S. 7B-1003 resolves the question as follows.

- The trial court may enforce an order that is on appeal unless the trial court or an appellate court stays the order.
- While an appeal is pending, unless an appellate court orders otherwise, the trial court may continue to exercise jurisdiction and conduct hearings, except under Article 11 (termination of parental rights), and may enter orders affecting the child's custody or placement as the court finds to be in the child's best interest.
- When an order in a termination of parental rights case is on appeal in a case that did not begin as an abuse, neglect, or dependency case, the court may enter temporary orders affecting the child's custody or placement as the court finds to be in the child's best interest.

The exclusion of termination of parental rights cases from those in which the trial court may proceed during an appeal supersedes the North Carolina Supreme Court's decision in *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005), in which the court interpreted current law to allow termination cases to proceed while another order in the case was on appeal.

Custody Orders in Juvenile and Civil Cases; Termination of Juvenile Court Jurisdiction

After the juvenile court adjudicates a child to be abused, neglected, or dependent, the court may place the child in the custody of a parent, a relative, an agency, or some suitable person. Sometimes the custody of the child already will have been the subject of a civil custody action between the parents (or other private parties), and an order giving a parent or other person custody will exist in an action under G.S. Chapter 50. That order and the juvenile disposition order may conflict. Although no statute addresses this type of conflict, generally the juvenile order is viewed as taking precedence for as long as the court exercises jurisdiction in the juvenile case.

If the court in the juvenile proceeding removes the child from the custody of a parent, the initial goal is almost always to return the child to the parent's custody as soon as is safely possible. Eventually, however, if the court determines that the child cannot return home safely within a reasonable period of time, the court establishes another "permanent plan" for the child, such as adoption, placement in the custody of a relative, or appointment of a legal guardian for the child.

Juvenile proceedings are designed to permit agency and judicial intervention to protect a child, and juvenile court orders are considered temporary in the sense that they should last only as long as state intervention on behalf of the child is justified. When the court implements a permanent plan of placing the juvenile in the custody of someone other than a parent, however, the juvenile court order awarding custody is intended to be as permanent as any order entered in a civil custody action under G.S. Chapter 50. In addition, the department of social services that initiated the juvenile action may have no further role to play, and the court may relieve the guardian ad litem—appointed to represent the child's best interest in the juvenile case—from further responsibilities.

S.L. 2005-320 adds new provisions to the Juvenile Code (G.S. Chapter 7B) and to G.S. Chapter 50 to address situations in which (1) both a juvenile court order and a Chapter 50 order pertain to the custody of a child or (2) a custody order entered in a juvenile proceeding is intended to be as permanent as a Chapter 50 order and no further need for juvenile court involvement in the matter exits. The General Assembly enacted a similar law in 2003 (S.L. 2003-381) as a pilot program applicable only in the Twelfth Judicial District (Cumberland County). The AOC reported favorably on the pilot and recommended that it be implemented statewide.

S.L. 2005-320 rewrites G.S. 7B-200 to provide explicitly that when a civil custody order and an order in a juvenile abuse, neglect, or dependency proceeding conflict, the juvenile order controls for as long as the court exercises jurisdiction in the juvenile case. In addition, whenever the court obtains jurisdiction over a child in an abuse, neglect, or dependency proceeding, any other civil action in which custody of the child is an issue is stayed automatically with respect to the custody issue. The court in the juvenile matter may consolidate the two actions if they are in the same judicial district. If the juvenile proceeding and the civil action or claim for custody are in different judicial districts, for good cause and after consulting the court in the other district, the court in the juvenile case may (1) order that the civil action or claim be transferred to the county in which the juvenile case is pending or (2) transfer the juvenile proceeding to the county in which the civil action or claim is pending. Regardless of where the actions are pending, the court in the juvenile case may proceed in the juvenile matter while the civil action or claim remains stayed, or it may dissolve the stay in the civil action and stay the juvenile proceeding pending resolution of the civil matter.

The court's jurisdiction in an abuse, neglect, or dependency proceeding ends when the child turns eighteen or when the court orders that jurisdiction is terminated, whichever occurs first. S.L. 2005-320 rewrites G.S. 7B-201 to clarify that when jurisdiction ends for either reason, all orders entered in the juvenile case cease to have effect. The custody and status of the child and the related rights of the parties revert to whatever they were when the juvenile petition was filed, subject to other applicable

laws (such as the child's automatic emancipation at age eighteen) or a valid court order in another action in which a court is properly exercising jurisdiction (such as a custody order in a divorce action).

Although such a requirement is already law, S.L 2005-320 adds to G.S. 7B-402 a provision that the petition (or an affidavit attached to the petition) in an abuse, neglect, or dependency proceeding must contain the information required by G.S. 50A-209, which includes information about any other court proceeding involving custody of the child.

S.L. 2005-320 creates new G.S. 7B-911 allowing the court in a juvenile proceeding to enter a custody order in a civil action under G.S. Chapter 50 and terminate its jurisdiction in the juvenile matter. This might occur when the permanent plan for a child has become placement in the custody of a relative. It also might occur when the child is returned to the custody of a parent and that parent needs the ongoing security of a custody order to clarify that the other parent is not entitled to custody of the child. The court may take this step on its own motion or motion of a party but only after making proper findings at a disposition or subsequent hearing. The order must comport with applicable requirements of G.S. 50-13.1, -13.2, -13.5, and -13.7 for entering or modifying a civil custody order. In a separate order terminating jurisdiction in the juvenile case, the court must make two critical findings:

1. There is no longer a need for continued state intervention on the child's behalf through a juvenile court proceeding.
2. At least six months have passed since the juvenile court determined that the permanent plan for the child was placement with the person to whom the court is awarding custody. This finding is not required, however, if the court is awarding custody to a parent or to the person with whom the child was living when the juvenile petition was filed.

The civil custody order will be entered one of two ways:

- If a civil custody action already exists, the court will enter the order in that action. If a custody order has been previously entered in that action, the new order will constitute a modification of that order. If necessary, the court may order that the party to whom custody is being awarded be joined as a party to the civil action and that the caption of the case be changed as appropriate.
- If there is no existing civil custody action, entry of the new order initiates one. The court must designate the parties and determine the appropriate caption for the case. The filing fee for a civil action is waived unless the court orders one or more of the parties to pay it. The act authorizes the AOC to adopt rules and develop appropriate forms for establishing a civil file in this circumstance.

The act applies to juvenile proceedings and civil actions pending or filed on or after October 1, 2005.

Termination of Rights of Parent Who Murders Other Parent

G.S. 7B-1111 sets out the grounds on which a court may terminate parental rights, rendering a child eligible to be adopted. S.L. 2005-146 (H 97) rewrites the section to allow termination of the rights of a parent who has committed murder or voluntary manslaughter of the child's other parent. A petitioner may establish the ground by proving the elements of the offense or by proving that a court has convicted the parent of the offense, whether by jury verdict or any kind of plea. In a case involving this ground, the court must consider whether the murder or voluntary manslaughter was committed in self-defense or in the defense of others or whether there was substantial evidence of other justification. The act applies to termination of parental rights proceedings filed on or after June 30, 2005.

Best Interest Determination in Action to Terminate Parental Rights

After the court concludes that a petitioner has proved that a ground exists for terminating a parent's rights, the court is not required to terminate the parent's rights if it determines that doing so is not in the child's best interest. Often the court makes an affirmative finding that terminating the parent's rights is in the child's best interest. Appellate courts have held consistently that this determination is in the trial court's discretion and that neither party has a burden of proof with respect to the best interest determination. S.L. 2005-398 rewrites G.S. 7B-1110 to require the court, after

adjudicating that one or more grounds exist, to determine whether termination of parental rights is in the child's best interest. In doing so the court must consider

- the child's age,
- the likelihood of the child's being adopted,
- whether termination will help achieve the permanent plan for the child,
- the bond between the child and the parent,
- the quality of the relationship between the child and the proposed adoptive parent, guardian, or custodian, and
- any other relevant factor.

These changes apply to petitions or actions filed on or after October 1, 2005.

Recoupment of Attorneys' Fees from Parents

Parents who are respondents in abuse, neglect, dependency, or termination of parental rights proceedings are entitled to court-appointed counsel if they are indigent and do not waive the right. Heretofore, statutes have not addressed recoupment from parents of fees for their court-appointed counsel in these cases, although there are provisions for recoupment from parents of fees for attorneys appointed to represent their children. (See G.S. 7A-450.1, -450.2, -450.3; 7B-603(c) and -2704.) S.L. 2005-254 (S 594) rewrites G.S. 7B-603 to provide that the district court may require payment from the parent respondent for his or her own attorneys' fees, but only if the child was adjudicated abused, neglected, or dependent or the parent's rights were terminated. In determining whether to order a parent to reimburse the state for some or all of his or her attorneys' fees, the court must take into account the parent's ability to pay. If the court orders the respondent to pay attorneys' fees and the respondent does not comply at the time of disposition, the court must enter a judgment against the respondent for the amount due the state. The act also authorizes the immediate entering of a judgment against a parent who does not comply at disposition with an order to pay the fees of the child's attorney or guardian ad litem. (A parent who fails to comply with an order to pay attorneys' fees in a delinquency proceeding, where the child always is entitled to court-appointed counsel, remains subject to civil or criminal contempt. See G.S. 7B-2704 and G.S. 7B-2706.) These changes apply to appointments of counsel made on or after October 1, 2005.

Parent's Participation in Reviews after Rights Are Terminated

S.L. 2005-398 rewrites G.S. 7B-908(b)(1) and G.S. 7B-909(c) to clarify that once a court has terminated a parent's rights, the parent is not considered a party for purposes of review hearings in the child's case unless an appeal of the termination order is pending and a court has stayed the order pending the appeal. These amendments apply to petitions and actions filed on or after October 1, 2005.

Adoption

Criminal History Checks

G.S. 48-3-309 requires the state Department of Health and Human Services (DHHS) to ensure that before a county department of social services places a child in a prospective adoptive home, the county, state, and federal criminal histories of the prospective adoptive parent or parents are checked. S.L. 2005-114 (H 451) rewrites that section and related sections to require, in addition, (1) criminal history checks of all other individuals eighteen or older who reside in the prospective adoptive home and (2) a determination by the county social services department of whether those individuals are fit for having an adoptive child live in the home with them. The act also rewrites G.S. 114-19.7 to authorize the state Department of Justice to provide these additional criminal histories. The act became effective June 27, 2005.

Procedures for Determining Whose Consent Is Required

With respect to adoption proceedings filed on or after October 1, 2005, S.L. 2005-166 (H 532) makes several changes to clarify and streamline procedures for determining whose consent is required before a child can be adopted.

G.S. 48-2-206 allows the court to find, before a child is born, that the biological father's consent to any adoption filed within three months after the child's birth is not necessary. The court may make this determination if the biological father is given proper notice and either (1) does not respond or (2) responds, but has not both acknowledged the child and taken at least one of the other steps specified in G.S. 48-3-601 to establish the necessity of his consent (for example, paid support and regularly visited or communicated with the child's mother). The statute states that a biological father who does not respond after being given proper notice is not entitled to notice of the adoption proceeding. S.L. 2005-166 clarifies that the same is true for a biological father who does respond but whose consent is found to be unnecessary. It also provides explicitly that a father whose consent to the adoption is unnecessary may not participate in the adoption proceeding.

With respect to the more usual circumstance of determining the need for a parent's consent after the child is born, G.S. 48-3-603 lists the persons whose consent to the adoption of a minor is not required. Often one or more possible fathers are served with notice of the adoption, and the consent of a person who does not respond to the notice is not required. If a person served with notice responds and asserts that his consent is required, the court applies the statutory criteria to determine whether his consent is necessary. Neither G.S. 48-3-603 nor any other statute, however, sets out a procedure for the court to follow to determine and document whether an individual's consent is required. S.L. 2005-166 adds new G.S. 48-2-207 to fill that gap. If the individual served with notice does not respond, the court must enter an order that his consent to the adoption is not required. If the individual does respond and assert that his consent is necessary, or if someone who did not receive notice intervenes and alleges that his consent is required, the court must hold a hearing to take evidence and determine whether that person's consent is indeed necessary. If an individual's consent is determined to be necessary, the adoption may not proceed until that person's consent is obtained or his rights are terminated. If the individual did not have physical custody of the child immediately before the adoptive placement, the determination that his consent is required does not entitle him to physical custody. An individual whose consent is not required is not entitled to participate further in the adoption proceeding.

Interstate Compact on the Placement of Children

Most adoptions involving two states require compliance with the Interstate Compact on the Placement of Children (ICPC), Article 38 of G.S. Chapter 7B. If the parties are unaware of the ICPC requirements or simply fail to comply with them, retroactive compliance may be impossible. Under G.S. 48-2-603(b), however, the court still may enter the final order of adoption, after finding that (1) in every other respect there has been substantial compliance with the adoption laws and (2) adoption will serve the child's best interest. S.L. 2005-166 amends G.S. 48-2-304 and G.S. 48-2-305, which govern adoption petitions and documents, to require that if compliance with the ICPC cannot be shown, the petitioner must provide a statement describing the circumstances of any noncompliance. The change applies to adoption proceedings filed on or after October 1, 2005.

Waiver of Notice to Nonpetitioning Parent

If an adoption petitioner is married, G.S. 48-2-301(b) requires that the petitioner's spouse join in the petition unless the spouse has been declared incompetent or the court waives the requirement for cause. Effective October 1, 2005, S.L. 2005-166 amends G.S. 48-2-401, so that the clerk also may waive the requirement that the nonpetitioning spouse be notified if a petitioner seeks a waiver of the requirement that the spouse join in the petition.

Juvenile Justice

Interstate Compact for Juveniles

The Interstate Compact on Juveniles was created in 1955 to give states a uniform approach to dealing with juveniles who cross state lines—both those who run away and those who need supervision in one state as a result of an offense committed in another state. All states adopted the compact, but it has become seriously outdated. The desired uniformity is lacking because not all states have passed the same amendments to their versions of the compact. S.L. 2005-194 (H 1346) adds to the Juvenile Code (G.S. Chapter 7B) a new Article 40, "The Interstate Compact for Juveniles." This new compact becomes effective when thirty-five states have adopted it. When all states have adopted it, North Carolina's version of the Interstate Compact on Juveniles, Article 28 of G.S. Chapter 7B, is repealed.

The Council of State Governments, which is supervising the introduction of the new compact in cooperation with the federal Office of Juvenile Justice and Delinquency Prevention, describes the primary changes as follows:

- The compact establishes an independent compact operating authority to administer ongoing compact activity.
- The compact provides for gubernatorial appointments of representatives from all member states to a national governing commission. The commission would meet annually to elect the compact operating authority members and to attend to general business and rule-making procedures.
- The compact establishes rule-making authority and provides for significant sanctions to support essential compact operations.
- The compact establishes a mandatory funding mechanism sufficient to support essential compact operations (staffing, data collection, training/education, and so forth).
- The compact compels the collection of standardized information.

Extensive information about the compact can be accessed from the Web site of the Council of State Governments, www.csg.org.

The new compact outlines its purposes and defines applicable terms. It creates the Interstate Commission for Juveniles and sets out details about the commission's powers and duties, its organization and operation, its rule-making function, and its role in oversight, enforcement, and dispute resolution. The commission's work will be funded through assessments on the participating states. In addition, each member state must create a State Council for Interstate Juvenile Supervision.

Unlike the original compact, the Interstate Compact for Juveniles does not set out the specific procedures states must follow with respect to juveniles who cross or need to cross state lines for reasons included within the compact. Rather, it apparently looks to the commission and its rule-making authority to provide those details.

One section of the new compact as enacted in North Carolina creates the state Council for Interstate Juvenile Supervision. The compact designates the Secretary of the North Carolina Department of Juvenile Justice and Delinquency Prevention, or the secretary's designee, to serve as the state's compact administrator, the state's commissioner to the interstate commission, and the chair of the state council. Other members of the state council include

- one member representing the executive branch, appointed by the Governor;
- one member from a victim's assistance group, appointed by the Governor;
- one at-large member, appointed by the Governor;
- one member of the state Senate, appointed by the President Pro Tempore of the Senate;
- one member of the House of Representatives, appointed by the Speaker of the House of Representatives;
- a district court judge, appointed by the Chief Justice of the North Carolina Supreme Court; and
- four members representing the juvenile court counselors, appointed by the Secretary of the Department of Juvenile Justice and Delinquency Prevention.

Juvenile Recidivism

Section 14.19(a) of S.L. 2005-276 enacts G.S. 164-48, directing the North Carolina Sentencing and Policy Advisory Commission to conduct biennial studies of recidivism among a sample of juveniles who have been adjudicated delinquent, looking at their subsequent involvement in both the juvenile and criminal justice systems. Section 14.19(c) of the act repeals Article 33 of the Juvenile Code (G.S. Chapter 7B), which imposed similar responsibilities on the Department of Juvenile Justice and Delinquency Prevention.

Juvenile Justice Advisory Council

Section 16.12 of S.L. 2005-276 rewrites G.S. 143B-556(i) to delete the requirement that the state Juvenile Justice Advisory Council meet at least four times a year. Instead, meetings are to be held "as often as necessary."

Youth Development Centers

Section 16.10 of S.L. 2005-276 directs the Department of Juvenile Justice and Delinquency Prevention and the State Construction Office in the Department of Administration to continue the planning, design, and construction of up to 224 youth development center beds, to be located at four 32-bed facilities and one 96-bed facility.

Evaluations and Reports

The appropriations act, S.L. 2005-276, contains numerous provisions requiring evaluations or reports by or related to the Department of Juvenile Justice and Delinquency Prevention. The topics, and the sections of the act in which they appear, include the following:

- Local Juvenile Crime Prevention Council grants [sec. 16.2]
- Operation and effectiveness of Project Challenge North Carolina Inc. in providing alternative dispositions and services to juveniles adjudicated delinquent or undisciplined [sec. 16.3(a)]
- Effectiveness of the Juvenile Assessment Center and of juvenile assessment plans and services [sec. 16.3(b)]
- The operation and effectiveness of Communities in Schools [sec. 16.3(c)]
- Evaluation of the Eckerd and Camp Woodson wilderness camp programs, the teen court programs, the program that grants funds to local Boys and Girls Clubs, the Save Our Students program, the Governor's One-on-One Programs, and multipurpose group homes—including whether participation in each program results in a reduction of court involvement among juveniles (sec. 16.4)
- The treatment staffing model being piloted at Samarkand and Stonewall Jackson Youth Development Centers and implementation of the treatment staffing model at Dobbs, Dillon, and Juvenile Evaluation Center Youth Development Centers (sec. 16.6)
- Progress in the planning, design, and construction of new youth development centers (sec. 16.7)
- Grants awarded to Juvenile Crime Prevention Councils for street gang violence prevention and intervention programs [sec. 16.8(a)]
- County-operated juvenile detention centers in Durham, Guilford, Forsyth, and Mecklenburg Counties, including admission trends and projections, offense histories and assessed needs, staffing levels, housing capacity, operating costs, feasibility of state operation if recommended by a county, repair and renovation needs, and estimated cost to plan, design, and construct new detention centers, if appropriate (sec. 16.9) (This study is to be done by the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee.)

- The awarding and use of grants to up to four Juvenile Crime Prevention Councils, from a $250,000 appropriation, to provide residential and/or community-based intensive services to juveniles who have been adjudicated delinquent and have a level 2 or 3 disposition or are reentering the community after release from a youth development center (sec. 16.11)
- The operations and effectiveness of the National Guard Tarheel Challenge Program (sec. 18.1) (This report is to be made by the Department of Crime Control and Public Safety.)

School-Based Child and Family Team Initiative

Section 6.24 of S.L. 2005-276 establishes the School-Based Child and Family Team Initiative to identify and coordinate community services for children at risk of school failure or out-of-home placement. Responsibility for the initiative is to be shared among DHHS, the Department of Public Instruction, the State Board of Education, the Department of Juvenile Justice and Delinquency Prevention, the AOC, and other state agencies that provide services for children. The new section also establishes the North Carolina Child and Family Leadership Council, in the Department of Administration, to advise the Governor in the development of the School-Based Child and Family Team Initiative and to ensure active participation and collaboration by state and local agencies providing services to children in participating counties. These provisions are described in more detail in Chapter 10, "Elementary and Secondary Education."

Comprehensive Treatment Services Program

Section 10.25 of S.L. 2005-276 directs DHHS to continue the Comprehensive Treatment Services Program for children at risk of out-of-home placement. It creates a children's services work group, in the Department of Administration, with specified membership and duties. In addition, it creates an eighteen-member Coordination of Children's Services Study Commission to study and recommend changes to improve collaboration and coordination among agencies providing services to children and families with multiple service needs. These provisions are described in more detail in Chapter 16, "Mental Health."

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Community Planning, Land Development, and Related Topics

Previous sessions of the General Assembly considered reports and bills proposing substantial updates of the planning and development regulation statutes. These included reports from the Smart Growth Commission and bills to address the scope of power delegated to local governments. None made serious progress through the legislative process.

There was a different result in 2005. The 2005 session brought the most substantial amendments in decades to the state's planning and development regulation statutes. Two major bills were adopted—S.L. 2005-418 (S 518), An Act to Clarify and Make Technical Changes to City and County Planning Statutes, and S.L. 2005-426 (S 814), An Act to Modernize and Simplify City and County Planning and Land-Use Management Statutes. A number of additional bills addressing important land use and development issues were also adopted.

The two major bills were sponsored by Sen. Daniel G. Clodfelter of Charlotte. Sen. Clodfelter, a former member of the Charlotte-Mecklenburg Planning Commission and the Charlotte city council, has a long-standing interest in planning issues. The principal sponsor of companion bills in the House of Representatives was Rep. Lucy T. Allen, a former mayor of Louisburg and the former president of the North Carolina League of Municipalities. The bills originated with a proposal by the North Carolina Chapter of the American Planning Association for a thorough update of the planning statutes, some of which had been in place for eighty years without a comprehensive update. After the bills were introduced, a number of interested groups actively participated in an intensive, informal process of revising the bills. These groups included the North Carolina Homebuilders Association, the North Carolina Association of Realtors, local chapters of the National Association of Industrial and Office Properties, the North Carolina League of Municipalities, and the North Carolina Association of County Commissioners. The result was broad consensus on the two bills. While lengthy deliberations, negotiation, and amendment led to these bills being considered at the deadlines for crossover and adjournment, both were unanimously approved in the Senate and had near-unanimous support in the House of Representatives (the vote in favor of S 518 was 111-1; for S 814, it was 104-12). Both bills received final legislative approval on August 24, 2005, and were signed into law by Governor Easley on September 22, 2005. The bills generally become effective January 1, 2006.

In addition to these bills, the General Assembly adopted legislation affecting local regulation of forestry activity, regulation of the display of governmental flags, city regulation of governmental land

uses that do not involve a building, continuing education requirements for code enforcement officials, and a variety of transportation measures.

Zoning

Unified Development Ordinances

Many local governments have an interest in better coordinating their development regulations. An increasingly common way of accomplishing this is to merge zoning, subdivision, and other development regulations into a single, unified development ordinance. These ordinances use common definitions, boards and commissions, and procedures for several types of development regulation. However, some local governments have believed that legislation is necessary to allow unification, while others have been uncertain whether tools and institutions used under one authority could be used in a different context.

Section 1 of S.L. 2005-418 revises G.S. 160A-363 and G.S. 153A-322 to specifically allow cities and counties to combine various planning and development ordinances into a single ordinance. This clarification recognizes internal coordination and simplification efforts. It allows a common organizational structure and a single set of definitions and procedures to be used for any and all development ordinances unless there is a specific restriction of authority. The ordinances that may be combined under this authority are those authorized by the Articles of G.S. Chapters 160A and 153A related to planning and development regulation. This legislation does not apply to separate ordinances adopted under the general ordinance-making authority (noise ordinances, nuisance lot ordinances, junk car ordinances, and so forth). Other amendments in both bills add references to unified development ordinances in the zoning and subdivision statutes.

Hearing Notices for Rezonings

State law has long required a public hearing prior to consideration of zoning amendments. G.S. 160A-364 and G.S. 153A-323 require that the notice of the hearing be published in a newspaper of general circulation once a week for two successive calendar weeks. The statutes also require mailed notice of the hearing to the most directly affected landowners when a zoning map amendment is proposed. However, there has heretofore been no general state requirement for posting a notice of the hearing on the affected site, even though many local ordinances required such notice.

Section 4 of S.L. 2005-418 changes that. It adds G.S. 160A-384(c) and G.S. 153A-343(c) to require that site posting be used to notify persons of hearings on rezonings. These statutes now require the county or city to prominently post a notice of the hearing on the site to be rezoned or on the adjacent street right-of-way. When multiple parcels are being rezoned, it is not necessary that each individual parcel be posted, but sufficient notices must be posted to provide reasonable notice to interested persons. This section also repeals the provision that exempted counties from having to mail notices of hearing on the initial county zoning of a parcel (there was no comparable city exemption).

Section 4 amends G.S. 160A-384(b) and G.S. 153A-343(b) to simplify the alternate notice provision for large-scale rezonings (those affecting more than fifty properties). Previously, if a mailing was not made to each property owner, four half-page newspaper advertisements were required. The amendment reduces the publication requirement to two half-page advertisements.

Two previous local bills (S.L. 2003-81 for Cabarrus County and S.L. 2003-161 for Raleigh and Lake Waccamaw) allowed substitution of electronic posting of hearing notices for newspaper publication. Senate Bill 518 as introduced proposed to extend this option statewide, allowing cities and counties to substitute electronic notice for one of the two required published notices. That provision was deleted from the bill by the Senate Judiciary Committee, however, largely due to concerns regarding adequate notice for those without Internet access.

Protest Petitions

If a sufficient number of the persons most immediately affected by a zoning change object to a proposed zoning amendment, the amendment may be adopted only if approved by three-fourths of all the members of the governing board. Prior to amendment in 2005, the North Carolina statutes used the formulation set by the original standard state zoning enabling act. The qualifying area for a protest was defined in G.S. 160A-385 to include a protest signed by "the owners of twenty percent (20%) or more either of the area of the lots included in a proposed change, or of those immediately adjacent thereto either in the rear thereof or on either side thereof, extending 100 feet therefrom, or of those directly opposite thereto extending 100 feet from the street frontage of the opposite lots." This formulation generated considerable confusion as to how it should be interpreted. Some local governments interpreted the statute to say that there were only two qualifying areas—the property being rezoned and a single 100-foot strip along the sides and the rear of the area being rezoned. Most local governments read it to say that there were five qualifying areas—the property being rezoned, the front, the rear, and the two sides. Still others read it to allow for an indefinite number of additional qualifying areas, as if there were an irregularly shaped parcel with many jogs in the zoning district boundary and each jog created another qualifying "side." The situation was further confused if there were streets adjoining the rezoned area on more than one side or if the affected area had no clear-cut "front" and "rear."

Section 5 of S.L. 2005-418 clarifies G.S. 160A-385 by substantially revising the definition of a qualifying area for a zoning protest petition. It simplifies the definition of a qualifying area for a protest so that it is triggered by a petition of either (1) the owners of 20 percent of the land included within the area proposed to be rezoned, or (2) the owners of 5 percent of the land included within a 100-foot-wide buffer around each separate area proposed to be rezoned (rather than 20 percent of any one of four sides). Street rights-of-way are not considered for the 100-foot buffer unless the right-of-way has a width greater than 100 feet. Given that many rezonings are of irregularly shaped parcels, this change will significantly simplify application of the protest calculation.

This section also changes the reference point for the 100-foot buffer. Previously, the buffer was the land immediately adjacent to the proposed zoning district boundary. Thus, when a large parcel was proposed for rezoning, if a 100-foot-wide strip of land within the parcel was left in the original zoning, no protest petition could be filed. This section changes the law to provide that when less than an entire parcel is proposed to be rezoned, the qualifying 100-foot buffer is measured from the property line rather than from the zoning district boundary.

Section 5 of S.L. 2005-418 also amends G.S. 160A-385 to provide that the three-fourths majority required if there is a qualified protest must be calculated on the basis of the number of council members eligible to vote on the matter. Vacant positions and council members who have a financial conflict of interest and are prohibited by law from voting on the matter are not considered in the calculation, but absent members and those who are present but choose not to vote are included.

These amendments also address whether and how a protest petition can be applied to text amendments, which poses the difficult question of how a qualifying area should be determined. For example, *Morris Communications Corp. v. City of Asheville*, 356 N.C. 103, 565 S.E.2d 70 (2002), addressed a situation where the city amended its zoning ordinance to include a sign amortization provision regarding nonconforming off-premise signs. Affected billboard owners protested, but the ordinance was adopted by a 4–3 vote. The city argued that the protest petition was not sufficient to trigger the three-fourths vote requirement, contending that owners of at least 20 percent of the land area in all the affected zoning districts would have to join the protest. The court held otherwise, ruling that only those with an "immediate and actual effect" from the proposed amendment should be considered. Section 5 of S.L. 2005-418 simplifies the protest provision and resolves this question by limiting application of protest petitions to zoning map amendments.

The amendment also adds references to the increasingly common practice of conditional zoning. It treats protests regarding amendments of conditional zoning districts in the same manner as the previously provided for conditional use district and special use district zoning. Amendments to special or conditional use districts and conditional zoning districts are exempt from the protest petition only if the type of use is not changed, the density of residential use allowed is not increased, the size of nonresidential development is not increased, and the size of any buffers or screening is not reduced.

Another question about protest petitions has been whether a protest could be withdrawn once submitted. The practice in most cities has been to allow withdrawal before the public hearing or before the vote, although others were uncertain that a protest could be withdrawn. Section 6 of S.L. 2005-418 resolves any uncertainty by amending G.S. 160A-386 to establish a uniform state rule. It provides that a person filing a protest against a proposed zoning amendment may withdraw the protest at any time before a vote on the rezoning. Only those protests that qualify at the time of the vote on the rezoning trigger the three-fourths majority requirement.

There is no comparable county statute on protest petitions. There was some discussion of including an authorization for optional county protest petitions in S 518, but that was not done. Counties may secure local legislation to authorize a protest petition, but unless they do so, it remains a feature of municipal zoning only.

Comprehensive Plan

Both the city and county zoning enabling statutes have always required that zoning be "in accordance with a comprehensive plan." Neither the North Carolina statutes nor case law mandate preparation of comprehensive plans, define their elements, or set a mandatory procedure for their adoption (with the modest exception of plans mandated under the Coastal Area Management Act). The zoning statutes were amended in 2005 to strengthen the role of adopted plans where they do exist.

Section 7 of S.L. 2005-418 amends G.S. 160A-387 and G.S. 153A-344 to clarify that planning board recommendations are required prior to initial adoption of zoning. It mandates referral of proposed zoning amendments to the planning board for review and comment (this review was previously mandated for counties but not for cities, although virtually all city zoning ordinances already provide for such a review). It allows the governing board to proceed with consideration of the amendment if no comments are made within thirty days of referral and specifies that the planning board recommendations are not binding on the governing board.

Section 7 of S.L. 2005-426 amends G.S. 160A-383 and G.S. 153A-341 to require that planning board review of zoning amendments include written comments on the consistency of the proposed amendment with the comprehensive plan and any other relevant plans (such as a small area plan, a corridor plan, or a transportation plan) that have been adopted by the governing board. The amendment provides that a statement from the planning board that the proposed amendment is inconsistent with a plan does not preclude the governing board from adopting the amendment. The governing board is also required to adopt a statement on plan consistency before adopting or rejecting any zoning amendment. This statement must also explain why the board believes the action taken is reasonable and in the public interest. The statement adopted by the governing board on plan consistency is not subject to judicial review.

Conflicts of Interest

Questions sometimes arise as to when a member of an elected board, planning board, or board of adjustment should refrain from participating in a matter before the board due to a potential conflict of interest. The North Carolina Supreme Court provided some general guidelines on the due process constitutional dimensions of this matter for legislative and quasi-judicial decisions in *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 511, 434 S.E.2d 604, 614 (1993). The state statutes were silent on the matter, however. There was also some concern that the statutes on voting by governing boards could be interpreted to limit nonparticipation in situations where the courts indicated that nonparticipation might be required. The 2005 General Assembly resolved these issues by setting specific rules for legislative, advisory, and quasi-judicial decisions by all local boards and commissions.

For legislative and advisory decisions, Section 5 of S.L. 2005-426 enacts G.S. 160A-381(d) and G.S. 153A-340(g) prohibiting financial conflicts of interest in consideration of zoning amendments. A governing board member must not vote on an ordinance if the member has a direct, substantial, readily identified financial interest in the outcome of the decision. The same rule also applies to planning board members making advisory recommendations on zoning text and map amendments.

For quasi-judicial decisions, Section 8 of S.L. 2005-418 enacts G.S. 160A-388(e1) and G.S. 153A-345(e1) to require impartiality for board members making quasi-judicial decisions. This rule applies to any board exercising the functions of a board of adjustment or making a quasi-judicial decision (such as a decision on a special or conditional use permit). Members must not participate in or vote on any matter in which they have a fixed opinion on the case prior to the hearing; have had undisclosed ex parte communications; have close family, business, or associational ties with an affected person; or have a financial interest in the outcome of the case.

Moratoria

Given the time required to complete the procedures for adoption or amendment of development regulations or even to rezone property, local governments sometimes adopt moratoria on development to preserve the status quo while plans are made, management strategies are devised and debated, ordinances are revised, or other development management concerns are addressed. Moratoria are also sometimes used when there are insufficient public services necessary to support development, such as inadequate water supply or wastewater treatment capacity.

Before 2005, there was no explicit statutory authority in North Carolina to adopt moratoria on development, with the exception of adult business siting. There was also considerable confusion and litigation regarding the proper procedure for adoption of moratoria. While it was generally agreed that statutory provisions were needed to clarify these questions, debate as to how this should be accomplished was perhaps the single most contentious issue in consideration of S 814. Section 5 of S.L. 2005-426 enacts G.S. 160A-381(e) and G.S. 153A-340(h) to explicitly recognize the authority of cities and counties to adopt temporary moratoria of reasonable duration. The new legislation also codifies the limitations on the use of moratoria and clarifies the procedures to be used in adopting and extending moratoria. These amendments are effective for moratoria adopted or extended on or after September 1, 2005.

The new law explicitly allows temporary moratoria to be placed on city or county development approvals (such as zoning permits, plat approvals, building permits, or any other regulatory approval required by local ordinance). It requires cities and counties to be explicit at the time of adopting a moratorium as to the rationale for the moratorium, its scope and duration, and what actions the jurisdiction plans to take to address the needs that led to imposition of the moratorium. The ordinance establishing a moratorium must expressly include the following four points:

1. A clear statement of the problems or conditions necessitating the moratorium, what courses of action other than a moratorium were considered by the city or county, and why those alternatives were not considered adequate
2. A clear statement of the development approvals subject to the moratorium and how a moratorium on those approvals will address the problems that led to its imposition
3. An express date for termination of the moratorium and a statement setting forth why that duration is reasonably necessary to address the problems that led to imposition of the moratorium
4. A clear statement of the actions proposed to be taken by the city or county during the moratorium to address the problems that led to its imposition, and a clear schedule for those actions

Renewal or extensions of moratoria are also limited by these statutes. Extensions are prohibited unless the city or county has taken all reasonable and feasible steps to address the problems or conditions that led to imposition of the moratorium. In addition to the four points noted above, an ordinance extending a moratorium must explicitly address this point and set forth any new facts or conditions warranting the extension.

The confusion in the case law regarding which process is to be followed in adopting moratoria is addressed by these statutes. They provide that if there is an imminent threat to public health and safety, the moratorium may be adopted without notice and hearing. Otherwise, a moratorium with a duration of sixty days or less requires a single public hearing with a notice published not less than seven days in advance of the hearing, and a moratorium with a duration of more than sixty days (and any extension

of a moratorium so that the total duration is more than sixty days) requires a public hearing with the same two published notices required for other land use regulations.

These statutes exempt several types of projects from the coverage of moratoria. In the absence of an imminent threat to public health and safety, moratoria do not apply to projects with legally established vested rights—that is, projects with a valid outstanding building permit or an outstanding approved site specific or phased development plan, or projects where substantial expenditures have been made in good faith reliance on a prior valid administrative or quasi-judicial permit or approval. The statutes also provide that moratoria do not apply to special or conditional use permits and preliminary or final plats for which complete applications have been accepted by the city or county before the call for a public hearing to adopt the moratorium. If a preliminary plat application is subsequently approved while a moratorium is in effect, that project can also proceed to final plat approval.

The new law also provides for expedited judicial review of moratoria. Any person aggrieved by the imposition of a moratorium may petition the court for an order enjoining its enforcement. Such an action is to be set for immediate hearing and given priority scheduling by both trial and appellate courts. In these challenges, the burden is on the city or county to show compliance with the procedural requirements of the statutory provisions regarding moratoria adoption.

Conditional Zoning

In the 1980s, North Carolina cities and counties began to utilize conditional use district zoning. In this type of zoning, a new district with no automatically permitted uses is created and a concurrent conditional use permit is issued for a particular development within the new district. The use of this technique was approved by the courts and later incorporated into the zoning statutes.

Recently, some local governments began to utilize a variation of this process termed conditional zoning. In this type of zoning, a site is rezoned and site specific conditions are incorporated directly into the ordinance requirements. Unlike conditional use district zoning, conditional zoning does not involve a concurrent quasi-judicial conditional use permit. The entire process is a legislative decision. In 2001 and 2002, the North Carolina Court of Appeals approved the use of this technique. While previous local legislation authorized use of this technique for Charlotte and Mecklenburg County, there was no mention of it in the state statutes.

Section 6 of S.L. 2005-426 amends G.S. 160A-382 and G.S. 153A-342 to provide that zoning ordinances may include "conditional districts, in which site plans and individualized development conditions are imposed." As with conditional use districts, the statute provides that land may be placed in a conditional district only upon petition of all of the owners of the land to be included.

The 2005 amendments also address the origin and nature of conditions that may be imposed. G.S. 160A-382(c) and G.S. 153A-342(c) provide that specific conditions may be suggested by the owner or the government, but only those conditions mutually acceptable to both the owner and the government may be incorporated into the ordinance or individual permit involved. These statutes also provide that any conditions or site specific standards imposed are limited to (1) those that address the conformance of the development and use of the site to city or county ordinances and officially adopted plans, and (2) those that address the impacts reasonably expected to be generated from the development or use of the site. These provisions regarding conditions apply to both conditional zoning and to special and conditional use district zoning.

Spot Zoning

Section 6 of S.L. 2005-426 amends G.S. 160A-382 and G.S. 153A-342 to codify the existing court-mandated analysis of the reasonableness of small-scale rezonings. North Carolina courts have held that spot zoning is arbitrary and capricious unless the local government establishes a reasonable basis for it. The amendment requires that a statement analyzing the reasonableness of the proposed rezoning be prepared as part of all rezonings to special/conditional use districts, conditional zonings, and other small-scale zonings. The statute does not specify who must prepare this statement or when it is required, thus leaving some flexibility to local governments. For example, the petitioner for a

rezoning could be required to provide the statement as part of the application process, the statement could be prepared by local government staff for presentation at the hearing, the issue could be addressed by the planning board, or any combination of the above could occur.

Special and Conditional Use Permits

Section 5 of S.L. 2005-426 amends G.S. 160A-381(c) and G.S. 153A-340(c1) to clarify that planning boards may be authorized to issue special and conditional use permits (as opposed to having to use the board of adjustment authority). It confirms that governing boards and planning boards must follow quasi-judicial procedures when acting on special and conditional use permits and provides that both planning boards and governing boards need only a simple majority (not a four-fifths vote) to approve the permits. The legislation provides that vacant seats and disqualified members are not counted in computing required majority votes. It also simplifies the law by replacing detailed provisions on appeals of special and conditional use permits with a simpler cross-reference to an existing statute that already sets out those details.

Variances

Section 5 of S.L. 2005-426 amends G.S. 160A-381(b1) and G.S. 153A-340(c) to codify longstanding case law that use variances are impermissible (as changes in permitted uses must be addressed by ordinance amendment rather that by variance). Section 8 of S.L. 2005-418 makes this same amendment to G.S. 160A-388(d) and G.S. 153A-345(d). It also provides that any conditions imposed on a variance be related to the variance standards.

Boards of Adjustment

Section 8 of S.L. 2005-418 makes several amendments to G.S. 160A-388 and 153A-345 regarding board of adjustment procedures. It provides that alternate members of a board of adjustment may serve in the absence or temporary disqualification of any regular member (for example, when a board member is disqualified from participation on an individual case due to a conflict of interest) or to fill a vacancy pending appointment of a new member. This section also provides that the size of the board for purposes of calculating the requisite four-fifths vote is reduced by vacancies and members who are disqualified from voting if there are no alternate members available. The amendments to G.S. 153A-345 also add a new subsection to give county boards of adjustment the same subpoena power that now exists for cities.

Section 8 clarifies that the term "special exception" includes provision for special and conditional use permits (as is now commonly assumed).

Government Land Uses

The General Assembly in 1951 enacted G.S. 153A-347 and G.S. 160A-392. These statutes make city and county zoning regulations applicable to "the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions." Thus, if a building is involved, zoning restrictions apply to land uses owned or operated by cities, counties, and the state.

Since a building is required to trigger application of zoning, and given that land uses per se are not covered, an open-air use of land without an associated building is not subject to local zoning regulations. The North Carolina Court of Appeals thus held in *Nash–Rocky Mount Board of Education v. Rocky Mount Board of Adjustment*, 169 N.C. App. 587, 610 S.E.2d 255 (2005), that a parking lot constructed at an existing high school was not subject to city zoning jurisdiction. The General Assembly had addressed this issue in 2004 S.L. by amending G.S. 160A-392 (but not the comparable county provision) to make municipal zoning applicable to the use of land as well as to the construction and use of buildings [S.L. 2004-199, sec. 41(e)]. However, in 2005, in S.L. 2005-280 (S 669) the General Assembly repealed the 2004 change so that the statute again provides that local zoning applies to state and local governmental entities only when a building is involved.

The General Assembly added one local exception to this reversal of course. Section 11(a) of S.L. 2005-305 (H 328) provides that all docks, buildings, and land under control of the State Ports Authority at Southport are fully subject to municipal zoning jurisdiction.

Planning and Regulatory Jurisdiction

While several bills were introduced that would have substantially altered the statutes on extraterritorial jurisdiction, only local bills making modest changes were adopted. S.L. 2005-115 (S 138) allows the City of Archdale to extend its extraterritorial jurisdiction up to two miles from the corporate limits. S.L. 2005-9 (H 446) adds specified land to the extraterritorial jurisdiction of the City of Roanoke Rapids.

Section 2 of S.L. 2005-305 allows the town of St. James to exercise land use regulatory powers as of October 1, 2005 (previously, Brunswick County had jurisdiction within town limits until the end of 2009). This section limits the town from exercising extraterritorial jurisdiction prior to 2010.

Miscellaneous

Throughout the statutes, S.L. 2005-418 and S.L. 2005-426 change the references to "planning agency" to the term "planning board." Both bills provide that they do not override previously adopted local legislation on these matters.

In 1994 the General Assembly amended G.S. 18B-901(c) to provide that the state Alcoholic Beverage Control (ABC) Commission "shall consider" local zoning and related land use factors in making ABC permit decisions. The statute had previously read that the commission "may consider" zoning in making these decisions. S.L. 2005-392 (H 1174) further amends this section to mandate that local governments return a Zoning and Compliance Form to the commission as part of the permit review process. This act also expands the provision relative to potential detriment to neighborhoods by specifying that the commission is to consider past revocations, suspensions, and violations of ABC laws within the previous year at the location, as well as evidence of illegal drug activity, fighting, disorderly conduct, and other dangerous activities (both within the facility and on the associated premises).

Wrightsville Beach's town charter previously required the town council to act as the board of adjustment. With growth of the town and the concomitant increase in the board's workload, the town sought and obtained an amendment to the charter [S.L. 2005-265 (H 1047)] to provide for appointment of a separate board of adjustment.

Land Subdivision Control

Subdivision Plat Approval

S.L. 2005-418 includes several parts that will affect local government plat approval. Sections 2.(a), 2.(b), 3.(a), and 3.(b) collectively amend G.S. 160A-371 and G.S. 160A-373 (cities) and G.S. 153A-330 and G.S. 153A-332 (counties) to make several sets of changes to plat approval arrangements. The first set of changes clarifies that a local government may adopt a subdivision ordinance as a separate ordinance or as part of a consolidated unified development ordinance. Additionally, a city or county may apply any definition or procedure authorized for one type of land development ordinance to any aspect of a unified development ordinance and may apply any organizational arrangement authorized for any other planning and development ordinance to the unified development ordinance. The second set of changes enables cities and counties to provide for the review and approval of sketch plans and preliminary plats as well as final plats. In addition, it allows different classes of subdivisions to be made subject to different review procedures. The third set of changes provides that plats may be approved by any of the following: the board of commissioners; the board of commissioners on recommendation of a designated body; or a designated planning board,

technical review committee, or other designated body or staff person. The legislation answers affirmatively the question of whether special subdivision review committees or staff members are authorized to approve plats required by the ordinance. It also appears to make it possible for a zoning board, such as the board of adjustment, to be assigned that power.

Subdivision Ordinance Standards

Sections 2.(a) and 2.(b) of S.L. 2005-418 also amend G.S. 160A-371 and G.S.153A-330 to address a concern of the development community. These subsections provide that decisions on whether to approve a subdivision plat (either preliminary or final) must be made on the basis of standards set forth explicitly in the ordinance. Although the act does not prohibit or circumscribe the use of discretionary standards in subdivision regulations, it mandates that if ordinance criteria require the application of judgment, the criteria "must provide adequate guiding standards for the entity charged with plat approval."

Subdivision Ordinance Performance Guarantees

Several additional changes to the subdivision statutes are included in S.L. 2005-426. Sections 2.(a) and 2.(b) amend G.S. 160A-372 (cities) and G.S. 153A-331(counties), respectively, to make changes concerning the construction of community service facilities. First, a subtle but important addition to the statutes requires these facilities to be provided in accordance with not only local government policies and standards but "plans" as well. This reference establishes more fully the link between subdivision requirements and external plans, such as transportation plans and land use plans. Second, new language clarifies that performance guarantees are intended to assure successful completion of required improvements. The third and perhaps most important change is the addition of language declaring that if a performance guarantee is required, the local government must provide a range of options or types of performance guarantees that are available to the developer. These may include, but are not limited to, surety bonds and letters of credit. The law then provides that the type of performance guarantee to be used is at the election of the developer, not the unit of local government.

Scope of Land Subdivision Regulation

A subtle change can be found in the definition of "subdivision" in G.S. 160A-376 and G.S. 153A-335. Before S.L. 2005-426, a land subdivision ordinance applied to divisions involving "two or more lots, building sites, or other divisions for the purpose of sale or building development." Some local governments (mainly counties) have interpreted this language to allow the owner of a tract of land to sell a single building lot created from it without being subject to regulation. The amended language provides that a regulated subdivision includes divisions into "two or more lots, building sites, or other divisions *when any one or more of those divisions is created* for the purpose of sale or development." (Emphasis added.) The act effectively removes all doubt about whether the ordinance applies to the "first lot out."

Remedies for Subdivision Ordinance Violations

The remedies and sanctions available to local governments when there are violations of a subdivision ordinance have always been weak. Section 3.(a) and 3.(b) of S. L. 2005-426 amend G.S. 160A-375 and G.S. 153A-334 to help address this problem. Under the new law, local governments will now be able to withhold building permits for lots that have been illegally subdivided. This change may be viewed as a successful attempt to overcome the ruling of the North Carolina Supreme Court in *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985). In that case, the court ruled that there was no statutory authority for a local government to withhold a building permit for a lot merely because the lot was part of an illegal subdivision. (Local governments could, however, withhold a building permit if a lot violated the current zoning ordinance.) This new power to withhold a building permit for a subdivision ordinance violation must be used carefully, since it will have

consequences when an innocent purchaser of an illegal lot applies for the permit. However, the availability of this remedy will also give local governments greater leverage over subdividers who ignore local regulations.

The subdivision statutes have for some years provided that a local government may enjoin illegal subdivision and obtain a court order requiring the offending party to comply with the subdivision ordinance. However, to what extent a court may prevent or restrain unlawful subdivision activity from occurring or whether it may issue an order to correct or abate the violation has been unclear. S.L. 2005-426 provides a statutory basis for a local government to seek and a court to authorize the use of these remedies.

Presale of Lots

One aspect of S.L. 2005-426 that has caused alarm among planners is a section designed to allow developers to enter into contracts for the sale or lease of lots before a final, surveyed plat is approved and recorded. Some developers use these so-called "pre-sale" or "pre-lease" contracts to demonstrate to lenders the feasibility of the proposed development. Although the North Carolina Attorney General has rendered the opinion that entering into a sales contract to sell a lot from a parent tract constitutes a "subdivision," the practice of developers entering into these contracts before a final plat is approved and recorded is not necessarily rare in this state. Section 3 of S.L. 2005-426 thus may be viewed as providing authorization for a not uncommon but arguably illegal practice.

Section 3 amends G.S. 160A-375 and G.S. 153A-344 to allow pre-sale and pre-lease contracts, but only after a preliminary plat has been approved. The requirement that a preliminary plat be approved by the local government before these contracts are executed—a last-minute addition to the legislation—should help ensure that planners are at least aware that a particular subdivision is being undertaken. The act provides that the closing and final conveyance of the lots subject to these contracts may not occur until after the final plat is approved and recorded.

G.S. 160A-375(c) and G.S. 153A-334(c) allow subdividers to pre-sell or pre-lease lots to builders and commercial intermediaries without any additional protection for these purchasers. If, however, the lots are to be sold to those who are not engaged in the construction business (that is, consumers), then a variety of protections apply. The buyer must receive a copy of the preliminary plat at the time the contract is executed. In addition, the buyer must be notified that no final plat has been approved and that there is no guarantee that changes will not be made to the plat before final approval. Also, the seller must furnish a copy of the final plat to the buyer before the closing. The contract or lease may be terminated by the buyer or lessee if the final recorded plat differs in any material respect from the preliminary plat.

Infrastructure Agreements

Section 8 of S.L. 2005-426 enables local governments to enter into reimbursement agreements with land developers who construct or install infrastructure on behalf of the public. Developers, as a condition of development permission, routinely install or construct infrastructural improvements on property that is eventually dedicated to a public agency or governmental unit. When a city or county uses its regulatory power to compel the developer to furnish the improvement, it is generally understood that the developer will determine who does the work and that no formal contract is required. However, in some cases it may be desirable for a developer to construct facilities and improvements that serve more than just the developer's own property. Local governments may offer to reimburse the developer (or the developer's contractor) to the extent that the improvements are "oversized," and a local government may better make these arrangements through an agreement than through regulation. Enabling legislation for several different types of infrastructure agreements is included in S.L. 2005-426. Each piece is patterned after local legislation on the same subject.

Sections 8(a) and 8(b) add new G.S. 160A-499 and G.S. 153A-451 and provide one model for cities and counties to use. These provisions apply to the construction of local government infrastructure anywhere within a local government's planning jurisdiction. The new law authorizes reimbursement agreements with developers and property owners for a wide variety of purposes,

including water and sewer utilities and street and traffic control improvements. In order to qualify, the facility or improvement must be included on the local unit's capital improvement plan. The city or county must also have adopted an ordinance setting out the procedures and terms under which it may enter into such an agreement. Perhaps the most distinctive feature of Section 8 is the requirement that if the work would have required competitive bidding had the project been undertaken by the local government, then the developer or property owner who actually undertakes the work must use the same bidding procedures that the local government would have used.

Earlier in the 2005 session, the General Assembly adopted a local act that mirrors the one described in the preceding paragraph. S.L. 2005-41 (H 489) authorizes reimbursement agreements for Apex, Broadway, Cary, Goldston, Holly Springs, Pittsboro, Siler City, Sanford, the municipalities located wholly or partially in Cabarrus County, and Lee, Durham, Chatham, and Cabarrus counties.

Sections 8(c) and 8(d) of S.L. 2005-426 enact new G.S. 160A-320 and G.S. 153A-280 to provide an alternative model for public enterprise improvements that are adjacent or ancillary to a private land development project. The new legislation allows a city or county to reimburse those costs associated with the design and construction of improvements that are in addition to those required by local land development regulations. The public bidding requirements of G.S. Chapter 143, Article 8, do not apply if two requirements are met. First, the public cost may not exceed $250,000. Second, the city or county must determine either that (1) the public cost will not exceed the local government's estimated cost of using force account labor or the cost of a public contract let through competitive bidding procedures or (2) the coordination of separately constructed improvements would be impracticable. The act clarifies that the improvements may be located on land owned by the private party or the local government. It also authorizes the private party to help the city or county obtain any easements that may be required.

Section 8.(c) enacts new G.S. 160A-309 to give cities authority similar to that described in the last paragraph, except that it allows cities to enter into reimbursement agreements for intersection and roadway improvements that lie within city limits.

Development Agreements

The infrastructure agreements discussed above are good vehicles for allocating the costs of oversized public facilities that benefit both private development and the public. The state, however, has recently seen development projects that are far larger in scope and that are built out over longer periods of time than ever before. Local governments have noticed that the off-site impacts and public facility implications of such projects outstrip the ability of their regulatory tools to manage them. Developers have major concerns of their own, particularly in regard to the risks involved in committing substantial funds to projects without adequate assurance that local development standards will not become more demanding as the full extent of the project takes form. Even statutory procedures for establishing vested rights, enacted more than fifteen years ago, may not adequately satisfy the concerns of developers and local governments in these unusual circumstances. A new tool or mechanism has been needed. Fifteen states have authorized so-called "development agreements." Sections 9.(a) and 9.(b) of S.L. 2005-426 provide this authority to North Carolina cities and counties by making substantial additions to G.S. 160A-400.20 to -400.32 and G.S. 153A-379.1 to -379.13. South Carolina legislation served as the model.

The development agreements authorized by the new legislation are limited in scope. Under a development agreement, a local government may not impose a tax or a fee or exercise any authority that is not otherwise allowed by law. The development agreement must be consistent with the local laws that apply when the agreement is approved by the local government. The new legislation does not provide express authority for a local government to commit its legislative authority in advance. Cities and counties may not make enforceable promises to refrain from annexing the property, to refrain from using their taxing authority in a particular way, or even to refrain from rezoning affected lands at some future time. The agreement may require the developer to furnish certain public facilities, but it must also provide that the delivery date of these facilities is tied to successful performance by the developer in completing the private portion of the development. (This feature is designed to protect developers from having to complete public facilities in circumstances where progress in buildout may not generate the need for the facilities.) The ordinances in effect when the agreement is executed remain in effect

for the life of the agreement, but the development is not immune to changes in state and federal law. A development agreement may require the project to be commenced or completed within a certain period of time. It must provide a development schedule and include commencement dates and interim completion dates for intervals no greater than five years. However, the act expressly provides that failure to meet a commencement or completion date does not necessarily constitute a material breach of the agreement. The act does provide a procedure by which a local government may declare that the developer has materially breached the agreement and cancel the agreement, but it remains unclear whether traditional remedies for the breach of the contract (for example, an action for damages or specific performance) are also available.

The property subject to a development agreement must be at least twenty-five acres in size. The agreements may last no more than twenty years. In order to be valid, the agreements must be adopted by ordinance of the governing board. The same public hearing requirements that apply before a zoning text amendment may be adopted also apply before a development agreement may be adopted. Once executed by both parties, the agreement must be recorded, and it binds subsequent owners of affected land as well the current owner.

Easements within Certain Public Rights-of-Way

In most municipalities it is understood that if a subdivider offers to dedicate a street in a new subdivision to the public, the street interest dedicated also accommodates various public utilities that are typically located within street rights-of-way. In some unincorporated areas of the state, however, a subdivider of land may choose to establish the necessary easements within new public or private road rights-of-way to accommodate telephone, cable television, and other public utility services only if the service provider is prepared to pay the subdivider for doing so. In any case, utility easements that are not included or accommodated within a highway easement are viewed as burdens. S.L. 2005-286 (H 1469) alters these arrangements insofar as new publicly dedicated roads outside city limits are concerned. It enacts new G.S. 62-182.1 to provide that the recordation of a subdivision plat for an unincorporated area that reflects the dedication of a new public street or highway automatically serves to make that public right-of-way available for use by any telephone, cable television, or other public utility for the installation of lines, cables, and other facilities to provide service. The act requires utility service providers who wish to take advantage of this accommodation to comply with standards established by the Division of Highways of the North Carolina Department of Transportation (NCDOT) for accommodating utilities or cable television systems within its highway rights-of-way. The act also applies only to plats properly recorded under G.S. 47-30 (requirements for the recordation of maps in the office of the register of deeds) and in compliance with G.S. 136-102.6 (dedication of roads to NCDOT). S.L. 2005-286 applies only to maps and plats recorded on or after August 22, 2005, the effective date of the act.

Transportation

Transportation Corridor Official Maps

Legislation enacted in 1987 allows certain transportation agencies and governmental units to adopt transportation corridor official maps to protect potential corridors for future transportation projects from development. Legislation adopted in 2005 allows an additional agency to exercise this power and makes a technical change to the procedures that apply to such maps. S.L. 2005-275 (H 253) authorizes the North Carolina Turnpike Authority to adopt such a map to protect the rights-of-way of certain turnpike (toll road) projects over which it has jurisdiction. In addition, Section 9 of S.L. 2005-418 amends G.S. 136-44.50(d) to correct a statutory inconsistency. The statute requires work on an environmental impact statement or preliminary engineering to begin within one year after the adoption

of the official map. The new law clarifies that an amendment to the corridor does not extend the one-year period unless the amendment results in a substantially different corridor in a primarily new location.

Toll Roads and the Turnpike Authority

The North Carolina Turnpike Authority was established by the General Assembly in 2002 to take on the responsibility for designing, financing, constructing, and operating certain turnpike (toll road) projects. Each year since, the scope of its power and responsibility has been increased. In addition to granting the Turnpike Authority the power to adopt official maps, S.L. 2005-275 increases from three to nine the number of turnpike projects for which the authority is allowed to undertake planning and preliminary design. In particular, the act directs that one of these projects must be the long (over two miles in length) and long-discussed bridge connecting the Outer Banks with the mainland near Corolla. In order to provide accelerated completion of the project toll bridge, the legislation adds new G.S. 136-89.183A to allow the Turnpike Authority to contract with and license a single private firm to design, obtain all necessary permits for, and construct the Outer Banks toll project. It also allows the NCDOT to participate in the cost of preconstruction activities for this project if the participation is requested by the authority, and to use incentives to promote expedited completion of the project. The authority is directed to provide a project report to the Joint Legislative Transportation Oversight Committee on December 1, 2005, and annually thereafter until the pilot toll bridge project is completed.

S.L. 2005-275 also enacts new G.S. 136-89.183B governing the replacement project for the Herbert Bonner Bridge connecting the Outer Banks and Roanoke Island, a project managed by NCDOT. This new statute allows NCDOT to contract with a single firm and to use expedited procedures to complete the new Bonner Bridge at Oregon Inlet. The act, as amended by a later-adopted act [S.L. 2005-382 (H 747)], requires NCDOT to report on the progress of the bridge project to the Oversight Committee on December 1, 2005, and annually thereafter.

The later act, S.L. 2005-382, amends new G.S. 136-89.183B and adds several additional requirements. It directs NCDOT to implement all reasonable measures to expedite the completion of the environmental review required by the National Environmental Policy Act. It also provides that the department's contracting responsibility begins within ninety days after it receives a record of decision from the Federal Highway Administration and that the department must proceed in accordance with G.S. 136-28.11 (provisions applying to design-build construction for transportation projects). The later act also moderates the language of the earlier act in one respect. It provides that the General Assembly "recommends" the location of the Bonner replacement bridge and recognizes that "the preferred alternative for the bridge location cannot be determined prior to compliance with all federal and State laws and regulations."

Another feature of S.L. 2005-275 provides that the hurricane evacuation standard to be used for state bridge and highway construction projects must be no more than eighteen hours, which is the standard recommended by state emergency management officials.

State Road Systems and Certain State Road Work Plans

One purpose of S.L. 2005-382 is simply to update outdated references in the statutes to various types of state roads. It clarifies that the state primary system includes certain roads both inside and outside city limits that are designated by N.C., U.S., or Interstate numbers. The rest of the state highway system consists of the state secondary system. The act eliminates obsolete references to the state urban system.

The act, however, also amends G.S. 136-66.1 to require that each highway division throughout the state take certain steps to make its road maintenance program a bit more transparent. Each division must develop an annual work plan for maintenance and contract resurfacing based on the needs set forth in the biennial maintenance and resurfacing needs report called for in G.S. 136-44.3. The plan must "give consideration" to special needs or information provided by municipalities within the division and must be made available to these cities upon request.

Municipalities, in turn, are directed to develop their own annual work plan with respect to roads in the state system that are within city limits. It, too, must be based on the needs report prepared under G.S. 136-44.3. Municipal work plans must be submitted to the appropriate highway district engineer and must be "mutually agreeable" to both parties.

Environmental Policies Affecting Transportation Projects

The General Assembly's unease with the construction pace of transportation projects has also shown up in several other ways. Section 28.8(b) of the Current Operations and Capital Improvements Appropriations Act of 2005 [S.L. 2005-276 (S 622)] adds new G.S. 136-44.7C. It directs the Department of Transportation to conduct an analysis of any proposed environmental policy or guideline to determine whether it results in increased cost to NCDOT projects. The analysis must be submitted to the Board of Transportation at least thirty days prior to the effective date of the policy or guideline. A companion provision applies to rules, policies, and guidelines adopted by other agencies. Section 28.8(a) enacts new G.S. 150B-21.4(a1) to require any agency that intends to adopt a rule affecting environmental permitting of NCDOT projects to conduct a similar analysis. This analysis must be submitted to the Board of Transportation before the initiating agency publishes its proposed rule change, and the agency must consider any recommendations that the board makes. If the board objects to the rule as adopted before the day following the rule's approval by the Rules Review Commission, then the rule's effective date is delayed as provided in G.S. 150B-21.3(b1) to give the General Assembly time to disapprove the rule.

NCDOT Reorganization

Section 28.11 of S.L. 2005–276 directs NCDOT to reorganize its units in a manner that reflects growing concern about the speed (or lack thereof) at which highway projects are being built. It transfers the Program Development Branch from the Deputy Secretary for Environmental, Planning, and Local Government Affairs to the office of the Chief Financial Officer. It also transfers both the Transportation Planning Branch and the Project Development and Environmental Analysis Branch from the same deputy secretary to the office of the State Highway Administrator. These three changes all refer to the units as they existed on May 1, 2005. In addition, the NCDOT may fill up to 196 existing or vacant positions in the Project Development and Environmental Analysis Branch and may make salary adjustments for positions that are difficult to fill. The department is also authorized to prepare plans for an incentive-pay program for employees of this branch.

NCDOT Stormwater Project

Section 28.20 of S.L. 2005-276 directs NCDOT to report to the Joint Transportation Oversight Committee by August 1, 2005, on its plan to clean up ocean outfalls in accordance with legislation adopted in 2004.

"Way-Finding" Signs within the Right-of-Way

Section 28.14 of S.L. 2005-276 authorizes NCDOT to manufacture and install "way-finding" signs within state highway rights-of-way for the Roanoke Voyages Corridor Commission and the Blue Ridge National Heritage Area Partnership. The signs are to inform travelers of the historic, educational, and cultural attractions on Roanoke Island (and up to thirty miles off the island) and throughout the twenty-five-county Blue Ridge National Heritage Area. The signs need not meet "normal transportation signage standards" (apparently, those sign standards that NCDOT administers).

Regional Transportation Authority Board Representation

S.L. 2005-322 (H 1202) amends G.S. 160A-635(a)(3), which concerns the composition of the Board of Trustees of a regional transportation authority. The act provides that one seat on the board

may be filled either by the chair of the metropolitan planning organization (MPO) or a member of the MPO designated by the organization. It removes the authority of the chair of the MPO to appoint as the chair's designee either the chair of the Transportation Advisory Committee or a designee approved by the committee.

The Future of Horace Williams Airport

The Horace Williams Airport in northern Chapel Hill is operated by the University of North Carolina at Chapel Hill and provides air transportation support for the planes that carry health-care and other university personnel to Area Health Education Centers (AHECs) and other locations. The university plans to include the airport in a site to be used by the university for the development of a satellite campus, known as Carolina North. For some years the General Assembly has succeeded in extending the life of the airport in its present form. Section 28.8(b) of S.L. 2005-276 enacts new G.S. 136-44.7C directing the Legislative Research Commission to study the continued viability of the AHEC program if Horace Williams Airport is not available and to report its findings to the 2006 session of the General Assembly.

Community Appearance

Tree Protection/Forestry Activity

The last five years have seen a growing interest among municipalities in preserving stands of trees from destruction and protecting undeveloped areas from clear-cutting. Although good arguments may be made that local governments have had the necessary general legislative authority to restrict and even prohibit activities of this sort, between one and two dozen local governments have taken a conservative course by seeking local acts specifically authorizing them to undertake narrowly prescribed regulatory activities. The struggle and debate during the past several years over whether local legislation is needed and what form local acts may take has pitted local governments and environmental groups against home builders and timbering interests. Some of the nagging questions on local government authority were resolved by the enactment of S.L. 2005–447 (S 681).

The act clarifies local authority over certain forestry activities in a way that recognizes tree protection as an adjunct of land development regulation but substantially restricts local authority in other respects. It prohibits cities and counties from enforcing any regulation affecting forestry activity on forest land that is assessed at its present-use value for purposes of local property taxes. (Such properties are typically found in rural areas but are also not uncommon in urban fringe areas.) In addition, municipal regulations may not be applied to forestry activity conducted in accordance with a forest management plan prepared by a registered forester. County regulations may not be applied to activity conducted in accordance with a management plan regardless of who prepared the plan.

There are, however, a variety of exceptions to this general prohibition. First, tree protection regulations that are part of land development regulations are exempt. Cities and counties may thus enforce these regulations if they are adopted as part of a zoning or land subdivision ordinance. (See, however, the discussion of restricting clearing "in anticipation of development," below.)

A second important exception to the prohibition against local regulations involves those regulations that are necessary to comply with any federal or state law, rule, or regulation. If, for example, a local government regulation protecting buffers along a water course is required under state watershed protection or stormwater management rules, that regulation may be enforced by a local government notwithstanding the new prohibition.

A third exception concerns the ability of a city to regulate trees within or affecting a municipal street right-of-way. For example, a city may require the trimming of trees if limbs or roots impede the use of the right-of-way.

A fourth exception allows local governments that are permitted to regulate trees and forestry activity under existing local acts to continue to do so.

One of the most important issues separating forestry and development interests from local government and environmental interests concerns clearing of sites in anticipation of development. The owner of land on the urban fringe may wish to harvest an old stand of timber before selling the land to a developer. Or a development company that has invested in land may wish to harvest the timber either simply to enjoy the cash flow or to avoid having to comply with the land development and tree protection standards that would apply (or would have applied) were a development application to be submitted.

The remedy for this "clearing in anticipation of development" that was made available in much of the local legislation adopted in the past five years was to allow the local government to withhold development permission for the property for a certain period of time after the clearing occurred. S.L. 2005–447 adopts similar standards. A city or county may deny a building permit or withhold site or subdivision approval for a period of up to three years after the completion of a "timber harvest" if it results in the removal of "all or substantially all of the trees that were protected" under development regulations that apply (or would have applied) to the tract of land. If the harvest is a "willful violation" of local government regulations, development approvals may be withheld for a period of five years after the clearing. Although withholding development permission seems like a strong remedy, the remedy is triggered only when a local government is prepared to demonstrate how its tree protection standards would have applied to the development site.

Display of Flags

S.L. 2005-360 (H 829) began as a bill primarily aimed at preventing homeowner associations from enforcing deed restrictions in private developments that would restrict the display of the American flag (both for patriotic and for commercial purposes). But because this topic was taken up in a comprehensive revision of the laws governing homeowner associations [S.L. 2005-422 (H 1541)], H 829 was changed to focus on the regulation of flags displayed by local governments. A federal court case involving the City of Durham influenced the final form of the bill as enacted. In *American Legion Post 7 of Durham v. City of Durham*, 239 F.3d 601 (4th Cir. 2001), the Fourth Circuit Court of Appeals rejected a First Amendment challenge to zoning ordinance standards restricting the size and other features of publicly displayed flags. S.L. 2005-360 serves mainly to codify existing law. It enacts new G.S. 144-7.1 to declare that local governments may not prohibit the display of an official governmental flag if it is being displayed in accordance with patriotic customs and with the consent of the owner or the person with control of the property upon which it is displayed. However, the statute expressly allows local governments to impose "reasonable restrictions on flag size, number of flags, location, and the height of flagpoles," so long as the regulation does not discriminate against any official governmental flag. Official governmental flags include the American flag, the North Carolina flag, the flag of any U.S. state or territory or any of its political subdivisions, or the flag of any nation recognized by the U.S. government.

S.L. 2005-422 (H 1541) adds new G.S. 47F-3-121 to prevent certain private restrictive covenants (whether registered before or after October 1, 2005) from being construed to regulate or prohibit the display of the United States flag or the North Carolina flag. The restriction applies to flags larger than four feet by six feet if displayed on member-owned property, unless the covenants include certain express language to accomplish the regulation or prohibition. Similar provisions prevent covenants from being construed to regulate or prohibit the display of political signs. However, S.L. 2005-422 also provides that if political signs are permitted, the association may prohibit the display of political signs up to forty-five days before election day and up to seven days after it, if the regulation is no more restrictive than any applicable local government regulation that applies to such signs. A similar allowance is also available if a local government regulation governs the size and number of political signs that may be displayed. If the local government does not regulate political signs, the association must permit at least one political sign with dimensions no greater than twenty-four inches by twenty-four inches, if the sign is displayed on a member's own property.

Aquatic Weed Control

Several counties have been plagued by the growth of algae and various aquatic weeds in lakes and rivers, which diminishes the attractiveness of these bodies of water for recreation and other purposes. S.L. 2005-440 (H 1281) provides a new mechanism for addressing these problems by allowing counties to establish county service districts to fund control and cleanup of "noxious aquatic weeds" in lakes, rivers, and their tributaries. The new law enacts G.S. 153A-301(e) to permit a county to establish such a district for property that is contiguous to these waterways or that is provided access to the water by means of a shared, certified access site. The term "noxious aquatic weed" includes any plant organism so identified by the Secretary of Environment and Natural Resources and regulated as a plant pest by the Commissioner of Agriculture.

Overgrown-Vegetation Ordinances

In 1999 the General Assembly authorized the City of Roanoke Rapids to give chronic violators of its overgrown-vegetation ordinances a single annual notice that the city may remedy (abate) the violation and charge the costs to the property owner. That idea has proved popular and other cities have sought similar local legislation. This year several more cities were granted identical authority. S.L. 2005-81 (H 940) authorizes the towns of Ayden, Leland, and Pineville to use this procedure, as does S.L. 2005-202 (S 338) for the Town of Ahoskie. In addition, S.L. 2005-44 (H 962) provides similar authority for the Town of Matthews with respect to its public nuisance ordinance, and defines a chronic violator as someone to whom the city issued a violation at least three times in the previous calendar year. Section 10 of S.L. 2005-305 provides identical authority for the town of Bladenboro. In yet another variation upon these themes, S.L. 2005-45 (H 987) provides that if the town of Cramerton or Grifton gives a violator notice a second time for violation of the town's weeded lot ordinance in the same calendar year, the town must charge to the violator the expense of the subsequent action and a surcharge of up to 50 percent in addition to this expense to remedy the preceding violation. Like authority is granted by S.L. 2005-308 (H 1078) to the towns of Angier and LaGrange and by S.L. 2005-175 (H 196) to the cities of Oxford and Morehead City and the towns of Atlantic Beach and Newport.

These local acts may, however, run afoul of Article II, Section 24. of the North Carolina Constitution, which prohibits the General Assembly from enacting "any local, private, or special act . . . [r]elating to health, sanitation, and the abatement of nuisances." A person charged with violating an ordinance adopted pursuant to one of these local acts may be able to block enforcement by asserting the unconstitutionality of the act that authorized the ordinance.

Junked Motor Vehicle Ordinances

G.S. 160A-303 allows a city to regulate junked and abandoned motor vehicles that are a health or safety hazard. G.S. 160A-303.2 governs a city's ability to regulate these vehicles for purposes of community appearance. S.L. 2005-10 (H 75) makes local modifications to the definition of "motor vehicle" in each statute to allow regulation of a vehicle that does not display a current license plate, that is more than five years old, and that appears to be worth less than $500 (was less than $100). The amended definition in G.S. 160A-303 applies to the City of Henderson and the Town of Louisburg. The amended definition in G.S. 160A-303.2 applies only to the Town of Louisburg. A second local act, S.L. 2005-25 (H 973), makes the same change to the definition of motor vehicle in G.S. 160A-303.2 as it applies to the City of Jacksonville. A third local act, S.L. 2005-24 (H 963), amends an earlier local act (S.L. 2004-30) to make the same change effective to ordinances adopted by the Town of Matthews.

Building Code

Continuing Education for Code Officials

Legislation requiring continuing education for building code officials was finally enacted in 2005, after unsuccessful attempts in the past several sessions. S.L. 2005-102 (H 658) authorizes the North Carolina Code Officials Qualification Board to adopt a continuing education program for code-enforcement officials, beginning January 1, 2006. The board may adopt rules governing (1) the content and subject matter of the professional development courses; (2) arrangements for approval of courses, course sponsors, and instructors; (3) methods of instruction; (4) computation of credits; (5) waivers or variances from the professional development rules; and (6) sanctions for noncompliance. However, the appropriations bill adopted by the General Assembly apparently includes no additional funding for the Department of Insurance (DOI) to carry out the requirements of the new program.

At each certificate renewal after initial certification, an active code-enforcement official must present evidence that he or she has completed the required course credit hours during the twelve months before the certificate expiration date. In addition, S.L. 2005-102 provides that an individual who has been on inactive status must complete professional development courses during the period after becoming active again. Requirements range from four hours of credit up to twelve hours of credit, depending on the length of time the person has been inactive and whether he or she has been continuously employed by a city or county inspection department during the inactive period.

The act provides that the board must initiate the program no later than October 1, 2005, and put the program into effect no later than January 1, 2006. Furthermore, the act declares that it applies to certificates issued or renewed on or after January 1, 2006.

Code Official Exam Fees

For many years, code officials have been able to take certification exams administered by the Department of Insurance free of charge. These written exams have been administered on a quarterly basis at locations in Raleigh. Recently the North Carolina Code Officials Qualification Board and DOI staff have explored the possibility of changing the way exams are given. The first change would allow applicants to take the exam at a computer terminal rather than by using a pencil and paper. The second change would allow the exams to be given at testing centers located throughout the state. The third change would allow the exams to be given more frequently than they are now. Under the proposed format, exams would be administered by private testing and learning centers for a fee.

Section 1 of S.L. 2005-289 (H 736) amends G.S. 143-151.16 to allow the Qualifications Board to establish and collect fees from exam applicants. The bill allows the board to establish an exam fee of up to $125 per applicant and an exam review fee of up to $50 per applicant. The bill then authorizes DOI to use these funds to pay approved testing services firms to administer exams and review them with test takers. The act became effective October 1, 2005, and allows fees to be charged for applications made on or after that date.

Building Permits and Contractor License Requirements

Among other things, G.S. 87-14 prohibits those who enforce the State Building Code from issuing a building permit for work that must be supervised by a licensed general contractor without obtaining satisfactory proof that the applicant is so licensed. Section 21.1 of S.L. 2005-276 directs the North Carolina Code Officials Qualification Board to take steps to ensure that code officials enforce the requirements of that statute.

Toilets in Malls

Section 2 of S.L. 2005-289 amends Section 37 of S.L. 2004-199, which governs access to toilets in shopping malls. It removes the December 1, 2005, sunset provision for the amendment to G.S. 143-143.5, which provides that notwithstanding any other rule or law (including, apparently, the

State Building Code), toilets for public use in covered mall buildings may be located at horizontal travel distance of (no more than) 300 feet from potential users within the mall.

Plumbing and Heating Work in Electric Generating Facilities

Section 3 of S.L. 2005-289 enacts new G.S. 87-21(c2) to provide that North Carolina contractor licensing requirements do not apply to plumbing, heating, and fire sprinkling work done in electric generating facilities regulated by the State Utilities Commission or the Federal Energy Regulatory Commission.

No Permit If Taxes Not Paid

A small but growing number of counties have sought legislation allowing them to refuse building permits to those who owe delinquent property taxes on property they own. Section 3 of S.L. 2005-433 (H 787) allows Greene, Lenoir, Iredell, Wayne, and Yadkin counties to adopt an ordinance allowing building permits to be withheld in these circumstances.

Bills Eligible for Consideration in 2006

The Rehabilitation Code. The idea of a so-called rehabilitation code as part of the State Building Code dates back to 2001. In that year, legislation was enacted allowing Mecklenburg County and the incorporated municipalities within the county to apply new code standards to the rehabilitation of existing buildings in the county, effective for a four-year pilot period from January 1, 2002, to January 1, 2006. These code standards were based primarily on the New Jersey Building Rehabilitation Code. A key feature of the 2001 legislation provided that any building or project constructed in compliance with such a code would not be required to be retrofitted to come into compliance with whatever statewide building code requirements might apply when the pilot program expired.

According to the 2001 legislation, additional local governments throughout the state were also permitted to enforce the code if the particular local government inspection department was approved by the Building Code Council to conduct local plan review for all building types and occupancies. Since the inception of the rehabilitation pilot program, about a dozen other eligible North Carolina local governments have chosen to make the rehabilitation code available for local rehabilitation projects.

Senate Bill 522, introduced by the sponsor of the 2001 legislation, Sen. Daniel G. Clodfelter from Mecklenburg County, seems intended to prolong and protect the pilot project. It would extend the expiration date of the pilot program from January 1, 2006, to January 1, 2007. It would also postpone (from April 1, 2006, to April 1, 2007) the date by which Mecklenburg County must submit a final report on the use of the rehabilitation program to the Building Code Council, the Department of Insurance, and the General Assembly.

In June 2005, however, the North Carolina Building Code Council formally approved the rehabilitation code as an alternative to the *Existing Buildings* volume of the State Building Code, initiating the rule-making process that should culminate in the rehabilitation regulations becoming part of the code by January 2006. Because it now seems likely that the rehabilitation code will be adopted on a statewide basis anyway, it is possible that Senate Bill 522 may be left to die.

Jet noise zones. Senate Bill 835 addresses noise problems caused by military aircraft and has ramifications for the State Building Code, local zoning ordinances, and private real estate sales contracts. The bill would authorize a city or a county to establish noise zones for areas near military bases as part of a local zoning ordinance. It would also direct the Building Code Council to evaluate the need for additional noise abatement requirements in military noise zones and to "amend the State Building Code accordingly." Perhaps most significantly, Senate Bill 835 would enact new G.S. 39-51 requiring the seller of real property located within a noise zone established by a local government to inform a potential buyer of that fact if the noise levels caused by military aircraft activity "would be material to the ordinary, reasonable, and prudent buyer." In this regard it would also direct the North Carolina Real Estate Commission to include a statement concerning military aircraft noise in the

standard real estate disclosure statement that the commission makes available. Such a disclosure statement may be used by the seller of real property as part of a property sales agreement.

It is important to note that the bill would apply only to aircraft noise associated with military activity. It expressly excludes noise associated with facilities used by the National Guard. It also does not apply to the noise associated with civilian commercial airports.

Building inspector liability. Several years ago the North Carolina Supreme Court, in *Thompson v. Waters*, 351 N.C. 462, 526 S.E.2d 650 (2000), held that the so-called "public duty doctrine" did not apply to local government code officials' activities in reviewing building plans and making site inspections. The public duty doctrine holds that certain law-enforcement officials owe no duty to members of the general public to ensure their safety and cannot be held liable for failure to prevent crimes and other wrongs from occurring. In the context of building code enforcement, the public-duty doctrine would have shielded building inspectors (and their local governments) from liability for failure to detect code violations in the construction of a building in a suit brought by the purchaser or occupant of the building.

Since the *Thompson* case, there has been some discussion about adopting legislation to accomplish through legislative channels what the courts refused to do judicially. Senate Bill 1143 may be viewed as one small step in that direction. The bill declares that it restores protection to local governments and their building inspectors when performing activities relating to building inspection. It would shield both local governments and inspectors from liability for acts or omissions involved in building inspection activities, subject to several exceptions. However, one of the exceptions appears to engulf the rule. The act would exclude acts or omissions that are "material to the value of the structure and demonstrated by clear and convincing evidence." This language seems to leave the liability door wide open since it is a rare inspector-negligence suit that does not involve a claim that the resulting damage has materially affected the value of the structure inspected. The bill also excludes liability protection for actions involving the operation of a motor vehicle.

Historic Preservation

Tryon Palace Historic Sites and Gardens Fund

Section 19A.1 of S.L. 2005-276 enacts new G.S. 121-21.1 to establish the Tryon Palace Historic Sites and Gardens Fund as a special nonreverting fund in the Department of Cultural Resources to repair, renovate, expand, and maintain the sites and gardens. All entrance fee receipts will now be credited to the fund. The act also directs the Tryon Palace Commission to report annually to the Joint Legislative Commission on Governmental Operations, the House and Senate Appropriations Subcommittees on General Government, and the Fiscal Research Division.

Statesville Historic District Structure Demolition

G.S. 160A-400.14 provides generally that a historic preservation commission may delay issuing a certificate of appropriateness for one year from the application date if the applicant proposes to demolish a building in a historic district. S.L. 2005-143 (H 1020) authorizes the City of Statesville to adopt an ordinance prohibiting such demolition, except upon the issuance of a permit granted by the city council. In determining whether to issue the permit the council may consider (1) the location of the structure within the district, (2) the state of repair of the structure, (3) the architectural and historical significance of the structure, (4) the owner's plans, (5) the impact of the demolition on the district, and (6) the economic impact of the denial of the permit upon the owner. The act specifically authorizes the city to require as a condition of the permit that the owner replace the structure to be demolished with another structure that conforms to plans submitted by the owner and approved by the city council.

