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Editor's Preface

North Carolina Legislation is a comprehensive summary of legislation enacted by the North Carolina General Assembly. This year's edition is the forty-first of these annual summaries published by the UNC Chapel Hill School of Government's Institute of Government. From 1955 through 1973, the summaries were included in special issues of *Popular Government.* Since 1974 they have been published annually in a separate book.

North Carolina Legislation 2004 is intended to cover all legislation enacted by the General Assembly in 2004 that may be of interest and importance to state and local government officials. The book is divided into twenty-three chapters according to subject matter. In some instances, to provide different emphases or points of view, the same legislation is discussed in more than one chapter. With one exception, each chapter was written by a School of Government faculty member having expertise in the particular subject discussed. The exception is Chapter 23, "State Taxation," which was written by members of the General Assembly's professional staff.

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

Though comprehensive, this book does not summarize every legislative enactment of the 2004 General Assembly. For example, some important legislation, such as that involving business regulation or insurance, does not substantially impact state or local government and is therefore not discussed at all. Local legislation of importance to a single jurisdiction is usually given only brief coverage. Readers who need information about public bills not covered in this book may wish to consult *Summaries of Substantive Ratified Legislation, 2004 General Assembly,* which contains brief summaries of all public laws enacted during the session. This compilation is published by the General Assembly's Research Division and posted on the Internet at the General Assembly's Web site. A list of General Statutes affected by 2004 legislation, prepared by the General Assembly's Bill Drafting Division, is also online at this site.

The Institute of Government also publishes two separate reports, *Final Disposition of Bills* and the *Index of Legislation,* that provide additional information with respect to public and local bills considered in 2004. These publications can be purchased through the School of Government Publications Sales Office (telephone: 919-966-4119; e-mail: sales@iogmail.iog.unc.edu).

Each day the General Assembly is in session, the Institute's Legislative Reporting Service publishes the *Daily Bulletin.* The *Daily Bulletin* includes summaries written by Institute of Government faculty

members of every bill and resolution introduced in the House and Senate and of all amendments and committee substitutes adopted by the House and Senate, as well as a daily report of all legislative action taken on the floor of both chambers. The *Daily Bulletin* is available by paid subscription, with delivery via U.S. mail, fax, or e-mail. For information about subscriptions, contact the School of Government Publications Sales Office.

Throughout this book, references to legislation enacted during the 2004 session are cited by the Session Law number of the act (for example, S.L. 2004-148), followed by a parenthetical reference to the number of the Senate or House bill that was enacted (for example, S 1136). Generally, the effective date of new legislation is not noted if it is prior to the production date of this book. References to the General Statutes of North Carolina are abbreviated as G.S. (for example, G.S. 105-374).

William A. Campbell

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The General Assembly

The 2004 session of the General Assembly lasted ten weeks, a return to normal after the almost seventeen-week session in 2002. The relative brevity of the 2004 session was chiefly the result of the small but welcome increase in state revenues and the Speakers' determination not to take up any controversial bills.

Overview of the 2004 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 special extra sessions (the N.C. 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 1973–1974 biennium, the General Assembly adopted the practice of 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 midsummer. 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 2004 session convened on May 10 and adjourned on July 18. The length of the session as compared to other recent short sessions is shown in Table 1-1.

Table 1-1. Length of Legislative Sessions

Year	1994	1996	1998	2000	2002	2004
Date Convened	May 24	May 13	May 11	May 8	May 28	May 10
Date Adjourned	July 17	June 21	Oct. 29	July 13	Oct. 4	July 18
Senate Legislative Days	35	25	101	40	69	44
House Legislative Days	35	27	100	40	77	44

The 2003 adjournment resolution provided that bills on the following matters could be considered in the 2004 session:

- Bills directly affecting the budget for fiscal 2004–2005, provided they were introduced by May 27, 2004
- Bills introduced in 2003 that passed third reading in the house of introduction and were not unfavorably disposed of in the other house
- Bills implementing recommendations of study commissions, commissions directed to report to the General Assembly, the House Ethics Committee, or the Joint Legislative Ethics Committee, provided they were introduced by May 19, 2004
- Noncontroversial local bills, provided they were introduced by May 26, 2004
- Bills making appointments
- Bills authorized for introduction by a two-thirds vote of both houses
- Bills affecting state or local pension or retirement programs, provided they were introduced by May 26, 2004
- Bills proposing constitutional amendments
- Resolutions regarding state government reorganization, memorial resolutions, resolutions disapproving administrative rules, and adjournment resolutions

In the 2004 regular session, 881 bills were introduced. Of these, 203 were enacted as session laws, 13 as joint resolutions, and 3 as House resolutions. One bill was vetoed. These numbers are generally consistent with those of previous short sessions. Table 1-2 compares the number of introductions and enactments in 2004 with those of the previous five short sessions.

Table 1-2. Statistical Analysis of Legislative Short Sessions

Year	1994	1996	1998	2000	2002	2004
Bills & Resolutions Introduced	1,062	911	1,036	760	706	881
Senate	427	442	516	383	368	415
House	635	469	520	377	336	466
Session Laws Enacted	220	222	229	191	190	203
Public Laws	116	113	135	118	80	116
Local Laws	104	109	94	73	110	87
Bills Vetoed	NA	NA	0	0	1	1

Major Legislation Enacted in 2004

Among the major items of legislation enacted in the 2004 regular session are the following, each of which is discussed in detail in the chapter indicated.

- **Budget modifications.** S.L. 2004-124 (H 1414) modifies the 2004–2005 state budget (Chapter 2).
- **Child restraint systems in motor vehicles.** S. L. 2004-191 (S 1218) increases the weight and age limits concerning when children must be placed in restraint systems (Chapter 17).

- **Domestic violence amendments.** S.L. 2004-186 (H 1354) significantly amends and broadens the state's laws regarding domestic violence (Chapter 3).
- **Saltwater fishing license.** S.L. 2004-187 (H 831) requires for the first time a special license for recreational fishing in the state's coastal waters (Chapter 9).
- **Compensation for billboard removal.** S.L. 2004-152 (H 1213) provides that local governments requiring removal of billboards must monetarily compensate the owners of those billboards (Chapter 13).
- **Overhaul of the public school calendar.** S.L. 2004-180 (H 1464) reduces the number of teacher workdays and places limitations on when schools may open in the fall and close in the spring (Chapter 8).
- **Stormwater management.** S.L. 2004-163 (S 1210) establishes procedures by which local governments are to implement Phase II of the federal stormwater management requirements (Chapter 9).
- **Methamphetamine penalties.** S.L. 2004-178 (S 1054) increases the penalties for unlawfully manufacturing or distributing methamphetamine (Chapter 6).
- **University projects.** S.L. 2004-179 (H 1264) authorizes the financing of several university projects, including a new cancer hospital at the University of North Carolina Hospitals at Chapel Hill and a North Carolina Cardiovascular Diseases Institute at East Carolina University (Chapter 11).

Governor's Veto

Governor Easley, as in past sessions, used his veto sparingly. He vetoed only one bill, H 429. This bill would have required a city or county to compensate the owner of a billboard when the local government requires removal of the billboard. The bill passed both the House and Senate and was ratified on July 1, 2004. The Governor vetoed the bill on July 9, 2004, and in his veto message stated that the formula for compensating billboard owners was unfairly costly to local governments. When the vetoed bill was returned to the House, that chamber, on July 12, 2004, voted to override the Governor's veto by a vote of more than the three-fifths required by the North Carolina Constitution. When H 429 was sent to the Senate for reconsideration, however, the Senate took a different approach. It referred the bill to a committee, and the committee never reported the bill to the floor for a vote. Instead, the Senate took H 1213—a bill that would have regulated the check-cashing business and that had passed the House—stripped it of its original provisions, replaced those provisions with a new version of the billboard compensation bill requiring less generous compensation by local governments, and passed it. The House passed it as well, and the Governor signed the new compensation bill on August 2, 2004.

The Legislative Institution

Amendments to Chapter 120

Chapter 120 of the General Statutes deals with matters concerning the General Assembly. Several acts passed by the 2004 session amended this chapter. S.L. 2004-199 (S 1225) concerns the Legislative Ethics Act. It amends G.S. 120-85 and -96 to include in the statement of economic interest that each legislator is required to file a description of any nonprofit organization receiving state funds with which the legislator or a member of his or her immediate household is involved. It also amends G.S. 120-99 and -100 to provide for the filling of vacancies on the Legislative Ethics Committee in the event a committee cochair or member is unable to act on a particular matter before the committee.

G.S. 120-122 establishes procedures to be followed when a vacancy occurs on any board or commission that is the subject of a legislative appointment. S.L. 2004-187 (H 831) makes three

changes in this statute. It provides that the procedures for filling a vacancy (for example, that the Governor may appoint someone) apply whenever a vacancy occurs for any reason, whenever the term of an office expires and a successor has not been appointed, and whenever a person is holding over in office after expiration of the term.

S.L. 2004-129 (S 991) makes numerous significant changes to the state's information technology programs. These changes are discussed in Chapter 12, "Information Technology." The act also amends G.S. 120-230 to change the name of the Joint Select Committee on Information Technology to the Joint Legislative Oversight Committee on Information Technology and to charge the committee with examining, on a continuing basis, systemwide issues affecting state government information technology. It further amends G.S. 120-231 to require the committee to submit annual reports to the General Assembly before the convening of each regular session. Finally, it amends G.S. 120-232 to provide that all sixteen members of the committee be legislators, eight from the Senate and eight from the House, and that at least two of the members from each chamber be members of that chamber's Appropriations Committee.

Membership Changes

In the House, Susan C. Fisher was appointed to replace Martin L. Nesbitt Jr., who was appointed to the Senate, and Fred F. Steen was appointed to replace W. Eugene McCombs, who died on January 20, 2004. In the Senate, Woody White was appointed to replace Patrick Ballantine, who resigned to run for governor, Ralph Hunt was appointed to replace Wib Gulley, who resigned, and Martin L. Nesbitt Jr. was appointed to replace Steven Metcalf, who resigned.

The 2005 Session

The next regular session of the General Assembly will convene at noon on January 26, 2005. Members of that General Assembly were elected in the November 2, 2004, elections.

William A. Campbell

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The State Budget

The major purpose of the short sessions of the General Assembly held in even-numbered years is to make mid-biennium adjustments to the state budget. After three years of severe revenue shortfalls, the 2004 session faced the encouraging prospect of a budget surplus of approximately $300 million. Whereas in the 2001, 2002, and 2003 budget negotiations legislators confronted difficult questions concerning what cuts to make and how large they would be, in the 2004 session they grappled instead with issues such as how surplus funds would be allocated, which appropriations should be increased, and which should be decreased.

The Budget Process

The bill that was to become the budget modification act, H 1414, was filed in the House on May 11, 2004, the day after the 2004 session convened. It passed third reading in the House on June 8, 2004, and was sent to the Senate. The Senate passed its version of the bill on June 24, 2004. House and Senate conferees were appointed to work out the differences between the two versions, and the House and Senate adopted the conference report on July 17, 2004. Governor Easley signed the ratified bill on July 20, 2004, and it was chaptered as S.L. 2004-124.

The act is 203 pages long, and although most of it deals with the appropriation of funds, much of it does not. Rather, as has become the General Assembly's practice, much of the act consists of special provisions, which either amend or create substantive law and have nothing to do with the appropriation of state funds. To give but a few examples, Section 6.1 enacts new G.S. 143-59.1A to give a state purchasing preference to products made in the United States; Section 18.2 transfers the State Boxing Commission to the Alcohol Law Enforcement Division; Section 30.6 enacts new G.S. 20-147.1 to require that passenger vehicles towing other vehicles keep to the right; and Section 30.17 directs the Department of Transportation to construct six median cuts on Catawba Avenue in the Town of Cornelius.

Budget Highlights

Highlights of the modified 2004–2005 budget include the following:

- Step pay increases for public school teachers averaging 2.5 percent
- Pay increases for most state employees of 2.5 percent or $1,000, whichever is greater
- Cost-of-living increases of 1.7 percent for retirees in the Teachers' and State Employees' Retirement System and the Legislative Retirement System
- An appropriation of $50,467,765 to reduce the teacher–student ratio in third grade classes to 1:18
- An appropriation of $9,057,202 to fund two thousand more places in the More at Four program
- An appropriation of $62 million to the Clean Water Management Trust Fund

The 2004–2005 Budget

General Fund Budget Availability

The state budget is supported by three major sources of funding: (1) tax revenues, (2) federal funds (including matching funds, categorical grants, and block grants), and (3) receipts (such as tuition payments to universities and community colleges and fees collected by state agencies). Appropriations from the General Fund support virtually all state government programs and services other than highway construction and maintenance. Table 2-1 shows the revenues available in the General Fund as calculated by the General Assembly in S.L. 2004-124. Amounts in parentheses indicate reductions in the associated categories.

Table 2-1. 2004–2005 General Fund Availability

Beginning unreserved credit balance	$ 271,200,829
Revenues based on existing tax structure	14,755,690,500
Nontax revenues	
Investment income	86,020,000
Judicial fees	136,730,000
Disproportionate share	100,000,000
Insurance	53,900,000
Other nontax revenues	261,517,607
Highway Trust Fund transfer	242,586,830
Highway Fund transfer	16,166,400
Subtotal Nontax Revenues	896,920,837
Total General Fund Availability	**$15,923,812,166**
Adjustments to Availability: 2004 Session	
H 1430 Conference Report (Internal Revenue Code conformity)	(2,600,000)
H 1303 Conference Report (reduce privilege and excise taxes)	(2,950,000)
Sales tax refunds and exemptions	(5,200,000)
Research and development tax credit	(4,500,000)
Qualified business investment tax credit	0
Tobacco payments decline—Tobacco Trust Fund	(5,000,000)
Transfer from Fire Safety Loan Fund	250,000
Transfer from Veteran's Home Trust Fund	500,000

Transfer from Office of State Controller, Budget Code 24160	2,180,000
H 1264 Conference Report (finance vital projects), reimburse debt service	5,380,000
Adjust transfer from Insurance Regulatory Fund	4,062,654
Adjust transfer from Treasurer's Office	424,708
Subtotal Adjustments to Availability: 2004 Session	(7,452,638)
Revised General Fund Availability for 2004–2005 Fiscal Year	**$15,916,359,528**

To achieve a balanced budget this year, the General Assembly made three substantial one-time expenditures: the use of a credit balance of $271 million, a transfer from the Highway Trust Fund of $242 million, and a transfer from the Highway Fund of $16 million. Overall $529 million out of a total General Fund availability of $16 billion is not very significant, and spending the credit balance is a long-established practice. The transfers from the Highway Trust Fund and the Highway Fund, both of which are funded through dedicated tax sources, are less easily defended.

General Fund Appropriations

This year's budget act appropriates all of the $15,916,359,528 available. In doing so it uses the appropriations act of 2003–2005, S.L. 2003-284, as the base to which it makes additions and reductions in appropriations. Table 2-2 sets out the revisions S.L. 2004-124 makes in the 2003–2005 budget. Reductions are shown in parentheses.

Table 2-2. 2004–2005 General Fund Appropriation Adjustments

EDUCATION	
Community Colleges System Office	$ 31,612,319
Department of Public Instruction	122,269,724
University of North Carolina—Board of Governors	6,386,840
HEALTH AND HUMAN SERVICES	
Department of Health and Human Services	
Office of the Secretary	5,319,802
Division of Aging	3,151,000
Division of Blind Services/Deaf/HH	(30,000)
Division of Child Development	7,925,000
Division of Education Services	10,873
Division of Facility Services	(450,000)
Division of Medical Assistance	(88,729,913)
Division of Mental Health	(5,962,273)
N.C. Health Choice	6,600,000
Division of Public Health	8,226,581
Division of Social Services	(5,561,948)
Division of Vocational Rehabilitation Services	(1,479,294)
Total	**$(70,980,172)**
NATURAL AND ECONOMIC RESOURCES	
Department of Agriculture and Consumer Services	100,538
Department of Commerce	
Commerce	(452,263)
Commerce State-Aid	1,950,000
N.C. Biotechnology Center	5,000,000
Rural Economic Development Center	1,144,000

Department of Environment and Natural Resources	
Environment and Natural Resources	1,021,957
Clean Water Management Trust Fund	0
Department of Labor	364,216
JUSTICE AND PUBLIC SAFETY	
Department of Correction	(11,309,897)
Department of Crime Control and Public Safety	3,912,627
Judicial Department	6,741,918
Judicial Department—Indigent Defense	11,000,000
Department of Justice	754,467
Department of Juvenile Justice and Delinquency Prevention	1,734,069
GENERAL GOVERNMENT	
Department of Administration	2,476,330
Office of Administrative Hearings	90,476
Department of State Auditor	(200,000)
Office of State Controller	(99,429)
Department of Cultural Resources	
Cultural Resources	14,944,032
Roanoke Island Commission	0
State Board of Elections	2,197,412
General Assembly	(921,318)
Office of the Governor	
Office of the Governor	42,702
Office of State Budget and Management	401,427
Reserve for Special Appropriations	2,213,382
Housing Finance Agency	1,725,000
Department of Insurance	
Insurance	4,062,654
Insurance—volunteer safety workers' compensation	(1,734,000)
Office of Lieutenant Governor	29,657
Department of Revenue	(1,661,794)
Rules Review Commission	(3,185)
Department of Secretary of State	(110,389)
Department of State Treasurer	
State Treasurer	424,708
Retirement for fire and rescue squad workers	665,000
TRANSPORTATION	
Department of Transportation	(228,056)
RESERVES, ADJUSTMENTS, AND DEBT SERVICE	
Reserve for 2003 compensation increases	(900,000)
Reserve for 2004 compensation increases	260,800,000
Reserve for LEO salary adjustments	2,007,385
Reserve for State Health Plan	(900,000)
Reserve for retiree health benefits	(6,900,000)
Reserve for contributions to benefit plans	(6,230,100)
Reserve for Teachers' and State Employees' Retirement System	9,180,000
Reserve for Consolidated Judicial Retirement System	339,000
Job Development Incentive Grants (JDIG) Reserve	4,500,000
Mental Health, Developmental Disabilities, and Substance Abuse Services Trust Fund	10,000,000

Reserve for Senate Bill 100 compliance	(11,813,949)
Debt Service	
General debt service	(78,268,480)
Federal reimbursement	460,432
Total Current Operations—General Fund	**$367,839,240**

The Highway Fund and Highway Trust Fund

The Highway Fund is funded by the motor fuels tax and other revenues related to motor vehicles. It supports most of the operations of the state Department of Transportation. The Highway Trust Fund is funded by a portion of the per-gallon motor fuels tax and other dedicated revenues. It funds the special program of highway construction authorized by the 1989 General Assembly. Table 2-3 shows the 2004–2005 adjustments to these funds.

Table 2-3. 2004–2005 Highway Fund and Highway Trust Fund Adjustments

HIGHWAY FUND	
Transportation Administration	$ 1,227,072
Operations	0
Match for federal aid	0
Construction Program	
State secondary system	410,000
Small construction	7,000,000
Contingency funds	5,000,000
Spot safety improvements	0
Access and public service roads	0
Maintenance	24,672,591
Capital improvements	0
Ferry operations	1,000,000
State aid to municipalities	410,000
State aid to railroads	0
State aid for public transportation	(436,479)
Asphalt plant cleanup	0
Governor's Highway Safety Program	0
Division of Motor Vehicles	1,218,921
Appropriations to other state agencies	1,030,489
Reserves and transfers	17,842,991
Total	**$ 59,375,585**
HIGHWAY TRUST FUND	
Intrastate system	(7,488,716)
Urban loops	(3,028,125)
Aid to municipalities	(785,741)
Secondary roads	236,830
Administrative expense	(439,735)
Transfer to General Fund	66,513
Total	**$(11,572,000)**

Capital Improvements

Considerably more money was appropriated for capital improvements for 2004–2005 than was made available in the previous three fiscal years. A total of $43,192,000 was appropriated for the following projects:

Department of Commerce—State Ports Authority	
Wilmington Port—replace crane rail	$ 2,000,000
Radio Island development and improvements	2,000,000
Department of Environment and Natural Resources	
Water resources development projects	26,492,000
North Carolina Museum of Art	
Expansion planning funds	2,200,000
University of North Carolina System	
Center for Design Innovation	2,000,000
Winston-Salem State University—Department of Life Sciences	2,000,000
UNC Greensboro and NC A&T Millennium Campus	4,000,000
N.C. Motor Sports Testing and Research Complex	2,000,000
UNC Wilmington—School of Nursing	500,000
Total Capital Improvements—General Fund	**$43,192,000**

Executive Budget Act Amendments

The 2004 session of the General Assembly made several substantive amendments to the Executive Budget Act (G.S. 143-1 through 143-34.7).

JDIG Reserve Fund

One of numerous economic development tools devised by the General Assembly over the past several sessions is the Job Development Investment Grant program (JDIG), the details of which are set forth in G.S. Chapter 143B, Article 10. S.L. 2004-124, Section 6.12(a), enacts new G.S. 143-15.3E to require the State Controller to establish a reserve in the General Fund to be known as the JDIG Reserve. The purpose of this reserve fund is to receive appropriations sufficient to meet the anticipated annual cash requirements of the JDIG program.

Reporting by Non-state Entities

G.S. 143-6.1 contains reporting requirements applicable to non-state entities that receive state funds. S.L. 2004-196 (S 1008) repeals G.S. 143-6.1 and replaces it with new G.S. 143-6.2. One of the new provisions defines a *non-state entity* as any firm, association, local government, or other organization that is not a state agency, department, or institution. Another provision requires the Director of the Budget to take appropriate administrative action if he or she finds that a non-state entity has spent or encumbered state funds for an unauthorized purpose and to report to the Attorney General any indication that a violation of criminal law may have occurred. And a third provision directs the Office of State Budget and Management to adopt rules to ensure the uniform administration of state grants by all grantor state agencies and the grantees and subgrantees. These rules must address several topics, including the establishment of mandatory periodic reporting requirements, grantee maintenance of adequate accounting records, and procedures to recover state funds from grantees unable to accomplish the purposes of a grant.

Flexible Compensation Benefits

S.L. 2004-199 (S 1225) amends G.S. 143-34.1(d), which authorizes the Director of the Budget to establish a plan of flexible compensation to certain state officers and employees. The current statutory

language prohibits the Director from including in the plan any benefits that already exist by statute. The amendment provides that the plan shall not "replace, substitute for, or duplicate" any of the existing statutory benefits, but it may offer products and benefits additional to those benefits.

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Children, Families, and Juvenile Law

The short session of the 2003 North Carolina General Assembly addressed a number of issues relating to children and families. This chapter summarizes bills enacted dealing with divorce, domestic violence, and juvenile proceedings. Also included are bills relating to child care and early childhood programs. Other chapters that may contain legislation of interest regarding children and families include Chapter 5, "Courts and Civil Procedure"; Chapter 6, "Criminal Law and Procedure"; Chapter 8, "Elementary and Secondary Education"; Chapter 10, "Health"; Chapter 11, "Higher Education"; Chapter 16, "Mental Health"; and Chapter 21, "Social Services."

Divorce

S.L. 2004-128 (S 577) amends G.S. 50-10 to allow the clerk of superior court, upon request of a plaintiff, to enter judgment in cases where the plaintiff's only claim is for absolute divorce or absolute divorce and resumption of former name. The clerk is allowed to enter judgment only when defendant has been defaulted for failure to appear, has answered admitting the allegations of the complaint, or has filed a waiver of the right to answer. The clerk cannot enter judgment if the defendant is a minor or is incompetent. S.L. 2004-128 applies to actions filed on or after October 1, 2004.

Family Court

The appropriations act, S.L. 2004-124 (H 1414), includes $150,000 to expand family court to one additional district. The General Assembly required the Administrative Office of the Courts (AOC) to establish the program in one of the following district court districts: 3A (Pitt County), 10 (Wake County), 19B (Randolph, Montgomery, and Moore counties), 21 (Forsyth County), 23 (Wilkes, Yadkin, Alleghany, and Ashe counties), and 28 (Buncombe County). The AOC decided to place the program in District 28. The program will begin January 1, 2005, bringing the total number of family court districts in the state to nine.

In addition, S.L. 2004-110 (H 1430) adds new G.S. 7A-314.1 to establish a $30 per hour fee to be paid to the AOC for the use of a supervised visitation and exchange center through a family court program. The AOC is allowed to reduce fees based on economic hardship or a litigant's status as a victim of domestic violence. The act was effective July 17, 2004.

Domestic Violence

The 2003 General Assembly created the House Select Committee on Domestic Violence. That committee studied various issues relating to domestic violence and issued an extensive report on April 15, 2004. Primarily as a result of this report, the General Assembly enacted S.L. 2004-186 (H 1354) entitled "An Act to Strengthen the Laws Against Domestic Violence, to Provide Additional Assistance to Domestic Violence Victims, and to Make Other Changes Recommended by the House Select Committee on Domestic Violence." The legislation includes provisions relating to civil protection orders, offender treatment programs, legal assistance for victims of domestic violence, and training for court, law enforcement, and school personnel. The act also amends the criminal law as it applies to domestic violence offenses.

Provisions relating to treatment programs and the criminal law are summarized in other chapters. All provisions of the legislation were effective August 12, 2004, unless otherwise provided.

Temporary Child Custody

S.L. 2004-186 significantly revises statutory provisions relating to the award of temporary child custody as part of a domestic violence protective order entered pursuant to Chapter 50B. All changes apply to actions filed on or after October 1, 2004.

Ex parte relief. G.S. 50B-2(c) allows a judge, and G.S. 50B-2(c1) allows a magistrate in limited circumstances when so authorized by the chief district court judge, to enter a domestic violence protective order prior to the defendant's receiving notice and an opportunity to be heard, if the plaintiff provides evidence that there is a danger of domestic violence against the plaintiff or a minor child. Before amendment, the statutes allowed temporary custody to be granted as part of such an ex parte order only if the court found that the child at issue was exposed to "a substantial risk of bodily injury or sexual abuse." S.L. 2004-186 amends G.S 50B-2(c) and -2(c1) to require the court to consider granting temporary custody at the ex parte hearing if it finds that the child "is exposed to a substantial risk of physical or emotional injury or sexual abuse." If the court finds such a risk, it must consider ordering the defendant to stay away from the child and must return the child to or not remove a child from the physical care of the parent or person acting as a parent. The court can enter such an order if it finds that the order is in the best interest of the child and necessary for the safety of the minor child. The court also can specify terms of visitation between the child and the offending parent, but the order itself must be designed to protect the safety of the minor child as well as the aggrieved party.

Orders entered after a hearing. G.S 50B-3(a)(4) allows a court to enter a temporary child custody order as part of the relief granted in a domestic violence protective order entered after a defendant has been served with process and given notice of hearing. S.L. 2004-186 adds new section G.S. 50B-3(a1) to specify that, upon the request of either party, the court must consider including a custody determination as part of the protective order. The new statute provides that the court's decision whether to include custody and visitation provisions in the protective order must be based on the best interest of the child with particular consideration given to the safety of the minor child. The statute also lists a number of factors the court must consider when making any decisions regarding custody and visitation.

Renewal of custody provisions. G.S. 50B-3(b) allows a court to renew a domestic violence protective order for up to an additional year upon the request of the aggrieved party. The statute contains no limit on the number of times a protective order may be renewed. However, S.L. 2004-186

amends this section to specify that an order for temporary custody is limited to a duration of one year only. While other provisions of a protective order can be renewed, custody and visitation provisions cannot be renewed to extend beyond one year from the time of the initial custody determination.

