2008

North Carolina Legislation

A summary of legislation in the 2008 General Assembly of interest to North Carolina public officials

Edited by Christine B. Wunsche

UNC SCHOOL OF GOVERNMENT

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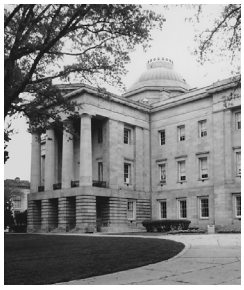

On the cover: The front cover photograph shows the second Capitol building, built in 1840 to replace the first Capitol, which was destroyed by fire in 1831. The photograph on the title page shows the current State Legislative Building, designed by Edward Durrell Stone and completed in 1963. Both photographs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

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Editor's Preface

Since 1933 the UNC Chapel Hill School of Government has published post-session summaries of legislation enacted by the North Carolina General Assembly. Initially these summaries appeared in special issues of *Popular Government* and, from 1951 through 1967, were supplemented by a handbook listing the legislative changes in order of statute number. The *Popular Government* format was replaced in 1974 by the current *North Carolina Legislation* book, published annually.

North Carolina Legislation 2008 is the forty-fifth 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-seven 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 the exception of the State Taxation chapter, which was written by General Assembly Research Division staff) with expertise in the particular field addressed.

The text of all bills discussed in this book may be viewed at the General Assembly's website: 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 www.dailybulletin.unc.edu/.

Albeit comprehensive, this book does not summarize every enactment of the 2008 legislative session. For example, some important legislation that does not have a substantial impact on state or local governments 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 for 2008*, 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 at the General Assembly's website at www.ncleg.net under the Research Division section of the Legislative Publications page. A list of General Statutes and Session Laws affected by 2008 legislation, prepared by the General Assembly's Bill Drafting Division, is online at the same site under the Bill Drafting Division section of the Legislative Publications page.

The School of Government also electronically publishes a separate report, the *Index of Legislation*, that provides additional information with respect to public and private bills considered in 2008, 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) an index of public bills, arranged by number; (4) status reports for local bills, arranged by counties affected; (5) an index of local bills, arranged by bill number; and (6) a chronological listing of all bills (public and local) and resolutions ratified in 2008. This publication can be purchased through the School of Government Publications Sales Office (telephone: 919.966.4119; e-mail: sales@sog.unc.edu; website: http://shopping.netsuite.com/s.nl/c.433425/it.A/id.1123/.f?sc=7&category=4157).

Each day the General Assembly is in session, the School of Government'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 filed 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 by both chambers. The *Daily Bulletin* is available by paid subscription, with delivery via 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@sog.unc.edu; website: http://shopping.netsuite.com/s.nl/c.433425/sc.7/category.27/.f).

Throughout the book, references to legislation enacted during the 2008 session are cited by the Session Law number of the act (for example, S.L. 2008-245), followed by a parenthetical reference to the number of the Senate or House bill that was enacted (for example, H 1231). 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).

Christine B. Wunsche

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The General Assembly

The 2008 session of the General Assembly lasted ten weeks. The 2008 General Assembly convened on May 13 and adjourned on July 18, continuing the trend of the last few short sessions of truly keeping the session short. This chapter provides an overview of the 2008 session, including an analysis of the length of the session and number of bills introduced, discussion of major legislation enacted, and explanation of bills enacted that impact the legislative institution.

Overview of the 2008 Regular Session

Article II, section 11, of the North Carolina Constitution provides for a biennial session of the General Assembly that convenes in every odd-numbered year. Until 1973 the General Assembly held a single regular session, convening in each odd-numbered year, meeting several months, and then adjourning *sine die*. Prior to 1974, legislative sessions in even-numbered years of the biennium were extra sessions (the North Carolina Constitution authorizes the governor or a three-fifths majority of both houses to call such a session), and they were rare and of short duration.

Beginning with the 1973–74 biennium, the General Assembly began holding annual sessions. The General Assembly convenes in January of odd-numbered years. In these "long sessions," which generally run through midsummer, a biennial budget is adopted and any legislative business may be considered. In even-numbered years the General Assembly convenes for a "short session," which generally runs from May through July or August. In the short session the General Assembly considers budget adjustments for the second year of the biennium and generally deals with bills that have passed one house and a limited number of additional noncontroversial matters. Legally the short session is a continuation of the long session.

The 2008 short session convened on May 13 and adjourned July 18. The length of the session as compared to other recent short sessions is shown in Table 1–1.

The 2007 adjournment resolution, Res. 2007-68 (S 1573), as amended by Res. 2007-70 (S 1575), provided that only the following could be considered during the 2008 short session:

- bills introduced by May 27, 2008, directly affecting the budget;
- bills amending the North Carolina Constitution;
- bills introduced in 2007 that passed third reading by May 24, 2007, in the house in which the bill was introduced and that were not unfavorably disposed of by the other house;
- bills and resolutions introduced by May 21, 2008, implementing the recommendations of various commissions and committees;
- noncontroversial local bills that are introduced by May 28, 2008, and are accompanied by a certification that no public hearing will be required and that the bill is approved for introduction by each member of the relevant house whose district is affected by the bill;
- bills making a selection, an appointment, or a confirmation of members of state boards and commissions;
- bills concerning matters authorized by joint resolution passed during the 2008 session by a two-thirds majority in each house and joint resolutions authorizing consideration of these bills;
- bills introduced by May 28, 2008, affecting state or local pension or retirement systems.
- Resolutions authorized under Senate Rule 40(b) or House Rule 31, primarily relating to deceased persons;
- adjournment resolution;
- bills disapproving administrative rules.

Table 1–1. Length of Legislative Sessions

Year	1998	2000	2002	2004	2006	2008
Date Convened	May 11	May 8	May 28	May 10	May 9	May 13
Date Adjourned	Oct. 29	July 13	Oct. 4	July 18	July 28	July 18
Senate Legislative Days	101	40	69	44	48	40
House Legislative Days	100	40	77	44	47	40

Table 1–2. Statistical Analysis of Legislative Short Sessions

Year	1998	2000	2002	2004	2006	2008
Bills & Resolutions Introduced	1,036	760	706	881	1,974	1,330
Senate	516	383	368	415	881	597
House	520	377	336	466	1,093	733
Session Laws Enacted	229	191	190	203	264	229
Public Laws	135	118	80	116	172	145
Local Laws	94	73	110	87	92	84
Bills Vetoed	0	0	1	1	1	1

In the 2008 regular session 1,331 bills were introduced, which is actually fewer than the 1,974 introduced in the 2006 session. The General Assembly enacted 229 session laws and thirty-one joint resolutions in 2008. Table 1–2 compares the number of introductions and enactments in 2008 with those of the previous five short sessions. A total of 4,993 bills were filed during the 2007–08 biennium; this is an increase over the 2005–06 biennium total of 4,961 bills filed.

Major Legislation Enacted in 2008

Among the major items of legislation enacted in the 2008 regular session are the following. These acts are explained in more detail in the chapter indicated; however, several of these acts are discussed in more than the chapter indicated.

Budget Modifications

S.L. 2008-107 (H 2436) and S.L. 2008-34 (H 2437, Continuing Budget) modify the 2008–09 state budget, approve state employee raises, borrow for capital improvements, and reduce taxes by creating new tax exemptions, refunds, and credits (Chapter 2, "The State Budget").

Abandoned Manufactured Homes

S.L. 2008-136 (H 1134) establishes a program through which counties can be reimbursed for the costs of removing and disposing of abandoned manufactured homes. Counties that choose to implement a program for the disposal of abandoned manufactured homes must develop a written plan as part of its solid waste management plan and establish a plan for the disposal of the homes (Chapter 4, "Community Planning, Land Development, and Related Topics").

Home Foreclosures

S.L. 2008-226 (H 2623) establishes the Emergency Program to Reduce Home Foreclosures Act and State Home Foreclosure Prevention Project to provide assistance to homeowners facing foreclosure. S.L. 2008-228 (H 2463) requires mortgage services to be licensed and regulated under the same provisions as mortgage brokers (Chapter 5, "Courts and Civil Procedures" and Chapter 7, "Economic and Community Development").

Sex Offenders

S.L. 2008-117 (H 933) establishes the Jessica Lunsford Act for North Carolina, increasing the punishment of, and restrictions on, sex offenders. The act also makes changes related to the sex offender registry. S.L. 2008-220 (S 1736) makes a number of changes to statutes concerning the sexual exploitation of minors and restricts the internet activities of sex offenders (Chapter 6, "Criminal Law and Procedure").

Gangs

S.L. 2008-214 (H 274) creates the Street Gang Suppression Act. The act establishes new offenses and enhances criminal penalties for individuals involved in gang related activities. S.L. 2008-56 (S 1358) addresses gang prevention and intervention (Chapter 6, "Criminal Law and Procedure").

Education of Military Children

S.L. 2008-185 (S 1541) enacts the Interstate Compact on Educational Opportunities of Military Children, removing barriers faced by military children when they change schools due to a parent's assignment or deployment. The compact addresses issues including education records and enrollment, placement and attendance, and graduation (Chapter 9, "Elementary and Secondary Education").

Drought

S.L. 2008-143 (H 2499) comes about as a result of the extreme drought conditions experienced across the state in 2007 and 2008. The act gives the state more authority to deal with water shortages in the event of a drought. Specific issues addressed in the act include: water conservation measures, water shortage emergency powers, water system efficiency, and gray water use (Chapter 11, "Environment and Natural Resources").

Smoking in State Vehicles

S.L. 2008-149 (S 1681) extends the smoking ban to state vehicles and allows local governments to also ban smoking in local government vehicles (Chapter 12, "Health").

Disabled Veterans Homestead Exclusion

S.L. 2008-107 provides some property tax relief to disabled veterans by establishing the disabled veterans homestead exclusion for honorably discharged veterans with permanent and total disabilities. The exclusion is equal to the first $45,000 of the property's appraised value (Chapter 15, "Local Taxes and Tax Collection").

Purchase and Possession of Firearms

S.L. 2008-210 (S 2081) amends North Carolina's involuntary commitment statutes to require the clerk of superior court to report to the National Instant Criminal Background Check System any person acquitted by reason of insanity, found mentally incompetent to proceed to trial, or committed for inpatient or outpatient mental health treatment. The act also provides a process for the removal of a mental commitment bar to the purchase, possession, or transfer of a firearm (Chapter 16, "Mental Health").

Driver's License Format

S.L. 2008-217 (H 2487) requires the Division of Motor Vehicles to issue driver's licenses in a vertical format to drivers under the age of twenty-one to assist those selling age restricted products (Chapter 18, "Motor Vehicles").

Retirement Community Program

S.L. 2008-188 (S 1627) establishes the North Carolina Certified Retirement Community Program, which includes in its purposes assisting communities in marketing themselves as retirement friendly. A pilot program will be implemented in the City of Lumberton (Chapter 22, "Senior Citizens").

Probation

S.L. 2008-129 (H 1003) and S.L. 2008-107 include several provisions that address shortcomings in the state's probation system, including establishing new reporting requirements and requiring a study on parole and probation officer compensation. S.L. 2008-129 amends the law concerning felony sentencing to include as an aggravating factor a violation of conditions of probation, or of a condition of parole or post-release supervision. The act also amends the law concerning revocation for probation violations to allow the court to extend or modify probation after the expiration of the period of probation when specified conditions are met (Chapter 23, "Sentencing, Corrections, Prisons, and Jails").

Public Duty Doctrine

S.L. 2008-170 (H 1113) clarifies when the state may assert the public duty doctrine as an affirmative defense to a tort claim action. With exceptions, the act provides that the state may assert the affirmative public duty doctrine defense only against a claim of action arising from a law enforcement officer's negligent failure to protect the claimant from the actions of another or an act of God, or where a state employee negligently failed to perform a health or safety inspection required by law that resulted in the injury to the claimant (Chapter 25, "State Government Ethics and Lobbying").

Small Business Protection

S.L. 2008-107 creates the Small Business Protection Act, providing several protections for owners of small business concerning sales tax provisions. These protections include requiring the Department of Revenue to document verbal advice given to certain taxpayers and requiring the Department to waive the penalties and additional assessments for a taxpayer reasonably relying on the erroneous verbal advice (Chapter 26, "State Taxation").

Governor's Veto

As in 2007, Governor Michael F. Easley only vetoed one bill in 2008, H 2167 (S.L. 2008-229), Towing of Recreational Boats/Exemption. For the first time in the General Assembly's history, the veto was overridden.

The act allows boats and boat trailers less than 120 inches wide to be towed without a permit. Boats and boat trailers up to 114 inches wide may travel on any road at any time, day or night, and any day of the week, while boats and boat trailers 114 to 120 inches wide may be towed any day of the week, including weekends and holidays, from sunup to sundown. The act also requires that boats and boat trailers more than 102 inches wide, but less than 120 inches wide, be equipped with at least two operable amber lights on the wider point of the boat and boat trailer so that the dimensions are clearly marked and visible. The Department of Transportation is required to issue annual overwidth permits for boats or boat trailers whose outside width is 120 inches or more, allowing the boat or boat trailer to be towed only during daylight hours.

The bill was ratified on July 17, 2008. The governor vetoed the bill on August 17, 2008, stating in his veto message that the bill put families at risk on the highways and would result in serious injury or death. Governor Easley referred to the "60,000 miles of narrow two lane roads that cannot accommodate the 9-1/2 foot width" and "roughly 1,000 bridges 18-feet wide or less, which would require a 9-1/2 foot boat to cross the center line . . . ."

The General Assembly reconvened to consider the veto on August 27, 2008. In a session lasting just over an hour, members of both chambers voted to override the veto, with a vote of 95–8 in the House of Representatives (House) and 39–0 in the Senate. More information on S.L. 2008-229 can be found in Chapter 17, "Miscellaneous" and Chapter 18, "Motor Vehicles."

The Legislative Institution

Ethics and Lobbying

A number of changes were made to the State Government Ethics Act, the Legislative Ethics Act, and lobbying laws. S.L. 2008-215 (S 1875) clarifies the roles of the State Auditor's Office and the State Ethics Commission, giving the commission authority over allegations of violations of G.S. Chapter 138A (State Government Ethics Act), Article 14 of G.S. Chapter 120 (General Assembly), and G.S. Chapter 120C (Lobbying).

S.L. 2008-213 (H 2542) makes a number of technical and clarifying changes. Changes made by the act include: clarifying that documents submitted in connection with requests for advisory opinions, information obtained by the Secretary of State as part of a systematic review of lobbying reports, and records obtained by the Secretary or Commission from other entities in the course of an investigation are confidential. Several changes were also made to reporting requirements, including excluding from reporting any scholarships that are paid for by a nonpartisan state, regional, national, or international legislative organization of which the General Assembly or a legislator is a member. Changes were also made to conflict of interest provisions including clarifying that a legislator employed or retained by a local government may take legislative action on behalf of the local government if the legislator is the only member of the house elected from the local government's district. A more thorough discussion of these changes and others, including changes concerning lobbying by judicial officials, allegations of misconduct, the gift ban, and statements of economic interest can be found in Chapter 25, "State Government Ethics and Lobbying."

General Assembly Police Powers

Under G.S. 120-32.2 the jurisdiction of the General Assembly police is limited to (1) Raleigh and unincorporated parts of Wake County surrounded by I-440 and (2) any part of the state while accompanying a General Assembly member who is conducting or traveling to or from official duties or while preparing or providing security to a session of either or both houses of the General Assembly or related official events. S.L. 2008-145 (S 1957) expands jurisdiction to include any part of the state while performing advance work and providing security for the protection of legislative members, staff, and the public for any General Assembly committee, commission meeting, or state, regional, or national meetings of legislative bodies or organizations representing legislative bodies and while accompanying a member of the General Assembly to or from these events. S.L. 2008-145 also allocates $25,000 of the General Assembly's funds for fiscal year 2008–09 to conduct the Southern Legislative Conference that will be held in Winston-Salem in 2009.

Program Evaluation Division

The General Assembly's Program Evaluation Division (PED) was established in 2007 to assist the General Assembly in overseeing governmental functions by providing information for evaluating whether public services are being delivered in an effective and efficient manner. S.L. 2008-196 (S 1652) made several changes to clarify the confidentiality of the division's documents. First, G.S. 120-36.13(a) was amended to clarify that the PED's annual work plan includes any enacted legislation that directs the PED to conduct a study or an evaluation and clarifies that any document prepared by a legislative employee under the PED work plan pursuant to a request under G.S. 120-131.1(a1) becomes available to the public only as provided in G.S. 120-131 (regarding documents produced by legislative employees). Under current law all PED employees are legislative employees.

Second,G.S. 120-131.1 is amended regarding confidentiality requirements for requests from legislative employees for assistance in preparing fiscal notes *and evaluation reports*. The act clarifies that when a legislative employee of PED requests assistance from an agency employee in preparing an evaluation report, the requested information, any accompanying materials, and documents prepared in response to the request are not public records and are confidential.

Third, G.S. 120-36.12 was amended to authorize PED to receive reports alleging improper activities or matters of public concern as listed in G.S. 126-84. The individual making the report may remain anonymous, and any reports that are received are not public records and only become available to the public as provided in G.S. 120-131.

Finally, G.S. 126-85(c) was amended to provide the same protections to a state employee making a report to PED as those afforded to state employees reporting allegations of improper government activity to the State Auditor.

Joint Legislative Elections Oversight Commission

S.L. 2008-150 (S 1263) enacts a new Article 12P in G.S. Chapter 120. This new article establishes the eighteen-member Joint Legislative Elections Oversight Commission to examine and recommend improvements to state elections administration and campaign finance regulation. The commission consists of nine members from the House and nine members from the Senate. In order to make recommendations, the commission is required to study the State Board of Elections' and county boards of elections' budgets, programs, and policies, examine election statutes and court decisions, study other states' initiatives in order to provide commentary and to recommend the implementation of similar initiatives, and study any other necessary election matters. This act is discussed in its entirety in Chapter 8, "Elections."

Membership Changes

In the Senate, Bob Rucho was appointed to replace Robert Pittenger, who resigned to run for lieutenant governor. In the House, Kelly M. Alexander Jr. was appointed to replace W. Pete Cunningham, who resigned. The House also underwent a historical membership change with the appointment of Sandra Spaulding Hughes following the expulsion of Thomas E. Wright.

Expulsion of Representative Thomas E. Wright. On May 15, 2007, the State Board of Elections conducted a hearing to consider allegations and evidence of alleged violations of campaign finance regulations and other possible criminal wrongdoing by Wright. After the hearing, the State Board of Elections referred the matter to the Wake County District Attorney to consider criminal charges against Wright. On December 10, 2007, the Wake County Grand Jury indicted Wright on five felony charges of obtaining property by false pretenses and one felony charge of obstruction of justice. On May 21, 2007, Speaker of the House Joe Hackney requested that the Legislative Ethics Committee investigate alleged violations by Wright of the Legislative Ethics Act or the criminal law, or both. On December 12, 2007, the Legislative Ethics Committee concluded that under the Legislative Ethics Act, as it existed at the time, the committee's jurisdiction under law in place at the time did not reach the matters alleged in the indictments. The committee also found that, if true, the acts alleged were unethical and warranted action. The committee referred the matters contained in the Wake County criminal files to the House for further action as deemed appropriate under Article II, section 20, of the North Carolina Constitution.

On December 13, 2007, Speaker Hackney established the *House Select Committee to Investigate Alleged Misconduct and Other Matters Included in Indictments Against Representative Thomas E. Wright* (select committee). The select committee was made up of the six House members of the Legislative Ethics Committee and was led by Chairman Representative Rick Glazier and Vice-Chair Representative Paul Stam. The select committee was charged with investigating the matters in the criminal indictments against Wright as well as other allegations of unethical or unlawful conduct that were outside the jurisdiction of the Legislative Ethics Committee.

The select committee met several times to adopt rules, conduct a probable cause hearing, hear and rule on motions, and approve witnesses and authorize subpoenas. On March 3 through March 6, 2008, the

committee held an evidentiary hearing and heard testimony from several witnesses. The select committee unanimously found six counts against Wright, which are summarized as follows:[1]

- Count 1: Wright improperly and unethically solicited Torlen L. Wade, who was the Acting Director of the North Carolina Department of Health and Human Services Office of Research, Demonstrations, and Rural Health Development, to write a fraudulent letter stating that his office was endorsing The Community's Health Foundation's (Foundation) project to convert a building into Foundation offices, health center offices, and a history museum and committing $150,000 in funding for the project. Wright and Wade knew that the Office of Rural Health would not make such a grant and that Wright would use the letter in seeking funding for the Foundation from other sources.
- Count 3 and Count 4: Wright converted money intended to be a charitable contribution to the Foundation to his own personal use. Wright wrote letters on the Foundation's letterhead to representatives of AstraZeneca Pharmaceuticals LP and Anheuser-Busch Companies, Inc., requesting as the Foundation's president, a donation to the Foundation that would be used by the Foundation for various health related purposes in New Hanover County and for the acquisition and development of a building for use as a museum. Wright deposited checks from AstraZeneca Pharmaceuticals and Anheuser-Busch in the amounts of $2,400 and $5,000 into his personal account rather than into the Foundation's account.
- Count 5: Wright converted money intended to be a charitable contribution to the Foundation, to his personal use. Wright wrote an invoice on the Foundation's letterhead to a representative of AT&T Corporation as a solicitation of a charitable contribution to the Foundation, and when a representative of AT&T sent a check made out to the Foundation for $1,500, Wright deposited that check into his personal account rather than into the Foundation's account.
- Count 7: Wright intentionally failed to disclose approximately $180,000 in contributions received by his campaign between January 1, 2000, and January 31, 2007.
- Count 8: Wright engaged in a pattern of conduct unbecoming and unfitting a member of the House by improperly, fraudulently, deceptively, and unethically soliciting a false document from a state agency and soliciting corporations for donations to a charitable corporation and by converting money contributed to the Foundation for his own personal use.

The committee failed to find Count 2, and Count 6 was not considered at the hearing.[2]

Based on its findings, the select committee unanimously recommended that Wright be expelled from the House.[3] On March 11, 2008, Speaker Hackney asked Governor Easley to call a special session. Pursuant to a proclamation issued by Governor Easley on March 11, 2008, the General Assembly convened in an extra session on March 20, 2008, in order for the House to (1) judge the qualifications of Representative Thomas Wright to continue to serve the 18th House District and/or (2) within its inherent power to discipline its members, to impose any sanctions against Wright. The special session lasted only one day, during which the House passed a resolution finding that the allegations in counts 1, 3, 4, 5, 7, and 8, as summarized above, were true. Wright was expelled for unethical and unlawful conduct unbecoming and unfitting a member of the House. The last House member to be expelled was Rep. Josiah Turner in 1880 for disorderly conduct.

On April 8, 2008, Wright was convicted of three felony counts of obtaining property by false pretenses while being acquitted of one fraud count.[4] Wright was sentenced to seventy to ninety-five months in prison. On August 27, 2008, Wright was found guilty of obstruction of justice for failing to report campaign contributions and was sentenced to six to eight months in prison, to be served concurrently with his other term.

The 2009 Session

The next regular session of the General Assembly will convene at noon on January 28, 2009. Members of that General Assembly were elected in the November 4, 2008, elections.

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1. The complete counts can be found in the Select Committee's report to the House of Representatives at: www.ncleg.net/documentsites/committees/HouseEthicsWright/Homepage/index.html.

2. The select committee failed to find the count alleging that Wright, knowing that the letter was false, submitted the letter written by Wade to the Coastal Federal Bank as a factor to be considered in loaning $150,000 to the Community's Health Foundation and the bank then made the loan, while in part, relying on the letter. The select committee also dismissed the count alleging that Wright improperly converted to his own use almost $10,000, which was loaned by the South East Community Credit Union to the Foundation.

3. The select committee's entire report to the House of Representatives can be found on the General Assembly's website at www.ncleg.net/documentsites/committees/HouseEthicsWright/Homepage/index.html.

4. Wright was acquitted of converting to his own use $1,500 that AT&T intended for the Foundation.

2

The State Budget

The General Assembly's main focus during the 2008 short session was making adjustments to the biennial state budget adopted during the 2007 session (S.L. 2007-323). The budget adjustments for the 2008–09 fiscal year include salary increases and funding for a number of essential state services and resources, including public education, natural and economic resources, mental health, human services, and criminal justice and public safety. This chapter summarizes the budget process and the 2008–09 fiscal provisions. Some of the chapters that follow include more detailed information about budget provisions that affect specific state departments and agencies.

The Budget Process

The North Carolina state government operates on a fiscal year that begins July 1 and ends 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 fiscal biennium). In even-numbered years, the legislature conducts a short session to make adjustments to the state budget for the second year of the biennium.

On May 12, 2008, the eve of the reconvening of the 2007 General Assembly for the 2008 short session, Governor Mike Easley released his recommended adjustments for the fiscal year 2008–09 budget, and the bill detailing the governor's budget, House Bill 2697, was filed on May 27, 2008. Upon reconvening on Tuesday, May 13, the House of Representatives (House) and Senate appropriations committees began conducting budget hearings. Holding to the tradition that the Senate and the House alternate responsibility for initiating the formal budget process each biennium,[1] the House filed House Bill 2436 (Modify Appropriations Act of 2007) on May 21, 2008. House Bill 2436 passed the House two weeks later, on June 5. The Senate undertook its own review of the budget bill, made proposed changes, and passed its version of the budget on June 19. The House and the Senate then each appointed members to the conference committee to negotiate a compromise between the two versions of the budget bill.

The negotiations were not completed as of June 30, 2008, the end of the 2007–08 fiscal year, and the budget bill had not yet become law. To extend certain budget authorizations beyond the end of the fiscal year, the General Assembly passed a continuation budget in S.L. 2008-34 (H 2437), which contained a provision setting the act to expire at 11:59 P.M. on July 15, 2008. The governor signed House Bill 2437 on June 30.

The end product of the conference negotiations was the conference report submitted to both chambers on July 8, 2008, and given final approval by the House and the Senate on that same date. Governor Easley signed the enacted bill into law on July 16 and it was chaptered as S.L. 2008-107.[2] Following enactment of the appropriations act, the General Assembly adopted S.L. 2008-118 (H 2438), which made a number of technical corrections to the appropriations act.

Budget Highlights

S.L. 2008-107 appropriates approximately $21.36 billion in spending for 2008–09. This year's budget act increases spending less than 4 percent from the previous year and does not raise taxes. North Carolina's 2008–09 budget provides important investments for the state's children and working families, including the following:

1. The Senate will initiate the budget process in the 2009 biennial session.

2. In North Carolina, the governor does not have line item veto authority. The governor must either accept or reject in its entirety the state budget as enacted by the General Assembly.

- Tax Reduction for Working Families, a 5 percent refundable state Earned Income Tax Credit for more than 825,000 low- and moderate-income families
- An additional $2 million in recurring funds for the Housing Trust Fund, bringing its annual appropriation up to $10 million
- The creation of NC Kids' Care to expand access to affordable health coverage for children.[3]

Other highlights from the budget adjustments to the second year of the 2007–09 biennium are discussed below.

Public Education

Lottery proceeds. For the third year, proceeds from the North Carolina Education Lottery were a part of the budget deliberations, with the budget adjustments providing that $385.5 million be transferred from the State Lottery Fund for 2008–09 to support appropriations made in the act.

Appropriations from the Education Lottery Fund for 2008–09 include (1) $127,864,291 for class size reduction, (2) $84,635,709 for prekindergarten programs; (3) $154,200,000 for the Public School Building Capital Fund and (4) $38,550,000 for scholarships for needy students.

The budget adjustments also include a special provision that directs $140 million of lottery revenues that were allocated to the Public School Capital Fund to be distributed to local education agencies (LEAs) based on the Average Daily Membership, the official determination of the number of students served in an LEA. Sixty-five percent of those lottery revenues will go to all LEAs, and the other 35 percent will go only to LEAs in counties[4] with effective tax rates that exceed the statewide average. The remaining balance of the $154.2 million in lottery proceeds, $14.2 million, is appropriated for school construction projects in counties, based on the county's effective tax rate.

In addition, the appropriations act requires that $41,030,212 be transferred from the Education Lottery Reserve Fund to the Education Lottery Fund to support appropriations made in the act. Of these funds, $19.75 million is allocated for class size reduction and $21,280,212 is allocated for the Public School Building Capital Fund for 2008–09. Any unexpended funds not needed for these purposes are to be transferred back to the Education Lottery Reserve Fund at the end of the 2008–09 fiscal year.

3. For further discussion of NC Kids' Care, see Chapter 3, "Children and Juvenile Law."

4. There are 100 counties in North Carolina and 115 school systems or local education agencies. Some counties have more than one LEA.

General Fund. Technology needs for public schools are also addressed in the budget with the inclusion of $1.5 million to expand funding for a pilot program to provide laptops to students and teachers in eight schools and $10 million to upgrade public school broadband connectivity.

Additional allocations for public schools from the General Fund include the following:

- $3.6 million in recurring and nonrecurring funds to open fourteen additional Learn and Earn high schools in Fall 2008
- $3.2 million to increase per-student funding for academically gifted students
- $6.2 million increase for students with disabilities
- $2.9 million to supplement funding for low-wealth school districts
- $6 million in Disadvantaged Student Supplemental Funding
- $3 million to establish a mentoring program for first- and second-year teachers
- $15 million to expand the dropout prevention grant program
- $30 million to expand the More at Four preschool initiative
- $35 million to increase school bus fuel allocations
- $90 million for ABC teacher performance bonuses

Salaries and Benefits

The appropriations act allocates a total of $368.3 million in additional funding for teacher and state employee salary and benefits increases. Public school teachers and community college and university faculty and professional staff received an average 3 percent raise. Public school principals and assistant principals received an average 2.69 percent salary increase. All other state employees received the greater of a 2.75 percent salary increase or $1,100. In addition, the budget includes $30.2 million to provide a 2.2 percent cost-of-living increase for state retirees and an additional $500,000 to provide signing bonuses for new registered nurses at state mental hospitals and other state facilities.

Natural and Economic Resources

The budget includes funds to address the state's shrinking oyster population in its coastal waters. North Carolina has lost nearly 90 percent of its oyster reefs since the early twentieth century due to a combination of over fishing, disease, and declining water quality. This has eroded the health of the coast's waters, given that one oyster can cleanse harmful pollutants from as much as fifty gallons of water a day.

The budget appropriates $4.3 million for a research hatchery at the University of North Carolina at Wilmington. It also earmarks $2 million for the N.C. Division of Marine Fisheries to fund six new positions and add equipment to expand the agency's oyster sanctuary program.

Additional allocations for natural and economic resources are made as follows:

- $4 million to purchase more agricultural conservation easements on farm and forest land
- $384,000 to provide funding for specified programs evaluating coastal water quality using equipment attached to ferry vessels
- $8 million to provide state matching funds for clean water and drinking water projects
- $50 million to provide water and sewer grants and an economic infrastructure fund administered by the N.C. Rural Economic Development Center
- $1.5 million to fund e-NC Authority to expand high-speed Internet to underserved areas
- $8.5 million to provide One North Carolina Fund and One North Carolina Small Business incentives funds

More Selected Budget Highlights

The budget provides funding for the UNC System, the Community College System, Health and Human Services, and Justice and Public Safety as follows:

University System

- $34.6 million to raise University of North Carolina System enrollment growth for additional 8,082 students in Fall 2008
- $15 million in recurring and nonrecurring funds to finance recommendations in University of North Carolina Campus Safety Task Report
- $250,000 grant to build N.C. State University's Advanced Transportation Energy Center to research development of plug-in cars
- $3 million to expand UNC fund to recruit and retain top-notch faculty
- $2 million to enhance academic student services at N.C. Central University Law School
- $6 million for UNC System programs at North Carolina Research Campus in Kannapolis

Community Colleges

The budget provides the following for the Community College System:

- $23.8 million to meet projected increased enrollment of 6,455 students for 2008–09 school year
- $5 million to purchase instructional equipment at all fifty-eight campuses
- $985,000 to establish seventeen minority-male mentoring programs and continue fifteen current programs
- $4 milllion to hire faculty and purchase equipment and supplies for allied health programs
- $1 million to hire faculty and purchase equipment and supplies for technical education programs

Health and Human Services

- $3.8 million in grants for health provider networks to provide free health care to the poor and uninsured
- $4 million in grants for community health centers
- $2 million to support operations and maintenance for small rural hospitals
- $2 million to create demonstration projects to reduce obesity and obesity-related diseases
- $4.8 million to provide aid to local health departments
- $8.2 million to implement new reimbursement system for foster care families
- $2.1 million to provide mental health screening for residents of adult care homes
- $6.7 million to fund in-home services to more developmentally disabled residents through the Community Alternatives Program
- $7.3 million to hire 107 additional nurses, psychiatrists, and other professionals at state mental hospitals
- $5.2 million to develop a sixty-bed overflow unit at Dorothea Dix Hospital during the transition to the new Central Regional Hospital

Justice and Public Safety

- $1.9 million to create a fifty-bed substance abuse treatment program for female parolees and probationers
- $22.7 million to restore funding to Juvenile Crime Prevention Councils
- $1.1 million for privately assigned counsel for indigent defense services
- $2.5 million to establish a reserve fund to hire probation and parole field staff

- $689,000 to hire additional psychiatrists and staff employees at juvenile detention centers
- $200,000 to provide North Carolina State Bar legal assistance to low-income homeowners hurt by predatory lending
- $1.3 million to hire three new assistant prosecutors, three new District Court judges, ten new magistrates, four deputy clerks of court, and two new employees at the North Carolina Innocence Inquiry Commission

The appropriations act also authorizes $857.5 million in debt over the next four years to add 1,500 prison beds and for university buildings and other construction projects, sets aside $10 million to carry out anti-gang legislation, appropriates $18.6 million for information technology improvements, and appropriates $15 million for Job Development Investment Grants for economic development incentives.

The appropriations act includes cuts and omissions in funding as well. The act includes a 10 percent reduction in tourism spending—a cut of $1.3 million for the current fiscal year. The appropriations act also does not provide any funding for child nutrition programs. The act does amend G.S. 115C-264.3, however, to direct the State Board of Education to establish statewide nutrition standards for school meal programs, a la carte foods, and beverage items for all food programs, including after-school food programs. These standards, which are to include the use of more fruits, vegetables, and whole grain products, are now to be implemented in all elementary schools across the state by the end of the 2009–10 school year, with implementation in middle and high school to follow.

The 2008–09 State Budget

The General Fund

With a few limited exceptions (such as highway maintenance and construction), virtually all functions of state government are funded through the General Fund. This is the fund from which monies are appropriated by the General Assembly through the budget process to support most areas of state government, ranging from education to economic development initiatives to health and human services to public safety. Funding comes to the General Fund from three main sources: (1) tax revenues, (2) federal funds (such as block grants and matching funds for certain programs), and (3) receipts (such as tuition, fees paid for certain government services, and investment income). Section 5(3) of Article III of the North Carolina Constitution requires that the state budget be balanced, so the budget as enacted by the General Assembly cannot appropriate more funds than are projected to be received during the fiscal year.

General Fund Availability

The primary source of new revenue for 2008–09 is from the 2007–08 fiscal year unappropriated balance of $270,504,098, with additional funds including $88.7 million from tax revenues collected above the amount projected. Subtractions from the budget's total availability include a $45 million adjustment for economic uncertainty as well as numerous reductions for tax credit extensions, tax holidays, and tax exemptions. All of these changes amount to a General Fund availability of more than $21.3 billion.

The General Fund availability used in developing the budget for fiscal year 2008–09 is shown below in Table 2-1.

Appropriations

The General Assembly made the following appropriations for fiscal year 2008–09:

- Total General Fund $ 21,355,967,434
- Highway Fund 1,841,325,658
- Highway Trust Fund 1,073,160,000

For purposes of documenting General Fund appropriations, the budget bill and the budget report[5] group functions and agencies within state government into seven main categories:[6]

- Education
- Health and Human Services
- Justice and Public Safety
- Natural and Economic Resources
- General Government
- Statewide Reserves and Debt Service
- Capital Improvements

During the short session budget process, adjustments were made to the fiscal year 2008–09 budget as enacted the previous year, so the budget figures in S.L. 2008-107 reflect adjustments (either increases or decreases in funding) to the previously adopted budget. Table 2-2 details these adjustments and includes the revised total appropriations for each agency or program listed.

5. The budget report accompanies the budget bill. It outlines line item appropriations within state agencies and is incorporated into the budget bill by reference.

6. Because the transportation budget is funded from the Highway Fund and the Highway Trust Fund, which are separate from the General Fund, transportation is not one of the General Fund appropriations categories.

Table 2–1. 2008–09 General Fund Availability

The General Fund availability used in adjusting the 2008–2009 budget is shown below:[a]

	FY 2008–2009
Unappropriated Balance from FY 2007–08 (S.L. 2007-323)	$ 270,504,098
Net Adjustment (S.L. 2007-540)	(1,000,000)
Adjustment from Estimated to Actual 2007–2008 Beginning Unreserved Balance	47,867,864
Projected Reversions from FY 2007–2008	170,000,000
Projected Overcollections from FY 2007–2008	88,700,000
Less: Credit to Repairs and Renovation Reserve Account	69,839,238
Beginning Unreserved Fund Balance	$ 506,232,724
Revenues Based on Existing Tax Structure	$ 19,903,800,000
Nontax Revenues	
Investment Income	$ 247,300,000
Judicial Fees	204,800,000
Disproportionate Share	100,000,000
Insurance	62,900,000
Other Nontax Revenues	160,600,000
Highway Trust Fund Transfer	172,500,000
Highway Fund Transfer	17,600,000
Subtotal Nontax Revenues	$ 965,700,000
Total General Fund Availability	$ 21,375,732,724
Adjustments to Availability: 2008 Session	
Adjustments for Economic Uncertainty	$(45,000,000)
Extend Sunset for State Ports Tax Credit	(1,000,000)
Extend Credit for Research and Development	(1,000,000)
Modify Estate Tax Law	(2,000,000)
Exempt Disaster Assistance Debit Sales	(500,000)
Sales Tax Holiday for Certain Energy Star Rated Appliances	(1,400,000)
Extend Sunset for Small Business Employee Health Benefits Tax Credit	(8,500,000)
Adjustments to Availability: 2008 Session (*continued*)	
State Sales Tax Exemption for Baked Goods Sold By Artisan Bakeries	(1,600,000)
Small Businesses Protection Act	(2,200,000)
Excise Tax on Machinery Refurbishers	(300,000)
Expand Film Industry Credit and Extend Sunset	(100,000)
Expand Renewable Energy Tax Credit	(100,000)
Reserve for Tax Relief	(700,000)
Health Care Facility Construction Project Fee Service Regulation Fee Increase	822,028
Adjust Fee Receipts for Asbestos Hazard Management Program	71,615
Adjust Securities Filing Fee	1,993,500
Reduce Transfer to Highway Trust Fund	(25,000,000)
Transfer from Disaster Relief Reserve (Western N.C. Disasters)	26,000,000
Transfer from NCRx Unexpended Balance	3,500,000
Transfer from Tobacco Trust Fund	5,000,000
Transfer from Health and Wellness Trust Fund	5,000,000
Transfer from Coaching Scholarship Fund	267,000
Transfer from Principal Fellows Trust Fund	1,000,000
Transfer from N.C. Community College System Computer Information System (CIS) Fund Balance	4,500,000
Transfer from Focused Industrial Training Unexpended Balance	783,246
Transfer from Disproportionate Share Reserve	19,300,000
Adjust Transfer from Insurance Regulatory Fund	633,492
Adjust Transfer from Treasurer's Office	763,829
Subtotal Adjustments to Availability: 2008 Session	$ (19,765,290)
Revised General Fund Availability for 2008-09 Fiscal Year	$ 21,355,967,434
Less: Total General Fund Appropriations for 2008-09 Fiscal Year	$ (21,355,967,434)
Unappropriated Balance Remaining	0

a. S.L. 2008-107, Section 2.2(a).

The Highway Fund and Highway Trust Fund

As with General Fund appropriations, the appropriations act makes adjustments to the Highway Fund and the Highway Trust Fund for the 2008–09 fiscal year. The Highway Fund appropriation for 2008–09 is $1.84 billion, a $9.2 million increase from the previous fiscal year. Reductions totaling $65.6 million to the Highway Trust Fund reduces the Fund availability for adjustments to the 2008–09 fiscal year budget to $1.07 billion.

The appropriations act calls for a $25 million reduction in the amount transferred annually from the Highway Trust Fund to the General Fund in fiscal year 2008–09 and an additional $24 million reduction in the amount transferred to the General Fund in fiscal year 2009–10. Concurrently, the act provides for an increased allocation from the Highway Trust Fund to the North Carolina Turnpike Authority of $25 million in fiscal year 2008–09 and $49 million in fiscal year 2009–10. The appropriations act directs that these funds be used for debt service on bonds issued for the construction of the Triangle Expressway and the Monroe Bypass.

In addition, the act appropriates $15 million annually for thirty-nine years to fund the mid-Currituck Bridge. This revenue also will be moved from the Highway Trust Fund to the North Carolina Turnpike Authority. The proposed seven-mile bridge would shorten the drive from the mainland to the Currituck Outer Banks.

Table 2–2. 2008–09 General Fund Appropriations Adjustments

General Fund Appropriations Fiscal Year 2008–09 2008 Session

	Certified Appropriation 2008–09	Recurring Adjustments	Nonrecurring Adjustments	Net Changes	Position Changes	Revised Appropriation 2008–09
Education:						
Community Colleges	899,643,003	24,845,698	8,794,000	33,639,698	1.00	933,282,701
Public Education	7,708,315,285	(42,542,790)	136,274,043	93,731,253	0.00	7,802,046,538
University System	2,656,447,099	44,828,045	(18,017,530)	26,810,515	2.00	2,683,257,614
Total Education	**11,264,405,387**	**27,130,953**	**127,050,513**	**154,181,466**	**3.00**	**11,418,586,853**
Health and Human Services						
Central Management And Support	62,592,178	(5,134,966)	(4,675,000)	(9,809,966)	0.00	52,782,212
Aging and Adult Services	35,745,179	2,000,000	500,000	2,500,000	0.00	38,245,179
Blind and Deaf/Hard of Hearing Services	11,434,643	0	75,000	75,000	0.00	11,509,643
Child Development	310,984,207	(6,110,422)	8,000	(6,102,422)	3.00	304,881,785
Education Services	38,855,457	0	698,940	698,940	0.00	39,554,397
Health Services Regulation	20,656,228	787,918	34,110	822,028	8.00	21,478,256
Medical Assistance	3,389,993,470	(204,606,516)	(6,215,491)	(210,822,007)	18.00	3,179,171,463
MH/DD/SAS	721,639,723	19,407,236	1,940,597	21,347,833	226.85	742,987,556
NC Health Choice	59,391,155	9,411,246	645,618	10,056,864	0.00	69,448,019
Public Health	182,162,710	2,050,131	4,755,406	6,805,537	2.00	188,968,247
Social Services	221,227,038	(455,218)	1,600,000	1,144,782	0.00	222,371,820
Vocational Rehabilitation	45,518,365	0	(2,000,000)	(2,000,000)	0.00	43,518,365
Total Health and Human Services	**5,100,200,353**	**(182,650,591)**	**(2,632,820)**	**(185,283,411)**	**257.85**	**4,914,916,942**
Justice and Public Safety						
Correction	1,226,627,581	2,623,108	(2,333,291)	289,817	41.00	1,226,917,398
Crime Control and Public Safety	41,489,037	(182,404)	2,762,579	2,580,175	0.00	44,069,212
Judicial Department	452,389,917	(758)	(1,557,497)	(1,558,255)	32.25	450,831,662
Judicial—Indigent Defense	115,991,348	(1,770,057)	1,335,000	(435,057)	0.00	115,556,291
Justice	92,171,670	(189,120)	(237,638)	(426,758)	3.00	91,744,912
Juvenile Justice and Delinquency Prevention	139,556,104	20,831,264	(636,984)	20,194,280	30.00	159,750,384
Total Justice and Public Safety	**2,068,225,657**	**21,312,033**	**(667,831)**	**20,644,202**	**106.25**	**2,088,869,859**
Natural and Economic Resources						
Agriculture and Consumer Services	60,699,001	(317,116)	5,277,705	4,960,589	6.00	65,659,590
Commerce	45,289,341	(1,590,267)	9,565,237	7,974,970	1.00	53,264,311
Commerce—State Aid	21,361,485	652,635	12,248,943	12,901,578	0.00	34,263,063
Environment and Natural Resources	192,815,663	854,336	11,419,398	12,273,734	26.62	205,089,397
DENR—Clean Water Mgmt. Trust Fund	100,000,000	0	0	0	0.00	100,000,000
Labor	16,594,951	901,392	0	901,392	5.00	17,496,343
N.C. Biotechnology Center	15,583,395	(155,834)	4,000,000	3,844,166	0.00	19,427,561
Rural Economic Development Center	24,302,607	(243,026)	54,000,000	53,756,974	0.00	78,059,581
Total Natural and Economic Resources	**476,646,443**	**102,120**	**96,511,283**	**96,613,403**	**38.62**	**573,259,846**
General Government						
Administration	70,959,534	603,171	673,877	1,277,048	-3.00	72,236,582
Auditor	12,746,479	(283,938)	0	(283,938)	0.00	12,462,541
Cultural Resources	71,881,424	(439,633)	4,225,000	3,785,367	0.00	75,666,791
Cultural Resources—Roanoke Island	2,020,023	(15,000)	0	(15,000)	0.00	2,005,023
General Assembly	55,740,786	(636,000)	(245,000)	(881,000)	0.00	54,859,786
Governor	6,300,587	(84,205)	0	(84,205)	0.00	6,216,382
N.C. Housing Finance Agency	9,608,417	5,000,000	7,000,000	12,000,000	0.00	21,608,417

Table 2–2. 2008–09 General Fund Appropriations Adjustments (*continued*)

General Fund Appropriations Fiscal Year 2008–09 2008 Session

	Certified Appropriation 2008–09	Recurring Adjustments	Nonrecurring Adjustments	Net Changes	Position Changes	Revised Appropriation 2008–09
Insurance	30,936,704	613,492	20,000	633,492	6.00	31,570,196
Insurance—Worker's Compensation Fund	4,500,000	0	(1,150,000)	(1,150,000)	0.00	3,350,000
Lieutenant Governor	915,109	0	0	0	0.00	915,109
Office of Administrative Hearings	3,521,735	60,144	253,400	313,544	0.00	3,835,279
Revenue	85,330,611	(1,415,864)	0	(1,415,864)	-29.00	83,914,747
Secretary of State	10,743,041	136,877	(1,106)	135,771	4.00	10,878,812
State Board of Elections	9,626,868	414,226	168,708	582,934	5.00	10,209,802
State Budget and Management	5,877,440	15,242	0	15,242	1.00	5,892,682
State Budget and Management—Reserve	5,621,446	300,000	16,650,000	16,950,000	0.00	22,571,446
State Controller	20,727,698	(110,940)	0	(110,940)	0.00	20,616,758
Treasurer—Operations	9,326,190	763,829	0	763,829	6.00	10,090,019
Treasurer—Retirement/Benefits	9,458,957	1,027,851	0	1,027,851	0.00	10,486,808
Total General Government	**425,843,049**	**5,949,252**	**27,594,879**	**33,544,131**	**-10.00**	**459,387,180**
Transportation	**0**	**0**	**0**	**0**		**0**
Statewide Reserves and Debt Service						
Debt Service:						
Interest / Redemption	659,016,907	0	(17,500,000)	(17,500,000)		641,516,907
Federal Reimbursement	1,616,380	0	0	0		1,616,380
Subtotal Debt Service	**660,633,287**	**0**	**(17,500,000)**	**(17,500,000)**	**0.00**	**643,133,287**
Statewide Reserves						
Compensation Increases	500,807,621	360,192,676	8,651,912	368,844,588		869,652,209
Salary Adjustment Fund 2007–09 Biennium	23,688,000	0	0	0		23,688,000
Teachers' and State Employees' Retirement Cont.	35,705,000	30,237,400	0	30,237,400		65,942,400
Hospitalization Reserve	122,890,207	(5,000,000)	0	(5,000,000)		117,890,207
Reserve for Eliminated Positions	(10,038,466)	0	0	0		(10,038,466)
Grant to Counties for Teachers' Personal Leave Day	0	0	5,000,000	5,000,000		5,000,000
Contingency and Emergency Fund	5,000,000	0	0	0		5,000,000
Information Technology Fund	7,840,000			0		7,840,000
Job Development Investment Grants Reserve	12,400,000	15,000,000	0	15,000,000		27,400,000
North Carolina Master Address Dataset	0	0	1,000,000	1,000,000		1,000,000
Criminal Justice Data Integration	0	0	5,000,000	5,000,000		5,000,000
Pending Gang Prevention Legislation (H 274)	0	0	10,000,000	10,000,000		10,000,000
Task Force on Preventing Pesticide Exposure	0	221,374	135,681	357,055	4.00	357,055
Subtotal Statewide Reserves	**698,292,362**	**400,651,450**	**29,787,593**	**430,439,043**	**4.00**	**1,128,731,405**
Total Reserves and Debt Service	**1,358,925,649**	**400,651,450**	**12,287,593**	**412,939,043**	**4.00**	**1,771,864,692**
Total General Fund for Operations	**20,694,246,538**	**272,495,217**	**260,143,617**	**532,638,834**	**399.72**	**21,226,885,372**
Other General Fund Expenditures:						
Capital Improvements	0	0	129,082,062	129,082,062		129,082,062
Repairs and Renovations	0			0		0
Total Other General Fund Expenditures	**0**	**0**	**129,082,062**	**129,082,062**	**0.00**	**129,082,062**
Total General Fund Budget	**20,694,246,538**	**272,495,217**	**389,225,679**	**661,720,896**	**399.72**	**21,355,967,434**

Capital Projects

The General Assembly approved more than $129 million in capital projects. Those appropriations include the following:

- $2.6 million for planning for the State Capital Visitors Center
- $35 million for complete planning and site development at UNC Chapel Hill Biomedical Research Imaging Center
- $53.1 million in additional planning funds for UNC System campus construction
- $11.5 million to begin Phase I of the Carolina North campus at UNC Chapel Hill
- $600,000 for planning for the N.C. Zoo African Pavilion replacement
- $450,000 for planning for the North Carolina Freedom Monument in Raleigh
- $6.6 million for Phase II structural rehabilitation of Mattamuskeet Lodge

Special Indebtedness

Continuing the trend of financing capital construction with special indebtedness as authorized under Article 9 of G.S. Chapter 142, the appropriations act provides for the issuance of $857 million in new debt over the next four years. Such debts are commonly referred to as "certificates of participation" (COPs) and are nonvoted debt that may be secured by an interest in state property that is being acquired or improved. Because there is no pledge of the state's faith and credit or taxing power to secure the debt, voters do not have to approve the borrowing. Special indebtedness may take one or more of the following forms: (1) installment purchase contracts (with or without COPs); (2) lease–purchase contracts (with or without COPs); or (3) bonds. Much of this appropriations act's special indebtedness is for UNC System building projects.

Sheria Reid

3

Children and Juvenile Law

New laws relating to gang activity and sex offenses have implications for juveniles as well as adults. Local school boards, for example, will have authority to expel a student who is ordered in a delinquency proceeding to register as a sex offender. The legislature made very few changes to the Juvenile Code, but enacted or rewrote several laws aimed at protecting children.

Delinquency

Study of Extending Juvenile Age

North Carolina remains one of only three states that automatically prosecute sixteen- and seventeen-year-olds as adults. During the 2007–08 session, legislators introduced, but did not enact, bills that would have raised the age of juvenile court delinquency jurisdiction from sixteen to eighteen. (*See* H 492, S 1078, and S 1445.) Section 18.1 of S.L. 2008-107 (H 2436), however, directs the Governor's Crime Commission in the Department of Crime Control and Public Safety to study multiple aspects of extending the juvenile age—legal, statutory, financial, systematic, organizational, practical—and to report to the governor and General Assembly by April 1, 2009. It also requires quarterly reports, beginning October 1, 2008, to specified legislative committees. The act authorizes the commission to use up to $200,000 of funds appropriated to the commission to conduct the study.

Release of Information about Escaped Juvenile

G.S. 7B-3102 prescribes conditions under which the juvenile justice system may release specified information to the public about a juvenile when that juvenile escapes. As rewritten by S.L. 2008-169 (H 2492), effective October 1, 2008, the statute provides as follows:

1. When a juvenile who has been adjudicated delinquent for any offense escapes from a detention facility, secure custody, or a youth development center, the Department of Juvenile Justice and Delinquency Prevention (DJJDP) is required to release to the public, within 24 hours,
   a. the juvenile's first name, last initial, and photograph;
   b. the circumstances and location of the escape, including the name of any institution from which the juvenile escaped; and
   c. a statement, based on the juvenile's record, of the level of concern DJJDP has about the juvenile's threat to self or to others.
2. DJJDP is authorized to release the same information when a juvenile who is alleged, but not adjudicated, to be delinquent escapes from a detention facility or secure custody, but only if
   a. the juvenile is alleged to have committed an offense that would be a felony if committed by an adult, and
   b. DJJDP determines, based on the juvenile's record, that the juvenile presents a danger to self or others.

In either circumstance DJJDP is required to make a reasonable effort to notify the juvenile's parent, legal guardian, or custodian before releasing information to the public. If an escaped juvenile is taken into custody before the information is released, DJJDP shall not release the information.

Juvenile Sex Offender Registration

When a juvenile is adjudicated delinquent for a sex offense, the court is never required to order that the juvenile register as a sex offender. G.S. 7B-2509 and G.S. 14-208.26 authorize the court at disposition in a delinquency case to order a juvenile to register with the sheriff only if

1. the juvenile was adjudicated delinquent for first or second degree rape, first or second degree sexual offense, or attempted rape or sexual offense; and
2. the juvenile was at least eleven years old at the time of the offense; and
3. the court finds that the juvenile is a danger to the community.

When the court is authorized to and does order a juvenile to register with the sheriff, the registration is separate from registrations of adults, is not a public record, and terminates when the juvenile becomes eighteen.

S.L. 2008-117 (H 933) increases the significance of a requirement that a juvenile sex offender register. First, the act amends G.S. 14-208.29 to require that registry information for any juvenile who is enrolled in the local school administrative unit be forwarded to the local board of education. Second, it amends G.S. 115C-391 to allow a local board of education to expel any student who is subject to the registration requirement. (This provision also applies to a student who is convicted and required to register as an adult, if the student committed rape or any other sex offense under Article 7A of G.S. Chapter 14 or any offense involving a victim who was younger than sixteen when the offense occurred.) Before ordering expulsion the school board must consider whether there is an alternative program for educational services that the school system might offer. If the board allows the juvenile to continue to attend school on school property, school personnel must supervise the student at all times.

The act makes many other changes in G.S. Chapter 14, and some of them affect juveniles who are required to register. A new section, G.S. 14-208.18, makes it a Class H felony for a juvenile who is required to register (as well as certain persons who are required to register as adults) to knowingly be

1. on the premises of a place intended primarily for use by minors or the care or supervision of minors, such as schools, children's museums, child care centers, nurseries, and playgrounds;
2. within 300 feet of a location of the type described in the preceding paragraph, when it is on premises that are not intended primarily for such use by or care or supervision of minors, such as malls, shopping centers, or other property open to the general public; or
3. at any place where minors gather for regularly scheduled educational, recreational, or social programs.

Two exceptions to these restrictions affect juveniles. First, a person who is eligible to attend public school may be on school property if permitted to be there by the local board of education. Second, a juvenile who is required to register may be at an otherwise proscribed location to receive medical treatment or mental health services, but only if the juvenile is under the direct supervision of an employee of the treating institution at all times.

The act shortens from ten days to three business days the time within which a court counselor must (1) notify the sheriff of a juvenile's change of address, as required by G.S. 14-208.27, and (2) return to the sheriff the periodic registration verification form required by G.S. 14-208.28(2).

Finally, the act directs the state Department of Justice to study federal guidelines issued pursuant to the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act of 2006—P.L. 109-248) and report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee by December 1, 2008, about its assessment of and any recommendations regarding the state's compliance with the guidelines.[1]

Street Gang Prevention and Intervention Act

One of two acts addressing gang issues, S.L. 2008-56 (S 1358) amends G.S. 143B-543 and 143B-549, which deal with local Juvenile Crime Prevention Councils, to

- express the General Assembly's intent to provide community-based gang prevention strategies and programs;
- require local councils to include in their annual assessments the needs of juveniles who are or are at risk of being associated with gangs or gang activity, and local resources to address those needs; and
- require each council to develop strategies to intervene in and respond appropriately to the needs of gang-associated juveniles.

The act requires DJJDP and the Department of Public Instruction to report to specified legislative committees by December 1, 2008, on

1. the prevalence of school violence and gang activity,
2. the use of DJJDP local council programs for out-of-school suspension alternative learning programs for gang-associated students,
3. programs to educate school personnel and parents about signs that a student may be involved or associated with a gang,

1. The U.S. Department of Justice's guidelines, issued in June 2008, are available online at www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

4. practices that have been successful in other states in reducing school violence and gang activity, and
5. recommendations for further coordination between the two departments to address issues related to the prevention of and intervention in youth gang activity.

The act requires the Department of Crime Control and Public Safety to report to specified legislative committees by December 1, 2008, on protocols and procedures for entering identifying information about juveniles in the GangNet database system.[2] The report must include any recognized standards for continuing the listing of juveniles in the database, any benefits of maintaining juvenile listings for extended periods, and any recommendations about listing juveniles in GangNet.

The act requires the Governor's Crime Commission to develop criteria for allocating funds appropriated for gang prevention and intervention, including a 25 percent match requirement (half of which may be in-kind). The commission must report to specified legislative committees by April 15, 2009, on the grant award process, the grants awarded, and criteria for program evaluation.

Street Gang Suppression Act

The other act addressing gang issues, S.L. 2008-214 (H 274), relates primarily to adult offenders (including juveniles who are tried as adults). It amends various sections of G.S. Chapters 14 and 15A and adds new sections, to create new gang-related offenses, procedures, and penalties that are effective December 1, 2008. New Article 13A of G.S. Chapter 14 is the North Carolina Street Gang Suppression Act. Juveniles younger than age sixteen are specifically excluded from most of its provisions. A new statute, G.S. 14-50.18, makes it a Class F felony for a person to cause, encourage, solicit, or coerce a person under age sixteen to participate in criminal street gang activity. The act is discussed more fully in Chapter 6, "Criminal Law and Procedure."

Juvenile Crime Prevention Council Programs

Section 14.8 of S.L. 2008-107 requires the North Carolina Sentencing and Policy Advisory Commission to conduct a feasibility study for measuring the effectiveness of programs that receive Juvenile Crime Prevention Council (JCPC) grants. The commission is required to make an interim report to specified legislative committees by December 1, 2008, and to submit a final plan for measuring programs' effectiveness by May 1, 2009.

The section repeals G.S. 143B-519, which required DJJDP to report annually to the General Assembly on numerous matters, including the effectiveness of programs that receive JCPC funding. However, Section 16.1 of S.L. 2008-107 continues some of those reporting requirements, calling for the department to submit a list of JCPC grant recipients and some of the other information that the statute previously specified to the Joint Legislative Commission on Governmental Operations and the Appropriations Committees of the Senate and House of Representatives by October 1 each year. The Fiscal Research Division of the General Assembly also must receive this report.

Section 16.3 of S.L. 2008-107 requires the DJJDP, the North Carolina Juvenile Services Association, and the Community Alternatives for Youth, in consultation with the Fiscal Research Division of the General Assembly, to develop and propose a revised county allocation formula for JCPCs. The department is required to report the recommendations to specified legislative committees by December 1, 2008.

Access to Juvenile Records

An involuntary mental commitment, whether inpatient or outpatient, is a bar to a person's ability to purchase, possess, or transfer a firearm. S.L. 2008-210 (S 2081) establishes in G.S. Chapter 122C a procedure by which a person may petition the district court for removal of that bar. The petitioner has the burden of proving by a preponderance of the evidence that he or she no longer suffers from the condition that resulted in the commitment and is no longer a danger to self or others. Notice of the hearing must be given to the district attorney, who is required to "present any and all evidence to the contrary." For purposes of the hearing, the district attorney may access and use, among other things, any juvenile records of the applicant. The act is effective December 1, 2008.

Child Welfare and Safety

Foster Care and Adoption Assistance Payments

Effective January 1, 2009, Section 10.7 of S.L. 2008-107 increases the maximum per child monthly rates for state participation in the foster care assistance program and for the state adoption assistance program as follows:

- for children up to age 5, from $390 to $475;
- for children ages 6 through 12, from $440 to $581; and
- for children ages 13 through 18, from $490 to $634.

2. In North Carolina "GangNet is a state-wide web based repository for law enforcement intelligence information on individual gang members and the gangs they associate with that was designed for the purposes of tracking and sharing this information with participating criminal justice agencies." Governor's Crime Commission Criminal Gang Study 2008: Interpreting the Data and Dispelling Myths, March 2008. Available online at www.neighborsforasafercharlotte.org/documents/Gang%20Study.pdf.

The act did not amend the rates for state participation in HIV foster care and HIV adoption assistance.

Studying Smoking in Foster Homes

Section 2.12 of S.L. 2008-181 (H 2431) authorizes the Legislative Research Commission to study the impact of smoking prohibitions in foster care homes, including whether the prohibitions affect the availability of foster care homes.

Fees and Costs in Juvenile Cases

S.L. 2008-193 (S 2056) rewrites G.S. 7A-317, effective July 1, 2008, to provide that counties (and municipalities) are not required to advance the following costs in civil actions:

- the facilities fee;
- the General Court of Justice fee;
- miscellaneous fees listed in G.S. 7A-308 in child support actions, child abuse actions, and other actions filed by the department of social services; or
- the civil process fees listed in G.S. 7A-311.

Reporting by Hospitals and Doctors

In addition to the duty to report suspected child abuse, neglect, dependency, and death by maltreatment to social services under G.S. 7B-301, hospitals and physicians have a duty under G.S. 90-21.20 to report specified types of injury or illness to a law enforcement agency. S.L. 2008-179 (H 2338) rewrites that section to add to the reporting requirement cases involving recurrent illness of or serious physical injury to a child younger than eighteen where, in the doctor's professional judgment, the illness or injury appears to be the result of nonaccidental trauma. The act is effective December 1, 2008.

Criminal Child Abuse

For offenses committed on or after December 1, 2008, S.L. 2008-191 (S 1860) amends G.S. 14-318.2 to make misdemeanor child abuse a Class A1 (instead of Class 1) misdemeanor. It also amends G.S. 14-318.4, the felony child abuse statute, so that it applies to a parent or other person providing care to or supervision of a child younger than sixteen, whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life. If the act or omission results in serious bodily injury to the child, the offense is a Class E felony. If it results in serious physical injury to the child, it is a Class H felony. The act includes definitions of "serious bodily injury" and "serious physical injury." Three other acts make numerous changes in criminal sex offense, pornography, and sex offender registration statutes: S.L. 2008-220 (S 1736); S.L. 2008-218 (S 132); and S.L. 2008-117 (H 933), discussed above in relation to delinquent juveniles. In addition, Section 39.1 of S.L. 2008-181 creates the Joint Legislative Study Committee on Civil Commitment of Sexual Predators Who Are Determined to be Incapable of Proceeding to Trial. These acts are discussed in Chapter 6, "Criminal Law and Procedure."

Information about Minors as Park or Recreation Participants

S.L. 2008-126 (S 212) adds a new G.S. 132-1.12, providing that a "public record" does not include specified information about any minor participant in a local government park or recreation program. It applies to the minor's name, address, age, date of birth, telephone number, parents' or guardian's name or address, and any other identifying information in a program's records. The act does not make the information confidential, but exempts it from being accessible as a public record. Information that remains accessible includes the county, municipality, and zip code of each participating minor's residence.

Transporting Children in Open Truck Bed

S.L. 2008-216 (H 2340) rewrites G.S. 20-135.2B, which makes it an infraction to allow children under twelve to ride in the back of pickup trucks or open vehicle beds, to (1) apply the prohibition to children under the age of sixteen, (2) delete the exemption for any county with no incorporated area and a population under 3,500, and (3) provide that violation of the section is not negligence per se. The act is effective October 1, 2008.

Other

Health Choice

North Carolina Health Choice for Children provides low cost medical insurance for children whose family income is less than 200 percent of the federal poverty level—children who may not be eligible for Medicaid. The General Assembly continued funding for the program and allocated additional funds for program growth of up to 6 percent. Under Section 10.14 of S.L. 2008-107, the Department of Health and Human Services (DHHS) may increase enrollment by up to 8.73 percent if Congress makes sufficient funds available.

Section 10.12 of S.L. 2008-107 rewrites Section 10.48 of S.L. 2007-323 (H 1473) to establish NC Kids' Care, an expansion of the children's health insurance program to cover children in families whose income is between 200 percent and 250 percent of the federal poverty level. The expansion will not be implemented, however, until July 1, 2009, or Congress's

reauthorization of the State Children's Health Insurance Program with funding sufficient to support both the NC Health Choice program and NC Kids' Care.

Child Care Funds

Section 10.6 of S.L. 2008-107 amends Section 10.17 of S.L. 2007-323 to increase from 15 percent to 20 percent the required match local purchasing agencies must provide when they receive reallocated funds beyond their initial allocations. No match is required if the funds are reallocated because of a disaster. The act requires DHHS to evaluate the match requirement, its effects on agencies, and whether it should be adjusted. The department must report to specified legislative committees by April 1, 2009.

Autism Awareness

According to the TEACCH Autism Program, a Division of the UNC Chapel Hill Department of Psychiatry, "[a]utism is one of the most common developmental disabilities in the world, affecting approximately 1 out of every 166 children."[3] Some of those children, who have special needs because of their autism, are children and youth in the state's foster care, child welfare, juvenile justice, and criminal justice systems.

Based on recommendations of the Joint Study Committee on Autism Spectrum Disorder and Public Safety, the General Assembly enacted S.L. 2008-83 (H 2523), which directs several university, governmental, and other entities to

1. develop a video for people involved in government and public service to increase their awareness of autism;
2. study groups in the judicial system to determine their training needs with respect to legal issues related to autism and appropriate responses to persons with autism; and
3. develop a proposal by October 1, 2008, for the most appropriate way to deliver that training.

Coordinating Councils for Young Children with Disabilities

S.L. 2008-85 (H 2127) repeals G.S. 143B-179.5A, which established regional interagency coordinating councils for children from birth to age five with disabilities and their families. The act does not affect the state coordinating council established by G.S. 143B-179.5.

3. Information about TEACCH is available online at www.psychiatry.unc.edu/teacch/welcome.html.

Educational Services in Private Facility

S.L. 2008-174 (H 2306) requires the State Board of Education and DHHS, jointly, to determine which public agency is responsible for providing special education and related services to children with disabilities who are placed in private psychiatric residential treatment facilities by a public agency other than the local educational agency. The board and DHHS are required to report the determination and any related recommendations by January 1, 2009, to the Joint Legislative Education Oversight Committee and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

Compulsory School Attendance Age

Section 5.4 of S.L. 2008-181 (H 2431) authorizes the Joint Legislative Education Oversight Committee, in coordination with the Department of Public Instruction, to study the effects of raising the compulsory school attendance age from sixteen to seventeen or eighteen.

Selected Appropriations

In Section 10.17 of S.L. 2008-107, appropriations for 2008–09 of funds from the Temporary Assistance for Needy Families (TANF) Block Grant included the following:

- $2,049,642 to the Division of Social Services in DHHS, to expand after-school programs and services by awarding grants to community-based programs that demonstrate the ability to reach children at risk of teen pregnancy, school dropout, and gang participation. The appropriation also may be used for one position in the Division of Social Services to coordinate at-risk after-school programs. Another appropriation to the division of $500,000 is for expansion of after-school programs for at-risk children attending middle school.
- $14,452,391 to the Division of Social Services in DHHS, to be allocated to county departments of social services for child welfare improvements.
- $3 million to the Special Children Adoption Fund in DHHS.
- $1.2 million to DHHS for implementation of North Carolina Families Accessing Services through Technology (N.C. FAST).
- $2 million to DHHS for grants to Boys and Girls Clubs.
- $600,000 to the Division of Social Services to implement a Citizens Schools Program, a three-year urban/rural dropout prevention pilot program in the Durham and Vance county public school systems. North Carolina State University is required to evaluate the program and report the results by January 1, 2009,

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.

From the Social Services Block Grant, for 2008–09, Section 10.17 of S.L. 2008-107 appropriates the following:

- $2,649,642 for DJJDP to support the existing Support Our Students program and to expand the program statewide,
- $2,738,827 to the Division of Social Services to support specified child welfare training projects,
- $838,000 to DHHS to purchase services at maternity homes in the state,
- $2,372,587 for allocation to the State Private Child-Caring Agencies Fund, and
- $290,000 to be used for the child care component of pediatric day treatment centers for medically fragile children.

Bill That Did Not Pass

Adoption Information

Two bills recommended by the House Select Committee on Adoptee Birth Certificates would have made changes with respect to confidential intermediary services relating to adoption information. H 2185 would have rewritten G.S. 48-9-104 to (1) require adoption agencies that act as confidential intermediaries to report specified information to DHHS; and (2) require DHHS to maintain that information, determine the numbers of agencies in each county that provide and do not provide confidential intermediary services, and report that information to the Legislative Study Commission on Children and Youth annually by July 31. H 2186 would have expanded both the list of individuals with access to confidential intermediary services and the kinds of information agencies providing those services could share.

Janet Mason

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Community Planning, Land Development, and Related Topics

The General Assembly enacted significant legislation in the 2008 short session affecting land use, development, transportation, and code enforcement. It provided enabling authority to set into motion a program for disposing of abandoned manufactured homes that dot the countryside. New legislation will now require local governments that operate public water systems to develop and carry out various water conservation measures. The legislature also reworked stormwater management standards for parking lots throughout the state and chose to disapprove coastal stormwater rules adopted by the Environmental Management Commission (EMC) and to replace them with certain statutory standards.

The bigger story may have been the bills in this field that were eligible for consideration but were not enacted. Bills to drastically change the annexation laws were blocked; a study commission will take up annexation next year. An amendment to a bill that would have significantly limited the existing laws on development moratoria was withdrawn. A bill that would have prevented local governments from accepting developer contributions in connection with development proposals (a big issue where adequate—public-facility ordinances are used) died in committee. A proposal by outdoor advertising interests to allow them to cut trees within certain state highway rights-of-ways so that their signs could be better seen from the road ran into potent opposition. Still another bill that would have limited the ability of local governments to make periodic inspections of property to check for compliance with housing and fire codes and unsafe building conditions never made it to the Senate floor. Finally, a bill concerning the judicial review of quasi-judicial land use decisions languished because of lukewarm support.

Zoning

Among the most notable legislative activities regarding zoning in 2008 were two initiatives that failed.

The first initiative addressed the question of new limits on the use of development moratoria. Amendments to the zoning statutes in 2005 established a detailed process for the adoption of moratoria. The law requires public hearings in most instances and requires consideration and adoption of a written rationale for the moratorium. A local government must specify the reason for a moratorium and why other steps are inadequate, specify the length and coverage of the moratorium, and approve an action plan to address the problem that led to the imposition of the moratorium. The length of the moratorium is limited to a reasonable period given the stated purpose. There are limits on extensions of moratoria and limits on its applicability to completed applications submitted prior to the call for a public hearing on the moratorium. Despite these limitations, several moratoria have been adopted in recent years that sparked considerable local controversy. As a result, in the last days of the 2008 session, a Senate committee added a limitation on moratoria to a pending bill on North Carolina Department of Transportation (NCDOT) access permits (H 2313). The proposed limit would have prohibited the adoption of any moratorium if "the sole purpose" of the moratorium was to update or amend a local plan or ordinance. Cities and counties were concerned that because most moratoria are adopted to maintain the status quo pending an ordinance amendment of some description, this could be read to effectively prohibit the use of temporary moratoria in most situations. After several days of heated debate, the sponsor of the limitation amendment agreed to withdraw the proposal for the 2008 session.

The second initiative tackled judicial review of land use appeals. In 2007 the Senate approved S 212 to codify various aspects of the procedures for judicial review of local government quasi-judicial land use approvals, including appeals of decisions on special and conditional use permits, enforcement actions, variances, and some plats. S 212 addressed the content of the judicial petition used to start an appeal, standing to bring an appeal for individuals and groups, parties that must be named in the appeal, and the process for intervention. The bill also addressed the scope of review to be used by the courts, the degree of deference to the local decision-making board, and remedies available for consideration by the court. However, in 2008 the House used S 212 as a vehicle to address the confidentiality of records of participants in local park and recreation programs, deleting the relevant zoning provisions in S 212. The bill was enacted in that amended form.

Several bills were enacted affecting zoning as it pertains to specific local governments. Two of these acts expand upon prior local authorizations. Local legislation in 2003 allowed electronic rather than published notice of hearings for Cabarrus County, Raleigh, and Lake Waccamaw. In 2007 Apex, Garner, and Knightdale were also allowed to provide notice of public hearings through electronic means. S.L. 2008-5 (S 1579) adds Cary to the list of local governments authorized to substitute electronic notification of hearings for published notice. These electronic notices do not supersede statutory requirements for mailing notices of hearings or for posting notices of hearings on the site of affected properties, nor do they alter the schedule for making the notices. The second act extends the number of local governments explicitly authorized to use development regulations to provide incentives for energy conservation. In 2007 Asheville, Carrboro, Chapel Hill, Charlotte, and Wilmington were given the authority to grant density bonuses, adjust development regulations, and provide other incentives to developers of projects that make a significant contribution to reduction of energy consumption. S.L. 2008-22 (S 1597) adds Cary, Concord, Durham, Harrisburg, Kannapolis, Locust, Midland, Mount Pleasant, Stanfield, and Cabarrus County to the list of local governments authorized to do this. The third act of interest, S.L. 2008-41 (S 2126), amends the Winston-Salem charter regarding zoning penalties.