Housing Code

Local Legislation

Two local acts adopted this year affect housing legislation. S.L. 2005-200 (S 474), which applies only to Greenville and High Point, allows these cities to order dwellings determined unfit for human habitation repaired or demolished after a period of six months. If the owner of a deteriorated building has opted to vacate and close the building to comply with an enforcement order and the governing board determines that the owner has no intention of repairing the building and that the closed building causes detrimental effects on the neighborhood, the city may adopt an order that the building either be repaired or demolished within ninety days. If the building is dilapidated, the owner may be ordered to demolish and remove the dwelling within ninety days.

Section 12 of S.L. 2005-305 (H 328) allows Morehead City to order an owner of residential property to repair rather than vacate and close the building. Like the Greenville/High Point act, S.L. 2005-305 also authorizes the city to order that dwellings deemed unfit for human habitation be repaired or demolished after a period of six months.

Like the local acts relating to overgrown vegetation, discussed above, these two acts may run afoul of Article II, Section 24, of the North Carolina Constitution, which prohibits local acts relating to "health, sanitation, and the abatement of nuisances."

Hurricane Response

Though not as devastating as 1999's Hurricane Floyd or the 2005 storms that struck the Gulf Coast, six hurricanes affected North Carolina in the late summer and fall of 2004. These storms caused substantial flooding, landslides, and wind damage in both the mountain and coastal areas.

S.L. 2005-1 (S 7) was enacted in response. It appropriates over $94 million in state funds to assist in disaster relief programs. It allows modification of the State Hazard Mitigation Grant program to provide housing buyout and relocation assistance for those persons in the mountains whose homes were severely damaged or destroyed in landslide hazard areas. This act also allows the expansion and modification of programs established in response to Hurricane Floyd to provide assistance and relief from the effects of the 2005 hurricanes; provides aid to Canton and to Hyde County for repair and replacement of public infrastructure and buildings; and accelerates flood hazard, streambed, and landslide hazard mapping in affected areas.

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Courts and Civil Procedure

Numerous bills affecting the court system were enacted in 2005, but most were modest in scope. There were no major rewrites of court administration statutes on jurisdiction, selection of judges, or matters relating to the allocation of power between the courts and the legislative branch. Bills concerning all of these topics were introduced, but none passed. The court system did not suffer significant budget reductions, but it also did not receive any substantial increases, even though the system's leaders presented an ambitious budget request to address what they believe to be serious funding shortfalls throughout the system.

Readers interested in matters affecting the courts should also see Chapter 4, "Children, Families, and Juvenile Law," Chapter 7, "Criminal Law and Procedure," Chapter 16, "Mental Health," Chapter 17, "Motor Vehicles," and Chapter 23, "Social Services."

Court Administration

Judicial and Prosecutorial Redistricting

Legislation in 2005 continued the recent trend of dividing or reconfiguring the districts used as the basis for administration of the superior court, the district court, and the district attorneys' offices. The Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), contains provisions dividing District 29 and reconfiguring the two districts that formerly constituted District 20.

District 29 is composed of McDowell, Rutherford, Polk, Henderson, and Transylvania counties. The appropriations act divides it into two districts—with McDowell and Rutherford counties comprising District 29A and the other three counties comprising District 29B. This division applies to the superior court, the district court, and the district attorney districts. No new judgeships were created, but a new district attorney position will be established so that each of the two districts has its own district attorney. This division was effective in December 2005, except that the district attorney division will be effective when new district attorneys are elected for both districts in 2006.

District 20 is on the southern border of the state, immediately east of Mecklenburg County, and consists of Anson, Stanly, Richmond, and Union counties. For superior court purposes only, Union and Stanly counties had comprised District 20B, and Anson and Richmond, District 20A. S.L. 2005-276

and a later technical corrections bill, S.L. 2005-345 (H 320), moved Stanly County into District 20A. Before this change there were two judges in District 20B and one in 20A. One of the current judges resides in Stanly County. Her seat was reallocated to District 20A, leaving District 20B (Union County) with one judge. The legislation adds another judge for District 20B, effective January 1, 2011. To ensure that both judges in that district are on the same election cycle, the election for the remaining Union County judge is postponed for four years—until 2010—to put them both up for election at the same time. The judgeship assigned from Stanly County to the new District 20A is also off-cycle with the other judgeship in that district. To put them on the same cycle, the election for the judge moving to District 20A is delayed until 2008. (G.S. 163-9(b) requires that multiple judgeships in a single superior court district remain on the same election cycle if any part of the district is subject to review of election changes for compliance with the federal Voting Rights Act. This policy ensures that minorities, if so inclined, may use the "single-shot" voting strategy.)

The new district court districts will have the same counties as the revised superior court districts, but S.L. 2005-345 further subdivides District 20B (Union County) into two subdistricts (District 20B and District 20C) for electoral purposes. One judge runs in District 20B and the other two run in District 20C, which is composed of the remaining parts of the county. Unlike other districts, these districts are used solely for elections; the two districts together comprise a "set of districts" which serves as the administrative unit. There will be only one chief district judge, for example, for the two subdistricts, District 20B and District 20C.

The district attorney districts will mirror the superior court districts and will be effective with the results of the 2006 election. One new district attorney position will be created to staff the new District 20B.

The appropriation for the new districts is $148,000 in fiscal 2005-06 and $561,000 in 2006-07. The actual annual cost will be greater; the 2006-07 appropriation funds only six months of the new district attorney positions. These district changes account for most of the new positions allocated in the budget for the court system.

Business Court Expansion

In 1995, in response to recommendations from a study commission appointed by the Governor, the legislature created a special superior court judgeship intended to be filled by a judge who would preside only over complex business cases. That judgeship was filled by Judge Ben Tennille and has commonly been referred to as the "business court." The judgeship is technically just a part of the superior court; creation of a separate business court would raise serious constitutional questions in light of provisions in Article IV of the North Carolina Constitution allowing only those courts specifically authorized in the constitution. Judge Tennille has a courtroom in Greensboro dedicated to the cases he hears. S.L. 2005-425 (H 650) expands the operations of the business court by authorizing the chief justice to designate one or more sitting special superior court judges to hear complex business cases, with one judge to be located in Raleigh and one in Charlotte. Since this bill was enacted, Chief Justice Beverly Lake appointed Judge John Jolly to sit as a business court judge in Raleigh and Judge Albert Diaz to sit in Charlotte. The state budget creates two support positions for these courts and allocates some nonrecurring funds to support the operation of the Mecklenburg court. The budget does not allocate any money for Wake County's court. S.L. 2005-425 also increases the filing fee for a civil case assigned to the business court from $69 to $269. The initial $69 is paid when the case is filed and the additional $200 is paid upon the case's assignment to business court. The act defines the type of case that must be assigned to a business court (presumably the nearest one) and specifies how cases are designated as business court cases.

Starting Dates for District Court Judges' Terms

Since the modern court system was established by constitutional amendments approved by the voters in 1962, district court judges' terms have begun on the date that local government terms begin—the first Monday in December—and superior court judges' and appellate judges' terms have begun on the date that statewide officers' terms begin—January 1 after the election. The dissimilarity

derives from the differing origins of the courts. Superior court judges have been state officials, paid from state funds, since colonial days. District court judges replaced judges who had been serving in the hundreds of local courts that sprang up in the early and mid-twentieth century. The court reform movement in the 1960s replaced the older system with a new district court. The starting date chosen by the legislature for the district court judges' terms, however, was the local government starting date. Over the next forty years, the difference in the starting dates for the two types of judges has created practical problems. S.L. 2005-415 (H 650) provides that the terms of office for district court judges also begin on the January 1 following an election. During the transition, judges will hold over from the first Monday in December until January 1.

Judges' Power to Marry

Under the general law, magistrates are the only court officials allowed to conduct marriages. In most legislative sessions since the early 1990s, however, there has been at least one bill introduced to allow judges to conduct marriage ceremonies. S.L. 2005-56 (S 262) is this year's version. It allowed any district court judge to conduct a marriage ceremony in North Carolina between June 23 and June 27, 2005. It also allowed judges from other states to do so during that time. In a related matter, near session's end a technical corrections bill (House Bill 327) passed the Senate with a provision amending the general law to allow judges to perform marriages on an ongoing basis. That bill will be eligible for consideration when the legislature returns for its short session in 2006.

Jury Service

Jury service is an obligation of citizenship and it is state policy that service be distributed evenly throughout the population. Over the years, however, the legislature has recognized that some senior citizens might have physical limitations that make it impossible to serve. As a courtesy to those citizens, the legislature has authorized an expedited process for them to request exemptions from service based on personal circumstances. Normally a citizen must appear in person to request an excuse from jury service. This personal appearance is not required for senior citizens; they may request the excuse in writing. The age at which a person becomes eligible to use this procedure had been set at sixty-five. S.L. 2005-149 (S 321) raises it to seventy-two. The law also clarifies that the court official handling the request may excuse the person permanently or temporarily or may defer the service to a later date. Often local court officials will defer service without requiring a personal appearance, and while S.L. 2005-149 does not specifically authorize this, it is the first North Carolina law to recognize the practice of deferrals.

S.L. 2005-149 does not entitle people over age seventy-two to an automatic exemption or excuse. In practice, many court officials grant these requests, but there is no statutory basis for them to do so. The principle that each juror's fitness should be evaluated remains the policy articulated in the jury statutes.

Cost and Fee Increases

The state budget raises numerous costs and fees applied to various court procedures. It raises criminal court fees (General Court of Justice Fees) by $9.50 in both district and superior court and civil, estate, and special proceedings fees by $10.00. The act raises the fee paid in criminal cases to the sheriff's retirement fund from $0.75 to $1.25. It raises the maximum cost assessed on estates or trusts (which are based on the size of the estate) from $3,000 to $6,000. It raises the fee assessed when a person applies for expunction of a criminal record from $65 to $125. It adds a $90 fee to be paid by any criminal defendant subject to electronic monitoring and house arrest. Finally, it raises the court costs assessed in motorcycle helmet and seat belt violation cases from $50 to $75.

S.L. 2005-396 (S 327) raises the fee assessed on out-of-state attorneys appearing in a court in this state for a single proceeding from $100 to $125. The additional $25 is earmarked for use by the North Carolina State Bar to help offset the cost of regulating the practice of out-of-state attorneys.

Effective for offenses committed on or after October 1, 2005, S.L. 2005-363 (H 890) adds G.S. 7A-304(a)(8) to direct the judge to assess a fee of $300 for the services of a crime laboratory operated by a local government if (1) the defendant is convicted; (2) as part of the investigation leading to conviction, the lab performed DNA analysis, tests of the defendant for the presence of alcohol or controlled substances, or analysis of a controlled substance possessed by the defendant or the defendant's agents; and (3) the judge finds that the work was substantially equivalent to the kind of work performed by the State Bureau of Investigation. The court may waive or reduce the fee for good cause. Any fees go to the general fund of the local government operating the lab and are to be used for law enforcement purposes.

Clerks' Conference

S.L. 2005-100 (H 878) establishes a statutory Conference of Clerks of Superior Court. The conference will be composed of elected clerks of court (and acting and interim clerks) and will meet twice a year. It may prepare training manuals, cooperate with other agencies to promote effective administration of justice, and provide education in conjunction with the UNC School of Government and the Administrative Office of the Courts (AOC). When funds are available, it may employ an executive secretary (no funds are provided in the 2005-07 budget). The conference is modeled on a similar organization of elected district attorneys established in the 1980s, although that organization now has both state-paid and grant-funded staff to support its efforts.

Court System Budget

The state budget (S.L. 2005-276, as amended by S.L. 2005-345) for the 2005-07 biennium allocates only modest increases for the courts. In addition to the personnel needed for the new districts described above, the budget creates a deputy clerk of court position in Hyde County and two support positions to accompany the establishment of a separate business court in superior court in Mecklenburg County. The budget also provides a one-time appropriation to purchase a telephone system for the new Mecklenburg County courthouse, funds for the operation of the Mecklenburg Drug Treatment Court, and funds to establish a family court in Wake County. The largest source of money for system operations is a reserve fund of $1.1 million for fiscal 2005-06 and $1.9 million for fiscal 2006-07 to offset any increased costs associated with implementing changes to the state's impaired driving laws. These changes are included in House Bill 1048. Because the bill did not pass in 2005, however, it is unclear how the reserve funds can or will be spent in 2005-06. House Bill 1048 is eligible for consideration in the 2006 short session.

The total budget for the courts remains about $340 million. Reductions to existing budgets nearly offset the increases, but for the most part the cuts were taken from reserve funds.

The budget bills also contain several substantive provisions that affect the court system. The most significant include the following:

1. Funds used for drug treatment courts must be used only to provide treatment and case coordination for offenders sentenced to intermediate punishment or for offenders sentenced to community punishment who are at risk of having their probation revoked.
2. The Office of Indigent Defense Services (IDS) has responsibility to set rates to be used generally to compensate attorneys hired to represent indigent criminal defendants and juveniles. However, the actual rate set in an individual case is determined by the trial judge, except in capital cases. Judges have, on occasion, awarded higher fees than the rate schedule would allow. The budget provides that compensation for attorneys representing indigent persons may not be set at rates higher than those established by rules adopted by IDS without its approval.
3. Judges have sometimes made the costs of monitoring probation treatment programs (typically monitoring alcohol usage) a higher priority than other costs due the courts or waived these other costs altogether. The budget act specifically prohibits this practice.

4. The AOC typically does not accept credit or debit card payments. The budget directs the Judicial Department to study the feasibility of implementing electronic payments for costs and other funds collected by the courts.
5. Two years ago the legislature adopted a public financing program for appellate judgeships. The sources of funding for the program did not produce enough funds to provide all the support proposed in the original plan. There was not enough money, for example, to mail a voter guide to each household in the state. The budget assesses a $50 annual surcharge on each member of the North Carolina State Bar to provide an additional source of funds for the public financing program.

Alternative Dispute Resolution

Two bills make changes to the alternative dispute resolution (ADR) programs. S.L. 2005-67 (H 1015) allows a clerk of court to require parties appearing before the clerk on contested matters to participate in a mediated settlement conference using a mediator. The bill exempts foreclosures and adoptions. It authorizes the North Carolina Supreme Court to adopt rules as necessary to supplement the statute. The clerk may order that parties, interested persons (for example, heirs, devisees, next of kin), and any nonparty participants and fiduciaries attend as necessary to ensure that mediation is effective. The parties may select a mediator, but if no mediator is selected, the clerk must appoint one certified by the Dispute Resolution Commission. Mediators are given judicial immunity. The parties, interested persons, and fiduciaries are required to pay the cost of hiring the mediator, subject to waivers for parties unable to pay their share of the costs. The rules adopted by the supreme court must specify how costs are to be paid. If costs are assessed against fiduciaries or the assets of a trust or estate, the clerk must enter an order that contains findings of fact supporting the assessment of costs. To promote free exchange of ideas, later testimony about what transpires in a mediation is severely limited. If a matter can be resolved by agreement of the parties, the settlement must be reduced to writing to be enforceable. If a matter requires the clerk's approval (for example, guardianship and estate matters), the parties may present a proposed settlement to the clerk "for consideration in deciding the matter." The clerk may sanction any person who fails to appear, subject to review by the superior court pursuant to statutes regulating appeals from the clerk.

S.L. 2005-167 (S 806) expands the powers of the Dispute Resolution Commission and clarifies procedures used in various ADR programs. It provides that the rule that statements made in negotiations are inadmissible in the principal action or in other civil actions applies to all persons in the mediation. It also provides that proceedings to discipline a mediator or neutral by the North Carolina State Bar or another agency and proceedings to enforce abuse laws are not covered by the rules on inadmissibility of evidence or confidentiality. It clarifies that the Dispute Resolution Commission has authority to regulate all the various mediated settlement programs established by state statutes. It removes the authority of the director of the AOC to perform commission management functions and instead requires the commission to consult the director about personnel and budget matters. It adds a clerk of court to the commission, and it allows the commission to employ special counsel or to use the Attorney General's office to conduct its regulatory responsibilities and on appeal of these matters. The act spells out procedures to be used in disciplinary proceedings; in general, it provides for confidentiality of information during the process until the commission has conducted an initial proceeding and the mediator or neutral has appealed the decision. Grounds for discipline are specified as a violation of a standard of conduct, a violation of a standard for the person's profession, a violation of a program rule, or conduct that is inconsistent with good moral character or reflects a lack of fitness to serve as a mediator or neutral. Appeals of final determinations by the commission about a mediator's fitness to serve are to the Wake County Superior Court.

Civil Procedure

Service of Process

Several bills made changes in the Rules of Civil Procedure. S.L. 2005-221 (H 1434) amends Rule 4 of the Rules of Civil Procedure to permit signature confirmation as an additional method of service on a natural person. Signature confirmation is a new service provided by the post office in which a recipient signs for a letter. Although signature confirmation costs less than certified mail, it is available only for items sent by priority mail or nonflat parcels sent by first class or parcel post. Therefore, the total cost of postage plus signature confirmation may not be less than certified mail, return receipt requested. The serving party proves service by filing an affidavit averring that a copy of the summons and complaint was deposited in the post office for mailing by signature confirmation and that the copy was in fact received. The serving party will receive a confirmation of service, including the recipient's name and signature, either online or by fax or mail and must attach the confirmation to the affidavit.

S.L. 2005-138 (S 465) amends Rule 5 of the Rules of Civil Procedure to clarify that a certificate of service pursuant to Rule 5 must accompany every pleading and paper required to be served on any party or nonparty, except papers that must be served under Rule 4. The act requires the certificate to show the name and service address of each person served as well as the date and method of service, and if service is by facsimile transmission, the certificate also must show the telefacsimile number of the persons so served. The act requires a certificate to be signed according to Rule 11 and subjects it to Rule 11 sanctions.

Filing of Court Papers

S.L. 2005-138 amends Rule 5 of the Rules of Civil Procedure to clarify which papers must be filed with the court within five days after service: all pleadings subsequent to the complaint; written motions; notices of hearings; any other application to the court for an order that may affect the rights of or commands any individual, business, or entity to forego action of any kind; notices of appearance; any other paper required by rule or statute to be filed; and all orders issued by the court. The act provides that other papers, even if required to be served on parties, should not be filed with the court unless the filing is agreed to by all parties, the papers are submitted in relation to a motion or other request for relief, or the filing is permitted by another statute or rule. The act specifically prohibits briefs or memoranda provided to the court from being filed with the clerk unless ordered by the court, and it places the burden of preserving depositions and material obtained through discovery on the party taking the deposition or obtaining the material.

Civil Motions in Superior Court

To expedite resolution of cases, S.L. 2005-163 (H 514) amends Rule 7 of the Rules of Civil Procedure to allow a motion in a civil action filed in a superior court district comprised of more than one county to be heard at a regular session of superior court in any county in the district. The motion may be heard at a regular civil session or, with the consent of the presiding judge, at a criminal session.

Copying Charges and Indigent Clients

S.L. 2005-251 (S 593) provides that the fee clerks charge for preparation of copies is not to be charged when an attorney appointed to represent an indigent person at state expense is requesting copies in connection with the appointed case. The provision saves time and money because clerks were required to charge attorneys for the copies and send the money to the state, and then the attorneys would be reimbursed by the AOC for the cost of the copies.

Distribution of Residuals in Class Actions

S.L. 2005-420 (S 911) requires the court before entry of judgment in class action cases to determine the total amount that will be payable to all class members. When the parties report the amount actually paid to class members, the court must direct the defendant to distribute the unpaid residue in equal shares to the Indigent Person's Attorney Fund (for providing criminal indigent legal defense) and to the North Carolina State Bar (for providing civil legal services to indigents).

Exemptions from Judgments

For the first time since 1991, the General Assembly in S.L. 2005-401 (H 1176) increased the value of property a judgment debtor may exempt from seizure to satisfy a judgment against the debtor. The increases are as follows:

- In a residence, from $10,000 to $18,500.
- In any property (wild card exemption), from $3,500 to $5,000 to the extent of the unused exemption amount under the residence exemption. This provision substantially increases the amount to be exempted under this exception because the previous provision allowed $3,500 "less any amount of exemption used." A person who claimed a residence with $3,500 equity would not be entitled to claim any wild card exemption under the previous law but, under the new provision, that person would have an unused amount of $15,000 in the residence exemption and could claim $5,000 under the wild card exemption.
- In one motor vehicle, from $1,500 to $3,000.
- In household furnishings, from $3,500 to $5,000, plus $1,000 for each dependent, not to exceed $4,000 for dependents.
- In tools of the trade, from $750 to $2,000.

The act also adds new types of property that may be claimed as exempt. A judgment debtor may exempt up to $25,000 in a qualified college savings plan; all retirement benefits under retirement plans of states other than North Carolina to the extent that the benefits are exempt under the laws of those states (retirement benefits from the State of North Carolina already are exempt by statute); and alimony, support, and child support payments that have been received or to which the debtor is entitled to the extent these are reasonably necessary for support of the debtor or the debtor's dependents.

S.L. 2005-401 also modifies G.S. 1C-1601(c) to conform it to the court's holding in *Household Finance v. Ellis,* 107 N.C. App. 262, *aff'd per curiam,* 333 N.C. 785 (1993), that the constitutional exemptions from judgments cannot be waived because of failure to respond to the notice of rights. Although the practice has been for the judgment creditor to serve a copy of the motion to claim exemptions on the debtor along with the notice of rights to claim exemptions, until the enactment of S.L. 2005-401, the statute itself did not require the service of the motion.

The new exemptions and exemption amounts apply to judgments filed on or after January 1, 2006.

Involuntary Commitments

S.L. 2005-135 (H 1199) amends the involuntary commitment law to conform to practice. Physicians and psychologists are not required to personally appear before a magistrate or clerk to initiate an involuntary commitment. They may send a sworn petition to the judicial official in lieu of personally appearing. Rather than sending a hospital employee to the magistrate or clerk's office with the petition, many hospitals have been sending a copy by facsimile and, if the judicial official issues a custody order, the law enforcement officer who goes to the hospital to take the respondent to the 24-hour facility where he will be held picks up the original petition and returns it to the clerk's office. The new law specifically authorizes physicians and psychologists to file the affidavits by facsimile so long as the original paper copy is mailed to the clerk or magistrate within five days after the facsimile transmission.

Matters of Particular Interest to Clerks

Trust Administration

The most extensive legislative change in 2005 was the adoption of the Revised Uniform Trust Code by S.L. 2005-192 (S 679). The new Code takes effect January 1, 2006, but applies to all trusts no matter when created. Only the changes that affect the clerks of superior court and the court system directly are discussed in this chapter.

The 2001 General Assembly expanded the jurisdiction of clerks to allow them to administer trusts, similar to their duties to administer decedent's estates. S.L. 2005-192 continues that authority and adds to it. It grants clerks jurisdiction to (1) convert a trust to or from a unitrust, (2) transfer a trust's principal place of administration, (3) require a trustee to provide a bond and to set the amount of the bond, (4) make orders with respect to a trust for the care of animals, and (5) make orders with respect to a noncharitable trust having no ascertainable beneficiary. The new Code provides that if a party files an action for a declaratory judgment, either party may move for a transfer of the trust proceeding from the clerk to the superior court, but if the proceeding is not removed, the clerk is to apply the declaratory relief to the extent it is consistent with Code provisions. Because of uncertainty about whether the Rules of Civil Procedure apply in estate proceedings, the Code specifies certain rules that always apply and others that apply if directed by the clerk. It allows a superior court judge to consolidate in superior court a trust proceeding before the clerk and a civil action before the superior court if the cases involve a common question of law or fact.

Because the 2001 legislation authorizing clerks to remove a trustee specified no grounds for removal, clerks have been left to look at general case law from North Carolina and other states to determine what grounds were sufficient. S.L. 2005-192 sets out the following grounds for removing a trustee:

- The trustee has committed a serious breach of trust.
- Lack of cooperation among cotrustees substantially impairs the administration of the trust.
- Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that the removal of the trustee best serves the interests of the beneficiaries.
- There has been a substantial change of circumstances, the court finds that the removal of the trustee best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

Pending a decision on a request to remove a trustee or in lieu of or in addition to removing the trustee, the new Code specifies various forms of relief the court may order if necessary to protect the trust property or the interests of the beneficiaries. It also specifies when the clerk may require a trustee to post a bond and how the clerk sets compensation for the trustee.

Decedents' Estates

In 2003 the General Assembly provided that an equitable distribution action could be filed after the death of a spouse and that the statutory provisions about claims against a decedent's estate apply to claims for equitable distribution as well. Thus, equitable distribution claims were paid as Seventh Class claims along with all debts of the estate and paid pro rata with debts of the estate if there were not sufficient funds to fully satisfy all claims. S.L. 2005-180 (H 804) amends G.S. 28A-19-6 to provide that a claim for equitable distribution is paid as a Seventh Class distribution of a decedent's estate and all general debts and claims become a new Eighth Class distribution, meaning equitable distribution awards are to be paid before general debts and claims.

S.L. 2005-411 (S 290) creates the Uniform Transfer on Death Security Registration Act. It allows owners of securities to execute registration in beneficiary forms that transfer listed securities to named beneficiaries on death of the owner. The law is similar to the statute authorizing transfer on death bank accounts. The registering entity is discharged from claims of the estate, creditors, and heirs if it registers a security in the name of the beneficiary in accordance with the form. S.L. 2005-411 adds

"Transfer on Death" securities to the list of assets that are not part of the decedent's estate but that may be acquired by the personal representative to satisfy claims if needed.

In a minor change to the year's allowance for a child of a deceased parent, S.L. 2005-225 (S 533) allows the full allowance to be paid without subtracting the value of articles consumed by the child after the parent's death.

Guardianships

S.L. 2005-333 (H 1394) enacts G.S. 35A-1212.1 authorizing a parent to recommend by will the appointment of a guardian for an adult, unmarried, incompetent child. The recommendation is a "strong guide" but not binding if the clerk finds that a different appointment is in the incompetent's best interest. The guardian may qualify without a bond if the will specifically directs that no bond is necessary.

Liens on Real Property

S.L. 2005-229 (S 887) clarifies G.S. Chapter 44A provisions dealing with laborers' liens for work performed on real property. A change in terminology helps to make clear whether a lien is against real property or funds owed to a contractor—what has commonly been referred to as a "claim of lien" becomes a "claim of lien on real property," and a subcontractor who has a claim against funds in the possession of a contractor now has a "claim of lien upon funds." A notice of a claim of lien upon funds is not filed with the clerk, docketed, or indexed in any way that would affect title to real property, except when it is attached to a claim of lien on real property.

Another provision in G.S. Chapter 44A was enacted in 2001 when a rash of liens not authorized by North Carolina law were being filed by "freemen" and from "common law courts." The law prohibits a clerk from docketing a lien unless the lien is authorized by statute and appears on its face to contain all information required by the statute under which it is offered for filing. S.L. 2005-229 attempts to make it more difficult for clerks to reject liens offered by attorneys licensed in North Carolina. It provides that a clerk may not reject for indexing and docketing a claim of lien upon real property or other document purporting to claim a lien on real property filed by an attorney licensed in North Carolina if the lien "otherwise complies with subsection (a) of the section." Subsection (a) requires the clerk to reject the lien if it is not specifically authorized by statute and appears on its face to contain all the information required by the statute. Since the subsection (a) provision is substantially identical to language in the 2001 law, however, S.L. 2005-229 may not offer much protection to attorneys presenting these liens.

New Proceedings before the Clerk

A real estate broker who holds earnest money under a contract to purchase real estate may not dispense the funds if the sale falls through, except with the written agreement of the parties or a court order. Sometimes the buyer and seller will not agree and neither will file a lawsuit to determine who is entitled to the moneys, leaving the real estate broker holding the funds. S.L. 2005-395 (H 1284) allows the broker to deposit the funds with the clerk in the county where the property for which the funds are being held is located. Once the money is deposited, the buyer or seller may file a special proceeding with the clerk to determine the rightful ownership of the funds. If no proceeding is filed within one year, the clerk forwards the funds to the Escheat Fund in the Department of the State Treasurer.

In response to the controversy over the release of Dale Earnhardt's autopsy photographs, the General Assembly enacted S.L. 2005-393 (H 1543) to provide that autopsy photos are not public records and to limit access to those photos. It authorizes a person who wants to access autopsy photos to file a special proceeding before the clerk to gain access to the photos upon a showing of good cause. Both the personal representative of the decedent's estate and any surviving spouse must be given notice of the proceeding.

In criminal cases where dogs used for fighting have been placed in an animal shelter, S.L. 2005-383 (H 1085) authorizes the trial court to fix the reasonable expenses for caring for the dogs

and requires the funds to be posted with the clerk every thirty days until the criminal charges are resolved. The funds can be paid to the animal shelter based on the actual costs incurred in caring for the dogs. A person found not guilty in the underlying criminal action is entitled to a full refund of the deposit. Although the statute does not specify, presumably the clerk is responsible for refunding only any funds held by the clerk and the animal shelter is responsible for refunding any moneys paid to it from the funds deposited with the clerk.

S.L. 2005-414 (S 1048) deals with curbing identity theft, a major concern in today's society. Among its many provisions, S.L. 2005-414 prohibits someone filing a document in the official records of the court from including in that document a person's social security, taxpayer identification, driver's license, state identification, passport, checking account, savings account, credit card, or debit card number or a personal identification (PIN) code or password unless expressly required by law or court order or unless the information is redacted. The act grants a person the right to request that the clerk of court remove any of this information from official records placed on any part of the court's Internet Web site available to the general public. The clerk must post notices in the office and on any Internet Web site informing the public of the right to redaction.

Domestic Violence

Legislative Committee on Domestic Violence

As has been the case in every legislative session in recent years, the General Assembly made changes in the domestic violence laws. In 2004 the General Assembly created an interim legislative committee to study and recommend changes to strengthen these laws. This year, S.L. 2005-356 (H 569) creates a permanent sixteen-member Joint Legislative Committee on Domestic Violence to make ongoing recommendations to reduce domestic violence. The committee is to examine policies and recommendations of the Domestic Violence Commission, established in G.S. 143B-394.15; study funding of domestic violence programs; explore new programs; examine law enforcement and judicial responses to domestic violence; and review data collected on domestic violence. S.L. 2005-356 also requires the AOC, with the Department of Correction, to study the use of Global Positioning Satellite (GPS) technology to track criminal offenders and to recommend to the General Assembly a pilot project using GPS technology as a condition of pretrial release for domestic violence offenders.

Domestic Violence Protective Orders

G.S. 50B-3 provides that the court may grant a domestic violence protective order to bring about a cessation of domestic violence. Appellate court decisions have implied that any relief granted in the order must be supported by facts that the specific relief is necessary to bring about a cessation of violence. S.L. 2005-423 (S 1029) rewrites the statute to provide that the court must issue a domestic violence protective order restraining the defendant from further acts of domestic violence if the court finds an act of domestic violence has occurred. It authorizes the court to give any relief listed in the statute, eliminating any requirement to show that the specific relief is necessary for a cessation of the violence. One possible type of relief in a protective order is to direct the defendant to stay away from the child's school. If that relief is granted, S.L. 2005-423 requires the sheriff to deliver a copy of the order to the principal of the school.

Previously, a judge could renew a protective order for an additional year upon a showing of good cause. S.L. 2005-423 authorizes renewals of protective orders for up to two years, but the length of the original order remains one year.

Under certain circumstances, a judge or magistrate must order a defendant, as part of a protective order, to surrender his or her firearms to the sheriff. The defendant may retrieve the firearms after the order is no longer in effect, subject to certain restrictions. S.L. 2005-423 adds a provision that the defendant is not entitled to retrieve the weapons until there is a final disposition of any pending

criminal charges in either state or federal court for any offenses committed against the person who was the subject of the protective order.

Many domestic violence advocates believe that victims of domestic violence should not be required to settle legal issues with their batterers through mediation. Because domestic violence is based on one party's power over and control of the other, mediation cannot be a true meeting of the minds and compromise between two equal parties. Many judicial districts have a mandatory custody and visitation mediation program under which any action for child custody is referred to mediation. S.L. 2005-423 allows a waiver of the mandatory setting of a custody matter for mediation if there has been domestic violence between the parents in common.

S.L. 2005-423 also made several changes to the landlord-tenant law affecting victims of domestic violence. Those changes are discussed in "Matters of Particular Interest to Magistrates," below.

Domestic Violence Victims and Concealed Weapon Permits

The General Assembly passed S.L. 2005-343 (H1311) allowing a sheriff to issue a temporary concealed weapon permit to a person who is protected by a domestic violence protective order if that person is not otherwise prohibited from getting a permit. The clerk must give a person for whom a protective order is issued a copy of an informational sheet explaining his or her right to get a concealed weapon permit. The bill was enacted even though it was opposed by many domestic violence advocates, and the Governor signed the bill after announcing that the General Assembly would later make some changes to the law. However, the General Assembly adjourned without readdressing the legislation.

Matters of Particular Interest to Magistrates

Domestic Violence Victims' Tenant Rights

S.L. 2005-423 creates several new statutes concerning the rights of tenants or household members who are victims of domestic violence, sexual assault, or stalking. First, it prohibits a landlord from terminating a tenancy, failing to renew a tenancy, refusing to enter into a rental agreement, or otherwise retaliating in the rental of a dwelling based substantially on a tenant, applicant, or household member's status as a victim of domestic violence, sexual assault, or stalking or based on the tenant or applicant having lawfully terminated a lease because of domestic violence, sexual assault, or stalking. The landlord may be provided law enforcement, court, or federal agency records or files or documentation from a domestic violence or sexual assault program or from a professional as evidence of domestic violence, sexual assault, or stalking.

Second, the new law sets out procedures for victims of domestic violence, sexual assault, or stalking (protected tenants) to have the locks changed on the rental unit at the cost of the tenant. If the perpetrator is not a tenant in the same dwelling, the protected tenant may request the landlord to change the locks upon giving notice of the tenant's status as a protected tenant. The landlord must change the locks or give the tenant permission to change them within forty-eight hours. If the landlord fails to act within the required time, the tenant may change the locks without the landlord's permission but must give a key to the new locks to the landlord within forty-eight hours after changing the locks. If the perpetrator is a tenant in the same dwelling unit, the protected tenant may request that the landlord change the locks. The tenant must provide the landlord a copy of a court order requiring the perpetrator to stay away from the dwelling unit. The landlord must change the locks or give the tenant permission to change the locks within seventy-two hours and if the landlord fails to act, the tenant may change the locks without permission but must give a key to the landlord within forty-eight hours after changing the locks. The landlord has no duty to allow the perpetrator access to the dwelling unit unless the court order allows the perpetrator to return to the dwelling to retrieve personal belongings. The

landlord also has no duty to provide keys to the perpetrator. A perpetrator who has been excluded from the dwelling remains liable under the lease with any other tenant for rent or damages to the dwelling unit.

Third, S.L. 2005-423 allows a protected tenant to terminate his or her rental agreement by giving the landlord notice of termination to be effective on a date at least thirty days after the landlord's receipt of the notice. The tenant must include with the notice a copy of a valid regular (not ex parte) order of protection issued under G.S. Chapter 50B or 50C, a criminal order that restrains a person from contact with the tenant, or a valid Address Confidentiality Program card issued to the victim. Additionally, if the protected tenant is a victim of domestic violence or sexual assault, the tenant must attach a copy of a safety plan to the notice to terminate. The safety plan must be provided by a domestic violence or sexual assault program and recommend relocation of the protected tenant. If other tenants besides the protected tenant reside in the dwelling unit, the tenancy continues for those other tenants. A perpetrator who has been excluded from the dwelling unit under a court order remains liable under the lease with any other tenant of the dwelling unit for rent or damages to the unit.

Summary Ejectments

Notice to terminate lease of mobile home space. G.S. 42-14 specifies the time by which a landlord or tenant must give notice to terminate a periodic tenancy at the end of the term if the lease does not provide a specific time for notice of termination. Under that provision, if the lease is for the rental of a mobile home space, the landlord or tenant who wishes to end the periodic tenancy at the end of a term must give at least thirty days' notice before the end of the term that the lease will terminate at the end of that term. Thus, if the tenant rents a mobile home space month-to-month with the term beginning on the fifteenth of the month and if the landlord wishes to terminate the lease at the end of the term in January, the landlord must give notice to the tenant by December 15 that the lease will terminate on January 15. If the tenant remains on the premises after January 15, the landlord may bring a summary ejectment action for holding over after the end of the term. S.L. 2005-291 (H 1243) lengthens the time of the notice from thirty to sixty days before the end of the term and applies to notices to quit given on or after January 1, 2006.

Summary ejectment judgment on the pleading. S.L. 2005-423 makes a major change in procedure in one type of summary ejectment judgment. General small claims law provides that failure to file a written answer constitutes a general denial, meaning that the plaintiff must offer sufficient evidence to prove by a preponderance of the evidence that the plaintiff is entitled to a judgment. The summary ejectment law provides that the magistrate must give judgment for possession if the plaintiff proves the case by a preponderance of the evidence or the defendant admits the allegations of the complaint. S.L. 2005-423 amends G.S. 42-30 to provide that the magistrate must give judgment for possession based solely on the filed pleadings if the pleadings allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed, the defendant has not filed an answer, the defendant fails to appear on the day of court, and the plaintiff requests, in open court, a judgment based on the pleadings. In that case, the magistrate must give judgment for possession without asking the plaintiff to offer any evidence. However, if the plaintiff is seeking monetary damages for back rent, the plaintiff must prove by a preponderance of the evidence any monetary damages that are due.

Bond to stay execution of summary ejectment judgment on appeal. G.S. 42-34 requires a tenant to post a bond to stay execution of a summary ejectment judgment for possession if the tenant wishes to remain on the premises during the appeal. S.L. 2005-423 makes some clarifying changes to that provision. First, it specifies that the tenant's undertaking to pay into the clerk's office the contract rent as it becomes due during the time the case is on appeal applies to the "tenant's share" of the contract rent. Thus, in cases in which the tenant is receiving housing assistance (such as Section 8 or public housing), the tenant must pay only the share of the rent he or she is obligated to pay, not the full amount of the contract rent, of which part is paid by an agency. Second, the tenant also must pay in cash to the clerk the amount of undisputed rent in arrears. The magistrate must determine this amount in the summary ejectment judgment. The new law specifies that the magistrate must base that determination on the available evidence presented or on the amounts listed in the complaint. Third, if a

party requests a hearing before the clerk to modify the terms of the undertaking, the clerk must hold the hearing within ten calendar days.

Military Termination of Lease

G.S. 42-45 sets out a procedure for military personnel to terminate a residential lease if they are required to move because of a permanent change of station orders or are prematurely discharged from the military. S.L. 2005-445 (S 1117) grants the same right to military personnel who are deployed with a military unit for a period of not less than ninety days. The termination is effective thirty days after the next rental payment is due or forty-five days after the landlord's receipt of the notice of termination, whichever comes first.

Counterclaims

G.S. 7A-219 provides that counterclaims making the amount in controversy exceed the jurisdictional limit for small claims cases are not permissible in a small claims action. The statute then provides: "No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action, which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claims action." Questions have been raised as to whether a defendant must file a compulsory counterclaim that falls within the jurisdictional amount of small claims court and whether a compulsory counterclaim that exceeds the jurisdictional amount must be raised on appeal of the case to district court. The Court of Appeals in *Fickley v. Greystone Enterprises, Inc.,* 140 N.C. App. 258, 536 S.E.2d 331 (2000), held that a defendant would lose the right to assert a compulsory counterclaim for more than the small claims jurisdictional amount if the defendant did not appeal the small claims action and raise the counterclaim in district court. S.L. 2005-423 clarifies the issue by providing that the defendant's failure to file a counterclaim in a small claims action or to appeal a small claim judgment to district court does not bar the defendant from filing the claim as a separate action.

Pending Bills

Under the rules governing the 2006 short session, any bill that passed one house by June 2, 2005, is eligible for consideration. Bills affecting the courts that have passed one house include the following:

- Senate Bill 523, which would submit to the voters a constitutional amendment to provide for gubernatorial appointment of appellate judges, with subsequent retention elections to determine whether appointees remain in office
- Senate Bill 353, which would place primary responsibility in the North Carolina Supreme Court for amending rules of evidence or of civil or criminal procedure, subject to a veto by the legislature
- House Bill 1323, which would establish an Actual Innocence Commission to review claims by persons who assert that they did not commit the crime for which they were convicted
- House Bill 1417, which would revise the procedures and operations of the Judicial Standards Commission to provide that separate panels of that body conduct the prehearing investigations and the formal hearings

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Criminal Law and Procedure

The most significant legislation enacted by the 2005 General Assembly in the field of criminal law and procedure was what has become known as the *Blakely* bill, which responds to rulings of the United States Supreme Court that rendered unconstitutional portions of North Carolina's sentencing statutes. As is common in most sessions, the General Assembly also passed legislation on a wide array of criminal law and procedure topics, including new restrictions on the sale of pseudoephedrine, a cold medication ingredient also used to manufacture methamphetamine, and revamped laws on identify theft and exploitation of an elderly or disabled adult. The General Assembly also passed legislation indirectly involving criminal law, expanding the collateral consequences of criminal convictions by requiring sex-offender registration for a wider range of offenses and criminal history checks for more types of employment and other activities.

This chapter does not review legislative changes to motor vehicle offenses. These are discussed in Chapter 17, "Motor Vehicles."

The *Blakely* Bill

Background

In *Apprendi v. New Jersey,* 530 U.S. 466 (2000), the U.S. Supreme Court held that any fact (other than a prior conviction) that increases the defendant's sentence beyond the statutory maximum permitted for the offense must be submitted to a jury and found beyond a reasonable doubt. In *Blakely v. Washington,* 542 U.S. 296 (2004), the Court elaborated on this principle, holding that the term *maximum* means the maximum sentence a judge may impose based solely on the facts found by the jury or admitted by the defendant. These rulings have had significant repercussions for felony sentencing in North Carolina. Almost all felonies in North Carolina are governed by structured sentencing, which has permitted judges to impose higher sentences based on the judges' findings, by a preponderance of the evidence, that certain aggravating factors and prior record points exist. In several North Carolina Court of Appeals decisions and in the North Carolina Supreme Court's decision in *State v. Allen,* 359 N.C. 425, 615 S.E.2d 256 (2005), the courts have recognized that, with some exceptions, this approach runs afoul of the principles announced in *Apprendi* and *Blakely.*

In light of these problems, the General Assembly enacted S.L. 2005-145 (H 822) (the *Blakely* bill), effective for offenses committed on or after June 30, 2005. [The North Carolina Supreme Court's *Allen* decision and the decisions by the North Carolina Court of Appeals govern the procedures to be followed for offenses committed before June 30, 2005. For a detailed discussion of the differences in procedure for offenses committed before and after the effective date of the act, *see* Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (Sept. 2005), ncinfo.iog.unc.edu/programs/crimlaw/faculty.htm]. The *Blakely* bill applies to structured sentencing for felonies in both district and superior court. It does not apply to structured sentencing for misdemeanors, which so far is unaffected by the U.S. Supreme Court's decisions. The act also does not apply to the sentencing scheme for impaired driving offenses under G.S. Chapter 20, although that scheme is affected by the U.S. Supreme Court's decisions. For guidance on the sentencing procedure to follow in those cases, *see State v. Speight,* 359 N.C. 602, 614 S.E.2d 262 (2005); *see also* Smith, *supra.*

The *Blakely* bill makes the following changes to the procedures for imposing a sentence in a felony case. The revised procedures can be divided into three categories—the procedures for pleading or otherwise alleging aggravating factors and prior record points that would enhance a defendant's sentence, the procedures for determining the existence of aggravating factors and prior record points, and the procedures for considering mitigating factors and weighing them against aggravating factors and imposing a sentence. Unless otherwise noted, all the changes appear in revised G.S. 15A-1340.16 (aggravated and mitigated sentences) and G.S. 15A-1340.14 (prior record level for felony sentencing).

Pleading Requirements

The act essentially creates three different pleading rules depending on the aggravating factors and prior record points being sought to enhance a defendant's sentence.

1. The state must allege in an indictment or other charging instrument (such as an information if an indictment is waived) the aggravating factor under G.S. 15A-1340.16(d)(20). This type of aggravating factor is known as a "nonstatutory aggravating factor" because it does not specify any particular conduct but rather includes any aggravating factor "reasonably related to the purposes of sentencing."

2. The state must provide written notice to the defendant of its intent to prove the existence of any aggravating factors listed in G.S. 15A-1340.16(d)(1) through (19). These are known as "statutory aggravating factors" because they specify conduct that constitutes an aggravating factor. The state also must provide written notice of its intent to prove the prior record level point under G.S. 15A-1340.14(b)(7), which adds a point if the defendant committed the offense while on probation, parole, or post-release supervision; while serving a sentence of imprisonment; or while on escape from a correctional facility during a sentence of imprisonment. The state must give this notice at least thirty days before trial or entry of a guilty or no contest plea, but the defendant may waive the notice. The act does not require the state to include these factors or points in an indictment or other charging instrument.

3. The state is not required to allege in the charging instrument or in a written notice prior convictions or the prior record point in G.S. 15A-1340.14(b)(6), which adds a point if all the elements of the present offense are included in a prior offense for which the defendant was convicted.

Procedure for Determining Aggravating Factors and Prior Record Points

The act essentially creates four new procedures for determining aggravating factors as well as the prior record point under G.S. 15A-1340.14(b)(7) (offense while on probation, parole, and so forth). These new procedures do not apply to prior convictions and the prior record point under G.S. 15A-1340.14(b)(6) (present offense included in prior offense); the act does not change the structured sentencing procedures for those sentence enhancements, which a judge continues to determine by a preponderance of the evidence. The act provides that the judge also determines the aggravating factor that the defendant was previously adjudicated delinquent for an offense that would

be a Class A through E felony if committed by an adult. (According to revised G.S. 15A-1340.16(a), the judge must find this factor beyond a reasonable doubt.) The North Carolina Court of Appeals has held, however, that this factor, like other aggravating factors, must be determined by the jury or admitted by the defendant. *See State v. Yarrell,* ___ N.C. App. ___, 616 S.E.2d 258 (2005). The North Carolina Supreme Court has temporarily stayed the Court of Appeals decision but, until there is a final ruling, the safer course is for trial courts to apply the new sentencing procedures to this aggravating factor. The new procedures are as follows.

1. If the defendant does not plead guilty to the charged felony and does not admit the aggravating factors and prior record points alleged by the state, a jury is impaneled to try the felony and determine the existence of the alleged aggravating factors and points. The state must prove these factors and points beyond a reasonable doubt. The judge may submit both the felony charge and the factors and points to the jury at the same trial unless the interests of justice require that the jury consider the factors and points at a separate proceeding after trial of the felony. The act describes the procedures to be followed for reconvening the jury in the event separate proceedings are held.

2. If the defendant pleads guilty to the felony but contests one or more of the alleged aggravating factors or prior record points, a jury is impaneled to determine the existence of the aggravating factors and points only.

3. If the defendant admits the alleged aggravating factors and prior record points but pleads not guilty to the charged felony, the jury decides the felony charge only; evidence relating solely to the establishment of the factors and points is inadmissible. In taking the defendant's admission, the court must engage in the colloquy for accepting a guilty plea under G.S. 15A-1022(a) and must comply with the procedures for taking guilty pleas in new G.S. 15A-1022.1, which require, among other things, that the judge advise the defendant of his or her rights, determine that there is a factual basis for the factors and points admitted by the defendant, and determine that the decision to admit is the informed choice of the defendant. A new Administrative Office of the Courts (AOC) transcript of plea form, AOC-CR-300 (Oct. 2005), lists these steps.

4. If the defendant pleads guilty to the charged felony and admits the alleged aggravating factors and prior record points, a jury trial is unnecessary. In accepting the defendant's admission to aggravating factors and points, the judge must follow the procedures in G.S. 15A-1022(a) and new G.S. 15A-1022.1, discussed above.

Under all of the above procedures, the judge does not determine the existence of aggravating factors or prior record points. A judge may rely on those factors and points to enhance a defendant's sentence only if they are found by a jury or admitted by the defendant.

Consideration of Mitigating Factors and Selection of Sentence Range

As under the previous version of structured sentencing, the judge determines the existence of any mitigating factors. If a jury has determined or the defendant has admitted any aggravating factors, and the judge determines that the aggravating factors outweigh any mitigating factors, the judge may depart from the presumptive range of sentences and impose a sentence in the aggravated range. If the judge determines that the mitigating factors outweigh the aggravating factors, the judge may impose a sentence in the mitigated range. The judge must consider any evidence of mitigating factors, but the decision to depart from the presumptive range is in the judge's discretion.

Criminal Offenses

Sex-Related Offenses

Computer solicitation of sex act with child. G.S. 14-202.3 has made it a Class I felony for a person to solicit a child by computer to commit a sex act if the person is sixteen years of age or older and the child is less than sixteen years of age and at least three years younger than the person. Effective for offenses committed on or after December 1, 2005, S.L. 2005-121 (S 472) raises this offense to a

Class H felony. It also revises the statute to make it a Class H felony if the person *believes* the child is less than sixteen years of age and at least three years younger than the person, whether or not the child is actually that age. The revised statute explicitly states that consent is not a defense to a violation.

The act also amends the sex offender registration statutes to provide that a violation of G.S. 14-202.3 is a "sexually violent offense" within the meaning of G.S. 14-208.6(5). Thus, a person convicted of this offense must register as a sexual offender for ten years following release or, if no prison sentence is imposed, for ten years following conviction. *See* G.S. 14-208.7.

Last, the act amends G.S. 114-15 to authorize the State Bureau of Investigation, on request of the Governor or Attorney General, to investigate the use of a computer to solicit children to participate in certain sex-related offenses.

Indecent exposure. G.S. 14-190.9(a) has made it a Class 2 misdemeanor for a person willfully to expose his or her private parts in a public place in the presence of a person of the opposite sex. Effective for offenses committed on or after December 1, 2005, S.L. 2005-226 (S 776) revises that section by deleting the requirement that the other person be of the opposite sex. The revised statute also provides that "same sex" exposure does not constitute indecent exposure if it occurs in a place designated for a public purpose and is incidental to a permitted activity.

The act also adds new G.S. 14-190.9(a1) making an act of indecent exposure a Class H felony if, in addition to the elements of misdemeanor indecent exposure, the defendant is eighteen years of age or older, the other person is under sixteen years of age, and the defendant acts for the purpose of arousing or gratifying sexual desire. The revised section states that the new felony offense is not a lesser offense of indecent liberties with a child under G.S. 14-202.1.

Last, the act revises G.S. 14-208.6(5) to designate the felony version of indecent exposure as a "sexually violent offense," subjecting a defendant convicted of that offense to the ten-year sex offender registration requirements under G.S. 14-208.7.

Sexual battery. In 2003 the General Assembly enacted G.S. 14-27.5A, making it a Class A1 misdemeanor for a person to commit sexual battery, defined as touching another person by force and against the person's will for the purpose of sexual gratification. Effective for offenses committed on or after December 1, 2005, S.L. 2005-130 (H 1209) amends the sexual offender registration statutes to provide that a violation of G.S. 14-27.5A is a "sexually violent offense" within the meaning of G.S. 14-208.6(5), subjecting the defendant to the ten-year sex offender registration requirements under G.S. 14-208.7. Previously, the only offenses subject to the mandatory sex-offender registration requirements have been felonies or offenses involving minors. Repeat misdemeanor peeping offenses are subject to the registration requirements, but the sentencing judge has the discretion to require registration.

The act also amends G.S. 15A-266.4 to add sexual battery to the list of offenses for which a person must provide a DNA sample if convicted.

Babysitting by or near sex offender. Effective for offenses committed on or after December 1, 2005, S.L. 2005-416 (H 1517) enacts new G.S. 14-321.1 to make babysitting unlawful in certain circumstances in which a sex offender is present. Under the new statute, it is unlawful for an

- adult
- to provide or offer to provide
- a "baby sitting service"
- either in a home in which a resident of the home is a sex offender registered in accordance with G.S. Chapter 14, Article 27, or when a provider of care for the babysitting service is a sex offender registered in accordance with G.S. Chapter 14, Article 27.

Baby sitting service, in turn, is defined as

- providing for profit
- supervision or care of a child under the age of thirteen
- who is unrelated to the provider by blood, marriage, or adoption
- for more than two hours per day
- while the child's parent or guardian is not on the premises.

A first offense is a Class 1 misdemeanor, and a subsequent offense is a Class H felony.

Animal-Related Offenses

Assault on assistance animal. G.S. 14-163.1 has made it a Class 1 misdemeanor to cause or attempt to cause physical harm to an assistance animal (an animal trained to assist a person with a disability) or to a law enforcement agency animal, and it has made it a Class I felony to cause or attempt to cause serious physical harm to such an animal. Effective for offenses committed on or after December 1, 2005, S.L. 2005-184 (S 1058) amends the statute to expand the definitions for both levels of offense to include nonphysical harm. For the misdemeanor offense, "harm" may include "any behavioral impairment" that impedes or interferes with the animal's duties. For the felony offense, "serious harm" may include harm that requires retraining or retirement of the animal. The revised statute also requires that a person convicted of a violation make restitution for specified expenses, such as veterinary care for the animal or retraining.

Electronic dog collars. G.S. 14-401.17 has made it a Class 3 misdemeanor, and a Class 2 misdemeanor for a subsequent offense, to remove an electronic collar from a dog in thirty-eight of North Carolina's one hundred counties. Effective for offenses committed on or after December 1, 2005, S.L. 2005-94 (H 862) extends that prohibition to the remaining counties. The act accomplishes this result by repealing G.S. 14-401.17(d), which listed the counties to which the prohibition applied.

Dogfighting. Effective for offenses committed on or after December 1, 2005, S.L. 2005-383 (H 1085) establishes a procedure to allow the court to order a defendant charged with illegally using dogs for fighting in violation of G.S. 14-362.2 to deposit with the clerk of superior court the expected costs of caring for the dogs pending disposition of the charges. New G.S. 19A-70 addresses the petition process (initiated by an animal shelter that takes possession of the dogs), service and hearing requirements, period of time covered by orders for the deposit of funds, renewal of orders, forfeiture of dogs for failure to pay, adoption or euthanizing of the dogs in the event of forfeiture, circumstances under which the defendant may obtain a refund of all or part of the deposit, and care of the dogs without removal from their existing location.

The new statute does not specify whether these matters are to be heard in district or superior court. If the matter is treated as a civil action, the district court may be the exclusive place for hearing. Article 1 of G.S. Chapter 19A provides that civil complaints for the protection and humane treatment of animals are filed in the district court in the county in which the animal cruelty allegedly occurred. In contrast, if the matter is construed to follow the criminal case, it could be heard by the district or superior court, depending on the stage of the case. A violation of G.S. 14-362.2, which is the basis for a petition for dog care expenses, is a Class H felony, which ordinarily begins in district court and, unless dismissed or resolved by guilty plea in district court, ends in superior court.

Cockfighting. Effective for offenses committed on or after December 1, 2005, S.L. 2005-437 (H 888) amends G.S. 14-362 to increase the offense of cockfighting from a Class 2 misdemeanor to a Class I felony.

Computer-assisted remote hunting. Effective for offenses committed on or after December 1, 2005, S.L. 2005-62 (H 772) prohibits engaging in computer-assisted remote hunting, or providing or operating a facility that allows computer-assisted remote hunting, of wild animals or wild birds located within North Carolina. *Computer-assisted remote hunting* is defined in new G.S. 113-291.1A as "the use of a computer or other device, equipment, or software, to remotely control the aiming and discharging of a firearm or other weapon, that allows a person, not physically present at the location of that firearm or weapon, to hunt or shoot a wild animal or wild bird." A violation of the new statute is a Class 1 misdemeanor under G.S. 113-294(q) and results in a two-year suspension, under G.S. 113-276.3(d), of any license or permit applicable to the type of activity that resulted in the conviction.

Theft-Related Offenses

Identity theft. Effective for offenses committed on or after December 1, 2005, S.L. 2005-414 (S 1048) renames the offense of financial identity fraud, in G.S. 14-113.20, as "identity theft" and makes other changes to facilitate enforcement of the statute. Amended G.S. 14-113.20 expands the definition of identifying information subject to the section to include employer tax identification

numbers, state identification cards, passport numbers, electronic mail names and addresses, and Internet account numbers and identification names. Under amended G.S. 14-113.21, the venue for prosecution of identity theft includes the county where the victim or defendant lives, any county where part of the identity theft took place, or any county instrumental to the completion of the offense. New G.S. 14-113.21A allows law enforcement officers to take complaints of identity theft and forward them to the appropriate law enforcement agency even though they do not have jurisdiction to investigate or prosecute the offense.

The criminal law changes are a small part of a larger act aimed at preventing identity theft. The act creates a new Article 2A in G.S. Chapter 75, entitled the "Identity Theft Protection Act," which contains numerous provisions requiring businesses to protect personal identifying information, such as Social Security numbers. Violations of the new provisions are considered violations of G.S. 75-1.1, subject to civil penalties under Article 1 of G.S. Chapter 75. The act also enacts G.S. 132-1.8 restricting the disclosure of Social Security numbers and other personal identifying information by agencies of the state or its political subdivisions. These provisions have varying effective dates. The new section also forbids a person, effective December 1, 2005, from filing a document in the official records of the register of deeds or of the courts that includes certain personal identifying information, such as Social Security numbers, in that document unless expressly required by law or court order or adopted by the State Registrar on records of vital events. A violation of this restriction is an infraction, subject to a penalty of up to $500. The register of deeds and clerk of court may not be held liable for the inclusion of personal identifying information in records filed with their offices.

Breaking or entering place of worship. Effective for offenses committed on or after December 1, 2005, S.L. 2005-235 (S 972) enacts new G.S. 14-54.1 making it a Class G felony to break or enter a building that is a place of religious worship (as defined in the new statute) with the intent to commit a felony or larceny. Breaking or entering other types of buildings (other than dwellings) remains a Class H felony.

Failure to return rented vehicle. G.S. 14-167 has made it a Class 2 misdemeanor to fail to return rented property, including a rented motor vehicle, at the expiration of the rental period. Effective for offenses committed on or after December 1, 2005, S.L. 2005-182 (H 1392) makes it a Class H felony to fail to return a rented motor vehicle if at the time of the rental the vehicle had a fair market value of more than $4,000.

The act also enacts new G.S. 14-168.5 and new G.S. 20-102.2. G.S. 14-168.5 provides that certain acts constitute prima facie evidence of an intent to commit the offenses of failing to return rented property in violation of G.S. 14-167, renting property with the intent to defraud in violation of G.S. 14-168, and conversion of rented property in violation of G.S. 14-168.1. G.S. 20-102.2 provides that a law enforcement officer who receives a report of a failure to return a rented vehicle in violation of G.S. 14-167 must report the information to the National Crime Information Center (NCIC); upon recovery of the vehicle, the officer must report this information to the NCIC and to the party who reported the loss.

Larceny of construction materials. Effective for offenses committed on or after December 1, 2005, S.L. 2005-208 (S 532) enacts new G.S. 14-72.6 to make larceny, receiving stolen goods, and possession of stolen goods Class I felonies if the goods are stolen from a permitted construction site and are valued at more than $300 and less than $1,000. Larceny, receiving, and possession remain Class H felonies, regardless of the site of the theft, if the goods are worth more than $1,000.

Exploitation of elder or disabled adult. G.S. 14-32.3(c) has made it a crime for a caretaker to exploit an elder or disabled adult. Violation of that subsection has been a Class H felony if the exploitation resulted in the loss of more than $1,000 and a Class 1 misdemeanor if the loss was $1,000 or less.

Effective for offenses committed on or after December 1, 2005, S.L. 2005-272 (H 1466) repeals G.S. 14-32.3(c) and replaces it with G.S. 14-112.2. The new statute creates two offenses involving exploitation of an elder or disabled adult [defined in new G.S. 14-112.2(a)]. Under new G.S. 14-112.2(b), it is unlawful for a person

- who is in a position of trust and confidence or has a business relationship with an elder or disabled adult
- knowingly

- by deception or intimidation
- to obtain or use or endeavor to obtain or use an elder or disabled adult's funds, assets, or property
- with the intent to deprive temporarily or permanently the elder or disabled adult of the use, benefit, or possession of the property or to benefit someone other than the elder or disabled adult.

A violation is a Class F felony if the property is valued at $100,000 or more, a Class G felony if the property is valued at $20,000 or more but less than $100,000, and a Class H felony if the property is valued at less than $20,000.

Under new G.S. 14-112.2(c), it is unlawful for a person

- who knows or reasonably should know
- that an elder or disabled adult lacks the capacity to consent
- to obtain or use, endeavor to obtain or use, or conspire with another to obtain or use an elder or disabled adult's funds, assets, or property
- with the intent to deprive temporarily or permanently the elder or disabled adult of the use, benefit, or possession of the property or to benefit someone other than the elder or disabled adult.

The subsection provides that it does not apply to a person acting within the scope of his or her lawful authority as an agent for the adult. A violation is a Class G felony if the property is valued at $100,000 or more, a Class H felony if the property is valued at $20,000 or more but less than $100,000, and a Class I felony if the property is valued at less than $20,000.

Pirating movie in theater. Effective for offenses committed on or after December 1, 2005, S.L. 2005-301 (H 687) enacts G.S. 14-440.1 making it a crime for a person to

- knowingly
- operate or attempt to operate
- an audiovisual recording device
- in a motion picture theater
- to transmit, record, or otherwise make a copy of a motion picture
- without the written consent of the theater owner.

A first offense is a Class 1 misdemeanor, and a subsequent offense is a Class I felony. Upon conviction, the court must order the forfeiture and destruction of unauthorized recordings made and devices used in connection with the offense.

Preparation to break or enter motor vehicle. G.S. 14-55 has made it a Class I felony to possess certain weapons or tools with the intent to break or enter a building to commit a felony or larceny. Effective for offenses committed on or after December 1, 2005, S.L. 2005-352 (H 891) enacts a parallel statute prohibiting preparation to break or enter a motor vehicle. New G.S. 14-56.4(b) makes it unlawful to

- possess
- a motor vehicle master key, manipulative key, or other motor vehicle lock-picking or hot-wiring device
- with the intent to commit a felony, larceny, or unauthorized use of a motor conveyance.

New G.S. 14-56.4(c) makes it unlawful to

- willfully
- buy, sell, or transfer
- a motor vehicle master key, manipulative key or device, or certain other instruments
- designed to open or capable of opening the door or trunk or starting the engine of a motor vehicle
- for use in any manner prohibited by G.S. 14-56.4.

A first offense is a Class 1 misdemeanor, and a subsequent offense is a Class I felony. The prohibition does not apply to locksmiths, towing service employees, law enforcement officers, and certain others.

Controlled Substances

Pseudoephedrine (methamphetamine precursor). Effective for offenses committed on or after January 15, 2006, S.L. 2005-434 (H 248) imposes various restrictions on the sale of pseudoephedrine, an ingredient in lawful cold medication, but also used in the illegal manufacture of methamphetamine. New G.S. 90-113.52 through G.S. 90-113.54 contain these restrictions—for example, that a retailer may not offer pseudoephedrine for sale by self service and a customer may not make a retail purchase without a prescription of more than three packages containing a total of more than nine grams of pseudoephedrine products within a thirty-day period.

New G.S. 90-113.56 establishes the following penalties for violations of these sales restrictions:

- A retailer who willfully and knowingly violates the restrictions in G.S. 90-113.52 through G.S. 90-113.54 is guilty of a Class A1 misdemeanor for a first offense and a Class I felony for a subsequent offense. A retailer convicted of a third offense on the premises of a single establishment is prohibited from selling pseudoephedrine products at that establishment. *See* G.S. 90-113.56(a).
- A purchaser or an employee of a retailer who violates the restrictions in G.S. 90-113.52(c) or 90-113.53 is guilty of a Class 1 misdemeanor for a first offense, a Class A1 misdemeanor for a second offense, and a Class I felony for a subsequent offense. These penalties do not apply to a bona fide innocent purchaser. *See* G.S. 90-113.56(b).
- A retailer who fails to train employees in accordance with G.S. 90-113.55, supervise them in transactions involving pseudoephedrine products, or discipline them for violations is subject to a fine of $500 for a first violation, $750 for a second violation, and $1,000 for a subsequent violation. Apparently these sanctions, although labeled "fines," are civil penalties, imposed administratively and not as part of a criminal case.

New G.S. 90-113.57 gives retailers and employees immunity from civil liability for reporting to law enforcement, reasonably and in good faith, criminal activity involving the sale or purchase of pseudoephedrine products and for refusing to sell such products to a person reasonably believed to be ineligible to purchase them.

The act also enacts G.S. 66-254.1 making it unlawful for itinerant merchants, peddlers, and specialty markets to sell pseudoephedrine products and certain other drugs. A first offense is a Class 1 misdemeanor, a second offense is a Class A1 misdemeanor, and a subsequent offense is a Class I felony.

For a discussion of pretrial release restrictions related to methamphetamine offenses, see "Criminal Procedure and Evidence," below.

Illegal substances tax. G.S. 105-113.112 has restricted the disclosure and use in a criminal proceeding of information obtained in the course of administering the tax on illegal substances in Article 2D of G.S. Chapter 105. Effective September 27, 2005, S.L. 2005-435 (H 105) amends that section to clarify the restrictions on disclosure and use. Amended G.S. 105-113.112 provides as follows:

- Information obtained by the Department of Revenue in the course of administering the illegal substances tax is confidential.
- The information may not be disclosed except in the limited circumstances described in G.S. 105-259.
- The information may not be used as evidence in a criminal prosecution, and no employee or agent of the Department of Revenue may testify about the information in a criminal prosecution, other than for an offense under the illegal substances tax article or under the article on general administration of the tax laws (Article 9 of G.S. Chapter 105). This restriction does not apply to information obtained from a source other than an employee or agent of the Department of Revenue. An employee or agent who provides evidence or testimony in violation of this provision is guilty of a Class 1 misdemeanor.

Alcohol and Tobacco

Stronger beer. Effective August 13, 2005, S.L. 2005-277 (H 392) amends G.S. 18B-101(9) to revise the definition of "malt beverage" to increase the allowable alcohol content from 6 percent to 15 percent by volume. A malt beverage with more than 6 percent alcohol by volume must bear a label indicating the alcohol content.

Alcohol and tobacco sales. Effective September 7, 2005, S.L. 2005-350 (H 1500) amends G.S. 18B-302(d) and G.S. 14-313(b) to provide that it is a defense to selling alcohol or tobacco to an underage purchaser that the seller relied on a biometric identification system that demonstrated that the purchaser was the required age for the purchase. A biometric identification system is a system in which the customer registers his or her identification in advance with the seller and thereafter makes purchases by, for example, pressing his or her finger on a fingerprint reader, of products that would otherwise require proof of age.

Gambling

Lottery offenses. The act authorizing a state-sponsored lottery [S.L. 2005-344 (H 1023), as amended by Part 31 of the Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622)] created two new offenses in G.S. 18C-131(d):

- selling a lottery ticket or share to a person under eighteen years of age, a Class 1 misdemeanor
- purchasing a lottery ticket or share by a person under eighteen years of age, also a Class 1 misdemeanor

The seller has a defense, under new G.S. 18C-131(e), if the underage buyer showed appropriate identification.

The lottery act also enacts G.S. 14-309.2 to exclude the state lottery from the prohibitions in Part 1 of G.S. Chapter 14, Article 37 ("Lotteries and Gaming," G.S. 14-289 through G.S. 14-309.1). The act amends certain statutes within Part 1 to exclude the lottery from their coverage, but the general exclusionary language in new G.S. 14-309.2 appears broad enough to cover all of the statutes within that part. The act also modifies the existing gambling statutes to permit possessing a lottery ticket from or playing or betting on a lottery lawfully conducted in another state.

The lottery act was effective August 31, 2005.

Raffles. Effective August 31, 2005, S.L. 2005-345 (H 320) amends G.S. 14-309.15(d) to increase the maximum cash prize that may be offered for any one raffle from $10,000 to $50,000 and to increase the maximum total cash prizes that may be offered or paid by any nonprofit organization or association during one calendar year from $10,000 to $50,000.

Confidentiality Violations

"Responsible Individuals" list. When a county department of social services receives a report of suspected child abuse or neglect, the department conducts an assessment to determine whether the child has been abused or neglected. Regardless of the determination, the department submits information about the report and assessment to a central registry maintained by the state Department of Health and Human Services (DHHS). The registry is a confidential collection of information used both to generate statewide statistics and to enable social services departments to identify children who are the subjects of more than one report. Effective for investigation assessment responses initiated by county departments of social services on or after October 1, 2005, S.L. 2005-399 (H 661) provides that when the county social services director's assessment determines that a child has been abused or seriously neglected, the director also must identify the person responsible for the child's status and report that information to DHHS for inclusion on a "Responsible Individuals" list. These responsibilities are reflected in revised G.S. 7B-311, which also identifies to whom DHHS may disclose information from the list, such as child care providers who need to determine the fitness of an individual to care for a child. G.S. 7B-311(c) makes it a Class 3 misdemeanor for a public official or employee knowingly to release information from the list or the central registry to an unauthorized

person, for an authorized person who receives such information to release it to an unauthorized person, or for an unauthorized person to access or attempt to access the information.

For a further discussion of the "Responsible Individuals" list, including the procedure for having one's name removed from the list (in new Article 3A in G.S. Chapter 7B), see Chapter 23, "Social Services."

Confidential school employee information. G.S. 115C-321 has designated as confidential most information in a school employee's personnel file. Effective for offenses committed on or after December 1, 2005, S.L. 2005-321 (S 1124) amends the statute to make it a Class 3 misdemeanor, punishable by a fine only of up to $500, for a person to knowingly, willfully, and with malice permit another person to have access to confidential personnel information when that person is not authorized for such access [G.S. 115C-321(c)] or for a person who is not authorized to have access to a personnel file to knowingly and willfully examine it in its official place or to remove or copy any portion of the file [G.S. 115C-321(d)].

Autopsy records. S.L. 2005-393 (H 1543) enacts new G.S. 130A-389.1 to regulate the disclosure of photographs and video and audio recordings of autopsies. A person who lawfully obtains an autopsy photograph or video or audio recording and discloses it without authorization is guilty of a Class 2 misdemeanor. *See* G.S. 130A-389.1(c). Other knowing and willful violations of the new section are also Class 2 misdemeanors. *See* G.S. 130A-389.1(g). A person is guilty of a Class 1 misdemeanor if he or she is not authorized to obtain an autopsy photograph or video and knowingly removes, copies, or otherwise creates an image of the photograph or video with the intent to steal it. *See* G.S. 130A-389.1(h). The new section does not apply to the use of autopsy photographs or video or audio recordings in a criminal, civil, or administrative proceeding, but the presiding judge may restrict public disclosure of autopsy, crime scene, or similar photographs or recordings. The act applies to unauthorized disclosures and other offenses committed on or after December 1, 2005, regardless of whether the autopsy occurred before or after that date.

Regulatory Offenses

Debt adjusting. G.S. 14-424 has made it a Class 2 misdemeanor to engage in *debt adjusting*, defined in G.S. 14-423 as entering into a contract with a debtor under which the debtor agrees to pay money to the debt adjuster, who then distributes the money to the debtor's creditors. G.S. 14-426 has exempted certain practices from this prohibition. S.L. 2005-408 (S 590) revises the definition of debt adjusting and exempts from the prohibition additional individuals and organizations, such as attorneys licensed to practice in North Carolina who are not employed by a debt adjuster. The act also revises G.S. 14-425 to authorize the Attorney General to file an action in superior court to enjoin, as an unfair or deceptive trade practice, the continuation or offering of any debt adjusting services. The act has varying effective dates in 2005 but expires October 1, 2007.

Falsifying highway inspection reports. Effective for offenses committed on or after December 1, 2005, S.L. 2005-96 (H 664) revises G.S. 136-13.2 to make it a Class H felony for any person knowingly to falsify or to direct a subordinate to falsify any inspection or test report required by the Department of Transportation (DOT) in connection with the construction of highways. Previously, the statute applied only to DOT employees.

Voting systems. Effective for purchases or upgrades of voting systems on or after August 1, 2005, S.L. 2005-323 (S 223) imposes new requirements on vendors of voting systems and, depending on the requirement at issue, makes a violation a Class G or Class I felony. The act also authorizes civil penalties of up to $100,000 per violation, to be assessed by the State Board of Elections. *See* G.S. 163-165.9A.

Boiler and pressure vessels. Effective October 1, 2005, S.L. 2005-453 (H 768) revises the civil and criminal penalties for violating the Uniform Boiler and Pressure Vessel Act. New G.S. 95-69.20 makes it a Class 2 misdemeanor to misrepresent oneself as an authorized inspector or to make a false statement in a required report or document. Other violations incur civil penalties under new G.S. 95-69.19.

Recreational therapy. Effective October 5, 2005, S.L. 2005-378 (H 613) enacts G.S. 90C-36 to make it a Class 1 misdemeanor for a person without a license to hold himself or herself out as a

licensed recreational therapist or to practice recreational therapy. The maximum fine for an offense is $500.

Notaries. Effective December 1, 2005, S.L. 2005-391 (S 671) repeals G.S. Chapter 10A (Notaries) and replaces it with new G.S. Chapter 10B. The criminal penalties for violations of the new chapter are set forth in new G.S. 10B-35.

Lobbyists. Effective January 1, 2007, S.L. 2005-456 (S 612) amends the restrictions on legislative branch lobbying in Article 9A of G.S. Chapter 120 and creates new Article 4C in G.S. Chapter 147 restricting executive branch lobbying, violations of which are Class 1 misdemeanors under G.S. 120-47.9 and G.S 147-54.42.

Pathology services and practice of medicine. Effective December 1, 2005, S.L. 2005-415 (H 636) requires certain disclosures on bills for pathology services. Each intentional failure to disclose is a Class 3 misdemeanor, punishable by a fine of up to $250 under new G.S. 90-681(i). The act also amends G.S. 90-18(a) to make it a Class I felony for an out-of-state practitioner to practice medicine without being licensed in North Carolina; it remains a Class 1 misdemeanor to practice medicine without a license.

Unemployment insurance. G.S. 96-18(b1) provides that the penalties and provisions of certain tax statutes apply to comparable violations with respect to unemployment insurance contributions. That subsection has provided that G.S. 105-236(7), which makes it a Class H felony to attempt to evade or defeat a tax, applies to unemployment insurance contributions if the employing unit or unpaid contribution is of a certain size. Effective December 1, 2005, S.L. 2005-410 (S 757) revises G.S. 96-18(b1) to make it a Class 1 misdemeanor to violate G.S. 105-236(7) if the size of the employing unit or contribution is less than that required for the felony offense.

False statements by grantees of state funds. Effective July 1, 2005, S.L. 2005-276 (S 622) adds G.S. 143-6.2(b2) to require nonstate entities that receive state funds to file with the disbursing state agency a sworn statement that the entity does not have any overdue tax debts. A false statement is a Class A1 misdemeanor under new G.S. 143-34(b).

Credit insurance. G.S. 58-57-80 has made it a Class 3 misdemeanor for a creditor to violate certain credit insurance requirements in G.S. Chapter 58, Article 57. Effective January 1, 2006, S.L. 2005-181 (H 653) repeals that section and enacts G.S. 58-57-71 giving the Commissioner of Insurance broader civil enforcement powers.

Bank logos. Effective for offenses committed on or after December 1, 2005, S.L. 2005-162 (H 1168) enacts G.S. 53-127(c1) to prohibit a person from using the name or logo of a bank in connection with the sale or advertising of any financial product or service unless the bank has consented in writing. A violation is a Class 3 misdemeanor. New G.S. 53-127(e) provides that a bank may file an action to enjoin the use of its name or logo, and a court may grant an injunction and order the defendant to pay the bank all profits derived from and all damages suffered because of the wrongful use of the name or logo.

Other Offenses

Shooting into occupied property. G.S. 14-34.1 has made it a Class E felony for a person willfully or wantonly to discharge or attempt to discharge a firearm into an occupied building or conveyance. Effective for offenses committed on or after December 1, 2005, S.L. 2005-461 (S 486) amends that section to create three separate offenses:

- G.S. 14-34.1(a) continues to make the above offense a Class E felony.
- New G.S. 14-34.1(b) makes it a Class D felony for a person willfully or wantonly to discharge a firearm into an occupied dwelling (as opposed to any occupied building) or an occupied conveyance that is in operation.
- New G.S. 14-34.1(c) makes it a Class C felony if a violation of subsections (a) or (b) results in serious bodily injury. The act does not provide a definition for "serious bodily injury." *Compare* G.S. 14-32.4 (for purposes of the offense of assault inflicting serious bodily injury, *serious bodily injury* is defined as "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that

causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization").

Concealing death of person. Effective for offenses committed on or after December 1, 2005, S.L. 2005-288 (H 926) enacts new G.S. 14-401.22 creating two new crimes. It is a Class I felony for a person, with intent to conceal the death of a person, to fail to notify law enforcement of the death or to secretly bury or otherwise secretly dispose of a dead body. It is a Class A1 misdemeanor to aid or abet another in concealing the death of a person.

Making a false bomb report. G.S. 14-69.1(a) has made it a Class H felony to make a false report that there is a bomb in a building, and G.S. 14-69.1(c) has made it a Class G felony to make a false report that there is a bomb in a public building. Effective for offenses committed on or after December 1, 2005, S.L. 2005-311 (H 490) revises both subsections to provide that it is a crime to make a false report that there is a bomb in sufficient proximity to damage a building.

Truancy. Effective for offenses committed on or after December 1, 2005, S.L. 2005-318 (H 779) amends G.S. 115C-380 and G.S. 116-235(b)(2) to increase from a Class 3 to Class 1 misdemeanor the offense of aiding and abetting a student's unlawful absence from school.

Pointing laser device at aircraft. Effective for offenses committed on or after December 1, 2005, S.L. 2005-329 (S 428) makes it a Class H felony for a person to

- willfully
- point a laser device at an aircraft that is taking off, landing, in flight, or otherwise in motion
- while the device is emitting a laser beam.

Criminal Procedure and Evidence

Jury Service

Effective for people summoned for jury service on or after October 1, 2005, S.L. 2005-149 (S 321) amends G.S. 9-6.1 to allow people seventy-two years of age or older to request to be excused from jury duty. Previously, a person could make such a request if sixty-five years of age or older. The statute does not give people seventy-two and older an automatic exemption. In practice, however, court officials routinely grant such requests.

Expunction of Records

Two acts deal with criminal record expunction. The first, S.L. 2005-452 (H 1213), enacts new G.S. 15A-146(a1) to authorize the expunction of multiple charges if

- all of the charges were dismissed or findings of not guilty or not responsible were made,
- the offenses were alleged to have occurred within the same twelve-month period or the charges were dismissed or findings were made at the same term of court (one week for superior court and one day for district court),
- the applicant has not previously received an expunction under the new subsection or under G.S. 15A-145 or G.S. 90-96, and
- the applicant has not been convicted of a felony.

A person may obtain an expunction of multiple charges under the new subsection even though the charges did not arise from the same transaction or occurrence and were not consolidated for judgment. Apparently a person may also obtain an expunction of multiple charges under the new subsection even if he or she previously obtained an expunction under G.S. 15A-146(a). New G.S. 15A-146(a1) bars an expunction only if the person has previously obtained an expunction under "this subsection"—that is, G.S. 15A-146(a1)—or under one of the other sections mentioned above. An expunction under G.S. 15A-146(a) is not listed as a bar. The act states that it is effective October 1, 2005, which means that a person should be able to obtain an order of expunction regardless of whether the alleged offense occurred or the proceedings ended before or after that date.

The second act, S.L. 2005-319 (H 1328), enacts new G.S. 15A-149 to provide that if a person receives a pardon of innocence, the person is entitled to have the records of the conviction expunged. The new statute describes the steps to be followed by the applicant, the clerk of court, and the various agencies in possession of these records. The act states that it is effective August 25, 2005, which means that a person should be able to obtain an order of expunction regardless of whether the conviction or pardon occurred before or after that date.

Search Warrants

Generally, for a judicial official to issue a search warrant, he or she must receive an affidavit from the applicant setting forth the facts and circumstances justifying issuance of the warrant. G.S. 15A-245(a) has allowed the supporting affidavit to be supplemented by oral testimony under oath. Effective October 1, 2005, S.L. 2005-334 (H 1485) amends G.S. 15A-245(a) to allow a search warrant to be issued based on audiovisual transmission of oral testimony under oath or affirmation from a sworn law enforcement officer to the issuing official. The issuing official and the officer must be able to see and hear each other. The statute does not address various implementation issues—for example, how the testimony will be memorialized and served. *Compare* FED. R. CIV. P. 41 (authorizing warrants based on telephonic communications and specifying that, among other things, the testimony must be recorded by a recording device or court reporter, the recording or court reporter's notes must be transcribed and certified by the issuing official, and the issuing official must prepare an original warrant and the applicant must prepare a duplicate warrant for service). The act requires that before a district may permit the issuance of search warrants based on audiovisual transmissions, the senior resident superior court judge and chief district court judge must obtain approval from the AOC of the equipment and procedures to be used.

Source of Bond Funds for Pretrial Release

S.L. 2005-375 (H 1409) amends G.S. 15A-539 to permit a judge, on motion of the state or on the judge's own motion, to conduct a hearing into the source of money or property to be posted for a defendant about to be released on a secured appearance bond. The judge may refuse to accept the money or property offered as security for the bond if the state proves by a preponderance of the evidence that, because of its source, the money or property will not reasonably assure the person's appearance. The act applies to bond hearings conducted on or after December 1, 2005. It also provides that a pretrial release order entered before December 1, 2005, may not be revoked or modified solely on the basis of the act.

Pretrial Release Restrictions Involving Methamphetamine Offenses

Effective for offenses committed on or after January 15, 2006, S.L. 2005-434 enacts G.S. 15A-736.1 to authorize judicial officials to deny pretrial release for certain methamphetamine offenses under certain conditions. The new statute provides that a rebuttable presumption arises that no conditions of release would assure the safety of the community if the state shows by clear and convincing evidence that

- the defendant is charged with a violation of G.S. 90-95(b)(c) (manufacture of methamphetamine) or G.S. 90-95(d1)(2)b. (possession of precursor chemical knowing that it will be used to manufacture methamphetamine), and
- the defendant is dependent on or regularly uses methamphetamine and the violation was committed or attempted to maintain or facilitate the defendant's dependence or use.

The act places this new statute in the article on extradition (Article 37 of G.S. Chapter 15A) rather than in the article on pretrial release (Article 26, Part 1, of G.S. Chapter 15A), and the new section states that it applies notwithstanding G.S. 15A-736, which deals with bail in extradition cases. Although it seems unlikely that the General Assembly intended to limit the new restrictions to

extradition cases—that is, to methamphetamine offenses committed in another state—the placement of the restrictions in the extradition article makes it unclear whether they may be applied to in-state offenses.