Legal Services Assistance for Domestic Violence Victims

S.L. 2004-186 also adds new Article 37B to G.S. Chapter 7A appropriating funds to allow Legal Services to provide legal assistance to victims of domestic violence in actions for 50B domestic violence protective orders, for custody or visitation pursuant to G.S. Chapter 50, and for other services ensuring the safety of victims of domestic violence and their children. The funding is to be obtained from civil and criminal court costs collected throughout the state. Specifically, the statute requires the State Treasurer to send 95 cents from each civil and criminal General Court of Justice cost assessed by any court in the state to the State Bar for distribution to the legal services programs throughout North Carolina. Twenty percent of the funds collected will be distributed equally among the counties while 80 percent will be distributed based upon the number of Chapter 50B actions filed in each county.

Protection against Employment Discrimination

S.L. 2004-186 creates new G.S. 50B-5.5 and amends G.S. 95-241(a) to prohibit an employer from discharging, demoting, denying a promotion to, or disciplining an employee because the employee took reasonable time off from work to obtain or to seek to obtain a domestic violence protective order pursuant to Chapter 50B.

Privacy for 50B Intake

S.L. 2004-186 amends G.S 50B-2(d) to provide that the clerk of superior court shall, whenever feasible, provide a private area for persons seeking to file 50B complaints to complete forms and make inquiries.

Training for Law Enforcement, School, and Court Personnel

S.L. 2004-186 amends G.S. Chapters 17C and 17E to require that law enforcement officers receive education and training in how to respond to and investigate domestic violence cases as well as how to conduct investigations for evidence-based prosecutions. The legislation also requires that the N.C. Department of Public Instruction, in collaboration with the State Board of Education, study the use of antiviolence programs in the schools and the training of school personnel who deal with students who are victims of physical violence and mental or verbal abuse, particularly abuse related to domestic and relationship violence. The results of the study are to be submitted to the House Select Committee on Domestic Violence and the Joint Legislative Education Oversight Committee by November 15, 2004, and a final report is due to the General Assembly by January 15, 2005. With regard to court personnel, S.L. 2004-186 requests that the North Carolina Supreme Court adopt rules establishing minimum standards of education and training for district court judges in handling civil and criminal domestic violence cases. The act also requires the AOC to study the issue of training in the area of domestic violence for all other court personnel. The AOC report is to be submitted to the 2005 General Assembly.

Civil No-Contact Orders for Victims of Violence

In addition to S.L. 2004-186, which deals primarily with domestic violence, the General Assembly enacted S.L. 2004-194 (H 951) to create new G.S. Chapter 50C to allow victims of sexual assault and stalking to seek civil no-contact orders similar to the domestic violence protective orders available pursuant to Chapter 50B. Chapter 50B relief is available to persons

who have a *personal relationship* with the defendant, as that term is defined by G.S. 50B-1(b). Because new Chapter 50C is intended to provide protection to persons not presently covered by Chapter 50B, it authorizes claims for civil no-contact orders only by persons who do not have a "personal relationship" with the defendant. New Chapter 50C is described in detail in Chapter 5, "Courts and Civil Procedure."

The General Assembly also enacted S.L. 2004-165 (S 916) to create new Article 23, entitled "Workplace Violence Prevention," in G.S. Chapter 95. Article 23 allows an employer to file a district court civil action seeking a no-contact order on behalf of an employee who has suffered unlawful conduct from any individual, conduct "that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace." This legislation is also described in detail in Chapter 5.

Juvenile Law

Parental Rights and Conviction of Rape

Upon conviction under G.S. 14-27.2 or G.S. 14-27.3 for a rape that occurs on or after December 1, 2004, the person convicted will have no custody rights in relation to a child born as a result of the rape, no right to inherit from the child, no rights under the state adoption laws, and no rights in any abuse, neglect, dependency, or termination of parental rights proceeding involving the child. In addition to amending the two criminal statutes to add those provisions, S.L. 2004-128 amends the following sections:

- G.S. 48-3-603(a), to provide that the convicted parent's consent to the child's adoption is not required
- G.S. 50-13.1(a), to provide that the parent may not claim a right to custody of the child
- G.S. 7B-402 and 7B-406(a), to provide that the parent need not be named in a petition alleging that the child is abused, neglected, or dependent and that no summons for that parent is required
- G.S. 7B-1103, to provide that the convicted parent may not file a petition to terminate the rights of the other parent
- G.S. 7B-1104, to provide that the parent need not be named in a petition or motion for termination of parental rights

Nurse Privilege

Effective December 1, 2004, Sections 16.1 and 16.2 of S.L. 2004-186 amend the nurse privilege enacted in 2003 by

1. rewriting the nurse privilege statute, G.S. 8-53.13, to clarify that it does not preclude the admission in court of otherwise admissible medical records pursuant to G.S. 8-44.1, once the court determines that disclosure should be compelled; and
2. rewriting G.S. 8-53.1 to provide that the nurse privilege, like the physician–patient privilege, cannot be a ground for excluding evidence about abuse or neglect of a child younger than sixteen or about the fact or cause of a child's illness or injuries in any proceeding related to an abuse, neglect, or dependency report under the Juvenile Code.

Child Fatality Task Force

S.L. 2004-186 rewrites G.S. 7B-1402 to replace two of the four public members on the North Carolina Child Fatality Task Force with (1) a representative from the North Carolina Domestic Violence Commission and (2) a representative from the North Carolina Coalition Against Domestic Violence.

Technical Changes

Predisposition report by department of social services. S.L. 2004-203 (H 281) amends G.S. 7B-808(b) to correct a reference to a mental health evaluation of an alleged perpetrator.

Effect of legitimation. The act also repeals G.S. 49-13.1, an obsolete provision relating to the effect of one parent's legitimating a child on the other parent's consent to the child's adoption.

Indecent liberties with a student. S.L. 2004-203 amends G.S. 14-202.4 to clarify that, for purposes of the crime of taking indecent liberties with a student, *same school* means a school at which (1) the student is enrolled or is present for a school-sponsored or school-related activity and (2) the alleged perpetrator is employed, volunteers, or is present for a school-sponsored or school-related activity.

Venue in Delinquency Cases

S.L. 2004-155 (H 1665) rewrites the venue provisions for delinquency proceedings in G.S. 7B-1800 to provide the following:

1. The adjudication hearing must occur in the district in which the offense occurred.
2. Except as specified in (3) below, after an adjudication in a district that is not the district of the juvenile's legal residence, the presiding judge may transfer the case to the juvenile's home district for disposition. If the presiding judge does not transfer the case, he or she must contact the chief judge in the juvenile's home district, and that judge may demand that the case be transferred to the home district for disposition. If the case is not transferred pursuant to either of these provisions, the juvenile may demand that it be transferred to the home district.
3. If the offense is committed in a district in which the juvenile is in residential treatment or foster care but that is not the juvenile's home district, then, after an adjudication in that district, the court must conduct the dispositional hearing in that same district, unless the judge enters an order, supported by findings of fact, that a transfer would serve the ends of justice or would be in the juvenile's best interests.

The act applies to hearings held on or after October 1, 2004.

Office of Juvenile Defender

Section 14.3 of S.L. 2004-124 authorizes the state Office of Indigent Defense Services to use up to $177,500 in appropriated funds to create the Office of the Juvenile Defender, to consist of one attorney position and one support staff position.

Youth Development Centers

Section 16.3 of S.L. 2004-124 authorizes the Department of Juvenile Justice and Delinquency Prevention (DJJDP) and the State Construction Office in the Department of Administration to continue planning and design for up to 512 youth development center beds. DJJDP must provide a final recommended plan for new youth development centers by November 1, 2004, to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and the chairs of other specified legislative committees. The plan must include the following:

1. A recommended number of beds and facilities, including schemes for 512 beds at thirteen facilities and alternate schemes for up to 512 beds at fewer sites
2. A project schedule for new facilities
3. A detailed schematic of a prototype facility
4. A facility staffing plan
5. A detailed transition plan for recruiting, establishing, and converting staff positions
6. Recommended site locations
7. A construction and operating cost comparison with other states
8. A description of major facility programs

9. An explanation of security components
10. Recommendations for new initiatives to provide community-based programs that will reduce youth development center populations

The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee must report its recommendations upon the convening of the 2005 General Assembly.

Youth Development Center Staffing

Section 16.4 of S.L. 2004-124 directs DJJDP to prepare a long-range plan for establishing a therapeutic staffing model for all youth development centers. It authorizes DJJDP to create and reclassify certain positions as a first step toward that possible model. The department must report by December 1, 2004, on the long-range plan and the costs involved in statewide implementation of the therapeutic staffing model.

Juvenile Escapees

S.L. 2004-161 (S 1152) authorizes the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee to study the problem of persons who escape from the custody of DJJDP and to develop appropriate sanctions for those persons. If the committee undertakes this study, it is required to consult with DJJDP, the AOC, and the North Carolina Sentencing and Policy Advisory Commission to develop a statutory scheme through which both juveniles and persons over the age of sixteen are punished for escaping from the custody of DJJDP. The committee must report its findings and recommendations no later than the convening of the 2005 General Assembly.

Juvenile Recidivism

Section 16.5 of S.L. 2004-124 directs the state Sentencing and Policy Advisory Commission, in consultation with DJJDP and the legislature's Fiscal Research Division, to develop a methodology for measuring juvenile recidivism. The commission must report the proposed methodology and any related recommendations to the 2005 General Assembly by March 1, 2005.

Alternatives to Commitment of Juveniles

Section 16.6 of S.L. 2004-124 directs DJJDP, in consultation with the Fiscal Research Division of the General Assembly, to study electronic monitoring and house arrest programs for juvenile offenders. The department must report certain data and any recommendations on ways to expand the use of electronic monitoring programs as alternatives to committing juveniles to youth development centers by March 1, 2005.

Section 16.7 of the act authorizes DJJDP to use up to $500,000 for demonstration projects involving Juvenile Crime Prevention Councils to identify effective community programs for juveniles who have been committed to, or who may be committed to, youth development centers. The department may award up to ten competitive grants to up to ten councils, and no award may exceed $100,000. When selecting award recipients, the department must consider (1) commitment rates, (2) programs that target juveniles in rural areas, (3) geographical representation, and (4) collaboration among counties. Funds that are not awarded by June 30, 2005, will revert to the General Fund.

Education of Committed Juveniles

Section 16.8 of S.L. 2004-124 requires DJJDP, in consultation with the state Board of Education and the Community Colleges System Office, to review the assessment of juveniles committed to DJJDP and the curricula, education plans, and alternative education programs

available to those juveniles. DJJDP, the state Board of Education, and the Community Colleges System Office must report to the General Assembly by March 1, 2005.

Youth Advocacy and Involvement Fund

Section 19.10 of S.L. 2004-124 rewrites G.S. 143B-387.1 to (1) change the name of the fund created by that section from Youth Legislative Assembly Fund to Youth Advocacy and Involvement Fund and (2) expand the purposes for which the fund may be used to include North Carolina Students Against Destructive Decisions (SADD) programs.

Child Day Care and Early Childhood Programs

Child Day Care Facilities

Section 10.35 of S.L. 2004-124 amends G.S. 110-88 to authorize the state Child Care Commission to adopt rules for child care facilities that provide care for medically fragile children.

Child Day Care Subsidies

S.L. 2004-124 provides an additional $25.1 million in state and federal funding for subsidized child care. The act also gives the Department of Health and Human Services additional flexibility in allocating federal and state child care funding to counties when doing so is necessary to prevent termination of services.

Criminal Records Checks

Section 10.36 of S.L. 2004-124 requires the Division of Child Development to use lapsed salary funds to support up to three temporary positions during fiscal year 2005 to eliminate the backlog of criminal history record checks for local child care centers.

More at Four

S.L. 2004-124 appropriates $9.1 million to fund approximately two thousand additional slots in the state's More at Four prekindergarten program. State funding for the program may not supplant any funding for classrooms that served four-year-olds as of fiscal year 2003–2004. The act also requires the program to establish income eligibility requirements in which the participants' family incomes do not exceed 75 percent of the state's median income but that allow up to 20 percent of the children enrolled in the program to come from families whose incomes exceed 75 percent of the state's median income if the children have other designated risk factors. S.L. 2004-124 also requires the program to shift unfilled slots to counties with waiting lists and to transfer any slots that remain unfilled on January 30, 2005, to the Division of Child Development for use in reducing the waiting list for subsidized child care.

Finally, S.L. 2004-124 provides that the director of the More at Four program (or his or her designee) will be a member of the board of directors of the North Carolina Partnership for Children (Smart Start).

Other Legislation Affecting Children and Families

S.L. 2004-191 (S 1218) amends G.S. 20-137.1(a1) to require that a child who is younger than eight years of age and who weighs less than eighty pounds be properly secured in an appropriate child passenger restraint system. (Until January 1, 2005, the requirement applies to children younger

than five who weigh less than forty pounds.) If no seating position equipped with a lap and shoulder belt in which to properly secure a weight-appropriate child restraint system is available, the restraint system may be secured by a properly fitted lap belt only. The act is effective January 1, 2005.

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Community Development and Housing

In the continued aftermath of widespread plant closings, economic development remained a dominant theme in the 2004 legislative agenda. The General Assembly responded to calls to create jobs by considering, with vigorous debate, changes in the ways the state grants incentives to and taxes its corporate citizens. Numerous bills were introduced that sponsors claimed would attract new businesses, aid existing businesses, and support new entrepreneurs. While most of these bills failed, the General Assembly did authorize some significant expenditures. In comparison, considerably less debate and fewer dollars were directed toward affordable housing efforts, with most of the enacted legislation being aimed at supporting local initiatives.

Community and Economic Development

One North Carolina Fund

In S.L. 2004-88 (H 1352) the General Assembly appropriated $20 million to the Governor's One North Carolina Fund. This fund (formerly the Governor's Industrial Recruitment Competitiveness Fund) gives the Governor significant discretion to provide grants to local governments to secure commitments from companies considering relocation to or expansion within the state or to convince companies considering leaving the state to remain. S.L. 2004-88 also amends G.S. 143B-437.71 to establish the fund as a nonreverting account and expresses the legislature's intent that the fund receive a recurring annual appropriation of $10 million.

Despite the discretion still afforded the Governor, the General Assembly placed some limitations on the fund's uses. Proceeds from the fund may be used only for (1) the installation or purchase of equipment; (2) structural repairs, improvements, or renovations to existing buildings

as part of expansion projects; (3) construction of or improvements to new or existing water, sewer, gas, or electric utility distribution lines or the purchase of related equipment for existing buildings; (4) construction of or improvements to new or existing water, sewer, gas, or electric utility distribution lines or the purchase of related equipment for new or proposed buildings that will be used for manufacturing and industrial operations; and (5) any other purposes specified by the General Assembly. Prior to the enactment of S.L. 2004-88, the administrative rules regulating the fund permitted all of the above uses except the construction of or improvements to the infrastructure of new or proposed buildings.

The new provisions of G.S. 143B-437.72 clarify that One North Carolina funds may only be disbursed as set out in agreements entered into between a local government and the state and a local government and a grantee business. An agreement between a local government and a grantee business must include (1) specific provisions regarding the number of jobs to be created or retained, the salary ranges involved, the location of the jobs, and the time period within which the jobs will be created or retained and maintained; (2) a commitment on the part of the business to provide proof of the jobs created or retained and the salary levels of those jobs; (3) limitations on the use of funds; (4) provisions regarding the right of the state or local government to inspect all records of the business to confirm compliance with the agreement; (5) a method for establishing compliance with the agreement; (6) a schedule for disbursing funds that relates disbursement to the level of performance the business has achieved under the agreement; (7) a requirement for recapturing funds if the business fails to comply with the terms of the agreement; and (8) any additional protections deemed necessary.

An agreement between the state and a local government must contain (1) the local government's commitment to match state funds with cash, fee waivers, in-kind services, donation of assets, provision of infrastructure, or a combination of these; (2) provisions regarding the local government's obligation to recapture funds if the company fails to meet its commitments; (3) provisions regarding the local government's obligation to reimburse the state for recaptured or improperly disbursed funds; (4) provisions regarding the state's right to access local government records regarding compliance; (5) a schedule for the disbursement of funds; and (6) any additional protections deemed necessary. The Department of Commerce is charged with developing further guidelines related to the administration of the fund.

Rural Economic Infrastructure Funds

Rural North Carolina has been particularly hard hit by the recent recession and the longer-term transitions in the national economy. The General Assembly, in S.L. 2004-88, sought to alleviate some of the economic stress facing rural communities by providing the North Carolina Rural Economic Center $20 million in funding to stimulate rural economic development. The legislation directs that $15 million of that funding be used to establish the North Carolina Infrastructure Program. This program will furnish grants to local governments for the construction of critical water and wastewater facilities and other infrastructure, including technology-related infrastructure, in sites where the facilities will provide opportunities for private job creation. The legislation also directs that the Rural Center set aside part of the funding for a program to redevelop some of the many buildings vacated by closed businesses as space for new and expanding businesses. Priority for the Building Reuse and Restoration Fund must be given to towns with a population of less than five thousand. Remaining funding may be used for research and demonstration grants and up to 4 percent of the total funds may be used for administrative costs. Local governments applying for the funds must specify the number of private sector jobs that will be created and provide a verifiable means of ensuring that commitments are met. The overall goal of the funding effort is to create 130 new businesses and 1,500 jobs in rural areas of the state.

Worker Retraining

North Carolina community colleges have been inundated with the training needs of dislocated workers. The General Assembly responded by appropriating $4.1 million to the Community Colleges System Office for the 2004–2005 fiscal year to support the new and expanding industry training program. S.L. 2004-88 provides that funds unexpended and unencumbered at the end of the fiscal year will not revert to the General Fund.

Job Development Incentive Grants

S.L. 2004-124 (H 1414) expanded and extended the Job Development Investment Grant (JDIG) program. JDIG, which was created in 2002, allows a state Economic Investment Committee to enter into agreements with companies for the reimbursement of 10–75 percent of state income tax withholding payments for up to twelve years if such agreements would secure industrial sites that would be located elsewhere but for the incentive. The major changes to JDIG include (1) an increase from 15 to 25 in the possible number of projects, (2) an increase from $10 to $15 million in the total amount available for grants in a single year, and (3) extension of the program's sunset to January 1, 2006. Responding to critics who claimed that JDIG has disproportionately benefited the urban areas of the state, the General Assembly strongly encouraged the Department of Commerce and the Economic Investment Committee to give priority consideration under JDIG to projects located in less economically developed areas. S.L. 2004-124 also authorizes a comprehensive study of JDIG which will be submitted to the 2005 General Assembly no later than April 1, 2005.

State Development Zones

S.L. 2004-132 (S 1063) directs the Secretary of Commerce to encourage, but not require, industrial and pollution control projects applying for industrial revenue bonds to locate in state development zones. In addition, S.L. 2004-203 (H 281), the technical corrections bill, clarifies G.S. 105-129.3A(a) and G.S 160A-536 to provide that the State Budget Officer, rather than the State Planner, is responsible for certifying population estimates for purposes of determining development zones and urban revitalization areas.

Changes to the Bill Lee Act

Enacted in 1996, the William S. Lee Quality Jobs and Business Expansion Act (Bill Lee Act) offers tax credits to companies in specifically named industrial classifications that create jobs or invest in machinery and equipment, worker training, research and development, and central offices. Counties in the state are grouped into five tiers based on per capita income, unemployment rates, and population growth. The lower-tiered counties are the more economically distressed counties, and companies investing in them qualify for larger tax credits. S.L. 2004-202 (S 1244) provides that counties will be reevaluated each year (instead of every three years) for purposes of determining their tier status. This change is intended to make the act's incentive system more sensitive to catastrophic changes in a county's economic conditions.

In the 2003 Special Session on Economic Development, the General Assembly created a corporate income tax credit for any cigarette manufacturer that exports cigarettes to foreign countries, uses the North Carolina State Ports, and maintains employment levels in North Carolina exceeding those of the manufacturer at the end of 2004. S.L. 2004-170 (H 1145) amends G.S. 130.46 to clarify that, for purposes of this credit, a job may only be counted in a company's employment total for any one year if the job is located (that is, more than 50 percent of the employee's duties are performed) in North Carolina for more than six months of the year.

Research and Development Tax Credit

For years, including during the 2004 session, economic developers have argued that many research and development activities are not well suited for the economically distressed areas the Bill Lee Act was designed to target. By removing the research and development tax credit from the Bill Lee Act, S.L. 2004-124 expanded the list of businesses eligible for the act's credits as well as the purposes for which the credits may be claimed. However, the act still provides greater incentive rewards for research and development investments in the state's most distressed areas. For example, a taxpayer may take a larger credit for expenses for research performed in an enterprise tier one, two, or three county than for research performed in a tier four or five county. A taxpayer may also take an additional credit of 15 percent for work conducted in North Carolina by a public research university. This tax credit sunsets on January 1, 2009.

Tax Credits for Renewable Fuel Facilities

S.L 2004-153 (H 1636) amends G.S. 105-129.16D to provide tax credits for the construction and installation of commercial facilities for dispensing renewable fuel. The credit, which amounts to 15 percent of the construction costs, must be taken in three equal annual installments beginning with the taxable year in which the facility is placed in service. The bill also provides a credit to taxpayers who construct and place in service a commercial facility for processing renewable fuel. These taxpayers may take a credit equal to 25 percent of construction costs. This credit must be taken in seven equal annual installments beginning with the taxable year in which the facility is placed in service.

Taxpayers may not take either the processing or dispensing credit if they claim any other state tax credit for the same costs of constructing and equipping the facility. The credit is effective for taxable years beginning on January 1, 2005, and will not apply to facilities placed in service after January 1, 2008.

Tax Law Changes

This year's General Assembly sought to make North Carolina a more appealing place for companies to do business by lessening their tax burdens. S.L. 2004-124 loosened eligibility restrictions for companies in less prosperous counties claiming sales tax refunds, expanded sales tax exemptions to include certain additional goods, and raised the amount of annual tax credits given for qualified business investments under G.S 105-163.012(b). The year's most publicized tax proposal—to exempt a portion of corporate income from taxation—did not pass.

Elimination of Wage Standards

Previously, companies that took advantage of industrial revenue bonds were required to pay their employees above a specified wage, which usually amounted to slightly more than the average manufacturing wage of the county to which the company was locating (or, in wealthier counties, slightly more than the state average manufacturing wage). S.L. 2004-132 removes this wage standard from bonds for industrial and pollution control projects.

Entrepreneurship

Entrepreneurship has emerged as an important aspect of economic development in recent years. Recognizing this fact, this year's General Assembly appropriated $2.25 million for the Department of Commerce and the North Carolina Rural Economic Development Center to create demonstration grants to be used by local governments in very distressed rural areas. S.L. 2004-124 directs that the grants be used to address critical infrastructure and entrepreneurial needs and to provide support to small businesses. The Department of Commerce also received $533,800 to fund

a Business ServiCenter. The center will house an ombudsman who will provide a centralized source of information to assist small businesses.

Community Development Block Grants

The budget act, S.L. 2004-124, increases the options for assistance available to nonprofit organizations, expanding their capacity to carry out, in partnership with units of local government, activities eligible for Community Development Block Grants. Under the new law, capacity building is an eligible activity under any program category. In addition, capacity building grants may be financed through program income or unobligated funds.

Support for Motor Sports

Two bills this session promote the multibillion dollar motor sports industry. The budget bill, S.L. 2004-124, appropriates $4 million for the planning and design of a testing complex near Charlotte to compete with similar tracks being developed in neighboring states. The North Carolina Motor Sports Testing and Research Complex will be linked to UNC Charlotte's motor sports engineering program. The second measure, S.L. 2004-185 (S 574), authorizes the Department of Motor Vehicles to issue special license plates having a stock car racing theme.

Regional Partnership Vision Plans

S.L. 2004-124 appropriates $1.75 million to the North Carolina Partnership for Economic Development Inc. for the creation and implementation of strategic economic development plans for each of the seven regional economic development partnerships.

Study Commission on Economic Development Infrastructure

S.L. 2004-161 (S 1152) creates a thirty-two-member Study Commission on Economic Development Infrastructure. The commission is charged with developing a plan to restructure and consolidate the system supporting economic development activities and must report its findings to the 2005 General Assembly upon its convening.

Housing

Limitations on Housing Authorities

In response to concerns that some housing authorities in the state were using fencing that posed safety hazards to public housing residents, S.L. 2004-199 (S 1225) prohibits housing authorities from erecting or maintaining around occupied housing units any fence or gate structure that is electrified or includes spikes or barbed wire.

Home Loss Protection

S.L 2004-124 directs the North Carolina Housing Finance Agency to develop and administer a Home Protection Pilot Program and Loan Fund to assist workers who lose their jobs and are in danger of losing their homes because of the state's changing economic conditions. The agency is authorized to make loans to such homeowners, fund nonprofit counseling agencies to implement the program, and develop methods to notify homeowners about foreclosure mitigation services and the availability of agency loans.

Minimum Housing Ordinances

Dilapidated and vacant buildings can haunt neighborhoods, blighting the city landscape, lowering nearby property values, increasing crime and the risk of fire, and posing health and safety hazards to children. Over the years the General Assembly has sought to provide local governments the specific tools needed to combat urban decay in their jurisdictions. This session was no exception. S.L. 2004-70 (H 1726) authorizes the City of Winston-Salem to order residential property owners to repair housing to meet minimum code standards rather than simply vacating these structures. Last session S.L. 2003-76 (S 290) and S.L. 2003-320 (S 357) granted this authority to Greensboro and Roanoke Rapids to allow those cities to address blight in a manner that did not further reduce the availability of affordable housing. Two other acts this session address the problem of urban decay differently. S.L. 2004-6 (H 1666) adds the Town of Garner to the growing list of municipalities allowed to declare residential buildings in community development target areas unsafe and to demolish those buildings by using the accelerated process authorized under G.S. 160A-426 for the demolition of unsafe nonresidential buildings. Finally, S.L. 2004-98 (H 1737) authorizes the cities of Winston-Salem and Reidsville to order that dwellings determined to be unfit for human habitation be repaired or demolished after a period of six months rather than the one year specified in G.S. 160A-443(5a).

Affordable Housing for Teachers

In many North Carolina communities, recent increases in the cost of housing have so outpaced increases in income that public servants cannot afford to buy, or sometimes even to rent, a home. This phenomenon has become a barrier to the recruitment of essential personnel, including teachers. Responding to one community's concerns, the General Assembly enacted S.L. 2004-16 (H 1640) authorizing the Dare County Board of Education to enter into contracts with nonprofit and public housing agencies to construct and provide up to three affordable housing projects on property owned or leased by the board. The projects may contain a mixture of below-market and at-market rental units. Teachers will have priority in securing these units.

Anita R. Brown-Graham

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Courts and Civil Procedure

After several years of increasing workloads and budget reductions, 2004 offered some fiscal relief to the strapped state court system. The appropriations act made no reductions in the court systems budget. This in itself was of significant benefit to the courts, as nearly all other departments experienced budget reductions this session. The act also addressed the main priorities of the Administrative Office of the Courts (AOC)—interpreters, equipment, additional deputy clerks, means to address domestic violence workload increases, and fees for attorneys representing abused and neglected children served by the guardian ad litem program.

This year all judicial employees received the pay raise provided for state employees in general; in recent years judges and other elected officials did not receive the bonuses and small raises provided to other state employees. The total budget increase, not including the salary increases, was nearly $7 million. A summary of the important budget items is included in this chapter.

In response to recommendations of the State Judicial Council, the legislature enacted some significant jurisdictional changes and proposed a constitutional amendment to extend the magistrate's term of office to four years after he or she serves an initial two-year term. This amendment came before the voters as a referendum in the November 2004 election.

This chapter also summarizes significant changes in civil procedure, especially those changes establishing new types of civil actions to provide court protection for victims of stalking and workplace harassment. It also discusses important changes to the laws that are commonly administered by clerks of court and magistrates.

Readers interested in the justice system will also want to review other chapters of this publication, including the chapters on family law, juvenile law, criminal law, and motor vehicle law. Significant substantive changes in the laws affecting domestic violence cases are discussed in both the criminal law and family law chapters.