Land Subdivision and Development Fees

Land Partition

The partition of land owned jointly by tenants in common and its sale is important to those interested in land subdivision regulation. Both voluntary and involuntary partitions of land, common ways of dividing land among family members, are generally thought to be outside the scope of subdivision regulation. Sections 42.1 to 42.5 of the studies act, S.L. 2008-181 (H 2431), establish a joint Partition Sales Study Committee to study how partitions sales procedures affect the economic use and loss of property by heirs in North Carolina. The committee must report to the General Assembly by March 1, 2009.

Local Acts

Chapel Hill secured the adoption of an amendment to an existing local act affecting "fees-in-lieu" of dedication of recreation lands and facilities. S.L. 2008-76 (H 2580) amends the town charter provisions applicable to new subdivisions to allow the town to require payment of fees instead of accepting dedications if the recreation areas involved would be less than four acres in size (previously, two acres). It also allows the town to require payments in lieu of accepting dedications of recreation land in connection with both residential and nonresidential development projects that are subject to special-use or conditional-use zoning permits.

Bills That Did Not Pass

In 2007 the Senate adopted S 1180, making it eligible for further consideration in the 2008 session. The bill prohibited a local government from imposing any tax or fee, or accepting a monetary contribution, in connection with development that is not specifically authorized by law. In particular the bill was targeted at local governments that invite developers to make "contributions" to defray certain infrastructure costs related to a development in order to meet "adequate-public-facility" standards in land development ordinances. The practice has become particularly common in a small number of metropolitan counties that enforce adequate-public-facility standards in connection with public schools. S 1180 was not taken up by the House and died in committee.

Community Appearance and Nuisances

Local Acts

Since 1999 over a half-dozen local acts have concerned the remedies that may be pursued by local governments in enforcing public nuisance ordinances (typically overgrown vegetation ordinances). Most include variations on the themes of providing notice to chronic ordinance violators, abating the nuisance, and establishing a lien against the property for unpaid costs. These local acts, however, may 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 . . . relating to health, sanitation, and the abatement of nuisances."

In any event, S.L. 2008-6 (S 1653) allows Franklinton, Louisburg, Mount Airy, Pinetops, Smithfield, and Yadkinville to give annual notice to violators of overgrown vegetation ordinances. S.L. 2008-23 (S 1636) provides similar authority for Morehead City and Wilson; S.L. 2008-25 (S 1828) does so for Marshville, Wadesboro, and Wingate.

Bills That Did Not Pass

In 2007 the Senate adopted S 150, making it eligible for further consideration in the 2008 session. The bill, pushed by outdoor advertising interests, would have allowed owners of billboards to cut more trees that might obscure their signs within state highway rights-of-way. Owners of these advertising displays along certain federally aided highways offered to pay more in administrative fees to NCDOT; the money would also fund the replanting of new trees elsewhere. In return owners would have been allowed to remove trees, shrubs, and other vegetation within 375 feet of their signs, an increase from the current standard of 250 feet. S 150 represented the industry's third attempt in as many years to secure favorable legislation. However, the bill was opposed by Speaker of the House Joe Hackney and Governor Michael Easley, and it died in a House committee.

Historic Preservation

In 2007 Cary and Wake Forest secured local legislation that allows each of them to regulate the demolition of certain historic structures within their jurisdictions. Among the historic structures that may be regulated are (1) state, local, and national landmarks; (2) structures listed in national, state, or county registers of historic places; and (3) certain structures that "contribute" to the historic district in which they are located. However, the act also provides that towns may not prohibit the demolition of historic structures except in accordance with existing general law. The act apparently intends that G.S. 160A-400.14 applies to all of these historic structures. That statute allows a local government to delay the effective date of a certificate of appropriateness for a proposed demolition up to 365 days after it is approved. S.L. 2008-75 (H 2579) amends the 2007 act to extend the authority to Chapel Hill. S.L. 2008-58 (S 1970) includes essentially identical language to extend this same authority to the City of Wilson.

Code Enforcement

Managing Abandoned Manufactured Homes

Over the years an increasing number of old manufactured homes (formerly "mobile homes") have been abandoned, discarded, or vacated in back lots, mobile home parks, and isolated rural areas in North Carolina. There has not been an especially active repair market for older units, and the cost of dismantling and hauling the units away has often exceeded their value. Proposals to fund a program for dealing with nuisance manufactured homes by imposing a tax or fee on the purchase of new units have not met with legislative success. This year, however, the General Assembly authorized a promising new multifaceted program, S.L. 2008-136 (H 1134), for funding the "deconstruction" and removal of units.

To break through the financial stumbling blocks that have thwarted past attempts at a solution, the General Assembly directs the Department of Environment and Natural Resources (DENR) to use up to $1 million from the Solid Waste Management Trust Fund to fund the cleanup of abandoned units. The money is to be used by DENR to provide grants to counties to reimburse their expenses in undertaking a cleanup program, to provide technical assistance and support to counties, and to fund the administrative expenses of staffing, training, and program support. Reimbursement grants made to counties, a key feature of the program, are to be calculated on a per-unit basis and are based on the actual cost of cleanup activities, but may not exceed $1,000 per manufactured home unit. However, a poor county (a tier-one development county or a tier-two development county for economic development purposes) is eligible to request a supplemental grant equal to 50 percent of the amount in excess of $1,000 per unit. These poorer counties are also eligible for a special planning grant of $2,500 from the Solid Waste Management Trust Fund. In making any of these grants DENR must review the budget submitted by the applicant county and settle on a grant amount that takes into account the availability of funds and the county's capacity to manage the program effectively and efficiently.

A county may choose whether or not to initiate an abandoned manufactured home program. If the county elects not to do so, the county must so state in the county comprehensive solid waste management plan that each county is required to develop. If the county decides to proceed with an abandoned manufactured home program, then it must develop a written plan outlining its intentions, which becomes a component of its comprehensive solid waste management plan. Among other things, the implementation plan must outline how an owner of a manufactured home may request designation of the unit as an abandoned manufactured home and how the county will dispose of units that are not "deconstructed." This latter matter is important because the act prohibits an intact abandoned manufactured home from being disposed of in a landfill. The act does, however, allow counties to charge a landfill disposal fee for deconstructed units.

The process for "managing" and removing such units is ambitious. Perhaps the key to S.L. 2008-136 is the definition of an "abandoned manufactured home." The unit must either qualify as a manufactured home (as defined for property tax assessment purposes in G.S. 105-164.3) or as a mobile classroom. It must also meet two additional tests. First, the unit must be either vacant or "in need of extensive repair." (Note that occupied units can still be deemed "abandoned.") Second, the unit must

pose an "unreasonable danger to the public health, safety, welfare, or the environment." It appears likely that the public officials charged with enforcing this program will exercise considerable discretion.

The gist of the program is simply to locate those manufactured homes that meet the definition of "abandoned," notify the "responsible party" (anyone possessing an ownership interest in the unit), give that party the opportunity to dispose of the unit, and, if the responsible party fails to do so, remove the unit from the premises and "deconstruct" it. Since much of the process is outlined in the statutes, an extensive implementing ordinance is probably not required. A county is authorized to contract with another unit of local government or private entity to carry out this program.

The "code enforcement" process for the counties that choose to participate in the program is as follows. The county must notify the responsible party and the owner of the land upon which the abandoned manufactured home is located that the unit must be disposed of. The notice must be in writing and served according to the Rules of Civil Procedure. The notice also informs the party that a hearing will be held before a designated public official not less than ten days nor more than thirty days after the notice is served. The notice must also declare that the responsible party has the right to file an "answer" to the order, to appear in person, and to give testimony in what is apparently a quasi-judicial hearing. If the hearing officer then determines that the unit is abandoned, then the officer must prepare findings of fact to support such a determination and order the responsible party to dispose of the unit within ninety days.

If the responsible party fails to comply with the order, the county may dispose of the unit. Specifically, the county may enter the property where the unit is located and arrange to "deconstruct" and dispose of it in a manner consistent with the county's plans. G.S. 130A-309.113(d) specifically provides that an "intact" abandoned manufactured home (one from which the wheels and axles, white goods, and recyclable materials have not been removed) may not be disposed of in a landfill. G.S. 130A-309.114 specifically provides that if the responsible party is not the owner of the land upon which the unit is located, the county may order the land owner to permit entry onto the land to permit the removal and disposal of the unit. It is unclear how this provision complements the state's trespass statutes.

If the county removes, deconstructs, and disposes of the unit (whether by force account or by independent contractor), the responsible party is liable for the actual costs incurred. Such costs include not only abatement activities, but administrative and legal expenses as well, minus the amount of any grant money received by the county for disposing of that unit. Nonpayment of any portion of the county's costs results in the imposition of a lien on any real property in the county that is owned by the responsible party. Although the new abandoned manufactured home statutes treat such units as if they were public nuisances, the legislation clarifies that is does not affect the existing legal ability of local governments to abate public nuisances or exercise any existing powers that a city may have under G.S. Chapter 160A or that a county may have under G.S. Chapter 153A.

Carbon Monoxide Detectors

Public discussion of global warming and carbon footprints has highlighted the growing menace of carbon dioxide in our atmosphere. However, carbon dioxide has a sibling, carbon monoxide, that can be lethal in confined quarters, particularly on residential premises. Because of the invisible, odorless danger caused by carbon monoxide, the North Carolina Child Fatality Task Force recommended legislation requiring the installation of carbon monoxide detectors in new residences (through the amendment of the North Carolina State Building Code) and in existing residential rental units as well.

Much of S.L. 2008-219 (S 1924) represents a compromise among a number of parties including landlords, builders, and those concerned with the public health and safety problems created by the gas. First, the act amends G.S. 143-138(b) to allow, but not compel, the North Carolina Building Code Council to amend the code to require either battery-operated or electrical carbon monoxide detectors in certain new residential units. The express authorization applies to each new dwelling unit with an attached garage, a fireplace, or a fossil-fuel-burning heater or appliance. The detectors to be used must be listed by certain nationally recognized testing laboratories and must be installed in accordance with either National Fire Protection Association standards or the standards outlined in the manufacturer's instructions. It also authorizes the use of carbon monoxide detectors that are combined with smoke detectors.

The act also requires that carbon monoxide detectors be installed by landlords by January 1, 2010, for each building level of each rental dwelling unit with an attached garage, a fireplace, or a fossil-fuel-burning heater. Unless there is an agreement with the tenant to the contrary, the landlord is obligated to install new batteries in a battery-operated detector at the beginning of each tenancy, and the tenant is obligated to replace them as needed. In this regard, the relative obligations are similar to those that apply to the installation and maintenance of smoke detectors in residential rental units.

Finally, the act directs the Building Code Council to study the needs and benefits of carbon monoxide detectors and to report the results of its study to the General Assembly no later than July 1, 2009.

Greenhouses Exempt from Building Code

Another new directive affecting the contents of the State Building Code, G.S. 143-138(b), grows out of S.L. 2008-176 (H 2313). This act deals primarily with driveway permits along state highways. However, one section of the act makes the Code inapplicable to greenhouses that are within a municipality's "building-rules" jurisdiction (apparently any area within which a municipality enforces the State Building Code, including, where applicable, a municipality's extraterritorial planning jurisdiction). A greenhouse is defined as a structure that

1. has a glass or plastic roof,
2. has one or more glass or plastic walls,
3. has an area over 95 percent of which is used to grow or cultivate plants,
4. is built in accordance with the National Greenhouse Manufacturers Association Structural Design manual, and
5. is not used for retail sales.

However, the act requires local governments subject to the exemption to approve additional requirements addressing various life safety hazards posed by greenhouses.

Government Liability for Negligence

The so-called public duty doctrine holds that the government and its agents cannot generally be held responsible for damages or injuries that occur to members of the public simply because government has not adequately protected them from the actions of third parties. Thus government owes no duty of protection to the public generally; in effect a duty to everyone is a duty to no one. S.L. 2008-170 (H 1113) affects the ability of state departments and agencies to use the doctrine as a defense against suits for alleged negligence. It does not directly affect local government liability for the negligence of code enforcement officials. In fact the act declares that nothing in it "shall limit the assertion of the public duty doctrine as a defense on the part of a unit of local government or its officers, employees, or agents." Its real purpose is to codify for the first time the portion of governmental liability law that applies to state government.

The act enacts new G.S. 143-299.1A, which generally limits the use of the public duty doctrine to two circumstances. The first involves the alleged negligence of a state law enforcement officer in protecting the claimant from the actions of others or from an act of God. The second involves the alleged negligent failure of a state official or agent to properly perform a health or safety inspection required by statute. It is worth noting that North Carolina courts have refused to apply the public duty doctrine to local government code enforcement officials involving the failure to conduct properly building or housing code or septic tank inspections. The new legislation is effective for claims made on or after October 1, 2008.

Studies

Section 18.1 of the studies act, S.L. 2008-181 directs the North Carolina Building Code Council to "reexamine" its adoption of certain sections of the North Carolina Electrical Code to determine "whether they are necessary and cost-effective." The sections concern circuit-interrupter protection, allowable ampacities in certain cables, and tamper-resistant receptacles in dwelling units.

Section 34.1 continues the Joint Select Committee on Emergency Preparedness and Disaster Management Recovery. One of the topics it is directed to study is "(w)hether the State building code sufficiently addresses issues related to commercial and residential construction in hurricane and flood prone areas." The committee's final report, including any proposed legislation, must be delivered to the General Assembly by December 31, 2009.

Local Acts

Building permit thresholds. In 1983 G.S. 160A-417 and G.S. 153A-357 were both amended to increase from $2,500 to $5,000 the value of the construction work below which no building permit was required. However, the act (Section 5 of S.L. 1983-614) specifically exempted Edgecombe, Nash, and Wilson counties from the increase in this threshold so that a stricter standard for building permits applied in those counties. This summer, twenty-four years later, the General Assembly enacted S.L. 2008-65 (H 2255), which repeals the exemption for these counties, thereby bringing these counties back under the $5,000 threshold that continues to exist to this day. The act became effective September 1, 2008.

Building condemnation authority. About a dozen cities are subject to G.S. 160A-425.1. The statute allows named cities to declare nonresidential as well as residential buildings in community development target areas to be unsafe and order their removal. S.L. 2008-59 (S 1971) adds Rocky Mount and Wilson to the list of cities that may use this authority.

Bills That Did Not Pass

The Senate passed S 1507 in 2007, making it eligible for further consideration in the 2008 session. It would have restricted the circumstances under which a local government could require periodic inspections in order to check for compliance with fire prevention regulations, minimum housing ordinances, and conditions giving rise to

building condemnation. Under the bill a local government could require periodic inspections in response to "blighted or potentially blighted conditions" in a designated target area. Otherwise periodic inspections could be conducted only where there was "probable cause."

The bill, however, also included provisions that would enhance the choices available to local minimum housing inspectors. It would have amended the housing statutes to provide that if a dwelling can be repaired or improved, the inspector could so require and would not have to allow the owner to comply by vacating and closing the dwelling. There are an increasing number of complaints about owners who simply board up houses to avoid having to repair them.

S 1507 never made it out of the House committee to which it was referred.

Transportation

State Road Connection and Encroachment Permits

One portion of S.L. 2008-176 reflects a legislative recommendation made by the Joint Legislative Transportation Oversight Committee. Section 1 of the act enacts new G.S. 136-93.1 to establish an express permitting review program for permits authorizing connections to the state highway system. The program applies to all permits for connections to the road system by way of a driveway, intersecting street, signal, drainage way, or any other encroachment. The problem has lain in the fact that some such permits take four months or more in some areas of North Carolina.

If a particular NCDOT highway division office routinely reviews and issues special commercial permits within an average of forty-five days, then the division is not compelled to adopt an expedited permit review process. Otherwise an express permit program must be established, supported by permit fees. A uniform system of fees must be adopted by NCDOT that is applicable to all participating divisions. Unless NCDOT contracts out for the permit review to be conducted by an engineering firm, the most that can be charged for the express review of all of the permits listed above is $4,000. Program fee revenues are earmarked for the administration of the program, including the costs of program staff salaries and contract firms.

One other feature of the expedited application review process is that once the application is deemed to be complete, the permit must be issued or denied within forty-five days. Yet the act provides that if the application is neither denied or the permit issued within forty-five days, the failure is deemed to be a denial of the express permit application.

The act requires NCDOT to report annually to the Fiscal Research Division and the Joint Legislative Transportation Oversight Committee concerning how the program is working.

Local Government Participation in State Highway Projects

Legislation adopted in 2006 opened the way for counties to play a larger role in the programming and funding of projects on the state highway system, if they choose to do so. S.L. 2008-180 (H 2314) represents a further expansion of the role of counties in such projects. In each instance the changes allows counties, like cities, to "participate" financially in the acquisition of land for and the construction and maintenance of state highway projects.

A number of statutory conforming changes have been made. First, the act amends G.S. 143B-350(f1) to provide that the fact that a county (as well as a city) participates financially in a state highway project "shall not be a factor considered by the Board of Transportation" in the development of its transportation improvement plan. Second, the act amends G.S. 136-18(27) to allow NCDOT to adopt rules for voluntary participation in state highway projects by counties as well as cities. Third, the act amends G.S. 136-66.3 to extend powers now held by cities to counties. The most notable of these are as follows. Where enabling authority allows it, counties, like cities, may require improvements to a state road such as additional travel lanes, turn lanes, curb and gutter, and drainage facilities in connection with land development projects abutting a state road. Similarly, a county as well as a city may pay for improvements to a road project in the state Transportation Improvement Plan that are in addition to the improvements that NCDOT would normally include in the project. In such instances NCDOT may now allow counties as well as cities a period of at least three years from the date the project is initiated to reimburse NCDOT an agreed upon share of the cost. Also, counties may now not only use eminent domain to acquire right-of-way for state projects, they may also employ the "quick-take" procedure available to NCDOT and cities. Fourth, an amendment to G.S. 136-98(c) seems intended to reassure counties that their participation is voluntary; it also provides that NCDOT "shall not transfer any of its responsibilities to counties without specific statutory authority." Finally, the act amends the roadway corridor official map statutes (G.S. 136-44.50 to 136-44.53) so as to allow counties to adopt such maps. Remarkably, the new legislation fails to clarify the nature of the geographic area for which a county may adopt an official map. It seems likely, however, that a county is authorized to adopt such a map for a road project located within the county's planning jurisdiction.

One other change made by S.L. 2008-180 amends G.S. 136-18(2) to add "broadband communications" to the list of infrastructural improvements and utilities that NCDOT may locate within a state road right-of-way and for which it may acquire right-of-way.

Studies

The studies act, S.L. 2008-181 provides for the possibility of several transportation-related studies. Sections 27.1 and 27.2 direct NCDOT to study the amending of its standards so as to allow construction of sound barriers along existing state highways that generate significant noise in order to protect adjacent residential communities. The study, which is to include the costs of changing the standards and potential sources of funding, is to be submitted to the Joint Legislative Transportation Oversight Committee by March 1, 2009. Section 4.4 authorizes the Joint Legislative Transportation Oversight Committee to study, and report to the 2009 session, whether North Carolina should enter into a compact with South Carolina, Tennessee, and Virginia to coordinate efforts to establish an inland port. Section 6.2 authorizes the Environmental Review Commission to study the costs and benefits of adopting the California motor vehicle emission standards for North Carolina. Section 26.1 directs NCDOT to study the Piedmont and Northern Railway line in Gaston County to determine the cost of bringing the full line back into operation. The report to the Joint Legislative Oversight Committee is due by January 15, 2009.

Local Acts

S.L. 2008-16 (S 1748) allows Chapel Hill to increase motor vehicle registration fees by an additional $10 annually to support public transportation.

Bills That Did Not Pass

In 2007 the House passed two transportation-related bills, H 1576 and H 1559, making them eligible for further consideration in the 2008 session. H 1576 would have authorized NCDOT, municipalities, and metropolitan planning organizations to devise and implement a comprehensive traffic control plan to coordinate traffic signals on certain state highways to reduce energy consumption. H 1559 would have authorized operators of transit systems to erect certain "transit amenities" (such as transit shelters, trash receptacles, and commercial advertising displays) within public rights-of-way. Both bills were left to die in the Senate committees to which they were referred.

Environment

Stormwater

The legislature enacted two notable acts regarding stormwater management in 2008 that have planning and development regulation implications. The first deals with a statewide requirement regarding parking lots and the second deals with coastal stormwater rules.

The parking lot provision had its origins in the 2007 budget bill. That act included a special provision on stormwater management that created G.S. 143-214.7(d2) requiring (as of October 1, 2008) that all surface parking lots have no more than 80 percent built-upon area and that the remaining 20 percent of the parking area have either permeable pavement or other design requirements for stormwater management (such as grass or other permeable surfaces, bioretention ponds, or other water retention devises). This requirement was modified in 2008. Section 8 of S.L. 2008-198 (S 845) repeals the 2007 provision and replaces it with a requirement that only applies in areas not subject to other stormwater management regulations (including rules applicable to water supply watersheds, high quality waters, outstanding resource waters, nutrient sensitive waters in the Neuse and Tar-Pamlico basins, the Randleman Lake watershed, and areas subject to Phase II or coastal counties stormwater rules). For other areas, the requirement applies to parking areas that have land disturbing activities (as defined by the Sedimentation Pollution Control Act) of an acre or more. The requirement gives two options for these lots: (1) the parking area may contain no more than 80 percent impervious surface; or (2) the stormwater runoff generated by the first two inches of rain that falls on at least 20 percent of the parking area must flow to an appropriately sized bioretention area. The bioretention area must meet standards to be set by DENR. Compliance with these requirements is also made a precondition for building permits for these projects.

The state has been wrestling with general stormwater management regulations for the better part of two decades. Statutes, regulations, and litigation have dealt with runoff standards applicable to a variety of areas. Perhaps none has been more controversial than the stormwater requirements for the coastal area. One result of this debate was legislative action in 2008 to take over the decision-making on the standards to be applied for coastal stormwater management. S.L. 2008-211 (S 1967) disapproves the coastal stormwater rules adopted by EMC in early 2008 and replaces those rules with the standards set out in the act. The standards differ based on the adjacent water bodies, with separate rules for (1) lands within 575 feet of Outstanding Resource Waters, (2) lands within one-half mile of and draining into waters with an "SA" classification, and (3) other development in coastal counties. The rules limit the amount of impervious surface coverage, require vegetated buffers adjacent to some waters, allow engineered solutions with some high density options, set standards for structural stormwater controls, and provide for vesting of some previously approved projects. Coastal jurisdictions generally are to comply with these rules rather than Phase II stormwater requirements. Also, S.L. 2008-198 (S 845) limits any new EMC rule-making covering coastal stormwater rules from becoming effective until October 1, 2013.

Water Supply

A severe drought has affected many parts of the state over the past two years. The legislature updated the statutes to address this issue in 2008. S.L. 2008-143 (H 2499) adds a number of items to the statutes to deal with these concerns.

A key component of the new legislation is new G.S. 143-355.2. This statute requires each local government that provides public water to develop and implement water conservation measures to respond to a drought, including a water shortage response plan that must be reviewed and approved by DENR. The plan must include tiered levels of water conservation measures based on drought severity (but it may not include metering or regulating private drinking water wells). The state is authorized to order a local government to implement its management plan if the local government has not acted and action is necessary to minimize the harmful impacts of a drought and may, under extreme conditions, order a local government to move to a more stringent tier under its plan. A state default plan can be imposed if a local government fails to adopt its own plan. Newly enacted G.S. 143-355.3 authorizes the governor to declare a water shortage emergency. Once that declaration is made, DENR can require local governments to allow temporary interconnections among water systems and impose emergency rules on conservation and use of water in the affected area.

The act provides that

- separate meters must be installed for new in-ground irrigation systems;
- local governments or large community water systems must meet specified requirements to be eligible for funding to extend waterlines or expand water treatment capacity, including that water rate structures not be discounted for high volume users, that localities have a leak detection system, and that consumer education programs be enacted;
- water reuse must be studied and is encouraged.

The act also allows limited use of grey water for watering trees, plants, and shrubs at single-family homes; adds new reporting requirements for large-scale agricultural water users; and limits restrictive covenants that require watering of lawns during droughts.

In other action affecting water supply issues, S.L. 2008-10 (S 1872) extends the Environmental Review Commission's Water Allocation Study to allow an interim report to the 2009 General Assembly and require a final report by October 1, 2010. S.L. 2008-137 (S 1046) requires the Environmental Review Commission to study the impacts of a new fifty-year license being considered by the Federal Energy Regulatory Commission for Alcoa's Badin facility.

Hazards and Emergency Preparedness

S.L. 2008-162 (H 2432) directs the state Division of Emergency Management to study ways and develop plans to increase the capacity of counties to plan for, respond to, and manage disasters. The study is to examine mandating that counties establish and maintain a county emergency management agency, having full-time local emergency management coordinators in each county, implementing an emergency management certification program for local staff, and developing registry programs for functionally and medically fragile persons who will need assistance during a disaster. The Division is to consult with the Association of County Commissioners when preparing the study and is to report its results to the legislature's Joint Select Committee on Emergency Preparedness and Disaster Management Recovery and the relevant Appropriations subcommittees by December 1, 2008. A comparable provision for this study was also included in the 2008 Studies Act, Section 20.1 of S.L. 2008-181.

Other Environmental Legislation

Legislators enacted a variety of other legislation on environmental issues that have implications for planning and development regulation. Many of these acts are discussed in more detail in Chapter 11, "Environment and Natural Resources."

S.L. 2008-152 (S 1885) amends G.S. 1432-14.11 to add provisions for private parties to provide compensatory mitigation for wetland alteration through use of private wetlands mitigation banks that have been approved either by DENR for resources regulated under the Neuse or Tar-Pamlico rules or by the U.S. Army Corps of Engineers.

S.L. 2008-171 (H 1889) extends use-value property taxation to wildlife conservation land. To qualify, the property must have at least twenty contiguous acres, and be under a written wildlife habitat conservation agreement with the Wildlife Resources Commission. No more than 100 acres of an owner's land in any one county may be included nor may land owned by businesses that are publicly traded.

S.L. 2008-203 (S 1946) sets energy and water efficiency standards for state funded buildings.

The 2008 Studies Act, S.L. 2008-181 authorizes a variety of environmental studies, including consolidation of environmental regulatory programs, state permits for wind turbines, hazard disclosures in coastal real estate transactions, phasing out hog lagoons, and limits on use of eminent domain for conservation lands. Section 36 of the act also creates a fourteen-member Legislative Study Commission on Urban Growth and Infrastructure Issues. The Commission is directed to study options for fostering regional planning for water and transportation infrastructure, strategies for encouraging the use of incentive-based

planning in urban areas (including additional local land use regulatory tools), and strategies to help urban communities and regions address the challenges presented by rapid growth and resultant demands on schools, roads, and other public services. State agencies and local governments are directed to provide the Commission with any requested information in their possession or available to them. The Commission is to report to the 2009 General Assembly upon its convening.

Miscellaneous

Real Property Reappraisal

S.L. 2008-146 (S 1878) allows counties to reassess real property more frequently than once every eight years and requires certain counties to reassess within three years if their sales/assessment ratios deviate too far from the norm.

Bills That Did Not Pass

H 878 passed the House in 2007, making it eligible for further consideration in the 2008 session. It would have called for a statewide voter referendum to consider an amendment to Article I, section 19 of the North Carolina Constitution to expressly prohibit the use of eminent domain for economic development purposes. The bill died in the Senate committee to which it was referred.

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Courts and Civil Procedures

The most important result of the 2008 session for the judiciary was what did not happen. Despite the state's budget woes, the courts' funding generally remained intact, even for the large number of new positions added in 2007. In fact, although the legislature slightly reduced the total judicial appropriation, it added more judicial positions. In other significant action, legislators restored recurring funding for the conferences of district attorneys and clerks of court, but they expressed their unhappiness with some prosecutors' activities by restricting lobbying by court officials. The back-and-forth regarding responsibility for the costs of a new telephone system—an issue that arose at the end of the 2007 session when a last-minute enactment obligated counties to pay for telephones—was resolved by restoring state responsibility and creating a new court fee to cover the costs. Several changes in the law will affect clerks of court, prompted by the problems in the housing and mortgage industries and the rising number of foreclosures. There were no substantial changes in the structure, procedures, funding, or administration of the Judicial Department, however.

Budget

Appropriations, New and Eliminated Positions

In 2007 the General Assembly responded to long-standing needs of the court system by appropriating unprecedented amounts of new funds and creating nearly 400 new positions for fiscal year 2007–08 and almost 300 more for fiscal year 2008–09. Even though, as with the rest of the country, the state's financial position has darkened greatly since then, the legislature stuck with almost all of the court improvements. The 2007 General Assembly appropriated $452 million to the Judicial Department for fiscal year 2008–09; when the 2008 session ended that number had been reduced by only about $1.5 million.

The budget enacted in 2007 included twenty-eight new assistant district attorneys to be added in fiscal year 2008–09. The 2008 session preserved those positions and added three more. Most of the districts that will receive new positions will get only one additional assistant district attorney; Districts 11 (Harnett, Johnston, and Lee counties) and 14 (Durham County), however, are allotted two new hires, District 10 (Wake County) is allotted three, and District 26 (Mecklenburg County) is allotted five. Districts 10, 11, and 26 each will also receive another district judge. In January 2009 the next governor will appoint the new judges, who will serve until their successors are elected in 2010 for regular four-year terms. With these new positions Mecklenburg County will have twenty-one district court judges and fifty-eight assistant district attorneys; Wake County will have nineteen district judges and forty-two assistant prosecutors.

In addition to the state-funded positions, the General Assembly authorized the Mecklenburg County district attorney's office to fund eight "time-limited" assistant prosecutors with money from the county and the City of Charlotte. "Time-limited" means the positions are full-time and counted as permanent for benefits, but they will exist only for a limited time.

The district judges and assistant district attorneys are not the only new positions. Ten full-time magistrates also will be added in January 2009, with one each to go to Durham, Forsyth, Gaston, and Guilford counties; two to Wake County; and four to Mecklenburg County in line with the recommendations of the Administrative Office of the Courts (AOC). Three new district court judicial assistant positions also are added starting in 2009. Other new personnel added by the 2008 session include four deputy clerks, more supervisors for the guardian ad litem program, two positions for the Innocence Inquiry Commission, and another staff person for the Sentencing and Policy Advisory Commission. Eliminated

positions include a superior court judgeship that AOC did not request and the two judicial assistants that went with that judgeship, plus the budgets for three now-closed dispute resolution centers.

In 2007 the General Assembly appropriated funds to expand the number of Indigent Defense Services (IDS) offices in both fiscal year 2007–08 and fiscal year 2008–09. This year's appropriations act eliminates the new offices for 2008–09, but it appropriates approximately the same amount of money to pay for private assigned counsel. The legislature added $200,000 to the IDS budget to maintain grants for local sentencing service programs operated by nonprofits at the 2007–08 level. The funds came from a $200,000 reduction in IDS's budget for inflation, lodging, transportation, supplies, and so forth.

Salaries

Like other state employees, all judicial branch officials and employees received fiscal year 2008–09 pay increases of the greater of 2.75 percent or $1,100. The salary charts for clerks and magistrates were amended to reflect those increases. The one exception to the general salary increase is an additional increase of $1,244 for the chief judge of the Court of Appeals to restore a salary differential that existed between the salary of the chief and other Court of Appeals judges until 1994; the difference is now also about the same as the difference between the chief justice and other justices on the North Carolina Supreme Court. The provision concerning the chief judge's salary is in S.L. 2008-118 (H 2438).

In response to efforts by bar officials to have a commission created to review and recommend judicial salaries, the legislature in S.L. 2008-181 (H 2431) established a new Study Commission on Compensation of the Governor's Cabinet and State Elected Officials. The eighteen-member commission is to report to the General Assembly by January 15, 2009.

Telephones

A contentious issue brewing since the end of the 2007 session was the responsibility for the cost of replacing courthouse telephone systems. Counties, of course, are responsible for providing court facilities, and the state pays for operating expenses of the court system. AOC generally has paid for computers and other equipment, but questions arise from time to time over whether a particular item instead ought to be considered part of the facility. At the end of the 2007 session, a last-minute budget amendment required counties to provide telephone systems in courthouses subject to AOC's specifications. AOC did not request the legislation, had been providing phones for years, and recently had been working toward an upgrade to Voice over Internet Protocol (VoIP), a computer-based technology.

Counties reacted unfavorably to the 2007 legislation and its new financial obligation, and AOC itself was concerned about maintaining its goal of standardized VoIP telephones in all courthouses. The solution, in the appropriations act, is to return telephone responsibility to AOC and to impose a new one dollar fee on all cases. The proceeds from the new fee go to the Court Information Technology Fund and are to be used to pay for phone systems. There was general agreement between AOC and the counties before the 2007 legislation that counties are responsible for wiring of buildings for telephones and other uses, and that will remain the case.

Other Fees

The only other court fee increase included in the appropriations act is a $20 jump in the filing fee in divorce actions—from $55 to $75—with all of the new money going to the Domestic Violence Center Fund.

Advancement of Fees by Local Governments

The 2007 appropriations act amended G.S. 7A-317 to remove the exemption for cities and counties from advancing most court costs. The change was to have taken effect July 1, 2008, but S.L. 2008-193 (S 2056) restored most of the exemption. The 2008 act returns the law to the existing practice that local governments do not have to advance the facilities fee, General Court of Justice fee, or the process fees in G.S. 7A-311. For the various miscellaneous fees imposed under G.S. 7A-308 (acknowledgement of oath, preparation of transcript of judgment, preparation of copies, and so forth), however, only actions brought by social services, such as child support and child abuse, are exempted from the advancement of those costs.

Other Budget Directives

The appropriations act also includes several directives to judicial branch officials that only partially involve appropriations. IDS and AOC are directed to consult and report by March 1, 2009, on developing a statewide system to enable IDS to obtain information about indigent cases when counsel is first appointed. The act also authorizes IDS to spend up to $25,000 for a pilot program on alternative court scheduling to reduce wait time for defense lawyers and prosecutors. Any pilot program will require agreement of the senior resident superior court judge, chief district judge, and district attorney.

The Sentencing and Policy Advisory Commission is to study how to measure the effectiveness of programs that receive Juvenile Crime Prevention Council grants. An interim report to the interested legislative committees is due by December 2008, and the final report is due by May 1, 2009.

In partial response to several high profile criminal cases involving probationers, the appropriations act requires AOC to use up to $100,000 from the Court Information Technology Fund to connect the computer databases of the Department of Correction and AOC to provide probation officers with the most current information on arrests and pending charges against probationers.

The appropriations act amends G.S. 7A-474.3(b) to empower legal aid lawyers to assist indigent clients in cases involving predatory mortgage lending, broker and loan abuses, foreclosures, and related issues. For those purposes, the act directs $200,000 to the State Bar to go to the Land Loss Prevention Project and Financial Protection Law Center.

Lobbying by Court Officials

In the 2007 session the General Assembly appropriated funds for the Conference of District Attorneys and the newer Clerks of Superior Court Conference, but the dollars were categorized as a one-time expenditure and not part of the continuation budget. At the same time legislators asked for reports about the work of the two associations. The actions were seen as a message that legislators were unhappy with the amount of time employees of the conferences, particularly the staff of the district attorneys' organization, were spending lobbying legislators—and sometimes taking positions contrary to those of AOC.

At different times in the 2008 legislative budget process the funds for the two conferences were included in or omitted from the budget, but finally the money was restored as a recurring appropriation. To more directly address the lobbying issue, though, the General Assembly adds restrictions on judicial branch lobbying in S.L. 2008-213 (H 2542).

First, Section 31 of S.L. 2008-213 amends G.S. 120C-500 to declare that the chief justice is to designate at least one person, but no more than four, to serve as a liaison to the legislature for all the agencies within the court system. The change will keep the conferences of district attorneys and clerks from sending their staff to lobby the General Assembly unless those employees happen to be chosen by the chief justice as designated liaisons of the judicial branch. Individual prosecutors and clerks and other court system officials, though, may still contact legislators on their own because existing law, in G.S. 120C-700(3), exempts public officials and employees from the restrictions on lobbying "when acting solely in connection with matters pertaining to the office and public duties . . . ."

Section 30 of S.L. 2008-213 also amends G.S. 120C-500, this time to prohibit any "constitutional officer" from contracting with an individual to lobby the legislature. The effect of this provision on court officials is unclear, however, because the statute does not define "constitutional officer." While judges, district attorneys, and clerks of court certainly hold offices that are created by the North Carolina Constitution, the State Government Ethics Act, which was enacted in 2006 in the same legislation that wrote the lobbying law in Chapter 120C, defines constitutional officer in G.S. 138A-3(8) to include only executive branch offices. If the same definition were applied to G.S. 120C-500, the prohibition on hiring lobbyists would not affect judges, district attorneys, or clerks.

Autism Study

In response to a recommendation from the Joint Study Committee on Autism Spectrum Disorder and Public Safety, S.L. 2008-83 (H 2523) requires the UNC School of Government to study whether court personnel need additional training on the legal issues related to autism and appropriate responses to individuals who have autism. The School of Government is to consult with the Autism Society of North Carolina, UNC's Division TEACCH (Treatment and Education of Autistic and related Communications-handicapped CHildren), and other appropriate organizations. The report, which is due October 1, 2008, is to document how the training should be delivered and estimate the cost of the proposed training.

Mediation

S.L. 2008-194 (H 545) amends the statutes concerning mediations in superior court (G.S. 7A-38.1), in actions before the clerk of court (G.S. 7A-38.3B), and in district court (G.S. 7A-38.4A) to state that a person who fails to attend a mediation or fails to pay the mediator's fee is subject to contempt as well as paying a fine, attorneys' fees, and the expenses and loss of earnings of others who attended. A party may move for sanctions to be imposed or the court may initiate the action on its own by entry of a show cause order. The changes take effect January 1, 2009.

Adult Guardianship and Incompetency

Guardian's Sale of Personal Property

Effective October 1, 2008, S.L. 2008-87 (H 2390) amends G.S. 35A-1251 and -1252 to increase to $5,000 the amount of a ward's tangible personal property a guardian may sell without a court order and to allow that amount to be sold in each accounting period. The statute previously limited the amount to a maximum of $1,500 for the duration of the estate.

Loss of Driver's License

G.S. 20-17.1(a) requires the commissioner of motor vehicles to determine whether to revoke the driver's license of a person who has been adjudicated incompetent or involuntarily committed to a treatment facility for drug or alcohol addiction. Under S.L. 2008-182 (H 2391) the commissioner is to

consider, with respect to a person who has been adjudicated incompetent, the clerk of court's recommendation. The amendment applies to persons adjudicated incompetent under G.S. Chapter 35A on or after October 1, 2008.

Foreclosures

Suspension of Foreclosure Proceeding upon Notice of Violation

S.L. 2008-228 (H 2463) requires mortgage servicers to be licensed and regulated by the commissioner of banks under the same provisions as mortgage brokers. Mortgage servicers receive scheduled periodic payments from a borrower pursuant to the terms of a loan, including amounts for escrow accounts, and make the payments of principal and interest and such other payments from the borrower under the terms of the loan.

S.L. 2008-228 also amends G.S. 53-243.12 to provide that if the commissioner of banks has evidence that a material violation of law has occurred in the origination or servicing of a loan in foreclosure, and that the violation would affect the validity or enforceability of the underlying contract or right to foreclose, the commissioner may notify the clerk of court. The clerk must then enter an order suspending the foreclosure for sixty days from the date of notice. The deadlines under the foreclosure statute are tolled during the suspension period. At the end of the sixty-day period the trustee may proceed with the hearing by providing written notice of a new hearing date not less than ten days before the hearing. If the order of suspension occurs after the clerk has authorized the foreclosure but before the expiration of the ten-day upset bid period, the trustee is not required to hold a new hearing but must advertise and hold the sale as provided in G.S. Chapter 45. If the violation is cured before the sixty-day period, the commissioner must notify the clerk so that foreclosure may resume. These new provisions affect foreclosure proceedings filed on January 1, 2009, or later.

Foreclosures of Subprime Loans

S.L. 2008-226 (H 2623) adds to G.S. Chapter 45 a new article, the Emergency Program to Reduce Home Foreclosures Act, in response to the flood of home foreclosures due to subprime loans. The new law applies to loans originated after January 1, 2005, and before December 31, 2007, that meet the definition of a rate spread home loan in G.S. 24-1.1F(a)(7). The legislation also creates the State Home Foreclosure Prevention Project to seek solutions to avoid home foreclosures in individual cases. Key provisions of the new article, which takes effect November 1, 2008, and expires October 31, 2010, include the following.

Pre–foreclosure notice requirement. At least forty-five days before filing a notice of hearing in a foreclosure proceeding, a mortgage servicer of a subprime loan must mail a pre–foreclosure notice to the borrower giving the borrower information about the availability of resources to avoid foreclosure. The mortgage servicer must also electronically file information about the borrower with AOC within three days of mailing the pre–foreclosure notice to the borrower. AOC must develop an internal database of such borrower information for access by the commissioner of banks, the clerks of court, and the newly created State Home Foreclosure Prevention Project. The AOC database and its contents are not public records.

Extension of time for foreclosure filings. The commissioner of banks may extend the time for filing a foreclosure proceeding on a primary residence for thirty days beyond the date set in the pre–foreclosure notice and also may notify the borrower and AOC if the commissioner determines that there is a reasonable prospect of avoiding foreclosure in a given case. This thirty-day period is designed to facilitate a negotiation period between the lender and borrower as to terms that might prevent the foreclosure.

Certification of pre–foreclosure notice. The act also amends G.S. 45-21.16 to provide that in any foreclosure filed November 15, 2008, or later, the notice of hearing must contain a certification that the pre–foreclosure notice was provided and that the periods of time in the statute have expired. Inclusion of a materially inaccurate statement in the certification is cause for dismissal of the foreclosure filing without prejudice and for payment by the filing party of the "costs of borrower in defending the foreclosure proceeding." It is unclear what costs would be payable by the filing party under the current costs and expenses provisions of G.S. Chapters 6 and 7A.

New fifth finding in all foreclosures. The act amends G.S. 45-21.16(d) to require the clerk of court to make a fifth finding in all foreclosure hearings in addition to the existing findings of valid debt, default, right to foreclose, and proper notice. The clerk must find either that the underlying mortgage debt is not a subprime loan or, if it is a subprime loan, that the pre–foreclosure notice was provided in all material respects and that the periods of time established under the act have elapsed. The clerk has access to the AOC database to confirm the information provided to borrower.

Matters of Particular Interest to Clerks

No Name Change for Sex Offender

S.L. 2008-218 (S 132) creates G.S. 142-02.6 and amends G.S. 101-6 to prohibit a registered sex offender from obtaining a name change.

Additional Checks for Firearm Purchasers and Owners

In response to the Virginia Tech murders, the General Assembly passed S.L. 2008-210 (S 2081), effective December 1, 2008, to create an additional check on who may purchase or possess a firearm in North Carolina. The act amends G.S. 122-C54 to require the clerk of court "in the county where the judicial determination was made" to report any involuntary commitment for mental illness to the National Instant Criminal Background Check System (NICS) so the information can be accessed in determining eligibility to purchase or possess a gun. The law applies to orders both for inpatient and outpatient commitment for mental illness, but then specifies that for outpatient commitment the report is to be made only if the individual is found to be a danger to self or others. Because North Carolina law does not require a finding of dangerousness for outpatient commitment, in practice the law is likely only to apply to inpatient commitment. The act also requires the clerk to notify NICS when a defendant is found not guilty by reason of insanity, or mentally incompetent to proceed in a criminal trial.

In addition, G.S. 122C-54.1 now sets out a procedure for a person to petition the district court for the removal of the mental commitment bar to firearm purchase and possession if the person no longer suffers from the relevant condition. The petition must be filed in the county in which the most recent judicial determination of commitment was made or in which the petitioner lives. The clerk of court will then schedule a hearing with notice to the petitioner and the district attorney in that county. Notice must also be served on the director of the inpatient treatment facility and the district attorney in the petitioner's current county of residence if different from the county of filing. The burden is on the petitioner to prove that he or she no longer suffers from the condition that resulted in the commitment and no longer poses a danger to self or others for the purposes of purchasing or possessing a firearm. The district attorney may present evidence to the contrary. The district court must find facts and decide whether the petitioner continues to suffer from the relevant condition and poses a danger to self or others. Appeal is de novo to superior court. After denial of the petition by the superior court, the petitioner may not file another petition for at least one year. If the petition is granted, the clerk of court must forward the order to NICS.

Monitoring Fees Accepted by Randolph Clerk

By S.L. 2008-20 (H 2762), the General Assembly authorized the Randolph County clerk of court to accept fees ordered by the court for pretrial electronic monitoring by the sheriff and to pay that money to Randolph County.

Civil Procedure

Electronic Receipts in Service of Process

Subsection (j) of Rule 4 of the North Carolina Rules of Civil Procedure allows service by designated private delivery service on many types of parties. In each instance, the serving party must obtain a delivery receipt. The rule was amended by S.L. 2008-36 (H 2287), which allows the receipts to be in electronic or facsimile form. This new provision is effective for receipts given on or after October 1, 2008. The bill also adds a new subsection (j6) to make explicit that nothing in subsection (j) authorizes service by electronic mailing.

Public Duty Doctrine

There has been some confusion in recent years within the case law on governmental liability about the extent of the public duty doctrine. S.L. 2008-170 (H 1113) sets rules for use of the public duty doctrine as a defense by state agencies, generally codifying the existing case law. The act applies to claims arising October 1, 2008, or later.

To summarize complicated legal issues in the simplest terms, a governmental body may be liable for injuries caused by its employee when the employee is engaged in a proprietary function (for example, operating a golf course or hospital) but have immunity from liability when the employee is serving a governmental function (for example, police protection, garbage collection). Governmental bodies may, and often do, waive their immunity. The state has waived its immunity and accepted liability up to certain limits by enactment of the State Tort Claims Act, and the legislature has specified that local governments waive the governmental immunity defense by purchasing insurance, up to the amount of the insurance. Still, even when liability otherwise might exist it may be barred by the public duty doctrine.

Under the public duty doctrine a governmental body may not be held liable for a failure to protect an individual from harm. Although the government may undertake to protect the public at large, that duty does not extent to individuals. For local governments, the courts have held, the public duty doctrine can be used as a defense only when the victim's claim is based on a law enforcement officer's failure to protect the person. Lovelace v. City of Shelby, 351 N.C. 458 (2000). For state government, the courts have extended the public duty doctrine defense beyond law enforcement to agencies that conduct health and safety inspections, allowing the defense to be used, for example, to protect the Department of Labor from liability to the victims of the Hamlet chicken processing plant fire for the department's negligent failure to conduct proper safety inspections. Stone v. N.C. Dep't of Labor, 347 N.C. 473, cert. denied, 525 U.S. 1016 (1998). More recently, though, the scope of the public duty

doctrine defense has been narrowed by the courts' willingness to find an exemption because a government agency has made an actual promise to protect an individual or created a special relationship in which such protection is expected. In *Multiple Claimants v. N.C. Dep't of Health and Human Servs.*, 361 N.C. 371 (2007), for example, the Supreme Court would not allow the public duty doctrine to be used by the state jail inspection office as a defense to claims of victims of the Mitchell County jail fire based on negligent failure to inspect the facility.

S.L. 2008-170 essentially codifies the case law which has developed concerning the use of the public duty doctrine by state agencies. The act adds a new Article 31 to G.S. Chapter 143 specifying that the public duty doctrine may be used as an affirmative defense only when liability is sought for the negligent failure of a law enforcement officer to protect or the negligent failure of an officer or employee to perform a health or safety inspection required by statute. The public duty doctrine may not be used when a special relationship has been created, a special duty is owed to and relied upon by the victim, or when the failure to perform the health or safety inspection was the result of gross negligence. The act specifies that it is addressing only the use of the public duty doctrine by state agencies, not local governments.

Studies

The comprehensive legislative studies bill, S.L. 2008-181 (H 2431), includes a number of potential studies of interest to court officials. As is always the case, though, the legislation only authorizes the studies: Some will be carried out, but others will not.

Among the topics the Legislative Research Commission is authorized to study are whether executions of individuals with severe mental disability should be prohibited, the felony murder rule and streamlining the determination of whether a first degree murder case may be tried as a capital case, whether denials of pistol permits should be reported to the State Bureau of Investigation for entry into its database, expunction of criminal records for youthful offenders, and timing issues in renewal of permits to carry concealed handguns. Also authorized for study are the standards to be applied in child custody cases, including whether there should be a presumption of joint custody.

The Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse is authorized to study whether appropriate supervision is provided when an individual is ordered to be examined for involuntary commitment.

Several new study committees are created, and the topics they are to consider are largely self-evident from the committees' names. One is a Joint Legislative Study Committee on Civil Commitment of Sexual Predators Who Are Determined to be Incapable of Proceeding to Trial, which will review whether current laws adequately address public safety issues when a defendant who is charged with a sex offense against a child is found incapable of proceeding to trial but does not meet the criteria for involuntary commitment. The Partition Sales Study Committee is to look at the effect of partition sale procedures on the economic use and loss of inherited property and farmland by heirs. The Joint Legislative Study Commission on State Guardianship Laws is to study a wide range of topics concerning guardianship statutes.

A separate act, S.L. 2008-4 (H 2189), requires law enforcement officers to provide additional information to domestic violence victims, as discussed below, and also directs the Domestic Violence Commission to study the adoption of an automated statewide system to notify victims who have received protective orders of critical dates such as when the respondent will be released from custody.

Miscellaneous

S.L. 2008-12 (H 724) amends G.S. 50-13.4 to remove the requirement that a child support order include the Social Security numbers of the parties.

Under G.S. 15A-831 law enforcement officers are required to provide certain information, including the availability of medical services and contract information for prosecutors, to victims of specified domestic violence felonies and misdemeanors. S.L. 2008-4 amends that statute to include in the information to be provided to the victim the informational sheet developed by AOC under G.S. 50B-3(c1) listing services for domestic violence, sexual assault, victims compensation, legal aid and address confidentiality, and the right to apply for a concealed handgun permit. The informational sheet needs to be provided only if the victim and accused are within a personal relationship.

Changes concerning the public financing of judicial election campaigns are discussed in Chapter 8, "Elections." Changes in the law concerning class actions for tax refunds based on the unconstitutionality of tax statutes are included in the appropriations act and discussed in Chapter 26, "State Taxation."

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Criminal Law and Procedure

As in past sessions, the 2008 General Assembly devoted considerable attention to sex offenders—creating, expanding, and tightening restrictions on their conduct and whereabouts. The General Assembly also enacted several offenses involving gang activity and made smaller changes on a range of issues involving criminal law and procedure. This chapter deals with subjects that directly involve criminal law and procedure. For a discussion of other topics that may bear on criminal law and procedure, *see* the chapters on "Children and Juvenile Law," "Courts and Civil Procedures," "Motor Vehicles," and "Sentencing, Corrections, Prisons, and Jails."

Sex Offenders

The General Assembly passed three major acts in 2008 related to sex offenders that create new sex offenses, increase the punishment for existing offenses, and tighten restrictions on convicted offenders. These changes follow major changes enacted in 2006 and 2007 involving sex offenders and may be a prelude to an additional set of changes in 2009, when the General Assembly will consider whether to adopt new federal standards on sex offenders. The discussion below begins with a description of the Jessica Lunsford Act for North Carolina, S.L 2008-117 (H 933), named after a young girl in Florida who was raped and killed in 2005. Various laws, commonly known as Jessica's Laws, have been introduced around the country to increase the punishment for and restrictions on sex offenders. North Carolina's version likewise takes a tough stance on sex offenders. The discussion below then describes the impact of the other two sex offender laws enacted by the 2008 North Carolina General Assembly. It closes by summarizing the key provisions of the federal standards under consideration in North Carolina and other states.[1]

Jessica's Law

Rape and sex offense against a child under age thirteen. Under G.S. 14-27.2, first-degree statutory rape is defined as vaginal intercourse with a victim under the age of thirteen when the perpetrator is at least twelve years old and at least four years older than the victim. Under G.S. 14-27.4, other serious sex acts (such as oral sex acts) constitute first-degree statutory sexual offense if the same age criteria are met. Both crimes are Class B1 felonies, the second highest class of felony in North Carolina. Effective for offenses committed on or after December 1, 2008, S.L. 2008-117 adds G.S. 14-27.2A and 14-27.4A to create the crimes

1. A fourth act, the technical corrections bill, S.L. 2008-187 (S 1632), revises G.S. 14-208.41(b) to clarify that a person must submit to satellite monitoring only if ordered by the court following a hearing under G.S. 14-208.40A or 14-208.40B. Previously, the statute stated that a person had to submit to satellite monitoring if ordered by the court or required by the Department of Correction. The deletion of the latter phrase is consistent with statutory changes made in 2007 by the General Assembly, which explicitly placed the responsibility on the court to decide whether a person met the statutory criteria for imposition of satellite monitoring.

A fifth act, the studies bill, S.L. 2008-181 (H 2431), creates the Joint Legislative Study Committee on Civil Commitment of Sexual Predators, consisting of ten members, five appointed by the Speaker of the House and five appointed by the President Pro Tem of the Senate. This committee is directed to study the state's laws on incapacity to proceed to trial and involuntary commitment, including whether these laws adequately address issues involved when defendants are charged with committing a sex offense against a child, are found incapable of proceeding to trial, and do not meet the criteria for involuntary commitment. The committee must make a final report of its findings and recommendations to the 2009 General Assembly.

of rape and sex offense against a child when the child is under the age of thirteen and the perpetrator is at least eighteen years old. Like first-degree statutory rape and first-degree statutory sex offense, these new offenses are Class B1 felonies. The difference is that the new offenses carry significantly greater penalties. First-degree statutory rape and statutory sex offense are designated as lesser offenses of the new offenses.

The first difference is that a person convicted of one of the new offenses must be sentenced to an active punishment of at least 300 months regardless of regular structured sentencing rules. Ordinarily, a person convicted of a Class B1 felony can receive a low of 144 months active imprisonment to a high of life in prison without parole, depending on the seriousness of the person's prior record level and the presence of aggravating or mitigating factors. The new statutes state that structured sentencing applies to these offenses, subject to the 300-month mandatory minimum and the life imprisonment provision described below. Thus, a person convicted of one of the new offenses may be sentenced to more than 300 months if the person's prior record level and any aggravating factors warrant a greater sentence under structured sentencing.

Second, the new statutes provide that when the defendant is released from prison, he or she must submit to satellite monitoring for life under the sex offender monitoring statutes. The act makes conforming changes to other statutes to apply the procedures for imposing lifetime satellite monitoring to the new offenses. Thus, revised G.S. 14-208.40A provides that upon conviction, the court at sentencing must determine whether the offense was a violation of the new statutes and, if so, order lifetime satellite monitoring. Under revised G.S. 14-208.43(a), a person ordered to submit to lifetime satellite monitoring based on one of the new offenses may petition the Post-Release Supervision Commission to terminate the requirement. The act also amends G.S. 14-208.6(5) to add the new offenses to the definition of *sexually violent* offense, which triggers registration as a sex offender. As with other offenses requiring registration, the length of registration is for a minimum of ten years unless the offense is an *aggravated offense* (as defined in G.S. 14-208.6(1a)), the person is a *recidivist* (as defined in G.S. 14-208.6(2b)), or the court classifies the person as a *sexually violent predator* (per the procedure in G.S. 14-208.20), in which case registration is for life.

Third, G.S. 14-27.2A(c) and 14-27.4A(c) provide that if the court finds *egregious aggravation*, it may sentence the defendant to up to life in prison without parole, regardless of whether the person could receive such a punishment under regular structured sentencing rules. The statutes place the responsibility for determining *egregious aggravation* on the sentencing judge, but this procedure is likely unconstitutional. In *Blakely v. Washington*, 542 U.S. 296 (2004), the U.S. Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. In light of this constitutional requirement, the jury, not the sentencing judge, would likely have to determine *egregious aggravation*.

This procedural defect may make the *egregious aggravation* provisions difficult to implement without further legislative action. One problem is that the new statutes do not contain a procedure for submitting the question of *egregious aggravation* to the jury, although this problem may be within the trial courts' authority to remedy. North Carolina faced a similar issue when the U.S. Supreme Court decided *Blakely* and effectively invalidated the portion of North Carolina's sentencing statutes directing the sentencing judge to decide aggravating factors. The General Assembly revised the sentencing statutes to address this defect, but for cases not covered by the revised statutes the North Carolina appellate courts held that trial judges could fashion a procedure for submitting aggravating factors to the jury.[2] Trial judges may have comparable authority to remedy the constitutional defect in the new rape and sex offense statutes by fashioning a procedure for submitting the issue of *egregious aggravation* to the jury. A second and perhaps bigger problem, however, lies in the imprecise definitions of *egregious aggravation* in the new statutes, which were designed for application by judges accustomed to exercising discretion, not for juries normally charged with finding concrete facts. The new statutes state that *egregious aggravation* may be found if "the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17" (structured sentencing). The term also can include "further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover." It also may be considered "based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim." In light of these definitions, it may be difficult without legislative clarification for a jury to follow a judge's instructions and determine whether an offense involves *egregious aggravation*.

Last, a person convicted of rape under new G.S. 14-27.2A "has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape" and has no rights "related to the child under Chapter 48 [adoptions] or Subchapter 1 of Chapter 7B [abuse, neglect and dependency] of the General Statutes." The same disqualifications apply to first- and second-degree rape under G.S. 14-27.2 and 14-27.3.

2. *See* State v. Blackwell, 361 N.C. 41 (2006).

Thirty-year registration for offenses not subject to lifetime registration. Before 2006, a person subject to registration in North Carolina had to register for ten years unless he or she was subject to lifetime registration. In 2006, the General Assembly amended the ten-year requirement to provide that registration does not terminate automatically after ten years; rather, the person must petition the superior court to terminate the requirement after ten years. Until terminated, the registration period continues indefinitely. S.L. 2008-117 amends G.S. 14-208.6A and 14-208.7 to impose a thirty-year registration requirement. The change appears to impose a maximum period of registration, after which registration automatically terminates.[3] A person still may petition the court to terminate registration after ten years (pursuant to the procedure in G.S. 14-208.12A). The new thirty-year requirement exceeds the federal standards, still to be considered by North Carolina, for two of three categories of sex offenders (discussed below under the heading "Federal Guidelines on Sex Offender Registration"). The effective-date clause states that the change applies to registrations made on or after December 1, 2008. By using the general term "made," the General Assembly appears to have intended for the change to apply to individuals who begin registration or are still required to register on or after December 1, 2008.[4]

Three-day time limit on changes in status. Several of North Carolina's statutes impose a ten-day time limit for sex offenders to register or give notice of certain changes in their status. G.S. 14-208.7 has required residents who are released from a penal institution, as well as nonresidents who move to North Carolina, to register within ten days of their release or arrival. G.S. 14-208.9 has imposed a ten-day time limit on giving notice of a: change of address, intent to move to another state (or to remain in North Carolina after giving notice of an intent to leave), enrollment or termination of enrollment at an institution of higher education, and employment or termination of employment at an institution of higher education. G.S. 14-208.9A has also required return of a semiannual verification of address form within ten days. S.L. 2008-117 reduces all of the time limits in these statutes from ten days to three business days. These changes anticipate the federal standards to be considered by the General Assembly in 2009. The act is effective for offenses committed on or after December 1, 2008, which in this context means that a violation of the new time limits on or after that date is punishable as a failure to register under G.S. 14-208.11, a Class F felony.

The act also amends G.S. 14-208.9A(c), which requires a person to appear at the local sheriff's office, on the sheriff's request, to have a photograph taken, by changing the time limit from 72 hours to three business days. A violation of this provision remains a Class 1 misdemeanor, punishable under that subsection rather than under G.S. 14-208.11. The General Assembly apparently overlooked G.S. 14-208.8A, which sets a 72-hour time limit on the giving of notice of out-of-county residence for purposes of temporary employment; that provision was not changed. The General Assembly also enacted new provisions, discussed further below, requiring registrants to provide the sheriff's office with their online identifiers when they register and when they reverify their information. If they obtain a new or modified online identifier, they have ten days to notify the sheriff of the change.

Last, the act amends G.S. 14-208.27 and G.S. 14-208.28, which have directed the juvenile court counselor responsible for a juvenile who is required to register to advise the sheriff of a change of address of the juvenile and to return the semiannual verification form to the sheriff. The act reduces the time limit for these actions from ten days to three business days. No penalties are provided for a violation.

Ban on sex offenders in locations used primarily by minors. Over the past several years the General Assembly has made it a crime for those required to register as sex offenders to reside within one thousand feet of a child care center or elementary or secondary school (*see* G.S. 14-208.16);

3. The new statutory wording is not entirely clear, but the interpretation in the text has the most statutory support. Revised G.S. 14-208.6A states that the General Assembly's objective is to establish a thirty-year registration requirement, with the right to petition to shorten the registration period after ten years. This language indicates that the thirty-year requirement is intended as a maximum, with the possibility of earlier termination. Revised G.S. 14-208.7 states that a person must maintain registration for at least thirty years unless the person petitions after ten years to terminate registration. The use of the term "at least" suggests that the thirty-year requirement does not terminate automatically; rather, the registrant still must petition to terminate after thirty years. Such an interpretation, however, is difficult to square with the ten-year termination provision. Because the statute already affords a person the right to petition to terminate after ten years, there would seem to be no need for the General Assembly to provide separately that a person may petition to terminate after thirty years. In addition, the registration statutes contain a procedure for petitioning to terminate after ten years, including specific criteria that a registrant must meet. There is no procedure specified for termination after thirty years and no indication that the General Assembly intended to impose the criteria applicable to termination after ten years to termination after thirty years.

4. The effective-date clause could be interpreted as applying only to registrations initiated on or after December 1, 2008, because generally speaking a person registers initially and verifies his or her information thereafter. Such an interpretation, however, would create two subcategories of offenders within the category of offenders who may petition to terminate registration after ten years, a curious distinction. Those people who began registering before December 1, 2008, would have to register indefinitely if unable to terminate registration, and those people who began registering on or after December 1, 2008, would have to register for thirty years if unable to terminate registration.

work at places where a minor is present if their responsibilities would include instruction, supervision, or care of a minor (see G.S. 14-208.17(a)); accept minors into their care or custody (*see* G.S. 14-208.17(b)); or provide babysitting services (*see* G.S. 14-321.1). Effective for offenses committed on or after December 1, 2008, S.L. 2008-117 enacts a considerably broader ban on where sex offenders may be present. Under new G.S. 14-208.18, it is a Class H felony for a person

1. who is required to register as a sex offender based on
   a. any offense in G.S. Chapter 14, Article 7A (including any degree of rape or sexual offense and misdemeanor sexual battery), or
   b. any offense where the victim was under the age of sixteen (including indecent liberties under G.S. 14-202.1)
2. knowingly
3. to be
   a. on the premises of any place intended primarily for the use, care, or supervision of minors, including schools, child care centers, playgrounds, and children's museums;
   b. within three hundred feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including malls, shopping centers, or other property open to the general public; or
   c. at any place where minors gather for regularly scheduled educational, recreational, or social programs.

The statute contains a technical flaw with respect to the first element of the offense, stating that a person is subject to the ban "if the offense requiring registration is described in subsection (b) of this section." Subsection (c) actually describes the covered offenses. Despite the incorrect reference, the courts may find that the statute adequately identifies the prior offenses covered by the ban. Greater difficulty may lie in consistently applying other elements of the offense. Several of the terms used are general in nature and are not defined in the statute—for example, *schools*, *child care centers*, and *playgrounds* (in what is designated as element 3a, above), locations *intended primarily for the use, care, or supervision of minors*, which an offender may *not be* within three hundred feet of (in element 3b), or *regularly scheduled programs* (in element 3c).

The statute includes a limited number of exceptions. Notwithstanding the ban, a parent or guardian of a minor may take the minor to a location that provides emergency medical care if the minor is in need of such care. A parent or guardian who is otherwise subject to the ban also may be present on school property if he or she (a) has a student enrolled in the school, (b) is there solely to attend a conference to discuss the student or in response to a request by the principal or designee for reasons relating to the welfare or transportation of the student, *and* (c) complies with the notice and supervision requirements in the statute. The statute also exempts voting, attendance at public school if permitted by the local school board pursuant to new G.S. 115C-391(d)(2) (discussed next), and receipt of medical treatment or mental health services by a juvenile. The statute contains no other exceptions.

New G.S. 14-208.18 applies to juveniles who have been required to register pursuant to the sex offender registration statutes, banning them from the areas described above unless one of the exceptions applies. Any juvenile required to register is covered by the ban (unless an exception applies) because the only offenses for which a juvenile can be required to register are rape and sex offense, both of which are subject to the new ban. The act also adds new G.S. 115C-391(d)(2) to give local school boards the authority to expel any student who is covered by the ban, including juveniles who have been adjudicated delinquent and have been required to register and juveniles who have been tried and convicted as adults of an offense covered by the ban (listed in G.S. 14-208.18). The new statute states that a local school board's decision to expel a student must be based on "clear and convincing evidence" but does not specify to what the clear and convincing evidence standard should be applied. The new provision does not contain an age minimum, but it could apply to a juvenile eleven years of age or older because, under the sex offender registration statutes, a juvenile may be required to register for an offense committed when he or she was eleven years old or older. *Compare* G.S. 115C-391(d)(1) (this statute allows a local school board to expel a student fourteen years of age or older for certain reasons). Before ordering expulsion, the board must consider whether there is an alternative program that may be offered by the local school unit to provide educational services. If the board decides to provide services to a student on school property, school personnel must supervise the student at all times.

Notice to schools. G.S. 14-208.29 has allowed registration information of juveniles who have been required to register to be released to law enforcement agencies only. Effective December 1, 2008, S.L. 2008-117 revises that statute to require registry information for any juvenile enrolled in a local school to be forwarded to the local school board. The statute does not specify who is responsible for forwarding this information, but presumably the responsibility falls to the local sheriff's office that maintains the information.

The act also adds G.S. 14-208.19 to require all licensed day care centers and the principals of all elementary, middle, and high schools to register with the North Carolina Sex Offender and Public Protection Registry to receive e-mail notification when a registered sex offender moves within a one-mile radius of the day care center or school.

Restrictions on release for probation violations or violations of post-release supervision. G.S. 15A-1345(b) requires a probationer arrested for a violation of probation conditions to be taken before a judicial official to have conditions of release set pending a probation revocation hearing. If the probationer meets those conditions, he or she is entitled to release pending the revocation hearing. Effective for offenses committed on or after December 1, 2008, S.L. 2008-117 revises G.S. 15A-1345(b) to impose a form of preventive detention on certain probationers.[5] The revised statute requires the court, prior to allowing release, to find that the probationer is not a danger to the public if he or she "has been convicted of an offense at any time that requires registration under Article 27A of Chapter 14 [the article containing the sex offender registration statutes] or an offense that would have required registration but for the effective date of the law establishing the Sex Offender and Public Protection Registration Program" (title of the article containing the sex offender registration statutes). This language appears to require that courts deny release to such a probationer, regardless of the offense for which the person is currently on probation and regardless of the date of conviction of the sexually related offense, unless the court finds that the probationer is not a danger.

The act also modifies G.S. 15A-1368.6(b), which affords a preliminary hearing to a person who is released on post-release supervision and who is arrested for an alleged violation of post-release conditions. The statute provides that if the hearing is not held within seven working days after arrest the person is entitled to release pending the hearing. The act adds G.S. 15A-1368.6(b1) to prohibit release prior to a preliminary hearing, regardless of when it is held, if the person was released on post-release supervision for an offense subject to registration. Although new 15A-1368.6(b1) appears to do away with the requirement for release of a supervisee if a preliminary hearing is not held within seven days, supervisees are still entitled as a matter of constitutional due process to a preliminary hearing "as promptly as convenient after arrest while information is fresh and sources are available."[6]

Sex offender registry checks. G.S. 115C-332 requires local school boards to conduct criminal history checks of school personnel and of contractors and their employees who perform duties customarily performed by school personnel. Effective December 1, 2008, S.L. 2008-117 adds G.S. 115C-332.1 to require local boards of education to include the following terms in any contract with *contractual personnel*, defined as individuals whose job involves direct interaction with students and who are not covered by G.S. 115C-332. The contract must require the employer of any *contractual personnel* to conduct an annual check of such personnel on the state and national sex offender registries and must prohibit any contractual personnel who are listed on those registries from having direct interaction with students.

Study of federal guidelines. S.L. 2008-117 directs the North Carolina Attorney General to study the federal sex offender guidelines, finalized in 2008, the federal Sex Offender Registration and Notification Act (SORNA). The Attorney General must report any recommended actions to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee by December 1, 2008. The federal guidelines are discussed below, after the discussion of the other sex offender acts enacted in 2008 by the North Carolina General Assembly.

Other Sex Offender Changes

Changes in definitions for child pornography offenses and increases in punishment. G.S. 14-190.14 through G.S. 14-190.19 contain several offenses related to child pornography. Those offenses are keyed to the definitions in G.S. 14-190.13. Effective for offenses committed on or after December 1, 2008, S.L. 2008-218 (S 132) amends G.S. 14-190.13 to expand the definition of *sexual activity*, an element of many of the child pornography offenses, to include the "lascivious exhibition of the genitals or pubic area of any person." *Compare* 18 U.S.C. 2256 (using the same terminology as part of the definition of federal child pornography offenses).

Effective for offenses committed on or after December 1, 2008, S.L. 2008-218 also increases the punishment for various offenses involving children. Most of the changes are identical to the increases in punishment enacted by S.L. 2008-117 (see discussion of Jessica's Law, above) except that S.L. 2008-218 also increases the punishment for a violation of G.S. 14-202.3 (solicitation of a child by computer to commit unlawful sex act) from a Class H to a Class G felony, if either the defendant or the person for whom the defendant was arranging the meeting actually appears at the meeting location. A violation of the statute that does not involve this additional element remains a Class H felony.

Expansion of registration to include felony child abuse involving prostitution and sexual acts. G.S. 14-208.6 lists the offenses that subject a person to sex offender registration requirements and related consequences. The principal category is *sexually violent offense* as defined in G.S. 14-208.6(5). S.L. 2008-220 (S 1736) expands that category by including a violation of G.S. 14-318.4(a1) (committing or permitting an act of prostitution on a child under age sixteen by his or her parent or caretaker) and a violation of G.S. 14-318.4(a2) (committing or allowing a sexual act on a child under age sixteen by his or her parent

5. *See generally* United States v. Salerno, 481 U.S. 739 (1987) (discussing constitutional limits on denial of pretrial release to criminal defendants).

6. *See* Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

or legal guardian). The act states that the change applies to persons convicted or released from a penal institution on or after December 1, 2008, and not just to offenses committed on or after that date.[7]

The act does not specifically describe the impact of the addition of these offenses, which are both Class E felonies, on post-release supervision (PRS). Under G.S. 15A-1368.2(c), a person convicted of a Class B1 through E felony who is subject to sex offender registration and who is sentenced to active imprisonment must serve five years of PRS after release from prison instead of the usual nine months. By making the above offenses subject to sex offender registration, the General Assembly automatically made the offenses subject to this five-year requirement. The question is whether the General Assembly intended to make the five-year requirement retroactive—that is, whether a person who commits an offense before December 1, 2008, is subject to it. The effective-date clause does not provide a clear answer because the changes made by the act do not specifically address PRS. If courts construe the act as applying retroactively with respect to PRS, the requirement may be subject to constitutional challenge.[8]

Inclusion of online identifier in required registration information. The sex offender registration provisions require covered offenders to provide specified information to the local sheriff's office, such as the person's photograph and address. S.L. 2008-220 amends several registration statutes to require that an offender provide to the sheriff any *online identifier* (defined in new G.S. 14-208.6(1n)) that the offender uses or intends to use. The offender must do so when he or she initially registers (*see* G.S. 14-208.7(b)), periodically reverifies information (*see* G.S. 14-208.9A(a)(3)), and changes an online identifier or obtains a new one (*see* G.S. 14-208.9(e)). All of these provisions require the offender to appear before the sheriff in person to provide the information. A failure to inform the sheriff of any new online identifiers or changes to online identifiers is, like most other failures to comply with registration obligations, a Class F felony under G.S. 14-208.11(a). These changes apply to any person who initially registers or who must maintain registration on or after May 1, 2009. The act also states that a person registered prior to May 1, 2009, is not in violation of the online identifier requirements if he or she provides the information at the first required deadline for the person to verify his or her registry information on or after May 1, 2009.

Also effective May 1, 2009, new G.S. 14-208.14 directs the North Carolina Division of Criminal Statistics to maintain the online identifier information of registrants in the central sex offender registry. New G.S. 14-208.15A authorizes the Division to release online identifiers to entities that provide Internet and other electronic communications services (as defined in new G.S. 14-208.6(1d), (1f), (1g), and (1i)) for the purpose of screening users and comparing the information held by an entity with the information in the central registry. The new statute also provides that when an electronic service entity receives a complaint or report of certain criminal violations, such as soliciting a minor by computer to commit an unlawful sex act, the entity must report the information and the online identifier of the person who allegedly committed the offense to the Cyber Tip Line at the National Center for Missing and Exploited Children.