Federal Lands

Effective May 27, 2005, S.L. 2005-69 (H 236) revises G.S. 104-7, which deals with the acquisition of state lands by the United States for certain purposes, such as expanding U.S. army bases. The revised section provides that the state has concurrent power to enforce its criminal law on lands purchased or otherwise obtained by the United States. This provision appears to apply prospectively to lands obtained by the United States on or after May 27, 2005. For lands obtained by the United States before that date, the terms and date of the transfer determine whether the state and federal government have concurrent jurisdiction or the federal government has exclusive jurisdiction. For a discussion of this issue, *see* ROBERT L. FARB, ARREST, SEARCH & INVESTIGATION 17 & n.60 (3d ed. 2003).

Speed-Checking Devices

G.S. 8-50.2 has allowed results obtained by radio microwave, laser, and other speed-measuring instruments to be admitted to corroborate the opinion of a person who visually observed the speed of an object. The statute also has required, as a condition of admissibility, that microwave and other electronic speed-measuring instruments be tested for accuracy by an appropriately licensed technician and that laser instruments be tested in accordance with standards established by the North Carolina Criminal Justice Education and Training Standards Commission. Effective October 1, 2005, S.L. 2005-137 (H 821) clarifies these testing requirements [in G.S. 8-50.2(c)] in two respects: (1) it requires that all of these devices be tested by an appropriately licensed technician and that the testing be done in accordance with commission standards, and (2) it specifies the types of licenses and certificates that qualify a technician to test these devices.

Law Enforcement

Campus Police at Private Nonprofit Colleges

Effective July 28, 2005, S.L. 2005-231 (S 527) enacts the Campus Police Act, codified in new G.S. Chapter 74G. It authorizes the Attorney General to certify a private nonprofit institution of higher education as a campus police agency and to commission campus police officers. Police agencies at private institutions of higher education that are certified under G.S. Chapter 74E (the Company Police Act) are automatically converted to campus police agencies under new G.S. Chapter 74G unless the institution's board of trustees elects not to have the agency converted. Police agencies with public institutions of higher education remain under the authority of G.S. Chapter 116 (constituent institutions of The University of North Carolina) and G.S. Chapter 115D (community colleges) unless they apply to the Attorney General to be certified as campus police agencies under new G.S. Chapter 74G.

While in the performance of their duties, campus police officers commissioned by the Attorney General have the same powers as municipal and county police officers to arrest for felonies and misdemeanors and to charge infractions in the following areas:

- Real property owned by or in the possession and control of the employing institution
- Public roads or highways passing through the institution's property or immediately adjoining it
- Other real property while the officer is in continuous and immediate pursuit of a person for an offense committed on the institution's property or on a public road or highway immediately adjoining it

The governing body of an educational institution that has a campus police agency may enter into joint agreements with municipalities, counties, and other educational institutions with campus police

agencies extending the law enforcement authority of its campus police officers into the other entity's jurisdiction. If authorized by their campus police agency, campus police officers may carry concealed weapons in accordance with G.S. 14-269(b)(5).

The act revises several criminal law and procedure statutes to recognize the status of campus police officers, including them under G.S. 14-34.2 (assault with firearm or other deadly weapon on officer), G.S. 14-415.10(4) and (5) (eligibility of officers for concealed handgun permit), G.S. 15A-402(f) (authority of officers to arrest outside territorial jurisdiction while in continuous and immediate pursuit of suspect for offense committed within territorial jurisdiction), and certain other statutes applicable to law enforcement officers.

The act also creates new G.S. 14-33(c)(8) making it a Class A1 misdemeanor to assault a company police officer certified under G.S. Chapter 74E or a campus police officer, whether certified under the new Campus Police Act or under G.S. Chapter 17C or 116.

General Assembly Special Police

Effective September 7, 2005, S.L. 2005-359 (H 1086) expands the territorial jurisdiction of General Assembly special police officers by providing that they have jurisdiction in Raleigh while on official duty, in unincorporated parts of Wake County surrounded by the innermost right-of-way of Interstate 440 while on official duty, and in any part of the state in connection with official duties of General Assembly members and General Assembly events. A General Assembly police officer also has the authority to arrest a person outside the above areas when the person has committed an offense within any area for which the officer could have arrested the person and the arrest is made during the person's immediate and continuous flight from the area.

Concealed Weapons

Five acts deal with concealed handgun permits and weapons.

Military personnel. Effective July 28, 2005, S.L. 2005-232 (S 109) enacts new G.S. 14-415.16A to extend concealed handgun permits of deployed military personnel for ninety days after the end of their deployment. The new statute allows a deployed military permittee or his or her agent to apply to the sheriff for the extension. Even if a military permittee does not apply for an extension, the act provides the following protections to a permittee who carries a concealed handgun after the permit expires. First, during the ninety days following the end of deployment, a military permittee with an expired permit may not be charged with carrying a concealed handgun in violation of G.S. 14-415.21 if he or she (1) displays proof of deployment to a law enforcement officer who approaches the permittee and (2) meets the other requirements of G.S. 14-415.11(a) (that is, the permittee notifies the officer that he or she is carrying a concealed handgun). Second, during the ninety-day period, a military permittee with an expired permit may not be charged with carrying a concealed weapon in violation of G.S. 14-269(a1) if he or she displays proof of deployment to the officer. Third, new G.S. 14-269(b2) provides that it is a defense to prosecution for carrying a concealed weapon if the military permittee provides proof of deployment to the court. Under this third provision, the defendant apparently has the benefit of the defense regardless of whether he or she displayed proof of deployment to the officer; however, the defense may apply only to the carrying of the handgun during the period of deployment.

Security guards. G.S. 14-415.12A has provided that a qualified sworn law enforcement officer or former officer is deemed to have satisfied the requirement under G.S. 14-415.12(a)(4) that an applicant for a concealed handgun permit complete an approved firearms safety and training course. Effective for applications submitted on or after July 20, 2005, S.L. 2005-211 (S 778) extends that exemption to a person who is licensed or registered as an armed security guard by the North Carolina Private Protective Services Board and who has been issued a firearm registration permit by the board.

Campus police officers. Effective July 28, 2005, S.L. 2005-231 (S 527) amends G.S. 14-415.10(4) and (5) to treat campus police officers as law enforcement officers for purposes of obtaining a concealed handgun permit.

Recipients of domestic violence protective orders. Effective August 27, 2005, S.L. 2005-343 (H 1311) creates new G.S. 50B-3(c1) to provide that, when a domestic violence protective order is

issued, the clerk of superior court must provide to the plaintiff an informational sheet explaining his or her right to apply for a concealed handgun permit. The act directs the AOC to develop a standard informational sheet for the clerks' use. The act also modifies the requirements in G.S. 14-415.15(b) for issuance of a temporary concealed handgun permit. The revised section provides that proof of a domestic violence protective order constitutes evidence of an emergency situation warranting a temporary permit. The applicant still must meet the other statutory requirements to qualify for a temporary or regular permit.

Off-duty officers. Effective August 26, 2005, S.L. 2005-337 (H 1401) amends G.S. 14-269(b) to allow off-duty law enforcement officers to carry a concealed weapon if they do not consume alcohol or an unlawful controlled substance and do not have any alcohol or unlawful controlled substance in their systems. The act deletes the requirement that the carrying of a concealed weapon by an off-duty officer be authorized by local regulations issued by the sheriff, chief of police, or other officer in charge.

Disposition of Weapons

G.S. 15-11.1(b1) has authorized the courts to order various dispositions of firearms seized in criminal cases and that are no longer necessary as evidence. Effective August 22, 2005, S.L. 2005-287 (H 1016) amends G.S. 15-11.1(b1) to permit a court to order that such a firearm be turned over to a law enforcement agency in the county of trial for the agency's official use or for sale to or exchange with a federally licensed firearm dealer. Such a disposition must be requested by the head of the law enforcement agency, and the firearm must have a legible, unique identification number. Proceeds of any sales go to the schools. The act makes similar amendments to G.S. 14-269.1, which authorizes the court to order the disposition of a deadly weapon upon conviction of certain offenses involving the weapon.

S.L. 2005-287 also enacts new G.S. 15-11.2, which provides for the disposition of unclaimed firearms that were not seized as trial evidence and were not related to a conviction covered by G.S. 14-269.1. The new section specifies notice and disposition procedures.

Electronic Surveillance

Effective December 1, 2005, S.L. 2005-207 (S 748) makes the following changes to Article 16 of G.S. Chapter 15A, which regulates electronic surveillance—the interception of wire, oral, and electronic communications.

First, the act extends the time during which an order authorizing electronic surveillance remains in effect. As under current law, the surveillance order may be in effect for up to thirty days. Revised G.S. 15A-293(c) provides further that the thirty-day period starts when the officer first begins the interception under the order or ten days after the order is entered, whichever occurs first. This provision gives law enforcement an opportunity to set up the surveillance before the order is considered to begin running. The revised section also provides that the order may be extended for up to an additional thirty days rather than up to the current ten days.

Second, revised G.S. 15A-293(c) deals with intercepted communications that are in a code or a foreign language. It provides that when an expert in that language or code is not reasonably available, the interception may be "minimized" (in essence, limited to communications relevant to the investigation) as soon as practicable. The revised section also provides that the surveillance may be done by state or federal government personnel or contractors acting under supervision of the law enforcement officer authorized to conduct the interception. This provision would permit an officer to contract with a foreign language interpreter to translate an intercepted communication.

Third, new G.S. 15A-294(i) allows law enforcement in certain circumstances to obtain an order authorizing electronic surveillance that does not specify the facilities or place from which the communications are to be intercepted. Thus, an order might authorize an officer to engage in electronic surveillance of a particular individual who uses multiple communication devices (such as prepaid cell phones having a limited life span). New G.S. 15A-294(j) adds that the time period of the order commences when the officer implementing the order determines where the communications are to be intercepted.

Enforcement of Lottery Laws

The lottery act (S.L. 2005-344, as amended by Part 31 of S.L. 2005-276), revises G.S. 18B-500 to provide that, in addition to their other duties, alcohol law enforcement agents are responsible for enforcing the lottery laws.

Seizure of Registration and License Documents

Effective December 1, 2005, S.L. 2005-357 (H 1404) amends G.S. 20-45 to authorize any sworn law enforcement officer, with jurisdiction, to seize a certificate of title, registration card or plate, permit, or license if the officer has notice from the Division of Motor Vehicles (DMV) that the item has been revoked or cancelled or the officer otherwise has probable cause to believe that the item has been revoked or cancelled. If the item is needed for a criminal prosecution, the officer is to retain the item as evidence, but otherwise the officer is to turn the item over to DMV. An officer must report the seizure of a registration plate to DMV within forty-eight hours.

Sentencing, Probation, and Corrections

Aggravating Factors

G.S. 15A-1340.16(d)(6) has made it an aggravating factor in felony sentencing if the offense was committed against or proximately caused serious injury to certain individuals while the individual was performing official duties or because of the individual's official duties. Effective for offenses committed on or after December 1, 2005, S.L. 2005-101 (S 507) revises that subsection to add social workers to the list of covered individuals.

Appeal of Probation from District Court

In *State v. Smith,* 165 N.C. App. 256, 598 S.E.2d 408 (2004), the North Carolina Court of Appeals addressed the effect of a defendant's appeal of a probationary sentence from district to superior court for a trial de novo. The court held that under the wording of G.S. 15A-1431(f), the defendant's probation was not stayed while the appeal was pending in superior court. The court also held that the time for the state to move to revoke the defendant's probation began to run from the date the district court imposed probation, notwithstanding that the probationary judgment was effectively in limbo while the case was pending in superior court. On July 1, 2005, the North Carolina Supreme Court reversed the court of appeals ruling and held that probation was stayed in the above circumstances. 359 N.C. 618, 614 S.E.2d 279 (2005). Consistent with that approach, the General Assembly, in S.L. 2005-339 (H 1145), effective August 26, 2005, repealed G.S. 15A-1431(f) and added G.S. 15A-1431(f1), which provides explicitly that an appeal for a trial de novo stays all of the following: payments of costs, payments of fines, probation or special probation, and active punishment. The amended statute recognizes that a district court's order imposing pretrial release conditions remains in effect during the appeal unless modified. [Under G.S. 15A-1431(c), which was not changed, apparently a district court judge may modify a pretrial release order up to ten days after entry of judgment, at which point jurisdiction of the case passes to superior court. *See also* 1 JOHN RUBIN, THOMASIN HUGHES, & JANINE FODOR, NORTH CAROLINA DEFENDER MANUAL § 1.9A, at 18 (1998) (discussing different interpretations of time within which district court judge may act), posted at www.ncids.org.]

New G.S. 15A-1431(f1) also states that pending a trial de novo the judge may order any appropriate condition of pretrial release, including confinement in a local confinement facility. It seems unlikely that the General Assembly intended by this provision to authorize a judge to order the defendant confined, without any pretrial release conditions, pending a trial de novo. Rather, it appears that a judge may order confinement if the defendant fails to meet pretrial release conditions [essentially the wording of repealed G.S. 15A-1431(f)]. The provision apparently was intended to make it clear

that, notwithstanding the stay of the district court's judgment, a judge may still impose "appropriate" pretrial release conditions. Confinement without any opportunity to obtain release is not an appropriate pretrial release determination for misdemeanors (or for most felonies) under North Carolina law. In addition, interpreting the statute otherwise would conflict with the overall purpose of the statutory change—to stay any punishment pending a trial de novo—and could be considered to impinge on the defendant's right to appeal and right to a jury trial and exceed the constitutional limits on preventive detention. *See generally United States v. Salerno,* 481 U.S. 739 (1987).

Parole

Section 17.28 of S.L. 2005-276 (S 622) directs the Post-Release Supervision and Parole Commission (Parole Commission), with the assistance of the Sentencing Commission and the Department of Correction (DOC), to analyze the amount of time each parole-eligible inmate has served compared to the time served by offenders for comparable crimes under structured sentencing. The Parole Commission must reinitiate the parole review process for any parole-eligible person who has served more time in custody than he or she would have served if sentenced to the maximum sentence under structured sentencing. *Maximum sentence* is defined as the maximum sentence a person could receive if sentenced in the presumptive range in prior record level VI. The Parole Commission must report to the General Assembly the results of the analysis by October 1, 2005, and the results of the parole reviews by February 1, 2006. The DOC and Parole Commission also must make a good faith effort (under Section 17.27 of the act) to enroll at least 20 percent of all eligible pre-structured-sentencing felons in the Mutual Agreement Parole Program by May 1, 2006. The DOC and Parole Commission must report to the General Assembly if the 20 percent participation goal is not met and explain why the goal was not realized.

Smoking in Prisons

Effective January 1, 2006, S.L. 2005-372 (S 1130) enacts G.S. 148-23.1 prohibiting the use of tobacco products inside buildings at state correctional institutions except for authorized religious purposes. Violations by inmates and employees are subject to disciplinary measures by DOC; visitors in violation of the ban are subject to removal from the facility and loss of visitation privileges. The act also directs the department to study the feasibility of banning smoking on all grounds (inside and outside buildings) of state correctional institutions.

Palliative Care

G.S. 148-4(8) has allowed the Secretary of Correction to extend the limits of the place of a prisoner's confinement for the purpose of receiving palliative care if the prisoner is terminally ill or permanently and totally disabled. S.L. 2005-276 (S 622) revises the criteria for this relief. A "terminally ill" inmate must have an incurable condition caused by illness or disease that was unknown at the time of sentencing and was not diagnosed upon entry to prison, will likely produce death within six months, and is so debilitating that it is highly unlikely the inmate poses a significant public safety risk. A "permanently and totally disabled" inmate must suffer from permanent and irreversible physical incapacitation as a result of an existing physical or medical condition that was unknown at the time of sentencing and was not diagnosed upon entry to prison, and is so incapacitating that it is highly unlikely the inmate poses a significant public safety risk. The Secretary must act expeditiously upon learning that an inmate meets these criteria and, in the case of a terminally ill inmate, must make a good faith effort to make a determination within thirty days of learning of the inmate's terminal condition.

Substance Abuse Monitoring Costs

Judges sometimes waive court costs or make the costs of probation treatment programs a higher priority than other costs due the courts. S.L. 2005-276 (S 622) amends G.S. 15A-1343(b) to prohibit this practice.

ADETS

S.L. 2005-312 (H 35) addresses attendance at Alcohol and Drug Education Traffic School (ADETS), a sanction for those convicted of impaired driving. The act directs the Commission on Mental Health, Developmental Disabilities, and Substance Abuse Services to revise its rules to do two things—raise the minimum number of hours of attendance to sixteen and limit the maximum size per class to twenty. To reflect the likely increased costs to programs to implement these changes, the act raises the fee for ADETS from $75 to $160. The fee increase will not become effective until the commission revises its rules. Beginning January 1, 2009, the act establishes the following statutory minimum qualifications for ADETS instructors: each instructor must be a certified substance abuse counselor, certified clinical addiction specialist, or certified substance abuse prevention consultant, as those terms are defined by G.S. 122C-142.1(d1).

Substance Abuse Treatment Providers

Article 5C of G.S. Chapter 90 establishes standards for the credentialing of substance abuse professionals practicing in North Carolina. Professionals credentialed under this law include, among others, substance abuse counselors, substance abuse prevention consultants, clinical supervisors, clinical addictions specialists, and substance abuse residential facility directors. Effective September 22, 2005, S.L. 2005-431 (S 705) amends Article 5C to add "certified criminal justice addictions professional" (CCJP) to the list of credentialed substance abuse professionals. New G.S. 90-113.31A(5) defines a *CCJP* as a person certified by the North Carolina Substance Abuse Professional Practice Board to practice as a CCJP and who, under supervision, provides direct services to clients or offenders exhibiting substance abuse disorders in a program determined by the board to be in a criminal justice setting. New G.S. 90-113.40(d1) describes the requirements for certification as a CCJP.

The act also requires, in new G.S. 90-113.46A, that all applicants for credentialing as a substance abuse professional submit to a criminal history record check. If the applicant has a conviction, the board must consider various factors in determining whether to deny registration, certification, or licensure of the applicant; a conviction does not automatically bar issuance of a credential. S.L. 2005-431 also enacts G.S. 114.19.11A to authorize the Department of Justice to provide criminal history information to the North Carolina Substance Abuse Professional Practice Board.

For more information about this act, see Chapter 16, "Mental Health."

Collateral Consequences

Miscellaneous Consequences

Parental rights. G.S. 7B-1111(a)(8) has provided that a court may terminate the parental rights of a parent if the parent has committed certain offenses against the child (such as solicitation to commit murder), another child of the parent (such as murder or voluntary manslaughter), or any other children in the home. Effective for termination proceedings filed on or after June 30, 2005, S.L. 2005-146 (H 97) revises the statute to provide that a court also may terminate the parental rights of a parent if the parent has committed murder or voluntary manslaughter of the other parent of the child. The court may consider, however, whether the parent's actions were committed in self-defense or defense of others or were based on some other justification.

Sex offender registration. For changes to the sex offender registration requirements, see the discussion of computer solicitation of a sex act with a child, sexual battery, and felony indecent exposure in "Criminal Offenses," above.

Domestic violence. S.L. 2005-423 (S 1029) makes several changes to the civil laws governing domestic violence protective orders, discussed in Chapter 4, "Children, Families, and Juvenile Law." The changes in that act involving criminal law are minimal. Effective October 1, 2005, amended G.S. 50B-3.1(e) and (f) provide that a person may not retrieve firearms ordered to be surrendered to the sheriff as part of an action for a domestic violence protective order until final disposition of any pending state or federal criminal charges allegedly committed by the defendant against the person who is the subject of the protective order.

Criminal Record Checks

Prospective adoptive parents. G.S. 48-3-309 has required DHHS to obtain a criminal history of all prospective adoptive parents seeking to adopt a minor who is in the custody of a department of social services. Effective June 27, 2005, S.L. 2005-114 (H 451) requires that DHHS obtain criminal histories of all individuals eighteen years of age or older who reside in the prospective adoptive home. Under the revised statute, a county department of social services must issue an unfavorable assessment if it determines that, based on the criminal histories, either the prospective adoptive parent is unfit to care for children or another individual living in the home is unfit to reside with children.

DHHS workers. Effective June 27, 2005, S.L. 2005-114 (H 451) revises G.S. 114-19.6(a)(1) to expand the list of individuals associated with DHHS who are subject to a criminal record check. The revised statute covers applicants for employment, current employees, independent contractors and their employees, and others who have been approved to perform volunteer services. Previously the statute was limited to employees and applicants for employment who provided or would provide direct care for a client, patient, student, resident, or ward of DHHS.

Health care facilities. Effective March 23, 2005, S.L. 2005-4 (S 41) revises several statutes that have required long-term care facilities (adult care homes and their contract agencies and nursing homes or home-care agencies) and providers of mental health, developmental disabilities, and substance abuse services to obtain a criminal history check of certain applicants for employment. Because the existing statutes [G.S. 122C-80(b), 131D-40(a) and (a1), and 131E-265(a) and (a1)] allowed these facilities to obtain the results of a national criminal history check of an applicant, they appeared to violate federal limitations on who could view such information. The revised statutes direct the North Carolina Department of Justice to turn the national criminal history of employment applicants over to DHHS, Criminal Records Check Unit, which then notifies the facility whether the information affects employability. The revised statutes forbid sharing the actual national record check results with the facility.

County governments. The 2003 General Assembly enacted G.S. 114-19.14 to allow cities to obtain criminal history checks from the Department of Justice for applicants for city employment. Effective September 7, 2005, S.L. 2005-358 (S 737) revises that statute to give a county the same access to criminal history information for applicants for county employment. The legislation also enacts G.S. 153A-94.2 authorizing boards of county commissioners to adopt rules requiring applicants for county employment to be subject to a criminal history check.

Archaeology. Effective for applications for permits and licenses submitted to the Department of Cultural Resources on or after October 1, 2005, S.L. 2005-367 (S 796) enacts G.S. 114-19.17 to allow the department to obtain criminal history checks from the Department of Justice for applicants for a permit or license to conduct archaeological investigations on state lands (under G.S. Chapter 70, Article 2) or exploration, recovery, or salvage operations in certain waters within and adjacent to North Carolina (under G.S. Chapter 121, Article 3). The act revises the articles regulating these operations to specify the parameters of these record checks.

Lotteries. Effective August 31, 2005, S.L. 2005-344 (H 1023), as amended by Part 31 of S.L. 2005-276 (S 622), enacts G.S. 114-19.16 to allow the North Carolina State Lottery Commission and its director to obtain criminal history checks from the Department of Justice for any prospective employee of the commission and any prospective lottery vendor.

Substance abuse treatment providers. For information about criminal record checks for these jobs, see "Sentencing, Probation, and Corrections," above.

Indigent Defense

This section discusses changes to the administration of indigent defense. Legislation affecting court administration in general is discussed in Chapter 6, "Courts and Civil Procedure."

Copies of Files

Effective July 5, 2005, S.L. 2005-148 (S 689) amends G.S. 7A-452 to require that, in cases in which an indigent person has appealed and has been appointed appellate counsel by the Office of Indigent Defense Services (IDS), the clerk of superior court must make a copy of the complete trial division file, including documentary exhibits if requested, and furnish these materials to the appointed attorney.

Effective August 4, 2005, S.L. 2005-251 (S 593) adds new G.S. 7A-308(b1) to clarify that fees charged by the clerk for copies [under G.S. 7A-308(a)(12)] are not chargeable when the copies are requested by an attorney who has been appointed to represent an indigent person at state expense and the request is made in connection with the appointed case.

$50 Appointment Fee

Effective August 4, 2005, S.L. 2005-250 (S 592) revises G.S. 7A-455.1, which imposes a $50 attorney appointment fee in criminal cases. The changes were made to conform to the North Carolina Supreme Court's decision in *State v. Webb,* 358 N.C. 92, 591 S.E.2d 505 (2004), which struck down the portion of the statute requiring payment of the fee from defendants who were not convicted. The decision did not affect assessment of the appointment fee after conviction. The revised statute therefore requires defendants to pay a $50 appointment fee only upon conviction. The court must add the fee to any amounts it determines to be owed for the value of the attorney's services in the case. The act does not modify the other limitations in the statute on assessment of the fee. The statute continues to impose the fee in criminal cases at the trial level only; provides that the failure or refusal to pay the fee is not grounds for the denial of counsel, withdrawal of counsel, or contempt; provides that the fee is due only once for each attorney appointment, regardless of the number of cases to which an attorney is assigned; and bars a second fee if the cases in which the attorney was appointed are reassigned to a different attorney.

Repayment of Attorneys' Fees for Appeals, Chapter 7B Proceedings, and Probation

G.S. 7A-455(c) directs the court to enter a judgment for the value of services rendered by an attorney on behalf of an indigent defendant who has been convicted in a criminal case. Effective August 5, 2005, S.L. 2005-254 (S 594) amends that subsection to provide that no judgment for fees may be entered for the value of legal services rendered on appeal to the appellate division or in postconviction proceedings if all of the matters raised in the proceeding are vacated, reversed, or remanded for a new trial or resentencing. *See also State v. Rogers,* 161 N.C. App. 345, 587 S.E.2d 906 (2003) (holding under previous version of statute that attorneys' fees could not be assessed for first trial and appeal when supreme court vacated convictions and ordered new trial).

Effective for appointments on or after October 1, 2005, the act revises G.S. 7B-603, which has authorized the court to order a parent or guardian to repay the costs of an attorney or guardian ad litem appointed for a juvenile in an abuse, neglect, and dependency proceeding or a proceeding to terminate parental rights. The statute has been unclear whether the court could order repayment of the fees for an attorney appointed for the parent in such proceedings. The revised statute clarifies that a court may

order repayment of the fees if the juvenile is adjudicated abused, neglected, or dependent or the parent's rights are terminated. The revised statute does not mandate that the court order repayment, however. New G.S. 7B-603(b1) uses the discretionary term "may" rather than the mandatory "shall" and also provides that in determining whether to order repayment, the court must consider the respondent's ability to pay. Thus, a court might decide not to order repayment if it found that the additional financial obligation would interfere with the parent's ability to take the necessary steps to care for his or her child. (The court must engage in a similar assessment under G.S. 7A-450.3 in deciding whether to require the parent to repay the attorneys' fees incurred for a juvenile.) If the court orders the parent to repay attorneys' fees (whether incurred for the parent or juvenile), and the parent fails to pay at the time of disposition, the court must enter a judgment in the amount due the state. The act deletes the provision, previously applicable to orders to repay attorneys' fees for juveniles, requiring the court to delay entry of judgment for ninety days following the order of repayment (in G.S. 7A-450.3). As part of these changes, the act also deletes the provision authorizing contempt for a failure to pay attorneys' fees [in G.S. 7B-603(c)]; however, other sections of G.S. Chapter 7B (G.S. 7B-2704 and G.S. 7B-2706) continue to provide that a court may hold a parent or guardian in contempt for failing to comply with court orders issued in delinquency proceedings, including orders to pay the attorneys' fees incurred on behalf of a juvenile.

G.S. 15A-1343(e) provides that, unless the court finds extenuating circumstances, it must require as a condition of probation that a defendant repay the fees of his or her public defender or appointed attorney. Effective August 4, 2005, S.L. 2005-250 revises G.S. 15A-1343(e) to clarify that the repayment obligation includes counsel who are employees of IDS, such as capital defenders, and counsel under contract with IDS, such as counsel who have contracted to handle a block of cases.

Appointment of Counsel in Chapter 35A Proceedings

Effective August 4, 2005, S.L. 2005-250 (S 592) amends G.S. 35A-1245(c) to clarify that the appointment of counsel for a ward when the guardian is seeking sterilization must be in accordance with rules adopted by IDS. This change makes the statute consistent with the other appointment of counsel statutes.

Legal Services for Inmates

Effective October 1, 2005, S.L. 2005-276 (S 622) transfers from DOC to IDS the responsibility for administering legal services for inmates in cases in which the state must provide legal assistance and access to the courts. The act revises G.S. 7A-498.3, which identifies the types of cases under IDS, to add this responsibility. Prisoners Legal Services, Inc. (PLS) has been providing legal services to inmates pursuant to a contract with DOC, and the act directs IDS to contract with PLS for an additional two years, during which time IDS must evaluate the services provided by PLS. The act transfers from DOC to IDS $1,883,865 for the 2005-06 fiscal year and $2,511,820 for the 2006-07 fiscal year to administer these services.

Expansion of Public Defender System

The budget act, S.L. 2005-276 (S 622), authorizes IDS to use existing funds to complete the establishment of a public defender office in Wake County, created by the General Assembly in 2004. The act authorizes the hiring of twenty attorneys, four investigators, and six administrative support staff. The act also authorizes IDS to use existing funds to add up to ten new attorney and five new support staff positions in other offices.

The budget act established a public defender office in District 5 (New Hanover and Pender counties), but the technical corrections budget act (S.L. 2005-345, Section 50A) repealed those provisions. S.L. 2005-345 also authorizes the addition of two new attorney positions and one new support staff position in District 1 and one new attorney position in District 3A to handle indigent cases in District 2, where there is not a public defender office.

Rates for Appointed Counsel

G.S. 7A-458 has provided that the fee to which an attorney who represents an indigent person is entitled is to be fixed in accordance with IDS rules. Pursuant to that statutory authorization, IDS adopted a rule establishing a statewide rate of $65 an hour for all appointed cases (other than capital cases) in the district and superior courts. Section 14.13 of S.L. 2005-276 (S 622) amends G.S. 7A-458 to clarify that a court may not award fees at a rate higher than that established by IDS without IDS approval. The court retains the authority to review the hours claimed in each fee application and to approve or reduce those hours based on the factors normally considered in fixing attorneys' fees, such as the nature of the case and the time and responsibilities involved.

Studies

Capital Cases

S.L. 2005-295 (H 1436) directs the North Carolina Sentencing and Policy Advisory Commission (Sentencing Commission) to study whether capital sentencing law should include as an aggravating factor that the capital felony was committed when the defendant knew the behavior was prohibited by a valid protective order entered under G.S. Chapter 50B or by a valid protective order entered by the courts of another state or an Indian tribe. The report is due by May 1, 2006.

Domestic Violence

S.L. 2005-356 (H 569) creates a sixteen-member legislative committee to "examine, on a continuing basis, domestic violence issues in North Carolina in order to make on-going recommendations to the General Assembly on ways to reduce the incidences of domestic violence, and to provide additional assistance to victims of domestic violence." The legislation also requires the AOC to study and review the use of global positioning satellite technology to track criminal offenders, to expand the family court model to additional districts as resources allow, and to study elements of the family court model that can be implemented without additional funding. The act directs DOC to study and report on measures the Division of Community Corrections is taking to address the issue of supervising domestic violence offenders.

Other Studies

The budget act [S.L. 2005-276 (S 622)] directs that the following studies be conducted.

- During the 2005-07 biennium, the Office of Indigent Defense Services (IDS), in consultation with the District Attorneys and the District and Superior Court Judges Conferences, is to formulate proposals to reduce costs, including decriminalizing minor traffic offenses, changing the way criminal district court is scheduled, and reevaluating the handling of capital cases.
- The Sentencing Commission is to conduct biennial recidivism studies of a sample of juveniles who have been adjudicated delinquent to assess their subsequent involvement in the juvenile and criminal justice systems.
- The DOC is to report on a pilot program using global positioning systems technology to monitor sex offenders and domestic violence offenders. The DOC also must report annually on its efforts to increase the use of electronic monitoring of offenders who violate probation as an alternative to revocation of their probation and incarceration.

John Rubin

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Economic and Community Development

Despite improved economic conditions in North Carolina this year, economic and community development initiatives continued to dominate the debate in the 2005 General Assembly. Surprisingly, the considerable debate failed to produce either the promised significant new legislation or sweeping reforms of existing legislation. At session's end, more money was available than in previous years to fund essentially the same types of community and economic development programs as existed before.

Tax and Grant Incentives

Industrial Recruitment Programs

This session both the House and Senate filed bills to significantly modify the economic development recruitment incentives that are part of the William S. Lee (Bill Lee) Act and the Job Development Investment Grant (JDIG) program. None of these bills came to a vote in either chamber.

Enacted in 1996, the Bill Lee Act offers tax credits to companies in specifically named industrial classifications that create jobs or invest in machinery and equipment, worker training, research and development, and central offices. Counties in the state are grouped into five tiers based on per capita income, unemployment rates, and population growth. The lower-tiered counties are the more economically distressed, and companies investing in them qualify for larger tax credits. In comparison, JDIG, which was created in 2002, allows a state Economic Investment Committee to enter into agreements with companies for the reimbursement of 10–75 percent of state income tax withholding payments for up to twelve years if these agreements would secure industrial sites that would be located elsewhere but for the investment.

Instead of making major revisions to either the Bill Lee Act or JDIG, S.L. 2005-241 (H 1004) extends the incentives available under both programs. These credits and incentives were due to expire January 1, 2006. In each case, the sunset was extended until January 1, 2008, for most industries and until January 1, 2010, for major industries and specific projects in state development zones.

S.L. 2005-241 includes provisions to shift the smallest counties and those ten counties with the highest unemployment rates into enterprise tier one under the Bill Lee Act. Under the amendments to

the JDIG program, an eligible business is required to provide health insurance only to full-time employees who earn less than $150,000 in taxable compensation annually or three and one-half times the annualized average wage for all privately insured employers with between 250 and 1,000 employees. Implying the possibility of future reform, the act creates the Joint Legislative Economic Development Oversight Committee, which is tasked with studying comprehensive changes to the Bill Lee Act, JDIG, and related economic development incentives. Finally, S.L. 2005-241 provides additional sunset extensions intended to bring specific projects to Gaston and Nash counties. The act accomplishes this by extending until 2010 the sunset for tax credits and incentives under JDIG or the Bill Lee Act for certain large projects located in development zones and partially completed before January 1, 2006.

S.L. 2005-406 (S 868) also amends the Bill Lee Act by providing an exception to the tier designation formula for industrial parks located in higher-tiered counties. If these parks meet certain conditions related to size, population, governmental ownership, and Medicaid eligibility percentages, they will be treated as if they were located in a tier one area. The act also gives dealers of tobacco products a refund of the excise tax paid on stale (and otherwise unsellable) cigars that are returned to the manufacturer.

Sales Tax Refunds

The 2005 General Assembly allowed additional sales tax refunds as incentives to specific industries. Effective for taxes paid on or after August 1, 2005, Section 33 of S.L. 2005-435 (H 105) extends to air couriers the refund of state and local sales taxes paid on construction materials and fixtures allowed to certain industries that make large investments in facilities. The existing refund was set to expire July 1, 2009, for the following industries: aircraft manufacturing, computer manufacturing, motor vehicle manufacturing, and semiconductor manufacturing. Section 33 delays the sunset until January 1, 2010 (the same date the Bill Lee Act is set to expire for major industries), and makes the sunset applicable to all industries entitled to the refund.

Part III of S.L. 2005-435 enacts two new sales tax refund incentives, effective retroactively to taxes paid on or after January 1, 2005, and expiring for taxes paid on or after January 1, 2007: (1) for interstate passenger air carriers, an annual sales tax refund for state and local sales taxes paid on fuel during the year over a threshold of $2.5 million after subtracting the existing fuel sales tax refund measured by the carrier's operations outside North Carolina; and (2) for motor sports racing teams and sanctioning bodies, an annual refund of state and local sales taxes paid on aviation fuel used to travel to and from motor sports events.

Film Industry Jobs Incentives

Part 39 of the Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622) replaces the film industry development grant program in G.S. 143B-434.4 (which had been unfunded for several years) with a refundable income tax credit equal to 15 percent of at least $250,000 of the qualifying expenditures made in connection with a production in North Carolina. The credit is effective for taxable years beginning on or after January 1, 2005, and sunsets January 1, 2010.

Mill Reuse Act

House Bill 474 would have created a state tax credit for investments in reusing historic mills. The proposed credit could have been claimed against the franchise tax, the income tax, or the insurer's gross premiums tax. To be eligible, a site would have had to meet the following criteria:

1. It was designed or used as a manufacturing facility, for purposes ancillary to manufacturing, or as a facility for providing utility services.
2. It was certified as a historic structure.
3. It was at least 80 percent vacant for a period of at least two years immediately preceding the time at which the eligibility certification was made.

4. The qualified rehabilitation expenditures for the site for which the taxpayer is allowed a credit under Section 47 of the Internal Revenue Code or the rehabilitation expenses for a site for which the taxpayer is not allowed a credit under Section 47 exceeded $2 million.

The bill was referred to the House Finance Committee.

Other Development Financing Tools

Project Development Financing

Legislation enacted in 2003 amended G.S. 158-7.3 to enable local governments to issue bonds, without voter approval, to finance public improvements associated with private development projects. This economic development tool is commonly referred to as "tax increment financing." S.L. 2003-403 required that voters approve it in a referendum amending the state constitution. The General Assembly again amended G.S. 158-7.3 in S.L. 2005-407 (S 528) to allow municipalities to use project development financing for tourism-related development projects. The provision is available only to areas designated as Enterprise Tier One under the Bill Lee Act and applies to districts created primarily for tourism-related economic development. Such developments might include facilities for exhibitions, athletic and cultural events, shows, and public gatherings; racing facilities; parks and recreation facilities; art galleries and centers; and museums.

One North Carolina Small Business Program

Section 13.14 of S.L. 2005-276 creates a special account in the One North Carolina Fund to fund two programs for small business development. The North Carolina Small Business Innovative Research and Small Business Technology Transfer (SBIR/STTR) Incentive Program will provide grants to eligible businesses to offset costs (not to exceed $3,000) associated with applying for Phase I federal Small Business Administration SBIR/STTR grants. The North Carolina SBIR/STTR Matching Funds Program will provide grants (not to exceed $100,000) to eligible businesses to match funds received as a federal SBIR/STTR Phase I award and will encourage eligible businesses to apply for federal Phase II awards.

Industrial Development Fund

Section 13.5 of S.L. 2005-276 authorizes grants from the Industrial Development Fund to be used for transportation infrastructure related to an operation deemed an eligible industrial activity.

Manufacturing Redevelopment Districts

S.L. 2005-462 (S 629) provides that a manufacturing redevelopment district may be created in an economically distressed county. The district is established upon certification by the owner to the Secretary of State that the area meets certain criteria (which describe an area in Transylvania County) and that the owner is financially capable of completing an assessment and a remediation program. The new operator of the facility must prefund the program with at least $5 million to assess and remediate known environmental conditions in accordance with applicable environmental laws and in light of the facility's intended use. The State Property Office must accept a donation of the real property comprising the manufacturing redevelopment district, then immediately transfer to the new operator a fee simple determinable interest in the real property. The consideration for the transfer to the new operator is the creation of jobs and economic opportunities that will result from restarting manufacturing operations. The act provides prior owners (or interest holders) of the district qualified immunity from civil environmental claims.

Community Development Block Grant Funds

The budget act, S.L. 2005-276, appropriates $45 million in federal community development block grants for housing programs, economic development, and community revitalization. The act also directs the Department of Commerce to partner with the North Carolina Rural Economic Development Center to award up to $2.25 million in demonstration grants to local governments in very distressed rural areas of the state for critical infrastructure and entrepreneurial needs and to provide small business assistance. The legislation further directs the Office of State Budget and Management to conduct a study to determine the best methods for collecting, managing, and providing access to information about technology, water, sewer, and other modern infrastructure that communities need to become and remain economically viable.

Rural Development

Rural economic development efforts received a boost from a new $20 million recurring appropriation to the North Carolina Rural Economic Development Center. At least $15 million of the appropriation must be used for physical infrastructure linked to job creation, including the Rural Center's Building Re-Use and Research Development programs that seek to rehabilitate abandoned buildings for new commercial uses. In addition, S.L 2005-276 provides that $500,000 of this appropriation be allocated to the e-NC Authority.

Funding for Community Development Corporations

Community-based development organizations, particularly those designated as community development corporations, are considered an important vehicle for creating development opportunities in economically distressed areas of the state. S.L 2005-276 appropriates $4 million ($1 million recurring and $3 million nonrecurring) to the North Carolina Community Development Initiative to fund mature community development organizations. The act also appropriates $250,000 for the capacity building grant program for emerging community development corporations. The North Carolina Rural Economic Development Center administers this program.

Workforce Development

Lead Agency for Workforce Development

S.L. 2005-77 (H 583) addresses the state's fragmented system of workforce development by designating the Community Colleges System Office as the primary lead agency for delivering workforce and adult literacy training and adult education programs in the state. The bill provides no guidance on how the Community College System is to exercise this new role.

Worker Training Trust Fund

S.L. 2005-276 extends the sunset for the Worker Training Trust Fund from January 1, 2006, to January 1, 2011. The act also appropriates $6.3 million from the Special Employment Security Administration Reserve Fund to local Employment Security Commission offices.

Water Infrastructure

The General Assembly failed to enact Senate Bill 1091, which would have increased the state's deed stamp tax to create a dedicated funding source for a water infrastructure fund. The fund would have provided resources for water, wastewater, and stormwater projects in the state. The General Assembly did, however, enact S.L. 2005-454 (H 1095), which establishes, but does not provide long-term revenue

for, a Water Infrastructure Fund. The act also creates a state Water Infrastructure Commission in the Office of the Governor. The commission's purpose is to identify the state's water infrastructure needs, develop a plan to meet those needs, and monitor plan implementation. A more detailed analysis of S.L. 2005-454 can be found in Chapter 11, "Environment and Natural Resources."

The General Assembly established the Clean Water Management Trust Fund (CWMTF) in 1996 to help finance projects that enhance or restore degraded waters, protect unpolluted waters, and/or contribute toward a network of riparian buffers and greenways benefiting environmental, educational, and recreational activities. The CWMTF was initially funded with an appropriation of $40 million per year. Although subsequent legislation called for a phased increase in the annual appropriation first to $70 million and then to $100 million, the past several budgets have not allocated these amounts. In this year's budget, the CWMTF was fully funded at $100 million in each fiscal year of the biennium. This new infusion of grant money will allow the CWMTF to provide assistance with a wider variety of projects to protect and improve water quality. Local governments will be the primary recipients of grants from the fund.

The budget also appropriates funds for certain named water resources development projects and provides the state match for federal safe drinking water funds.

Affordable Housing

Housing Finance Agency Funds

S.L. 2005-276 provides the North Carolina Housing Finance Agency with an additional $4.5 million for housing programs. Advocates had sought a $50 million appropriation for each year of the biennium for affordable housing through the North Carolina Housing Trust Fund.

Manufactured Housing

The General Assembly continued its efforts to improve consumer protections for purchasers of manufactured housing, a growing affordable housing alternative in North Carolina. S.L. 2005-451 (H 630) requires manufactured home dealers to establish and maintain escrow or trust accounts for buyer deposits. Dealers must also provide buyers with a receipt for all deposits. The receipt must include the name and address of the bank where the deposit will be made.

House Bill 1288 would have (1) established an advance disposal tax on the sale of new and used manufactured homes, (2) required counties to develop a plan for the management of abandoned manufactured homes, and (3) provided a process for counties to use to remove and properly dispose of abandoned manufactured homes deemed to be nuisances. The bill is pending in the House Finance Committee.

Related Development Legislation

Interlocal Agreements

S.L. 2005-72 (S 867) enhances the multi-jurisdiction industrial park statutes by increasing from forty to ninety-nine years the period of time which an interlocal agreement regarding an industrial or commercial park may remain in effect.

Economic Development Public Records

S.L. 2005-493 (S 393) will allow public access to most records about state and local economic development incentive deals within twenty-five business days after the announcement that a business

has committed to expand or locate a specific project in the state. Disclosure of local government records relating to the project is not required if the business has not yet selected a specific location for the project. Once a location has been chosen, however, the local government records (including those maintained by the state related to the local government's efforts to attract the project) must be disclosed upon request. For further details, see Chapter 20, "Public Records."

Regional Councils of Government

Regional Councils of Government (COGs) play an increasingly important role in community and economic development activity in North Carolina. S.L. 2005-276 appropriates up to $48,950 per fiscal year for each regional council of government or lead regional organization. In addition, S.L. 2005-290 (H 819) authorizes COGs to acquire real property by purchase, gift, or otherwise, and to improve the property. The bill makes clear, however, that a COG may not exercise the power of eminent domain.

Global TransPark Changes

S.L. 2005-364 (S 606) updates the statutes to reflect that the Global TransPark Development Zone has been renamed North Carolina's Eastern Region and that its governing body is renamed as North Carolina's Eastern Region Commission. The act adds to the commission's economic development responsibilities by directing it to promote travel, tourism, and natural resource–based attractions in the eastern part of the state.

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Elections

Two unexpected events in the 2004 elections brought elections law issues to the fore in the 2005 General Assembly. First, an electronic voting system in Carteret County failed to record the votes of more than 4,500 voters, leaving the outcome of the statewide Commissioner of Agriculture race in question and casting doubt on the credibility of the elections process. Second, a post-election ruling of the state supreme court regarding the use of provisional ballots blocked the certification of the results in the statewide Superintendent of Public Instruction race, resulting in a historic and unprecedented joint session of the General Assembly to decide the contested election.

The legislature responded with wide-ranging new laws regarding voting equipment and a new procedure for resolving contested legislative and council of state races. Other new legislation addresses voter registration, vote counting, and campaign finance regulation.

Overhaul of the Law on Voting Machines

For decades, North Carolina county boards of elections could choose between five types of voting systems: traditional hand-counted paper ballots, mechanical lever machines, punch-card ballot machines, optical-scan paper ballots counted by electronic tabulators, and direct-record electronic machines (commonly called "DREs" and usually requiring the voter to touch a video screen). In the aftermath of the well-known difficulties experienced in Florida in the 2000 elections, the General Assembly enacted legislation in 2001 and 2003 prohibiting the future use of punch-card and lever machines, reducing the North Carolina options to three.

The Carteret County problem mentioned above involved DREs used in an early-voting site in the early-voting period prior to election day. Before the election, employees of the DRE manufacturer told county elections officials that the system could handle up to 10,000 votes. The voting system, however, was incorrectly set up by a technician and as a result could handle only about 3,000 votes. Had it been set up correctly, as the DRE employees assumed, it would have had the capacity to handle the 10,000 votes. Failure to click one switch caused the system to run below its full capacity. During the early voting period, approximately 7,500 voters voted using the DREs. For the first 3,005 votes, the system worked properly and the votes were properly tabulated. Beginning with vote 3,006, however, the next 4,531 votes were not tabulated at all. The error was discovered on election night when the

written poll books and daily logs showed that 7,536 voters had voted, but the machine's vote tabulation totaled only 3,005.

Consequently, more than 4,500 votes went uncounted. There was no local race in Carteret County with a margin of fewer than 4,500 votes, so the missing votes could not have affected the outcome of any of those races. But the statewide race for Commissioner of Agriculture was within that margin. A contest of that election resulted. The State Board of Elections (SBE) first ordered a revote by the 4,500 voters whose votes were lost (these voters were identifiable because early voting is a form of absentee voting) plus any Carteret voters who had not voted in the election. That order was thrown out by the superior court. The SBE then ordered a statewide election, and that order was also thrown out by the superior court. The matter was resolved only when one candidate dropped his election contest and conceded.

In 2004, before the Carteret DRE problem occurred, the General Assembly established the Electronic Voting Systems Study Commission, charged with, among other tasks, considering whether DREs used in North Carolina elections should be required to produce a voter-verifiable paper record suitable for a recount or a manual audit. This committee started to meet in the fall of 2004 after the Carteret incident and made recommendations to the General Assembly as it convened early in 2005. Armed with the recommendations of that study commission and concerned about eroding public confidence in the administration of elections, the General Assembly enacted S.L. 2005-323 (S 223) on August 16, 2005, shortly before it adjourned, entitled (in part) An Act to Restore Public Confidence in the Election Process.

Uniform Oversight by the State Board of Elections

The SBE has long had the responsibility of certifying voting machines for use in North Carolina, and G.S. 163-165.7 has long provided that only machines so certified may be used. Traditionally counties have independently determined which voting machines to acquire, from among those certified, and dealt with vendors on a county-by-county basis. S.L. 2005-323 creates a more uniform system, placing new obligations on the SBE with respect to certification of voting machines and supervision of their use. Under the new system, the SBE will create standards voting machines must meet, set mandatory terms for contracting for the various machines (including terms relating to maintenance, support, and training), and negotiate a uniform statewide price. These requirements are found principally in amendments to G.S. 163-165.7 and in new G.S. 163-165.9A. The SBE will issue a Request for Proposal (RFP) to obtain uniform prices for the voting systems and to ensure that the standards and contract terms for the systems are attained. The SBE will select the voting systems submitted in response to the RFP that meet both the state standards and conditions set out in S.L. 2005-323 as well as the federal standards under the Help America Vote Act (HAVA). The uniform system will authorize only optical-scan machines and DREs.

New G.S. 163-165.7(c) requires that before certifying a new machine, the SBE must (1) review (or designate an expert to review) all source code made available by the machine's vendor and (2) assess the security of the machine. A report made after this review might contain trade secret information and, if so, that information is not subject to public disclosure under the public records law.

Automatic Certification of Hand-Counted Paper Ballots

Amended G.S. 163-165.7 provides that paper ballots marked by the voter and counted by hand are deemed a certified voting system. That is, any election may be conducted using hand-counted paper ballots. Counties should be aware, however, that voting systems using hand-counted paper ballots alone may have trouble meeting the federal accessibility requirements under HAVA. That statute requires there be at least one voting system in each precinct that allows full accessibility for visually impaired and other disabled voters to vote with "privacy and independence" [42 USCA § 15481(a)(3)(A) (2005)].

New Obligations of Vendors

As part of the uniform system, the SBE will impose four significant new requirements on vendors who wish to sell voting machines to North Carolina counties. First, the vendor must post a bond or letter of credit to cover damages resulting from any defects in the machines. Damages may include, among other things, the costs of conducting a new election held as a consequence of machine defects.

Second, the vendor must place in escrow (with an SBE-approved agent) all software relating to the function, setup, configuration, and operation of the voting machine, including a complete copy of the source code. The vendor's chief executive officer must sign a sworn affidavit that the source code and other material in escrow are the same as that being used in the vendor's voting machines in North Carolina. The vendor must notify the SBE of any changes in any escrowed item, of the decertification of the machine in any state, or of any defects known to have occurred with the machine anywhere or in similar machines. Material in escrow may be examined by designated SBE agents, the state Office of Information Technology Services, the state chairs of each political party, and the purchasing county.

Third, the vendor must maintain an office in North Carolina with staff to service the machines. Fourth, the vendor must agree that if it is granted a contract to provide software for a voting machine but fails to maintain or update the software as required, or if the vendor enters bankruptcy, the escrow agent will release the source code to the counties using the vendor's machines.

Willful violation of any of these requirements is a Class G felony, and substitution of source code without proper notification is a Class I felony. In addition the SBE may impose civil penalties of up to $100,000.

Paper Record Requirements

In the Carteret County incident, the 4,500 votes that went unrecorded by the DRE were simply lost. S.L. 2005-323 requires that each voting machine (or connected group of machines) generate a paper record of each individual vote cast, a paper record that can be subsequently counted by hand. This requirement adds no new element in the case of optical-scan machines, because the electronic tabulator in these machines counts a paper ballot marked by the voter, and that ballot itself constitutes the newly required paper record. For DREs, however, the requirement adds a significant new component. No DREs ever certified for use in North Carolina have been able to produce the required paper record. In fact, no such paper record DREs have ever been used on a large scale anywhere in the nation.

The new statute requires that in an approved DRE system, (1) the voter must be able to see the paper record before casting the vote electronically, (2) the voter must be able to correct any discrepancy between the electronic vote and the paper record before the vote is cast, and (3) the machine must make it impossible for the voter to alter the paper record or remove it from the voting enclosure. G.S. 163-167.7(c), regarding the process of voting, is amended to conform to these requirements.

S.L. 2005-323 permits the SBE to conduct in 2006, in a maximum of nine counties, experiments using machines that provide a paper vote record along with an alternative method of recording votes cast. The experiment may be conducted in no more than two voting sites per county, and voters must have the option of voting on a nonexperimental machine. For all votes cast on the experimental machines, the county elections board must conduct a full hand-to-eye recount.

The new paper records will, by virtue of amended G.S. 163-165.1, have the same confidentiality as ballots themselves.

County Acquisition of New Machines

The new statute continues from prior law the obligation of the county board of elections to recommend to the county commissioners the particular type of election machines the commissioners should acquire. The commissioners may reject the elections board recommendation, but they may not acquire any other machine unless the elections board specifically recommends the alternative machine. Under old G.S. 163-165.9, the county elections board was responsible for obtaining financial

statements from the vendor. Under the statute as amended, that obligation is deleted, because the SBE will, as described above, supervise a uniform statewide system of certifying voting equipment, through the voting system RFP and certification process.

Given that counties will be choosing among voting machines from the uniform SBE-certified list at the RFP uniform statewide prices, G.S. 163-165.9 is amended to specify that Article 8 of G.S. Chapter 143, setting out bidding and other related requirements, does not apply to county acquisition of voting machines.

S.L. 2005-323 provides that each county is to receive a grant of up to $12,000 per polling place and one-stop early voting site for election equipment, providing for two backup units per county. In addition, each county is to receive a grant equal to $1 per voter in the 2004 Presidential election (but not more than $100,000 or less than $10,000) for central administrative software for vote tabulation. The money comes from HAVA grant funds currently in the state's Election Fund. The Election Fund was created in 2003 by G.S. 163-82.28 as the depositary for all federal and state HAVA funds that may be used by the SBE to implement HAVA requirements.

S.L. 2005-323 also directs the SBE to develop a model code of ethics for members and employees of county boards of elections addressing the appropriate relations between these individuals and the vendors who sell voting machines.

Effective Date

The uniform system operated by the SBE, the SBE certification of machines, the obligations of vendors, and the paper record requirement for DREs all are effective for elections beginning with the primaries in early 2006.

Different Machines in One Precinct

A separate enactment of the General Assembly, S.L. 2005-428 (H 1115), authorizes the executive director of the SBE to permit counties to have more than one type of voting machine in a precinct if necessary to comply with law (most likely meaning, if necessary to provide adequate access for disabled voters).

Machine Counting of Out-of-Precinct Provisional Ballots

G.S. 163-132.5G requires county boards of elections to maintain voting data by precinct and to include in the precinct election vote totals absentee ballots for that precinct, including absentee ballots cast by mail and by one-stop early voting at other sites. S.L. 2005-323 amends the statute to provide that the data must also include provisional ballots cast at that precinct. It also amends G.S. 163-165.7 to require that all voting machines must be able to include in precinct returns provisional votes cast by voters outside of the voter's precinct.

Contested Legislative and Council of State Races

Provisional voting has been used in North Carolina for about a decade. Under provisional voting, an individual who believes that he or she should be on the voter rolls but is not, or who for some other reason appears ineligible, can vote a ballot that will be held separately and counted later only if the voter's eligibility can be subsequently established. For the 2004 elections, the SBE interpreted 2002 state and federal enactments to require that elections officials allow a registered voter of a county to vote a provisional ballot at any voting place in the county. That is, an eligible voter of a county was, in the 2004 elections, permitted to vote not only at his or her precinct of registration (where a regular ballot would be cast) but also at any other precinct in the county (where the voter would cast a provisional ballot). Such out-of-precinct provisional ballots would be counted for all the races in which the voter would have been eligible to vote if he or she had voted in his or home precinct.

In 2004, more than 11,000 voters statewide cast out-of-precinct provisional ballots.

In the Superintendent of Public Instruction race, the margin between the Democratic candidate (Atkinson) and the Republican candidate (Fletcher) was about 8,000 votes. Fletcher instituted a legal action, alleging that out-of-precinct provisional voting violated the North Carolina constitution. The courts stayed the certification of the election results until the matter could be resolved, so no one took office as Superintendent. In February 2005, the North Carolina Supreme Court ruled that there was no statutory authorization for out-of-precinct provisional ballots—that is, while it did not rule on Fletcher's constitutional claim, it ruled that the SBE had improperly conducted the election.[1]

Reaffirmation of Out-of-Precinct Provisional Voting

The General Assembly responded to the supreme court ruling with two pieces of legislation—one reasserting its intent to permit out-of-precinct provisional voting and another establishing a new procedure for resolving contested legislative and council of state races. The preamble of the first of these, S.L. 2005-2 (S 133), states that "The State Board of Elections and all county boards of elections were following the intent of the General Assembly when they administered [relevant portions of the elections laws] to count in whole or in part ballots cast by registered voters in the county who voted outside their resident precincts" in the 2004 elections. The act amended G.S. 163-55, 163-166.11, and 163-182.2 to clarify that out-of-precinct provisional voting was permitted. Further, it amended G.S. 163-82.15(e) to clarify that a voter who had moved from one precinct to another within a county more than thirty days before an election but had not reported the move to the county board of elections could vote a provisional ballot at the new precinct.

Section 7 of S.L. 2005-2 made the provisions of the act applicable to the 2004 elections, bringing the new statute into apparent conflict with the supreme court ruling.

New Procedures for Resolving Contested Council of State Elections

At issue before the North Carolina Supreme Court in the out-of-precinct provisional voting case was a little-known provision of the North Carolina state constitution, Article VI, Section 5, which provides that a contested election for a council of state office—such as Superintendent of Public Instruction—"shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law." To the surprise of most observers, it turned out that the legislation that had set out the "manner prescribed by law" under this constitutional provision had been repealed in 1971 and no subsequent legislation had replaced it.

In that circumstance, the supreme court held that the courts had jurisdiction over the contested Superintendent of Public Instruction race and remanded the case to the superior court for further proceedings consistent with the supreme court's ruling that out-of-precinct provisional ballots should not have been permitted in 2004.

The General Assembly responded with S.L. 2005-3 (S 82), setting out a comprehensive scheme for resolving contested council of state elections, with the following characteristics, found in new G.S. 120-10.1 through G.S. 120-10.14, new G.S. 163-182.13A, and amended G.S. 163-182.14 and G.S. 163-182.15.

Beginning procedures. Under the new procedures, a candidate for a council of state office—Governor, Lt. Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Insurance, or Commissioner of Labor—who wishes to contest an election may appeal directly from the final decision of the SBE to the General Assembly. He or she first files a notice of intent to contest the election. The notice is filed with the clerk of the House of Representatives and may be based on either of two grounds: (1) that the opponent is ineligible or unqualified or (2) that there was an error in the conduct or results of the election. The opponent may, if he or she chooses, file an answer to the notice of intent. During a period of time specified in the statute, the parties may take depositions and prepare

1. James v. Bartlett, 359 N.C. 260, 607 S.E.2d 638 (2005).

for a proceedings before a special committee. If the contesting candidate wishes to continue with the contest, he or she may then file a petition and the opponent may file a reply.

Appointment and work of the special committee. The Speaker of the House and the President Pro Tempore of the Senate then each appoint five members of their chambers to the special committee, with no more than three being of the same political party. The committee is authorized to adopt rules, oversee fact investigation, conduct hearings, compel the testimony of witnesses, and, if proper, order the recounting of ballots. At the conclusion of its efforts, the committee reports its findings as to the law and the facts and makes recommendations to the General Assembly for its action.

Determination by the General Assembly. With the report of the special committee in hand, the two chambers of the General Assembly meet in joint session, with the Speaker of the House presiding. Each of the 170 members (120 representatives and 50 senators) has one vote. A majority of those 170 votes is needed for the General Assembly to order one of the candidates elected. If the issue is the eligibility or qualifications of the candidate who is the subject of the contest, the General Assembly determines whether that candidate is ineligible or unqualified. If he or she is found to be eligible and qualified, then the General Assembly orders a new election. If the issue is alleged error in the conduct or results of the election, the General Assembly determines which candidate received the most votes in the election. If it can make that determination, then that candidate is declared elected. If it cannot, then the General Assembly may order a new election or other appropriate relief.

Judicial proceedings stop; no review. Upon initiation of a contest in the General Assembly, any judicial proceedings regarding the election abate. The decision of the General Assembly is not reviewable in the courts.

Application of the New Procedures in 2005

S.L. 2005-3 provided that it applied to the 2004 elections, and, when candidate Atkinson filed a notice of intent to contest the Superintendent of Public Instruction race, the General Assembly invoked the new procedure.

First, it notified the courts that the procedure had begun in the General Assembly, so that the abatement provision could be applied. The speaker and the president pro tempore appointed members to the Joint Select Committee on Council of State Contested Elections. That committee adopted rules for its procedure, received briefs of the parties, conducted a hearing at which it took the testimony of witnesses and questioned counsel for the parties, and made its report to the full General Assembly.

On August 23, 2005, in an unprecedented proceeding, the House and Senate met in joint session and, after brief debate, voted. Because the issue was alleged error in the conduct of the election, the question on the ballot was which candidate received the most votes in the election. Members had the option of indicating that Atkinson received the most votes, that Fletcher received the most votes, or that it was not possible to determine who received the most votes.

Atkinson received a majority of the votes cast and was declared elected.

New Procedures for Resolving Contested Legislative Elections

S.L. 2005-3 applies the new contested elections procedures to contested races for seats in the General Assembly itself, in light of Article II, Section 20, of the state constitution, which provides that each house of the General Assembly—the House of Representatives and the Senate—"shall be judge of the qualifications and elections of its own members." There are a few differences in the procedure when the contest concerns a legislative seat as opposed to a council of state office.

First, all filings are with the clerk of the relevant chamber (for council of state contests, all filings are with the clerk of the House).

Second, the committee that conducts the investigation is the Committee on Rules in the appropriate chamber, not a special committee. The rules of the House or Senate may, however, specify a different committee.

And third, the contest is determined by the chamber at issue: if the contest is for a House seat, the House of Representatives determines the winner; if the contest is for a Senate seat, the Senate determines the winner.

In other principal aspects, the procedures are the same.

New Requirements for Ballot Counting and Recounts

In the aftermath of the Carteret County lost-votes difficulty, the General Assembly, in S.L. 2005-428 and S.L. 2005-323, enacted a number of changes to the laws regarding ballot counting and the conduct of recounts.

Mandatory Sample Hand-to-Eye Counting

With optical-scan voting machines, the electronic tabulator counts the paper ballots and produces the vote total. It has always been possible to retrieve the paper ballots and have human beings count them, and on occasion this kind of recount has been done. This procedure is commonly referred to as a hand-to-eye count.

In the case of DREs, the machine counts the electronically cast votes and, in all elections past, there has been no paper record available for a hand-to-eye count. The machine-reported total was the only available count. As described above, however, beginning with the 2006 elections, all machines, including DREs, must produce a paper record of each individual vote cast. That paper record will then be available for a hand-to-eye count.

Hand-to-eye sample counting in every election. S.L. 2005-323 amends G.S. 163-182.1(b) and G.S. 163-182.2 to require, beginning in 2006 and for every election, a hand-to-eye count of a sample of the paper ballots tabulated by optical scan machines or of the paper records produced by DREs. If a particular election includes a Presidential contest, that contest must be included in the sample. If there are statewide races on the ballot, then one of those must be included. If there is no statewide race, then the SBE must provide a process for selecting district or local races to be sampled. The sample, chosen by the SBE, must include full precincts, full counts of absentee ballots, and full counts of one-stop early voting sites. The size of the sample must produce a statistically significant result and is to be selected in consultation with a statistician. The actual units must be chosen at random.

Controlling count. The county board of elections is, in the normal course, to rely on the machine count rather than the hand-to-eye count. That is, if the difference is not significant or material, then the machine count is to be the official total.

Complete hand-to-eye counts. If, however, the hand-to-eye count differs "significantly"—a term that is not defined in the statute—then a complete hand-to-eye count of all votes must be conducted. In the event of a "material discrepancy"—also not defined in the statute—between the machine count and the full hand-to-eye count, the hand-to-eye count is to control, except where paper ballots or paper records have been lost or destroyed or where there is another reasonable basis to conclude that the hand-to-eye count is not the true count. These terms and procedures are to be clarified by rules to be adopted by the SBE as authorized in G.S. 163-182.2 and G.S. 163-182.7.

Candidate Right to Hand-to-Eye Sample Recount

In addition to the new requirement for sample hand-to-eye counts as described above, S.L. 2005-323 also enacts new G.S. 163-182.7A giving candidates the right to demand a sample hand-to-eye *recount* after an election.

G.S. 163-182.7 has for years provided to a trailing candidate the right to demand a recount if the margin between that candidate and the leading candidate is less than 1 percent (or 0.5 percent in statewide races). New G.S. 163-182.7A provides that if the recount is a machine recount and does not reverse the results of the original count, the trailing candidate may demand a hand-to-eye recount of all ballots in 3 percent of the precincts (including one-stop early voting sites) in each county voting in the

race. (Or, if the machine recount does reverse the original count, then the candidate who originally led may demand the hand-to-eye recount.) The precincts in which the hand-to-eye recount is to be held must be chosen at random.

If the results of the hand-to-eye recount differ from the machine results in the affected precincts to the extent that, if the same pattern held through all precincts, the results of the election would be reversed, the SBE must order a hand-to-eye recount of all precincts in which the election occurred.

Count and Recount Pattern

Consider an election in which the optical scan tabulators or DREs operate flawlessly, with no indication of malfunction or miscount. As a consequence of the new requirements for sample hand-to-eye counts and candidates' rights to call for sample hand-to-eye recounts, described above, the pattern for elections, even where there is no indication of machine trouble, will be this:

1. Election with count by machine
2. Automatic sample hand-to-eye paper count
3. Automatic right of candidate in close race to demand machine recount
4. Automatic right of candidate in close race to demand sample hand-to-eye paper recount

Delayed Canvass in the General Election

To provide the time necessary for the hand-to-eye counting that will follow the machine counts, S.L. 2005-428 amends G.S. 163-182.5 to provide that the canvass will be moved from the seventh day to the tenth day after the election for the general election in even-numbered years. In all other elections, the canvass will remain on the seventh day after the election.

Lost Ballots

The Carteret County lost-votes incident created a problem for the SBE. Because the lost votes were cast at an early-voting one-stop site and because early voting is a form of absentee voting, it was possible to identify the particular individual voters whose votes were not counted. Yet the statute giving the SBE authority to remedy problems in elections appeared to limit the possible responses by the SBE, and a satisfactory response proved difficult to identify. The matter was resolved only when the trailing candidate withdrew his protest, thereby allowing the original results—which did not include the lost votes—to stand.

S.L. 2005-428 addresses this problem by amending G.S. 163-182.12 to provide that where a known group of voters cast votes that are lost beyond retrieval, the SBE may authorize a county board of elections to allow those voters to recast their ballots during a two-week period following the election. The SBE must approve the county board's procedures for contacting those voters and allowing them to vote.

Election Wins

G.S. 163-111 sets out the procedure for determining who is the victor in a primary election. But a 2001 revision of portions of the General Statutes had deleted the previous statutory specification that in the general election the candidate with the most votes wins. S.L. 2005-428 enacts new G.S. 163-182.15(d) specifying just that, correcting the deletion.

Eligibility to Register and Vote

The General Assembly amended a number of statutory provisions related to voter registration and eligibility to vote.

Cancellation of Other-County Registration

The application form for voter registration contains a special provision for a voter who is registered to vote in one North Carolina county but has moved and is now applying to register in another North Carolina county. That special provision authorizes the cancellation of the old registration. S.L. 2005-428 amends G.S. 163-82.9 to provide for the automatic cancellation even if the voter fails to complete the special provision.

Affirmation of Citizenship

The application form for voter registration also asks the applicant to answer the question "Are you a citizen of the United States of America?" G.S. 163-82.4 provides that an applicant who has failed to answer that question is to be notified and given the opportunity to answer. S.L. 2005-428 amends the statute to clarify that the voter may correct the omission at any time up to and including election day and then proceed to vote.

Voting by Previously Removed Voter

G.S. 163-82.14(d) sets up a procedure for county boards of elections to follow to remove from the voter lists individuals who have moved out of the county. S.L. 2005-428 amends the statute to provide that if a voter appears at the polling place to vote but has been removed under this provision, the voter must be reinstated and allowed to vote if the voter gives oral or written affirmation that he or she has not moved out of the county but has maintained residence continuously within the county.

Determination of Residency

Occasionally a question will arise as to the residency of an individual when that individual lives on property that is divided by the boundary line of a city, the boundary between two counties, or some other jurisdictional boundary. S.L. 2005-428 amends G.S. 163-57 to provide that in such an instance the location of the bedroom or usual sleeping area of that person determines the residence. This reflects the "bedroom rule" used by almost all states to determine voter residency in a home split by an electoral boundary. The amendments also provide that if the voter challenges the determination of his or her residency before the county board of elections, the presentation of an accurate and current representation of the residence and the boundary line by map or other means is to constitute prima facie evidence of the residence.

S.L. 2005-428 also enacts new G.S. 163-82.15A requiring the executive director of the SBE to direct county boards of elections to change the voter registration of a voter whose county of residence is changed when a county boundary line is altered. No action is to be required of the voter. But the affected voter may challenge the change in a hearing before the county board of elections if he or she so desires.

Access to Registration Records

G.S. 163-82.10 contains provisions specifying the circumstances under which county boards of elections are to provide information from the voter registration lists upon a request for such information. S.L. 2005-428 amends the statute to reflect the fact that all voter registration lists are now maintained electronically and to remove references to paper lists and exceptions for counties not maintaining lists electronically.

Conduct of Elections

The 2005 General Assembly enacted a number of statutory changes related to the conduct of the election itself.

Electronic Poll Books

S.L. 2005-428 amends G.S. 163-166.7 to permit the use of electronic registration records in the voting place in lieu of or in addition to a paper poll book or other registration record.

Voter with an Unreported Move and One-Stop Sites

S.L. 2005-428 amends G.S. 163-227.2 and G.S. 163-166.11 to provide that a voter who has moved within the county more than thirty days before election day but has not reported that move to the county board of elections may vote a regular ballot at a one-stop early voting site rather than a provisional ballot as long as the one-stop site has available all the information necessary to determine whether the voter is registered to vote in the county and which ballot the voter should receive.

Voter Assistance at One-Stop Sites

S.L. 2005-428 amends G.S. 163-227.2 and G.S. 163-226.3 to clarify that a voter voting at a one-stop absentee voting site may receive the same assistance in voting that is available at the polling place on election day.

One-Stop Ballot Counts

G.S. 163-234(2) has authorized county boards of elections to start counting absentee ballots at 5:00 p.m. on election day (or as early as 2:00 p.m. with the adoption of a proper resolution to that effect), but it has not permitted the electronic counting of one-stop absentee ballots before the close of the polls. S.L. 2005-159 (H 1102) amends the statute to remove that restriction and to permit the county board of elections to take preparatory steps for the count before 5:00 (or 2:00) p.m. as long as those steps do not reveal any results to any individual not engaged in the actual count. The statute specifies, by way of illustration, that a preparatory step could include the entry of tally cards from DREs into a computer for processing.

Observers and Runners

G.S. 163-45 permits the political parties to name individuals to serve as observers at the polls on behalf of the party. It also entitles the observers to receive on three occasions throughout election day lists of voters who have voted so far that day. S.L. 2005-428 makes two changes in this statute. First, it provides that the three lists may be provided to "runners" sent by the party chair to the polls rather than to observers. G.S. 163-166.3 is amended to permit the runner limited access to the voting enclosure. The party chair must notify the chair of the county board of elections of the identity of all runners. Second, the statute specifies that no candidate may serve as an observer or runner.

Candidate Filing Fees

Candidates pay filing fees when they file to run for office, and the fee is 1 percent of the salary of the office sought. S.L. 2005-428 amends G.S. 163-107 to clarify that the salary upon which the fee is to be based is the starting salary for that office, not the salary then being received by the incumbent, if different. If no starting salary can be determined, then the basis salary is the salary being paid to the incumbent as of January 1 of the election year.

Campaign Finance

The 2005 General Assembly made a few adjustments to several statutes regulating campaign finance.

Training for All Political Committee Treasurers

S.L. 2005-430 (H 1128) adds new G.S. 163-278.7(f) directing the SBE to provide training for every treasurer of a political committee prior to the election in which the committee is involved. The SBE must provide each treasurer with electronic materials and conduct regional seminars for in-person training free of charge to the treasurers. However, the treasurers are not required to take any training.

Audit of Contributions by Money Order

Campaign contributions in excess of $100 may not, under G.S. 163-278.14, be made in cash, but must be made by check, draft, money order, credit card charge, debit, or other method subject to written verification. S.L. 2005-430 amends the statute to direct the SBE to prescribe methods to ensure an audit trail for contributions by money order so that the identity of the contributor can be determined.

Campaign Expenditures Other Than by Check

G.S. 163-278.8 has required that all campaign expenditures over $50 and all campaign expenditures for media expenses regardless of amount must be made by check. S.L. 2005-430 amends the statute to provide that the payments may be made not only by check but by any verifiable form of payment by which the identity of the payee can be determined.

North Carolina Public Campaign Fund

In 2002 the General Assembly established the North Carolina Public Campaign Financing Fund in Article 22D of G.S. Chapter 163 to provide an optional method for candidates for the North Carolina Supreme Court and Court of Appeals to finance their campaigns. If a candidate agreed to certain limitations on contributions and expenditures, he or she would receive money from the fund for the campaign. The fund was first used in the 2004 elections. S.L. 2005-430 enacts the following modifications to the statutes: it clarifies which candidates are eligible to participate in the program, it clarifies the kinds of contributions and expenditures that can be made from moneys other than fund moneys, and it specifies when the mandated Judicial Voter Guide may be issued.

To help support the fund, the Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), amends G.S. 84-34 to add a mandatory surcharge of $50 to the annual state bar membership fee that active lawyers in the state must pay. Previously, the $50 payment was optional. S.L. 2005-276 also changes the name of the fund from "Public Campaign Financing Fund" to "Public Campaign Fund."

Duties of the Executive Director

G.S. 163-278.23 gives the executive director of the SBE certain responsibilities with respect to reports filed under the state's chief campaign finance regulation statute (Article 22A of G.S. Chapter 163) and authorizes the executive director to issue written opinions upon which persons involved in campaign finance are entitled to rely. S.L. 2005-430 extends those duties and that authorization to other campaign finance statutory provisions, including those regulating the Political Parties Financing Fund, the Public Campaign Fund, and electioneering communications.

Electioneering Communications Expenditures

Statutes enacted by the General Assembly in 2004 require reporting of disbursements made by any individual or other entity for broadcast, cable, or satellite communication, mass mailings, or telephone banks if the communication refers to a clearly identified candidate for a statewide office or for the General Assembly and if the communication is made within sixty days before a general election in which that candidate is running or within thirty days before a primary election in which that candidate is running for nomination (or within thirty days before a nominating convention). S.L. 2005-430

amends G.S. 163-278.81, 163-278.82, 163-278.91, and 163-278.92 to clarify that any disbursement for an electioneering communication of this sort must be made from a segregated account into which no funds from a prohibited source have been directly or indirectly introduced.

Corporate Contributions

In general, the campaign finance statutes prohibit contributions by corporations. S.L. 2005-430 amends G.S. 163-278.6(7) to conform that statute with others that clarify that the prohibition applies to corporations whether or not they are doing business in North Carolina.

Miscellaneous

Appointments to the State Board of Elections

Under G.S. 163-19, the Governor names five individuals to the SBE every four years, three of one party and two of the other. The statute has provided that the party chairs of each political party submit to the Governor a list of five nominees from which the Governor chooses. S.L. 2005-276 amends the statute to remove the requirement that the Governor choose from among those five nominees.

Terms of District Court Judges

G.S. 7A-140 has provided that terms of newly elected district court judges begin on the first Monday in December following their election. S.L. 2005-425 (H 650) amends that statute and G.S. 163-1 to provide that these terms begin on the first day of January following the election.

Participation in the Census Redistricting Data Program

G.S. 163-132.1 authorized the state of North Carolina to participate in the 2000 Census Redistricting Data Program and specified how census data was to be used in the creation of precinct boundaries for the principal purpose of avoiding splitting precincts in the creation of electoral districts. S.L. 2005-428 deletes the specifications and merely authorizes participation in the 2010 program.

Robert P. Joyce

10

Elementary and Secondary Education

This was the year of the lottery. For many sessions in a row, the question of adopting a lottery for North Carolina sharply divided the General Assembly. In 2005 the lottery act passed and the Education Lottery Fund was created. Its impact will be measured in the years to come. There were no other major initiatives in education legislation in 2005.

Financial Issues

Appropriations

The Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), as amended by S.L. 2005-345 (H 320), appropriates to the Department of Public Instruction (DPI) $6.62 billion for 2005–06 and $6.58 billion for 2006–07. As in years past, moneys were earmarked for a number of special purposes, including supplemental funding for low-wealth counties, small school systems, disadvantaged students, children with limited English proficiency, children with disabilities, academically gifted students, highest-priority schools, and student accountability standards.

Annual Independent Audit

G.S. 115C-447 has long required local school administrative units to have an annual independent audit of their accounts and the accounts of individual schools in the unit. Section 7.58 of S.L. 2005-276 amends this statute to give the State Board of Education (State Board) a new role in this process. When the State Board finds it appropriate to review the internal controls of a school unit because of fraud, embezzlement, theft, or management failures, it must notify the unit. If the problems were discovered by the firm conducting the annual audit, the school board must respond by submitting to the State Board and the Local Government Commission (LGC) the audit and a plan for any corrective actions. The local board must then implement the approved changes before the next annual audit. If the school unit's problems were not discovered by its auditor, the State Board and the LGC must employ an auditing firm to review the local board's internal control procedures—at the expense of the local board. After the audit review and public report, the State Board may determine that significant changes are needed in the school unit's internal control procedures. If so, the local board must submit a plan of

corrective action to the State Board and the LGC and must implement the changes they approve before the next annual audit.

Civil Penalty and Forfeiture Fund Appropriations

For years there have been questions about the meaning of Article IX, Section 7, of the state constitution, which states that the clear proceeds of all civil penalties, forfeitures, and fines collected by state agencies belong to the public schools.[1] A constitutional amendment effective January 1, 2005, authorizes the General Assembly to place the moneys collected from such sources in a state fund. The General Assembly must appropriate the funds, on a per pupil basis, to the counties, which must use them exclusively for maintaining free public schools.

Under G.S. 115C-457.2, these funds are deposited in the Civil Penalty and Forfeiture Fund. Section 6.37 of S.L. 2005-276 amends G.S. 115C-457.3 by changing the method of appropriating these moneys. In the past, the funds were automatically transferred to the State School Technology Fund. Now the General Assembly must appropriate the moneys from the Civil Penalty and Forfeiture Fund to the State Public School Fund in the current operations budget. The State Board, on behalf of the counties, then allots the funds to local school administrative units on a per pupil basis.

G.S. 115C-457.2 requires the clear proceeds of all appropriate civil penalties, civil forfeitures, and civil fines to be deposited in the Civil Penalty and Forfeiture Fund. It defines "clear proceeds" as the full amount of these penalties, forfeitures, and fines, diminished only by the actual costs of collection. Section 6.37 of S.L. 2005-276 amends G.S. 115C-457.2 by raising the limit on collection costs from 10 to 20 percent of the amount collected.

Appropriations from the Civil Penalty and Forfeiture Fund to the School Technology Fund are $18 million for 2005-06 and $18 million for 2006-07; appropriations to the State School Public School Fund are $102.5 million for 2005-06 and $107.5 million for 2006-07.

Sales Tax Refunds

Local school administrative units (individually and as cooperatives) are among the governmental entities permitted to apply to the Secretary of Revenue for an annual refund of the state and local sales and use taxes paid on direct purchases of tangible personal property and services (other than electricity and telecommunications services). A refund request must be submitted in writing no more than six months after the end of the unit's fiscal year. Because the refund comes from a source outside the appropriations and budgetary process, moneys refunded may be spent in whatever manner the local school unit chooses.

The legislature's intention, in Section 7.51 of S.L. 2005-276, as amended by Section 7 of S.L. 2005-345, is to repeal the state sales tax portion of the refund for local school units on purchases made on or after July 1, 2005; it also directs an equivalent amount of state funds to the State Public School Fund for allotment to local units through state position, dollar, and categorical allotments. The intended effect is to funnel all state moneys for public education through the budgetary process by eliminating the state funds going directly to local school units as refunds. Through a technical error, however, Section 7.51 actually repeals both the local refund and the state refund and directs that local refunds be replaced by state funds. It is anticipated that 2006 legislation will restore the local refund so that the provision will affect only state moneys, as originally intended.

Local school units will be able to obtain a refund for sales and use taxes they paid during the 2004–05 fiscal year. The request for the refund was due by December 31, 2005, and the amount will be refunded during the 2005-06 fiscal year. Beginning with the 2006-07 fiscal year, Section 7.51 directs the Secretary of Revenue to transfer quarterly to the State Public School Fund a calculated amount drawn from state tax collections. The annual amount will be equal to the amount refunded to local school units during the 2005–06 fiscal year, adjusted up or down in proportion to the increase or

1. *North Carolina Schools Boards Association v. Moore,* 614 S.E.2d 504 (N.C. 2005), is the state supreme court's most recent ruling on the scope of this provision.

decrease in state sales tax collections during that fiscal year. The same amount will be transferred in each subsequent fiscal year, adjusted according to the change in state sales tax collections in that year.

Lottery

After years of discussion, the General Assembly established a lottery by enacting new G.S. Chapter 18C, the North Carolina State Lottery Act, in S.L. 2005-344 (H 1023), as amended by Part 31 of S.L. 2005-276. (The lottery is discussed in detail in Chapter 24, "State Government.") The important point for public education is that the lottery will bring in funds for public schools and for college and university scholarships. Net revenues of the State Lottery Fund, which must be at least 35 percent of gross revenues, must be transferred to the Education Lottery Fund. After setting aside a contribution to the Education Lottery Reserve Fund, the Lottery Commission must distribute the remaining revenue in the lottery fund as follows:

- 50 percent to support reduction of class size in early grades to teacher–student allotments not exceeding 1:18 and to support academic prekindergarten programs for at-risk four-year-olds
- 40 percent to the Public School Building Capital Fund
- 10 percent to the State Educational Assistance Authority to fund college and university scholarships

The General Assembly must appropriate funds in each category annually based on revenue estimates. If actual revenues are less than the appropriation, the Governor may transfer money from the reserve fund to equal the appropriation. If reserve funds are insufficient to cover all the shortfall, the Governor must transfer money for the following purposes, in order of priority:

1. To fund academic prekindergarten programs for at-risk four-year-olds
2. To reduce class size
3. To provide financial aid for needy students to attend college
4. To fund the Public School Building Capital Fund

If actual revenues exceed the appropriation, excess revenues must be transferred in equal portions to the Public School Building Capital Fund and the State Educational Assistance Authority for expenditure in the same manner as appropriations from the Education Lottery Fund.