Budget Matters

The total court system budget for fiscal 2004–2005 is $318.2 million. The budget bill (S.L. 2004-124 [H 1414]) adds seventy-two positions to the court system, including the following:

1. Forty deputy clerks
2. Seven judges
   - Two superior court judges (in districts 3A and 15B)
   - One special superior court judge
   - Four district court judges (in districts 5, 17B, 21, and 29)
3. Fifteen assistant district attorneys (in districts 1, 2, 7, 9, 10, 13, 16B, 18, 25, 26(3), 27B, 28, and 30)
4. Two magistrates (in Stanly and Davie counties)

The budget also appropriates $1 million per year to partially fund the costs of providing interpreters to court participants who do not speak or understand English. The need for interpreters, however, greatly exceeds this appropriation. Previously the interpreter program has been subsidized by lapsed salaries, money allocated for positions that are vacant due to retirement, resignation, and so forth. The $1 million will reduce the demand on that portion of the AOC budget. S.L. 2004-124 also provides funds to raise the rate paid to guardian ad litem attorneys from $35 to $45 per hour.

The budget also appropriates expansion funding for several important court system programs. Family court will be extended to another district. After the legislative session, the AOC designated district 28 (Buncombe County) as the new family court district, which means it will receive the additional staff training and personnel included with the designation as a family court district. Drug treatment courts in Durham, Mecklenburg, and Randolph counties were funded on a permanent basis. The custody mediation program, which has been growing slowly in recent years, received $50,000 in expansion funds, which will allow the AOC to extend the program into at least one additional district. The budget also includes funding for critical equipment needs in three local telephone courthouse upgrades and in the statewide electronic warrant repository system. Despite the appropriations for these two programs ($908,000 in nonrecurring moneys), most of the nearly $7 million needed for new equipment remains unfunded.

Finally, in a related action, the budget establishes two new public defender offices. In district 1 (Currituck, Pasquotank, Dare, Gates, Camden, Chowan, and Perquimans), the office is to be established in 2004 and in district 10 (Wake), in July 2005.

Court Jurisdiction

In 1999 the legislature authorized the creation of the State Judicial Council. Its purpose is to study the judicial system and make periodic reports on ways to improve it. One of the areas on which the council has focused since its inception has been the jurisdiction of various court officials. Many of the determinations about which judicial officials should handle particular kinds of cases have been in place since the 1960s. Several years ago the council appointed a subcommittee to review the allocation of jurisdiction to determine if the courts could operate more efficiently by changing that allocation. S.L. 2004-128 (S 577) contains some of the council's jurisdictional recommendations. The new legislation raises the civil small claims jurisdiction of magistrates to $5,000 and authorizes clerks of court to hear and decide requests for uncontested divorces (which are now heard by the district court). The council had also recommended that the authority of magistrates and clerks to hear infraction cases be expanded, that district court judges be authorized to hear guilty pleas in several categories of felony cases, that superior court judges be authorized to dispose of misdemeanors pending in district court in limited circumstances, and that clerks of court be authorized to set child support amounts in certain cases. All of these proposals, however, were deleted from the bill before it was enacted.

The legislature also added some provisions to S.L. 2004-128 that did not arise from the council's recommendations. The act specifies that assignment to a drug treatment court is an

intermediate punishment for purposes of applying the structured sentencing laws (for more information on this topic, see Chapter 6, "Criminal Law and Procedure"). It submits to the voters a constitutional amendment proposed by the North Carolina Magistrates Association to extend the terms of magistrates. Magistrates are now appointed for two-year terms. If the voters approve the amendment, new magistrates will serve an initial two-year term, and any subsequent terms will be for four years.

Civil Procedure

The General Assembly made several minor civil procedure changes. S.L. 2004-113 (H 918) amends G.S. 7A-311 to increase the sheriff's fee for serving civil process from $5 to $15. (The fee for serving criminal process remains at $5.) The fee had been $5 since 1990, and the sheriffs had been seeking an increase for the past several sessions of the General Assembly. Counties must use 50 percent of the additional fees collected to ensure timely service of process.

In 2003 the General Assembly amended the judgment docketing statutes in preparation for a new electronic docketing and judgment abstracting system. This amendment provided that the clerk's office must maintain a record of the date and time of both the entry and indexing of the judgment but not the date of the rendition of the judgment. (A judgment is *rendered* when it is announced in court, and it is *entered* when it is reduced to writing, signed, and filed with the clerk.) Although the 2003 legislation modified several judgment provisions that were based on the date of rendition, it failed to amend G.S. 1-47, which provides that the statute of limitations for filing an action on an underlying judgment from a court in North Carolina or any other state is ten years from the date of the rendition of the judgment. S.L. 2004-203 (H 281) amends G.S. 1-47 and similar G.S. 1-52(8) to make the statute of limitations run from the date of the entry of the judgment rather than the rendition since the court record no longer captures the date of rendition. In fact, even since before the 2003 amendments, the practice has been to use the date of the entry of the judgment to determine when the statute of limitations begins to run, because often the date of the rendition of the judgment could not be found in the official court records.

Rule 5(d) of the Rules of Civil Procedure provides that all papers required to be served on the parties to a case must be filed with the clerk of court. However, the General Assembly has made several exceptions to this rule for papers for which there is no reason the clerk would need copies and the volume of which would needlessly overburden the clerk's case files. S.L. 2004-199 (S 1225) provides that subpoenas and objections to subpoenas may not be filed with the clerk unless ordered by the court. The practice has been to file with the clerk any subpoenas that have been served. Even though it appears the new law is intended to change this practice, sheriffs who serve subpoenas will likely continue to submit their returns to the clerk's office and the clerk will file the subpoenas. A party who uses someone other than the sheriff to serve a subpoena may choose not to file the subpoena with the clerk.

No-Contact Orders

Advocates have been lobbying for a law to protect victims of sexual assaults and stalking similar to the one that protects victims of domestic violence. At the same time advocates for victims of domestic violence had been working with businesses to help them understand and deal with domestic violence issues. Partly as a result of this advocacy, the General Assembly enacted two new laws providing for civil no-contact orders.

Victims of Stalking or Nonconsensual Sexual Conduct

S.L. 2004-194 (H 951) adds new G.S. Chapter 50C to allow victims of stalking or non-consensual sexual conduct occurring in North Carolina to seek civil no-contact orders. The new

law does not apply if the relationship between the parties would allow a victim to seek a domestic violence protective order. Chapter 50C authorizes a district court to issue a civil no-contact order upon a finding that the plaintiff or a minor child suffered "unlawful conduct" (nonconsensual sexual conduct or stalking) committed by the defendant. The statute specifically provides that a plaintiff does not need to prove physical injury. Upon a finding that the plaintiff suffered such unlawful conduct, the court may order the defendant

- not to visit, assault, molest, or otherwise interfere with the victim;
- to cease stalking the victim, including at the victim's workplace;
- to cease harassment of the victim;
- not to abuse or injure the victim;
- not to contact the victim by telephone, written communication, or electronic means; and
- to refrain from entering or remaining present at the victim's residence, school, site of employment, or other specified places when the victim is present.

In addition, the court may order any other relief deemed necessary and appropriate.

A plaintiff can file an action for a civil no-contact order in any county in which the plaintiff or the defendant resides or in which the unlawful conduct occurred. No court costs may be charged for filing the complaint or for service of process or orders. If a victim states that disclosure of his or her address will place the victim or any member of his or her family or household at risk of further unlawful conduct, the victim's address may be omitted from all documents filed with the court, and the victim must designate an alternative address to receive court notices.

As with domestic violence protection orders issued under Chapter 50B, a plaintiff seeking relief under Chapter 50C may seek a temporary order ex parte. Under Chapter 50C a temporary order may be granted without notice to the defendant only in certain situations. The chief district judge may designate at least one judge or magistrate to be available to issue temporary no-contact orders in emergency situations when district court is not in session. Temporary orders are effective for ten days but may be extended for another ten days for good cause. Following notice to the defendant and a hearing, the court may enter a permanent no-contact order. Although called "permanent," the order cannot be effective for longer than one year, but it may be renewed by the court. Violations of no-contact orders are punishable by contempt.

Workplace Violence

A second act—S.L. 2004-165 (S 916)—adds new Article 23 to G.S. Chapter 95 allowing an employer to file a district court civil action seeking a no-contact order on behalf of an employee who has suffered unlawful conduct at his or her workplace. *Unlawful conduct* is defined as:

- attempting to cause bodily injury or intentionally causing bodily injury;
- willfully, and on more than one occasion, following, being in the presence of, or otherwise harassing the employee without legal purpose and with intent to place the employee in reasonable fear for his or her safety; or
- willfully threatening to physically injure the employee in a manner and under circumstances that would cause a reasonable person to believe that the threat is likely to be carried out and that actually causes the employee to believe that the threat will be carried out.

While the employer must consult with the employee before seeking an order, the employee's cooperation is not required to bring the action. The employer cannot discipline an employee who is unwilling to participate in the process.

The procedure for seeking a workplace violence no-contact order is identical to that for seeking no-contact orders in response to stalking or nonconsensual sexual conduct, except that court costs are assessed for filing the workplace action. The court may issue a ten-day temporary no-contact order and a permanent order for up to one year. If the employer proves that the employee has been the subject of unlawful conduct at the employer's place of business, the court may order the defendant

- not to visit, assault, molest, or otherwise interfere with the employer or employee at the workplace;
- to cease stalking the employee at the workplace;

- to cease harassment of the employer or employee at the workplace;
- not to abuse or injure the employer or employee at the workplace or damage the employer's property; and
- not to contact either the employer or employee at the workplace.

The court may also order any other relief that it deems necessary and appropriate. Permanent orders are subject to renewal for good cause and violations are punishable by contempt.

S.L. 2004-165 also adds new G.S. 95-270 to prohibit employers from discharging, demoting, denying a promotion to, or disciplining an employee who takes a reasonable amount of time off work to obtain relief from the court under a domestic violence protective order or a no-contact order for stalking or nonconsensual sexual conduct.

Matters of Interest to Clerks of Court

Clerk's Authority to Enter Judgment of Absolute Divorce

S.L. 2004-128 amends G.S. 50-10 to allow the clerk of superior court, upon request of a plaintiff, to enter judgment in cases where plaintiff's only claim is for absolute divorce or absolute divorce and resumption of former name. The clerk is allowed to enter judgment only when the defendant has been defaulted for failure to appear, has answered admitting the allegations of the complaint, or has filed a waiver of the right to answer. The clerk cannot enter judgment if the defendant is an infant or is incompetent.

Private Area for Domestic Violence Complainants

S.L. 2004-186 (H 1354) requires the clerk, when feasible, to provide a private area for complainants to fill out domestic violence forms and make inquiries to court personnel.

Guardianships

North Carolina law has authorized the clerk to appoint a nonresident guardian of the person but has prohibited a nonresident from serving as a general guardian or guardian of the estate. S.L. 2004-203 amends G.S. 35A-1213(b) to remove the restriction that a general guardian or guardian of the estate must be a North Carolina resident. The clerk must require a nonresident general guardian or guardian of the estate to post a bond and may require a guardian of the person to post one. The act adds as a ground for removal or other action that the guardian is a nonresident and refuses to obey any citation, notice, or process served on him or her. Removal is the only penalty the clerk can impose against a noncomplying out-of-state guardian because the clerk cannot get physical custody of the person for contempt.

When the clerk removes a guardian for cause and determines that there is some danger to the ward or the ward's assets while the ruling is being contested, the clerk may enter any order necessary to protect the ward or the ward's estate, such as freezing the ward's bank account or prohibiting the guardian from removing the ward from a nursing home. Before entering such an order, the clerk must have held a hearing and found that one of the grounds for removing a guardian exists. S.L. 2004-203 amends G.S. 35A-1291 to add a new ground and procedure for removing a guardian. It allows the clerk to remove a guardian without a hearing if the clerk finds reasonable cause to believe an emergency exists that threatens the ward's physical well-being or constitutes a risk of substantial injury to the ward's estate. The new law provides no mechanism for the guardian to have a post-removal hearing if he or she contests the removal. The guardian may appeal the clerk's order of removal to the superior court, but such an appeal is on the record rather than for a new hearing.

Compensation of Trustees and Other Fiduciaries

S.L. 2004-139 (S 470) repeals current G.S. 32-50 to -52, dealing with compensation of trustees and other fiduciaries, and replaces it with a new statute. G.S. 32-50 capped compensation to trustees according to the size of the estate and capped compensation to other fiduciaries at 5 percent of the receipts and expenditures.

Trustees. If the terms of the trust do not specify the trustee's compensation, under S.L. 2004-139 the trustee is entitled to compensation that is reasonable under the circumstances. The trustee may pay itself compensation without court approval (1) if the amount of the compensation does not exceed 4/10 of 1 percent of the principal value of the trust's assets or (2) when compensation exceeds that amount, if written notice of the compensation was given to all beneficiaries and no beneficiary filed a proceeding for review of the compensation with the clerk within twenty days of receiving the notice. The trustee also is entitled to reimbursement from the trust's assets for expenses properly incurred in the administration of the trust and is authorized to pay those expenses without prior approval by the clerk. The trustee or any beneficiary may initiate a trust proceeding before the clerk for review of the reasonableness of any compensation or expense reimbursement and for the approval or denial of a compensation or expense reimbursement payment. A beneficiary may bring the proceeding even though the twenty-day period after notice of payment has expired. In reviewing the reasonableness of the compensation, the clerk must consider all of the following:

- Degree of difficulty and novelty of the tasks required of the trustee
- The responsibilities and risks involved in the administration of the trust
- Amount and character of trust assets
- Skill, experience, expertise, and facilities of the trustee
- Quality of the trustee's performance
- Comparable charges for similar services
- Time devoted to administering the trust
- Time constraints imposed upon the trustee in administering the trust
- Nature and costs of services the trustee has delegated to others
- Where more than one trustee is serving, reasonableness of the total fees paid to all the trustees
- Any other factors the clerk deems relevant

If the clerk determines that the trustee has received excessive compensation or expense reimbursement, he or she may order the trustee to make appropriate refunds.

The clerk may allow counsel fees to be paid to an attorney serving as trustee in addition to trustee compensation where the attorney renders professional services differing from the services normally performed by a trustee and of a type that would reasonably justify the retention of legal counsel by a non-attorney trustee.

Other fiduciaries. Fiduciaries other than trustees must request the clerk, in writing, to set the compensation. The fiduciaries are entitled to reasonable compensation in an amount set by the clerk after the clerk takes into consideration the same factors that are listed above for trustees. Other fiduciaries also are entitled to reimbursement for expenses properly incurred in the administration of the fiduciary relationship. The clerk may authorize counsel fees for an attorney-fiduciary in addition to fiduciary compensation on the same grounds as specified above for attorney-trustees. If a power of attorney instrument does not specify how much compensation is to be paid or how compensation should be determined, subsequent to the principal's incapacity the attorney-in-fact is entitled to compensation as determined by the clerk after the clerk considers the factors set out above.

Interpreting trust and fiduciary instruments. S.L. 2004-139 specifies that provisions in current trusts or fiduciary instruments for compensation in an amount "provided by law" or that reference G.S. 32-50 must be construed to allow compensation under the new statute. The new law applies to payments made to a fiduciary on or after January 1, 2005, even if the compensation was earned before that date.

Matters of Interest to Magistrates

Magistrates' Terms

S.L. 2004-128 submits to the voters at the November 2004 election a constitutional amendment to lengthen magistrates' terms of office. Currently this term is two years. Under the proposal the first term would be for two years, but subsequent terms would be extended to four years.

Small Claims Court

S.L. 2004-128 also increases the jurisdictional amount for small claims court from $4,000 to $5,000. In 1965, when the small claims courts were created, the maximum amount in controversy was $300. The General Assembly has increased that amount over the years, with the $4,000 limit having been in effect since 1999.

Tenancy and Water Conservation

S.L. 2004-143 (H 1083) modifies the law governing landlords who charge tenants occupying the same contiguous premises for water or sewer service. The stated purpose of the statute is to encourage water conservation. It creates G.S. 42-42.1, which allows a written lease to include a provision that the landlord will charge the tenant for the cost of providing water or sewer service based on the user's metered consumption. The landlord must receive prior approval from the Utilities Commission to charge for water or sewer service and may also charge a reasonable administrative fee, not to exceed an amount authorized by the commission, for providing the service. S.L. 2004-143 prohibits a landlord from disconnecting or terminating water or sewer services for nonpayment of any amounts due for the service, provides that failure to pay costs for water or sewer service cannot be used as a basis for termination of a lease, and requires the landlord to apply any payments from tenants first to rent owed and then to water or sewer charges. A landlord who is providing water or sewer service and who has actual knowledge that the water being supplied to the tenants exceeds the maximum contaminant level must notify the tenants of this fact.

Involuntary Commitment

A high profile incident in the state where officers did not believe they could serve a commitment custody order issued in another county led to the enactment of S.L. 2004-23 (H 1366). The new statute makes it clear that custody orders for involuntary commitment issued by magistrates or clerks of court are valid throughout the state and can be served in any county in North Carolina regardless of where they were issued. Although this was already the law, some confusion about the matter remained because it was not specifically spelled out in the statute.

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Criminal Law and Procedure

The General Assembly enacted three major pieces of legislation in the field of criminal law and procedure as well as numerous lesser acts. It significantly expanded the discovery rights of both the defense and prosecution in criminal cases; enacted a package of legislation recommended by the House Select Committee on Domestic Violence, making changes affecting domestic violence prosecutions and criminal law generally; and significantly increased the punishments for offenses involving the controlled substance methamphetamine.

Criminal Discovery

A defendant's right to pretrial discovery in cases within the original jurisdiction of the superior court (that is, felonies and misdemeanors joined with felonies) has been limited to fairly narrow statutory categories. The defendant was entitled to obtain discovery of his or her own statements, statements of codefendants, documents that the state intended to use at trial or that belonged to the defendant, reports of examinations and tests conducted in connection with the case, and statements of witnesses once the witness testified. The defendant's obligation to provide information to the state has also been limited. A defendant had to turn over documents and reports of examinations and tests that he or she intended to introduce at trial but little more. Both sides complained that criminal proceedings amounted to "trial by ambush."

Many district attorneys adopted "open-file" discovery policies, allowing defendants access to investigative and other materials beyond the statutory categories. But the decision to have an open-file policy rested with individual district attorneys' offices. There also was not a uniform understanding of what information a defendant could review under an open-file policy; and, if a prosecutor failed to turn over information covered by the policy but not legally required, a defendant had little, if any, recourse.

To ensure greater openness in the discovery process, S.L. 2004-154 (S 52) revises the statutory discovery rights of both the defense and the prosecution. The procedure for obtaining discovery remains essentially the same, but the categories of discoverable information differ significantly from earlier provisions.

Applicability and Effective Date

G.S. 15A-901 continues to provide that the revised discovery article (Chapter 15A, Article 48) applies only to cases within the original jurisdiction of the superior court. It does not apply to misdemeanors heard initially in district court or appealed for trial de novo to superior court. A defendant does not have the right to discovery in those cases except to the extent guaranteed by the United States and North Carolina constitutions (a defendant has the right to exculpatory evidence) or by other statutes [for example, under G.S. 20-139.1(e), a defendant has the right in impaired driving cases to a copy of the record of the chemical analysis].

The changes became effective October 1, 2004, and apply to cases in which the trial date set pursuant to G.S. 7A-49.4 is on or after October 1, 2004. In other words, in addition to future cases, the new discovery provisions apply to pending cases in which the trial is not set to commence before October 1. Thus, if the trial is set for a date before October 1 but is continued to a date after October 1, the new discovery provisions may not apply. (A broader interpretation of the effective-date language would be that the new discovery provisions apply to cases in which the trial has not actually commenced before October 1.)

What must the parties do to exercise their new discovery rights in pending cases? For cases in which the defendant is represented by counsel and the probable cause hearing has not yet been held or waived, the parties would have to comply with the normal timelines for requesting discovery (for defendants represented by counsel, within ten working days of the probable cause hearing or waiver, and for the prosecution, within ten working days of when it provides discovery in response to the defendant's request). In cases in which those dates have already passed but the trial has not yet occurred, the parties could not have complied with those timelines because they had no right to request the broader discovery until the act's effective date. The legislation does not specify a deadline or procedure to follow to obtain the broader discovery in those cases, and probably the safest course for the parties to take is to make a new discovery request as soon after the act's effective date as possible.

Basic Procedures

With minor revisions, G.S. 15A-902 continues to establish the basic procedure for obtaining discovery. The principal procedural changes expand the circumstances in which a defense request for discovery triggers reciprocal discovery rights by the prosecution, allow the parties to apply ex parte for a protective order limiting disclosure (G.S. 15A-908), modify the standard for obtaining sanctions (G.S. 15A-910), and recognize explicitly that the parties may waive the requirement of a written request for discovery. Additional procedural changes apply to specific categories of discovery (for example, the disclosure of the identity of witnesses). These are discussed below in connection with the particular categories of information.

Defense discovery requests. Under G.S. 15A-902, the defendant ordinarily remains responsible for initiating the discovery process by requesting in writing that the prosecution voluntarily provide discovery. A new provision, discussed below, waives the requirement of a written request if the parties have entered into a written agreement to that effect, but for purposes of this discussion it is assumed there is no written agreement in place. If dissatisfied with the prosecution's response to the discovery request, the defendant may file a motion with the court to compel the requested discovery. If the court orders discovery and the prosecution fails to comply, the defendant may ask the court for sanctions. The time limit for making an initial discovery request is the same as under prior law. If the defendant is represented by counsel, the defendant may, as a matter of right, request discovery no later than the tenth working day after either the probable cause hearing or the date the defendant waives the hearing. (The time limits for unrepresented defendants also remain the same as under prior law.)

G.S. 15A-902 continues to specify that if the prosecution voluntarily provides discovery in response to a written request, the prosecution assumes the obligation to provide discovery as if under order of the court. [Revised G.S. 15A-903(b), which describes the information the prosecution must provide in discovery, reiterates this requirement.] Thus the defendant may

request sanctions for the prosecution's failure to provide discovery without having first obtained a court order compelling discovery.

Prosecution discovery requests. In most respects, the same procedures apply to prosecution discovery requests. The prosecution must make a written request for discovery (unless there is a written agreement waiving the requirement) and, if dissatisfied with the response, must follow up with a motion to compel discovery. If, following a written request, the defendant voluntarily provides discovery or the court orders discovery, the prosecution may seek sanctions for noncompliance. As under prior law, the prosecution must make its discovery request within ten days of when it provides discovery to the defendant.

The prosecution's right to discovery differs in one significant respect from the defendant's rights. At least in principle, the defendant controls whether the prosecution obtains discovery, although in practice most defendants will rarely exercise this right. As under prior law, the prosecution has the right to discovery from the defendant only if the defendant requests discovery of the prosecution and either the prosecution voluntarily furnishes the discovery in response or the court compels discovery. [G.S. 15A-905(c), which sets forth the new categories of information the defendant must provide to the prosecution, reiterates that if the prosecution voluntarily provides discovery in response to a written request, the discovery is deemed to have been made under court order and therefore triggers the prosecution's reciprocal discovery rights; this language does not change existing law, embodied in G.S. 15A-902(b).] Consequently, if the defendant does not make a written request for discovery, the prosecution has no right to discovery from the defendant.

The circumstances in which a defendant opts not to take advantage of discovery from the prosecution should be rare, however. Under the revised statute, the defendant must make an all-or-nothing decision about discovery. If the defendant makes a written request for any statutory discovery and the prosecution voluntarily provides discovery or is ordered to do so by the court, the prosecution gains full discovery rights. Previously, a defendant could pick and choose which discovery rights to afford the prosecution by selecting which categories of discovery it wanted. For example, if the defendant requested all of the discovery categories from the prosecution except reports of examinations and tests, the prosecution had no right to reciprocal discovery of the defendant's reports of examinations and tests. The General Assembly accomplished this change by providing that the prosecution is entitled to the discovery set forth in each subsection of G.S. 15A-905 if the court grants any relief sought by the defendant under G.S. 15A-903, the section giving the defendant discovery rights. Previously, each subsection of G.S. 15A-905 was tied to the corresponding subsection of G.S. 15A-903.

Written agreements. Revised G.S. 15A-902(a) and (b) recognize that a written request for discovery is not required of either party if they have agreed in writing to comply voluntarily with the statutory discovery requirements. A written agreement, in other words, can replace a written request. While the provision allows parties to enter into written agreements on a case-by-case basis, its main purpose is to clarify the enforceability of standing discovery agreements such as the one in Mecklenburg County. There, the district attorney's office and the public defender's office have had an agreement to provide discovery without a written request by the opposing party, reducing the need for form discovery requests by both sides. Because the state is a party in all criminal prosecutions, a district attorney should be able to enter into such an agreement and bind the state in all prosecutions in a particular district. Such an agreement would have a more limited effect on defendants because a public defender can act only on behalf of clients represented by his or her office. In addition, because the defendant is not the same party in each case, a standing agreement would have to give public defender clients the right to opt out if they wanted to forego discovery of the prosecution and avoid triggering reciprocal discovery.

Protective orders. G.S. 15A-908(a) has allowed either party to apply to the court, by written motion, for an order protecting information from disclosure for good cause, such as substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment. The statute is revised to provide that a party may now apply ex parte for such an order. Under the revised provision, if an ex parte protective order is granted, the opposing party receives notice of entry of the order but not of the subject matter of the order. The revised section does not specify any further procedures, but the court should maintain under seal

the motion, order, and information protected by the order in the event disclosure is required at trial or the propriety of the order is challenged on appeal.

Sanctions. G.S. 15A-910 has provided that a party may seek sanctions if the responding party has failed to comply with an order for discovery, including voluntary discovery deemed to be made under court order. The revised section adds that the court, before imposing sanctions, must consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply. The extent to which this new requirement changes existing law is not clear.

Continuing duty to disclose. G.S. 15A-907, which imposes a continuing duty to disclose discoverable evidence, was not materially changed.

Defense Discovery Rights

The new legislation completely rewrites G.S. 15A-903, the section giving the defense discovery rights, by deleting all of the former discovery categories and creating three new ones: investigative and prosecutorial files, expert witnesses, and lay witnesses.

Investigative and prosecutorial files. The most significant discovery category is in new G.S. 15A-903(a)(1), which provides that the state must make available to the defendant "the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant." This provision is patterned after G.S. 15A-1415(f), revised in 1996 to give defendants sentenced to death the right to open-file discovery in postconviction proceedings. The pretrial and postconviction provisions differ in one important respect, however. In capital postconviction proceedings the law provides no protection for the prosecuting attorney's work product (although the state may ask the court in the interests of justice to deny access to some files). *See* State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (1998). In contrast, revised G.S. 15A-904, discussed below, continues to protect before trial materials containing the prosecuting attorney's theories, strategies, and other mental processes. The new pretrial discovery provision also differs from the postconviction provision in that the pretrial provision does not specify that the state's disclosure obligation is "to the extent allowed by law." Interpreting this qualifying language in the context of capital postconviction proceedings, the North Carolina Supreme Court in *Bates* held that the state is not required to produce information it is prohibited by other laws from disclosing. Because this qualification is not included within the new pretrial discovery provisions, the state would appear to be obligated to disclose all evidence it obtains in the investigation or prosecution of the defendant. (Even under the capital postconviction provision, the extent to which the state is actually prohibited from disclosing information, once the information comes into the state's possession, is unclear.) There could be some circumstances, however, in which other laws might preempt the statutory discovery requirements.

The new subsection provides a definition of *file*, stating that it includes "the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." This definition, particularly the last clause, clarifies that the defendant is not literally entitled to review all of the files of an agency involved in the investigation or prosecution of the defendant; rather, the defendant is entitled to the complete agency files concerning the investigation or prosecution of the defendant. For example, a defendant would be entitled to law enforcement files concerning the investigation of the offenses allegedly committed by the defendant but would not necessarily be entitled to information from other files, such as the investigating officer's personnel file or the files of investigations of other offenses, unless the investigation or prosecution of the defendant involved that information or other grounds warranted disclosure, such as that the files contained exculpatory evidence.