Online identifier information in the central registry, as well as in the local sheriff's office, is *not* available for public inspection. G.S. 14-208.10 and G.S. 14-208.15 identify the information open to the public, and those statutes were not amended to include online identifiers. New G.S. 14-208.15A(d) also directs the Division to adopt rules regarding the release and use of online identifier information, including a requirement that the information not be disclosed for any purpose other than for screening users and comparing information as provided in the new statute.

An entity that complies in good faith with new G.S. 14-208.15A is immune from civil and criminal liability for (a) refusing to provide service to a person on the basis that the entity reasonably believed that the person was subject to sex offender registration requirements and (b) a person's criminal or tortious acts against a minor with whom the person had communicated on the entity's system. This provision does not require that entities deny all services to a person subject to sex offender requirements. Under new 14-202.5, discussed next, a registered sex offender may not access certain social networking websites but is not barred from using discrete electronic services, such as e-mail or instant messaging services.

Ban on use of certain websites. Effective for offenses committed on or after December 1, 2008, S.L. 2008-218 adds new G.S. 14-202.5 to make it a Class I felony for a person

- who is registered as a sex offender
- to access a commercial social networking Web site
- where the person knows that the site permits minor children to become members or to create or maintain personal web pages on the site.

A *commercial social networking Web site* is defined in G.S. 14-202.5(b) as an Internet website that meets the criteria listed in that subsection, including that it allows users to create web pages or personal profiles that contain such information as a nickname of the user, photographs, and

7. Also added to the definition of sexually violent offense, effective for offenses committed on or after December 1, 2008, are the new offenses of rape and sexual offense against a child under age thirteen (see discussion of Jessica's Law, above).

8. *See, e.g.*, Purvis v. Commonwealth, 14 S.W.3d 21 (Ky. 2000) (post-release supervision is a form of punishment, barring retroactive application).

links to other personal web pages of friends or associates. The definition excludes an Internet website that provides only one discrete service (photo sharing, e-mail, instant messaging, or chat room or message boards) or has as its primary purpose commercial transactions. G.S. 14-202.5(d) states that North Carolina has jurisdiction if the transmission that constitutes the offense either originates or is received in North Carolina.

The statute does not specifically define what it means for a person *to access* a commercial social networking website, but new G.S. 14-202.5A may provide some guidance. That statute provides (effective for acts occurring on or after May 1, 2009) that a commercial social networking website may be held civilly liable for damages for failing to make reasonable efforts to prevent a registered sex offender from accessing its website. It states that *access* means allowing the sex offender to utilize the website to do any of the activities described in G.S. 14-202.5(b)(2) through G.S. 14-202.5(b)(4)—that is, facilitate social introductions, create web pages or personal profiles, and provide mechanisms to communicate with other users. Thus, using a commercial social networking website in these respects is prohibited; merely viewing such a website may not be.

Ban on name changes by sex offenders. Effective December 1, 2008, S.L. 2008-218 adds G.S. 14-202.6 and G.S. 101-6(c) to prohibit a registered sex offender from obtaining a name change. Name changes are handled by the clerk of superior court pursuant to the procedures in G.S. Chapter 101. The statutes do not appear to make a violation a crime, as they do not designate a violation as a criminal offense or provide for any criminal penalties.

Reporting of convictions not resulting in active time. S.L. 2008-220 requires the North Carolina Administrative Office of the Courts (AOC), in consultation with the North Carolina Department of Justice, Department of Correction, and Sheriffs' Association, to develop, by December 1, 2008, a procedure to ensure timely notification to the Division of Criminal Information and to sheriffs of any person who is subject to sex offender registration and does not receive an active term of imprisonment.

Grants to sheriffs' offices. Effective July 1, 2008, S.L. 2008-220 authorizes the Governor's Crime Commission to award grants to sheriffs' offices to assist with the enforcement of sex offender laws. Participating sheriffs' offices must provide nonstate matching funds equal to 50 percent of the grant amount, one-half of which may be in the form of in-kind contributions. The act appropriates $250,000 from the General Fund for such grants, up to $25,000 of which may be awarded to each eligible sheriff's office.

Federal Guidelines on Sex Offender Registration

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act. Title I of the Adam Walsh Act is the Sex Offender Registration and Notification Act ("SORNA" or the "Act"), which contains a new set of standards for sex offender registration. The U.S. Department of Justice (US DOJ) has issued guidelines ("Guidelines") interpreting and elaborating on the provisions of SORNA. States must substantially implement the new standards by July 27, 2009, with up to two one-year extensions, or lose 10 percent of their Byrne Justice Assistance Grant funds. Many of the registration requirements adopted by North Carolina in the past have been in response to this type of federal directive. States may adopt more stringent requirements than required by federal law.

The summary below highlights some of the significant changes required by SORNA and the Guidelines, which may be found on the website of US DOJ's Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) office: www.ojp.usdoj.gov/smart/. It is by no means a comprehensive summary of the numerous requirements in SORNA and the Guidelines. S.L. 2008-117, discussed above, requires the North Carolina Attorney General to review the requirements and report to the General Assembly with recommended actions by December 1, 2008.

Retroactivity. One of the biggest changes required by the Guidelines is that states would have to make their registration requirements retroactive for covered offenses. Thus, subject to narrow exceptions, a person would have to register for those offenses regardless of the date of offense, conviction, or completion of his or her sentence. For example, if a person is convicted of sexual battery for an offense committed before December 1, 2005, the person does not currently have to register under North Carolina law. *See* S.L. 2005-130 (adding sexual battery to the offenses subject to registration, effective for offenses committed on or after December 1, 2005). Under the Guidelines, however, the person may be subject to registration for that offense. *See* II.C, IX of Guidelines (describing retroactivity requirement); *see also* IV.C of Guidelines (describing offenses subject to registration). Similarly, under the Guidelines, a person who was convicted of indecent liberties in 1980 and who completed all of the incidents of his or her sentence by 1985, before any of the sex offender registration requirements took effect, might still be subject to registration. (If the person has been in the community longer than the registration period required by SORNA, a state may give him or her credit for that time and not require registration.) Under the Guidelines, states need not seek out individuals who are subject to retroactive application of the registration requirements if they are no longer subject to oversight by the criminal justice system; however, if those individuals remain in or reenter the criminal justice system under the conditions described in the Guidelines, states would have to require that they register.

Offenses covered. The Guidelines would likely broaden the offenses that are subject to registration in North Carolina, although it is not yet certain what offenses North Carolina would have to add to the list of registration offenses to comply with the Guidelines. For example, the Guidelines require registration for any sexual offense the elements of which involve "(i) any type or degree of genital, oral, or anal penetration, or (ii) any sexual touching of or contact with a person's body, either directly or through the clothing." *See* IV.C of Guidelines. This definition might require registration for a violation of G.S. 14-27.7A(b) (statutory rape or sexual offense against a person who is thirteen, fourteen, or fifteen years old when the defendant is more than four but less than six years older than the person), which is currently not subject to registration under North Carolina law. Under the retroactivity provision discussed above, a person could be required to register for this and other offenses that currently are not subject to registration under any circumstance in North Carolina.

Juvenile registration. North Carolina currently has a limited sex offender registration program for juveniles who commit certain offenses. The information in the registry is not public; registration expires when the juvenile turns eighteen or juvenile court jurisdiction ends; and the juvenile judge has discretion not to require registration for covered offenses. Under the Guidelines, certain juveniles would be subject to full registration requirements, including the longer registration periods required for adults (discussed below). As with offenses by adults, the new juvenile registration requirements may be retroactive for delinquency adjudications that predate implementation of the SORNA requirements.

The Guidelines (in IV.A) provide that the following convictions and delinquency adjudications of juveniles are subject to registration.

> "Convictions" for SORNA purposes include convictions of juveniles who are prosecuted as adults. It does not include juvenile delinquency adjudications, except under the circumstances specified in SORNA § 111(8). Section 111(8) provides that delinquency adjudications count as convictions "only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code), or was an attempt or conspiracy to commit such an offense."
>
> Hence, SORNA does not require registration for juveniles adjudicated delinquent for all sex offenses for which an adult sex offender would be required to register, but rather requires registration only for a defined class of older juveniles who are adjudicated delinquent for committing particularly serious sexually assaultive crimes (or attempts or conspiracies to commit such crimes). Considering the relevant aspects of the federal "aggravated sexual abuse" offense referenced in section 111(8), it suffices for substantial implementation if a jurisdiction applies SORNA's requirements to juveniles at least 14 years old at the time of the offense who are adjudicated delinquent for committing (or attempting or conspiring to commit) offenses under laws that cover:
>
> - engaging in a sexual act with another by force or the threat of serious violence; or
> - engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim.
>
> "Sexual act" for this purpose should be understood to include any degree of genital or anal penetration, and any oral-genital or oral-anal contact. This follows from the relevant portions of the definition of sexual act in 18 U.S.C. 2246(2), which applies to the 18 U.S.C. 2241 "aggravated sexual abuse" offense.

Length of registration. The federal standards place sex offenders within one of three tiers, each with its own registration period and obligations. For a tier one offense, the required registration period is fifteen years; for a tier two offense, the period is twenty-five years; for a tier three offense, the period is life. The tiers determine other registration obligations, such as the frequency with which the person must verify his or her information with the sheriff or other registering entity. *See* V and XII of Guidelines for the offenses in each tier and the duration of registration. The fifteen-year registration requirement for tier one offenders can be reduced to ten years if the person meets certain conditions—namely, having a clean record as defined by the Guidelines. Also, a person classified as a tier three offender based on an adjudication of juvenile delinquency can have the lifetime registration requirement reduced to twenty-five years in specified circumstances. The other required periods of registration are not subject to reduction.

A state is not required to establish the specific tiers described in the Guidelines as long as the minimum registration period for each category of offenders is satisfied. A state may require longer periods of registration.

Gangs

The 2008 General Assembly passed two acts involving gangs. One, S.L. 2008-214 (H 274), creates several new criminal offenses specific to gangs, requires forfeiture of the proceeds of gang activity, restricts pretrial release, and creates first offender and expunction procedures. The other, 2008-56 (S 1358), encourages the development of strategies to prevent gangs and addresses youth involvement with gangs.

New Gang Offenses

Effective for offenses committed on or after December 1, 2008, S.L. 2008-214 creates several new offenses involving gangs, keyed to specific definitions of gangs, gang activity, and other terms. Most of the new offenses are in new Article 13A in G.S. Chapter 14, the North Carolina Street Gang Suppression Act (G.S. 14-50.15 through G.S. 14-15.30). G.S. 14-50.21 states that each offense in violation of new G.S. 14-50.16 through G.S. 14-50.20 is considered a separate offense. The new offenses are described first, the definitions of the italicized terms thereafter.

Offense of pattern of criminal street gang activity. Under new G.S. 14-50.16(a), a person commits a Class H felony if he or she

- is employed by or associated with a *criminal street gang* and either
- conducts or participates in a *pattern of criminal street gang activity* or
- acquires or maintains any interest in or control of any real or personal property through a *pattern of criminal street gang activity*.

A person commits a Class F felony rather than a Class H felony if he or she

- is an organizer or supervisor, or acts in any other position of management with regard to a *criminal street gang*, and
- conducts or participates in a *pattern of criminal street gang activity*.

Solicitation of criminal street gang activity by person sixteen years of age or older. Under new G.S. 14-50.17, a person commits a Class H felony if he or she

- causes, encourages, solicits, or coerces
- a person sixteen years of age or older
- to participate in *criminal street gang activity*.

Solicitation of criminal street gang activity by person under age sixteen. Under new G.S. 14-50.18, a person commits a Class F felony if he or she

- causes, encourages, solicits, or coerces
- a person under sixteen years of age
- to participate in *criminal street gang activity*.

The statute states that it does not preclude a person who violates the statute from being held criminally culpable under any other provision of law for an offense committed by a minor.

Threat to deter withdrawal from criminal street gang. Under new G.S. 14-50.19, a person commits a Class H felony if he or she

- communicates a threat of injury to a person or damage to the property of another
- with the intent of deterring a person from assisting another to withdraw from membership in a *criminal street gang*.

Threat of retaliation for withdrawal from criminal street gang. Under new G.S. 14-50.20, a person commits a Class H felony if he or she

- communicates a threat of injury to a person or damage to the property of another
- as punishment or retaliation against a person for having withdrawn from a *criminal street gang*.

Enhancement of misdemeanor committed for benefit of criminal street gang. Under new G.S. 14-50.22, a person is guilty of an offense that is one class higher than the offense committed if he or she

- is age fifteen or older and
- commits a misdemeanor
- for the benefit of, at the direction of, or in association with
- a *criminal street gang*.

If the misdemeanor committed is a Class A1 misdemeanor, it is treated as a Class I felony under this statute.

Discharging firearm from enclosure. Under new G.S. 14-34.9, a person commits a Class E felony if he or she

- willfully or wantonly
- discharges or attempts to discharge
- a firearm
- as part of a pattern of criminal street gang activity
- from within any building, structure, motor vehicle, or other conveyance
- toward a person not within that enclosure.

This statute, which is not part of Article 13A, does not contain any definitions, and it is not clear which, if any, definitions from Article 13A apply (see definition of terms, below). If the term *pattern of criminal street gang activity* is meant to be applied as required in Article 13A, the defendant must have had two prior convictions to be charged with this offense. If the General Assembly intended to apply the definition of *criminal street gang activity* from Article 13A, using the term *pattern* in a colloquial sense only, less stringent requirements would apply.

Offenses involving criminal street gang activity that are not specifically enumerated. New G.S. 50.25 provides that when a defendant is found guilty of a criminal offense other than an offense under G.S. 14-50.16 through 14-50.20, the presiding judge must determine whether the offense involved *criminal street gang activity*. If the judge so finds, the judge must so indicate on the judgment form, and the clerk

of court must ensure that the official record of conviction includes a notation of the court's determination. There is no additional punishment prescribed in these circumstances.

Applicability to juveniles. G.S. 14-50.28 states that the new offenses do *not* apply to juveniles under the age of sixteen except for a violation of G.S. 14-50.22 (enhancement of misdemeanor committed for benefit of criminal street gang, described above), which specifically applies to violators fifteen years of age or older.

Key Definitions

New G.S. 14-50.16 contains several key definitions for the new gang offenses, described above.

A *criminal street gang* or *street gang* means

- an organization, association, or group of three or more people that
  - has as one of its primary activities the commission of one or more felonies or delinquent acts that would be felonies if committed by an adult;
  - has three or more members individually or collectively engaged in, or who have engaged in, *criminal street gang activity*; and
  - may have a common name or identifying sign or symbol.

Criminal street gang activity means to

- commit, or attempt to commit, or solicit, coerce, or intimidate another person to commit an act or acts
- with the specific intent that such act or acts be for the purpose or in furtherance of the person's involvement in a *criminal street gang*.

The definition states that "an act or acts is included if accompanied by the necessary mens rea or criminal intent and would be chargeable by indictment" under Article 5 of G.S. Chapter 90 (the Controlled Substances Act) or as an offense under G.S. Chapter 14 except for certain listed offenses.

A *pattern of criminal street gang activity* means

- engaging in and having a conviction for
- at least two prior incidents of *criminal street gang activity* that
  - have the same or similar purposes, results, accomplices, victims, or methods of commission or are otherwise interrelated by common characteristics and
  - are not isolated and unrelated
- provided that at least one of these offenses occurred after December 1, 2008, and the last of the offenses occurred within three years of prior *criminal street gang activity*, excluding any period of imprisonment.

This last clause indicates that an offense of criminal street gang activity committed before December 1, 2008, may be a qualifying prior offense; however, this offense did not exist under North Carolina law before passage of the act, which applies only to offenses committed on or after December 1, 2008. Consequently, all qualifying prior offenses may have to be on or after that date.

The definition also states that an offense committed by a defendant prior to indictment for an offense based on a pattern of criminal street gang activity may not be used as the basis for any subsequent indictments for offenses involving a pattern of street gang activity. In other words, a prior offense appears to be extinguished for purposes of charging a pattern of criminal street gang activity once a person is indicted for a pattern of criminal street gang activity, whether or not the prior offense is alleged in the indictment.

Other Penalties and Adverse Consequences

S.L. 2008-214 revises and adds a number of statutes to impose other consequences for gang activities.

Forfeiture. Revised G.S. 14-2.3 and new G.S. 14-50.23 provide for forfeiture of property used in connection with certain gang activities.

The violations covered by the two statutes are not entirely consistent. Revised G.S. 14-2.3, the general provision on forfeiture of the proceeds of crime, states in the case of *any* violation of Article 13A of G.S. Chapter 14, the new article on gangs, any money or other property acquired thereby shall be forfeited to the state. G.S. 14-50.23 states that property used in the course of, derived from, or realized through *criminal street gang activity* or a *pattern of criminal street gang activity* (as defined in Article 13A and described above) is subject to the seizure and forfeiture provisions of G.S. 14-2.3. New G.S. 14-50.23 also includes an exception for "innocent activities" as described in that statute.

Nuisance abatement. New G.S. 14-50.24 provides that any real property that is erected, established, maintained, owned, leased, or used by any *criminal street gang* for the purpose of conducting *criminal street gang activity* (as defined in Article 13A and described above) constitutes a public nuisance and may be abated as provided in G.S. Chapter 19, Article 1 (abatement of nuisances). The new statute includes an exception for "innocent activities."

Use of conviction in civil action. New G.S. 14-50.26 states that a conviction of an *offense defined as criminal gang activity* precludes the defendant from contesting any factual matters determined in the criminal proceeding in any subsequent civil action or proceeding based on the same conduct. This provision reverses the usual rule that convictions (other than guilty pleas or other admissions) are not admissible in later civil proceedings to establish facts determined in the

criminal proceeding. It is not entirely clear what is meant by an *offense defined as criminal gang activity*. New Article 13A does not use the term *criminal gang activity*, but new G.S. 14-50.26 may have been intended to apply to *criminal street gang activity*. Also, there is no *offense defined as* criminal gang activity or criminal street gang activity, although there are a number of new gang offenses that include criminal street gang activity as an element.

Local ordinances not preempted. New G.S. 14-50.27 states that new Article 13A does not preclude a local governing body from adopting and enforcing ordinances relating to gangs and gang violence that are consistent with the article and supplement its provisions.

Pretrial Release Restrictions

In most instances, a person charged with a criminal offense has the right to have pretrial release conditions determined. G.S. 15A-533 restricts pretrial release in certain drug trafficking cases by creating a rebuttable presumption that no condition of release will reasonably assure the appearance of the accused or the safety of the community. *See also* G.S. 15A-534.6 (similar presumption in certain methamphetamine cases). S.L. 2008-214 adds G.S. 15A-533(e) to provide that this rebuttable presumption exists if

- there is reasonable cause to believe that the person committed an offense for the benefit of, at the direction of, or in association with any *criminal street gang*;
- the offense was committed while the person was on pretrial release for another offense; and
- the person has previously been convicted of an offense described in G.S. 14-50.16 through G.S. 14-50.20 and not more than five years has elapsed since the date of conviction or the person's release for the offense, whichever is later.

A person who meets these criteria may only be released by a district or superior court judge upon a finding that there is a reasonable assurance that the person will appear and that release does not pose an unreasonable risk of harm to the community.

Conditional Discharge and Expunction

S.L. 2008-214 contains two provisions affording first offenders leniency in certain circumstances for violations of new Article 13A.

Conditional discharge and dismissal. G.S. 14-50.29 creates a conditional discharge procedure for first offenders. With the defendant's consent, if the defendant pleads guilty or is found guilty, the court may place him or her on probation, defer further proceedings, and eventually dismiss the case without court adjudication of guilt if

- the defendant has not reached the age of eighteen,
- the defendant has not been previously convicted of any felony or misdemeanor other than a traffic violation, and
- the current offense is a Class H felony under Article 13A or an enhanced offense under G.S. 14-50.22.

If the court defers proceedings, it must place the defendant on supervised probation for at least one year, in addition to any other conditions. If the defendant fulfills the conditions of probation, the court must discharge the defendant and dismiss the proceedings. A discharge and dismissal is without court adjudication of guilt and does not constitute a criminal conviction. A person may receive one discharge and dismissal under the statute.

The first requirement concerning the defendant's age does not specify the dispositive date, but the answer may lie later in the statute concerning the defendant's eligibility for an expunction. G.S. 14-50.29(d) states that a person who receives a discharge and dismissal may apply for an expunction and that the court must enter an expunction order if the defendant had not turned eighteen years old at the time of the offense. In light of this provision, it appears that a person is eligible for a discharge or dismissal, as well as a later expunction, if the offense occurred before he or she turned eighteen. G.S. 14-50.30 contains additional requirements for obtaining an expunction following a discharge and dismissal, including various affidavits attesting to the defendant's good character, lack of record, and lack of outstanding restitution orders in the case. The district attorney of the court in which the county was tried is entitled to notice of the proceeding and to respond.

Expunction of conviction. G.S. 14-50.30(a) authorizes an expunction of a criminal conviction, not just an expunction of a discharge and dismissal, but there are two significant differences in the procedures and requirements. First, although the age requirement for expunction of a conviction is identical on its face to the age requirement for expunction of a discharge and dismissal—it states that the defendant must not have turned eighteen years of age—the requirement may be stricter. G.S. 14-50.30(b) states that the court must order expunction, assuming all other requirements are met, if the defendant has not turned eighteen years of age at the time of conviction. Thus, if the defendant commits the offense before eighteen and is convicted thereafter, he or she may not be eligible for an expunction of a conviction. Second, the statute provides that a defendant may not file an application for expunction earlier than (a) two years after the date of conviction or (b) the completion of any probation, whichever is later.

Gang Prevention

S.L. 2008-56 (S 1358), as amended by Section 44.5 of S.L. 2008-187 (S 1632), directs County Councils, the Department of Public Instruction, the Department of Juvenile Justice and Delinquency Prevention, and the Governor's Crime Commission to study and develop strategies concerning gang activity and youth involvement in gangs.

The Governor's Crime Commission also must develop criteria for eligibility for grants for gang prevention and intervention. Funds are available to public and private entities or agencies for juvenile and adult programs that meet the criteria established by the Governor's Crime Commission. The act does not specify the amount of funds available, but the General Assembly set aside a reserve of $10 million in nonrecurring funds for fiscal year 2008–09 for gang prevention.[9]

The act also directs the Department of Crime Control and Public Safety to report to the General Assembly on protocols and procedures used to enter identifying information of juveniles in the GangNet database system. "GangNet is an Internet based law enforcement intelligence sharing database which houses information about known gang members that have been entered by law enforcement agencies. . . . "[10] The General Assembly appropriated $260,000 in nonrecurring funds for fiscal year 2008–09 to Durham County to make enhancements to GangNet.[11]

Domestic Violence

New Definition of Stalking

In 1992, North Carolina first created the offense of stalking in G.S. 14-277.3. Since then, the definition of the offense and its punishment have been revised several times, in 1997, 2001, and 2003. Effective for offenses committed on or after December 1, 2008, S.L. 2008-167 (H 887) repeals G.S. 14-277.3 and adds new G.S. 14-277.3A, incorporating many of the previous changes and making additional ones. A person is guilty of stalking under the new statute if he or she

- willfully
- without legal purpose
  - harasses another person on more than one occasion or
  - engages in a course of conduct directed at another person
- knowing that the harassment or course of conduct would cause
- a reasonable person to
  - fear for that person's safety or the safety of that person's immediate family or close personal associates or
  - suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

The new statute contains definitions of *harassment*, *course of conduct*, *reasonable person*, and *substantial emotional distress*. As under the previous statute, if the prohibited behavior is harassment, it must occur on more than one occasion. If the behavior involves a course of conduct, the new statute does not expressly require that the acts occur on separate occasions, stating only that the defendant must have engaged in two or more acts, such as monitoring, observing, following, or threatening another person. However, by using the term "course of conduct," the statute may require that the two acts occur in separate incidents.

The offense classifications for stalking offenses remain the same as under the previous statute. A first offense is a Class A1 misdemeanor, a second offense is a Class F felony, and an offense while a court order is in effect is a Class H felony. As under the previous statute, a person convicted of the misdemeanor offense and sentenced to community punishment must be placed on supervised probation in addition to any other punishment. The new statute slightly modifies the description of the court order required for conviction of a Class H felony. Under the previous statute, the court order had to prohibit similar behavior; under the new statute, the court order must prohibit the conduct described in the new statute.

The new statute also contains a jurisdiction provision, stating that North Carolina may prosecute a defendant for a violation of the statute if any part of the violation, including the effect on the victim, occurred in North Carolina.

Several other statutes refer to repealed G.S. 14-277.3—for example, G.S. 15A-266.4 (blood sample for DNA analysis on conviction of certain offenses), G.S. 15A-830 (offenses subject to Crime Victims' Rights Act), and G.S. 50B-1 (definition of domestic violence for purposes of obtaining domestic violence protective order). The act did not change these references to reflect new G.S. 14-277.3A.

Repeat Violation of Domestic Violence Protective Order

S.L. 2008-93 (H 44) amends G.S. 50B-4.1(f) to provide that a person is guilty of a Class H felony for violating a domestic violence protective order if he or she has previously been convicted of two rather than three offenses under G.S. Chapter 50B. The act states that it is effective for offenses committed on or after December 1, 2008, but that offenses committed before December 1, 2008, may be considered in determining the total number of prior offenses.

9. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, House Bill 2436, sec. L, Reserves/Debt Service/Adjustments.

10. North Carolina Department of Crime Control and Public Safety, Governor's Crime Commission, *A Comprehensive Assessment of Gangs in North Carolina: A Report to the General Assembly* at viii (March 2008).

11. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, House Bill 2436, sec. I, Correction.

Informational Sheet for Domestic Violence Victims

G.S. 15A-831(a) describes the duties of the investigating law enforcement agency in cases involving offenses covered by the Crime Victims' Rights Act, including certain offenses in which the accused and the victim have a personal relationship as defined in G.S. 50B-1(b)—that is, domestic violence offenses. Effective July 1, 2008, S.L. 2008-4 (H 2189) amends G.S. 15A-831(a) to require the investigating law enforcement agency to provide a victim of a domestic violence offense a copy of the informational sheet developed by the AOC pursuant to G.S. 50B-3(c1) (AOC-CV-323T, online at www.nccourts.org/Forms/Documents/1074.pdf). This is the same informational sheet that the clerk of court gives to the applicant for a protective order. The act also requires the North Carolina Domestic Violence Commission to study the adoption of a statewide automated notification system for individuals who have received a domestic violence protective order under G.S. Chapter 50B. The Commission must report on the study to the Joint Legislative Commission on Domestic Violence and the General Assembly by January 1, 2009.

Other Criminal Offenses

Generally

Sixty-month sentencing enhancement for use of firearm *or* deadly weapon. G.S. 15A-1340.16A increases a defendant's sentence by sixty months if the defendant commits a Class A through E felony by using, displaying, or threatening the use or display of a firearm while actually possessing the firearm about his or her person. Effective for offenses committed on or after December 1, 2008, S.L. 2008-214, the act creating several new gang offenses, significantly broadens this statute by imposing the sixty-month sentence enhancement if the crime involves a firearm *or* a deadly weapon in the above circumstances. The enhancement does not apply—whether the weapon is a firearm or other deadly weapon—if the evidence regarding its use, display, or threatened use or display is needed to prove an element of the felony or if the defendant does not receive a sentence of active imprisonment.[12]

Increased punishment for child abuse. North Carolina's statutes have divided physical forms of child abuse into three categories: misdemeanor child abuse inflicting physical injury, felony child abuse inflicting serious physical injury, and felony child abuse inflicting serious bodily injury. Effective for offenses committed on or after December 1, 2008, S.L. 2008-191 (S 1860) revises the child abuse statutes as follows:

- Misdemeanor child abuse inflicting physical injury under G.S. 14-318.2 is increased from a Class 1 to a Class A1 misdemeanor. The elements of the offense remain the same.
- Felony child abuse inflicting serious physical injury is subdivided into two offenses. G.S. 14-318.4(a) continues to provide that a parent or other caretaker is guilty of a Class E felony if he or she intentionally inflicts serious physical injury on a child or intentionally assaults a child and causes serious physical injury. New G.S. 14-318.4(a5) provides that a parent or other caretaker is guilty of a Class H felony if his or her willful act or grossly negligent omission shows a reckless disregard for human life and results in serious physical injury. For purposes of both offenses, new G.S. 14-318.4(d)(2) defines *serious physical injury* as physical injury that causes great pain and suffering *or* serious mental injury. These terms appear to be drawn from case law interpreting the offense of assault inflicting serious injury, in which the courts have construed *serious injury* as including serious mental injury.[13]
- Felony child abuse inflicting serious bodily injury is also subdivided into two offenses. G.S. 14-318.4(a3) continues to provide that a parent or other caretaker is guilty of a Class C felony if he or she intentionally inflicts serious bodily injury on a child or intentionally assaults a child and causes serious bodily injury. New G.S. 14-318.4(a4) provides that a parent or other caretaker is guilty of a Class E felony if his or her willful act or grossly negligent omission shows a reckless disregard for human life and results in *serious bodily injury*. The definition of serious bodily injury is recodified in new G.S. 14-318.4(d)(1) but is unchanged.

Server-based electronic game promotions. Article 37 of G.S. Chapter 14 prohibits various gambling devices, including slot machines described in G.S. 14-306 and video gaming machines described in G.S. 14-306.1A. Effective for offenses committed on or after December 1, 2008, S.L. 2008-122 (S 180) enacts G.S. 14-306.3 to make it unlawful to

- promote, operate, or conduct a server-based electronic game promotion or
- possess any game terminal with a display that simulates a game ordinarily played on a slot machine or video gaming machine for the purpose of promoting, operating, or conducting a server-based electronic game promotion.

12. G.S. 15A-1340.16A(f); *see also* John Rubin, Ben F. Loeb & James C. Drennan, Punishments for North Carolina Crimes and Motor Vehicle Offenses at 8 (UNC School of Government, 2005) (discussing cases interpreting statute).

13. *See* Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime at 86 (6th ed. 2007).

G.S. 14-306.3(c) defines a *server-based electronic game promotion* as a system that meets the following criteria: (1) there is a database containing a pool of entries with each entry associated with a prize value; (2) participants purchase or otherwise obtain a prepaid card; (3) with each prepaid card the participant obtains one or more entries; and (4) entries are revealed at a point-of-sale terminal or at a game terminal with a display that simulates a slot machine or video gaming machine.

Under G.S. 14-309(a), a person who violates any provision of G.S. 14-304 through G.S. 14-309, including new G.S. 14-306.3, is guilty of a Class 1 misdemeanor for a first offense, a Class H felony for a second offense, and a Class G felony for a third or subsequent offense. Under new G.S. 14-309(c), a person who violates G.S. 14-306.3(b) involving the possession of five or more machines prohibited by that subsection is guilty of a Class G felony. Other consequences for a violation of G.S. 14-306.3 include automatic revocation of any alcoholic beverage and control permit under G.S. Chapter 18B and any contract to sell lottery tickets under Article 5 of G.S. Chapter 18C. Revised G.S. 14-298 also authorizes the seizure of any game terminal described in G.S. 14-306.3(b). The prohibitions do not apply to gaming on Indian lands as described in G.S. 14-306.3(e).

Internet sales of tickets above face value. G.S. 14-344 prohibits "ticket scalping," making it a Class 2 misdemeanor to sell or resell tickets for an event for more than their face value, plus tax and a reasonable service fee. The service fee limit is $3 per ticket except that a ticket sales agent may charge a higher service fee if the promoter and agent have so agreed. S.L. 2008-158 (S 1407) adds new G.S. 14-344.1 allowing Internet sales of tickets above face value on the following conditions: (a) the venue where the event will occur has not prohibited resales above face value and (b) the person reselling the ticket provides a ticket guarantee that meets the requirements of the statute. An Internet sale that exceeds the face value of the ticket and does not comply with new G.S. 14-344.1 is punishable as a violation of G.S. 14-344. The new statute states that it does not apply to student tickets issued by institutions of higher education in North Carolina for sporting events, indicating that Internet sales of student tickets above face value will still be treated as ticket scalping. The act is effective August 1, 2008, and expires June 30, 2009.

Effective for the same time period, the act also adds G.S. 14-344.2 making it an unfair trade practice in violation of G.S. 75-1.1 for a person to sell, use, or possess software designed primarily to interfere with the operation of a ticket seller who sells over the Internet. The new statute gives the ticket seller and the venue hosting the event standing to bring a private civil action for a violation.

Hate crimes. In 1953, the North Carolina General Assembly enacted Article 4A of G.S. Chapter 14 to prohibit cross burning and other acts of intimidation. Effective for offenses committed on December 1, 2008, S.L. 2008-197 (S 685) amends several of the statutes in that article as well as G.S. 14-3(c), the general punishment provision for misdemeanors committed out of ethnic animosity. The changes are as follows.

- G.S. 14-12.12(b) has made it a Class I felony to place a burning cross on the property of another or on a public street or highway with the intent to intimidate any person, prevent a person from doing a lawful act, or cause a person to do an unlawful act. The act revises G.S. 14-12.12(b) to include the burning of a cross on any public property with the specified intent and revises G.S. 14-12.15 to increase the punishment for a violation from a Class I to Class H felony.
- G.S. 14-12.13 has made it a Class I felony to place an exhibit of any kind in any location with the intent to intimidate any person, prevent a person from doing a lawful act, or cause a person to do an unlawful act, and G.S. 14-12.14 has made it a Class I felony to commit such an act with the specified intent while the perpetrator is wearing a mask, hood, or other device to disguise his or her identity. The act revises these two statutes to specify that the term *exhibit* includes a noose, and it revises G.S. 14-12.15 to increase the punishment for such a violation from a Class I to Class H felony.
- G.S. 14-3(c) has made it a Class 1 misdemeanor to commit a Class 2 or Class 3 misdemeanor because of the victim's race, color, religion, nationality, or country of origin and has made it a Class I felony to commit a Class 1 or Class A1 misdemeanor for that reason. The act revises this statute to increase the latter punishment to a Class H felony.

The act directs the Legislative Research Commission to study the impact of recent cross burnings and hanging of nooses within North Carolina to determine whether additional modifications should be made to deter such conduct. The Commission's report is due by the 2009 session of the General Assembly.

Child support orders. Effective October 1, 2008, S.L. 2008-12 (H 724) amends G.S. 50-13.4(g) to eliminate the requirement that the social security numbers of the parties be listed on North Carolina child support orders. G.S. 50-13.4(g) continues to require that the parties provide their social security number to the clerk of court in the county where the action is brought or order is issued, and revised G.S. 5-13.4(h) requires the AOC to transmit this information to the Department of Health and Human Services, Child Support Enforcement Program.

Property Offenses

Increased punishment for vandalism. G.S. 14-144 has made it a Class 2 misdemeanor to deface or damage houses, churches, fences, and walls as described in that statute. Effective for offenses committed on or after December 1, 2008, S.L. 2008-15 (H 946) makes a violation a Class I felony if the damage is $5,000 or more.

Theft of fixtures. North Carolina generally follows the common law definition of larceny except as modified by court decision or statute. Traditionally, the offense of larceny has applied to the theft of personal property only—property that is not real property (land) or fixtures (property affixed to real property). New G.S. 14-83.1, enacted in S.L. 2008-128 (S 944), abolishes this distinction. Effective for offenses committed on or after December 1, 2008, the new statute provides that the theft of personal property that has become affixed to real property is chargeable as larceny as provided in other statutes.

Changes to larceny offenses. The 2007 General Assembly created and revised three statutes involving larceny offenses.[14] Effective for offenses committed on or after August 7, 2008, S.L. 2008-187, Section 34 (S 1632), makes minor changes to all three.

In G.S. 14-71, the 2007 General Assembly revised the elements of the offenses of receiving and possessing stolen goods to include property in the custody of a law enforcement agency that was represented by an agent of the agency to be stolen. The act revises that statute to add representations by "a person authorized to act on behalf of a law enforcement agency."

G.S. 14-72.11 created four different types of larceny from a merchant. For one version, the defendant must use an exit door erected and maintained in accordance with the requirements of certain federal regulations. The act changes the C.F.R. (Code of Federal Regulations) references.

G.S. 14-86.6 made it a Class H felony for a person to conspire to commit theft of retail property from a *retail establishment* with a value exceeding $1,500 over a ninety-day period (assuming the other elements of the offense are satisfied). The act modifies the statute to provide that the offense is committed if the person conspires to commit theft of retail property from *retail establishments* (assuming the value, time period, and other elements are met). Thus, a conspiracy meeting the requirements for the offense may be prosecuted if directed at a single retail establishment or multiple establishments.

14. *See* John Rubin, *2007 Legislation Affecting Criminal Law and Procedure,* Administration of Justice Bulletin No. 2008/01 at 23-24 (Jan. 2008), online at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0801.pdf.

Regulatory Offenses

Recycling violations by permittees. G.S. 18B-1006.1 requires permittees, such as restaurants and bars, to recycle all recyclable beverage containers sold at retail on the premises. The statute has provided that failure to comply with the statute is not grounds for revoking a permit. The technical corrections bill, S.L. 2008-187, Section 35.5, revises the statute to clarify that a conviction for a violation of the statute does not constitute an alcoholic beverage offense under G.S. 18B-900(a)(4), which otherwise would disqualify a person from holding a permit if the conviction was within the preceding two years. The change is effective August 7, 2008. A violation of the statute remains a Class 1 misdemeanor under G.S. 18B-102(b), the general punishment statute for violations of G.S. Chapter 18B.

Massage therapy. S.L. 2008-224 (S 1314) amends various statutes in Article 36 of G.S. Chapter 90, the North Carolina Massage and Bodywork Therapy Practice Act. Effective for offenses committed on or after December 1, 2008, the act makes one criminal change, revising G.S. 90-634 to make it a Class 3 misdemeanor to open, operate, or advertise a massage and bodywork therapy school without first having obtained the approval required by G.S. 90-637.1. The statutory reference is incorrect, however. The correct reference is new G.S. 90-631.1. Other violations of the massage therapy act remain punishable as a Class 1 misdemeanor under G.S. 90-634.

Effective for applications for licensure on or after August 17, 2008, the act also adds G.S. 90-629.1 to require applicants for licensure as massage and bodywork therapists to consent to a criminal history record check. The act adds G.S. 114-19.11B to authorize the North Carolina Department of Justice to provide criminal record information to the North Carolina Board of Massage and Bodywork Therapy.

Regulation of mortgage lenders and servicers. S.L. 2008-228 (H 2463) amends various statutes in Article 19A of G.S. Chapter 53, the North Carolina Mortgage Lending Act. Effective for anyone engaged in the business of mortgage servicing on or after January 1, 2009, the act requires mortgage servicers, as defined in revised G.S. 53-243.01, to be licensed under revised G.S. 53-243.02. The act also revises G.S. 53-243.14, which has made it a Class I felony to act as a mortgage broker or banker without a license, to reduce the penalty to a Class 3 misdemeanor, and to make that penalty applicable to acting as a mortgage servicer without a license.

Election law offenses. S.L. 2008-150 (S 1263) addresses a number of election-related issues. A violation of some provisions, such as contribution limits, is a criminal offense. For a discussion of this law, *see* Chapter 8, "Elections."

Drought preparedness. Effective for offenses committed on or after December 1, 2008, S.L. 2008-143 (H 2499) adds G.S. 143-355.6(d) to provide that a violation of emergency water conservation rules adopted by the Secretary of Environment and Natural Resources pursuant to new G.S. 143-355.3(b) is a Class 1 misdemeanor. This provision is part of a larger set of measures intended to improved drought preparedness and response.

Substance abuse professionals. The North Carolina Substance Abuse Professionals Practice Act, Article 5C of G.S. Chapter 90, regulates the substance abuse professionals described therein. Effective July 28, 2008, S.L. 2008-130 (S 2117) revises the definitions and titles of certain of the professionals covered by that article and makes those revised positions subject to G.S. 90-113.43, which provides that it is a Class 1 misdemeanor to engage in an illegal practice described therein.

Law Enforcement

Interstate Wildlife Violator Compact. Effective October 1, 2008, S.L. 2008-120 (S 175) enacts the Interstate Wildlife Violator Compact (G.S. 113-300.5 through G.S. 113-300.8) and directs the Governor to enter into the Compact with other states on behalf of North Carolina. Beginning October 1, 2008, the Compact is effective when adopted by at least two states (pursuant to the procedures described in Article VIII in new G.S. 113-300.6).

The legislative findings in the Compact, in Article I of new G.S. 113-300.6, focus on arrest and bond practices for violations of wildlife laws. They state that a person cited for a wildlife violation in a state other than the person's home state often has been required to post bond to secure appearance for trial and, if unable to post bond, has been taken into custody. According to the findings, the purpose of this practice is to ensure compliance by out-of-state residents, who otherwise might disregard the charge upon returning home. The findings recognize, in contrast, that a person charged with a wildlife violation in the person's home state is usually cited at the scene and released immediately. The findings conclude that the practice of arresting and requiring bond of nonresidents causes unnecessary inconvenience and at times hardship for the person charged and consumes an undue amount of law enforcement time. In light of these findings, the Compact restricts the authority of law enforcement officers to arrest and require the posting of bond by out-of-state residents for wildlife violations. In lieu of these powers, the Compact establishes a procedure for suspending the hunting and fishing licenses of out-of-state residents who fail to comply with or are convicted of wildlife charges.

Article III of new G.S. 113-300.6 provides that if a resident of one state, called the *home state*, commits a wildlife violation in another state, called the *issuing state*, the officer in the issuing state may only issue a citation to the person and may not take the person into custody or require the person to post collateral to secure the person's appearance in the issuing state. These restrictions apply if: (1) the home state is a member of the Compact; (2) the cited person gives the officer his or her *personal recognizance*, defined in the Compact as the person's agreement that he or she will comply with the terms of the citation; and (3) the person provides adequate proof of identification to the officer. A *wildlife violation* is defined as any violation of a statute, law, regulation, ordinance, or rule developed and enacted to manage wildlife resources and their use. If the person fails to comply with the terms of the citation or is convicted, the failure to comply or conviction is reported to the licensing authority of the home state.

Article IV in G.S. 113-300.6 provides that upon receiving a report of a failure to comply, the home state must initiate an action to suspend the person's license privileges and must suspend those privileges unless satisfactory evidence of compliance with the wildlife citation is furnished by the issuing state to the home state. If the home state receives a report of conviction from the issuing state, the home state must enter the conviction in its records and treat the conviction as if it occurred in the home state for purposes of license privileges. Article V in G.S. 113-300.6 provides that all states that are party to the Compact must recognize the suspension of license privileges as if the violation on which the suspension is based had occurred in their state.

Last, effective for offenses committed on or after October 1, 2008, new G.S. 113-300.8 makes it a Class 1 misdemeanor for a person to hunt, fish, trap, possess, or transport wildlife, or to purchase or possess a license to do those things, in violation of a suspension or revocation under the Compact.

General Assembly police. G.S. 120-32.2 describes the jurisdiction of members of the General Assembly police. Effective August 2, 2008, S.L. 2008-145 (S 1957) amends that statute to authorize General Assembly police officers to exercise their powers anywhere in the state while performing advance work or providing security for legislative members, staff, and the public for study, standing, select, or joint select committee meetings, commission meetings of the General Assembly, regional, state, or national meetings of legislative bodies, and while accompanying a member of the General Assembly to or from such events.

Immigration enforcement funds. The sum of $600,000 in nonrecurring funds for fiscal year 2008–09 is appropriated to the Department of Crime Control and Public Safety to contract with the North Carolina Sheriffs' Association for immigration enforcement services. The funds are to be used for technical assistance and training associated

with immigration enforcement.[15] The Sheriffs' Association must report to the General Assembly on the use of the funds by March 1, 2009. *See* S.L. 2008-107, Section 18.3 (H 2436).

Reporting of recurrent illness or serious physical injury of minor to law enforcement. In addition to the duty to report suspected child abuse, neglect, dependency, and death by maltreatment to the Department of Social Services under G.S. 7B-301, hospitals and physicians have a duty under G.S. 90-21.20 to report certain types of injury or illness to law enforcement. Effective December 1, 2008, S.L. 2008-179 (H 2338) adds G.S. 90-21.20(c1) to require hospitals and physicians to report to law enforcement cases involving recurrent illness or serious physical injury of a person under eighteen years of age when, in the doctor's professional opinion, the illness or injury appears to be the result of nonaccidental trauma.

Report of death at state mental health facility. Effective July 28, 2008, S.L. 2008-131 (S 1770) amends G.S. 122C-31 to require state mental health facilities to report the death of any client of the facility, regardless of the manner of death, to the medical examiner of the county in which the body of the deceased is found. The act makes a conforming amendment to medical examiners' jurisdiction, described in G.S. 130A-383.

Limitation of public duty doctrine as defense. Effective for claims arising on or after October 1, 2008, S.L. 2008-170 (H 1113) adds G.S. 143-299.1A to limit the use of the public duty doctrine as an affirmative defense to a civil lawsuit for acts by state law enforcement officers and other state employees. The statute states that it does not limit the assertion of the public duty doctrine as a defense on the part of a unit of local government or its officers, employees, or agents.

Collateral Consequences, Proceedings, and Services

Increased compensation for erroneous conviction. Article 8 of G.S. Chapter 148 authorizes the state to compensate people who were convicted of a felony, imprisoned, and received a pardon of innocence from the Governor. Effective for pardons of innocence granted on or after January 1, 2004, S.L. 2008-173 (H 2105) amends G.S. 148-84(a) to increase the compensation for each year of wrongful incarceration from $20,000 to $50,000 and the maximum compensation from $500,000 to $750,000. The amended statute also states that no compensation is due for any portion of a prison sentence during which the person was serving a concurrent sentence for a conviction for which a pardon of innocence was not granted.

15. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, House Bill 2436, sec. I, Crime Control and Public Safety.

New G.S. 148-84(c) provides additional compensation for lost educational or training opportunities. It authorizes an award of compensation for at least one year of job skills training through an appropriate state program and for expenses for tuition and fees at any public North Carolina community college or university for any degree or program. A person is also entitled to assistance in meeting admission standards for these institutions, including assistance in satisfying the requirements for a certificate of equivalency of completion of secondary education; a person may apply for this aid up to ten years after his or her release from incarceration, and this aid may continue for a total of five years. The additional compensation received under new G.S. 148-84(c) is included in calculating whether the person has reached the total compensation limit for an erroneous conviction.

Restoration of firearm rights of individual involuntarily committed for mental health treatment. North Carolina sheriffs have the responsibility for issuing permits to purchase or receive pistols and crossbows and permits to carry concealed handguns. G.S. 14-404 has prohibited the sheriff from issuing a pistol or crossbow permit to a person who has been adjudicated mentally incompetent or committed to a mental institution. G.S. 14-415.12 has prohibited the sheriff from issuing a concealed handgun permit to a person who has been adjudicated as mentally ill or lacking mental capacity. Effective December 1, 2008, S.L. 2008-210 (S 2081) creates a restoration process to allow a person who was involuntarily committed for either inpatient or outpatient mental health treatment to obtain a firearms permit from the sheriff. This process may also have the effect of removing the federal disqualification by reason of mental commitment to the purchase, possession, or transfer of firearms.

New G.S. 122C-54.1 sets forth the procedure by which a person may petition for the removal of the mental commitment bar. The new statute states that a person who has been found not guilty by reason of insanity may not petition for restoration of firearms rights. The act makes conforming changes to G.S. 14-404 and G.S. 14-415.12 to allow the sheriff to issue a permit to a person who has had his or her rights restored pursuant to new G.S. 122C-54.1. The sheriff may still deny a permit on other grounds.

The act also adds G.S. 122C-54(d1) to require the clerk of superior court to report to the National Instant Criminal Background Check System (NICS) any individual who is

1. involuntarily committed for inpatient mental health treatment;
2. involuntarily committed for outpatient mental health treatment if the individual has been found to be a danger to self or others;
3. acquitted of a crime by reason of insanity; or
4. found mentally incapable to proceed to trial.

Reporting of the first two grounds is by the clerk of court in the county where the judicial determination was made. (Since North Carolina law does not require a finding of dangerousness for outpatient commitment, in practice the clerk will submit information on inpatient commitment orders only.) Reporting of the third and fourth grounds is by the clerk in the county where the person was found not guilty by reason of insanity or found incapable to proceed to trial.

NICS is a national information system used by federally licensed firearms dealers to determine whether a prospective purchaser is disqualified from receiving a firearm. 18 U.S.C. 922(g) disqualifies a person from receiving a firearm on nine separate grounds, including having been "adjudicated a mental defective" or having been "committed to a mental institution." Federal law does not require states to submit information to NICS, and until enactment of the above provision, North Carolina law did not require state or local officials to provide information to NICS.

Sexual assault victims' assistance program. Victims of a rape or sexual offense or an attempt to commit those crimes are eligible for financial assistance as provided in G.S. 143B-480.1 through G.S. 143B-480.3. G.S. 143B-480.2 has provided that a victim of such an offense may apply for assistance if he or she reports the alleged offense to a law enforcement officer within five days of the occurrence of the act. Effective July 1, 2008, S.L. 2008-107, Section 18.2 (H 2436), as amended by S.L. 2008-118, Section 2.5 (H 2438), reduces this time limit to seventy-two hours; the Department of Crime Control and Public Safety, which administers the assistance program, may still waive the time limit. The act also authorizes payment for the full cost of a victim's forensic medical examination up to a maximum of $800, payable directly to the service provider. Revised G.S. 143B-480.3 provides for payment of any co-payment that the victim is required to pay for the forensic medical examination, up to the maximum amount payable for the examination. The act appropriates $1,078,078 in recurring funds to the Department for fiscal year 2008–09 to enhance the ability of the program to pay claims.

Sexual assault and rape crisis center fund. Effective July 1, 2008, S.L. 2008-107, Section 19.1 (H 2436), adds G.S. 143B-394.21 to create the Sexual Assault and Rape Crisis Center Fund, administered by the North Carolina Council for Women within the Department of Administration. The fund is to be used to make grants to centers for victims of sexual assault or rape crisis and to the North Carolina Coalition against Sexual Assault, Inc. The act appropriates $1 million in recurring funds for fiscal year 2008–09 for the program.[16]

16. *See* Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, House Bill 2436, sec. J, Administration.

Criminal record checks of employees and contractors of the Division of Motor Vehicles. Effective August 8, 2008, S.L. 2008-202 (S 1799) adds G.S. 114-19.24 to authorize the North Carolina Department of Justice to provide to the Division of Motor Vehicles (DMV) the criminal history of job applicants, employees, contractors, and employees of contractors if these individuals are or will be involved in the production of driver's licenses or identification cards or if they have or will have the ability to affect the identity information that appears on driver's licenses or identification cards. When making a request, DMV must submit a signed consent to the criminal record check by the affected individual.

Other acts, discussed earlier, provide for a criminal record check of applicants for licensure as a massage therapist and sex offender registry checks of contractual personnel at schools.

Expunctions. Effective August 7, 2008, S.L. 2008-187, Section 35 (S 1632), the technical corrections bill, revises G.S. 15A-145 to clarify that a person who meets the criteria for expunction of a first offense may petition for the expunction (1) two years after the date of the conviction or (2) after the completion of any period of probation, whichever occurs later.

Studies

The General Assembly authorized the following studies on criminal law. For studies relating to topics or legislation already discussed in this chapter, *see* the applicable discussion above. For additional studies that may bear on criminal law, *see* the chapters on "Children and Juvenile Law," "Courts and Civil Procedures," "Motor Vehicles," and "Sentencing, Corrections, Prisons, and Jails."

S.L. 2008-181 (H 2431) authorizes the Legislative Research Commission to study

- prohibiting the execution of a person with a severe mental disability;
- streamlining and making more cost-effective the determination of whether first-degree murder may be tried capitally;
- felony murder;
- reporting of a denial of a pistol permit;
- time limits on review of renewal applications for concealed handgun permits; and
- expunction of youthful offenders' criminal records.

The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee may study

- whether the prescription drug database maintained by the Department of Health and Human Services should be accessible to county sheriffs and deputies; and

- methods for increasing inmates' access to educational and vocational training opportunities at state prison facilities and increasing the number of work release slots at minimum security prisons.

The act authorizes the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse to study the involuntary commitment statutes to determine if an individual ordered to undergo an examination by a physician or eligible psychologist is being appropriately supervised during the period of the individual's examination.

S.L. 2008-83 (H 2523) directs the UNC School of Government, in consultation with the Autism Society of North Carolina, UNC–CH TEACCH Autism Program, and appropriate legal associations and organizations to study the training needs of the various groups in the judicial system on the legal issues and appropriate responses regarding individuals with autism. The School of Government must report to the Joint Study Committee on Autism Spectrum Disorder and Public Safety by October 1, 2008.

John Rubin

7

Economic and Community Development

The General Assembly continued to pay close attention to the nation's growing credit and foreclosure crisis during this session. Although the 2008 legislative session was replete with policy interventions aimed at the foreclosure crisis, for the most part proposals expanded existing foreclosure prevention programs rather than starting new initiatives. In the end a wide range of foreclosure-related legislation was approved that consisted of a mix of immediate relief mechanisms and long-term preventive measures. North Carolina stands to receive more than $50 million in federal funds for the purchase or rehabilitation of foreclosed homes under the Housing and Economic Recovery Act of 2008, but there was no state legislative initiative pertaining to that effort. Outside of the foreclosure arena, legislators provided little in the way of new economic and community development initiatives.

Foreclosure and Home Loss Prevention

The General Assembly enacted a number of measures to provide relief to homeowners facing foreclosure. The policies range from pre–foreclosure counseling and assistance to legal aid for homeowners defending themselves against foreclosure filings.

Mortgage Counseling Services and Mortgage Assistance

Starting in 2004 the General Assembly provided initial funding for a "Home Protection Pilot Program" administered by the North Carolina Housing Finance Agency (NCHFA) to assist homeowners facing foreclosure who had lost their jobs due to "changing economic conditions." Part XXI of the appropriations act, S.L. 2008-107 (H 2436), moves the program beyond its pilot stage, codifies it in new G.S. Section 122A-5.14, and provides $3 million in recurring funds for the program. NCHFA will continue to administer the program by

1. managing a fund to provide assistance to workers facing foreclosure;
2. developing procedures by which property owners facing foreclosure may receive assistance from the program;
3. providing loans to property owners (the pilot program offered zero-interest loans in amounts up to $20,000 to keep a homebuyer's mortgage or mortgage-related loans current for up to eighteen months);
4. designating and funding nonprofit counseling agencies to assist in implementing the program and in negotiating with lenders on behalf of unemployed workers; and
5. developing "enhanced methods" of notifying workers of available foreclosure mitigation services, counseling agencies, and NCHFA loans.

At least two-thirds of the funds allocated to the program must be used to provide loans to North Carolina workers who have lost their jobs due to "changing economic conditions."

In addition to offering loans, the program offers its applicants temporary protection against foreclosure and related mortgage enforcement actions. For 120 days following the proper filing of an application to the program, applicants are protected from foreclosure and enforcement by lenders of many standard mortgage default rights. If, however, an application to the program is denied, the protection no longer applies with respect to that applicant. The 120-day protection extends to lender actions such as accelerating mortgage maturity, commencing foreclosure or other legal actions to enforce the mortgage obligation, taking possession

of security for the mortgage, and accepting a deed in lieu of foreclosure. The grace period provides time for applicants to work with counseling agencies and negotiate with lenders to avoid foreclosure. NCHFA has been tasked with rule-making authority for the statutory program and, to expedite implementation, has received a partial exemption to the rule-making procedures of Article 2A of G.S. Chapter 150B.

In a separate initiative, S.L. 2008-107, as modified by S.L. 2008-226 (H 2623), directs the Commissioner of Banks (COB) to employ $600,000 of funds available to the State Banking Commission in the 2008–09 fiscal year to make grants to nonprofit housing counseling agencies. The purpose of these grants is to provide counseling and related services to help homeowners avoid home loss and foreclosure. The grants may also be used to provide training for counselors.

Pre–foreclosure Notice for Subprime Loans

To complement its efforts to increase available counseling services, the General Assembly established a notification requirement to inform subprime borrowers facing foreclosure of the opportunity to receive counseling. At least forty-five days prior to filing a notice of hearing in a foreclosure proceeding, S.L. 2008-226 requires mortgage servicers (i.e., companies administering mortgage loans on behalf of mortgage lenders) to send written notice by mail to subprime borrowers facing foreclosure, informing them of the availability of counseling resources and providing contact information for at least one approved counseling agency assisting North Carolina borrowers. The notification must also report the past due amounts that have placed the subprime loan in default, enumerate the payments required to bring the loan current, provide contact information for agents of the mortgage lender and mortgage servicer who are "authorized to attempt to work with the borrower to avoid foreclosure," and list the contact information for the consumer complaint section of COB.

Within three days of mailing the pre–foreclosure notice described above, mortgage servicers must file information about the loan and pre–foreclosure notice with the Administrative Office of the Courts (AOC), which is tasked with establishing a database in conjunction with COB to track the information provided. The data is to be used exclusively for the State Home Foreclosure Prevention Project (*see* "State Home Foreclosure Prevention Project," below).

Foreclosure notices filed on or after November 15, 2008, must contain a certification that the pre–foreclosure notice to the borrower and the filing with AOC were provided as required. Subprime loans subject to these notification requirements are those that originated after January 1, 2005, but prior to December 31, 2007, and those meeting the definition of a "rate–spread" (i.e., high interest rate) home loan under G.S. 24-1.1F(a)(7) at interest rates set by the COB. The provisions of S.L. 2008-226 became effective on November 1, 2008, and expire October 31, 2010. Note, however, that the obligation on servicers to provide pre–foreclosure notifications to borrowers will not actually expire at that time, because an identical notice requirement appears in a nonexpiring mandate pursuant to S.L. 2008-228 (H 2463), discussed in "Licensing of Mortgage Servicers and Brokers," below.

State Home Foreclosure Prevention Project

In S.L. 2008-226 the General Assembly directs COB to use $400,000 of funds available to the State Banking Commission in the 2008–09 fiscal year to carry out the Emergency Home Foreclosure Reduction Program, a component of which is the State Home Foreclosure Prevention Project (hereinafter "Foreclosure Prevention Project"). As part of the Foreclosure Prevention Project, COB reviews information provided in the pre–foreclosure notice database (*see* "Pre–foreclosure Notice for Subprime Loans," above) and seeks solutions to avoid foreclosures of subprime loans. In the event that the COB reasonably believes that further efforts by the Foreclosure Prevention Project could avoid foreclosure of a primary residence, COB is empowered to delay the earliest permitted filing date for foreclosure of that residence by up to thirty days. This delay, when combined with the forty-five-day waiting period originally established by mailing the pre–foreclosure notice, can provide up to seventy-five days during which a troubled homeowner can work with a lender to prevent foreclosure. The pre–foreclosure database established for the Foreclosure Prevention Project is to be used exclusively for this program. The database is not considered a public record, and access to the complete database is restricted to AOC and COB.

The emergency authority to delay a foreclosure filing provided by this act became effective November 1, 2008, and expires October 31, 2010. For additional information, *see* Chapter 5, "Courts and Civil Procedures."

Legal Aid for Foreclosure Defense and Home Loss Prevention

The General Assembly appropriated state funds for the specific purpose of providing legal aid to persons facing foreclosure. Section 6.9A of S.L. 2008-107 authorizes $200,000 in recurring funds to the North Carolina State Bar for the provision of legal assistance to low-income consumers who are facing foreclosure and home loss. Eligible cases involve predatory mortgage lending, mortgage broker and loan services abuses, foreclosure defense, and other legal issues related to foreclosure and home loss. The funds are to be split evenly between two legal aid programs, the Land Loss Prevention Project and the Financial Protection Law Center.

Section 14.9 of S.L. 2008-107 also opens up, for the first time, an existing source of legal aid funding for foreclosure defense, by amending G.S. 7A-474.3(b) to add foreclosure defense and home loss prevention to the list of cases eligible for funds provided to legal aid organizations from court fees assessed on convicted defendants.

Regulation of Mortgage Brokers and Servicers

While the General Assembly took the emergency—and in some cases temporary—measures detailed above, other legislation established or expanded permanent regulation of mortgage brokers and servicers to encourage fair dealing in the mortgage lending business and require additional notifications to North Carolina consumers.

Mortgage Servicing Fee Notification and Broker Compensation

In 2007 the General Assembly enacted legislation to require mortgage servicers to notify borrowers of any fees assessed against them and to explain the fees clearly. This legislation also required servicers to notify a borrower within ten days in the event that a payment received from the borrower was not credited to the borrower's account. S.L. 2008-227 (H 2188) makes technical corrections to that legislation; clarifies that fee notifications must be mailed to borrowers within thirty days after assessing a fee; and adds some exceptions to the notification requirements, such as situations in which the borrower is already aware of the fee. The act also regulates mortgage broker fees for certain subprime loans. For "rate–spread" home loans defined under G.S. 24-1.1F, lenders are prohibited from providing, and brokers are prohibited from receiving, any compensation that adjusts based upon the terms of the loan. Commissions that adjust based on the size of the loan—as opposed to the terms of the loan—are permitted.

Licensing of Mortgage Servicers and Brokers

The General Assembly also enacted S.L. 2008-228 to bring mortgage servicers under the umbrella of regulatory and licensing requirements originally designed for mortgage lenders and brokers. Effective January 1, 2009, the legislation folds mortgage servicers into the existing licensing provisions of the Mortgage Lending Act (Article 19A of G.S. Chapter 53). This act tightens some existing license requirements, and it expands the bases under which COB may suspend the license of a mortgage lender, broker, or servicer. Other licensing requirements were designed specifically for servicers. For example, servicers are prohibited from forcing placement of excessive hazard, homeowner's, or flood insurance on mortgaged property. Additionally, at least forty-five days prior to initiating foreclosure, servicers must provide pre–foreclosure notice to delinquent borrowers containing identical information to the S.L. 2008-226 notice described in "Pre–foreclosure Notice for Subprime Loans," above; the important difference being that the pre–foreclosure notice under S.L. 2008-228 is required for all loans, not just subprime loans, and the authority, once effective on January 1, 2009, does not expire. The act also places a reporting requirement on servicers, obligating them, upon request by COB, to provide information on their servicing activities, including foreclosures commenced in North Carolina and details regarding workout arrangements for defaulted loans. Servicers are required to act in good faith to inform borrowers of the nature of any default or delinquency, and they have an affirmative obligation to negotiate with a borrower in default to attempt a loan workout or other resolution to the delinquency, subject to the servicer's duties and obligations under any relevant mortgage servicing contract. For additional information, *see* Chapter 5, "Courts and Civil Procedures."

Suspension of Foreclosure Proceedings for Material Violations of Law

With reports of illegal or abusive practices by brokers, lenders, and servicers permeating the news, the General Assembly empowered COB under S.L. 2008-228 to take action upon discovery of illegal activities in mortgage lending. COB may, if there is evidence of a material violation of law in the origination or servicing of a loan being foreclosed, notify the appropriate clerk of superior court of the violation. The clerk must then suspend the relevant foreclosure proceedings for sixty days from the date of notice. Once the violation is cured, however, COB must notify the clerk that the foreclosure may proceed. Unlike COB's emergency authority to delay foreclosure filings by thirty days in connection with the Foreclosure Prevention Project (*see* "State Home Foreclosure Prevention Project," above), the sixty-day suspension authorized under S.L. 2008-228 becomes effective for foreclosure proceedings filed on or after January 1, 2009, and does not expire. For additional information, see Chapter 5, "Courts and Civil Procedures."

Tax and Grant Incentives

Job Development Investment Grants

The Job Development Investment Grant program provides grants to businesses to foster economic development in the state in accordance with criteria set forth in G.S. 143B-437.52 and by the Economic Investment Committee. The statutory maximum annual liability for grants under

the program is $15 million, but pursuant to S.L. 2008-147 (S 2075), the General Assembly increased the maximum amount for calendar year 2008 to $25 million.

Extension and Expansion of Industry-Targeted Tax Credit Incentives

S.L. 2008-107 includes extensions and expansions for a number of state income tax credit incentive programs as described below. These modifications took effect when the bill became law on July 16, 2008, unless otherwise noted.

1. The Research and Development Tax Credit, set to expire on January 1, 2009, pursuant to G.S. 105-129.51(b), is extended to January 1, 2014.
2. The sunset of the Low-Income Housing Tax Credit pursuant to G.S. 105-129.45 is extended from January 1, 2010, to January 1, 2015.
3. The Mill Rehabilitation Tax Credit (Article 3H of G.S. Chapter 105) previously expired for all mill rehabilitation expenditures incurred on or after January 1, 2011, but S.L. 2008-107 extends the credit to include rehabilitation expenditures for any project for which an application for an "eligibility certification" is submitted to the State Historic Preservation Officer prior to January 1, 2011. These modifications are effective for taxable years beginning on or after January 1, 2008.
4. The sunset of the State Ports Tax Credit pursuant to G.S. 105-130.41(d) and 105-151.22(d) is extended from January 1, 2009, to January 1, 2014.
5. The sunset of the credit for qualifying expenses of a film production company pursuant to G.S. 105-130.47 and 105-151.29 is extended from January 1, 2010, to January 1, 2014. Additionally, this credit was expanded to include as qualifying expenses: (a) the cost of film production-related insurance coverage and (b) up to $1 million dollars of compensation paid to an individual, such as an actor, for personal services with respect to a single production. These modifications are effective for taxable years beginning on or after January 1, 2008.

For additional information on these and other tax incentive programs, *see* Chapter 26, "State Taxation."

Sales and Use Tax Refund for Solar Electricity Materials Manufacturers

S.L. 2008-118 (H 2438) extends eligibility for a refund of sales and use taxes to manufacturers of "solar electricity generating materials" that make large investments in facilities in the state. The sales and use tax refund, codified at G.S. 105-164.14, permits the owner of an eligible facility to obtain a refund of sales and use taxes paid on certain qualified building materials, supplies, and equipment installed in the initial construction of the facility. Manufacturers of "solar electricity generating materials" qualify for the refund provided that they pay a weekly wage at least equal to 105 percent of the average weekly wage for all insured private employers in either the relevant county or the state, whichever is less. For additional information, *see* Chapter 26, "State Taxation."

Income Tax Deduction for Sale of Manufactured Home Community

Manufactured homes, also known as mobile homes, are one of the most prevalent forms of low-income housing in North Carolina. It is not uncommon for residents of manufactured homes to own the manufactured home in which they live but not the land on which it sits; rather, the homeowners pay rent to a landlord of a manufactured home community for the privilege of maintaining their home on a plot of land within the community. Unless the owner of a manufactured home also owns the land underneath the home, manufactured homes do not present the owner with any real opportunity for building equity in his or her home. The General Assembly enacted legislation designed to preserve more manufactured home communities and increase the opportunities for owners of manufactured homes to obtain some form of ownership over the land on which their homes sit. Section 28.27 of S.L. 2008-107 provides a state income tax deduction for owners of manufactured home communities who sell the land in a single sale to a group comprised of a majority of the leaseholders in the community or to a nonprofit representing such a group. The tax deduction, which is equal to 5 percent of the gross purchase price of the sale, is effective for taxable years beginning on or after January 1, 2008, and expires for taxable years beginning on or after January 1, 2015. For additional information, *see* Chapter 26, "State Taxation."

Development Finance

Special Assessments for Critical Infrastructure

For the purpose of financing critical infrastructure, S.L. 2008-165 (H 1770) permits cities and counties to impose special assessments on benefited property, subject to the consent of a percentage of the benefited property

owners. The special assessments may be pledged, alone or in conjunction with other revenue sources, to the repayment of revenue bonds issued for the proposed infrastructure project. Critical infrastructure includes the following: sanitary sewer systems, storm sewers and flood control facilities, water systems, public transportation facilities, school facilities, streets, and sidewalks. For more detailed information on these assessments, *see* Chapter 14, "Local Government and Local Finance."

Rural Development

A lack of public wastewater and water system infrastructure is often faulted for inhibiting development in many rural counties. Since 1994 the North Carolina Rural Economic Development Center, Inc. (hereinafter Rural Center), has been providing water and wastewater infrastructure grants primarily through two programs: the Planning Grants Program, which provides local governments with funding to undertake planning efforts for water and sewer investments, and the Supplemental Grants Program, which provides funding for making improvements to water and sewer systems. The General Assembly continued its support for these programs in Section 13.8 of S.L. 2008-107 by appropriating almost $54 million to the Rural Center for the 2008–09 fiscal year. The Rural Center must use the appropriated funds to continue to provide planning grants and supplemental grants in a total amount of $50 million. The General Assembly placed restrictions on both grant types similar to those instituted in the 2007 appropriations act. Planning grants are limited to $40,000; supplemental grants are limited to $500,000 per local government applicant and require a dollar-for-dollar local match. For local governments meeting certain criteria of distress, larger supplemental grants are available with lower matching requirements. Grants are awarded through a competitive process, and up to $4 million may be awarded to natural gas line projects.

Section 13.9 of S.L. 2008-107 directs the Rural Center to provide grants in the total amount of $4 million through its Rural Economic Transition Program, which was first established in the 2007 appropriations act. The current appropriation is to be used to make grants primarily for the economic development and revitalization of small towns, with priority going to those towns with populations of less than 10,000 and those located in tier-one development areas as defined in G.S. 143B-437.08. Eligible projects include building reuse and restoration projects leading to job or business creation; brownfield assessment and remediation projects leading to productive reuse; projects to support economic recovery and revitalization in small towns; and innovative local and regional economic development and agriculture diversification projects that spur business activity, job creation, or public or private investment.

Wine and Grape Growers

Section 13.6A of S.L. 2008-107 provides $25,000 per quarter from the excise tax collected on fortified wine to the Department of Commerce. Those funds are to be allocated to the North Carolina Wine and Grape Growers Council for contracting research and development of viticultural and enological practices in North Carolina.

Economic Development Regulation

Multijurisdictional Industrial Parks

Industrial parks located in at least three contiguous counties and created pursuant to an inter–local agreement under G.S. 158-7.4 receive special treatment under G.S. 143B-437.08(h). All parcels of land within the multijurisdictional park, regardless of the county in which a specific parcel is located, receive a tier-one development designation, provided that at least one of the participating counties is a defined tier-one development area. This can result in a clear advantage for property located in such an industrial park, because the tier one designation qualifies the property for the most favorable tax treatment available under a series of state tax credit and grant programs. In order to qualify as a multijurisdictional park and receive the tier one designation, the park must have at least 250 developable acres in each county in which it is located. If a multijurisdictional park is successful over time, however, the land in these parks will be transferred to new corporate owners who will develop the property for private uses. At some point these land transfers to new owners may cause the remaining park acreage in a participating county to drop below the required 250 acre threshold, thereby casting doubt on the tier designation assigned to the remaining parcels in the park. The General Assembly settled the question in S.L. 2008-147 by clarifying that a transfer of acreage to a new owner who develops the property for industrial or commercial uses does not affect an industrial park's eligibility to receive the lowest tier designation among the participating counties.

Certified Retirement Communities

S.L. 2008-188 (S 1627) creates Article 10, Part 2K of G.S. Chapter 143B, called the "North Carolina Certified Retirement Community Program." The purpose of the program is to assist communities in marketing themselves as retirement locations and developing themselves as destinations that would be attractive to retired persons. When the program becomes effective on July 1, 2010, it will be part of the 21st Century Communities Program of the Department of Commerce. The act directs the Department of Commerce to establish criteria for obtaining certification as a North Carolina certified retirement community, and it charges the 21st Century Communities Program with administering the program for qualifying

communities and providing assistance related to the designation, such as marketing. Although the program does not become fully effective until 2010, a pilot program with the City of Lumberton became effective October 1, 2008.

Disclosures during Incentives Negotiations

H 2512, which would have required businesses seeking incentives to make certain disclosures under oath, failed to make it out of the House Finance Committee. Under the bill a business would have been required to disclose information about other industrial sites it was considering, incentives being offered by other government units or agencies, and incentives for which the business had applied at each site under consideration. Had the bill become law, the disclosures would have been required for businesses applying for state incentive programs such as the Job Development Investment Grants Program and the One North Carolina Fund.

Workforce Development

Section 8.7(a) of S.L. 2008-107 consolidates several community college workforce development programs (the Customized Industry Training Program, the New and Expanding Industry Training Program, and the Focused Industry Training Program) into a single program dubbed the Customized Training Program. Funds allocated to the program will not revert at the end of a fiscal year, but rather will remain available to the program until expended. For a business to qualify to receive assistance under the consolidated program, the requirements will be identical to the requirements under the original Customized Industry Training Program, but with one additional requirement: the business must be creating jobs, expanding an existing workforce, or enhancing the productivity and profitability of its operations within North Carolina.

Affordable Housing Development

Housing Trust Fund and Housing for Disabled Persons

Section 6.9A of S.L. 2008-107 authorizes an additional $2 million in recurring funds for the North Carolina Housing Trust Fund (hereinafter, "Trust Fund"), a state-funded housing resource administered by the North Carolina Housing Finance Agency for the purpose of providing affordable housing to low-income citizens. The additional amount brings the annual recurring appropriation for the Trust Fund to $10 million.

In the same section of the act, the General Assembly provides a one-time infusion of $7 million to the Trust Fund for the provision of additional independent and supportive-living apartments for persons with disabilities. Additionally, the act provides $1 million in recurring funds to the Department of Health and Human Services for operating cost subsidies for independent and supportive-living apartments for individuals with disabilities.