New G.S. 115C-546.2(d) requires that lottery revenues transferred to the Public School Building Capital Fund be allocated 65 percent on the basis of per average daily membership and 35 percent to local schools in counties in which the effective county tax rate as a percentage of the effective state average tax rate is greater than 100 percent, as defined in the act. Counties may use these moneys to pay for school construction costs incurred after January 1, 2003, but may not use them to pay for school technology needs.

Scholarship provisions are discussed in Chapter 13, "Higher Education," and Chapter 24, "State Government."

School Purchasing

The formal bidding statute, G.S. 143-129, requires governing board approval of purchase and construction or repair contracts in the formal bidding range. The statute authorizes the board to delegate its authority to award contracts, reject bids, and re-advertise to receive bids. When this provision was originally enacted, local school units were not governed by it as they now are. S.L. 2005-227 (H 1332) updates the statute to add school superintendents to the list of individuals to whom this authority may be delegated.

Instructional Issues

Financial Literacy

As young people earn and control more and more money and often have easy access to credit, they need to develop knowledge and skills in personal finance. Section 7.59 of S.L. 2005-276 amends G.S. 115C-81 to require that both the Standard Course of Study and the Basic Education Program include instruction in personal financial literacy for all public high school students. The State Board is responsible for determining the components of the new personal financial literacy curriculum and the course into which this new curriculum can be integrated. The State Board has up to two years to develop and integrate the curriculum into the Standard Course of Study.

Alternative Learning Programs and Schools

Local school boards have been addressing the educational needs of some students who have academic or behavioral problems in traditional schools—or who have been suspended from school—by establishing alternative learning programs and schools. Under G.S. 115C-12(24) the State Board has been responsible for adopting guidelines for assigning students to such alternative learning environments. S.L. 2005-446 (H 1076) amends the statute to require the State Board to adopt "standards" rather than "guidelines" for alternative programs and schools. The board must also evaluate its standards and change them based on strategies that have proven successful in improving student achievement.

New G.S. 115C-105.47A requires local boards of education to develop a proposal and submit it to the State Board before establishing new alternative learning programs or schools. If the State Board offers recommendations, the local board must consider them before implementing the program or school. Some of the required elements of a proposal are

- Educational and behavioral goals for students assigned to the program or school
- Policies and procedures for operating the program or school based on the State Board's standards
- Identified strategies to improve student achievement and behavior
- Documentation that similar programs and schools have demonstrated success in improving students' achievement and behavior
- Estimated actual cost of operating the program or school
- Documented support of school personnel and the community for implementation of the program or school

S.L. 2005-446 also amends G.S. 115C-47(32a), which requires local boards to adopt guidelines for assigning students to alternative learning programs. Local boards must now adopt policies based on the State Board's standards and apply these new policies to any new alternative learning program or school implemented, effective with the 2006–07 school year.

Content and Exit Standards

Curriculum and requirements for graduation from high school are ongoing concerns for educators, students, parents, employers, postsecondary institutions, and legislators. S.L. 2005-458 (H 911) repeals G.S. 115C-12(9a) and (9b) and enacts G.S. 115C-12(9c) dealing with the State Board's authority to develop academic content standards and exit standards. The State Board must develop a comprehensive plan to review content standards and the Standard Course of Study in the core academic areas of reading, writing, mathematics, science, history, geography, and civics. As part of its plan, the State Board must survey a representative sample of parents, teachers, and the public to help determine the priorities and usefulness of academic content standards. Revised content standards must

- Reflect high expectations of students
- Reflect in-depth mastery of the content
- Be understandable to teachers and parents
- Whenever possible, be measurable in a reliable, valid, and efficient manner

- Be aligned with the minimum course requirements for undergraduate admission to the University of North Carolina
- Meet other specific requirements

The State Board must also develop and implement a process to align state programs and support materials with the revised academic content standards for each core academic area on a regular basis. All support materials developed by the State Board must be made available to teachers and parents.

The State Board may develop required exit standards for high school graduation. An amendment to G.S. 115C-174.11 authorizes the State Board to develop and implement a plan for high school end-of-course tests aligned with the content standards.

S.L. 2005-458 also amends G.S. 115C-174.11(c) by deleting provisions related to establishment of a baseline to be used to measure academic growth at the end of the third grade.

Time for Standardized Tests

Public school students take an array of standardized tests, and many school officials are concerned about the amount of time devoted to the tests, test preparation, and field testing. In an effort to limit the time students spend taking tests administered through state and local testing programs and participating in field testing, the legislature passed Section 7.37 of S.L. 2005-276, amending G.S. 115C-47(12)(a). The amended statute contains specific requirements for State Board policies and guidelines. Under new guidelines,

1. students may devote no more than two days of instructional time per year to taking practice tests that do not have the primary purpose of assessing learning;
2. students may not be subject to field tests or national tests during the two-week period before end-of-grade or end-of-course tests or the school's regularly scheduled final exams; and
3. no school may participate in more than two field tests at any one grade level during a school year unless the school volunteers, through a vote of its school improvement team, to participate in more field tests.

PSAT Purchase

In an effort to help students prepare for college entrance exams, in 1989 the state assumed responsibility for the cost of administering the Preliminary Scholastic Aptitude Test (PSAT) to students in the eighth through tenth grades who had completed or were in the last month of Algebra I and who wanted to take the test. The statute also required the State Board to contract with the College Board to provide comprehensive diagnostic information along with reports of PSAT scores. S.L. 2005-154 (H 403) amends G.S. 115C-174.18 to eliminate the requirement related to diagnostic information.

Center for 21st Century Skills

Section 7.39 of S.L. 2005-276 directs the State Board to transfer funds earmarked for the Center for 21st Century Skills to the Office of the Governor to establish the center within the North Carolina Business Committee for Education, Inc. The center's purpose is to design curriculum, teacher training, and student assessment tools to support students' acquisition of the knowledge and skills needed for participation in the twenty-first century workforce. The center may propose options to create new mathematics and science summer enrichment programs, expand existing programs, and establish nonresidential high schools focused on mathematics, science, and technology.

Expanding Opportunities for Students

Virtual High School

The Internet has made it possible for students who want or need to learn and earn credit without being physically present in a classroom to do so. Section 7.41 of S.L. 2005-276 directs the State Board, the UNC Board of Governors, the Independent Colleges and Universities, and the State Board of Community Colleges to develop E-learning standards and plan infrastructures for providing virtual learning opportunities to students and other citizens through the state's schools, universities, and community colleges. The State Board must initially focus on high schools and use the funds appropriated for this purpose to establish and implement a pilot virtual high school during the 2005-06 and 2006-07 school years. If the pilot is successful, the General Assembly intends to provide funds to implement a virtual high school on a statewide basis.

High School Innovation

Section 7.33 of S.L. 2005-276 amends Part 9 of Article 16 of G.S. Chapter 115C, Cooperative Innovative High School Programs, to allow local boards of education to jointly establish cooperative innovative high school programs with universities as well as community colleges. Students may now earn up to two years of college credit in appropriate programs. The applicable governing board (the State Board of Community Colleges, the UNC Board of Governors, or the Board of the North Carolina Independent Colleges and Universities) may exempt a cooperative program from rules usually applicable to a local board of education or administrative unit, community college, UNC constituent institution, or local board of trustees. In the past these programs were automatically exempt from the rules; such exemptions must now be consistent with the limits set out in Part 9.

Learn and Earn High Schools

According to Section 7.32 of S.L. 2005-276, the Learn and Earn high school workforce development program is designed to create rigorous and relevant high school options. Students have the opportunity to earn an associate's degree or two years of college credit by the end of the year following their senior year in high school. Funds for the program are available to establish new high schools in which a local school unit, two- and four-year colleges and universities, and local employers work together to ensure that high school and postsecondary college curricula operate seamlessly and meet the workforce needs of participating employers. Programs must be evaluated annually.

Community College Tuition Waiver

An increasing number of high school students are enrolling in community colleges. Some enroll because they are in programs aimed at students who may be more successful in nontraditional programs than in traditional high schools; others may want to take courses not available at their schools. S.L. 2005-193 (S 566) amends G.S. 115D-5(b) to provide for tuition waivers for community college courses taken by high school students—including students in early college and middle college high school programs.

Intellectually Gifted Youth in Community Colleges

S.L. 2005-77 (H 583) amends G.S. 115D-1.1, which allows students under the age of sixteen who are both intellectually gifted and sufficiently mature to enroll in community college courses. These students must have the approval of an appropriate authority as identified in the statute. S.L. 2005-77 adds to the list of appropriate authorities the administrator of the college or university where the student is enrolled and the local board of education of the school administrative unit in which the student is domiciled.

Collaborative Efforts to Help Students

School-Based Child and Family Team Initiative

Schools alone cannot fully address the many problems that some children face and that affect their school attendance, learning, and achievement. Section 6.24 of S.L. 2005-276 establishes the School-Based Child and Family Team Initiative; its purpose is to identify and coordinate appropriate community services and supports for children at risk of school failure or out-of-home placement to address the physical, social, legal, emotional, and developmental factors affecting their academic performance. DPI is just one of several agencies charged with collaborating in this initiative. These agencies must provide services and "share responsibility and accountability to improve outcomes for these children and their families." Of the many required actions, the one that most directly affects schools directs appropriate state and local agencies to increase the schools' capacities to address the academic, health, mental health, social, and legal needs of children.

In coordination with the North Carolina Child and Family Leadership Council, each local school board must establish the initiative at designated schools and appoint a school nurse and a school social worker as Child and Family Team Leaders. These leaders must identify and screen children who are potentially at risk of academic failure or out-of-home placement due to physical, social, legal, emotional, or developmental factors. Each agency's responsibilities are determined by the results of the screening; school personnel must take the lead role for those children and families whose primary unmet needs are related to academic achievement. Representatives from appropriate agencies will work as a team to coordinate, monitor, and assure the successful implementation of a unified Child and Family Plan.

In each county with a participating school, the superintendent must either identify an existing cross-agency collaborative or council or form a new group to serve as a local advisory committee to monitor and support implementation of the initiative. The new North Carolina Child and Family Leadership Council will review the initiative. The Superintendent of Public Instruction and the chair of the State Board will serve on the council. DPI must participate in developing and implementing the initiative and provide "all required support to ensure that the Initiative is successful."

Military Families

North Carolina is the permanent home of many military families and the temporary home of many others. S.L. 2005-445 (S 1117) contains many provisions aimed at supporting members of the military and their families, and several of these provisions affect public schools. DPI must study the feasibility of designating an employee as its liaison to the state's military bases—to facilitate communication and cooperation between military personnel, their families, and DPI and between military families and the public schools. The State Board must review and revise policies and practices related to awarding credit for high school courses to ensure that all students, especially the highly mobile children of members of the armed forces, receive credit in the public schools for comparable courses taken out of state.

S.L. 2005-445 amends G.S. 116-235(b)(1), which sets out eligibility criteria for applicants to the School of Science and Mathematics. Eligibility was previously limited to legal residents of North Carolina. Now a student whose parent is an active duty member of the armed services abiding in the state incident to active military duty at the time an application is submitted is also eligible to be considered for admission, as long as the student resides with that parent.

Other Student Issues

Use of Seclusion and Restraint

Apparently in response to a few highly publicized incidents involving children with disabilities, S.L. 2005-205 (H 1032) was enacted to clarify the use of certain behavior management techniques in public schools. To meet the goal of providing school staff with clear limits, the act sets out in detail explicit restrictions on the use of aversive procedures, seclusion, isolation, mechanical restraint, and physical restraint, as each of these is defined in G.S. 115C-391.1.

Most notably, S.L. 2005-205 prohibits any use of aversive procedures in public schools. An aversive procedure is "a systematic physical or sensory intervention program for modifying the behavior of a student with a disability which causes or reasonably may be expected to cause (1) significant physical harm; (2) serious foreseeable long-term psychological impairment; or (3) obvious repulsion on the part of observers who cannot reconcile extreme procedures with acceptable, standard practice." Some examples of the third category include electric shock applied to the body, pinching, blindfolding, and denial of reasonable access to toileting facilities.

The act also defines and imposes limits on the use of (1) seclusion (confinement of a student alone in an enclosed space that he or she cannot leave because of locking hardware, other means of confinement, or the student's physical or intellectual incapacity); (2) isolation (placing a student alone in an enclosed space from which he or she is not physically prevented from leaving); and (3) physical and mechanical restraints. The act does not prohibit or regulate the use of time-outs (separating a student from other students for a limited period of time in a monitored setting). These limits do not affect law enforcement officers in the exercise of their duties, nor do they change the rights of school personnel to use reasonable force under G.S. 115C-390 or any of the rules and procedures governing discipline under G.S. 115C-391.

S.L. 2005-205 requires local school units to give annual notice of this statutory section and all local board policies developed to implement it to all parents, guardians, and school personnel; the latter category includes not only employees of the local school board but also any person working on school grounds or at a school function and providing educational or related services to students, whether under contract with the school system or another agency. School personnel must notify the principal or principal's designee of (1) any use of aversive procedures, (2) any prohibited use of mechanical restraint, (3) any use of physical restraint resulting in observable physical injury to a student, or (4) any prohibited use of seclusion or isolation that exceeds ten minutes or the amount of time specified on a student's behavior plan.

Once a principal or designee has actual notice or personal knowledge of any of these incidents, that person must promptly (no later than the end of the following workday) notify the affected student's parent or guardian and provide the name of a school employee the parent or guardian can contact for more information. In addition, the parent or guardian must be provided with a written incident report no later than thirty days after the incident. An amendment to G.S. 115C-47 requires local boards of education to maintain a record of all reported incidents and to provide this record annually to the State Board.

Neither the board of education nor any individual board employee may retaliate against a board employee who reports an incident unless that employee knew, or should have known, that the report was false.

S.L. 2005-205 does not expose any local board of education, its agents or employees, or any institution of teacher education or its agents or employees to any new civil liability or criminal charges. At the same time, it does not limit potential liability or charges under other existing laws.

This act recognizes that many teachers and those studying to become teachers would benefit from training in working with students who present problems in class. S.L. 2005-205 amends the certification requirements in G.S. 115C-296 to require teacher education programs to include positive management of student behavior and effective communication techniques for defusing and de-escalating disruptive or dangerous behavior. In addition, an amendment to G.S. 115C-296(c) requires that, beginning with the 2006–07 school year, the criteria and procedures for employing teachers through lateral entry must include preservice training in the identification and education of children

with disabilities, positive management of student behavior, effective communication for defusing and de-escalating disruptive or dangerous behavior, and the safe and appropriate use of seclusion and restraint. For current teachers, G.S. 115C-105.47(b)(9) now requires professional development to include a training component on the management of disruptive or dangerous student behavior. As part of its Safe School plan, the local school board must identify procedures to evaluate the effectiveness of this training in preventing or addressing such behavior. However, implementation of this training component is required only to the extent that funds have been appropriated for this purpose by the General Assembly or units of local government.

An amendment to G.S. 143-138(b) requires state, county, and local building codes and regulations to allow special locking mechanisms for seclusion rooms in public schools, to be used according to the safety measures specified in S.L. 2005-205.

Health Issues

Asthma and Anaphylactic Reactions

The increasing number of students with asthma or subject to anaphylactic reactions raises important issues about responding appropriately to their needs at school. S.L. 2005-22 (H 496) adds new Article 26A, Special Medical Needs of Students, to G.S. Chapter 115C. It requires local boards of education to adopt a policy authorizing students with asthma or subject to anaphylactic reactions, or both, to possess and self-administer asthma medication while on school property, at school-sponsored activities or events, or in transit to or from school. "Asthma medication" is defined as a medicine prescribed for the treatment of asthma or anaphylactic reactions and includes a prescribed asthma inhaler or epinephrine auto-injector.

The act builds in safeguards to limit the possession and self-administration of asthma medication to children who are able to do this safely. Each board's policy must require that the child's parent or guardian provide the school with

- Written permission
- A written statement from the student's health care practitioner saying that the practitioner prescribed the medication and that the student understands its use and is able to self-administer it
- A written treatment plan and emergency protocol formulated by the practitioner
- A signed statement acknowledging that the school administrative units and its employees and agents are not liable for an injury arising from a student's possession and self-administration of asthma medication
- Backup medication, to be kept at school and to which the student will have immediate access if necessary

The student must demonstrate to the school nurse or nurse's designee that he or she has the skill level necessary to use the medication and any device needed to administer the medication.

Permission for a student to possess and administer asthma medication is effective only while the student is enrolled in the same school and only for 365 days.

If a student uses the asthma medication in a manner other than as prescribed, he or she may be disciplined, but the disciplinary action may not limit or restrict the student's immediate access to the medication.

A local board of education and its members, employees, designees, agents, and volunteers are immune from civil damages to any party for any act authorized under S.L. 2005-22 or for any related failure to act unless that act or omission amounts to gross negligence, wanton conduct, or intentional wrongdoing.

S.L. 2005-22 also restructures the statutes dealing with the provision of medical care to students by school employees by amending G.S. 115C-307(c) and enacting G.S. 115C-375.1. This new statute does not change the scope of school employees' authority or duty.

Nutrition Standards

Nutrition is important to a student's health and development, and schools play a significant role in a student's access to nutritious food. Every school day hundreds of thousands of students eat meals or after-school snacks at school. S.L. 2005-457 (H 855) enacts new G.S. 115C-264.3, which directs the State Board to establish statewide nutrition standards for school meals, à la carte foods and beverages, and items served in the After School Snack Program administered by DPI and local school board child nutrition programs. The nutrition standards must promote gradual changes to increase fruits, vegetables, and whole grain products and to decrease foods high in total fat, transfat, saturated fats, and sugar.

The standards are to be implemented first in elementary schools, which must achieve a basic level by the end of the 2007-08 school year, and then in middle and high schools. In addition to the elementary schools pilot projects established in 2004, pilot projects in a minimum of eight middle schools and eight high schools across the state will institute the nutrition standards at a time to be determined by the State Board.

Soft Drinks and Snacks in Vending Machines

Concerns about children's health in general and obesity and diabetes in particular have led to new restrictions on the availability of soft drinks and snacks in vending machines at public schools. S.L. 2005-253 (S 961) amends G.S. 115C-264 and G.S. 115C-264.2 to further regulate the sale of beverages in vending machines. With the approval of the local board of education, a school may sell beverages in vending machines as long as

- soft drinks are not sold in elementary schools;
- sugared carbonated soft drinks, including mid-calorie carbonated soft drinks, are not sold in middle schools;
- no more than 50 percent of the offerings for sale to students in high schools are sugared carbonated soft drinks, a category that does not include diet carbonated soft drinks;
- bottled water products are available in the school; and
- soft drinks are not sold at any school during breakfast or lunch periods or in any way that is contrary to the requirements of the National School Lunch Program.

G.S. 115C-264.2 applies to snack vending in all schools. By the start of the 2006-07 school year, snack vending must meet the "Proficient" level of the "NC Eat Smart Nutrition Standards." This standard allows no snack vending at elementary schools and directs that 75 percent of the snack vending products sold in middle and high schools have no more than 200 calories per portion or package.

Comprehensive Eye Examinations

G.S. 130A-440 has long required children entering kindergarten to have a health assessment within twelve months of beginning school. An assessment must include a medical history and a physical examination with screening for vision and hearing. Physicians, physicians' assistants, certified nurse practitioners, and public health nurses meeting certain standards are qualified to conduct these assessments. Under Section 10.59F of S.L. 2005-276, new G.S. 130A-440.1 requires every child entering kindergarten in the public schools to have a comprehensive eye examination conducted by an optometrist or ophthalmologist not more than six months before the date of school entry. "Comprehensive eye examination" is defined in the statute; vision screening as part of the health assessment does not fulfill this requirement.

A child who does not have documentation of this examination may not attend kindergarten. An exception, for children who have moved to North Carolina within the sixty days preceding school entry, grants a sixty-day extension from the date of school entry for submission of proper documentation. If at the end of the sixty days a child has been unable to obtain the required eye examination, the principal must report this fact to the Governor's Commission on Early Childhood Vision Care, which will identify alternative ways to provide vision services to the child.

Section 10.59F of S.L. 2005-276 also establishes the Governor's Vision Care Program in the Department of Health and Human Services (DHHS). The program provides funds for early detection and correction of vision problems in children enrolled in kindergarten through third grade who are eligible for services.

Miscellaneous

Public Comment at Board Meetings

Most school boards have routinely set aside time at board meetings for public comment, but boards have not been required to do so. S.L. 2005-170 (H 635) enacts new G.S. 115C-51, which applies to boards of education, county commissioners, and city councils. A board of education must now provide at least one period for public comment per month at a regular board meeting in any month in which a regular meeting is held. The board may adopt reasonable rules for the conduct of public comment to

- fix the maximum time for each speaker,
- provide for the designation of representatives to speak for groups of persons supporting or opposing the same positions,
- provide for selection of delegates from groups of persons supporting or opposing the same position when the number of persons wishing to attend exceeds the capacity of the meeting room, and
- provide for the maintenance of order and decorum in the conduct of the meeting.

Education Cabinet

The Education Cabinet works to resolve issues arising among existing providers of education, sets the agenda for the State Education Commission, develops a strategic design for a continuum of education programs, and studies other issues referred to it by the Governor or the General Assembly. Section 7.38 of S.L. 2205-276 amends G.S. 116C-1(b) by adding the Secretary of Health and Human Services to the Education Cabinet.

Residential Schools

DHHS operates several residential schools. S.L. 2005-195 (S 630) amends numerous sections of Part 3A of G.S. Chapter 143B to make the accountability system and the requirements for school improvement plans at the Governor Morehead School and the schools for the deaf the same as those for other public schools.

Section 7.54 of S.L. 2005-276 gives schools operated by DHHS the same opportunities to participate in federal funding as other public schools. An amendment to G.S. 115C-66 provides that DHHS is a public authority for purposes of eligibility for federal grant funds and is the school administrative agency for the schools it operates.

School Bus Routes

In the past, school buses were required to travel on state-maintained highways unless road or other conditions made that inadvisable. Now, under an amendment to G.S. 115C-246(b) made by S.L. 2005-151 (S 821), school buses are required to travel on state-maintained highways, municipal streets, or other streets with publicly dedicated rights-of-way unless that is inadvisable. Local boards of education are not responsible for damage to roadways.

Identify Theft

S.L. 2205-414 (S 1048), the Identity Theft Protection Act, is one response to the ongoing and increasing problem of identity theft. Most of the act's protections are set out in new Article 2A of G.S. Chapter 75 and apply to businesses. Other sections of the act amend G.S. Chapter 132 and limit the way governmental units, local boards of education, and state agencies (including DPI) may use personal information about students, employees, and others. These provisions are significant because many local school boards have traditionally used students' Social Security numbers as identification numbers for school purposes. New G.S. 132-1.8 directs state and local government agencies to collect Social Security numbers only for legitimate purposes or when required by law. In addition, disclosure of Social Security numbers, both within government and to the general public, must be minimized. This act places a number of more-specific limits on the collection, use, storage, and disclosure of Social Security numbers and lists specific situations in which the limits do not apply. For a more complete discussion, see Chapter 20, "Public Records."

School Technology Needs

The state and every local school unit must adopt a technology plan. Section 7.43 of S.L. 2005-276 amends G.S. 115C-102.6A(c) to require that the state school technology plan include a baseline template of technology and service application infrastructure and an evaluation component. G.S. 115C-102.7 now requires DPI to randomly check local school system technology plans to ensure that units are implementing their plans as approved. It also directs the State Board to study and identify the resources school systems need to design schools that meet the needs of twenty-first century learners.

School Accreditation Requirement

To abolish duplicate accreditation requirements, S.L. 2005-155 (H 404) amends G.S. 115C-12(9)(c) by removing the obligation of the State Board to develop a state accreditation program to which local boards must comply. S.L. 2005-155 makes a corresponding amendment to G.S. 115C-81(a3).

Studies, Pilot Programs, Surveys, and Reports

School Transportation

Section 7.57 of S.L. 2005-276 directs DPI to study the current allotment formula for school transportation. An independent consultant must conduct the study, propose options for reducing the severe and growing disparity in funding among school units the formula has created, and make other recommendations.

Small Specialty High Schools

Some education reform advocates say that many students will achieve more in relatively small schools or in schools with a special focus. Section 7.52 of S.L. 2005-276 appropriates funds to create eleven small specialty high schools within existing high schools. The purpose of the pilot program is to improve graduation rates and achieve higher student performance, as measured by standard tests and postgraduate employment or admission to an institution of higher education. The State Board is responsible for evaluating this program.

School Employee Salaries

Section 7.47 of S.L. 2005-276 directs the Joint Legislative Education Oversight Committee to research and study the current salary structure for teachers. Section 2.2(j) directs the Governor to analyze the state's current public school salary schedule, trends in salaries, and the current disparity between North Carolina teacher pay and the national average to determine how teacher pay affects the state's ability to recruit and retain highly qualified teachers. Before July 1, 2006, the Governor may, after consultation with the Speaker of the House and the President Pro Tempore of the Senate, devise and execute a plan to reduce the disparity and to use funds available from the Reserve for Contingent Appropriations to begin executing the plan. In October 2005 the Governor acted on this authority to authorize an increase of $75 a month for state-paid teachers.

Teacher Working Conditions

Section 7.40 of S.L. 2005-276 requires the State Board, in collaboration with the North Carolina Professional Teaching Standards Commission, to administer the Governor's Teacher Working Conditions Survey, establish an advisory board to oversee implementation of survey recommendations, and support the North Carolina Network in providing customized analysis to incorporate into school improvement plans.

School-Based and School-Linked Health Centers

Section 10.59G of S.L. 2005-276 authorizes the Legislative Research Commission to study and evaluate the impact of school-based and school-linked health centers on the primary care, mental health services, and other health care services delivered to school-aged youth.

Office of School Readiness

Under Section 10.68 of S.L. 2005-276 DHHS, DPI, and the Office of the Governor must establish a study group to develop a plan for an Office of School Readiness. This study group must develop recommendations for the structure of the state's prekindergarten and other early childhood-related programs and design a plan to implement its recommendations.

Education and Economic Growth

Section 13.15 of S.L. 2005-276, as amended by Section 25 of S.L. 2005-345, requires the North Carolina Board of Science and Technology to prepare a biennial report by county on the status of trends that reflect the impact of education on economic growth.

Regional Education Networks

Section 7.42 of S.L. 2005-276 directs the North Carolina Rural Economic Development Center and the e-NC Authority, in collaboration with many others (including the State Board and representatives from local school units), to perform a feasibility study of developing regional education networks to provide and maintain broadband service access to individual students and teachers at all levels of education.

Nurses, Social Workers, and Other Instructional Support Personnel

Section 7.38 of S.L. 2005-276 directs the Education Cabinet to study collaboration among school nurses, school social workers, and other instructional support personnel—and their collaboration with local health, mental health, and social services providers—to meet the needs of at-risk children and their families and to support the educational achievement of at-risk children. The cabinet must also

address the need for additional training of school nurses, social workers, and other instructional support personnel on multidisciplinary assessments and on referral and care coordination for at-risk students and their families.

Dropouts and Suspended Students

S.L. 2005-271 (S 408) directs the State Board to identify research-based methods to reduce the dropout rate and the number of suspended students, especially at schools in areas with high poverty and diverse student populations.

Criminal Law Changes

Unlawful Absences

Regular attendance at school is essential for student learning and achievement. S.L. 2005-318 (H 779) amends G.S. 115C-380 by increasing the penalty for violation of the compulsory attendance law from a Class 3 to a Class 1 misdemeanor. The same change is made in G.S. 116-235(b)(2), which deals with attendance at the North Carolina School of Science and Mathematics.

Stopped School Buses

S.L. 2005-204 (H 1400) amends G.S. 20-217 to clarify when a driver must stop for a school bus and to increase the penalty for failing to stop. A person violating the statute is now guilty of a Class 1, not a Class 2, misdemeanor. A person who fails to stop and willfully strikes any person causing serious bodily injury to that person is now guilty of a Class 1 felony. For this statute a "school bus" includes a public school bus transporting children or school personnel, a public school bus transporting senior citizens under G.S. 115C-243, or a privately owned bus transporting children. All such vehicles must display on their front and rear a plainly visible sign containing the words "school bus."

School Employment

Salaries

S.L. 2004-276 sets provisions for the salaries of teachers and school-based administrators. For teachers, the act sets a salary schedule for 2005-06 that ranges from $25,551 for a ten-month year for new teachers holding an "A" certificate to $56,647 for teachers with twenty-nine or more years of experience, an "M" certificate, and national certification. (By action taken in October 2005, after the General Assembly had adjourned, the Governor, acting under authority of Section 2.2(j) of S.L. 2005-276, authorized an increase of $75 per month for state-paid teachers, raising the ten-month salary at each step by $750; so the minimum salary, for instance, is $26,626, rather than $25,551.) For school-based administrators (meaning principals and assistant principals), the ten-month pay range is from $32,590 for a beginning assistant principal to $75,680 for a principal in the largest category of schools who has more than forty years of experience. Of course, many school-based administrators are employed not for ten but for eleven or twelve months and will receive proportionately higher salaries.

In addition, teachers with twenty-nine years of experience or more who are, consequently, at the top of the salary schedule received a one-time bonus equivalent to the average increase of the twenty-six- to twenty-nine-year steps. Principals and assistant principals at the top of their salary range received a one-time bonus of 2 percent.

Salaries of central office administrators are not set by a salary schedule but by local school boards within ranges fixed by the General Assembly. For 2005-06, each central office administrator received a salary increase of 2 percent or $850, whichever is greater.

Similarly, noncertified public school employees paid with state funds received an increase of 2 percent or $850, whichever is greater.

Return to Work after Retirement

Under the provisions of the Teachers and State Employees Retirement System (TSERS), covered employees may retire, begin to draw retirement benefits, and then return to work, drawing both salary and retirement benefits. For most covered employees, the maximum salary that can be drawn upon returning to work is 50 percent of pre-retirement salary. This limitation is commonly referred to as the "salary cap." Faced with severe teacher shortages, the General Assembly, beginning in 1998, amended provisions of the retirement statutes as they related to teachers to permit, under certain circumstances, retired teachers to return to teaching and collect full salary for teaching while drawing full retirement benefits—that is, the salary cap did not apply to retired teachers returning to teach.

For teachers, the statutes provided for a six-month period following retirement during which the teacher could not be employed by a public school (except as a substitute teacher or a part-time tutor) before he or she could return to full-time employment at full pay while still receiving retirement benefits. For other employees, however, there was no waiting period, and sometimes employees retired, began to draw retirement pay, and almost immediately went back to work, drawing salary under the salary cap. The Internal Revenue Service began to examine these practices, calling into question the tax-advantaged status of the retirement system and the ability of employees to make their contributions to the system with pre-tax dollars. In response, the General Assembly, in Section 29.28 of S.L. 2005-276, amended G.S. 135-1 and 135-3 (of the retirement system statutes) and G.S. 115-325(a)(5a) (of the public schools statutes) to make the following changes:

1. For all employees who retire and wish to return to work and draw a salary, there must be a complete six-month period following retirement in which the now-retired employee is not employed by any employer (public school system or not) that participates in TSERS. This requirement applies both to individuals returning under the salary cap and to teachers returning at full salary.
2. When an employee retires, there may be "no intent" (in the words of the statute) or agreement, express or implied, between the employee and the school unit that he or she will return to service. It is now a violation of the retirement system statutes for a school administrative unit to agree, at the time of retirement, to rehire any retiring employee, either under the salary cap or as a teacher outside the salary cap.
3. The provision permitting teachers to return to work outside the salary cap had been scheduled to expire in 2005. The sunset was extended to 2007.

Principal and Assistant Principal Evaluations

G.S. 15C-333, the statute that requires school systems to conduct regular evaluations of teacher performance, has not expressly required similar evaluations of the performance of principals and assistant principals. Section 7.29 of S.L. 2005-276 adds new G.S. 115C-286.1 to require that the performance of principals and assistant principals be evaluated at least once a year. The evaluations are to include accountability measures for teacher retention, teacher support, and school climate.

School Administrator Certificate Requirements

G.S. 115C-290.7(b) sets out the qualifications an individual must meet to be certified as a school administrator and thus become eligible to serve as a superintendent, associate superintendent, assistant superintendent, principal, or assistant principal. The statute has required, among other things, that the individual hold either a graduate degree in school administration or a master's degree in another field plus training in school administration. S.L. 2005-179 (H 11) amends the statute to provide that an individual may qualify for certification with alternative education and training that the State Board determines are equivalent to these graduate degrees.

Teacher Assistants as Student Teachers

S.L. 2005-302 (H 1414) adds new G.S. 115C-310 directing the State Board of Education to adopt a program to facilitate the process by which teacher assistants may become teachers. Under this program, a teacher assistant who is enrolled in an approved teacher education program in a North Carolina college may, at the discretion of the local school administrative unit, continue to receive his or her salary and benefits as a teacher assistant while student teaching in that same system. The new section encourages school units to assign a teacher assistant who is doing student teaching to a classroom other than his or her regular classroom or, if possible, to place the individual in a different school within the system for student teaching.

Community Colleges Train Lateral Entry Teachers

There are two primary ways for an individual to enter public school teaching in North Carolina. First, he or she may complete a regular teacher-education program at a four-year college. Second, the individual may come into teaching directly from other work, through what is known as "lateral entry." Anyone who enters the profession through lateral entry must complete certain coursework within prescribed time limits in order to become a regularly licensed teacher. S.L. 2005-198 (H 563) amends G.S. 115C-296 and G.S. 115D-5 to authorize community colleges to offer the necessary courses. The lateral entry teacher must have completed his or her bachelor's degree at least five years before registering for the community college coursework.

Privacy of School Personnel Records

G.S. 115C-321 makes the content of school personnel files confidential (with the exception of certain elements—such as salaries—that are set by statute). Until now, the statute has made no provision for punishing a violation of personnel records confidentiality—although of course an employee caught breaching confidentiality would be subject to dismissal or other adverse employment action. S.L. 2005-321 (S 1124) amends the statute to add a criminal violation: a school official who knowingly, willfully, and with malice gives out confidential information from the school personnel file is guilty of a Class 3 misdemeanor and may be fined up to $500. Anyone who is not authorized to view a personnel file but nonetheless knowingly and willfully examines a personnel record while it is in its official file is guilty of the same misdemeanor and is subject to the same punishment.

State Funds to Pay Visiting International Exchange Teachers

In general, the state allocates teacher positions to each school administrative unit based on the number of students the unit serves. The school unit employs the teachers, and the state provides the salary money for those particular teachers according to the state salary schedule. If the school unit chooses to employ an inexperienced teacher who is low on the salary schedule, the state provides the relatively low salary for that teacher; and if the school unit employs an experienced teacher high on the salary schedule, the state provides the relatively higher salary for that teacher. Section 7.22 of S.L. 2005-276 enacts new G.S. 115C-105.25(b)(5a) to provide that if a teacher allotment is filled by a visiting international exchange teacher under a state-approved program, the state will provide an amount equivalent to the average teacher salary in the state to cover the costs associated with employing the visiting teacher.

School Social Workers Transporting Students

S.L. 2005-355 (H 1491) enacts new G.S. 115C-317.1 providing that a school social worker may not be required to transport students unless his or her written job description or a local board policy imposes that duty. It also adds new G.S. 115C-47(25a) providing that if a school system imposes such a responsibility, it may not require the social worker to increase the liability limits of or add a business-use rider to his or her automobile liability insurance unless the cost of the added coverage is

reimbursed by the school system. The school system may, alternatively, provide the liability insurance coverage itself.

Test for Entry into Teacher Education Programs

An undergraduate student seeking a degree in teacher education must attain a passing score on a preprofessional skills test before being admitted to the teacher education program. S.L. 2005-419 (H 1310) adds new G.S. 115C-296(b2) directing the State Board of Education to permit students to fulfill this testing requirement by achieving a board-set minimum score on the Praxis I test or on the combined mathematics and verbal portions of the SAT. The board is to set the score on the SAT at between 900 and 1200.

Teacher Planning Time Best Practices

G.S. 115C-301.1 requires school systems to give every teacher a regular duty-free period during the regular school day if safety and the proper supervision of students permit and if the General Assembly provides funds. Section 7.30 of S.L. 2004-276 directs the State Board to report on the best practices schools in the state have found for providing teachers a minimum of five hours per week, within the school day, for planning, collaborating with colleagues and parents, and professional development, especially in elementary schools.

Veto of House Bill 706 Regarding Certification of Out-of-State Teachers

House Bill 706, An Act to Amend the Teacher Certification Law to Facilitate the Hiring of Teachers, passed the House of Representatives and the Senate and was presented to the Governor on August 23, 2005. On September 29 the Governor vetoed the bill and returned it to the General Assembly, which had by then adjourned. The General Assembly returned to a special session on October 12, but no vote to override the veto was taken during the session.

The bill would have made a number of changes in teacher certification standards in North Carolina's public schools. It would, for instance, have reduced from five to three years the time within which a teacher who has entered the profession through lateral entry must complete the requirements to obtain regular (nonlateral) certification. The chief change in House Bill 706 concerned teachers licensed in other states who come to teach in North Carolina's public schools. It would have granted a regular North Carolina teaching certificate to any licensed out-of-state teacher with at least three years of experience as a full-time teacher.

In addition to these substantive changes regarding certification, the bill would have amended G.S. 115C-296, which now provides that the "State Board of Education shall have entire control of certifying all applicants for teaching positions," by removing the word "entire" and adding the phrase "subject to law enacted by the General Assembly."

The Governor, in his veto message, reacted to both the substantive changes and to this change in the scope of control over certification. The Governor said: "This bill reduces the North Carolina teaching standards to the lowest in America. It cheats our children out of a quality education and dishonestly classifies unqualified teachers as 'highly qualified.' Further, it restricts the authority of the State Board of Education to certify teachers and puts it within the General Assembly. Therefore, I veto the bill."

Between the time of the veto on September 29 and the special session of the General Assembly on October 12, the State Board made some changes in its rules with respect to certifying teachers with out-of-state certifications. The Governor and legislative leaders agreed to ask a committee of legislators, educators, and school administrators to make recommendations on additional steps to be taken with respect to certification and easing the teacher shortage. In light of those developments, the General Assembly in its October 12 session took no vote on overriding the veto.

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Environment and Natural Resources

The high-profile environmental bills in the 2005 session of the General Assembly concerned global warming and nutrients in Falls Lake, the drinking water supply for Raleigh. The legislation from this session with the largest impact, however, will likely be the environmental finance bills, notably the revision of the state's system for capital financing of water, wastewater, and stormwater infrastructure improvements. The forest products industry succeeded in getting legislation enacted that will restrict local government regulation of forestry activity. A bill to increase and diversify the enforcement authority of environmental regulators died on the House floor. At the same time, other bills strengthened provisions for water supply protection, sediment and erosion control, and regulation of particular watersheds in the mountains and piedmont.

Agriculture and Forestry

Voluntary Agricultural Districts

S.L. 2005-390 (H 607) creates a new category of agricultural district, the "Enhanced Voluntary Agricultural District." Cities and counties can, by ordinance, create these districts where landowners enter a ten-year conservation agreement as defined in G.S. 121-35. These agreements retain land or water predominantly in their natural, scenic, or open condition or in agricultural or forest use. Residents of an enhanced voluntary agricultural district can receive up to 25 percent of gross sales from nonfarm products while their property remains in bona fide farm status, which exempts them from zoning regulation under G.S. 153A-340(b). Cities or counties establishing these districts are also permitted to hold utility assessments in abeyance until utilities are actually connected to the farm property.

Forest Resources

S.L. 205-447 (S 681) prohibits cities and counties from regulating forestry activity on land taxed under the present-use value program as forestland and from regulating any forestry activity conducted in accordance with a forest management plan, except that

- development approval may be withheld for three years after an otherwise illegal clearcut,

- development approval may be withheld for five years after an otherwise illegal clearcut that was a "willful" violation of local government regulations,
- regulation under a local act by the General Assembly may continue,
- regulation necessary to comply with state or federal law is allowed,
- units of local government may exercise their planning and zoning jurisdiction, and
- cities may regulate and protect streets under their existing authority.

For purposes of the ban on local regulation, the bill also defines "forest management plan" as being aimed at commercial production of timber.

S.L. 2005-126 (H 698) rewrites portions of the Forest Development Act in Article 11 of G.S. Chapter 113A to add "insuring maximum growth potential of forest stands to commercial production levels" as an approved practice for cost sharing.

Air

Global Climate Change Study Commission

S.L. 2005-442 (S 1134) creates a thirty-four-member commission to study global climate change and to report to the legislature before November 1, 2006, when the commission terminates.

Low Sulfur Gas

S.L. 2005-196 (S 316) repeals the sunset provision of S.L. 2002-75, which had delayed the implementation of state standards for low sulfur gasoline originally enacted in 1999. Although these original more stringent state standards (an average of thirty parts per million of sulfur) have now been abandoned, the federal Tier II standards required of refiners by 2006 are very similar.

Contaminated Property Cleanup

MTBE Phase-Out Plan

Methyl tertiary butyl ether (MTBE) is an oxygenate sometimes added to unleaded gasoline to boost its octane rating. It has caused severe contamination problems with drinking water supplies across the United States due to its tendency to migrate very quickly through the water table. S.L. 2005-93 (H 1336) bans the intentional use of MTBE by the end of 2007. The act also directs the Secretary of the Department of Environment and Natural Resources (DENR) and the Commissioner of Agriculture to study the feasibility and advantages of a coordinated regional phase-out of MTBE across the southeastern United States.

DuPont Liability Relief

S.L. 2005-462 (S 629) purportedly creates a category of "manufacturing redevelopment districts" but in fact was written to give liability protection to DuPont for a facility in Transylvania County, in the middle of DuPont State Forest. Bill proponents hoped that passage of the act would facilitate transfer of the facility to Ilford, an imaging company. Ilford backed out of the deal, but the bill was passed nonetheless.

Underground Storage Tanks

S.L. 2005-365 (H 1385), the annual "tank bill," clarifies the process and standards for the preapproval that is now required for reimbursement of cleanup expenditures for most spills from petroleum underground storage tanks. The act also codifies and removes the sunset from a special

provision that requires DENR to use risk assessment to decide whether and in what order to require tank cleanups.

Enforcement

The General Assembly debated, but did not pass, House Bill 1283, which would have increased some environmental fines and authorized DENR to require some violators to take educational courses and perform community service in lieu of paying fines. The bill failed on second reading in the House.

Environmental Finance

Infrastructure Financing

When the General Assembly last enacted major legislation for water and sewer infrastructure funding in 1998, it created a Water Infrastructure Council to coordinate and oversee grants and loans made under that legislation. The council, however, was never able to move much beyond debates over the geographically appropriate split of funding. S.L. 2005-454 (H 1095) provides a broader mandate for water, stormwater, and sewer funding coordination and creates a Water Infrastructure Commission to carry out the mandate. The act provides common criteria for water, stormwater, quality, and wastewater loans or grants from state sources, including the Clean Water Management Trust Fund. The criteria include a showing of public necessity; higher priority for improvement of impaired waters, for regional systems, for conservation or reuse of water, for units with comprehensive land use plans, for units with a flood hazard prevention ordinance, for ten-year or greater capital improvement plans, and for coastal habitat protection. The act also sets out common process requirements for state water, stormwater, quality, and wastewater funding. The act's criteria and process requirements explicitly exclude federal funding under the clean water and drinking water revolving loan programs. The new Water Infrastructure Commission is established in the Office of the Governor and is directed to meet at least four times annually to make recommendations on the state's role in infrastructure funding, the adequacy of projected funding, and the priorities for future state funding.

Energy Credit Banking

S.L. 2005-413 (S 1149) provides a mechanism administered by the State Energy Office for state agencies to buy and sell federal energy credits. These credits are currently provided for purchases of vehicles that use alternative fuels (such as biodiesel, ethanol, and compressed natural gas) or that are hybrid gasoline-electric vehicles.

Farmland Preservation Fund

S.L. 2005-390 renames the Farmland Preservation Fund the North Carolina Agricultural Development and Farmland Preservation Trust Fund and broadens its coverage to include farm operation subsidies.

Noxious Aquatic Weed Control Service Districts

S.L. 2005-440 (H 1281) allows counties to create service districts for riparian areas where invasive aquatic plants are a problem. The service districts allow special assessments for use in fighting the weeds to be made on property within the district.

Pesticide Disposal

The Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), includes administrative funding of the Department of Agriculture's pesticide disposal program among the uses of the Pesticide Environmental Trust Fund.

Randleman Reservoir (Water and Sewer Authority) Bonds

To facilitate the completion of water treatment facilities for the Greensboro area at Randleman Reservoir, S.L. 2005-249 (S 1011) permits municipalities to finance water treatment facilities and distribution lines on land leased from a water and sewer authority, even though the financed assets are owned and operated by the authority.

Riparian Buffer Funding

S.L. 2005-443 (S 998) implements a provision of the Coastal Habitat Protection Plan by broadening the permitted use of funds from the Riparian Buffer Restoration Fund to include construction of alternative means that reduce nutrient loading as well as or better than a typical buffer. The fund is also to be administered by DENR rather than the Division of Water Quality within DENR.

Sludge Management

S.L. 2005-176 (H 1097) adds sludge management to the list of environmental services for which local governments can enter into contracts based on factors other than cost alone, as provided in G.S. 143-129.2.

Water and Sewer District Property Transfers and Per Diems

S.L. 2005-127 (S 15) allows a board of county commissioners to transfer state-owned property received from the county and located in a water and sewer district to another water and sewer district. It also raises the maximum annual per diem paid to members of a water and sewer district authority from $2,000 to $4,000.

Water Resources and Water Quality Funding Special Provisions

Section 45 of S.L. 2005-345 (H 320) provides water project funding to twenty-eight projects, including $3.6 million to the Neuse Regional Water and Sewer Authority.

Marine Fisheries

In 2004, after a decade of bills, the General Assembly passed a coastal recreational fishing license (CRFL) requirement. The effective date was deferred to 2006 in light of unresolved controversy about the amount and administration of license fees. S.L. 2005-455 (S 1126) addresses these issues by creating a new series of licenses and associated fees, including annual and short-term CRFLs for residents and nonresidents and lifetime CRFLs for young, middle-aged and elderly persons and for totally disabled persons and disabled veterans. The act also provides exemptions for those who held various lifetime fishing and hunting licenses prior to January 1, 2006, and waivers for subsistence fisherfolk. The act also provides a license structure for "for hire" boat operators and for commercial fishing piers. The act restricts personal information collected by the Division of Marine Fisheries and the Wildlife Resources Commission in connection with licensure from disclosure under the Public Records Act. Finally, the act creates a Marine Resources Fund and a Marine Resources Endowment

Fund to hold license revenues and other funds dedicated to marine resource enhancement. The funds will be administered jointly by the Division of Marine Resources and the Wildlife Resources Commission.

Permits

S.L. 2005-276 expands DENR's pilot program for express permitting, under which permit applicants can pay higher fees for faster review, to a statewide program covering erosion and sedimentation control plan approvals, coastal management act permits, water quality certifications under Section 401 of the federal Clean Water Act, and stormwater management.

Solid Waste

Landfill Disposal Ban

S.L. 2005-362 (H 1465) prohibits the disposal of motor vehicle oil filters, recyclable rigid plastic containers, wooden pallets, and oyster shells in landfills. Local governments may petition DENR for a waiver from these prohibitions if they can demonstrate the prohibition creates an economic hardship.

Mercury Switches

S.L. 2005-384 (H 1136) requires DENR to develop a plan, in consultation with vehicle manufacturers, to recycle or otherwise capture at least 90 percent of the mercury switches in junked cars and trucks. The act requires vehicle recyclers or scrap metal facility owners to remove all mercury switches before crushing or shredding vehicles, unless the switch is inaccessible. The act creates a fund to reimburse recyclers at the rate of $5 per mercury switch removed and properly disposed of. To fund the reimbursement system, the act raises various motor vehicle title fees by $1.

Recycling by ABC Permit Holders

S.L. 2005-348 (H 1518) requires holders of on-premises ABC permits to separate, store, and provide for collection of all recyclable containers they sell. The ABC Commission is required to develop a model program for recycling by its permittees.

State Parks, Natural Areas, and Land Conservation

Federal Jurisdiction over Land

S.L. 2005-69 (H 236) amends North Carolina's early twentieth century statute granting exclusive jurisdiction to federal agencies over land they acquire in the state. Effective May 27, 2005, jurisdiction does not automatically and fully vest in the federal government unless the land is twenty-five acres or less or is contiguous to a military base. The bill arose out of concerns over the Navy's proposed outlying landing field for military aircraft to be located in northeastern North Carolina.

New Parks

S.L. 2005-26 (S 586) authorizes two new state parks: one in the Hickory Nut Gorge/Chimney Rock area (at the intersection of Rutherford, Polk, Henderson, and Buncombe counties) and one at Carvers Creek in the Sandhills Region of Cumberland County.

Conservation Lands Near Military Facilities

S.L. 2005-445 (S 1117), the Soldier, Sailor, Marine, Airmen, and Guardsmen Support Act, appropriates $1 million to the Conservation Grant Fund for acquisition of easements and similar interests to provide buffers for military installations and flyways.

Water

Drinking Water Reservoir Protection Act

S.L. 2005-190 (S 981) blocks increased nutrient loading allocations for Falls Lake pending a required statewide survey of water quality in drinking water reservoirs. The Environmental Management Commission (EMC) must develop a nutrient management strategy and adopt permanent rules for Falls Lake by July 1, 2008, with specific mandatory measures to achieve water quality standards (the primary standard of concern being chlorophyll A). The act also directs the EMC to study the water quality in all the state's drinking water reservoirs and identify nutrient control criteria needed to prevent excess nutrient loading in each reservoir by January 1, 2009.

Floodplain and Landslide Mapping

S.L. 2005-1 (S 7) provided $247 million in relief for hurricanes Francis and Ivan, which caused major flooding and landslides in western North Carolina. The act also provided $7 million to update flood maps and begin landslide hazard mapping in the western part of the state. Coupled with the ongoing flood elevation mapping in eastern and piedmont North Carolina that resulted from hurricanes in the mid-1990s, this effort should greatly improve base maps of North Carolina. These maps have many environmental uses, including stormwater and watershed design.

Lake Fontana Tributary Classification

In order to protect Lake Fontana, which serves as a drinking water supply, S.L. 2005-97 (H 1189) requires the EMC to classify all creeks between Forney and Eagle creeks on the north side of the lake as "outstanding resource waters."

Sedimentation Pollution Control

S.L. 2005-443 sets the time for establishing temporary or permanent ground cover on graded slopes and fills at twenty-one calendar days.

Section 7.1 of S.L. 2005-386 (H 1096) specifies that applicants for erosion control plan approval who are not owners of the land to be disturbed must include the owner's written consent for the plan submission and the land-disturbing activity. It also allows approval of an erosion control plan in less than thirty days if the plan is submitted under DENR's express permitting program.

Stream Clearing Liability

S.L. 2005-441 (H 1029) allows cities and counties to clear natural and man-made obstructions from streams without thereby increasing city or county responsibility for stream maintenance or liability for flooding problems, unless the actions of the city or county are negligent.

Swift Creek Management Plan Enforcement

S.L. 2005-89 (H 1054) confers standing to sue on any local government that is a party to the 1988 Swift Creek Management Plan and on residents of the Swift Creek watershed who live in a jurisdiction that is a party to the plan. These parties are authorized to contest, by filing a petition in Wake County

Superior Court, any action of another party to the plan believed to violate the standards and provisions of the plan. The petition must be filed within sixty days of whatever action is believed to violate the plan and must state with specificity the alleged violation.

Well Contractor Certification

Section 9 of S.L. 2005-386 clarifies the permitted activities of uncertified well contractors as regards construction of a particular well. It also adds a series of exemptions from the certification requirement.

Yadkin/Pee Dee Basin Commission Members

S.L. 2005-37 (H 908) expands the types of members eligible to serve on the Yadkin/Pee Dee River Basin Advisory Commission to include an official from a water and sewer "utility" as opposed to an official from a water and sewer "authority."

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Health

During the 2005 session, the General Assembly enacted more than sixty bills and budget special provisions affecting public health, government health insurance, health care facilities, and the health care professions.

The Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), provides funding for a number of public health initiatives, including fifty new school nurse positions, grants for community-based programs to eliminate disparities in health status between majority and minority populations, and a pilot program to pay for interpreter services for local health department patients who do not speak English proficiently.

A special provision in the appropriations act transfers children under age six from North Carolina Health Choice, the state children's health insurance program, to the Medicaid program. Other special provisions create the Medicaid Ticket to Work program and establish new criteria for how Medicaid applicants may provide evidence of their North Carolina residency.

A new law will require local health departments to obtain and maintain accreditation. Local authority to regulate smoking in public places has been expanded, and smoking inside buildings operated by the Department of Correction (DOC) has been prohibited. The tax on cigarettes increased from 5 cents to 30 cents per pack on September 1, 2005, and will rise to 35 cents per pack on July 1, 2006.

The legislature was quite active in the area of school health. A new law requires local boards of education to adopt policies permitting students with asthma or life-threatening allergies to carry and self-administer medications. Another law regulates snacks and beverages in school vending machines. Special provisions in the appropriations act enact a new law requiring all students enrolling in public kindergarten to obtain a comprehensive eye examination and establish the Governor's Vision Care Program to provide funds for early detection and correction of vision problems in children.

The 2005 General Assembly provided for the licensure of perfusionists, the health care personnel who operate heart and lung machines. Several other new laws amend other licensure acts, including those applying to acupuncturists, recreational therapists, and occupational therapists.

Two enacted bills make changes to the state's certificate of need law that are the most significant the health care industry has experienced in over a decade. More than a dozen other new laws or special provisions that are not specifically directed to public health or health care nevertheless will be of interest to health professionals. They include the Identity Theft Protection Act and the Methamphetamine Lab Prevention Act.

These and several other new laws are summarized in this chapter. Other chapters that summarize laws that may be of interest to public health or health care professionals include Chapter 4, "Children, Families, and Juvenile Law"; Chapter 11, "Environment and Natural Resources"; Chapter 16, "Mental Health"; Chapter 22, "Senior Citizens"; and Chapter 23, "Social Services."

Public Health

Budget

The 2005 appropriations act, S.L. 2005-276, provides funding for a number of new and continuing public health programs. The act allocates $2 million in nonrecurring funds for the Community-Focused Eliminating Health Disparities Initiative. This program will provide grants to community-based organizations, including faith-based organizations. Grant recipients must use the funds to develop programs focused on reducing certain health problems in minority communities, including infant mortality, HIV/AIDS, sexually transmitted diseases, cancer, diabetes, homicides, and motor vehicle–related deaths.

In 2004 the General Assembly created the School Health Nurse Initiative and appropriated $4 million in recurring funds to pay for eighty school nurse positions across the state (S.L. 2004-124). The 2005 appropriations act provides an additional $2.5 million in recurring funds to continue this effort and pay for fifty additional permanent school nurse positions.[1]

The act appropriates a little more than $4 million in nonrecurring funds to the North Carolina Division of Public Health to develop and implement the Health Information System, an automated data system for monitoring, reporting, and billing services provided in local health departments, children's developmental services agencies, and the state public health lab. The system is intended to replace the Health Services Information System that is currently in use.

S.L. 2005-276 provides a substantial amount of nonrecurring funding to automate the state's vital records system. The Office of Vital Records will receive $100,000 in fiscal year 2005–06 and $1.4 million in fiscal year 2006–07 to carry out this effort. The act also appropriates about $75,000 in recurring funds to establish two new staff positions to process vital records.

Section 10.9 of S.L. 2005-276 provides that $2 million of the recurring funds appropriated for community health grants must be used for federally qualified health centers, rural health centers, local health departments, and other community health centers to

1. increase access to preventive and primary care by uninsured or medically indigent patients in existing or new health centers;
2. establish community health center services in counties without these services;
3. create new services or augment existing services for uninsured or medically indigent patients, including primary care and preventive services and dental, pharmacy, and behavioral health services; and
4. increase capacity to serve the uninsured by enhancing or replacing facilities, equipment, or technologies.

Section 10.57 of the appropriations act directs the North Carolina Division of Public Health to develop a pilot program to place automated external defibrillators (AEDs) in public buildings, including public gymnasiums. The division must use $17,000 of the funds appropriated to it for 2005–06 and $6,000 of the funds appropriated for 2006–07 to purchase AED units, conduct training in their use at the pilot sites, and provide ongoing education and awareness campaigns for the general public.

Other key public health initiatives that received appropriations in 2005 include

- $700,000 in recurring funds to provide staff and other resources for a new local health department accreditation program (described below).

1. For additional information about the use of these funds, see the section on "School Health," later in this chapter.

- $2 million in recurring funds to pay for a model program to provide eye examinations for needy children in child care centers and preschools. This program is linked to the new kindergarten comprehensive eye examination program, described below in the section on school health.
- $5 million in recurring funds for the provision of services under the state's early intervention program. Section 10.54A of the 2005 appropriations act enacts G.S. 130A-126, which transfers rule-making authority for the birth to three-year-old early intervention program from the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to the Commission for Health Services. Another special provision, Section 10.54, requires the North Carolina Division of Public Health to evaluate and report on early intervention services. The report must analyze the funding for the children with special needs program and develop a plan to use those funds within the early intervention program.
- A $1 million increase in recurring funds for the AIDS Drug Assistance Program, a program that pays for prescription drugs to treat individuals with HIV or AIDS who have family incomes at or below 125 percent of the federal poverty guidelines. A special provision, Section 10.59, prohibits the Department of Health and Human Services (DHHS) from extending eligibility for the program to individuals with incomes above 125 percent of the federal poverty guidelines during the 2005–07 fiscal biennium.
- $250,000 in recurring funds for a pilot program to pay for interpreter services in local health departments. Local health departments are required by federal civil rights laws to provide interpretation services to their limited-English proficient clients, and they are prohibited by the same laws from charging the clients for the services.
- $1 million in recurring funds for continued support of North Carolina's public health incubators. The public health incubator program was established by the 2004 appropriations act (S.L. 2004-124) to promote collaboration among local health departments and build capacity in the state's public health system.[2]
- $100,000 in recurring funds for the Healthy Carolinians program. The act also provides $400,000 in nonrecurring funds for the program for fiscal year 2005–06.

The 2005 appropriations act reduces the state appropriation for the State Public Health Laboratory by about $370,000 in the expectation that the reduction will be offset by an increase in the fee for required newborn screening tests. On September 1, 2005, the fee rose from $10 to $14.

The 2005 appropriations act did not reduce funding for chronic disease prevention activities, but a special provision, Section 10.56, appears to signal that cuts may be forthcoming. Section 10.56 directs DHHS to inventory all chronic disease prevention activities, funding, staffing, and other resources "in order to reduce costs and eliminate duplication of effort." The inventory must include programs in heart disease, stroke, diabetes, osteoporosis, and cancer. In addition, DHHS must create a plan to combine task forces and activities for chronic disease prevention and explore collapsing those activities into the Healthy Carolinians structure.

Local Health Department Accreditation

In late 2003 Secretary of Health and Human Services Carmen Hooker Odom convened the Public Health Task Force 2004 and charged it with developing recommendations for improving North Carolina's public health infrastructure, improving the health status of North Carolinians, and eliminating disparities in health status between the majority population and minority groups. From the outset, one of the task force's goals was to implement a statewide system for accrediting local health departments in North Carolina, building on a pilot accreditation program that had been underway for

2. The 2004 appropriations act appropriated $1 million in nonrecurring funds to the North Carolina Institute for Public Health to establish the incubator program. The institute then allocated funds to four incubators: the Northeastern North Carolina Partnership for Public Health (composed of ten local health departments serving nineteen counties), the South Central Incubator (composed of eight local health departments serving eight counties), the Western Incubator (composed of thirteen local health departments serving seventeen counties), and the Region III Northwest Incubator (composed of eight local health departments serving ten counties).

several years. When the task force released its final report in January 2005, one of its key recommendations was to establish a mandatory accreditation system for all local health departments in North Carolina.[3]

That recommendation was carried out in S.L. 2005-369 (S 804). This law enacts new G.S. 130A-34.1, which requires all local health departments in North Carolina to obtain and maintain accreditation. The initial accreditation of local health departments is to be implemented over a period of eight years, beginning January 1, 2006.

The new law creates the Local Health Department Accreditation Board within the North Carolina Institute for Public Health (a unit of the University of North Carolina at Chapel Hill School of Public Health). The Accreditation Board will be composed of seventeen members appointed by the Secretary of Health and Human Services, including county commissioners, local board of health members, local health directors, and staff members of the state Divisions of Public Health and Environmental Health. It will be responsible for developing a schedule by which local health departments must apply for initial accreditation, reviewing each department's application for accreditation, and assigning each department a status as follows:

- "Accredited" means the department has satisfied the standards for accreditation. Accreditation expires after four years and the department must apply for re-accreditation.
- "Conditionally accredited" means the department has failed to meet one or more of the standards for accreditation and has been granted short-term accreditation status that is subject to conditions set by the board. This status is good for two years. By the end of that time, the department must have satisfied the board's conditions and met the criteria for accredited status, or it will become unaccredited.
- "Unaccredited" means the department has continued to fail to meet one or more of the standards after a period of conditional accreditation.

Finally, the new law authorizes the Commission for Health Services to adopt accreditation standards and rules for the accreditation process, which must include a health department self-assessment and a site visit. The commission must also adopt rules for informal procedures for review of Accreditation Board decisions.

Smoking Regulation and Cigarette Tax

Article 64 of G.S. Chapter 143 regulates smoking in public places in North Carolina. When it enacted this law in 1993, the General Assembly expressed the intent to "address the needs of both smokers and nonsmokers" by providing that public places contain both smoking and nonsmoking areas.[4] Article 64 requires at least 20 percent of the interior space of public buildings to be designated as a smoking area, unless to do so is physically impracticable. Local governments were permitted to enact more stringent local regulations until October 15, 1993, but local rules or ordinances enacted after that date must provide for a smoking area in most local government buildings, indoor arenas, and other public places. However, G.S. 143-599 provides a list of facilities that are exempt from the provisions of Article 64 and in which smoking may be prohibited entirely.

The list of exemptions in G.S. 143-599 has always included local health departments. However, while it was clear that local health departments could prohibit smoking in all of the health department's interior spaces, it was unclear whether the prohibition could extend to the health department's grounds. It was also unclear whether smoking could be prohibited throughout a building containing a health department when the building also contained another government agency that was not on the exemption list, such as a department of social services. S.L. 2005-19 (H 239) clarifies these two issues. It amends G.S. 143-599 to specify that the exemptions include the local health department and the building and grounds where it is located. S.L. 2005-168 (H 1482), enacted later in the session, further amends the same subsection to add the local department of social services and the buildings and

3. North Carolina Department of Health and Human Services, *North Carolina Public Health Improvement Plan: Final Report* (January 15, 2005) (available on the Internet http://www.ncpublichealth.com/taskforce/docs/FinalReport1.15.05.pdf).

4. S.L. 1993-367, sec. 1 (codified at G.S. 143-595).

grounds where it is located to the exemption list. "Grounds" is defined to mean the area located within fifty linear feet of a local health department or a local department of social services.

S.L. 2005-239 (S 482) amends the list of exemptions in G.S. 143-599 to include indoor arenas with a seating capacity of greater than 23,000.

S.L. 2005-372 (S 1130) regulates smoking and other tobacco use in buildings that are part of a state correctional institution New G.S. 148-23.1 prohibits the use of tobacco products in state correctional institution buildings by inmates, employees, and visitors, effective January 1, 2006. The prohibition extends to chewing tobacco and snuff, as well as cigarettes and cigars. The new law applies only to facilities operated by the Department of Correction and therefore does not extend to local jails. Furthermore, it addresses only the use of tobacco products inside buildings—it does not extend to facility grounds. However, an uncodified provision of the law authorizes DOC to conduct one or more pilot programs banning smoking on facility grounds as well. If DOC conducts such a pilot, it must offer inmates and staff of the facility an opportunity to participate in a smoking cessation program, but no person may be required or coerced to participate. Finally, S.L. 2005-372 adds state correctional facilities operated by DOC to the list of facilities exempt from the provisions of G.S. Chapter 143, Article 64.

A significant increase in the tax on cigarettes was included in the 2005 appropriations act. Section 34.1 of S.L. 2005-276 increased the tax to 1.5 cents per cigarette, or 30 cents per pack, effective September 1, 2005. On July 1, 2006, the tax will increase to 1.75 cents per cigarette, or 35 cents per pack. Section 34.1 also increased the tax on other tobacco products from 2 percent to 3 percent of the wholesale price.

School Health

There was significant legislative activity in the area of school health this year. New laws

- require local boards of education to adopt policies authorizing students who have asthma or life-threatening allergic reactions to possess and self-administer medication,
- regulate food products sold in school vending machines,
- require new statewide standards for school nutrition programs, and
- establish a comprehensive eye examination requirement for students enrolling in public kindergarten.

S.L. 2005-22 (H 496) requires local boards of education to adopt policies authorizing students who have asthma or who are subject to anaphylactic allergic reactions to possess and self-administer medication during the school day, at school-sponsored activities, or while in transit to or from school or school-sponsored events. The policies must include a requirement that parents provide the school with several documents:

- Written permission for the student to possess and self-administer the medication.
- A written statement from the student's health care provider verifying the student's diagnosis and prescription for medication that may be needed during school or school-related activities. The health care provider's statement must affirm that the student has been instructed in self-administration of medication and has the skills necessary to use the medication and any device required to administer it.
- A written treatment plan and emergency protocol formulated by the health care provider who prescribed the medication.
- A signed statement acknowledging that the school is not liable for an injury arising from a student's possession and self-administration of medication.

Local policies must also require the student to demonstrate to the school nurse or the nurse's designee the student's ability to self-administer the medication. The student's parent or guardian must provide back-up medication to the school to be kept in a location where the student will have immediate access in the event of an emergency. If a student uses the medication for a purpose other than that for which it was prescribed, he or she may be subject to discipline in accordance with a school's disciplinary policy, but the disciplinary measures may not limit or restrict the student's immediate access to the medication. Finally, the new law provides qualified immunity from liability for local boards of education and their members, employees, designees, and agents for any act

authorized by the new law or any omission related to it. S.L. 2005-22 was enacted in April 2005 and is in effect for the 2005–06 school year.

Two new laws are directed at improving the nutritional value of foods and beverages sold in schools. S.L. 2005-253 (S 961) regulates the sale of products sold in school vending machines. Since 1992, G.S. 115C-264 has permitted schools, with local board of education approval, to use vending machines to sell soft drinks to students, as long as the drinks were not sold (1) during breakfast or lunch times, (2) to elementary students, or (3) contrary to the requirements of the National School Lunch Program. S.L. 2005-253 deletes the provisions addressing soft drink vending from G.S. 115C-264 and reenacts them in a new section, G.S. 115C-264.2, which governs all snack and beverage vending machines in schools. Under the new law, any vending contracts executed or renewed after August 1, 2005, must provide that sugared carbonated soft drinks will not comprise more than 50 percent of the offerings for sale to students in high schools, and they may no longer be sold in middle schools at all. Furthermore, bottled water products must be available in every school that offers beverage vending. Finally, by the 2006–07 school year, snack vending in all schools must meet the "proficient" level of the North Carolina Eat Smart nutrition standards. The proficient level requires that there be no snack vending in elementary schools, and that 75 percent of the snack vending products in middle and high schools contain 200 calories or less.

Another law, S.L. 2005-457 (H 855), directs the State Board of Education to develop statewide standards for school meals, à la carte foods and beverages, and items served in after-school programs and local education agencies' child nutrition programs. The standards must promote gradual changes to increase the availability of fruits, vegetables, and whole-grain products and decrease foods that are high in fat or sugar.

A special provision in the 2005 appropriations act enacts new G.S. 130A-440.1, which will require each child entering kindergarten in the state's public schools to have an eye examination. Beginning with the 2006–07 school year, each child enrolling in kindergarten in a public school must present proof of a comprehensive eye examination by an ophthalmologist or optometrist. If a child has moved to North Carolina within the sixty days immediately preceding school entry, the child will be given sixty days after school entry to obtain the examination. The new law does not apply to children enrolling in kindergarten in private church schools, schools of religious charter, or qualified nonpublic schools.

Another special provision in S.L. 2005-276 establishes the Governor's Vision Care Program, which will provide funds for early detection and correction of vision problems in children enrolled in kindergarten through third grade. Children will be eligible for the program if they have a family income that is less than 250 percent of the federal poverty guidelines, do not have private health insurance, and are not eligible for services under North Carolina Health Choice, Medicaid, or programs operated by the Commission for the Blind, VSP's Sight for Students program, or the Lions Club foundation. Funds appropriated to the program will be used to reimburse providers for conducting the comprehensive eye examinations required by new G.S. 130A-440.1 and for providing eyeglasses.

Section 10.40D(f) of the 2005 appropriations act gives local boards of education the authority to adopt policies and procedures authorizing schools to use unlicensed personnel to administer medications to students. If a local board chooses to exercise this authority, its policies and procedures must address training and competency evaluations of the unlicensed personnel, requirements for listing the personnel in the medication aide registry established by new G.S. 131E-270,[5] and requirements for supervision of medication aides by licensed health professionals or qualified supervisory personnel.

Another special provision in the 2005 appropriations act establishes the School-Based Child and Family Team Initiative to identify and coordinate community services for children at risk of school failure or out-of-home placement. Section 6.24 of S.L. 2005-276 has a stated goal of increasing schools' capacity to address academic, health, mental health, social, and legal needs of school children. The provision requires local health directors to serve on a local advisory committee for the initiative

5. This special provision actually refers to the medication aide registry established in G.S. 131E-271, but the citation is incorrect. The medication aide registry was established by another special provision, Section10.40C(c), and codified as G.S. 131E-270. The new legislation regarding medication aides is discussed later in this chapter, under "Health Care Professions," "Medication Aides."

and local health departments to take the lead role in assisting children and families whose primary needs are health related.

Section 10.53 of the 2005 appropriations act provides $2.5 million to pay for fifty additional permanent school nurse positions. The Division of Public Health will distribute the school nurse funds in conjunction with the Department of Public Instruction. The agencies must determine which areas have the greatest need for school nurses and the greatest inability to pay for them. The agencies must also consider local nurse-to-student ratios, economic status, and health needs of children. A nonsupplant clause requires communities to maintain their current level of effort and funding for school nurses. School nurses funded through this appropriation are required to participate as needed in the School-Based Child and Family Team Initiative.

The General Assembly did not enact House Bill 865, a bill that would have required local boards of education to adopt policies requiring physical activity for elementary and middle school children, but a State Board of Education policy adopted in April 2005 achieved the same effect. The board's policy number HSP-S-000 requires schools to provide students in kindergarten through eighth grade with thirty minutes of moderate to vigorous physical activity each school day. The requirement can be achieved through regular physical education classes or other activities such as recess or classroom energizers. Schools must fully implement the physical activity requirement by the 2006–07 school year.

Finally, Section 10.59G of S.L. 2005-276 authorizes the Legislative Research Commission to study and evaluate school-based and school-linked health centers in North Carolina.

Environmental Health

In the fall of 2004, North Carolina experienced an outbreak of *E. coli* that was eventually traced to a petting zoo exhibited at the 2004 state fair. The outbreak caused more than 100 cases of diarrheal illness, primarily in young children. Some of the children developed hemolytic uremic syndrome, a life-threatening complication of *E. coli* that can require long-term hospitalization and produce lasting health effects. The General Assembly responded to the outbreak by enacting S.L. 2005-191 (S 268), which was named "Aedin's Law" for one of the children who became seriously ill. The new law regulates animal exhibitions, defined to include agricultural fairs where animals are displayed for physical contact with humans. The law requires animal exhibitions to be inspected and permitted by the Commissioner of Agriculture. The commissioner is authorized to adopt rules, with the advice and approval of the State Board of Agriculture and in consultation with the North Carolina Division of Public Health. Among other things, the rules must include requirements for hand-washing facilities in animal exhibitions, animal care and management, and education and signs addressing health and safety issues. In the event the rules are violated, the commissioner is authorized to revoke an operator's permit and to assess a civil penalty of up to $5,000. The law became effective October 1, 2005.

Part IV of S.L. 2005-386 (H 1096) amends the inspection schedule for food service establishments that is set forth in G.S. 130A-249.[6] The former law required quarterly inspections of restaurants, except for temporary establishments. The new law directs the Commission for Health Services to establish a schedule for inspections of food service establishments. It requires the commission to take into account the risks to the population served by the establishment and the type of food and drink served by the establishment. The new schedule and implementing rules must be adopted by November 1, 2007.

A bill that public health officials monitored closely but that did not pass during the 2005 session was House Bill 900.[7] Under present law, only a local health department may evaluate a proposed development site and issue an improvement permit authorizing the construction of an on-site wastewater system. House Bill 900 would have authorized private licensed soil scientists or professional engineers to perform this function. It also would have provided that if an improvement permit application that was based on the evaluation of a licensed soil scientist or both a licensed soil

6. S.L. 2005-386 amends a number of the state's environmental laws, but only Part IV is summarized in this chapter. For additional information about the new law, see Chapter 11, "Environment and Natural Resources."

7. An identical bill was introduced in the Senate (S 902). The Senate did not act on the bill during the 2005 session.

scientist and a professional engineer was not acted upon by a local health department within ten days, the site would be deemed permitted. The bill did not pass either chamber of the General Assembly during the legislative session, but the issue is expected to resurface in future sessions.

Public Health Authorities

In 1997 the General Assembly enacted a law that authorized counties to provide public health services through a single- or multi-county public health authority, rather than a traditional local health department.[8] Public health authority boards have different membership requirements than traditional boards of health and also have expanded powers and duties.

The 2005 General Assembly enacted two laws that affect the powers of public health authorities. S.L. 2005-326 (S 682) amends G.S. 105A-2(6) to add public health authorities to the list of local agencies that are permitted to use the set-off debt collection procedures that are currently available to North Carolina cities and counties.

S.L. 2005-459 (S 665) authorizes certain public health authorities to expand their board membership. Public health authority boards ordinarily may have no more than nine members for a single-county authority or eleven members for a multi-county authority. The new law amends G.S. 130A-45.1 to authorize public health authority boards that intend to pursue federally qualified health center status (or look-alike status) to have between nine and twenty-five members. S.L. 2005-459 also enacts new G.S. 130A-45.13, which authorizes public health authority boards to contract with private vendors to operate the authority's Medicaid billing system, permitting the authority to bypass the state's health services information system (HSIS) and bill Medicaid directly. However, any system used by a public health authority must still have the ability to interface with state public health data systems.

Government Health Insurance

Medicaid

The 2005 General Assembly considered a number of alternatives for reducing eligibility or services under the Medicaid program. In the end, there was no major overhaul of Medicaid, but several significant changes to the program were enacted by the 2005 appropriations act.

One of the most significant changes was the transfer of children under the age of six from the state children's health insurance program (North Carolina Health Choice) to the Medicaid program. In the past, infants under the age of one have been eligible for Medicaid if their family income was at or below 185 percent of the federal poverty guidelines (FPG), and children between the ages of one and five have been eligible for Medicaid if their family income was at or below 133 percent FPG. Children in each age group whose family incomes were higher than those limits but at or below 200 percent FPG have not been eligible for Medicaid but have been eligible for Health Choice. Section 10.11(m) of the 2005 appropriations act provides that children under the age of six in families with incomes of up to 200 percent FPG will be eligible for Medicaid, effective January 1, 2006. Section 10.22 amends G.S. 108A-70.21 to reflect this change.

Section 10.18 of the 2005 appropriations act enacts the Health Coverage for Workers with Disabilities Act, also known as the Medicaid Ticket to Work program, and appropriates $150,000 in recurring funds to support it, beginning July 1, 2006. The purpose of the new program is to allow low-income workers with disabilities to buy health insurance through the Medicaid program. A new statute, G.S. 108A-54.1, establishes the eligibility criteria for the program.

To be eligible to receive Medicaid in North Carolina, an applicant must be a resident of the state. A new statute, G.S. 108A-55.3, requires applicants to provide "satisfactory proof" of their residency by providing at least two documents from a specified list. If an applicant declares under penalty of perjury

8. S.L. 1997-502.

that he or she does not have two of the specified documents, other credible evidence of residency may be considered. Furthermore, applicants for emergency Medicaid will not be required to provide the documents. For emergency Medicaid applicants, a declaration, affidavit, or other statement from the applicant's employer, clergy, or another person with personal knowledge of the applicant's residency will be sufficient. Finally, the satisfactory proof requirement does not apply to a Medicaid applicant who qualifies for an exception from state residency requirements under federal law.

The 2005 appropriations act also makes the following changes to the Medicaid program:

- Freezes Medicaid provider reimbursement rates at 2004–05 amounts, meaning the reimbursement rates cannot be increased during fiscal year 2005–06 (however, the rates may be decreased).
- Provides $1.7 million in recurring funding for personal care services for residents of adult care home special care units, beginning October 1, 2006. At the same time, the act reduces funding for personal care services by $13.7 million in fiscal year 2005–06 and $16.1 million in 2006–07. Section 10.19(a) specifies that the Division of Medical Assistance must accomplish this reduction by implementing a utilization management system for personal care services that may include reducing personal care service hours or otherwise managing the services.
- Provides $2 million in recurring funding to increase Medicaid reimbursement rates for dental services.
- Increases to $3.00 the required co-payment for generic prescription drugs and for the following health care services: chiropractic, optical, podiatry, hospital outpatient, and nonemergency visits to hospital emergency departments. The increase was effective October 1, 2005.
- Decreases recurring funding to the Division of Medical Assistance by $2.7 million in fiscal year –5-06 and $6.7 million in fiscal year 2006–07, in the expectation that the decrease will be offset by the use of drug utilization management measures. Such measures may include requirements for pre-authorization or reviews for particular drugs or limitations on drugs, drug classes, brands, or quantities. However, the Division of Medical Assistance is prohibited from imposing prior authorization requirements on certain categories of medications and may not limit the use of brand-name medications when the health care provider who prescribes the brand-name medication specifies that it is medically necessary.
- Decreases state funding to account for the Medicare Part D "clawback"—that is, the amount the Medicaid program will no longer pay when the new Medicare prescription drug program begins to pay for prescription medications for individuals who are eligible for both Medicaid and the Medicare benefit.
- Authorizes the Division of Medical Assistance to use up to $3 million each fiscal year to develop and implement Medicaid cost-containment activities, such as service limits, pre-authorization requirements, requirements that services be provided in the least costly settings, and medical necessity reviews. Before spending any funds to implement a cost-containment strategy, the division must submit a proposal specifying the cost of implementing the strategy and the expected cost savings to the Office of State Budget and Management and must receive its approval.
- Amends G.S. 108A-70.5, the provision that permits the Department of Health and Human Services to recover money spent on Medicaid from recipients' estates. The amended law authorizes DHHS to impose liens against real property, including a recipient's home, to the extent allowed by federal law. Additional new provisions require DHHS to postpone or waive claims against estates when enforcement of the claim would cause an undue hardship on an heir or a beneficiary of the Medicaid recipient (new G.S. 108A-70.6); require DHHS to waive its claim or lien when recovery is not cost-effective (new G.S. 108A-70.7); require DHHS to give Medicaid applicants written notice that receipt of assistance may result in a claim or lien (new G.S. 108A-70.8); authorize DHHS to require county departments of social services to give DHHS information and assistance needed to recover funds; and require DHHS to pay the county 20 percent of the nonfederal share of the recovery (new G.S. 108A-70.9). The new

laws are effective January 1, 2006, and apply to individuals who receive Medicaid on or after that date.

Another law extends the sunset on a 2003 law pertaining to hemophilia drugs. In 2003, the General Assembly enacted G.S. 108A-68.1, which provided that a health care provider does not have to obtain prior authorization from the state Medicaid program before prescribing certain brand-name drugs for hemophilia and blood disorders if no generic drug is available. The section was to expire on July 1, 2006. S.L. 2005-83 (H 916) extends the expiration date to July 1, 2009.

North Carolina Health Choice (Children's Health Insurance Program)

The most significant change to N.C. Health Choice was the transfer of all children under age six to the Medicaid program, as described above. In addition, the 2005 appropriations act provides funding to support increased enrollment in the Health Choice program for children ages six to eighteen. Effective January 1, 2006, the program is authorized to allow up to a 3 percent growth in enrollment every six months. Section 10.22(d) of S.L. 2005-276 adds new subsection (b1) to G.S. 108A-70.2, establishing payment rates for Health Choice providers. By January 1, 2006, Health Choice providers will be reimbursed at rates that are equivalent to 115 percent of Medicaid reimbursement rates. Effective July 1, 2006, Health Choice providers will be reimbursed at the same rates as Medicaid providers.

Senior Prescription Drug Assistance

Section 10.3 of S.L. 2005-276 authorizes the Governor to use up to $1.5 million during the 2005–06 fiscal year to fully fund the Senior Prescription Drug Access Program, if funds from the Health and Wellness Trust Fund are insufficient to provide services through December 31, 2005. Section 10.4 provides that the program will expire on December 31, 2005, and its members will be eligible for automatic enrollment by DHHS into a federally approved Medicare drug prescription plan, if their incomes are not more than 135 percent of the federal poverty guidelines. However, before automatically enrolling an individual in the program, DHHS must give the individual the opportunity to opt out of automatic enrollment.

Health Information

Controlled Substances Reporting System

The General Assembly created a new system for maintaining information about health care providers who prescribe or dispense controlled substances and about the patients who fill the prescriptions. A special provision in Section 10.36 of the 2005 appropriations act adds Article 5D to G.S. Chapter 90. The new Article requires DHHS to establish and maintain a reporting system of prescriptions for controlled substances listed on Schedules II through V. The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services must adopt rules requiring dispensers of controlled substances to report all of the following:

- The federal Drug Enforcement Administration numbers of both the dispenser and the prescriber
- Information about the patient for whom the substance was dispensed, including the patient's name, address, telephone number, and date of birth
- Information about the prescription, including the date it was written, the date it was filled, whether it was a new prescription or a refill, and the prescription number
- Information about the dispensed drug, including the quantity dispensed, the estimated days of supply provided, and the national drug code

Information submitted to DHHS for the reporting system must be kept confidential. It is exempt from the public records act and is not subject to subpoena, discovery, or any other use in civil proceedings. In general, the information may be used only for investigative or evidentiary purposes

related to violations of state or federal laws, but there are additional specified circumstances in which data in the system may be disclosed to other parties. For example, information may be released to persons authorized to prescribe or dispense controlled substances for the purpose of providing medical or pharmaceutical care for their patients. Information that is more than six years old must be purged from the database.