The definition of *file* repeats some of the categories of information that the prosecution formerly had to provide—the defendant's statements, codefendants' statements, and results of tests and examinations. Presumably the defendant (and the prosecution, to the extent it is entitled to discovery of the defendant's tests and examinations) would be entitled to the data underlying the tests and examinations, as under prior law. *See* State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802

(1992) (interpreting prior discovery statute, which gave defendant right to discover results and reports of tests and examinations, court held that defendant was entitled to underlying data).

The definition also adds new categories of discoverable information. Thus, the prosecution must turn over witness statements in pretrial discovery; previously, the statute required the state to turn over witness statements only after the witness had testified and only if the statement fell within the definition of witness statement in repealed G.S. 15A-903(f)(5) (requiring disclosure only of statements signed or otherwise adopted or approved by the witness, recorded statements, and substantially verbatim transcriptions of statements). The prosecution also must turn over officer notes; previously, the statute required that an officer's notes (as well as officer reports) be turned over only to the extent they contained information within specific statutory discovery categories. The definition includes a catchall requirement that the state turn over any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

As under prior law, the defendant has the right to inspect and obtain copies or photographs of discoverable information and, under appropriate safeguards, to test physical evidence. This language tracks prior law. The subsection also requires that oral statements be in written or recorded form. Previously, only oral statements of defendants and codefendants had to be reduced to writing or recorded. The new provision is not limited to defendants and codefendants, and its reach is unclear.

What agencies' files must the prosecution obtain and make available for the defendant's review? The language of the statute both establishes the prosecution's obligation and limits it, although some questions may remain. The clearest way to consider this issue may be to look at different types of agencies.

1. Obviously, files within the prosecuting district attorney's own office are subject to the new discovery requirements.
2. The files of state and local law enforcement offices (as well as other district attorneys' offices) involved in investigating the defendant are also subject to discovery. Revised G.S. 15A-501 reinforces this obligation, stating that following the arrest of a person for a felony, law enforcement must make available to the prosecutor on a timely and continuing basis all materials and information acquired in the course of the investigation. These requirements are similar to the state's obligations under the prior discovery statute and *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court decision requiring the state to turn over exculpatory evidence. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (prosecutor has duty to learn of favorable evidence known to others acting on government's behalf in case); State v. Smith, 337 N.C. 658, 447 S.E.2d 376 (1994) (under *Brady*, prosecution deemed to have knowledge of information in possession of law enforcement); State v. Pigott, 320 N.C. 96, 357 S.E.2d 631 (1987) (court holds under prior discovery statute that prosecutor is obligated to turn over discoverable information in possession of those working in conjunction with him or his office; photographs taken by law enforcement officer were subject to discovery).
3. The files of state and local agencies that are not law enforcement or prosecutorial agencies, such as schools and social services departments, would appear to be exempt from the statutory discovery procedures in most circumstances. A defendant may still be entitled to obtain the information in some instances, however. First, the disclosure requirements would apply to materials obtained from other agencies by law enforcement or prosecutorial agencies during the investigation of the defendant. Second, in some circumstances a defendant may have the right to obtain the information directly from the agency possessing it, either by subpoena or motion to the court. *See generally* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (describing defendant's right to obtain records possessed by third parties). Third, an agency could be involved in a criminal investigation to the extent that it could be considered to be acting in a law enforcement capacity, and the portion of its files pertaining to the investigation could become subject to the statutory disclosure requirements. Whether an agency has crossed this line may be difficult to determine. *See generally* State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147

(1993) (social worker representing abused child acted as law enforcement agent in interviewing defendant, rendering inadmissible custodial statements made to worker without benefit of *Miranda* warnings); Martinez v. Wainwright, 621 F.2d 184, 186–88 (5th Cir. 1980) (in case applying *Brady v. Maryland*, court found that prosecution was obligated to disclose evidence in medical examiner's possession; although not a law enforcement agency, medical examiner's office was participating in criminal investigation).

4. Information collected by federal agencies may be subject to disclosure in some circumstances. The prosecution would appear to be obligated to turn over information that it or state or local law enforcement agencies obtained from federal agencies (unless the prosecution obtained a protective order). When state and federal law enforcement agencies are engaged in a joint investigation of the defendant, the prosecution also may have an obligation to request information obtained by the federal agency. Ultimately, however, the prosecution's obligation to obtain information from non-state agencies would appear to be limited by the willingness of the other agencies to provide it. *See generally* State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979) (prior discovery law obligated state to produce information in its possession, custody, or control; materials within possession of mental health center and social services department were not subject to statutory discovery where prosecution was denied access to and had no power to obtain information).

Expert witnesses. Under new subsection (a)(2) of G.S. 15A-903, the prosecution must give notice to the defendant of any expert witness that it reasonably expects to call as a witness at trial. Each such witness must prepare, and the prosecution must furnish to the defendant, a report of the results of any examinations or tests, including the expert's opinion and underlying basis for that opinion. The expert also must provide his or her curriculum vitae. The courts had interpreted the prior discovery provisions as allowing trial courts to require testifying experts for each side to prepare reports of their findings and furnish the reports to the other side. *See* State v. East, 345 N.C. 535, 481 S.E.2d 652 (1997). The new provision makes this practice an explicit requirement. The specified information must be produced a reasonable time before trial, as determined by the trial court.

Other witnesses. Subsection (a)(3) of G.S. 15A-903 provides that at the beginning of jury selection, the state must provide to the defendant a list of all other witnesses whom the state reasonably expects to call at trial. Previously, trial judges often pressed the parties to disclose their witnesses before jury selection, which helped expedite the trial. The new subsection makes this practice a requirement, subject to three exceptions. First, the prosecution may omit names if it certifies in writing and under seal to the court that disclosure may subject the witnesses or others to physical or substantial economic harm or coercion or that there is other particularized compelling need. The statute does not explicitly require court approval, but a prudent prosecutor may want to obtain it. The omission of a witness's name without adequate cause could be grounds for sanctions, including the witness being precluded from testifying. Second, if the prosecution in good faith did not list a witness because it did not reasonably expect to call the witness, the statute does not bar the prosecution from calling the witness. Third, the court has the discretion to permit an undisclosed witness to testify in the interests of justice.

Work product restrictions. The attorney work-product doctrine is "designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case." State v. Hardy, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (1977). At its broadest the doctrine has been interpreted as protecting information collected by an attorney and his or her agents in preparing a case, including witness statements and other factual information. *See* Hickman v. Taylor, 329 U.S. 495 (1947) (discussing doctrine in civil cases). At its core the doctrine is concerned with protecting the attorney's mental impressions, opinions, conclusions, theories, and strategies. *See Hardy*, 293 N.C. at 126, 235 S.E.2d at 841. Former G.S. 15A-904 reflected the broader version of the work-product doctrine, although the statute did not specifically mention the term. *Id.* (discussing statute and doctrine). It allowed the state to withhold from the defendant internal documents made by the prosecutor, law enforcement, or others acting on the state's behalf in the course of investigating or prosecuting the case unless

the document fell within certain discoverable categories (for example, it contained the defendant's statement). Revised G.S. 15A-904 embodies the narrower version of the doctrine. It continues to protect the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the state.

The revised statute provides that the state may withhold the following from discovery:

- Written materials, including witness examinations, voir dire questions, opening statements, and closing arguments, drafted by the prosecuting attorney or his or her legal staff for their own use at trial
- Legal research
- Records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or his or her legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or his or her legal staff

Thus, the revised statute no longer protects materials prepared by non-legal staff or by personnel not employed by the prosecutor's office, such as law enforcement officers. It also does not protect evidence or information obtained by a prosecutor's office. For example, interview notes reflecting a witness's statements, whether prepared by a law enforcement officer or a member of the prosecutor's office, would not be protected under the work-product provision; however, notes made by the prosecutor or his or her legal staff reflecting their theories, strategies, and the like remain protected.

Prosecution Discovery Rights

The legislation significantly adds to the prosecution's discovery rights in G.S. 15A-905, retaining the previous two categories of discovery and creating three new ones.

Documents and reports of examinations and tests. G.S. 15A-905(a) has given the state the right to inspect and copy books, papers, photographs, and other tangible objects that the defendant intends to introduce in evidence at trial. G.S. 15A-905(b) has given the state the right to: (1) inspect and copy the results or reports of physical or mental examinations or tests, measurements, or experiments made in connection with the case if the defendant intends to introduce them at trial or they were prepared by and relate to the testimony of a witness whom the defendant intends to call at trial; and (2) test physical evidence, subject to appropriate safeguards, if the defendant intends to offer the evidence or tests or experiments made in connection with the evidence. The new legislation retains these rights. The only change is that if the defendant requests and obtains from the prosecution any discovery authorized by G.S. 15A-903, the prosecution is entitled to seek all of the discovery authorized by G.S. 15A-905, not just the particular category of discovery requested by the defendant (see "Basic Procedures," above).

Notice of defenses. The first of three new categories of prosecution discovery is found in G.S. 15A-905(c)(1). It requires the defendant to give notice of his or her intent to offer at trial any of the following defenses: alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, and voluntary intoxication. The defendant must give this notice within twenty working days after the date the case is set for trial pursuant to G.S. 7A-49.4 or within such other time as set by the court. The notice is inadmissible against the defendant at trial.

Conforming changes are made to G.S. 15A-959, which contains a notice requirement for the defense of insanity and the introduction of expert testimony relating to a mental condition that bears on whether the defendant had the mental state required for the offense charged. Under amended G.S. 15A-959(a), if the defendant intends to raise the defense of insanity, he or she must comply with the time limits in revised G.S. 15A-905(c)(1); in cases not subject to G.S. 15A-905(c)(1)—that is, cases in which the defendant has not requested discovery and the prosecution has no reciprocal discovery rights—the defendant must give notice of the defense of insanity within a reasonable time before trial. Likewise, under amended G.S. 15A-959(b), if the case is not subject to G.S. 15A-905(c), the defendant must give notice of the intent to use the indicated expert testimony within a reasonable time before trial; if the prosecution has reciprocal discovery rights

under G.S. 15A-905(c), the defendant must give notice of the defenses listed in subsection (c)(1) and notice of his or her expert witnesses as provided in subsection (c)(2), discussed below.

For the defense of alibi, the court upon motion of the state may order the defendant to disclose the identity of his or her alibi witnesses two weeks before trial. If the state makes the motion and the court orders disclosure, the court must require the state to disclose any rebuttal alibi witnesses no later than one week before trial. The court may set different time limits if the parties agree.

For defenses for which the burden is on the defendant to persuade the jury—namely, duress, entrapment, insanity, automatism, and involuntary intoxication—the revised statute provides that the notice of defense also must contain specific information as to the nature and extent of the defense.

Expert and other witnesses. G.S. 15A-905(c)(2) mirrors G.S. 15A-903(a)(2), discussed above, which gives the defendant the right to discovery of the state's expert witnesses. It requires the defendant to give notice to the state of the expert witnesses he or she reasonably expects to call at trial and to provide the state a report by each such witness and other supporting information. The defendant must produce the information within a reasonable time before trial, as specified by the trial court.

Likewise, G.S. 15A-905(c)(3) mirrors G.S. 15A-903(a)(3). It provides that at the beginning of jury selection, the defendant must furnish the state a list of all other witnesses he or she reasonably expects to call at trial. The circumstances in which nondisclosure is permitted are the same as those in G.S. 15A-903(a)(3).

Work product restrictions. G.S. 15A-906, which protects the defendant's "work product," was not changed. It reflects that the defendant's discovery obligations, although expanded, remain narrower than the prosecution's. Thus, under G.S. 15A-905 the defendant must provide certain categories of information to the state, not his or her complete files. G.S. 15A-906 recognizes that internal defense documents outside these categories are not subject to discovery.

Domestic Violence

The General Assembly passed a package of legislation addressing domestic violence and related issues. The principal act, S.L. 2004-186 (H 1354), spans several areas of law, incorporating recommendations made by the House Select Committee on Domestic Violence, created by the General Assembly in 2003. The act is referred to here as the DV Act. Unless otherwise noted, all changes are contained in that act. The discussion here concerns changes involving criminal law and procedure. For civil law matters involving domestic violence, refer to Chapter 3, "Children, Families, and Juvenile Law."

Criminal Offenses and Sentencing

New strangulation offense. The DV Act creates a new felony offense of strangulation. Effective for offenses committed on or after December 1, 2004, new G.S. 14-32.4(b) makes it a Class H felony to

- assault another person and
- inflict physical injury by
- strangulation.

The new subsection does not define *strangulation* or *physical injury*. (The revised habitual misdemeanor assault offense, discussed below, also makes "physical injury" an element of the offense, but that section does not define the term either.)

Courts in other states, interpreting the term "strangulation" primarily in murder cases in which strangulation was an element of the offense, have looked to dictionaries for guidance. Although the term "strangulation" (or "strangle") often is used to refer to acts that result in death, it does not always refer to lethal acts, and the General Assembly certainly could not have intended in an assault statute to refer only to actions resulting in death. Webster's Third New International

Dictionary (3d ed. 1966) gives as one definition "inordinate compression or constriction of a tube or part (as the throat . . .) esp. to a degree that causes a suspension of breathing, circulation, or passage of contents."

If this or a comparable definition of strangulation is used, the act of strangulation alone could be sufficient to satisfy the element of "physical injury." Because the statute requires both strangulation and physical injury, however, additional evidence of injury may be necessary to prove the offense. *See generally* State v. Kelly, 580 A.2d 520 (Conn. App. 1990) (offense of assault on peace officer under Connecticut statute required proof of "physical injury," defined as "impairment of physical condition or pain"; court finds that judo stranglehold that made officer grow faint to the verge of unconsciousness qualified as impairment of physical condition). In comparison to existing assault offenses in North Carolina, the injuries required to prove "physical injury" would certainly not need to be as great as for the Class F felony of assault inflicting "serious bodily injury" under G.S. 14-32.4(a). Injuries inflicted by strangulation may not need to be as great as for the misdemeanor offense of assault inflicting "serious injury" under G.S. 14-33(c). More would appear to be required, however, than is required for the offense of battery under G.S. 14-33(a), which may be proved by mere physical contact. *See* State v. West, 146 N.C. App. 741, 554 S.E.2d 837 (2001) (defining battery as unlawful application of force, however slight). The new strangulation offense could not be established by the threat of physical injury without physical contact, which can be sufficient for assault offenses such as simple assault under G.S. 14-33(a) and assault on a female under G.S. 14-33(c). *See* State v. Wortham, 318 N.C. 669, 351 S.E.2d 294 (1987).

Habitual misdemeanor assault. Under G.S. 14-33.2 a person has been subject to prosecution for habitual misdemeanor assault if he or she (1) violates G.S. 14-33(c) or G.S. 14-34 *and* (2) has five or more prior misdemeanor convictions, two of which were assaults. G.S. 14-33(c) consists of various Class A1 misdemeanor assaults, such as assault on a female and assault with a deadly weapon, and G.S. 14-34 contains the offense of assault by pointing a gun.

Effective for offenses committed on or after December 1, 2004, the DV Act amends both elements of habitual misdemeanor assault. Under amended G.S. 14-33.2 a violation of any subsection of G.S. 14-33 (as well as a violation of G.S. 14-34) satisfies the first element of the offense, but the violation of G.S. 14-33 now must cause "physical injury." Thus a simple assault in violation of G.S. 14-33(a) would satisfy the first element of habitual misdemeanor assault if it caused physical injury, but an assault that only threatened physical injury would not. Likewise, physical injury is now required for any assault in violation of G.S. 14-33(c), such as assault on a female or assault with a deadly weapon. The possible meaning of *physical injury* is discussed above in connection with the new offense of assault by strangulation.

As for the second element of habitual misdemeanor assault, the defendant must have two or more prior convictions (rather than five convictions) for either misdemeanor or felony assault (rather than misdemeanor assault only). The earlier of the two prior convictions must not have occurred more than fifteen years before the date of the current offense.

The amended statute also provides that a conviction of habitual misdemeanor assault may not be used as a prior conviction for any other habitual offense prosecution, such as a habitual felon prosecution. The amendment reverses North Carolina case law on this issue. *See* State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518 (2000). The amended statute continues to contain no prohibition, however, on the prosecution of a person as a habitual felon when the current felony is habitual misdemeanor assault.

The DV Act explicitly provides that the amendments do not affect prosecutions based on the previous version of the statute for offenses committed on or before December 1, 2004.

Ban on possession of any firearm by a convicted felon. G.S. 14-415.1 has prohibited a person who has been convicted of a felony from possessing a handgun or other firearm of comparable length outside his or her home or business. Thus a convicted felon could possess a handgun inside his or her home or business and a longer firearm, such as a shotgun, in other areas. Prior to 1995 the prohibition was for five years after the person completed his or her sentence, including any period of probation or parole. In 1995 the General Assembly revised the statute to

impose a lifetime ban on the possession of handguns by a convicted felon outside the home or business.

Effective for offenses committed on or after December 1, 2004, the DV Act revises G.S. 14-415.1 to extend the ban to all firearms, regardless of type or length and regardless of where possessed. The DV Act accomplishes this result by deleting from G.S. 14-415.1 the language that limited the prohibition to handguns and other firearms of a certain length and that allowed a convicted felon to possess a firearm in his or her home or business. Presumably a convicted felon would still have a defense to this charge in the rare case in which he or she briefly came into possession of a firearm while defending him- or herself or acting out of some other necessity, such as disarming an attacker. *See, e.g.*, United States v. Newcomb, 6 F.3d 1129 (6th Cir. 1993) (defendant produced sufficient evidence to warrant instruction on justification defense); State v. Boston, ___ N.C. App. ___, 598 S.E.2d 163 (2004) (evidence did not support claim that defendant was under imminent threat of death or great bodily injury). The DV Act explicitly states that it does not affect prosecutions under the previous version of the statute for offenses committed before December 1, 2004.

Assault in the presence of a minor. In 2003 the General Assembly created new G.S. 14-33(d), providing that a person who committed an assault with a deadly weapon or an assault inflicting serious injury in violation of G.S. 14-33(c)(1) had to be placed on supervised probation in addition to any other punishment if the offense was committed in the presence of a minor and was against a person with whom the defendant had a personal relationship. This language created some uncertainty about the permissible sentence that could be imposed because a defendant cannot be given both supervised probation and an active sentence; therefore one interpretation of the new section was that a judge was precluded from imposing an active sentence. S.L. 2004-199 (S 1225) clears up this uncertainty by revising G.S. 14-33(d) to provide that a defendant *who is sentenced to a community punishment* must be placed on supervised probation in addition to any other punishment; thus, if the court sentences a defendant to active imprisonment, the requirement of supervised probation does not apply. Revised G.S. 14-33(d) also clarifies that assault in the presence of a minor is a distinct offense by designating it a Class A1 misdemeanor. Thus, for the state to rely on the mandatory punishment provisions in G.S. 14-33(d), which also include a minimum active sentence of imprisonment for a second offense, it would have to allege the required elements of the offense and prove them to the fact finder beyond a reasonable doubt.

Revised aggravating factor for felonies. G.S. 15A-1340.16(d) lists aggravating factors that may be considered in determining the sentence to be imposed under structured sentencing. One of the aggravating factors, in G.S. 15A-1340.16(d)(15), has been that the defendant took advantage of a position of trust or confidence. Effective for offenses committed on or after December 1, 2004, the DV Act revises that factor to specify that a position of trust or confidence includes a domestic relationship. *Domestic relationship* is not defined. *Compare* G.S. 50B-1 (for purposes of civil protective orders, statute requires that plaintiff and respondent have or have had "personal relationship") *with* G.S. 15A-534.1 (for purposes of applying 48-hour pretrial release procedures for domestic violence offenses other than Chapter 50B violations, statute requires that victim be spouse or former spouse of defendant or person with whom defendant lives or has lived as if married) and G.S. 14-134.3 (for purposes of crime of domestic criminal trespass, statute requires that premises have been occupied by present or former spouse or person with whom defendant has lived as if married).

Domestic violence treatment program as part of sentence. G.S. 15A-1343 has allowed courts in imposing probation to impose as a special condition that the defendant attend and complete an abuser treatment program. Effective for offenses committed on or after December 1, 2004, the DV Act amends that statute to make attendance at an abuser treatment program a regular condition of probation if (1) the court finds that the defendant is responsible for acts of domestic violence and (2) a program approved by the Domestic Violence Commission is reasonably available to the defendant. The court retains the discretion not to impose this condition if it finds that doing so would not be in the best interests of justice.

The DV Act also adds new G.S. 143B-262(e) requiring the Department of Correction (DOC) to establish a domestic violence treatment program for defendants sentenced to a term of active

imprisonment in DOC's custody. The new subsection provides that DOC shall ensure that defendants complete the program before their release unless other requirements, deemed critical by DOC, prevent completion.

Additional reporting and sentencing provisions. Article 86 of G.S. Chapter 15A has addressed the reporting of dispositions in criminal cases. The DV Act adds to that article new G.S. 15A-1382.1 containing both reporting and sentencing requirements for certain domestic violence cases. New G.S. 15A-1382.1(a) provides that when a defendant is found guilty of an offense involving assault or communicating a threat, the court must determine whether the defendant and victim had a personal relationship as defined in G.S. 50B-1(b). (An *offense involving assault* is defined as including any offense in which an assault occurred, whether or not the conviction is for an offense under G.S. Chapter 14, Article 8, "Assaults.") If so, the judge must indicate on the form reflecting the judgment that the case involved domestic violence, and the clerk of court must ensure that the official record of the defendant's conviction includes the court's determination.

New G.S. 15A-1382.1(b) deals with sentencing in such cases. (Subsection (b) does not specifically state the types of offenses to which it applies, providing only that the judge must consider the indicated sentencing options upon determining that there was a personal relationship between the defendant and the victim; however, because subsection (a) requires the judge to determine the existence of a personal relationship only if the defendant is convicted of assault or communicating a threat, the General Assembly likely intended for subsection (b) to be limited to those circumstances.) The new subsection provides that if the judge imposes a community punishment, he or she must determine whether the defendant should be required to comply with one or more special conditions of probation under G.S. 15A-1343(b1). The new subsection provides further that the court may impose house arrest under G.S. 15A-1343(b1)(3c), even though such a condition is authorized in other cases only if the court imposes an intermediate punishment. Both the reporting and sentencing changes apply to offenses committed on or after December 1, 2004.

Study of misdemeanor classifications, including assault inflicting serious injury. The DV Act states that the North Carolina Sentencing and Policy Advisory Commission (Sentencing Commission) has developed criteria for classifying felony offenses but has not done so for misdemeanors. The act states further that the misdemeanor offense of assault inflicting serious injury has an element—serious injury to person—that is a type of harm used in distinguishing among felonies and that classifying such an offense as a misdemeanor is inconsistent with the Sentencing Commission's felony classification criteria. The DV Act therefore directs the Sentencing Commission to study and develop a system for classifying misdemeanor offenses, particularly assault offenses, based on their severity. The Sentencing Commission may consider reclassifying existing offenses and creating new offenses to ensure proportionality and consistency. The commission must report its findings and recommendations by the 2005 regular session and make a final report by the 2006 regular session.

Criminal Procedure and Evidence

Warrantless arrest for violation of pretrial release conditions. The DV Act expands the circumstances in which a law enforcement officer may arrest a person before an arrest warrant has been issued. Effective for offenses committed on or after December 1, 2004, new G.S. 15A-401(b)(2)f. provides that an officer may arrest a person without an arrest warrant or order for arrest if the person has violated pretrial release conditions imposed under G.S. 15A-534.1(a)(2). This subsection includes conditions that may be imposed in connection with certain crimes involving domestic violence, such as a condition that the defendant stay away from the alleged victim's home. In other cases involving violations of pretrial release conditions, the appropriate judicial official must issue an order for the person's arrest. Upon making an arrest—whether with a warrant or order for arrest or without one—the law enforcement officer must take the arrested person without unnecessary delay to a magistrate, and the magistrate has the responsibility of setting new pretrial release conditions. *See* G.S. 15A-501 and -511 (describing procedures upon

arrest). If the defendant is also charged with a new domestic violence offense subject to G.S. 15A-534.1, the magistrate cannot set pretrial release conditions for the new offense; only a judge may do so.

Issuance of cross-warrants. G.S. 15A-304 provides that a judicial official may issue an arrest warrant when he or she is supplied with sufficient information, supported by oath or affirmation, that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it. The DV Act amends G.S. 15A-304 to clarify that when probable cause exists to issue an arrest warrant, a judicial official may not refuse to issue a warrant solely because a prior warrant has been issued for the arrest of another person involved in the same matter. For example, suppose John goes to the magistrate's office and, based on the information he presents that Sally assaulted him, the magistrate issues a warrant for Sally's arrest. Sally later goes to the magistrate and presents sufficient information to show probable cause that John assaulted her. Amended G.S. 15A-304 clarifies that the magistrate may not refuse to issue a warrant for John's arrest—in other words, a cross-warrant—solely because John got to the courthouse and obtained a warrant first. The amended statute continues to provide that a judicial official may not issue a warrant, including in situations involving cross-warrants, if the information provided is insufficient to show probable cause. A judicial official retains the discretion, under G.S. 15A-303 and -304, to issue a criminal summons directing the person to appear in court, instead of an arrest warrant directing law enforcement to arrest the person, when the judicial official finds probable cause but concludes that taking the person into custody is unnecessary.

These amendments were effective August 12, 2004.

Clarification of Nurse Privilege. In the 2003 legislative session, the General Assembly enacted G.S. 8-53.13, which established a privilege comparable to the physician–patient privilege for information obtained by nurses. The DV Act clarifies the circumstances in which information privileged under that statute is admissible. First, amended G.S. 8-53.13 provides that if the court has found disclosure of the contents warranted, hospital medical records produced in accordance with G.S. 8-44.1 may be admitted. (G.S. 8-44.1 provides that hospital medical records that have been subpoenaed are admissible if they are authenticated by live testimony or if they have been submitted to the court with an appropriate authenticating affidavit in accordance with North Carolina Rule of Civil Procedure 45(c) regarding subpoenas for hospital medical records.) Second, amended G.S. 8-53.1 provides that, like the physician–patient privilege, the nurse privilege is not grounds for excluding evidence of abuse or neglect of a child under age sixteen in judicial proceedings related to a report of abuse, neglect, or dependency under the Juvenile Code.

The amendments to G.S. 8-53.13 were effective December 1, 2004.

Training, Studies, and Funding

Domestic violence training. G.S. Chapters 17C and 17E require the North Carolina Criminal Justice and Education and Training Standards Commission and the North Carolina Sheriffs' Education and Training Standards Commission to create training standards for law enforcement officers and sheriffs. The DV Act amends those chapters to require the two commissions to adopt standards that include domestic violence training for entry-level officers, in-service training for current officers, and training for domestic violence instructors. Among others things, entry-level and in-service training must include training in investigation procedures for *evidence-based prosecutions*, those in which the alleged victim does not testify. Training must be available by March 1, 2005.

The DV Act also requests the North Carolina Supreme Court to adopt minimum training standards for district court judges presiding in civil and criminal domestic violence cases. In addition, the Administrative Office of the Courts (AOC) is directed to study the issue of domestic violence training for court personnel. The AOC must report its findings and recommendations to the 2005 regular session of the General Assembly.