Property Tax Assessment for Low-Income Housing Tax Credit Developments

Housing owned by nonprofit corporations for the benefit of low- and moderate-income households is exempt from property tax under North Carolina law (G.S. 105-278.6), but that benefit is not available for affordable housing owned by business partnerships and limited liability corporations subsidized with federal low-income housing tax credits ("LIHTC"). The General Assembly did, however, take action to ease the property tax burden on LIHTC properties in S.L. 2008-146 (S 1878). Effective for taxable years beginning on or after January 1, 2009, the law bestows a special status to low-income housing developments which have received an LIHTC allocation from NCHFA. Assessors must use the income method of valuation for such properties, and they must consider the rent restrictions that apply to a property in determining the income attributable to it. Assessors may not consider LIHTC, nor state low-income housing tax credits received pursuant to G.S. 105-129.42, as income. Prior to enactment, assessors would make income determinations and valuations for these properties based upon rents available at market rates, typically leading to property valuations not reflective of the actual income produced. Some housing advocates expect that the change will result in lower property taxes and improved margins for operating and maintaining these properties. For additional information, *see* Chapter 15, "Local Taxes and Tax Collection," and Chapter 26, "State Taxation."

State Low-Income Housing Tax Credit Extended

As already stated above in "Extension and Expansion of Industry-Targeted Tax Credit Incentives," S.L. 2008-107 extends the state's low-income housing tax credit sunset pursuant to G.S. 105-129.45 from January 1, 2010, to January 1, 2015. For additional information, *see* Chapter 26, "State Taxation."

Community Development

Community Development Block Grant Allocations

Section 13.5(a) of S.L. 2008-107 allocates $45 million in community development block grants for the 2009 program year. The money will be allocated in nearly the same proportions as in 2008, with the exception of $500,000 that was removed from each of the community revitalization and the housing development program categories. The resulting combined $1 million was reallocated to the economic development category. Table 7–1 shows the final allocation for the 2009 program year.

Table 7–1. 2009 Community Development Block Grant Allocations

Community Development Block Grant Program Category	Amount Allocated ($)	Notes
State administration	1,000,000	
Urgent needs and contingency	1,000,000	
Scattered site housing	13,200,000	
Economic development	8,710,000	This is $1 million more than in 2008.
Small business/entrepreneurship	1,000,000	
Community revitalization	13,000,000	This is $500,000 less than in 2008.
State technical assistance	450,000	
Housing development	1,500,000	This is $500,000 less than in 2008.
Infrastructure	5,140,000	

Cleanup of Abandoned Manufactured Homes

S.L. 2008-136 (H 1134) creates a program to assist counties with planning and managing the identification, deconstruction, recycling, and disposal of abandoned manufactured homes. For counties adopting and implementing a management plan under the act, guidelines for the disposal process are established. The process includes notification and hearing rights for owners of abandoned manufactured homes. In the event that an owner fails to dispose of an abandoned manufactured home after notice and a hearing, a participating county may enter the property to remove and dispose of the abandoned manufactured home. If the owner of the manufactured home is not the owner of the land on which the home is located, then the county may order the landowner to permit entry onto the land for the purpose of carrying out removal and disposal of the manufactured home. A county is then permitted to seek reimbursement from the owner of the manufactured home for the county's unrecovered costs related to the removal and disposal, and it has authority to place liens on the manufactured home owner's property in the county, if any.

The process described above appears to be new, supplemental authority for local governments to manage abandoned manufactured homes without supplanting existing authority. The act is not to be construed to change or limit the existing authority of a county or a municipality to enforce any existing laws or of any person to abate a nuisance, nor does it limit county or municipal authority under the statutes governing planning and regulation of development.

Grants to reimburse counties for expenses incurred under the program are made available out of the Solid Waste Management Trust Fund by application to the Department of Environment and Natural Resources (DENR). Grants may not exceed $1,000 for each abandoned manufactured home disposed through the program, but a matching grant for costs above $1,000 per unit may be available to counties designated as tier-one or tier-two development areas. Additionally, to encourage development of management plans, a county in a tier-one or tier-two development area may request a planning grant of up to $2,500 out of the Solid Waste Management Trust Fund.

DENR is authorized to use up to $1 million annually from the Solid Waste Management Trust Fund for grants made pursuant to this program. The Management of Abandoned Manufactured Homes Act is codified as Article 9, Part 2F of G.S. Chapter 130A, is effective July 1, 2009, and expires October 1, 2023. More details about various aspects of the act may be found in Chapter 4, "Community Planning, Land Development, and Related Topics," Chapter 11, "Environment and Natural Resources," and Chapter 14, "Local Government and Local Finance."

Expanded Health Care for Children (NC Kids' Care)

NC Kids' Care, a health care assistance program implemented by Section 10.12 of S.L. 2008-107, bears mentioning briefly here. Although it is not a community development program targeted to distressed communities, it will have a direct impact on the health care needs of many children living in such communities. NC Kids' Care provides health insurance coverage to children in families with incomes above 200 percent and not more than 250 percent of the federal poverty level. This amounts to an expansion of eligibility for the Health Insurance Program for Children established under Article 2, Part 8 of G.S. Chapter 108A, which provides coverage for children in families with incomes between 100 percent and 200 percent of the federal poverty level. For more details on the program requirements and services offered through NC Kids' Care, *see* Chapter 3, "Children and Juvenile Law."

C. Tyler Mulligan

8

Elections

One act, S.L. 2008-150 (S 1263), contains all 2008 elections legislation, covering topics from oversight of elections to campaign finance regulation. It is referred to in this chapter as "the omnibus act."

Oversight of Elections

The omnibus act creates the Joint Legislative Elections Oversight Committee, composed of nine members of the Senate who are appointed by the President Pro Tempore and nine members of the House of Representatives who are appointed by the Speaker of the House. The committee membership is to proportionally represent the partisan composition of each chamber.

The committee is to examine, on a continuing basis, election administration and campaign finance regulation in North Carolina and make recommendations to the General Assembly for improvement. The act charges the committee to study the budgets, programs, and policies of the State Board of Elections (SBE) and the county boards of elections; examine election statutes and court decisions; study other states' practices; and study other election matters as determined by the committee.

Conduct of Elections

Instant Runoff Voting

In 2006 the General Assembly directed the SBE to conduct a pilot test of an innovative method of conducting elections. In the pilot, second primaries and "runoff" elections were eliminated in favor of "instant runoff voting." Under the pilot, Hendersonville and Cary used instant runoff voting in municipal elections in 2007.

In traditional primaries, if no candidate receives at least 40 percent of the vote—the "substantial plurality"—the second-place candidate may call for a second primary. In instant-runoff voting, by contrast, voters cast their ballots only once, so they do not have to return to the polls for a second primary or runoff. When voters mark their ballots, they mark not only their choice for the winner—as they would in traditional voting—but they also mark their second and third choices. When the ballots are counted, only the first choices are tallied in the initial round of counting. If the race is a partisan primary and any candidate receives the 40 percent substantial plurality, then that candidate is declared the winner, and no further counting in that race is necessary. If, however, no candidate receives the substantial plurality, then the ballot counters conduct a second round of tallying, with only the two top finishers from the first round advancing to the second round. In the second round each ballot counts as a vote for whichever of the two finalists is ranked higher on the ballot. The candidate with the higher number of votes in the second round wins.

Instant runoff voting can be used in nonpartisan primaries, as well. If the race is a nonpartisan election and any candidate receives a majority of the votes, then that candidate is the winner, and no further counting in that race is necessary. If, however, no candidate receives a majority, then the counting continues to a second round as described in the paragraph above.

The 2008 omnibus act authorizes the SBE to use instant runoff voting in up to ten local jurisdictions in elections in 2009, 2010, and 2011. The governing board of each jurisdiction selected must approve participation in the pilot and agree to cooperate with the county board of elections. In the case of school board elections, the approval must come from the county board of elections itself, not the board of education. The SBE, in

consultation with the School of Government at the University of North Carolina, is to develop goals, standards, and criteria for implementation and evaluation.

Residence Period for Voting in a Primary

Article VI, section 2 of the North Carolina Constitution provides that a person who is otherwise qualified to vote may, after living in the state and the proper electoral district for thirty days, "vote at any election held in this State." This constitutional requirement can be found in G.S. 163-55. In recent times the issue has arisen as to the proper interpretation of the state constitution and the statute with respect to primaries. Must a voter be a thirty-day resident before being eligible to vote in a primary, or should a primary be considered a part of the general election, so that a voter who has not resided for thirty days before the primary, but will have resided for thirty days by the time of the general election, be allowed to vote in the primary? The General Assembly answers this question in the omnibus act by amending G.S. 163-55 and a few related statutory provisions to make it clear that the thirty-day requirement applies to primaries as well as general elections. A voter must have resided for at least thirty days before a primary to be eligible to vote in the primary.

In addition voters must register to vote, under G.S. 163-82.6, at least twenty-five days before an election to be eligible to vote in the election. The omnibus act amends that statute to make clear that it applies to primaries as well as general elections.

Candidates on Ballot When New Election Ordered

By the general rule, when the SBE orders a new election because of irregularities in the original election, all candidates on the ballot in the original election are to appear on the ballot in the new election. G.S. 163-182.13(e) has provided, however, that when the SBE orders a new election in a multiseat race because of irregularities in the original election, and the irregularities could not have affected the election of one or more of the "leading vote getters," then the SBE may order the election to be held among only "those remaining" candidates whose election could have been affected by the irregularities.

The omnibus act makes two wording changes. First, it substitutes "candidates" for "leading vote getters," and, second, it deletes the word "remaining" from the statute. As thus rewritten, the statute says that when the irregularities could not have affected the election of one or more of the candidates, then the election may be limited to those candidates whose elections could have been affected.

This change was prompted by a situation that arose in a 2007 municipal election in Clayton. Five candidates ran for two seats. Only fourteen votes separated the top three vote getters. The fourth-place and fifth-place finishers were separated from third place by fifty-six votes and 389 votes, respectively. Exactly twenty improper ballots were cast in the election. Because fewer than twenty votes separated the top three vote getters, the old wording of the statute required that in the new election all five candidates were to appear on the ballot. With the changed wording of the new statute, since the fourth- and fifth-place finishers were not within twenty votes of the second-place finisher, the irregularities could not have affected their outcomes, and the new election could have been limited to the top three finishers.

Candidates of New Political Parties

The General Statutes provide for the formation of new political parties. G.S. 163-98 provides that when a new party has met the statutory requirements and been recognized by the SBE, its candidates for the first general election are to be nominated by convention (rather than by primary); those nominees will then appear on the general election ballot. The president of the convention is to certify the names of those nominees to the SBE. The omnibus act adds a provision to the statute specifying that the nominees must be affiliated with the new party at the time of the certification. They may meet this requirement by submitting an application to change party affiliation at the time the certification is submitted.

Delivery of Notice of Final SBE Decision

G.S. 163-182.14 has provided that a final decision by the SBE on an election protest is to be delivered to the parties personally or by certified mail. The omnibus act amends the statute to provide that delivery may also be made by regular U.S. mail or by delivery services that provide a record of the date and time of delivery.

Campaign Finance Adjustments to Court Decision

North Carolina's campaign finance statutes have been the subject of nearly constant litigation since 1996. The most recent major court ruling came in May 2008. In *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), the federal court of appeals held several portions of the statutes unconstitutional.

First, the court overturned a portion of the statutory provisions for determining whether a contribution is the kind of contribution that can be regulated. For a contribution to be the kind that is subject to regulation, it must be made "to support or oppose the nomination or election of one or more clearly identified candidates." G.S. 163-278.14A has provided the

basis for making the determination of whether a contribution met this requirement: either the communications funded by the contribution contained words like "vote for Smith" or "Smith for commissioner," or, in the absence of such words, "contextual factors" such as the language, timing, and distribution of the communication revealed that the nature of the communication was "electoral advocacy." The court held that this second prong—the contextual factors prong—was unconstitutional, because it could include many kinds of speech other than speech that is "the functional equivalent of express advocacy" of a candidate.

Second, the court overturned a portion of the statutory provisions for determining whether an entity that spends money for election-related speech is a "political committee." Only if the entity meets the definition of political committee is it subject to the full range of campaign finance regulation. G.S. 163-278.6(14) set out several ways in which an entity would meet the definition. For instance, an entity "controlled by a candidate" would be a political committee. The statute has provided further that an entity is a political committee subject to regulation if it had "as a major purpose" the support or opposition of the nomination or election of a candidate. The court held that this last provision—"a major purpose"—was unconstitutional. It would be constitutional, the court decided, only if its coverage was limited to entities with "the major purpose" of supporting or opposing candidates. The difference between "a major purpose" and "the major purpose" is crucial, the court ruled. Allowing regulation of entities with "a major purpose" that is electoral sweeps in too many entities that have many major purposes and amounts to unconstitutional regulation of protected speech.

Third, the court overturned a portion of the statutory provision, G.S. 163-278.13, that places a limitation of $4,000 as the most that a contributor may give during any one election to any one candidate or political committee. The court held that enforcing this limitation against committees that make only independent expenditures—that is, expenditures that are not coordinated with any candidate—is an unconstitutional limitation on free speech.

In response to these rulings, the 2008 omnibus act contains a number of revisions to the campaign finance regulation statutes.

"Support or Oppose" Limitation

To meet the first of the court's rulings, the omnibus act amends G.S. 163-278.14A to provide that a contribution or expenditure is made "to support or oppose the nomination or election of one or more clearly identified candidates" only if it contains words such as "vote for Smith" or "Smith for commissioner." The act deletes the provision for "contextual factors" discussed above.

"The" Major Purpose

To meet the second of the court's rulings, the omnibus act amends G.S. 163-278.6(14) to provide that an entity not controlled by a candidate meets the definition of "political committee," and is thus subject to the full range of campaign finance regulation, only if it has "the major purpose" of supporting or opposing a candidate. Before the change, the statute referred to "a major purpose."

Limits Not Applicable to Independent Expenditure Committees

To meet the third of the court's rulings, the omnibus act amends G.S. 163-278.13 to add a new subsection providing that the contribution limitation of $4,000 per election does not apply to contributions made to an independent expenditure political committee. The treasurer of such a committee must make a certification to the SBE that the committee does not and will not make contributions, directly or indirectly, to candidates or to committees that make contributions to candidates.

Other Campaign Finance Adjustments

Candidate Serving as Own Treasurer

G.S. 163-278.6 contains definitions of terms that apply throughout the campaign finance statutes. One such defined term is "political committee," and the campaign finance statutes then spell out many responsibilities of political committees. The omnibus act amends the statute to make clear that the term includes the campaign of a candidate who serves as his or her own treasurer.

Matching Funds

Article 22D of G.S. Chapter 163 governs the North Carolina Public Campaign Fund, under which candidates for justice of the state's Supreme Court or judge of the Court of Appeals may choose to forego the opportunity to raise funds for their campaign and instead, in return for a promise to limit campaign spending, receive public funds to support their campaigns. G.S. 163-278.67 provides for a participating candidate to receive public funds in addition to the regular amount when a nonparticipating opponent has spent more than a certain amount in the campaign. These additional funds are called "matching funds." The omnibus act amends the statute to add a requirement that when a candidate becomes eligible for any amount of matching funds, the SBE is to authorize the transfer of the matching funds as soon as practicable; the Department of Administration is to transfer the funds to the candidate no later than twelve hours after receiving the notice from the SBE.

G.S. 163-278.13(e2) has provided that no nonparticipating candidate who is opposed by a participating candidate may accept a contribution in the final twenty-one days of the election, if the contribution would trigger the participating candidate's right to matching funds. The omnibus act repeals that provision.

The North Carolina Public Campaign Fund, as noted above, offers public funding to candidates for Supreme Court and Court of Appeals. Similarly, Article 22J of G.S. Chapter 163, the Voter-Owned Elections Act, offers public funding to candidates for commissioner of insurance, superintendent of public instruction, and auditor. In both instances, nonparticipating candidates who have participating opponents are required to report when they reach 80 percent of the trigger amount that would entitle the participating opponent to matching funds. The two statutory provisions requiring this report—G.S. 163-278.66(a) and G.S. 163-278.99A(a)—have required the report when the nonparticipating candidate's expenditures or obligations reach that 80 percent level. The omnibus act amends both statutes to require the report when contributions reach the 80 percent level. It also deletes from the statute particulars about triggers for further reports and instead directs the SBE to set out the schedule for further reports.

Separate Accounts for Funds

The omnibus act enacts new G.S. 163-278.8(h), which requires that committee treasurers maintain all moneys of the committee in a bank account or accounts used exclusively by the political committee and may not commingle those funds with any other funds.

Purchases of Campaign Merchandise Not "Contributions"

The omnibus act enacts new G.S. 163-278.8A, which provides that a political party executive committee may sell goods or services and that the purchase price of the goods or services will not count as a "contribution" for purposes of the contributions limits contained in the campaign finance statutes, for purposes of reporting contributions, or for purposes of account-keeping. For this exemption to apply, the executive committee must have filed a plan with the SBE, and the SBE Executive Director must have approved it. Under the plan the price of the goods and services must be reasonably close to the market price, total sales must not exceed $10,000 in an election cycle, no single purchaser may make total purchases of more than $50, and the treasurer of the executive committee is to report the amount raised and the number of purchases.

Clarifying Quarterly Reports

G.S. 163-278.9 sets out the reporting schedule for candidates and committees. One of the required reports is the quarterly report, required during even-numbered years when "there is an election for that candidate or in which the campaign committee is supporting a candidate." The omnibus act adds the words "or opposing" so that the reporting is required when there is an election for that candidate or "the campaign committee is supporting or opposing a candidate."

Nonmunicipal Committees Reporting for Municipal Contributions and Vice Versa

The campaign reporting statutes contain a distinct set of provisions for municipal elections, separate from the provisions for county and state elections, with distinct provisions for political committee organization and reporting. The omnibus act enacts new G.S. 163-278.40J, making it clear that political committees that are organized under the general provisions must, if they make contributions or expenditures in municipal elections, make reports according to the municipal reporting schedule for those contributions or expenditures.

An amendment to G.S. 163-278.9(d) applies the other way around. It provides that a committee organized under the municipal provisions that makes contributions in nonmunicipal elections must meet the general reporting requirements.

Electioneering Communications

Two different articles in G.S. Chapter 163 regulate certain kinds of election-related communications in the sixty days before a general election and thirty days before a primary. Article 22E regulates broadcast, cable, and satellite communications; Article 22F regulates mass mailings and telephone bank communications. In both cases if the communication refers to a clearly identified candidate for statewide office or for the General Assembly and reaches a large audience, it is referred to as an "electioneering communication," and the sponsor must report certain information regarding expenditures for the communication. Further, the statutes prohibit corporations, insurance companies, labor unions, and professional associations from making any expenditure for an electioneering communication.

The omnibus act amends both G.S. 163-278.82 and G.S. 163-278.92 to provide that the prohibition on expenditures by corporations, insurance companies, labor unions, and professional associations does not apply unless the electioneering communication at issue is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

Reporting Late Contributions

The statutes calling for reports of contributions and expenditures by political committees and referendum committees—G.S. 163-278.9 and G.S. 163-278.9A—have required that contributions of $1,000 or more from political committees be reported within forty-eight hours of receipt. The omnibus act amends the statutes to require that any contributions of that size, whether from political committees or other sources, must be so reported and to specify that in-kind contributions must be reported.

Robert P. Joyce

9

Elementary and Secondary Education

The General Assembly enacted no major school law changes. It continued to support efforts to help all students learn and achieve.

Appropriations

The appropriations act, S.L. 2008-107 (H 2436), added $93.7 million to the appropriation adopted for the Department of Public Instruction (DPI) in S.L. 2007-323, for a total of $7.55 billion for 2008–09. Section 5.1 of the act allocates $18 million to the School Technology Fund and $114,038,000 to the State Public School Fund from the Civil Penalty and Forfeiture Fund. Section 5.2 allocates funds from the Education Lottery Fund, with approximately $128 million allocated for class size reduction, just under $85 million for the prekindergarten program, $38.5 million for scholarships for needy students, and $154.2 for the Public School Building Capital Fund. Section 2.1 of S.L. 2008-118 (H 2438), the budget technical corrections act, amends section 7.11 of the appropriations act to specify how moneys appropriated to the Public School Building Capital Fund will be allocated. The method of allocation will depend on whether the moneys total more or less than $154.2 million.

Student Issues

Children with Disabilities

S.L. 2008-90 (H 12) makes several modest changes to the special education statutes. These statutes were rewritten in 2006 (S.L. 2006-69) in part for the purpose of aligning state law with the federal Individuals with Disabilities Education Act (IDEA). To further that alignment, S.L. 2008-90 amends the definition of *educational services* in G.S. 115C-106.3 to require behavior intervention services for students only to the extent required by federal law.

Students with disabilities are entitled to receive their educational services in the least restrictive appropriate placement. As a result, students are placed in a wide variety of settings, ranging from regular classrooms to residential institutions. S.L. 2008-90 amends G.S. 115C-107.7, which deals with those students assigned to homebound instruction. As before, the appropriateness of homebound instruction for each student assigned to it must be evaluated monthly. However, the evaluation must now be conducted by the designee or designees of the student's individualized education program (IEP) rather than by the head of the student's IEP team.

School boards must provide students with disabilities a free appropriate education (FAPE) even if these students are suspended for more than ten days or expelled. In addition, school administrators and boards must follow different procedures for imposing long-term suspensions or expulsions on students with disabilities than for imposing them on other students. These responsibilities make identifying which students are students with disabilities for disciplinary purposes a significant decision. The special protections of the law cover not only students formally identified as disabled before the time of their misconduct but extend to any student for whom the local educational agency has a "basis of knowledge" that the student is a child with a disability. New G.S. 115C-107.7(c) provides that a school has this basis of knowledge if the child's behavior and performance clearly and convincingly establish the need for special education *before* the behavior that precipitated the disciplinary action. Prior disciplinary actions, standing alone, do not constitute clear and convincing evidence. This new subsection is effective January 1, 2009, and expires March 1, 2011.

It is clear that the state must offer all students with disabilities special education and related services, but occasionally, it is not clear which public agency is responsible for providing them. S.L. 2008-174 (H 2306) requires

the State Board of Education (State Board) and Department of Health and Human Services to jointly determine which agency is responsible for services to children with disabilities who are placed in private psychiatric residential treatment by a public agency other than the local educational agency. This determination and any recommendations must be reported to various General Assembly committees.

Children of Military Families

Moving from place to place often creates challenges for children. Children of military families may change schools because of a parent's or guardian's military assignment or deployment. When they enroll in a new (receiving) school, these students often encounter barriers to educational success and full participation in school activities.

The Interstate Compact on Educational Opportunity for Military Children is designed to minimize the barriers. Its goal is to offer these students the same opportunities as other students by avoiding penalties and unnecessary delays in school enrollment and by facilitating participation in school activities and progress toward graduation.

Membership in the compact is optional for states, and states that join may later withdraw. A minimum of ten states must choose to participate in order for the compact to become effective, and that minimum has been met. With the enactment of S.L. 2008-185 (S 1541), new Article 29B of G.S. Chapter 115C, North Carolina becomes a member of the compact. As a result, state laws that conflict with the compact are superseded to the extent of the conflict.

The member states comprise the Interstate Commission on Educational Opportunity for Military Children (commission). The commission has the authority to adopt rules that have the force and effect of rules promulgated under G.S. Chapter 150B, the Administrative Procedure Act. North Carolina will have one voting representative, called the Compact Commissioner, who is responsible for the administration and management of the state's part in the compact. The governor appoints the commissioner, who must be an attorney licensed in North Carolina and represent at least one local board of education.

S.L. 2008-185 also requires the State Board to establish a State Council. The council's membership must include, at a minimum, the Superintendent of Public Instruction; a superintendent of a local education agency with a high concentration of military children; one representative each from a military installation, the executive branch of government, the North Carolina School Boards Association, and the North Carolina Association of School Administrators; and two members appointed by the General Assembly. The council must name a military family education liaison to assist military families and the state in implementing the compact.

The compact protects school-aged children enrolled in kindergarten through twelfth grade who are part of the household of a member of full-time duty status in the uniformed service of the United States. In addition to children of these active duty members, the compact also covers, for a period of one year, children of certain injured members or veterans of the uniformed services and children of certain deceased members or veterans.

Key strategies for achieving the compact's goals involve

- facilitating qualification and eligibility for enrollment, educational programs, and participation in extracurricular activities;
- facilitating on-time graduation;
- providing for information sharing between and among states, schools, and military families; and
- promoting flexibility and cooperation between the education system, parents, and the student.

Enrollment, placement, and attendance. Several provisions of S.L. 2008-185 make it easier for students to enroll in new schools. Some of these provisions are particularly significant when a student from another state is enrolling in a North Carolina school or when a student is leaving North Carolina to enroll in a school in another state, because fewer potential barriers exist when a student is staying within the state.

G.S. 115C-366 sets out eligibility requirements for students who are entitled to enroll without payment of tuition in North Carolina public schools. G.S. 115C-366(a3) provides that children of military families not domiciled in North Carolina have a right to enroll as long as the statutory conditions related to suspension or expulsion and to filing affidavits are met. This exception to the domicile requirement is amended by S.L. 2008-185 to apply if the parent or legal guardian is on active military duty and is deployed outside the local school unit in which the student resides. The exception also applies, for a period of one year after the parent's or guardian's medical discharge or retirement, if the parent or guardian is a member or veteran of the uniformed services who is severely injured and medically discharged or retired. Finally, the exception applies, for a period of one year after the parent's or guardian's death, if the parent or guardian is a member of the uniformed services who died while on active duty or as a result of injuries sustained on active duty. Active duty does not include periods of active duty for training for less than thirty days.

S.L. 2008-185 says, "Continuing the student's academic program from the previous school and promoting placement in academically and career challenging courses should be paramount when considering placement." In light of these goals, the act grants local school administrative officials flexibility in waiving course or program

prerequisites or other preconditions for placement in the courses and programs offered by the school system. (In North Carolina, G.S. 115C-288 grants school principals the authority to grade and classify students.)

When a student enrolls, the receiving school must initially honor placement in educational courses based on the student's prior enrollment and/or prior educational assessments, as long as those courses are available. The new school may conduct its own evaluations to ensure a student's appropriate placement and continued enrollment in a course or courses. These requirements also apply to programs such as academically gifted, English as a second language, Advanced Placement courses, International Baccalaureate and to career pathways courses.

When a student with a disability enrolls, the receiving school must comply with IDEA by providing special education services according to the student's IEP and with Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act by making reasonable accommodations for students covered by these federal statutes. A receiving school may conduct its own evaluation to ensure proper placement.

States must give these students thirty days—or a length of time set by the commission—from enrollment to get any required immunizations. G.S. 130A-152 and 130A-155 address the required immunizations and filing of an immunization certificate.

States do not have one uniform date for determining eligibility for enrollment in kindergarten or first grade. Receiving states must allow students to continue their enrollment at their grade level in their former school regardless of age or date of entry into the new school. G.S. 115C-364 addresses the age requirements for initial entry into North Carolina's public schools.

State and local educational agencies must facilitate transitioning military children's inclusion in all extracurricular activities to the extent they wish to participate and are otherwise qualified, regardless of any application deadlines.

The superintendent is authorized to grant a student excused absences to allow the student time to visit a parent or guardian who has been called for, is on leave from, or has just returned from deployment to a combat zone or combat support posting.

On-time graduation. Moving to a new school during high school may create obstacles to timely graduation because coursework and testing requirements vary across the country. The compact requires school officials to make special efforts to facilitate on-time graduation. Local education officials must waive specific courses required for graduation if similar course work has been satisfactorily completed in another local educational agency. If an official denies a waiver, the official must provide a reasonable justification for that decision. If a waiver is not granted to a student who would qualify to graduate from his or her former school, the receiving local educational agency must provide an alternative means for the student to acquire the coursework required for an on-time graduation.

A receiving local educational agency must accept exit or end-of-course exams required for graduation in the sending state, national norm-referenced achievement tests, or alternative testing from the sending state in lieu of testing required for graduation in the receiving state.

Enrolling in a new school as a high school senior may make it especially difficult to graduate on time, so special provisions apply to any student transferring at the start of or during his or her senior year. If a senior would be ineligible to graduate from the receiving local educational agency after all alternatives have been considered, the sending and receiving local educational agencies must ensure that the student receives a diploma from the sending local educational agency if the student meets that local educational agency's graduation requirements. If either the sending or receiving state is not a member of the compact and thus not bound by these provisions, then the state that is a member must use its best efforts to facilitate the student's on-time graduation in accordance with the provisions described above related to course work and testing.

Information sharing. When a new student enrolls in school, the student and the school both benefit when the school has appropriate education records. The compact's provisions are designed to help schools more easily and quickly get relevant information about students. If official education records cannot be released to the parent for transfer to the new school, the custodian of the records of the sending state must provide the parent with a complete set of "unofficial education records." The receiving school must enroll and place the student based on the information in those records, pending validation by official records as quickly as possible. The receiving school must request the student's official records from the former school. Once a request has been made, the sending state must furnish the records within ten days or within a length of time set by the commission.

Safety at Schools

Sexual Offenders and Schools

Several years ago, a young girl, Jessica Lunsford, was kidnapped, sexually abused, and killed. Since then her father and many others have pushed for "Jessica's Law" to help prevent similar crimes. In 2008 North Carolina enacted its version of Jessica's Law. S.L. 2008-117 (H 933) has many provisions related to individuals who are convicted of certain sexual offenses and required to register as sex offenders. Many of the amendments are to G.S. Chapter 14, and some of them are described in Chapter 6, "Criminal Law and Procedure." The new law is effective December 1, 2008, and applies to offenses committed on or after that date.

Other provisions of S.L. 2008-17 are important to school boards and administrators and school contractual personnel, as well as to any parents, guardians, and students who are themselves registered sex offenders. The most significant of these provisions (1) make it unlawful for registered sex

offenders to be on certain premises, (2) address the education of juveniles who are themselves registered, and (3) require sex offender registry checks of school contractual personnel before allowing them to have direct interaction with students.

Presence on or near school property. New G.S. 14-208.18 makes it unlawful for offenders who are registered for offenses specified in Article 7A of G.S. Chapter 14 to knowingly be on the premises of any place intended primarily for the use, care, or supervision of minors, including schools, child care centers, and playgrounds. It is also unlawful for these registered offenders to be within 300 feet of any location intended primarily for the use, care, or supervision of minors when that place is located on premises that are not intended primarily for such use. This limitation applies to schools, child care centers, nurseries, and playgrounds located in malls, shopping centers, or other property open to the general public. The restriction also applies to any place where minors gather for regularly scheduled educational, recreational, or social programs. A violation of G.S. 14-208.18(a) is a Class H felony.

Parents and guardians. An easing of these restrictions is available to a person who is the parent or guardian of a child enrolled in school. The parent or guardian may be present on school property if he or she is there to attend a conference with school personnel to discuss the academic or social progress of the child or if the principal or designee has requested the presence of the parent or guardian for any other reason relating to the child's welfare or transportation.

If a parent or guardian is entering school property for one of these reasons, he or she must notify the principal of his or her registration as a sex offender and of his or her presence at the school unless the superintendent, local school board, or school principal has granted written ongoing permission for regular visits of a routine nature. If the superintendent or school board grants this permission, the superintendent or board chair must notify the principal. Notification must include the nature of the visits and hours when the parent or guardian will be at the school. The parent or guardian must notify the principal's office upon his or her arrival and departure at each visit.

In all of these situations, school personnel must directly supervise the parent or guardian at all times that he or she is on school property. If no one is reasonably available for this supervision, then the parent or guardian is not allowed to be on school property, whether or not ongoing permission for regular visits of a routine nature has been granted.

Young offenders. If a registrant is eligible to attend public school under G.S. 115C-378, then he or she may be present on school property if the local board of education allows it. Before Jessica's Law, G.S. 115C-391(d) authorized a school board to expel a student if specified conditions were met, including that the student was at least fourteen years old. An amendment to that subsection now allows a board to expel any student who is subject to G.S. 14-208.18, based on clear and convincing evidence. This new provision has no age limitation. Before ordering expulsion, the board must consider whether there is an alternative program that may be offered by the local school unit to provide educational services. If the board decides that a student will be provided services on school property, school personnel must supervise the student at all times.

Medical care. A juvenile may be present at a restricted location if the juvenile is there to receive medical treatment or mental health services and remains under the direct supervision of an employee of the treating institution at all times.

Voting. If a school is used as a voting place, then a person subject to the restrictions may be present only to vote and may not be outside the voting enclosure except to enter and exit the voting place. The person must notify the principal of the school that he or she is a registered offender.

Registration information. Information regarding a juvenile required to register is not a public record. However, the sheriff must forward registration information of a juvenile who has been adjudicated delinquent and is required to register to the local board of education. Every school principal must register with the North Carolina Sex Offender and Public Protection Registry to receive e-mail notification when a registered sex offender moves within a one-mile radius of the school.

School contractual personnel. New G.S. 115C-332.1 applies to contractual personnel, defined as any individual or entity under contract with the local board of education whose contractual job involves direct interaction with students. It does not apply to any person covered by G.S. 115C-332 (school personnel criminal history checks).

Any contract with the board of education must require the contractual personnel's employer to conduct an annual check of that person on the State Sex Offender and Public Protection Registration Program, the State Sexually Violent Predator Registration Program, and the National Sex Offender Registry. The contract also must require the board of education to prohibit direct interaction with students for any contractual personnel listed on any of these registries.

Gangs

Gangs are likely to create disciplinary and safety problems at school as well as in the community. The North Carolina Street Gang Prevention and Intervention Act, S.L. 2008-56 (S 1358), is designed to develop community-based gang prevention strategies and programs. One provision requires DPI and the Department of Juvenile Justice and Delinquency Prevention to report to General Assembly committees on a number of topics. These topics include the prevalence of school violence and gang activity, programs designed to educate school personnel and parents on signs that a student may be involved or associated with a gang, and effective practices for reducing school violence and gang activity that have been successfully implemented in other states. The act also amends several sections of G.S. Chapter 143B, and those changes are discussed in Chapter 6, "Criminal Law and Procedure."

Miscellaneous

Child Nutrition

Schools have an important role to play in efforts to improve students' health and wellness. As one step, the State Board recently adopted new standards for the Child Nutrition Program. Section 7.25 of S.L. 2008-107 (H 2436) amends G.S. 115C-264.3 to give elementary schools an additional year to implement the new nutrition standards. All elementary schools must now achieve a basic level by the end of the 2009–10 school year.

More at Four Program

Section 7.17 of S.L. 2008-107 and Section 49.1 of S.L. 2008-181 (H 2431) direct DPI to continue to implement the More at Four prekindergarten program for at-risk four-year-olds who are at risk of failure in kindergarten.

Dropout Prevention Committee

Section 7.14 of S.L. 2008-107 reestablishes the Committee on Dropout Prevention, which was created in Section 7.32 of S.L. 2007-323. The committee determines which schools or other entities will receive dropout prevention grants, use of those grants, and evaluation of the grants. The committee will disband on December 31, 2010.

Bus Inspections

G.S. 115C-248(a) requires safety inspections of all school buses owned or operated by the local school unit every thirty days during the school year. S.L. 2008-172 (H 2265) amends G.S. 20-183.2(a1) to exempt school buses from the section's required safety inspection if the buses are titled to a local board of education and subject to the school bus inspection requirements specified by the State Board and G.S. 115C-248(a).

School Employment

Salaries

S.L. 2008-107 sets provisions for the salaries of teachers and school administrators. For teachers, the act sets a salary schedule for 2008–09 that ranges from $30,430 for a ten-month year for new teachers holding an "A" certificate to $64,750 for teachers with thirty-one or more years of experience, an "M" certificate, and national certification. For school-based administrators (principals and assistant principals), the ten-month pay range is from $37,810 for a beginning assistant principal to $83,400 for a principal in the largest category of schools with more than forty years of experience. Of course, many school-based administrators are employed not for ten but for eleven or twelve months, adding the proportionate amount to their salaries.

For central office administrators (assistant superintendents, associate superintendents, directors/coordinators, supervisors, and finance officers), the ten-month range is $33,090 to $83,360, and many are employed for more than ten months. For superintendents, the twelve-month range is $56,640 to $134,352.

Noncertified public school employees paid with state funds receive an increase of 2.75 percent or $1,100, whichever is higher.

Funds are provided in the act so that payments may be made under the ABCs of Public Education program, up to the following amounts: $1,500 per teacher and $500 per teacher assistant in schools that achieve higher than expected improvements, and $750 per teacher and $375 per teacher assistant in schools that meet expectations.

Teachers Using Personal Leave

G.S. 115C-302.1(d) provides for teachers to earn up to two days of personal leave per year and to accumulate personal leave up to a maximum of five days. It further permits teachers to use the personal leave upon five days' notice, except that personal leave may not be used on certain days, such as the first day of school and days scheduled for state testing. The statute formerly provided that teachers using personal leave received full pay less the required substitute deduction ($50 per day). Both S.L 2008-107 and S.L. 2008-209 (H 15) amend the statute. The acts put into place a temporary rule for the 2008–09 school year providing that teachers using up to one day of personal leave a year will receive their full salary and those using more than one day will receive full pay minus the substitute deduction; teachers using personal leave on specified teacher workdays (days when students are not in school) also receive their full salary. After June 30, 2009, only teachers using personal leave on specified teacher workdays will receive full salary without the substitute deduction.

Nationally Certified Teachers as Mentors

G.S. 115C-296.2 provides for a salary differential for teachers who have achieved certification through the National Board for Professional Teaching Standards. The statute formerly required that certified teachers, to be eligible to continue to receive the differential, must spend at least 70 percent of their time in classroom instruction (or in work related to the certification if the certification does not relate to classroom instruction). S.L. 2008-86 (H 2360) amends the statute to provide that certified teachers may also be assigned as full-time mentors after having served at least two years as a classroom teacher following certification. The mentoring assignment may be for a maximum of three years (after which the teacher must return to the classroom for at least three years to be eligible again) and must involve the mentoring of at least fifteen newly hired teachers. A school system may assign no more than 5 percent of its certified teachers as mentors (with a minimum of five).

School Personnel Records

S.L. 2008-194 (H 545) amends G.S. 115C-321 to provide that the Retirement Systems Division of the Department of State Treasurer may disclose the names and mailing addresses of former public school employees to North Carolina nonprofit organizations representing 10,000 or more retired state government, local government, or public school employees.

School Administrator Certification

G.S. 115C-290.7(b) previously set out the qualifications that an individual had to meet to attain certification as a school administrator. That statute was repealed as part of the general repeal in 2006 of Article 19A of G.S. Chapter 115C, the article that established and governed the former Standards Board for Public School Administrators. S.L. 2008-187 (S 1632) restores the provisions of former G.S. 115C-290.7(b), codifying it at G.S. 115C-284(b1).

Studies

The General Assembly authorized or directed several committees and agencies to study issues related to public schools.

Students with Disabilities

Section 7.12 of S.L. 2008-107 (H 2436), the appropriations act, and section 16.1 of S.L. 2008-181 (H 2431), the studies act, direct DPI to analyze the participation of students with disabilities in Learn and Earn Early College High Schools, Redesigned High Schools, the North Carolina Virtual Public School, and North Carolina public high schools that are on block schedules. DPI must consider enrollment, graduation, and dropout rates for students with disabilities in these programs.

Geography Education

Section 23.1 of S.L. 2008-181 directs DPI to study the effectiveness of geography education in middle and high schools.

Physical Education

Section 25.1 of S.L. 2008-181 directs the State Board to study the current status of K–12 physical education. Each school administrative unit must submit baseline data at the school level and report it to DPI for analysis. Baseline data includes body mass index (BMI) for a statistically valid random sample of students of various ages from all one hundred counties. This data must be collected by a trained professional such as a school nurse or physical education teacher.

Principal and Assistant Principal Program

Section 24.1 of S.L. 2008-181 directs the State Board, in cooperation with the University of North Carolina Board of Governors, to conduct a study to develop a framework for a North Carolina Certified Principal and Assistant Principal Program.

Funding

Section 37.1 of S.L. 2008-181 directs the Joint Legislative Study Committee on Public School Funding to extend its review of public school funding and evaluation of modifications to public school funding formulas.

Higher Education Civic Education

Section 48.1 of S.L. 2008-181 establishes the Higher Education Civic Education Study Commission. The commission is to advise the state on the role of higher education in helping strengthen and enhance the ability of colleges and universities to participate in civic engagement activities with K–12 educational institutions, faith-based programs, or other service programs affecting the social development and literacy of school-aged children. One of the commission's responsibilities is to develop recommendations for monitoring and evaluating the impact of civic engagement programs on the performance of K–12 and higher education students.

Additional Studies

The studies act also authorizes the Joint Legislative Education Oversight Committee to study the following:

- The dismissal, demotion, or suspension without pay of noncertified school employees, including considering whether such employees should be dismissed, demoted, or suspended without pay only for just cause, which would in essence grant them tenure (sec. 5.2).
- The impact of raising the compulsory attendance age for public school attendance from sixteen to seventeen or eighteen, in coordination with DPI (sec. 5.4).
- The roles that regional education service centers created within DPI could play in the delivery of professional development throughout the state (sec. 33.1).

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Emergency Management

The most significant change made to emergency management provisions during the 2008 session was the General Assembly's decision to provide private entities responding during emergencies with the same immunity given to emergency workers. Several other changes made during the session include changes to the 911 Board and to emergency management personnel benefits. Steps taken to address the drought, the most pressing natural disaster facing the state during the 2008 legislative session, are discussed in Chapter 11, "Environment and Natural Resources."

Liability Protection for Private Entities

The General Assembly took steps to remove any disincentive for private corporations to help provide resources in the event of an emergency. On the recommendation of the Joint Select Committee on Governmental Immunity and the Joint Select Committee on Emergency Preparedness and Disaster Management Recovery, S.L. 2008-200 (S 1766) amends G.S. 166A-14 to provide immunity from liability for firms, partnerships, associations, or corporations when the entity is providing disaster assistance. This immunity protects an entity from liability for the death or injury of any person or for property damage that results from the entity's activities. In order to qualify for the protection, the entity must meet several conditions. The entity must provide assistance for free or only charge for actual expenses, and the entity must be responding to an officially declared emergency and acting under the direction of the state or local government. Specifically, one of the following conditions must exist: (1) emergency management services are being provided in the state during a state of disaster or state of emergency declared by the Governor and the services must be provided under the direction and control of the Secretary of the Department of Crime Control and Public Safety or the Governor; (2) emergency management services are being provided during a local state of emergency and the services are provided under the direction and control of municipality's governing body, a county's governing body, or a board of county commissioners; or (3) the entity is providing planning, preparation, training, or exercises related to emergency management services or measures with the Division of Emergency Management, Division of Public Health, or the governing body of the municipality or county.

The immunity does not apply if the entity's action or omission is the cause of the emergency or disaster or is the reason that emergency management measures are needed. If an entity has liability insurance, immunity is waived by the entity to the extent of the indemnification by insurance. The act also prohibits an insurer from excluding from coverage under an entity's liability policy acts or omissions for which the entity would be liable only to the extent indemnified by insurance as provided in the act.

911 Changes

Several changes were made to the 911 Board¸ established during the 2007 session. S.L. 2008-134 (S 1704) amends G.S. 62A-44 to remove the specific percentage amounts allocated from the 911 Fund for reimbursements to Commercial Mobile Radio Service (CMRS) providers and as monthly distributions and grants to public safety answering points (PSAPs). The statute now provides that the percentage of the funds remitted by CMRS providers allocated to CMRS providers and PSAPs must be set by the 911 Board and may be adjusted by the board to ensure full cost recovery for CMRS providers and for distributions to primary PSAPs, to the extent there are excess funds.

The act also amends G.S. 62A-46 to clarify that the Eastern Band of Cherokee Indians is an eligible PSAP. The Tribal Council is required to give the 911 Board adequate information for the determination of the Eastern Band's base amount, and the board must use the most recent federal census estimate of the population living on the Qualla Boundary to determine the per capita distribution amount. These amounts will be used to calculate the monthly distribution to the Eastern Band from the 911 Fund.

Emergency Personnel

State Highway Patrol Funeral Expenses

S.L. 2008-142 (S 1100) amends G.S. 143B-476 to authorize the Secretary of the Department of Crime Control and Public Safety to use up to $10,000 in available funds to reimburse a family for the funeral expenses of a member of the State Highway Patrol who is killed in the line of duty. This provision expires on June 1, 2009. The Department is also directed to study whether the Secretary should be authorized to reimburse the family for funeral expense of a *state law enforcement officer* killed in the line of duty and report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee by January 1, 2009. More information can be found in Chapter 19, "Public Employment."

City Firefighters Overtime Pay

S.L. 2008-151 (S 963) enacts new Article 14A of G.S. Chapter 160A establishing overtime for municipal firefighters. More information can be found in Chapter 19, "Public Employment."

Extended Fire and Rescue Death Benefits

S.L. 2008-163 (H 1563) amends G.S. 143-166.2 to include fire or rescue instructors conducting training outside of their home departments in those who are eligible for line-of-duty death benefits. More information can be found in Chapter 19, "Public Employment."

Disaster Recovery and Business Continuity

S.L. 2008-107 (H 2436) requires the State Chief Information Officer (CIO) to determine whether state agencies (excluding the General Assembly, Judicial Department, and University of North Carolina) have made the preparations necessary for backing up critical applications. If backup is not sufficient to minimize disruptions in critical state services caused by a man-made or natural disaster, the CIO must work with agencies and the Office of State Budget and Management to develop plans to use the Western Data Center to provide backup. The CIO must report to the Joint Legislative Oversight Committee on Information and Technology by December 1, 2008.

Budget Provisions

Section 22.2 of the appropriations act (S.L. 2008-107) increases the amount allocated from the General Assembly for the annual appropriation to the State Fire Protection Grant Fund from $3.88 million to $4.18 million. The Fund is used to provide compensation for local fire protection of state-owned buildings.

The act also appropriates $698,940 in nonrecurring funding to the Office of Education Services for the purchase of a new telephone/campuswide emergency system for the Governor Morehead School for the Blind.

North Carolina currently has seven Hazardous Materials (HAZMAT) Regional Response Teams. In December 2006, the Governor's HAZMAT Task Force recommended that to ensure adequate statewide coverage for hazardous material emergencies funding should be provided to support the operating needs and equipment replacement for the teams. The appropriations act appropriates $200,000 in nonrecurring funds for this purpose.

Studies

S.L. 2008-181 (H 2431) continues the Joint Select Committee on Emergency Preparedness and Disaster Management Recovery. The committee now must submit its final report by December 31, 2009.

S.L. 2008-162 (H 2432) directs the Division of Emergency Management, in consultation with the North Carolina Association of County Commissioners, to study ways and develop plans to increase the capabilities of counties to plan for, respond to, and manage disasters at the local level. The act enumerates issues that must be addressed in the plans, including mandating the establishment of emergency management agencies at the county level and implementing an emergency management certification requirement for all local emergency management coordinators and other essential personnel. The Division must report to the chairs of the Joint Select Committee on Emergency Preparedness and Disaster Management Recovery and the chairs of the House and Senate Appropriations Subcommittees on Natural and Economic Resources by December 1, 2008.

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Environment and Natural Resources

The fall and winter of 2007–08 brought a deep and threatening drought to central North Carolina, including Falls Lake, the water supply for Raleigh and the legislature. The General Assembly responded with significant water supply and drought-related legislation. Among many changes and new provisions, the drought bill gave the governor new powers to require the transfer of water from one system to another in the event of a water shortage emergency. The General Assembly also extended its ongoing study, in conjunction with the UNC School of Government, of water allocation, suggesting that water supply will continue to be a high-priority environmental issue for 2009 and beyond.

Administration in General

S.L. 2008-181 (H 2431), the studies bill, authorizes the Environmental Review Commission (ERC) to study the feasibility of a fulltime environmental commission, modeled on the Utilities Commission, in place of unnamed existing environmental regulatory programs.

Agriculture

S.L. 2008-212 (S 847) gives some protection for agricultural workers exposed to pesticides. It adds violations of pesticide laws to the list of "whistleblower" complaints protected under the retaliatory employment discrimination provisions of G.S. Chapter 95, Article 21. It also directs the Pesticide Board to promulgate rules to implement the recommendations of the Governor's Task Force on Preventing Agricultural Pesticide Exposure, requiring recording of the specific time of day when each pesticide application was completed and extending the retention period for pesticide application records for all pesticides covered under the Worker Protection Standards for agricultural pesticides from thirty days to two years.

At the request of small organic dairy farmers, S.L. 2008-88 (H 2524) disapproved a rule of the N.C. Board of Agriculture requiring raw milk for animal feed to be dyed charcoal gray. Instead, the statute requires a label stating that the milk is not for human consumption.

Animal Waste

House Bill 822 started as an environmental technical corrections bill, but after passing the House of Representatives, the bill was amended in the Senate to allow variances and exceptions from the swine farm siting act setback provisions and to change the enforcement of swine farm setbacks. After significant public outcry, the House did not concur in the changes, so the bill did not become law.

Air Quality

Climate Change

S.L. 2008-81 (H 2529) extends the Climate Change Commission final report deadline from April 15, 2008, to October 1, 2009.

Mobile Sources

S.L. 2008-181 authorizes the ERC to study the costs and benefits of adopting California motor vehicle emissions standards in North Carolina.

Coastal Resources

S.L. 2008-181 authorizes the ERC to study hazard disclosure in coastal real estate transactions.

Senate Bill 599, a bill to allow hardening the coastline at Figure Eight Island through a groin at the inlet, was defeated despite a great deal of lobbying effort on the part of Figure Eight Island property owners.

Contaminated Property Cleanup

S.L. 2008-195 (H 2498), the almost-annual bill amending the underground storage tank program, raises annual operating fees for owners and operators of tanks to $420 (the current fee is $200 for smaller tanks and $300 for larger tanks). This fee increase is estimated to generate $4 million in additional revenue for the tank funds. The bill directs the Department of Environment and Natural Resources (DENR) to use up to $3 million of this annual increase to address problems noted by the U.S. Environmental Protection Agency in a 2006 letter to the state, mostly concerning the need to remove free product (gasoline and other petroleum) from groundwater at sites contaminated by underground storage tanks. The bill also sets a one-year time limit for determinations of eligibility for the tank funds and for requests for reimbursement, creates a process for cost recovery of improperly paid reimbursement funds, clarifies how financial assurance can be demonstrated, directs DENR to create a pilot program for site-specific cleanup standards that differ from the present risk-based standards, and makes other technical changes to the program.

Energy

S.L. 2008-203 (S 1946) codifies and strengthens the energy and water efficiency requirements for major public building and renovations that were passed in 2007 as a mostly uncodified session law, S.L 2007-546. The bill requires major new and renovated state-owned, University of North Carolina, and community college system buildings to be 20 to 30 percent more energy efficient and 20 percent more water efficient than designated standards from 2004 and 2006, respectively. It further requires building commissioning and separate metering so that a building's performance can be verified. State buildings that are purchased must be at least as energy and water efficient as comparable state buildings built at the time that the purchased structure was built.

S.L. 2008-146 (S 1878) provides a solar energy tax exemption from property taxes of 80 percent of the appraised value of solar electric energy equipment.

S.L. 2008-107 (H 2436), the appropriations act, directs the University of North Carolina to study the feasibility of establishing wind turbines in the Pamlico and Albemarle sounds. It also creates a sales tax holiday the first weekend of November for certain Energy Star–rated appliances.

S.L. 2008-181 (H 2431) authorizes the ERC to study a state-level permit system and siting requirements for commercial wind energy.

State Parks, Natural Areas, and Land Conservation

S.L. 2008-155 (H 2496) adds Bear Paw State Natural Area and Yellow Mountain State Natural Area to the state parks system. Bear Paw is on the Avery and Watauga county line; Yellow Mountain is in Avery and Mitchell counties, near Roan Mountain.

S.L. 2008-11 (S 1862) removes a portion of Lake Waccamaw State Park from the parks system to allow realignment of a bridge.

S.L. 2008-13 (S 1646) sets up a trust fund for Swain County from proceeds of a settlement agreement with the U.S. Department of the Interior and the Tennessee Valley Authority. The settlement covers a debt owed to Swain County from the 1940s, when construction of Fontana Dam flooded a road for which Swain County had assumed the debt. A new road could not be built because of environmental impacts to the Great Smoky Mountains National Park. The fund is to be administered by the State Treasurer, with the interest paid out annually to Swain County on request of the commissioners and the principal disbursed only on a referendum of the county residents. The fund is planned to be initially capitalized with $6 million; another $46 million is pledged to be paid in the future. Assuming full payment of this amount, the county could have between $2.5 and $4 million available yearly from the fund.

S.L. 2008-107 (H 2436), the appropriations act, authorizes up to a $50 million debt to purchase state park lands and conservation areas under the Land for Tomorrow effort.

S.L. 2008-171 (H 1889) adds "wildlife conservation land" as a classification of land that is taxed under the present-use value system, rather than under normal principles of market-value estimation. The bill also clarifies the use-value status of property with a conservation easement when the property owner receives compensation for the easement. The Department of Revenue had previously maintained that only 100 percent donations of easements entitled an owner to continue being taxed at use-value rates. The clarification sets the threshold at receipt of no more than 75 percent of fair market value to retain use-value taxation.

Solid Waste

Recycling

S.L. 2008-208 (H 819) adds televisions to the electronics recycling law passed in 2007 (S.L. 2007-550) but delays the effective date of the law to January 1, 2010, and beyond for certain provisions.

S.L. 2008-181 (H 2431) authorizes the ERC to study the recycling of fluorescent lamps and plastic bags.

Manufactured Homes

S.L. 2008-136 (H 1134) adds a new Part 2F to Article 9 of G.S. Chapter 130A, providing for the management of abandoned manufactured homes. The act directs each county to consider developing a plan for this wastestream in its solid waste management plan. It prohibits intact manufactured homes from being disposed of in landfills. Counties that do adopt and implement plans for abandoned manufactured homes are authorized to use a new process set out in the statute to notify owners, enter the property of nonresponsive owners, and deconstruct the abandoned homes and dispose of them—and to charge the costs of doing so to the owner as a lien on his or her property. The statute also authorizes reimbursement grants to counties to cover their costs in creating and implementing the plans.

Tipping Fee

A bill (H 2541) was introduced to delay the start of collecting the statewide tipping fee passed in 2007 (S.L. 2007-550), but the bill did not pass.

Toxics and Biocides

S.L. 2008-181 (H 2431) authorizes the ERC to study a ban on toxic brominated fire retardants (PBDEs).

Water Supply

Drought

In 2007 North Carolina went into one of the quickest and deepest droughts on record. The governor presented a package of proposals to give the state greater authority to deal with drought in February of 2008. The proposals, as amended, passed as S.L. 2008-143 (H 2499). The act strengthens water withdrawal registration and reporting requirements by increasing the possible civil penalties for failure to report, by requiring quicker reporting, by committing the state Department of Agriculture to do an annual inventory of agricultural water withdrawals, and by promising greater priority to those who register withdrawals in the event of a need to allocate water more rigorously than in the past.

The act statutorily defines *essential water uses* as "firefighting, health, and safety; water needed to sustain human and animal life; and water necessary to satisfy federal, State, and local laws for the protection of public health, safety, welfare, the environment, and natural resources; and a minimum amount of water necessary to maintain the economy of the State, region, or area." It allows the governor to declare a "water shortage emergency" and to require water systems with water supply in excess of their needs for essential water uses to transfer that water to systems in a water shortage emergency. The act gives the Secretary of DENR authority to pass emergency rules requiring conservation in water shortage emergency areas. It also provides for temporary rights of way for lines to transfer emergency water and for compensation at 110 percent of the cost that would be paid by a customer of the sending system for emergency water.

S.L. 2008-143 specifies elements of a water shortage response plan to be included in the local water supply plans of all large (more than 1,000 customer) community water systems and local governments that supply water. Systems in severe, extreme, or exceptional drought as defined by the U.S. Drought Monitor can be required to implement more severe water shortage response measures than are contained in their plans, if DENR makes written findings that such measures are necessary. In extreme or exceptional drought, the act authorizes DENR to require weekly water use reporting by large community systems and local governments.

The act has water efficiency measures that apply without regard to drought status. Local government and large community water systems must require separate meters for new in-ground irrigation systems connected to their systems. To be eligible for state water infrastructure funds from any funding source allocated by the General Assembly, whether the allocation of funds is to a state agency or to a nonprofit organization for the purpose of extending waterlines or expanding water treatment capacity, these water systems must:

- Establish a water rate structure that is adequate to pay the cost of maintaining, repairing, and operating the system, pursuant to guidelines to be developed by the State Water Infrastructure Commission
- Implement a leak detection and repair program
- Have an approved water supply plan pursuant to G.S. 143-355
- Meter all water use except for water use that is impractical to meter, including, but not limited to, use of water for firefighting and to flush waterlines
- Not use a rate structure that gives residential water customers a lower per-unit water rate as water use increases
- Have evaluated the extent to which the future water needs of the water system can be met by reclaimed water
- Have implemented a consumer education program that emphasizes the importance of water conservation

S.L. 2008-143 declares that the reuse of treated wastewater or reclaimed water is critical to meeting future supply needs of the state, and the act directs the Environmental Management Commission (EMC) to adopt rules to promote water reuse. It directs the Commission for Health Services to pass rules on the use of gray water for irrigation on single-family residential properties. The act also increases the priority accorded funding requests that improve a water system's vulnerability to drought, including interconnections, water reuse, repair or replacement of leaking lines, and meter replacement.

The act refines membership on the Drought Management Advisory Council and its process for making drought designations. It prohibits restrictive covenants that require irrigation of landscaping during designated droughts.

S.L. 2008-143 also directs the State Water Infrastructure Commission, working with the UNC School of Government, the public staff of the Utilities Commission, and the Local Government Commission, to develop guidelines for water rate structures that are adequate to pay the cost of maintaining, repairing, and operating water systems, including payment of principal and interest on indebtedness incurred for maintenance or improvement of the water system. The guidelines are also to consider the effect of water rates on water conservation and recommend rate structures that support water conservation. The Department of Environment and Natural Resources is directed to develop recommendations, in consultation with a technical working group, for water efficiency standards for water-using fixtures in residential and commercial building and for in-ground irrigation systems, as well as recommendations for efficient metering of water use by local government and large community water systems.

The UNC School of Government is assisting the ERC with a study of the fundamental legal and policy choices the state has for water allocation. S.L. 2008-10 (H 2447) extends that study to October 1, 2010.

River Basins and Water Transfers

S.L. 2008-125 (H 821) revises the boundaries of river basins, for purposes of giving notices of interbasin transfers, to include areas outside of North Carolina in adjoining states that are close enough to the state to be directly concerned with the effects of proposed water transfers. The bill also directs the Environmental Review Commission to include a study of the boundaries of river basins for interbasin transfers within North Carolina and to include that study in the work underway with the UNC School of Government.

Federal Energy Regulatory Commission Licensing

S.L. 2008-137 (S 1046) directs the ERC to study the impacts on the state of the potential issuance of a new fifty-year license by the Federal Energy Regulatory Commission to Alcoa Power Generating Inc. on the Yadkin/Pee Dee River. It further directs DENR to consider the study's findings before issuing a water quality certification for the license under Section 401 of the federal Clean Water Act.

Drinking Water

S.L. 2008-140 (S 1259) statutorily exempts community water systems from commercial code warranties, including the warranty of merchantability and warranty of fitness for a particular purpose.

The appropriations act amends G.S. 87-98 to provide for emergency drinking water supplies in some situations where water problems do not involve a pollutant with a federally created maximum contaminant level and to put a cap ($10,000 per household) and threshold criteria on payments to connect a single house to a public water supply system.

Water Quality

Stormwater

S.L. 2008-211 (S 1967) is a major rewrite of the Coastal Stormwater Program. The EMC finalized rules in 2007 that increased stormwater regulation in the coastal area, in many ways bringing the coastal rules in line with the Phase II stormwater requirements now in place in the urbanized areas of the state, but in other ways going beyond the Phase II requirements. Development interests and concerned coastal local governments introduced a bill to disapprove the EMC rules, which led to a lengthy stakeholder negotiation process facilitated by legislative staff. S.L. 2008-211 is the result of that process and represents, if not a perfect consensus, at least widespread agreement on coastal stormwater rules. The statute supersedes prior coastal stormwater requirements in the administrative code, N.C. Admin. Code tit. 15A, ch. 02H, § .1005 (1995).

S.L. 2008-211 essentially brings the coastal stormwater rules into line with the Phase II requirements. The changes made to the EMC rules clarified the kind of activity that triggered a stormwater permit requirement (from 10,000 square feet of "disturbed area" to 10,000 square feet of "built-upon area," or development requiring an Erosion and Sediment Control Plan or a major Coastal Area Management Permit). One special provision remains: in calculating "built-upon area" for purposes of a 24 percent threshold beyond which structural stormwater controls are required, coastal wetlands are excluded from the area of the site. The EMC rules had proposed to exclude all wetlands from the area of the site. Special requirements also remain for development within one-half mile

and draining to class SA shellfish waters. The special requirements include options for the use of rain gardens, cisterns, and permeable pavement.

S.L. 2008-198 (S 845), the environmental technical corrections bill, makes many changes in the law, including adding additional parameters for testing new private wells before they are certified to be complete and a restriction on further EMC rulemaking on coastal stormwater before October 1, 2011.

S.L. 2008-181 (H 2431) authorizes the ERC to study the feasibility of implementing state stormwater programs without requiring state permits, relying instead on engineers' certifications of stormwater system compliance with state rules.

Soil and Water Conservation

S.L. 2008-107 (H 2436) sets up the Agricultural Drought Response Cost Share Program, which authorizes the use of cost share funds for several drought response purposes, including pasture renovation and repair of farm ponds. This marks a potentially significant change in the use of the agricultural cost share program beyond just water quality purposes and into water quantity-related needs.

Wetlands

S.L. 2008-152 (S 1885) amends the Ecosystem Enhancement Program statute to make the use of private mitigation banks the required option for stream and wetland mitigation by persons other than the N.C. Department of Transportation, if there is a state or federally approved private mitigation bank in the eight-digit hydrologic unit where the project needing mitigation is located.

Richard Whisnant

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Health

During 2008 the General Assembly considered health-related legislation covering a wide variety of topics, including the regulation of smoking in public places, the sale of unpasteurized milk to the public, and the donation of anatomical gifts. Most of the legislation enacted produced relatively minor changes to existing state laws, but the General Assembly did establish two significant new reporting requirements—one related to childhood injuries and another related to race and ethnicity of patients. In addition, the appropriations process resulted in significant increases in funding for local public health services, both in the form of grant programs and direct aid to counties and in various public health initiatives.

Public Health

Budget

The 2008 appropriations act, S.L. 2008-107 (H 2436), makes several significant changes to funding allocated to the Division of Public Health within the North Carolina Department of Health and Human Services (DHHS). Recurring funding is appropriated as follows:

- $4.8 million in direct aid to local health departments, which increases the total direct aid amount to over $11 million.
- $1 million in grant funding for community programs seeking to prevent chronic illness among minority populations.
- $500,000 for the tobacco quitline, which is a telephone-based education, counseling, and support service intended to help individuals quit using tobacco.
- $500,000 for a grant-in-aid to the Healthy Start Foundation, which is a nonprofit organization focused on reducing infant mortality and other women's and children's health issues.
- Over $300,000 to the Office of the Chief Medical Examiner to add positions to support increased reporting requirements and to manage a backlog in the toxicology laboratory.
- $100,000 to fund family planning for uninsured women who are not eligible for Medicaid.

In addition, the appropriations act provides for nonrecurring funding for several public health programs, including:

- $4 million in nonrecurring grant funding for safety net providers, including rural health centers, local health departments, free clinics, school-based health centers, and others.
- $2 million for comprehensive demonstration projects focused on reducing obesity and chronic diseases caused by obesity.
- $450,000 for various purposes related to stroke prevention and rehabilitation.
- Over $400,000 to the Healthy Carolinians program.
- $400,000 for programs related to an initiative focused on adolescent pregnancy prevention, school dropout prevention, and teen parenting.
- Almost $250,000 for a program designed to (1) improve birth outcomes by educating women about the benefits of progesterone and purchasing medication for women at risk for preterm births and (2) reducing infant mortality through the implementation of a safe sleep public awareness campaign.
- $150,000 for a grant-in-aid to Prevent Blindness North Carolina to expand the prekindergarten vision screening program.

S.L. 2008-107 also reduces some of the Division of Public Health's appropriations from last year, including reductions to the following:

- Operating funds ($1.9 million) and contracts ($2 million).
- State Public Health Laboratory (over $400,000).
- Women, Infants, and Children Program (WIC) (over $300,000).
- Vision Care Program ($500,000).
- Breast and Cervical Cancer Program ($500,000).

Other provisions of the budget that directly impact public health providers include:

- An appropriation of $2.8 million in recurring and $950,000 in nonrecurring grant funding to support provider networks that coordinate free care for low-income and uninsured patients.
- $250,000 in nonrecurring grant funding for the expansion of school-based health centers.
- Authorization for the Aids Drug Assistance Program (ADAP) to serve individuals with incomes up to 300 percent of the federal poverty level, rather than 250 percent.
- A requirement that DHHS use $100,000 from the Maternal and Child Health Block Grant to establish a Task Force on Preventing Childhood Obesity.

Smoking

In 2007 the General Assembly enacted G.S. 130A-493, which prohibits smoking in state government buildings and allows local governments to regulate smoking in local government buildings and a few other public places. S.L. 2008-149 (S 1681) amends G.S. 130A-493 to extend the prohibition on smoking to state vehicles. A *state vehicle* is defined as "any passenger-carrying vehicle owned, leased, or otherwise controlled by the State and assigned permanently or temporarily to a State employee or state agency or institution for official State business." The legislation directs the person in charge of assigning the vehicle to post "no smoking" signs in conspicuous areas of the vehicle, except if the vehicle is used for undercover law enforcement operations. The legislation also amends G.S. 130A-498 to allow local governments to regulate smoking in local government vehicles.

Several years ago, community colleges were granted an exception to a law that had previously restricted their ability to prohibit smoking in their buildings and on their grounds.[1] Relying upon this exception, many community colleges adopted policies prohibiting smoking on their campuses, including on their campus' grounds. When the General Assembly passed legislation last year allowing local governments to restrict smoking in local government buildings, the authority of community colleges to restrict smoking was arguably diminished. Because it appeared that community colleges fell within the definition of "local government," the colleges would have the authority to regulate smoking only inside their buildings and not on their grounds. In 2008 the General Assembly enacted S.L. 2008-95 (S 1669) amending G.S. 130A-498 to clarify that the term "local government" did not include community colleges in the context of smoking laws. It also adds new G.S. 115D-20.1 to the General Statutes Chapter governing community colleges. The new section authorizes a local community college's board of trustees to adopt, implement, and enforce a written policy prohibiting tobacco use in college buildings, in college facilities, on college campuses, in college vehicles, at college-sponsored events, and on any other property owned, leased, or operated by the college. The language in the new law is similar to the language authorizing local school officials to adopt tobacco-related policies.[2]

Another piece of legislation also included a smoking-related provision. Section 10.4B of S.L. 2008-107 adds new G.S. 90-18.6, which governs state-funded nicotine replacement therapy programs. The new provision authorizes the Health and Wellness Trust Fund or DHHS to contract for the operation of a tobacco-use cessation program. Under the contract the program can recommend over-the-counter nicotine replacement therapy products to individuals, counsel them about the products (e.g., contraindications), and provide the products free of charge. The law stipulates that any medical aspects of the program must be supervised by a licensed physician.

Unpasteurized Milk

The General Assembly has the authority to disapprove rules adopted by administrative rulemaking bodies, such as the Commission for Public Health and the Environmental Management Commission. In S.L. 2008-88 (H 2524) the legislature exercises this authority by disapproving rules adopted by the North Carolina Board of Agriculture in 2007. The board's rules would have required unpasteurized milk, which is currently allowed to be distributed as commercial feed, to be dyed gray with food coloring and labeled "NOT FOR HUMAN CONSUMPTION."[3] The expectation was that the dying and labeling of the milk would discourage human consumption of unpasteurized, or raw, milk. In lieu of the rules, the legislature amended G.S. 130A-279, the public health law that already prohibits the sale or dispensing of unpasteurized milk directly to consumers for human consumption. The statute now requires that raw milk dispensed as animal

1. S.L. 2006-133 (amending G.S. 143-599).

2. *See* G.S. 115C-407.

3. 22 North Carolina Register 1028 (December 3, 2007) (reprinting the text of 02 N.C.A.C. 09E .0116 as adopted by the North Carolina Board of Agriculture and approved by the Rules Review Commission).

feed include a warning statement explaining that (1) the milk is not for human consumption, and (2) it is illegal to sell raw milk for human consumption in the state.

Drinking Water Wells

In 2006 the General Assembly adopted legislation requiring local health departments to begin issuing permits for the construction and repair of private drinking water wells.[4] The new permitting requirements went into effect on July 1, 2008. As part of the permitting program, the law requires that the water from permitted private drinking water wells be sampled and tested for several different parameters. S.L. 2008-198 (S 845) expands the list of parameters in G.S. 87-97(h) to include methyl tert-butyl ether, ethylene dibromide, 1,2-dichloroethane, 1,2-dichloropropane, isopropyl ether, benzene, toluene, ethylbenzene, xylenes, trichloroethylene, and tetrachloroethylene. These additional testing requirements will go into effect October 1, 2009.

Public Health Incubator Program

In 1997 several local health departments in northeastern North Carolina joined together in an effort to improve public health services in their region. They formed a group, called the Northeastern North Carolina Partnership for Public Health. The partnership served as a model for what are now called public health incubators—voluntary collaborations among local health departments and other community groups that are intended to "hatch" new ideas leading to improved public health practices. Since 2004 the General Assembly has provided funding to the North Carolina Institute for Public Health to support the public health incubator program.[5] S.L. 2008-92 (S 1687) directs the program to report annually to the Public Health Study Commission; the first report was due October 1, 2008. The annual reports must address how the program is achieving its mission of supporting the voluntary collaborations and regional health needs and discuss the program's efforts to address the urgent public health needs identified in the Public Health Task Force's 2008 Public Health Improvement Plan.[6]

4. S.L. 2006-202 (amending G.S. Chapter 87).

5. Sec. 10.32 of S.L. 2004-124.

6. The Public Health Task Force studies public health in North Carolina and creates plans intended to strengthen public health infrastructure and improve health outcomes in the state. The Task Force's 2008 Public Health Improvement Plan is available online at www.ncpublichealth.com/taskforce/taskforce-2008.htm.

Early Intervention Services

The Early Intervention Branch, part of the Division of Public Health, works in conjunction with other state agencies to provide services to children under age five who have disabilities or other special needs. The work of the branch and other state agencies is overseen by the NC Interagency Coordinating Council. Some early intervention services are provided through regional children's developmental services agencies (CDSA). In 2003 the General Assembly established eighteen Regional Interagency Coordinating Councils to serve each of the eighteen CDSA catchment areas and charged them with developing early intervention plans for their regions. S.L. 2008-85 (H 2127) repeals G.S. 143B-179.5A, the statute that created the regional councils. The law's title suggests that the purpose of the repeal is to save funds and avoid duplication of effort. The repeal was effective July 11, 2008.

Health Information

Reporting Children's Injuries to Law Enforcement

For over thirty years, G.S. 90-21.20 has required physicians and the administrators of health care facilities to make a report to law enforcement when patients are treated for certain injuries that may have been caused by criminal acts. The reporting requirement covers injuries caused by firearms, illnesses from poisoning, and some injuries caused by knives and other sharp instruments. In addition, a report is required for "every case of a wound, injury or illness in which there is grave bodily harm or grave illness if it appears to the physician or surgeon treating the case that the wound, injury or illness resulted from a criminal act of violence." This last requirement is difficult to interpret, because the terms "grave bodily harm" and "grave illness" are undefined. This difficulty has led to a recurring question: when must physicians and health care facility administrators report to law enforcement any injuries or illnesses that they believe resulted from child abuse?[7] When is the threshold of "grave bodily harm" or "grave illness" met? In the absence of statutory definitions or court interpretations of the terms, practices regarding reports of children's injuries to law enforcement have varied.

In 2008 the N.C. Child Fatality Task Force recommended amending G.S. 90-21.20 to clarify this issue. The result was S.L. 2008-179 (H 2338), which adds subsection (c1) to G.S. 90-21.20. The new subsection requires a report to a local law enforcement agency when a child under the age of eighteen is treated for a recurrent illness or serious physical injury that

7. This is a separate issue from whether a child's injury or illness must be reported to a county department of social services. G.S. 7B-301 requires any person who has cause to suspect a child is abused, neglected, or dependent to make a report to the county department of social services.

appears to the treating physician to be the result of nonaccidental trauma. If the child is treated in a hospital or other medical facility, the report must be made by the facility's director or administrator. Otherwise, the report must be made by the treating physician.

The law specifies that the report to law enforcement must be made in addition to any report that is required under G.S. 7B-301 (reporting of child abuse or neglect to the department of social services). The new reporting requirement became effective December 1, 2008.

Reporting Race and Ethnicity

S.L. 2008-119 (S 4) enacts new G.S. 130A-16, directing medical care providers who make certain reports to the Division of Public Health to include the race and ethnicity of patients in those reports. The term "medical care providers" is undefined, but the Division of Public Health has determined that the new section will apply to reports of emergency department data that certain hospitals are required to make under G.S. 130A-480. The terms "race" and "ethnicity" are also undefined in the new law, but the division plans to use a modified version of definitions supplied in a federal Census Bureau directive. The categories for race are expected to be white, black, American Indian or Alaskan native, Asian or Pacific Islander, and other. The categories for ethnicity are expected to be Hispanic and non-Hispanic.[8]

The same act amends G.S. 131E-214.1 to include race and ethnicity information in the patient data that hospitals and ambulatory surgical facilities are required to submit to a statewide data processor certified by the Division of Health Service Regulation, under the Medical Care Data Act (Article 11A of G.S. Chapter 131E).

The new reporting requirements take effect January 1, 2010.