If DHHS finds patterns of prescribing controlled substances that are unusual, it is required to inform the Office of the Attorney General, which will review the findings and determine whether information should be referred to the State Bureau of Investigation for the investigation of possible violations of state or federal controlled substances laws.

The law imposes civil penalties on persons who release, obtain, or attempt to obtain information from the system in violation of the law. It also provides immunity from liability for health care providers that make reports or transmit data to the system, if their actions are in good faith.

Identity Theft Protection Act and Government Agencies' Use of Social Security Numbers

Both private and public health care providers will be affected—though in somewhat different ways—by S.L. 2005-414 (S 1048). Some sections of the law impose requirements on businesses. "Business" is defined in a manner that captures nongovernmental health care providers, but the definition specifically excludes government agencies.[9] Thus, the requirements applying to businesses will not apply to DHHS or local health departments. However, other sections of the act impose specific requirements on government agencies regarding the use of Social Security numbers (SSNs) and other personal identifying information. Those sections will apply to DHHS and local health departments. This summary addresses the requirements for businesses and the requirements for government agencies separately.

Requirements for businesses. S.L. 2005-414 enacts new Article 2A in G.S. Chapter 75, to be known as the Identity Theft Protection Act. Among other things, the act requires businesses—including health care providers—to protect individuals' SSNs and other personal information from security breaches.

Effective December 1, 2005, businesses may not intentionally make an individual's SSN public, or sell, lease, loan, trade, rent, or otherwise disclose an individual's SSN to a third party without the written consent of the individual, when the business knows or should know that the third party does not have a legitimate purpose for obtaining the SSN. Effective October 1, 2006, businesses may not

- Intentionally put an individual's SSN on any card required for the individual to obtain the business's products or services.
- Require an individual to transmit his or her SSN over the Internet, unless the connection is secure or the SSN is encrypted.
- Require an individual to use his or her SSN to access a Web site, unless a password, unique personal identification number, or other authentication device is also required.
- Print an individual's SSN on information that is mailed to the individual, unless a state or federal law requires the SSN to appear on the document being mailed. If the SSN is required, the document must be mailed in an envelope and must not be visible unless the envelope is opened.

The above prohibitions do not apply in certain circumstances. For example, they do not apply when an SSN is included in an application or other documents related to an enrollment process. They also do not apply if the collection, use, or release of the SSN is for internal verification or administrative purposes.

S.L. 2005-414 requires businesses that own or license personal information to notify individuals when there is a security breach. "Personal information" is defined as a person's first name (or initial) and last name in combination with certain other identifying information, including SSN, driver's

9. "Business" is defined as "[a] sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit. . . . Business shall not include any government or governmental subdivision or agency." G.S. 75-61(1).

license numbers, personal identification numbers, passwords, and biometric data.[10] The definition of personal information explicitly excludes publicly available directories containing information an individual has voluntarily consented to have disseminated or listed and information lawfully available to the general public through government records.

Finally, the law enacts new G.S. 75-64, which requires businesses that maintain or possess records with personal information about North Carolina residents to take reasonable measures to protect against unauthorized access to or use of the information after it is disposed. However, the statute does not apply to health insurers or health care facilities that are subject to and in compliance with the federal HIPAA regulations that protect the privacy and security of medical records.

Requirements for government agencies. Section 4 of S.L. 2005-414 adds a new section to G.S. Chapter 132, North Carolina's public records law, that restricts government agencies' collection and use of Social Security numbers and certain other personal information.[11] Beginning December 1, 2005, state and local government agencies may not collect an SSN from an individual unless (1) the agency is specifically authorized by law to collect the SSN or (2) collection of the SSN is imperative for the performance of the agency's legally prescribed duties and responsibilities. An agency that collects SSNs must clearly document that it is authorized to collect SSNs under this standard, and any SSN collected must be relevant to the purpose for which it is collected.

In addition, an agency that is permitted to collect SSNs under this section must segregate the SSN from the rest of the record so that it can be readily redacted in the event of a public records request and, upon request, must provide individuals with a statement of the purpose or purposes for which the SSN is being collected or used. Furthermore, agencies that are permitted to collect SSNs may not use SSNs for any purpose other than the stated purposes, nor may they intentionally communicate or otherwise make public SSNs or other personal identifying information.

All of the above provisions became effective December 1, 2005. Beginning July 1, 2007, government agencies that are permitted to collect SSNs may not

- Intentionally imprint or imbed an SSN on a card that is required to access government services.
- Require an individual to transmit his or her SSN over the Internet, unless the connection is secure or the SSN is encrypted.
- Require an individual to use his or her SSN to access a Web site, unless a password, unique personal identification number, or other authentication device is also required.
- Print an individual's SSN on materials mailed to the individual, unless required to do so by state or federal law. If a law requires the SSN to appear on the mailed materials, the mailing must be in an envelope and must not be visible unless the envelope is opened.

The prohibitions described above do not apply to

- SSNs or other identifying information that is disclosed to government agencies or employees if the disclosure is necessary for the receiving entity to perform its duties. However, the receiving entity must maintain the confidentiality of the SSN.
- SSNs or other identifying information that is disclosed pursuant to a court order, warrant, or subpoena.
- SSNs or other identifying information disclosed for public health purposes, in accordance with the laws in G.S. Chapter 130A.
- Certified copies of vital records.
- Any recorded document in the official records of the register of deeds or any document filed in the official records of a court. However, as of December 1, 2005, persons who prepare

10. This list is not exhaustive. The definition of "personal information" incorporates by reference the definition of "identifying information" that appears in G.S. 14-113.20.

11. Although the new section is part of the public records law, it appears to apply to all of the activities of government agencies, even when the records produced as a result of those activities are exempt from the public records act. Thus, the requirements imposed by the new section apply to local health departments' patient medical records, even though those records are not public records. G.S. 130A-12 provides that local health department records containing privileged medical information or information that is "protected health information" under the HIPAA Medical Privacy Rule are confidential and not public records as defined in G.S. 132-1.

documents for recording or filing by the register of deeds or the courts must not include any person's SSNs or certain other identifying information unless they are expressly required to do so by law or court order, or by the state registrar for a record of a vital event.

Section 5 of S.L. 2005-414 enacts new G.S. 120-61, which requires state government agencies to evaluate their efforts to reduce the dissemination of personal identifying information and make an annual report to the General Assembly. Agencies must give special attention to their collection and use of SSNs. The section further provides that if the collection of an SSN is found to be unwarranted, the state agency must immediately discontinue the collection of SSNs for that purpose. This requirement became effective December 1, 2005.

Autopsy Photos and Recordings

Autopsy reports—including photos, video recordings, and audio recordings—have always been considered public records under North Carolina's public records law. As a result, any member of the public has had the right to inspect and obtain a copy of the photos or recordings. S.L. 2005-393 (H 1543) preserves the public's right to inspect those records, but it carves out an exception to the public records law that limits who may obtain copies of autopsy photos or video or audio recordings. New G.S. 130A-389.1 provides that any person may inspect those records at reasonable times and under the reasonable supervision of the records' custodian. However, the custodian of the records is prohibited from providing copies of the records to persons other than specified public officials, the personal representative of the decedent's estate, or a licensed physician who plans to use the records to confer with attorneys or others on forensic matters. Copies of records with identifying information removed may be provided to medical examiners, coroners, or physicians for the purpose of medical, scientific, or forensic training or research. The law provides for a special procedure before the clerk of court for a person who is denied copies of the records or restricted in the use of them. If the clerk finds good cause to do so, he or she may issue an order authorizing the person to copy or disclose an autopsy photo or recording. In deciding whether there is good cause, the clerk must consider whether the disclosure is necessary for the evaluation of governmental performance, the seriousness of the intrusion into the family's right to privacy, and the availability of similar information through other public records. Unauthorized disclosure of an autopsy photo or audio or video recording is a Class 2 misdemeanor.

Cancer Registry

G.S. 130A-209 requires health care facilities and providers to report diagnoses of cancer to a central cancer registry. S.L. 2005-373 (S 506) amends this law to require facilities and providers to report diagnoses of benign brain or central nervous system tumors as well.

Health Care Power of Attorney

North Carolina's health care power of attorney law has long had an internal inconsistency. G.S. 32A-19(b) provided that a health care agent could be authorized to make decisions for the principal regarding anatomical gifts, autopsies, or disposition of remains. However, G.S. 32A-20(b) provided that the health care power of attorney was revoked upon the death of the principal. Since the power of attorney was revoked, it was unclear whether the authority the health care agent had apparently been granted under G.S. 32A-19(b) should be honored.

S.L. 2005-351 (H 967) clarifies this issue by amending G.S. 32A-20(b) to provide that the health care power of attorney is revoked upon death *except* for purposes of exercising any authority granted to the health care agent to make decisions regarding anatomical gifts, autopsies, or disposition of remains. The act also modifies the statutory health care power of attorney form in G.S. 32A-25 to take this change into account and makes conforming changes to other laws as follows:

- G.S. 130A-398 lists the individuals who may request an autopsy of a decedent. The new law adds to the list a health care agent granted authority by the principal to request an autopsy.
- G.S. 130A-404(b) provides that, if a person has not made an anatomical gift before death in accordance with state law, certain persons may be asked to make the anatomical gift. The persons are listed in priority order and include the decedent's spouse, adult children, and other close relatives. The new law puts at the top of the list a health care agent granted authority by the principal to make an anatomical gift.

The new law became effective October 1, 2005, and applies to health care powers of attorney created on or after that date.

Health Care Professions

Medication Aides

The North Carolina Board of Nursing and DHHS have been working together for several years to develop standards for non–health care providers who administer medications in health care facilities, correctional facilities, and schools. After jointly conducting a pilot project, the board and DHHS recommended legislation to set standards for training, competency, and registration of medication aides. In March 2005, identical bills that would have authorized and regulated the use of unlicensed personnel as medication aides were introduced in the House (H 783) and Senate (S 662). As initially drafted, those bills would have

- explicitly authorized the use of medication aides in health care facilities licensed under G.S. Chapter 131E, Articles 5 (hospitals), 6 (nursing homes, home care agencies, and ambulatory surgical facilities), and 10 (hospice facilities); in adult care homes licensed under G.S. Chapter 131D; in facilities offering mental health, developmental disabilities, and substance abuse services; in schools; and in Department of Correction facilities;
- authorized the North Carolina Board of Nursing to develop standards for medication aide training; and
- established a medication aide registry listing all persons who have successfully completed the medication aide program and passed a state competency exam.

Both bills were referred to the health committees in their respective chambers but were not acted on further. However, the 2005 appropriations act includes a special provision that contains some of the provisions of those bills.

Section 10.40C(b) of S.L. 2005-276 requires the North Carolina Board of Nursing to establish standards for medication aide training. Section 10.40C(c) enacts new G.S. 131E-270, which requires DHHS to establish and maintain a medication aide registry that contains the names of all persons who have successfully completed a training program approved by the Board of Nursing and passed a competency exam. Some health care facilities must not employ or use a person as a medication aide without first verifying that the person is listed on the registry.[12] A separate special provision, section

12. It is not clear which health care facilities are affected. Section 10.40C addresses medication aides in nursing homes, but it is unclear whether and to what extent the section affects medication aides in other health care facilities. The new statute that requires DHHS to establish the medication aide registry and employers to consult it appears in Article 16 of G.S. Chapter 131E, Miscellaneous Provisions. However, the use of medication aides is addressed only in a new section added to Article 6, Part 1, of G.S. Chapter 131E, which governs the licensure of nursing homes. The first sentence of subsection (a) of new G.S. 131E-114.2 states that facilities licensed under Part 1—that is, nursing homes—may use medication aides to perform the technical aspects of medication administration. It does not appear to authorize the use of medication aides in health care facilities licensed under other parts of G.S. Chapter 131E. However, subsection (a)(1) refers to the use of medication aides in facilities licensed under Article 5 (hospitals) and Article 10 (hospice facilities), as well as those licensed under Article 6, Part 1. Those health care facilities, as well as others not named, have long had a practice of using unlicensed personnel as medication aides. See N.C. Board of Nursing, Fact Sheet: Medication Aide Project, available on the Internet at http://www.ncbon.org/education-factsheet.asp.

10.40D(f), authorizes local boards of education to adopt policies and procedures permitting unlicensed health care personnel to administer medications in schools. That section—which is described in more detail under "School Health," above—also refers to the new registry and training requirements set forth in new G.S. Chapter 131E.

Finally, subsection (b) of new G.S. 131E-114.2 requires the Medical Care Commission to adopt rules addressing the training and competency of medication aides, requirements for listing in the medication aide registry, and requirements for the supervision of medication aides by licensed health professionals or qualified supervisory personnel.

Section 10.40D of S.L. 2005-276 directs the Secretary of Health and Human Services and the President of The Community Colleges System to convene a study group to make recommendations to the 2006 session of the General Assembly regarding the training, evaluation, and supervision of medication aides. In addition, DHHS must continue its pilot program on the use of medication aides and report on the program's status.

Physicians

Most of S.L. 2005-402 (H 1349) makes changes to the Pharmacy Practice Act (see below). However, Sections 5 and 6 increase certain fees payable to the North Carolina Medical Board. The application fee for a license to practice medicine or surgery is increased from $250 to $350. The law also increases the fee for a limited license to practice in a medical education and training program (from $25 to $100), the annual registration fee for fully licensed physicians (from $125 to $175), and the fee for failure to register annually (from $20 to $50).

Nurses

S.L. 2005-186 (S 3) authorizes the North Carolina Board of Nursing to adopt rules requiring applicants for license renewal or reinstatement to submit evidence of their continuing competence in the practice of nursing.

Section 9.33 of the 2005 appropriations act amends G.S. 90-171.61, which provides a scholarship loan program for nurses and students who wish to become nurses. Under the amended law, if a loan recipient is unable to attend school for a semester because of limited faculty resources during that semester, the recipient will not be required to forfeit or repay the loan for that semester. This provision can be used for only one semester and extends the recipient's eligibility for the program by no more than one semester.

Dentists

G.S. 90-30 authorizes the State Board of Dental Examiners to grant a license to practice dentistry in North Carolina to an individual who meets certain educational requirements and passes an examination. In the past, individuals have been required to pass an examination conducted by the board. S.L. 2005-366 (S 711) amends G.S. 90-30 to permit the board to accept the results of other board-approved regional or national clinical examinations that include the performance of procedures on human subjects and that the board determines thoroughly test the applicant's qualifications.

Errors in references to specific sections of G.S. Chapter 131E contribute to the confusion. G.S. 131E-114.2(b) refers to the medication aide registry "as provided for under G.S. 131E-271," but section 10.40C(c) established the registry in G.S. 131E-270. Furthermore, Section 10.40D(f), which authorizes school boards to adopt policies permitting the use of unlicensed personnel as medication aides, refers to G.S. 131E-270 as the source of the training requirements that are actually contained in G.S. 131E-114.2 and that appear to apply only to nursing homes. The original medication aide bills, Senate Bill 662 and House Bill 783, would have placed the training requirements in G.S. 131E-270 and established the registry in G.S. 131E-271. Since that is the case, it appears that the General Assembly's decision to put the training requirements in the nursing home licensure act rather than in the miscellaneous provisions portion of G.S. Chapter 131E was deliberate, but it is not at all clear what that implies for other health care facilities whose use of medication aides is implicitly acknowledged by the reference in G.S. 131E-114.2(a) to health care facilities licensed under other articles.

Pharmacists

S.L. 2005-427 (H 1493) enacts the Pharmacy Quality Assurance Protection Act, Article 4B of G.S. Chapter 90. The stated purpose of the act is to require quality assurance activities to reduce medication errors and to provide for the continuous review of the practice of pharmacy. The new law requires every person or entity holding a valid North Carolina pharmacy permit to establish or participate in a pharmacy quality assurance program to evaluate specified matters, including the causes of medication errors, methods to reduce errors, and the quality of pharmacy practice. The act provides protection for information disclosed in pharmacy quality assurance programs that is similar to the protections provided to medical review committees: the proceedings of such a program and the records and materials it produces are exempted from the North Carolina public records act and are not subject to discovery or introduction as evidence in any civil action, administrative hearing, or Board of Pharmacy investigation against persons or entities permitted or licensed under the Pharmacy Practice Act. However, this protection does not extend to records that are used by the program but available independently from other sources.

The act also provides a means for the Board of Pharmacy to obtain information about medication errors from a pharmacy permit holder. Upon receipt of written notice from the board that it has commenced an investigation against a pharmacist, the permittee must compile and provide documentation of any known medication error made by the pharmacist within the twelve months preceding the investigation, if the error resulted in a death or caused the patient to obtain medical care. However, the documentation may not include the proceedings or records of a pharmacy quality assurance program.

S.L. 2005-402 authorizes the Board of Pharmacy to increase certain fees, including application fees, fees for license renewals and reinstatements, and annual registration fees, among others. An uncodified provision, Section 1, states that the General Assembly's goal is for the board to use the funds generated by the increases to conduct investigations and inspections and directs the board to annually expend at least $100,000 of the funds generated on a Pharmacy Recovery Network. The law also authorizes the board to increase the number of continuing education hours licensed pharmacists must obtain from ten hours per year to thirty hours every two years, with a minimum of ten each year.

Perfusionists

Perfusionists are health care personnel who operate heart and lung machines during cardiac surgery and other procedures. In the past, unlicensed personnel have been permitted to perform this function. S.L. 2005-267 (S 1059) enacts new G.S. Chapter 90, Article 40, the Perfusionist Licensure Act. The act defines the practice of perfusion and requires perfusionists to be licensed. It creates the North Carolina Perfusion Advisory Committee and authorizes it to determine the qualifications and fitness of applicants for licensure as perfusionists, to issue or deny licenses, to revoke licenses or take other disciplinary actions, to establish continuing education standards for licensees, and to adopt rules necessary to carry out the act. The act establishes a schedule of fees for licenses and renewals, to be paid to the North Carolina Medical Board and used to carry out the purposes of the Perfusionist Licensure Act. Perfusionists must obtain licenses by July 1, 2006, and must practice under the supervision of a physician who is licensed to practice medicine in North Carolina. Section 2 of S.L. 2005-267 is a grandfather clause that directs the Perfusion Advisory Committee to issue a license to any person who has been practicing perfusion in a licensed health care facility in the five years immediately preceding application for a license, or within five of the eight years immediately preceding application, notwithstanding the new requirements. The grandfather clause will expire on December 31, 2007.

Chiropractors

A special provision in the 2005 appropriations act prohibits health insurers from imposing higher co-payments for the services of a chiropractor than they would charge a primary care physician for treatment of the same condition. This change to G.S. 58-50-30, which is found in Section 6.29 of

S.L. 2005-276, clarifies that insurers may not charge specialist co-payments when a chiropractor is providing primary care that would qualify for a lower, nonspecialist co-payment if it were provided by a physician.

Acupuncturists

S.L. 2005-379 (H 1357) amends the acupuncture practice laws. The act amends G.S. 90-455, which sets forth the qualifications for licensure, to allow the Acupuncture Licensing Board to grant a license to an applicant who has been continuously licensed to practice acupuncture in another state for at least ten years, if the following conditions are met: (1) the other state's requirements for licensure meet or exceed North Carolina's, (2) the applicant has met certain continuing education requirements, and (3) there have been no disciplinary actions against the applicant. Additional changes to G.S. 90-455 require applicants to be of good moral character, to not be currently engaged in practice or conduct that would constitute grounds for discipline by the board, and to submit a signed form attesting to the applicant's intention to adhere to the ethical standards adopted by the board. The law also allows acupuncturists who are not presently practicing to apply for inactive licensure status and sets forth the requirements for licensure for applicants whose licenses have been suspended or have expired or lapsed. Finally, the law authorizes the board to set and enforce continuing education standards for licensed acupuncturists and to establish and collect certain fees.

Recreational Therapists and Occupational Therapists

S.L. 2005-378 (H 613) rewrites G.S. Chapter 90C, the licensure act for recreational therapists. It changes the title of the chapter from Therapeutic Recreation Personnel Certification Act to North Carolina Recreational Therapy Licensure Act and makes conforming terminology changes throughout (for example, by changing the name of the State Board of Therapeutic Recreation Certification to the North Carolina Board of Recreational Therapy Licensure). The act modifies the examination, education, and experience requirements for recreational therapists, effective January 1, 2006. Grandfather provisions allow currently certified recreational therapists to be exempt from the new requirements if they submit an application for licensure to the board by January 15, 2008.

S.L. 2005-432 (S 208) amends the Occupational Therapy Practice Act. The act deletes G.S. 90-270.71, which contained detailed requirements for the examination of occupational therapists by the North Carolina Board of Occupational Therapy and replaces the statute with an amendment to G.S. 90-270.70 requiring applicants for licensure to pass an examination approved by the board. Another amendment to G.S. 90-270.70 requires applicants for licensure who were trained outside the United States to meet examination eligibility requirements established by a credentialing agency recognized by the board. The new law also provides for issuance of 120-day limited permits to individuals who have met all requirements for examination but who have not yet taken or received the results of the examination. It alters the grounds for disciplinary actions by the board under G.S. 90-270.76 to include engaging in unprofessional conduct, having disciplinary action taken by a licensure authority in North Carolina or another state, and being unfit or incompetent. The act enacts new G.S. 90-270.80A, authorizing the board to assess civil penalties and charge costs of disciplinary actions against individuals found to be in violation of licensure laws or rules. An amendment to G.S. 90-270.81 provides that an occupational therapist who irregularly provides consultation to North Carolina occupational therapists or the educational facilities that train them need not be licensed in North Carolina. Finally, S.L. 2005-432 alters the membership of the board; provides for removal of members for neglect of duty, incompetence, or unprofessional conduct; and authorizes the board to communicate any disciplinary actions it takes to relevant state and federal authorities and other states' occupational therapist licensing boards.

Miscellaneous

Physicians, hospitals, dentists, and podiatrists who charge their patients more for anatomic pathology services than the providers themselves are billed will have to disclose those mark-ups under

new G.S. 90-681, enacted by S.L. 2005-415 (H 636). The disclosure must be made in writing and include, among other things, the amount charged to the health care provider by the laboratory. The law provides exceptions for licensed practitioners performing or supervising anatomic pathology services and for hospitals or physician group practices that have a physician employee or physician under contract to perform or supervise the services. Failure to make a required disclosure is a Class 3 misdemeanor.

Section 2 of S.L. 2005-415 amends G.S. 90-18(a), the statute that prohibits the practice of medicine without a license. The statute provides that a person who practices medicine or surgery without a license is guilty of a Class 1 misdemeanor. The amendment increases the penalty to a Class I felony if the person practicing without a license is an out-of-state practitioner.

S.L. 2005-431 (S 705), which amends G.S. Chapter 90, Article 5C, the substance abuse professionals certification law, is summarized in Chapter 16, "Mental Health."

Health Care Facilities

Certificate of Need

North Carolina's certificate of need (CON) law was enacted in 1977 with the goal of controlling health care costs by reducing unnecessary duplication of health care services and facilities. The law requires health care providers to obtain a CON from DHHS before offering certain new services or constructing or acquiring certain facilities or equipment. Facilities that require a CON include hospitals, nursing homes, adult care homes, home health agencies, and ambulatory surgical facilities. In addition, a health care provider must obtain a CON before establishing a new facility, undertaking a capital expenditure of more than $2 million, changing facility bed capacity or relocating facility beds, or offering certain services, including bone marrow transplantation, neonatal intensive care, and burn intensive care services. A CON is also required to acquire certain equipment, including air ambulances, magnetic resonance imaging (MRI) scanners, and positron emission tomography (PET) scanners.[13]

S.L. 2005-325 (S 740) adds the following to the list of facilities, services, activities, and equipment for which a CON is required:

- Most cardiac catheterization services
- Long-term care hospitals
- The opening of an additional office by a hospice
- Kidney disease treatment centers
- Linear accelerators (machines used to produce radiation for cancer treatment)
- Simulators (machines that produce diagnostic radiographs)

Separate legislation addresses the regulation of gastrointestinal endoscopy rooms under the CON law. A gastrointestinal endoscopy room is a room used to perform procedures for visualizing the gastrointestinal lining and adjacent organs for diagnostic or treatment purposes. Prior CON law did not distinguish between general surgical operating rooms and gastrointestinal endoscopy rooms. S.L. 2005-346 (H 1060) defines and distinguishes between the two types of rooms, adds gastrointestinal endoscopy rooms to the list of facilities for which a CON is required, and adds to the list of activities for which a CON is required a change in designation of an operating room to a gastrointestinal endoscopy room (or vice versa). Section 7 of S.L. 2005-346 provides a procedure by which existing facilities can be exempted from the new requirements.

13. These lists are not exhaustive. The complete list can be gleaned from the definitions section of the CON law, G.S. 131E-177.

Home Care Clients' Bill of Rights

A special provision in the 2005 appropriations act enacts the Home Care Clients' Bill of Rights. Section 10.40A(n) of S.L. 2005-276 adds new Part 3A to G.S. Chapter 131E, Article 6. The new law includes a declaration of home care clients' rights, including (but not limited to) the following:

- The right to be informed and participate in the client's plan of care
- The right to voice grievances about care
- The right to have personal and medical records kept confidential and not disclosed without appropriate written consent[14]
- The right to be free of mental and physical abuse, neglect, and exploitation
- The right to accept or refuse services
- The right to be informed of adverse actions against the home care agency's license

The Department of Health and Human Services is responsible for enforcing the new provisions and must investigate complaints within specified time limits, depending on the allegation. For example, a complaint of neglect must be investigated within forty-eight hours, while a complaint alleging a life-threatening situation must be investigated immediately. Home care agencies must provide each client with a copy of the declaration of rights and certain other information, including the address and telephone number of the DHHS section responsible for enforcing the new provisions.

Public Hospitals

S.L. 2005-70 (H 869) amends the conflict of interest law for public hospitals. G.S. 131E-14.2 prohibits public hospital employees and members of public hospital boards of directors from acquiring any interest in

- a hospital facility or property that is included or planned to be included in a hospital facility, or
- a contract or proposed contract for materials or services to be furnished or used in connection with a hospital facility (with the exception of employment contracts for employees).

S.L. 2005-70 makes two changes to G.S. 131E-14.2. First, the statute formerly specified that "direct or indirect" interests in contracts were prohibited. The word "indirect" has been deleted; thus, only direct interests in contracts are prohibited. Second, the new law provides that the prohibitions listed above will not apply if the director or employee is not involved in making or administering the contract.

Section 14 of S.L. 2005-238 (H 1117) amends G.S. 131A-6 to authorize public agencies, including public hospital authorities, to grant mortgages or security interests in their health care facilities in order to finance hospital facilities and equipment.

Another new law addresses public hospital investments. S.L. 2005-417 (S 443) authorizes public hospitals to deposit with the State Treasurer any funds not required for immediate disbursement, as well as funds held in reserves or sinking funds. The State Treasurer may invest the funds as provided in G.S. 147-69.2.

Section 4 of S.L. 2005-417 enacts a new statute to regulate funds received and held by UNC Hospitals. G.S. 116-37.2 provides that the Board of Directors of the UNC Health Care System is responsible for the custody and management of those funds and requires the board to adopt policies and procedures for the administration of the funds. The new law requires UNC Hospitals funds to be deposited with the State Treasurer, who will hold them in trust. The funds and their investment earnings will be available for expenditure by UNC Hospitals without further authorization by the General Assembly.

A special provision in the 2005 appropriations act directs DHHS to allocate $3 million of the funds it receives for the 2005–06 fiscal year to rural hospitals in need of assistance in paying operating

14. The impact of this provision on general medical confidentiality law is unclear. However, it seems unlikely that the General Assembly intended the declaration of rights to alter existing laws that permit or require disclosure of confidential patient information without consent when necessary for the home care provider to comply with other legal duties—such as the duty to make appropriate reports to adult protective services or the duty established in this same new law to make medical records available to DHHS during an investigation of an alleged violation.

expenses. The department must establish criteria for distribution of the funds, including the number of indigent patients served by the hospital, the number of Medicaid recipients served, the per capita income of the area served by the hospital, and the hospital's financial needs.

Miscellaneous

Several other new laws affecting health care facilities are summarized in Chapter 22, "Senior Citizens." S.L. 2005-66 (S 572) creates a licensure category for assisted living communities that serve only elderly adults. S.L. 2005-4 (S 41) provides for criminal history checks for employees of long-term care facilities. Several sections of the 2005 appropriations act impose new requirements on home care agencies and adult care homes for the aged and disabled.

Other Laws of Interest

Immunity from Liability for Volunteer Emergency Responders

S.L. 2005-273 (H 1297) amends G.S. 1-539.10 to provide qualified immunity from liability for Medical Reserve Corps members, members of Community Emergency Response Teams, and other volunteers engaged in providing emergency services. The law also defines "emergency services" in G.S. 1-539.11 as "the preparation or carrying out of functions to prevent, minimize, and repair injury and damage resulting from natural or man-made disasters," including medical, health, and rescue services (among others).

Methamphetamine Lab Prevention Act

S.L. 2005-434 (H 248) restricts the sale of pseudoephedrine, a popular over-the-counter decongestant that can be used to manufacture methamphetamine. The restrictions include the following:

- Pseudoephedrine products in tablet or caplet form must be stored and sold from behind a pharmacy counter.
- Nonprescription pseudoephedrine products may be sold only to individuals age eighteen and older. Retailers must require purchasers to furnish photo identification showing date of birth.
- Retailers must keep a record of disposition of pseudoephedrine products that records the name and address of each purchaser, identifies each product purchased, and specifies the amount of grams purchased and the purchase date. Each purchaser must sign the record at the time of purchase. The retailer must maintain records for two years and make them available for inspection by authorized law enforcement officials.
- Individuals are prohibited from purchasing or attempting to purchase over-the-counter more than two packages containing a total of six grams of pseudoephedrine in a single purchase and from purchasing or attempting to purchase over-the-counter more than three packages containing a total of nine grams in a thirty-day period.

The restrictions do not apply to pseudoephedrine products in the form of liquid, liquid capsule, or gel capsule; nor do they apply to pediatric products labeled and intended for administration to children under age twelve.

The law also requires retailers who sell pseudoephedrine products covered by the restrictions to post signs about the restrictions and to require their employees to participate in a training program. There are criminal penalties for retailers, employees, and purchasers who willfully and knowingly violate the restrictions.

State Veterinarian's Authority to Control Contagious Animal Diseases

In 2001, in response to an epidemic of foot and mouth disease among animals in Europe, the General Assembly enacted legislation strengthening the authority of the State Veterinarian to respond to contagious animal diseases with the potential for serious and rapid spread. Among other things, S.L. 2001-12 authorized the State Veterinarian to stop and inspect vehicles transporting animals, to quarantine areas to prevent the spread of contagious animal diseases, and to order that infected animals be destroyed. The original law had a sunset date of April 1, 2003. In 2003 the General Assembly extended the sunset to October 1, 2005.[15] S.L. 2005-21 (S 210) extends the sunset again, to October 1, 2009.

Medical Examiner Fees

G.S. 130A-387 requires the state or a county to pay a fee for postmortem investigations conducted by medical examiners. S.L. 2005-368 (S 505) increases the fee from $75 to $100 per investigation.

Interpreters/Transliterators

G.S. Chapter 90D, the Interpreter and Transliterator Licensure Act, governs the provision of interpretation or transliteration services to individuals who are deaf, hard of hearing, or otherwise dependent on manual modes of communication. G.S. 90D-8 allows the North Carolina Interpreter and Transliterator Licensing Board to grant provisional licenses to individuals who meet specified criteria. S.L. 2005-299 (H 1507) extends eligibility for provisional licensure to individuals who do not meet the certification or education requirements established under prior law but have completed specified training requirements. The act enacts G.S. 90D-14 to authorize the board to assess civil penalties for violations of the statutes or the board's rules.

Volunteer Rescue/Emergency Medical Services Fund

The North Carolina Department of Insurance maintains the Volunteer Rescue/Emergency Medical Services (EMS) Fund to provide grants to volunteer rescue and EMS units for the purchase of equipment and for capital improvements. The Department of Health and Human Services provides the Department of Insurance a priority list for EMS equipment funding. S.L. 2005-283 (S 687) directs the North Carolina Association for Rescue and Emergency Medical Services, Inc., to provide DHHS with an advisory priority list for rescue equipment funding. It also provides that grants may no longer be used to pay highway use taxes on equipment purchases.

Nutrition in Universities and Community Colleges

Section 9.28 of the 2005 appropriations act directs the UNC Board of Governors and the State Board of Community Colleges to adopt policies for any food programs they operate to prohibit the use of cooking oils containing trans-fatty acids and the sale of processed foods containing trans-fatty acids. The policies must apply to contracts entered or renewed on or after August 1, 2006.

Jill Moore

15. S.L. 2003-6.

13

Higher Education

As it has in recent years, money remained tight in the 2005 General Assembly, and overall appropriations for The University of North Carolina (UNC) and The Community College System rose only slightly. This was not a year of major legislative initiatives with regard to higher education.

Appropriations and Salaries

UNC Current Operations

The Current Operations and Capital Improvements Appropriations Act of 2005 [S.L. 2005-276 (S 622)][1] (the budget act) appropriates $2,086,052,890 for fiscal 2005-06 and $2,120,397,081 for fiscal 2006-07 to The University of North Carolina Board of Governors for the operation of all UNC campuses and hospitals. In the budget act of 2003, the comparable figures for the two years of the 2003-05 biennium were $1,792,141,661 and $1,822,426,657.

Community Colleges Current Operations

The budget act appropriates to The Community Colleges System Office $787,685,943 for fiscal 2005-06 and $767,295,886 for fiscal 2006-07. In the budget act of 2003, the comparable figures for the two years of the 2003-05 biennium were $660,927,719 and $660,199,222.

Capital Improvements

In 2000 the voters of the state approved the issuance of bonds in the amount of $2.5 billion for UNC and $600 million for The Community College System to fund an extensive list of capital improvement projects. Since then, the General Assembly has made few direct appropriations for capital improvements for UNC or the community colleges; in some years, no funds at all have been appropriated.

1. As amended by S.L. 2005-345 (H 320), the general technical amendments bill).

In 2005 the budget act's total statewide appropriation for capital improvements—for all government, not just higher education—was only $54,960,000. That total includes nothing for The Community College System and $16,550,000 for UNC. The largest UNC appropriation, $8.7 million, is for an engineering complex at North Carolina State University. The budget act also modifies a number of the capital projects funded by the proceeds of the 2000 bond referendum and, in Section 9.26, authorizes the expenditure of $30 million for a new family medicine center at the Brody School of Medicine at East Carolina University. The center is to be financed with funds available from Medicare reimbursements and other specified funds but not General Fund appropriations.

In addition, S.L. 2005-324 (H 1775) authorizes a number of capital improvement projects at UNC constituent institutions; these are to be funded by receipts, self-liquidating indebtedness, or other sources but not General Assembly appropriations. The largest of these projects are infrastructure improvements at UNC Chapel Hill (just over $100 million), a student housing project at North Carolina Central University ($30 million), and the aforementioned family medicine center at East Carolina University ($30 million).

Salaries

All community college employees paid from state funds received, under the budget act, salary increases of $850 or 2 percent, whichever is greater. The same is true for UNC employees who are subject to the State Personnel Act. UNC employees not subject to the State Personnel Act who have an annual salary of $42,500 or less received an $850 increase. All other UNC employees[2] together received an average increase of 2 percent, with the amount awarded to each individual varying according to rules adopted by the Board of Governors. In addition, most UNC and community college employees received a special credit of five additional days of annual leave.

The budget act also sets a 2005-06 minimum salary schedule for nine-month, full-time, curriculum community college faculty with the following qualifications: vocational diploma or less, $29,932; associate's degree, $30,373; bachelor's degree, $32,283; master's degree or education specialist, $33,978; doctoral degree, $36,421. The act also permits community colleges to use portions of state-appropriated faculty salary funds for purposes other than salary that directly affect student services; the amount used for these purposes depends on a sliding scale related to how nearly the college's average faculty salary matches the national average. The closer to the national average, the more salary funds the college may transfer to other purposes.

Use of Funds

A number of provisions in the budget act concern the use of funds by The Community College System, UNC, or individual institutions.

Section 8.2 of the budget act permits The Community College System to carry forward without reversion to the General Fund up to $15 million of operating funds and to reallocate them to the system's Equipment Reserve Fund. Sections 8.1 and 8.4 (amending G.S. 115D-5.1) provide, respectively, that funds appropriated for the system's College Information System Project and funds available to the New and Expanding Industry Training Program are not to revert. Also, under Section 8.10, certain community colleges may retain without reversion all their General Fund current operations credit balances. To qualify, the community college must be located in a county that is designated as tier one or tier two under G.S. 105-129.3, have an unemployment rate of at least 7 percent, and be designated a low-wealth county with a wealth calculation of 80 percent or less of the state average.

Section 9.21 of the budget act amends the G.S. 116-41.15 provisions for the Distinguished Professors Endowment Trust Fund. That statute sets out a formula governing the use of state funds to

2. Except teachers at the School of Science and Mathematics, whose raise is to average 2.44 percent.

match private donations raised to endow a teaching chair. The amendment adds flexibility to the formula while maintaining the basic ratio of private-to-state funds.

University and Community College Governance

Community Colleges Train Lateral-Entry Teachers

There are two primary ways for individuals to become public school teachers in North Carolina. First, the individual may complete a regular teacher-education program at a four-year college. Or, second, the individual may come into teaching directly from other work through what is known as "lateral entry." An individual who enters the teaching profession through lateral entry must complete certain coursework within prescribed time limits in order to attain a teaching license. S.L. 2005-198 (H 563) amends G.S. 115C-296 and G.S. 115D-5 to authorize community colleges to offer the required courses. To enroll in a community college coursework program, the lateral-entry teacher must have completed his or her bachelor's degree at least five years before.

Scholarship Students at In-State Tuition Rate

Section 9.27 of the budget act adds new G.S. 116-143.6 authorizing the board of trustees of each UNC constituent institution to elect to treat as in-state residents for all purposes all out-of-state undergraduate students who hold full scholarships provided by entities recognized by the institution. The constituent institution choosing to do so must (1) administer the election in a way that has no fiscal impact and (2) maintain at least the current number of North Carolina residents admitted to the institution.

Umstead Act Amendments

G.S. 66-58, commonly known as the Umstead Act, prohibits agencies of state government, including UNC and the community colleges, from operating enterprises that compete with private businesses. The statute contains a number of exceptions. For instance, it permits the sale of meals and articles incident to classroom work at college facilities. S.L. 2005-397 (H 1539) amends the statute to add additional exceptions, exempting UNC with respect to (1) activities that further the mission of UNC; (2) activities that serve students or employees of UNC or members of their immediate families; (3) activities that provide university-related services or that market university-related merchandise to alumni and their families; and (4) activities that enable people to utilize the university's facilities, equipment, or expertise. The statute directs the Board of Governors to establish a panel to determine whether particular activities are authorized under exceptions (2), (3), and (4) and permits UNC and its employees to rely on a finding by the panel that such an activity is authorized until a contrary determination is made by a court or the attorney general. The panel is to consist of two members familiar with the interests of the business community appointed by the Governor; two such members appointed by the Speaker of the House; two such members appointed by the President Pro Tempore of the Senate; and three members who are not UNC employees and are appointed by the Board of Governors.

In addition, three other statutes provide new Umstead Act exceptions. (1) S.L. 2005-247 (S 565) creates an exception allowing a private business enterprise that has loaned or donated instructional equipment to a community college to use college facilities to demonstrate that equipment to customers. (2) S.L. 2005-20 (H 752) creates an exception for sales of dairy products by North Carolina State University. (3) S.L. 2005-63 (S 510) creates an exception for economic development activities at the East Campus of Western Piedmont Community College.

Foundations to Support UNC Institutions

The budget act adds new G.S. 116-30.20 directing the UNC Board of Governors to encourage the establishment of private, nonprofit foundations to support UNC constituent institutions. The new provision permits the UNC President and the chancellors of the constituent institutions to assign employees to assist with the establishment and operation of the foundations and to provide office space, supplies, and equipment. The foundations must be audited by UNC.

Addressing the Teacher Shortage

The budget act contains several provisions designed to address the shortage of teachers in North Carolina's public schools.

The first directs the UNC Office of the President to obtain from each UNC institution its plans for maintaining its current enrollment in teacher-education programs and measures for achieving growth—including targeted admissions; faculty increases; and enhanced student support, advising, and recruiting. The Office of the President is to assemble those plans and report them to the Office of State Budget and Management and the Joint Legislative Education Oversight Committee.

The second provision directs the UNC Board of Governors and the State Board of Community Colleges to strongly encourage UNC constituent institutions and community colleges not presently offering certain specified UNC/community college cooperative programs in teacher education to design and enter into partnerships for such programs.

The third provision directs that funds be used to create new positions within the University of North Carolina–North Carolina Community College System (UNC–NCCCS) Joint Initiative for Teacher Education and Recruitment. The new employees are to assist the efforts of the Regional Alternative Licensure Centers of the Department of Public Instruction to increase the number of licensed teachers in the public schools. The budget act directs the Joint Initiative to report annually on students moving from community colleges to UNC institutions to work toward teacher licensure and related education.

For more information, see "Community Colleges Train Lateral-Entry Teachers," above.

New Enrollment Growth Funding Model

Each year the General Assembly must provide additional funds to The University of North Carolina to cover the expenses associated with enrollment growth. The budget act directs the Office of State Budget and Management, along with UNC and the Fiscal Research Division of the General Assembly, to develop an alternative model and to use both the current and the new models side-by-side in developing the request for enrollment-growth funding in 2007.

Community College Education Program Audit

G.S. 115D-5(m) has required that the State Board of Community Colleges require auditors of community college programs to use a statistically valid sample size in performing program audits. The budget act amends that section to retain the requirement but also to specify the purpose of the annual audit: to ensure that college programs and related fiscal operations comply with state law, state regulations, State Board policies, and System Office guidance. The new provision requires audit findings to be forwarded to the college president, the board of trustees, the State Board, and the State Auditor. It further directs the State Board to assess a 25-percent fiscal penalty when audit exceptions result from any cause other than processing errors.

Community College Multicampus Funds

The budget act adds a new requirement that multicampus community colleges and community colleges with off-campus centers must report annually to the System Office on all expenditures—by line item—of funds used to support the multiple campuses and the off-campus centers. The act

specifies that funds appropriated to the System Office for multicampus colleges or off-campus centers are to be used only for the administration of the multicampus college or off-campus center for which the funds were allotted and may not be transferred to any other campus or center.

Massage and Bodywork Therapy Program Approval

G.S. 90-631 directs the North Carolina Board of Massage and Bodywork Therapy to set standards for schools operating in the field and to approve schools that meet the standards. The budget act amends the statute to exempt programs operated by accredited community colleges and by other accredited degree-granting colleges that are licensed by The Community College System or by the UNC Board of Governors.

Community College Customized Industry Training Program

The budget act, in Section 8.4, adds new G.S. 115D-5.1(e) creating the North Carolina Community College System Customized Industry Training Program to offer worker training assistance to businesses that are making appreciable capital investments and deploying new technologies. Funds from the New and Expanding Industry Training Program may be used to operate this new program.

Employers' Mandatory Training and Reemployment Contribution

G.S. 96-6.1—enacted in 1999—levies a mandatory employer contribution to provide funds for worker training (in addition to employer unemployment insurance contributions). The statute, which mandates that 80 percent of the funds be allocated to The Community College System, was scheduled to expire in 2006. The budget act adds new G.S. 96-6.1(c) extending the sunset to 2011.

Horace Williams Airport

The budget act, in Section 9.15, directs UNC Chapel Hill to continue to operate the Horace Williams Airport and to continue air transportation support for the Area Health Education Centers (AHEC) program and the public until thirty days after adjournment of the General Assembly in 2006. The Legislative Research Commission is directed to study the means of continuing the AHEC program if the airport becomes unavailable.

Distance Education Study

The budget act, in Section 9.7, directs the Office of State Budget and Management to study the distance education programs at UNC institutions, identify duplications, assess the cost of developing online courses, and determine which campuses are best suited to offer particular courses.

Enrollment of Students under Sixteen at Community Colleges

G.S. 115D-1.1 (which expired September 1, 2004) permitted the enrollment of a student under sixteen years of age in a community college if the president of the college finds the student to be intellectually gifted and if the enrollment is approved by certain public school officials. S.L. 2005-77 (H 583) amends the statute to add to the list of officials authorized to approve the enrollment the local board of education of the school administrative unit in which the student is domiciled (whether enrolled there or not) and the administrator of a college or university where the student is enrolled. It also extends the expiration date of the statute to September 1, 2008.

Community College Statement of Purpose

G.S. 115D-1 contains the statement of purpose of the North Carolina Community College System. S.L. 2005-77 amends the statute to add a statement that the System Office is designated as the primary

lead agency for delivering workforce development training, adult literacy training, and adult education programs in the state.

Center for Applied Textile Technology

How many community colleges are there in North Carolina's system? For some purposes, the answer has been fifty-eight and for others it has been fifty-nine, depending on how one counted the Center for Applied Textile Technology. The question is now simplified. S.L. 2005-103 (S 988) deletes the statutes that have governed the center and enacts new statutes constituting it a unit of Gaston College, one of the fifty-eight community colleges. The old board of trustees of the center is dissolved and replaced with an advisory board composed of the president of Gaston College, four members appointed by the N.C. Manufacturers Association, three members appointed by the State Board of Community Colleges, two members appointed by the board of the center's foundation, two members appointed by the board of trustees of Gaston College, one member appointed by the dean of the College of Textiles of North Carolina State University, and the director of the Hosiery Technology Center at Catawba Valley Community College. A director of the center is to be chosen by the Gaston College president from nominees put forward by the advisory board.

No Tuition for Early College and Middle College High School Students

G.S. 115D-5(d) provides that tuition is to be waived for all high school students taking courses at community colleges. S.L. 2005-193 (S 566) makes it clear that this waiver applies to students in early college and middle college high school programs.

UNC Pembroke Designation

S.L. 2005-153 (H 371) designates The University of North Carolina at Pembroke as "North Carolina's Historically American Indian University."

University and Community College Contracting

See Chapter 19, "Public Purchasing and Contracting," for a discussion of 2005 legislation affecting contracting by UNC and the community colleges.

Funds of the University of North Carolina Hospitals at Chapel Hill

S.L. 2005-417 (S 443) adds new G.S. 116-37.2 specifying that the Board of Directors of the University of North Carolina Health Care System is responsible for the custody and management of the funds of the University of North Carolina Hospitals at Chapel Hill. It provides that the board is to develop uniform policies and procedures for administering those funds, which are to be available for general institutional purposes and to supplement state appropriations, so enabling the hospitals to improve and increase their functions, enlarge their service areas, and become more useful to a greater number of people.

A&T State University Parking

S.L. 2005-165 (H 1552) grants ordinance-making authority to the Board of Trustees of North Carolina Agricultural and Technical State University with respect to parking on designated streets in Greensboro.

Private College Police

S.L. 2005-231 (S 527) adds a new G.S. Chapter 74G (Campus Police Act), creating the Campus Police Program and governing the provision of police protection by police forces of private colleges. See Chapter 6, "Courts and Civil Procedure," for a fuller discussion.

Student Relationships and Financial Aid

Lottery Scholarships

After many years of debate, the General Assembly in 2005 enacted a North Carolina State Lottery. S.L. 2005-344 (H 1023), as amended by Section 31.1 of the budget act, directs, through new G.S. 18C-164, that a portion of the net revenue in the Education Lottery Fund is to be distributed to the State Education Assistance Authority to fund college and university scholarships.

The lottery act also adds new Article 35A to G.S. Chapter 115C, specifying how the lottery-funded scholarships will work. Under current federal rules for determining eligibility for higher education financial aid, aid officials use financial information provided by the family to calculate each family's "expected financial contribution"—that is, the amount the family is able to pay annually toward the student's higher education. Under new G.S. 115C-499.2, students who are North Carolina residents will be eligible for lottery-funded scholarships if their expected annual family contribution does not exceed $5,000. The maximum scholarship amount is $4,000 a year, and no student may receive a scholarship for more than four full academic years.

Relations with the Military

G.S. 116-143.3 provides that active duty members of the armed services and their dependent relatives receive in-state tuition at UNC institutions, even if they do not qualify as North Carolina residents for tuition purposes. S.L. 2005-345 (H 320) amends the statute to allow active duty members who are enrolled at the time they are honorably discharged from the service to remain eligible for in-state tuition as long as they establish North Carolina residency within thirty days of discharge and remain continuously enrolled in the original program. The same is true for dependent relatives. S.L. 2005-445 (S 1117) extends this same benefit to active duty members (or dependent relatives) who retire from the service.

S.L. 2005-445 also amends G.S. 116-235(b)(1) to provide that a student whose parent is an active duty member of the armed services residing in North Carolina incident to military service is eligible for admission to the School of Science and Mathematics, even if the student is not a North Carolina resident.

S.L. 2005-444 (S 725) amends portions of Article 15 (North Carolina National Guard Tuition Assistance Act of 1975) of G.S. Chapter 127A. That article has provided an educational assistance grant of up to $2,000 per year for four years for qualifying members of the National Guard to attend university, college, or business or trade school. The amendments raise the maximum grant from $2,000 to the highest amount charged by a public educational institution in the state. The amendments also provide that the tuition portion of a grant is to be paid directly to the educational institution but that any portion for books and materials is to be paid to the Guard member.

In-State Tuition in Reciprocal Graduate Programs

The budget act adds new G.S. 116-43.10 authorizing the UNC Board of Governors to participate in the Southern Regional Education Board Common Market for graduate studies. Under this program, North Carolina residents may attend certain graduate programs at universities operated by other participating states at in-state tuition rates, and students from those states may attend certain UNC graduate programs at in-state rates. The program applies to programs at public universities that are not offered at the universities of the other participating states. The new statute directs the Board of

Governors to select for participation in the market those UNC graduate programs likely to be unique or not commonly available in other member states.

Employee Tuition Waivers

The budget act adds new G.S. 116-143.1 permitting full-time employees of UNC (and their spouses) who are legal residents of North Carolina to qualify for in-state tuition even if they have not yet lived in the state for twelve consecutive months.

The budget act, in Section 9.25, also directs the Board of Governors and the State Board of Community Colleges to study the feasibility of a tuition-waiver exchange program. Under such a program, full-time UNC employees would be allowed to take a specified number of courses at a community college without paying tuition; full-time community college students could, similarly, take a specified number of courses at a UNC constituent institution.

Tuition Waivers for Wards of the State

The budget act adds new G.S. 115B-2(a) to permit a North Carolina resident between the ages of seventeen and twenty-three to attend UNC institutions tuition free if he or she is a ward of the state or was a ward of the state at the age of eighteen.

Escheat Fund Financial Aid Appropriations

Section 9.6 of the budget act appropriates from the Escheat Fund just under $68 million for the UNC Board of Governors and just over $15 million for the State Board of Community Colleges for need-based student financial aid; the aid is to be allocated by the State Education Assistance Authority (SEAA).

Scholarship Loans for Prospective Teachers

The budget act adds new G.S. 116-209.38 establishing the Future Teachers of North Carolina Scholarship Loan Funds. It is to provide one hundred scholarships of $6,500 per year for North Carolina students in their junior and senior years of college enrolled in accredited teacher preparation programs at North Carolina colleges. The student must agree to become certified in math, science, special education, or English as a second language and to teach full-time in that subject area in a North Carolina public school for three years within five years of graduation. The student must maintain a B average. A student who fails to meet these requirements must repay the loan with interest.

In addition, the budget act amends G.S. 115C-468, -469, -470, -471, and -472.1, moving the amended provisions to G.S. Chapter 116, thus transferring the administration of the Scholarship Loan Fund for Prospective Teachers and the rule-making authority for the loans from the Department of Public Instruction to the SEAA.

Physical Education–Coaching Scholarship Loan

The budget act adds new G.S. 116-209.36 establishing the Physical Education–Coaching Scholarship Loan Funds. The program is to provide twenty-five scholarships of $4,000 per year for North Carolina students pursuing degrees at North Carolina colleges to become public school teachers and coaches or assistant coaches. The student must agree to accept employment as a coach or assistant in an elementary or secondary school in a rural or other need-based county. Each year a recipient is so employed as a teacher after receiving a bachelor's degree cancels the obligation to repay one year of the loan.

Nursing Scholars Program

The budget act adds new G.S. 90-171.61(B1) governing loans under the Nursing Scholars Program. It provides that if a recipient of a scholarship loan is enrolled, or accepted for enrollment, in a baccalaureate nursing program but is unable to pursue the nursing course for a semester due to limited faculty resources at the institution, he or she will continue to receive the scholarship loan for that one semester only.

In addition, S.L. 2005-40 (H 780) amends G.S. 90-171.65 to move administration of the need-based nursing scholarship fund to the SEAA. It has been jointly administered by the State Board of Community Colleges, the UNC Board of Governors, and the SEAA. As amended, the statute provides that scholarship loan funds are to be distributed to students enrolled in UNC constituent institutions, community colleges, and private colleges in amounts proportionate to the amounts awarded to each such group of students in the preceding year.

UNC Tuition for School of Science and Mathematics Graduates

G.S. 116-238.1 provides that North Carolina residents who graduate from the School of Science and Mathematics may receive a grant to cover the cost of tuition at any UNC constituent institution. The statute formerly limited the grant to no more than the cost of tuition at the institution. Section 9.14 of the budget act amends the statute to provide that the grant may not exceed the cost of attendance at the institution.

Robert P. Joyce

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Local Government and Local Finance

This chapter primarily discusses acts of interest to local governments that are not addressed in other chapters of *North Carolina Legislation 2005*. Local officials interested in particular topics should also consult Chapter 20, "Public Records"; Chapter 19, "Public Purchasing and Contracting"; Chapter 5, "Community Planning, Land Development, and Related Topics"; Chapter 15, "Local Taxes and Tax Collection"; Chapter 18, "Public Employment"; Chapter 8, "Economic and Community Development"; Chapter 11, "Environment and Natural Resources"; Chapter 9, "Elections"; Chapter 10, "Elementary and Secondary Education"; Chapter 12, "Health"; Chapter 16, "Mental Health"; Chapter 22, "Senior Citizens"; Chapter 23, "Social Services"; Chapter 7, "Criminal Law and Procedure"; and Chapter 17, "Motor Vehicles."

Local Government

Local Government Structures and Procedures

Public comment period requirements. In response to citizen complaints about the unwillingness of certain local boards to hear their comments, the General Assembly enacted S.L. 2005-170 (H 635), mandating that city councils, boards of county commissioners, and boards of education provide at least one period for public comment per month at a regular meeting of the board. The history of the act and case law on citizen comment periods as "limited public forums" under the First Amendment suggest that the board probably must allow comment on any subject that is within the jurisdiction of the local government. A board need not provide a public comment period if no regular meeting is held during the month.

The act allows boards to adopt reasonable rules governing the conduct of the public comment period, including but not limited to rules setting time limits for speakers and rules providing for (1) the designation of persons to speak for groups supporting or opposing the same position, (2) the selection of delegates from groups with the same position when the meeting hall's capacity is exceeded, and (3) the maintenance of order and decorum in the conduct of the hearing. This authorization of regulations is taken almost verbatim from the statutes governing the conduct of public hearings by counties and municipalities, G.S. 153A-52 and G.S. 160A-81, respectively.

Exercise of municipal functions by certain counties. S.L. 2005-35 (H 399), as amended by Section 10 of S.L. 2005-433 (H 787), authorizes a new form of local government for North Carolina: a county with municipal powers. Specifically, the act allows for the creation of a single, comprehensive local government for a county (1) having no incorporated municipalities or (2) having only one incorporated municipality, which has less than 100 acres in the county and is located primarily in another county. Creation of the unified government must be approved by the qualified voters of the county in a referendum called by the board of county commissioners. The rules governing this new type of entity are set out in new Article 24, Unified Government, in G.S. Chapter 153A, which contains the general county laws for North Carolina. The original bill was proposed primarily for Currituck County, a rapidly growing area along the coast and sounds in northeastern North Carolina, but the act also applies to two other eastern counties, Hyde and Camden. Currituck and Hyde counties have no incorporated municipalities or parts thereof within their boundaries, while Camden County falls under the second authorization.

If the voters approve the unified county government, the county is vested with all of the powers, duties, functions, rights, privileges, and immunities of a city, with certain limitations. In particular, the county may not exercise any of its city powers outside the county or within the portion of the municipality within the county, and it may not annex territory to the county. In addition, the statutes governing forms of government, administrative offices, and law enforcement for cities do not apply to the unified county, and the prohibition on zoning of bona fide farms by counties remains in force. The statutes governing municipal elections do not apply to any county covered by Article 24, except to the extent that they already did without the new law.

A county subject to the second authorization (Camden County) may not levy property taxes on the *entire county* for any function authorized by Article 24 but not otherwise authorized by the law for counties. Instead, any such Article 24 service (for example, road construction and maintenance) must be financed by means of a property tax levied within a service district consisting of the entire area of the county not within an incorporated municipality. In establishing such a countywide service district, the county is subject, under new G.S. 153A-302(e), to special, more limited requirements concerning findings and notice than is the case for other service districts.

S.L. 2005-35 provides that a unified county is to be treated much like a city whenever the Joint Legislative Commission on Municipal Incorporations makes a recommendation to the General Assembly concerning a proposed incorporation that might affect the county. Specifically, the act amends G.S. 120-169 and G.S. 120-166, respectively, to prohibit the commission from making a positive recommendation on incorporating a new town if any part of the proposed municipality is included within the boundaries of a unified county, or if the proposed municipality lies outside but within certain distances of the county. These provisions will likely make it difficult politically for the residents of a particular area within a unified county to obtain legislative approval to incorporate as a municipality.

The county commissioners in a unified county may by ordinance provide that Article 24 does not confer particular municipal powers, duties, and the like on the county. If the board of commissioners exercises any responsibilities authorized under both the county law and the municipal law (G.S. Chapter 160A), and those statutes conflict, the board must state in its minutes the chapter under which it is acting.

Boundary changes between adjacent service districts. S.L. 2005-136 (S 396) enacts G.S. 153A-304.3, which authorizes a board of county commissioners to adopt a resolution relocating the boundary lines between adjoining county service districts created pursuant to G.S. Chapter 153A, Article 16, if the districts were established for substantially similar purposes. The boundary lines may be changed in accordance with a petition from landowners or in any manner the board considers appropriate. On receipt of a request to change service district boundaries, the board must prepare a report containing specified information about the change and hold a public hearing, with published notice, on the proposal before taking action. The resolution changing the districts' boundaries is to take effect at the beginning of a fiscal year commencing after the passage of the resolution, as determined by the board.

Civil liability of regional public transportation authority. S.L. 2005-160 (H 1503) enacts new G.S. 160A-627, specifying that a regional public transportation authority established pursuant to

G.S. Chapter 160A, Article 26, is deemed to be a city for purposes of civil liability pursuant to G.S. 160A-485 (waiver of immunity through insurance purchase). (The Triangle Transit Authority, based in the Research Triangle Park, is currently the only such authority in existence.) The act waives the authority's governmental immunity up to a minimum of $20 million per single accident or incident and requires the authority to maintain at least that much liability insurance. For purposes of the statute, participation in a local government risk pool pursuant to G.S. Chapter 58, Article 23, is considered to be the purchase of insurance. S.L. 2005-160 applies to claims arising on or after July 7, 2005.

Vacancies in Beaufort County elective offices. Vacancies in the offices of county commissioner, register of deeds, and sheriff in North Carolina's counties are filled by the board of county commissioners, after receiving the advice of the county executive committee of the political party of the person being replaced. G.S. 153A-27. However, in about forty-one counties, the board of commissioners has no flexibility in making the appointment. The board must appoint the political party's nominee if a nomination is made within a specified time. G.S. 153A-27.1. Since 1997, Beaufort County has had a special rule different from either statute—the commissioners were to appoint a replacement from a list of nominees submitted by the party executive committee. S.L. 2005-263 (H 922) repeals the special rule and places Beaufort County back under G.S. 153A-27.1.

Police Power

Highway solicitation ordinances. S.L. 2005-310 (H 813) may answer some questions about the extent of local government authority to regulate solicitation on public rights-of-way, particularly along state highways. The act enacts new G.S. 20-175(d) to authorize local governments to enact ordinances restricting or prohibiting a person from standing on any street, highway, or right-of-way excluding sidewalks while soliciting, or attempting to solicit, any employment, business, or contributions from the driver or occupants of any vehicle. The activities of licensees, employees, and contractors of the North Carolina Department of Transportation (NCDOT) and of municipalities that are engaged in construction or maintenance or in making traffic or engineering surveys are exempted.

S.L. 2005-310 leaves several questions about roadside solicitation unanswered. First, the act authorizes local governments to prohibit solicitation of "*any* employment, business, or contributions" (emphasis added). Does this mean that a local government may prohibit solicitation in *any one or more* of these categories, while allowing other roadside solicitation to continue? For example, could it prohibit solicitation by unemployed or homeless persons, while allowing charitable solicitation by civic clubs or allowing the operation of fruit and vegetable stands? Would such an approach be consistent with the First Amendment to the United States Constitution? Second, is there less justification for a prohibition if none of the prohibited activities interfere with traffic? Third, the act allows local governments to prohibit only standing on roads and rights-of-way while soliciting or attempting to solicit. Could a local government use the act to regulate persons sitting in a chair by the roadside?

Exemptions from the statewide smoking law. S.L. 2005-19 (H 239) and S.L. 2005-168 (H 1482) exempt the buildings and grounds of health departments and social services departments, respectively, from G.S. Chapter 143, Article 64, which deals with smoking in public places. (Health departments were already exempt from the article, but the exemption did not specify what health department property was covered.)

The effect of these acts is to permit local governments to regulate smoking in the specified areas, free of the various restrictions to which they would otherwise be subject under Article 64. The *grounds* of a health or social services department is defined as the area located within 50 linear feet of the department.

Property Transactions

Laws enacted this session concerning the sale of property by local governments, acquisition of real property by regional councils of governments, and the disposition of firearms are discussed below.

Informal property disposal and electronic auctions. S.L. 2005-227 (H 1332) makes two important changes in G.S. Chapter 160A, Article 12, the statute governing property disposal by cities,

counties, school administrative units, and other local governments. First, the act amends G.S. 160A-266(c) to raise the upper limit on disposal of personal property using informal, locally adopted procedures from $5,000 to $30,000 for any one item or group of similar items. Second, it amends G.S. 160A-270(c) to clarify the notice procedures for public auctions of property that are conducted electronically. Under the amended statute, notice of the auction may be published in a newspaper having general circulation in the local political subdivision, by electronic means, or both. The local governing board must approve any decision to publish notice solely by electronic means for a particular contract or for all contracts under the electronic auction authorization.

Acquisition of real property by regional councils of governments. G.S. 160A-475(8) has prohibited regional councils of governments from constructing or purchasing buildings or acquiring title to real property. Consequently they have had to lease all of the facilities needed for their operations. S.L. 2005-290 (H 819) enacts new G.S. 160A-475(7a), which partially repeals this prohibition. Specifically, the act authorizes regional councils to acquire real property by purchase, gift, or otherwise and to improve that property to meet their office space and program needs. Regional councils are still prohibited, however, from exercising the power of eminent domain.

Disposal of firearms seized by law enforcement agencies. S.L. 2005-287 (H 1016) amends various laws governing the disposal of firearms seized, found, or received by local and other law enforcement agencies to allow the agencies more disposal options in many cases. An agency may be allowed either to keep the firearms for its official use or to trade or exchange them with or sell them to a federally licensed firearms dealer, depending on the applicable statute and provided that procedures set out in the act are followed. If firearms are sold, the proceeds may be used either for law enforcement purposes or to maintain free public schools in the county, depending on the statute under which the disposition occurs. S.L. 2005-287 is discussed in detail in Chapter 7, "Criminal Law and Procedure."

Public Enterprises and Transportation

In addition to this section, the reader interested in particular aspects of this subject should consult Chapter 5, "Community Planning, Land Development, and Related Topics"; and Chapter 17, "Motor Vehicles."

Local government stream-clearing programs. Obstructions in streams make removal of storm water more difficult and can lead to increased flooding. These concerns have led some local governments to consider establishing stream-clearing programs. S.L. 2005-441 (H 1029) specifically authorizes counties and municipalities to address this issue. Under new G.S. 153-A-140.1 and G.S. 160A-193.1, counties and cities, respectively, may remove natural and artificial obstructions in stream channels and floodways if the obstructions may impede the passage of water when it rains. The act applies to stream-clearing activities that begin on or after September 27, 2005.

The act also limits county and municipal liability with respect to stream-clearing. It specifies that the actions of a city or county to clear stream obstructions do not create or increase the city's or county's responsibility for the clearing or maintenance of the stream or for the stream's flooding. County and municipal stream-clearing efforts do not create any ownership in the stream or obligation to control it. These efforts do not affect any otherwise existing private property right, responsibility, or entitlement concerning a stream, nor is the act to be construed as affecting existing rights of the state to control or regulate streams or activities within streams.

The city or county must comply with all state and federal legal requirements in implementing its program. Nothing in the new law relieves a local government from negligence that might be found under otherwise applicable law.

Maintenance of state roads. S.L. 2005-382 (H 747) clarifies definitions concerning the state road system used in G.S. 136-44.2, a statute dealing with the state budget and appropriations for highways. The act specifies that the terms "state primary system" and "state secondary system" include all portions of those road systems located both inside and outside municipal limits, and it deletes the somewhat confusing category of "state urban system."

The act also provides a means for coordinating maintenance and resurfacing work between municipalities and state highway divisions. Specifically, it amends G.S. 136-66.1 to require all state

highway divisions and those cities and towns that are under contract with NCDOT to maintain roads on the state highway system to develop annual plans for that work. The work plans must be as consistent as possible with the needs identified in the state road condition and maintenance report developed biennially by NCDOT in accordance with G.S. 136-44.3. In developing its plan, each highway division must give consideration to any special needs or information provided by that division's municipalities and must make the plan available to the municipalities on request. The plans developed by the cities and towns must be submitted to the respective division engineers and must be mutually agreeable to both parties.

Prohibition of "bundling" of electric services. S.L. 2005-150 (S 512) enacts new G.S. 75-39 to prohibit municipalities and other providers of water or sewer services from offering or agreeing to provide, extend, enhance, or accelerate the provision of these or other municipal services or facilities to any person in consideration of that person or another person agreeing to receive electric service from the municipality or another electric supplier. Further, these providers may not refuse to provide or threaten or act to deny, delay, or terminate the provision of, any municipal services or facilities to anyone as a result of, or in an attempt to influence, that person's choice of an electric supplier. Practicing such so-called "bundling" is declared to be an unfair method of competition and an unfair act or practice under G.S. 75-1.1 (part of the state's antitrust laws).

Electric service territories. S.L. 2005-150 also introduces a framework within which North Carolina's electricities (cities that are in the electricity business) may be able to settle territorial disputes with other electric suppliers such as electric membership corporations. Specifically, the act provides that during the period beginning June 1, 2005, and ending May 31, 2007, a city must obtain the written consent of an electric membership corporation before it extends an electric distribution line outside of the city's corporate limits and into territory assigned to the corporation, and that a corporation must obtain the consent of any city the corporate limits of which are within three miles of any part of a line or extension proposed by the corporation before it undertakes construction or extension of the line (new G.S. 160A-331.1, 160A-331.2, and 117-10.3). The act requires that this consent be given, unless the consenting party concludes that the line's construction is not supported by public need. During this same period, electric membership corporations and cities that own electric lines must undertake good faith negotiations regarding the provision of electric service in areas outside a city's corporate limits and submit those agreements to the N.C. Utilities Commission for approval. S.L. 2005-150 specifies that any dispute concerning a party's failure to grant consent or to enter into an agreement concerning electric service outside a city's corporate limits must be resolved through procedures for prelitigation mediation of territorial disputes set out in new G.S. 7A-38.3B. Under G.S. 7A-38.3B(i), a member of the Public Staff of the N.C. Utilities Commission has authority to issue a binding opinion resolving any territorial dispute that is not resolved through negotiation or mediation.

S.L. 2005-150 requires any supplier that supplies electric services in an area where the consumer has a right to choose its supplier to notify the consumer of that choice. If the supplier fails to provide this notice, it will forfeit its right to service that customer [G.S. 160A-332(a)(6b)].

Finally, the act makes it unlawful for a primary or secondary supplier to provide electricity in an area it does not have the right to serve. It requires such a supplier to cease providing services upon written notification by the lawful provider servicing the area, unless the challenged supplier has a good faith basis for believing it has authority to continue rendering the service. The act authorizes the legitimate supplier to bring an action to compel the challenged supplier to discontinue the unlawful service and to remove its facilities used to provide it. The lawful supplier may recover its costs—including attorneys' fees—of enforcing these provisions, which are found in new G.S. 160A-332(c).

Subdivision streets and utilities. S.L. 2005-286 (H 1469) makes the dedicated streets or other public rights-of-way shown on recorded subdivision plats or maps immediately available for use by public utilities and cable television systems. The act's details are discussed in Chapter 5, "Community Planning, Land Development, and Related Topics." S.L. 2005-286 was effective August 22, 2005, with respect to maps and plats recorded after that date.

Reports of positive drug and alcohol test results for transit operators. S.L. 2005-156 (H 740) requires public transit operators and other employers of persons who operate commercial motor

vehicles and are subject to federal drug and alcohol testing to report any positive results on federally required tests to the N.C. Division of Motor Vehicles. The employer must also disqualify the person testing positive from operating such vehicles until successful completion of treatment. This act is discussed in detail in Chapter 17, "Motor Vehicles."

Representation of metropolitan planning organizations on regional transportation authority boards of trustees. S.L. 2005-322 (H 1202) clarifies that either the chair of each metropolitan planning organization within the territorial jurisdiction of a regional transportation authority organized under G.S. Chapter 160A, Article 27, or an organization member designated by the planning organization is to serve as a member of the authority's board of trustees. Previously, if the chair did not serve, he or she was to appoint either the chair of the transportation advisory committee, or a committee designee, to serve.

Animal Control

The North Carolina General Assembly enacted several new laws in 2005 that will affect animal control services provided by local governments. The new laws address state regulation of animal shelters, euthanasia of animals held in shelters, financial responsibility for the care of dogs allegedly used for fighting, criminal penalties for cockfighting, and state regulation of petting zoos. The acts dealing with the first four topics are discussed below. The act regulating petting zoos, S.L. 2005-191 (S 268), or Aedin's Law, is covered in Chapter 12, "Health."

Regulation of animal shelters. Local governments are authorized to operate or contribute to the support of animal shelters. Under the Animal Welfare Act (G.S. Chapter 19A, Article 3), the North Carolina Department of Agriculture and Consumer Services is responsible for establishing and enforcing licensing regulations governing animal shelters. Until recently, only private animal shelters operated by animal welfare organizations were subject to those regulations; city and county shelters were exempt.

In 2004 the General Assembly enacted S.L. 2004-199 to require local government shelters to comply with department regulations. The 2004 amendments, however, did not provide the department with specific authority to enforce those regulations against local government shelters. A provision in the Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), directly addresses the ambiguities that remained after the 2004 amendments. The legislation amends the definition of "animal shelter" in the Animal Welfare Act to clarify that all of the provisions of the act apply not only to private shelters but also to those owned, operated, or maintained by or under contract with a local government. This change was effective October 1, 2005. In general, the act requires animal shelters to have certificates of registration from the department, authorizes the department to take action on a certificate of registration, and requires the Board of Agriculture to establish standards (i.e., rules) governing the care of animals at shelters, transportation of animals to and from shelters, and record keeping at shelters.

Two additional changes were made to the definition of *animal shelter*. First, the definition was expanded to encompass facilities affiliated with nonprofit organizations devoted to animal rehabilitation. Second, the definition previously encompassed facilities used to house or contain any dogs and cats. The language was clarified to limit the scope of the definition to facilities housing or containing "seized, stray, homeless, quarantined, abandoned or unwanted" dogs and cats.

Euthanasia. Until this session, the only state law addressing euthanasia procedures in local government shelters was the rabies law (G.S. 130A-192). The rabies law permits animal control officers or shelters to employ euthanasia procedures that are approved by one of three national organizations: the American Veterinary Medical Association, the Humane Society of the United States, or the American Humane Association. S.L. 2005-276 amends a section of the Animal Welfare Act (G.S. 19A-24) to require the Board of Agriculture to adopt new rules related to the euthanasia of animals in animal shelters and other facilities regulated by the department (such as pet shops and boarding kennels). The rules will identify those euthanasia methods that are approved for use in all of the regulated facilities in all situations (not just when an animal is impounded for a violation of the rabies law). The rules must also address equipment, process, separation of animals, age and condition of animals, and mandatory training of personnel.

Dogfighting. Current state law makes it a crime to be involved with dogfighting and dog baiting. G.S. 14-362.2. Often when a dogfighting operation is discovered, local animal control officials are involved in seizing the dogs and providing food, shelter, and veterinary care for them until the criminal case has been resolved. If an alleged offender is convicted under the criminal law, the court may order the person convicted to reimburse the local government for the cost of the animals' care while the case was pending, but the local government rarely recovers the full amount.

S.L. 2005-383 (H 1085) enacts new G.S. 19A-70, which allows animal shelters to get a court order requiring a defendant in a dogfighting case to pay in advance for the anticipated costs of caring for seized dogs. If the defendant does not comply with the order, the dogs may be forfeited, and the shelter may either euthanize them or place them for adoption (if appropriate). If the defendant complies with the order and is subsequently found not guilty, the defendant is entitled to a full refund of the entire amount deposited with the court. The law was effective December 1, 2005.

Cockfighting. Current state law makes it a crime to be involved with an exhibition featuring cockfighting G.S. 14-362. S.L. 2005-437 (H 888) significantly increases the penalty for these activities from a Class 2 misdemeanor to a Class I felony.

Petting zoos. A new state law regulating petting zoos, S.L. 2005-191, called Aedin's Law, is discussed in Chapter 12, "Health."

Local Government Finance

Revenues

Lottery revenues. The most significant source of new revenue affecting local government will be the new state lottery approved at the very end of the 2005 session. [The lottery was enacted by S.L. 2005-344 (H 1023), as modified by S.L. 2005-276 (S 622), and is summarized in Chapter 24, "State Government."] The lottery sponsors estimate that it will provide about $300 million in net revenues, and 40 percent of this amount, or about $120 million annually, will be allocated to the Public School Building Capital Fund to support public school construction. Of this amount, 65 percent is to be allocated to local school units on the basis of average daily membership, while the remaining 35 percent is to be allocated to local school administrative units located, in whole or part, in counties in which the effective county tax rate is higher than the effective statewide average rate.

Local option sales taxes. Late in the session, when it appeared that the Senate would not pass the lottery legislation, the House passed and sent to the Senate three bills authorizing local referenda in forty-six counties to approve an additional 0.5 percent local sales and use tax. Although there were some differences among the three bills, each would earmark the proceeds from the tax, should it pass, to school construction. These bills remained in the Senate at session's end; given the enactment of the lottery legislation, their prospects might not be bright in 2006.

Tax-base sharing. In 2003 the General Assembly enacted G.S. 158-7.4, which is intended to facilitate tax-base sharing by local governments cooperating in economic development projects. It permits two or more local governments to develop a project cooperatively and then agree to share in the taxes levied on the resulting private development. Originally the statute limited the duration of such an agreement to forty years. S.L. 2005-72 (S 867) extends this period to ninety-nine years.

911 charges. G.S. Chapter 62A authorizes two charges on telephone service to help support creation and maintenance of 911 centers. Article 1 of the chapter authorizes a locally imposed charge on land-based telephone service, while Article 2 authorizes a state-imposed charge on wireless telephone service, with a portion of the proceeds shared with local governments. S.L. 2005-439 (H 1261) amends the law as regards both of these charges.

Local charges. The act freezes the maximum 911 charge that a local government may levy. It is either the amount charged on July 1, 2005, or the amount charged pursuant to a resolution adopted on or before August 15, 2005, and effective on or before December 15, 2005, whichever is greater. In addition, the act directs the Joint Legislative Utility Review Committee to study a set of issues

associated with local 911 charges and report to the 2006 session of the General Assembly. The specific issues assigned to the committee are as follows:

- Mechanisms to improve accountability for collection and spending of 911 charges by local governments
- Modification of what constitutes authorized expenditures from the proceeds of these local charges
- Whether to adopt a statewide, uniform 911 charge
- Whether to create a State Emergency Telephone Fund and a formula for distributing those moneys to local governments
- Whether to designate the Community College System as the preferred provider of training for public safety answering point staff

Wireless charges. The initial monthly 911 charge for wireless phone service was $0.80, which the act reduces to $0.70. The act retains the power of the Wireless 911 Board to modify the charge every two years. It also increases the share of the proceeds from this charge allocated to local governments. The original legislation had allocated 60 percent of these proceeds to providers of wireless telephone services and 40 percent to operators of Enhanced 911 centers. The act reduces the first share to 53 percent and increases the local government share to 47 percent. In addition the act expressly permits a local government to spend its share on equipment used to receive both land-based and wireless 911 calls. Finally, the act gives express authority to the Wireless 911 Board to enforce the restrictions on use of Enhanced 911 funds, including the power to require repayment to the state of funds used for unauthorized purposes.

Court fees. S.L. 2005-363 (H 890) adds a new fee to be charged in some criminal cases in district or superior court. If the defendant is convicted, and if as part of the investigation a local government crime lab conducted DNA analysis, a test of bodily fluids, or an analysis of a controlled substance, then the court may order the defendant to pay up to $300 to the local government or governments operating the lab. The money is to be placed in the government's or governments' general fund and used for law enforcement.

Borrowing

Project development bonds. In November 2004 the state's voters approved a constitutional amendment that authorized the General Assembly to enact legislation permitting project development bonds in North Carolina. (In other states these bonds are usually known as tax increment or tax allocation bonds.) The implementing legislation was enacted in 2003, contingent on the success of the referendum, but the 2005 General Assembly enacted a series of modifications to the original legislation, most of which are minor in nature. These were included in two separate bills: S.L. 2005-238 (H 1117), which includes other legislation relating to local government finance, and S.L. 2005-407 (S 528). The changes to the project development statutes are as follows:

- A city issuing project development bonds will be able to pledge its share of local government sales tax proceeds as additional security for the bonds. (A county may not pledge sales tax proceeds unless the bonds have been approved by the county's voters.)
- A city or county issuing project development bonds will be able to pledge the proceeds from special assessments levied against property within a project development district as additional security for the bonds.
- A city or county issuing project development bonds will be able to pledge a security interest in property financed or improved with the proceeds of the bonds as additional security for the bonds.
- The original legislation limits the total size of development financing districts within a county or city to 5 percent of the unit's land area. When a city annexes property within such a district, the city's taxes are not automatically diverted to retiring the project development bonds associated with the district; rather, the city must agree to the diversion. Unless the city does so agree, the land within such a district does not count against the 5 percent limit for the city.

- The original legislation permits project development districts to be established in redevelopment areas or in areas that are appropriate for economic development. With the latter sort of district, however, the statute limits the amount of commercial development that can be forecast for the district if it is outside a city's central business district. That limit is 20 percent of the projected floor space of private development within the district. Under the 2005 legislation, the limit does not apply to a district located in a tier one area and created primarily for tourism-related economic development.

Revenue bonds. Three separate acts modify the law with respect to revenue bonds. The most important change is in S.L. 2005-238, which amends G.S. 159-83 to permit a local government issuing revenue bonds to pledge in support of bond repayment real or personal property that is part of the revenue bond project or of the enterprise system being improved with revenue bond proceeds. This form of security would be in addition to the basic pledge of net revenues from the project or the enterprise system of which it is a part.

Two other changes to the revenue bond statute deal with projects involving special purpose units. S.L. 2005-249 (S 1011) permits a local government to issue revenue bonds for a water treatment facility located on land leased by the local government from a water and sewer authority. The legislation permits the treatment facility to be operated by the authority or by one of the political subdivisions that comprise the authority. This act was probably enacted to facilitate a particular project. S.L. 2005-342 (H 1030) enacts new G.S. 159-201 to permit an airport authority that is authorized by law to construct improvements or facilities and then lease those facilities to another party to borrow money to pay for the improvements and pledge the leases as security for the repayment. This new provision was included in a bill that also expanded the powers of the Brunswick County Airport Commission, which suggests the borrowing provisions were enacted with that county's airport in mind.

Other bond changes. S.L. 2005-238, parts of which are discussed above, also makes changes to the laws concerning procedures for bond issuance and repayment. Most of these changes are technical in nature—for example, allowing the Secretary of the Local Government Commission flexibility to adopt rules in areas in which the statute had set out specific standards. Two important changes, however, further the policy of expanding the security that may be given by local governments when they borrow. First, the act allows a local government borrowing money from the Clean Water Revolving Loan program to secure the loan by providing a security interest in the facility financed with the loan or in the enterprise system of which it is a part. Second, and similarly, the act allows a public agency financing hospital improvements through the Medical Care Commission to secure the loan by providing a security interest in the hospital facility being improved.

Financial Administration

Sales tax refunds to schools. For many years school administrative units were not entitled to sales and use tax refunds, but in 1998 the General Assembly amended the statutes to permit these entities to file for such refunds. The 2005 appropriations act (S.L. 2005-276), however, takes school administrative units out of the refund statute once again, providing that the refund money should henceforth be placed in the State Public School Fund. This change may stimulate county construction of schools on behalf of school administrative units, as permitted under G.S. 153A-158.1. Because the facility would be owned by the county, the county could seek a refund for any sales or use tax paid during the construction project.

Finance officer bonds. Since 1973 the Local Government Budget and Fiscal Control Act has provided that finance officers must be bonded in an amount between $10,000 and $250,000. S.L. 2005-238 updates that requirement by establishing the minimum bond at $50,000 and removing the maximum. (This provision became effective August 1, 2005; local governments and public authorities should examine their fidelity bond policies to ensure they meet the new minimum.)