Domestic violence studies. The DV Act requires various agencies to study issues relating to domestic violence. The North Carolina Department of Public Instruction, in collaboration with the State Board of Education, must study the issue of antiviolence programs in the schools and

training for school personnel who deal with students who are victims of domestic and relationship violence. The Department of Health and Human Services must study the issue of and develop a plan for serving clients of domestic violence programs who have mental health and substance abuse needs. The plan must address, among other things, diagnostic and referral services for such clients. The North Carolina State Bar, in cooperation with the North Carolina Bar Association, must study the issue of giving Continuing Legal Education (CLE) credit to attorneys who provide pro bono legal representation, including the possibility of granting CLE credit for pro bono legal representation of domestic violence victims. The DV Act also amends G.S. 7B-1402 to place two domestic violence representatives—one from the North Carolina Domestic Violence Commission and one from the North Carolina Coalition against Domestic Violence—on the North Carolina Child Fatality Task Force within the Department of Health and Human Services.

Domestic violence program funding. The budget bill [S.L. 2004-124 (H 1414)] appropriates $132,000 for improvements to the court information system to track domestic violence offenders, $90,000 for training judicial officials on domestic violence issues, and $20,000 for the Sentencing Commission to study misdemeanor offense classifications. The budget bill adds one position to the Criminal Justice Training Division and one position to the Sheriffs' Standards division to develop and oversee domestic violence training for various law enforcement personnel. It also states that the creation of various new positions within the court system, such as judgeships and positions in district attorneys' offices, is necessary, for among other reasons, to enhance the courts' response to domestic violence.

Criminal Offenses

General Provisions

Possession of firearm by felon. Perhaps the biggest change involving criminal offenses this session was the complete elimination of a person's right to possess a firearm after conviction of a felony. This modification, a part of the domestic violence amendments recommended by the House Select Committee on Domestic Violence, is discussed under "Domestic Violence," above.

Increased penalties for offenses involving methamphetamine. In response to concerns about the spread of methamphetamine labs in North Carolina, the General Assembly increased the penalties for several offenses involving that drug. Effective for offenses committed on or after December 1, 2004, S.L. 2004-178 (S 1054) makes the following changes:

1. G.S. 14-17 has defined second-degree murder to include murder proximately caused by the unlawful distribution of cocaine when ingestion of the cocaine causes the user's death. That statute is revised to make such actions involving methamphetamine second-degree murder as well.
2. G.S. 90-95(b) has made it a Class H felony to manufacture a Schedule II controlled substance. That section is revised to make it a Class C felony to manufacture methamphetamine; however, packaging, repackaging, labeling, or relabeling methamphetamine remain Class H felonies even though those actions might otherwise be considered forms of manufacturing.
3. G.S. 90-95(d1) makes it a Class H felony to commit offenses involving immediate precursor chemicals used for the manufacture of a controlled substance. New G.S. 90-95(d1a) provides that if the offenses involve immediate precursor chemicals for the manufacture of methamphetamine, the offenses are Class F felonies. G.S. 90-95(d2) also is revised to add several new substances to the list of precursor chemicals to which subsections (d1) and (d1a) apply.
4. G.S. 15A-1340.16(d) lists the factors that may be used to impose an aggravated sentence for felony offenses. A new aggravating factor is that the offense is the manufacture of methamphetamine and was committed where a person under age eighteen lives, was present, or otherwise was endangered by exposure to the drug.

5. G.S. 15A-1340.16A has provided for an enhanced sentence for the use of a firearm for certain offenses. G.S. 15A-1340.16B and 15A-1340.16C provide similar enhancements for certain other conduct. New G.S. 15A-1340.16D provides that a person's sentence must be increased by twenty-four months if (1) the offense is manufacture of methamphetamine; (2) certain personnel, such as law enforcement officers, were seriously injured while discharging their duties; and (3) such injury was directly caused by a hazard associated with the manufacture of methamphetamine. If the offense involves packaging, repackaging, labeling, or relabeling, the enhancement does not apply. The new section requires that the enhancement be alleged in the indictment or information, submitted to the jury for decision, and proved by the state beyond a reasonable doubt.

In addition to the criminal law changes discussed above, new G.S. 130A-284 directs the Commission for Health Services to adopt rules containing decontamination standards for property that has been used for the manufacture of methamphetamine and requires property owners and others in control of the property to comply with those rules; and new G.S. 114-43 provides civil and criminal immunity for certain actions taken in good faith as part of a Methamphetamine Watch Program approved by the Department of Justice, such as cooperating in a law enforcement investigation concerning the manufacture of methamphetamine.

To combat illegal methamphetamine operations, the budget bill (S.L. 2004-124) creates six sworn lab positions and eight sworn agent positions in the SBI. The budget bill also states that the creation of various new positions within the court system, such as judgeships and assistant district attorney positions, is necessary, for among other reasons, to assist the courts in dealing with the growth in the methamphetamine caseload.

Firearm on educational property. S.L. 2004-198 (H 1453) revises G.S. 14-269.2(b), which has made it a Class I felony to possess a firearm on educational property, to create a new offense of discharging a firearm on educational property, a Class F felony. The act provides, in new G.S. 14-269.2(g)(4), that the prohibition on possession and use of weapons on educational property does not apply to weapons used for hunting with the written permission of the school's governing board. S.L. 2004-198 is effective for offenses committed on or after December 1, 2004.

Specialized assault. S.L. 2004-26 (H 1373) creates G.S. 14-33(c)(7) to make it a Class A1 misdemeanor to assault a public transit operator, whether a public employee or private contractor, when the operator is discharging or attempting to discharge his or her duties. Previously, assault on a public employee performing such duties could be prosecuted as assault on a government official under G.S. 14-33(c)(4), also a Class A1 misdemeanor, while assault on a private contractor could be prosecuted as a simple assault under G.S. 14-33(a), a Class 2 misdemeanor. S.L. 2004-26 is effective for offenses committed on or after December 1, 2004.

Threatening witness. Effective for offenses committed on or after December 1, 2004, S.L. 2004-128 (S 577) revises G.S. 14-226, which has made it a Class H felony to intimidate a witness in state court, to provide that it is a violation of the statute for a criminal defendant to threaten a witness in the defendant's case with the assertion or denial of parental rights. Other parts of the act, discussed under "Collateral Consequences," below, deny parental rights to a person convicted of a rape resulting in the birth of a child.

Peeping changes. Last session the General Assembly substantially revised G.S. 14-202, the statute prohibiting peeping, to create several new peeping offenses. S.L. 2004-109 (S 1167) adds G.S. 14-202(a1) making it a Class 1 misdemeanor to secretly peep under or through the clothing of another person without consent using a mirror or other device to view the other person's body or undergarments. The act also revises G.S. 14-202(*l*), which has required the sentencing court to consider whether to require a person to register as a sex offender upon a second or subsequent conviction of certain peeping offenses. The act amends that subsection to add a violation of new G.S. 14-202(a1) to the list of potential triggering offenses. These provisions are effective for offenses committed on or after December 1, 2004.

Indecent liberties with student. G.S. 14-202.4 has made it a Class I felony for school personnel to engage in indecent liberties (that is, conduct for the purpose of arousing or gratifying sexual desire) with a student. One element of the offense has been that the school official and student must have been at the "same school" before or at the time of the sexual conduct. Under the

previous definition of "same school," a student had to be enrolled at, and the school official had to be employed at, assigned to, or a volunteer at the school in question. Effective for offenses committed on or after December 1, 2004, S.L. 2004-203 (H 281) expands the definition of "same school" by providing that a student and school official are also considered at the same school if the student and official are present at a school-sponsored or school-related activity. The act does not change the definition of "same school" in G.S. 14-27.7A, which applies to vaginal intercourse and certain other sexual acts by school personnel with students.

Rebirthing. In 2003 the General Assembly passed G.S. 14-401.21 outlawing "rebirthing techniques" that include restraint and create a situation in which a person may suffer physical injury or death. The budget bill (S.L. 2004-124) amends that section to provide that no state funds may be used to pay for unlawful rebirthing techniques performed in another state that permits the technique. The amendment was effective July 1, 2004.

Unlawful removal or destruction of electronic dog collars. S.L. 2004-60 (H 1613) adds Anson and Chowan to the list of counties in which it is a Class 2 misdemeanor, under G.S. 14-401.17, to remove or destroy an electronic dog collar placed on a dog by its owner. The amendment increases the number of covered counties to thirty-eight. It is effective for offenses committed on or after October 1, 2004.

Regulatory Offenses

Use of unauthorized CB radio. Effective for offenses committed on or after December 1, 2004, S.L. 2004-72 (H 257) creates G.S. 62-328 to make it a Class 3 misdemeanor to knowingly and willfully use a citizens band radio (CB radio) not authorized by the Federal Communications Commission. Certain licensees under federal law are not subject to the new provision.

Professional employer organizations. S.L. 2004-162 (S 20) creates new Article 89 in G.S. Chapter 58, establishing a regulatory and licensing scheme for professional employer organizations. Such organizations assign employees to work for client companies on a long-term or continuing basis and share employment responsibilities with the client companies. A violation of the licensing requirements in new G.S. 58-89-170 is a Class H felony under new G.S. 58-89-175. S.L. 2004-162 is effective for contracts entered into, business conducted, and actions taken on or after January 1, 2005.

Electioneering communications. S.L. 2004-125 (H 737) creates new Article 22E in G.S. Chapter 163, establishing a reporting and regulatory scheme for electioneering communications. A violation of the new article is a Class 2 misdemeanor. The criminal penalties in this act are effective for offenses committed on or after October 1, 2004.

Unauthorized insurance. S.L. 2004-166 (H 1107) amends G.S. 58-33-95 to increase the penalty for soliciting, negotiating, or selling insurance on behalf of an unauthorized insurer. Taking such actions knowing that the insurer is unauthorized is a Class H felony; taking such actions without knowledge is a Class 1 misdemeanor. Previously, a violation of the section was a Class 1 misdemeanor. S.L. 2004-166 is effective for offenses committed on or after December 1, 2004.

Fortune-telling. Effective August 17, 2004, S.L. 2004-203 repeals G.S. 14-401.5, which made it unlawful to practice fortune-telling, palmistry, and similar crafts in certain counties.

Wildlife offenses. The General Assembly passed several local bills relating to wildlife offenses and enforcement. Among other things, the General Assembly [in S.L. 2004-87 (H 1649), effective July 9, 2004] authorized Wake County to "regulate, control, restrict, and prohibit hunting" with a firearm while impaired.

Criminal Procedure and Evidence

Jurisdiction over Probation Revocation Hearing

In 1996 the General Assembly revised G.S. 7A-272 to authorize district courts to accept guilty pleas to Class H or I felonies with the consent of the prosecutor, defendant, and presiding judge. If the defendant was placed on probation and thereafter was alleged to have violated probation, the revocation hearing would take place in district court. Confusion arose, however, over which court initially should hear the appeal of a district court's decision to revoke probation, and the North Carolina Supreme Court ultimately interpreted the statutes as giving the defendant the right to a de novo revocation hearing in superior court. *See* State v. Hooper, 358 N.C. 122, 591 S.E.2d 514 (2004).

S.L. 2004-128 indirectly addresses this result by adding G.S. 7A-271(e). It provides that unless the state and defendant agree to have the district court hold the revocation hearing, the superior court has exclusive jurisdiction over probation revocation hearings in cases in which the defendant pled guilty to a Class H or I felony in district court. Thus, if the state does not agree, the initial revocation hearing is held in superior court, and the defendant's only right of appeal is to the appellate division. These changes took effect July 26, 2004.

Admissibility of Forensic Analysis

In drug-related prosecutions G.S. 90-95(g) has allowed the state to submit a report of a chemical analysis of a controlled substance, in lieu of calling the analyst as a witness, if the state satisfies certain conditions. Among other things, if the report is to be used in a criminal proceeding in superior court (or in an adjudicatory hearing in juvenile court), the state must notify the defendant of its intent to introduce the report and may introduce it only if the defendant fails to object within the time limits in the statute. [G.S. 90-95(g1) contains similar procedures allowing the state to introduce a written statement to establish chain of custody for a controlled substance.]

Following that approach, Section 15.2(c) of the budget bill (S.L. 2004-124) establishes procedures allowing the state to submit a laboratory report of a forensic analysis, including an analysis of the defendant's DNA, without calling the analyst as a witness. New G.S. 8-58.20 requires that the forensic analysis meet certain standards, that the analyst complete an affidavit containing certain averments (for example, that the analyst is qualified to perform the analysis), and that the prosecutor provide a copy of the report and affidavit to the defendant's attorney (or to the defendant if he or she has no attorney) within the time specified in the statute. If the defendant fails to file a written objection with the court within fifteen business days of receipt of the report and affidavit, the state may introduce the report and affidavit without calling the analyst as a witness unless the presiding judge rules otherwise. If the defendant timely objects, the state may not introduce the forensic analysis unless it would otherwise be admissible. The notice and objection procedures apply to both district and superior court proceedings. The new section is effective for offenses committed on or after December 1, 2004.[1]

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1. The new procedures for introducing forensic analysis reports (as well as the procedures for introducing controlled substances reports) must satisfy the U.S. Supreme Court's decision in *Crawford v. Washington*, ___ U.S. ___, 124 S. Ct. 1354 (2004). There, the court held that the Confrontation Clause forbids the state from introducing "testimonial" out-of-court statements except in limited circumstances. The Court did not give a precise definition of *testimonial*, but it most likely includes affidavits such as those described here, which are prepared by the state as part of its criminal investigation. Although not specifically discussed as an exception, the new statutory procedures may satisfy the Confrontation Clause because the state must give notice of its intent to offer the evidence and the defendant has the right to object and prevent the state from introducing the evidence unless it is otherwise admissible. *See* State v. Miller, 790 A.2d 144 (N.J. 2002) (pre-*Crawford* case finds that such a procedure does not violate Confrontation Clause if defendant has no burden other than to submit objection; footnote 2 collects cases reaching similar result); *but see*

Video Testimony

Section 14.5 of the budget bill directs the AOC to conduct a pilot program in Superior Court District 27B (Cleveland and Lincoln counties) allowing SBI lab analysts to testify by videoconference about chain-of-custody issues and other matters. The act provides that analysts may provide such testimony notwithstanding any law to the contrary. The General Assembly appropriated $25,640 in recurring funds and $67,589 in nonrecurring funds to purchase the necessary equipment for courthouses in that district and $3,000 in recurring funds and $45,500 in nonrecurring funds to the SBI for implementation of the project.

Nurse Privilege

As part of a package of changes concerning domestic violence, the General Assembly clarified the admissibility of information subject to the nurse privilege in G.S. 8-53.13, enacted in 2003. *See* "Domestic Violence: Criminal Procedure and Evidence," above.

Law Enforcement

Pistol Purchases

S.L. 2004-183 (H 817) revises G.S. 14-402 to provide that a person may purchase a pistol without a purchase permit if he or she has a valid North Carolina concealed handgun permit and is a North Carolina resident at the time of the purchase. The new law was effective August 10, 2004.

Gaming Tables

Section 47 of S.L. 2004-199 updates G.S. 14-298 to accord with current procedural requirements for the seizure of property. That provision had allowed law enforcement officers to seize and destroy illegal gaming tables, apparently without judicial authorization, upon the receipt of information under oath. It also purported to allow officers to call to their aid "all the good citizens of the county" to help destroy illegal gaming tables. The statute was found to violate due process in *Helton v. Hunt*, 330 F.3d 242 (4th Cir. 2003). The revised statute authorizes law enforcement officers to seize illegal gaming tables if they have probable cause and comply with applicable state law. Thus, unless an exception applies, officers need a warrant to seize gaming tables. The revised statute also contains procedures ensuring judicial oversight of any decision to destroy or otherwise dispose of the property. This act repeals a provision in Section 20 of S.L. 2004-203 (passed earlier in the session) that dealt with the same statute. The new legislation was effective October 1, 2004.

Funds for Rape Kit Backlog

The budget bill (S.L. 2004-124) requires the Department of Justice to use $250,000 of appropriated funds to contract with private entities to test the backlog of rape kits in storage in local law enforcement agencies.

People v. McClanahan, 729 N.E.2d 470 (Ill. 2000) (court finds that similar statute violates Constitution because it impermissibly requires defendant to take procedural step to secure his or her confrontation rights).

Involuntary Commitment

S.L. 2004-23 (H 1366) amends various sections of the involuntary commitment law to clarify that a custody order issued by a magistrate or clerk is valid throughout the state and can be served in any county in North Carolina no matter where issued. The act was effective June 25, 2004.

Sentencing

Drug Treatment Court Program

S.L. 2004-128 creates G.S. 15A-1340.11(3a) to designate assignment to a drug treatment court program as an intermediate punishment under structured sentencing. The new subsection defines a *drug treatment court program* as one in which, as a condition of probation, offenders are required to comply with certain rules and to participate in specified activities, such as drug screening or testing. The subsection was effective July 26, 2004.

Other Sentencing Changes

Other sentencing changes are discussed in connection with the changes in the domestic violence and methamphetamine laws, under "Domestic Violence" and "Criminal Offenses," above.

Capital Punishment

Effective August 17, 2004, S.L. 2004-203 revises G.S. 15-190 to provide that the names of those people designated to carry out an execution are confidential, exempt from the public records law, and not subject to discovery or introduction as evidence in any proceeding unless the senior resident superior court judge for Wake County finds that disclosure is necessary to a proper administration of justice. [The budget bill (S.L. 2004-124), effective July 20, 2004, made similar revisions to G.S. 15-190; presumably, S.L. 2004-203, which has a later effective date, supersedes the provisions in the budget bill.]

Victims' Rights

Payment of Restitution

G.S. 15A-145 allows expunction of records for certain young offenders. As amended by S.L. 2004-133 (H 1518), that section provides that to be eligible for such an expunction, the petitioner must attest in an affidavit, and the court must find, that there are no outstanding restitution orders or civil judgments representing amounts ordered for restitution against the petitioner. The new section applies to petitions for expunctions filed on or after September 1, 2004.

Access to Crime Profits

S.L. 2004-159 (H 1519) adds new Article 2 to G.S. Chapter 15B allowing victims of certain crimes to reach crime profits and other funds received by offenders.

The key definitions in new G.S. 15B-31 are as follows:

- *Offender* means a person who has been convicted of a *felony*, which in turn is defined as a felony that was committed in North Carolina and that resulted in physical or emotional injury or death.
- *Profit from crime* means any income, assets, or property obtained through or generated from the commission of the crime for which the offender was convicted, including profits

from the sale of crime memorabilia or obtained through the use of unique knowledge obtained during the commission of the crime. The term does not include donations or contributions to an offender's appeal if not obtained in exchange for something of material value.

- *Funds of an offender* means funds from any source (not just crime profits), other than earned income and child support, received by an offender while he or she is serving an active sentence of imprisonment, a probationary sentence, or a period of post-release supervision.
- *Eligible person* means the victim of the crime for which the offender was convicted; a surviving spouse, parent, or child of a deceased victim of the offender's crime; or any other person dependent for his or her principal support on a deceased victim of the offender's crime.

G.S. 15B-32 imposes various notice obligations in accordance with these definitions. A person or entity that pays or agrees to pay an offender profit from a crime or funds of an offender exceeding $10,000 must notify the Crime Victims Compensation Commission (Commission) of the arrangement. The state must give written notice to the Commission if an offender is serving an active sentence of imprisonment and the prison or jail receives funds of an offender in excess of $10,000. The state also must give written notice to the Commission if it pays or has an obligation to pay funds of an offender in excess of $10,000. In other instances involving payment of funds of an offender in excess of $10,000 (for example, an offender is serving a probationary sentence and is to receive the money from an entity other than the state), the offender must give written notice to the Commission. Upon receiving notice the Commission must notify those people eligible to recover from the offender.

If a person or entity (other than the state) fails to give the required notice to the Commission, G.S. 15B-33 authorizes an assessment against that person or entity up to the amount of the payment to the offender, plus a penalty of $1,000 or 10 percent of the payment, whichever is greater. The Commission must deposit the assessment in an escrow account for the three-year limitations period established by G.S. 15B-34, discussed next. If an eligible person presents to the Commission a civil judgment for damages arising out of the offender's crime, the Commission is to satisfy the judgment up to the amount of the escrow account. If no one comes forward with a judgment within the three-year limitations period, the Commission is to return the assessment to the person or entity that paid it. The penalties for failure to give the required notice are not placed in the escrow account for satisfaction of judgments and are not returned at the end of the three-year limitations period; instead, they go to the Civil Penalty and Forfeiture Fund.

Under new G.S. 15B-34 an eligible person has three years from the discovery of crime profits or funds of an offender to bring a civil action for damages. This provision appears to have the effect of extending the limitations period for civil damage actions, allowing an eligible person to bring a civil action within three years after discovery of crime profits or funds of an offender even if the limitations period has otherwise expired.

G.S. 15B-34 also gives the Commission the authority to seek provisional remedies, such as attachment or receivership, to freeze crime profits and funds of an offender. After the filing of a civil action by an eligible person, the Commission may seek such remedies to the extent the plaintiff in the civil action could do so. The Commission may seek provisional remedies before the filing of a civil action by an eligible person if such remedies would otherwise be authorized before commencement of an action.

The act applies to contracts for crime profits entered into, and funds of an offender that have accrued, on or after October 1, 2004. Any action taken by an offender to defeat the purpose of the new article is void as against public policy under new G.S. 15B-37.

Crime Victims' Compensation

G.S. Chapter 15B contains procedures for the payment of compensation to victims of certain criminal conduct. The budget bill (S.L. 2004-124) amends the definition of *allowable expense* in

G.S. 15B-2(1) to specify that compensation for medical expenses is limited to 66 2/3 percent of the amount usually charged by the provider for treatment or care. The amended section also states that a medical provider who accepts compensation paid as an allowable expense agrees that the compensation constitutes payment in full for the treatment and care and that he or she will not hold the patient financially responsible for additional sums for that service.

To eliminate the backlog of approved but unpaid claims for compensation, the budget bill appropriates $2.5 million in nonrecurring funds to the Crime Victims Compensation Fund. The budget bill states that this increase will allow the crime victims compensation program to draw an additional $1.5 million in federal matching funds.

Collateral Consequences

Parental Rights and Conviction of Rape

S.L. 2004-128 amends G.S 14-27.2 and -27.3 to provide that a person convicted of first- or second-degree rape has no rights to custody of or inheritance from a child born as a result of the rape. The person also has no rights under the adoption or abuse, neglect, and dependency statutes. The act makes conforming amendments to G.S. 48-3-603(a), G.S. 50-13.1, and various provisions in Chapter 7B. These amendments are effective for offenses committed on or after December 1, 2004.

Criminal Record Checks

Continuing a trend of several years, the General Assembly authorized the Department of Justice (DOJ) to provide criminal history record checks for the following additional personnel:

- Effective July 13, 2004, S.L. 2004-89 (S 1254) amends G.S. 90-652 to authorize DOJ to provide a criminal record check to the Respiratory Care Board for applicants for licensure.
- Effective October 1, 2004, S.L. 2004-171 (S 676) amends G.S. 53-243.16 to authorize DOJ to provide a criminal record check to the Commissioner of Banks for applicants for licensure as mortgage bankers; if the applicant is a corporation or other entity, DOJ may provide a criminal record check for any person who has control, is the managing principal, or is the branch manager of the entity.

Section 10.1 of the budget bill (S.L. 2004-124) directs the Department of Health and Human Services (DHHS) to centralize all activities relating to the processing of criminal record checks, beginning January 1, 2005. Section 10.36 of the budget bill directs the Division of Child Development to use lapsed salary money to support up to three additional temporary positions to eliminate the backlog of criminal record checks for child care centers. Effective January 1, 2005, Section 10.19D of the budget bill amends G.S. 131E-265 concerning nursing homes and home care agencies, G.S. 131D-40 concerning adult care homes, and G.S. 122C-80 concerning mental health area authorities to clarify that DOJ shall provide national criminal record checks for certain positions not covered by federal law. To carry out these duties, the act directs DHHS to use up to $200,000 from appropriated funds and to transfer to DOJ $284,000 for processing expenses and office space for fiscal year 2004–2005. The budget bill also provides that DOJ may establish up to eleven positions from receipts for background checks on direct service providers at adult care homes.

Studies

Unless otherwise indicated, all of the studies discussed below were authorized by the studies bill, S.L. 2004-161 (S 1152). Studies pertaining to domestic violence and juvenile proceedings are discussed under the applicable headings, above.

Criminal Issues

- The Legislative Research Commission is authorized to study sentencing guidelines, judicial approval for pleas in certain cases; reclassifying statutory rape, amendments to the habitual felon law, restructuring prior criminal record points; sentence lengths, adjusting penalties for Class B1 to E felonies, arson offenses, drug trafficking laws, youthful offenders, street gang terrorism prevention, trafficking in persons, casino nights for nonprofits, and charitable bingo.
- The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee is authorized to study the state's current system of structured sentencing and compare it with the federal system. It also is directed, in Section 14.2A of the budget bill (S.L. 2004-124), to study the funding formula used for state funding to community mediation centers.
- The Sentencing Commission is required to study the structured sentencing laws in light of *Blakely v. Washington*, the U.S. Supreme Court's decision raising questions about the constitutionality of certain aspects of North Carolina's sentencing scheme.
- The AOC and DOC are directed to study the process for collecting and paying restitution and to determine methods for reducing the number of restitution payments that go unclaimed. The AOC and DOC are also directed, in Section 17.12 of the budget bill, to study ways to improve the collection rate of fees from probationers and nonprobationers sentenced to community service.
- Section 15.1 of the budget bill directs the Office of State Budget and Management to study the cost of the DCI-PIN system.

Corrections

- The Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee (Committee) is authorized to study the issue of people who escape from the custody of the Department of Juvenile Justice and Delinquency Prevention (DJJDP) and to develop appropriate sanctions. If it undertakes this study, the committee shall consult with DJJDP, the AOC, and the Sentencing Commission to develop a statutory scheme under which both juveniles and people over the age of sixteen shall be punished for escaping from the custody of DJJDP.
- The Committee is also authorized to study the confinement of inmates who are irreversibly physically incapacitated due to chronic illness or disability. The Committee's study may include a review of current policies, a calculation of potential population figures and medical care costs, a determination of possible alternatives to incarceration and accompanying costs, and a consideration of procedures for termination or commutation of sentences.
- The Post-Release Supervision and Parole Commission is required, in Section 17.10 of the budget bill, to report on a plan for restructuring and reducing staff in light of reduced workload. The Sentencing Commission, in consultation with the Post-Release Supervision and Parole Commission, is to review alternatives for transferring responsibility for post-release supervision to another division of DOC or to the Judicial Department.

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Elections

This year the General Assembly made relatively minor adjustments to the elections laws: it appropriated additional money as state matching funds for greater-than-expected federal elections funding, lifted the freeze on precinct boundary changes, and revised a portion of the state's campaign finance reporting laws. It also created a commission to study the use of electronic voting machines and whether to require that they produce verifiable paper records.

Additional State Appropriations to Match Increased Federal Funds

The federal Help America Vote Act (HAVA), enacted by Congress in 2002, requires each state receiving federal funds under the act to establish a special account for that money and to appropriate to the account matching state funds equal to 5 percent of the federal amount. The General Assembly, in response, created the Election Fund in 2003 and appropriated $1,922,215 to it to constitute the 5 percent match over the biennium. Of that amount approximately $1.2 million would be used in the first year of the biennium to match an expected $22.6 million in federal funding that year, and the remaining $0.7 million would be reserved to match an expected $14 million in federal funds the second year of the biennium. However, the federal HAVA funding for the first year of the biennium was in fact $23.4 million (as opposed to $22.6 million), and the estimate for the second year funds is $42.0 million (as opposed to $14 million). In response to this increase, the General Assembly appropriated in the budget act [S.L. 2004-124 (H 1414)] an additional $1,521,918 to the state Election Fund.

Precinct Boundaries

Freeze Lifted

Under Subsection (e) of G.S. 163-132.3, county boards have, for several years, been prohibited from changing precinct boundary lines, except under specific situations. The freeze had been enacted to keep precinct boundaries set during the course of lawsuits challenging some of the electoral districts drawn by the legislature after the 2000 census. S.L. 2004-127 (H 119) amends G.S. 163-132.3 to end the freeze, effective August 15, 2004.