Anatomical Gifts and Blood Donation

In 2007 the General Assembly repealed North Carolina's Uniform Anatomical Gift Act (former Article 16, Part 3 of G.S. Chapter 130A) and replaced it with the Revised Uniform Anatomical Gift Act (Article 16, Part 3A of G.S. Chapter 130A).[9] At the same time, the legislature directed the General Statutes Commission to review statutes related to organ donation to determine whether they should be amended to be consistent with the revised act. S.L. 2008-153 (S 1651) enacts recommendations arising from that review. The changes to the statutes that resulted became effective August 2, 2008.

Under prior law both G.S. 90-602 and G.S. 130A-412.14 (part of the Revised Uniform Anatomical Gift Act) contained procedures for searching a trauma victim for information about the victim's intentions regarding anatomical gifts. S.L. 2008-153 deletes the search and notification procedures from G.S. 130A-412.14 and replaces them with a provision stating that searches are governed by G.S. 90-602. That statute permits law enforcement and other emergency officials to search individuals who are dead or near death for a document or other information indicating the individual's intention to make or refuse to make an anatomical gift. Hospitals are also permitted to search for such documents if no other source of information is immediately available to them. The statute also allows law enforcement, emergency officials, or hospitals to search Division of Motor Vehicles records to determine whether a trauma victim is a donor of anatomical gifts. The new law amends G.S. 90-602 to specify that law enforcement or emergency officials who locate information about an individual's intention to make or refuse to make an anatomical gift through either of these methods must provide the information to any hospital where the individual is taken.

S.L. 2008-153 further amends G.S. 90-602 to provide immunity from criminal or civil liability to hospitals and persons who fail to discharge their duties under the statute. However, such hospitals or persons may be subject to administrative sanctions. Another amendment provides qualified immunity from civil, criminal, or administrative liability to persons who take (or attempt in good faith to take) the actions authorized by the statute. The new law also incorporates into G.S. 90-602 the Revised Uniform Anatomical Gift Act's definitions of certain terms.

As part of the effort to conform laws relating to the anatomical gifts to the Revised Act, a statute that governed the removal of corneal tissue, G.S. 130A-391, was repealed.

Finally, S.L. 2008-153 amends G.S. 130A-412.31 to change the minimum age for blood donors from seventeen to sixteen; this change became effective August 2, 2008.

Health Professions

Home Care

The term *home care services* is defined broadly in state law to include not only nursing, but also physical, occupational and speech therapy, medical social services, pulmonary rehabilitation, and other services. S.L. 2008-127 (H 964) further expands the definition of home care services to include in-home companion, sitter, and respite care services and homemaker services. The legislation directs the North Carolina

8. Personal communications with Paul Buescher, Director, State Center for Health Statistics (July 31, 2008 and August 1, 2008) (on file with author). The federal directive mentioned is the U.S. Census Bureau's Directive 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting (May 12, 1977), available online at http://wonder.cdc.gov/WONDER/help/populations/bridged-race/Directive15.html.

9. S.L. 2007-538.

Medical Care Commission to adopt regulations to implement this revised definition, which will go into effect in January of 2010. The legislation also increases the annual licensure fee for home care agencies from $350 to $400 beginning in January 2009.

Nursing

The North Carolina Board of Nursing is authorized to establish standards for the faculty of *nursing programs*—educational programs that prepare individuals for licensure as registered or licensed practical nurses.[10] The board establishes these standards through the administrative rule-making process. In May 2007 the board adopted several amendments to 21 N.C.A.C. 36 .0318, the rule that sets the standards for nursing program faculty. The chief effect of the amendments would have been to change the academic qualifications required of faculty who teach in a program leading to initial licensure as a nurse. Presently, such faculty are required to hold either a baccalaureate or master's degree in nursing. The amendments would have required persons employed in that role after December 31, 2014, to hold either a master's or doctoral degree, unless a waiver was granted by the board. The amended rule was approved by the Rules Review Commission in June 2007. The rule, however, was the subject of written objections and therefore was submitted to the General Assembly for its approval, in accordance with the Administrative Procedure Act. S.L. 2008-14 (S 1662) disapproves the amended rule. Thus the academic qualifications for faculty in nursing programs leading to initial licensure are unchanged.

Massage and Bodywork Therapy

Under current law the North Carolina Board of Massage and Bodywork Therapy is responsible for the licensure of massage and bodywork practitioners. S.L. 2008-224 (S 1314) amends the law to authorize the board to approve and regulate massage and bodywork schools. In addition, the law now requires criminal history record checks for each applicant and allows individuals who hold licenses from other jurisdictions to obtain North Carolina licenses in some circumstances.

Studies

The 2008 Studies Act, S.L. 2008-181 (H 2431), authorizes several studies related to health care or public health. It also requires some state agencies to conduct studies related to those areas.

Section 2.12 of the act authorizes the Legislative Research Commission to study the impact of smoking prohibitions on foster care homes. If it conducts the study, the commission must consider whether smoking prohibitions protect the health of foster children or reduce the number of available foster care homes.

Part 3 of the act authorizes the Joint Legislative Health Care Oversight Committee to study the following topics:

- Do Not Resuscitate (DNR) orders issued in the absence of a declaration of a desire for a natural death,
- Regulation of dental laboratories,
- Development of a coordinated statewide electronic health information network,
- Bedding laws (Article 8, Part 8 of G.S. Chapter 130A), and
- Increase in medical records copy fees permitted under G.S. 90-411.

Section 6.7 authorizes the Environmental Review Commission (ERC) to study a date certain for the phase-out of hog lagoons. The ERC is also authorized by section 6.10 to study, in consultation with the N.C. Child Fatality Task Force, a ban on toxic brominated fire retardants.

The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee is authorized to study whether the prescription drug database maintained by DHHS (concerning prescriptions for controlled substances) should be accessible to county sheriffs and their deputies (Section 8.2).

Part 19 directs the General Statutes Commission to study the Uniform Emergency Volunteer Health Practitioners Act and report its recommendations and legislative proposals to the General Assembly by February 1, 2009.

Part 20 directs the Division of Emergency Management, in consultation with the N.C. Association of County Commissioners, to study and develop plans to enhance emergency management at the county level. The division was to report the results of its study and provide the plans it develops to the Chairs of the Joint Select Committee on Emergency Preparedness and Disaster Management Recovery, the House of Representatives Appropriations Subcommittee, and the Senate Appropriations Committee on Natural and Economic Resources by December 1, 2008.

Part 21 addresses an issue that arose from a recommendation by the UNC Safety Task Force. It directs the Board of Governors of the University of North Carolina, the State Board of Community Colleges, the State Board of Education, and the North Carolina Independent Colleges and Universities to study providing qualified immunity to mental health and health professionals who disclose confidential information for the

10. G.S. 90-171.23(b)(8).

purpose of preventing or mitigating harm to others. In conducting the study the Board of Governors must consult with mental health and health care professionals' licensing boards. A final report, including any legislative recommendations, was to be submitted to the Joint Select Committee on Governmental Immunity by December 1, 2008.

Part 25 directs the State Board of Education to study K–12 physical education in public schools. The board was to report to the Joint Legislative Education Oversight Committee by December 1, 2008.

Part 31 directs the North Carolina Institute of Medicine to convene a panel to study access to appropriate and affordable health care for all North Carolinians and make recommendations. However, in making its recommendations, the Institute may not study issues related to scope of practice or professional licensing. The Institute must report its recommendations to the Joint Legislative Health Care Oversight Committee by January 15, 2009.

Part 34 ensures the continuation of the Joint Legislative Study Committee on Emergency Preparedness and Disaster Management Recovery. Section 34.1 establishes the committee and provides for the appointment of its thirty members. Section 34.2 directs the committee to study a number of issues, including North Carolina's public health infrastructure and its capacity to respond to disasters, including pandemic flu; and bioterrorism preparedness and response. The committee must submit a final report to the General Assembly by December 31, 2009. The committee terminates upon submission of its final report.

Part 47 creates the Epilepsy Patients and Medication Interchange Study Commission, a twenty-one-member body charged with studying the protection of epilepsy patients from medication interchange. The commission must report its findings and recommendations to the General Assembly and the Joint Legislative Health Care Oversight Committee by February 1, 2009. The commission terminates upon submission of its final report.

Other Laws of Interest

The following laws, which may be of interest to readers of this chapter, are summarized in other chapters of *North Carolina Legislation 2008*:

- S.L. 2008-2 (S 1480), providing for medical releases from custody for certain prisoners who are disabled, terminally ill, or aged and incapacitated by illness, is summarized in Chapter 23, "Sentencing, Corrections, Prisons, and Jails."
- S.L. 2008-136 (H 1134), authorizing counties to adopt and implement a plan for the management of abandoned manufactured homes, is summarized in Chapter 4, "Community Planning, Land Development, and Related Topics," Chapter 7, "Economic and Community Development," and Chapter 11, "Environment and Natural Resources."
- S.L. 2008-170 (H 1113), limiting the use of the public duty doctrine as an affirmative defense, is summarized in Chapter 14, "Local Government and Local Finance."
- S.L. 2008-191 (S 1860), implementing recommendations of the N.C. Child Fatality Task Force to increase the penalty for misdemeanor child abuse and amend the offense of felony child abuse, is summarized in Chapter 6, "Criminal Law and Procedure."
- S.L. 2008-200 (S 1766), providing qualified immunity from liability for certain private entities that assist government officials in responding to emergencies, potentially including public health emergencies, is summarized in Chapter 10, "Emergency Management."

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Higher Education

This was a quiet year for higher education in the North Carolina General Assembly. The legislature granted modest budget increases for the University of North Carolina and the state's community college system, mostly to cover costs related to enrollment growth. It gave the university the power to establish an airport authority, authorized community college trustees to ban smoking on their campuses, and changed the name of the School of the Arts.

Appropriations and Salaries

The University of North Carolina Current Operations

In even-year sessions, the General Assembly makes modifications to the appropriations made in the previous odd-year session for the second year of the biennium. The 2007 appropriations act appropriated a total of $2.656 billion from the General Fund to UNC for fiscal year 2008–09. The 2008 appropriations act [S.L. 2008–107 (H 2436)] adjusts UNC's 2008–09 appropriations by increasing some items and decreasing others. The single largest funding increase, $34,613,302, was to cover anticipated enrollment growth of 8,082 students. The net increase was $26,810,515, bringing the 2008–09 budget to a total of $2.683 billion.

Community Colleges' Current Operations

The appropriation for community colleges' current operations made in 2007 for 2008–09 totaled $899,643,003. The 2008 appropriations act adds $33,639,698 to that total, bringing the 2008–09 budget to a total of approximately $933 million. As with the UNC changes, some appropriations were increased and some were decreased. Also as with UNC, the single largest funding increase was $23,779,955 to cover anticipated enrollment growth. That growth is expected to amount to the equivalent of 6,119 full-time students.

Capital Improvements

The appropriations act's total statewide appropriation for capital improvements for all government—not just UNC and the community colleges—is $129,082,062. Of that total, approximately $99,612,000 is for UNC. The single largest amounts are $35 million for a Biomedical Research Imaging Center at UNC Chapel Hill, $14.4 million for engineering complex planning at North Carolina State University, and $11.5 million for UNC Chapel Hill for Carolina North Phase I and replacement law school planning.

None of the $129 million appropriated statewide for capital improvements is for the community college system. Capital improvements for community colleges are primarily a county, not a state, responsibility, and in many years the General Assembly appropriates no capital improvement funds for community colleges.

In addition, Section 27.8 of the appropriations act authorizes special indebtedness under the State Capital Facilities Finance Act for a number of UNC projects. The largest, with the indicated amounts, include

- $109.1 million for the Centennial Campus Library at NCSU,
- $69 million for dentistry school expansion at UNC Chapel Hill,
- $69 million for a school of dentistry building at East Carolina University,
- $57,218,000 for an Energy Production Infrastructure Center at UNC Charlotte,
- $42.67 million for an academic classroom and office building at UNC Greensboro,
- $36.8 million for a family medicine building at ECU,
- $25 million for land acquisition throughout the UNC system,
- $24.5 million for a nursing building at North Carolina Central University,

- $20,490,000 for a classroom building at North Carolina Agricultural and Technical State University, and
- $18 million for a School of Education building at Elizabeth City State University.

Finally, S.L. 2008-204 (S 1925) authorizes a number of construction projects at UNC institutions that will be funded from gifts, grants, receipts, liquidating indebtedness, or other funds but not from General Fund appropriations. The largest of these, with the indicated amounts, include

- $50 million for expansion of Kenan Stadium at UNC Chapel Hill,
- $35 million for expansion of the Student Recreation Center at UNC Wilmington,
- $28.5 million for residence hall expansion at East Carolina University,
- $26 million for a dental sciences building at UNC Chapel Hill, and
- $24 million for improvements at Dowdy-Ficklen Stadium at East Carolina University.

Salaries

All community college faculty and professional staff paid from state funds receive, under the appropriations act, salary increases of 3 percent. Other community college employees paid from state funds receive increases of 2.75 percent or $1,100, whichever is higher.

Similarly, for UNC employees who are subject to the State Personnel Act, the appropriations act provides for a salary increase of 2.75 percent or $1,100, whichever is higher. UNC employees, including faculty, who are not subject to the State Personnel Act receive an average increase of 3 percent. Faculty in the School of Science and Mathematics receive an average increase of 3 percent, with a minimum increase of $470.

The appropriations act also sets the following minimum salary schedule for nine-month, full-time, curriculum community college faculty for 2008–09:

- vocational diploma or less, $34,314;
- associate degree, $34,819;
- bachelors degree, $37,009;
- master's degree or education specialist, $38,952; and
- doctoral degree, $41,753.

University and Community College Governance

UNC Airport Authority

UNC Chapel Hill and the UNC Health Care System have for many years used the Horace Williams Airport as a base for university-related flights. The airport is scheduled to close as part of the development of Carolina North, the expansion campus of UNC Chapel Hill. S.L. 2008-204 (S 1925) enacts new Article 33 (Airport Authorities) in G.S. Chapter 116 authorizing the UNC Board of Governors to create an airport authority in Orange County. The sole purpose of the authority would be "to resite Horace Williams Airport and operate the resited airport." The authority may be established to support UNC Chapel Hill or the UNC Health Care System, or both.

The airport authority would have all the powers of a municipal airport authority and would have the capital expenditure financing powers and operational powers granted to UNC constituent institutions and the UNC Health Care System. In addition to other enumerated powers, the airport authority would have the power of eminent domain to acquire property for establishing, extending, enlarging, or improving the airport. The authority would enjoy governmental immunity, which it could waive through the purchase of insurance.

The act spells out membership on the board of directors of the airport authority, and the exact composition of the board will depend on whether the airport is created to support only UNC Chapel Hill, only the UNC Health Care System, or both. In either case, the board is to include members appointed by the House, the Senate, the Orange County commissioners, the city council of Chapel Hill, and (on a rotating basis) the city councils of Carrboro and Hillsborough. It will also include members appointed by the UNC Board of Governors upon recommendation by the UNC Chapel Hill trustees and members appointed by the Board of Directors of the UNC Health Care System, or both (as appropriate).

School of the Arts Name Change

S.L. 2008-192 (S 2015) amends numerous provisions within G.S. Chapter 116 and several other provisions of the General Statutes to redesignate the North Carolina School of the Arts as the University of North Carolina School of the Arts.

UNC Enrollment Growth Reporting

G.S. 116-11(9) directs the UNC Board of Governors to present annually to the governor and the General Assembly a unified recommended budget for the constituent institutions of the university. The appropriations act, in Section 9.8, adds a provision specifying that the board, in presenting the budget, is to provide full documentation and justification of any

enrollment growth funding request, including the most recent year's actual enrollment numbers, in the same format in which the growth increase request is made.

Additionally, Section 9.10 of the appropriations act directs the Joint Legislative Program Evaluation Oversight Committee to conduct a comprehensive review of the enrollment growth formulas used by UNC, comparing them to those used in other states and determining what modifications, if any, should be made.

Finally, the appropriations act, in Section 9.15, enacts new G.S. 116-30.7 specifying categories within which enrollment projections are to be made.

Community College Smoking Regulation

S.L. 2008-95 (S 1669) enacts G.S. 115D-20.1 authorizing community college boards of trustees to adopt and enforce policies prohibiting the use of tobacco at all times in college facilities, on college campuses, and in college vehicles.

Community College Personnel Records

S.L. 2008-194 (H 545) amends G.S. 115C-29 to provide that the Retirement Systems Division of the Department of State Treasurer may disclose the name and mailing address of former community college employees to North Carolina nonprofit organizations representing two thousand or more active or retired state government, local government, or public school employees.

Student Relationships and Financial Aid

Certain Student Loan Rates

The Nursing Scholars Program, the Graduate Nurse Scholarship Program for Faculty Production, and the North Carolina Principal Fellows Program all provide loans to students that are forgiven over time if the students, following graduation, meet employment criteria. The statutes governing the programs previously provided that the interest rate on the loans was 10 percent, payable if the student failed to meet the criteria. S.L. 2008-204 (S 1925) amends G.S. 90-171.62(a), G.S. 90-171-101(a), and G.S. 116-74.43 to provide that, beginning July 1, 2009, the interest rate is to be whatever rate is set by the State Education Assistance Authority, with a maximum of 10 percent.

Fee Waiver for Older Students

G.S. 115B-2 directs the constituent institutions of UNC and the state's community colleges to permit North Carolina residents who are sixty-five or older to attend classes without payment of tuition. S.L. 2008-135 (H 1076) enacts G.S. 115B-2.1 to provide that such residents may, in addition, attend noncredit courses or classes for up to six hours of credit per semester without payment of fees, except for costs of textbooks, the community colleges' computer use and technology fee, and community college course-specific fees.

Eligibility for Tuition Grants for Private College Students

G.S. 116-21.2 grants to each North Carolina undergraduate student attending a private college in North Carolina a sum of money, determined by the General Assembly for each academic year, to partially offset the student's tuition cost. Part-time students are eligible for a pro rata grant. The appropriations act, in Section 9.11, amends the statute to lower from nine to six the minimum number of credit hours a student must be undertaking in order to be eligible for a pro rata grant.

EARN Eligibility

The Education Access Rewards North Carolina Scholars Fund (EARN), established by G.S. 116-209.26, is funded by direct appropriations from the General Fund and by appropriations from the Escheat Fund. To be eligible for EARN grants, students previously have been required to be enrolled in UNC institutions or North Carolina community colleges. The appropriations act, in Section 9.2, expands eligibility to include students at private North Carolina colleges. For those students, grants may be funded by appropriations from the General Fund, but not from the Escheat Fund.

Coaching Scholarship Loan Fund

The appropriations act, in Section 9.1, repeals G.S. 116-209.36, ending the Coaching Scholarship Loan Fund.

Studies

The General Assembly in S.L. 2008-181 (H 2431) (the studies bill) authorizes or directs several studies involving higher education.

Campus Safety Immunity

The studies bill directs the UNC Board of Governors, in conjunction with the State Board of Community Colleges, the State Board of Education, and the North Carolina Independent Colleges and Universities, to study the issue of providing qualified immunity to mental health and health professionals for the disclosure of confidential information when the disclosure is for the purpose of preventing or mitigating harm to others. The Board of Governors is to seek the input of licensing bodies of the mental health and health professionals when developing its recommendations.

Severely Disabled Students' Access

The Board of Governors is to study the accessibility of its facilities to severely physically disabled individuals seeking basic access to higher education at UNC constituent institutions.

Civic Education

The Higher Education Civic Education Study Commission is created to advise the state on the role of higher education in helping to strengthen and enhance the ability of colleges and universities to participate in civic engagement activities with K–12 educational institutions, faith-based programs, or other service programs affecting the social development and literacy of school-aged children.

Robert P. Joyce

14

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 2008*. Local officials interested in particular topics should also consult Chapter 4, "Community Planning, Land Development, and Related Topics"; Chapter 7, "Economic and Community Development"; Chapter 8, "Elections"; Chapter 10, "Emergency Management"; Chapter 11, "Environment and Natural Resources"; Chapter 12, "Health"; Chapter 15, "Local Taxes and Tax Collection"; Chapter 16, "Mental Health"; the ABC section of Chapter 17, "Miscellaneous"; Chapter 19, "Public Employment"; Chapter 20, "Public Purchasing and Contracting"; Chapter 24, "Social Services"; and Chapter 25, "State Government Ethics and Lobbying."

Public Records and Open Meetings

Recreation Records Involving Minors

The basic structure of the public records law in North Carolina is that all government records are open to the public unless a statute specifically exempts a category of records from the right of public access. There are doubtless categories of records that most people would agree ought not to be open to public access that are open, simply because no one has ever thought to ask the General Assembly to exempt that set of records. This session of the General Assembly witnessed the relatively swift introduction and passage of legislation involving such a category. S.L. 2008-126 (S 212), which exempts from the right of public access certain information about minors participating in parks and recreation programs, began as a local bill applicable to one county but was quickly converted to a general law and easily passed in each house of the General Assembly. The protected information is the minor's name, address, age, date of birth, telephone number, the names of parents or legal guardians and their addresses, and any other identifying information that is listed on an application to participate in a recreation program or found in other records related to the program. Because the statute does not define *minor*, the general definition found in G.S. 48A-2 presumably applies; the statute defines a minor as anyone not yet 18. New G.S. 132-1.12 does provide that the "county, municipality, and zip code of residence" of each participating minor is a public record, which will require local governments to either create a new record with that information or redact the protected information from a record with the public information.

It should be noted that the statute does not prohibit a government from releasing this information but, rather, simply exempts the information from the usual right of public access. A government may release any or all of the protected information if it wishes to.

Release of Retirement System Records to Employee Organizations

Under the various personnel privacy statutes the home addresses of current and former public employees is not open to public inspection. S.L. 2008-194 (H 545) enacts a small modification of that rule with respect to the mailing addresses of most former public employees. The statute amends five of the personnel privacy statutes—those dealing with state employees, public school employees, community college employees, county employees, and city employees—to permit the Retirement Systems Division of the Department of State Treasurer to disclose the names and addresses of former employees to nonprofit organizations that represent a minimum number of such former employees. The minimum number of members required for release of the names and addresses of former state or public school employees is 10,000 retired employees, while the minimum number required for college, county, or city employees is 2,000 *active* or retired employees.

It might be noted that three of the local government personnel privacy statutes were not amended, those for employees of public health authorities, public hospitals, and water and sewer authorities. Thus, the Retirement Systems Division may not release the names and addresses of former employees of these entities.

Electronic Meetings

Local government attorneys have disagreed as to whether a county or city governing board may allow one or more members to participate in a meeting electronically, such as by telephone. A provision in the open meetings law recognizes and regulates electronic meetings, and a number of attorneys have viewed that provision as authority to hold such a meeting. Others have argued that the open meetings provision is simply intended to protect the public's right to observe official meetings and is not an independent authorization for electronic meetings. The issue is now complicated by enactment of S.L. 2008-111 (S 1631), a local act that specifically authorizes electronic meetings in Hyde County. Although the act specifically provides that it is not to be "construed to affect the validity of actions related to electronic meetings of any other public body," it cannot help but cause some concern about whether the open meetings law provision is in fact sufficient authority to hold an electronic meeting.

There was some effort to make the Hyde County bill into a general law, but the session was ultimately too short to allow that to happen. It may well be, however, that the matter will be taken up again in the 2009 session.

Local Government Police Power

Prohibition on Ordinances Restricting Newspaper Distribution

The story of S.L. 2008-223 (S 942), which prohibits local governments from enacting or enforcing ordinances that prohibit newspaper distribution, begins in the 2005 General Assembly. G.S. 20-175(d) (S.L. 2005-310) was enacted that year to authorize local governments to enact ordinances restricting or prohibiting persons from standing on any street, highway, or right-of-way (excluding sidewalks) while soliciting or attempting to solicit employment, business, or contributions from vehicle drivers or occupants. The activities of licensees, employees, and contractors of the Department of Transportation (DOT) and of municipalities that are engaged in construction or maintenance or in making traffic or engineering surveys are exempted.

Perhaps in response to questions about the coverage of G.S. 20-175(d), including a concern that it did not allow for local governments to permit certain solicitations while prohibiting others, the statute was amended in 2006 (S.L. 2006-250, Section 7) by the addition of new G.S. 20-175(e). That subsection, which apparently applies only to cities, permits local governments to grant authorization for persons to stand in, on, or near a street or state highway within the local government's municipal corporate limits in order to solicit charitable (but not other) contributions, as long as certain conditions are met:

- The person seeking authorization must file a written application with the local government no later than seven days before the solicitation is to occur. A separate application must be filed and a separate fee paid (see below) for each event or each day of a multiday event.
- The application must include the date, time, and locations at which the solicitation is to occur as well as the number of solicitors at each location.
- The applicant must provide the local government with advance proof of liability insurance of at least $2 million to cover damages that may arise from the solicitation. The insurance must provide coverage for claims against any solicitor and agree to hold the local government harmless.
- The local government may, if it wishes, charge a fee for a permit of $25 or less per day per event.

G.S. 20-175(e) specifies that a local government acting under its provisions does not waive or limit any immunity or create any new liability for itself. It further provides that the issuance of an authorization and the conducting of a solicitation are not considered governmental functions of the local government.

G.S. 20-175(e) also provides that if the event or the solicitors create a nuisance, delay traffic, or create threatening or hostile situations, any law enforcement officer with proper jurisdiction may order the solicitation to cease. Failure to follow a lawful order to cease solicitation is a Class 2 misdemeanor.

Perhaps in further response to the severity of some of the requirements in subsection (e), the 2008 General Assembly amended G.S. 20-175(d) to provide a specific exception to subsections (d) and (e). S.L. 2008-223 prohibits local governments from enacting or enforcing any ordinance that prohibits engaging in the distribution of newspapers on the nontraveled portion of any street or highway (nontraveled portion is not defined; it perhaps includes the road shoulder and the unpaved right-of-way), except when those distribution activities impede the normal movement of traffic on the street or highway.

Unfortunately, creating a special rule for newspaper distribution that does not apply to other types of commercial or charitable solicitation probably exacerbates the constitutional issues already raised by G.S. 20-175(d) and (e). As noted in Chapter 15, "Local Government and Local Finance," of *North Carolina Legislation 2006* (pp. 153–54), some of the

provisions of G.S. 20-175(e) may well be problematic under existing U.S. Supreme Court precedent that recognizes that restrictions on charitable and other solicitation must be consistent with the free speech clause of the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. Soliciting has long been considered protected speech in "traditional public forums," such as streets and highways, and it generally can be restricted only because of a compelling governmental interest. While traffic safety may be such an interest, any restrictions on solicitation must be reasonable; apply only to the time, place, and manner of the speech; be narrowly tailored to meet the government concern; and leave open adequate alternative channels of communication.

Restrictions on speech in traditional public forums must also be content-neutral; that is, one type of speech must not be treated more favorably than another type. S.L. 2008-223 violates this fundamental principle by creating a special exception for newspaper distribution.

It may well be that some of the specific requirements of G.S. 20-175(e) described above are unconstitutional because of their negative or "chilling" effects on solicitation that is protected speech (*see North Carolina Legislation 2006*, pp. 153–54) and because of their differing treatment of charitable and other soliciting. However, removing one type of solicitation from these restrictions and giving it special status does not solve the potential problem—it only makes it worse.

Street Gang Prevention

The new legislation on street gang prevention, S.L. 2008-214 (H 274), is discussed at length in Chapter 6, "Criminal Law and Procedure." There is one provision, however, that should be mentioned here. This is a special provision that reverses the usual rules of preemption of local ordinances by state statutes. The usual rule, set out in G.S. 160A-174(b)(6), is that if a local ordinance simply repeats the prohibitions of a state statute, the local ordinance is preempted and may not be enforced. One of the sections of the new North Carolina Street Gang Suppression Act, codified as Article 13A of G.S. Chapter 14, provides that nothing in the Article is to prevent a local government from adopting and enforcing ordinances that are consistent with the new statute and then goes on to provide that if a local ordinance duplicates provisions of the Article, "this Article shall be construed as providing alternative remedies and not as preempting the field."

The standard preemption rule noted above grows out of a concern that attempting to enforce both a state statute and a local ordinance, with identical provisions, would constitute double jeopardy. It does not appear that the problem goes away simply because the General Assembly declares that the local ordinance is not preempted.

Prohibiting Smoking in Local Government Vehicles

In 2007, the General Assembly enacted legislation that prohibited smoking in most state government buildings and that permitted local governments to enact similar prohibitions for their buildings. This year the legislature amended the 2007 legislation to include state and local government motor vehicles within its terms. S.L. 2008-149 (S 1681) directly prohibits smoking within state government vehicles and authorizes local governments to adopt ordinances that prohibit smoking within their vehicles. The prohibition may be applied to any "passenger-carrying vehicle owned, leased, or otherwise controlled by local government and assigned permanently or temporarily . . . to employees, agencies, institutions, or facilities."

It is probable that a local government already had the authority to prohibit smoking within its vehicles in its capacity as owner of the vehicles. What this legislation adds is the ability to enforce such a prohibition through the remedies available for ordinance violations. The act becomes effective January 1, 2009.

Annexation

A considerable number of bills were introduced in the 2007 session of the General Assembly proposing changes to the involuntary annexation statutes. None of the bills emerged from committee, but there clearly was interest in reviewing the statutes. At the end of the 2007 session the House of Representatives sought to include an annexation study in the studies bill normally enacted at the end of each session, but the Senate refused to agree to such a study, and the entire studies bill was not enacted. As a result, late in 2007 the Speaker of the House appointed the House Select Committee on Annexation and asked it to report to the 2008 session. The Committee began meeting in January and held several meetings and public hearings; the opponents of involuntary annexation were well represented at both the meetings and the public hearings.

At about the same time, the N.C. Association of County Commissioners (Association) created a committee to review the annexation statutes; the hope was that the committee's report might be a starting point for negotiations between the Association and the League of Municipalities (League) that could lead to a legislative proposal acceptable to each organization. The committee developed a number of recommendations, but when it came time to prepare its report, it narrowed its recommendation to General Assembly enactment of a moratorium on involuntary annexation, and the recommendation was accepted by the Association's board of directors. Not long after, the House Select Committee concluded its work by making a comparable recommendation.

Members of the House Select Committee duly introduced legislation to adopt an involuntary annexation moratorium. As introduced, the moratorium was quite broad, prohibiting any involuntary annexation actions—resolutions of consideration, resolutions of intent, or ordinance adoptions—during the period of the moratorium. In addition, it delayed the effective date of any annexation ordinance not yet effective (with the exception of one that was lacking only preclearance by the U.S. Justice Department) until the end of the moratorium. A House committee deleted the prohibition on any annexation-related actions, but they were restored on the House floor and the bill passed the House by a wide majority.

The League strongly opposed the moratorium, pointing out that a temporary annexation moratorium enacted several decades ago in Virginia was still in place. While the League had little success with its arguments in the House, they were effective in the Senate; the bill was never taken up in that body. The Senate did agree, however, to a study of annexation, and that study is included in this session's study bill, S.L. 2008-181 (H 2431).

The act creates the Joint Legislative Study Commission on Municipal Annexation, a twenty-eight-member body appointed by the Speaker and the President Pro Tem. The act authorizes a thorough study of the annexation statutes in North Carolina, but it's not clear how thorough the Commission will be able to be, inasmuch as it is directed to deliver its final report upon the convening of the 2009 General Assembly. What is clear is that annexation will be a legislative issue yet again next year.

Animal Control

In 2005, the General Assembly passed legislation directing the North Carolina Board of Agriculture to adopt regulations governing euthanasia of animals in shelters, including shelters owned and operated by local governments.[1] The Board approved final euthanasia regulations in February 2008. Shortly thereafter, staff with the Rules Review Commission, a body that must approve the rules before they can go into effect, objected to the rules. The objections related to the Board's statutory authority to directly regulate training and certification requirements for euthanasia technicians. As a result, the rules were withdrawn and reconsidered. The General Assembly responded by enacting Section 2 of S.L. 2008–198 (S 845), which amends the powers of the Board of Agriculture in G.S. 19A-24 to expressly grant the Board the authority to adopt regulations governing training and certification of euthanasia technicians. The legislature made the effective date for this change retroactive to the date the regulations were initially proposed, November 1, 2007.

1. S.L. 2005-276, sec. 11.5.

Nuisance Abatement: Cleanup of Abandoned Manufactured Homes

S.L. 2008-136 (H 1134) creates G.S. Chapter 130A, Article 9, Part 2F, "Management of Abandoned Manufactured Homes." The new law is intended to provide units of local government with the authority, funding, and guidance needed to provide for the efficient and proper identification, deconstruction, recycling, and disposal of abandoned manufactured homes. An "abandoned manufactured home" is a manufactured home or mobile classroom that is both vacant or in need of extensive repair and an unreasonable danger to public health, safety, welfare, or the environment.

The act requires each county to consider whether to implement a program for the management of abandoned manufactured homes, and it provides guidelines for such plans. It authorizes counties that are designated as development tier one or two areas to request a planning grant of up to $2,500 from the Solid Waste Management Trust Fund to be used to prepare a plan and to identify abandoned manufactured homes. The act also provides that the Department of Environment and Natural Resources is to use up to $1 million annually from the Trust Fund for the cleanup of such homes.

S.L. 2008-136 appears to provide an additional source of regulatory authority for local governments rather than to replace any existing enabling laws. For example, the section dealing with the process for disposal of abandoned manufactured homes, G.S. 130A-309.114, provides that it does not change the existing authority of a county or a municipality to enforce any existing laws or of any person to abate a nuisance. Also, G.S. 130A-309.118 specifies that the new law is not to be construed to limit the authority of counties or cities under the statutes dealing with planning and regulation of development (Chapter 153A, Article 18, and Chapter 160A, Article 19, respectively).

S.L. 2008-136 becomes effective July 1, 2009, and expires October 1, 2023. More details about various aspects of the new law may be found in Chapter 4, "Community Planning, Land Development, and Related Topics," Chapter 7, "Economic and Community Development," and Chapter 11, "Environment and Natural Resources."

Liability

Public Water Service Warranties

The North Carolina Court of Appeals has held that the sale of water is a sale of goods under the Uniform Commercial Code (U.C.C.). In 2007, the court carried this conclusion a step further by holding that the sale of water was subject to the Code's implied warranty of merchantability, allowing a suit against a town by a dry cleaner who alleged that the town's water

was often filled with impediments that left brown spots or discoloration on garments washed or cleaned by the business.[2] S.L. 2008-140 (S 1259) reverses the result of the case. The act amends the Drinking Water Act to provide that a public water system regulated under the act "shall not be deemed to provide any warranty [under the Sales provisions of the U.C.C.] including an implied warranty of merchantability or an implied warranty of fitness for a particular purpose."

The Public Duty Doctrine

S.L. 2008-170 (H 1113), as amended by Section 47 of S.L. 2008-187 (S 1632), deals with the public duty doctrine, a principle of law that states that in many instances where governments and government officials are carrying out their official duties, they are acting on behalf of the public at large, so that there is no liability to particular individuals who may be affected by their actions. While the act is concerned primarily with limiting the applicability of the public duty doctrine as an affirmative defense for certain claims under the State Tort Claims Act, one of its provisions directly applies to local officials. New G.S. 143-299.1A(c) specifies that the new limitations do not apply to units of local government or their officers, employees, or agents. More indirectly, the new law will affect claims under the State Tort Claims Act that involve actions of local officials when they are acting as agents of the state, such as local environmental health specialists enforcing state regulations governing food and lodging sanitation. S.L. 2008-170 became effective October 1, 2008, and applies to claims arising on or after that date.

Transportation

Truck Routes

G.S. 20-115.1(g) permits the Department of Transportation (DOT) to designate the state highway system roads on which trucks are permitted. The subsection has required that the city council agree before DOT designates a truck route on a state system street within a city, but the sentence imposing that requirement has been deleted by S.L. 2008-221 (S 1695), a bill that deals with a variety of motor vehicle–related issues.

Involvement of Counties and Other Local Governments in State Road Projects

S.L. 2008-164 (H 2318) amends G.S. 136-18(39) to authorize DOT to enter into partnership agreements to plan, design, develop, acquire, construct, equip, maintain, and operate highways, roads, streets, bridges, and existing rail as well as properties adjoining existing rail lines. These agreements may be with, among others, "authorized political subdivisions." Any contracts for the construction of highways, roads, streets, and bridges that are awarded pursuant to such partnership agreements must comply with the competitive bidding requirements of G.S. Chapter 136, Article 2.

S.L. 2008-164 also adds counties to the authorization already possessed by municipalities to participate financially in private engineering and construction contracts for projects pertaining to streets or highways, if certain requirements are met. The act also gives both municipalities and counties authority to participate financially in private land acquisition contracts for such projects. To qualify, the project must either be (1) the construction of a street or highway on DOT's adopted Transportation Improvement Plan or (2) the construction of a street or highway on a mutually adopted transportation plan that is designated as a DOT responsibility.

Some of the provisions of a related act, S.L. 2008-180 (H 2314), specify that "local governments," which primarily means counties and municipalities, are covered by several enabling statutes related to roads that in the past had only applied to municipalities. The statutes affected include:

- G.S. 143B-350(f1)—States that the ability of a local government to pay for a transportation improvement project is not a factor to be considered by the Board of Transportation in its development and approval of a schedule of major state highway improvement projects to be undertaken by DOT under G.S. 143B-350(f)(4).
- G.S. 136-18(27)—Provides for voluntary cost-sharing by local government property owners or highway users in the cost of road maintenance and improvement that benefit the owner or user. The cost-sharing may be through materials, money, or land for right-of-way, as deemed appropriate by DOT. This authority does not apply to toll roads or bridges.
- G.S. 136-44.50, 136-44.52, and 136-44.53—Deal with the adoption and amendment of transportation corridor maps and preparation of the environmental impact study and preliminary engineering work; variances from transportation corridor maps; and advance acquisition of right-of-way within the transportation corridor.
- G.S. 136-66.3 and G.S. 136-98—Provide for local government participation in improvements to the state highway system. County participation in improvements to the state highway system is voluntary, and DOT is not to transfer any of its responsibilities to counties without specific statutory authority.

These provisions of S.L. 2008-164 and S.L. 2008-180 continue a trend begun last year by S.L. 2007-428, an act that, among other things, authorizes but does not require counties to participate in paying the costs of rights-of-way, construction, reconstruction, improvement, or

2. Jones v. Town of Angier, 181 N.C. 121 (2007).

maintenance of roads on the state highway system, under agreement with DOT. S.L. 2007-428 also authorizes a county to acquire land by dedication and acceptance, purchase, or eminent domain and to make improvements to portions of the state highway system, if it uses local funds that have been authorized for this purpose.

Disaster Management

Among the studies mandated by the General Assembly this session is one concerning the enhancement of disaster management capabilities at the county level. Section 20.1 of the Studies Act of 2008, S.L. 2008-181 (H 2431), requires the Division of Emergency Management, in consultation with the N.C. Association of County Commissioners, to study ways and develop plans to increase the capabilities of counties to plan for, respond to, and manage disasters at the local level. Plans that are developed are to include time lines for implementation and estimates of funding needs.

The plans are to address the following items.

1. Mandating, if determined necessary, the establishment and maintenance of emergency management agencies at the county level.
2. Increasing the number of counties employing full-time emergency management coordinators so that every county has such a coordinator available either individually or pursuant to a joint undertaking between two or more counties.
3. Implementing an emergency management certification requirement for all local emergency management coordinators and other essential local emergency management personnel.
4. Developing a model registry for use by counties in (a) identifying persons who are functionally and medically fragile and in need of assistance during a disaster and (b) allocating resources to meet those needs.
5. Establishing a registry program in all counties for functionally and medically fragile persons.

The division is to report the results of its study and provide the plans developed to the chairs of the legislature's Joint Select Committee on Emergency Preparedness and Disaster Management Recovery and the House of Representatives Appropriations Subcommittee and Senate Appropriations Committee on Natural and Economic Resources by December 1, 2008.

Ethics

While most of the ethics and lobbying law changes made this session apply mainly to state government officials and agencies, two provisions of interest to local officials should be noted.

Food and Drink Revisions

One of the exceptions to the ban on the receipt of gifts under the ethics and lobbying laws allows for the giving of food and beverages for immediate consumption in connection with "public events."[3] This exception can sometimes be useful to local governments that invite their legislators or other state officials covered by the law to meetings at which food or beverages are provided. Section 79 of S.L. 2008-213 (H 2542) expands and clarifies the coverage of the exception. Under Section 79, there is an exception if food and beverages for immediate consumption are provided in connection with any of the following types of gatherings:

1. An open meeting of a public body, as long as proper notice of the open meeting is given under G.S. Chapter 143, Article 33C (the Open Meetings Law).
2. A gathering of an organization with at least ten or more individuals in attendance open to the general public, as long as a sign or other communication is displayed at the gathering that contains a message reasonably designed to convey to the general public that the gathering is open to the general public.
3. A gathering of a "person or governmental unit" to which one of the following is invited:
    a. The entire board of which a public servant is a member ("public servant" is a term of art used in defining who is covered by the law);
    b. At least ten public servants;
    c. All the members of the House of Representatives;
    d. All the members of the Senate;
    e. All the members of a county or municipal legislative delegation;
    f. All the members of a recognized legislative caucus with regular meetings other than meetings with one or more lobbyists;
    g. All the members of a committee, a standing subcommittee, a joint committee or joint commissioner of the House of Representatives, the Senate, or the General Assembly; or
    h. All legislative employees.

3. G.S. 138A-32(e)(1).

For the third exception to apply, either (1) at least ten individuals associated with the person or the governmental unit must actually attend, other than the covered person or legislative employee or the immediate family of the covered person or legislative employee; or (2) all shareholders, employees, board members, officers, members, or subscribers of the person or governmental unit located in North Carolina must be notified and invited to attend.

For purposes of the third exception, "invited" means that written notice from at least one host or sponsor of the gathering containing the date, time, and location of the gathering is given at least twenty-four hours in advance of the gathering to the specific qualifying group listed above. If it is known at the time of the written notice that at least one sponsor is a lobbyist or lobbyist principal, the written notice must also state whether or not the gathering is permitted under G.S. 138A-32(e)(1).

Ethics and Lobbying Laws Study

The second provision that should interest local officials is an evaluation of the current ethics and lobbying laws. Section 15.1 of the Studies Act of 2008, S.L. 2008-181, requires the State Ethics Commission to conduct a study of the implementation and effectiveness of S.L. 2006-201, the State Government Ethics Act. The study is to examine issues related to the administration of the laws created under the act and to identify the areas of the ethics and lobbying process in which public input is needed. Other subjects to be considered are the need for notice to the public of interpretations of the law, the effectiveness of the ethics and lobbying education process, the volume of requests for advice, the adequacy of staffing to meet the needs of the act in a timely manner, and the general perception of the community affected by the act. The study must also assess and identify proposed legislative changes needed to promote and continue high ethical behavior by governmental officers and employees. The commission must consult with the Legislative Ethics Committee (LEC) and is to report its findings and recommendations in writing to the LEC by March 1, 2009.

Revenues

Special Assessments

Article 9 of G.S. Chapter 153A and Article 10 of G.S. Chapter 160A authorize counties and municipalities, respectively, to make special assessments against benefited property within their territorial limits to fund certain public improvement projects.[4] Local units may levy the assessments without a petition except for street and sidewalk improvements.[5] The assessed amount must be based on one or more of the statutory bases, such as front footage, size of the area benefited, and value added to the property because of the improvement. The governing board may authorize payment of the assessments over a ten-year period. The special assessments may not be levied, however, until the improvement being financed has been completed. The county or municipality must advance its own funds to construct the improvement.

S.L. 2008-165 (H 1770) provides another avenue for counties and municipalities to make special assessments to fund certain infrastructure projects. It does not alter the existing authority to make special assessments under Article 9 of G.S. Chapter 153A and Article 10 of G.S. Chapter 160A. Instead, it provides supplemental authority for counties and municipalities to use assessments as a financing tool for certain long-term capital projects. The supplemental authority, found in new Article 9A of G.S. Chapter 153A (counties) and new Article 10A of G.S. Chapter 160A (municipalities), overlaps the existing authority with respect to some of the procedural requirements and allowable purposes for which special assessments may be made. It adds new purposes, however, and alters a few of the procedural requirements for approving and making the assessments under the new articles. It also requires counties and municipalities to issue revenue bonds to fund at least a portion of the infrastructure projects and pledge the special assessments as collateral for the bonds.

Under the supplemental authority, both counties and municipalities may make special assessments against certain benefited property to fund the capital costs of the following projects:

- Sanitary sewer systems;
- Storm sewers and flood-control facilities;
- Water systems;
- Public transportation facilities;
- School facilities; and
- Streets and sidewalks.

Before imposing a special assessment, a local unit must receive a petition for the project to be financed by the assessment signed by at least a majority of the owners of real property to be assessed and who

4. Counties have the authority to make special assessments to fund certain projects related to water systems, wastewater systems, beach erosion control, flood and hurricane protection works, watershed improvement, drainage, water resources development, and street lights. G.S. 153A-185; -206. Counties also may fund the local cost of improvements made by DOT to subdivision and residential streets outside municipalities. Municipalities have authority to make special assessments to fund certain projects related to streets, sidewalks, water systems, wastewater systems, storm sewer and drainage systems, beach erosion control, and flood and hurricane protection works. G.S. 160A-216; -238.

5. For such improvements a county must first receive a petition requesting the assessments from 75 percent of the property owners to be assessed, and those who petition must own at least 75 percent of the frontage on the street. In a city the comparable percentages are a majority of the owners and a majority of the frontage.

represent at least 66 percent of the assessed value of all real property to be assessed. The petition must include a statement of the project, an estimate of the cost of the project, and an estimate of the portion of the cost of the project to be assessed.

Once it receives a petition that satisfies the statutory criteria, a local unit must follow the procedural requirements under Article 9 of G.S. Chapter 153A (counties) and Article 10 of G.S. Chapter 160A (municipalities) for approving a special assessment, with the following modifications:

- The governing board is not restricted to the statutory assessment methods set forth in G.S. 153A-186 (counties) and G.S. 160A-218 (municipalities)—it must select a basis upon which to make the assessment that accurately assesses each lot or parcel of land according to the benefits conferred upon it by the project.
- The special assessment may be imposed before the costs of the project are incurred by the unit, based on the governing board's cost estimates. A local government still may have to front a significant portion of the costs of the project, but it does not have to wait until its completion to impose the special assessment on benefitted properties.
- The governing board may authorize the special assessment to be paid in up to thirty annual installments.

Furthermore, the governing board must wait at least ten days after the public hearing on the preliminary assessment resolution before adopting a final resolution. During this time, a petition may be withdrawn if notice of the withdrawal is given in writing to the governing board signed by at least a majority of the owners who signed the original petition and representing at least 50 percent of the assessed value of all real property to be assessed. The governing board may not adopt a final assessment resolution if it receives a timely notice of petition withdrawal.[6]

S.L. 2008-165 also requires local units of government to finance the cost of a project for which an assessment may be made under Article 9A of G.S. Chapter 153A or Article 10A of G.S. Chapter 160A solely from revenue bonds to be repaid from the assessments or from a combination of financing sources that include revenue bonds. The unit may pledge the special assessment revenue as security for the revenue bonds.

Significantly, the legislation authorizes municipalities to impose special assessments and to issue revenue bonds secured by the special assessments to finance the construction of school facilities—providing the only authority for municipalities to fund public schools. Newly enacted G.S. 160A-239.4 also allows a municipality's governing board to "pay the cost of a project for which an assessment may be imposed . . . solely from revenue bonds to be repaid from the assessments or from a combination of financing sources that include the revenue bonds. Other financing sources include general obligation bonds and general revenues." It is unclear, however, whether this provision affords municipalities the independent authority to appropriate other, unrestricted funds to finance public school construction.

Similarly, the legislation expands existing authority for counties to fund capital projects relating to streets and sidewalks. Again, however, it is unclear whether this authority expands beyond imposing special assessments and issuing revenue bonds secured by the assessment revenue. *See* G.S. 153A-210.4.

The supplemental special assessment and additional revenue bond authority is only temporary, as it expires on July 1, 2013. The expiration date will not affect the validity of existing assessments as of that date or revenue bonds issued prior to that date.

Medicaid Funding Reform

After years of intense lobbying by counties across the state, the General Assembly enacted comprehensive Medicaid funding reform legislation in the 2007 appropriations act (S.L. 2007-323). The cornerstone of the legislation was the state assuming the counties' Medicaid costs, but the act contained several other provisions that impact county revenue. Specifically, in exchange for the elimination of the counties' Medicaid costs, the legislation temporarily reduced allocations from the Public School Building Capital Fund (PSBCF) in fiscal year 2007–08, and it phased out the counties' authority to levy a one-half-cent local option sales and use tax (local sales tax) beginning in October of 2008. The legislation also required counties to hold municipalities harmless for their loss in local sales tax revenue and required the state to guarantee counties a certain return as a result of the exchange of Medicaid costs for local sales tax revenue (county supplemental payment). Finally, it provided counties with a choice of an additional local option revenue source subject to voter approval.

S.L. 2008-134 (S 1704) makes several changes to the 2007 Medicaid funding reform legislation (2007 legislation).[7] In addition to a few technical corrections, the legislation modifies the calculation of the municipal hold harmless funds; modifies the calculation of the county supplemental payment funds; and modifies the calculation of the amount of Article 42 proceeds that are explicitly earmarked for public school capital outlay.

6. Note that an action challenging the validity of an assessment for failure to comply with the petition requirement must be commenced within ninety days after publication of the notice of adoption of the preliminary assessment resolution.

7. For a complete summary of the 2007 legislation see Kara A. Millonzi and William C. Rivenbark, "Analyzing the Financial Impact of the 2007 Medicaid Funding Reform Legislation on North Carolina Counties," *Local Finance Bulletin* No. 37 (Feb. 2008).

Municipal hold harmless funds. Section 31.16.3(f) of the 2007 legislation enacted G.S. 105-522, which attempted to hold any municipalities incorporated as of October 1, 2008, harmless for the loss of the municipalities' portion of the repealed Article 44 tax revenue. After the change in allocation method of the Article 42 tax proceeds from per capita to point of origin, as of October 1, 2009, some municipalities would not have been held completely harmless for the loss in tax revenue, however. Sections 14 and 15 of S.L. 2008-134 (S 1704) (2008 legislation) amends G.S. 105-522 to correct this error. The following summarizes the municipal hold harmless calculations, as amended by the 2008 legislation:

- As of October 1, 2008, the municipal hold harmless funds are 50 percent of the amount of local sales tax revenue a municipality receives from the Article 40 tax, minus the amount distributed to the municipality in October, November, and December of 2008 under the repealed portion of the Article 44 tax.
- As of October 1, 2009, the hold harmless funds are the amount of local sales tax revenue a municipality receives from the Article 40 tax, plus the difference between 50 percent of the amount of local sales tax revenue a municipality receives from the Article 40 tax and 25 percent of the amount of local sales tax revenue a municipality receives from the Article 39 tax.[8]

County supplemental payment. The state guarantees that each county experience a financial gain of at least $500,000 each fiscal year as a result of the exchange of Medicaid costs for a portion of the local sales tax revenue. Section 31.16.3(f) of the 2007 legislation enacted G.S. 105-523, which required that if a county's repealed sales tax amount for a fiscal year exceeded the county's hold harmless threshold for that fiscal year, the state would be required to pay the amount of the difference to the county. This calculation did not factor in the additional loss of local sales tax proceeds to the county because of its obligation to hold any eligible municipalities incorporated after October 1, 2008, harmless for the loss of the municipalities' portion of the repealed local sales tax revenue. The 2008 legislation amends G.S. 105-523 to explicitly include the municipal hold harmless amount in the county supplemental payment calculation.

As amended by the 2008 legislation, G.S. 105-523 provides that if a county's repealed sales tax amount *plus its municipal hold harmless amount* for a fiscal year exceeds the county's hold harmless threshold for that fiscal year, the state is required to pay the amount of the difference to the county.

The 2008 legislation also modifies the calculation of a county's repealed sales tax amount. As of October 1, 2009, a county's repealed sales tax amount is 50 percent of the amount of revenue a county receives from the Article 40 tax minus the amount distributed to the county in October, November, and December 2008 from the repealed portion of the Article 44 tax. As of October 1, 2009, a county's repealed sales tax amount is the amount of revenue a county receives from the Article 40 tax, plus the difference between 50 percent of the amount of local sales tax revenue a county receives from the Article 40 tax and 25 percent of the amount of local sales tax revenue a county receives from the Article 39 tax.[9]

The hold harmless threshold calculation remains unchanged; it is the amount of a county's Medicaid service costs and Medicare Part D clawback payments assumed by the state for the fiscal year minus $500,000.

Earmark of Article 42 proceeds. The 2007 legislation changed the allocation method of the Article 42 proceeds from per capita to point of origin, as of October 1, 2009. Under G.S. 105-502, 60 percent of the amount of revenue a county receives from the Article 42 tax is earmarked for public school capital outlay purposes or to retire any indebtedness incurred by the county for those purposes. The 2007 legislation did not hold public schools harmless for any loss in any earmarked Article 42 proceeds resulting from the change in allocation method.

The 2008 legislation amends G.S. 105-502 to ensure that a county earmark at least as much money for public school capital outlay as it would have had to earmark had the change in allocation method of the Article 42 proceeds not occurred. Specifically, as of October 1, 2009, it requires a county to use 60 percent of the following for public school capital outlay purposes or to retire any indebtedness incurred by the county for public school capital outlay purposes:

- the amount of revenue the county receives from the Article 42 tax plus
- if the amount allocated to the county under G.S. 105-486 (Article 40 tax) is greater than the amount allocated to the county under G.S. 105-501(a) (Article 42 tax), the difference between the two amounts.

The statutory language, however, creates some confusion as to the amount of revenue that must be earmarked for public school capital outlay because the phrase "allocated to the county" has at least two different potential meanings. The Department of Revenue determines the amount of proceeds from each local sales tax that is due to each county according to either a per capita or a point of origin method and then divides the proceeds among the county and its eligible municipalities according to

8. For fiscal year 2009–10, the hold harmless amount is reduced by the amount distributed in October, November, and December of 2009 to the municipality under the repealed Article 44 tax.

9. For fiscal year 2009–10, the repealed sales tax amount is reduced by the amount distributed in October, November, and December of 2009 to the county under the repealed Article 44 tax.

either a per capita or an *ad valorem* distribution method. Thus, "allocated to the county" may refer to the full amount due to the county from each local sales tax, before the proceeds are divided among the county and its eligible municipalities. Alternatively, it may refer to the amount of local sales tax proceeds a county actually receives from each of the taxes—an amount necessarily determined after the division of the proceeds among the county and its eligible municipalities.

A plain language interpretation of this phrase suggests that "allocated to the county" has a specific meaning under G.S. 105-486 and G.S. 105-501(a)—referring to the full amount of local sales tax revenue due to the county before the revenue is divided out among the county and its eligible municipalities.[10] Under this interpretation, though, at least some counties will be required to earmark significantly more revenue for public school capital outlay than they would have been required to earmark had the change in allocation method not occurred. (A few counties may have to earmark more money than they actually receive in Article 42 proceeds.) This interpretation appears contrary to what the legislature intended, which was simply to hold public schools harmless for any loss in earmarked Article 42 proceeds, not to cause counties to have to earmark significantly more revenue for capital school outlay purposes.

The better interpretation, at least in the context of what the legislature was trying to accomplish, is to read the phrase "allocated to the county" in G.S. 105-502(a)(2) as referring to the amount a county actually receives from each of the local sales taxes. That said, it is unclear how a court would interpret this phrase if the amount earmarked by a county for public school capital outlay were to be challenged by its local school administrative unit.

10. G.S. 105-486(a) states the following: "County Allocation. The Secretary shall, on a monthly basis, allocate the net proceeds of the additional one-half percent sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer." Subsection (b) of this statute then requires the Secretary of Revenue to "adjust the amount allocated" to the county by a statutory formula, and subsection (c) directs that "[t]he amount allocated to each taxing county [] be divided among the county and its municipalities in accordance with the method" prescribed by the county commissioners. Similarly, G.S. 105-501(a) states that "[t]he Secretary [of Revenue] must, on a monthly basis, allocate the net proceeds of the additional one-half percent sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Secretary shall then adjust the amount allocated to each county as provided in G.S. 105-486(b). The amount allocated to each taxing county shall then be divided among the county and the municipalities located in the county in accordance with the method" prescribed by the county commissioners.

A separate bill related to the Medicaid funding reform legislation, SB 1951, would have repealed counties' authority to levy the local land transfer tax. It also would have allowed county commissioners the option of specifying a particular purpose or purposes for expenditure of the proceeds of the quarter-cent Article 46 tax on the ballot put forth to the voters as to whether or not to approve the additional local sales and use tax authority. The bill passed in the Senate but did not make it out of the House Committee on Rules, Calendar, and Operations.

911 Charges

The General Assembly enacted legislation in 2007 establishing a consolidated system for administering both wireline and wireless 911 systems across the state. The act created a 911 Board and authorized it to develop a comprehensive state plan for communicating 911 call information across networks and among public safety answering points (PSAPs)—defined as the public safety agencies that receive incoming 911 calls and dispatch appropriate public safety agencies to respond to the calls. It authorized the 911 Board to levy a monthly service charge of 70 cents on each active voice communications service connection and specified how the proceeds were to be distributed. The legislation directed that, after subtracting administrative costs, 53 percent of the monies remitted by commercial mobile radio service (CMRS) providers be reimbursed to the CMRS providers that comply with certain statutory requirements to cover the actual costs they incur in complying with the requirements of enhanced 911 services. (A CMRS provider is an entity that is licensed by the Federal Communications Commission (FCC) to provide commercial mobile radio service or that resells commercial mobile radio service in North Carolina. CMRS is defined by federal law as an interconnected radio communication service carried on for profit between mobile stations or receivers and land stations and by mobile stations communicating among themselves.) The remaining 47 percent of the monies remitted by CMRS providers and all monies remitted by all other voice communication service providers was to be used to make monthly distributions to primary PSAPs and grants to PSAPs that comply with certain statutory requirements.

S.L. 2008-134 (S 1704) modifies the distribution of the monthly service charge proceeds. Specifically, it amends G.S. 62A-44(b) to eliminate the statutorily prescribed percentages of proceeds that must be remitted to CMRS providers and primary PSAPs. Instead, the act authorizes the 911 Board to set the percentage of the proceeds from the service charge that will be remitted to CMRS providers and primary PSAPs. The Board may adjust the amounts allocated to ensure full cost recovery for CMRS providers and, if there are excess funds, for additional distributions to primary PSAPs.

Additionally, the act makes the following technical changes:

1. It specifies that the Eastern Band of Cherokee Indians is an eligible PSAP.
2. It extends the time period during which the service charge will not apply to prepaid wireless telephone service through the first nine months of the 2009 calendar year.
3. It amends G.S. 62A-46(b) to prohibit the 911 Board from changing the percentage designation of the remaining funds to be distributed to primary PSAPs on a per capita basis more than once per fiscal year (was calendar year).

Supplemental PEG Support

The General Assembly enacted legislation in 2006 replacing the local cable television franchising system with a statewide video service franchising scheme. Among other things, the legislation replaced local revenues from the cable franchise taxes with a distribution of shared state sales tax collections on telecommunications services, video programming services, and direct-to-home satellite services. Under the 2006 legislation, the first $2 million of the local share of the proceeds from the three taxes was to be distributed to local governments to support local public, educational, or governmental access channels (supplemental PEG channel support). Each local government was eligible to receive $25,000 (or a prorated amount if the total exceeded $2 million) for each PEG channel, to a maximum of three channels. As of April 2008, however, local governments had certified more PEG channels than were initially anticipated by the General Assembly.

In response, the General Assembly enacted S.L. 2008-148 (S 1716), which makes two changes to the supplemental PEG channel support provisions. First, it sets out specific requirements to be met by a county or municipality to receive the supplemental PEG channel support funds. Second, it provides for an additional amount of supplement PEG channel support funds to be distributed in a fiscal year (above the $2 million) under certain circumstances.

PEG channel support requirements. The legislation enacts new G.S. 105-164.44J, which defines a qualifying PEG channel as one that operates for at least ninety days during a fiscal year and that meets the following programming requirements:

1. It delivers at least eight hours of scheduled programming a day.
2. It delivers at least six hours and forty-five minutes of scheduled non-character-generated programming a day.
3. Its programming content does not repeat more than 15 percent of the programming content on any other PEG channel provided to the same county or municipality.

A county or municipality must certify to the Secretary of Revenue by July 15 of each year all of the qualifying PEG channels provided during the previous fiscal year. In fiscal year 2008–09, however, certifications had to be submitted by September 15, 2008, and the distribution of supplemental PEG channel support funds made within seventy-five days of June 30, 2008, will be based on the qualifying PEG channel certification in effect for the prior distribution.

A local government must equally allocate the supplemental PEG channel support funds for the operation and support of each of its qualifying PEG channels. The local unit must distribute the funds to the PEG channel operator (defined as an entity that produces programming for delivery on a PEG channel or provides facilities for the production of programming or playback of programming for delivery on a PEG channel) of the qualifying PEG channel within thirty days of the receipt of the funds or as specified in an interlocal agreement.

Additional supplement PEG channel support funds. If a county or municipality determines that it certified a PEG channel in error, it must submit a revised certification to the Secretary of Revenue and return all supplemental PEG channel support funds distributed to the unit as a result of the error. The Secretary of Revenue must add any returned funds in the prior fiscal year to the amount of supplemental PEG channel support funds available for distribution.

In addition to modifying the supplemental PEG channel support funding, the legislation also specifies that if a county or municipality imposed subscriber fees during the first six months of fiscal year 2006–07, the unit must use a portion of the remaining funds (after any supplemental PEG channel support funds are distributed) distributed to it for PEG channel operation and support. The amount of funds is the same proportionate amount of the funds that were used for this purpose in fiscal year 2006–07, which was equal to two times the amount of subscriber fee revenue the county or municipality certified that it imposed during the first six months of fiscal year 2006–07.

Finally, the legislation amends G.S. 66-352(a) to provide that if the description of an area to be served described in a notice of a cable franchise includes the area within the boundaries of a municipality, then the area to be served is considered to include any area that is subsequently annexed to the municipality unless the notice limits the area to be served to the boundaries of the municipality on the effective date of the notice.

Short-term Equipment Rentals Tax

Effective for taxable years beginning on or after July 1, 2009, S.L. 2008-144 (S 1852) excludes heavy equipment that is rented or leased on a short-term basis from the property tax base. Heavy equipment is defined as earthmoving, construction, or industrial equipment that is mobile, weighs at least 1,500 pounds, and is either:

1. a self-propelled vehicle that is not designed to be driven on a highway or
2. industrial lift equipment, industrial handling equipment, industrial electrical generation equipment, or a similar piece of industrial equipment.

The definition includes attachments for heavy equipment regardless of the weight of the attachments.

The act instead enacts G.S. 153A-156.1 and G.S. 160A-215.2 authorizing a county and municipality to adopt a resolution imposing a tax of 1.2 percent and 0.8 percent, respectively, on the gross receipts from the short-term lease or rental of heavy equipment by a person whose principal business is the short-term lease or rental of heavy equipment at retail. Gross receipts are subject to a tax imposed by a county if the place of business from which the heavy equipment is delivered is located in that county, and gross receipts are subject to a tax imposed by a municipality if the place of business from which the heavy equipment is delivered is located in that municipality.

If levied, the gross receipts tax proceeds must be remitted to the county or municipal finance officer on a quarterly basis. Payment may be enforced by any remedies available to the local government under G.S. 105, Article 5. The tax may not become effective before January 1, 2009.

The gross receipts tax is expected to generate slightly more revenue for local governments than the property tax on the heavy equipment. The share of total revenue received by individual local governments will vary because the tax proceeds are distributed to counties and municipalities based on where the equipment is rented, whereas the current property tax is paid based on where the equipment is located on January 1 of each year. Also, unlike the property tax on heavy equipment, a unit has a choice as to whether to levy the gross receipts tax on heavy equipment rentals.

Environmental Issues: Solid Waste Tax

The General Assembly enacted legislation in 2007 that authorized the Department of Environment and Natural Resources (DENR) to establish a statewide solid waste management program. Among other things, S.L. 2007-550 directed DENR to impose a $2-per-ton statewide excise tax on both the disposal of municipal solid waste and construction and demolition debris in any landfill permitted under the state's solid waste management program and the transfer of municipal solid waste and construction and demolition debris to a transfer station permitted under the state's solid waste management program for disposal outside the state. The tax became effective July 1, 2008.

S.L. 2008-207 (H 2530) amends the legislation to alter the distribution method of the excise tax proceeds, specify when payment of the excise tax is due, and provide for a bad debt deduction.

Distribution of excise tax proceeds. The legislation amends G.S. 105-187.63 to provide that 37.5 percent of the excise tax proceeds (after subtracting certain administrative costs) must be distributed to municipalities and counties on a per capita basis—with one-half distributed to municipalities and one-half distributed to counties. For purposes of calculating the per capita amount, the population of a county does not include the population of its incorporated areas. In order to receive a distribution of the excise tax proceeds a municipality or county must provide, and be responsible for the payment of, solid waste management programs and services or the unit must be served by a regional solid waste management authority under G.S. 153A, Article 22. If a municipality or county is served by a regional authority, it must forward the proceeds it receives to that authority.

Payment of excise tax. The legislation amends G.S. 105-187.62 to require payment of the excise tax on a quarterly basis. Payment is due by the last day of the month following the end of a calendar quarter.

Bad debt deduction. The legislation also amends G.S. 105-187.62 to authorize an owner or operator of an authorized landfill to recover any tax paid on tonnage received from a customer whose account is found to be worthless and charged off for income tax purposes. A local government also may recover taxes paid on a worthless account as long as it meets all of the requirements that would have applied were the local government subject to income tax. To recover the excise tax paid, the overall tonnage on which the owner or operator pays tax will be reduced in a calendar quarter by the tonnage for which it was never compensated from the worthless account. If the owner or operator of an authorized landfill subsequently collects on an account that has been declared worthless, any excise tax recovered by the owner or operator must be repaid in the subsequent calendar quarter.

Trust Fund: Swain Settlement Funds

In 1943, flooding from the construction of the Fontana Dam destroyed a road that had been constructed with road bonds assumed by Swain County. The United States Department of the Interior (DOI) and the Tennessee Valley Authority subsequently agreed to compensate Swain County by constructing a new road. The road was never built, and in 2007, the National Park Service concluded that construction of the road would have unacceptable impacts on the natural environment in the Great Smoky Mountains National Park. Swain County and the DOI have instead agreed to negotiate a monetary settlement. S.L. 2008-13 (S 1646) establishes

an irrevocable trust fund under the management of the State Treasurer to consist of proceeds of any payments by the United States under the settlement agreement, other contributions made by Swain County or other entities, and investment income earned by the trust fund.

By majority vote, Swain County's commissioners may request that the Treasurer disburse funds each fiscal year, not to exceed the total interest and investment income earned in the fiscal year. The county may receive a distribution of principal from the trust fund only upon two-thirds approval by the registered voters in the county. The board of commissioners may direct the Swain County Board of Elections to conduct an advisory referendum on the question of whether any portion of the principal of the trust fund should be disbursed to and expended by the county for a particular purpose. The election must be held in accordance with the procedures of G.S. 163-287, and the ballot must disclose the specific purpose proposed for expenditure of the funds. The election may be held on the same day as any other referendum or election in the county but may not be held within thirty days before or after the day of any other referendum or election.

The settlement funds may not be used to compensate any attorney or agent for services rendered in negotiating the settlement agreement. The funds also may not take the place of or be counted against any other state appropriations or program providing funds or disbursements to Swain County.

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Local Taxes and Tax Collection

The General Assembly returned to the subject of property tax reform in 2008, one year after creating new tax relief for elderly and disabled homeowners in the form of the "circuit breaker" deferred tax program. Although the highest profile property tax bill may have been the one that modified the schedule for general reappraisals of real property, several others are likely to have a more substantial statewide impact. These include bills that create a new homestead exclusion for disabled veterans and add wildlife conservation land to the list of property eligible for tax deferrals. Other bills make substantial changes to the existing homestead exclusion and circuit breaker programs for elderly and disabled homeowners as well as the ownership requirements for "present use" property. Relatedly, the payment and enforced collection procedure was standardized for what are now seven different tax deferral programs. The General Assembly also added several new narrow classifications and exclusions and revisited the details of the pending combined motor vehicle registration and property tax system, the likely start date of which was postponed by one year to July 2011.

Mandatory General Reappraisals

Amidst news accounts of homeowners being hit with dramatically larger property tax bills in reappraisal years,[1] this summer the General Assembly mandated in S.L. 2008-146 (S 1878) that large counties conduct general reappraisals more frequently when market values diverge from appraisal values by more than 15 percent.

Although permitted to conduct reappraisals more frequently, all North Carolina counties have been required to do so at least every eight years.[2] Beginning in 2009, counties with populations of 75,000 or more are required to conduct reappraisals more frequently than every eight years if the county's "sales assessment ratio"—that is, the ratio of arms-length sales prices to assessed value as calculated annually by the Department of Revenue—drops below .85 or increases to more than 1.15. A reappraisal mandated by a widening gap between market and assessed values must be effective the third year following the notice of the sales assessment ratio or the eighth year following the year of the county's last reappraisal, whichever is sooner.

One of the counties with a population large enough to trigger the bill's requirements is Wake County, which conducted a countywide reappraisal effective January 1, 2008, pursuant to its standard eight-year reappraisal cycle. The county intends for the next reappraisal to be effective January 1, 2016. If, however, the Department of Revenue were to notify Wake County in April 2010, of a sales assessment ratio of .84, Wake County would be required to carry out a countywide reappraisal effective no later than January 1, 2013, three years after the date of the notice. If Wake County's sales assessment ratio remained within the acceptable range until 2014, and the county was then to receive notice of a sales assessment ratio of .84, the county would be permitted to adhere to the eight-year reappraisal schedule because its regularly scheduled reappraisal date of January 1, 2016, would be earlier than January 1, 2017, the mandated reappraisal date three years from the date of the sales assessment ratio notice.

The practical implication of the bill is likely to be minimal. No counties would have been subject to mandatory reappraisal if the bill had been effective for tax year 2008. According to North Carolina Department of Revenue statistics, forty-eight of North Carolina's one hundred counties

1. *News & Observer (Raleigh)*, "Property Tax Bills Land with a Big Thud," K. Butler, M. Dees & S. LaGrone, July 25, 2008 (detailing homeowners' dismay at increased tax bills following Wake County's 2008 general reappraisal).

2. G.S. 105-286(a) [hereinafter G.S.].

had sales assessment ratios as of January 1, 2008, that fell below the bill's .85 threshold.[3] However, of those forty-eight counties, only ten had populations above 75,000.[4] All ten of those counties have general reappraisals scheduled on or before tax year 2011, the year reappraisals would have been mandated if the bill was effective this year.

The same bill that creates the new mandatory reappraisals also instructs the Revenue Laws Study Committee to study the impact of this requirement on staffing needs at the Department of Revenue.

Homestead Exclusions

In 2008 the General Assembly approved a new homestead exclusion for disabled veterans, clarified eligibility issues for the existing elderly or disabled homestead exclusion, and mandated how the two exclusions interact with one another and with co-owners.

Disabled Veterans Homestead Exclusion

Previously, G.S. 105-275(21) excluded from the property tax calculation the first $38,000 in assessed value for the homes of disabled veterans who receive specially adapted housing benefits under 38 U.S.C. 2101. S.L. 2008-107 (H 2436) repeals that provision but creates an increased benefit for an expanded class of disabled veterans. Beginning in the 2009 tax year, honorably discharged veterans with permanent and total disabilities or who receive benefits under 38 U.S.C. 2101 may exclude the first $45,000 in assessed value of their permanent residences from taxation. The surviving unmarried spouse of an eligible veteran may also receive the exclusion. A taxpayer who obtains property tax relief under this new exclusion may not also receive relief under either the elderly and disabled homestead exclusion[5] or the circuit breaker deferred tax program.[6]

A few details regarding the eligibility process for this new benefit bear highlighting. Unlike the elderly or disabled homestead exclusion and the circuit breaker benefit (the two other programs that fall under the newly defined term "property tax relief"), there is no income restriction for property owners who seek the disabled veteran benefit. However, applicants must satisfy both the disability and the discharge requirements. An applicant who does not receive housing benefits under 38 U.S.C. 2101 must provide documentation from the Veterans Administration indicating that the applicant has been found to be permanently and totally disabled; proof that the applicant is receiving disability compensation at the 100 percent level is not sufficient. With regard to discharge status, there is a military distinction between a veteran who has been honorably discharged and one who has been "discharged under honorable conditions." The latter, a lesser status of discharge, does not entitle the veteran to benefits under this new program.

Elderly or Disabled Homestead Exclusion

The 2007 legislation that increased the income eligibility limit for the elderly or disabled homestead exclusion left some doubt as to the correct limit for tax year 2008, the first year that the increased limit was to apply.[7] The General Assembly resolved that uncertainty with a technical correction in S.L. 2008-35 (S 1876), which clarifies that the income limit for 2008 is $25,000.[8] This limit is adjusted each year based on the Social Security cost-of-living index and will rise to $25,600 for tax year 2009.[9] As with the new disabled-veterans' homestead exclusion, S.L. 2008-107 mandates that a taxpayer who receives property tax relief under the elderly or disabled homestead exclusion may not also obtain relief from the veterans' exclusion or the circuit breaker benefit.