New investment instrument. If a local government invests its idle cash with a bank, that money is secured in two ways. First, a minimum amount is insured by federal deposit insurance, currently the first $100,000. Second, any deposit in excess of the amount covered by federal insurance is secured by collateral posted by the bank; the collateral is typically money market securities. In recent years a

number of financial firms have marketed a new investment practice that allows a local government to invest an amount in excess of the federal deposit insurance with one bank, then have that bank buy certificates of deposit from one or more other banks, with the amount invested in each other bank within the amount of the federal insurance. Because the final deposits are with different banks, the local government's money is separately insured in each bank. S.L. 2005-394 (H 1169) amends the public investment statutes in North Carolina to allow the state and its local governments to participate in this sort of investment vehicle. Although the original bank, with which the local government deals directly, must be in North Carolina, the other participating banks may be located anywhere within the United States.

Miscellaneous. S.L. 2005-326 (S 682) expands the kinds of local government entities that may participate in the set-off debt collection system to include public health authorities, metropolitan sewerage districts, and sanitary districts. (This change is effective as to income tax refunds determined on or after January 1, 2006.)

S.L. 2005-368 (S 505) increases the fee paid by counties to county medical examiners for conducting autopsies from $75 to $100.

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Local Taxes and Tax Collection

Collection of property taxes for two types of property—motor vehicles and manufactured homes—has traditionally posed the greatest challenge for local tax collectors. While the General Assembly has enacted numerous laws to facilitate the collection of taxes assessed on motor vehicles and manufactured homes, none of the legislative remedies to date have eradicated the collection difficulties posed by the mobility of such property. The 2005 General Assembly took substantial steps toward solving the problems associated with collecting taxes for registered motor vehicles, the largest of these problematic categories. New legislation establishes funding and launches a process for the full integration of vehicle taxation and registration. Beginning July 1, 2009, taxes will be billed simultaneously with registration fees and must be paid before a vehicle's registration is renewed. The 2005 amendments to the laws governing taxation of motor vehicles are the most significant since 1991, when the legislature first linked vehicle taxation to vehicle registration.

Tax collectors' efforts to strengthen enforced collection measures for the other major category of mobile property, manufactured homes, were unsuccessful in the 2005 General Assembly. House Bill 1549 would have required lienholders to pay taxes due before repossessing a manufactured home and would have created an automatic tax lien against such homes of the same nature as the lien that attaches to real property, but the bill languished in committee.

Legislative enactments in 2005 affecting the assessment of property taxes were limited. House Bill 648, which exempted from property taxes improvements to real property held for sale by a builder, generated considerable negative attention from county assessors concerned that such legislation would substantially reduce annual growth in counties' tax bases. Like House Bill 1549, the exempt builder's inventory bill never emerged from committee. Statutes governing present-use assessment were once again amended, in part to conform to existing assessment practice. Narrow amendments to the exemption for property owned by religious bodies and for property used for nonprofit educational, scientific, literary, or charitable purposes also were enacted.

The 2005 General Assembly enacted a bevy of local acts authorizing local governments to levy or increase room occupancy taxes. Mecklenburg County became the first and only taxing unit authorized to impose an occupancy tax of greater than 6 percent. A local act permits the county to increase its occupancy tax by 2 percent (bringing the total to 8 percent) upon confirmation that the NASCAR Hall of Fame Museum will be located in the City of Charlotte.

Registered Motor Vehicles

Integrated System for Simultaneous Taxation and Registration

S.L. 2005-294 (H 1779) amends Article 22A of G.S. Chapter 105 to create a combined system for registration and taxation of motor vehicles to become effective July 1, 2009, or upon the earlier creation of a combined registration renewal and tax collection computer system within the Division of Motor Vehicles (DMV). The act increases the first month's interest on delinquent registered motor vehicle taxes from 2 to 5 percent, beginning January 1, 2006. Sixty percent of the increased first month's interest is allocated to fund the development of an integrated computer system for taxation and registration. While S.L. 2005-294 states that 60 percent of all interest is to fund the new system, the intent of bill sponsors and supporters was for counties to remit 60 percent of the first month's interest only. The North Carolina Department of State Treasurer issued Memorandum #1046 on December 12, 2005, instructing counties to remit only 60 percent of the first month's interest for deposit in the integrated computer system fund. The Department of State Treasurer explained that the drafting error would likely be corrected during the 2006 session.

Under the combined system, the Property Tax Division of the Department of Revenue must annually adopt a schedule of motor vehicle values for use by all county assessors. The schedule must account for local market conditions and allow adjustments for mileage and condition. Taxes on registered motor vehicles become due on the date a new registration is applied for or at the end of the grace period following the expiration of a vehicle's current registration. Under the current system, property taxes for the twelve-month period that begins the first month following vehicle registration or renewal become due four months after the registration or renewal. If those taxes remain unpaid four months after they become due (eight months after the registration or renewal), the tax collector may submit the registration information to DMV, which places a block on the registration, preventing it from being renewed without payment of taxes. S.L. 2005-294 eliminates the need for this post-registration enforced collection remedy by making payment of taxes a prerequisite to issuance or renewal of the registration for the taxable period.

S.L. 2005-294 also combines the tax notice and the registration renewal notice, which will be prepared by the Property Tax Division once the integrated system is in place. The act permits the Department of Revenue (DOR) to establish a fee equal to the cost of sending the combined notice and provides that DOR will receive a fee for each notice from the taxes and fees remitted to the taxing units in which the vehicle is registered.

Taxes and registration fees may be collected by DMV or a DMV agent, which are defined as "collecting authorit[ies]" under the act. The collecting authority may retain a fee equal to at least one-third of the compensation DMV agents currently receive for registration renewals pursuant to G.S. 20-63(h). Each collecting authority must provide a weekly financial report to taxing units and DMV.

The act directs the Property Tax Division and DMV to study and develop a plan for determining the method for valuing motor vehicles and for implementing an integrated computer system. The divisions must report their findings to the Revenue Laws Study Committee, the Joint Legislative Transportation Oversight Committee, and the Fiscal Research Division by April 30, 2006.

Proration and Billing for Vehicles Converted to Staggered Registrations

The 2004 General Assembly enacted legislation converting registrations for commercial and dealer-owned vehicles from an annual to a staggered system, beginning January 1, 2006. DMV plans to implement these changes by renewing annual registrations in 2006 for periods ranging from seven to eighteen months. These registrations will expire in varying months, from July 2006 to June 2007. Upon expiration, commercial and dealer registrations may be renewed for a twelve-month period. Since the renewals will take place in varying months, a staggered registration system will result.

Registered motor vehicles are listed by taxing units based upon registration information provided by DMV, and former G.S. 105-330.6 defined a vehicle's tax year as beginning the month following the date the vehicle's registration expires and extending for twelve months. Taxing units therefore needed

legislative authorization to tax registered motor vehicles for a period other than twelve months, so that the tax year would correspond to the period of registration.

Sections 8 and 9 of S.L. 2005-313 (H 116) amend G.S. 105-330.5 and G.S. 105-330.6 by defining a vehicle's tax year as its period of registration and by permitting taxing units to levy ad valorem taxes on motor vehicles for periods longer or shorter than twelve months.

Exclusion of Highway Use Tax from Valuation

S.L. 2005-303 (H 988) amends G.S. 105-330.2(b) to require that highway use taxes paid by the purchaser of a motor vehicle be excluded from any valuation of the vehicle based upon its sales price.

Municipal Vehicle Taxes

Increased municipal vehicle taxes are authorized for the following municipalities:

Cabarrus County municipalities. S.L. 2005-116 (S 407) authorizes municipalities in Cabarrus County to increase municipal vehicle taxes from $5 to $20.

City of Winston-Salem. S.L. 2005-278 (H 464) amends G.S. 20-97(b) to permit the City of Winston-Salem to immediately increase its municipal vehicle tax from $5 to $15 and to increase the tax to $20 effective January 1, 2007. Proceeds of a tax above $10 must be used in equal parts for traffic management, public transit, and nonmotorized transportation functions.

Town of Black Mountain. S.L. 2005-306 (H 691) amends G.S. 20-97(c) to permit the Town of Black Mountain to levy an additional municipal vehicle tax of $5 to fund its local public transportation system.

Town of Carrboro. S.L. 2005-306 amends G.S. 20-97(b) to authorize the Town of Carrboro to increase its general municipal vehicle tax from $5 to $25.

Collection of Property Taxes

Payment of Taxes by Offset

G.S. 105-357 formerly prohibited the payment of taxes by offset of any obligation owed to the taxpayer by the taxing unit. S.L. 2005-134 (S 537) amends G.S. 105-357 to permit payment of taxes by offset of an obligation arising from a lease or another contract entered into between the taxpayer and the taxing unit before July 1 of the fiscal unit for which the unpaid taxes are levied.

The amended provision may benefit a taxing unit that has entered into a contract with a taxpayer who subsequently declared bankruptcy before paying property taxes. To the extent that a right of offset exists under state law, that right is preserved by the bankruptcy code. Thus, a taxing unit may seek permission from the bankruptcy court to enforce payment of taxes by withholding payments due under a qualifying contract.

Payment before Deed Recordation or Issuance of Building Permit

S.L. 2005-433 (H 787) provides counties with various local mechanisms to enforce payment of property taxes. Section 1 of the act amends Chapter 65 of the 1993 Session Laws, as amended by Section 9 of S.L. 1997-410, to require that Ashe County municipal tax collectors, in addition to the county tax collector, certify that all delinquent taxes have been paid on property described in a deed before the Ashe County Register of Deeds may record the instrument.

The act amends G.S. 153A-357 to permit Green, Lenoir, Iredell, Wayne, and Yadkin counties to adopt ordinances providing that a permit may not be issued to a person who owes delinquent property taxes.

S.L. 2005-109 (H 131) amends G.S. 161-31 by adding Johnston, Onslow, Robeson, and Surry counties to the list of counties that may adopt resolutions requiring that the register of deeds not accept

a deed transferring real property unless the county tax collector certifies that no delinquent ad valorem county taxes, ad valorem municipal taxes, or other taxes with which the collector is charged are a lien on the property described in the deed.

Assessment of Property Taxes

Exemptions

Literary purpose includes literature of stage and screen. Section 59 of S.L. 2005-435 (H 105) amends G.S. 105-278.3, which exempts certain property owned by religious bodies from taxation, by redefining "literary purpose" to include "literature of the stage and screen as well as the performance or exhibition of works based on literature." Given that the former definition of literary purpose specifically included purposes pertaining to drama, it is unclear whether the amendment expands permissible purposes warranting exemption. Interestingly, the former definition of literary purpose remains in effect for purposes of G.S. 105-278.7, which exempts from taxation certain property used for nonprofit literary purposes.

Exemption of property used for a cultural purpose. Section 59 of S.L. 2005-435 also amends G.S. 105-278.7, which exempts from taxation certain property used for educational, scientific, literary, or charitable purposes. As amended, G.S. 105-287.7 also exempts from taxation buildings and adjacent land owned by a qualifying entity and occupied by a permissible agency that uses the property wholly and exclusively for nonprofit *cultural* purposes. Formerly, only property owned by a religious body could qualify for exemption—pursuant to another statute, G.S. 105-278.3—if used by another agency for a cultural purpose. Property owned by qualifying entities other than religious bodies was exempted only if used for nonprofit educational, scientific, literary, or charitable purposes. New G.S. 105-278.7(f)(5) adopts the G.S. 105-278.3 definition of a "cultural purpose" as one "conducive to the enlightenment and refinement of taste acquired through intellectual and aesthetic training, education and discipline."

Use-Value Amendments

S.L. 2005-313 (H 116) and S.L. 2005-293 (H 705) amend various provisions of the present-use valuation statutes, addressing the premium rental rates associated with horticultural land and clarifying eligibility requirements for transferred property as well as whether tobacco buyout payments constitute income produced from the property.

Horticultural or agricultural? S.L. 2005-313 amends GS 105-277.2(3) to provide that land used to grow horticultural and agricultural crops on a rotating basis or upon which a horticultural crop is planted and harvested within one growing season may be considered agricultural land when there is no significant difference in the cash rental rate for the land. The act also amends G.S. 105-277.7(c) to require that the present-use value manual state separate cash rental rates for agricultural versus horticultural crops. The Department of Revenue is directed to study cash rents for horticultural lands, as it has for agricultural property.

The piggyback is back. Owners of property in the use-value program have been permitted through various iterations of the present-use statutes to extend the present-use classification of a parent parcel to other parcels that would not immediately qualify for present-use taxation due to the four-year ownership requirements. This practice has been referred to as "piggybacking" additional parcels and continues to be recognized by tax assessors. The statutory basis for this practice had, however, been cast into doubt by recent amendments to the present-use statutes. S.L. 2001-499 amended G.S. 105-277.3(b2) to permit property in the present-use program to be transferred without triggering a rollback of deferred taxes when the new owner continued to use the land for the classified purpose. In enacting these amendments, the General Assembly removed the express provision allowing for immediate present-use classification of property acquired by the owner of property already in the program.

S.L. 2005-313 clarifies the authority to piggyback parcels. New G.S. 105-277.3(b2)(2) expressly authorizes present-use classification of land purchased by a new owner if, under his or her ownership, the land is eligible at the time of transfer for classification on the same basis as other present-use property he or she owns. If the purchased property was classified at present-use value before the transfer, the new owner may, under G.S. 105-277.3(b2)(1), file a new application and certify his or her acceptance of liability for deferred taxes. Otherwise the deferred taxes become due upon transfer, notwithstanding the property's possible immediate eligibility for present-use classification under G.S. 105-277.3(b2)(2).

Other amendments to G.S. 105-277.3(b2) clarify that a purchaser of land may avoid the four-year ownership prerequisite to present-use classification only if (1) the purchaser owns other present-use property upon which the new land may piggyback or (2) the purchased land was in the present-use program at the time of transfer. The four-year ownership requirement continues to apply to land that was eligible for, but not in, the present-use program at the time of transfer if the purchaser has no present-use land upon which the property may piggyback.

Farm unit. S.L. 2005-313 narrows the G.S. 105-277.2(7) definition of "unit" by requiring that multiple tracts attributed to a single agricultural, horticultural, or forestland unit must be tracts of the same type as the qualifying parent tract. Sharing the same labor force as the parent tract is no longer sufficient.

Sixty days to appeal or produce information in response to audit. S.L. 2005-313 amends 105-277.4(b1) to specify that taxpayers have sixty days to appeal an assessor's decision regarding the qualification or appraisal of property for present-use taxation. Amended G.S. 105-296(j) gives taxpayers sixty days in which to submit information in support of the reinstatement of present-use classification after the loss of classification for failure to provide information. Amendments to G.S. 105-296(l) provide the same sixty-day response period for all property that loses its exemption or exclusion for failure to provide information requested in an audit.

Income credit for tobacco buyout payments. S.L. 2005-293 amends G.S. 105-277.3(a)(1) to provide that amounts paid to a taxpayer pursuant to the federal Fair and Equitable Tobacco Reform Act of 2004 constitute income for purposes of the $1,000 average gross income requirement.

Service Districts

Rate-Limited Fire Protection Districts

S.L. 2005-281 (S 32) enacts G.S. 153A-309.3, which permits a county board of commissioners to remove an area from a fire protection district and to simultaneously place that area in a new service district with a limited tax rate. The statute applies to land and structures of an industrial facility that (1) is subject to a contract not to annex by a municipality under which the owner of the property makes payments in lieu of taxes equal to 50 percent of the taxes the industry would pay if it were annexed; and (2) is served by an industrial fire brigade. Taxes levied for fire protection purposes in the new district may not exceed a rate of $0.035 per $100.00. If the area fails to satisfy the two-part test enumerated above, the board may abolish the new district and annex the area to the district from which it was removed. The act evolved from a local bill applicable only to Rockingham County. Such a local act would have been unconstitutional as the General Assembly is authorized to enact only general laws authorizing the governing body of a county, city, or town to create a special tax area.

County Authority to Alter Service District Boundaries

S.L. 2005-136 (S 396) permits boards of commissioners, by resolution and after a public hearing, to relocate boundary lines between adjoining county service districts that were established for substantially similar purposes.

Levy of Property Taxes by Counties with Only a Portion of One City

S.L. 2005-433 (H 787) amends G.S. 153A-471 to vest municipal powers with any county that has only one incorporated municipality if most of the land area of the municipality is located in another county, with less than 100 acres in the county to be given municipal powers. New G.S. 153A-472.1 provides that such a county may establish a service district for its non-incorporated area and levy property taxes for municipal functions only in the service district.

Collection and Confidentiality of Identifying Information

S.L. 2005-414 (S 1048) enacts the Identity Theft Protection Act of 2005, effective December 1, 2005. New G.S. 132-1.10 prohibits governmental units and their agents and employees from collecting a Social Security number from an individual unless the governmental unit is authorized by law to collect the number or collection of the number is "otherwise imperative for the performance of [the] agency's duties and responsibilities." A governmental unit or agency that collects Social Security numbers pursuant to either exception must segregate the number on a separate page from other records or take other appropriate measures so that it may easily be redacted pursuant to a public records request. The governmental unit must also provide an individual with a statement of the purpose for which the number is collected and used. The number may be used only for the stated purpose.

State and local governments may, under federal law, require an individual to provide his or her Social Security number as part of the administration of a state or local tax. 42 U.S.C. § 405 (c)(2)(C)(i). Thus, taxing units may continue to collect Social Security numbers but must ensure that such numbers are stored in a manner to adequately protect them from disclosure.

Taxing units also must ensure that requests for Social Security numbers comport with the requirements of the State Privacy Act, which was enacted in 2001. The State Privacy Act, codified at G.S. 143-64.6, requires a local government requesting disclosure of a Social Security number to inform the individual whether the disclosure is mandatory or voluntary, by what authority the number is solicited, and what uses will be made of the number.

It bears noting that many taxing units use commercial databases to obtain taxpayer information, including Social Security numbers. Social Security numbers gathered from third parties must, like numbers gathered from individuals, be safeguarded from public disclosure. New G.S. 132-1.10 bars governmental units from intentionally communicating or making available to the general public a person's Social Security number or other "identifying information," defined as a driver's license number, checking or savings account number, credit or debit card number, PIN code for a financial transaction card, digital signature, biometric data, fingerprints, or password, or a number or information that could be used to access a person's financial resources (other than an e-mail name or address, Internet account number, or Internet identification name). In addition, governmental units may not print an individual's Social Security number on materials mailed to the individual, unless state or federal law requires that the number appear on the document. If state or federal law requires that the Social Security number appear on a mailed document, no portion of the number may be printed on a postcard or be visible on the outside of an envelope.

Taxing units must consider the application of the mailing restrictions in at least two circumstances. First, taxing units mail copies of notices of attachment to taxpayers, which pursuant to G.S. 105-368, must contain taxpayers' Social Security numbers, if known by the taxing unit. Taxing units must ensure that copies of such notices are mailed in an envelope and that no portion of the number is visible on the outside of the envelope. Second, taxing units must be mindful of the new law when mailing listing forms to taxpayers. Because there is no requirement that listing forms contain a taxpayer's Social Security number, no portion of that number should appear on a listing form mailed to the taxpayer.

New G.S. 132-1.10 also imposes restrictions on information that may be included on official documents filed with a register of deeds or court. These documents may not include a person's Social Security number, employer tax identification, driver's license, state identification, passport, checking or savings account, credit card, or debit card number or a person's PIN code or password, unless

expressly required by court order or adopted by the State Registrar on records of vital events. Taxing units filing documents with the court in disputed attachment proceedings pursuant to G.S. 105-368 and with the court and register of deeds in *in rem* foreclosure proceedings pursuant to G.S. 105-375 must ensure that filed documents do not include prohibited identifying information.

The Identity Theft Protection Act is discussed in further detail in Chapter 20, "Public Records."

Local Legislation

Occupancy Taxes

The 2005 General Assembly authorized several cities and counties to levy new or additional occupancy taxes.

Carteret County. S.L. 2005-120 (H 1056) amends S.L. 2001-381 by extending until July 1, 2008, the effective date of an additional occupancy tax of up to 1 percent to fund construction of a new convention center. The act extends the time for approval of a development plan for the convention center to June 30, 2008, and extends the deadline for a signed construction contract to July 1, 2009.

City of Belmont. S.L. 2005-220 (H 580) authorizes the City of Belmont to levy an occupancy tax of up to 3 percent pursuant to the uniform administrative provisions of G.S. 160A-215. The proceeds of the tax must be remitted to the city's Tourism Development Authority for use in promoting travel and tourism in Belmont and for tourism-related expenditures.

City of Durham. Part IV of S.L. 2005-233 amends S.L. 2001-480, as amended by Section 1 of S.L. 2002-36, to extend by 12 months the time by which the City of Durham must approve a plan for financing and begin construction of a Performing Arts Theater to avoid repeal of its additional 1 percent occupancy tax. The act also permits up to $2,752,000 in proceeds from the 1 percent occupancy tax to be used by the city to finance design and engineering costs for construction of the theater.

City of Eden. Part II of S.L. 2005-233 authorizes the City of Eden to levy an occupancy tax of up to 2 percent. The city must remit proceeds of the tax to the Rockingham County Tourism Development Authority for deposit in a separate Eden account.

City of Reidsville. Part III of S.L. 2005-233 authorizes the City of Reidsville to levy an occupancy tax of up to 2 percent, which must be remitted to the Rockingham County Tourism Development Authority for deposit in a separate Reidsville account.

City of Roanoke Rapids. Part II of S.L. 2005-46 (H 540) authorizes the City of Roanoke Rapids to levy an occupancy tax of 1 percent pursuant to the uniform administrative provisions of G.S. 160A-215. Proceeds must be remitted to the Halifax County Tourism Development Authority for placement in a separate Roanoke Rapids account.

Duplin County. S.L. 2005-53 (H 843) amends Chapter 377 of the 1987 Session Laws to permit Duplin County to levy an additional occupancy tax of up to 3 percent in addition to the 3 percent tax already authorized. The act makes the uniform administrative provisions of G.S. 153A-155 applicable to all occupancy taxes levied by the county. The act requires the county to create a Tourism Development Authority when the annual net proceeds of the tax exceed $200,000.

Elizabeth City. S.L. 2005-16 (H 351) amends Chapter 175 of the 1987 Session Laws to authorize Elizabeth City to levy an additional occupancy tax of up to 3 percent. Elizabeth City previously was authorized to impose an occupancy tax that, when combined with the initial occupancy tax levied by Pasquotank County, did not exceed 3 percent. Pursuant to S.L. 2005-16, Elizabeth City may levy an additional occupancy tax of up to 3 percent so long as the total rate of occupancy tax imposed by the city and county does not exceed 6 percent.

The act requires that the Elizabeth City Area Convention Center and Visitors Bureau be converted to a Tourism Development Authority upon the city or county's adoption of a resolution levying an occupancy tax. The act incorporates the administrative provisions of G.S. 160A-215 and specifies the manner for allocating proceeds collected pursuant to each occupancy tax levy.

Franklin County. Part I of S.L. 2005-233 authorizes Franklin County to levy an occupancy tax of up to 6 percent. Proceeds of the tax must be remitted to the Franklin County Tourism Development Authority for promotion of travel and tourism and tourism-related expenditures.

Halifax County. Part I of S.L. 2005-46 amends Chapter 377 of the 1987 Session Laws to authorize Halifax County to levy an additional occupancy tax of up to 2 percent in addition to the 3 percent already authorized. The act amends the membership requirements for the Halifax County Tourism Development Authority and makes the uniform administrative provisions of G.S. 153A-155 applicable to all occupancy taxes levied by the county.

Madison County. S.L. 2005-118 (H 544) amends Section 1 of Chapter 102 of the 1997 Session Laws to authorize Madison County to levy an additional occupancy tax of up to 2 percent in addition to the previously authorized 3 percent tax and removes the requirement for a referendum prior to levy of the tax.

Mecklenburg County. S.L. 2005-68 (S 525) authorizes Mecklenburg County to levy an additional occupancy tax of up to 2 percent upon receiving written confirmation from NASCAR that the NASCAR Hall of Fame Museum will be located in the City of Charlotte. In authorizing the additional tax, the General Assembly noted that the county already was permitted to levy an occupancy tax of 6 percent and that it had not previously authorized any local government to levy an occupancy tax in excess of that amount. Nonetheless, the legislature concluded that the additional tax was warranted as Charlotte had a "'once-in-a-lifetime' opportunity to potentially locate a unique national tourism facility" within its borders. The General Assembly concluded that such a facility would have a "significant positive impact on the economy of the Charlotte region and the State." The additional tax must be repealed by July 1, 2038, or upon earlier satisfaction of debt incurred to finance the museum.

Pasquotank County. S.L. 2005-16 (H 351) amends Chapter 175 of the 1987 Session Laws to authorize Pasquotank County to levy an occupancy tax of up to 3 percent, in addition to a previously authorized 3 percent occupancy tax. The act incorporates the uniform administrative provisions of G.S. 153A-155 and specifies the manner for allocating proceeds collected pursuant to each occupancy tax levy.

Rockingham County. Part V of S.L. 2005-233 amends Chapter 322 of the 1991 Session Laws, as amended by Chapter 52 of the 1995 Session Laws, to modify the membership requirements for the Rockingham County Tourism Development Authority and incorporate the uniform administrative provisions of G.S. 153A-155. Tax proceeds must be used to promote travel and tourism and for tourism-related expenditures.

Town of Troutman. S.L. 2005-220 (H 580) authorizes the Town of Troutman to levy an occupancy tax of 3 percent pursuant to the uniform administrative provisions of G.S. 160A-215. Proceeds of the tax must be remitted to the Troutman Tourism Development Authority for use in promoting travel and tourism in Troutman and for tourism-related expenditures.

Town of West Jefferson. S.L. 2005-49 (H 125) authorizes the Town of West Jefferson to levy an occupancy tax of up to 3 percent pursuant to the administrative provisions of G.S. 160A-215. Tax proceeds must be remitted to the West Jefferson Tourism Development Authority for use in promoting travel and tourism in West Jefferson and for tourism-related expenditures.

Watauga County. S.L. 2005-197 (S 92) creates Watauga County District U, comprised of all unincorporated areas of Watauga County, as a taxing district. District U may levy an occupancy tax of up to 6 percent, the proceeds of which must be remitted to the Watauga County District U Tourism Development Authority.

Prepared Food and Beverage Taxes

S.L. 2005–276 (S 622) amends the sales tax definitions in G.S. 105–164.3(10) to remove alcoholic beverages from the definition of "food." The act makes corresponding amendments to G.S. 105–164.13B, which previously excluded alcoholic beverages from the state sales tax exemption generally applicable to food. The amendments conform to the Streamlined Sales Tax Agreement and do not change the rate of sales tax applicable to alcoholic beverages (which remains at a combined state and local rate of 7 percent). Because alcoholic beverages are taxed by certain cities and counties authorized by local act to levy a prepared food and beverage tax, the act amends the definition of

"prepared food" in those local acts to permit the continued local taxation of alcoholic beverages that meet one of the conditions set forth in the definition of prepared food, as defined in G.S 105–164.3.

Other Local Acts

Replace elected collector with appointed collector in Henderson County. S.L. 2005-305 (H 328) provides for the appointment of a tax collector in Henderson County pursuant to G.S. 105-349, beginning in October 2007.

Prepared food and beverage tax in City of Monroe. S.L. 2005-261 (H 689) authorizes the City of Monroe to levy a prepared food and beverage tax of up to 1 percent upon approval of the voters during a 2006 election. The act designates proceeds of the tax to the city's civic center project.

Special assessments without petition in Kill Devil Hills. S.L. 2005-142 (H 1063) amends the Charter of the Town of Kill Devil Hills, Chapter 735 of the 1995 Session Laws, to exempt the town from the provisions of G.S. 160A-217(a), which require a petition from the majority of owners of property to be assessed when the town levies assessments for the construction of new streets, sidewalks, curbs, or gutters or for the widening of streets or sidewalks. The act permits the town to make such assessments without a petition upon a four-fifths majority vote of its board of commissioners.

Shea Riggsbee Denning

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Mental Health

This chapter discusses acts of the General Assembly affecting mental health, developmental disabilities, and substance abuse services, with particular attention given to legislation affecting publicly funded services. Although these services are administered on the state level by the Department of Health and Human Services' (DHHS) Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, they are delivered primarily at the community level through a service network managed by local governments or units of local government called area mental health, developmental disabilities, and substance abuse authorities (area authorities) or county mental health, developmental disabilities, and substance abuse programs (county programs). These entities are also referred to as "local management entities," a term not defined in statute but used colloquially and in some of the legislation discussed in this chapter, denoting a shift in the function of area authorities and county programs from service provider to manager of service providers resulting from changes mandated by S.L. 2001-437.

Among the 2005 legislative enactments are laws requiring area authorities and county programs to establish a crisis response system for psychiatric and substance abuse crises, permitting disclosure of medical records to employers and insurers paying medical compensation under the Workers' Compensation Act, and providing for the credentialing of criminal justice addictions professionals. The General Assembly also made changes to the laws governing the licensure and inspection of residential treatment facilities and enacted several provisions governing children's services, aimed at inducing greater coordination and collaboration among the several state agencies that administer services and programs for children at risk of institutionalization or other out-of-home placement.

Appropriations

General Fund Appropriations

The Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), appropriates $603,315,155 from the General Fund to the Division of Mental Health, Developmental Disabilities, and Substance Abuse (MH/DD/SA) Services for fiscal year 2005–06 and $602,556,655 for 2006–07, both more than the $574.4 million appropriated for 2004–05 but less than the $630.4 million appropriated for 2000–01, the high-water mark in recent years for public mental

health services funding. Other annual appropriations for the past six years were $577.3 million (2003–04), $573.3 million (2002–03), $581.4 million (2001–02), $630.4 million (2000–01), and $614.3 million (1999–2000).

The 2005 appropriations act cuts funding to the Division of MH/DD/SA Services by $3,050,000 for each fiscal year of the 2005–07 biennium by continuing two reductions from last year: $500,000 for the Division of MH/DD/SA Service's central office operations and $2,550,000 in funding to state-operated institutions. The central office funding reduction is based on historical reversions and the state institution reduction is offset by budgeting over-realized receipts.

S.L. 2005-276 provides a net increase in MH/DD/SA services funding after balancing the reductions with over $10 million in expansion funding, including the following recurring funding:

- $2 million for start-up and continuing funding for crisis services
- $2 million for implementing and continuing community-based "system of care" child and family teams
- $258,000 for the mental health treatment courts in judicial districts 15B and 26 (serving Orange/Chatham and Mecklenburg counties respectively)
- $1.25 million for intensive substance abuse services for children
- $750,000 for adult substance abuse services
- $427,747 for the UNC TEACCH Division in the School of Medicine
- $1.5 million for long-term vocational support services for clients in supported employment

In addition to the recurring expansion funds, nonrecurring increases in funding for MH/DD/SA services include a number of relatively small grants-in-aid for specific programs as well as $1.95 million to address a lack of sufficient funding for the administration of local management entities.

Increases in recurring funding to the DHHS Division of Facility Services (DFS) that could impact the quality of MH/DD/SA services include $936,000 for 2005–06 and $1,560,724 for 2006–07 to add twenty-three new personnel positions in the division's Mental Health Licensure and Certification Section and to create two new regional offices. Thirty-one new personnel positions and two new regional offices are added to the Adult Care Licensure Section of DFS through approximately $3 million in expansion funding over the 2005–07 biennium.

Mental Health Trust Fund

In 2001 the General Assembly established the Trust Fund for Mental Health, Developmental Disabilities, and Substance Abuse Services and Bridge Funding Needs as a nonreverting special trust fund in the Office of State Budget and Management. G.S. 143-15.3D provides that the fund must be used solely to meet the mental health, developmental disabilities, and substance abuse services needs of the state and must supplement, not supplant, existing state and local funding for these services. Specifically, the fund must be used only for the following:

1. To provide start-up and operating funding for community-based treatment alternatives for individuals residing in state-operated institutions
2. To facilitate compliance with the U. S. Supreme Court's *Olmstead*[1] decision
3. To expand services to reduce waiting lists
4. To provide bridge funding to maintain client services during transitional periods of facility closings and departmental restructuring
5. To construct, repair, and renovate state mental health, developmental disabilities, and substance abuse facilities

In 2005 the General Assembly allocated $10 million in nonrecurring funds to the trust fund for fiscal year 2005–06, following trust fund appropriations of $10 million in 2004–05 and $12.5 million in 2003–04.

1. Olmstead v. L.C., 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). In *Olmstead*, the Court held that the unnecessary segregation of individuals with mental disabilities in institutions may constitute discrimination based on disability, in violation of the Americans with Disabilities Act. As a result of the ruling, states risk litigation if they do not develop a comprehensive plan for moving qualified persons with mental disabilities from institutions to less restrictive settings at a reasonable pace.

Section 10.24 of S.L. 2005-276 directs that money may not be transferred from the trust fund until the Secretary of DHHS consults with the Joint Legislative Oversight Committee on MH/DD/SA Services and with the chairs of the Senate Appropriations Committee on Health and Human Services and the House of Representatives Appropriations Subcommittee on Health and Human Services. Further, DHHS must use at least 50 percent of the trust fund money for fiscal year 2005–06 for nonrecurring start-up funds for community-based services, which may include funding for transferring the provision of services from area authorities and county programs to the private sector or other public agencies. Trust funds may be used to expand recurring community services only if DHHS can identify sufficient recurring funds within its current budget for the continued support of these services.

Federal Block Grant Allocations

Section 5.1 of S.L. 2005-276 allocates federal block grant funds for fiscal year 2005–06. The Mental Health Services (MHS) Block Grant provides federal financial assistance to states to subsidize community-based services for people with mental illnesses. This year the General Assembly allocated $6,983,202 (up from $6,307,035 in 2004–05) from the MHS Block Grant for community-based services for adults with severe and persistent mental illness, including crisis stabilization and other services designed to prevent institutionalization of individuals when possible. From the same block grant the legislature appropriated $3,921,991 (the same amount as in 2004–05) for community-based mental health services for children, including school-based programs, family preservation programs, group homes, specialized foster care, therapeutic homes, and special initiatives for serving children and families of children having serious emotional disturbances. As it did last year, the General Assembly allocated $1.5 million of the MHS Block Grant funds for the Comprehensive Treatment Services Program for Children (CTSP), which provides residential treatment alternatives for children who are at risk of institutionalization or other out-of-home placement.

The Substance Abuse Prevention and Treatment (SAPT) Block Grant provides federal funding to states for substance abuse prevention and treatment services for children and adults. This year's SAPT Block Grant funding matched the funding levels of 2004–05. The General Assembly allocated $20,441,082 for the state-operated alcohol and drug abuse treatment centers, community-based alcohol and drug abuse services, and tuberculosis services. Other allocations include $4,940,500 for services for children and adolescents (for example, prevention, high-risk intervention, outpatient, and regional residential services), $5,835,701 for child substance abuse prevention, and $8,069,524 for services for pregnant women and women with dependent children. The budget act also appropriates $4,816,378 from the SAPT Block Grant for substance abuse services for treatment of intravenous drug abusers and others at risk of HIV disease and $851,156 for prevention and treatment services for children affected by parental addiction.

From the Social Services Block Grant (SSBG), which funds several DHHS divisions, S.L. 2005-276 allocates $3,234,601 to the Division of MH/DD/SA Services for unspecified purposes and another $5 million to assist individuals on the state's developmental disabilities services waiting list. From the same block grant, the General Assembly allocated $205,668 (down from $213,128 in 2004–05) to the DHHS DFS for mental health licensure purposes and $422,003 for the CTSP for Children. Both of the CTSP block grant allocations, from the MHS and SSBG block grants, must be used in accordance with Section 10.25 of the budget act, discussed below in the section entitled "Comprehensive Treatment Services Program for Children."

Area Authorities and County Programs

Crisis Services

S.L. 2005-371 (H 1112) amends the statutory powers and duties of area authorities by requiring them to maintain, twenty-four hours a day, seven days a week, a service system for responding to psychiatric and substance abuse crises. New G.S. 122C-117(a)(14) requires area authorities to establish

both telephonic and face-to-face capabilities, clarifying that area authorities' crisis response systems must go beyond providing telephonic triage and referral to other providers to include crisis prevention, intervention, and resolution services as well. These services must be provided in the least restrictive setting possible consistent with patient and family needs and community safety. Crisis services do not require prior authorization. DHHS must report to the Joint Legislative Commission on Governmental Operations and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services on the status and compliance of area authorities' crisis services by March 1, 2006.

Fiscal and Administrative Policy Review

Section 10.31 of S.L. 2005-276 requires the DHHS Division of MH/DD/SA Services, in cooperation with area authorities and county programs, to identify and eliminate administrative and fiscal barriers created by state and local policies to the delivery of area authority and county program services, including services delivered to multiply-diagnosed adults and services provided through the CTSP. The special provision further directs DHHS to implement changes in policies and procedures to accomplish the following:

1. Create a system for allocating state and federal funds to area authorities and county programs based on projected needs rather than on historical allocation practices and spending patterns
2. Provide services to adults and children defined as priority or targeted populations in the State Plan for MH/DD/SA Services
3. Provide services to children not deemed eligible for the CTSP but who would otherwise need medically necessary treatment services to prevent out-of-home placement
4. Provide community-based services to adults who should be moved to less restrictive settings in accordance with *Olmstead v. L.C.* but who remain or are being placed in state-operated institutions

Private Agency Uniform Cost-Finding Requirement

Section 10.30 of S.L. 2005-276 duplicates a provision in the 2001 and 2003 appropriations acts authorizing the Division of MH/DD/SA Services to require private agencies providing services under a contract with an area authority or county program to complete an agencywide uniform cost finding. This year, however, the legislative language is codified in G.S. 122C-147.2 and clarifies that it does not apply to hospital services having an established Medicaid rate. The cost finding is intended to ensure uniformity in rates charged to area authorities and county programs for services paid for with state-allocated funds. DHHS may suspend all funding and payment to a private agency if the agency fails to timely and accurately complete the required agencywide uniform cost finding in a manner acceptable to the DHHS controller's office. Funding may remain suspended until an acceptable cost finding has been completed by the private agency and approved by the DHHS controller's office.

Involuntary Commitment

North Carolina's involuntary commitment statutes provide that anyone with knowledge of an individual meeting the criteria for court-ordered psychiatric treatment may initiate proceedings for involuntary commitment by filing a petition with a magistrate or clerk of court. Petitioners must appear personally before the magistrate or clerk, except a physician or psychologist who has examined the individual may avoid personal appearance if the petition is executed before any official authorized to administer oaths. The petition must then be hand delivered to the clerk or magistrate, although some judicial districts have permitted physician or psychologist petitioners to send a copy of the petition by facsimile transmission.

S.L. 2005-135 (H 1199) clarifies that facsimile transmission is permissible by amending G.S. 122C-261(d) to provide that, when the petitioner is a physician or psychologist, the petition may

be filed with the clerk or magistrate by delivering the original petition or transmitting a paper copy through facsimile transmission. If the petition is filed through facsimile transmission, the petitioner must mail the original petition to the clerk or magistrate no later than five days after the facsimile transmission. The law then requires the clerk or magistrate to file the original petition with the facsimile copy.

In related legislation (S.L. 2005-371), the General Assembly directed the Division of MH/DD/SA Services to develop a central listing of the mental health facilities designated by DHHS for the placement of individuals to be involuntarily committed. Intended to help law enforcement officers providing custody and transportation of individuals subject to the commitment process, the list was required to be accessible on the Internet by October 1, 2005.

Identity Theft Protection Act and Use of Social Security Numbers

S.L 2005-414 (S 1048) creates requirements, applicable to private and public providers of MH/DD/SA services, concerning the collection, use, and dissemination of Social Security numbers. For a description of the obligations imposed on both private businesses and government agencies, see Chapter 12, "Health."

Workers' Compensation Act—Access to Medical Information

Section 6.1 of S.L. 2005-448 (H 99) amends Article 1 of Chapter 97 of the General Statutes to provide that, notwithstanding the physician-patient privilege or other laws concerning the privacy of medical information, an employer or insurer paying medical compensation under the Workers' Compensation Act to a treatment provider may obtain "records of the treatment" without the express authorization of the employee.

This provision, set forth in new G.S. 97-25.6, also permits an employer or insurer paying compensation for a claim to communicate with an employee's medical provider in writing to determine, among other information, the diagnosis for the employee's condition, the reasonable and necessary treatment, the anticipated time the employee will be out of work, the relationship of the employee's condition to the employment, the restrictions resulting from the condition, the kind of work for which the employee may be eligible, the anticipated time that the employee will be restricted, and the permanent impairment, if any, resulting from the condition. This communication is limited to specific questions promulgated by the North Carolina Industrial Commission, and the employer or insurer must provide a copy of the written communication to the employee at the same time it is made to the provider. Other forms of communication with a medical provider may be authorized by the voluntary written consent of the employee, by agreement of the parties, or by order of the commission.

The act also provides that, with written notice to the employee, the employer or insurer may obtain from a medical provider "medical records of evaluation or treatment restricted to a current injury or condition" for which the employee is claiming compensation from that employer under the act. To the extent that any such records are in the possession of an employee seeking compensation, the employee must furnish the records to the employer if the employer makes a written request for the records.

The provision authorizes the commission, upon motion of an employee or medical provider or upon its own motion, to enter any order that justice requires to protect an employee or other person from unreasonable annoyance, embarrassment, or oppression, or undue burden or expense. G.S. 97-25.6 became effective September 29, 2005, and applies to claims pending or filed on or after that date.

Licensed Professionals

Substance Abuse Professionals

Article 5C of G.S. Chapter 90 establishes standards for the credentialing of substance abuse professionals practicing in North Carolina. Professionals credentialed under this law include substance abuse counselors, substance abuse prevention consultants, clinical supervisors, clinical addictions specialists, and substance abuse residential facility directors. The law also sets standards for and recognizes professionals under interim status such as registrants, substance abuse counselor interns, and clinical addictions specialist interns. S.L. 2005-431 (S 705) amends Article 5C, now called the North Carolina Substance Abuse Professional Practice Act, to add "certified criminal justice addictions professional" to the list of recognized and credentialed substance abuse professionals, to change the credential issued to a clinical addictions specialist, and to provide for criminal history record checks of applicants seeking credentialing under the act.

S.L. 2005-431 changes the credentialed status of clinical addictions specialists from "certification" to "licensure" without substantially changing the qualifications for credentialing. The act also more specifically defines in new G.S. 90-113.31B the scope of practice for each category of substance abuse professional and incorporates into the defined scopes of practice the principles, methods, and procedures of performance domains prescribed by the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, Incorporated (ICRC/AODA).

The 2005 law defines *certified criminal justice addictions professional* (CCJP) as a person certified by the North Carolina Substance Abuse Professional Practice Board to practice as a CCJP and who, under supervision, provides direct services to clients or offenders exhibiting substance abuse disorders in a program determined by the board to be in a criminal justice setting. According to the act, the CCJP's scope of practice is based on knowledge in the domains of dynamics of addiction in criminal behavior; legal, ethical, and professional responsibility; the criminal justice system and processes; screening, intake, and assessment; case management; monitoring; and client supervision and counseling to treat, and prevent or reduce the risk of, addictive disorder or disease.

To become certified as a CCJP, an applicant must have

- 270 hours of board-approved education or training, except that 180 hours is sufficient if the applicant has a minimum of a master's degree with a clinical application and a substance abuse specialty from a regionally accredited college or university;
- 300 hours of board-approved supervised practical training;
- a certain number of hours of supervised work experience providing direct services to clients or offenders involved in the criminal justice system (the required number of hours varies depending on the applicant's level of education); and
- passed the certified criminal justice addictions professional written examination of the ICRC/AODA.

Section 4 of S.L. 2005-431 provides that, within ninety days after the time the act became effective (September 22, 2005) and the ICRC/AODA approves the CCJP credential, the board may certify a person as a certified criminal justice addictions specialist under a set of alternative qualifying criteria that recognize longer periods of supervised work experience in lieu of other requirements.

All applicants for credentialing as a substance abuse professional must submit to a complete criminal history record check, and the board must provide the North Carolina Department of Justice (DOJ) with all materials necessary for processing the record check with the state and national repositories of criminal histories, including the applicant's fingerprints and written consent to the check. The act amends G.S. 114-19.11A to authorize the DOJ and the State Bureau of Investigation to process the criminal record checks for the board. If an applicant's criminal history record check reveals one or more of several types of convictions specified in the act, the board must review the criminal history in light of factors enumerated in G.S. 90-113.46A to determine whether to deny registration, certification, or licensure of the applicant. A conviction does not automatically bar issuance of a credential by the board.

Among other changes to the practice act, S.L. 2005-431 does the following:

- Defines "dual relationship" and recognizes as a ground for disciplinary action dual relationships that impair professional judgment or increase the risk of exploitation of a client or supervisee
- Modifies the continuing education requirements for renewal of credentials and the number of hours of supervised experience required for obtaining certification as a substance abuse counselor or substance abuse prevention consultant
- Changes the term of office for board members from three to four years and authorizes the board to employ legal counsel

Social Work Certification and Licensure Board

S.L. 2005-129 (H 1262) amends G.S. 90B-6 to authorize the North Carolina Social Work Certification and Licensure Board to employ or retain professional personnel, including legal counsel or clerical or other special personnel, as necessary to carry out the provisions of the Social Work Certification and Licensure Act.

School Social Worker Liability Insurance

S.L. 2005-355 (H 1491) amends G.S. 115C-317.1, effective October 1, 2005, to provide that a school social worker cannot be required to transport students under that provision without the existence of a written job description or local school board policy imposing the requirement. The act also amends G.S. 115C-47 to provide that, unless a local school board otherwise provides for liability insurance coverage of a school social worker who is required to transport students under G.S. 115C-317.1, the board may require a school social worker to increase liability protection on the employee's personal automobile liability insurance policy for the purpose of transporting students within the course of the employee's work only if the board reimburses the employee for the additional premium charged for the increased protection.

Criminal Record Checks

Over the past few years, the General Assembly has sought ways to expand the state's laws on criminal history record checks while meeting federal requirements affecting the distribution of national criminal history check information. (See Section 2.1A of S.L. 2002-180 and Sections 10.19 and 10.1 of S.L. 2004-124.) Until S.L. 2005-4 (S 41) became law, on March 23, 2005, laws requiring criminal record checks for applicants for employment with area authorities, adult care homes, nursing homes, home care agencies, and contract agencies of these entities required the North Carolina Department of Justice (DOJ) to forward the results of national criminal history record checks for employment positions not covered by Public Law 105-277 to the DHHS DFS, which would forward the results to the agency requesting the check. To conform the record check process to federal law, S.L. 2005-4 now requires DOJ to forward these record check results to the DHHS Criminal Records Check Unit, which in turn must notify the requesting entity, without sharing the results of the national criminal history record check, whether the information received may affect the employability of the applicant.

In light of the fact that many providers of mental health, developmental disabilities, and substance abuse services no longer have to contract with area authorities to receive Medicaid reimbursement or to have area authority clients referred to them, S.L. 2005-4 amends G.S. 122C-80—the statute requiring state and national criminal history checks of applicants for employment with area authorities

and their contract agencies—to expand the statute's applicability to any MH/DD/SA service provider licensed under G.S. Chapter 122C. The act also clarifies that G.S. 122C-80 is applicable to county MH/DD/SA programs.

In related enactments, S.L. 2005-358 (S 737) amends G.S. 114-19.14 to authorize a county and the DOJ to conduct state and national criminal history record checks on applicants for county employment, and S.L. 2005-114 (H 451) amends G.S. 114-19.6(a)(1) to expand the types of individuals subject to criminal records checks by DHHS to include independent contractors providing services to DHHS, employees of these contractors, and individuals approved to perform volunteer services for DHHS.

Substance Abuse Services for Persons Convicted of Driving While Impaired

A person whose driver's license is revoked as a result of a conviction of driving while impaired must obtain a certificate of completion before having his or her license restored by the Division of Motor Vehicles. To obtain a certificate of completion, the person must have a substance abuse assessment and, depending on assessment results, complete either an alcohol and drug education traffic (ADET) school or a substance abuse treatment program. In 2004 the General Assembly amended G.S. 122C-142.1, effective October 1, 2005, to specify the professionals authorized to conduct substance abuse assessments and to require the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services to study the certification requirements for persons conducting ADET schools (S.L. 2004-197). In response to this study, the legislature enacted S.L. 2005-312 (H 35), amending G.S. 122C-142.1 again, to specify the professionals qualified to provide ADET school instruction. By January 9, 2009, these instructors must be either certified substance abuse counselors, certified clinical addiction specialists, or certified substance abuse prevention consultants, as defined by the Commission for MH/DD/SA Services.

The 2004 law also required the Oversight Committee to study the adequacy of fees paid by clients to treatment facilities and ADET schools. In response to recommendations of the Oversight Committee, S.L. 2005-312 changes from $75 to $160 the fee to be paid to an ADET school, while maintaining the fee paid to a treatment facility at $75. The 2005 law also increases from 5 to 10 percent the amount of each fee that must be remitted from an ADET school to DHHS for ADET school administration.

S.L. 2005-312 directs the Commission for MH/DD/SA Services to revise its rules regarding the number of instructional program hours and class size for ADET schools and sets a minimum of sixteen program hours and a maximum class size of twenty participants. In addition, DHHS must establish an outcomes evaluation study on the effectiveness of substance abuse services provided to persons obtaining a certificate of completion under G.S. 20-17.6 as a condition for driver's license restoration and report the study's findings every two years to the Joint Legislative Commission on Governmental Operations, with the initial report to be submitted by December 31, 2007.

Licensable Facilities

Section 10.40A of S.L. 2005-276 amends the statutory provisions governing licensable mental health facilities, adult care homes, home care services, and hospital facilities. "Licensable mental health facilities" means facilities licensable as mental health, developmental disabilities, or substance abuse facilities under G.S. Chapter 122C, which includes facilities providing outpatient services, day services offered to the same individual for three or more hours during a twenty-four-hour period, and residential services for twenty-four consecutive hours or more. With respect to these facilities, Section 10.40A amends G.S. 122C-23(e) to shorten the period of time a license issued under G.S. Chapter 122C is valid. Initial licenses, previously valid for a two-year period, will be valid for no more than fifteen months. Thereafter, licenses must be renewed annually and will expire at the end of the

calendar year. Licenses for facilities that have not served any clients in the previous twelve months are not eligible for renewal.

G.S. 122C-23(d) requires the Secretary of DHHS to issue a license to a person who complies with the licensure provisions of G.S. 122C and with applicable regulatory standards. G.S. Chapter 122C-23(e) grants the Secretary the authority to issue a provisional six-month license to a person temporarily unable to comply with a rule. Section 10.40A qualifies that provision by adding that the noncompliance must not present an immediate threat to the health or safety of individuals served in the licensable facility. The act also adds that a provisional six-month license may be granted to a person obtaining the initial license for a facility, but it does not define the basis for issuing such a license or otherwise provide any guidance on when these licenses may be issued. Before being issued a full license, the licensee operating under an initial six-month license must demonstrate substantial compliance. Similarly, Section 10.40A amends G.S. 131-2 to require all initial licenses for adult care homes, previously valid for one year, to be issued on a six-month basis, with licenses for the balance of the calendar year issued after the licensee demonstrates substantial compliance with applicable statutes and rules.

Section 10.40A of S.L. 2005-276 requires licensable facilities to be inspected every two years for compliance with physical plant and life-safety requirements. In addition, it amends the penalty provisions of the licensure statutes to double the penalties for a Type A violation (a rule violation that results in, or creates a substantial risk of, death or serious physical harm) and for failure to correct violations.

Residential Treatment Facilities

Section 10.40 of S.L. 2005-276 applies to *residential facilities* as defined in G.S. 122C-3(14): twenty-four-hour facilities, including group homes and excluding hospitals, whose primary purpose is to provide mental health, developmental disabilities, or substance abuses services in structured living environments. Section 10.40 amends Article 2 of G.S. Chapter 122C to require applicants for licensure of residential facilities to submit to DHHS with the application a letter of support obtained from the area authority or county program in whose catchment area the facility will be located. The letter of support must be submitted to both DFS and the Division of MH/DD/SA Services, specify the number of existing beds for the same type of facility in the catchment area, and specify the projected need for additional beds of the same type of facility. The provision excludes residential facilities subject to Certificate of Need requirements under Article 9 of G.S. Chapter 131E and applies to license applications pending or submitted on or after August 13, 2005.

In a separate provision, Section 10.40A of S.L. 2005-276 amends G.S. Chapter 122C to require all residential facilities to be inspected annually by DHHS and to post conspicuously in a public area of the facility the DFS complaint hotline number. The same requirements are made applicable to adult care homes in G.S. 131D-2.

Accreditation Study

Section 10.35A of S.L. 2005-276 requires DHHS to study the feasibility of establishing accreditation requirements for residential treatment facilities and to report its findings and recommendations to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division by March 1, 2006.

Temporary Rule Making

Section 10.35B of S.L. 2005-276 authorizes DHHS to adopt as temporary rules those rules governing residential treatment for children and adolescents that were both approved for adoption or revision on May 18, 2005, by the Commission on MH/DD/SA Services and approved by the Rules Review Commission.

Comprehensive Treatment Services Program for Children

Section 10.25 of S.L. 2005-276 directs DHHS to continue the Comprehensive Treatment Services Program for Children (CTSP) and establishes both an interagency children's services workgroup and a study commission on children's services. The purpose of CTSP is to provide appropriate and medically necessary residential and nonresidential treatment alternatives for children at risk for institutionalization or other out-of-home placement. Program funds must be targeted to non-Medicaid eligible children and may be used to expand statewide a "system-of-care" approach to children's services. The children's program must include the following:

1. Behavioral health screening for all children at risk of institutionalization or other out-of-home placement
2. Appropriate and medically necessary residential and nonresidential services for deaf children, sexually aggressive youth, children with serious emotional disturbances, and youth needing substance abuse treatment services
3. Multidisciplinary case management services
4. A system of utilization review specific to the nature and design of the program
5. Mechanisms to ensure children are not placed in department of social services custody for the purpose of obtaining mental health residential treatment services
6. Mechanisms to maximize current state and local funds and to expand the use of Medicaid funds to accomplish the intent of the program
7. A system to identify and track children placed outside of the family unit in group homes, therapeutic foster home settings, and other out-of-home placements

S.L. 2005-276 requires DHHS to establish from funds appropriated for CTSP a 3 percent reserve to ensure the availability of funding for children with specialized needs and complex problems. In addition, the act authorizes DHHS to enter into contracts with residential service providers. The Division of MH/DD/SA Services is charged with implementing utilization review of services, limiting services to those that are medically necessary, providing services in accordance with guidelines enumerated in the act, and implementing cost-reduction strategies, including the preauthorization of all services except emergency services.

Interagency Memoranda of Agreement for Children's Services

Section 10.25 of S.L. 2005-276 prohibits the allocation of funds appropriated for CTSP until a memorandum of agreement has been executed between DHHS, the Department of Public Instruction (DPI), and other affected state agencies. The memorandum of agreement must address the specific roles and responsibilities of various departmental divisions and state agencies involved in the administration, financing, care, and placement of children at risk for institutionalization or other out-of-home placement. Although the Department of Juvenile Justice and Delinquency Prevention (DJJDP) is not specifically listed as a participant in the state agency memorandum of agreement, it presumably should be, as it is included in other provisions of the act requiring it to consult, collaborate, and report on the program with DHHS and DPI.

S.L. 2005-276 also requires local government agencies to be parties to memoranda of agreement with each other and certain state agencies. DHHS must not allocate CTSP funds until memoranda of agreement are executed between local departments of social services, area mental health programs, local education agencies, the Administrative Office of the Courts, and DJJDP, as appropriate to effectuate the program. These memoranda of agreement must address issues pertinent to local implementation of the program, including the availability of student records to a local school administrative unit that receives a child placed in a residential setting outside of the child's home county.

DHHS, in conjunction with DJJDP and DPI, must report specified program data to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Joint Legislative Oversight Committee on MH/DD/SA Services, and the Fiscal Research Division on April 1, 2006, and April 1, 2007.

Children's Services Work Group

Expressing the need for greater collaboration and coordination among the state agencies responsible for developing and implementing policy pertaining to children's services, Section 10.25 of S.L. 2005-276 establishes a state-level children's services work group. The Secretaries of DHHS and DJJDP, the Chair of the State Board of Education, the Superintendent of Public Instruction, and the Chief Justice of the North Carolina Supreme Court must each designate at least one representative to serve on the work group from among the programs, divisions, or departments under their respective control that provide services to children and youth. Each of these administrators must also appoint at least one parent of a child or youth who has been or is at risk for behavioral, social, health, or safety problems or academic failure; at least one member of a local collaborative body; and at least one private sector service provider. The work group must meet at least monthly to do the following:

1. Identify common outcome and preventative measures for child-serving agencies that can be used for monitoring the safety, health, and well-being of North Carolina's children, youth, and families
2. Identify strategies for funding flexibility between state and local agencies, including shared funding streams and the removal of financial and bureaucratic barriers
3. Develop an appropriate common service terminology to be used across child-serving agencies that will assist collaboration and coordination
4. Make recommendations regarding the creation of a shared database to track population and program outcomes information while protecting individual confidentiality
5. Develop mechanisms to allow agencies to share information about individual children receiving multiple services in a manner that would meet legal requirements for confidentiality, be voluntary on the part of the party receiving services, and be time-limited
6. Examine state and local training needs for implementing increased coordination and collaboration
7. Study other issues the work group determines would improve coordination and collaboration between child-serving agencies

The work group must submit its findings and recommendations, specifying those recommendations that require statutory changes and those that do not, to the Coordination of Children's Services Study Commission (discussed below) by December 15, 2005, and April 15, 2006.

Children's Services Study Commission

S.L. 2005-276 creates the Coordination of Children's Services Study Commission to study and recommend changes to improve collaboration and coordination among agencies providing services to children, youth, and families with multiple service needs. As part of its charge, the commission must do the following:

- Recommend consolidation, reorganization, or elimination of existing state, regional, and local collaborative bodies charged with serving, protecting, or improving the well-being of children, youth, and families
- Study agencies currently implementing a "system of care" platform of practices and recommend whether to adopt those practices in child-serving agencies statewide
- Examine the principles associated with a system of care platform and determine whether to recommend the adoption of a state policy reflecting these principles
- Determine whether system of care principles articulate measurable goals and, if not, whether they can be modified to reflect measurable goals
- Receive and study the recommendations of the children's services work group and determine whether to recommend any of that group's statutory proposals

The commission must consist of eighteen members, nine appointed by the Speaker of the House of Representatives (five members of the House and four members of the public) and nine appointed by the President Pro Tempore of the Senate (five members of the Senate and four members of the public). The study commission must report annually on April 1 to the House of Representatives Appropriations

Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Joint Legislative Oversight Committee on MH/DD/SA Services, and the Fiscal Research Division.

Consumer Advocacy Program

In 2001 the General Assembly enacted legislation to establish the Mental Health, Developmental Disabilities, and Substance Abuse Consumer Advocacy Program (Section 2 of S.L. 2001-437). The program is to furnish consumers, their families, and providers with the information and advocacy needed to locate services, resolve complaints, address common concerns, and promote community involvement. (*Consumer* is defined as a client or potential client of public services provided by an area or state MH/DD/SA services facility.) The 2001 legislation contained a provision, however, making it effective only if the 2001 General Assembly appropriated funds for the program in the 2002 regular session. When funds were not appropriated in 2002 or thereafter, the legislature simply inserted a special provision in the budget act for each succeeding legislative session amending S.L. 2001-437 to permit the program to become effective if funds were appropriated in the legislative session following the enactment of the special provision. As an acknowledgement that funds are unlikely to be available for the program next year, Section 10.27 of S.L. 2005-276 amends S.L. 2001-437 deleting the reference to a particular year and providing that the consumer advocacy program provisions of that law will become effective the year funds are appropriated by the General Assembly.

Rule-Making Commission

Sections 10.33 and 10.35 of S.L. 2005-276 amend the powers and duties of the Commission for MH/DD/SA Services. New G.S. 122C-26(5)e directs the commission to adopt rules requiring personnel of licensable facilities who refer clients to other provider agencies to disclose any pecuniary interest the referring person has in the provider agency or any other interest that may create the appearance of impropriety. New G.S. 143B-147(a)(9) directs the commission to establish a process for non-Medicaid-eligible clients of area authorities and county programs to appeal to the Division of MH/DD/SA Services decisions affecting the client made by the area authority or county program. The new provision is not to be construed to create an entitlement to MH/DD/SA services.

Studies

Long-Range Plan for MH/DD/SA Services

Section 10.24 of S.L. 2005-276 directs DHHS, in consultation with advocacy groups and affected state and local agencies, to develop a long-range plan for addressing the mental health, developmental disabilities, and substance abuse services needs of the state. The plan must be consistent with the State Plan for MH/DD/SA Services developed pursuant to G.S. 122C-102 and must address the following:

1. The services needed at the community level within each local management entity (LME) to ensure an adequate level of services to the average number of persons needing services based on population projections
2. The full continuum of services needed for each disability group within an LME, including the following:
    - Which services could be based regionally or in a multi-LME area
    - What percentage of the population each LME would expect to use state-level facilities
    - An inventory of existing services and service gaps within each LME for each disability

3. Projected growth in services for each disability group within each LME or region that can reasonably be managed over the next five years
4. Projected start-up costs and total funding needed from the Trust Fund for MH/DD/SA Services and Bridge Funding Needs to implement the long-range plan

DHHS must report on the implementation of the long-range planning initiative to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division by March 1, 2006.

DHHS Monitoring and Oversight of Services

Section 10.34 of S.L. 2005-276 directs the Legislative Oversight Committee on MH/DD/SA Services to study the oversight and monitoring roles and activities of the DHHS Divisions of Social Services, Facility Services, Medical Assistance, and MH/DD/SA Services and how those activities benefit consumers of MH/DD/SA services in residential settings. The committee must report its findings and recommendations to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Joint Legislative Oversight Committee on MH/DD/SA Services, and the Fiscal Research Division no later than April 1, 2006.

Mark F. Botts

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Motor Vehicles

As in most previous sessions, the 2005 General Assembly enacted many bills affecting the operation of motor vehicles. The most comprehensive bills, however, did not pass. In the interim between the 2004 and 2005 sessions, Governor Easley appointed a special Task Force on Driving While Impaired. The task force's report led to the introduction of House Bill 1048 and Senate Bill 1069. The House of Representatives passed House Bill 1048, and thus it is eligible for consideration in the 2006 short session. The bill as it passed the House makes many substantive changes to the impaired driving statutes and would be the most extensive revision made to those statutes since the passage in 1983 of The Safe Roads Act.

This chapter summarizes the session's enacted bills that directly affect the operation of motor vehicles on the state's public roads. Bills affecting a single local government (for example, bills concerning the use of golf carts in cities and towns, regulating junked vehicles, or making motor vehicle laws applicable to private roads in subdivisions) and bills affecting the business operations of entities that sell or repair motor vehicles are not included in this summary.

Rules of the Road

Accident Investigations

Two bills amend the criminal and infractions statutes regulating driver conduct when accidents or other traffic disruptions occur. The first of these, S.L. 2005-460 (H 217), was enacted in response to a highly publicized fatal accident, after which it became apparent that it was not a crime for a passenger to drive a vehicle that had been involved in an accident away from the scene of the accident. The act addresses this problem by making it a felony for any passenger to leave the scene of an accident or collision unless (1) the passenger leaves only temporarily to seek assistance or (2) remaining at the scene would place the passenger or others at significant risk of injury. The act also makes it a misdemeanor for a passenger to fail to provide the driver of any vehicle other than the one in which the passenger was riding the usual identification that is transferred at accident scenes.

S.L. 2005-460 also clarifies and reinforces the duties of drivers involved in accidents. Even before the law's enactment, drivers were required to stop, provide information to other drivers, report most accidents to law enforcement authorities, and, if appropriate, seek medical assistance. S.L. 2005-460

also provides that a driver may not have the vehicle he or she drove removed from the scene until an investigating law enforcement officer allows the removal.

The new act does not make any changes in the types of accidents covered by the hit-and-run statutes. The law applies only to offenses in which the driver knew there was an accident or collision and the accident resulted in death or injury to persons or damage to property. In accidents involving only property damage, the driver is required to report the accident to law enforcement only if at least $1,000 total damage was sustained. In less serious accidents, drivers must stop and exchange information but are not required to contact law enforcement before they leave the scene. S.L. 2005-460 does not affect the rule providing that, when an accident does not result in any personal injury, operable vehicles must be moved to the shoulder of the street or highway pending investigation.

S.L. 2005-189 (H 288) amends G.S. 20-157(f), which was enacted in 2001 in response to the needs of emergency personnel working at accident scenes or at other times when emergency vehicles are present. This statute, known as the "move over" law, requires a driver to move to the lane of traffic away from an emergency or law enforcement vehicle or slow down if the driver has to stay in the lane nearest the vehicle. S.L. 2005-189 expands the types of vehicles covered to include *public service vehicles,* defined as vehicles assisting in the towing or moving of disabled vehicles. It also increases the penalties for violations of G.S. 20-157, which regulates the conduct of drivers when they are approached by emergency vehicles: most violations are infractions, punishable by a $250 penalty; violations resulting in more than $500 damage to property near an emergency vehicle or in personal injury to an emergency service worker are Class 1 misdemeanors; violations resulting in serious injury to an emergency service worker are Class I felonies. The Division of Motor Vehicles can suspend the driver's license of any driver convicted of the felony, for up to six months, and a judge can issue a limited driving privilege for persons whose licenses are suspended under that section in the same terms and conditions applicable to limited privileges issued in speeding cases.

School Bus Passing Rules

Under current law, it is a Class 2 misdemeanor to pass a school bus stopped for the purpose of receiving or discharging passengers. S.L. 2005-204 (H 1400) raises that classification to a Class 1 misdemeanor and makes it a Class I felony to violate the bus-passing law and willfully strike a person, causing serious bodily injury. S.L. 2005-204 also eliminates the requirement that the sign indicating that the bus is a school bus be marked by letters eight inches high—the sign must be visible, but no minimum size is specified. The driver's license consequences for the misdemeanor offense are not changed—a conviction carries five driver's license points for a noncommercial vehicle and eight points for a commercial vehicle. There are no driver's license consequences for a conviction of the felony offense contained in S.L. 2005-204, but G.S. 20-17, which requires the Department of Motor Vehicles to revoke the driver's license of any person for a felony conviction in which a motor vehicle was used, would apply to those convictions.

Speeding to Elude Arrest

When a person is driving a vehicle for the purpose of eluding apprehension, he or she is not likely to observe normal rules of safety. Because the risk of harm is so great, the legislature made the offense of speeding to elude arrest a felony if certain aggravating factors are present. If no such factors are present, the offense is a misdemeanor. S.L. 2005-341 (H 1279) amends that law to impose higher penalties if the offense results in the death of another person. If the offense would have been a misdemeanor had the death not occurred, the offense is now a Class H felony. If the offense would have been a felony, the death raises it to a Class E felony.

All-Terrain Vehicles

All-terrain vehicles (ATVs) , often referred to as "four-wheelers," are motorized off-highway vehicles designed to travel on three or four low-pressure tires and having a seat designed to be straddled by the operator and handlebars for steering control. In the past North Carolina has not

regulated these vehicles. There have been statutes that make it a criminal offense to operate "utility vehicles" on a highway, because the vehicles can't be registered and aren't exempted from registration, an indirect way of regulating the vehicles. S.L. 2005-282 (S 189) adds several new statutes to regulate ATVs. The act prohibits the operation of ATVs by children under eight and allows children under twelve and under sixteen to operate specially sized vehicles (70 cc's and 90 cc's piston displacement, respectively) and allows drivers over sixteen but under eighteen to drive regular-sized ATVs only when supervised by someone over eighteen. Any person who owned an ATV before August 15, 2005, is exempt from the new age requirements applicable to twelve- and sixteen-year-olds.

S.L. 2005-282 also prohibits operation of ATVs on highways and streets. Since none of the traditional rules of the road or laws concerning required equipment apply on private property, the statutes make it an infraction to violate some of these more serious rules—those involving driving while impaired, reckless driving, use of headlights, and rules requiring brakes, mufflers, and spark arresters. Effective January 1, 2006, any potential operator born after January 1, 1990, must also have a safety class certificate from the All-Terrain Vehicle Safety Institute before he or she may operate the vehicle legally. There are, however, exceptions from this requirement for ATV operation in farming or hunting activities. There are no driver's license consequences for convictions under these new statutes.

Regulatory Changes

Drivers' Licenses

The driver's license laws consist of one set of rules applicable to the drivers of noncommercial vehicles and another set of more restrictive rules applicable to the drivers of commercial vehicles. Commercial vehicles are large (over 26,000 lbs.), tow large trailers (over 10,000 lbs.), or carry large numbers of passengers (over sixteen) or certain hazardous materials. Drivers of any of these types of vehicles must have a special commercial driver's license. S.L. 2005-349 makes several changes to the commercial driver's license laws.

S.L. 2005-349 (H 670) makes numerous changes to the laws governing commercial driver's licensees, to bring North Carolina's statutes into compliance with federal mandates. Such compliance is necessary for the state to remain fully eligible to receive federal highway funds. The changes generally make the state laws more strict or punitive.

Most penalties imposed by the Division of Motor Vehicles affecting drivers' licenses are the result of a conviction for an offense involving a motor vehicle. S.L. 2005-349 includes in the definition of *conviction* any prayers for judgment continued for individuals having a commercial driver's license or driving a commercial motor vehicle. A prayer for judgment continued is a sentence deferral procedure often used in motor vehicle cases to postpone indefinitely the imposition of a sentence. Noncommercial drivers must accumulate three prayers for judgment continued before they count as convictions. The definition of conviction applicable to the out-of-state conduct of any driver (commercial or noncommercial) is also amended to include no contest pleas.

Noncommercial licensees who move to North Carolina have a sixty-day grace period to obtain a North Carolina license. S.L. 2005-349 reduces that period for commercial licensees to thirty days.

G.S. 20-17.4 sets out the rules governing license disqualifications. Disqualifications are special license actions taken by the Department of Motor Vehicles to prohibit a person from driving a commercial vehicle. They do not, by themselves, prohibit the driver from driving a noncommercial vehicle. As originally enacted several years ago, G.S. 20-17.4 required that the conduct leading to the disqualification must have occurred in a commercial vehicle, unless the statute specifically provided otherwise. S.L. 2005-349 reverses that rule, so that a commercial driver who commits an offense in his or her private automobile, off the job, will be treated for disqualification purposes in the same manner as if he or she had been driving a commercial vehicle. It also adds as grounds for disqualification the following: civil revocations under G.S. 20-16.5 or similar statutes in other jurisdiction, if the offense

occurred in a commercial vehicle; convictions of death by vehicle or manslaughter occurring while the person was operating a motor vehicle; and driving a commercial vehicle while the person's license is revoked or the person is disqualified from driving a commercial vehicle.

S.L. 2005-349 also reverses another rule. It provides that multiple disqualifications for serious violations of traffic regulations run consecutively to other disqualifications; the general rule for most license actions is that multiple periods of revocation run concurrently.

S.L. 2005-349 exempts some commercial license records from yet another rule applicable to most other drivers. G.S. 20-36 provides that, in determining the suspension or revocation of a person's driving privilege, the Department of Motor Vehicles may use the driving records for incidents occurring in the most recent ten-year period only. S.L. 2005-349 eliminates that ten-year limit for offenses occurring in a commercial vehicle.

Finally, S.L. 2005-349 imposes civil penalties (in addition to any criminal punishments) on a person convicted of driving a commercial vehicle without a license and on employers who knowingly permit certain individuals to drive a commercial vehicle or permit a driver of a commercial vehicle to violate portions of the law dealing with railroad crossings. The same conduct by an employer may also be prosecuted in criminal court; upon conviction, the employer is guilty of an infraction.

S.L. 2005-156 (H 740) also amends the commercial driver's license laws. It requires employers to notify the Department of Motor Vehicles when an employee subject to federal drug testing rules for transit operators tests positive for drugs. Any person testing positive for drugs under this procedure is disqualified from driving a commercial vehicle until the person proves that he or she has been assessed and treated. The person has a right of appeal to the Department of Motor Vehicles.

ADETS Changes

For several years the General Assembly has directed the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services to review various aspects of the education and treatment programs in which convicted impaired drivers must participate. In the 2003–04 biennium, the committee focused on the treatment programs. In this biennium the review shifted to the Alcohol and Drug Education Traffic School (ADETS) program. (ADETS attendance is required of persons convicted of impaired driving who do not need substance abuse treatment.) As a result of its review, the committee recommended changes to the minimum qualifications for those teaching in the program. In response, the General Assembly enacted S.L. 2005-312 (H 35), which creates new statutory minimum qualifications for ADETS instructors, beginning January 1, 2009; after that date each instructor must be a certified substance abuse counselor, certified clinical addiction specialist, or certified substance abuse prevention consultant, as those terms are defined by statute. S.L. 2005-312 also directs the Commission on Mental Health, Developmental Disabilities, and Substance Abuse Services to amend its rules to do two things—raise the minimum number of hours required of participants to sixteen and limit the maximum class size to twenty. To reflect what will likely be increased costs to programs to implement these changes, S.L. 2005-312 raises the fee assessed for ADETS from $75 to $160. The percentage of that fee that must be sent to the Department of Health and Human Services to administer the program is raised from 5 to 10 percent. The fee increase will fund another mandate of S.L. 2005-312—the development of an ongoing outcomes evaluation study of persons participating in substance abuse treatment or ADETS as a result of an impaired driving conviction. The fee increase will not become effective until the rules regarding hours and class size are adopted.

Registration and Equipment

Specialized (Affinity) Plates

For the past several years, the General Assembly has authorized specialized license plates for various groups and organizations. Typically the plates carry an additional fee of from $20 to $30, the

proceeds of which support the administration of the special license plate program and the group or organization represented on the plate. This year S.L. 2005-216 (H 85) authorizes twenty-four new plates. Some are exempt from the requirement that the plate contain the "First in Flight" logo in addition to the design representing the cause supported by the plate. Some of the plates will include special images while others will use only words to identify the charity or cause. Typically, the Division of Motor Vehicles may not issue a specific special plate until it has received at least three hundred requests for that plate. The new plates are as follows:

1. Air Medal Recipient
2. Alpha Phi Alpha Fraternity
3. ARC of North Carolina
4. Autism Society of North Carolina
5. Buddy Pelletier Surfing Foundation
6. Coastal Conservation Association
7. Cold War Veteran
8. Corvette Club
9. Guilford Battleground Company
10. Marine Corps League
11. National Multiple Sclerosis Society
12. National Wild Turkey Federation
13. North Carolina Aquariums
14. North Carolina Libraries
15. North Carolina Museum of Natural Sciences
16. North Carolina Trout Unlimited
17. North Carolina Wildlife Habitat Foundation
18. Operation Enduring Freedom
19. Operation Iraqi Freedom
20. SCUBA
21. Shag Dancing
22. Share the Road
23. Tar Heel Classic Thunderbird Club
24. Watermelon

Red and Blue Light Prohibition

Current law prohibits a private individual from possessing the type of red or blue light used by emergency personnel to warn motorists they are approaching and on emergency business. S.L. 2005-152 (H 355) amends these laws to clarify that they apply to any red or blue light that faces forward and is installed on a vehicle after the vehicle's initial manufacture.

Weight and Size Regulations

The relationship between weight and size restrictions on vehicles using North Carolina's roads and the condition of those roads received a great deal of media coverage during the 2005 session. No legislation was passed to lower any of the maximum weights or sizes, but a couple of new laws modify some of the related rules. The first of these, S.L. 2005-361 (H 669), makes the following changes:

1. It authorizes law enforcement officers to detain property-hauling vehicles operated in violation of the statute allowing the use of special permits to exceed the basic size and weight limits.
2. It prohibits the operation of a vehicle when its load extends more than 14 feet beyond the rear of the vehicle, unless the property being transported is forestry products or utility poles.
3. It shifts the authority to impose civil penalties for violations from the Department of Transportation to the Department of Crime Control and Public Safety and limits the amount of fees assessed for various permit violations to $25,000.

4. It deletes the authority of the Department of Transportation to issue permits to exceed the statutory number of units that may be operated as a combination of vehicles.

S.L. 2005-248 (S 832) allows wreckers to take disabled vehicles up to fifty miles for repair, parking, or storage, even if the combination exceeds statutory weight limits. The former law allowed towing to the "nearest feasible point."

Seizure of Registration and License Documents

S.L. 2005-357 (H 1404) authorizes any sworn law enforcement officer who has jurisdiction to seize a certificate of title, registration card or plate, permit, or license if the officer has notice from the Division of Motor Vehicles that the item has been revoked or cancelled. If the item is needed for a criminal prosecution, the officer must retain the item as evidence, but otherwise the officer must turn the item over to the Department of Motor Vehicles. The officer must turn a registration plate over within forty-eight hours of its seizure.

Bills Eligible for Consideration in 2006

As noted in the introduction to this chapter, House Bill 1048, a major rewrite of the impaired driving laws, passed the House and will be eligible for action by the Senate in the 2006 short session. Other bills eligible for consideration in the short session include the following:

1. House Bill 267, which establishes an eight-year renewal cycle for drivers' licenses issued to young adults and allows Internet renewal in some circumstances
2. House Bill 643, which prohibits the possession of some devices intended to impede the use of traffic monitoring and detection systems
3. House Bill 666, which modifies the penalties for violation of restrictions on the use of high-occupancy vehicle lanes
4. Senate Bill 61, which raises the punishment for convictions of felony death by vehicle
5. Senate Bill 217, which requires a driver's license revocation for certain convictions of illegal use of alcohol by underage persons
6. Senate Bill 603, which exempts transportation of home-building and land development products from the weight limits otherwise imposed for light-traffic roads
7. Senate Bill 774, which requires all passengers in vehicles subject to the seat belt law to use seat belts
8. Senate Bill 881, which deals with the procedures and penalties imposed when a person allows his or her vehicle liability insurance to lapse
9. Senate Bill 1077, which shortens the period for which a motorcycle learner's permit can be issued and sets the permit fee
10. Senate Bill 1087, which allows judges to issue limited driving privileges to certain drivers convicted of driving while license revoked

James C. Drennan

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Public Employment

The 2005 session of the General Assembly saw few significant changes to North Carolina law affecting state and local government employees. State employees and retirees received modest salary and retirement income allowance increases. Local government employees also received modest retirement income allowance increases.

State Employees

Salary

Pursuant to The Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), the Governor's annual salary will increase to $123,819, while the annual salaries of the members of the Council of State will increase to $109,279. The salaries of appointed state department heads will increase to $106,765. Other executive, legislative, and judicial branch officials also received salary increases.

The General Assembly has increased by the greater of $850 or 2 percent the annual salaries of most other state employees, including employees of the judicial branch, the General Assembly, and the Community College System, as well as all SPA state employees. University of North Carolina EPA employees earning $42,500 or less will receive a salary increase of $850, while those earning more than $42,500 will receive salary increases of 2 percent.

In addition, all state, community college, and local board of education employees who are permanent employees as of September 1, 2005, and who are eligible for annual leave will receive an additional one-time grant of five days of paid annual leave (Special Annual Leave Bonus). The Special Annual Leave Bonus will be accounted for separately from other annual leave and will remain available until it is used. Rules that limit the amount of annual leave that may be carried over from year to year will not apply to the Special Annual Leave Bonus. Excluded from eligibility for the Special Annual Leave are state and public school employees who are on the Teacher Salary Schedule or the School-Based Administrator Salary Schedule.

The appropriations act also provides for a minimum salary of $20,112 per year for all permanent, full-time SPA state employees and authorizes salary supplements for certain teaching personnel in the

Department of Health and Human Services and the Department of Corrections and for the staff of the Industrial Commission.

State Employee Retirement Systems Increases and Changes

The appropriations act provides a 2 percent cost-of-living retirement allowance increase for retirees in the Teachers' and State Employees' Retirement System (TSERS), the Judicial Retirement System (JRS), and the Legislative Retirement System (LRS). It also adjusts the employer contribution rates for the various state retirement programs.

The appropriations act transfers the membership and retirement contributions of North Carolina Utilities Commission members serving on or after September 1, 2005, from TSERS to JRS.

Finally, the appropriations act amends G.S. 135-1(20), the definition of retirement applicable to TSERS, to (1) preclude TSERS members from any type of state employment, whether on a part-time, temporary, substitute, or contractor basis, during the six months immediately following the member's effective date of retirement; and (2) provide that there may be no intent or agreement with the employer that the employee will return to service after the six-month period. This amendment does not apply to participants in The University of North Carolina Phased Retirement Program until June 30, 2007.

State Health Plan

The 2005 legislature made a number of changes to the benefits provided under the Teachers' and State Employees' Comprehensive Major Medical Plan (the State Health Plan). Although benefits under the plan remain payable on the basis of 80 percent by the plan and 20 percent by the employee, the maximum out-of-pocket payment required of employees enrolled in the plan has been increased from $1,500 to $2,000 per person per fiscal year, with the maximum out-of-pocket payment per employee/children or employee/family contract increasing from $4,500 to $6,000. In addition, member payment for the first day of a hospital stay increased from $100 to $150, member payment for the fees and charges associated with individual outpatient visits increased from $50 to $75, and member payment for each emergency room visit increased from $100 to $200. The appropriations act also increased the co-payments for certain types of outpatient prescription drugs: the co-payment for each branded prescription with a generic equivalent will increase from $35 to $40, and the co-payment for each branded or generic prescription not on the plan's formulary will increase from $40 to $50.

Local Government Employees

Criminal History Checks

S.L. 2005-358 (S 737) amends G.S. 153A-94.2 to give county boards of commissioners authority to require criminal history checks on applicants for county employment and G.S. 114-19.14 to give the Department of Justice authority to provide the criminal history of an applicant for county employment from the State and National Repositories of Criminal Histories. The Department of Justice is already authorized to provide criminal histories to municipalities pursuant to G.S. 114-19.14.

Local Governmental Employees' Retirement System

S.L. 2005-276 provides a 2.5 percent cost-of-living retirement allowance increase for retirees in the Local Governmental Employees' Retirement System (LGERS).

Public Safety Retirement

The appropriations act increases the maximum monthly amount that a retired sheriff may receive from the Sheriffs' Supplemental Pension Fund to $1,500. It also increases the monthly benefit for members of the Firemen's and Rescue Squad Workers' Pension Fund to the sum of $163 per month. Finally, it amends G.S. 143-166.2(c) to clarify that the Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act includes within its coverage all state and local government law enforcement and detention officers.