Rules for New Precinct Boundaries

For some time G.S. 163-132.3 has required that when county boards of elections change precinct boundary lines, they must set the new boundary lines to coincide with the boundary lines of U.S. census blocks. The purpose of this requirement is to facilitate the creation of electoral districts for federal, state, and county elections from whole census blocks without splitting precincts. With the freeze on new precinct boundaries lifted, S.L. 2004-127 revises the rules by which county boards of elections may change precinct boundaries. It amends G.S. 163-132.3(a), which has set out the limited circumstances under which precinct boundaries could be changed, to provide that a county board may change precinct boundary lines in the following three ways:

1. By dividing an existing precinct into one or more new precincts. The lines according to which the new precincts are divided must follow census block boundaries.
2. By combining one or more existing precincts into a single precinct. The resulting new precinct cannot be redivided for at least four years.
3. By moving a precinct boundary line that does not follow a census block boundary so that it does follow the boundary.

All proposed new precincts must consist solely of contiguous territory.

Names for New Precincts

S.L. 2004-127 adds new G.S. 163-132.3A, providing that no county board of elections may assign to any precinct a name that has been used after January 1, 1999, for a precinct containing different territory. An exception exists when the new precinct includes territory from an older precinct that has been redrawn to match the census blocks (see 3 above). All precinct name changes must be submitted to the Executive Director of the State Board of Elections for approval.

Administration of Elections

Confidentiality of Date of Birth

S.L. 2004-127 amends G.S. 163-82.10B to provide that, effective June 1, 2005, boards of elections are to keep confidential the date of birth of every registered voter and every applicant for voter registration. The provision does not apply to disclosing an individual's age—say, 55 years old—only to the date of birth. It also does not apply when a registered voter becomes an elective officeholder or a candidate for elective office or when a voter's registration is challenged under the challenge procedures in Chapter 163. The prohibition does not prevent the board of elections from giving precinct workers access to date-of-birth information where that access is necessary for election administration.

Prohibited disclosure cannot give rise to a civil cause of action—that is, become grounds for a lawsuit—unless it was the result of gross negligence, wanton conduct, or intentional wrongdoing.

A conforming change to G.S. 132-1.2 (a portion of the state's public records law) prohibits agencies other than county boards of elections from revealing an individual's date of birth if the only way the agency has obtained that information is from a voter registration document.

A further conforming change is made to G.S. 163-82.10. That statute directs county boards of elections to make lists of registered voters available to anyone who requests them and permits the boards to break the lists down by party affiliation, gender, race, voting districts, and other criteria. S.L. 2004-127 amends the statute to provide that these lists may not contain voters' dates of birth but may be broken down by voters' ages. Similarly, the free lists provided to political parties by county boards of elections under G.S. 163-82.10(c) are to include voters' ages, but not dates of birth, as are copies of the statewide computerized voter registration file provided to the parties by the State Board of Elections under G.S. 163-82.13.

Finally, a conforming change to G.S. 163-42.1 provides that the date of birth of a student election assistant must be kept confidential.

Acceptance of Scanned Documents

Two provisions of G.S. Chapter 163 permit boards of elections to accept facsimile transmissions of documents in the same way they would accept such documents by mail: G.S. 163-82.6 (voter registration applications) and -257 (military absentee voting). S.L. 2004-127 amends these two statutes to provide that elections boards may also accept transmission of scanned documents.

New Party Petitions

G.S. 163-96(b) sets out the wording that must be included in petitions for the creation of a new political party. The required wording has included this statement: "The signers of this petition intend to organize a new political party to participate in the next succeeding general election." S.L. 2004-127 deletes this statement from the required wording, leaving: "The undersigned registered voters in _____ County hereby petition for the formation of a new political party to be named _____."

Technical Changes

S.L. 2004-127 includes numerous technical changes to G.S. Chapter 163, such as the correction of erroneous cross-references from one statute to another. Among the technical changes are: (1) a clarification of the statistical base to be used in several cases in which petitions must be signed by a certain percentage of registered voters, (2) the correction of a reference in G.S. 163-1 that failed to take into account the changing of judicial elections to nonpartisan, and (3) the conformation of language to correct inexplicable differences in wording in different sections of G.S. 163-112(d), which deals with filling candidacy vacancies.

Campaign Finance Reporting

"Electioneering Communications"

Under North Carolina's statutes regulating campaign finance (Article 22A of G.S. Chapter 163), candidates and their political committees must report expenditures they themselves make in attempting to influence an election's outcome. Similarly, individuals and entities that are not candidates or political committees must report "independent expenditures" they make in support of or in opposition to clearly identified candidates but without consultation or coordination with those candidates. One particular statutory provision, G.S. 163-278.12A, has also required reporting when an individual, political committee, or other entity makes an expenditure for printed material or broadcast advertisements that merely name a candidate, regardless of whether it appears the expenditure was made to support or oppose the candidate. In 2000, however, G.S. 163-278.12A was found to be unconstitutional in two federal court cases, *North Carolina Right to Life Inc. v. Leake*, 108 F. Supp. 2d 498 (E.D.N.C.) and *Perry v. Bartlett*, 231 F.3d 155 (4th Cir.). Then, in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), the United States Supreme Court found certain provisions of the federal Better Campaign Reporting Act (BCRA) constitutional. Having learned the lessons of these cases, the General Assembly enacted S.L. 2004-125 (H 737), repealing G.S. 163-278.12A and replacing it with new provisions patterned after those portions of BCRA found to be constitutional. The results are Article 22E ("Electioneering Communications") and Article 22F ("Mass Mailings and Telephone Banks: Electioneering Communications") of G.S. Chapter 163.

When reporting required. Together the new provisions require reporting of disbursements made by any individual or other entity for broadcast, cable, or satellite communication, mass mailings, or telephone banks if the communication refers to a clearly identified candidate for a statewide office or the General Assembly and if the communication is made in the sixty days before a general election in which that candidate is running for election or within thirty days of a primary election in which that candidate is running for nomination (or within thirty days of a nominating convention). The reporting requirement does not apply to the following:

1. Broadcast news stories, commentaries, or editorials (unless a political party, committee, or candidate owns the broadcast facility)
2. Bona fide candidate debates
3. Communications that are primarily advertisements advocating for or against specific legislation pending while the General Assembly is in session, urging the audience to communicate with members of the General Assembly
4. Communications that constitute "independent expenditures" under the regular campaign finance reporting statutes and thus trigger the regular reporting requirements

The reporting requirements apply only if the electioneering communications are sent to specifically large audiences. For broadcast and cable communications, the requirements apply only if the audience includes at least 50,000 people in elections for statewide offices and at least 7,500 in General Assembly races. The requirements apply only to mass mailings targeting 50,000 or more addressees in the state in a thirty-day period in elections for statewide offices and 5,000 or more for General Assembly offices. For telephone banks, the requirements apply only if 50,000 calls are made in a thirty-day period in elections for statewide offices and 5,000 calls are made in a thirty-day period in elections for the General Assembly.

What must be reported. The reports must disclose the identity of the individuals or other entities making disbursements, the individuals' or entities' places of business, the amount of each disbursement greater than $1,000, the elections involved and the candidates named, and certain information about the source of funds for the disbursements.

Prohibitions on corporate and labor disbursements. No corporation, labor union, insurance company, or professional association may make any disbursement that would be required to be reported.

Penalties. Violations are a Class 2 misdemeanor, and the civil remedies available to the State Board of Elections under the regular campaign finance reporting statutes apply.

Campaign Contributors

A provision of the regular campaign finance reporting statutes, G.S. 163-278.8(c), has provided that candidates and their treasurers may not accept any contribution of more than $100 from outside the state unless the contribution is accompanied by a written statement setting out the name and address of the contributor. S.L. 2004-125 repeals this statute but leaves in place the requirement in G.S. 163-278.14 that contributions over $100 must be made by check, draft, money order, credit card charge, debit card, or another noncash method that can be subject to written verification.

Voter Paper Trail Study

S.L. 2004-161 (H 1152) establishes the Electronic Voting Systems Study Commission, composed of nine members: four appointed by the President Pro Tempore of the Senate (one of whom must be a county commissioner and one a citizen who does not hold office and who has been an active advocate of prohibiting the use of direct record voting equipment without voter-verifiable paper records), four appointed by the Speaker of the House (one of whom must be a member of the State Board of Elections, one a county election board member, and one a person with computer security expertise), and the Executive Director of the State Board of Elections. The commission is to study whether direct record electronic voting systems should be prohibited in North Carolina unless each unit of the system produces a voter-verifiable paper record suitable for a recount or a manual audit and equivalent or superior to the paper record produced by a paper ballot system.

Robert P. Joyce

8

Elementary and Secondary Education

The General Assembly made only a few significant changes to public elementary and secondary school law this year. The session's highest-profile issue, revision of the public school calendar, divided educators and the public alike. Starting in 2005, summer vacation will be longer for most students. With some exceptions, schools that operate on a traditional calendar will open for students no sooner than August 25 and close no later than June 10. In adopting these limits, the General Assembly took control of a decision that has traditionally been left to the discretion of local boards of education. As a part of the calendar revision, five teacher workdays were eliminated from the school year with no corresponding reduction in employee pay. Some observers viewed these changes as simply an effort to support the state's tourism industry; others said the act was responsive to family concerns; some were concerned that teachers' professional development would suffer; and yet others claimed that both teachers' development and student learning and performance would ultimately benefit. All agreed that the act was another step in the ongoing search for the proper balance between state and local control of public schools.

Although the calendar changes made headlines, their long-term significance pales in comparison with another issue: how to meet the state's constitutional obligation to offer all public school students a "sound basic education." Although the General Assembly did not directly address this obligation in 2004, it is sure to be a dominant concern in the years to come.

The obligation was first identified by the North Carolina Supreme Court in 1997, but the high court did not decide at that time whether the state was in fact meeting the obligation.[1] Instead, the supreme court sent the case to a trial court to (1) determine whether students were being offered a sound basic education and (2) identify appropriate remedies if they were not. At trial, the parties agreed to examine these issues only with regard to Hoke County, one of the low-wealth plaintiffs in the lawsuit. The trial court found that the state is not meeting its obligation to all Hoke County's at-risk students and ordered the state to do more for them, including establishing prekindergarten programs. The court's ruling was appealed directly to the North Carolina Supreme Court.[2]

1. Leandro v. State of North Carolina, 488 S.E.2d 249, 346 N.C. 336 (1997). Available through www.nccourts.org.

2. Hoke County Bd. of Educ. v. State of North Carolina, No. 95CVS 1158 (April 4, 2002). Available through www.ncforum.org/resources, which also has other documents relating to this lawsuit.

While the appeal was pending, state education leaders went ahead and asked the General Assembly for a $22-million Disadvantaged Student Supplemental Fund as a first step in meeting the trial court's order. But before the supreme court ruled on the appeal, the General Assembly adjourned without appropriating the money. In late July, the Governor made $12 million available to fund a plan approved by the State Board of Education. Under that plan, eleven school systems were identified by a formula that looked at the percentages of (1) students performing at a proficient level on state tests, (2) teachers retained, (3) teachers with five or more years experience, and (4) students from families above the poverty line. Each of the eleven school systems will receive $250 per student and must develop its own plan for using the money.

On July 30, 2004, a unanimous North Carolina Supreme Court issued its ruling on the appeal, making it clear that the state does have a constitutional duty to offer *every* child in North Carolina the opportunity for a sound basic education in public schools.[3] The court found that the state defendants have failed to meet this obligation—at least with regard to at-risk students in Hoke County (the only students considered in the trial)—and that the state must remedy this deficiency. Because the trial court did not address the issue with regard to non–at-risk students, low-wealth litigants other than those in Hoke County, or urban systems, neither did the supreme court. The supreme court did reverse the trial court's ruling that prekindergarten programs for at-risk students in Hoke County were necessary to offer them a sound basic education.

In October the Governor made available an additional $10 million in state money for school administrative units with poverty, high teacher turnover, and low student achievement.

The proper way for the state to meets its obligation to offer all students a sound basic education will be one of the most critical issues facing the 2005 General Assembly.

Financial Issues

Appropriations

S.L. 2004-124 (H 1414) appropriates $6.035 billion to the Department of Public Instruction (DPI) for 2004–2005. The largest new item in the budget is $50 million to reduce class size in third grade; the new teacher–student allotment ratio for that grade is set at 1:18. A total of $108 million was allocated for bonuses under the ABCs (the state's accountability program) for employees in schools that met or exceeded their expected annual growth in student performance. Funds were once again allocated for low-performing schools, for small county and low wealth supplements, and to assist schools in achieving adequate yearly progress in each subgroup identified in the federal No Child Left Behind Act.

School Operations

School Calendar

Although the number of instructional days for students remains unchanged at 180, many students will have a longer summer vacation. S.L. 2004-180 (H 1464) sets statewide limits on the school calendar for public schools other than year-round schools. Beginning in 2005, schools must open for students no earlier than August 25 and close no later than June 10. The requirement does not apply to "any school that a local board designated as having a modified calendar for the 2003–2004 school year or to any school that was part of a planned program in the 2003–2004 school year for a system of modified calendar schools, so long as the school operates under a modified calendar."

The State Board may waive the calendar restrictions for school systems and individual schools. To the extent that a school's calendar provides sufficient days to accommodate anticipated makeup

3. Hoke County Bd. of Educ. v. State, No. 530PA02 (N.C. July 30, 2004).

days due to school closings, the State Board may grant a waiver on a showing of good cause or for an educational purpose. "Good cause" means that schools in any school unit in a county have been closed for eight days during any four of the last ten years because of severe weather conditions, energy shortages, power failures, or other emergency situations. "Educational purpose" means that a school unit can establish a need to adopt a different calendar for (1) a specific school to accommodate a special program offered generally to the student body, (2) a school that primarily serves a special population of students, or (3) a defined program within a school. The State Board may grant the waiver for an educational purpose if it finds that the purpose is reasonable, the accommodation is necessary to accomplish it, and the request is not an attempt to circumvent the statutory opening and closing dates. Waiver requests may not be used to accommodate systemwide class scheduling preferences. Local boards of education may offer supplemental or additional educational programs or activities at times outside the official school calendar.

For changes in the school calendar affecting school employees, see "School Employment," below.

K–2 Assessment

Under G.S. 115C-174.11, school administrative units have been prohibited from administering standardized tests to first- and second-grade students. That statute requires the State Board to provide developmentally appropriate individualized assessment instruments that local school units may use in place of standardized tests. Section 7.11 of S.L. 2004-124 amends the statute to allow schools to use standardized tests for first- and second-grade students if use of a test is a condition of receiving a federal grant under the Reading First Program.

High School Workforce Development Program

DPI administers a high school workforce development program for students who are not planning to attend, or are not adequately prepared to attend, a two- or four-year degree program. The goal is to enable such students to earn an associate's degree the year after their senior year in high school. Section 7.22 of S.L. 2004-124 requires that funds appropriated for this program be used to establish five pilot projects. In each project, a local school unit, two- and four-year colleges and universities, and local employers are to work together to ensure that high school and community college curricula operate seamlessly and meet the needs of participating employers. The State Board must evaluate the programs annually.

Section 53 of S.L. 2004-199 (S 1225) amends Section 7.22 to direct the local school administrative unit and the colleges and universities to agree on the minimum age for students in the pilot projects.

Accountability System Evaluation

North Carolina's School-Based Management and Accountability Program (also known as the ABCs) sets annual performance standards for each school to measure the growth in performance of the school's students. Section 7.12 of S.L. 2004-124 amends G.S. 115C-105.35 to require regular evaluations of the program to make sure that its standards reflect the state's high expectations for student performance. Beginning in the 2004–2005 school year, and at least every five years thereafter, the State Board must evaluate the accountability system. If necessary, the State Board must modify the testing standards to make certain that they reasonably reflect the level of performance necessary for students to be successful at the next grade level or to undertake more advanced study in the content area. Modified standards resulting from the first review must be in effect no later than the 2005–2006 school year.

Agricultural Education Accountability Assessment

Section 7.20A of S.L. 2004-124 directs the State Board to submit an amended State Career-Technical Education Plan to the U. S. Department of Education during the 2005–2006 school year.

The plan will allow the state to field-test the North Carolina Agricultural Education Program Standards and use the data collected as an alternative to the end-of-course tests in the Vocational Education Competency Achievement Tracking System (VoCATS). The plan also will require the DPI and the Department of Agricultural Education at North Carolina State University to monitor the program to ensure compliance with all standards. If the field testing is successful, the State Board can decide whether to implement the standards on a statewide basis.

Alternate Competency Tests

G.S. 115C-174.11(b) requires the State Board to develop a high school competency test and at least one alternate test and standards for students who do not pass the regular competency test. Students with disabilities who fail the competency test twice must be given the opportunity to take an alternate test or to meet an alternate standard. Section 7.7 of S.L. 2004-124 requires the State Board to adopt or develop and validate alternate tests no later than April 15, 2005, and to begin using them in the 2005–2006 school year.

Vocational Education

In 2003 the General Assembly announced its intention to eliminate funding for vocational education in the seventh grade. This year, in Section 7.15 of S.L. 2004-124, the General Assembly retracted that intent. Instead, it directed schools using funds for vocational education to give priority to vocational education in grades eight through twelve. Section 7.15 amends G.S. 115C-151 and directs the State Board to administer a vocational and technical education program that gives priority to students in grades eight through twelve. A corresponding amendment to G.S. 115C-157 directs local school boards to give priority to these students for vocational education instruction, activities, and services.

Purchasing and Contracting

Several acts that affect school purchasing and contracting are discussed in Chapter 19, "Purchasing and Contracting."

Student Health

Meningococcal Meningitis and Influenza Information

In an attempt to prevent illness and tragic deaths, S.L. 2004-118 (S 444)—called "Garrett's Law" after a high school student who died—is intended to make sure that parents receive information about two serious diseases and the vaccines that might prevent them. G.S. 115C-47(44), added by the new act, directs local boards of education to ensure that schools provide parents and guardians with information about meningococcal meningitis and influenza at the beginning of every school year. The information must include each disease's causes, symptoms, and methods of transmission and also must identify places where parents and guardians can get additional information and vaccinations for their children. Amendments to G.S. 115C-238.29F, G.S. 115C-548, G.S. 115C-556, and G.S. 115C-565 place the same responsibility on the DPI with regard to charter schools and on the Division of Nonpublic Education, Department of Administration, for private church schools, schools of religious charter, qualified nonpublic schools, and home schools.

The Division of Public Health, Department of Health and Human Services, must develop sample educational materials schools can provide to parents and guardians and must make the materials available to local school units, the DPI, and the Division of Nonpublic Education.

School Food Programs

This year has seen a remarkable jump in attention paid to child obesity and nutrition. As one small reflection of that concern, Section 7.20 of S.L. 2004-124 amends G.S. 115C-264 to provide that after July 31, 2005, public schools may not (1) use cooking oils containing trans-fatty acids in their school food programs or (2) sell processed foods containing trans-fatty acids formed during commercial processing.

Healthful School Food Choices Pilot Program

Because thousands of students regularly eat food supplied by their schools, efforts to reduce obesity and improve health naturally look to school food programs. Section 1.17 of S.L. 2004-124 directs the State Board to develop and implement a pilot program to support local school units in offering students only healthful, nutritious food choices. In the 2004–2005 school year, the pilot program will be conducted in all the elementary schools of eight school units distributed geographically throughout the state. If food service revenues in a pilot unit decrease because students do not purchase the healthful food, the State Board will reimburse the unit for any reduction in revenues for the year. The State Board will set the standards for the food offered to students.

Criminal Law Issues

Taking Indecent Liberties with a Student

G.S. 14-202.4 makes it unlawful for school personnel to take indecent liberties with a student at any time during or after the time the defendant and victim are together in the school the victim attends. Section 19 of S.L. 2004-203 (H 181) clarifies that this statute applies both to the school where the student is enrolled and to a school-related or school-sponsored activity at another school where the defendant is employed, volunteers, or is otherwise present.

Discharging a Firearm on School Property

S.L. 2004-198 (H 1453) adds a provision to G.S. 14-269.2(b) making any person who willfully discharges a firearm of any kind on educational property guilty of a Class F felony unless that conduct is covered under another statute that provides a greater punishment. S.L. 2004-198 also excepts from G.S. 14-269.2(b) weapons used for hunting purposes when used with the written permission of the governing body of the school that controls the educational property.

Studies

Local School Construction Financing

G.S. 115C-408(b) says, “It is the policy of the State of North Carolina that the facilities requirements for a public education system will be met by county governments.” Many counties are finding it difficult to meet facilities requirements, even though the state has contributed funds for this purpose over the years. In order to look for ways to help counties, Section 7.32 of S.L. 2004-124 establishes the Local School Construction Financing Study Commission. This twenty-member commission is directed to examine the present system of school facilities financing and study options for financing local school construction, renovation, repair, and maintenance. The commission may consider public–private partnerships, sale lease-back arrangements, private and commercial financing arrangements, design standards, alternative local revenue sources, use of real estate investment trusts, state and local construction bond pools, and

other applicable financing methods. The commission must make a final report no later than March 31, 2006, when its commission will expire.

Part XI (sec. 11.1 through 11.10) of this year's study bill, S.L. 2004-161 (S 1152) also establishes the Local School Construction Financing Study Commission in terms identical to those of S.L. 2004-124 except that the membership does not include the chair of the State Board and the funding provisions for the Commission itself differ.

Teacher Workdays

The same act that changes the school calendar, S.L. 2004-180, requires the State Board to study the scheduling and purposes of noninstructional teacher workdays. As part of the study, the State Board must consult with interested stakeholders.

Antiviolence Education

Violence in schools and in communities continues to be a serious problem. Section 3.1 of S.L. 2004-186 (H 1354) directs the DPI to study the issue of antiviolence programs in schools. Topics to be studied include (1) whether all public schools should be required to incorporate an antiviolence program of instruction into the curriculum and (2) minimum requirements to ensure that the curriculum addresses physical violence, mental or verbal abuse, and domestic and relationship violence. In addition, the DPI must study providing training to school personnel dealing with students who are victims of physical violence and mental or verbal abuse. The study must consider whether school personnel should be required to undergo training, and, if so, which personnel and what type of training they should receive.

S.L. 2004-116 (H 1459) directs the State Board of Education to determine whether teacher preparation programs should require courses in diversity training, anger management, conflict resolution, and classroom management.

Sales and Use Tax Exemption

Section 14 of S.L. 2004-161 authorizes the Revenue Laws Study Commission to study (1) granting local school administrative units a sales and use tax exemption instead of a tax refund and (2) methods of funding such a change.

Children with Multiple Service Needs

Section 24.2 of S.L. 2004-161 directs the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Service to convene a task force to comprehensively review the state's system of care for children with multiple service needs.

Teacher Recruitment and Retention

Section 28 of S.L. 2004-161 directs the State Board to form a task force to study issues related to effective recruitment and retention of teachers.

Section 7.19A of S.L. 2004-124 directs the Joint Legislative Education Oversight Committee to study strategies for increasing the number of students in teacher training programs. Among the matters to be reviewed are increased collaboration between universities and community colleges, distance learning programs, branch campuses, and other nontraditional approaches.

Regional Staff Development

Section 7.31 of S.L. 2004-124 authorizes the Joint Legislative Education Oversight Committee to consider the efficacy of providing for staff development in the core curricular areas through teacher-on-loan positions at Regional Education Service Alliances (RESA). These alliances would provide direct training services to member school systems.

Legislative Research Commission

The studies act of 2004, S.L. 2004-161 (S 1152), authorizes the Legislative Research Commission to study

- Purchasing alternative-fuel or low-emission school buses
- Job sharing
- Reemployment of retirees
- Postretirement earnings for state and local government employees
- VoCATS, the accountability system for vocational education courses
- The relationship between the state and local governments with respect to the provision of services
- The school calendar, the first instructional day, and the number of teacher workdays

Joint Legislative Education Oversight Committee

Part XIII of S.L. 2004-161 authorizes the Joint Legislative Education Oversight Committee to study

- Establishment of a teacher assistant salary schedule
- Issues unique to rural schools
- Use of physical restraints and seclusion in schools
- Bonuses to principals for increased high school graduation rates
- A single funding stream targeted to at-risk students
- Best practices for closing the achievement gap among various demographic groups performing below grade level
- Availability and use of E-textbooks
- Attracting teachers to become coaches
- Kindergarten admission requirements
- School counselor job description
- The state's testing program
- The Total Teacher Program
- School construction and capacity issues
- Computer-based math and literacy programs for students under six years of age
- Appropriate education for students on long-term suspension
- School nutrition and opportunities for healthful physical activity
- Low-wealth school funding

Miscellaneous

License Plates

The Division of Motor Vehicles, which issues many kinds of special license plates every year, is now able to offer special license plates with a phrase or insignia representing a North Carolina public high school. S.L. 2004-200 (S 1118) amends G.S. 20-79.4 to direct the division to issue these plates in accordance with G.S. 20-81.12, which requires that three hundred applications be received before plates are issued. The fee for a plate is $25 in addition to the regular registration fee. Under an amendment to G.S. 20-81.12, DPI will receive the money and transfer it annually to each school in proportion to the number of plates sold representing that school. A high school must use the money for academic enhancement.

Educating Suspended Students

Many students who are suspended from school for more than ten days do not receive any public education during the term of the suspension, which has a direct impact on their learning and performance. Several bills that were not enacted—including H 1135, H 1460, H 1457, and H 1458—would have examined or changed the schools' obligation to serve these students.

Instead of enacting these measures, the General Assembly took several smaller steps, including authorizing the study listed above. S.L. 2004-73 (H 1456) directs the State Board to recommend a specified percentage of the Alternative Schools/At-Risk Student Allotment to be designated for services to students who have been suspended from school for more than ten days. S.L. 2004-76 (H 1145) requires the State Board to develop and recommend a formula for allotting funds to alternative learning programs and schools based on the number of students expelled or suspended from school for more than ten days and assigned to an alternative learning program or an alternative school.

A related act, S.L. 2004-111 (H 1459), requires the State Board to determine whether teacher preparation programs should require courses in diversity training, anger management, conflict resolution, and classroom management.

Local Acts

Although local acts affect only named governmental units, at times these acts turn out to be harbingers of more widespread change. In 2004 the two local acts described below may fit this description.

Teacher Housing

S.L. 2004-16 (H 1640) authorizes the Dare County Board of Education to construct and provide affordable rental housing for teachers on property owned or leased by the school board. The school board may enter into a lease, partnership, joint venture, or similar arrangement with governmental and nonprofit entities to construct or provide such housing. The act authorizes the building of up to three affordable housing projects, which may contain a mix of below-market and at-market rental units. The program must include a provision giving teachers priority in renting the units.

County Funds for Charter Schools

Charter schools receive county funds for current operations but not for construction of school facilities. Section 7.25 of S.L. 2004-124 applies only to the Mount Airy City School Administrative Unit and to Surry County. It permits the board of education to submit a charter school's request for construction of facilities to the board of county commissioners along with the school board's own budget request. The county may appropriate funds for the charter school facilities if certain conditions are met.

School Employment

Shortening the Teacher Work Year and Related Changes

S.L. 2004-180 (H 1464) amends G.S. 115C-84.2 to require that the opening date for students in most school systems be no earlier than August 25 and the closing date no later than June 10. (For a further discussion, see "School Calendar," above.) An accompanying change to the statute reduces the statutorily set school calendar year by five days, from a total of 220 to a total of 215.

Before the change, the 220 days in the school calendar year included 200 working days for teachers. (The other 20 days were vacation days and holidays). Because the normal total of

student-attendance days is 180, that left 20 for scheduling teacher workdays. The statute provided that the local board of education would assign 8 of the 20 workdays (and could make some or all of those 8 additional student-attendance days) and individual school principals would assign the other 12.