Last year, the General Assembly changed the definition of income under this program (and, by reference, under the circuit breaker program) to move from a calculation that began with federal adjusted gross income to one that simply captures all income except gifts and bequests from family members.[10] Because adjusted gross income includes reductions for a number of expenses including student loan interest, alimony, and tuition, the new definition may make it more difficult for some taxpayers to qualify for property tax relief. This year, S.L. 2008-146 instructs the Revenue Laws Study Committee to study the impact of this change.

3. "Sales Assessment Ratio Studies as of January 1, 2008," Property Tax Division, North Carolina Department of Revenue (August 2008). According to this report, the average county sales assessment ratio was .8549, just over the bill's .85 threshold.

4. North Carolina Office of State Budget and Management county population projections as of July 2007, http://www.osbm.state.nc.us/ncosbm/facts_and_figures/socioeconomic_data/population_estimates/county_estimates.shtm (last visited December 10, 2008). According to these projections, thirty-four of North Carolina's one hundred counties had populations greater than 75,000 as of July 2007.

5. G.S. 105.277.1.

6. G.S. 105-277.1B.

7. G.S. 105-277.1(a2).

8. Also proposed but not approved was House Joint Resolution 2326, which was intended to authorize the General Assembly to consider a bill to raise the income limit to $35,000.

9. Memorandum from David D. Duty, Property Tax Division, North Carolina Department of Revenue, to County Assessors (July 1, 2008) (setting forth income eligibility limits for the 2009 homestead exclusion and circuit breaker program).

10. G.S. 105-277.1(b)(1a).

Co-Ownership Rules for the Two Homestead Exclusions

In conjunction with its approval of the new veterans' exclusion in S.L. 2008-107, the General Assembly added language to both that exclusion and the existing elderly or disabled homestead exclusion to clarify how they affect properties owned by more than one taxpayer.

Tenants by the entirety. If at least one spouse meets the relevant exclusion requirements, a husband and wife who live in and own their home as tenants by the entirety may receive *either* the veterans' exclusion or the elderly or disabled homestead exclusion. Spouses who qualify for both exclusions must choose one; they cannot claim benefits under both. Suppose, for example, that a 60-year-old husband and his 65-year-old wife own their residence as tenants by the entirety. If the couple meet the income requirements for the elderly homestead exemption (under $25,000 for 2008), the wife qualifies for that exclusion because she is at least 65 years of age.[11] The couple could apply the full benefits of that exclusion (the greater of 50 percent of their home's assessed value or $25,000) to reduce their property tax bill, with no reduction due to the fact that the husband does not qualify for either of the two homestead exclusions.

Consider the same facts, but assume further that the husband is a qualified disabled veteran. The couple could then choose *either* the $45,000 veterans' homestead exclusion or the elderly homestead exclusion. If their home is appraised for less than $90,000, they would benefit more from the veterans' exclusion of $45,000 than from the elderly homestead exclusion equaling 50 percent of the assessed value. If their home is appraised at more than $90,000, they would benefit more from the elderly homestead exclusion. The couple would not have the option of combining the two exclusions.

All other co-owners. Two general rules apply to co-owners who are not married to each other. A single co-owner may not benefit from more than one exclusion, but different co-owners may choose to benefit from different exclusions for the same property. The fact that one co-owner does not satisfy the requirements for either exclusion does not prohibit other qualified co-owners from receiving exclusion benefits.[12]

When calculating the specific exclusions permitted, three more rules come into play. First, each owner is entitled to the full amount of the exclusion not to exceed his or her proportionate share of the valuation of the property. Second, no part of an exclusion available to one co-owner may be claimed by another co-owner. Third, the total exclusion amount granted to all co-owners may not exceed the greater of (i) the $45,000 veterans' exclusion or (ii) the applicable elderly or disabled exclusion.

Confusing, to be sure. A few examples may help.

Start with a situation in which only one co-owner is entitled to a homestead exclusion. Suppose two sisters, Maude and Clementine, own as tenants in common (each with a 50 percent interest) a house and .25 acre lot, where they have lived for forty years. The house and lot appraised for $100,000 in the county's last reappraisal. Clementine meets the requirements for the elderly homestead exclusion; Maude does not qualify under either that exclusion or the veterans' homestead exclusion. Clementine is therefore entitled to the full amount of the exclusion not to exceed her proportionate share of the value of the property. The full amount of the exclusion is $50,000 (50 percent of the appraised $100,000 value); this amount equals, but does not exceed, Clementine's 50 percent ownership interest in the property. No part of Clementine's exclusion may be claimed by the other co-owner, Maude.

Now consider a situation in which two co-owners each qualify for the same exclusion. Assume the same facts as above but now Maude also qualifies for the elderly homestead exclusion. The maximum exclusion permitted all co-owners is 50 percent of the assessed value—in this case $50,000—which will be shared equally between Maude and Clementine based on their respective 50 percent ownership shares.[13]

Reducing the value of the home affects the exclusion allocation. Suppose that Maude and Clementine jointly own and reside in a manufactured home appraised for $24,000. The maximum elderly or disabled homestead exclusion under G.S. 105-277.1 is the greater of $25,000 or 50 percent of the value of the residence. In this case, $25,000 is the greater amount. But, a co-owner's exclusion amount may not exceed her interest in the property. If only Clementine were eligible for the homestead exclusion, her exclusion would be limited to her 50 percent ownership interest of $12,000. If Maude were to become eligible for the homestead exclusion, then each sister would be entitled to a $12,000 exclusion, and the entire assessed value of the manufactured home may be excluded from taxation.

What if co-owners qualify for different homestead exclusions? Returning to the above example, assume Maude is a qualified disabled veteran under S.L. 2008-107, Clementine qualifies for the elderly

11. G.S. 105-277.1(a).

12. Contrast this with the circuit breaker program, which prohibits a co-owner from receiving a tax deferral unless all co-owners are eligible and apply for the same benefit. *See* below and G.S. 105-277.1B(e).

13. As a practical matter, most assessors do not list interests of tenants in common on separate abstracts or apportion property values among tenants in common. Likewise, the general practice is to send one bill to the tenants in common, without apportioning tax liability. So, in all likelihood, the apportionment issue here is an issue between Maude and Clementine, which does not affect the listing or assessing of the property. The assessed value of the property does not change simply because one or more owners qualify for exclusions. However, ownership and apportionment percentages are of concern to tax collectors. If enforced collection procedures are required, then each owner will be responsible for her share of the taxes minus her portion of the exclusion, both of which are based on her share of ownership.

homestead exclusion under G.S. 105-277.1, and their co-owned home is assessed at $100,000. Under the veteran's exclusion, Maude's maximum exclusion is $45,000. Under the elderly homestead exclusion, Clementine's maximum exclusion is $50,000. The total exclusion granted both co-owners may not exceed the larger of the veterans' homestead exclusion or the elderly homestead exclusion. In this instance, the homestead exclusion is larger, so the total exclusion permitted both Maude and Clementine is $50,000, which again will be split equally based on their equal ownership shares.

As before, if the assessed value of the home changes, so do the calculations. Assume the same facts as in the second example above but reduce the value of Maude and Clementine's home to $80,000. Now, the maximum total exclusion is $45,000, because the veterans' exclusion limit ($45,000) is greater than the elderly homestead exclusion limit (the greater of 50 percent of the value of the home, which is $40,000 in this case, or $25,000). Each sister will be entitled to an exclusion of $22,500, one-half of that maximum amount.

Deferred Property Tax Programs

New "Wildlife Conservation Land" Classification

Prior to the 2008 legislative session, six deferred tax programs provided property tax relief for various types of property deemed inappropriate for standard market value tax assessments:

- historic property,[14]
- non-profit property held as the future site of historic structures,[15]
- elderly and disabled homeowners' property (the circuit breaker benefit),[16]
- agricultural, horticultural, and forestland property,[17]
- working waterfront property,[18] and
- nonprofit property held as the future site of low- and moderate-income housing property.[19]

This year, in S.L. 2008-171 (H 1889) the General Assembly added "wildlife conservation land" to this list and mandated that this type of property benefit from the same present-use valuations already applied to agricultural, horticultural, and forestland property under G.S. 105-277.4.

To qualify for the deferred tax benefit, the wildlife conservation property must consist of at least 20 contiguous acres; be owned by an individual, a family business, or a family trust; and be managed under a written wildlife habitat conservation agreement with the North Carolina Wildlife Resources Commission (NCWRC). That agreement must require the owner to protect either one of the species on the NCWRC "protected animal list" or one of several "priority animal habitats, including long-leaf pine forests." The NCWRC is developing the agreement required under this section and will make it available before the law becomes effective for tax year 2010.

Generally, land must be have been owned by the same owner for at least five years before qualifying for the wildlife conservation classification. Continuation exceptions exist for land transferred to a business entity or trust of which the original owner is directly or indirectly a member or beneficiary. (*See* the next section, "Changes to 'Present-Use' Deferred Tax Program") for a more detailed discussion of the direct/indirect ownership issue.) New owners unrelated to the prior owners may also continue eligibility if they continue to use the land for wildlife conservation and they file an application and sign an NCWRC agreement within sixty days of acquiring the property. No more than 100 acres of an owner's land in any one county may be classified under this new benefit.

The benefits of receiving a wildlife conservation land classification are identical to those provided to qualified agricultural land, namely that the property is assessed at a present-use value that is likely to be substantially lower than the true market value. The difference between the taxes that would have been due at market value and the actual taxes assessed at present-use value become a lien on the property. If the property loses eligibility for the classification due to a change in ownership or use, the deferred taxes for the three prior years become immediately due and payable. However, the bill permits land to move between the agriculture, horticulture, and forestland present-use classification and the new wildlife conservation classification without triggering payment of deferred taxes.

Changes to "Present-Use" Deferred Tax Program

The "present-use" deferred tax requirements for agricultural, horticultural, and forest land were amended to recognize common forms of land ownership created for estate-planning and other purposes. S. L. 2008-146 amends G.S. 105-277.2(4) to allow indirect ownership of land by individuals through business entities or trusts in addition to direct ownership. In essence, there now may be multiple layers of trust or business entity ownership, so long as a qualifying individual is ultimately the beneficial owner.

The definition of "business entity" now permits indirect ownership by individuals who are shareholders, partners, or beneficiaries of corporations, partnerships, or trusts, respectively, that are themselves shareholders or

14. G.S. 105-278.
15. G.S. 105-275(29a).
16. G.S. 105-277.1B.
17. G.S. 105-277.4.
18. G.S. 105-277.14.
19. G.S. 105-278.6(e).

partners of the corporation or partnership that actually owns the land. As before, regardless of whether their ownership is direct or indirect, the individual owners must be actively engaged in farming or be the relative of other individual owners so engaged. The definition of "trust" was similarly changed to permit indirect ownership by individuals who are either (i) beneficiaries of a trust that is itself a beneficiary of the trust that actually owns the land or (ii) shareholders or partners of a corporation or partnership that is itself a beneficiary of the trust that actually owns the land. As before, regardless of whether their ownership is direct or indirect, the individual owners must be either the creator of the original trust or relatives of the creator.

Another important change involves the standardization of payment procedures for all of the deferred tax programs, discussed in more detail below. Previously, G.S. 105-277.4(c) permitted the payment of "deferred taxes for any given year [to be] paid in that year without the qualifying tract of land becoming ineligible for deferred status." This language had been interpreted as requiring termination of present-use eligibility if an owner or other interested party paid deferred taxes from past years. S.L. 2008-35 adds a new provision that explicitly permits the payment of any or all deferred taxes without affecting the property's eligibility for continued tax deferrals.

Finally, S.L. 2008-71 changes the requirements for land eligible for present-use valuation without the standard production and income requirements due to a conservation easement under G.S. 105-277.3(d1). Now, in addition to the requirement that such land be subject to an enforceable easement that qualifies for conservation tax credits, the taxpayer must demonstrate that he or she received no more than 75 percent of the fair market value of the donated property interest in compensation for the easement. For example, if a conservation easement reduces the value of the taxpayer's property from $300,000 to $200,000, then the value of the easement interest is $100,000. In this instance, the taxpayer could not have received more than $75,000 in compensation for the easement to qualify for present-use value under amended G.S. 105-277.3(d1).

Circuit Breaker Modifications

The General Assembly also made several clarifications to the "circuit breaker" tax deferral program for elderly and disabled homeowners that was created in 2007 and takes effect in the 2009 tax year.[20] S.L. 2008-35 eliminates potential confusion in the original law regarding ownership by husband and wife as tenants in the entirety: if at least one of the spouses satisfies the circuit breaker requirements, the property owned under a tenancy in the entirety is eligible for the full tax deferral benefit.

S.L. 2008-35 also clarifies that a taxpayer seeking the circuit breaker benefit must have owned the property for the previous five years in addition to residing there. The bill makes clear that a co-owner who takes full ownership as a result of another owner's death or a spouse who takes ownership through a divorce transfer does not lose circuit breaker eligibility so long as the new owner continues to occupy the property as a permanent residence. That same bill mandates that taxpayers seeking the circuit breaker benefit must reapply annually, to ensure that their income still falls within the statutory limits. Failure to file an application is not a disqualifying event that renders deferred taxes payable, but it does eliminate the deferral benefit for the current year and creates a gap in deferral that must be taken into consideration when the deferred taxes eventually become payable.

As a result of S.L. 2008-35, the circuit breaker program now requires tax collectors rather than tax assessors to annually notify each owner in the program of the "accumulated sum of deferred taxes and interest." It appears that this language will require the tax collector to provide notice of all deferred taxes, despite the fact that the taxpayer will only be liable upon disqualification for payment of the three most recent years of deferrals.

The changes to the multiple ownership provisions of the elderly and disabled homestead exclusion in S.L. 2008-107 also affect the circuit breaker program. Previously, G.S. 105 -277.1(e) mandated that if multiple owners who were not spouses wished to take advantage of the circuit breaker program, they all needed to qualify for both the elderly and disabled exclusion and the circuit breaker benefit. This provision effectively prevented multiple owners who were not spouses from using the circuit breaker benefit unless each of them qualified for the 5 percent ceiling on property taxes. If one of the owners qualified only for the 4 percent circuit breaker ceiling because his or her income was greater than the eligibility limit for the elderly and disabled, none of the owners could take advantage of the circuit breaker benefit. S.L. 2008-107 eliminates that restriction, meaning that when the circuit breaker program becomes effective in tax year 2009, multiple owners may benefit from the circuit breaker program under different ceiling percentages.

S.L. 2008-35 answers the question of how to allocate the taxes owed and deferred under the circuit breaker program between multiple taxing units. When the taxes owed exceed the circuit breaker ceiling, both the taxes paid in the current year and those deferred are allocated among multiple taxing units proportionately based on their tax rates.[21] For example, assume property eligible for the circuit breaker is subject to both Raleigh city taxes and Wake County taxes and that Raleigh's tax rate

20. G.S. 105-277.1B.

21. If the total taxes owed are less than the circuit breaker ceiling, then all taxes from all taxing units are completely deferred and there is no need for an allocation.

is .66 and Wake County's rate is .33. If the taxpayer originally owed $1,000 in total property taxes but was subject to a $700 circuit breaker ceiling on taxes based on his or her income level, he or she would be required to pay only $300 in taxes this year and would defer the remaining $700. Of the $300 that was paid, based on the relative city and county tax rates, two-thirds would go to Raleigh ($200) and one-third would be paid to Wake County ($100). The deferred tax lien and future rollback would be shared between the city and county based on the same proportion.

Finally, S.L. 2008-35 amends the city[22] and county[23] prohibitions against disclosing information relating to a taxpayer's income to permit publishing on a tax record the amount of property taxes deferred under the circuit breaker program. Because a taxpayer's income could be calculated using this information, it could not be disclosed absent these amendments.

Uniform Provisions for Payment and Enforced Collection of Deferred Taxes

To standardize administration of the six existing and one new property tax deferral programs, the General Assembly included in S.L. 2008-35 uniform payment and enforced collection procedures for all seven programs. As before, under new G.S. 105-277.1C all deferred taxes accrue interest as if they had been due and payable without any deferrals.[24] New G.S. 105-277.1C also provides that payment of deferred taxes does not remove the property from the program. Combined with related changes to the present-use continuation provisions in S.L. 2008-146, it is now clear that an eligible farmer may sell land, pay the present-use deferred taxes that are a lien on the property, and still permit the property to remain in the present-use program in the hands of a new owner who intends to continue farming the land without that new owner needing to satisfy the standard four-year ownership requirement.

Relatedly, in S.L. 2008-35 the General Assembly added G.S. 105-365.1 to summarize when and against whom enforced collection remedies may be pursued for various types of taxes owed. Prior to 2006, when a property was transferred before payment of outstanding taxes, the former owner (i.e., the taxpayer in whose name the real property was listed on January 1 preceding the tax year in question) was the taxpayer whose name was advertised in the newspaper for nonpayment of property taxes and whose bank accounts, wages, and personal property were subject to attachment, garnishment, and levy. Two years ago, the General Assembly changed the definition of "taxpayer" in G.S. 105-273(17) to identify the record owner as of the date the taxes became delinquent—not the record owner when the property was listed—as the taxpayer who could be subjected to the various enforced collection remedies.[25] G.S. 105-360(a) states that taxes become delinquent when interest charges begin to accrue on January 6 of the year. Thus, owners who transferred their property before the end of the calendar year were generally off the hook for outstanding property taxes due on property they no longer owned.

However, the 2006 changes left unclear the date on which deferred taxes become delinquent. New G.S. 105-365.1 clarifies that, with one exception, deferred taxes become delinquent on the date that the property is no longer eligible for deferred classification due to a disqualifying event. The one exception applies only to the circuit breaker exclusion when the disqualifying event is the death of the owner, in which case the deferred taxes become delinquent nine months after the owner's death, to allow time for the estate to be settled.

Although new G.S. 105-365.1 is open to interpretation, it likely creates personal liability for both the transferee and the transferor when deferred taxes become due and payable after a disqualifying transfer. G.S. 105-365.1 makes the owner as of the date of delinquency liable for all delinquent taxes, which as described above is generally the date of the disqualifying event. Thus, if the disqualifying event is a sale, the seller could be personally liable because, as of the beginning of the sale date, the seller was still the record owner. G.S. 105-365.1 states further that "any subsequent owners" are also liable for delinquent taxes, meaning that the buyer could be personally liable for the deferred taxes, too. To satisfy the deferred tax obligation after a disqualifying transfer, a tax collector therefore could levy or attach any personal property owned by either the current real property owner or the immediate prior owner. Regardless, a tax collector may always pursue foreclosure remedies against the real property itself.

Low-Income Housing Property Classification

S.L. 2008-146 mandates that beginning in tax year 2009, low-income housing property that is allocated a federal tax credit by the North Carolina Housing Finance Agency must be assessed using the income method, taking into consideration any rent restrictions that apply to the property. This bill codifies a 2001 North Carolina Court of Appeals decision that overruled a county's use of the cost method to appraise an apartment complex financed under a federal tax credit program that limited rental

22. G.S. 153A-148.1(a).
23. G.S. 160A-208.1(a).
24. *See, e.g.*, G.S. 105-277.5(c).
25. Transferees who take ownership subsequent to the date of delinquency may also be subject to enforced collection procedures. For a more detailed analysis of the 2006 changes, *see* Chapter 16 of *North Carolina Legislation 2006*, available at http://www.sog.unc.edu/pubs/nclegis/nclegis2006/index.html (last accessed September 10, 2008).

rates to roughly 25 percent below prevailing market rates.[26] Now, when appraising such property using the required income method, assessors must consider the lower rents available to the property owner but are not permitted to value as income the tax credits made available under the applicable state or federal low-income housing provisions.

Exclusions from Property Tax

S.L. 2008-146 amends G.S. 105-275 to exempt two new categories of property from property tax: prescription drugs that are given to medical providers to dispense for free to their patients and 80 percent of the appraised value of solar energy electric systems. This latter benefit is aimed at commercial solar power generation, as opposed to individual systems that do not provide power to other customers. According to the Department of Revenue, no such systems existed in the state as of 2008, although several are planned in the coming years. Both of these new classifications are effective for tax year 2008, meaning counties that listed and taxed "free sample" drugs as "supplies" for physicians or hospitals for this tax year should amend those tax bills to reflect the new exempt status of those drugs.

Separately, the General Assembly created an exception to the general taxability of leasehold interests in exempt property. S.L. 2008-171 exempts from property tax a leasehold interest in exempt real property that is used to provide affordable housing for employees of the governmental unit that owns the property. This change is also effective for 2008.

Finally, S.L. 2008-144 (S 1852) creates a new method of taxation for heavy machinery used in earth moving, construction, and similar industries and rented on a short-term basis. Similar to the local taxation of rental cars, such heavy equipment is now exempt from property tax but subject to city and county privilege license taxes on a gross receipts basis.

Changes to Combined Motor Vehicle Registration and Property Tax System

The revenue laws technical corrections bill, S.L. 2008-134 (S 1704), made several changes to the pending combination of the state motor vehicle registration and the local motor vehicle property tax collection systems. The most important of these changes is to postpone by one year the likely effective date of the combined system's implementation to the earlier of July 1, 2011, or when the necessary Department of Revenue/Department of Transportation integrated computer system is in place. Previously, the combined system was to take effect on the earlier of July 1, 2010, or when the computer system was in place. Other changes include a clarification that the owners of certain exempt vehicles, such as those owned by the government agencies, need not apply for an exemption from the new system. The bill also creates more specificity regarding the required memorandum of understanding between the Departments of Revenue and Transportation concerning the new combined system. Previously, the departments were required to agree upon appropriate listing, appraisal, and assessment procedures and vehicle and owner information collection procedures. Under the new law, they will also be required to agree upon procedures for the "business practices, accounting and costs" for the required computer system. For all procedures relating to the new combined system, the departments must consult with and obtain the endorsement of the North Carolina Association of County Commissioners and the North Carolina League of Municipalities.

26. *In re* Appeal of The Greens of Pine Glen, Ltd., 147 N.C. App. 221, 555 S.E.2d 612 (2001).

Annexation Refunds

S.L. 2008-134 adds a new section to G.S. Chapter 153A concerning tax refunds after municipal annexations. New G.S. 153A-304.4 mandates that the refund calculations for law enforcement service district taxes be identical to those for other county service district taxes under G.S. 153A-304.1.

Local Occupancy Taxes

Interpretations by the Secretary of Revenue

S.L. 2008-134 makes clear that the Secretary of Revenue's interpretation of a state law is binding upon any local laws that refer to said state law. Primary examples of this type of interaction between state and local laws are the various occupancy taxes approved by county boards and city councils, most of which refer to the statutes authorizing county (G.S. 153A-155) and city (G.S. 160A-215) occupancy taxes. Any interpretations of these two statutes by the Secretary of Revenue will be binding on local occupancy tax laws. Reliance on such an interpretation provides the same protection from liability under the local laws as it would under the state laws.

Accommodations Sold as Part of a Package

S.L. 2008-134 makes identical changes to the statutes generally authorizing county (G.S. 153A-155) and city (G.S. 160A-215) occupancy taxes. The new language requires that accommodations sold as part of a package be priced for occupancy tax purposes pursuant to the "bundled transactions" provisions of G.S. 105-164.4D. If those provisions do not address the type of package sold, the business collecting the occupancy tax may allocate a reasonable price to the accommodations based on its normal business practices.

Cherokee County

S.L. 2008-33 (H 2783) amends Chapter 1055 of the 1983 Session Laws to permit Cherokee County to levy an occupancy tax of up to 3 percent in addition to the 3 percent previously authorized under the uniform administrative provisions of G.S. 153A-155. The 2008 act redefines "net proceeds" to cap the percentage of gross proceeds the county may deduct for the costs of administering and collecting the tax. The amendments also alter the membership composition and terms of the Cherokee County Tourism Development Authority, which receives the net proceeds of the tax. The authority must use at least two-thirds of the funds to promote travel and tourism in the county and the remainder for tourism-related expenditures.

Granville County

S.L. 2008-45 (H 2218) expands membership of the Granville County Tourism Development Authority from five to seven. One of the new members must be appointed by the Granville County Board of Commissioners, the other by the Butner Town Council. Two of the four members appointed by the county commissioners must be the owners or operators of hotels or motels in the county, while the remaining two must be "currently active in the promotion of travel and tourism in the county."

Town of Ahoskie

S.L. 2008-45 amends the Town of Ahoskie occupancy tax to permit the Ahoskie Tourism Development Authority to use two-thirds of the tax proceeds to promote travel and tourism in the *area* and not only in the town.

Town of Leland

S.L. 2008-64 (H 2156) authorizes the Town of Leland to levy an occupancy tax of up to 3 percent pursuant to the uniform administrative provisions of G.S. 160A-215. The act requires the town council to create the Leland Tourism Development Authority and sets forth requirements of authority membership. The town must remit the net proceeds of the new tax to the authority on a quarterly basis, two-thirds of which must be used by the authority to promote travel and tourism in the town and the remainder for tourism-related expenditures.

Local Legislation

Municipal Motor Vehicle Taxes

S.L. 2008-16 (S 1748) amends G.S. 20-97(b), as it applies to the Town of Chapel Hill, to authorize the town to increase its general motor vehicle tax from $15 to $25 per vehicle. Any taxes over $15 per vehicle must be used for public transportation purposes. Including the $5 per vehicle public transportation tax under G.S. 20-97(c), the total motor vehicle tax in Chapel Hill may now reach the $30 per vehicle maximum tax permitted under G.S. 20-97(c).

S.L. 2008-29 (H 2455) amends G.S. 20-97(b), as it applies to the City of Oxford, to permit the city to increase its general motor vehicle tax from $10 to $20 per vehicle beginning in the 2008 tax year.

S.L. 2008-31 (H 2689) extends the sunset on the City of Durham's $5 per vehicle additional motor vehicle tax until June 30, 2009. Under S.L. 2004-103 (H 1700), the authorization for the additional tax was set to expire on June 30, 2008.

Town of Kernersville Tax Collection

S.L. 2008-27 (H 2091) amends the Town of Kernersville's charter, as previously approved under S.L. 1989-381, to permit the town to contract for tax collection services with either Guilford County or Forsyth County, the two counties in which the town is located. Previously, the town could contract only with Forsyth County.

Christopher McLaughlin

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Mental Health

This chapter discusses acts of the General Assembly affecting mental health, developmental disabilities, and substance abuse (MH/DD/SA) services, with particular attention given to legislation affecting publicly funded services. Although these services are largely governed by policies administered on the state level by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services within the Department of Health and Human Services (DHHS), they are primarily delivered at the community level through a service network managed by local governments called "local management entities" or "LMEs." Much of the legislation discussed in this chapter pertains, directly or indirectly, to LMEs.

The 2008 General Assembly, upon the recommendation of the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services (LOC), enacted legislation to improve how LMEs receive and expend state funds, to reign in expenditures for the Medicaid community support program, to streamline the appeals process for Medicaid applicants and recipients whose services are denied or terminated, to address the backlog of cases brought by service providers challenging agency decisions requiring the payback of public funds, and to strengthen the LME role in authorizing services and monitoring providers. To address the continued high demand and unmet need for inpatient psychiatric care, the General Assembly also acted on LOC recommendations to increase the purchase of inpatient psychiatric beds in community hospitals and temporarily to expand state hospital beds. These and other legislative enactments are discussed below.

Appropriations

General Fund Appropriations

In 2007 the General Assembly appropriated $721,639,723 from the General Fund to the DHHS Division of MH/DD/SA Services for the second year of the 2007–09 biennium (S.L. 2007-323). The 2008 General Assembly, through a combination of cuts and expansion funding, provided a net increase of $21 million, appropriating $742,987,556 from the General Fund to the Division of MH/DD/SA Services for 2008–09. Annual appropriations for the past five years were $713 million (2007–08), $662.8 million (2006–07), $603.3 million (2005–06), $574.4 million (2004–05), and $577.3 million (2003–04).

The Current Operations and Capital Improvements Appropriations Act of 2008, S.L. 2008-107 (H 2436), cuts $4.3 million from the Division's personnel and operating funds and $15 million from MH/DD/SA services based on the expectation that this amount will be collected through increased patient receipts by implementing uniform co-payment collections. Expansion funding to the Division is described by general category below, as are appropriations to the DHHS Division of Medical Assistance (DMA) that affect MH/DD/SA services.

Crisis services. Crisis and inpatient services received particular attention in the appropriations act. In an effort to increase the availability of local inpatient psychiatric beds and reduce the need for state hospital beds, approximately $8.1 million of the funds appropriated to MH/DD/SA services is allocated for the purchase of inpatient psychiatric care at community hospitals. These funds will be held in a statewide reserve rather than allocated to LMEs but will be used to pay for services authorized by LMEs and billed by hospitals through the LMEs. The money must be distributed across the state according to need as determined by DHHS and pursuant to contracts with LMEs and community hospitals that give LMEs control and management of the inpatient beds. In addition, LMEs will have the authority to determine which community or state-operated hospital an individual should be admitted to under an involuntary commitment order. If DHHS determines that (1) an LME is not effectively managing beds or bed days, as evidenced by beds or bed days in the local hospital not being

utilized while demand for services at the state psychiatric hospitals has not decreased, or (2) that the LME has failed to comply with payment provisions, then DHHS may pay the hospital directly.

Approximately $1.9 million of the funding to MH/DD/SA services is allocated to LMEs to support six crisis services teams for persons with developmental disabilities based on the START (Systemic, Therapeutic, Assessment, Respite, and Treatment) model. Approximately $6.1 million is appropriated for walk-in psychiatric services (crisis and immediate aftercare) to be allocated to LMEs to support thirty psychiatrists and related support staff. About $1.6 million of this money is a nonrecurring appropriation for telepsychiatry equipment to be owned by the LMEs and distributed across the state according to need determined by DHHS. For mobile crisis services, the appropriation act provides approximately $1.1 million in nonrecurring start-funds for eleven mobile crisis teams, increasing the total number of teams to thirty statewide, and $4.6 million in operating subsidies for the thirty teams.

Housing. In the past two years the General Assembly has targeted the housing needs of individuals with disabilities by making a $10.9 million appropriation in 2006 and a $7.5 million appropriation in 2007, both nonrecurring, to the North Carolina Housing Trust Fund to finance the construction of independent and supportive-living apartments for individuals with disabilities. These apartments must be affordable to those with incomes at the Supplemental Security Income level. This year the General Assembly appropriated $7 million in nonrecurring funds to the North Carolina Housing Trust Fund for additional independent and supportive-living apartments for persons with disabilities. An additional $1 million in recurring funding was provided to subsidize the operating costs associated with the apartments. The appropriations act also makes a $129,331 recurring and a $155,000 nonrecurring appropriation to support six two-bedroom and nineteen one-bedroom apartments financed through the U.S. Department of Housing and Urban Development and $200,000 in ongoing program service funding for two group homes under development by the Mental Health Association in North Carolina, Inc.

State facilities. Several publicized incidents of patient abuse at the state's psychiatric hospitals, which led to the suspension of federal funding, prompted the General Assembly to attempt to improve patient care through staff recruitment, training, and oversight. S.L. 2008-107 appropriates approximately $7.3 million for 107 new positions at the hospitals and $1.8 million to improve training and supervision of direct-care staff and create new monitoring, accounting, and pharmacy management positions. The appropriations act dedicates an additional $1.3 million for recruitment and workforce development initiatives that include loan repayment and scholarship opportunities for psychiatrists and nurse practitioners.

To address the high rate of admissions to acute care unit beds in the state psychiatric hospitals, the appropriations act authorizes the Secretary of DHHS to maintain a sixty-bed unit at Dorothea Dix Hospital, which was slated to close upon the opening of the new Central Regional Hospital at Butner. The act appropriates $5.2 million in 2008–09 for this purpose and expresses the legislative intent that funding will be provided for three years of operation. In addition to the state appropriation, the unit will be funded with approximately $4.8 million in receipts from Wake County. S.L. 2008-107 appropriates $472,785 to create a four-position pharmacy program at the Julian F. Keith Alcohol and Drug Abuse Treatment Center to serve the expanded acute care treatment beds. The Substance Abuse Prevention and Treatment Block grant includes $70,000 in one-time, start-up funding for costs associated with the pharmacy.

Division of Medical Assistance. The appropriations act reduces state appropriations to the DHHS Division of Medical Assistance (DMA) by cutting $86.4 million from the Community Support Services Medicaid program. Most of this reduction is achieved by tightening eligibility requirements for the program. Increases in funding to the DMA include an additional $6,666,667 for the state's share of funding for the Community Alternatives Program Mental Retardation/Developmental Disability program (CAP-MR/DD) beginning November 1, 2008. This funding increase was made to create additional patient slots in the program, and the full-year cost of this recurring increase is anticipated to be $10 million. The appropriations act also increases funding to the DMA to implement a mental health screening program for residents of adult care homes. A nonrecurring appropriation of $1.9 million will permit 7,800 evaluations in 2008–09, and a recurring appropriation of $198,846 is intended to provide approximately 850 evaluations per year in future years.

The appropriations act allocates $70,934 in recurring and $165,145 in nonrecurring funds to DMA for personnel positions in the Attorney General's Office to implement a new appeals process for providers of community support services. This appeals process is described further in the section below entitled "Community Support Services." Finally, S.L. 2008-107 appropriates to DMA $217,021 in recurring and $249,534 in nonrecurring funds for personnel to implement a new appeals process for consumers of Medicaid services who challenge the denial, reduction, or termination of their services. (*See* the "Medicaid Consumer Appeals" section in this chapter for more information.)

Miscellaneous. The appropriations act also

- Appropriates $300,000 to DHHS, Office of the Secretary, for allocation to the North Carolina Institute of Medicine to hire new staff and undertake studies at the request of the General Assembly.
- Reduces funding to the DMA for Medicaid-provider inflationary increases by $35,324,306.
- Provides $608,333 recurring and $1 million nonrecurring for replacing resident furnishings at state mental health facilities.
- Appropriates about $1.9 million for services for children with autism and $30,000 for the development of a video for autism education for public officials, including judicial officials.
- Appropriates $1 million for the provision of traumatic brain injury services.

Federal Block Grant Allocations

Section 10.17 of S.L. 2008-107 allocates federal block grant funds for fiscal year 2008–09. 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 $6,854,932 (up from $5,654,932 in 2007–08) 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 whenever possible. From the same block grant the legislature appropriated $3,921,991 (the same amount as in 2007–08) 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. The General Assembly allocated $21,938,080 (up from $20,287,390 in 2007–08) for alcohol and drug treatment services for adults. Other allocations include $4,940,500 for services for children and adolescents, $7,186,857 (up from $5,835,701) for child substance abuse prevention, and $8,069,524 for services for pregnant women and women with dependent children. The appropriations act also appropriates $5,116,378 (up from $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 $70,000 for one-time expenses associated with the creation of a pharmacy program at the Julian F. Keith Alcohol and Drug Abuse Treatment Center.

From the Social Services Block Grant (SSBG), which funds several DHHS divisions, S.L. 2008-34 allocates $3,234,601 to the Division of MH/DD/SA Services for mental health and substance abuse services for adults, mental health services for children, and for developmental disabilities programs. An additional $5 million is allocated to developmental disabilities services and $422,003 to mental health services. From the same block grant the General Assembly allocated $205,668 to the DHHS Division of Health Service Regulation for mental health licensure purposes. The dollar amounts of these SSBG allocations match the amounts allocated in 2007–08.

State Psychiatric Hospitals

Section 10.15(g) of S.L. 2008-107 prohibits the Secretary of DHHS from transferring patients from John Umstead Hospital or Dorothea Dix Hospital to the new Central Regional Hospital until the Secretary submits a written report to the Governor stating that, on the day of its opening and thereafter, Central Regional Hospital will be operated in a manner that provides a safe and secure environment for its patients and staff. If this certification is made, the Secretary may transfer patients from John Umstead Hospital. Dorothea Dix patients may be transferred after John Umstead patients if the Secretary has determined that (1) Central Regional Hospital is in compliance with the standards for accreditation of the Joint Commission on the Accreditation of Healthcare Organizations and (2) that an inspection of Central Regional Hospital indicates that it complies with the conditions of participation set by the federal Centers for Medicare and Medicaid Services (CMS). In 2006 CMS suspended funding to Broughton Hospital for almost one year for failing to comply with CMS conditions for participation in Medicare and Medicaid. Cherry Hospital is currently facing similar sanctions.

Local Management Entities

The 2008 legislative enactments discussed in this section affect LME mergers, functions, funding, and provider relations.

LME Mergers

S.L. 2008-107 prohibits the Secretary, until January 1, 2010, from taking any action that would result in the merger or consolidation of LMEs operating as of January 1, 2008, or that would establish consortia or regional arrangements for the same purpose. This provision does not prohibit

the Guilford Center, the Smoky Mountain Center, or the Mecklenburg Area Authority from pursuing their initiative, under way in the spring of 2008, to consolidate some of their functions under one administrative service organization. Any other plan for merging LMEs or consolidating LME functions that involves Secretary action must be developed with the consultation and input of the affected LMEs and presented to the General Assembly for review by March 1, 2009.

Removal of LME Functions

In 2006 the General Assembly codified the primary functions of LMEs in G.S. 122C-115.4 and required the Secretary of DHHS to develop and implement critical performance indicators to hold LMEs accountable for managing the mental health, developmental disabilities, and substance abuse services system. Subdivision (d) of G.S. 122C-115.4 authorizes the Secretary of DHHS to remove an LME's authority to perform a function if (1) the LME fails for three months to meet the Secretary's performance standards related to the function and (2) continues to be unable to meet performance standards after six months of receiving related technical assistance from the Secretary. In this case, the Secretary must enter into a contract with another LME or agency to implement the function on behalf of the LME from which the function has been removed.

Section 10.15 of S.L. 2008-107 amends G.S. 122C-115.4(d) to reduce the technical assistance and corrective action period from six to three months. If the LME fails to meet relevant performance standards after three months of receiving technical assistance, the Secretary may remove the LME's authority to perform the function.

Service Authorization

Among the functions of an LME is authorization of services to individual consumers. This includes authorizing initial eligibility and payment for state-funded services and the ongoing management and review of a consumer's services to determine continued eligibility and the appropriate level and intensity of services. DHHS has permitted LMEs to perform this function for non-Medicaid, state-funded services but has chosen to contract with an independent fiscal agent, a private firm called Value Options, to perform the service authorization function for Medicaid-funded services. For a couple of years now, the General Assembly's Legislative Oversight Committee on MH/DD/SA Services (LOC) has indicated an interest in moving service authorization for Medicaid-funded services, including the related functions of utilization review and utilization management, from Value Options back to the LMEs. As an indication of this intent, and perhaps a transition, the 2007 General Assembly amended G.S. 122C-115.4, the statute that enumerates and describes LME functions, to provide that an LME's utilization management and review function includes the authority to participate in the development of *any* consumer's person-centered plan and the duty to monitor all person-centered plans to see that the consumer is receiving necessary services.

This year the appropriations act contains a special provision requiring DHHS to develop a plan by February 1, 2009, for returning the service authorization, utilization review, and utilization management functions for Medicaid-funded services to LMEs. By July 1, 2009, 30 percent of MH/DD/SA Medicaid services must be approved by LMEs. In addition, the act prohibits DHHS from contracting with a fiscal agent for the performance of service authorization, utilization management, and utilization review or from otherwise obligating funds for these purposes, beyond September 30, 2009. To be eligible to perform service authorization, utilization management, and utilization review, the LME must be nationally accredited (or demonstrate submission of an accepted application for national accreditation) by a national accrediting entity approved by the Secretary and demonstrate readiness to meet the requirements of the state's existing contract with Value Options.

The budget act also requires DHHS to develop a service authorization process that requires a comprehensive clinical assessment to be completed by a licensed clinician prior to service delivery, except where this requirement would impede access to crisis or other emergency services. DHHS must report on the development of this process by October 1, 2008, and may not implement the process until fifteen days after notifying the LOC and other specified legislative committees.

Single Stream Funding

Historically, funding for client services has been allocated to LMEs according to funding categories that designate the clients and services for which a particular category of funds may be expended. Recently, the state has begun to move toward "single stream funding," which dissolves the categorical restraints of multiple funding streams so that LMEs have the flexibility to shift available funds between traditional service categories to meet local needs and priorities. The 2007 General Assembly required DHHS to develop and implement clear standards for how an LME can qualify for single stream funding and to award single stream funding to any LME that meets these standards during the 2007–08 and 2008–09 fiscal years.

This year the appropriations act requires DHHS to encourage all LMEs to convert from non–single stream funding to single stream funding as soon as possible and to develop "prompt pay" guidelines as part of the requirements for receiving single stream funding. The department must develop standards for removing the single stream funding designation when an LME fails to comply with applicable requirements, but LMEs will have a six-month grace period for noncompliance with the standards during their first year of single stream funding designation.

Other LME Funding Issues

To improve the utilization of state funding for MH/DD/SA services (non-Medicaid service funds), the legislature included several related provisions in the appropriations act. One provision attempts to deal with the cash flow problems that LMEs experience when the state does not pass the appropriations act until well after the beginning of the fiscal year, leaving LMEs without state funding for one or many months. Specifically, Section 10.15 of S.L. 2008-107 requires the Division of MH/DD/SA Services to allocate to each LME at the beginning of the fiscal year funds equal to one-twelfth of the LME's prior fiscal year funding. This provision applies only to LMEs that do not participate in single stream funding.

To encourage more providers of services to serve state-funded clients, S.L. 2008-107 requires DHHS to simplify the Integrated Payment and Reporting System used to bill for services provided to non-Medicaid, state-funded clients of MH/DD/SA services. This effort must include working with LMEs to develop billing codes for relevant services currently lacking such codes.

In an attempt to understand why some state funds have been unspent in the face of unmet service needs while other state dollars run out before the end of the fiscal year, the General Assembly directs DHHS to consult with LMEs and service providers to determine why there has been both underutilization and overutilization of state service dollars and to take actions necessary to address the problem. DHHS must report its actions to the General Assembly by January 1, 2009, and include in its report any recommended legislative action.

Provider Endorsement

Before a provider of services may provide MH/DD/SA services to LME clients, the LME must determine that the provider is qualified to provide the services. The process used to make this determination is called provider "endorsement." Section 10.15A of S.L. 2008-107 requires DHHS to adopt rules governing the LME endorsement of providers of Medicaid- and state-funded services and guidelines for the periodic review of services by LMEs. The rules and guidelines must ensure that only qualified providers are endorsed and that LMEs hold providers accountable for the quality of the services they provide.

Required Reporting of Confidential Information

Driving Privilege of Person Adjudicated Incompetent

General Statutes 20-17.1 requires the commissioner of motor vehicles to determine whether a person is competent to operate a motor vehicle upon receiving notice from a clerk of court that the person has been adjudicated incompetent or has been involuntarily committed for the treatment of alcoholism or drug addiction. Effective October 1, 2008, S.L. 2008-182 (H 2391) amends the statute to provide that, when the commissioner is inquiring about someone who has been adjudicated incompetent on or after October 1, 2008, the commissioner must consider the clerk of court's recommendation regarding whether the incompetent person should be allowed to retain his or her driving privilege.

Trauma Injuries to Children

G.S. 90-21.20 requires physicians and hospitals to report to law enforcement agencies gunshot wounds, knife injuries, cases of illness caused by poisoning, and other wounds, injuries, or illnesses that appear to have resulted from a criminal act of violence. Effective December 1, 2008, S.L. 2008-179 (H 2338) amends the statute to require the reporting of any case involving recurrent illness or serious physical injury to any minor child if the illness or injury, in the judgment of the physician, appears to be the result of nonaccidental trauma. The report must be made as soon as practicable before, during, or after completion of treatment to municipal police authorities or, if the hospital or facility is outside the corporate limits of a city or town, to the sheriff of the county where the facility is located.

Deaths in State Facilities

Effective July 18, 2008, S.L. 2008-131 (S 1770) amends G.S. 122C-31 to require state-operated MH/DD/SA facilities listed in G.S. 122C-181 to report the death of any patient, regardless of manner of death, to the medical examiner of the county where the deceased is found. The act amends G.S. 130A-383 to expand the medical examiners' jurisdiction to include deaths occurring in these facilities.

Gun Privilege of Person Committed to Mental Health Treatment

Federal law makes it unlawful for a person to purchase or possess a firearm if the person has been (1) adjudicated by a court to be a danger to self or others as a result of mental illness or (2) committed by a court to treatment by a mental health facility. One of the questions that arose following the shooting of students at Virginia Tech by Cho Seng-Hui in 2007 is how Cho, who was disqualified on both grounds, managed to purchase a firearm. It turns out that the disqualifying information about Cho was not in the federal database that gun dealers use for background checks because Virginia law prohibited court officials involved in cases like Cho's from reporting the information. Similarly, North Carolina law makes proceedings for court-ordered mental health treatment confidential. North Carolina state legislators have created numerous public policy exceptions to the rules that generally prohibit the disclosure of confidential

information. For example, the clerk of court must report involuntary substance abuse commitments to the state's Division of Motor Vehicles so that the commissioner of motor vehicles can determine if the committed person is competent to operate a motor vehicle, and confidentiality is waived by law when necessary for reporting information to public officials charged with preventing child abuse and neglect, elder abuse, and the spread of communicable diseases. Yet, until the 2008 legislative session, state law did not permit court officials to report court-ordered mental health commitments to the National Instant Criminal Background Check System (NCIS).

Effective December 1, 2008, S.L. 2008-210 (S 2081) amends North Carolina's involuntary commitment statutes (Article 5 of G.S. Chapter 122C) to require the clerk of superior court to report to NCIS, as soon as practical, any person acquitted by reason of insanity, found mentally incompetent to proceed to trial, or committed for "inpatient or outpatient mental health treatment." The amendment to G.S. 122C-54 also provides that no involuntary commitment for outpatient treatment may be reported unless the individual is found to be "a danger to self or others." Because no finding of danger to self or others is required for outpatient commitment, and any finding of danger to self or others would necessarily lead to a court order for inpatient commitment, the new law appears, in spite of its introductory language to the contrary, to prohibit the reporting of any individual committed to an outpatient mental health facility. Accordingly, the new state law does not permit the reporting of all information that may disqualify an individual under federal law from purchasing or possessing a firearm.

The act also contains a restoration procedure for removing the bar to purchasing, possessing, or transferring firearms. At the expiration of any court-ordered commitment for mental health treatment, an adult may petition for removal of the bar to purchase or possess a firearm when he or she no longer suffers from the condition that led to the involuntary commitment and no longer poses a danger to self or others. The individual may petition the district court in the county where the commitment was ordered or the district court in the county of the petitioner's residence. Copies of the petition must be served on the director of the inpatient and outpatient treatment facility that treated the petitioner as well as on the district attorney for the county where the petitioner currently resides.

Community Support Services

The General Assembly included special provisions in the appropriations act aimed at improving and strengthening the fiscal oversight of community support services, a category of Medicaid-funded MH/DD/SA services.

Service Definitions

Section 10.15A of S.L. 2008-107 directs DHHS to submit to the federal government revised community support service definitions for Medicaid-billable services to adults and children. The revised definitions must focus on rehabilitative services and be designed to minimize over expenditures.

Reimbursement Rates

The appropriations act requires DHHS to replace the current "blended rate" structure for community support services with a tiered rate structure that sets reimbursement rates according to the level of professional expertise necessary to perform a particular service. Services that are necessary but able to be performed without the skill, education, or knowledge of a professional who is "qualified" under the state's regulatory law may not be paid at the same rate as services provided by qualified skilled professionals. Once the tiered rate structure is implemented, at least 50 percent of community support services must be provided by qualified professionals.

Provider Appeals

Section 10.15A of S.L. 2008-107 directs DHHS to create an expedited appeals process for providers of Medicaid community support services that temporarily substitutes for two existing appeals processes: the informal appeals process available through DHHS and the formal appeals process of the Office of Administrative Hearings (OAH). The act directs OAH to transfer all pending appeals of community support providers to DHHS for processing under the new procedure. The new appeals process applies to Medicaid community support services providers that are appealing:

- a DHHS decision to reduce, deny, recoup, or recover reimbursement for community support services,
- a DHHS decision to deny, suspend, or revoke a provider agreement for community support services, or
- an LME decision to withdraw or deny the endorsement that a provider must have to provide services to LME clients.

The act sets forth deadlines for filing petitions, issuing notice of hearings, and rendering decisions that are designed to provide prompt resolution of contested cases. The act applies to all petitions filed by a Medicaid community support services provider on or after July 1, 2008, and requires that the final decision in these cases be rendered within ninety days of the filing of the petition. The act also applies to all Medicaid community support services petitions that have been filed with OAH prior to July 1, 2008, but for which a hearing on the merits has not commenced

by that day. The ninety-day decision deadline does not apply to petitions that were filed with OAH, or to requests for hearings made to DHHS under its informal settlement process, prior to July 1, 2008.

The act authorizes DHHS to suspend the endorsement or Medicaid participation of a provider of community support services pending a final agency decision. A provider whose endorsement, Medicaid participation, or services have been suspended is not entitled to payment during the period the appeal is pending.

The act also amends G.S. 122C-151.4 to clarify that providers who have had an application for endorsement denied by an LME may appeal to the State MH/DD/SA Appeals Panel after exhausting the appeals process at the LME level, unless the provider appeals directly to DHHS under the community support provider appeals process.

The new appeals process sunsets on July 1, 2010.

Medicaid Consumer Appeals

S.L. 2008-107, as amended by Section 3.13 of S.L. 2008-118 (H 2438), establishes a temporary appeals process for Medicaid applicants and recipients who wish to appeal DHHS decisions to deny, terminate, suspend, or reduce benefits. Effective October 1, 2008, and until July 1, 2010, this process replaces the previous informal appeals process used by DHHS. All appeals pending under the old process on October 1, 2008, must be terminated, and the applicant or recipient must be offered an opportunity to appeal to OAH in accordance with the new appeals process.

Under the new process, at least thirty days before an adverse determination is effective, DHHS must give the applicant or recipient notice of the decision and the right to appeal. The applicant or recipient has thirty days from the mailing of the notice to file an appeal, which is a contested case under G.S. Chapter 150B. Prior to the hearing before an administrative law judge, the petitioner (the recipient or applicant) must be offered mediation as a means for resolving the dispute. If mediation is successful and the mediator informs the administrative law judge that a settlement has been achieved, the case will be dismissed. If mediation is unsuccessful, the administrative law judge must hear the case and make a decision.

To the extent possible, the case must be heard within forty-five days of submission of a request for appeal, and the administrative law judge has the authority to limit and simplify procedures to expedite the case. The petitioner has the burden of proof to show entitlement to a benefit that the agency has denied. The agency has the burden of proof when the appeal is from an agency decision to reduce, terminate, or suspend a benefit previously granted. Within twenty days of the conclusion of the hearing the judge must send a written decision to DHHS, which has twenty days from receipt of the decision to make a final decision and promptly notify the petitioner of the decision and right to judicial review.

Accreditation of Medicaid Service Providers

S.L. 2008-107 requires that providers of mental health, developmental disabilities, and substance abuse services be nationally accredited if they provide services designated by the Secretary as requiring accreditation. The Secretary must designate the kinds of services that require national accreditation either through the Medicaid State Plan, Medicaid waiver, or rulemaking process. Accreditation must be performed by an entity approved by the Secretary, and the failure to achieve specified progress toward, and ultimately obtain, accreditation according to the benchmarks and time frames set forth in the act, codified at G.S. 122C-81, will result in the termination of a provider's ability to provide services.

Providers of Medicaid services enrolled in the Medicaid program prior to July 1, 2008, and providing services requiring accreditation must successfully complete national accreditation requirements within three years of enrollment with the Medicaid program. Providers of Medicaid services enrolled in the Medicaid program on or after July 1, 2008, must be awarded national accreditation within one year of enrollment. Providers of state-funded services requiring national accreditation and contracting to provide state-funded services on or after July 1, 2008, must be awarded national accreditation within two years following their first contract to deliver a designated state-funded service.

Education for Disabled Children in Psychiatric Facilities

S.L. 2008-174 (H 2306) requires the State Board of Education and the Department of Health and Human Services to meet jointly to determine which agency is responsible for providing special education and related services to children with disabilities who are placed in private psychiatric residential treatment facilities by an agency other than a local educational agency. By January 1, 2009, the two agencies must report their determination and any recommended legislation or policy changes to the Joint Legislative Education Oversight Committee and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

Substance Abuse Professionals

S.L. 2008-130 (S 2117) amends the Substance Abuse Professional Practice Act, effective July 28, 2008, to eliminate the oral examination requirement for becoming a certified substance abuse counselor, certified substance abuse prevention consultant, or licensed clinical addictions specialist.

Studies

Involuntary Commitment Statutes

The Studies Act of 2008, S.L. 2008-181 (H 2431), authorizes the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services to study the involuntary commitment statutes in G.S. Chapter 122C to determine if an individual lawfully ordered to undergo an examination by a physician or psychologist is appropriately supervised to protect the health and safety of the individual and others during the period of the examination.

Medicaid Waivers

The appropriations act directs DHHS to study the potential application of Medicaid waivers for all LMEs and, where a Medicaid waiver may not be appropriate for an LME, to identify and recommend strategies to increase LME flexibility to provide case management and assessment, limit provider networks, or develop other innovative approaches for managing care. By March 1, 2009, DHHS 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 Fiscal Research Division, and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

Developmental Disabilities

S.L. 2008-107 directs the Institute of Medicine to study and report on the transition of persons with developmental disabilities from one life setting to another. The study must examine barriers to transition and best practices in successful transitions and include the following topics: (1) the transition of adolescents leaving high school, including those in foster care and other settings; (2) the transition for persons who live with aging parents; and (3) the transition from developmental centers to other settings. The Institute must report its findings and recommendations by March 1, 2009, to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Fiscal Research Division, and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

Service Gap Analysis

The appropriations act directs DHHS to involve LMEs in an analysis of service gaps in the MH/DD/SA system and to report the results of the analysis by January 1, 2010, to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Fiscal Research Division, and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

Death Reporting

S.L. 2008-131 directs the Commission on Mental Health, Developmental Disabilities, and Substance Abuse Services to study current death reporting requirements and assess the need for any additional reporting requirements or modifications to existing rules. The commission must report its findings to the LOC by November 1, 2008.

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Miscellaneous

During the 2008 legislative session, the General Assembly made changes to a number of laws involving miscellaneous subjects, including ABC laws, the lottery, and wildlife and boating. These changes are summarized below.

ABC Law

Sale of Mixed Beverages by Nonprofits

S.L. 2008-159 (H 1230) amends G.S. 18B-1002(a)(2) to allow the ABC Commission to issue special one-time permits allowing nonprofit organizations to sell mixed beverages at fundraising events. Formerly, such permits authorized the sale of only malt beverages and wine.

Failure to Recycle Not an Alcohol Beverage Control Offense

S.L. 2008-187 (S 1632, 2008 Technical Corrections Act) amends G.S. 18B-1006.1 to provide that a conviction for a violation of the requirement that holders of on-premises ABC permits recycle beverage containers is not an alcoholic beverage offense within the meaning of G.S. 18B-900(a)(4).

Lottery

Lottery Fund Revenue

The 2008 appropriations act, S.L. 2008-107 (H 2436), transfers $385.5 million from the State Lottery Fund to the Education Lottery Fund for the 2008–09 fiscal year as required by G.S. 18C-164. S.L. 2008-107 also transfers $19.75 million from the Education Lottery Reserve Fund to the Education Lottery Fund for class size reduction, with the unexpended remainder reverting to the Reserve Fund at the end of the 2008–09 fiscal year. The funds from the Education Lottery Fund are appropriated in specific amounts for use in class size reduction, prekindergarten programs, the Public School Building Capital Fund, and scholarships for needy students. S.L. 2008-107 also provides that if the lottery revenues for 2007–08 or 2008–09 exceed the amounts appropriated, the excess will be transferred from the State Lottery Fund to the Education Lottery Fund to be appropriated to the Public School Building Capital Fund. S.L. 2008-118 (H 2438) also makes clarifying changes to the allocation of appropriated funds from the Education Lottery Fund to the Public School Building Capital Fund.

Lottery Commission Compensation

S.L. 2008-107 enacts a new G.S. 18C-173, which prohibits the Lottery Commission from awarding Lottery Commission employees merit or performance-based salary increases in excess of the funds that would have been expended had the Lottery Commission employees received the same across-the-board salary increases granted by the General Assembly to state employees subject to the State Personnel Act. The Lottery Commission may award merit or performance-based salary increases on an aggregate average basis according to the Lottery Commission's adopted rules. Prior to the enactment of this law, the Lottery Commission's approved budget had allowed for an average employee salary increase of 5 percent.

Wildlife and Boating

Recreational Boat and Boat Trailer Towing

During the 2008 short session, several bills (H 2150, H 2167, H 2408, S 1589, and S 1695) were introduced that addressed exemptions for the towing of boats and boat trailers of a specified size from vehicle size restrictions, resulting in substantial legislative debate regarding road safety issues and

the burden of existing restrictions on recreational boat use. Proposed legislation included allowing the towing of a boat or boat trailer (1) in excess of 120 inches in width with a permit, (2) at night and on holidays and weekends regardless of width, (3) 120 inches wide or more with a permit during daylight hours only, (4) 120 inches wide or less two hours before sunrise and two hours after sunset, and (5) with a $25 annual fee for oversized permitting.

Ultimately legislators passed S.L. 2008-229 (H 2167) amending G.S. 20-116 (restricting the size of vehicles and loads on public roads) to exempt the towing of boats and boat trailers greater than 102 inches but less than 120 inches in width from permitting requirements under certain conditions. Existing law limits the total width of any vehicle or load on public roads to 102 inches, with some listed exceptions. Previously the law implicitly restricted towing of boats and boat trailers wider than 102 inches without a special permit under G.S. 20-119, available through the payment of fees. S.L. 2008-229 amends G.S. 20-116 to (1) allow towing of a boat or boat trailer less than 120 inches wide without a permit; (2) allow towing of a boat or boat trailer 102 to 114 inches wide at any time, including nights and weekends; (3) allow towing of a boat or boat trailer from 114 to 120 inches wide on any day of the week from sun up to sun down; and (4) require two operable amber lamps on the widest point of any boat or boat trailer between 102 and 120 inches wide to clearly mark its dimensions. Further, S.L. 2008-229 amends G.S. 20-119 by requiring the Department of Transportation (DOT) to issue annual overwidth permits for boats or boat trailers 120 inches wide or wider, with a restriction limiting towing to daylight hours only.

Governor Easley expressed concerns with the bill prior to its passage but, despite the veto threat, legislators approved S.L. 2008-229 in the final days of the session. The governor vetoed the bill on August 17, 2008. Legislators reconvened on August 27, 2008, and voted to override a veto for the first time in General Assembly history.

Boating Studies and Changes

S.L. 2008-181 (H 2431) authorizes the Legislative Research Commission to study the feasibility of implementing mandatory boating education in the state, including determining whether boating education requirements should be required prior to any person operating a motorboat or personal watercraft.

S.L. 2008-107 (H 2436) requires DOT to cease annual production of the North Carolina State Transportation Map and the Coastal Boating Guide. Instead, DOT will produce a biennial North Carolina State Transportation Map and may provide funding, in conjunction with the Wildlife Resources Commission, for a biennial Coastal Boating Guide.

Interstate Wildlife Violator Compact in North Carolina

S.L. 2008-120 (S 175) enacts a new Article 22B in G.S. Chapter 113 (Conservation and Development) directing the governor to execute the Interstate Wildlife Violator Compact (IWVC) with other participating member states, effective upon adoption by at least two states. The IWVC was first created in 1989 and is currently utilized by more than thirty states, including Florida, Georgia, Kentucky, and Tennessee. In 1999 the Utah Division of Wildlife Resources established an IWVC database to track reports of license suspensions in participating states to coordinate interstate enforcement of wildlife laws. North Carolina's participation in the compact will authorize wildlife officers to treat member states' residents similarly to state residents when issuing citations for violations of wildlife laws. Previously, wildlife statute violators from out of state were required to post collateral or bond, be taken into custody until a collateral or bond was posted, or be brought before a court for an immediate appearance. The new law authorizes on-the-spot issuance of citations irrespective of residency status and reciprocity for member-state wildlife license suspensions. It also requires that a recorded wildlife conviction in any participating state be recognized and treated as if it had occurred in the home state. New G.S. 113-300.8 makes a person in violation of a suspension or revocation under the compact guilty of a Class 1 misdemeanor.

New G.S. 113-300.6 establishes a Board of Compact Administrators, composed of a representative from each member state, to administer the provisions of the compact and serve as a governing body for related matters. New G.S. 113-300.7 authorizes the chair of the Wildlife Resources Commission (WRC) to appoint the compact administrator for North Carolina and directs the commission to enforce and adopt rules to carry out the compact. The law also requires that any proposed amendments to the compact be submitted to the General Assembly and enacted into law prior to state endorsement.

Disabled Sportsman Program

S.L. 2008-205 (H 2768) amends G.S. 113-296 by raising the application fee for Disabled Sportsman Program activities to $10. Previously, a disabled participant was charged a $5 application fee for each special hunt for disabled persons, with a $10 annual limit. According to this change in the law, an applicant may apply for any or all available Disabled Sportsman hunts for a single $10 fee but will be charged an additional $10 for any subsequent application. Further, the holder of a Resident Disabled Veteran or Resident Totally Disabled hunting license is now automatically eligible for participation in the Disabled Sportsman Program.

Hunting and Fishing on Private Property in Orange County

S.L. 2008-205 also amends Section 1 of S.L. 2007-264, which prohibits hunting and fishing on private property without written permission from the landowner, lessee, or his or her designee, to allow members of a hunting club to hunt on private property if (1) the landowner or lessee has granted permission to the hunting club and (2) the member is carrying a current club membership card and a copy of the valid written permission. This change applies to Orange County only.

Coastal Recreational Fishing Licenses

Effective January 1, 2009, S.L. 2008-141 (S 1340) creates an additional option for purchasing ten-day coastal recreational fishing licenses (CRFLs) as provided in the revised license system established in 2005. Under existing law, an individual ten-day CRFL costs $5 for residents and $10 for nonresidents and is only valid for ten consecutive days from the date of issuance. Newly enacted G.S. 113-174.5 allows the owner of a vessel 23 feet or more in length and documented with the U.S. Coast Guard or registered with the WRC to purchase a block of ten ten-day CRFLs for $150. The purchaser must provide the Division of Marine Fisheries the identity of the designated vessel and any other requested data. The vessel's owner also must record the initial date of fishing activity and specific information regarding the individuals using the CFRLs, which are then valid for only ten consecutive days from that date. The block of ten ten-day CRFLs expires two years from the date of purchase. An individual CRFL obtained through this option is restricted to use on the owner's designated vessel and may not be used on a for-hire boat. A vessel owner who does not comply with the new law will be unable to purchase additional blocks of CRFLs for a two-year period.

Aquaculture

S.L. 2008-181 authorizes the Joint Legislative Commission on Seafood and Aquaculture to study the feasibility of increasing production, processing, and marketing of aquaculture products in the state. The commission will report its findings to the 2009 General Assembly.

Leslie Arnold

Shea Denning

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Motor Vehicles

The 2008 session was short, and the General Assembly made no substantive changes to the laws and procedures governing impaired driving offenses. Nonetheless, motor vehicle legislation occupied center stage at the conclusion of the session after Governor Easley vetoed House Bill 2167, which authorized the towing without a permit of boats and boat trailers less than 10 feet wide. The General Assembly promptly reconvened and overrode the governor's veto, the first veto override in the state's history.

Much of the other 2008 legislative action affecting motor vehicle law was more mundane, yet nonetheless important. The General Assembly amended state law to conform with federal requirements under the Real ID Act of 2005 and the Motor Carrier Safety Improvement Act of 1999 and adopted administrative procedures to govern the levying of tolls for travel on North Carolina roads, fees that have not been part of highway funding in the state's recent history.

Towing of Wider Boats and Boat Trailers

Though few outside the boating industry or legislative process might have predicted the attention, the motor vehicle legislation that garnered the most press coverage in 2008 was a bill permitting wider boats and boat trailers on state roads. Before the enactment of S.L. 2008-229 (H 2167), boats and boat trailers up to 102 inches wide could be transported at any time on North Carolina roads. To transport a wider boat or boat trailer, a driver had to obtain a single trip permit from the North Carolina Department of Transportation (DOT).

S.L. 2008-229 enacts G.S. 20-116(m), authorizing the towing of boats and boat trailers without a permit as long as they are less than 120 inches wide. In addition, boats and boat trailers up to 114 inches wide may be towed on any road at any time, day or night, and any day of the week. Boats and boat trailers 114 to 120 inches wide may be towed any day of the week, including weekends and holidays, from sunup to sundown. Boats and boat trailers more than 102 inches wide but less than 120 inches wide must be equipped with at least two operable amber lights on the widest point of the boat and boat trailer so that the dimensions are clearly marked and visible.

Amended G.S. 20-119(g) requires DOT to issue annual overwidth permits for boats or boat trailers whose outside width is 120 inches or more. Such a permit allows the boat or boat trailer to be towed in daylight hours only.

Governor Easley vetoed the bill on the basis that it would "put[] families at a risk on the highways and would result in death or serious injury."[1] The governor noted that the state has "60,000 miles of narrow two lane roads that cannot accommodate the 9-1/2 foot width and maintains roughly 1,000 bridges 18-feet wide or less, which would require a 9-1/2 foot boat to cross the center line in violation of N.C.G.S. 20-146, and into oncoming traffic."

Because the General Assembly had adjourned when the governor vetoed House Bill 2167, the governor called a reconvened session for consideration of the vetoed bill as required by Article 11, Section 22, of the North Carolina Constitution. Both houses approved the bill by three-fifths majority, and it became law on August 27, 2008.

Combination Vehicles and Weight Limits

S.L. 2008-221 (S 1695) amends G.S. 20-7(a)(3) effective September 1, 2008, to provide that a Class C license authorizes license holders who are at least eighteen years old to drive a combination of noncommercial motor vehicles with a gross vehicle weight rating of more than 10,000

1. Governor's Objections and Veto Message, August 17, 2008.

pounds but less than 26,001 pounds. G.S. 20-88(b)(3) is amended to authorize the use of registration plates issued for farm vehicles on trucks and truck-tractors operated primarily (was, exclusively) for transporting farm products and supplies.

Amendments to G.S. 20-115.1(b) permit motor vehicle combinations consisting of a semitrailer no more than 53 feet long and a truck-tractor to be operated on all primary highway routes in North Carolina as long as the motor vehicle combination complies with the weight requirements in G.S. 20-118 and meets certain additional requirements. Previously, such motor vehicle combinations could only be operated on interstate highways and federal-aid primary system highways. Amended G.S. 20-115.1(b) permits DOT to prohibit motor vehicle combinations on portions of the state highway system. DOT must document any such prohibition by submitting a report to the General Assembly within six months confirming through traffic engineering studies that (1) such combinations cannot be safely accommodated and (2) the route does not have sufficient capacity to handle these vehicle combinations. Pursuant to amended G.S. 20-115.1(g), DOT is no longer required to obtain consent from a municipal governing body before designating state highway system roads within a municipality for use by certain vehicle combinations.

G.S. 20-116 prohibits, subject to certain exceptions, combinations of vehicles that are coupled together (that is, a tractor and a trailer) from exceeding more than 60 feet in length. An exception applies to combinations that include semitrailers under a certain length. Pursuant to amended G.S. 20-116(e), combination vehicles may exceed 60 feet in length if the semitrailer is no longer than 53 feet (was, 48 feet).

Amendments to G.S. 20-116(j) permit self-propelled grain combines and farm equipment no more than 25 feet wide (was, 18 feet wide) to be operated on state highways, except for fully controlled access highways or highways that are part of the National System of Interstate and Defense Highways. New G.S. 20-116(j)(7) provides that combines and farm equipment more than 10 feet wide must be operated on the highway "in the designed transport position that minimizes equipment width" but specifies that there is no requirement that equipment and appurtenances be removed.

G.S. 20-118(c)(12) exempts certain vehicles hauling agricultural crops from the farm to market from the weight and load limitations generally applicable to vehicles. Amendments to this provision eliminate the requirement that the market be within 35 miles of the farm, instead specifying that the hauling must be "from the farm where the crop is grown to the closest market." Amended G.S. 20-118(c)(12) simplifies the weight requirements applicable to such vehicles, mandating a single-axle weight of no more than 22,000 pounds, a tandem-axle weight of no more than 42,000 pounds, or a gross weight of 90,000 pounds. Amendments to G.S. 20-118(k) increase the permissible weight of vehicles used to take cotton from the farm to a cotton gin from 44,000 to 50,000 pounds.

Amendments to G.S. 20-118(c)(15) exempt vehicles hauling raw logs to first market from generally applicable weight requirements and incorporate provisions of G.S. 20-118(c)(5) permitting certain limited light-traffic road travel.

Trailer Frames

S.L. 2008-160 (H 2570) enacts new G.S. 20-115.1(j) authorizing manufacturers of trailer frames to move frames that are no more than 14 feet wide on public streets and highways to locations where the manufacturing process will be completed that are within 3 miles of the first place of manufacture. Manufacturers must obtain a permit for moving such trailer frames pursuant to amended G.S. 20-119(b), which imposes a $200 annual fee for the permit.

Real ID Requirements

Despite the introduction of identical bills in the North Carolina House of Representatives and the North Carolina Senate declaring an intention to ignore the Real ID Act of 2005 as an unfunded federal mandate,[2] legislators continued to amend state driver's license laws to meet the requirements of this federal act. Specifically, the General Assembly enacted laws requiring background checks of employees involved in producing driver's licenses and eliminated a religious-based exception to the requirement that a person's picture appear on his or her driver's license.

Background Checks of Certain DMV Employees

S.L. 2008-202 (S 1799) enacts new G.S. 114-19.24, which permits the Division of Motor Vehicles (DMV) to obtain the criminal history of certain individuals who are (or will be) involved in manufacturing or producing driver's licenses and identification cards or who have (or will have) the ability to affect identity information that appears on such cards. DMV may request criminal history information from the Department of Justice (DOJ) for applicants for employment, current employees, contractual employees or applicants, and employees of a contractor who meet the above criteria. DMV must provide along with the criminal history request a copy of the person's fingerprints and a form signed by the person who is the subject

2. *See* House Bill 2136, An Act to Prevent the State of North Carolina from Participating in or Complying with the Real ID Act of 2005 (filed May 15, 2008); S 1786, An Act to Prevent the State of North Carolina from Participating in or Complying with the Real ID Act of 2005 (filed May 20, 2008).

of the record check consenting to the criminal record check and the use of the fingerprints. New G.S. 114-19.24(b)(2) requires that the form signed by the subject further "consent[] to" "any other identifying information required by the State and National Repositories" and "[a]ny additional information required by the Department of Justice." It is unclear whether the subject must consent to the release of such information or whether the form must contain this additional information. The latter interpretation seems more likely.

DOJ must send the fingerprints provided by DMV to the State Bureau of Investigation (SBI) for a search of the state's criminal history record file, and the SBI must send a set of fingerprints to the FBI for a national criminal history record check.

DMV must keep all information obtained pursuant to G.S. 114-19.24 confidential. DOJ may charge a fee to offset its cost in conducting a criminal record check. The fee may not exceed the cost of locating, editing, researching, and retrieving the information.

Laser Engraved Pictures on Driver's Licenses

S.L. 2008-202 amends G.S. 20-7(n) to permit a driver's license to contain a "properly applied laser engraved picture on polycarbonate material" in lieu of a color photograph. The act also eliminates the exception to requiring photographs on licenses for applicants for whom the taking of photographs violates their religious convictions. The Real ID Act does not permit any such exception to the requirement that a driver's license contain a person's picture.

Mailing of Driver's Licenses

G.S. 20-7(f)(5) was enacted in 2006 to require, beginning July 1, 2008, pursuant to the Real ID Act of 2005, that DMV produce driver's licenses at a central location and mail them by first class mail to the residence address provided by the applicant. Before this date, drivers could renew or apply for licenses at any DMV office and obtain the license card on-site. S.L. 2008-202 amends G.S. 20-7(f)(5) to permit DMV to mail the license to a post office box rather than the applicant's residence address if the applicant is ineligible for mail delivery by the United States Postal Service at the applicant's address. If the United States Postal Service documents that it does not deliver to the residential address provided by the applicant and DMV has verified the applicant's residential address by other means, DMV may mail the driver's license to the post office box provided by the applicant. In addition, an applicant whose only mailing address before July 1, 2008, was a post office box in North Carolina may continue to receive the license at that post office box if DMV verifies the applicant's residential address.

Passengers in the Back of Pickup Trucks

S.L. 2008-216 (H 2340) amends G.S. 20-135.2B by raising the minimum age at which children can ride in the open bed or cargo area of a vehicle (such as the back of a pickup truck) from twelve to sixteen years old. The act also removes the exception for vehicles operated in a county with no incorporated area with a population exceeding 3,500. The amendments were effective October 1, 2008.

Inspections

Safety Inspections

S.L. 2008-190 (S 1787) amends G.S. 20-183.4(b)(4) to require that an applicant for a license as a safety inspection station have DMV-approved equipment and software that will electronically transfer safety inspection information to DMV. Amendments to G.S. 20-183.4C require that vehicles acquired outside North Carolina by North Carolina residents along with vehicles owned by new residents of North Carolina be inspected before (was, within ten days after) the vehicle is registered with DMV. Likewise, used vehicles acquired by private sale within North Carolina must be inspected before they are registered with DMV (was, within thirty days after registration with DMV), unless the vehicle has received a passing inspection within the previous twelve months.

S.L. 2008-172 (H 2265) amends G.S. 20-183.2(a1) to exempt buses owned by a local board of education and subject to the State Board of Education school bus inspection requirements from safety inspections required of other vehicles.