Other Employment Legislation

Notice to Division of Motor Vehicles of CDL Holder's Positive Drug Test

S.L. 2005-156 (H 740) amends G.S. 20-17.4 and G.S. 20-37.19 and adds new G.S. 20-37.20A and G.S. 20-37.20B to require employers who, pursuant to 49 C.F.R. Part 382 and 49 C.F.R. Part 655, perform drug and alcohol tests of employees with commercial driver's licenses (CDLs) to notify the Division of Motor Vehicles (DMV) in writing of any confirmed positive drug or alcohol test. Upon receipt of such a notice, DMV will suspend the CDL of the individual until the driver has completed the assessment and treatment required by 49 C.F.R. Section 382.503. A notation of the suspension will remain on the driver's DMV record for two years.

Restrictions on Use of Social Security Numbers

S.L. 2005-414 (S 1048) (the Identity Theft Protection Act of 2005) adds new G.S. 132-1.10 to create new restrictions on how state and local governments may request and use Social Security numbers. The act prohibits government units from collecting these numbers unless the units are authorized by law to do so or unless the collection of the Social Security number is "imperative" for the performance of that agency's duties and responsibilities. As applied to employment practices, the act prohibits employers from collecting Social Security numbers from job applicants and from using Social Security numbers as employee identifiers. Collection of Social Security numbers for tax withholding purposes is not affected as this is specifically authorized by the Internal Revenue Code.

When employers are authorized to collect Social Security numbers, the act requires that they segregate the number on a page separate from the remainder of an associated document and redact the number when it appears on a personnel document validly disclosed in accordance with a public records request. Employers must also provide a statement of the purpose for which the Social Security number will be used if an employee so requests and cannot use the number for any purpose other than the stated purpose.

Changes to Certain Employment Security Contribution Rates

S.L. 2005-410 (S 757) makes a number of clarifying and technical changes to the Employment Security Act, the most important of which are amendments to G.S. 96-9(b)(3)d3 and G.S. 96-9(a)(3)d5. These amendments change the way certain aspects of the contribution rate are calculated.

Payroll Deduction for Employees' Association

S.L. 2005-276 amends G.S. 143-3.3(g) to extend to local governments the authority to make periodic payroll deductions of a designated sum from employee paychecks for payment to an employees' association. This type of deduction may now be made for all North Carolina public employees. This provision, however, also changes the definition of a qualifying employee organization from one that has at least two thousand members, the majority of whom are employees of the state or a

public school system, to one that has at least two thousand members, five hundred of whom are employees of the state, a political subdivision, or a public school system.

Public School Employees

The General Assembly's 2005 legislation affecting public school employees is discussed in Chapter 10, "Elementary and Secondary Education."

Diane M. Juffras

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Public Purchasing and Contracting

Legislative changes in the 2005 session affecting public contracting continue the recent trend of increasing flexibility through higher bidding thresholds and the creation of new exceptions to bidding requirements. The most important change was the increase in the minimum threshold for informal bidding, which created a significant category of contracts (those costing less than $30,000) that do not require any form of competition. Even though some jurisdictions may choose to conduct informal bidding for some or all contracts below this threshold, local units will have a choice about what procedures to adopt and are not restricted to the statutory procedures. Another significant change is the explicit authorization for agreements with developers to construct infrastructure improvements associated with new development. These provisions, which were enacted as part of a major revision to the land use development laws for local governments, provide a practical approach to the common occurrence in which developers are able to make infrastructure improvements as part of a private project, improvements that will benefit the jurisdiction as a whole.

Threshold Changes and New Exceptions

Threshold Changes

The legislature changed the dollar thresholds that trigger several contracting procedures for purchasing, construction contracting, and property disposal. In S.L. 2005-227 (H 1332), which became effective July 27, 2005, the legislature increased from $5,000 to $30,000 the minimum expenditure level in G.S. 143-131(a) at which informal bidding is required for purchases of apparatus, supplies, materials, and equipment, and for construction or repair work. Therefore, unless required by local policy, bidding procedures are no longer required for contracts in these categories costing less than $30,000. Local governments may establish local policies requiring competition at a lower threshold or in certain circumstances. Since the requirement to award contracts to the "lowest responsible bidder" would no longer apply to contracts below this threshold, local governments may be able to establish local preferences for contracts in this dollar range. As another result of this change, minority outreach requirements included in G.S. 143-131(b) no longer apply to contracts below $30,000. Local governments may, under local policies, continue minority outreach practices when seeking competition below this threshold. The threshold change is automatic; that is, it requires no action by the governing

board to become effective in a local unit of government. A local policy to continue bidding requirements below the $30,000 threshold, however, will require local action; the policy adopted should specify whether the unit will follow the otherwise applicable informal bidding procedures or whether local variations will apply.

The new law also increases from $5,000 to $30,000 the value of surplus property that may be sold under a delegation of authority as provided in G.S. 160A-266(c). This statute allows the governing board to delegate authority for disposal of property using informal procedures designed to receive fair market value. Unlike the change in the bidding threshold, this change is not automatic, and local governing boards must approve a delegation to the increased level. The effect of the delegation is to alleviate the need for public advertisement and board action on sales of particular property valued at up to $30,000. The new delegation provides broader authority for the use of electronic auction or other methods of selling property as it becomes surplus as an alternative to storing such property for later sale by public auction.

S.L. 2005-227 also adds authority in two statutes for the use of electronic advertisement instead of published notice: G.S. 143-129(g), commonly referred to as the "piggybacking" exception, and G.S. 160A-270(c), regarding electronic auctions. This authority was included in the formal bidding statute, G.S. 143-129, in 2001.

The changes discussed above apply to cities, counties, schools, and other local government entities. Lower thresholds in local acts or charters remain in effect.

Infrastructure Agreements

As part of a major revision to the land use development laws, the legislature has created new provisions that govern infrastructure projects conducted by private developers or property owners. In S.L. 2005-426 (S 814) the legislature enacted parallel statutes for cities and counties authorizing reimbursement agreements to be used when private developers design and construct infrastructure included in the local government's Capital Improvement Plan. The agreements must be provided for by ordinance, and the reimbursements may be paid from any lawful source. The statutes specifically exempt these agreements from the competitive bidding requirements. The developer, however, must comply with these requirements when awarding contracts for work that would have required competitive bidding if the contract had been awarded by the local government.

Similar provisions for road work and public enterprise (utility) work authorize cities and counties to contract with a developer or property owner, or with a contractor working for a developer or property owner, for improvements adjacent or ancillary to a private land development project. These contracts are exempt from bidding if the public cost does not exceed $250,000 and the local government determines that: (1) using the private developer will be less expensive than the unit's estimated cost of using its own forces or contracting with a different private contractor or (2) it would be impracticable to coordinate the work if the projects were separately constructed. These provisions become effective January 1, 2006.

In S.L. 2005-41 (H 489) several local governments obtained the same authority regarding reimbursement agreements as provided by S.L. 2005-426. S.L. 2005-41 applies to Apex, Broadway (but only for municipal infrastructure located in Lee County), Cary, Goldston, Holly Springs, Pittsboro, Sanford, Siler City, to all municipalities wholly or partially in Cabarrus County, and to Cabarrus, Chatham, Durham, and Lee counties. The act exempts reimbursement agreements with private developers and property owners for design and construction of public infrastructure included in the unit's Capital Improvement Plan designed for the benefit of the developer or property owner and contains the same requirements as described above regarding developer compliance with bidding requirements. This act became effective May 16, 2005.

Sludge Management Facilities

An existing statute, G.S. 143-129.2, authorizes an alternative bidding and contracting approach for certain solid waste facilities. The law sets out a request for proposals process rather than sealed bidding for contracts that include the design, construction, operation, and maintenance of a solid waste

management and disposal facility. The statute also establishes a flexible standard for awarding the contract, specifically including factors other than price, and allows negotiation prior to contract finalization. The legislature amended this statute in S.L. 2005-176 (H 1097) so that it now applies to any sludge management facility, defined as "a facility that processes sludge that has been generated by a municipal wastewater treatment plant for final end use or disposal." The definition excludes "any component of a wastewater treatment facility that generates sludge." The law also amends the statute to specify that it applies to sanitary districts, water and sewer authorities, metropolitan sewerage districts, and county water and sewer districts.

Purchase of Voting Systems

The legislature established new requirements for voting systems used in state elections, including minimum requirements for the purchase of new systems. In S.L. 2005-323 (S 223), the legislature amended G.S 163-165.7 to require that counties purchase only voting systems certified by the State Board of Elections. While paper balloting systems are automatically deemed certified, other systems must be specifically approved by the state. To be certified the systems must meet the requirements of a request for proposal process set forth in the amended statute. The state request for proposal process will establish which systems may be purchased by counties upon recommendation of the county board of elections. Under G.S. 163-165.8, when the county purchases a voting system certified by the state, the county is exempt from the otherwise applicable bidding requirements in Article 8 of G.S. Chapter 143. The amendments affecting voting systems also require the vendors to place the source code in escrow to secure its continued use in the event of a failure of the system or the business. A list in the statute specifies who may view this material, which is otherwise not subject to public disclosure.

Local Exemptions

As is typical, the legislature approved several local modifications to the bidding requirements. Durham County obtained flexibility under S.L. 2005-172 (S 435) for public-private projects, including freedom from the procedural requirements for leases of greater than ten years and from otherwise applicable bidding procedures to allow use of the same contractor for the publicly and privately funded portions of the projects.

S.L. 2005-174 (S 340) grants exemptions to Roanoke Rapids from the building construction requirements for construction of theater projects in the Music Theater and Entertainment District and for construction of a new fire station using the design-build construction method, which is not authorized under the otherwise applicable law.

S.L. 2005-32 (H 997) increases the force account limit in Davie County from the statutory threshold of $125,000 to $600,000 for expansion and improvement of an EMS station.

State, University, and Community College Contracts

Historically Underutilized Business Certification

A new law requires the state Department of Administration to adopt rules and procedures for certification of historically underutilized businesses and to create and maintain a database of these businesses. S.L. 2005-270 (S 907) amends several statutes that deal with minority business programs in state and local government contracting to create the new requirement. The definition of "historically underutilized business" is consistent with the definitions already listed in these statutes for "minority business" as well as businesses owned by disabled persons as defined in G.S. 168-1 or G.S. 168A-3. This act codifies authority for the substantial certification program already in place at the state level. While the law does not require local governments to recognize the state certification process, it may promote more consistency and reliability in the recognition of minority firms included in contracting programs.

Outsourcing and Preferences

Under a new statute, G.S. 143-59.4 [S.L. 2005-169 (H 800)], vendors bidding on state contracts will be required to disclose in a statement submitted with their bids where contracted services (including subcontracted services) will be performed. The statement must specify whether any work is anticipated to be performed outside the United States. The law requires the Secretary of the Department of Administration to retain these statements and report annually on them. The law became effective on October 1, 2005, and applies to bids submitted on or after that date. The new requirement applies to state government contracts only, and not to local government contracts.

S.L. 2005-213 (S 879) removes the sunset on the reciprocal preference requirement enacted in 2001 (S.L. 2001-240). That law requires the state to increase bids from vendors who come from states having in-state preferences. The increase is a percentage equal to that of the in-state preference. The legislature also amended several statutes to authorize the state to maintain a list of resident bidders and to endeavor to provide notice to all resident bidders who express an interest in bidding on state contracts.

University Contracts

The Umstead Act limits state agency and university competition with the private sector in the provision of specified services. The act contains numerous exceptions for particular activities. This year, in S.L. 2005-20 (H 752), the legislature created an exception in G.S. 66-58(c) for sales by North Carolina State University of dairy products produced by the Dairy and Process Applications Laboratory. Profits from these sales must be used to support the University Department of Food Science and the College of Agriculture and Life Sciences. S.L. 2005-63 (S 510) adds a new exception for the use of personnel and facilities of Western Piedmont Community College in support of economic development through the operation of the East Campus and its companion facilities as an event venue. Another new provision of the Umstead Act enacted in S.L. 2005-397 (H 1539) requires the UNC Board of Governors to create a panel to determine whether particular activities are covered by the authority provided in the act.

Several acts this session provide the University system additional contracting flexibility. S.L. 2005-125 (H 678) amends G.S. 143-53 to add a new subsection (d) allowing The University of North Carolina to solicit bids for service contracts with terms of ten years or less, including extensions and renewals, without prior approval of the State Purchasing Officer. This act became effective June 29, 2005. S.L. 2005-300 (H 1464) makes permanent an increase in autonomy for University construction projects costing $2 million or less. That law also removed the sunset provision in a 2001 law giving the University autonomy and flexibility in managing projects. S.L. 2005-300 requires the Board of Governors annually to report to the State Building Commission on projects undertaken under the flexibility provisions.

A provision in the Current Operations and Capital Improvements Appropriations Act of 2005 [S.L. 2005-276 (S 622); section 9.8] authorizes the University and its constituent institutions to participate in the aggregation of purchasing for computer hardware and software licenses and multiyear agreements as administered by the Office of Information Technology Services. The provision directs the Office of State Budget and Management to study whether further aggregation is cost justified.

Community Colleges

S.L. 2005-370 (H 576) gives community colleges flexibility in awarding open-ended contracts (that is, contracts that are not limited to a single project) for architectural, engineering, or surveying services estimated to cost less than $300,000. (Similar flexibility has previously been provided to The University of North Carolina.) As amended by this act, G.S. 143-64.34 exempts community college projects below the $300,000 threshold from State Building Commission approval if they are part of an open-ended contract, are publicly announced, and comply with State Building Commission procedures. This change became effective October 1, 2005.

School Purchasing

The formal bidding statute, G.S. 143-129, requires governing board approval of purchase and construction or repair contracts in the formal bidding range. The statute provides, however, that for purchase contracts only, the board may delegate authority to award contracts and to reject bids or readvertise to receive bids. In S.L. 2005-227 the legislature included superintendents in the list of individuals to whom the delegation may be made. When the provision was originally enacted, local school units were not governed by it, so this change brings the law into conformity now that it applies to schools.

Sales of certain beverages in school vending machines will be restricted under a new law enacted in S.L. 2005-253 (S 961), which limits certain types of food and drinks in the schools. For more information about this law, see Chapter 10, "Elementary and Secondary Education."

Other Contracting Changes

S.L. 2005-134 (S 537) authorizes a taxing unit to accept as payment of taxes due an offset against an obligation under a lease or another contract between the taxpayer and the taxing unit entered into prior to July 1 of the taxing year for which the unpaid taxes were levied. This law became effective June 29, 2005.

S.L. 2005-290 (H 819) gives regional councils of government authority to acquire and improve real property in order to meet office space and program needs. The statute, G.S. 160A-475, as amended, specifically states that councils of government are *not* authorized to acquire property by eminent domain.

Property Disposal

The legislature enacted several new provisions regarding the disposition of firearms. G.S. 15-11.1(b1) lists the ways a judge may order the disposition of firearms in cases where firearms are seized and are no longer needed for a criminal trial. S.L. 2005-287 (H 1016) adds to that statute a provision specifying that the judge may order the firearm turned over to a law enforcement agency, which may in turn use, sell, or trade it to or exchange it with a federally licensed firearm dealer. The law specifies that if the firearm is sold, the proceeds of the sale must be remitted to the schools pursuant to G.S. 115C-452. The receiving agency must maintain a record of all firearms received. Identical language was also added to G.S. 14-269.1, which addresses the confiscation and disposition of deadly weapons. In addition, a new section was added to G.S. Chapter 15 setting forth similar procedures for firearms found or received by a law enforcement agency rather than confiscated. G.S. 15-11.2 establishes procedures for providing notice of unclaimed firearms. If a firearm remains unclaimed after the notice and thirty-day waiting period, the statute provides for disposition in the same manner as described above for firearms awarded by a judge. In the case of unclaimed firearms under this section, however, the proceeds of sales may be retained by the agency. (The constitutional requirement to remit proceeds to the schools does not apply to found property, only to seized or confiscated property.)

The City of Raleigh obtained a local act [S.L. 2005-157 (S 392)] amending its charter to authorize the city to sell uniforms and equipment (excluding weapons) to employees at private sale upon their separation from employment. The city council must set prices, terms, and conditions by resolution.

Conflicts of Interest

S.L. 2005-70 (H 869) amends G.S. 131E-14.2, which concerns the conflict of interest laws that apply to public hospitals. As amended, the statute now prohibits hospital board members from having

direct interests (was, direct or indirect interests) in hospital contracts. The statute was also amended to specify that there is no conflict of interest if the board member is not involved in making or administering the contract. The new provision incorporates parallel language from G.S. 14-234 in the definition of the following: (1) *administering* a contract includes overseeing performance of, or interpreting, the contract; (2) *making* a contract includes participating in the development of specification or contract terms or in the contract preparation or award. The new law adds several conditions to the exception for small contracts under subsection (d) of the statute and creates an exception for a director who serves on the board as an *ex officio* representative of the hospital medical staff under a hospital bylaw adopted prior to January 1, 2005. This exception also applies to the spouse of any director who meets these criteria.

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Public Records

The 2005 General Assembly enacted three significant acts concerning public records: the first is intended to provide protection against identity theft by restricting public access to Social Security numbers and other personal identifying information, the second protects the trial preparation materials of government lawyers from public access, and the third concerns public access to records relating to economic development projects. This chapter addresses these three acts at some length and then briefly summarizes other public records legislation.

Social Security Numbers

S.L. 2005-414 (S 1048) enacts the Identity Theft Protection Act of 2005. Most of the act regulates how private businesses may use Social Security numbers and other personal identifying information, but it also enacts new G.S. 132-1.10 regulating governmental use and distribution of this type of information. *Identifying information*, defined in G.S. 14-113.20, includes driver's license numbers, checking and savings account numbers, credit and debit card numbers, digital signatures, biometric data, fingerprints, and passwords.

Subject to certain exceptions set out below, new G.S. 132-1.10 prohibits state and local government agencies from doing the following:

1. Effective December 1, 2005, an agency may not collect a Social Security number from an individual unless either authorized by law to do so or "collection of the social security number is otherwise imperative for the performance of that agency's duties and responsibilities." Before an agency may collect Social Security numbers, it must document the need for the numbers. In addition, the State Privacy Act (codified at G.S. 143-64.60), which mirrors a comparable federal statute, prohibits a state or local government agency from denying any person any right, benefit, or privilege simply because that person refuses to disclose his or her Social Security number to the agency. The only exceptions to the Privacy Act prohibitions are when disclosure of the number is required or permitted by federal statute or when the disclosure is subject to a state law or regulation in existence before January 1, 1975. In addition, the Privacy Act requires an agency requesting Social Security numbers to inform individuals whether the disclosure is mandatory or voluntary, under what statutory authority the number is requested, and what use the agency will make of the number. The new public records statute repeats the requirement that individuals be given a statement of the purpose or purposes

for which the number is being collected, but conditions the requirement on an individual's requesting the statement. The unconditional requirement set out in the Privacy Act, however, remains in force.

2. Effective December 1, 2005, an agency must maintain any Social Security numbers it collects in a way that facilitates the number's redaction if the record in which it is found will be made public. If the record is maintained in physical form, the statute urges that the number be segregated on a separate page.

3. Effective December 1, 2005, an agency may not use a Social Security number for any purpose other than the purpose or purposes included in the statement made available to individuals when the number is collected.

4. Effective December 1, 2005, an agency may not intentionally communicate or otherwise make available to the public either a person's Social Security number or other personal identifying information. (For purposes of this prohibition, identifying information does not include electronic identification numbers, electronic mail names or addresses, Internet account numbers or identification names, a parent's legal surname before marriage, or driver's license numbers found on law enforcement records.) This is the only provision in the new statute specifically limiting what governments may do with identifying information other than Social Security numbers. [In what may be a bit of redundancy, S.L. 2005-455 (S 1126) prohibits the Wildlife Resources Commission from making public personal identifying information in its possession taken from applicants for licenses, titles, permits, and registrations. The Wildlife Commission statute defines such information more broadly than does the Identity Theft Protection Act, including within the definition a person's mailing address, residence address, date of birth, and telephone number.]

5. Effective July 1, 2007, an agency that provides persons a card required for access to government services may not intentionally print or embed that person's Social Security number on the card.

6. Effective July 1, 2007, an agency may not require a person to transmit his or her Social Security number over the Internet unless the connection is secure or the number is encrypted.

7. Effective July 1, 2007, an agency may not require a person to use his or her Social Security number to access an Internet Web site unless a password, unique personal identification number, or other authentication device is also required.

8. Effective July 1, 2007, an agency may not print a person's Social Security number on any materials mailed to the person unless state or federal law requires that the number be on the mailed document. In addition, if the number is permitted to be mailed, it may not be printed on the envelope or postcard or otherwise be visible without the envelope having been opened.

The new statute then sets out seven exceptions to the prohibitions just summarized:

1. An agency may disclose Social Security numbers or other identifying information to another governmental entity only if disclosure is necessary to the other entity's work. The receiving entity must, however, maintain the confidentiality of the numbers and other information.

2. An agency may disclose Social Security numbers and other identifying information pursuant to a court order, a warrant, or a subpoena.

3. None of the prohibitions apply to Social Security numbers or other identifying information disclosed for public health purposes in compliance with G.S. Chapter 130A. For example, vital records routinely include an individual's Social Security number, and this new statute apparently does not apply to these records.

4. None of the prohibitions apply when the Social Security number or other identifying information has been redacted. The act's provisions applicable to private businesses define *redaction* as "the rendering of data so that it is unreadable or is truncated so that no more than the last four digits of the identification number is accessible as part of the data." This definition does not, on its face, apply to the new public records statute, nor does that statute define redaction. Therefore, it is unclear whether redacting all but the final four digits of a Social Security number would be an acceptable means of redaction under the public records statute as well, although it seems likely intended to be.

5. The State Registrar and other authorized officials may include Social Security numbers in certified copies of vital records issued pursuant to G.S. 130A-93(c). If the Registrar issues an uncertified copy of such a record, the Social Security number must be redacted.

6. None of the prohibitions apply to Social Security numbers or other identifying information included on documents recorded in the office of the register of deeds.

7. None of the prohibitions apply to Social Security numbers or other identifying information filed with a court.

These final two exceptions give rise to a number of special provisions concerning documents recorded with the register of deeds or filed with a court. First, the new statute prohibits any person from including a Social Security number, an employer taxpayer identification number, a driver's license or state identification number, a passport number, a bank account number, a credit or debit card number, a personal identification code, or a password on any document to be recorded with the register of deeds or filed with a court, unless inclusion of that information is required by law or regulation or the number is redacted (probably meaning only the final four digits are visible). The statute makes a loan closing instruction requiring a Social Security number void and makes violation of either of these provisions an infraction. Second, if personal information is improperly included on a document, the inclusion has no effect on the validity of the document, and the register of deeds may not reject such a document. Third, if a register of deeds or clerk of court places or arranges to place documents on the Internet, any person whose Social Security number or other identifying information is on such a document is entitled to have the number or other information removed from the image of the document placed on the Internet. (It is apparent from the statute's context that this may entail removing the number or other information from the original document on file.) Fourth, the register of deeds and the clerk of court must post signs in their offices setting out the rules described in this paragraph.

The major portion of this act became effective December 1, 2005. As noted above, four prohibitions on use of Social Security numbers, however, do not become effective until July 1, 2007.

Trial Preparation Materials and Attorneys' Fees

Trial Preparation Materials

In *News & Observer Publishing Company v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992), the North Carolina Supreme Court held that just because documents were protected under the attorney-client privilege did not mean they were exempt from public inspection under the public records law. The main purpose of the privilege is to protect privileged statements and documents from being introduced into evidence or from being subject to discovery in a court case. The logic of the *Poole* decision suggested that other litigation-related material exempt from discovery might nevertheless also be subject to public access under the public records law, and in June 2004 the state court of appeals agreed. In *McCormick v. Hanson Aggregates Southeast, Inc.,* 164 N.C. App. 459, 596 S.E.2d 431 (2004), the court held that a city attorney's work product, or material prepared by the attorney in anticipation of litigation and which is not subject to discovery, was in fact available, even to a litigant, under the public records law.

S.L. 2005-332 (S 856) partially reverses the outcome of the *McCormick* decision. It applies to trial preparation materials as defined in the Rules of Civil Procedure, which are materials prepared in anticipation of litigation or for trial, including "the mental impressions, conclusions, opinions, or legal theories" of the lawyers involved in the litigation. Until the litigation for which the materials were prepared is entirely completed, these materials are not available under the public records law. Rather, they may be accessed only pursuant to the rules of discovery under the Rules of Civil Procedure. Once the litigation is complete, however, the materials become fully subject to the public records laws. (Some trial preparation materials may be covered by other exemptions to the public records law, and this new statute does not change that status.) These new provisions became effective October 1, 2005.

Attorneys' Fees

G.S. 132-9 has provided that if a person brings suit to force disclosure of public records and wins the suit, the trial court may allow that person to recover attorneys' fees. Before such an award could be

made, the court must have found that the agency denied the person access to the records without substantial justification and that there were no special circumstances that would make the award of fees unjust. As part of the price of obtaining legislative passage of the exemption of trial preparation material from public records access, the lobbying organizations for government agencies were forced to accept modification of this attorneys' fee provision to the end that the chances a successful public records plaintiff would recover his or her attorneys' fees are increased. S.L. 2005-332 amends G.S. 132-9 to change that section's permission for award of attorneys' fees into a requirement. Thus, if a plaintiff wins disclosure of records in a public records suit, the trial court must now award reasonable attorneys' fees to the plaintiff unless the court finds that the agency acted with substantial justification in originally denying access to the records or that there are special circumstances making the award of attorneys' fees unjust. This change became effective October 1, 2005.

Economic Development Records

G.S. 132-6(d) has exempted from public access records "relating to the proposed expansion or location of specific business or industrial projects." The exemption exists as long as necessary to avoid frustrating the purpose for which the records were created. S.L. 2005-429 (S 393) modifies this law by providing a deadline for release of these economic development records. The statute provides that the exemption is no longer valid once the state, a local government, or the business itself has announced the business's commitment to expand or locate in North Carolina. (If the business commits to locate in the state but leaves open the issue of where to locate within North Carolina, local government records associated with the project remain confidential until that second decision is announced.)

The state and its local governments often undertake cost-benefit analyses or similar assessments to determine how large any incentives offered to a project should be. S.L. 2005-429 adds a new provision to the public records law requiring any agency preparing such an analysis or assessment to "describe in detail the assumptions and methodologies used" in making it. This description is then a public record subject to all the provisions of the public records law [including the possibility of being held confidential pursuant to G.S. 132-6(d)].

Finally, the act requires the state and local governments to prepare a document describing to businesses the state laws that regulate records received or created as part of an economic development project. In particular, the document must describe when confidential information may be withheld from disclosure and what steps must be taken to ensure the information remains confidential. This provision seems intended to ensure that businesses are aware of their responsibilities if they wish to maintain the confidentiality of their trade secrets under G.S. 132-1.2. A government agency must share this document with a potential applicant for economic development incentives at the beginning of its negotiations with such an applicant.

This act became effective when it was signed by the Governor on September 22, 2005.

Other Public Records Legislation

Autopsy Photos and Recordings

After the death in Florida of NASCAR driver Dale Earnhardt and the resulting controversy over access to the photographic records of his autopsy, legislation was introduced in the 2003 General Assembly to restrict public access to such photographs. It did not pass in that General Assembly, but comparable legislation did pass this year. S.L. 2005-393 (H 1543) continues to allow any person to examine photographs or video or audio recordings of autopsies, but it sharply restricts who may be given a copy of the photographs or recordings. The new statute permits giving a copy to a quite short list of public officials, to personal representatives of the estate of the deceased, and to physicians for purposes of conferring with attorneys or for teaching purposes. It also permits any other person who wishes to have a copy of such a photograph or recording or to use it in ways not permitted by the

statute to bring a special proceeding before the clerk of court. After considering whether the disclosure is necessary for the public evaluation of governmental performance, the seriousness of the intrusion into the family's right to privacy and whether the disclosure is the least intrusive means available, and the availability of similar information in other public records, the clerk may in his or her discretion permit making or using the copy.

School Employee Personnel Records

There are separate personnel privacy statutes for several different groups of public employees, including one for public school employees. Most of these statutes make improper release of the records a misdemeanor, but the school statute has not included any remedies for violation. S.L. 2005-321 (S 1124) addresses this situation, adding to the school statute (G.S. 115C-321) criminal enforcement provisions identical to those already found in the comparable statutes for county and city employees.

Other Legislation

S.L. 2005-65 (H 231) specifically permits the State Controller to review a state agency's compliance with prescribed uniform state accounting system standards. The act also adds new G.S. 143B-426.39B, which excludes from the definition of public record under G.S. Chapter 132 the work papers and other supportive material created as a result of such a review.

G.S. 7A-38.2 establishes the Dispute Resolution Commission within the Judicial Department and charges it with administering the state's program to qualify and certify mediators and other so-called neutrals. S.L. 2005-167 (S 806) amends this statute to make confidential all information held by the commission pertaining to mediator certification, qualification of other neutrals, certification or qualification of training programs for mediators and neutrals, and certain other information.

S.L. 2005-231 (S 527) provides for the establishment of a Campus Police Program within the state Department of Justice, which will permit certification of campus police agencies in both private and public universities. The act provides that the personnel files of individual officers held by the program must be treated in the same way as the personnel files of state, county, and city employees—that is, these records will be largely exempt from public access.

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Registers of Deeds, Land Records, and Notaries

The laws governing the institutions involved in real estate transactions underwent substantial change in 2005. The reforms can be classified into three general categories. The most fundamental reforms changed the procedures for recording real estate instruments, conforming the process more closely to that of other states, by narrowing registers' review responsibilities and simplifying methods for recording satisfactions of security instruments. The second category of reforms is a comprehensive rewrite of the notary laws, including rules about notary qualification and discipline and the performance of notarial acts. The third category consists of new statutes intended to facilitate the electronic recording of real estate instruments, the standards for which are to be developed by the Secretary of State in consultation with a newly formed Electronic Recording Council. The 2005 legislation represents substantial progress in positioning North Carolina's fundamental real estate transaction institutions to handle modern transactions.

Mortgage Satisfactions and Registers' Review

S.L. 2005-123 (S 734) resulted from the combined efforts of groups involved in real estate transactions, including registers of deeds, attorneys, title insurance companies, lenders, and the Secretary of State's office. The final act is the fusion of two individual legislative endeavors. The first of these is embodied in the Uniform Residential Mortgage Satisfaction Act, a product of the National Conference of Commissioners on Uniform State Laws. This act is intended to simplify some of the complexities in real estate transactions resulting from idiosyncratic rules for recording mortgage satisfactions and to provide a mechanism for dealing with obtaining satisfactions from uncooperative secured creditors. The second influence in the framing of S.L. 2005-123 was an effort by entities involved in real estate transactions to clarify and narrow the instrument review responsibilities historically assigned to registers, which were perceived as causing unnecessary complexities and delays and presenting an obstacle to the implementation of electronic recording.

S.L. 2005-123 makes some of the most fundamental revisions in decades to North Carolina law governing registers' duties. North Carolina registers have long been more involved in the real estate instrument recording process than is common in other states. They have been obliged to certify the

acknowledgment or proof appearing on instruments by determining whether it is in "due form" and "duly proved or acknowledged." Registers also have played an unusually active role in handling real estate financial documents, examining security instrument satisfaction records for completeness, accuracy, and form compliance, and making entries on the record. This process consumed registers' and lenders' resources and resulted in delays that impaired the mortgage lending process. S.L. 2005-123 greatly narrows the registers' role in reviewing and preparing records of mortgage satisfactions. These changes took effect October 1, 2005. Instruments not yet recorded as of that date will be governed by the revised law regardless of when they were executed or acknowledged.

Registers' Review

S.L. 2005-123 has eliminated the requirement that registers certify that execution by one or more signers has been "duly proved or acknowledged" and that the proof or acknowledgment is "in due form." The revised statute limits the register's review to determining if the instrument has a proof or acknowledgment if one is required and then only verifying that the proof or acknowledgment "by one or more signers appears to have been proved or acknowledged before an officer with the apparent authority to take proofs or acknowledgments, and the said proof or acknowledgment includes the officer's signature, commission expiration date, and official seal, if required." G.S. 47-14(a). The statute clarifies that the register is not required to verify "(i) the legal sufficiency of any proof or acknowledgment, (ii) the authority of any officer who took a proof or acknowledgment, or (iii) the legal sufficiency of any document presented for registration." G.S. 47-14(a). An additional clarification of the register's review responsibilities included in the amended notary laws provides that registers must accept notarial certificates that are in the statutory form and need not review signatures for statements about representative capacity or authority to sign. S. L. 2005-391 (S 671), Section 9; G.S. 47-37.1.

S.L. 2005-123 also provides: "Any document previously recorded or any certified copy of any document previously recorded may be rerecorded, regardless of whether it is being rerecorded pursuant to G.S. 47-36.1 [pertaining to correction of minor errors by explanation]." G.S. 47-14(a). This language indicates that a document need not be reviewed for compliance with recording requirements if it is the same document previously recorded or a certified copy of the document. A technical correction was proposed in Section 40(c) of House Bill 327, the 2005 Technical Corrections Act, to clarify that registers had no obligation to review documents presented for rerecording for alterations, but House Bill 327 was not passed before the General Assembly adjourned.

Simplified Satisfaction Process

S.L. 2005-123 provides new forms of satisfaction documents to be prepared and recorded by secured creditors or trustees. New provisions define the term *security instrument* as any document creating an interest in real property to secure an obligation, including deeds of trust and mortgages, and the term *secured creditor* as the holder of the interest, which does not include a trustee. G.S. 45-36.4(16), (18). A "satisfaction of security instrument" is to be provided by a secured creditor of a security instrument including a mortgage or deed of trust or a "trustee's satisfaction of a deed of trust" by the trustee or substitute trustee of a deed of trust. Either satisfaction document must identify the type of security instrument, the parties to the original instrument, the original instrument's recording data, and the office in which it was recorded. The satisfaction document also must indicate that the person signing is the secured creditor, or the trustee for a trustee's satisfaction, and it must contain language terminating the effectiveness of the security instrument. It must be signed by the secured creditor in the case of a satisfaction of security instrument or the trustee in the case of a trustee's satisfaction, and be acknowledged. G.S. 45-36.10, 45-36.11, 45-36.20, 45-36.21. The revised law says that "[n]o particular phrasing is required for a satisfaction of a security instrument" or a trustee's satisfaction of a deed of trust, but it provides forms including the minimum information. G.S. 45-36.11, G.S. 45-36.21.

The revised law provides that there are only two reasons for a register to refuse to record a satisfaction of security instrument or trustee's satisfaction of a deed of trust: It "is submitted by a

method or in a medium not authorized for registration by the register of deeds under applicable law," or it is not signed by the required party and acknowledged as required for a real estate conveyance. G.S. 45-36.10(b), G.S 45-36.20(e). The statutes clarify that a register is not "required to verify or make inquiry concerning . . . the truth of the matters stated" in any satisfaction document or to verify "the authority of the person executing" the document. G.S. 45-36.10(b)(2), G.S. 45-36.20(e)(2). The revised law has also deleted a provision directing registers to reject instruments that did not meet a requirement that names be printed, stamped, or typed beneath signatures on satisfactions prepared under G.S. 45-37, although the requirement itself remains. G.S. 45-37(f). No fee is to be charged for recording satisfactions. G.S. 45-37.2(a).

Obsolete Satisfaction Methods

S.L. 2005-123 deletes from the statute the provision requiring the register to cancel a security instrument upon receipt of a "notice of satisfaction" by a trustee or mortgagee, which effectively has been replaced by the satisfaction of security instrument and trustee's satisfaction of a deed of trust. G.S. 45-37(a)(5). The satisfaction of security instrument document similarly effectively replaces the register's cancellation of a security instrument upon exhibition of a certificate of satisfaction by the note owner, which was required by the previous statute. G.S. 45-37(a)(6). The revisions also eliminate the provision for acknowledgment of satisfaction before the register by the trustee, mortgagee, or trustee's or mortgagee's legal representative, agent, or attorney. G.S. 45-37(a)(1). A notice of satisfaction or a certificate of satisfaction in the old forms will be accepted and recorded as a proper satisfaction instrument. G.S. 47-46.1, G.S. 47-46.2.

Satisfaction Rescission

The revised law authorizes anyone who erroneously records a satisfaction instrument to record a document of rescission that identifies the erroneous satisfaction or affidavit and states that the error has been made, that the secured obligation remains unsatisfied, and that the security instrument remains in force. Lenders sought this change as some relief from the revised law's shorter period for lenders to provide satisfaction records—thirty days—fearing the shorter period would increase the likelihood of erroneous recordings. The statute does not expressly require the document of rescission to be acknowledged, which likely will be addressed in corrective legislation. The document of rescission does not affect the rights of those who acquire a real estate interest between the time the satisfaction or affidavit and the document of rescission were recorded, and the law subjects anyone who erroneously or wrongfully records such an instrument to liability for actual losses, attorneys' fees, and costs. G.S. 45-36.6.

Self-Help Satisfactions

S.L. 2005-123 requires secured creditors to submit for recording a satisfaction document, or to arrange for a recorded satisfaction by other authorized means, within thirty days after full payment or performance of the secured obligation. The law subjects the creditors to liability for actual damages for missing the deadline and, if the failure continues for another thirty days after notice from the landowner, for an additional $1,000 and attorneys' fees and court costs. G.S. 45-36.9. The time limit for recording or providing satisfactions for mortgages or deeds of trust satisfied before October 1, 2005, was sixty days. G.S. 45-36.3.

S.L. 2005-123 also creates a mechanism for a borrower to make a record of satisfaction when the lender fails to do so. If the secured creditor fails to provide a satisfaction as required, an attorney licensed to practice law in North Carolina, acting as "satisfaction agent," may give notice to the secured creditor of intent to record an "affidavit of satisfaction." This notice must contain prescribed information and give the secured creditor thirty days to provide the satisfaction instrument or to give notice of nonpayment, assignment, or accomplishment of a recorded satisfaction by other permitted methods. G.S. 45-36.14. In the absence of an appropriate response, the satisfaction agent may record an affidavit of satisfaction containing prescribed information. G.S. 45-36.16. The statute says that

"[n]o particular phrasing of an affidavit of satisfaction is required," but provides a form that will be sufficient. G.S. 45-36.17.

The statute provides that a register must accept an affidavit of satisfaction unless it "is submitted by a method or in a medium not authorized for registration by the register of deeds under applicable law" or it is not signed by the satisfaction agent and acknowledged as required by law for a real estate conveyance. G.S. 45-36.18(c). The statute expressly states that a register is not "required to verify or make inquiry concerning" "the truth of the matters stated" in the affidavit or "the authority of the person executing" it. G.S. 45–36.18(c)(2).

Subsequent Instruments, Indexing, and Good Faith

Subsequent instruments, which are instruments that purport to modify, amend, supplement, assign, satisfy, terminate, revoke, or cancel a previously recorded instrument—such as satisfactions, affidavits of satisfaction, assignments, and designations of substitute trustees—are recorded separately. They are to be indexed in the names of the parties to the subsequent instrument and any original parties as they are named in it, and there must be a reference to the recording data of the original instrument in the index if it is stated in the subsequent instrument. The register may rely solely on the information contained in the first two pages of the subsequent instrument, including the names and recording data provided therein. G.S. 161-14.1.

S.L. 2005-123 specifies that deeds of trust may be indexed in the names of the grantor and the beneficiary only. Prior law permitted the register to index deeds of trust in the names of the grantor and trustee only. G.S. 161-22(d). The revised law has eliminated authority for making marginal notes about foreclosure on recorded deeds of trust or mortgages. The notice of foreclosure is simply recorded and indexed as a subsequent instrument. G.S. 45-38.

Finally, S.L. 2005-123 affirms the guiding principle that registers must perform their duties regarding satisfactions "in good faith." G.S. 45-36.2. *Good faith* is defined as "[h]onesty in fact and the observance of reasonable commercial standards of fair dealing." G.S. 45-36.4(6).

Registers' Duties under the Identity Theft Protection Act

The Identity Theft Protection Act, S.L. 2005-414 (S 1048), which contains a number of protections for personal identifying information, gives individuals the right to require registers of deeds to redact identification numbers from official records on a publicly available Internet Web site maintained by the register or a court. G.S. 132-1.8(f). The protected information includes a person's Social Security, driver's license, state identification, passport, checking account, savings account, credit card, or debit card number, as well as personal identification (PIN) codes and passwords. The most likely instance in which such information will appear on a register's Web site is in loan documents.

A person wishing personal identifying information to be redacted must submit a signed request in writing by mail, facsimile, electronic transmission, or hand delivery, which must specify the information to be redacted and the document in which it appears. No fee may be charged for the redaction. Anyone who submits such a request without proper authority is guilty of an infraction and is subject to a $500 fine. Registers must post notices about the right of redaction, and the process for doing so, conspicuously in the register's office and on the Web site containing the records to which redaction applies. G.S. 132-1.8(g).

Electronic Recording

North Carolina has been among the first states to enact legislation to validate the use of electronic records in commerce and in filings with the government. In 2000, the state adopted the Uniform Electronic Transactions Act (UETA), which declared that any record or signature required by law may

be satisfied with an electronic record or electronic signature that complies with the act. G.S. 66-311 to G.S. 66-330. UETA uses broad definitions, providing that an electronic record could be any of a variety of common events such as a facsimile or an e-mail transmission. UETA did not resolve a basic question about the extent to which registers of deeds could accept and maintain official land records electronically, due to the interpretation that North Carolina law requires an "original signature" on real estate instruments submitted for recording unless a statute specifically authorizes a copy to be recorded.

The concern over authority for electronic land records was addressed in the Uniform Real Property Electronic Recording Act (URPERA) [Section 1 of S.L. 2005-391 (S 671)]. The act was drafted by the National Conference on Uniform State Laws to respond to what it described as "uncertainty and confusion" about whether electronic documents may be recorded in land records offices. Uniform Real Property Electronic Recording Act, Prefatory Note (revised 2005).

URPERA overcomes the requirement that a document be a paper "original" by defining a *document* to include "information that is . . . [i]nscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form" and providing that registers may accept electronic documents, broadly defined, if the records comply with standards to be established by the North Carolina Secretary of State. G.S. 47-16.2(1). Registers also are authorized to convert paper documents for recording into electronic form. G.S. 47-16.4(b)(5). They must continue to accept paper documents for recording. G.S. 47-16.4(b)(4). The statute specifically provides that "[a] physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature" as long as the necessary information "is attached to or associated with the document or signature." G.S. 47-16.3(c).

URPERA defines *electronic signature* broadly to include "an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document." G.S. 47-16.2(4). The law defers the question of standards for electronic records and signatures to a state advisory body. It requires the Secretary of State to develop "standards for recording electronic documents and implementing the other functions" of electronic recording and creates an Electronic Recording Council to advise the Secretary. A majority of the council members will be registers of deeds, but the council will also include representatives from the Bar Association, Society of Land Surveyors, Bankers Association, Land Title Association, Association of Assessing Officers, and the office of the Secretary of Cultural Resources. G.S. 47-16.5. This council and the Secretary of State must also set standards for electronic notarization, not only in response to legislation allowing electronic recording, but also as part of the Secretary's overall governance of notaries and the need to address their role in the new dimension of electronic recording.

The Electronic Recording Council will be supported by the Secretary of State's professional and clerical staff and is directed to consult with the North Carolina Local Government Information Systems Association. G.S. 47-16.5(f). URPERA expressly states the intent that North Carolina strive to develop electronic recording standards and procedures that will be consistent with those in other states, as well as considering differences in county size, population, and resources and the need to maintain "adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering." G.S. 47-16.5(g).

The work of the Electronic Recording Council and Secretary of State's office in developing the standards for electronic recordings and notarial acts will be difficult and critically important to the viability of electronic recording in North Carolina. The two organizations must address complex technological questions, such as what type of technology offers sufficient authenticity and security protections, at the same time they consider how counties with very limited resources will be able to install and maintain the facilities necessary for electronic recording in an increasingly interstate and international transactional environment.

Recording Priority

S.L. 2005-212 (H 764) clarifies G.S. 47-18 and G.S. 47-20(a), which govern priority of recorded instruments in general and deeds of trust and mortgages in particular, by replacing the word "recorded" with "registered" to make the terminology of these statutes consistent with that used elsewhere to refer to the act of proper filing with the register of deeds. The law also clarifies a rebuttable presumption that the order of priority is determined by the time of registration and, if the time is identical for competing documents, the priority is by document number. If there is no document number, priority is by the book and page at which the instrument is registered.

Subordination Agreements

S.L. 2005-212 provides that to be valid a subordination agreement need not state financial terms, including interest rate or principal amount. This rule applies retroactively except to litigation pending on July 20, 2005, with respect to agreements filed or recorded before October 1, 2003. G.S. 39-6.6.

Registers' Notary Commission Records

Registers of deeds maintain records of notary commissions within their counties. The Secretary of State maintains these records for various purposes, including determining acknowledgment validity. Section 11 of S.L. 2005-391 requires registers to make their records available to the Secretary of State for duplication, the cost of which will be borne by the Secretary of State. Consistent with other legislative changes facilitating use of electronic records, Section 1 authorizes registers to keep commission records in electronic format if the records can be viewed and printed. G.S. 10B-9(c).

Notary Act Overhaul

S.L. 2005-391 repeals G.S. Chapter 10A, the Notary Public Act, and replaces it with new G.S. Chapter 10B, which contains a new Notary Public Act and the Electronic Notary Act. S.L. 2005-391 facilitates electronic recording by authorizing notaries to acknowledge instruments electronically. It also refines the laws governing notaries, including those regulating qualification and discipline. The new notary law was effective December 1, 2005.

Refinements in Notary Procedure

S.L. 2005-391 makes many sound notarial practices into explicit requirements while also introducing new requirements and restrictions. The revised Notary Public Act addresses the four basic types of acts that notaries may perform: acknowledgments, oaths or affirmations, jurats, and verifications or proofs.

An acknowledgment, the most common notary act, is a notary's attestation that someone known to the notary, or whose identity is proved through satisfactory evidence, has voluntarily signed a record in the notary's presence. G.S. 10B-3(1). A verification or proof occurs when a person whose identity is known or proved to a notary certifies under oath or affirmation to having already executed a record. G.S. 10B-3(28). The Notary Public Act now defines a *jurat* as a certification added to an affidavit or deposition in which the person giving testimony subscribes and swears to the content of the affidavit or deposition. G.S. 10B-3(8). For each of these acts, the revised Notary Public Act clarifies, in several instances, that the person must be in the notary's presence when the act occurs, which has always been a requirement. The clarity with which this requirement is now expressed is reflected in the new definition of *personal appearance*, which occurs only when "an individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and

exchange records back and forth during the notarization process." G.S. 10B-3(16). The statute also clarifies that although the principal or subscribing witness must be in the notary's presence when the notarial act is performed, the notary can later complete the certificate. G.S. 10B-20(c)(1). The revised law expressly prohibits notaries from using false certificates or certificates not written in English; from notarizing a signature on a record without indicating what type of notarial act is being performed; from certifying, notarizing, or authenticating a photograph; or from using the notary title or seal in connection with endorsements of products, candidates, or other offerings. G.S. 10B-22, 10B-23, 10B-24.

The evidence on which a notary may rely to determine a signer's identity now includes documents issued by a "federal or state-recognized tribal government agency"; the statute also allows use of photograph identification having either a physical description or signature. G.S. 10B-3(22). The revised law clarifies that a witness who is verifying or proving a signature must sign the document along with the principal, be known to the notary or prove identity with satisfactory evidence as defined by the statute, and take an oath or affirmation to having witnessed the signature. G.S. 10B-3(26). For identification of someone not personally known to a notary, the notary may rely only on a *credible witness*, defined as "an honest, reliable, and impartial person who is personally known to the notary and takes an oath or affirmation from the notary to confirm a signer's identity." G.S. 10B-3(5).

The revised law also describes additional express limitations on the acceptable demeanor of the person whose acknowledgment is being taken. A notary is prohibited from performing a notarial act if "[t]he principal or subscribing witness shows a demeanor that causes the notary to have a compelling doubt about whether the principal knows the consequences of the transaction requiring a notarial act," or "[t]he principal or subscribing witness, in the notary's judgment, is not acting of the principal's or the subscribing witness's own free will." G.S. 10B-20(c)(3)–(4).

S.L. 2005-391 revises the language governing the nature of an oath or affirmation. Prior law distinguished between an oath or affirmation based on whether the act occurred with "reference made to a Supreme Being" or with "no reference made to a Supreme Being." The revised law further defines an *oath* as "a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word 'swear,'" and an *affirmation* as a vow "based on personal honor and without invoking a deity or using any form of the word 'swear.'" G.S. 10B-3(2), (14).

The Notary Public Act now provides forms for certificates for acknowledgments, verifications or proofs, and oaths or affirmations. It also describes information that satisfies an acknowledgment given by someone in a representative capacity. G.S. 10B-40 through G.S. 10B-43. The authorized forms supplement forms set forth in other statutes for particular types of notarial acts.

The notary's name must now be legibly typed or printed near the notary's signature. G.S. 10B-20(b)(2). Previous law allowed use of the name in the seal. A notary's seal must now include the word "County" or Co." with the name of the county in which the register is commissioned, and it must be of a prescribed size and shape. G.S. 10B-37(b)(3), G.S. 10B-37(c). The notary must place the image or impression on the same page as the signature. G.S. 10B-36(b).

The statutory definition of an official signature consists of misplaced language, specifically a repeat of the definition of an official seal, which should be corrected in the next legislative session. G.S. 10B-35. The definition as was envisioned is a restatement of the requirement that a notary sign a paper record in ink using "exactly and only the name indicated on the notary's commission" at the time the notary act is performed, and not by using a stamp or other printing method.

The Notary Public Act now spells out the process for notarization of a signature made by mark or through other persons. The notary must be present when the mark is made and write the following below it: "Mark affixed by (name of signer by mark) in presence of undersigned notary." A principal unable to make a mark may designate a disinterested party to do it, if the principal directs the signature in the presence of the notary and two witnesses unaffected by the record, the witnesses sign near the principal's signature, and the notary writes the following below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)." G.S. 10B-20(d), (e).

The revised law requires a notary to cross out all blank spaces in a certificate, except for lines for unknown recording information to be shown in powers of attorney. G.S. 10B-20(o). Failure to do so,

however, does not invalidate the acknowledgment or record and is not a ground for a register to refuse to record the instrument. G.S. 10B-20(o)(2), (3).

In a number of instances, the revised law stresses protection of notary seals from unauthorized access. It requires notaries to keep "the seal in a secure location that is accessible only to the notary" and directs notaries not to allow others to use the seal and not to surrender it to an employer upon termination of employment. G.S. 10B-36(a). A notary must report theft of a seal to law enforcement and the appropriate register of deeds within ten days. G.S. 10B-36(c). Seals must be delivered to the Secretary of State upon termination of a notary's authority. G.S. 10B-36(d).

Effective December 1, 2005, the revised law increases the fee a notary may charge to $5 for each signature and for each oath or affirmation without a signature. G.S. 10B-31. [The fee had been increased from $3 to $4 by S.L. 2005-328 (H 1217), effective August 26, 2005.] Notaries who charge must display a conspicuous schedule of their fees. G.S. 10B-32.

The Secretary of State provides certificates of authentication of a notary's or other official's act for use in other jurisdictions. S.L. 2005-391 deleted the option of certifications for acknowledgments prepared in another language and translated into English—the acknowledgment must be in English. G.S. 66-273(3).

Interstate Recognition

Another express goal of the Notary Public Act revisions is "[t]o enhance interstate recognition of notarial acts." G.S. 10B-2(5). The revised law provides: "Any notarial certificate made in another jurisdiction shall be sufficient in this State if it is made in accordance with federal law or the laws of the jurisdiction where the notarial certificate is made." G.S. 10B-40(e). The revised law also provides that a notarial act performed in another jurisdiction is valid under North Carolina law if the notary or other official was authorized by, and complied with, the laws of that jurisdiction, North Carolina law, or federal law. G.S. 10B-20(f). Similarly, the law defers to federal law or regulation for a determination about a military officer's authority to perform a notarial act for military personnel or their spouses or dependents. G.S. 10B-20(g). These revisions will clarify the validity of notarial acts across jurisdictions, although other statutes, such as those governing the registration of instruments with registers of deeds, may have additional requirements.

Notary Qualification and Discipline

The North Carolina Secretary of State handles thousands of complaints about notary misconduct annually. Many of the complaints are addressed with simple cautionary letters but some result in disciplinary action or even criminal investigations. The revised law includes provisions sought by the Secretary of State to discourage misconduct and clarify and solidify enforcement mechanisms. The revised law states an express purpose "[t]o foster ethical conduct among notaries." G.S. 10B-2(4).

S.L. 2005-391 adds three specifically prohibited actions that constitute Class 1 misdemeanors:

1. Performing a notarial act if the person's commission has expired or been suspended
2. Performing a notarial act before the person has taken the oath of office
3. Taking an acknowledgment or performing an oath, affirmation, or jurat without the principal personally appearing before the notary

G.S. 10B-60(b)(2), (b)(3), (c)(1). Four additional actions are now among those for which a person can be convicted of a Class I felony:

1. Taking an acknowledgment or jurat without the principal appearing before the notary if done with the intent to commit fraud
2. Taking a verification or proof without the subscribing witness appearing before the notary if done with the intent to commit fraud
3. Performing a notarial act in this state knowing he or she is not commissioned
4. Obtaining, using, concealing, defacing, or destroying notarial seals or records without the proper authority

G.S. 10B-60(d)(2)(3), (e), (f), (g). The statutes now expressly provide that investigations into misconduct need not terminate upon a notary's resignation. G.S. 10B-60(h). Any person who

knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct is subject to the same punishment as a notary, for aiding and abetting. G.S. 10B-60(j). The revised law also expressly reserves application of other laws and remedies, including for forgery and aiding and abetting. G.S. 10B-60(k).

The circumstances under which notaries must resign now also include becoming "permanently unable to perform their notarial duties." G.S. 10B-54(b). A notary has forty-five days to surrender the seal upon resignation or revocation of authority, but those whose commissions have expired (without being revoked or denied) have three months to apply for recommissioning before having to surrender the seal. G.S. 10B-55(a), (b). A deceased notary's estate must notify the Secretary of State of the death and deliver the seal as soon as reasonably practicable but no later than the closing of the estate. G.S. 10B-55(c).

The prohibition against the practice of law by nonattorneys expressly forbids assisting someone "in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act." G.S. 10B-20(k). Notaries also are prohibited from determining "the type of notarial act or certificate to be used" if "certificate wording is not provided or indicated for a record," although a notary may provide a selection of authorized or recognized forms. G.S. 10B-20(m). A notary is also expressly prohibited from claiming "to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters." G.S. 10B-20(n).

Persons seeking to be commissioned as notaries must meet additional qualifications under the revised law. Applicants must reside legally in the United States; be able to speak, read, and write English; and possess a high school diploma or equivalent. G.S. 10B-5(b). The requirement that notaries receive the recommendation of a publicly elected official has been eliminated in counties where there are more than 15,000 active notaries, a condition currently applicable only to Wake County. S.L. 2005-75 (S 763); G.S. 10B-5(b)(8). The law clarifies that a notary must be commissioned in his or her county of residence, or, if not a state resident, in the county of employment. G.S. 10B-5(c).

The revised Notary Public Act describes in general terms the contents of an application for commission, which must include disclosure of the information necessary for establishing the statutory qualifications, and specifies an oath or affirmation that must be made on the application. G.S. 10B-6, 10B-7, 10B-12. The revised law specifically identifies more grounds for denying a commission or recommission application, which are as follows:

1. "Submission of an incomplete application or an application containing material misstatement or omission of fact"
2. Having pleaded "nolo contendere to a felony or any crime involving dishonesty or moral turpitude" (previously only conviction was disqualifying)
3. Having been released from prison, probation, or parole within the last ten years
4. "A finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit"

G.S. 10B-5(d)(1)–(3). The statute defines *moral turpitude* as "conduct contrary to expected standards of honesty, morality, or integrity." G.S. 10B-3(9). The law also now provides that at least five years must have lapsed after compliance with conditions of any disciplinary order in connection with notary or professional licensure before an applicant may be approved for commissioning. G.S. 10B-5(d)(4).

The revised Notary Public Act has increased from three to six hours the minimum length of the course required for an initial commission for a nonattorney notary. The course must be taken within three months preceding application, and a nonattorney applicant for an initial commission or for recommissioning must pass an examination approved by the Secretary of State by answering at least 80 percent of the questions correctly. G.S. 10B-8, G.S. 10B-11(b)(3). The examination for recommissioning will be available on the Secretary of State's Web site. Commission applicants who are former registers of deeds and clerks of court who have been notary instructors are exempt from the education requirement. G.S. 10B-14(d). The revised law clarifies that notary commissions are not effective until the notary takes the oath of office. G.S. 10B-9.

Heightened standards for notary conduct are also reflected in the revised requirements for notary instructor certification, which now specify that the qualifying course be at least six hours and that the instructor have at least one year of experience as a notary. G.S. 10B-14(a), (b). Assistant and deputy registers of deeds must have had a regular notary commission before being qualified as an instructor.

G.S. 10B-14(e). The Secretary of State has express authority to suspend or revoke a notary instructor's teaching certification for violation of the law or applicable rules. G.S. 10B-14(f).

The revised law allows forty-five days, rather than thirty, for a notary to give the Secretary of State notice of a change in name, phone number, or address, which notice can be given by fax, e-mail, or certified mail. G.S. 10B-50, G.S. 10B-51. A notary with a name change may continue to use the former name until receiving a new seal and confirmation of the new name from the Secretary and taking a new oath with the register of deeds, which must occur within forty-five days after the change's effective date. G.S. 10B-51. A notary who changes county of residence need not change the seal or take a new oath until recommissioning. G.S. 10B-52. Notaries may not apply for recommissioning earlier than ten weeks before the expiration date of the prior commission. G.S. 10B-11(a). Notaries also may apply for recommissioning within one year after expiration of the prior commission but must retake the course of study unless this requirement is waived by the Secretary of State. G.S. 10B-11(c).

Electronic Notarization

Some of the revisions to the Notary Public Act were intended "[t]o integrate procedures for traditional paper and electronic notarial acts." G.S. 10B-2(6). S.L. 2005-391 also adds a new Article 2 to G.S. Chapter 10B, called the Electronic Notary Act. G.S. 10B-100 to G.S. 10B-118. The act validates electronic notarial acts in connection with electronic records. The precise methods of performing these acts will be governed by standards to be adopted by the Secretary of State with input from the same Electronic Recording Council that will be involved in developing standards for electronic recording with registers of deeds.

A notary must register the capability to notarize electronically with the Secretary of State upon commissioning and recommissioning and pay a $50 fee. G.S. 10B-105; G.S. 10B-106(a)–(c); G.S. 10B-108. The registration is electronic and includes a description of the technology that will be used as well as information about any issuing or registration authority for that technology. G.S. 10B-106(d). Any issuing registration must be kept current and any changes reported to the Secretary of State. G.S. 10B-127. The registration also must include "any decrypting instructions, codes, keys, or software that allow the registration to be read." G.S. 10B-106(e). The electronic signature and seal must comply with rules to be adopted by the Secretary of State. G.S. 10B-125.

All of the types of notary acts may be performed electronically. G.S. 10B-115. The law allows an electronic notary to charge up to $10 per signature. G.S. 10B-118. Although proposals have been made to allow electronic notary acts to be conducted by issuance of keys that would not require a notary to be present when the document is signed electronically, the law as enacted in North Carolina requires the signer to be in the notary's presence at the time of notarization. G.S. 10B-116. Thus the notary's physical observation of the act of signing is considered to be essential corroboration.

The electronic notarial act requires that all of the notary information, including the notary's electronic signature, "be attached to, or logically associated with, the electronic document" in an "immediately perceptible and reproducible" form. G.S. 10B-117. An electronic notary act must indicate that the official is an "Electronic Notary Public." G.S. 10B-117(2).

Notaries must safeguard their electronic signatures, seals, and records and may not surrender or destroy them without a court order or unless allowed by rules to be adopted by the Secretary of State. G.S. 10B-126(a). Electronic notaries must keep the signature, seal, and records under their exclusive control, G.S. 10B-126(b), which will require special attention when a notary is employed in an organization where access to electronic files is shared among employees.

Electronic notaries must complete an additional three hours of instruction and pass an examination administered by the Secretary of State. G.S. 10B-107. Electronic notaries will be governed by rules to be adopted by the Secretary of State, which may include rules requiring them to maintain an electronic journal. The statute provides that rules regarding electronic journals will become effective no earlier than eighteen months after the statute's effective date. G.S. 10B-126(e). This delay was a compromise between proponents of the view that journals of notarial acts are an important safeguard against fraud, and those opposing the introduction of such a requirement in general and with respect to electronic

notaries in particular. Notaries must report within ten days to law enforcement and the Secretary of State that an electronic seal or signature has been stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image. G.S. 10B-126(c). Any records that will be required of an electronic notary must be surrendered to the Secretary of State upon termination of the notary's authority. G.S. 10B-126(g). Electronic signature programs or devices must be destroyed unless recommissioning occurs within three months. G.S. 10B-128. Wrongful manufacture, distribution, or possession of electronic notary software or hardware will be a felony. G.S. 10B-146.

The new law also provides a form for an electronic certificate or authority to be issued by the Secretary of State, which can be used to establish the notary's authority in other jurisdictions. G.S. 10B-137.

S.L. 2005-391 appropriates $100,000 for each year of the 2005–07 fiscal biennium to the Secretary of State for administration of the Electronic Notary Act. In addition, the act authorizes the Department of the Secretary of State to use its information technology staff and to spend up to $200,000 in 2005–06 from the department's E-Commerce Transaction Fund to implement the act. S.L. 2005-391, Section 10(a), 10(b).

Charles Szypszak

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Senior Citizens

The 2005 General Assembly considered, but rejected, a proposed budget cut that would have eliminated or limited the Medicaid eligibility of approximately 65,000 elderly or disabled persons, made several changes to the laws governing licensure of adult care homes, and enacted legislation creating two new criminal offenses dealing with financial exploitation of elderly or disabled persons.

Government Programs for Senior Citizens

Adult Protective Services

S.L. 2005-23 (H 45) directs the state Department of Health and Human Services (DHHS) adult protective services task force to collaborate with stakeholders and others interested in improving adult protective services and to report its recommendations to the North Carolina Study Commission on Aging and the Legislative Study Commission on State Guardianship Laws by April 1, 2006.

Medicaid

The General Assembly considered, but rejected, a proposed budget cut that would have eliminated or limited Medicaid eligibility of approximately 65,000 elderly or disabled persons with incomes between the Supplemental Security Income income limit ($579 per month for an individual) and the federal poverty level ($798 per month for an individual).

Other legislative changes to the state's Medicaid program are summarized in Chapter 23, "Social Services."

Prescription Drug Assistance for Senior Citizens

In 1999 the General Assembly created a state-funded prescription drug assistance program for senior citizens. In 2002 this program was replaced by the Senior Care prescription drug assistance program, funded by the Health and Wellness Trust Fund.

Section 10.4 of the Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), terminates the Senior Care prescription drug assistance program effective

December 31, 2005, and authorizes DHHS to enroll senior citizens who receive benefits under this program in one of the federally approved Medicare Part D prescription drug programs, which are effective January 1, 2006, if the senior citizens qualify for the $0 premium and $0 deductible benefit for Medicare recipients with incomes under 135 percent of the federal poverty level and do not decline enrollment under Medicare Part D.

Senior Center Outreach and Start-Up

S.L. 2005-276 requires that state funding appropriated for the enhancement of senior center programs be used to (1) expand the outreach capacity of senior centers to reach unserved or underserved areas or (2) provide start-up funds for new senior centers. Appropriated funds must be allocated by October 1 of each fiscal year and may not exceed 75 percent of reimbursable costs. In the case of start-up funding for a new senior center, the board of commissioners of the county where the new center will be located must formally endorse the need for the center, agree on the sponsoring agency for the center, and make a formal commitment to use local funds to support ongoing operation of the center.

State–County Special Assistance for Adult Care Home Residents

S.L. 2005-276 increases the maximum monthly payment for State–County Special Assistance for elderly or disabled residents of adult care homes from $1,084 to $1,118 ($1,515 for residents of special care units), effective October 1, 2005. This rate increase will require North Carolina counties to provide an additional $1.7 million in local funding for the State–County Special Assistance program in fiscal year 2005-06 and an additional $1.8 million in 2006-07.

State–County Special Assistance for In-Home Care

Effective October 1, 2005, S.L. 2005-276 continues, revises, and expands a special program that allows payment of State–County Special Assistance benefits to individuals who do not live in adult care homes but otherwise are eligible for assistance. The maximum payment under the demonstration project may not exceed 75 percent of the State–County Special Assistance payment the individual would receive if he or she resided in an adult care home.

Long-Term Care

Adult Care Home Licensure and Inspection

G.S. 131D-2 governs the licensure of adult care homes for persons who are elderly or mentally or physically disabled. Effective October 1, 2005, S.L. 2005-66 (S 572) provides that there are two types of adult care homes: adult care homes and adult care homes that serve only elderly persons [defined as persons who either (1) are at least fifty-five years old and require assistance with activities of daily living, housing, and services, or (2) have a primary diagnosis of Alzheimer's disease or other form of dementia and require assistance with activities of daily living, housing, and services provided by a licensed Alzheimer's and dementia care unit]. The Medical Care Commission is directed to adopt rules implementing the act.

Effective July 1, 2007, Section 10.40A(i) of S.L. 2005-276 amends G.S. 131D-2 to require DHHS to issue an initial six-month license (rather than a standard one-year license) to an adult care home not currently licensed. If an initially licensed adult care home demonstrates substantial compliance with Articles 1 and 3 of G.S. Chapter 131D and rules adopted pursuant thereto, DHHS must issue a license for the remainder of the calendar year. Thereafter the license may be renewed annually.

Effective October 1, 2005, Section 41.2 of S.L. 2005-276 doubles the license fees for adult care homes (and other long-term care and health care facilities).

Section 10.40A(j) of S.L. 2005-276 rewrites the adult care home inspection requirements of G.S. 131D-2(b)(1a). Effective July 1, 2007, adult care homes must be inspected on an annual basis and every two years to determine compliance with physical plant and life-safety requirements. Effective August 13, 2005, county departments of social services must provide written documentation of all on-site visits, monitoring visits, and complaint investigations to the DHHS Division of Facility Services (DFS) within twenty working days after each visit. DFS must conduct an annual review of the county departments' performance of these inspection and monitoring responsibilities. If a county fails to conduct timely monitoring or to identify or document noncompliance with licensure requirements, DFS must provide technical assistance, take corrective action, or, if necessary, assume a county's regulatory responsibilities.

S.L. 2005-276 also appropriates additional funding (over $1 million in state fiscal year 2005-06 and over $2 million in 2006-07) to increase the staff of the DFS adult care licensure section (fourteen additional positions in 2005-06 and seventeen more positions in 2006-07) and to create two additional regional DFS adult care licensure offices.

Effective July 1, 2006, Section 10.40A(j) of S.L. 2005-276 also amends G.S. 131D-2(b)(1a) to require adult care home specialists and supervisors employed by county departments of social services to complete eight hours of pre–basic training within sixty days of employment, thirty-two hours of basic training and at least eight hours of complaint investigation training within six months of employment, twenty-four hours of post–basic training within six months of completing basic training, and at least sixteen hours of statewide DFS training annually. Adult care home specialists and supervisors employed on or before July 1, 2006, must complete the required training components by June 1, 2007.

Effective August 13, 2005, Section 10.40A(l) of S.L. 2005-276 amends G.S. 131D-34 to increase the minimum and maximum civil penalties for Type A violations of adult care home licensing requirements. For adult care homes licensed for six or fewer beds, the minimum penalty is $500 and the maximum penalty is $10,000; for adult care homes licensed for seven or more beds, the minimum penalty is $1,000 and the maximum penalty is $20,000. Section 10.40A(l) also doubles the maximum penalty for failing to correct violations ($1,000 for a Type A violation and $500 for a Type B violation); provides that a plan to correct a Type B violation must be implemented within a "reasonable" time and may not impose requirements greater than those imposed by existing laws or rules; and requires DHHS to impose a civil penalty in the same amount as for a Type A violation on any applicant for licensure who provides false information or omits information on the portion of the licensure application requesting information about owners, administrators, principals, or affiliates of the facility.

Effective August 13, 2005, Section 10.40A(l) of S.L. 2005-276 also amends G.S. 131D-34(h) to require the DHHS penalty review committee to meet at least semiannually; require that the committee be cochaired by one member who is not affiliated with DHHS and one member of DHHS working outside of DFS; repeal the training requirement for committee members; require DHHS to notify families or guardians of affected residents that they may request the committee to review a penalty decision by DHHS; require the committee to meet and review a penalty decision within sixty days of receipt of a request by a family member or guardian of an affected resident; require the secretary of DHHS to give notice of the committee's meetings to licensed providers who may be subjected to a civil penalty, the county social services department that is responsible for oversight of the facility, and the families or guardians of affected residents; and allow the committee to make recommendations and reports to DHHS regarding changes in policy, training, or rules as a result of its reviews.

Effective August 13, 2005, Section 10.40A(k) of S.L. 2005-276 amends G.S. 131D-2 to require adult care homes to post the DFS complaint hotline number conspicuously in a public place.

Section 10.40A(p) of S.L. 2005-276 requires the DHHS Division of Aging and Adult Services (DAAS), in consultation with adult care homes, county social services departments, consumer advocates, and other interested stakeholders, to develop a quality improvement consultation program for adult care homes and to submit a progress report regarding the program to the North Carolina Study Commission on Aging and the legislative appropriations committees for health and human services by April 1, 2006. County social services departments will be responsible for implementing the program. DAAS must conduct a pilot of the program in no more than four counties. If DAAS

concludes that the pilot program is effective and should be expanded, it must submit its report and recommendations regarding program expansion, a proposed timetable for expanding the program, the estimated cost of an expanded program, and necessary statutory and administrative rule changes to the North Carolina Study Commission on Aging and the legislative appropriations committees for health and human services.

Section 10.41 of S.L. 2005-276 requires DHHS to develop a plan for implementing a star-rating system for adult care homes to improve quality of care and to submit a report regarding its plan to the General Assembly's Fiscal Research Division and the legislative appropriations committees for health and human services by January 1, 2007.

Criminal History Checks for Employees of Long-Term Care Facilities

G.S. 131D-40 and G.S. 131E-265 require adult care homes, nursing homes, and home care agencies to conduct a national criminal history check of nonlicensed applicants for employment who have lived in North Carolina less than five years. An applicant's conviction of a criminal offense that may bear on his or her fitness to have responsibility for the safety and well-being of elderly or disabled persons is not, in and of itself, a basis for denying employment, but may be considered in conjunction with other factors, such as the date and seriousness of the crime and the nexus between the offense and the duties of the position for which the individual is applying, in determining whether to hire the individual.

National criminal history checks must be requested through the state Department of Justice and conducted by the Federal Bureau of Investigation. In the case of nursing home or home care agency employees who will provide direct patient care, federal and state law allows the Department of Justice to provide the results of a national criminal history check to the nursing home or home care agency. In the case of adult care home employees and nursing home and home care agency employees who do not provide direct patient care, G.S. 131D-40 and G.S. 131E-265 required the state Department of Justice to forward the results of national criminal history checks to the state DHHS DFS and DFS to provide the results of the check to the adult care home, nursing home, or home care agency. Federal law, however, prohibits a state agency from disclosing the results of an FBI national criminal history check. Because of this prohibition, the General Assembly enacted legislation suspending the national criminal history check requirements of G.S. 131D-40 and G.S. 131E-265 until January 1, 2005. S.L. 2005-4 (S 41) attempts to address this problem by amending G.S. 131D-40 and G.S. 131E-265 to (1) require the Department of Justice to provide the results of national criminal history checks of nonlicensed applicants for employment with adult care homes, nursing homes, or home care agencies (other than those applicants who would provide direct patient care) to the DHHS criminal records check unit, rather than to the DHHS DFS; (2) require DHHS to notify the adult care home, nursing home, or home care agency whether the national criminal history check may affect an applicant's employability; and (3) prohibit DHHS from sharing the results of these checks with an adult care home, nursing home, or home care agency.

If DHHS notifies an adult care home, nursing home, or home care agency that the results of a national criminal history check might affect an applicant's employability, the affected entity must consider seven statutory factors in determining whether to hire the applicant and may not refuse to employ the applicant solely because he or she has been convicted of a relevant offense. G.S. 131D-40(b); G.S. 131E-265(b). Since DHHS cannot release the results of the national criminal history check to the adult care home, nursing home, or home care agency, the affected entity must obtain information regarding the applicant's criminal history from another source. One possible solution is to require the applicant or employee to request DHHS to release the national criminal history check to the applicant or employee and require the applicant or employee to provide the report to the adult care home, nursing home, or home care agency.

Home Health Care Clients' Bill of Rights

Section 10.40A(n) of S.L. 2005-276 enacts a bill of rights for home health care clients, codified as Article 6 of G.S. Chapter 131E. This legislation is discussed in Chapter 12, "Health."

Medication Aides

Section 10.40C of S.L. 2005-276 authorizes medication aides to perform the technical aspects of medication administration in skilled nursing facilities. This legislation is discussed in Chapter 12, "Health."

Section 10.40D of S.L. 2005-276 authorizes DHHS to continue its pilot program involving the use of medication aides and requires DHHS and the state community college system to study the use of medication aides to perform the technical aspects of medication administration and to submit a report and recommendations to the General Assembly. This legislation is discussed in Chapter 12, "Health."

Retired State and Local Government Employees

Retirement Benefits for State and Local Government Employees

S.L. 2005-276 provides a 2 percent cost-of-living increase for persons receiving retirement benefits under the Teachers' and State Employees' Retirement System (TSERS), the Consolidated Judicial Retirement System, the Legislative Retirement System, and Local Government Employees' Retirement System. S.L. 2005-276 also appropriates $25 million in nonrecurring funding for partial repayment of funds withheld from TSERS due to the budget crisis in state fiscal year 2001-02.

Section 29.28(e) of S.L. 2005-276 rewrites the definition of "retirement" for state government employees who are members of TSERS, thereby affecting their eligibility for retirement benefits and health insurance coverage as retired employees under TSERS. As rewritten, G.S. 135-1(20) defines *retirement* as an employee's termination of employment and complete separation from active service with no intent or agreement, express or implied, to return to service. In order for a retired employee's retirement to become effective in any month, the retired employee may not render any service, including part-time, temporary, substitute, or contractor service, at any time during the six months immediately following his or her effective date of retirement. The amendment to G.S. 135-1(20) is effective November 1, 2005, but will not apply to The University of North Carolina Phased Retirement Program until June 30, 2007.

In 1998 the General Assembly enacted legislation allowing retired teachers to continue receiving their TSERS retirement benefits regardless of whether their post-retirement earnings exceeded the "retirement earnings cap" under G.S. 135-3(8)c. *if* (1) they were reemployed as public school teachers and (2) their retirement and reemployment met other statutory requirements. This legislation, which was amended in 2000, 2001, 2002, and 2004, was set to expire on June 30, 2005. Section 7A of S.L. 2005-144 (H 1630), Section 29.28 of S.L. 2005-276, and Section 43 of S.L. 2005-345 (H 320), however, extend this sunset to June 30, 2007, and revise the legislation so that it (1) applies only to teachers who have been retired for at least six months and have not been employed in any capacity (including as a substitute teacher or part-time tutor) with a public school for at least six months preceding the effective date of reemployment, and (2) excludes from the TSERS "retirement earnings cap" earnings while the beneficiary is employed to teach in a public school on a permanent full-time basis or part-time capacity that exceeds 50 percent of the workweek. Retired teachers who return to work under this provision are also subject to the requirements of G.S. 135-1(20) discussed above.

State Income Tax Deduction for State and Local Government Retirement Benefits

House Bill 1267, allowing the deduction of state and local (and federal) government retirement benefits from taxable income under the state's income tax law, was introduced but was not reported out of committee.

Other Legislation Affecting Senior Citizens

Exemption from Jury Service

G.S. 9-6.1 established a special procedure through which a person could request an exemption from jury service if he or she was summoned for service and was at least sixty-five years old. Effective October 1, 2005, S.L. 2005-149 (S 321) amends G.S. 9-6.1 to make this procedure applicable to persons at least seventy-two years old and to allow these persons to be granted a temporary exemption, excuse, or deferral from jury service or a permanent exemption from jury service.

Financial Exploitation of Elderly or Disabled Adults

Effective December 1, 2005, S.L. 2005-272 (H 1466) revises the criminal penalty for financial exploitation of elderly or disabled adults, repealing G.S. 14-32.3(c) and replacing it with a new statute, G.S. 14-112.2.

The prior statute applied to the caretaker of an elderly or disabled adult residing in a domestic setting if the caretaker knowingly, willfully, and with the intent to permanently deprive the owner of property or money caused an elderly or disabled adult to give or lose possession and control of property or money through coercion, command, or threat, abuse of a position of trust or fiduciary duty, or making a false representation.

The new statute makes it unlawful for a person to knowingly, by deception or intimidation, obtain, use, or endeavor to obtain or use an elderly or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly or disabled adult of the use, benefit, or possession of the funds, assets, or property or to benefit someone other than the elderly or disabled adult if the person (1) stands in a position of trust or confidence with the elderly or disabled adult or (2) has a business relationship with the elderly or disabled adult. Violation of this provision is a Class F felony if the value of the funds, assets, or property is at least $100,000, a Class G felony if the value is at least $20,000 and not more than $100,000, and a Class H felony if the value is less than $20,000.

The new statute also makes it unlawful for any person, other than a person acting within the scope of his or her lawful authority as the agent for an elderly or disabled adult, to obtain, use, endeavor to obtain or use, or conspire to obtain or use an elderly or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly or disabled adult of the use, benefit, or possession of the funds, assets, or property or to benefit someone other than the elderly or disabled adult if the person knows or reasonably should know that the elderly or disabled adult lacks the capacity to consent to the transfer or use of the funds, assets, or property. Violation of this provision is a Class G felony if the value of the funds, assets, or property is at least $100,000, a Class H felony if the value is at least $20,000 and not more than $100,000, and a Class I felony if the value is less than $20,000.

Health Care Agent's Authority Regarding Anatomical Gifts, Autopsy, and Disposition of Remains

S.L. 2005-351 (H 967) clarifies a health care agent's authority regarding anatomical gifts, autopsy, and disposition of remains under a valid health care power of attorney. This legislation is summarized in Chapter 12, "Health."

Homestead Property Tax Exemption

Three bills concerning the homestead property tax exemption were introduced in 2005 but were not enacted. House Bill 1777 would have allowed municipalities to expand the homestead property tax exemption for senior citizens using revenue generated from an additional local one-half cent sales and use tax. House Bill 36 would have provided an income tax credit for property taxes paid on primary residences owned by elderly or disabled persons having annual household incomes that do not exceed

$30,000. Senate Bill 852 would have allowed low-income elderly or disabled homeowners to defer property taxes on their primary residences.

Mediation in Incompetency and Guardianship Proceedings

S.L. 2005-67 (H 1015) authorizes the clerk of superior court to order mediation in incompetency and guardianship proceedings under G.S. Chapter 35A. Agreements resulting from mediation in these proceedings are not binding between the parties but may be considered by the clerk in making a decision. S.L. 2005-67 applies to incompetency and guardianship proceedings pending on or after the date on which the North Carolina Supreme Court adopts rules implementing the act. S.L. 2005-67 is discussed in more detail in Chapter 6, "Courts and Civil Procedure."

Parent's Testamentary Recommendation of Guardian for Unmarried, Incapacitated Adult

Effective August 26, 2005, S.L. 2005-333 (H 1394) enacts new G.S. 35A-1212.1 allowing the parent of an unmarried adult who has been adjudicated incompetent to execute a will that includes provisions recommending the appointment of a particular individual as the incompetent adult's guardian, specifying desired limitations on the guardian's powers, and allowing the guardian to serve without posting a bond. If both parents make recommendations, the most recent will prevails unless other relevant factors require a contrary result. In appointing a guardian, the clerk of superior court first must consider appointing the recommended individual but is not required to appoint that individual as guardian if appointing another qualified individual or entity is in the incompetent adult's best interest. Despite a parent's recommendation, the clerk may require a recommended individual to post a bond as guardian if doing so is in the incompetent adult's best interest.

Recognition of Attorney-in-Fact

Article 5 of G.S. Chapter 32A, enacted by S.L. 2005-178 (H 510),

1. provides legal protection for persons who act in good faith reliance on the authority granted by a duly acknowledged power of attorney that is regular on its face;
2. allows a person to rely on an affidavit executed by an attorney-in-fact regarding the authenticity and current validity of a power of attorney;
3. provides that a person or entity is not required to make a loan to the principal at the request of an attorney-in-fact, to open an account for the principal at the attorney-in-fact's request if the principal is not a current customer, or to recognize an attorney-in-fact's authority or conduct business with an attorney-in-fact under a power of attorney if the person is not required to conduct business with the principal in the same circumstances or the person has reasonable cause to question the authenticity or validity of the power of attorney;
4. authorizes initiation of a special proceeding to determine the authenticity or validity of a power of attorney; and
5. provides that a person who unreasonably refuses to recognize an attorney-in-fact's authority under a valid power of attorney is liable for reasonable attorneys' fees and costs in any action or proceeding required to confirm the power of attorney's validity.

The act applies to powers of attorney executed on, before, or after October 1, 2005. It does not apply to health care powers of attorney executed under G.S. Chapter 32A, Article 3.

Tax Credit for Long-Term Care Insurance

The General Assembly failed to enact legislation that would have reinstated the state income tax credit for payment of premiums for long-term care insurance, which expired for tax years beginning on or after January 1, 2004.

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Social Services

The 2005 session of the General Assembly brought several significant changes in the child welfare area. The General Assembly provided for statewide implementation of the Multiple Response system of responding to reports of child abuse, neglect, and dependency and amended the Juvenile Code to reflect that the initial response to such a report is an "assessment," rather than an "investigation." Another new law creates a state-level "Responsible Individuals List" of persons determined by county social services departments to have caused a child's condition of abuse or neglect. Because this information will be made available to specified agencies and employers, the legislation provides a means by which an individual may appeal the placement of his or her name on the list.