With the change, the school calendar year includes 215 days, of which 195 are working days for teachers and the remaining 20 are vacation days and holidays. The normal total of student-attendance days is still 180, leaving 15 teacher workdays to be scheduled. Five of the 15 are to be scheduled by the local board of education—one day each at the beginning of the school year and the end of each quarter—and are to be reserved solely for completing instructional and classroom administrative duties without additional tasks. Local school boards are to schedule the remaining 10 days, in consultation with each school's principal, as workdays, additional instructional days, or other uses, including make-up days caused by inclement weather.

Of the 15 teacher workdays, at least 7 must be designated as days on which teachers who have additional accrued vacation may take leave. [G.S. 115C-84.2 provides—both before and after the changes introduced by S.L. 2004-180—that teachers be given 14 days' notice in advance if particular workdays are to be scheduled as required-attendance days on which vacation leave may not be taken. S.L. 2004-203 (H 281), a technical corrections act, purports to amend the statute to remove the 14-day notice requirement, but as it makes reference to incorrect portions of G.S. 115C-84.2, the effect of the purported change is unclear.]

The statute specifies that the reduction in the work year is not to result in a reduction in pay for any employee.

Retired Teachers Returning to Work

Beginning in 1998, the General Assembly, faced with severe teacher shortages, amended provisions of the statutes related to the Teachers' and State Employees' Retirement System to permit retired teachers to return to teaching and collect, under certain circumstances, both salary for teaching and full retirement benefits. Over the years, the statutory provisions have been amended and the sunset deadlines extended.

Section 31.18A of S.L. 2004-124 (H 1414) extends the sunset deadline to June 30, 2005, continuing for at least one more year the provisions for employing retired teachers. It also imposes a new requirement that for each retired teacher so employed, the school administrative unit must pay into the retirement system a sum equal to 11.7 percent of that teacher's salary.

Section 57 of S.L. 2004-199 (S 1225), the main technical corrections act, amends G.S. 135-3(8)c, a portion of the retirement system statute, to make it clear that retired teachers may return to teach in charter schools on the same basis as they do in regular public schools. The act makes corresponding changes in G.S. 115C-325(a)(5a).

State Board Authorized to Drop Licensure Exam

G.S. 115C-296 has required the State Board of Education to impose an examination requirement as part of its licensure requirements for all teachers. S.L. 2004-124 (H 1414) amends the statute to provide that the State Board may require an examination, not that it must do so.

Salaries

S.L. 2004-124 (H 1414) sets provisions for the salaries of teachers and school-based administrators. For teachers, the act sets a salary schedule for 2004–2005 that ranges from $25,420 for a ten-month year for new teachers holding an "A" certificate to $56,280 for teachers with twenty-nine or more years of experience, an "M" certificate, and national certification. For school-based administrators (meaning principals and assistant principals), the ten-month pay range is from $32,480 for a beginning assistant principal to $75,420 for a principal in the largest category of schools who has more than forty years of experience. Of course, many school-based administrators are employed not for ten but for eleven or twelve months, adding the proportionate amount to their salaries.

These salaries at the various steps of the schedules are 0.67 percent higher than the salaries on the same steps of the schedules that have been in effect for the past three years. The effective average salary increase for teachers and administrators is 2.5 percent, which results from the combined effects of the 0.67 percent increase in the step amounts and the increase that each individual receives by virtue of moving up one step in the experience ranks.

In addition, teachers with twenty-nine or more years of experience, who are at the top of the salary schedule, receive a one-time bonus equivalent to the average increase of teachers at the twenty-six- to twenty-nine-year steps. Principals and assistant principals at the top of their salary schedule receive a one-time bonus of 2 percent.

Salaries of central office administrators are set by local school boards within salary ranges fixed by the General Assembly, not according to a salary schedule. For 2004–2005, each central office administrator is to receive a salary increase of 2.5 percent or $1,000, whichever is greater.

Similarly, noncertified public school employees paid with state funds receive an increase of 2.5 percent or $1,000, whichever is greater.

A special $1,800 annual bonus, introduced in 2003 and paid to certain mathematics, science, or special education teachers in grades six through twelve was repealed. It formerly went to teachers of those subjects at schools having either 80 percent or more of their students eligible for free or reduced-cost lunch or 50 percent or more students performing below grade level in Algebra I or Biology.

A provision in S.L. 2004-180 (H 1464) (the school calendar and teacher work-year act discussed above) amends G.S. 115C-302.1(b). The new provision directs that teachers—except for those in year-round schools or paid in accordance with a year-round calendar—be paid a full month's salary by August 31. In effect, because they will not yet have worked a full month by that date, they will be prepaid.

ABCs Incentives

S.L. 2004-124 directs the State Board of Education to provide incentive funding for schools that met or exceeded levels of improvement in student performance during the 2003–2004 school year, in accordance with the ABCs of Public Education Program. The awards are to be made at the following levels: for schools exceeding expectations, up to $1,500 for each teacher and other certified personnel and $500 for each teacher assistant; for schools meeting expectations, $750 and $375, respectively.

Agriculture Teachers

S.L. 2004-124 (H 1414), in Section 7.20, amends G.S. 115C-302.1(b) to specify that local boards of education may not reduce the term of employment of any vocational agriculture teaching position that was a twelve-month position for the 2003–2004 school year for any subsequent school year.

Teacher Allotments for Small, Rural Schools

Section 7.28 of S.L. 2004-124 (H 1414) directs the State Board of Education to modify its policy on the allotment of classroom teachers for certain small schools to provide them with additional teachers. In administrative units where average daily membership as a whole is less than 1.5 per square mile, the new provision directs the State Board to allot teachers on the basis of one teacher per grade level to small schools where

- consolidation is not feasible due to the geographic isolation of the school, and
- average daily membership is 110 or less.

Teachers should be assigned to other schools in the unit according to the regular allotment formula.

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Robert P. Joyce

9

Environment and Natural Resources

The 2004 session produced significant environmental legislation, including an act requiring a license for coastal recreational fishing and an act authorizing innovative debt financing of protected open space. A controversial bill intended to help implement federal Phase II stormwater requirements was also enacted.

Agriculture

Nutrient Management for Feedlots

S.L. 2004-176 (H 1112), Phosphorous Nutrient Management/Animal Feedlots, changes the definition of *animal operation* in the state water quality statutes to separate permit requirements for operations with liquid animal waste management systems from the requirements for dry litter operations. The act also adds phosphorus as a nutrient that may be the rate-limiting nutrient (as opposed to nitrogen) for nutrient management plans.

Duties and Qualifications of Technical Specialists

Section 12.7C of the appropriations act [S.L. 2004-124 (H 1414)] purports to prohibit, until July 1, 2006, any change in the "requirements and qualifications" for animal waste management systems technical specialists or any changes in the activities they are authorized to carry out. This special provision appears to target a pending decision of the Board of Professional Engineers on whether animal waste technical specialists are engaged in the practice of engineering.

Raw Milk Sharing

Section 6.2 of S.L. 2004-195 (S 823), the environmental technical corrections bill, makes technical corrections to several environmental laws and also prohibits cooperatives and bartering to share raw milk.

Coastal Resources

Coastal Recreational Fishing License/Saltwater Fishing Fund

In 1994, the "Year of the Coast," various interests began calling for a bill requiring licensure for coastal recreational fishing. In light of this and of the declining commercial fishing industry and the widespread adoption of recreational licensing elsewhere along the Atlantic seaboard, the legislature began, in 1996, to consider such a bill. Since that time the ensuing stream of annual bills exempted or otherwise mollified the casual weekly visitor to the coast who wanted to drop a line off a pier for an afternoon, so that eventually the only interest groups who seriously objected to the bill were, ironically, the commercial fishermen, who genuinely feared the increased power recreational anglers would have once recreational license fees began supporting marine fisheries. Yet year after year, the opposition from commercial fishers was enough to stop the bill in the Senate. In the 2004 session, a coastal recreational license bill finally emerged from the Senate, in the form of a drastic markup to H 831, and passed as S.L. 2004-187. The new law contains many complex and contradictory provisions, leaving its proponents somewhat split in the degree and direction of their support. Nonetheless, it enacts a license requirement effective January 1, 2006 (thus allowing one more year of legislative tweaking to the controversial aspects of the bill—that is, the money provisions). The act establishes a Saltwater Fishing Fund to receive income from the fees for the new recreational licenses. Investment income on the fund's corpus would be controlled and distributed by a nine-member board of trustees, appointed by the Governor, the President Pro Tempore of the Senate, and the Speaker of the House. Funds can be granted to state agencies, local governments, and nonprofit organizations for a broad but politically astute set of purposes, including the following:

- Resource and habitat enhancement, restoration and enhancement of submerged aquatic vegetation, and creation and restoration of oyster habitat
- Grants to fund fisheries management research
- Acquisition of land for fishery habitat enhancement
- Purchase or construction of public beach access areas and public marinas
- Emergency dredging for the restoration of access to public fishing areas
- Establishment of scholarships for individuals pursuing degrees in marine science
- The board's administrative and operating expenses

The act prohibits use of the fund for law enforcement purposes. The license itself would cost $15 annually, with a seven-day license costing $1. Lifetime licenses will also be made available. Persons under eighteen years of age are exempt from the license requirements. The legislature appropriated $450,000 to the Division of Marine Fisheries and $300,000 to the board of trustees as start-up money for the licensing program. Those funds must be repaid from license revenues within eight years.

New Urban Waterfront Development

S.L. 2004-117 (S 732), masquerading as a pilot project, is actually a legislative override of Coastal Resources Commission (CRC) rules to allow a "new urban" waterfront development for a particular project in Chowan County. The CRC only began allowing coastal waterfront development that was not "water dependent" to be built next to the water in the late 1990s, and, through rules and limitations in recent enabling legislation, had restricted such development to historic waterfronts that had previously been used for non-water-dependent purposes (examples of such development include the restaurants along Chandler's Wharf in Wilmington and hotels and businesses on the old waterfront in New Bern). S.L. 2004-117 further widens the crack in what was once an ironclad CRC policy against building urban structures directly on the waterfront.

Fort Fisher Beach Access

Section 12.3 of the appropriations act attempts to resolve a controversy concerning nighttime access to the beach at Fort Fisher in New Hanover County. It directs Department of Environment and Natural Resources (DENR) and UNC Wilmington scientists to study the likely effects of night access to the beach on the local economy, endangered sea turtles, and nesting birds. The researchers must report their recommendations to the General Assembly by February 1, 2005. The special provision also allows night access from September 15 to April 15 for people who purchase a permit; the terms of and fee for the permit will be determined based on the study.

Beach Engineering

Section 30.12 of the appropriations act requires the Joint Legislative Transportation Oversight Committee to consider creating a state dredging program that uses dredge spoils for beach engineering.

Enforcement

Two interesting bills dealing with environmental enforcement were introduced in 2004, but both failed. House Bill 868, "Improve Environmental Enforcement," would have raised maximum fines for environmental violations and removed the cap on the portion of fines that could be retained by DENR to cover enforcement costs. This cap was necessitated by constitutional litigation brought by the Craven County Board of Education, which had successfully diverted the bulk of proceeds from environmental enforcement efforts to local schools.

House Bill 1393, "Federal Enforcement by Marine Inspectors," would have authorized the Division of Marine Fisheries to contract with the National Marine Fisheries Service to enforce federal fishing laws in state waters.

Environmental Finance

Budget

The budget increases DENR funding for the last year of the biennium by slightly over $1 million. Special provisions in the budget

- earmark $500,000 to the Museum of Natural Sciences for the development of a plan to expand the museum, contingent on the museum raising private matching funds;
- require the Wildlife Resources Commission (WRC) to "segregate revenue affected by the requirements or conditions of federal law from revenue that is not affected by the requirements or conditions of federal law";
- excuse the WRC from paying fees when it handles certain recycled materials;
- direct the WRC to make a one-time payment in lieu of taxes of $37,500 to Swain County for the loss of future property tax revenue as a result of having had the Needmore Tract put into conservation status;
- transfer funds remaining in the Partnership for the Sounds for the Pamlico County education initiative to Pamlico County;
- earmark $5 million for projects approved in April 2004 by the State Energy Council (affiliated with the State Energy Office in the Department of Administration) and $1 million to the council for weatherization assistance;
- earmark $15 million for stormwater controls on existing DOT facilities along the entire coast and $26.5 million for twenty-two water resources development projects;
- authorize DENR to transfer $6.9 million from the General Water Supply Revolving Loan Account and $776,000 from the Industrial Development Fund to match federal Safe Drinking Water Act funds;

- authorize the Division of Waste Management in DENR to use up to $50,000 of its appropriation to monitor and conduct emergency cleanup at the Texfi contaminated site in Fayetteville; and
- specify that unspent funds appropriated in 2003 for the Oregon Inlet Project will not revert to the General Fund but will be transferred to the accounts of the N.C. Seafood Industrial Park Authority to be spent on maintenance dredging of Oregon Inlet.

Express and One-Stop Permitting

The appropriations act revises DENR's one-stop permitting program to require automatic issuance of a permit if the agency misses a permit deadline by more than sixty days. It also expands DENR's express permitting program (faster processing for applicants who pay more) to two more regional offices to be chosen by the agency.

Dedicated Funds

The 2004 budget act appropriates $62 million to the Clean Water Management Trust Fund (CWMTF), the same amount provided in the 2003 biennial budget. Section 6.31 of the act authorizes the CWMTF to use up to $4.1 million for farmland preservation projects, and directs the Department of Agriculture to prepare a master plan for farmland preservation in North Carolina. The Farmland Preservation Fund itself received no appropriation. For a discussion of the new Saltwater Fishing Fund, see "Coastal Resources," above.

Certificates of Participation

S.L. 2004-179 (H 1264), "Finance Vital Projects/Studies," authorizes the state to use certificates of participation, or "special indebtedness," for a variety of projects, including conservation land acquisition. This form of borrowing gives a substantial degree of state backing to project financing without requiring voter approval. Authority for land conservation expenditures from the Clean Water Management Trust Fund, the Natural Heritage Trust Fund, and the Parks and Recreation Trust Fund is capped at a collective $45 million. The projects will include acquisition of land around military bases and the creation of a new public park on Lake James in the upper Catawba basin.

Payments in Lieu of Taxation

S.L. 2004-188 (S 933) requires that before a state agency or local government can acquire land in a tier one or two county for wetland mitigation, it must pay the county government twenty times the land's annual property tax liability.

Present-Use Value Taxation

S.L. 2004-8 (H 1465) allows farmland owned by a family business to retain present-use value tax status even when the land is leased to another farmer.

Tax Credits

S.L. 2004-243 (H 1602) postpones from 2005 to 2006 the sunset on limits for tax credits for donations of property interests by partnerships.

S.L. 2004-153 (H 1636) provides a tax credit for purchasing, dispensing, or processing renewable fuels, defined as biodiesel from animal or plant materials.

Senate Bill 848 would have created generous tax credits for donations to a proposed new hybrid/alternative fuel vehicle research facility in Northampton County, but the bill did not pass.

Contaminated Property Cleanup

Underground Storage Tanks

The state continues to struggle with its public funding program for leaking underground storage tanks; the fund has become the financial tail that wags the cleanup dog, and in recent years the tail has barely been wagging. Section 30.10 of the appropriations act provides an additional one-time appropriation to the fund and also makes substantive changes in how the fund can be used. The supplementary appropriation comes from the motor fuels tax and is ultimately expected to provide an additional $32 million to the Commercial and Noncommercial Leaking Tank Funds and the Water and Air Quality Account by the end of fiscal 2004–2005. Money is also independently appropriated to create an additional accounting position that will handle claims on the funds and to cover the legislative pay increase for fund personnel. Substantive changes to the program affect pre-approvals of cleanups that ultimately will be subsidized in part from the public funds. Pre-approvals (which are now required for certain cleanups to go forward) are prohibited unless DENR has the funds available to pay resulting claims within ninety days of claim approval (which is currently impossible, in light of fund insolvency). Exceptions are possible if the responsible party requests pre-approval so that cleanup work can proceed or if some emergency exists that presents an imminent threat to human health or the environment. The provision also authorizes and requires both rule-making and departmental pronouncements outside the rule-making process on which cleanup activities require pre-approval and what level of costs the funds will cover. DENR is directed to give priority in its reimbursements to higher risk sites, "risk" being specified as to both human health and the environment.

The special provision also directs the Environmental Review Commission and the General Assembly's Joint Legislative Transportation Oversight Committee to study and report by January 2005 on the role of the state and the funds vis-à-vis cleanup needs, the adequacy of revenue for the trust funds, privatization of trust fund administration, the state's role in the cleanup of orphan underground storage tank (UST) sites, and whether existing UST rules and related enforcement are adequate to prevent future releases from USTs.

Dry Cleaning Solvent Cleanup

S.L. 2004-48 (S 1219) increases the amount of money from the Dry Cleaning Solvent Cleanup Fund that can be used to pay for assessment or remediation of dry cleaning solvent contamination from 10 to 25 percent of revenues credited to the fund in a given fiscal year.

Marine Fisheries

Shellfish Leases

S.L. 2004-150 (H 1427) establishes training requirements for new shellfish cultivation lease applicants and increases permit and rental fees. Section 12.7B of the appropriations act creates a program for "under dock" oyster culture, including permitting, training, and reporting requirements.

Fishery Management Plans

S.L. 2004-160 (H 1429) changes the goal for fisheries management from "optimal yield" to "sustainable harvest" and sets a time frame of ten years for rebuilding overfished stocks.

State Parks, Natural Areas, and Land Conservation

Changes to the State Parks

S.L. 2004-24 (H 1574) adds the Lower Haw River State Natural Area to the state parks system and directs DENR to study the feasibility of establishing a state recreation area at Blewett Falls Lake, on the border between Anson and Richmond Counties. S.L. 2004-25 (H 1607) removes a small portion of land in the Hemlock Bluffs State Park from the State Nature and Historic Preserve and State Parks System for a right-of-way to widen Kildaire Farm Road in Cary. The bill also transfers the Horne Creek Living Historical Farm near Pilot Mountain from the parks system to the Department of Cultural Resources.

Local Open Space Preservation

S.L. 2004-119 (H 1547) allows the Town of Chapel Hill to purchase land outside its jurisdiction to preserve as open space. For a period, the bill also authorized the town to create a system for transfer of development rights, a local authority previously sought by the Town of Huntersville and rejected. The language for Chapel Hill, passed by the House but not the Senate, was removed in conference.

Game Lands

Section 19.8 of the appropriations act transfers the 1,094-acre Light Ground Pocosin property in Pamlico County from the Department of Administration to the WRC for management as a game land.

Water

Stormwater

The current major frontier in water pollution control, after the regulation of point source dischargers that began in earnest with the Federal Water Pollution Control Act of 1972, is reducing pollution from "nonpoint" sources, primarily the problems that occur whenever it rains and the resulting runoff carries pollutants from streets, roofs, and yards directly into streams. In 1990 the U.S. Environmental Protection Agency (EPA) published rules for stormwater management for cities with a population of over 100,000; this was Phase I of the federal stormwater control effort. In 1999 EPA finalized rules for Phase II stormwater controls, which apply to a far greater number of places—generally, to places defined by the Census Bureau as "urbanized areas" and to smaller construction sites. Like most federal environmental programs, the federal Phase II stormwater rule gives states the option of implementing the program themselves, rather than having EPA attempt to regulate localities directly. North Carolina has been trying to establish its state Phase II program since 1999. But despite serious efforts, including various facilitated stakeholder processes, North Carolina lags behind most other states and missed the key deadline under the federal rule for having permits issued to owners of "municipal separate stormwater systems" (the various devices, such as curb and gutter systems, for channeling stormwater to streams). In part, the problem is the almost unique way in which North Carolina maintains ownership of its roads—at the state rather than the county level, differing from most other states. This means that North Carolina counties, unlike those in most other states, are often not "owners of municipal separate stormwater systems" and are thus not subject to the federal rule, as it was promulgated. This has created difficult questions for North Carolina—namely, who will regulate stormwater in urbanized areas outside of designated Phase II cities, and how will that regulation occur? To make matters more complicated, the Environmental Management Commission (EMC) passed both a temporary and a final rule creating a system for such regulation, but the Rules

Review Commission objected to the final rule. The two commissions, along with an environmental group, are now in litigation over the rule; meanwhile, the cities that are certainly subject to the Phase II federal rule, in addition to developers who are developing in urbanized areas, risk EPA and citizen enforcement actions for proceeding without the stormwater permit and controls required under the federal rule.

S.L. 2004-163 (S 1210) was the legislature's effort to clear up some of this turbid situation. It primarily makes the EMC's temporary rule the basis for a Phase II program in North Carolina, adding some administratively complex arrangements for development in urbanized areas outside the 123 municipalities now designated as Phase II communities. The act also establishes designation and petition procedures to bring additional communities under the program no sooner than 2010. In addition, new developments in the unincorporated areas surrounding designated Phase II municipalities must meet stormwater management requirements if they are located in a federally defined "urbanized area" or within the potential extraterritorial jurisdiction (ETJ) of a Phase II municipality (the ETJ is the area outside the city limits in which the city may exercise planning and zoning authority). A city's potential ETJ extends 1–3 miles beyond its boundaries (depending on the population of the city). If the municipality is not actually exercising its planning and zoning authority throughout the entire area, then DENR is supposed to implement stormwater management requirements in any areas not regulated by the municipality. Counties may request delegation from DENR and implement the stormwater program themselves in unincorporated areas regulated under the bill. Furthermore, if the combination of area covered by Phase II municipalities, the potential extraterritorial jurisdiction around those municipalities, and other urbanized areas totals at least 85 percent of the county, then stormwater requirements apply to any new development in the entire county. As additional cities come into the Phase II program through state designation, the EMC may require stormwater controls in unincorporated areas surrounding those cities.

Other stormwater legislation includes Section 6.29(a) of the appropriations act, providing that retail merchants may not pave more than four hundred square feet of surface for a nursery display area unless they control stormwater runoff. Another budget special provision directs the Department of Transportation to use $15 million of its funds to clean up state-maintained stormwater pipes that discharge into the ocean.

Drinking Water

S.L. 2004-143 (H 1083) attempts to resolve a lingering controversy over the responsibilities of landlords who submeter and charge tenants for providing water or sewer service in apartment complexes and other multifamily housing units. Such landlords who have knowledge of contamination must notify tenants of any violations of water quality standards. The act also clarifies the responsibility of the supplying water system and the landlord for water quality problems occurring within the residential water system.

Wastewater

S.L. 2004-140 (S 1202) provides for ten-foot setbacks between septic systems in certain types of sandy soils. Current state rules require a distance of twenty feet between septic systems. The act applies only to lots platted before July 1, 1977. The act also authorizes the Commission on Health Services to adopt rules that incorporate the provisions of the bill.

Water Resources

S.L. 2004-83 (S 859) establishes a Catawba/Wateree River Basin Advisory Commission and a Yadkin/PeeDee River Basin Advisory Commission, with representation from both North Carolina and South Carolina. The purpose of each commission is to lead discussions about the use, stewardship, and management of the respective river basins.

Richard Whisnant

10

Health

In 2004 the issues of public health and access to health care were front and center on the legislative agenda. Funding was restored to several existing programs and new funding streams and initiatives were launched, including the School Health Nurse Initiative, the Public Health Incubator program, and a new Community Health Grant fund.

Several of these initiatives were derived from the recommendations included in the interim report of the Public Health Task Force 2004. The Task Force was convened by the North Carolina Department of Health and Human Services (DHHS) and included representatives from the local and state public health communities, legislators, community leaders, and others. The task force's report included eighteen recommendations related to the infrastructure of the public health system and core service gaps across the state.[1] The group is expected to continue deliberating, and additional recommendations may become legislative proposals in the coming years.

Budget

Public Health

Two major funding initiatives in the 2004 appropriations act [S.L. 2004-124, (H 1414)] focus exclusively on the public health community; one infuses money into an existing program, and the other establishes an entirely new program. First, funding for the AIDS Drug Assistance Program (ADAP) was increased by over $2.7 million to purchase prescription drugs to treat HIV and AIDS. Individuals with family incomes of less than 125 percent of the federal poverty level ($11,600 for a family of one) may be eligible for the program. Before this funding increase, North Carolina had the longest ADAP waiting list in the country. The increased funding will allow enrollment of all the individuals on the waiting list as well as other eligible individuals. In addition to the funding increase, Section 10.31 of the 2004 appropriations act directs DHHS to study whether the adoption of a six-month eligibility process would save the program money in the future.

To establish and administer a new "public health incubator" program, the North Carolina Institute for Public Health at the UNC School of Public Health will receive over $1 million. The incubator program is intended to promote regionalism in public health activities across the state

1. The task force's interim report is available online at http://www.dhhs.state.nc.us/dph/taskforce/taskforce.htm.

and collaboration between public health departments, other government agencies, and nonprofit organizations. The new program arises from recommendations of the Public Health Task Force. The task force recognized the success of a regional partnership launched in the northeastern region of the state in 1999 and suggested that funding be made available to encourage other models of cooperative regional planning and service delivery. The new funding must be used for specific purposes, including the following:

- Building capacity for activities related to disease surveillance and health disparities
- Conducting regional health assessments and identifying priorities
- Raising public awareness about health-related issues
- Providing additional training to board of health members
- Evaluating workforce preparedness

DHHS must submit an evaluation of the incubator program to the General Assembly by January 2005.

By comparison, a relatively small sum ($50,000) was allocated to the DHHS Division of Public Health (DPH) for distribution to those health departments that are officially accredited as a result of a pilot accreditation program established last year. The funds may be used for a wide range of activities, including the following:

- Appointing quality improvement officials in each department
- Developing new partnerships
- Providing incentives for regional collaboration, including the creation of district health departments and public health authorities
- Assisting other public health departments seeking accreditation
- Strengthening the role of local boards of health

An additional $50,000 was allocated to the North Carolina Institute for Public Health to establish the Pilot Accreditation Advisory Board. The Board must evaluate the new accreditation process and report its findings. The General Assembly directed DHHS to expand the current pilot accreditation process to include additional counties and also to continue the work of the Public Health Task Force.

Several other public health programs also received new or increased funding for the coming fiscal year. Recurring funds were allocated to several programs that suffered cuts in past years, including the Child Fatality Task Force ($69,429, including the creation of one new position), the Women, Infants, and Children (WIC) Farmers Market Program ($156,630), and Prevent Blindness ($41,900). Nonrecurring funds were allocated to the Healthy Start Foundation for the prevention of infant mortality and morbidity ($225,000), the University of North Carolina Children's Communicative Disorder Program ($177,000), and the Arthritis Prevention Program ($25,000).

The General Assembly also provided for fifty-three new positions within various DPH programs and one position dedicated to bioterrorism preparedness within the Division of Facility Services. Positions are to be supported almost entirely by receipts from outside sources such as the Centers for Disease Control and the U.S. Department of Homeland Security.

While funding for public health programs increased overall, a few programs did suffer reductions, including the Early Intervention Children's Development Services Agencies ($250,000), the Office of the Medical Examiner ($25,000), and the State Center for Health Statistics ($10,000). In addition, state funding for health promotion activities was reduced by $159,000. However, federal funding for health promotion through the Preventive Services Block Grant is expected to increase in the coming years.

School Nurses

One of the most significant new funding streams in this year's appropriations act will fund the creation of the School Health Nurse Initiative, another program recommended by the Public Health Task Force. The initiative, managed by the DHHS Division of Public Health (DPH) and the Department of Public Instruction (DPI), will provide funds to communities across the state to hire a total of 145 school nurses. The legislature appropriated $4 million in recurring state funds to

hire 80 new nurses. In addition, Section 5.1(cc) of the appropriations act earmarks $6.5 million from the federal Maternal and Child Health Block Grant to hire 65 school nurses on a time-limited basis. When allocating funds the departments must consider, among other things, current nurse-to-student ratios, the economic status of targeted communities, and the health needs of area children. On August 18, 2004, the Governor's office issued a press release identifying the local education agencies that will receive the funding for new nurse positions.