Limited Liability for Child Passenger Safety Technicians

S.L. 2008-178 (H 2341) enacts new G.S. 20-137.5, which limits liability for the acts of certified child passenger safety technicians and child safety seat education and check program sponsoring organizations when technicians and sponsoring organizations act in good faith and provide free services. The act became effective October 1, 2008, for any cause of action arising on or after that date. Inspections, installation, adjustment, and education provided in conjunction with the for-profit sale of child safety seats are not covered. Acts by safety technicians or sponsoring organizations that constitute willful misconduct or gross negligence are likewise exempted from the protection afforded by the act.

Vehicle Inspections

Amendments in S.L. 2008-190 to G.S. 20-183.4C(b) authorize DMV to issue a three-day trip permit that allows a person to drive an insured vehicle with an expired inspection or registration. Formerly, the provision

authorized the issuance of a one-way trip permit for vehicles with expired inspection stickers (but not expired registrations) to be driven to an inspection station. Under the amended statute, the permit authorizes the person to drive the vehicle described in the permit only from the place the vehicle is parked to an inspection station, repair shop, or DMV or tag agent office. Other amendments to subsection (b) allow DMV to issue a 10-day temporary permit authorizing a person to drive a vehicle that failed an emissions—but not a safety—inspection. These provisions became effective October 1, 2008.

Commercial Driver's License Disqualification

S.L. 2008-175 (H 2308) amends several provisions of G.S. Chapter 20 pertaining to commercial driver's licenses to comply with federal regulations. These changes are required for North Carolina to retain authority to issue commercial driver's licenses and its eligibility for Motor Carrier Safety Assistance Program grant funds.[3] Amended G.S. 20-17.4(a)(7) disqualifies a person from driving a commercial vehicle for a year if the person's license is civilly revoked for impaired driving regardless of whether the driving giving rise to the civil revocation occurred in a commercial motor vehicle. Amended G.S. 20-17.4(c) provides for a lifetime disqualification for commercial driver's license holders who manufacture, distribute, or dispense a controlled substance or who possess a controlled substance with the intent to manufacture, distribute, or dispense the substance. Previously, commercial license holders were disqualified only if the commercial vehicle was used in the commission of the drug trafficking crime. Likewise, amended G.S. 20-17.4(d) provides for 60- or 120-day disqualifications for commercial driver's license holders who are convicted of two or three serious traffic violations, respectively, arising from separate incidents within a three-year period, regardless of whether the offenses were committed in a commercial vehicle. Previously, the traffic convictions had to involve driving a commercial vehicle to trigger a disqualification. Amendments to G.S. 20-17.4(l) require DMV, upon receiving notice of a positive drug or alcohol test, to disqualify the holder of a commercial license from operating a commercial motor vehicle for a minimum of thirty days *and* until receipt of proof of successful completion of assessment and treatment by a substance abuse professional in accordance with 49 C.F.R. 382.503. Formerly there was no minimum disqualification period. Amendments to G.S. 20-37.20A require that a disqualification based upon a positive drug or alcohol test remain on the license holder's records for three years (was, two years) after the disqualification.

3. *See* 49 U.S.C.A. § 31312; 49 U.S.C.A. § 31102 note.

These amendments are effective December 1, 2008, and apply to offenses committed on or after that date.

Driver's Licenses

New Format for Underage Licenses

S.L. 2008-217 (H 2487) amends G.S. 20-7(n) to require that driver's licenses and identification cards issued for persons twenty-one years old and older be printed in a horizontal format, while those issued for persons under the age of twenty-one be printed in a vertical format. The formatting is designed to assist clerks selling age-restricted products such as alcoholic beverages and tobacco. The act requires that the Office of the State Controller, with the support of the Office of State Budget and Management, identify and make efforts to secure any matching funds or other resources to assist in subsidizing this initiative. The act was effective October 1, 2008, and applies to driver's licenses and special identification cards issued or renewed after that date.

One-Stop Shops

Section 25.3 of S.L. 2008-107 (H 2436) (Modify Appropriations Act of 2007), as amended by S.L. 2008-118 (H 2438) (2008 Budget Technical Corrections), prohibits DMV from opening driver's license issuance and vehicle registration issuance and renewal one-stop shops until the General Assembly has considered and appropriated funds for these one-stop shops. DOT must develop a plan that thoroughly outlines the operational procedures of combined function centers designated as one-stop shops. The plan may contain recommendations regarding making changes to G.S. 20-63(h) (provision requiring that the DMV contract with outside parties for the issuance of registration plates, registration certificates, and certificates of title) to expand DMV services. The plan must include a justification for each proposed one-stop shop location. DMV must analyze the anticipated number of transactions and consider the impact on commission contracts for independent license plate agents and other interested parties. DMV must report to the General Assembly by October 31, 2008.

Competency Determinations

S.L. 2008-182 (H 2391) amends G.S. 20-17.1(a), which requires the Commissioner of Motor Vehicles, upon receiving notice that a person has been adjudicated incompetent, to determine whether the person is competent to operate a motor vehicle. If the commissioner determines that the person is not competent to safely operate a motor vehicle, the commissioner must revoke the person's driving privilege. Amendments to G.S. 20-17.1(a) require the commissioner, in making this determination,

to consider the clerk of court's recommendation regarding whether the incompetent person should be allowed to retain his or her driving privilege. The amendments became effective on October 1, 2008, and apply to any person adjudicated incompetent on or after that date.

Criminal Offenses

Hit and Run

S.L. 2008-128 (S 944) amends G.S. 20-166 to replace the terms "accident" and "collision" with the term "crash." Amendments distinguish leaving the scene of a crash resulting in serious bodily injury, as that term is defined in G.S. 14-32.4, from leaving the scene of a crash resulting in injury. A person who leaves the scene of a crash resulting in serious bodily injury commits a Class F felony, whereas a person who leaves the scene of a crash resulting in injury commits a Class H felony. The act is effective December 1, 2008, and applies to offenses committed on or after that date.

Court Costs

S.L. 2008-118 (H 2438) amends G.S. 20-20.1(d) and G.S. 7A-305 to clarify that civil action court costs apply only to petitions for limited driving privileges made pursuant to G.S. 20-20.1 (applicable to persons seeking a privilege for a driving-while-license-revoked revocation) or in cases in which the conviction resulting in the revocation occurred in a different county. A $100 processing fee remains applicable to all limited driving privileges issued under G.S. Chapter 20.

S.L. 2008-107 (H 2436), as amended by S.L. 2008-118 (H 2438), enacts new G.S. 7A-304(a)(2a), which increases the court costs in criminal actions by $1 to support the upgrade, maintenance, and operation of the judicial and county courthouse phone systems. The cost increase was effective July 20, 2008, and applies to all costs assessed and collected on or after that date. However, in misdemeanor or infraction cases for which the citation or other criminal process was issued before July 20, 2008, but which are disposed of on or after that date by written appearance, waiver of trial, or hearing and guilty plea pursuant to the schedule of waiveable offenses promulgated by the Conference of Chief District Court Judges, court costs are the lesser of those specified in G.S. 7A-304(a) or in the notice portion of the defendant's copy of the citation or other criminal process.

Promotion of Blended Fuels

In a summer when gasoline prices topped $4 a gallon, the General Assembly passed legislation designed to reduce dependence on foreign oil by promoting the use of blended fuels in automobiles. S.L. 2008-222 (S 1339) enacts new G.S. 75-90, which requires gasoline suppliers to offer gasoline for sale to distributors and retailers that is not pre-blended with fuel alcohol (defined as alcohol, methanol, or fuel grade ethanol) and that is suitable for subsequent blending with fuel alcohol. G.S. 75-90(c) provides that any provision of a public contract restricting or preventing a distributor or retailer from blending gasoline with fuel alcohol or from qualifying for any state or federal tax credit due to blenders is void as contrary to public policy. Existing contracts are not affected, but the provisions apply to modifications, amendments, or renewals of existing contracts as well as to new contracts.

Turnpike Authority and Tolls

The North Carolina Turnpike Authority was created in 2002 to manage projects for toll roads and bridges,[4] but tolls have yet to be levied on North Carolina highways. The General Assembly enacted administrative procedures this session to govern the collection of tolls for travel on turnpike projects—a necessary step in implementing toll charges in the state. In addition, the General Assembly re-named certain turnpike projects, including renaming "Triangle Parkway" as "Triangle Expressway" to include N.C. 540, Triangle Parkway, and the Western Wake Freeway in Wake and Durham counties. G.S. 136-89.187, as amended by S.L. 2008-225 (S 1697), permits a segment of N.C. 540 under construction as of July 1, 2006, located in Wake County and extending from the N.C. 54 exit on N.C. 540 to the N.C. 55 exit on N.C. 540, to be converted to a toll route while prohibiting the conversion of any other segment of the nontolled State Highway System to a toll facility. S.L. 2008-225 also enacts new G.S. 136-89.183A, setting forth the legislature's findings that a mid-Currituck bridge is needed to connect the Currituck County mainland with the Currituck County Outer Banks and directing that the bridge be built in a manner that protects the natural environment and quality of life on the Outer Banks as well as the character of the existing road system.

Collection of Tolls

S.L. 2008-225 enacts G.S. Chapter 136, Article 6H, Part 2, entitled Collection of Tolls on Turnpike Projects. New G.S. 136-89.210 through G.S. 136-89.218 set forth the procedures and requirements for imposing and collecting a toll for a motor vehicle driven on a turnpike.

G.S. 136-89.211 prohibits the Turnpike Authority (Authority) from setting open road tolls (meaning that there is not a way to pay a toll in cash while driving on the highway) that vary for the same class of motor vehicle depending upon the method by which the Authority identifies the vehicle but permits the Authority to allow a discount of up to 35 percent for a vehicle equipped with an electronic toll collection responder. The

4. S.L. 2002-133.

Authority is also prohibited from exempting motor vehicles other than law enforcement vehicles and emergency fire, rescue, or medical services vehicles from payment of a toll for use of a turnpike project.

New G.S. 136-89.212 provides that a motor vehicle driven on a turnpike project is subject to a toll imposed by the Authority for the project. If the toll is an open road toll, the registered owner of the vehicle is liable for payment of the toll unless the registered owner establishes that the motor vehicle was in the care, custody, and control of another person when it was driven on the turnpike. A person may establish that the vehicle was in the control of another person by submitting to the Authority a sworn affidavit stating one of the following:

1. the name and address of the person who had care, custody, and control of the motor vehicle when it was driven on the turnpike;[5]
2. the motor vehicle was stolen;[6]
3. the person transferred the vehicle to another person before it was driven on the turnpike.[7]

Payment and Billing of Tolls

New G.S. 136-89.213 permits the Authority to contract with one or more providers to collect tolls. The Authority may exchange information that identifies motor vehicles and their owners with DMV, another state, another toll operator, or a toll collection-related organization. Identifying information obtained by the Authority through an agreement is not a public record and is subject to the disclosure limitations in the federal Driver's Privacy Protection Act.

If the turnpike project uses an open road tolling system, the Authority must operate a facility in the immediate vicinity of the project that accepts payment of the toll. The Authority must place signs on the turnpike that notify drivers, before the toll is incurred, that they are approaching a highway for which a toll is required. The signs must also list the methods that can be used to pay the toll and provide directions to the nearby facility to pay the bill in cash.

New G.S. 136-89.214 sets forth billing procedures for open road tolls. If a motor vehicle travels on a turnpike that uses an open road tolling system and a toll is not paid within fifteen days after the travel, the Authority must send a bill for the toll by first-class mail to the registered owner of the motor vehicle. The Authority must send the bill within ninety days after the travel occurs; if the bill is not sent within the required time, the Authority waives collection of the toll. The Authority must establish a billing period for tolls that is at least fifteen days, and a bill for a billing period must include all unpaid tolls incurred by the same person during the billing period. Bills must include the following information:

1. the name and address of the registered owner of the motor vehicle;
2. the date, time, and segment of the turnpike on which the travel occurred;
3. an electronic image of the vehicle's registration plate if the Authority captured such an image;
4. the amount due and an explanation of how payment may be made;
5. the date by which the toll must be paid to avoid a processing fee of a stated amount;
6. a statement that a vehicle owner who has unpaid tolls is subject to a civil penalty and may not renew the vehicle's registration until the tolls and civil penalties are paid;
7. a clear and concise explanation of how to contest liability for the toll.

New G.S. 136-89.215 requires that a person who receives a bill for an unpaid road toll pay the bill or send a written request for review of the toll to the Authority within thirty days. If the person fails to act within thirty days, the Authority may add a processing fee not to exceed the lesser of $6 or the costs of identifying the owner of a motor vehicle that is the subject of an unpaid toll and billing for the toll. A person may not be charged more than $48 in processing fees in a calendar year.

G.S. 136-89.216 imposes a civil penalty of $25 for failure to pay an open road toll within thirty days after the end of the first or second six-month period in a year. The Authority must send notice by first-class mail to a person assessed a civil penalty under this section. A person who is assessed a civil penalty must pay the unpaid toll for which the penalty is imposed, the processing fee, and the civil penalty within thirty days after receiving the notice. The clear proceeds of the penalty must be credited to the Civil Penalty and Forfeiture Fund established in G.S. 115C-457.1.

G.S. 136-89.218 provides that a person may contest liability for an unpaid road toll by sending a request for review to the Authority within thirty days after receiving the bill for the toll. After thirty days the right to review is waived. If a person submits a timely request for review, the Authority may not collect the disputed toll and any processing fee until the review process concludes. If the Authority conducts an informal review and determines the person is liable, it must send the person a

5. If the vehicle was leased under a long-term lease or rental, a copy of the lease or other written evidence of the agreement must be submitted with the affidavit.
6. The affidavit must be supported by an insurance or police report or other written evidence of the theft.
7. The affidavit must be supported by documentary evidence of the transfer.

notice of its determination. The person may contest this determination by filing a petition with the Office of Administrative Hearings (OAH). Article 4 of G.S. Chapter 150B provides for judicial review of a final decision made in a contested case before OAH.

Amendments to G.S. 20-63(g), effective December 1, 2008, add toll collection systems to those systems for which it is an infraction to willfully cover a registration plate to interfere with the taking of a clear photograph of the registration plate.

Registration Block for Unpaid Toll

G.S. 136-89.217 requires the Authority to notify the Commissioner of Motor Vehicles of a person who owes a toll, a processing fee, or a civil penalty and requires the commissioner to withhold the registration renewal of any vehicle registered in that person's name upon receiving such notice. Corresponding amendments to G.S. 20-54 provide that beginning January 1, 2011, DMV must refuse to register or issue a certificate of title for a vehicle upon notification by the Authority that the owner has failed to pay tolls, fees, and civil penalties owed to the Authority. A person whose registration renewal is blocked for an unpaid toll may pay DMV the amount owed. DMV must remit this amount to the Authority, which in turn must reimburse DMV for the costs it incurs in collecting tolls, fees, and civil penalties.

Commercial Vehicles

S.L. 2008-156 (S 1800) amends the definition of *hazardous materials* in G.S. 20-4.01(12c) to conform to federal law. Amendments to the definition of "state" provide that for purposes of G.S. Chapter 20 provisions applicable to commercial licenses, *state* means a state of the United States and the District of Columbia.

All-Terrain Vehicles

S.L. 2008-156 (S 1800) enacts new G.S. 20-171.25, which permits certain natural gas company employees and contractors to use motorized all-terrain vehicles on public highways and rights-of-way.

S.L. 2008-91 (H 133) enacts new G.S. 20-171.22(c) to except from otherwise applicable regulations all-terrain vehicles driven by persons at least sixteen years old in an ocean beach area where the use of all-terrain vehicles is allowed. *Ocean beach area* is the area adjacent to the ocean and ocean inlets subject to public trust rights.

Smoking Ban in State Vehicles

S.L. 2008-149 (S 1681), which requires that state-controlled passenger-carrying vehicles be smoke free and permits local governments to require the same of local government vehicles, is summarized in Chapter 12, "Health."

Technical Corrections

Section 9 of S.L. 2008-187 (S 1632) divides G.S. 20-19(e) (governing permanent license revocations for impaired driving) into subsections (e), (e1), (e2), and (e3).

Section 10 of S.L. 2008-187 amends the implied consent offense procedures in G.S. 20-38.7(d) to permit a defendant to appeal from a new sentencing hearing in district court if the sentence is based upon additional facts considered by the district court that were not considered in the previously vacated *sentence* (was, *judgment*) and the defendant would be entitled to a jury determination of those facts pursuant to G.S. 20-179.

Section 11 of S.L. 2008-187 amends G.S. 20-171.21 to provide that any person convicted of violating laws governing the operation of all-terrain vehicles may be subject to a *penalty* (was, *fine*) of $200.

Local Legislation

S.L. 2008-99 (H 2093) amends G.S. 20-171.24(f) to add the towns of Lowell and Manteo to the list of cities where municipal employees may use all-terrain vehicles on highways with posted speeds of 35 miles per hour or less.

S.L. 2008-71 (S 1598) amends G.S. 160A-300.5 to add New Hanover County as well as the cities of Locust and Wilmington and the towns of Beulaville, Butner, Erwin, Hobgood, Mayodan, Mount Olive, Oakboro, Oriental, Pineville, and the Village of Pinehurst to the list of local governments permitted to regulate the operation of golf carts on public streets or highways within the city limits and on property owned or leased by the city. Permissible regulation includes requiring the registration of golf carts, charging a fee for registration, specifying who is authorized to operate golf carts, and specifying the required equipment, load limits, and the hours and method of operation of golf carts. New G.S. 160A-300.5(d) broadens the definition of *city* for these purposes to include a city, town, village, or county and defines *county* as any unincorporated area within the county boundary. Section 2 of the act provides that the Town of Mayodan may not enact ordinances regulating golf carts until a public hearing is held and the governing body votes to approve adoption of such ordinances.

S.L. 2008-100 (H 2155) establishes a no-wake speed zone in the Intracoastal Waterway adjacent to the towns of Holden Beach and Oak Island and provides that the act is enforceable under G.S. 75A-17 as if it were a provision of G.S. Chapter 75A. Operation of a vessel at greater than a no-wake speed in areas designated by the act and marked is a Class 3 misdemeanor.

Study Bills

S.L. 2008-121 (H 93) directs DOT to study issues related to the vehicular transportation of individuals in wheelchairs. The study must review appropriate ways to transport passengers remaining seated in wheelchairs while in motor vehicles and develop guidelines for the installation and use of wheelchair tie-down systems. DOT must report its findings and recommendations to the North Carolina Study Commission on Aging and the Joint Legislative Transportation Oversight Committee by February 1, 2009.

S.L. 2008-181 (H 2431) permits the Environmental Review Commission, in consultation with the Division of Air Quality of the Department of Environment and Natural Resources, to study the costs and benefits of adopting the California motor vehicle emissions standards in this state, including the projected emissions, the projected increase in costs to sellers and purchasers of new vehicles, and the projected reduction in quantity and cost of fuel under the plan.

Shea Riggsbee Denning

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Public Employment

The 2008 session of the General Assembly saw few significant changes to North Carolina law affecting state and local government employees. State employees received modest salary and retirement income increases. Local government employees also received modest retirement income allowance increases, but through their retirement system's board of trustees, not through the General Assembly.

State Employees

Salary

Pursuant to S.L. 2008-107 (H 2436), the appropriations act, the governor's annual salary will increase to $139,590, while the annual salaries of the members of the Council of State will increase to $123,198. The salaries of appointed state department heads will increase to $120,363. Other executive, legislative, and judicial branch officials also receive salary increases.

The General Assembly has also increased the salaries of all permanent, full-time SPA employees by the greater of 2.75 percent or $1,100. The salaries of all nonelected employees of the General Assembly will also increase by the greater of 2.75 percent or $1,100.

Community college faculty and professional staff supported by state funds will receive a 3 percent salary increase. The General Assembly also set minimum salaries for community college faculty members based on the highest educational degree held by a faculty member. All other community college employees supported by state funds will receive a salary increase of the greater of 2.75 percent or $1,100.

For all University of North Carolina faculty and EPA employees supported by state funds, the General Assembly authorized aggregate average increases of 3 percent. For teaching employees of the North Carolina School of Science and Mathematics, the General Assembly authorized aggregate average increases of 3 percent, with a minimum increase of $470.

S.L. 2008-132 (H 2728) authorizes the State Treasurer to establish a compensation system that includes bonuses for the Investment Division's Chief Investment Officer and Investment Director. The act allows the bonuses to be based on compensation studies conducted by a nationally recognized firm specializing in public fund investment compensation.

Study Commission on Compensation of the Governor's Cabinet and State Elected Officials

S.L. 2008-181 (H 2431), the studies act, creates the Study Commission on Compensation of the Governor's Cabinet and State Elected Officials to study whether the compensation of the Cabinet and state elected officials is fair and appropriate in light of the duties of each office. The commission will have eighteen members, five of whom will be selected from the members of the Senate, five of whom will be selected from the members of the House of Representatives, and eight of whom will be representatives of business and industry. The commission is to report its findings, together with any recommended legislation, to the 2009 session of the General Assembly.

State Health Plan

In the 2007 appropriations act (S.L. 2007-323), the General Assembly terminated the traditional major medical indemnity plan covering state employees effective July 1, 2008, and provided for the automatic enrollment in the Standard Preferred Provider Plan of any state employee or retiree who had not yet enrolled in one of the previously optional preferred provider network (PPO) plans. The 2007 appropriations act also

changed the official name of the State Health Plan, namely, the Teachers' and State Employees' Comprehensive Major Medical Plan, to the State Health Plan for Teachers and State Employees.

This year the General Assembly did not increase deductibles or co-payments under any of the preferred provider plans, nor did it make any substantive changes in benefits. S.L. 2008-168 (H 2443) does, however, make numerous technical and conforming changes to the governing provisions of the State Health Plan, and it renumbers sections to reflect the completed changeover from a comprehensive major medical plan to a preferred provider-based organization. This act also amends G.S. 135-39.22 to authorize the state health plan to offer a new Medicare Advantage benefit for retired participants who are eligible for Medicare in lieu of other coverage offered under the State Health Plan.

State Personnel Commission Rules

The use of temporary employees in state government has come under scrutiny in recent years as some workers alleged in newspaper reports that they were routinely hired for periods of less than a year, then dismissed and rehired a month or two later. This practice prevented them from becoming permanent employees entitled to benefits, including participation in the Teachers' and State Employees' Retirement System. The Office of State Personnel (OSP) subsequently drafted a set of rules designed to bring consistency to state practices with respect to temporary employees. These rules were adopted by the State Personnel Commission and approved by the Rules Review Commission.

In S.L. 2008-82 (H 2748) the General Assembly disapproved these rules, specifically 25 N.C.A.C. 01C. 0216 (Temporary Employment Services), 25 N.C.A.C. 01C. 0217 (Office of State Personnel Temporary Employment Services), 25 N.C.A.C. 01C. 0405 (Temporary Appointment), and 25 N.C.A.C. 01C. 0407 (Temporary Part-Time Appointment). The effect of the disapproval is to prevent the specified rules from taking effect.

S.L. 2008-82 directs OSP to conduct an analysis of the use of nonpermanent employees by state agencies and to use the results of the analysis to develop draft definitions distinguishing among various categories of nonpermanent employment, as well as policies governing the selection, appointment, and duration of the various categories of nonpermanent employment for recommendation to the State Personnel Commission for adoption as rules. OSP must report to the General Assembly by December 31, 2008.

State and Local Government Retirement

Retirement Allowance Increases

The appropriations act provides a 2.2 percent cost-of-living retirement allowance increase for retirees in the Teachers' and State Employees' Retirement System, the Judicial Retirement System, and the Legislative Retirement System. The act also adjusts the employer contribution rates for the various state retirement programs. Although not addressed by the appropriations act, local government retirees will also receive an increase in their retirement allowance. The Board of Trustees of Local Governmental Employees' Retirement System Local government retirees had previously approved a 2.17 percent cost-of-living increase for the 2008–09 fiscal year.

Administration of the North Carolina 401(k) and 457 Deferred Compensation Plans

S.L. 2008-132 creates a new board called the Supplemental Retirement Board of Trustees to administer both the North Carolina 401(k) Plan and the North Carolina Public Employee Deferred Compensation Plan (this is the public employee plan authorized by Internal Revenue Code section 457 and is known as a 457 plan). The new board will consist of nine members, six of whom will be appointed by the governor, and two of whom will be appointed by the General Assembly. The ninth member will be the State Treasurer, who shall serve as chair. Previously, the North Carolina 401(k) Plan was administered by the combined boards of trustees of the Teachers' and State Employees' Retirement System and the Local Governmental Employees Retirement System. The 457 plan was administered by a separate board of trustees.

Public Safety Retirement and Death Benefits

The appropriations act increases the monthly benefit for members of the Firemen's and Rescue Squad Workers' Pension Fund to the sum of $170 per month. S.L. 2008-163 (H 1563) amends G.S. 143-166.2 to make state and local firefighters and rescue workers who die while conducting training outside their home departments eligible for line-of-duty death benefits. Before the statute was amended, firefighters and rescue workers were only covered by line-of-duty death benefits if they were working in their employing department or squad.

S.L. 2008-142 (S 1100) amends G.S. 143B-476 to authorize the Department of Crime Control and Public Safety to use up to $10,000 to reimburse families of State Highway Patrol members killed in the line of duty for funeral expenses. This authorization expires June 1, 2009. The act also directed the department to study whether the Department should reimburse the costs of funeral expenses to the families of all state law enforcement officers killed in the line of duty.

Disclosure of State and Local Retiree Personal Information

S.L. 2008-194 (H 545) amends G.S. 126-22 and 115C-321 (personnel privacy acts applicable to state employees and to public school employees, respectively) to allow the Retirement Systems Division to disclose the name and mailing address of former state and public school employees to nonprofit organizations with 10,000 or more active or retired public employees. The act also amends G.S. 115D-29, 153A-98, and 160A-168 (personnel privacy acts applicable to community college employees, to county employees, and to municipal employees, respectively) to allow the Retirement Systems Division to disclose the name and mailing address of former community college, county, and municipal employees to nonprofit organizations with 2,000 or more active or retired public employees.

Overtime for Municipal Firefighters

S.L. 2008-151 (S 963) creates new Article 14A of G.S. Chapter 160A. The new article seems to incorporate the provisions of section 207(K) of the federal Fair Labor Standards Act (FLSA) [29 U.S.C. 207(k)] as they apply to municipal firefighters, as well as the FLSA's rules governing compensation for on-call time. FLSA section 207(k) allows firefighters to be scheduled on twenty-eight-day work cycles (or any increment thereof) and increases the number of hours that firefighters must work before being entitled to overtime to 212 hours in a twenty-eight-day cycle and fifty-three hours in a seven-day cycle. The new article does not use the same terminology as the FLSA, and thus the extent of its coverage appears to be narrower than that of the FLSA. The new article also changes the overtime rules for members of a fire department who do not engage in fire suppression by defining eligibility for overtime by reference to the average number of hours worked by nonfire personnel in a normal workweek, instead of by reference to a standard forty-hour workweek.

This act only becomes effective when section 207(k) of the FLSA is repealed or becomes unenforceable. There is nothing pending in Congress or the courts to suggest that this is under consideration, much less imminent, so municipalities need not change any of their compensation practices in response to the passage of this bill.

Diane M. Juffras

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Public Purchasing and Contracting

The legislature did not make any significant changes in the public purchasing and contracting laws this session. This summary includes several minor changes that will be of interest to local and state government purchasing officials.

Construction Contracting Changes

Statute of Limitations on Breach-of-Contract Lawsuits against Local Governments

G.S. 1-53(1) provides a two-year statute of limitations for breach-of-contract actions brought against local units of government. S.L. 2008-139 (H 1284) amends G.S. 1-53(1) to permit the commencement of actions arising out of a contract to improve real property if the suit is brought no later than ninety days after (1) substantial completion of the project (as defined in G.S. 1-50(a)(5)(c)), as long as proper notice of the claim has been given if required by the contract, or (2) the date the contract was terminated, if the contract was terminated before substantial completion.[1] This amendment was a reaction to a recent North Carolina Court of Appeals case, *ABL Plumbing & Heating Corp. v. Bladen County Board of Education*, 175 N.C. App. 164, 623 S.E.2d 57 (2005), *rev. denied*, 360 N.C. 362, 629 S.E.2d 846 (2006). In *ABL Plumbing & Heating*, the court held that the plaintiff's breach-of-contract claims against the Bladen County Board of Education were barred by the two-year statute of limitations in G.S. 1-53. The plaintiff in *ABL Plumbing & Heating* argued that the statute of limitations should not begin to run on construction contracts until the date of substantial completion.[2] The court disagreed, instead following what it called the "well-settled rule in North Carolina that a cause of action for breach of contract accrues as soon as the injury becomes apparent to the claimant or should reasonably become apparent to the claimant."[3] With this amendment to G.S. 1-53(1), that "well-settled rule" will no longer apply to breach-of-contract actions brought against local governments on contracts involving improvements to real property as long as the claimant brings its lawsuit within ninety days of substantial completion of the project or ninety days of contract termination. S.L. 2008-139 applies to actions filed on or after July 28, 2008, but does not revive claims previously barred under G.S. 1-53(1).

Joint Municipal Assistance Agency Contracts

Article 3 of G.S. Chapter 159B authorizes agencies and municipalities to form joint municipal assistance agencies to assist municipalities in the construction and operation of their electronic systems. G.S. 159B-44(13) gives these agencies the authority to make and execute contracts "necessary or convenient in the exercise of the powers and functions of" the agency. By deleting the three-year limitation from G.S. 159B-44(13), S.L. 2008-38 (H 1679) permits joint municipal assistance agencies to make and execute contracts for periods greater than three years.

Greenhouses Exempt from Building Rules

S.L. 2008-176 (H 2313) amends G.S. 143-138(b) to exempt farm buildings that are greenhouses from building rules under the North Carolina State Building Code or under local building rules even if those farm buildings are located within the building-rules jurisdiction of a municipality. The revised statute defines a greenhouse as "a structure that has a glass or

1. G.S. 1-50(a)(5)(c) defines "substantial completion" as "that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended."

2. 175 N.C. App. at 168, 623 S.E.2d at 59-60.

3. *Id.*

plastic roof, has one or more glass or plastic walls, has an area over ninety-five percent (95%) of which is used to grow or cultivate plants, is built in accordance with the National Greenhouse Manufacturers Association Structural Design manual, and is not used for retail sales." The statute is also amended to permit local building-rules jurisdictions to approve rules addressing "distinct life safety hazards."

Public-Private Agreements for Construction of Transportation Infrastructure

In 2006, the General Assembly enacted G.S. 136-18(39), which gave the Department of Transportation (DOT) the authority to enter into private-public agreements to finance the cost of acquiring, constructing, and operating transportation infrastructure through "tolls and other financing methods authorized by law." A 2007 amendment to the statute included the use of contracts as a permissible financing method for such agreements. S.L. 2008-164 (H 2318) further amends G.S. 136-18(39) to give DOT the authority to enter into public-private agreements "to plan, design, develop, acquire, construct, equip, maintain, and operate highways, roads, streets, bridges, and existing rail, as well as properties adjoining existing rail lines in this State." The amendment, however, requires that any contracts for construction entered into under the statute comply with the competitive bidding requirements applicable to DOT, which are found in Article 2 of G.S. Chapter 136.

G.S. 136-28.6 permits DOT to participate in private engineering and construction contracts for state highways as long as the requirements in G.S. 136-28.6 are met. A 1995 amendment to the statute permitted municipalities to participate financially in these contracts when the contracts involved streets or highways on a "mutually adopted transportation plan" for the municipality. S.L. 2008-164 amends G.S. 136-28.6 to permit both municipalities and counties to participate financially in private land acquisition contracts—as well as private engineering and construction contracts—entered into for the construction of a street or highway on either (1) the Transportation Improvement Plan adopted by DOT or (2) a "mutually adopted transportation plan" that is designated a DOT responsibility.

Irrigation Contractor Licensing

As part of its response to the recent drought in North Carolina, the General Assembly enacted a new G.S. Chapter 89G [S.L. 2008-177 (H 2353)] requiring the licensure of irrigation contractors and creating the North Carolina Irrigation Contractors' Licensing Board. The new chapter requires any individual, firm, partnership, association, corporation, or other entity that "constructs, installs, expands, services, or repairs irrigation systems" for pay to be licensed as an irrigation contractor. There are several exemptions to the licensure requirement, including exemptions for:

- public entities performing irrigation work on public property;
- a property owner performing irrigation work on his or her own property;
- registered landscape architects;
- licensed professional engineers, general contractors, wastewater contractors (performing irrigation work on wastewater systems), public utility contractors, and plumbing contractors (performing plumbing work on irrigation systems); and
- projects costing less than $2,500.

The section of the new chapter creating the North Carolina Irrigation Contractors' Licensing Board became effective on October 1, 2008; the sections authorizing the new licensure requirements become effective on January 1, 2009.

New State Purchasing and Contracting Initiatives

Sustainable Public Buildings Program

In 2007, the General Assembly passed legislation [S.L. 2007-546 (S 668)] directing the Department of Administration (DOA) to administer a program to improve the energy efficiency of buildings designed and constructed by the state, state agencies, constituent institutions of the University of North Carolina, and all community colleges and regional institutions. S.L. 2008-203 (S 1946) codifies this program in the new Article 8C of G.S. Chapter 143 and the new section 146-23.2. The program requires that buildings larger than 20,000 gross square feet that are constructed or renovated by a "public agency"—defined as the state, state agencies, constituent institutions of the University of North Carolina, and all community colleges and regional institutions—to meet specific energy efficiency and water use standards. The program applies to building construction and renovation projects that have not yet entered the schematic design phase before the August 8, 2008, effective date. Under new Article 8C, DOA is also directed to (1) establish policies and guidelines to implement the article, (2) create an advisory committee, (3) develop education and training requirements based on recommendations from the advisory committee, (4) conduct an annual performance review of the program, and (5) report to specified General Assembly commissions and committees on its findings from this review. One of the required components of DOA's performance review under new Article 8C is whether additional public agencies should be included in the program.

New G.S. 146-23.2 prohibits state agencies from purchasing a building unless the building was designed and constructed to at least the same energy efficiency and water use standards that would have applied to the design and construction of a comparable state building at the time the building was constructed. Similarly, the statute prohibits state agencies from purchasing any building that had a major renovation unless the renovation complied with the same energy efficiency and water use standards that would have applied to a renovation of a comparable state building at the time of the renovation. These restrictions do not apply to the purchase of buildings of historical, architectural, or cultural significance, nor do they apply to gifts or bequests.

Statewide Electronic Document Management System Pilot Program

Section 6.12 of the appropriations act, S.L. 2008-107 (H 2436), requires $200,000 of the funds appropriated to the Office of Information Technology Services (ITS) for the 2008–09 fiscal year to be used for a statewide electronic document management system pilot program that will include digital signature capability. ITS will identify a state agency for the pilot, and that agency must develop the requirements for the statewide electronic document management system, including the development of statewide procurement standards for "electronic records infrastructure."

Exemptions from Bidding and Property Disposal Laws

Section 27.7A of the appropriations act (S.L. 2008-107) authorizes DOA to contract with the North Carolina Freedom Monument Project, Inc., a nonprofit 501(c)(3) corporation, for the design and construction of the North Carolina Freedom Monument. The act also requires the North Carolina Freedom Monument Project, Inc., to select the designer and consultant for the project, notwithstanding the requirements in G.S. 143-64.31 regarding the selection of design professionals using a qualifications-based process or the State Building Commission's rules regarding the selection of designers and consultants.

S.L. 2008-204 (S 1925) amends G.S. 142-94 to exempt the purchase, construction, or operation of capital facilities by Gateway University Research Park, Inc., a joint Millennial Campus in Greensboro, from the procurement requirements and energy conservation requirements that apply to the purchase, construction, and operation of other state facilities under Articles 3, 3B, 3C, 3D of G.S. Chapter 143. The amendment provides that Article 8 of G.S. Chapter 143 (requiring the use of specific construction methods and requiring competitive bidding for construction projects) does not apply to the purchase, construction, and operation of capital facilities by Gateway University Research Park, Inc.

In the 2008 session, the legislature followed a common pattern of authorizing several local modifications allowing exemptions from aspects of the competitive bidding requirements for construction projects. These acts often create exemptions to particular requirements to deal with circumstances affecting particular projects. Iredell County is exempted, in S.L. 2008-67 (H 2468), from certain bidding requirements for the purchase and erection of a prefabricated modular building system for use as an animal shelter. This exemption expires July 1, 2010. S.L. 2008-67 (H 2468) permits the Town of Mooresville to use the design-build method of construction for the construction of a sewer pumping station. S.L. 2008-55 (H 2770) increases the force account limit in G.S. 143-135 for several City of Winston-Salem road projects and greenway projects (until July 1, 2010) and for the City of Asheville Zoo City Park Project (until December 31, 2010) to $300,000. S.L. 2008-40 (S 1895) exempts Johnson County from certain bidding requirements for renovations to the Johnson County Courthouse. S.L. 2008-7 (S 2136) exempts the City of Concord from certain bidding requirements for the construction of the Speedway Area Infrastructure Projects until December 31, 2013. The city council must adopt a resolution approving the exemption, and specified conditions must be met in order for the exemption to take effect. S.L. 2008-73 (H 2376) exempts the City of Goldsboro from the competitive bidding requirements of Article 8, G.S. Chapter 143, until December 31, 2008, for the repurchase of a performing arts facility.

In addition to these exemptions from the bidding laws, the legislature approved an exemption relating to property disposal and an exemption relating to leases. S.L. 2008-46 (H 2347) authorizes the City of Winston-Salem to impose limitations on the future use of property disposed pursuant to Article 12, G.S. Chapter 160A. S.L. 2008-60 (S 2118) authorizes the Village of Wesley Chapel to lease certain property to the YMCA of Greater Charlotte for a term of more than ten years without following any procedures other than the procedures required by G.S. 160A-272 for leases of less than ten years. (G.S. 160A-272 requires that leases of real property for a term of more than ten years be executed following the procedures required for the sale of real property under Article 12, Chapter 160A of the General Statutes.)

Eileen R. Youens

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Registers of Deeds, Land Records, and Notaries

The 2008 session of the General Assembly made significant changes to the statutes affecting register responsibilities. It revised and clarified the laws governing a register's acceptance of electronic records and previously recorded documents and clarified the law describing the register's responsibility for complying with technical indexing requirements. In addition, the fee for recording a deed of trust or mortgage was increased. This chapter describes these changes.

Rerecording Prerequisites

G.S. 47-14(a) requires registers to verify the presence of a proof or acknowledgment on instruments that require one, which include most commonly recorded real estate instruments—deeds, deeds of trust, satisfaction instruments, leases, contracts to convey, and powers of attorney. Registers have understood this requirement to involve confirmation that a presented document is the same document that was signed before an authorized official—not a copy unless a statute specifically allows a copy to be recorded. Once verified and recorded, the same document, or a certified copy of it, may be recorded again without having to be verified a second time.[1]

The register's verification of an acknowledgment on a document being submitted for the first time is a long-standing practice with two principal functions, both of which protect bona fide grantees of real estate interests. The first function reflects the historic requirement that presented transactional instruments must appear to have basic elements of authenticity. Most real estate instruments are presented for registration not by the grantors who executed them, but by the grantees to whom the instruments were delivered or their representatives. Possession and presentation of a document that bears direct evidence of the grantor's execution is some assurance of authenticity. Registers enable grantees to make a public record of such bona fide conveyance instruments. Once a document is registered, its presence on the public record is an indication that the presenter satisfied the authenticity prerequisites for recording. Verification is a link in authentication of the record of a real estate transaction. The second principal function of verification is confirmation that an instrument submitted for registration has a completed acknowledgment, which is a requirement for instruments of conveyance to be properly registered and for them to be effective against third parties claiming competing interests.

Once a document requiring verification has been verified and recorded, there is no logical reason to subject that same document to a second verification if it is submitted for rerecording. Someone may wish to record the same document in another county or to rerecord it in the same county to put it in a different sequence of recording with other documents. The logic of the exception from verification does not apply if the presented document is different than what was previously recorded. For example, if a previously recorded document has been altered to describe different or additional property, or different parties or interests, the presented document expresses a different conveyance and logically requires verification in the same manner as any other document not previously recorded. If the previously recorded document incorrectly expressed the grantor's intent, the grantor must express the correct intent on the record, with a newly signed and acknowledged corrective instrument or a re-signed and re-acknowledged altered instrument, both of which are subject to verification. Without the grantor's signature and an acknowledgment, the instrument may be legally invalid as a conveyance.[2]

1. G.S. 47-14(a); G.S. 47-36.1.

2. *See, e.g.,* Moelle v. Sherwood, 148 U.S. 21 (1892) (deed with altered property description not valid against subsequent purchasers); *In re* Hudson, No. COA06-345 (N.C. Ct. App. April 3, 2007) (foreclosure petition dismissed when

Occasionally someone wishes to record something to give notice that an error was made in a previous recording. This may be appropriate, for example, if a minor technical mistake is made in a deed that does not materially change the grantor's expression of intent, such as a minor error in a property description. Prior to 1986 the two methods for correcting such errors in a recorded instrument were recording a new instrument executed by the grantor and acknowledged, or making a change on the instrument and having it re-executed by the grantor and acknowledged.[3] In 1986 G.S. 47-36.1 was enacted in response to growing concerns about unauthorized and unattributed altered documents. It allowed original instruments with "an obvious typographical or other minor error" to be rerecorded, provided the changes are "clearly set out on the face of the instrument" and initialed by the grantor or drafting attorney and a "statement of explanation" is attached. Registers have encountered interpretative and practical problems with respect to G.S. 47-36.1. They frequently have been presented with documents that do not comply with the statute or as to which application of the statutory requirements is unclear. The requirement that a statement of explanation be "attached" is unclear as to whether "attached" means on the previously recorded pages or in a separate newly attached page, and, if a separate page is allowed, it is unclear what can be "attached" and still be considered part of a statement of explanation. The statute required changes to be initialed, which clearly was intended to require all changes to be shown and attributed, yet presenters commonly attempted to attach pages without initials or attribution. The requirement that the grantor or drafting attorney initial changes and sign the explanation leads those who are neither grantors nor drafting attorneys, such as bank employees who prepare the instruments, to conclude that there is no means of showing a minor error on the record; however, such a preparer could record an affidavit to give notice of an error, for whatever legal effect that affidavit might have. The requirement that a statement of explanation be used only for "an obvious typographical or other minor error" is not a matter for register enforcement, but its inclusion in the statute gave some the impression that such a determination is a prerequisite to registration. Some practitioners have had the wrong impression that, because the General Statutes authorize use of a statement of explanation, such an instrument provides constructive notice of the corrected information as of the date of the original flawed recording. These statements only provide notice of the information they contain as of the date they are recorded, however, as the final clause in G.S. 47-36.1 expressly states, and as is consistent with basic recording law.

The problems interpreting the verification and rerecording laws were further complicated in 2006 when G.S. 47-14(a) was amended to provide that a document or certified copy could be "rerecorded" "regardless of whether it has been changed or altered."[4] This change was intended to clarify that a register is not responsible for examining a document submitted as a rerecording to determine if changes were made to it since its prior recording. However, the statute still requires registers to verify acknowledgments on documents that are not the same documents previously recorded. In attempting to fulfill this responsibility, registers have encountered difficulties deciding what is a document that must be acknowledged and therefore verified and what could be a permissible "altered" rerecording. Documents submitted as "rerecordings" are among the most problematic that registers have encountered, often involving obviously unauthorized and legally ineffective changes as discussed above.

S.L. 2008-194 (H 545) simplifies the law describing the register's responsibilities for handling rerecordings. The apparent confusing authorization to record documents altered after they were acknowledged is eliminated. Effective October 1, 2008, to rerecord an original document without verification, the presenter must mark the document on its first page as a "rerecording," thus denoting that it is the same unaltered document as previously recorded. This mark is a representation on which the register may rely. The register checks for this mark and for recording information showing the document is a previously recorded document. The register has no responsibility to check for alterations. The statutes also have been revised to remove the confusing indication of permission to record "altered" certified copies. When a document is submitted for recording as a certified copy, the register checks only to see that it is a document with a record-keeper's "certified copy" mark. The register is not responsible for looking for alterations that make the document different than what was certified by the record-keeper—in other words, not truly a certified copy.[5]

The purposes of giving notice of a minor error, previously usually made with a statement of explanation, can be accomplished with an affidavit of correction, or a "scrivener's affidavit," which is commonly used in other jurisdictions. Information about errors identified in an affidavit clearly

property description was added to deed of trust after its execution); William A. Campbell, "Correction Deeds and Deeds of Trust," *Land Records Bulletin* No. 6 (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, September 1984) ("To summarize, changes in a recorded instrument should be made by preparing and recording a correction deed. An attempt to short-cut this procedure by altering the original instrument results in a new instrument that the register of deeds should not record unless it is re-executed and re-acknowledged. If it is recorded anyway, the recording is invalid and does not give constructive notice").

3. William A. Campbell, "Correction Deeds and Deeds of Trust," *Land Records Bulletin* No. 9 (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, July 1986).

4. S.L. 2006-259, secs. 502(a)–(b); S.L. 2006-264, sec. 40(c).

5. G.S. 47-31(a).

is attributable to the affiant and does not involve the many registration interpretative issues entailed with G.S. 47-36.1. Registers have no role in reviewing an affiant's capacity or the contents of an affidavit. Anyone can submit an affidavit of correction (they need not be attorneys) to record typographical or minor errors, and those who present affidavits can attach any exhibits to explain or show the correction, including marked-up copies of the corrected document. Registers verify the notary certificate the same as any other affidavit. Although affidavits already could be recorded without need for legislative action, revised G.S. 47-36.1 notes the possibility of use of an affidavit and expressly preserves the notice effect of statements of explanation previously recorded. It also provides guidance about indexing. If an affidavit is conspicuously identified as a "corrective" or "scrivener's" affidavit in its title, the register indexes the affiant's name, the names of the original parties to the document described in the affidavit, and the recording information for the document being described, if and as this information is provided in the affidavit.

The changes in S.L. 2008-194 regarding recording documents identified as "rerecordings" or statements of explanation were effective October 1, 2008. The clarification regarding the recordation of altered certified copies was effective August 8, 2008. Although documents with un-notarized statements of explanation are not recordable on or after October 1, 2008, attorneys, grantors, and others may give the same kind of notice of a correction by using an affidavit with an appropriate form of notarized jurat.

Electronic Recording Verification

In 2005 the North Carolina General Assembly enacted the Uniform Real Property Electronic Recording Act (URPERA) to facilitate use of electronic documents for public real estate records.[6] URPERA provides that "[i]f a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying" the laws governing electronic records.[7] URPERA thereby provides a framework for recordation of real estate documents in electronic format. URPERA also sets out a framework for use of electronic signatures by providing in G.S. 47-16.3(b) that "[i]f a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature." Some real estate records must be acknowledged by notaries or other authorized officials before they may be recorded, and URPERA provides that "[a] requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to notarize, acknowledge, verify, witness, or administer the oath, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature."[8] This provision authorizes use of acknowledgments in electronic form but does not specify what information a register must check before accepting an electronic record.

In 2005 the North Carolina General Assembly enacted the Electronic Notary Act, and pursuant to this law the North Carolina Secretary of State adopted standards for electronic notarization.[9] These standards describe what a notary must do to perform an electronic notarization and among other things require that the notary's signature and seal be "attached or logically associated with the document, linking the data in such a manner that any subsequent alterations to the underlying document or electronic notary certificate are observable through visible examination."[10] The Electronic Notary Standards also prescribe requirements for those who supply the mechanisms for electronic notarization. In addition, the Secretary of State adopted Electronic Recording Standards developed by the Electronic Recording Council pursuant to URPERA.[11] These standards provide guidance to registers and submitters of electronic documents about the format and procedure for electronic record submissions and for the maintenance of electronic records. Among other things, the standards provide that registers should establish a memorandum of understanding with each submitter to describe the rights and responsibilities of the register and the authorized submitter.[12]

These laws and rules address many aspects of electronic document completion and the register's authority to accept them. They do not specifically address the register's role in verifying the components of an electronic signature or notarization before accepting a document for recording. The register's verification responsibility is set forth in G.S. 47-14(a). When verifying paper documents, registers look for original signatures. This is consistent with the Notary Public Act, which states that "[w]hen notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate."[13] S.L. 2008-194 (H 545) clarifies the register's responsibility with respect to verifying the components of an electronic document, and it describes the representations to be made by trusted submitters regarding the originality and authenticity of electronic documents they present.

6. G.S. 47-16.1 to 16.7
7. G.S. 47-16.3(a).
8. G.S. 47-16.3(c).
9. 18 NCAC 07C .0101–.0604.
10. *Id.* §§ .0401(d), .0402(d).
11. G.S. 47-16.5.
12. *Report from the North Carolina Electronic Recording Council,* Part Three, ¶ 4, April 2007.
13. G.S. 10B-35.

Effective October 1, 2008, G.S. 47-14 authorizes registers who wish to accept electronic documents requiring acknowledgments to do so if they can confirm that the acknowledgments have been completed. They may accept electronic documents from two types of submitters: the government or a "trusted submitter." Someone can become a trusted submitter only by agreeing to the register's requirements in a memorandum of understanding. When such an agreement is in place, the register is not required by statute to check for originality of electronically submitted documents unless the register has chosen to make this requirement a condition of the agreement. The submitter is responsible for complying with the originality requirements. The statutes do not require any register to accept electronic submissions nor do the statutes require registers who decide to accept electronic documents to accept them from anyone other than whom the register authorizes.

The amended statute requires that documents submitted by trusted submitters include the following statement that will appear on the public record:

> Submitted electronically by *submitter's name* in compliance with North Carolina statutes governing recordable documents and the terms of the submitter agreement with the *county name* County Register of Deeds.

The record will then show who was entrusted to comply with the recording requirements for documents submitted electronically by trusted submitters. The revised statute makes clear that the register may rely on the trusted submitter's representation of compliance with the requirements.

If a document originates in electronic form, submitters are responsible for complying with North Carolina electronic recording and notary statutes and rules. They are also responsible for not electronically recording a document that originated in paper form unless the paper document would have been recordable in that form. For example, a submitter cannot properly scan a copy of a document and submit it electronically if the copy is not recordable in its paper form. Also, a submitter cannot properly record an altered document that does not conform to the paper document rerecording requirements.

Indexing

Indexing and registration are important to the validity of instruments conveying valuable real estate interests. This state's unusual race recording law provides that no instrument of conveyance "shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration . . . but from the time of registration thereof in the county where the land lies."[14] By operation of this law, an otherwise valid instrument given in good faith could be subordinated to another interest if that instrument is deemed not to have attained the status of being "registered" even though it was presented to a register. Prior to enactment of S.L. 2008-194 (H 545), G.S. 161-22(h) stated that "[n]o instrument shall be deemed registered until it has been indexed as provided in this section." G.S. 161-22(g), which authorizes use of county-specific recording rules, stated that "[f]rom and after the effective date of such rules, a registered instrument shall be deemed properly registered only when it has been indexed according to the rules." These two clauses could have been interpreted as invalidating a document's registration based on a technical noncompliance with an indexing rule.

Registers maintain indexes of the names of parties to recorded instruments to enable examiners to locate instruments affecting particular property owned by those parties. There are no registration restrictions on the types of instruments that may be recorded, who may be considered parties to them, or how the parties are to be identified within the instruments. Registers must examine each presented instrument to extract the indexing information according to their best understanding of what the instrument purports to be and how the indexing laws and rules apply to it. Sometimes the identity of the parties to even the most basic real estate instrument is unclear. The task is further complicated by dozens of other General Statutes requirements for indexing specific kinds of instruments. In addition, pursuant to G.S. 161-22.3 indexers must follow rules established by the Minimum Standards for Indexing Real Property Instruments. These standards address a myriad of indexing possibilities but cannot possibly address all name variations. Registers commonly do not have any clear guidance and must rely on their best judgment to index the instrument in a manner that can reasonably be expected to enable a title examiner to find it with ordinary care. Title examiners similarly must rely on their reasonable understanding of how any particular instrument would be indexed.

Under the approach common in state law and applied in North Carolina courts, instrument indexing is sufficient if a reasonably careful and prudent examiner would find the instrument as indexed. In *West v. Jackson*, 198 N.C. 693, 153 S.E. 257 (1930), the North Carolina Supreme Court rejected a strict interpretation that "the [indexing] statute should be complied with to the exact letter," noting that "the underlying philosophy of all registration is to give notice, and that hence the ultimate purpose and pervading object of the statute is to produce and supply such notice." S.L. 2008-194 revises the indexing statutes to reflect the courts' approach. It makes clear that the legal effect of indexing is based on the reasonableness standard, stating: "No instrument shall be deemed

14. G.S. 47-18(a) (deeds and certain other instruments); G.S. 47-20 (security instruments); G.S. 47-27 (easements).

registered until it has been indexed in a manner to put a reasonably careful and prudent examiner on notice upon inquiry, and, if upon inquiry, the instrument would have been found."[15] S.L. 2008-194 also makes other changes to G.S. 161-22 to reflect current indexing requirements as set forth in other statutes.

Recording Fee for Deeds of Trust and Mortgages

Section 29.7 of the 2008 appropriations act [S.L. 2008-102 (H 2436)] increases the fee for recording any deed of trust or mortgage from $12 to $22 for the first page and $3 for each additional page, effective October 1, 2008. From this recording fee the additional $10 must be forwarded to the county finance officer, who in turn forwards it to the Department of Crime Control and Public Safety to be credited to the Floodplain Mapping Fund. The additional $10 is not retained by the county and therefore would not be subject to the Automation Enhancement and Preservation Fund set aside pursuant to G.S. 161-11.3.

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15. G.S. 47-14(h).

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Senior Citizens

Although issues directly affecting government programs for senior citizens were not a primary focus of the 2008 legislative session, the General Assembly authorized the North Carolina Study Commission on Aging to study the state's readiness to respond to increasing numbers of older adults residing in North Carolina, created a new North Carolina Certified Retirement Community program, and enacted a handful of laws of interest to the state's senior citizens and state government retirees.

Government Assistance and Services for Senior Citizens

Adult Care Home Training and Technical Assistance

S.L. 2008-107 (H 2436) directs the Division of Health Service Regulation of the Department of Health and Human Services (DHHS) to use the remaining funds appropriated for implementation of rated certificates for adult care homes (other than $35,000 that S.L. 2008-107 allocates to the DHHS Division of Aging and Adult Services for the Adult Care Home Quality Improvement Consultation Program) for the development and implementation of a training and educational program by the North Carolina adult care home provider associations that will be integrated with the assessment, care planning, training, and quality improvement initiative being coordinated and financially supported by participating adult care home providers and those associations.

Adult Protective Services

The General Assembly considered, but did not enact, legislation (H 2399, S 1751) that would have appropriated funding for a pilot program to assess changes in the state's adult protective services law [Article 6 (Protection of the Abused, Neglected, or Exploited Disabled Adult Act) of G.S. Chapter 108A] proposed by a DHHS task force.

Appropriations for State Aging Programs and Services

S.L. 2008-107 provides an additional $2 million in recurring funding for the state's Home and Community Care Block Grant, allocates almost $2 million in nonrecurring funding for mental health screening and assessment of elderly and disabled persons who live in adult care homes, and appropriates $500,000 in nonrecurring funding for a program to provide respite care and support to families caring for a person with dementia.

Medicaid

North Carolina's Medicaid program provides medical assistance to more than 400,000 low-income elderly and disabled North Carolinians. Legislation affecting North Carolina's Medicaid program is summarized in Chapter 24, "Social Services."

North Carolina Study Commission on Aging

State readiness. S.L. 2008-181 (H 2431) authorizes the North Carolina Study Commission on Aging to study the state's readiness to respond to increasing numbers of older adults residing in North Carolina and to report its findings and recommendations to the 2009 General Assembly.

Hearing loss. S.L. 2008-181 directs DHHS to study the impact of hearing loss on North Carolina's older adult population and to present its findings and recommendations to the North Carolina Study Commission on Aging on or before November 1, 2009.

Adult care in public housing. S.L. 2008-181 directs the DHHS Division of Aging and Adult Services and the DHHS Division of Medical Assistance to study the feasibility and possible cost savings to the state of operating a licensed adult care home in a public housing facility and to report their findings and recommendations by August 1, 2009, to the North Carolina Study Commission on Aging, the House Appropriations Subcommittee on Health and Human Services, and the Senate Appropriations Committee on Health and Human Services.

Respite services. S.L. 2008-181 directs the DHHS Division of Aging and Adult Services to study the adequacy of service standards and funding for group respite services, directs the DHHS Division of Medical Assistance to study including respite services under the state's Medicaid plan, and requires the divisions to report their findings and recommendations to the North Carolina Study Commission on Aging by November 1, 2009.

Special Assistance and Medicaid income disregards. S.L. 2008-161 (H 2410) directs the DHHS Division of Aging and Adult Services and the DHHS Division of Medical Assistance to study the implementation of an income disregard policy for current Special Assistance and Medicaid recipients who are adversely impacted due to cost-of-living or other income increases and to report their findings by October 1, 2009, to the North Carolina Study Commission on Aging, the House Appropriations Subcommittee on Health and Human Services, and the Senate Appropriations Committee on Health and Human Services.

Transportation of persons in wheelchairs. S.L. 2008-121 (H 93) directs the state Department of Transportation to study the vehicular transportation of persons seated in wheelchairs and to report its findings and recommendations by February 1, 2009, to the North Carolina Study Commission on Aging and the Joint Legislative Transportation Oversight Committee.

Property Tax Relief for Low-Income Elderly Homeowners

G.S. 105-277.1 provides a homestead property tax exclusion for certain low-income elderly homeowners. G.S. 105-277.1B creates a "circuit breaker" that allows the deferral of part of the property tax owed by specified low-income elderly homeowners.

Revision of the circuit breaker benefit and correction of effective date of changes to the homestead exclusion. S.L. 2008-35 (S 1876), which modifies the "circuit breaker" benefit, standardizes the administration of all deferred property tax programs, and corrects the effective date of changes to the homestead property tax exclusion, is summarized in Chapter 15, "Local Taxes and Tax Collection."

Expanded eligibility for the homestead exclusion. The General Assembly considered, but did not enact, legislation (H 2112, S 1861) that would have expanded the eligibility of elderly homeowners for the homestead exclusion.

State–County Special Assistance

The State–County Special Assistance program provides financial assistance to elderly and disabled persons who cannot pay the cost of care in an adult care home. The program is administered by county departments of social services. The cost of assistance is divided between the state and counties.

Income disregard for Special Assistance applicants and recipients. S.L. 2008-184 (S 1796) provides that the eligibility and benefits of persons who apply for or receive Special Assistance benefits on or after July 1, 2009, will not be affected due to annual cost-of-living allowances they receive under the federal Social Security, Supplemental Security Income, Railroad Retirement, or Veterans Affairs programs.

Increase in maximum payment. S.L. 2008-107 increases the maximum State–County Special Assistance payment for most eligible residents of adult care homes from $1,173 to $1,207 per month effective January 1, 2009, unless the maximum payment amount is adjusted by DHHS in accordance with Section 10.13(e) of S.L. 2007-323.

State and Local Government Retirement Benefits

Cost-of-living increases for state and local government retirees. S.L. 2008-107 provides a 2.2 percent cost-of-living increase in the retirement benefits paid under the state Teachers' and State Employees' Retirement System, Consolidated Judicial Retirement System, and Legislative Retirement System and appropriates $41 million in supplemental funding for these increases. Local government retirees covered by the Local Government Employees' Retirement System will receive a 2.17 percent cost-of-living increase, which was previously approved by the Retirement Systems Board of Trustees and did not require the General Assembly's approval since no additional funding was required of local government employers.

Investment of pension funds. Legislation (H 2758) was introduced, but not passed, that would have transferred authority to make decisions regarding the investment of the state's pension funds from the State Treasurer to the Retirement Systems Board of Trustees.

Health insurance for state government retirees. Retired state employees with at least five years of creditable service are eligible for health insurance benefits under the state health plan on a noncontributory or contributory basis. S.L. 2008-168 (H 2443) rewrites the statutes pertaining to health insurance for state government retirees and employees to recognize the transition from a single comprehensive

major medical plan to the preferred provider organization (PPO) options now available to state employees and retirees. It also authorizes the state health plan to offer a new Medicare Advantage benefit for participants who are eligible for Medicare in lieu of other coverage offered under the state health plan in conjunction with carve-outs for Medicare Parts A and B. S.L. 2008-168 is discussed more fully in Chapter 19, "Public Employment."

In response to reports that the state health plan might experience a loss of as much as $257 million in 2008–09, the House of Representatives passed a bill (H 2440) that would have established a State Health Plan Contingency Account in the Office of State Budget and Management. This account would have been funded with existing reserves and a transfer of $100 million from the state's "rainy day fund" to pay benefits under the state health plan. The bill was not considered by the Senate before adjournment.

Waiver of University and Community College Fees for Senior Citizens

S.L. 2008-135 (H 1076), which requires the constituent institutions of the University of North Carolina and the state's community colleges to waive certain fees for specified students who are at least sixty-five years old, is summarized in Chapter 13, "Higher Education." State law (G.S. 115-B2) already requires the University of North Carolina and the state's community colleges to waive the *tuition* that would otherwise be charged to students who are legal residents of North Carolina and at least sixty-five years old.

Other Legislation of Interest to Senior Citizens

Driving Privileges of Incapacitated Adults

S.L. 2008-182 (H 2391), which directs the state's Division of Motor Vehicles to consider the recommendation of the clerk of superior court regarding whether an adult who has been found incapacitated under the state's guardianship statutes should be allowed to retain his or her driving privileges, is summarized in Chapter 18, "Motor Vehicles."

Guardianship of Incapacitated Adults

Sale of personal property. Effective October 1, 2008, S.L. 2008-87 (H 2390) amends G.S. 35A-1251 to allow the guardian of the estate of an incapacitated adult to sell up to $5,000 of the ward's personal property during each accounting period without a court order.

Study of state guardianship laws. S.L. 2008-181 (H 2431) creates a Joint Legislative Study Commission on State Guardianship Laws; directs the commission to study more than twenty subjects related to the guardianship of minors and incapacitated adults, including public guardianship, the state's adult protective services law, and the enactment of the Uniform Guardianship and Protective Proceedings Act; and authorizes the commission to make a final report to the 2009 General Assembly prior to the General Assembly's convening.

Home Care Services

Effective January 1, 2010, S.L. 2008-127 (H 964) amends G.S. 131E-136 to expand the definition of home care services to include specified in-home companion, sitter, and respite care services provided to individuals and homemaker services provided in combination with those services. Effective January 1, 2009, S.L. 2008-127 increases the annual license fee for home care agencies from $350 to $400.

Income Tax Credit for Purchase of Long-Term Care Insurance

G.S. 105-151.28 provides a credit against a taxpayer's state income tax liability for a portion of an eligible taxpayer's expenses related to the purchase of long-term care insurance. The General Assembly considered, but did not enact, legislation (H 2111, S 1808) that would have expanded eligibility for the state's income tax credit for the purchase of long-term care insurance or increased the amount of the tax credit.

Licensure of Nursing Home Administrators

S.L. 2008-183 (H 2397), authorizing criminal history record checks of applicants for licensure as nursing home administrators, is summarized in Chapter 12, "Health."

Medical Release of Geriatric Inmates in Prisons

S.L. 2008-2 (S 1480), which provides for the medical release of prison inmates who are at least sixty-five years old; suffer from chronic infirmity, illness, or disease related to aging; and, as a result of such infirmity, illness, or disease, are incapacitated to the extent that they do not pose a public safety risk, is summarized in Chapter 23, "Sentencing, Corrections, Prisons, and Jails."

Multiunit Assisted Housing with Services

Effective January 1, 2010, S.L. 2008-166 (H 2409) amends G.S. 131D-2(a)(7a) to (1) require Multiunit Assisted Housing with Services (MAHS) programs to register annually with the DHHS Division of Health Service Regulation; (2) require MAHS programs to pay an annual registration fee of $350; and (3) impose criminal penalties for establishing, conducting, managing, or operating an unregistered MAHS program.

North Carolina Certified Retirement Community Program

S.L. 2008-188 (S 1627) establishes the North Carolina Certified Retirement Community Program as part of the Department of Commerce's 21st Century Communities program and establishes criteria for certification as a North Carolina Certified Retirement Community. The purposes of the program include promoting North Carolina as a retirement destination, assisting North Carolina communities in their efforts to market themselves as retirement locations and to develop communities that retirees would find attractive for a retirement lifestyle, and assisting in the development of retirement communities and continuing care facilities. The City of Lumberton is acting as a pilot community for the program.

Silver Alert System

G.S. 143B-499.8 establishes a Silver Alert System within the state Center for Missing Persons to disseminate information about missing persons believed to be suffering from dementia or other cognitive impairments. S.L. 2008-83 (H 2523) amends the section to require the center to disseminate the information as quickly as possible, regardless of the missing person's age, when a report about the missing person has been made to a law enforcement agency.

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Sentencing, Corrections, Prisons, and Jails

As discussed in Chapter 6, "Criminal Law and Procedure," the General Assembly's main activity in the criminal law field in 2008 focused on sex offenders and gangs. New legislation in those arenas creates new crimes, raises the offense class of existing crimes, and it adds additional sentence enhancements and aggravators.

With respect to corrections, probation was under the microscope this year. In the wake of the murders of a UNC Chapel Hill undergraduate in Chapel Hill and a Duke University graduate student in Durham—both allegedly committed by probationers—the General Assembly looked for ways to evaluate probation officer caseloads, management oversight, and information sharing between the Division of Community Corrections (DCC) and other state agencies.

Sentencing

Summary of Offense Class Changes

The following is a summary of offense class and sentence enhancement changes the General Assembly made in 2008. All of the changes became effective for offenses committed on or after December 1, 2008, unless otherwise indicated. For summaries of substantive changes in the law accompanying these offense class changes, see Chapter 6, "Criminal Law and Procedure."

- Injuring houses, churches, fences and walls (G.S. 14-144) is made a Class I felony when damages are in excess of $5,000; under previous law this offense was a Class 2 misdemeanor, irrespective of the cost of damage. S.L. 2008-15 (H 946).
- Placing a burning or flaming cross on the property of another or on a public street or highway or on any public place (G.S. 14-12.12) is changed from a Class I to a Class H felony. S.L. 2008-197 (S 685).
- First degree sexual exploitation of a minor (G.S. 14-190.16) is changed from a Class D to a Class C felony. S.L. 2008-117 (H 933).
- Second degree sexual exploitation of a minor (G.S. 14-190.17) is changed from a Class F to a Class E felony. S.L. 2008-117.
- Third degree sexual exploitation of a minor (G.S. 14-190.17A) is changed from a Class I to a Class H felony. S.L. 2008-117.
- Promoting prostitution of a minor (G.S. 14-190.18) is changed from a Class D to a Class C felony. S.L. 2008-117.
- Solicitation of a child by computer to commit unlawful sex act [G.S. 14-202.3(c)] is changed from a Class H to a Class G felony if the defendant or any person for whom the defendant was arranging the meeting actually appears at the meeting location. S.L. 2008-218 (S 132).
- Child abuse (G.S. 14-318.2) is changed from a Class 1 to a Class A1 misdemeanor. S.L. 2008-191 (S 1860).
- Failure to stop in the event of a crash resulting in death or serious bodily injury (G.S. 20-166) is changed from a Class H to a Class F felony. S.L. 2008-128 (S 944).
- The criminal penalty for violations of Article 16 (Professional Housemoving) of G.S. Chapter 20 or any regulation of the Department of Transportation governing housemoving is increased from a Class 3 to a Class 1 misdemeanor. S.L. 2008-89 (S 236).
- The criminal penalty for violations of regulations of mortgage servicers under G.S. 53-243.02 is decreased from a Class I felony

to a Class 3 misdemeanor, effective for offenses committed on or after January 1, 2009. S.L. 2008-228 (H 2463).

- New G.S. 14-50.22 creates a one-class enhancement for any misdemeanor committed by a person fifteen or older for the benefit of, or at the direction of, or in association with a criminal street gang. A Class A1 misdemeanor is enhanced to Class I felony under this law. S.L. 2008-214 (H 274).
- Class A1 and Class 1 misdemeanors committed because of the victim's race, color, religion, nationality, or country of origin are enhanced to Class H felonies, rather than Class I felonies as provided under existing G.S. 14-3. S.L. 2008-197 (S 685).

Other Sentencing Legislation

Sex offenders. The General Assembly made numerous changes to the sex offender registration and monitoring laws in 2008, many of which have sentencing and corrections implications. For ease of reference, the summary of this legislation can be found in Chapter 6, "Criminal Law and Procedure."

New aggravating factor. Effective for offenses committed on or after December 1, 2008, S.L. 2008-129 (H 1003) adds a new felony sentencing aggravating factor to the list of statutory aggravators in G.S. 15A-1340.16(d). Under the new factor a defendant who, during the ten-year period prior to the commission of the offense for which he or she is now being sentenced, has been found by a North Carolina judge to be in willful violation of a condition of probation, or by the Post-Release Supervision and Parole Commission (the Commission) to be in willful violation of a condition of parole or post-release supervision, may be sentenced in the aggravated range. The law does not appear to be limited to violations that result in revocation. Thus findings of willful violation resulting in extension or modification of probation—or indeed resulting in termination of probation or no action at all—could support the new aggravating factor.

The law states that this aggravating factor may, like a previous juvenile adjudication for a serious felony under G.S. 15A-1340.16(d)(18a), be found by the court and not by the jury. This provision appears to rest on the assumption that prior revocations of probation, parole, or post-release supervision would fall within the prior-record exception to the rule set out in *Blakely v. Washington*, 542 U.S. 296 (2004), which requires facts other than a "prior conviction" to be admitted to or submitted to a jury and proved beyond a reasonable doubt before they may be used to increase the sentence beyond the presumptive statutory maximum. The North Carolina Court of Appeals has determined juvenile adjudications to be sufficiently analogous to "prior convictions" to fall within the prior-record exception to *Blakely*.[1] Whether the courts would reach the same conclusion with respect to probation revocations is an open question.

Broadened sentence enhancement for use of firearm or deadly weapon. For a discussion of the broadened sixty-month sentence enhancement for the use of a firearm *or deadly weapon* added by the North Carolina Street Gang Suppression Act (S.L. 2008-214), *see* Chapter 6, "Criminal Law and Procedure."

Corrections

Prisons

Medical release for ill and disabled inmates. Under S.L. 2008-2 (S 1480) the the Commission is directed to establish a program, to be administered by the Department of Correction (DOC), for the medical release of certain disabled, terminally ill, or geriatric inmates. The law became effective June 10, 2008.

An inmate is eligible to be considered for medical release if DOC determines that he or she:

- is diagnosed as *permanently and totally disabled*; or
- is diagnosed as *terminally ill*; or
- is diagnosed as *geriatric*; and
- is incapacitated to the extent that he or she does not pose a public safety risk; and
- was not convicted of a capital felony, a Class A, B1, or B2 felony, or an offense requiring registration as a sex offender; and
- meets whatever additional eligibility conditions are established by the Commission.

The statute defines each of the italicized terms above. An inmate is *permanently and totally disabled* when he or she suffers from a "permanent and irreversible physical incapacitation" that was unknown at the time of sentencing or has progressed since sentencing. *Terminally ill* describes an inmate with an incurable illness or disease that was unknown at the time of sentencing or has progressed since sentencing such that the inmate is likely to die within six months. *Geriatric* means sixty-five years of age or older and suffering from an age-related chronic infirmity, illness, or disease related to aging. Each of the defined terms also requires that the condition be such that the inmate "does not pose a public safety risk"—seemingly making the requirement of "incapacitation" under G.S. 15A-1369.2(a)(2) redundant.

The procedure for medical release is set out in G.S. 15A-1369.3. The initial referral for release is made by DOC to the Commission, based on a

1. State v. Boyce, 175 N.C. App. 663, 625 S.E.2d 553 (2006).

request from the inmate, the inmate's attorney, or the inmate's next of kin, or upon a recommendation from within DOC. The referral, which must be completed within forty-five days of receiving a request for release, must include an assessment of the inmate's "medical and psychosocial condition" and the risk he or she poses to society. The Commission then has fifteen days to make its determination of whether to grant release to a terminally ill inmate, or twenty days in the case of permanently and totally disabled and geriatric inmates. An inmate denied release under the program may not reapply absent a demonstrated change in medical condition.

Inmates granted release are subject to conditions that apply through the date upon which the inmate's sentence would have expired, including supervision by DCC. The inmate must allow DCC officers to "visit the inmate at reasonable times at the inmate's home or elsewhere." Upon receipt of "credible information that an inmate has failed to comply with any reasonable condition" of release, the Commission shall order an inmate retuned to DOC custody pending a revocation hearing, probably governed by the hearing procedures set out in G.S. 15A-1368.6, although the statute does not expressly say so.

Under existing law the Secretary of Correction has authority to "extend the limits of the place of confinement" of certain terminally ill or permanently and totally disabled prisoners by authorizing them to "leave the confines of that place unaccompanied" to receive palliative care. G.S. 148-4(8). This authority (used sparingly in recent years) is presumably unaffected by the new medical release program, though the new program may have greater appeal as a means to reduce state liability for the cost of medical care for eligible inmates.