Counties again failed to obtain the relief they sought from the growing financial burden of Medicaid costs, although other changes were made in the Medicaid program. The state is prohibited from imposing a waiting period for Medicaid eligibility for people who move into the state; and a new law sets out the means a Medicaid applicant may use to establish that he or she actually is a resident of the state. Other new provisions enhance the state's ability to recover Medicaid costs through the use of liens in specified circumstances.

This chapter discusses these and other enactments related to social services. Other chapters that may cover related topics include Chapter 4, "Children, Families, and Juvenile Law," Chapter 6, "Courts and Civil Procedure," Chapter 7, "Criminal Law and Procedure," Chapter 10, "Elementary and Secondary Education," Chapter 12, "Health," Chapter 13, "Higher Education," and Chapter 16, "Mental Health."

Medicaid

County Funding

State law requires North Carolina counties to pay 15 percent of the nonfederal share of the cost of Medicaid services provided to county residents (about 6 percent of the total cost of Medicaid services and approximately $450 million annually). As in past years, legislators introduced several bills (H 132, H 149, H 316, H 1721, S 105, and S 117) to reduce or eliminate counties' fiscal responsibility for the state's Medicaid program, but none of these bills was reported out of committee.

A provision in the House committee substitute for the Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), would have appropriated $15 million in state funding to offset a fraction of the counties' fiscal responsibility for Medicaid, but this provision was eliminated in the conference report and was not enacted. Section 10.11(b) of S.L. 2005-276 requires counties to pay 15 percent of the nonfederal share of the cost of Medicaid services and 15 percent of the state's Medicare Part D "clawback" payments to the federal government.

Eligibility

Elderly or disabled persons. The General Assembly considered, but rejected, a proposed budget cut that would have eliminated or limited the Medicaid eligibility of approximately 65,000 elderly or disabled persons with incomes between the Supplemental Security Income (SSI) income limit ($579 per month for an individual) and the federal poverty level ($798 per month for an individual). Section 10.11(e) of S.L. 2005-276 directs the Department of Health and Human Services (DHHS) to provide Medicaid coverage to all elderly, blind, or disabled persons with incomes that do not exceed the federal poverty level.

Children in low-income families. North Carolina's Medicaid program currently covers children under the age of one year who live in families whose incomes do not exceed 185 percent of the federal poverty level, children aged one through five who live in families whose incomes do not exceed 133 percent of the federal poverty level, and children aged six through eighteen who live in families whose incomes do not exceed the federal poverty level. Effective January 1, 2006, Section 10.11(m) of S.L. 2005-276 extends Medicaid eligibility to all children who are under the age of six years and live in families whose incomes do not exceed 200 percent of the federal poverty level. Extending Medicaid coverage for all low-income children under the age of six allows children who previously were covered under the Health Choice insurance program for uninsured children rather than Medicaid to be "shifted" from Health Choice to Medicaid.

"Ticket to Work" program for working disabled persons. Section 10.18 of S.L. 2005-276 establishes a Medicaid "Ticket to Work" demonstration program that will allow disabled people who work and are not otherwise eligible for Medicaid to enroll in the state's Medicaid program. Individuals whose countable incomes do not exceed 150 percent of the federal poverty level are not required to pay an enrollment fee or premiums. Individuals whose countable incomes exceed 150 percent of the federal poverty level must pay an annual enrollment fee of $50. Individuals whose countable incomes are at least 200 percent of the federal poverty level must pay a monthly premium. If an individual's income is at least 450 percent of the federal poverty level, he or she must pay the full cost of the premium based on the experience of all individuals participating in the Medicaid program. If an individual's income is at least 200 percent of the federal poverty level but less than 450 percent of the federal poverty level, his or her monthly premium will be based on a sliding scale established by DHHS. Individuals enrolled in the "Ticket to Work" program must pay co-payments equal to those under the North Carolina Health Choice program. The "Ticket to Work" program is codified in G.S. 108A-54.1, which becomes effective on January 1, 2007, or within thirty days after the date on which the Medicaid Management Information System becomes operational, whichever is later. Enrollment in the program must begin within six months of the program's effective date.

Verification of residency. Effective January 1, 2006, Section 10.21A of S.L. 2005-276 enacts a new statute, G.S. 108A-55.3, regarding verification of state residency of persons who apply for Medicaid. The new statute specifies fifteen types of documents that may be used to prove an individual's residency in North Carolina. These documents include a valid North Carolina driver's license or identification card issued by the Division of Motor Vehicles, a current utility bill or mortgage or rent receipt, a valid North Carolina motor vehicle registration card, any document showing that the applicant is employed in North Carolina, any document showing that the applicant's child is enrolled in a North Carolina school or child care facility, a current North Carolina voter registration card, etc. Under the new statute, a person's residency in North Carolina may be proved by providing at least two of the specified documents. In the case of applicants—including those who are homeless or migrant laborers—who declare under penalty of perjury that they do not have two of the specified documents, any other evidence that verifies residency may be considered. But, except in the

case of persons applying for emergency Medicaid coverage, a declaration, affidavit, or other statement from an applicant or other person that the applicant is a North Carolina resident is insufficient in the absence of other credible evidence. The statute also states that, unless otherwise provided under the federal Medicaid law, a minor child is deemed to be a resident of the state in which the child's parent or legal guardian is domiciled.

Transfer of assets penalty. Federal and state law (G.S. 108A-53) restrict the Medicaid eligibility of certain persons who attempt to qualify for Medicaid by transferring their property, resources, or assets for less than market value. Section 10.11(t) of S.L. 2005-276 reenacts the Medicaid transfer of assets rules that apply to income-producing property and tenancy-in-common interests in real property. Effective not earlier than October 1, 2005, it also extends the transfer of assets rules to life estates that are purchased by or on behalf of a Medicaid applicant or recipient with the exception of a life estate in property that is the applicant's or recipient's home, is measured by the applicant's or recipient's life, and is the result of a transfer of a remainder interest in the property.

Liens and Estate Recovery

Section 10.21C of S.L. 2005-276 amends G.S. 108A-70.5 to allow DHHS to impose a lien against the real property of a person prior to the person's death for the cost of Medicaid services that are provided while the person is an inpatient in a nursing home, intermediate care facility for the mentally retarded, or medical institution, if the person is required to spend for the cost of medical care all but a minimal amount of his or her income required for personal needs. A lien may not be imposed under the statute unless DHHS determines, after notice and an opportunity for hearing, that the person cannot reasonably be expected to be discharged to return home. A lien imposed under the statute dissolves if the person is discharged from the nursing home, facility, or medical institution and returns home. A lien may not be imposed on the person's home if the home is lawfully occupied by the person's (1) spouse, (2) child under the age of twenty-one years, (3) blind or disabled child, or (4) sibling, if the sibling has an equity interest in the home and resides in the home for at least one year immediately before the person is admitted to the nursing home or medical institution. Under the federal Medicaid law, a lien imposed against a Medicaid recipient's property may be enforced only when the property is sold or via the Medicaid estate recovery plan after the recipient dies. *See also* 42 U.S.C. 1396p(a); 42 U.S.C. 1396p(b); 42 C.F.R. 433.36.

Section 10.21C of S.L. 2005-276 also revises the Medicaid estate recovery program established under G.S. 108A-70.5. The amended statute allows DHHS to file a claim against the estate of a Medicaid recipient to recover the cost of Medicaid services provided to the recipient if (1) the Medicaid services were provided to the recipient as an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution and DHHS has determined, after notice and an opportunity for hearing, that the recipient cannot reasonably be expected to be discharged to return home; or (2) the Medicaid services were provided to a recipient who is at least 55 years old and are for nursing home care, home and community-based services, hospital care, or prescription drugs related to nursing home care or home and community-based services, personal care services, payment of Medicare premiums, private duty nursing, home health aide services, home health therapy, or speech pathology services.

Section 10.21C of S.L. 2005-276 also enacts two new statutes, G.S. 108A-70.6 and 108A-70.7, establishing criteria for the waiver or postponement of lien attachment or estate recovery if assertion of the lien or claim would result in undue hardship or would not be cost effective. This section also repeals the authority of DHHS to adopt rules governing waiver or postponement of estate recovery.

G.S. 108A-70.6, as added by S.L. 2005-276, provides that an "undue hardship" exists if the property subject to a lien has a tax value that does not exceed $30,000; if the property subject to a claim is the sole source of income for a surviving heir or beneficiary and loss of the property would impoverish the heir or beneficiary; or if sale of the recipient's home would be required to satisfy the claim, the surviving heir or beneficiary lived in the recipient's home on a continual basis for at least twenty-four months immediately before the recipient's death, the heir or beneficiary used the property as his or her principal place of residence on the date of the recipient's death, the heir's or beneficiary's income does not exceed 150 percent of the federal poverty level, the heir or beneficiary does not own

other real property or agrees to sell other real property in partial payment of the claim, and the net value of the heir's or beneficiary's other assets does not exceed $30,000. An heir or beneficiary must file a claim of undue hardship within 30 days after receipt of notice of a Medicaid lien or estate recovery claim. New G.S. 108A-70.8 requires that Medicaid applicants receive notice regarding Medicaid liens and estate recovery but does not address notice of Medicaid liens or estate recovery given to heirs or beneficiaries of deceased Medicaid recipients.

G.S. 108A-70.7, as added by S.L. 2005-276, requires DHHS to waive a lien or claim if the amount of payments for Medicaid services subject to recovery is less than $8,000 or the value of the assets subject to the claim or lien is less than $5,000.

G.S. 108A-70.9, as added by S.L. 2005-276, requires county social services departments to provide DHHS with information and administrative and legal assistance needed to recover the cost of Medicaid services under G.S. 108A-70.5, requires DHHS to pay county social services departments 20 percent of the nonfederal share of recovered payments, and allows DHHS to withhold these payments if a county social services department fails to provide assistance as required by G.S. 108A-70.9.

Section 10.21C is effective July 1, 2006, and applies to persons receiving Medicaid on or after that date.

Services, Payment, and Administration

Medicaid provider rates and recipient co-payments. S.L. 2005-276 freezes the rates paid to most Medicaid providers, provides funding to increase the Medicaid rates for dental services, and, effective October 1, 2005, increases to $3.00 the Medicaid co-payments for chiropractic services, optical services, podiatry services, hospital outpatient services, nonemergency emergency room visits, and generic prescription drugs.

Prescription drug utilization. S.L. 2005-276 expands the authority of the state Division of Medical Assistance regarding prescription drug utilization. Section 10.11(y) of S.L. 2005-276 requires the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services to provide an opportunity for interested advocacy organizations to comment on proposed Medicaid prescription drug restrictions. The committee is authorized to report its findings or recommendations based on these comments by April 30, 2006, to the General Assembly's Fiscal Research Division and the legislative appropriations committees on health and human services.

Prior authorization exemption for antihemophilic drugs. S.L. 2005-83 (H 916) extends until July 1, 2009, the provisions of S.L. 2003-179 exempting antihemophilic drugs prescribed for the treatment of hemophilia and blood disorders from the Medicaid prior authorization requirements for prescription drugs.

Prescription management program. Section 10.19B of S.L. 2005-276 requires DHHS to implement an electronic quality prescription management program for prescription drugs using personal data assistance technology.

Personal care services. Section 10.19 of S.L. 2005-276 requires DHHS to reduce the cost of providing personal care services for Medicaid recipients by $13.7 million in state fiscal year 2005-06 and $16.1 million in state fiscal year 2006-07 by implementing a utilization management system. The system may include reducing the limit on personal care services to fifty hours. The DHHS Division of Medical Assistance must study the implementation of additional utilization or prior authorization systems for personal care services and other home- and community-based services and, by May 1. 2006, report a plan for implementing these systems to the General Assembly's Fiscal Research Division and the legislative appropriations committees for health and human services. Effective October 1, 2006, S.L. 2005-276 provides funding to increase the number of hours of adult care home personal care services for residents of special care units from 1.1 hours per day to 4.07 hours per day.

Community Care of North Carolina. Section 10.17 of S.L. 2005-276 expands the scope of Community Care of North Carolina (a Medicaid managed care program) to include elderly, blind, or disabled Medicaid recipients who are dually eligible for Medicare and Medicaid. DHHS must submit a report regarding implementation of this section to the General Assembly's Fiscal Research Division and the legislative appropriations committees on health and human services by March 1, 2007.

Community Alternatives Program. Section 10.20 of S.L. 2005-276 requires DHHS to develop a new system for reimbursement for services provided under the Medicaid Community Alternatives Program. The new system must use a case-mix reimbursement system, incorporate home environment and social support systems into the case-mix system, and use Resource Utilization Groups-III (RUG-III) to determine the level of need for services other than those for the Community Alternatives Program for the Mentally Retarded or Developmentally Disabled. DHHS must submit a report on the new system by May 1, 2006, to the General Assembly's Fiscal Research Division and the legislative appropriations committees for health and human services and must implement the new system by January 1, 2007.

Medicaid services for persons who are dually eligible for Medicare and Medicaid. Section 10.21E of S.L. 2005-276 requires DHHS to study Medicaid services for persons who are dually eligible for Medicaid and Medicare, the impact of Medicare Part D on Medicaid services, the financial impact of Medicare "clawback" provisions, and efficiencies that may be realized in services for this population. DHHS must report the results of its study to the General Assembly's Fiscal Research Division and the legislative appropriations committees for health and human services by May 1, 2006.

Fraud and abuse. Section 10.11(x) of S.L. 2005-276 requires the state Division of Medical Assistance (DMA) to require Medicaid recipients to sign an authorization allowing the release to DMA of their medical records for a period of three years immediately preceding their application for Medicaid benefits. DMA may use these records for the purpose of investigating and reducing recipient fraud and abuse or for any other purpose permitted by the federal medical privacy rules under the Health Insurance Portability and Accountability Act and required or authorized by other applicable federal or state law. DMA may not implement this requirement if it is prohibited by federal law. Section 10.11(o) of S.L. 2005-276 continues DMA's authority to provide financial incentives to counties that successfully recover fraudulently spent Medicaid funds. Part II of S.L. 2005-424 (H 646) provides that if the Department of Insurance receives grant funding from the Federal Administration on Aging, the department may establish a full-time, federally funded position for a Medicare Lookout Program Coordinator for the State Health Insurance Information Program, whose purpose is to reduce fraud in the Medicare and Medicaid programs.

Other Public Assistance and Social Services Programs

Child Day Care

Subsidized child care. Section 10.60 of S.L. 2005-276 (S 622), the appropriations act, provides that DHHS may not require local matching funds for the receipt of funds appropriated by the act for child care unless federal law requires a match. Section 10.61 sets out the allocation formula for child care subsidy voucher funds and authorizes the department to reallocate unused funds. It requires DHHS to allocate up to $22 million in federal block grant funds and state funds appropriated for fiscal years 2004-05 and 2005-06 to prevent the termination of child care services. Section 10.62 establishes the maximum gross annual income for initial eligibility for subsidized child care services at 75 percent of the state median income, adjusted for family size, and includes other detailed provisions relating to eligibility and payment requirements. Section 10.66 requires the Division of Child Development in DHHS to analyze the child care subsidy reimbursement system and to develop strategies to implement market rate equity among counties. The division must report its findings and recommendations by April 30, 2006, to the General Assembly's Fiscal Research Division and the legislative appropriations committees on health and human services. The act appropriates an additional $3.6 million to reduce child care subsidy waiting lists.

Star-rated licensure of child care facilities. S.L. 2005-36 (H 707) rewrites G.S. 110-90(4) regarding star-rated licensure of child care facilities. Current law provides that ratings are based on program standards, staff education levels, and a facility's compliance history. Effective January 1, 2006, new licenses issued for child care facilities with a rating of two to five stars will be based on program standards and staff education levels, and DHHS may issue a provisional license or Notice of

Compliance to a facility that fails to maintain a compliance history of at least 75 percent for the past eighteen months or during the length of time it has operated, whichever is less. For facilities already holding licenses of two to five stars on January 1, 2006, this change does not take effect until January 1, 2008. The act requires DHHS to give child care providers additional opportunities to earn points for program standards and staff education levels.

Short-term and drop-in child care. Effective September 22, 2005, S.L. 2005-416 (H 1517) rewrites the definition of "child care" in G.S. 110-86(2) to make clear that it does not include drop-in or short-term care provided by an employer for its part-time employees where (1) the child is not provided care for more than two and a half hours in a day, (2) the parents are on the premises, and (3) no more than twenty-five children are in any one group in any one room. Both these providers and the short-term and drop-in care providers already clearly excluded from the definition must register with DHHS the fact that they are providing this type of care and post a notice that the care is not licensed or regulated by DHHS. The act requires the Director of the Division of Child Development to report to the General Assembly

- by May 1, 2006, the number of facilities that have registered pursuant to this provision.
- by April 30, 2006, findings and recommendations based on a study of current policies, practices, and laws related to drop-in and short-term care and baby sitting services.

Babysitting services. S.L. 2005-416 also enacts G.S. 14-321.1, making it unlawful for an adult to provide or offer to provide a babysitting service (1) in a home in which a resident is a registered sex offender, or (2) if a provider of care for the babysitting service is a registered sex offender. For purposes of the section, "baby sitting service" means providing, for profit, supervision or care for a child younger than thirteen who is not related to the provider by blood, marriage, or adoption, for more than two hours per day while the child's parent or guardian is not on the premises. A first offense is a Class 1 misdemeanor. A second or subsequent offense is a Class H felony. These provisions apply to offenses committed on or after December 1, 2005.

Child Support Enforcement

Attachment of bank accounts to collect past-due child support. G.S. 110-139.2(b1) allows the state's child support enforcement agency to collect past-due child support by attaching a bank account (or other account in a financial institution) maintained by a person who owes past-due child support. Effective December 13, 2005, S.L. 2005-389 (H 1375) amends this statute (1) to make it applicable to persons who owe past-due child support but are not "delinquent" (*see* Davis v. Dep't. of Human Resources, 126 N.C. App. 383, 485 S.E.2d 342 (1997), *aff'd in part and rev'd in part*, 349 N.C. 208, 505 S.E.2d 77 (1998)); (2) to require that notice of the attachment be served pursuant to G.S. 1A-1, Rule 4, on any nonliable owner of an account held jointly with the person who owes past-due child support; (3) to allow a nonliable owner to contest the attachment to the extent that the funds in the account belong to the nonliable owner rather than to the person who owes past-due child support; (4) to require that the notice of attachment be served on the financial institution pursuant to G.S. 1A-1, Rule 5; (5) to allow this procedure to be used by the child support programs of other states without the involvement of North Carolina's child support enforcement agency; and (6) to make it clear that use of this procedure does not preclude the use of other child support enforcement remedies.

Performance standards for state and local child support enforcement agencies. Section 10.43 of S.L. 2005-276 requires DHHS to develop and implement performance standards for state and local child support enforcement (IV-D) agencies; to monitor the performance of state and local IV-D agencies; to publish an annual performance report; and to report its compliance with this section to the Fiscal Research Division and designated legislative committees by May 1, 2006.

Federal Block Grants

Section 5.1(e) of S.L. 2005-276 requires DHHS to develop a monitoring and oversight plan for all public and private recipients and subrecipients of federal block grant funding. The plan must include performance standards for recipients, financial audit standards for nonstate entities, and mechanisms

for collecting performance data from recipients. DHHS must provide the plan to the General Assembly's Fiscal Research Division by December 1, 2005.

Health Choice Program for Uninsured Children

Effective January 1, 2006, Section 10.22 of S.L. 2005-276 amends G.S. 108A-70.21 to limit eligibility for Health Choice to children between the ages of six through eighteen (low-income children aged five and under will be covered under North Carolina's Medicaid program). Effective July 1, 2006, payments under the Health Choice program will be equivalent to those provided under the state's Medicaid program (between January 1, 2006, and June 30, 2006, Health Choice payments will be 115 percent of the Medicaid rate). Effective January 1, 2006, Health Choice services will be provided through Community Care of North Carolina (a managed care program). Effective January 1, 2006, enrollment growth in Health Choice will be limited to 3 percent every six months.

Noncustodial Parent's Debt for Work First and Aid to Families with Dependent Children

Effective December 12, 2005 (ninety days after it became law), S.L. 2005-389 amends G.S. 110-135 to provide that the debt owed by a noncustodial parent for public assistance (Work First or Aid to Families with Dependent Children) paid for the parent's dependent child will be reduced by two-thirds if

- the debt is at least $15,000;
- the state and the parent enter into an agreement regarding the debt;
- a court approves the agreement after inquiring into the parent's financial status; and
- the parent makes timely payment of all court-ordered child support—including payments on child support arrearages—for a period of twenty-four consecutive months.

State–County Special Assistance for Adult Care Home Residents

S.L. 2005-276 increases the maximum monthly payment for State–County Special Assistance for elderly or disabled residents of adult care homes from $1,084 to $1,118 ($1,515 for residents of special care units), effective October 1, 2005. This rate increase will require North Carolina counties to provide an additional $1.7 million in local funding for the State–County Special Assistance program in state fiscal year 2005-06 and an additional $1.8 million in 2006-07.

State–County Special Assistance for In-Home Care

Effective October 1, 2005, S.L. 2005-276 continues, revises, and expands a demonstration project allowing payment of State–County Special Assistance benefits to individuals who do not live in adult care homes but otherwise are eligible for assistance. The maximum payment under the demonstration project may not exceed 75 percent of the State–County Special Assistance payment the individual would receive if he or she moved to an adult care home.

Temporary Assistance for Needy Families

Section 10.51 of S.L. 2005-276 approves the state's Temporary Assistance for Needy Families (TANF) plan for October 1, 2005, through September 30, 2007, and designates the following counties as "electing" counties: Beaufort, Caldwell, Catawba, Iredell, Lenoir, Lincoln, Macon, McDowell, Sampson, and Stokes.

Foster Care and Adoption Assistance

Section 10.46 of S.L. 2005-276 sets the maximum rates for state participation in the foster care and adoption assistance programs as follows:

Foster Care Assistance

1. $390 per child per month for children aged birth through five,
2. $440 per child per month for children aged six through twelve, and
3. $490 per child per month for children aged thirteen through eighteen.

Of these amounts, $15 is a special-needs allowance for the child.

Adoption Assistance

1. $390 per child per month for children aged birth through five,
2. $440 per child per month for children aged six through twelve, and
3. $490 per child per month for children aged thirteen through eighteen.

HIV Foster Care and Adoption Assistance

1. $800 per child per month with indeterminate HIV status,
2. $1,000 per child per month confirmed HIV-infected, asymptomatic,
3. $1,200 per child per month confirmed HIV-infected, symptomatic, and
4. $1,600 per child per month terminally ill with complex care needs.

Adoption of Special Children

Section 10.48 of S.L. 2005-276 allocates $100,000 to support the Special Children Adoption Fund for the 2005-06 fiscal year and directs the Division of Social Services, in consultation with others, to develop guidelines for awarding funds to licensed public and private adoption agencies to enhance adoption services. It directs the division to monitor fund expenditures, redistribute unspent funds, and report to the General Assembly's Fiscal Research Division and the legislative appropriations committees for health and human services on program expenditures and activities by December 1, 2005, and June 30, 2006.

Section 10.49 directs DHHS to study potential incentives for the adoption of children who are difficult to place and to report by October 1. 2005, to the General Assembly's Fiscal Research Division and the legislative appropriations committees for health and human services.

Child Abuse, Neglect, Dependency

Assessment Response to Reports of Abuse, Neglect, and Dependency

S.L. 2005-55 (H 277) codifies and makes statewide the multiple response approach to responding to reports of abuse, neglect, and dependency. This approach began as a pilot program and is already in place in many counties. Where the Juvenile Code previously required a county social services department to conduct an investigation after receiving a report of suspected abuse, neglect, or dependency, S.L. 2005-55 requires the department to conduct either a family assessment or an investigative assessment, depending on the nature of the report. The county social services director determines which response is appropriate in a particular case. An investigative assessment response involves a formal information gathering process to determine whether a child is abused, neglected, or dependent. A family assessment response, which may not be used in abuse cases, uses a "family-centered approach that is protection and prevention oriented and that evaluates the strengths and needs of the juvenile's family, as well as the condition of the juvenile." The act makes a number of technical and conforming amendments to Subchapter I of the Juvenile Code, G.S. Chapter 7B. It also rewrites G.S. 7B-302(a) to provide that an assessment following a report that a child is abused or neglected in a child care facility does not require a visit to the place where the child lives, as other assessments do. Finally, it rewrites G.S. 7B-303(a) to require a department of social services, when it files a petition alleging interference with or obstruction of an assessment, to include in the petition a concise statement of the basis for initiating the assessment. The act became effective October 1, 2005.

Section 10.45 of S.L. 2005-276, the appropriations act, requires the DHHS Division of Social Services to continue working with local social services departments to implement the multiple

response system, which includes these assessment responses. The multiple response system also includes establishing a system of care with child and family teams.

Responsible Individuals List, Appeal, and Expunction Procedures

When a county department of social services receives a report of suspected child abuse or neglect, the department conducts an assessment to determine whether the child has been abused or neglected and submits information about the report and assessment to the Central Registry maintained by DHHS. The registry is a confidential collection of information used both to generate statewide statistics and to enable social services departments to identify children who are the subject of more than one report. Effective October 1, 2005, S.L. 2005-399 (H 661) provides that when the county social services director's assessment determines that a child has been abused or seriously neglected—a determination primarily about the child's status, not the parent or other adult's conduct—the director also must identify the person(s) responsible for the child's status and report that information to DHHS for inclusion on a responsible individuals list.

The act authorizes DHHS to release information from this list to child caring institutions, child placing agencies, group homes, and other providers of foster care, child care, or adoption services, to assist in determining whether individuals are fit to care for or adopt children. The act also directs the state Social Services Commission to adopt rules defining "serious neglect" and addressing various procedures relating to the list. It is a Class 3 misdemeanor for a public official or employee knowingly to release information from the list or the central registry to an unauthorized person, for an authorized person who receives the information to release it to an unauthorized person, or for an unauthorized person to access or attempt to access the information.

Because information released from the responsible individuals list may affect a person's employment, potential employment, or opportunity to provide foster care or to adopt a child, it is essential that the information be accurate, that an individual know that his or her name is being put on the list, and that procedures exist for contesting, correcting, or expunging information on the list. If the county department of social services initiates a juvenile court proceeding alleging that the child is abused or neglected, the person determined by the director to be a responsible individual has a judicial forum for contesting the department's allegations. (The precise issue of whether the individual is a "responsible individual" whose name should be placed on the list is not before the court, although the court may make findings of fact about individuals' responsibility for a child's condition.) In most cases, the individual will have a right to appeal the court's order to the court of appeals. (A "caretaker," who is not a parent, guardian, or custodian, does not have a right to appeal. *See* G.S. 7B-1002.) In many cases, however, after determining that a child is abused or neglected, a county social services department works with the family to ensure the child's safety without the necessity of initiating a court action.

S.L. 2005-399 adds to the Juvenile Code, G.S. Chapter 7B, a new Article 3A, establishing notification requirements and expunction procedures for the responsible individuals list. Within five days after completing an investigative assessment, the social services director must notify DHHS and give "personal written notice" of the results of the assessment to anyone determined to be a responsible individual. If personal notice cannot be given within fifteen days, the director must send notice by registered or certified mail, restricted delivery, to the individual's last known address. The notice must

1. inform the individual of the nature of the assessment response and whether the director determined abuse or serious neglect or both.
2. summarize "substantial evidence" supporting the director's determination, without identifying the reporter or collateral contacts.
3. inform the individual that his or her name is being placed on the responsible individuals list and of the extent to which DHHS may release information from the list.
4. clearly describe procedures the individual must follow to seek removal of his or her name from the list.

The first step for a person seeking removal of his or her name from the responsible individuals list is to make a written request for expunction to the social services director. The request must be delivered in person or by certified mail within thirty days after receipt of the notice described above.

Within fifteen working days after receiving the request, the director must review all relevant agency records and information to determine whether substantial evidence supported placement of the individual's name on the list. Within the same time frame, the director must either

1. notify DHHS to expunge the person's name from the list, or
2. uphold or modify the initial determination and refuse the expunction request.

In either case, the director must send a written statement of the decision to the individual by personal delivery or first-class mail. If the decision is to deny the expunction request, the director also must send the individual a written statement of the reasons for the decision; a statement that the decision is final; information about the time within which the individual may seek review of the decision by the district attorney or the court; a second notice like the one sent to the individual initially; and a copy of a petition for expunction form. Within thirty days after receiving notification that a request for expunction has been denied, the individual may request review of the director's decision by the district attorney or file a petition for expunction in the district court. A director's failure to send a written notice within fifteen days operates as a denial of the expunction request, and the individual may seek review by the district attorney or file a petition for expunction.

A request for review by the district attorney (or the district attorney's designee) is made by letter to the attention of the district attorney. The social services director must provide the district attorney with all of the information that was used in reaching the decision to deny the expunction request. The district attorney conducts a review and within thirty days after receiving the request for review must either agree or disagree with the director's determination that substantial evidence supported the director's initial decision. The district attorney must notify the individual and the director of the decision in writing. Failure to make a timely request for review by the district attorney is a waiver of the right to that form of review but does not affect the individual's right to petition the court for expunction.

A person may petition the district court for expunction of his or her name from the responsible individuals list either within thirty days after receiving the director's review decision or within thirty days after the district attorney's decision agreeing with the director's determination, whichever is later. The petition must contain information specified in the statute, and a copy must be delivered in person or by certified mail to the social services director. Failure to file a timely petition constitutes a waiver of the right to file a petition for expunction. Nevertheless, a district court may review a determination of abuse or serious neglect any time, if the review serves the interest of justice or in the case of extraordinary circumstances.

The clerk of superior court is required to maintain a separate docket for expunction actions, to schedule the cases for hearing in a session of district court hearing juvenile cases, and to send the director and the petitioner a notice of hearing. At the request of a party, the court is required to close the hearing to everyone except parties, witnesses, and officers of the court.

At the hearing the social services director has the burden of proving by a preponderance of the evidence the correctness of the director's decision determining abuse or serious neglect and identifying the petitioner as a responsible individual. The rules of evidence in civil cases apply; however, the court has discretion to admit any evidence that is reliable and relevant if doing so will best serve the general purposes of the rules of evidence and the interests of justice. The parties have the right to

- present sworn evidence, law, or rules;
- represent themselves or obtain representation by an attorney at their own expense; and
- subpoena witnesses, cross-examine witnesses, and make closing arguments.

The court must enter its order, making findings of fact and conclusions of law, within thirty days after the hearing. The order may uphold the director's decision or reverse or modify it and order that DHHS be notified to make appropriate changes in the responsible individuals list. A party may appeal the court's decision to the court of appeals.

A person is not entitled to challenge the placement of his or her name on the responsible individuals list if the person

1. is convicted criminally as a result of the same incident. The district attorney must notify the director of the result of the criminal proceeding, and the director must notify DHHS, which must consider the information when determining whether the person's name should remain on

or be expunged from the list. It is not altogether clear how the district attorney is to identify the cases in which he or she must notify the social services director.

2. is a respondent in a juvenile proceeding involving abuse or serious neglect from the same incident. The director must notify DHHS, which must consider the information when determining whether the person's name should remain on or be expunged from the list.
3. fails to make a timely request for expunction to the county social services director.
4. fails to file a timely petition for expunction with the court.
5. fails to keep the department of social services informed of his or her current address during a request for expunction so that the individual may receive notification of the director's decisions.

If before or during an expunction proceeding the individual seeking expunction is named as a respondent in a juvenile proceeding based on the same incident, the expunction proceeding—whether before the director, the district attorney, the district court, or the court of appeals—is stayed until the juvenile proceeding is completed or dismissed. If the juvenile proceeding is dismissed or concluded either without an adjudication or with an adjudication different from the director's determination (for example, neglect instead of abuse), the director must notify DHHS to expunge the individual's name or modify information on the list as appropriate.

The act applies to investigative assessment responses initiated by county social services departments on or after October 1, 2005.

Intensive Family Preservation Services

Section 10.51A of S.L. 2005-276 provides that the Intensive Family Preservation Services (IFPS) Program must provide intensive services to children and families in

1. cases of abuse, neglect, and dependency, where a child is at imminent risk of removal from the home; and
2. cases of abuse, where a child is not at imminent risk of removal.

The program is to be implemented statewide, on a regional basis, and is to use standardized criteria for determining when "imminent risk" of removal exists. The section sets out information and data that DHHS must ensure that participating entities provide. The department must report on the program's implementation by February 1, 2006, to the General Assembly's Fiscal Research Division and the legislative appropriations committees for health and human services.

Other Legislation of Interest to Social Services Agencies and Employees

Certification and Licensure of Social Workers

House Bill 1087 passed the House before the crossover deadline and remains eligible for consideration during the 2006 legislative session. If enacted, this bill would

- define a social worker as a person who is a licensed or certified social worker, who has attained a doctorate in social work or has received a bachelor's or master's degree in social work from an accredited school of social work;
- prohibit persons who are not social workers from holding themselves out to the public as social workers;
- exempt social workers who are not licensed or certified social workers from the academic qualifications of G.S. Chapter 90B if they remain continuously employed in the field of social work in North Carolina; and
- allow a person to hold himself or herself out to the public as a social worker if the person is engaged in the practice of social work while employed by a North Carolina county and is designated as a "county agency social worker."

Criminal Offenses against Social Workers

S.L. 2005-101 (S 507) amends G.S. 15A-1340.16(d)(6) to provide that the commission of an offense that is directed against or that proximately causes serious injury to a social worker is an aggravating factor that may be considered in sentencing an individual who is convicted of that offense. The act applies to offenses committed on or after December 1, 2005.

Department of Health and Human Services Office of Policy and Planning

Section 10.2 of S.L. 2005-276 codifies as G.S. 143B-216.70 previous legislative provisions requiring the DHHS Secretary to establish an Office of Policy and Planning that must coordinate the development of departmental policies, plans, and rules; develop a process for the review and coordination of existing policies, plans, and rules and the development, coordination, and implementation of new policies, plans, and rules; and implement ongoing strategic planning that integrates budget, personnel, and resources with the department's mission and operational goals.

Financial Exploitation of Elderly or Disabled Persons

Effective December 1, 2005, S.L. 2005-272 (H 1466) revises the criminal penalty for financial exploitation of elderly or disabled adults, repealing G.S. 14-32.3(c) and replacing it with G.S. 14-112.2. S.L. 2005-272 is summarized in Chapter 22, "Senior Citizens."

Licensure and Inspection of Adult Care Homes

Section 10.40A(j) of S.L. 2005-276 rewrites the adult care home inspection requirements of G.S. 131D-2(b)(1a). Effective July 1, 2007, adult care homes must be inspected every two years to determine compliance with physical plant and life-safety requirements, in addition to being inspected annually for all other requirements. Effective August 13, 2005, county departments of social services must document in a written report all on-site visits, monitoring visits, and complaint investigations and submit these reports to the DHHS Division of Facility Services (DFS) within twenty working days after each visit. The Division of Facility Services must conduct an annual review of the county departments' performance of their inspection and monitoring responsibilities and provide technical assistance, take corrective action, or, if necessary, assume a county's regulatory responsibilities if a county fails to conduct timely monitoring or fails to identify or document noncompliance with licensure requirements.

Effective July 1, 2006, Section 10.40A(j) of S.L. 2005-276 amends G.S. 131D-2(b)(1a) to require adult care home specialists and supervisors employed by county departments of social services to complete eight hours of prebasic training within 60 days of employment; thirty-two hours of basic training and at least eight hours of complaint investigation training within six months of employment; twenty-four hours of postbasic training within six months of completing basic training; and at least sixteen hours of statewide DFS training annually. Adult care home specialists and supervisors employed on or before July 1, 2006, must complete the required training components by June 1, 2007.

Section 10.40A(p) of S.L. 2005-276 requires the DHHS Division of Aging and Adult Services (DAAS), in consultation with adult care homes, county social services departments, consumer advocates, and other interested stakeholders, to develop a quality improvement consultation program for adult care homes and to submit a progress report regarding the program to the North Carolina Study Commission on Aging and the legislative appropriations committees for health and human services by April 1, 2006. County social services departments will be responsible for implementing the program. The Division of Aging and Adult Services must conduct a pilot of the program in no more than four counties. If DAAS concludes that the pilot program is effective and should be expanded, it must submit its report and recommendations regarding expansion of the program, a proposed timetable for expanding the program, the estimated cost of an expanded program, and necessary statutory and administrative rule changes to the North Carolina Study Commission on Aging and the legislative appropriations committees for health and human services.

Additional provisions of S.L. 2005-276 regarding the licensure and inspection of adult care homes are summarized in Chapter 22, "Senior Citizens."

Child Caring Institutions

Section 10.47 of S.L. 2005-276 requires the Office of the State Auditor to conduct an audit to evaluate overhead rates and reimbursements for child caring institutions that receive state funding and allocates $150,000 for that purpose. The audit must include, among other things,

1. an evaluation of each institution's cost allocation processes,
2. an examination of other states' rate-setting methodologies,
3. recommendations about how to develop equitable and reasonable rates, and
4. an assessment of the feasibility of allowing child caring institutions to compete based on providing the best service at the least cost.

The Office of the State Auditor must report by May 1, 2006, to the General Assembly's Fiscal Research Division and the legislative appropriations committees for health and human services.

The section also directs DHHS to establish standardized rates for child caring institutions, which would become effective July 1, 2006, and be updated annually on July 1. The rate-setting methodology must incorporate the recommendations of the Office of the State Auditor. Until the standardized rates are set, maximum reimbursements may not exceed the rate established for the specific institution by the DHHS controller.

Smoking Restrictions in County Department of Social Services Offices

Effective July 7, 2005, S.L. 2005-168 (H 1482) allows the adoption of a local ordinance, law, or rule that establishes smoking restrictions that exceed those otherwise allowed under Article 64 of G.S. Chapter 143 with respect to areas in and around the buildings in which county departments of social services are located.

Janet Mason

John L. Saxon

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State Government

The most noteworthy act of the 2005 legislative session was the State Lottery. The General Assembly also enacted major reform of its lobbying regulations as well as legislation affecting the Administrative Procedures Act, the Escheat Fund, and several executive branch agencies.

The Lottery

When the Senate and House of Representatives reached agreement on the state budget in mid-August and worked into the wee hours of the morning—events generally indicative of impending adjournment—without adopting H 1023, the lottery bill passed by the House in April 2005, many declared the lottery defeated. A few lottery opponents even left the city in the recess that followed the budget's passage with no plans to return for the waning days of the session, much like sports fans heading early to the parking lot, confident that the game is in the bag. But in a dramatic end that few predicted, the Senate voted 25-24 on August 30, 2005, in favor of the State Lottery Act, thus ending a losing streak for lottery proponents that had spanned more than two decades. Lieutenant Governor Beverly Perdue cast the deciding vote, and Governor Easley signed S.L. 2005-344 (H 1023) into law the next day.

A discussion follows of the players, rules, and revenue subject to new Chapter 18C, the North Carolina State Lottery Act, enacted by S.L. 2005-344 (H 1023), as amended by the Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622).

The Players

State Lottery Commission. Article 2 of new G.S. Chapter 18C establishes the North Carolina State Lottery Commission, an independent, self-supporting, and revenue-raising agency charged with overseeing operation of the state lottery. The commission consists of nine members, five of whom are appointed by the Governor. One of the Governor's appointees must have served five years in law enforcement. Two members of the commission are appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate. One of these persons must be a certified public accountant. The final two commission members are appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives. One of these appointees must have

served as the owner or manager of a retail sales business. In making appointments to the commission, the appointing authorities must consider the composition of the state with respect to geographic representation and gender, ethnicity, race, and age.

The Governor selects the chair of the commission from among its members. Members initially are appointed to staggered terms of one to three years. All succeeding appointments are for five-year terms. Members may not serve for more than two successive terms. The commission meets at least quarterly. Members receive per diem, subsistence, and travel reimbursement for their service, but no other compensation.

The commission is empowered and required to

- select a director to operate and administer the lottery and to serve as the Secretary of the Commission;
- set the amount of compensation for the director;
- specify the types of lottery games and gaming technology;
- set rules for lottery games and methods for determining winners;
- prescribe the nature of lottery advertising within statutory parameters;
- set the number and value of prizes for winning tickets or shares in lottery games;
- establish the retail sales price for tickets or shares for lottery games;
- establish a system to claim prizes and verify validity of tickets or shares;
- specify the manner of distribution and sale of lottery tickets or shares to lottery game retailers or directly to the public;
- determine incentives for lottery employees, vendors, contractors, or electronic computer terminal operators; and
- send quarterly and annual reports on its operations to the Governor, State Treasurer, and General Assembly.

State Lottery Director. Article 3 of G.S. Chapter 18C sets forth the powers and duties of the State Lottery Director, who serves as the chief administrator of the lottery. The director is authorized and required to

- report payment of prizes to state and federal tax authorities and withhold state and federal income taxes as required by law;
- conduct background checks of applicants for employment with the commission, lottery retailers, and lottery contractors;
- set salaries of commission employees;
- enter into contracts with lottery retailers and contactors upon approval by the commission;
- coordinate and collaborate with law enforcement in investigations of violations of the laws relating to operation of the lottery;
- study the operation and administration of other lotteries and make recommendations to improve the operation and administration of the lottery;
- provide monthly financial reports to the commission of lottery revenues, prize disbursements, expenses, net revenues, and all other financial transactions involving lottery funds; and
- enter into agreements with other states to operate and promote multistate lotteries.

Lottery retailers. The commission contracts with lottery retailers to sell tickets or shares in lottery games. Lottery retailers retain 7 percent of the retail price of tickets or shares. The director recommends lottery retailers to the commission. In making these recommendations, the director must, to the extent practicable, meet minority participation goals under the laws governing public contracts. The director may not recommend contracting with a person under twenty-one, a person who would be engaged exclusively in the business of selling lottery tickets or operating computer terminals solely for entertainment, a person who owes delinquent state taxes or has failed to file state tax returns, a person who resides in the same household as a member of the commission, the director, or any employee of the commission.

Lottery retailers must, if requested, furnish bond or a letter of credit. The director may purchase blanket bonds for all lottery retailers if authorized by the commission. Lottery retailers and persons applying to become lottery retailers are prohibited from giving gifts, loans, or favors to the director, commission members, or employees, or to immediate family members residing in the same household

as these individuals. Lottery retailers may provide food and drink not exceeding $100 per calendar year to these individuals.

Lottery vendors and lottery contractors. Lottery vendors are persons other than lottery retailers who submit bids, proposals, or offers to procure contracts for goods or services for the commission. Lottery contractors are persons other than lottery retailers with whom the commission contracts for goods or services. Article 6 of G.S. Chapter 18C governs the commission's relationship with vendors and contractors.

Public bidding laws, including provisions relating to minority participation goals, apply to contracts entered into by the commission. Moreover, contracts of $90,000 or more for the purchase of services, apparatus, supplies, materials, or equipment may be awarded by the commission only after it has done the following:

- Advertised an invitation for the submission of proposals, requiring proposals to be accompanied by a bond or letter of credit equal to 5 percent of the proposal plus the fee to cover the costs of a criminal record check
- Complied with minority participation goals
- Investigated and compared business practices, ethical reputation, criminal records, civil litigation, competence, integrity, backgrounds, and regulatory compliance records of lottery vendors

No lottery vendor who has been convicted of a felony or any gambling offense in the last ten years, or who employs officers and directors with such convictions, may be awarded a contract by the commission.

Before a contract is awarded to a lottery vendor, the director must conduct background investigations of the vendor, any parent or subsidiary corporation of the vendor, any shareholders with a 5 percent or more interest in the vendor or its parent or subsidiary, and the officers and directors of the vendor and its parents and subsidiaries.

The prohibition barring gifts from lottery retailers to the director, members of the commission, commission employees, and their respective family members also applies to lottery vendors.

Auditors. Chapter 18C of the General Statutes sets forth specific roles for the State Auditor and independent audit firms selected by the commission. The State Auditor must conduct annual audits of all accounts and transactions of the commission. An independent auditing firm must conduct an audit of security procedures for the lottery at the beginning of each calendar year. In addition, an independent auditing firm must biennially at the end of the fiscal year evaluate the operation of the lottery.

Department of Health and Human Services. The commission must consult with the Department of Health and Human Services (DHHS) to develop and provide to the public information about gambling addiction and treatment. The department must study the effects of the state lottery on gambling addiction in the state and report the results of the study to the General Assembly by January 1, 2007. Annual transfers of $1 million to DHHS for gambling addiction education and treatment programs are considered an expense of the lottery pursuant to G.S. 18C-163.

Alcohol Law Enforcement. The State Lottery Act amends G.S. 18B-500(b) to vest Alcohol Law Enforcement agents with primary responsibility for enforcing lottery laws. Commission contracts with lottery retailers for the sale of tickets or shares are considered "permits" for purposes of G.S. Chapter 18B.

Rules of the Game

Types of games. The commission determines the types of games that comprise the state lottery. Those games may include instant lotteries, online games, games played on computer terminals, and games that have been conducted by other state government–operated lotteries. Slot machine games using computer terminals or electronic devices that directly dispense money to players are prohibited. In addition, lottery games may not involve wagering on the outcomes of sporting events.

At the time the lottery game is offered for sale to the public, the commission must provide a detailed tabulation of the estimated number of prizes of each particular denomination that it expects to be awarded in each lottery game or the estimated odds of winning these prizes.

Lottery advertising. Advertising must be "tastefully designed" and presented in a manner to minimize the appeal of lottery games to minors. The use of cartoon characters or of false, misleading, or deceptive information in lottery advertising is prohibited. All advertising promoting the sale of lottery tickets or shares for a particular game must include the actual or estimated overall odds of winning the game.

Ticket sales. Tickets or shares may not be resold for more than the retail sales price set by the commission. Each ticket or share in a lottery game must have a retail price of at least 50 cents. This minimum price does not apply to discounts or promotions authorized by the commission for a particular lottery game.

The sale of a lottery ticket or share to a person under eighteen is a Class 1 misdemeanor, pursuant to G.S. 18C-131. It is a defense for the person who sold a ticket or share to a minor if the person produces evidence of facts that reasonably indicated at the time of sale that the purchaser was at least eighteen years old. No prize may be paid to a person under eighteen.

In addition to minors, the following persons may not purchase a lottery ticket or share or be awarded a prize: commission members and employees, the director, or a spouse, parent, or child living in the same household as one of these individuals.

Games with tickets. Each ticket must be imprinted with a unique number, abbreviated game play rules, and resources for information on responsible gaming. Tickets may have cartoon characters designed to appeal to adults, not minors. In games using tickets with preprinted winners, the overall estimated odds of winning prizes must be printed on each ticket. No names or photographs of current or former elected officials may appear on game tickets.

Drawings. G.S. 18C-132 sets forth procedures for drawing and claiming prizes, payment of prizes, and protecting information identifying certain prize winners.

Games that employ daily or less frequent drawings of winning numbers, drawings among entries, or drawings among finalists must comply with the following conditions:

- The drawing must be open to the public.
- An independent certified public accountant (CPA) must witness the drawing.
- An independent CPA and a commission employee must inspect the equipment used before and after the drawings.
- Audio and visual records of the drawings and the required inspections must be made.

Prizewinners. Winners of less than $600 may claim prizes from any lottery retailer or the commission. Winners of more than $600 must claim prizes directly from the commission.

Identity protection. If a prize winner presents a protective order issued under G.S. 50B-3, a court order restricting access to or contact with the person, or an Address Confidentiality Program authorization card, the winner's identifying information must be treated as confidential.

Withholding. New G.S. 105-163.2B requires the commission to withhold state income taxes from payment of lottery winnings at a rate of 7 percent.

Debt set-off. The commission may establish a debt set-off program allowing prize payments to be used to satisfy a debt of at least $50 owed by the winner to a state or local government agency. The commission must match the information submitted by agencies with persons entitled to prize payments of $600 or more. A collection assistance fee of $5 for state agency debt and $15 for local agency debt applies.

Reporting. After the period for claiming prizes for each game expires, the commission must make available a detailed tabulation of prizes claimed and paid directly by the commission.

Prohibition of local regulation. Pursuant to G.S. 18C-170, counties and municipalities are prohibited from enacting ordinances or regulations relating to the lottery. Chapter 18C of the General Statutes preempts all existing ordinances that impose additional restrictions or requirements upon the operation of the lottery.

The Revenue

New G.S. 18C-160 creates the North Carolina State Lottery Fund, an enterprise fund, within the State Treasury. The State Lottery Fund is appropriated to the State Lottery Commission, which is authorized to expend the funds to operate the commission and the lottery games.

The following revenues must be deposited in the lottery fund:

- Proceeds from the sale of lottery tickets or shares
- Funds for initial start-up costs provided by the state
- All other funds credited or appropriated to the commission from any source
- Interest earned by the fund

Section 15 of the State Lottery Act requires the State Treasurer to lend to the lottery commission funds not exceeding $10 million to cover its initial operating expenses and requires the commission to repay the funds, with interest, in twenty-four months. Pursuant to Section 15.1, all net revenues from the lottery in 2005–06 must be transferred to the Education Lottery Reserve Fund.

Beginning in 2006–07, G.S. 18C-162 requires that State Lottery Fund revenues be allocated as follows:

- At least 50 percent of revenues must be expended as prizes.
    - At least 35 percent of revenues must be transferred to the Education Lottery Fund, established by G.S. 18C-164.
    - No more than 8 percent of revenues may be allocated for lottery expenses.
    - No more than 7 percent of revenues may be allocated for compensation to lottery retailers.

Permissible commission expenses are

- costs incurred in operating and administering the commission;
- costs resulting from commission contracts for the purchase or lease of goods or services;
- the appropriation of $1 million annually to DHHS for gambling addiction education and treatment programs;
- costs of supplies, materials, tickets, independent studies and audits, data transmission, advertising (not to exceed 1 percent of annual revenue), promotion, incentives, public relations, communications, bonding for lottery retailers, and printing and distribution of tickets and shares; and
- reimbursement to other governmental entities for services provided to the commission.

If commission expenses total less than 8 percent of revenue, the commission may use surplus funds to increase prize payments or for any public purpose described in G.S. Chapter 18C.

Unclaimed prizes are not considered abandoned property but instead are allocated in equal portions to enhance prize payments and to the Education Lottery Fund. The General Assembly must transfer unclaimed prize money from the State Lottery Fund to the Escheat Fund in an amount equal to the principal transferred from the Escheat Fund for scholarships in fiscal years 2003–04, 2004–05, 2005–06, and 2006–07 until the Escheat Fund is repaid for any amounts of principal transferred in those fiscal years.

Net revenues of the State Lottery Fund, which must be at least 35 percent of total revenue, must be transferred to the Education Lottery Fund. Five percent of the net revenue of the prior year must be transferred to the Education Lottery Reserve Fund, a special revenue fund established in the State Treasury. The reserve fund is capped at $50 million.

The commission must distribute the remaining revenue in the Education Lottery Fund as follows:

- Fifty percent to support reduction of class size in early grades to class size allotments not exceeding 1:18 and to support academic prekindergarten programs for at-risk four-year-olds
- Forty percent to the Public School Building Capital Fund
- Ten percent to the State Educational Assistance Authority to fund college and university scholarships

The General Assembly must appropriate funds in each category annually based upon revenue estimates. If actual revenues are less than appropriations, the Governor may transfer from the reserve fund moneys to equal the appropriation. If the reserve funds are insufficient to cover the shortage, the Governor must transfer money for the following purposes, listed in order of priority:

1. To fund academic prekindergarten programs for at-risk four-year-olds
2. To reduce class size
3. To provide financial aid for needy students to attend college
4. To fund the Public School Building Capital Fund

If, on the other hand, actual revenues exceed appropriations, excess revenues must be transferred in equal portions to the Public School Building Capital Fund and the State Educational Assistance Authority for expenditure in the same manner as appropriations from the Education Lottery Fund.

New G.S. 115C-546.2 requires that lottery revenues transferred to the Public School Building Capital Fund must be allocated as follows: 65 percent on a per average daily membership basis as determined by the State Board of Education and 35 percent to local schools in counties in which the effective county tax rate as a percentage of the effective state average tax rate is greater than 100 percent. The effective county tax rate is defined as the actual county tax rate multiplied by a three-year weighted average of the most recent annual sales assessment ratio studies. Counties are not required to match funds appropriated pursuant to the effective tax rate category. Counties may use appropriations based upon effective tax rates to pay for school construction projects in local school administrative units and to retire indebtedness incurred for school construction projects on or after January 1, 2003, but may not use the funds to pay for school technology needs.

New Article 35A in G.S. Chapter 115C, "College Scholarships," sets forth criteria for awarding scholarships from appropriated lottery revenues. Students who are legal residents of North Carolina, who meet Pell Grant eligibility requirements (other than family contribution requirements), and whose expected family contribution to college under federal guidelines does not exceed $5,000 are eligible for scholarships. Students must be admitted, enrolled, and classified as undergraduates at a North Carolina community college or an accredited college or university in North Carolina.

Students must maintain satisfactory academic progress and may not receive a scholarship for more than four years. A scholarship must be at least $100 and not more than $4,000 per academic year. The State Education Assistance Authority must administer scholarships under rules it adopts. The authority must report by June 1, 2008, and annually thereafter to the Joint Legislative Education Oversight Committee the amount of scholarship money disbursed, the number of eligible students, and the eligible institutions that received the funds. It may use 1.5 percent of appropriated scholarship funds for administrative purposes.

Lobbying

S.L. 2005-456 (S 612) reforms and strengthens the North Carolina laws on lobbying. The act makes the following changes, effective January 1, 2007:

- Closes the goodwill lobbying loophole, which required reporting of only those expenses incurred while discussing specific legislation. Under the new law, lobbyists must report all lobbying expenditures above $10 a day, whether to influence specific legislation or to create goodwill.
- Requires expense reports to be filed monthly while the legislature is in session and quarterly between sessions. Currently, lobbyists report their expenses twice a year.
- Enacts new Article 4C of G.S. Chapter 147, imposing the same registration and reporting requirements on lobbyists who solicit members of the executive branch.
- Institutes a six-month cooling off period, preventing former legislators and executive branch officials from becoming lobbyists for six months after leaving office.
- Creates a "no gifts" registry that allows legislators and executive branch officials to voluntarily signal that they do not want to receive gifts or anything of value from lobbyists or lobbyist principals.
- Authorizes the Secretary of State to impose a civil fine of up to $5,000 per violation for false or incomplete reporting. This civil penalty would be in addition to the other consequences of being convicted of violating the lobbying laws: a two-year ban on lobbying and, in the case of intentional violations, criminal punishment as a Class 1 misdemeanant.

Administrative Procedure Act

Analysis of Impacts on Transportation Projects

A special provision, Section 28.8 of S.L. 2005-276, the 2005 appropriations act, amends the State Administrative Procedure Act (G.S. Chapter 150B) to require any agency adopting a rule that affects environmental permitting by the Department of Transportation to submit the draft rule to the Board of Transportation before publication in the North Carolina Register and to consider any recommendations from the board prior to adopting the rule. Further, the special provision gives the board the unique ability to delay the effective date of the rule by objecting to it within a day after the rule is approved by the Rules Review Commission, whether or not any other parties have concerns about the rule.

State Lottery Exemption

A special provision in S.L. 2005-276, Section 31.1(ff), completely exempts the State Lottery from the State Administrative Procedure Act.

Wildlife Resources Contested Case Exemption

The Coastal Recreational Fishing License bill, S.L. 2005-455 (S 1126), exempts the Wildlife Resources Commission from the contested case provisions of the Administrative Procedure Act in regard to the granting or terminating of the right to sell licenses. The act is summarized in detail in Chapter 26, "Wildlife and Boating."

Escheat Fund

During the 2005 regular session, the General Assembly enacted several changes affecting escheated property. Escheated property is property the state assumes ownership of under G.S. Chapter 116B, either because the property is determined to be abandoned or because the property was owned by a person who died and had no heirs. Article IX, section 10, of the North Carolina Constitution requires property in the Escheat Fund to be used to "aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State." The State Treasurer administers the Escheat Fund.

In S.L. 2005-252 (S 341), the General Assembly authorized up to 20 percent of the Escheat Fund to be invested in (1) insurance contracts, trusts, limited partnerships, and limited liability companies whose primary purpose is investing in or owning real estate or related debt financing; (2) certain corporate stock; and (3) limited partnerships and limited liability companies whose primary purpose is to invest in public or private debt, public or private equity, or corporate buyout transactions. In Section 28.17 of S.L. 2005-276, the General Assembly extended until October 1, 2007, the maximum maturity date of an Escheat Fund investment in obligations of the North Carolina Global TransPark Authority and provided that if any of the authority's property is divested, the proceeds must be applied to repay these obligations.

Section 9.6 of S.L. 2005-276 appropriates from the Escheat Fund just under $68 million to the UNC Board of Governors and just over $15 million to the State Board of Community Colleges to be allocated by the State Education Assistance Authority for need-based student financial aid. Section 96 states that the funds will be drawn from Escheat Fund principal if there is insufficient income to pay the appropriations, except that the Escheat Fund may not be drawn down below $400 million. The 2003 General Assembly began addressing budget problems by reducing General Fund support for need-based scholarships and appropriating funds for this purpose from the principal as well as the interest of the Escheat Fund. At the conclusion of the 2004 regular session, the State Treasurer warned that continued withdrawals at the same rate would drain the Escheat Fund in five to seven years. The

State Lottery Act, S.L. 2005-344, as amended by Part 31 of S.L. 2005-276, provides in Section 15.3 that the General Assembly must transfer unclaimed prize money from the North Carolina State Lottery Fund to reimburse the Escheat Fund for any principal taken from the Escheat Fund for scholarships in fiscal years 2003-04 through 2006-07.

Finally, S.L. 2005-132 (H 672) reduces from five to three years the holding period before certain property escheats. The act applies to

- stock or another equity interest in a business association if (1) the cash dividend is unclaimed, (2) two or more consecutive communications from the holder to the apparent owner have been returned unclaimed or undeliverable, or (3) the holder has discontinued communications to the apparent owner;
- debts of business associations if the interest or principal payment is unclaimed by the apparent owner; and
- dividends, profits, distributions, and other security-related payments that are unclaimed.

Miscellaneous

State Controller

S.L. 2005-65 (H 231) authorizes the State Controller to review a state agency's compliance with prescribed uniform state accounting system standards. The act also enacts new G.S. 143B-426.39B, which excludes the work papers and other supportive material created as a result of such a review from the definition of public record under G.S. Chapter 132.

Borrowing for Highway Projects

S.L. 2005-403 (H 254), which was recommended by the Joint Legislative Transportation Oversight Committee, authorizes the State Treasurer to issue grant anticipation revenue vehicle (GARVEE) bonds on behalf of the Department of Transportation to fund highway projects. The act specifies that North Carolina will not be obligated to pay the principal or the interest on the bonds except from federal transportation funds and that neither the state's full faith and credit nor its taxing authority is pledged for payment of principal or interest. The bond authorization becomes effective February 1, 2006. The act directs the Secretary of Transportation and the State Treasurer to submit to the General Assembly by December 1, 2005, an implementation plan for issuance of GARVEE bonds.

State Bar

S.L. 2005-237 (H 896) provides the North Carolina State Bar with an appeal of right to the Court of Appeals from final orders of the bar's disciplinary hearing commission. The act also increases from $200 to $300 the maximum annual membership fees that may be assessed by the State Bar Council.

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State Taxation

The 2005 regular session saw numerous tax changes, ranging from bold reforms to minor, temporary adjustments. As in 2001 and 2003, the General Assembly failed to address its structural budget shortfalls, extending for two more years hundreds of millions of dollars in "temporary" taxes: the additional one-half percent state sales tax, the additional one-half percent income tax on upper-income individuals, and the estate tax. In contrast to its timidity regarding those issues, the General Assembly enacted several tax reforms, dramatically increasing the excise tax on cigarettes and tobacco products, providing uniformity in gross premiums tax rates, and simplifying the sales tax structure to enable multistate retailers to collect tax on Internet and mail order sales. As usual, a number of economic development incentives were enacted—these are discussed in Chapter 8, "Economic and Community Development."

Income Taxes

Upper Income Tax Rate

Section 36.1 of The Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), delays the sunset of the upper-income individual income tax bracket from January 1, 2006, to January 1, 2008. In 2001, the General Assembly added a new tax bracket that imposed an additional 0.5 percent income tax (for a total rate of 8.25 percent) on certain North Carolina taxable income, as indicated in the chart below. The 8.25 percent tax bracket had previously been set to expire January 1, 2004, but S.L. 2003-284 had extended the sunset to 2006.

Tax Rate	Married Filing Jointly	Heads of Household	Single Filers	Married Filing Separately
6.00%	Up to $21,250	Up to $17,000	Up to $12,750	Up to $10,625
7.00%	Over $21,250 and up to $100,000	Over $17,000 and up to $80,000	Over $12,750 and up to $60,000	Over $10,625 and up to $50,000

7.75%	Over $100,000 and up to $200,000	Over $80,000 and up to $160,000	Over $60,000 and up to $120,000	Over $50,000 and up to $100,000
8.25%	Over $200,000	Over $160,000	Over $120,000	Over $100,000

Internal Revenue Code Reference Update

North Carolina's tax law tracks many provisions of the federal Internal Revenue Code by reference to the Code.[1] The General Assembly determines each year whether to update its reference to the Internal Revenue Code.[2] Updating the Internal Revenue Code reference makes recent amendments to the Code applicable to the state to the extent that state law tracks federal law. The General Assembly's decision on whether to conform to federal changes is based on the fiscal, practical, and policy implications of the federal changes and is normally enacted in the following year, rather than in the same year the federal changes are made. Under North Carolina law prior to the enactment of S.L. 2005-276, the reference date to the Code was May 1, 2004. Part 35.1 of S.L. 2005-276 changes the reference date to January 1, 2005. Updating the reference date to January 1, 2005, incorporates federal changes made by the Working Families Tax Relief Act of 2004 (Pub. L. No. 108-311) and the American Jobs Creation Act of 2004 (Pub. L. No. 108-357). These acts made numerous tax changes affecting individuals, businesses, and other entities; those changes that are important for North Carolina tax purposes are described in detail in *2005 Finance Law Changes,* written by the legislature's tax staff and available on its Web site at: http://www.ncleg.net/LegislativePublications/. Part 35.1 of S.L. 2005-276 also conforms to a federal act (Pub. L. No. 109-1) that enhanced the tax benefit for charitable contributions made in January 2005 for tsunami relief.

There are some areas in which the General Assembly chose not to conform to federal law. Part 35.1 of S.L. 2005-276 does not conform to (1) the optional exclusion of income on qualified shipping activities in exchange for being subjected to a federal tonnage tax or (2) a new federal deduction for domestic production activities enacted to replace the exclusion for qualifying extraterritorial income that is being phased out because the World Trade Organization declared the exclusion an illegal trade subsidy. In addition, as with the current federal deduction for state income taxes, the law will require taxpayers to add back to state taxable income the new alternative deduction for state sales taxes. Finally, as required by the North Carolina Constitution, the act delays until January 1, 2005, conformity to any federal changes that would increase North Carolina taxable income retroactively for an earlier tax year.

Hurricane Relief

Six hurricanes in the late summer and fall of 2004 caused substantial flooding, landslides, and wind damage both in the mountains and on the coast of North Carolina. S.L. 2005-1 (S 7) provides relief, including individual and corporate income tax exemptions for state disaster relief payments and a requirement that agencies disbursing disaster relief include with the disbursement a written statement of the state and federal income tax treatment of the funds or property disbursed.

1. North Carolina first began referencing the Internal Revenue Code in 1967, the year it changed its taxation of corporate income to a percentage of federal taxable income.

2. The North Carolina Constitution imposes an obstacle to a statute that automatically adopts any changes in federal tax law. Article V, Section 2(1) of the constitution provides in pertinent part that the "power of taxation . . . shall never be surrendered, suspended, or contracted away." Relying on this provision, the North Carolina court decisions on delegation of legislative power to administrative agencies, and an analysis of the few federal cases on this issue, the Attorney General's Office concluded in a memorandum issued in 1977 to the Director of the Tax Research Division of the Department of Revenue that a "statute which adopts by reference future amendments to the Internal Revenue Code would . . . be invalidated as an unconstitutional delegation of legislative power."

N.C. Political Parties Financing Fund

G.S. 105-159.1 permits an individual to direct that $1 of the individual's income tax liability will be credited to the Political Parties Financing Fund without increasing or decreasing the amount of any tax refund the individual is otherwise due. Section 46 of S.L. 2005-345 (H 320) adds a provision to the budget act, S.L. 2005-276, to increase the amount that may be designated from $1 to $3. In the case of a married couple filing a joint return, each spouse may designate $3 to the fund. The increase makes the amount that may be designated to the Political Parties Financing Fund the same as the amount that may be designated to the Public Campaign Financing Fund under G.S. 105-159.2.

Tobacco Taxes

Part 34 of S.L. 2005-276 increases the cigarette tax from $0.05 a pack to $0.30 a pack effective September 1, 2005, and to $0.35 a pack effective July 1, 2006. It also increases the tax on other tobacco products from 2 to 3 percent of the cost price, effective September 1, 2005. S.L. 2005-406 (S 868) allows tobacco products dealers a refund of tobacco products excise tax paid on stale or otherwise unsalable cigars returned to the manufacturer, also effective September 1, 2005.

Estate Taxes

Part 8 of S.L. 2005-144 (H 1630) repeals the July 1, 2005, sunset on the North Carolina estate tax, so that the amount of this tax remains equal to the amount of the federal state death tax credit allowed in 2001 under the Internal Revenue Code. The North Carolina estate tax is then automatically repealed in 2010, when the federal estate tax is repealed.

Sales Taxes

The General Assembly made numerous changes to the sales tax law in 2005. Most significantly, Section 9.1 of S.L. 2005-144 and Section 33.1 of S.L. 2005-276 extend until July 1, 2007, the sunset on the additional 0.5 percent state sales and use tax, which would have otherwise expired July 1, 2005.

Other sales tax increases in Part 33 of S.L. 2005-276 include reclassifying candy as a nonfood, so that it is no longer eligible for the lower tax rate on food; applying a 7 percent sales tax to cable television services, subject to a credit for any local franchise taxes paid; and increasing the sales tax on satellite television services from 5 to 7 percent, to conform to the Streamlined Sales and Use Tax Agreement.

The Streamlined Sales Tax Project is an effort by states, with input from local governments and the private sector, to simplify and modernize sales and use tax collection and administration. The goal of the project is to enhance collection of sales and use taxes on interstate transactions, which should result in substantial revenue gains for state and local governments. The project, which began in March 2000, is intended to achieve sufficient simplification and uniformity to encourage sellers to voluntarily collect use tax in participating states even if the seller does not have nexus there. In November 2002 the implementing states approved the Streamlined Sales and Use Tax Agreement, which contains the uniformity and simplification provisions developed by the project. The Agreement becomes effective when at least ten states representing 20 percent of the population of all states with a sales tax are in compliance with the provisions of the Agreement. As of April 2005, fourteen states representing 24 percent of the population had petitioned for membership, signifying that their individual state laws conform to the uniform provisions of the Agreement. North Carolina is one of those states.

Part 33 of S.L. 2005-276 modifies the sales tax statutes extensively to bring them into compliance with the uniformity requirements of the Agreement. It updates various sales tax definitions, extends the annual sales tax holiday to include computer supplies costing up to $250, clarifies that voice mail is

part of telecommunications services for tax purposes, and revises the taxation of the following items to eliminate tax caps and thresholds and nonuniform tax rates, as required by the Agreement.

Item	Former Sales Tax	Under S.L. 2005-276
Trains	3% capped at $1,500 per item	7%, with partial refund
Telecommunications	6%	7%
Spirituous liquor	6%	7%
Mobile classrooms and offices	3% capped at $1,500 per item	7%
Supplies consumed by freezer locker plants	1%	7%
Sales of horses and mules to farmers, commercial sales of animal semen, and sales of fuel other than electricity to farmers and commercial cleaners	1%	Exempt
Sales to manufacturers of fuel other than electricity or piped gas	1%	1% privilege tax
Sales of certain property to major recycling facilities	1% capped at $80 per item	1% privilege tax capped at $80 per item
Sales to farmers of machinery, parts, containers, and facilities	1% capped at $80 per item	Exempt
Sales of certain machinery to commercial cleaners, interstate air businesses, telephone companies, and radio and television providers	1% capped at $80 per item	Exempt
Funeral services	Exemption for up to $1,500 of goods and services combined	Exempt
Funeral goods	Exemption for up to $1,500 of goods and services combined	7%

In a related change, S.L. 2005-276 extends for five more years the inclusion of a line on the individual income tax form to facilitate payment of consumer use taxes. The use tax is owed by consumers on purchases for which no sales tax was paid and, unlike with the sales tax, it is the consumer rather than the retailer who must remit the tax to the state. To simplify use tax collection, the General Assembly established an annual filing period in 1997 for the payment of use taxes owed by consumers on mail-order and other out-of-state purchases and in 1999 provided that the use tax must be paid with consumers' income tax returns. The provision was set to expire in anticipation that use tax collection would be handled by retailers as a result of the Streamlined Sales and Use Tax Agreement, but the sunset date was overly optimistic. S.L. 2005-276 extends the sunset from January 1, 2005, to January 1, 2010.

Section 33.32 of S.L. 2005-276 directs the Revenue Laws Study Committee to study the equity of taxation of providers of cable service, direct-to-home satellite service, satellite digital audio radio service, video programming service, and data service. The act also directs the committee to study application of sales and use tax to maintenance agreements, stating the General Assembly's intent to tax these agreements beginning July 1, 2006.

Other miscellaneous sales tax changes made by S.L. 2005-276 include subjecting satellite radio services to a 7 percent tax, exempting potting soil sold to farmers, and repealing the sales tax refund for school boards (in exchange for an equivalent annual transfer to the State Public School Fund). The latter change is discussed in more detail in Chapter 10, "Elementary and Secondary Education."

Incentives

The General Assembly made a number of tax changes in an attempt to lure businesses to the state, including delaying the sunset on the Bill Lee Act tax credits, allowing special tax credits for the film industry, and providing sales tax refunds for specific industries. These provisions are discussed in detail in Chapter 8, "Economic and Community Development." In Sections 4 and 5 of S.L. 2005-413 (S 1149), the General Assembly extended from 2006 to 2011 the sunset on the tax credit for investing in renewable energy property and increased the maximum credit for nonresidential renewable energy projects from $250,000 to $2.5 million per installation.

Business Taxes

Motor Fuels Taxes

S.L. 2005-377 (S 356) adds pumper trucks and sweepers to the group of vehicles that receive a partial refund of motor fuel taxes to reflect the fact that part of their fuel is used for nonhighway purposes. S.L. 2005-435 (H 105) makes a number of changes to the motor fuels tax laws, including the following.

- It authorizes the Secretary of Revenue to impose a penalty of $1,000 for a person's failure to obtain certain required fuel tax licenses.
- It provides that taxpayers who are required to file motor fuels tax returns electronically must also pay the tax by electronic funds transfer.
- It transfers responsibility for audits related to the International Registration Plan from the Division of Motor Vehicles to the Motor Fuels Tax Division of the Department of Revenue.
- It authorizes the Secretary of Revenue to refuse to register a motor carrier if the carrier has had a registration cancelled for cause; has been convicted of fraud, misrepresentation, or any other offense indicating that the applicant may not comply with motor carrier fuel tax requirements; or has failed to pay a state tax or file a return.
- It sets out the conditions for establishing a defense to the $5,000 civil penalty imposed on fuel transporters who deliver fuel to a state other than the state shown on the shipping document.
- It authorizes the Secretary of Revenue to assess a civil penalty of $5,000 against a terminal operator who intentionally issues a shipping document that does not contain all the required information.
- It extends shipping document requirements to a person who operates a tank wagon into which motor fuel is loaded at the terminal and requires fuel transporters to retain shipping documents at a central office for at least three years after the fuel is delivered.
- It imposes a civil penalty on a person who intentionally fails to mark a storage facility for dyed (untaxed) motor fuel.
- It requires distributors of dyed diesel fuel to be licensed.

Employment Security Tax

In 1999 the General Assembly enacted S.L. 1999-321, temporarily suspending 20 percent of the unemployment insurance taxes employers pay to fund the unemployment insurance fund, which is used for unemployment benefits as required by federal law. In place of this 20 percent reduction, the act substituted an equal temporary tax, the training and reemployment contribution, which is paid instead into state coffers to be appropriated annually by the General Assembly to the Department of Community Colleges for various worker training programs. This arrangement thus has the effect of redirecting payments from the unemployment insurance fund to appropriations for state programs. Accordingly, the statute automatically suspends the training and reemployment contribution any time the unemployment insurance fund falls to $900 million or less or any time the state unemployment rate rises above 4.3 percent. The training and reemployment contribution program was originally set to

expire in two years, but its expiration was extended to 2006 by Section 30.5 of S.L. 2001-424. Section 8.8 of S.L. 2005-276 extends the sunset date to 2011.

Gross Premiums Tax

Business corporations are generally subject to income and franchise taxes while insurers, instead of paying these taxes, pay the gross premiums tax. Before 2001, HMOs and nonprofit medical service corporations (such as Blue Cross Blue Shield and Delta Dental Corporation) were treated as general corporations, not insurers. In 2001, these entities were moved from the general tax law to the gross premiums tax, but at the reduced tax rate of 1 percent. Effective January 1, 2004, the General Assembly increased the rate on nonprofit medical service corporations to 1.9 percent. Part 38 of S.L. 2005-276 equalizes the gross premiums tax effective January 1, 2007, by increasing the rate on HMOs from 1 percent to 1.9 percent. When Part 38 of S.L. 2005-276 goes into effect, all health insurers will be taxed at the same rate.

Tax Administration

Property Tax Commission Salary

The Property Tax Commission is the five-member state board of equalization and review that hears and decides taxpayers' administrative appeals from decisions concerning the listing, appraisal, or assessment of property made by county boards of equalization and review and boards of county commissioners. Three of its members are appointed by the Governor and two by the General Assembly. The expenses of the Property Tax Commission are not paid from the General Fund but by local governments. The Department of Revenue collects local sales taxes on behalf of local governments and distributes the proceeds quarterly. In making these distributions, the department is required under G.S. 105-501 to deduct the state's costs relating to local property tax administration, the Property Tax Commission, the School of Government's property tax training program, and the Local Government Commission.

Section 22.5 of S.L. 2005-276 authorizes the Property Tax Commission to set the salary for its members, effective September 1, 2005. Under prior law, the commission members were compensated $200 a day for their work on the commission. In the fourth edition of Senate Bill 622, Section 22.5 changed the salary of commission members from $200 to $400 a day and set the salary for the commission chair at $450 a day. Although the final budget act did not set the salaries at this amount, Section 36 of S.L. 2005-345, Modify 2005 Appropriations Act, added a Section 22.5A to S.L. 2005-276 specifying the amount of funds appropriated to the Department of Revenue that must be used to pay the increased salaries of commission members.

Collection Assistance Fee

In 2001 the General Assembly established a system under which the cost of collecting overdue tax debts is borne by delinquent taxpayers, not by the taxpayers who pay their taxes on time. Under this system, a collection assistance fee of 20 percent is imposed on delinquent tax debts. Part 22 of S.L. 2005-276 makes several changes regarding the collection assistance fee. First, Part 22 clarifies that the amount of the fee is the lesser of the actual cost of collection or 20 percent. Second, Part 22 authorizes the use of the fee proceeds for additional purposes and requires the Department of Revenue and the Office of State Budget and Management to account for the use of the fee proceeds with accounting procedures that distinguish costs allocable to collecting overdue tax debts from costs allocable to other purposes. Third, Part 22 requires the Department of Revenue to report annually to the General Assembly regarding use of the fee proceeds.

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Wildlife and Boating

The most important legislation enacted in 2005 regarding wildlife was the revision of the coastal recreational fishing license system designed to generate additional funds for management and conservation of marine resources. The 2005 General Assembly made only a handful of other changes affecting hunting, fishing, and boating, as described below.

Fishing and Hunting Licenses

In 2004 the General Assembly enacted controversial legislation requiring a license for recreational fishing in coastal waters. North Carolina had been the only southeastern coastal state without a coastal recreational fishing license (CRFL) requirement. The 2004 law was slated to go into effect January 1, 2006. S.L. 2005-455 (S 1126) revises the 2004 law, makes other changes relating to fishing licenses, and delays the effective date of the new license requirement until January 1, 2007.

The new CRFL is the final component of an effort to prevent over-fishing and protect fishing stock, which began in 1997 with the enactment of the Fisheries Reform Act. The license is intended to provide data for resource managers and generate funds for protecting fish habitat, restoring fish stocks, and research.

S.L. 2005-455 retains the $15 cost of an annual CRFL for state residents but increases the cost for nonresidents to $30. The duration of a short-term license is extended from seven to ten days and its cost is increased from $1 to $5 for residents; it will be $10 for nonresidents. Students attending North Carolina schools qualify for resident rates for hunting and fishing licenses. Businesses that operate fishing piers or charter and other for-hire boats may purchase a blanket license to cover fishing from the pier or boat, relieving their customers of the individual license requirement.

Lifetime fishing licenses are available for residents and nonresidents at costs ranging from $100 for infants to $500 for nonresident adults. Special low-cost lifetime CRFLs are available for residents who are elderly, disabled veterans, or totally and permanently disabled. S.L. 2005-455 exempts from the CRFL requirement children under sixteen, holders of lifetime fishing licenses for the legally blind, holders of fishing licenses for residents of adult care homes, and individuals who obtained certain lifetime licenses by January 1, 2006. The Fourth of July is a free fishing day every year.

The act also establishes unified fishing licenses to cover recreational fishing in both coastal and inland waters and to cover hunting. It repeals the inland fishing license exemption for residents fishing

with hook and line in their home counties using natural bait, but authorizes county departments of social services to issue free fishing license waivers to individuals receiving public assistance. The Wildlife Resources Commission is also authorized to adopt rules to exempt participants in organized fishing events from inland recreational fishing license requirements.

S.L. 2005-455 enacts new G.S. 143-254.5, providing that personal identifying information obtained by the Wildlife Resources Commission is confidential under the public records act and may be disclosed only in limited circumstances. The act also modifies the law governing designation and oversight of Wildlife Resources Commission license agents and directs the commission to adopt rules providing for license agents' qualifications, duties, and accountability.

The fees collected for CRFLs are to be used "to manage, protect, restore, develop, cultivate, conserve, and enhance the marine resources of the State." S.L. 2005-455 reorganizes the marine resources funding structure by converting the Saltwater Fishing Fund to a Marine Resources Fund and by creating a Marine Resources Endowment Fund. The principal of the endowment fund will remain in the fund, but its income as well as all funds in the Marine Resources Fund may be disbursed by joint agreement of the Marine Fisheries Commission and the Wildlife Resources Commission. Proposals for disbursement are to be coordinated by the director of the Marine Fisheries Commission, and the chairs of the two commissions must report jointly to the Joint Legislative Commission on Seafood and Aquaculture by October 1, 2006, and annually thereafter. The act provides for the transfer of $3.4 million from the Wildlife Endowment Fund to the Marine Resources Fund in installments over five years, to account for the CRFL exemption extended to current holders of certain lifetime licenses for hunting and for inland fishing. The act also authorizes the disbursement of up to $1 million from the Wildlife Resources Fund to implement the act, with the amount disbursed to be repaid from the Marine Resources Fund on July 1, 2010.

In other matters regarding licenses, S.L. 2005-285 (H 1012) clarifies that members of recognized Indian tribes are not required to obtain a permit or license from the Wildlife Resources Commission for hunting, trapping, or fishing on tribal land, as long as they possess identification confirming their tribe membership. S.L. 2005-82 (S 844) amends the requirement that participants in Wildlife Resources Commission managed hunts have licenses, to limit the requirement to adult participants only. The act allows unlicensed individuals under age sixteen to participate in managed hunts if they are members of a party that includes a properly licensed adult.

Other Wildlife Changes

Hunting by Disabled Individuals

S.L. 2005-438 (H 1277) reduces the fee the Wildlife Resources Commission charges disabled persons for participating in the Disabled Sportsman Program, from $10 a year to $5 per event not to exceed $10 a year. The act also gives the commission more flexibility in determining when to schedule special hunting events for disabled persons. S.L. 2005-455, the CRFL rewrite discussed above, expands the range of disabilities that may qualify a person to participate in the Disabled Sportsman Program to include the loss of 50 percent or more of a limb, whether by amputation or natural causes.

During the 2005 session, considerable publicity was drawn to a Texas Web site that offered online hunting, in which a computer user could use the Internet to aim and fire real weapons at animals. The service, which was developed in April 2005 for disabled hunters, generated a swift negative reaction among the public and was banned by the Texas legislature only two months later. North Carolina became one of about a dozen other states to ban Internet hunting when it enacted S.L. 2005-62 (H 772), which makes it a Class 1 misdemeanor to engage in or provide remote, computer-assisted hunting of wild birds or animals located in North Carolina, effective December 1, 2005.

Hunting Safety

S.L. 2005-438 authorizes certain disabled and underage individuals and certain holders of lifetime hunting licenses to hunt without having obtained a hunting safety certificate if they are accompanied by a licensed adult hunter who maintains a proximity that enables the adult to monitor the activities of, and communicate with, the uncertified hunter at all times.

Dog Training with Waterfowl and Game Birds

S.L. 2005-76 (H 1206) authorizes the use of domestically propagated waterfowl and game birds for training hunting dogs during the closed season in limited circumstances prescribed by the Wildlife Resources Commission.

Bear-Baiting Prohibition Amendment

S.L. 2005-298 (H 1395) amends the statute prohibiting bear baiting to limit its scope to black bears and to give the Wildlife Resources Commission additional authority to address problems caused by the placement of processed foods in areas frequented by black bears.

Boating

S.L. 2005-164 (H 1430) authorizes the towing of a vehicle left at a Wildlife Resources Commission public boating access area if the vehicle is parked anywhere not designated for parking or is left for a purpose other than boating. The act also provides that violation of commission rules regarding parking at boating access areas is an infraction punishable by a $50 fine. S.L. 2005-161 (H 702) increases from twelve to fourteen the minimum age at which a person may operate a personal watercraft under certain conditions, but it does not apply to persons between the ages of twelve and fourteen as of the act's effective date, November 1, 2005.

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