Limited release of inmates for deportation. Effective August 8, 2008, under S.L. 2008-199 (S 1955), the Commission may, in its discretion, conditionally release certain inmates into the custody and control of United State Immigration and Customs Enforcement (ICE) pursuant to new G.S. 148-64.1. That section sets out the following eligibility criteria:

- ICE must submit to DOC a final order of removal for the inmate; and
- The inmate must be incarcerated only for nonviolent offenses, defined in the statute as including *only* impaired driving; breaking and entering buildings under G.S. 14-54; breaking and entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft under G.S. 14-56; possessing stolen goods under G.S. 14-71.1; obtaining property by false pretenses under G.S. 14-100, where the thing of value is less than $100,000; and possession of a Schedule VI controlled substance under G.S. 90-95(d)(4); and
- The inmate must have served at least half of the minimum sentence imposed by the court, or must be parole eligible in the case of impaired driving under G.S. 20-138.1; and
- The inmate must not have been convicted of an impaired driving offense resulting in death or serious bodily injury; and
- The inmate must agree not to reenter the United States unlawfully.

If ICE does not deport the inmate, the inmate must be returned to DOC custody to serve the remainder of his or her sentence. If an inmate released under the new law returns unlawfully to the United States, the release will be revoked and the inmate will serve the maximum of his or her sentence, less time already served. Additionally, the inmate will be ineligible from that point forward for any form of release other than post-release supervision.

Parole and Post-Release Supervision

Parole reviews for inmates convicted of murder. The parole laws still apply to inmates sentenced for crimes committed before October 1, 1994. Previously, under G.S. 15A-1371, the the Commission considered parole-eligible inmates for release on parole once each year. Under S.L. 2008-133 (H 1624), the Commission will review the cases of prisoners convicted of first- or second-degree murder once every three years, unless exigent circumstances or the interests of justice demand more frequent consideration.

Limit on release following arrest of sex offenders. Ordinarily, when a person on post-release supervision is arrested for a violation of the terms of that supervision he or she is entitled to a preliminary hearing within seven days under G.S. 15A-1368.6(b) to determine whether there is probable cause to believe that the supervisee actually committed the violation. If this hearing does not take place, the supervisee must be released to continue on supervision pending a hearing. A provision in the Jessica Lunsford Act for NC (Jessica's Law), S.L. 2008-117, adds new G.S. 15A-1368.6(b1), prohibiting release prior to the holding of a preliminary hearing, regardless of whether seven days have passed, if the person was on post-release supervision for an offense subject to sex offender registration. Though the new law appears to do away entirely with the requirement for release of a supervisee if a hearing is not held within seven days, supervisees may still be entitled as a matter of constitutional due process to a preliminary hearing "as promptly as convenient after arrest while information is fresh and sources are available."[2]

2. Morrissey v. Brewer, 408 U.S. 471, 485 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

Probation

Limit on bail following arrest of sex offenders. Jessica's Law amends G.S. 15A-1345(b) with respect to bail following arrests for probation violations, prohibiting "the court" (which was probably meant to include any judicial official, including a magistrate) from releasing a probationer who has ever been convicted of what is now a reportable sex crime (regardless of whether the crime was reportable at the time committed, and regardless of the offense for which the person is currently on probation), without first finding that the probationer is not a danger to the public.

Probation revocation after the period of probation. G.S. 15A-1344(f) grants jurisdiction to hold a probation revocation hearing after the period of probation has expired. The statute previously required the state to file a written motion of its intent to conduct a revocation hearing prior to the expiration of the period of probation, and it required the court to make a finding that the state had made a "reasonable effort to notify the probation and to conduct the hearing earlier" G.S. 15A-1344(f). For at least two reasons the statute had been a source of confusion and frustration. First, the statute's prior wording only granted a judge authority to "revoke" probation after the period of probation expired—not to extend or modify it.[3] Second, a series of appellate decisions over the past several years had put complicated gloss on what constituted a "reasonable effort" by the state to hold the hearing earlier.[4]

Changes to the statute under S.L. 2008-129 address both problems. The law adds the words "extend" and "modify" to the statute, making clear that the court is empowered to do everything after the period of probation is expired that it could have done during the period itself. The law also does away entirely with the requirement of a judicial finding as to the state's "reasonable efforts." In its place, the amended statute requires findings that the probationer violated "one or more conditions of probation prior to the expiration period [*sic*] of probation," and that probation should be extended, modified, or revoked "for good cause shown and stated." Extensions under the amended statute are governed by existing G.S. 15A-1342(a), although it is unclear whether the new 15A-1344(f)(4) authorizes the court to order the special extension for restitution or treatment after the period of probation has expired, as that extension may be ordered only in the last six months of the original period of probation. If that special extension is not possible after the period has expired, then extensions would be limited by the maximum authorized period of probation, five years.

The amended law applies to probation violation hearings held on or after December 1, 2008.

Interstate Compact for Adult Offender Supervision

Changes in membership of State Council, clarification of procedures. The Interstate Compact for Adult Offender Supervision (the Compact) was enacted in North Carolina in 1951 and has now been adopted by all states. The Compact allows a person who is sentenced to probation or granted parole in one state, and who wants to reside in another state, to be supervised in the other state. The Compact is a source of some confusion for magistrates and others in the criminal justice system, who confuse Compact supervisees with fugitives from justice subject to extradition, or who are unaware of the hearing procedures required under the Compact and related state law.

Under S.L. 2008-189 (S 1214), three new positions are added to the North Carolina State Council for Interstate Adult Offender Supervision, including a district court judge (appointed by the chief justice), a district attorney (appointed by the governor), and a sheriff (also appointed by the governor). The law also enacts new G.S. 148-65.7(a), implementing a $150 transfer application fee for persons convicted in North Carolina who desire to transfer supervision to another state under the Compact. The fee may be waived by the Compact Commissioner or his or her designee if it constitutes an undue economic burden. Persons supervised in North Carolina under the Compact are still subject to a $30 monthly fee under what is now G.S. 148-65.7(b).

Compact supervisees in North Carolina may be detained for up to fifteen days pending a hearing to determine whether or not North Carolina officials will recommend returning the supervisee to his or her state of conviction (the "sending state") for a parole, probation, or post-release supervision violation. The new law clarifies that the offender is not entitled to bail pending this hearing (though a similarly situated North Carolina probationer would be entitled to bail under G.S. 15A-1345(b)). With respect to the hearing itself, the new law requires that a record of the hearing shall be made and, as soon as practicable, forwarded with recommendations to the supervisee's sending state. If the recommendation is that the sending state retake or re-incarcerate the supervisee, then he or she may be detained pending notice of a final decision from the sending state. If the sending state agrees, the supervisee may be further detained as long as reasonably necessary to arrange for the retaking.

3. State v. Reinhardt, 183 N.C. App. 291, 644 S.E.2d 26 (2007).

4. *See, e.g.*, State v. Burns, 171 N.C. App. 759, 615 S.E.2d 347 (2005); State v. Bryant, 361 N.C. 100, 637 S.E.2d 532 (2006).

Budget and Reporting Requirements

Most of the reporting requirements relevant to sentencing and corrections are outlined in Chapter 6, "Criminal Law and Procedure."

Two high-profile homicides helped shape the General Assembly's criminal law agenda in 2008. On January 19, 2008, Abhijit Mahato, an engineering graduate student at Duke University, was found dead in his apartment in Durham. On March 5, 2008, Eve Carson, an undergraduate and the student body president of the UNC Chapel Hill was murdered in Chapel Hill. One suspect was implicated in both of the murders; another was allegedly involved only in the Mahato case. Because both suspects were on probation at the time of the murders, DCC faced considerable scrutiny with respect to probation officer caseloads, professionalism, and information sharing among DCC county offices and between DCC and law enforcement. The appropriations and reporting requirements outlined below reflect the General Assembly's response to the murders (S.L. 2008-107, H 2436).

- DOC is required to report by March 1 of each year with data on caseload averages for probation officers and the process of assigning offenders to an appropriate supervision level based on a risk assessment.
- DOC must conduct a study of probation/parole officer workload at least biannually.
- The Office of State Personnel, in conjunction with DOC, must study compensation study of probation/parole officers.
- A $2.5 million reserve fund is created to address critical staffing and resource needs in Probation and Parole Field Services.
- $100,000 is allocated from Administrative Office of the Courts funds in the Court Information Technology Fund to develop an interface between DOC's Offender Population Unified System (OPUS) and the Automated Court Information System to provide probation/parole officers with access to the most recent information on arrests and pending charges against probationers.

James Markham

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Social Services

The General Assembly enacted only a few laws affecting state and county social services agencies and public assistance and social services programs for North Carolinians during its 2008 legislative session.

County Social Services Departments

In 2007 the General Assembly enacted legislation that would have required a county to advance the cost of filing civil actions brought by the county, including civil actions filed by the county social services department. S.L. 2008-193 (S 2056), which repeals the 2007 legislative change, is summarized in Chapter 5, "Courts and Civil Procedures."

Medicaid

Administrative Appeal Process for Medicaid Recipients

G.S. 108A-79 establishes an administrative hearing and judicial review procedure that a Medicaid applicant or recipient may use to appeal a county social services department's decision to deny his or her application for medical assistance or to terminate his or her eligibility for medical assistance under the state's Medicaid program. When the Department of Health and Human Services (DHHS) makes a decision to deny, terminate, suspend, or reduce the covered Medicaid services provided to an eligible Medicaid recipient, the Medicaid recipient may seek review of DHHS's decision through an informal administrative appeals process that is separate from the administrative appeal and judicial review procedure established by G.S. 108A-79.

Effective October 1, 2008, S.L. 2008-118 (H 2438) requires DHHS to discontinue this informal appeals process for Medicaid recipients who are appealing a decision by DHHS to deny, terminate, suspend, or reduce Medicaid covered services. All recipient cases pending in the informal appeals process on October 1, 2008, will be transferred to the Office of Administrative Hearings (OAH). Effective July 1, 2008, all Medicaid recipient appeals will be referred to the Mediation Network of North Carolina, which will offer the recipient an opportunity to resolve the issues through mediation. If the recipient declines the offer of mediation, or if mediation does not resolve the dispute, an OAH administrative law judge will hear the case pursuant to the administrative appeals process established by S.L. 2008-118

The administrative appeals process established by S.L. 2008-118

1. includes requirements regarding the notice that DHHS must give a Medicaid recipient when DHHS makes a decision to deny, terminate, suspend, or reduce Medicaid covered services;
2. requires DHHS to provide Medicaid recipients with an appeals request form when it mails the notice of an adverse determination;
3. allows a Medicaid recipient to initiate a contested case by mailing an appeal request form to OAH within thirty days of the mailing of the adverse determination notice by DHHS;
4. provides that these contested cases will be governed by the provisions of Article 3 of the Administrative Procedure Act (G.S. Chapter 150B) except as otherwise provided by S.L. 2008-118;
5. allows OAH to limit and simplify the procedures that apply to these contested cases in order to complete the cases as quickly as possible;
6. requires OAH to schedule and hear these contested cases within forty-five days of submission of the request for appeal;

7. provides that a Medicaid recipient has the burden of proving entitlement to service when DHHS has denied the service but that DHHS has the burden of proof in appeals regarding the reduction, suspension, or termination of a service that was previously granted;
8. requires the administrative law judge to prepare and mail a written recommended decision within twenty days of the hearing; and
9. requires DHHS to issue a final agency decision within twenty days of its receipt of the recommended decision.

DHHS and OAH must submit reports regarding the cost, effectiveness, and efficiency of the appeals process to the General Assembly's Fiscal Research Division, the House Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

The appeals process established by S.L. 2008-118 expires on July 1, 2010. S.L. 2008-118 does not affect the process established by G.S. 108A-79 that applies to administrative appeals by Medicaid applicants and recipients from decisions by county social services departments regarding eligibility for assistance under the state Medicaid program.

Medicaid Policies

S.L. 2008-107 (H 2436) requires DHHS to submit to the Office of State Budget and Management any proposed policy change or policy interpretation change in the state's Medicaid program and a fiscal analysis of the proposed change prior to implementing the change if the change involves more than $3 million in total requirements and is required to comply with federal law.

Medicaid Ticket to Work Program

In 2005 the General Assembly enacted legislation (codified as G.S. 108A-54.1) establishing a Medicaid "Ticket to Work" demonstration program that would allow disabled people who work and are not otherwise eligible for Medicaid to enroll in the state's Medicaid program. In 2007 the legislature delayed implementation of the program. S.L. 2008-107 requires DHHS to implement the program by July 1, 2008, regardless of whether the new Medicaid Management Information System is operational.

Personal Care Services

S.L. 2008-107 repeals the provisions of S.L. 2007-323 that required prior authorization for Medicaid payment for personal care services and allows these services to be reimbursed in accordance with the state Medicaid plan.

Temporary Assistance to Needy Families (Work First)

S.L. 2008-69 (H 2738) provides that, notwithstanding the provisions of G.S. 108A-27.11(c), the Work First Family Assistance block grant allocation for 2008–09 for a county that has been designated as an "electing county" under the state's Work First program (Beaufort, Caldwell, Catawba, Iredell, Lenoir, Lincoln, Macon, and Wilson counties) will not be less than the actual block grant allocations that the county received in 2007–08.

State–County Special Assistance

Legislation regarding the State–County Special Assistance program is summarized in Chapter 22, "Senior Citizens."

Child Welfare and Related Services

The General Assembly increased the monthly rates for foster care and adoption assistance payments and authorized a study of the impact of prohibiting smoking in foster homes. These provisions and other legislation relating to child safety and protection are summarized in Chapter 3, "Children and Juvenile Law."

Other Public Assistance and Social Services Programs

Child Support Enforcement (IV-D) Program

S.L. 2008-12 (H 724), which repeals the provisions of G.S. 50-13.4(g) and (h) requiring the inclusion of social security numbers on child support orders, is summarized in Chapter 5, "Courts and Civil Procedures."

State Children's Health Insurance Program (Health Choice)

Legislation regarding the state Children's Health Insurance Program (Health Choice) and the NC Kids' Care program is summarized in Chapter 3, "Children and Juvenile Law."

Subsidized Child Day Care

Legislation regarding the state's subsidized child day care program is summarized in Chapter 3, "Children and Juvenile Law."

John L. Saxon

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State Government Ethics and Lobbying

During the 2008 session legislators continued to amend and clarify laws regulating ethics and lobbying. Changes include giving the State Ethics Commission sole jurisdiction over the investigation of ethics violations, clarifying when information is considered confidential, and amending lobbyists' reporting requirements. While lobbying and ethics legislation make up the bulk of this chapter, other acts include changes made to the public duty doctrine.

Investigation of Improper Governmental Activity

State Auditor and State Ethics Commission Authority

An investigation initiated in October 2007 by the State Auditor's Office regarding Senator Martin Nesbitt's statement of economic interest (SEI), submitted pursuant to the State Government Ethics Act, spurred legislation designating sole jurisdiction over the investigations of alleged ethics violations to the State Ethics Commission (Commission). Controversy over this issue arose after the Commission refused to provide the State Auditor with information regarding a request from Senator Nesbitt for a Commission advisory opinion on the accuracy of statements made in his SEI. At the conclusion of the Auditor's investigation, the State Auditor and the Commission reached conflicting determinations on what information should have been included in the SEI and the definition of potential conflict of interest. Debate ensued over the impact of political party influence on both entities, the need to clarify the role of the Commission, including the confidentiality of its documents, and the extent of the State Auditor's authority. This debate resulted in the following legislative directive, which was one of several making clarifying changes to ethics laws.

S.L. 2008-215 (S 1875) enacts a new statute, G.S. 147-64.6B, directing the State Auditor to provide a variety of avenues for receiving reports of alleged improper governmental activities, including a telephone hotline, e-mail, and Internet access. Previously, an abbreviated version of this requirement was stated in G.S. 147-64.6(c)(16). Under the new law the State Auditor must investigate reports of such improper activity within the scope of the authority set forth in G.S. 147-64.6, including misappropriation, mismanagement, or waste of state resources, fraud, violations of state or federal laws, and substantial and specific danger to public safety. However, G.S. 147-64.6B specifically requires the State Auditor to refer a matter to appropriate state agencies or governing entities when it is determined to be outside that scope of authority or involves allegations of improper activity in specific areas. Particularly, the State Auditor must refer allegations of violations of G.S. Chapter 138A (State Government Ethics Act), Article 14 (General Assembly) of G.S. Chapter 120, or G.S. Chapter 120C (Lobbying) to the Commission. Amendments to G.S. 147-64.6 also state that the State Auditor is bound by interpretations issued by the Commission regarding violations of those laws and requires the State Auditor to keep any interpretations, advisory opinions, or other information or materials furnished to or by the Commission related to an investigation confidential. New language added to G.S. 138A-12(b) authorizes the Commission, on its own motion, to conduct an inquiry into a report or referral made by the State Auditor.

Additionally, S.L. 2008-215 amends G.S. 138A-13 to allow the State Auditor to request that the Commission issue an advisory opinion regarding specific questions involving the meaning and application of the ethics laws and an affected person's compliance with those laws. The change requires that the Commission issue an advisory opinion to the State Auditor within sixty days of receiving all necessary information, unless the circumstances involve an advisory opinion requested by a legislator. In that instance the Commission must deliver a recommended advisory opinion to the Legislative Ethics Committee (Committee) within sixty days. The Committee must act upon the opinion within thirty days of its receipt, and the Commission will then deliver the final advisory opinion to the State Auditor. If the Committee fails to act within this time frame, then the Commission must deliver its recommended advisory opinion to the State Auditor.

Finally, the new law makes conforming changes to G.S. 138A-12(n), G.S. 138A-10 (concerning the binding nature of Commission's advisory opinions on all state agencies), and G.S. 126-85(c). The law applies to all information received or collected by the State Auditor concerning alleged violations of G.S. Chapter 138A, G.S. Chapter 120C, or Article 14 of G.S. Chapter 120 on or after January 1, 2007.

Ethics and Lobbying

In addition to the specific changes discussed below, S.L. 2008-213 (H 2542) makes numerous technical and clarifying changes to the State Government Ethics Act, the Legislative Ethics Act, and lobbying laws. The changes became effective August 15, 2008, unless indicated otherwise.

Confidentiality

G.S. 120-104, G.S. 138A-13, and G.S. 120C-102 are amended to clarify that documents submitted in connection with requests for advisory opinions are confidential, although the person or governmental unit requesting the opinion may authorize the release of the opinion and documents. G.S. 138A-13 and G.S. 120C-102 are also amended to require the Commission to publish edited opinions within thirty days of the issuance of the opinion and within thirty days of receiving opinions from the Committee. These provisions are retroactive, with a January 1, 2007, effective date.

G.S. 120C-600 is amended to provide that any information obtained by the Secretary of State as part of a systematic review of lobbying reports is confidential and may only be released by a court order. Additionally, G.S. 120C-600 and G.S. 120C-601 are amended to provide that records obtained by the Secretary or the Commission from other entities in the course of an investigation are confidential to the same extent that they would be confidential while in the possession of the entity providing the information.

Reporting Requirements

The reporting requirements in G.S. 120C-400 are amended to exclude from the lobbyists and lobbyist principals reporting requirements a reportable expenditure of cash, a cash equivalent, or a fixed asset that is made directly to a state agency that maintains an accounting of the expenditure. G.S. 120C-401 is amended to require a lobbyist or lobbyist principal to report the description and approximate number of designated individuals benefiting from a gift when the lobbyist or principal does not know the names of the individuals who will ultimately receive an indirect gift. G.S. 120C-403 is amended to allow a lobbyist principal to rely on a lobbyist's statement estimating the portion of the lobbyist's annual salary, fees, or retainer that are allocated for lobbying for the principal's reporting purposes.

Effective retroactively to January 1, 2007, G.S. 120C-800 is amended to exclude scholarships that are paid for by a nonpartisan state, regional, national, or international legislative organization of which the General Assembly or a legislator is a member of from items that must be reported.

Lobbying by Court Officials

Amendments to G.S. 120C-500 restrict lobbying by the judicial branch. The statute has been amended to require the chief justice of the Supreme Court to designate one to four liaison personnel to lobby for legislative action. The statute is also amended to clarify that state agencies and constitutional officers of the state may not hire contract lobbyists. A more thorough discussion of these changes can be found in Chapter 5, "Courts and Civil Procedures."

Allegations of Misconduct

G.S. 138A-12 is amended to require the Commission to immediately notify a covered person or legislative employee when the Commission (1) receives a written allegation that the individual has acted unethically, or (2) initiates an inquiry into unethical conduct by the individual.

Statements of Economic Interest

G.S. 138A-24 has required legislators to include in their annual SEI "any other economic or financial information that is necessary either to carry out the purposes of this Chapter or to fully disclose any conflict of interest or potential conflict of interest." This broad language resulted in inconsistent reporting. The provision has been amended to now require the reporting of "any other information that the filing person believes may assist the Commission in advising the filing person with regards to compliance with this Chapter." This change is effective retroactively to apply to SEIs filed on or after January 1, 2007.

G.S. 138A-24 is also amended to clarify that the Commission does not have to prepare a written evaluation of a SEI for a legislator or judicial officer. The statute is also amended to require the Commission to prepare a written evaluation of each SEI for nominees of the UNC Board of Governors and the State Board of Community Colleges within seven days of the submission of a completed statement.

Gift Ban

G.S. 138A-32 is amended to provide that invitations to qualifying public events that are not subject to the open meetings law or open to the general public must contain the date, time, and location of the event, be given at least twenty-four hours in advance, and state whether the event qualifies as a permitted public event.

Conflicts of Interest

G.S. 138A-36 is amended to prohibit a public servant from participating in an official action by his or her employing entity if the public servant knows that he or she, or a person with whom the he or she is associated, may incur a reasonably foreseeable financial benefit from the matter under consideration. G.S. 138A-37 is amended to make a similar change for legislators concerning legislative actions when the financial benefit from the matter under consideration would impair the legislator's independence of judgment.

G.S. 138A-38 is amended to allow a legislator that is employed or retained by a unit of government to take legislative action on behalf of the unit if the legislator is the only member of the house elected from the district where the unit of government is located. The legislator must make a written disclosure to the principal clerk of the nature of the relationship with the governmental unit prior to or at the time that the legislator took the action.

The statute is also amended to provide that a president, chief financial officer, chief administrative officer, or voting member of the board of trustees of a community college who serves on the community college's nonprofit corporation does not have a conflict of interest if the majority of the nonprofit's board of directors is not comprised of the president, chief financial officer, chief administrative officer, or voting member of the board of trustees of the community college for which the nonprofit was created to support.

Electronic Mail System

Section 6.14 of S.L. 2008-107 (H 2436) requires the State Chief Information Officer to develop a detailed plan providing for the transition of all state agencies, institutions, and departments, with the exception of the General Assembly, the Judicial Department, and the University of North Carolina, to a single statewide electronic mail system by January 1, 2010. The plan was to be presented to the Joint Legislative Oversight Committee on Information Technology by November 1, 2008.

State Tire Contract

S.L. 2008-201 (S 1797) requires the Division of Purchase and Contract in the Department of Administration to make the following changes to its request for proposal criteria for a statewide tire retread contract:

- require that the bids remain closed until a designated and advertised bid opening day in which the bids are opened, announced, and recorded in public;
- require that the cost of the tire retread include spot repairs and that there no longer be a separate charge for a spot repair;
- include in the contract that all casings receive a state of the art inspection with the use of industry standard testing methodology;
- include a threshold for the number of times a casing may be retread;
- include a threshold for the age of a casing that may be retread;
- include the number of nail hole repairs that are permissible for a casing to be retread;
- provide assurance that a particular fleet will receive its own casings back after retread completed;
- set minimum tread depths per category or application of the retread tire;
- consider a multiaward contract structure that includes several vendors; the Office of Purchase and Contract will take into account geographic location, proximity of vendor to customer, and the needs of the users when creating a multiaward contract; and
- provide for any method of tire retreading to be bid separately.

Public Duty Doctrine

S.L. 2008-170 (H 1113) enacts new G.S. 143-299.1A, limiting the use of the public duty doctrine by a state department, institution, or agency as a defense to instances where the injury is a result of (1) the negligent failure of a law enforcement officer to protect a claimant from the acts of another or from an act of God; or (2) the negligent failure of a state officer, employee, involuntary servant, or agent to perform a statutorily required safety or heath inspection. The public duty doctrine may not be

asserted when (1) a special relationship exists, (2) a special duty is owed by the state to the victim and is relied upon by the victim, or (3) where the failure to perform the health or safety inspection was the result of gross negligence. The act also states that the statute does not limit the assertion of the public duty doctrine by local governments. The changes became effective for claims arising on or after October 1, 2008. For more information on the public duty doctrine and the changes made in S.L. 2008-170, *see* Chapter 5, "Courts and Civil Procedures."

Studies

Section 22.1 of S.L. 2008-107 requires the Office of State Budget and Management (OSBM) to conduct a staffing analysis of the Ethics Commission and the Lobbyist Registration Section of the Secretary of State's Office to determine if staffing is appropriate for the workload. OSBM must report its findings to the House Appropriations Subcommittee on General Government, Senate Appropriations Subcommittee on General Government and Information Technology, and the Fiscal Research Division by March 1, 2009.

The Studies Act of 2008, S.L. 2008-181 (H 2431) includes the following two studies. First, the State Ethics Commission is required to study the implementation and effectiveness of the State Government Ethics Act and report to the Legislative Ethics Committee by March 1, 2009. Second, the Study Commission on Compensation of the Governor's Cabinet and State Elected Officials is established to study whether compensation is fair and appropriate and whether state officials are paid according to the duties of their office. The eighteen-member commission is required to make a final report to the General Assembly by January 15, 2009.

Leslie Arnold

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State Taxation

The General Assembly enacted $18.7 million of net tax reductions for fiscal year 2008–09 and $79.1 million of net tax reductions for fiscal year 2009–10. The most notable tax reductions are the repeal of the gift tax and the increase in the state refundable earned income tax credit. The tax reductions also include several new tax exemptions, refunds, and credits. Tax credits are one of many economic incentives offered by the state designed to attract and maintain businesses in North Carolina. Many of the state's economic tax incentives have sunset dates as a means to review and reevaluate those credits to determine whether they are accomplishing their intended goal. During the 2008 session, the General Assembly extended or modified the sunset on several of these credits. The General Assembly also enacted a procedure for tax class actions as well as an act that provides small businesses with certain protections related to their sales and use tax obligations.

Small Business Protection Act

During the 2008 session the Senate and House Finance Committees heard from a number of small business owners who expressed concern and confusion regarding the application of certain sales and use-tax provisions to their particular businesses and, in some instances, verbal information provided by the Department of Revenue (DOR) that they believed to be erroneous or unclear. Section 28.16 of S.L. 2008-107 (H 2436) addresses many of the expressed concerns. It provides small businesses with certain protections related to their sales and use-tax obligations, requires DOR to establish and implement procedures for improving customer service and quality control measures with regard to advice given to taxpayers in certain areas of the tax law, and directs the Revenue Laws Study Committee to study issues related to the interpretation and application of certain areas of the sales and use-tax law.

Also under this section, the Secretary of Revenue is required to reduce an assessment for sales and use taxes made against a small business as the result of an audit and waive any associated penalties if all of the following conditions are met:

- The annual gross receipts of the business and all related persons for the calendar year preceding the year in which the audit period begins do not exceed $1.8 million dollars.
- The business remitted all the sales and use taxes it collected during the audit period.
- The business had not been told by DOR in a prior audit to collect sales and use taxes in the circumstance that is the basis of the assessment.
- The business made a good faith effort to comply with the sales and use-tax laws, and the assessment is based on the incorrect application of one of the following complex areas of these laws:
  - the rate of tax that applies to prepared food;
  - the distinction between a retailer and a performance contractor
  - the distinction between a service that is necessary to complete the sale of tangible personal property, which is taxable, and a service that is incidental to the sale of tangible personal property, which is not taxable; or
  - the determination of whether a person is a manufacturer.

Table 26–1. Assessment Reduction

Average Monthly Gross Receipts	Reduction of Assessment (%)
0–50,000	98
50,001–100,000	95
100,001–150,000	90

The amount of the reduction is a percentage of the assessment and varies depending on the average monthly gross receipts of the business as detailed below in Table 26–1.

In addition to applying prospectively to future assessments and claims for the refund of an assessment, Section 28.16 of S.L. 2008-107 also has limited retroactive application. Specifically, it applies to assessments that are pending as of July 15, 2008, to assessments that have been identified in a notice of final assessment under former G.S. 105-241.1 prior to July 15, 2008, or to assessments that became collectible but have not been paid as of July 15, 2008. If, however, an assessment was paid within six months after it became collectible, then the taxpayer may also be eligible for a reduction if a timely claim for refund could be filed.

This section attempts to address either the actual or perceived issues of quality control within DOR with respect to verbal advice given to taxpayers. Specifically, this section requires DOR to document certain conversations with taxpayers, regardless of whether the conversation is conducted by phone or in person. Effective January 1, 2009, DOR must document advice given to a taxpayer when the taxpayer provides identifying information, asks about the application of a tax to the taxpayer in specific circumstances, and requests that the Secretary of Revenue document the advice in the taxpayer's records. The documentation must set out the date of the conversation, the question asked, and the advice given. This requirement does not apply in a conference or presentation type setting. Effective July 1, 2009, DOR must document in a similar manner a conversation with a taxpayer who is not registered as a retailer or a wholesale merchant under Article 5 (Sales and Use Tax) of G.S. Chapter 105 when the taxpayer identifies himself or herself, describes the business in which he or she is engaged, and asks if he or she is required to be registered under Article 5.

Under current law a taxpayer may request in writing specific advice from DOR. If DOR furnishes erroneous written advice in response and the taxpayer reasonably relies on that advice, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice. However, the same protection does not apply with regard to verbal advice. This same protection, which became effective July, 16, 2008, is extended to taxpayers with regard to erroneous verbal advice provided that DOR records establish that the erroneous advice was given.

This section rewrites the offer and compromise statute so that it more accurately reflects current practice, is adjusted for inflation, and eliminates the requirement that DOR obtain approval from the Attorney General unless the matter is in litigation. It also adds a new condition under which DOR may settle a tax liability for less than that asserted to be due; that is, when the collection of an amount greater than the amount offered would produce an unjust result under the circumstances. The rewrite of this statute is intended, in part, to provide DOR with additional flexibility with regard to offers and compromise.

This section requires DOR to do two things. First, DOR must establish and implement by July 1, 2010, a plan to record telephone calls received at the Taxpayer Assistance Center for training, customer service, and quality control purposes. Second, DOR must report to the Revenue Laws Study Committee, prior to the convening of the 2009 General Assembly, on customer service improvement initiatives.

Sales Tax Changes

Exemption of Disaster Assistance Debit Sales

Section 28.6 of S.L. 2008-107 (H 2436) exempts from sales tax tangible personal property purchased with a client assistance debit card issued for disaster assistance relief by a state agency or a federal agency or instrumentality. The American Red Cross (ARC) is an instrumentality of a federal agency. Another example of a federal agency or instrumentality that may utilize this exemption would be the Federal Emergency Management Agency (FEMA). This section became effective for purchases made on or after August 1, 2008.

A state may not impose its sales tax on purchases made by the federal government or an instrumentality of the federal government. G.S. 105-164.13(17) specifically exempts from North Carolina sales tax "sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State." Sales made pursuant to a disbursing order issued by a federal governmental agency or instrumentality is considered a sale to the government that is exempt from taxation. However, for purposes of the sales tax exemption, there is a significant difference between a debit card and a disbursing order: the purchaser, for purposes of the sales tax exemption, is the disaster victim when a debit card is used, and it is the disbursing entity when the disbursing order is used. Section 28.6 of S.L. 2008-107 extends the same sales tax treatment that exists for purchases made through a disbursing order issued by a federal agency or instrumentality to purchases made with a client assistance debit card issued by it.

Sales Tax Holiday for Certain Energy Star Rated Appliances

Section 28.12 of S.L. 2008-107 creates a state and local sales and use-tax exemption, applicable during the first weekend in November, for the following Energy Star rated products: clothes washers, freezers and refrigerators, central air conditioners and room air conditioners, air source heat pumps and geothermal heat pumps, ceiling fans, dehumidifiers, and programmable thermostats. An Energy Star rated product is one that meets the energy efficient guidelines set by the United States Environmental Protection Agency and the United States Department of Energy and is authorized to carry the Energy Star label. The exemption does not apply to the sale of a product for use in a trade or business or to the rental of a product. This section became effective when the governor signed the act into law on July 16, 2008.

State Sales Tax Exemption for Baked Goods Sold by Artisan Bakeries

For several years North Carolina has grappled with the issue of the taxation of bakery items. The term *bakery item* is a subset of the defined term *prepared food*. North Carolina imposes a higher sales tax rate on prepared food than food. The distinction between food and prepared food often becomes complex. The Senate Finance Committee heard testimony from many small bakeries across the state that they received conflicting information about the applicable tax rate they should impose on their bakery items. The conflicting information resulted in many bakeries being assessed additional tax, along with interest and penalties, because they taxed their bakery items at the incorrect, lower rate. The bakeries also argued that the differential tax rates imposed an unfair economic burden on their goods.

Section 28.19 of S.L. 2008-107 reduces the sales tax applicable to bakery items sold without eating utensils by an artisan bakery by exempting those items from the general state sales tax rate. Bakery items include bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas. Effective January 1, 2009, bakery items sold without eating utensils by an artisan bakery will be taxed at the applicable local sales tax rate, as opposed to the combined general rate applicable to prepared foods. An artisan bakery is one that meets both of the following requirements:

- It derives over 80 percent of its gross receipts from bakery items.
- Its annual gross receipts, combined with the gross receipts of all related persons, do not exceed $1.8 million.

Prohibition of Tax on Interior Design Services

For sales and use-tax purposes the definition of *sales price* is the total amount or consideration for which tangible personal property is sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services necessary to complete the sale. Over the past several months, DOR audited some interior designers and decorators and assessed sales tax on services it found necessary to complete the sale of the tangible personal property sold by the designers or decorators. Many of the interior designers and decorators appealed the assessment of the tax and brought the issue to the attention of legislators.

Section 28.20 of S.L. 2008-107 specifically exempts interior design services provided in conjunction with the sale of tangible personal property from the sales and use tax. This section became effective August 1, 2008. It does not affect the assessments imposed under the prior law. It also does not address other transactions in which the tangible personal property transferred is largely the result of personal services. The legislation directs the Revenue Laws Study Committee to examine the taxation of services necessary to complete the sale of tangible personal property and the standards for distinguishing between a service that is taxable as one that is necessary to complete the sale and a service that is incidental to the sale of tangible personal property.

Cap on Excise Tax for Machinery Refurbishers

Section 28.21 of S.L. 2008-107 expands Article 5F (Manufacturing Fuel and Certain Machinery and Equipment) of G.S. Chapter 105 to provide that the 1 percent privilege tax, with a cap of $80, applies to an industrial machinery refurbishing company that purchases equipment, or an attachment or repair part for equipment, used by the company in repairing or refurbishing tangible personal property owned by a third party. Property subject to the excise tax under Article 5F is exempt from sales and use tax. The change from a sales tax to a privilege tax not only means a lower tax rate for the property purchased but also means that retailers are not responsible for collecting and remitting the tax. The change became effective for purchases made on or after July 1, 2008.

Clarification of the 501(c)(3) Sales Tax Refund

G.S. 105-164.14 provided a semiannual state and local sales and use-tax refund to a nonprofit, charitable institution. DOR had to determine whether a nonprofit entity requesting a sales and use-tax refund qualified as a "charitable institution." To make its determination, DOR relied on past determinations and court decisions. In May 2008 the North Carolina Court of Appeals appeared to expand the definition of charitable institution in

The Lynnwood Foundation v. N.C. Department of Revenue, when it affirmed a trial court's ruling that DOR erred in denying a sales and use-tax refund to the foundation.

Section 28.22 of S.L. 2008-107 seeks to clarify the law, not expand it, by providing a bright line test for determining whether a nonprofit entity is a charitable one. The section, which became effective July 1, 2008, provides that a nonprofit entity may receive a sales tax refund if it is exempt from income tax under section 501(c)(3) of the Internal Revenue Code (IRC) but not designated as one of the following organizations under the National Taxonomy of Exempt Entities (NTEE):

- Community improvement, capacity building organization
- Public, society benefit, multipurpose organization
- Mutual/membership benefits organization

The NTEE is a classification system categorizing charitable organizations with 501(c)(3) status by organizational mission into twenty-six subgroups based on Internal Revenue Service (IRS) activity codes. The activity codes provide detail on the operational activities of an organization that has been granted 501(c)(3) status. The IRS assigns an activity code to a charitable organization based on information provided by the organization at the time of application for 501(c)(3) status.

Sales Tax Refund for Certain Nonprofits

Direct purchases by a state agency, which by definition includes The University of North Carolina (UNC), may be exempt from state and local sales and use tax. A state agency may also receive a quarterly refund of local sales and use taxes paid by it indirectly on building materials, supplies, fixtures, and equipment that become part of a facility owned or leased by the agency. S.L. 2008-154 (H 2509) provides similar sales and use tax treatment to a nonprofit entity that procures, designs, constructs, or provides facilities to a constituent institution of UNC by expanding the list of nonprofit organizations allowed a semiannual refund of sales and use-tax to include this type of nonprofit organization. The act specifically allows the refund to an entity exempt from taxation as a disregarded entity of such a nonprofit organization. This act is applicable to purchases made on or after January 1, 2004. A refund claim for the period January 1, 2004, through December 31, 2007, was considered timely filed if it was submitted to DOR by October 15, 2008.

The act provides a refund to a type of nonprofit entity that was denied a sales tax refund from DOR in 2004 on the grounds that the nonprofit organization did not qualify as one of the statutorily eligible entities. One such entity, Affinity Housing LLC, filed a lawsuit against DOR challenging the department's denial of its refund claim. Affinity Housing LLC is a single-member LLC of Western Carolina University Research and Development Corporation, a Section 501(c)(3) nonprofit entity formed to aid and promote the educational and charitable purposes of WCU. Affinity Housing LLC constructs housing facilities for WCU. The act makes the application of the change retroactive to January 1, 2004, and applicable to purchases made on or after that date. This time period will allow Affinity Housing LLC to receive the refund it originally sought.

Constituent institutions of UNC have begun to use nonprofit organizations to procure, design, and construct facilities, such as student housing and dining facilities, on their behalf. An institution leases property to a nonprofit organization, and the nonprofit organization constructs the facility on the property. The institution leases the facility from the nonprofit and usually operates and manages the facility. The lease payments made by the institution, recouped through rents charged to students, enable the nonprofit to pay the indebtedness on the facility. At the conclusion of the lease and the retirement of the debt, the ownership of the facility lies with the institution. The General Assembly recognized the trend in 2004, when it expanded the property tax exemption for educational property by exempting property held by a nonprofit entity for the sole benefit of a university located in the state and by expanding the definition of educational purposes to include the operation of a student housing facility or a student dining facility.

UNC's outsourcing of its capital construction responsibilities continues to evolve. The institutions have found that privatized facility projects cost less to construct and are completed sooner than traditional facility projects, primarily because the projects are not subject to the state's bidding laws and construction process. At its inception some of the financing was private financing. Increasingly, the financing is secured through self-liquidating revenue bonds. Today most of these projects are included in the bond projects submitted to the General Assembly for its approval by UNC. The Office of the State Treasurer exercises oversight of the lease agreements between the institutions and the nonprofit entities.

Personal Taxes

Gift Tax Repeal

Section 28.18 of S.L. 2008-107 repeals North Carolina's gift tax law, effective January 1, 2009. The nuances of North Carolina's gift tax laws make the transfer of property through gifts difficult and complicate estate planning. The North Carolina Association of Certified Public Accountants and the Estate and Gift Tax Section of the North Carolina Bar Association have consistently recommended that North Carolina eliminate or simplify its gift tax law. With the repeal of the gift tax in North Carolina, Connecticut and Tennessee remain the only two states in the nation to impose a tax on gifts.

Estate Tax Changes

Section 28.17 of S.L. 2008-107 modifies the formula for calculating North Carolina estate tax on estates that include property located in another state by excluding the value of that property from the estate tax payable to North Carolina. The section became effective July 16, 2008, and applies retroactively to the estates of decedents for which the statute of limitations for claiming a refund had not expired on December 27, 2007. A case has been filed in Mecklenburg County, *Stowe v. Department of Revenue*, to recover North Carolina estate taxes imposed on property located in South Carolina. The plaintiffs argue in their complaint that the formula for calculating North Carolina estate tax due when property is located in more than one state is unconstitutional because it provides less than a full reduction of the tax attributable to the out of state property when the other state does not impose an estate tax, or imposes an estate tax less than the prorated federal credit amount. The plaintiffs filed the complaint on December 27, 2007.

A personal representative of an estate for which the statute of limitations had not expired may file a claim for refund under G.S. 105-241.6. The statute provides that the general statute of limitations for obtaining a refund of an overpayment of tax is the later of the following:

- three years after the due date of the return, or
- two years after payment of the tax.

A North Carolina estate tax return is due on the date a federal estate tax return is due. A federal estate tax return is due nine months from the date of death. An extension of time to file a federal estate tax return is an automatic extension of the time to file a state tax return.

Increase in Earned Income Tax Credit

Section 28.9 of S.L. 2008-107 increases the amount of the state's refundable earned income tax credit from 3.5 percent of an individual's federal earned income tax credit amount to 5 percent, effective for taxable years beginning on or after January 1, 2009. The General Assembly enacted a refundable state earned income tax credit in 2007, effective for taxable years beginning on or after January 1, 2008. The amount of the federal credit varies depending upon whether the taxpayer has children and the amount of earned income the taxpayer has. The credit is phased out as the taxpayer's earned income rises. The earned income amounts and the credit amounts are indexed annually to inflation.

Tax Deduction for the Sale of a Manufactured Home Community to Manufactured Homeowners

North Carolina's calculation of state taxable income begins with federal taxable income. Section 28.27 of S.L. 2008-107 allows a taxpayer to deduct from federal taxable income, and thus from state income tax, the taxable gain from a qualified sale of a manufactured home community. A *qualified sale* is a sale of land comprising a manufactured home community that is transferred in a single purchase to a group composed of a majority of the manufactured home community leaseholders, or to a nonprofit organization representing such a group. To qualify for this deduction, the taxpayer must give notice of the sale to the North Carolina Housing Finance Agency (NCHFA). The deduction is applicable to taxable years beginning on or after January 1, 2008, and it expires for taxable years beginning on or after January 1, 2015.

Expansion of the Renewable Energy Tax Credit

North Carolina provides a tax credit for investing in renewable energy property. The credit amount is equal to 35 percent of the cost of the property placed in service. Renewable energy property includes biomass equipment that uses renewable biomass resources for biofuel production of ethanol, methanol, and biodiesel; commercial thermal or electrical generation from renewable energy crops or wood waste materials; hydroelectric generators; solar energy equipment; and wind equipment. The credit may be taken against either the franchise tax or the income tax of the taxpayer, and it may not exceed 50 percent of the tax against which it is claimed. The credit expires for renewable energy property placed into service on or after January 1, 2011.

Last session, S.L. 2007-397 expanded the concept of this tax credit to include a charitable contribution to a tax exempt nonprofit organization for the purpose of providing funds for the organization to invest in renewable energy property. The amount of credit allowable to the donating taxpayer is equal to the following calculation:

> (taxpayer's donation ÷ cost of the renewable energy property of governmental entity placed in service that year as a result of the donation) × the amount of the credit the governmental entity could claim if it were subject to tax.

Section 28.25 of S.L. 2008-107 extends the tax credit enacted last session to include similar donations made to a unit of state or local government, effective for taxable years beginning on or after January 1, 2008. The credit must be taken in the year in which the property is placed in service. A taxpayer who claims this credit may not also claim the donation as a charitable contribution. Moreover, the total amount of the

credit may not exceed the amount of the credit the governmental entity could claim under G.S. 105-129.16A if it were subject to tax, which for nonresidential property, is capped at $2.5 million.

A governmental entity must keep a record of all donations it receives for renewable energy property and the amount of the donations used for this purpose. If the entity places renewable energy property in service, it must give each taxpayer who made a donation a statement setting out the amount of the credit the taxpayer qualifies for, a description of the renewable energy property placed in service, the cost of the property, the amount of the credit the entity could claim under G.S. 105-129.16A if it were subject to tax, and the taxpayer's share of the credit allowed. If the donations made for the renewable energy property exceed the cost of the property, the entity must prorate each taxpayer's share of the credit.

Corporate Tax Changes

IRC Update

Section 28.1 of S.L. 2008-107 updates from January 1, 2007, to May 1, 2008, the reference to the IRC used in defining and determining certain state tax provisions. With one major exception, changing the reference date to May 1, 2008, incorporates into state tax law the changes made by the following acts: the Economic Stimulus Act of 2008, the Mortgage Forgiveness Debt Relief Act of 2007, and the Small Business and Work Opportunity Tax Act of 2007. This section became effective for taxable years beginning on or after January 1, 2008.

The one major exception concerns the application of the bonus depreciation provision. Unlike federal law, Section 28.1 of S.L. 2008-107 requires an 85 percent add back of the bonus depreciation allowed under the Economic Stimulus Act of 2008 in order to achieve revenue neutrality for fiscal year 2008–09. Over the life of an asset placed in service during 2008, taxpayers will be able to deduct the same amount of the asset's basis under both federal and state law; the timing of the deduction will differ, however. To accomplish this decoupling, the section does two things:

- It requires a taxpayer to add back to federal taxable income 85 percent of the accelerated depreciation amount in the year the accelerated depreciation is claimed for federal purposes.
- In tax years beginning on or after January 1, 2009, it allows a taxpayer to deduct from federal taxable income the total amount of the add back required for either the 2007 or 2008 tax year, divided into five equal installments.

The decoupling, for state tax purposes, means a taxpayer may deduct a greater depreciation amount in the outlying tax years, which will be the normal depreciation amount plus 20 percent of the accelerated depreciation amount the taxpayer had to add back. The purpose of this recovery provision is to enable the taxpayer to have the same basis in assets for federal and state purposes. Without this deduction provision, a taxpayer would have a different basis in the depreciable asset for state and federal purposes and would have to keep separate books and records for state and federal purposes until the disposal of the asset. In effect, the add back and the subsequent deduction will affect the timing of the impact of bonus depreciation on the state but it will not increase or decrease the total amount of revenue the state receives over the affected years.

Closing of Franchise Tax Loopholes

Section 28.7 of S.L. 2008-107 changes the franchise tax laws, effective for taxable years beginning on or after January 1, 2009, to conform with changes the General Assembly made to the corporate income tax laws in 2006 and 2007.

First, the act provides that limited liability companies (LLCs) that elect to be taxed as S corporations for income tax purposes are subject to the franchise tax in the same manner as other S corporations. Prior to 2006 a LLC did not pay franchise tax. In 2006 the General Assembly amended the definition of *corporation*, as it applies to the franchise tax statutes, to include a LLC that elects to be taxed as a C corporation for federal income tax purposes. DOR began to receive questions from S corporations as to whether they could convert to a LLC and elect to be treated as an S corporation for income tax purposes, thereby becoming exempt from franchise tax. To curb this potential franchise tax loophole, Section 28.7 of S.L. 2008-107 makes a similar change to the one enacted in 2006; it provides that a LLC that elects to be treated as a corporation for income tax purposes, either a C corporation or an S corporation, is also considered a corporation for franchise tax purposes.

Second, the act provides that captive real estate investment trusts (REITs) are subject to the franchise tax since they are treated as corporations for income tax purposes. In 2007 the General Assembly limited a corporation's ability to use captive REITs to avoid state taxes by disallowing the dividend paid deduction when a REIT is a captive REIT. The effect of this change is that a captive REIT is treated as a regular corporation for income tax purposes. Section 28.7 of S.L. 2008-107 provides that a captive REIT will also be treated as a regular corporation for franchise tax purposes. Under the current franchise tax law a REIT may, in determining its value for franchise tax purposes, deduct the aggregate market value of its investments in the stocks, bonds, debentures, or other securities or evidences of debt of other corporations, partnerships, individuals, municipalities, governmental agencies, or governments. This section changes the statute to provide that this deduction may only be

used by a REIT that is not a captive REIT. A REIT is an organization that uses the pooled capital of many investors to purchase and manage real estate. A captive REIT is one that is owned or controlled by a single entity.

Publicly Traded Partnerships

A partnership doing business in North Carolina must file an information return with DOR that gives the name and address of each person who would be entitled to share in the partnership's net income, if distributable, and the amount each person's distributive share would be. A partnership that files a report must also furnish to each partner the information needed by that partner to file a North Carolina income tax return. For nonresident members of a partnership, the partnership must pay income tax for that partner based on the partner's distributive share.

Section 28.8 of S.L. 2008-107 changes the reporting and payment requirements that apply to a publicly traded partnership (PTP) that is described in section 7704(c) of the IRC. It requires a qualifying PTP to report annually to the department the partners in the PTP who received more than $500 of income rather than report the income received by every partner. It also exempts qualifying PTPs from the requirement to pay tax on the partnership income received by a nonresident. The Revenue Laws Study Committee recommended this tax law change. In making this recommendation, the committee sought to strike a balance between the costs and burden of compliance with the reporting requirements for both the PTPs and DOR and the benefits gained by compliance. This section is effective for taxable years beginning on or after January 1, 2008.

A PTP is a limited partnership the interests in which are traded on stock exchanges such as the New York, American, and NASDAQ exchanges. Unlike a traditional partnership, a PTP has tens of thousands, and sometimes hundreds of thousands, of unitholders. A PTP's unitholders can change daily in trades on public exchanges. A PTP determines who its unitholders are once a year so the PTP can send K 1s to the unitholders. A PTP described in section 7704(c) of the IRC is one that generates 90 percent of its income from qualified sources. Qualified sources include real estate activities; mineral or natural resources activities like exploration, production, mining, refining, marketing; and transportation of oil, gas, minerals, geothermal energy, and timber. There are approximately ninety PTPs in the country that meet the description in section 7704(c) of the IRC, and ten of these PTPS are located in North Carolina.

Economic Incentives

Extension of the Research and Development Credit

Section 28.2 of S.L. 2008-107 extends the sunset on the income tax credit for research and development for five years, until the year 2014. Prior to the enactment of this section, the credit was scheduled to expire for taxable years beginning on or after January 1, 2009. The credit amount varies. For North Carolina university research expenses, the credit amount is equal to 20 percent of the amount a taxpayer paid to the university for the research and development. For all other qualified research expenses, the credit is equal to a percentage of the expenses. Specifically, the rate is 3.25 percent for small businesses and for research and development conducted in a development tier one area. For other research and development expenditures, the rate ranges from 1.25 percent to 3.25 percent as the amount of those expenditures increases.

Extension of the Low Income Housing Credit

Section 28.3 of S.L. 2008-107 extends the sunset on the low income housing tax credit from January 1, 2010, until January 1, 2015. Although the sunset was not scheduled to expire for two more years, developers of low income housing begin their work months in advance and need to know what financing will be available as they secure options on sites.

In 1999 North Carolina authorized a state income tax credit modeled after the federal housing credit. A taxpayer may elect to receive the credit in the form of either a credit against tax liability or a loan generated by transferring the credit to the NCHFA in return for a 0-percent interest thirty-year balloon loan equal to the credit amount. Historically, project developers have almost always elected the loan option. Neither a tax refund generated by the credit, nor a loan received as a result of the transfer of the credit is considered taxable income by the state. Although a state tax refund is considered taxable income by the IRS if the taxpayer itemizes deductions, a private letter ruling from the IRS provides that the loan proceeds are not.

Extension of the Mill Rehabilitation Tax Credit

North Carolina allows a tax credit for rehabilitating vacant historic manufacturing sites if the taxpayer spends at least $3 million to rehabilitate the site and meets other qualifying conditions. The credit expires for qualified rehabilitation expenses occurring on or after January 1, 2011. Section 28.4 of S.L. 2008-107 extends the sunset to include projects for which an application for an eligibility certification is submitted on or after January 1, 2011.

The amount of the tax credit for rehabilitating a vacant historic manufacturing site is a percentage of the qualified rehabilitation expenditures, and the percentage varies depending on the enterprise tier location of the site and the eligibility for the federal credit. The credit may be claimed against the franchise tax, the income tax, or the gross premiums tax. Any unused portion of the credit may be carried forward for the succeeding nine years. This credit may be taken in place of the credit for historic rehabilitation, not in addition to it.

Extension of the State Ports Tax Credit

Section 28.5 of S.L. 2008-107 extends the sunset on the income tax credit for using the state's ports for five years, until the year 2014. Prior to the enactment of this section, the credit was scheduled to expire for taxable years beginning on or after January 1, 2009. In 1992 the General Assembly enacted the state ports tax credit to encourage exporters to use the two state owned port terminals in Wilmington and Morehead City. At that time the credit applied to amounts paid by a taxpayer on any cargo exported at either port. Over the years the credit has been expanded, and the sunset has been extended four times.

Extension of the Small Business Employee Health Benefits Credit

Section 28.9 of S.L. 2008-107 extends from January 1, 2009, to January 1, 2010, the sunset on the income tax credit available to a small business that pays at least 50 percent of the health insurance premiums for its employees. The credit amount is equal to $250 per employee for whom a taxpayer pays the health insurance premium, not to exceed the taxpayer's cost of providing the health insurance benefit. The taxpayer may use the credit against either its income tax or its franchise tax liability. The credit may not exceed 50 percent of the taxpayer's tax liability. Any unused portions of the credit may be carried forward for five years.

Extension of Aviation Fuel Refunds

Section 28.23 of S.L. 2008-107 extends the sunset for refunds of the state sales and use tax paid on fuel used by interstate passenger air carriers and on aviation fuel used by a professional motorsports racing team or a motorsports sanctioning body from January 1, 2009, to January 1, 2011. To receive a refund a taxpayer must submit a refund request in writing and include any information and documentation required by the Secretary of Revenue. The request is due within six months after the end of the calendar year for which the refund is claimed.

In 2005 the General Assembly provided a sales and use-tax refund to an interstate passenger air carrier for the net amount of sales and use tax paid by it on fuel during a calendar year in excess of $2.5 million. The *net amount of sales and use taxes paid* is the amount of sales tax paid by the interstate passenger air carrier less the refund of that tax allowed to all interstate carriers under subsection (a) of G.S. 105-164.14. The refund for which the sunset provision is being extended is in addition to the refund allowed under G.S. 105-164.14(a).

In that same year the General Assembly enacted a refund of sales and use taxes paid on aviation fuel by a motorsports racing team or motorsports sanctioning body. In order to qualify for the refund, the fuel must have been used to travel to or from a motorsports event in North Carolina, from North Carolina to a motorsports event in another state, or to North Carolina from a motorsports event in another state. For the purposes of the refund, a *motorsports event* includes a motorsports race, a motorsports sponsor event, and motorsports testing.

Expansion and Extension of the Film Industry Credit

Section 28.24 of S.L. 2008-107 (H 2436) extends for four years, until January 1, 2014, the sunset on the tax credit for investing in the film industry. This credit is a refundable income tax credit equal to 15 percent of the qualifying expenses spent by a production company in connection with a production. The amount of the credit with respect to a feature film production is capped at $7.5 million. In order to obtain the credit, a taxpayer must have qualifying expenses in excess of $250,000. Qualifying expenses are the total amount spent in North Carolina for the following:

- goods and services purchased by a production company in connection with a production
- compensation and wages paid by a production company on which it remitted withholding payments to the Department of Revenue.

Under prior law any amount paid to an individual who receives in excess of $1 million with respect to a single production may not be included in a qualifying expense. Section 28.24 of S.L. 2008-107 modifies the limitation by allowing a production company to include in its qualifying expenses up to $1 million in compensation paid to a highly compensated individual. Any amount paid in excess of $1 million continues to be disallowed.

In addition to extending the sunset and modifying the limitation on highly paid individuals, this section makes the following three changes to the credit:

- It allows a production company to include in its qualifying expenses the cost of insurance coverage for production related insurance that is obtained on the production. The expenses do not qualify if the insurance coverage is purchased from a related member, which is defined in the current law.

- It requires a taxpayer who claims the credit to file an intent to film notice with the North Carolina Film Office. The notice must include the name of the production, the name of the production company, the name of a financial contact for the production company, the proposed dates on which the production company plans to begin filing the production, and any other information required by the NC Film Office. This provision codifies current administrative practice.
- It requires a taxpayer to acknowledge in the production credits both the NC Film Office and the regional film office responsible for the geographic area in which the filming of the production occurred.

Increase in the Qualified Business Venture Tax Credit Cap

Section 28.26 of S.L. 2008-107 increases from $7 million to $7.5 million the total amount of all qualified business investment credits that may be taken each year. Demand for the credit exceeded $7 million in 2006 and totaled more than $6.5 million in 2007. This section is effective for investments made on or after January 1, 2008.

The qualified business investment tax credit is allowed for an individual taxpayer who purchases the equity securities or subordinated debt of a qualified business venture, a qualified grantee business, or a qualified licensee business directly from that business. The credit is equal to 25 percent of the amount invested and may not exceed $50,000 per individual in a single taxable year. An individual investor may also claim the allocable share of credits obtained by pass through entities of which the investor is an owner. Pass through entities include limited partnerships, general partnerships, S corporations, and limited liability companies. The credit may not be taken in the year the investment is made. Instead, the credit is taken in the year following the calendar year in which the investment was made, but only if the taxpayer files an application with the Secretary of Revenue. Any unused credit may be carried forward for the next five years. The Secretary of Revenue calculates the total amount of tax credits claimed from applications filed. If the amount exceeds the cap, then the Secretary of Revenue allows a portion of the tax credits claimed by allocating the total amount of credits allowed in proportion to the size of the credit claimed by each taxpayer. In general a taxpayer forfeits the credit if the taxpayer transfers the securities within one year or the qualified business redeems the securities purchased by the taxpayer within five years after the investment was made. This credit is currently set to expire for investments made on or after January 1, 2011.

Solar Electricity Generating Materials Manufacturing Credit

Section 3.10 of S.L. 2008-118 (H 2438) adds "solar electricity generating materials manufacturing" to the list of industries entitled to an annual refund of the sales and use tax paid by the owner of the industry on building materials and supplies, fixtures, and equipment used to construct a facility that will be used primarily to manufacture solar electricity generating materials. Solar electricity generating materials manufacturing is defined as the development and production of one or more of the following:

- photovoltaic (PV) materials or modules used in producing electricity
- polymers or polymer film primarily intended for incorporation into photovoltaic materials or modules used in producing electricity

To be eligible for this refund, the Secretary of Commerce must certify that the owner of the facility will invest at least $50 million of private funds in the construction of the facility if the facility is located in a development tier one area and at least $100 million if the facility is located elsewhere in the state. In addition to the investment requirement, a solar electricity generating materials manufacturing business must also meet a wage standard in order to qualify for the sales tax refund. A business meets the wage standard if it pays the lesser of an average weekly wage that is equal to or greater than 105 percent of the average weekly wage for the state or the average weekly wage for the county.

If the owner does not make the required minimum investment within five years after the first refund is received, the owner forfeits all refunds already received. Upon forfeiture the owner is liable for not only the tax due, but also for interest computed from the date each refund was received. A person that fails to pay the tax and interest due within thirty days after the date of forfeiture is subject to the penalties provided in G.S. 105-236. A request for a refund must be in writing and must be submitted within six months after the end of the state's fiscal year. A refund applied for after the due date is barred. The refund provision became effective July 1, 2008, and applies to purchases made on or after that date; it expires for purchases made on or after January 1, 2013.

PVs are solar cells made and composed of semiconductor materials that are used to convert sunlight directly into electricity. DuPont is a materials and technology supplier to the PV industry. It offers products needed for PV module production, such as polymer films, resins, sheets, and conductive pastes. DuPont has one facility in Bladen County and another in Kentucky that produce polymers needed to manufacture polymer film. The company is looking to expand this industry. United

Solar Ovonic is a company headquartered in Michigan that specializes in thin film solar technologies and the manufacture of thin film solar electric modules and laminates. It, too, is looking to expand its operations.

Land Sales in Multijurisdictional Industrial Parks and Increase in the JDIG Cap

Any two or more counties may enter into contracts or agreements to jointly undertake the development of an industrial or commercial park or site. The lowest development tier incentive status is granted to the entire multijurisdictional industrial park (MIP), regardless of the tier designation of each individual county, if certain criteria are met. One of the criteria is that there be 250 developable acres in each county where the park is located. As a county sells property in the MIP to businesses to carry out the purposes of the MIP, it may not be able to meet the prerequisite number of acres it must own in the MIP. S.L. 2008-147 (S 2075) clarifies that the sale of parcels of land from a MIP for industrial or commercial purposes does not change the original tier status of the MIP or availability of the incentives to successive purchasers based on its original tier status.

The act also temporarily raises the maximum amount of total annual liability for grants for agreements entered into in calendar year 2008 under the Job Development Investment Grant Program from $15 million to $25 million.

Other State Tax Law Changes

Procedure for Tax Class Actions

Section 28.28 of S.L. 2008-107 establishes a procedure for taxpayers seeking to initiate or join a class action in order to obtain a refund of tax paid due to an alleged unconstitutional statute. This section became effective for civil actions filed on or after October 1, 2008.

The Revenue Laws Study Committee spent a significant amount of time examining this issue. Prompted by requests from both the North Carolina Bar Association and the North Carolina Association of Certified Public Accountants, the committee first examined the issue in 2002. The committee revisited the issue in 2006 as part of its broader, in-depth study of the procedures related to the review of disputed tax matters. Most recently, in its report to the 2008 Regular Session General Assembly, the committee determined that the existing law needed to be clarified because of ambiguity surrounding recent judicial interpretations of the "protest statute," G.S. 105-267, which was the prior mechanism for bringing a civil suit for a refund of tax. The purpose of this legislation is to identify and protect the potential liability of the state for tax refunds and to give taxpayers, DOR, and practitioners clear guidance as to the proper procedure governing tax-related class actions.

Authority. Neither the law prior to 2007, nor the law in place prior to the effective date of this act expressly allows for a class action for the refund of a tax. However, the North Carolina courts have allowed civil actions brought under the former protest statute to be certified as class actions. A new statute, G.S. 105-241.17, governs the conditions under which a civil action may be initiated by a taxpayer for the refund of a tax based on the alleged unconstitutionality of a statute. However, the statute is silent with regard to class actions. This section provides specific statutory authority for tax class actions, which may be brought only on the grounds of an alleged unconstitutional statute.

Bringing a tax class action. A taxpayer who wishes to commence a class action challenging the constitutionality of a tax statute and who seeks to represent the class must meet certain requirements. First, the taxpayer must meet the same requirements that any other taxpayer is required to meet in order to bring a civil action. Those requirements are as follows:

- The taxpayer must receive a final determination from DOR after a review and conference.
- The taxpayer must commence a contested case at the Office of Administrative Hearings (OAH).
- OAH subsequently dismissed the case for lack of jurisdiction because the sole issue in the case is the facial constitutionality of a statute.
- The taxpayer has paid the tax, penalties, and interest due in the final determination.
- The civil action is filed within two years of the dismissal from OAH.

Second, the taxpayer must also comply with any requirements under Rule 23 of the North Carolina Rules of Civil Procedure. North Carolina courts have required compliance with Rule 23 in prior tax class actions, so the requirement is not new, but this section sets out the requirement explicitly in statute.

Finally, this section adds a new requirement for bringing a tax class action. The taxpayer's claims must be typical of the claims of the class members in order for the taxpayer to serve as the class representative. This language mirrors language in Rule 23 of the Federal Rules of Civil Procedure. Whether a claim is "typical" is an issue for the court to determine when approving the class representative.

Joining a tax class action. In order to become a member of a tax class action, a taxpayer must be eligible and must affirmatively elect to participate as a member of the class. A taxpayer is eligible to become a member of the class if the taxpayer could have filed a claim for refund as of the date the class action was commenced or as of a subsequent date set

by the court, whether or not the person actually filed a claim. For purposes of determining this eligibility, a class action "commences" upon the later of the date a complaint is filed alleging the existence of a class or the date a complaint is amended to allege the existence of a class. An eligible taxpayer becomes a member of a class by affirmatively indicating a desire to be included in the class in response to a notice of the class action. A taxpayer who joins a class is not required to exhaust the administrative review process; only the class representative must do so.

Procedure. The procedure for notifying potential class members, the content of the notice, and the method by which potential class members indicate a desire to be included in the class in response to the notice must be approved by the court. This procedure may include ordering DOR to provide the class representative with a list of names and last known addresses of all taxpayers who are readily determinable by the department and are eligible to become a member of the class. The class representative must advance the costs of notification.

Statute of limitations. As discussed above, the general statute of limitations for obtaining a refund of overpayment of tax is the later of three years after the due date of the return or two years after payment of the tax. Without a class action mechanism, each taxpayer seeking a refund of a tax paid under an alleged unconstitutional statute would have to file a claim for refund within the statute of limitations period and exhaust the administrative and judicial review process.

One general principle of class actions is that the filing of a suit tolls the statute of limitations for all prospective class members until class certification is denied. If certification is denied, the limitations period begins to run again and plaintiffs may file their own individual claims. This same principle applies to tax class actions. The statute of limitations for filing a claim for refund on the grounds of an unconstitutional statute is tolled for a taxpayer who is eligible to become a member of a class action. The tolling begins on the date the class action is commenced. For a taxpayer who does not join the class, the tolling ends when the taxpayer does not affirmatively indicate a desire to be included in the class as provided by the court. For a taxpayer who does join the class, the tolling ends when the court enters any of the following:

- a final order denying certification of the class
- a final order decertifying the class
- a final order dismissing the class action without an adjudication on the merits
- a final judgment on the merits

Effect on nonparticipating taxpayers. Class actions are designed to adjudicate, in a single action, the claims of numerous parties with similar claims. One objective of a class action judgment is to prevent future litigation of claims that were, or could have been, litigated in the class action. Thus the legal principles of "claim preclusion" and "issue preclusion" arise in the class action context. *Claim preclusion* means that a final judgment on the merits in a case is conclusive as to the rights of the parties to that case and bars them from bringing a subsequent action involving the same claim. In the class action context, the application of claim preclusion means that the judgment applies to the entire certified class. In certain instances, it can also bind nonparties. It does not, however, bar an individual who elects not to participate in the class action from bringing his or her own claim. *Issue preclusion* bars the same parties from relitigating in a subsequent action an issue that was litigated in a prior action. Courts have generally held that a successful defendant in a prior class action suit may not assert issue preclusion in a subsequent suit against a plaintiff who opted out of the earlier class action. Similarly, when a class prevails in an earlier action, an individual who opted out of that class who now chooses to bring his or her own individual claim against the same defendant may not assert issue preclusion in that case.

This section provides that the principles of claim preclusion and issue preclusion apply to tax class actions in the same manner in which they apply to class actions generally. It further specifies that if a final judgment on the merits is entered in a class action in favor of the class, the following applies to an eligible taxpayer who did not become a member of the class:

- The taxpayer is not entitled to share in any monetary relief awarded to the class.
- If the taxpayer has been assessed for failure to pay the tax at issue in the class action and the taxpayer has not paid the assessment, then the assessment is abated.
- The taxpayer is relieved of any future liability for the tax that is the subject of the class action.

Home Inspector Privilege License

S.L. 2008-206 (H 2558) imposes an annual state privilege license tax of $50 on an individual licensed under the Home Inspector Licensure Act. Article 9F (North Carolina Home Inspector Licensure Board) of G.S. Chapter 143 requires home inspectors and associate home inspectors to be licensed. The state privilege license tax imposed under this act applies to both types of licenses.

The state's privilege license tax is imposed on a fiscal year basis and is due by July 1 of each year. The full amount of the tax applies to a person who, during the fiscal year, begins to engage in an activity for which a privilege license is required. Because the act became effective after July 1, 2008, it includes a provision extending the time in which a person engaged in the business of home inspection has to obtain the required state license for fiscal year 2008–09, from July 1, 2008, until October 1, 2008.

By imposing a state license tax on this profession, the act repeals the authority of cities to impose a local license tax on this profession. Under the general authority of G.S. 160A-211, several cities impose a privilege license tax on home inspectors. Since many of these cities have already collected the tax for fiscal year 2008–09, the act specifically authorizes its imposition and collection by those cities for this fiscal year. A city cannot impose a license tax on this profession for fiscal years beginning on or after July 1, 2009.

An individual required to have a state privilege license may not engage in the licensed activity until a license is obtained. To obtain a license, an individual must file a completed application with DOR and pay the required tax. An application for a license is considered a return. The license does not of itself authorize the practice of a profession, business, or trade for which a state qualification license is required.

Solid Waste Disposal Tax Changes

S.L. 2008-207 (H 2530) makes several administrative changes to the solid waste disposal tax enacted by the General Assembly last session in S.L. 2007-550. The solid waste disposal tax became effective July 1, 2008. The rate of tax is $2 per ton of waste to be imposed on the disposal of municipal solid waste in landfills in the state and on the transfer of municipal solid waste for disposal outside the state. The purpose of the tax is to help offset the cost of the assessment and remediation of pre-1983 landfills and to provide additional resources for solid waste management programs and services. The tax proceeds are allocated to cities, counties, and state agencies.

This act clarifies that the tax and the return are due on a quarterly basis. Second, it provides that the taxpayer may deduct the tax paid in the following circumstances:

- If a third party fails to pay the amount charged for the disposal of waste tonnage and an owner or operator has deducted that amount from gross income as a bad debt, then the owner or operator may deduct the amount of that tonnage if the tax was paid on the tonnage.
- If the owner or operator is not subject to income tax, the owner or operator may take the deduction when it is determined that the charges are not collectible.

Finally, the act excludes a city or county from receiving proceeds if it does not provide solid waste management programs and services and is not responsible by contract for payment, unless the city or county is served by a regional solid waste management authority. If the city or county is served by the authority, then the city or county must forward the amount of proceeds it receives to that authority. To assist DOR with distribution, the Department of Environment and Natural Resources must provide the department with a list of cities and counties that are excluded by May 15 of each year.

Unsalable OTP Refund

In S.L. 2007-323, the General Assembly increased the excise tax levied on other tobacco products (OTP) from 3 percent to 10 percent of the cost price of the products, effective October 1, 2007. The additional revenue generated by this tax is remitted by the Secretary of Revenue to the University Cancer Research Fund. S.L. 2008-207 permits wholesale and retail dealers who possess unsalable OTPs to return them to the manufacturer and apply for a refund of the excise tax paid on them. A similar provision already exists for cigarettes and cigars. The act applies to products returned on or after October 1, 2008 .

Supplemental PEG Support

In 2006 the General Assembly established uniform taxes for video programming services by applying the combined general rate of sales tax to all video programming services and by repealing the authority local governments had to impose a local franchise tax. It preserved the local government revenue stream by distributing part of the sales tax revenues from telecommunications and video programming services to the counties and cities, based on the amount of cable franchise tax imposed during the first six months of fiscal year 2006–07 plus any subscriber fees imposed during that same period.

Of the revenue distributable to local governments, $2 million a year is allocated for supplemental PEG channel support. A PEG channel is a public, educational, or governmental access channel provided to a county or city. The $2 million allocation is distributed to counties and cities with qualifying PEG channels. The annual amount per qualifying PEG channel is $25,000. A county or city may not receive supplemental PEG channel support for more than three PEG channels. The amount distributed to a county or city as supplemental PEG channel support must be used by it for the operation and support of PEG channels. If the total amount distributed for qualifying PEG channels in a fiscal year is less than $2 million, the Secretary of Revenue must credit the excess amount to the PEG Channel Fund to be used for matching local grants for PEG channel support.

When the General Assembly considered the legislation in 2006, the available data indicated there would be thirty-six qualifying PEG channels. For the March 2008 distribution DOR received PEG channel certifications for 276 channels. Some of the discrepancy is believed to be due to confusion on the form used by the department that may have resulted in some channels being double counted or receiving a distribution when they did not qualify.

S.L. 2008-148 (S 1716) clarifies the distribution requirements, reduces the number of channels receiving the distribution, and provides that all qualifying PEG channels receive supplemental PEG support funding. The act defines in the distribution statute what constitutes a "qualifying PEG channel" as a channel with character generated programming that does not exceed 15 percent of eight hours of scheduled programming and is operated for at least ninety days during the year. A county or city must certify all qualifying PEG channels and allocate the proceeds it receives equally among all of its certified PEG channels. A distribution must be made to the PEG channel within thirty days of the county or city's receipt of the supplemental PEG support revenue. This modifies the prior law, in which a county or city could only receive supplemental funding for three PEG channels. These changes address the concerns of some qualifying PEG channels regarding whether supplemental funding is being distributed fairly among the channels by ensuring all of the following:

- Each qualifying PEG channel receives supplemental funding, even if a county or city has more than three qualifying channels.
- Each qualifying PEG channel receives an equal amount of funding.
- Each qualifying PEG channel receives the funding in a timely manner.

The act also defines a PEG channel operator, requires a county or city to include the name of the PEG channel operator for each qualifying PEG channel it certifies, and requires the county or city to distribute the proceeds to the PEG channel operator. This change better ensures that the money is distributed by the local government for the use of the PEG channels. In addition, where a single PEG channel has more than one operator or the PEG channel is claimed by more than one local government, the change ensures that the funds go to the operator of the PEG channel. It limits a PEG channel operator from being included in multiple certifications for the same PEG channel, which should reduce the number of qualifying PEG channels by eliminating much of the double counting that currently occurs. The act also provides a method to account for revenues that are distributed in error by requiring any county or city that received a distribution in error to submit a revised certification and return all funds received in error. Such funds are added to the amount to be distributed in the following year as supplemental PEG support funding.

Finally, the act allows the Secretary of Revenue to request additional information and extends from July 15, 2008, to September 15, 2008, the period of time a county and city has to make its certification in 2008. The act permits DOR to make the distribution of supplemental PEG channel support for the quarter ending June 30, 2008, based upon the qualifying PEG channel certifications in effect for fiscal year 2007–08 distributions.

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