Community Health

The budget earmarked $7 million in nonrecurring funds for a new DHHS competitive grant program. The funds are intended to increase access to care for uninsured and medically indigent patients by

- expanding services provided by health centers currently serving these populations;
- establishing new health centers in counties without them; and
- increasing capacity at current centers by enhancing or replacing facilities, equipment, or technologies.

Of the total grant funds, $5 million must be used for community health centers (that is, federally qualified health centers [FQHCs] and FQHC look-alikes) and $2 million must be used for rural health centers and public health departments. DHHS is required to work closely with the North Carolina Community Health Center Association and the North Carolina Public Health Association in developing the evaluation process. The grant program should generate some interesting data because grant recipients must submit annual reports to DHHS regarding the care provided to uninsured and medically indigent patients. DHHS is required to report to the General Assembly in 2005 regarding the need for continuing funds for the grant program.

Medicaid and Health Choice

Funding and programmatic changes related to the Medicaid and Health Choice programs are addressed in Chapter 21, "Social Services."

Public Health

Confidentiality

North Carolina local health departments are required by state and federal law to maintain the confidentiality of patient medical records. The federal HIPAA privacy regulation[2] is the most comprehensive law governing confidentiality, but several state laws also apply. Under HIPAA local health departments may share identifiable health information with others for purposes of treatment, payment, and health care operations without obtaining written permission from the patient (or the patient's legal representative). State law, however, has limited the types of information local health departments can share with others for these three purposes. For example, under G.S. 130A-143 health departments could share only limited information for payment purposes when that information related to a reportable communicable disease, such as HIV or tuberculosis. As a result, in these situations health departments have had to obtain written permission from patients to disclose information for treatment, payment, and health care operations purposes.

Obtaining such permission presents unique challenges for local health departments because they are legally obligated to care for individuals in their counties in several circumstances. For example, if a person infected with a communicable disease comes to a health department, the

2. HIPAA is the Health Insurance Portability and Accountability Act of 1996. All local health departments in North Carolina were required to come into compliance with the HIPAA privacy regulations by April 14, 2004. *See* 45 C.F.R. Parts 160 and 164.

department is legally required to care for that person. If the person refuses to sign the permission form allowing the health department to disclose information for purposes of treatment, payment, or health care operations, the department finds itself in a difficult position: it must provide care, but it may not share the information necessary to obtain payment for that care (such as reimbursement from Medicaid) and it may not share information related to the person's treatment with other health care providers. To resolve this dilemma, the General Assembly amended a state confidentiality law, G.S. 130A-12, to authorize health departments to disclose information for purposes of treatment, payment, and health care operations [S.L. 2004-80, (S 582)]. Such disclosures are further restricted by HIPAA and other state law, but this amendment assures local health departments that they may disclose most health information for these three purposes in most situations without written permission.[3]

Public Health Preparedness

In 2002 the General Assembly enacted S.L. 2002-179, which included several new provisions intended to enhance state and local public health officials' preparedness for emergencies, particularly bioterrorism-related emergencies. This session several adjustments to the new laws were adopted as part of S.L. 2004-80. The first involves a change to the definition of *isolation authority* in G.S. 130A-2(3a). The term previously encompassed only persons and animals actually infected with a communicable disease or condition. The revised definition extends the scope of the term to include persons and animals "reasonably suspected" of being infected with a communicable disease or condition. Among other things, this expanded definition will allow state and local public health officials to exercise their authority in emergent situations where confirmed diagnoses may not be readily available.

The next series of changes relates to the procedures and time frames applicable when a local health director or the State Health Director exercises quarantine or isolation authorities to limit a person or animal's freedom of movement or to limit access to a person or animal. When the law was amended in 2002, the General Assembly incorporated significant due process protections for persons and animals affected by quarantine or isolation orders limiting freedom of movement or access. For example, the 2002 law added new language to G.S. 130A-145 to provide that an initial order would be valid for only ten days and the health director would have to go to court to have it extended for successive periods of up to thirty days. After the implementation of the 2002 law, health officials recognized that to contain the spread of some diseases such as Severe Acute Respiratory Syndrome (SARS), initial orders limiting movement or access should be effective for periods longer than ten days. Officials concluded that the extension procedures could become unwieldy if the officials were required to pursue extensions for hundreds or thousands of people in the event that North Carolina experienced a SARS outbreak similar to that of Toronto in 2003. They thus appealed to the General Assembly for an extension of the initial period limiting freedom of movement or access. The 2004 amendments extend this period from ten to up to thirty days.

After the initial limitation, local and state health directors may still ask a court to extend the limitation for additional periods of up to thirty days each. S.L. 2004-80 amends the law to require the court order to provide for automatic termination of the limitation if a health official determines that the quarantine or isolation is no longer necessary. It also provides the subject of the limitation (that is, the person or the owner of an animal) with the opportunity to prove to the court that the order should be terminated before the established expiration date. A special time frame applies when a person infected with tuberculosis has had his or her freedom of movement limited. In those cases the court is authorized to extend the order for up to a year at a time. This longer period reflects concern about a drug-resistant strain of tuberculosis, a disease that can present a public

3. At least two exceptions apply. State regulations require health departments to obtain written permission to (1) bill a third-party payer for HIV testing or counseling and (2) disclose HIV/AIDS-related information for treatment purposes when the department has *not* provided direct medical care to the patient. 10A NCAC 41A .0202(9) and (11).

health threat indefinitely. As with other cases, a person with tuberculosis who is subject to a longer limitation may at any time ask the trial court to reconsider its order and seek termination of the order before the established expiration date.

In 2002 similar due process protections were also incorporated into G.S. 130A-475, one of the sections added to address public health activities in the context of suspected terrorist attacks involving nuclear, biological, or chemical agents (hereinafter bioterrorism). S.L. 2004-80 amends those protections to extend the initial period for limiting freedom of movement or access from ten to up to thirty days. Technical changes to the 2004 provisions were included in Section 33 of S.L. 2004-199 (S 1225).

S.L. 2004-80 adds a new due process protection to both G.S. 130A-145 and G.S. 130A-475. Whenever a health official exercises his or her authority to limit freedom of movement or access under either of these two sections, the official is now required to provide notice to certain individuals about their rights to have the limitation reviewed by a court.[4] The official must provide notice to any person the official knows is substantially affected by the limitation.

S.L. 2004-80 adds or modifies several other provisions related to public health preparedness. New G.S. 130A-141.1 gives the State Health Director the authority to issue a temporary order requiring health care providers to report health-related information in order to conduct a public health surveillance or an investigation. Such an order may be appropriate if, for example, a new communicable disease may be emerging (such as when SARS first appeared) and public health officials need to track the number of people experiencing certain symptoms to determine how and where the disease is spreading and to develop an appropriate response. These temporary orders may be valid for up to ninety days. After that time the Commission for Health Services has the authority to adopt rules continuing the reporting requirement if necessary.

S.L. 2004-80 also revises two public health laws concerning the authority of state and local officials to access medical and other records. The law amends G.S. 130A-144(b), a general provision in the state's communicable disease control law requiring physicians and medical facilities to provide to the State Health Director or a local health director access to medical records upon request. The new law makes two significant changes to this provision. First, providers and facilities must now provide access to *any* records (rather than only medical records) the state or a local health director determines are relevant to the public health inquiry. The second amendment relates to the scope of the records request. Prior to the amendment, the law required that access must be provided only to records pertaining to the care of a patient infected with, exposed to, or reasonably suspected of being infected with or exposed to a communicable disease or condition. The section was amended so that the health directors may also have access to information pertaining more generally to the investigation of a known or suspected outbreak of a communicable disease or condition. The request for access apparently does not need to be directly related to an infected or exposed individual. This more expansive authority could be useful to health officials investigating a new or emerging illness and attempting to identify clusters of symptoms or conditions present in a community.

The other access provision amended by S.L. 2004-80 concerns bioterrorism-related investigations. Language added to G.S. 130A-476(c) provides more expansive authority for records requests by state and local officials, consistent with the new authority in G.S. 130A-144(b), described above. Under the revised law, state and local health directors may demand records necessary to deal with a case or an outbreak of a disease that may have been caused by a bioterrorism-related incident. Language was also added to clarify the authority of state and local health directors with respect to access requests. G.S. 130A-476(c) previously stated that these officials "may request" access to certain records of health care providers, health care facilities, and laboratories. Some providers questioned whether such language ("may request") required them to provide access upon request

4. Under the 2002 law, such persons were given the right to institute an action to have the limitation reviewed in superior court in Wake County or in the county where the limitation was imposed.

or whether compliance with the requests was optional. The amendments clarify that these entities are indeed required to disclose records to the state or local health officials who request them.

The 2004 appropriations act modifies another provision of the 2002 bioterrorism law. The original version of G.S. 130A-476(f) authorized the State Health Director to collect voluntarily provided data from hospital emergency rooms and urgent care centers in order to conduct public health surveillance. Some health care providers, however, were reluctant to provide such data because of concerns that the disclosure would violate state medical confidentiality law. Section 10.34 of the 2004 appropriations act repealed that provision and added new G.S. 130A-480, which requires the State Health Director to develop a hospital emergency room surveillance program to facilitate the detection of epidemics, diseases (such as communicable diseases), and bioterrorism-related threats. The new law expressly *requires* hospitals to submit emergency room data to the surveillance system as directed by Commission for Health Services rules. To protect patient privacy, the law limits the types of identifiers the State Health Director may collect. For example, he or she may not collect patient names, social security numbers, or account numbers. In addition, the Director must protect the confidentiality of all data collected through this program, and the data is exempt from the state public records laws.

Nutrition

Section 7.17 of the 2004 appropriations act directs the State Board of Education to establish a pilot program to support the efforts of eight school systems to provide only healthful, nutritious food choices to elementary school students. The Board may reimburse the pilot systems for any loss in food service revenues during the 2004–2005 school year resulting from the implementation of a healthful school food program.

Early Intervention Services

North Carolina offers two Early Intervention programs to provide an array of services to children with special needs from birth to age five. Section 10.9 of the 2004 appropriations act directs DPH to track and report on the number of children referred to the Early Intervention programs through Department of Social Services abuse and neglect agents.

Environmental Health

Two pieces of recent legislation will directly affect local environmental health programs. S.L. 2004-178 (S 1054), which primarily focuses on enhancing penalties for crimes associated with the manufacture and distribution of methamphetamine, added a provision to the public health laws related to decontamination of property used for manufacturing the drug. New G.S. 130A-284 directs the Commission for Health Services to adopt rules establishing standards governing decontamination of residences and places of business where the drug was manufactured. If the property owner, lessee, operator, or other person in control of the property knows that the property was used for drug manufacturing, that person is required to comply with the commission's decontamination standards (and presumably assume the cost of any decontamination). The law does not specify who, if anyone, will be responsible for compliance with the decontamination standards if the property owner or other person did not have any knowledge regarding the illegal use of the property.

The second piece of environmental health-related legislation involves subsurface wastewater disposal systems (septic systems). In response to the concerns of some coastal counties, the General Assembly adopted a change to the law regulating the required distance between residential septic systems. The modification included in S.L 2004-140 (S 1202) applies only if the following conditions are satisfied:

- The lot's deed or plat was recorded before July 1977.
- The lot is too small to accommodate the setback requirements included in current wastewater regulations.
- The system will support a single-family dwelling with no more than four bedrooms.
- No public or community wastewater alternative is available.
- The system will be installed in certain types of sandy soils.

The setback requirement for systems satisfying these conditions is ten feet; the requirement for other systems is twenty feet. The law authorizes the Commission for Health Services to adopt rules incorporating these requirements and provides that the law expires once the commission's permanent rules become effective.

Quality Assurance and Peer Review

S.L. 2004-149 (H 669) made several changes to Chapter 131E provisions governing hospitals and other health care providers. It defines a new term in G.S. 131E-101: *quality assurance committee.* The term encompasses peer review corporations or organizations as well as committees or other organizations affiliated with hospitals, nursing homes, and adult care homes formed to evaluate the quality or cost of or necessity for health care services under applicable laws. The law also revises the definition of *medical review committee* to refer to several different types of committees formed to evaluate the quality or cost of or the necessity for hospitalization or health care, including committees of state or local professional societies, hospital medical staffs, and peer review corporations or organizations.

The legislation also amended G.S. 131E-107 to extend immunity from civil liability to members of quality assurance committees. The immunity only extends to statements and actions falling within the scope of the members' quality assurance activities. This same immunity was already applicable to activities of medical and peer review committees. In addition, G.S. 90-21.22A now shields quality assurance committees (as defined in that section) from medical malpractice liability for committee statements and activities.

New language was also added to G.S. 131E-107 to protect the confidentiality of the materials of all three types of committees. This section also now provides that information forwarded by the committees to the Joint Commission on Accreditation of Healthcare Organizations remains confidential. The law clarifies that information otherwise available is not shielded from discovery simply because it was considered by a quality assurance, medical, or peer review committee. It also specifically provides that public records do not become confidential simply by virtue of being considered by the committee. Finally, the new law provides that committee members may not be compelled to testify about information related to committee proceedings. Similar changes were also incorporated into G.S. 131D-21.2, which regulates adult care and maternity homes.

For changes related to peer review activities of facilities licensed under Chapter 122C, see the discussion in Chapter 16, "Mental Health."

Health Professions

Liability

S.L. 2004-149 adds a new section to Chapter 90 to shield medical directors of nursing homes from liability in certain circumstances. Directors may still be named in lawsuits when the allegations relate either to a patient under his or her direct care or to the director's conduct in a supervisory or consulting role.

The law also adds a new section to the North Carolina Rules of Evidence. Under new Section 413, statements by a health care provider apologizing for an adverse outcome in a medical treatment or offering to undertake corrective or remedial treatment or actions are not admissible to prove

negligence or culpable conduct in a medical malpractice action against the provider. Information about a provider's gratuitous acts to assist affected persons is also not admissible in such actions.

Pharmacies

Under G.S. 90-85.21A(a), out-of-state pharmacies dispensing legend drugs into the state (via mail or otherwise) are required to register with the North Carolina Board of Pharmacy. S.L. 2004-199 amends the requirement to provide that, as part of the registration, such pharmacies must certify that they employ pharmacists who meet licensure requirements equivalent to those of North Carolina. The pharmacist must agree to be subject to the jurisdiction of the Board of Pharmacy.

Physician Assistants

Ordinarily, a physician assistant licensed in North Carolina is authorized to dispense drugs if he or she does so under the supervision of a licensed pharmacist and complies with the rules of the North Carolina Board of Pharmacy. S.L. 2004-124 adds new G.S. 90-18.2A, which creates an exception to this general rule. The law provides that the North Carolina Medical Board (rather than the Board of Pharmacy) has sole jurisdiction to regulate and license physician assistants who receive, prescribe, or dispense prescription drugs without charge or fee to the patient, provided the physician assistant is working under the supervision of a licensed physician.

Drug Assistance Program

Seniors in North Carolina now have at least two governmental prescription drug programs available to help them pay for medicines. The state offers some low-income seniors the option of enrolling in the Senior Care Prescription Drug Assistance Program (Senior Care), which provides a prescription drug benefit up to $600 per year. In addition, the federal government recently approved a program through which Medicare beneficiaries may obtain and use a drug discount card until the full Medicare prescription drug benefit is implemented in 2006. The Medicare prescription drug program also provides a $600 benefit for some low-income seniors. To ensure the two programs are well-coordinated and that the federal Medicare dollars are exhausted before state dollars are used, S.L. 2004-124 provides the state program the authority to automatically enroll into the Medicare drug discount program any senior participating in the state Senior Care program. The state must provide the senior an opportunity to opt out of such an enrollment.

Studies

The studies act of 2004, S.L. 2004-161 (S 1152), authorizes and requires several studies related to health and health care. The Legislative Research Commission is authorized to study issues including the following:

- High-risk health insurance pools and health insurance mandates
- Availability of health insurance to small businesses, trade associations, and individuals who have difficulty obtaining coverage
- The practice of naturopathy in the state
- Care and safety of residents in residential care facilities

The Joint Legislative Health Care Oversight Committee is authorized to study issues including the following:

- Alternative benefit plans for dependents of state employees
- Establishment of one or more public entities to perform functions such as purchasing health care services provided with state funds, negotiating the cost of prescription drugs, and consolidating data and processing claims
- Internet sale of prescription drugs
- Pain management and palliative care
- Medical errors

The act directs the Commission for Health Services to evaluate the possibility of implementing a pilot program related to innovative peat-based on-site wastewater systems.

The law also establishes a new study commission that will focus on Health Care Workforce Development. The commission is expected to determine methods for increasing the number of people providing health and dental care in North Carolina and submit its final report to the 2006 session of the General Assembly.

Other Laws of Interest

Health Insurance Innovations Commission

In S.L. 2004-175 (S 1202), the General Assembly established the Health Insurance Innovations Commission, which will focus on the availability of health insurance to small businesses in North Carolina. The commission's responsibilities include evaluating the health insurance environment for small businesses, initiating regional demonstration projects to pilot innovative health plans and products, and developing recommendations for changes to the current insurance climate. The commission's plans and products must be approved by the state Commissioner of Insurance.

Rebirthing

In April 2000 a North Carolina child died after undergoing a "rebirthing" procedure in Colorado, a procedure intended to reenact the birthing process. As a result the 2003 General Assembly criminalized such rebirthing procedures. This year's budget bill (S.L. 2004-124) amended the criminal statute (G.S. 14-401.21) to further provide that no state funds may be used to pay for rebirthing procedures performed in other states.

Aimee N. Wall

11

Higher Education

For the last several sessions, austerity in the funding of public higher education has been the norm. In 2004 the North Carolina General Assembly once again ordered reductions in spending for institutions of the University of North Carolina (UNC). The reductions were offset, however, by hikes in appropriations to the university and the Community College System to accommodate continued enrollment increases as well as by approval of several large capital projects—including a $180-million cancer center at UNC Chapel Hill.

Appropriations and Salaries

The University of North Carolina Current Operations

In even-year sessions, the General Assembly modifies the appropriations for the second year of the biennium that were made during the preceding odd-year session. The 2003 budget act appropriated a total of $1,822,426,657 from the General Fund to UNC for fiscal year 2004–2005. The 2004 appropriations act (S.L. 2004-124, H 1414) adjusts UNC's 2004–2005 appropriations by increasing some items and making reductions in others. The largest funding increase, $63,991,225, covers the cost of anticipated enrollment growth of more than seven thousand full-time students and offsets all the reductions. The net increase of $56,386,840 brings the total appropriated to $1,878,813,497.

Community Colleges Current Operations

The 2003 appropriation for the community colleges' current operations in 2004–2005 totaled $660,199,222. The 2004 appropriations act adds a net $31,612,319 to that total. The largest increase, $23,432,327, is to cover the cost of an anticipated enrollment growth of almost eight thousand full-time students. In addition, S.L. 2004-88 (H 1352) appropriates $4.1 million to the Community College System office for new and expanding industrial training.

Capital Improvements

The 2004 appropriations act provides $10.5 million in capital improvement funds for the university system. The largest amount, $4 million, is appropriated for the joint Millennial Campus of the University of North Carolina at Greensboro and North Carolina A&T State University.

In addition, S.L. 2004-181 (H 1699) authorizes thirty-five capital improvement projects at UNC institutions for a total of $355,482,900, to be financed with funds other than state appropriations (chiefly revenue bonds and special obligations bonds). S.L. 2004-179 (H 1264) also authorizes the issuance of special indebtedness up to $388 million for construction projects at UNC institutions, including: $180 million for a cancer center at Chapel Hill; $35 million for a bioinformatics center at Charlotte; $35 million for a health promotion center at Asheville; $28 million for a pharmacy school at Elizabeth City; and $10 million each for a nursing center at Fayetteville State, the joint Millennial Campus for A&T State and UNC Greensboro, an optometry school at UNC Pembroke, an area health education center at Western Carolina University, and property acquisition for Winston-Salem State University and the School of the Arts at the Piedmont-Triad Research Park.

Section 9.4 of the 2004 appropriations act approves certain changes in UNC construction projects that are funded through the $2.5-billion Hooker Higher Education Facilities Financing Act of 2000.

Historically, the General Assembly has only occasionally made appropriations for capital improvements in the Community College System; it has left the chief burden for community college facilities where the general law places it: on the counties. The 2004 appropriations act contains no capital improvement appropriations for community colleges.

Salaries

Sections 31.11 and 31.12 of the 2004 budget act provide for salary increases to UNC and community college employees.

For UNC employees who are exempt from the State Personnel Act, the increases average the greater of 2.5 percent or $1,000 per employee, distributed according to rules established by the UNC Board of Governors. Teaching employees of the School of Science and Mathematics receive an average increase of 2.5 percent. UNC employees subject to the State Personnel Act and employees of the Community College System paid from state funds receive the greater of a 2.5 percent increase or $1,000. Community college faculty members receive an additional 2 percent increase.

In addition, Section 8.3 of the appropriations act states the General Assembly's intent to establish a community college faculty salary plan with a uniform minimum salary based on level of education and equivalent applicable experience and to move North Carolina community college faculty and professional staff salaries toward the national average. It sets minimum salaries for 2004–2005 (for full-time, nine-month annual employment) ranging from $28,512 for instructors with vocational diplomas to $34,874 for instructors holding doctoral degrees. To encourage individual colleges to bring their salaries in line with the national average, Section 8.3 authorizes colleges whose salaries are the closest to the national the greatest flexibility in using state funds to set salaries.

Tuition and Student Aid

Need-Based Aid from Escheat Funds

For fiscal 2004–2005, Section 9.2 of the 2004 appropriations act provides from the Escheat Fund $28,610,240 to the UNC Board of Governors and $718,396 to the State Board of Community Colleges. These funds are to be allocated to the State Educational Assistance Authority for need-based student financial aid. An additional $390,000 from the Escheat Fund was appropriated to the Board of Governors to provide scholarship loans for North Carolina high school seniors interested in becoming public school teachers if they enroll at any of the state's historically black colleges that presently lack Teaching Fellows. Twenty grants of $6,500 each are allocated for each of the three qualifying colleges.

Military and National Guard Tuition

G.S. 116-143.3 sets the terms for payment of tuition at UNC institutions and community colleges by members of the armed forces and their dependents. The statute formerly contained different rules for UNC and the community colleges; S.L. 2004-130 (S 1058) removes those differences and provides that members of the armed forces living in North Carolina while on active duty will be charged the in-state tuition rate. If reassigned outside the state, members may continue to pay the in-state tuition rate as long as they remain continuously enrolled in the same program. The act amends G.S. 116-143.3 to apply the reassignment provision to dependent relatives of members as well.

The act also amends G.S. 116-143.1 to make active and reserve non–state residents who are members of the North Carolina National Guard eligible for in-state tuition.

University Governance

Educational System Study

S.L. 2004-179 [(H 1264) (as amended by Section 51 of S.L. 2004-179)] directs the UNC Board of Governors and the State Board of Community Colleges to contract with a private consulting firm to conduct a comprehensive study of the mission and educational program needs of the university and community college systems. The study is to consider demography, capital needs, current program offerings, and emerging needs. A preliminary report from the two boards and the consultant is due to the Joint Legislative Education Oversight Committee by April 15, 2005, and a final report is due by December 31 of that year. The 2004 appropriations act, in Section 9.14, provides $2 million to fund the study.

UNC Board of Governors Study Commission

Section 22.1 of S.L. 2004-161 (S 1152), the general studies bill, creates a UNC Board of Governors Study Commission comprised of ten members—five appointed by the Speaker and five appointed by the President Pro Tempore. The commission is to study the method of election or appointment to the board, the length of members' terms, the number of terms members may serve, and the size of the board. The commission is to report to the 2005 General Assembly.

Personnel Mediations

S.L. 2004-154 (S 52) adds new G.S. 116-3.3, providing that evidence of statements made and conduct occurring during mediation of a personnel matter involving UNC or any constituent institution is not subject to discovery or admissible in any other legal action, except a proceeding to enforce a signed settlement agreement. It also provides that such evidence is not a public record under the Public Records Law. However, any evidence that was discoverable or admissible before the mediation began remains discoverable or admissible, whether or not it is presented during the mediation. No mediator or participant may be compelled to testify or produce evidence with respect to the mediation except to attest to the signing of a settlement agreement.

The act also amends G.S. 82-2.1 to provide that the writing of memorandums or understandings of agreement by mediators in UNC personnel matters does not constitute the practice of law.

Property Tax Exemption for Foundations

S.L. 2004-173 (S 277) amends G.S. 105-278.4 to expand the exemption from property taxation applied to property owned by educational institutions, including UNC institutions, to include property owned by nonprofit entities for the benefit of educational institutions. As amended, the statute provides that to be exempt property must be owned by an educational institution or by a nonprofit entity that uses it for the sole benefit of an educational institution. The statute also requires that such property be used for an educational purpose as defined by the

statute. This act amends the statute to make it clear that a student housing facility or dining facility does meet the educational-purpose requirement.

School of Science and Math as Special Responsibility Constituent Institution

G.S. 116-30.1 empowers the UNC Board of Governors to name selected institutions within the University of North Carolina system as "special responsibility constituent institutions" (SPRIs); several of the statutes that follow G.S. 116-30.1 set out the consequences of being so named. The North Carolina School of Science and Mathematics is separately named, in G.S. 116-30.2, as an SPRI for specific named statutory consequences. Section 9.6 of the 2004 appropriations act amends G.S. 116-30.2 to provide that the school will be treated as an SPRI for purposes of G.S. 116-30.3, which permits it to carry forward credit balances from its General Fund appropriation in a current fiscal year to pay for one-time, nonrecurring expenditures in the next fiscal year.

Horace Williams Airport in Chapel Hill

The University of North Carolina at Chapel Hill is in the process of planning a satellite campus north of the current campus. The new campus will include property currently occupied by the Horace Williams Airport, which is used by planes of the statewide Area Health Education Center (AHEC). Plans for the new campus have called for closing the airport. Section 9.7 of the 2004 appropriations act directs the university to continue operating the airport until a replacement facility accessible to the university becomes available for AHEC flights.

North Carolina Central Mold Remediation

In 2003, the General Assembly authorized North Carolina Central University, with the approval of the Board of Governors, to transfer funds from one project under the Hooker Higher Education Facilities Financing Act to another to make infrastructure improvements and building repairs to remediate the campus mold problem. Section 9.9 of the 2004 appropriations act allocates $8,906,642 to the campus to replace the funds transferred. That amount is to be repaid from the proceeds of any recovery in a lawsuit or insurance settlement related to mold remediation.

School of the Arts Umstead Act Exemption

G.S. 66-58, the Umstead Act, generally prohibits units of government from competing with private businesses in the sale of goods, wares, or merchandise. A number of exceptions, however—such as the sale of meals and the operation of hotel facilities—apply to UNC institutions. Section 9.13 of the 2004 appropriations act adds to G.S. 66-58(b)(8) a further exception, allowing the School of the Arts to use that school's facilities, equipment, and students, faculty, and staff to create commercial materials and productions as long as the proceeds are used to benefit the educational mission of the school.

Beverage Contracts

See discussion below under "Community College Governance."

Friday Institute for Higher Education Leadership

Section 6.28 of the 2004 appropriations act directs the UNC Board of Governors to create the William Friday Institute for Higher Education Leadership to provide programs for developing future leaders in higher education administration.

Community College Governance

Educational System Study

S.L. 2004-179 (H 1264) requires a study of the entire higher education system of the state. See the discussion above under "University Governance."

Property Tax Exemption for Foundations

S.L. 2004-173 (S 277) expands the exemption from property taxes applied to property owned by educational institutions, including community colleges, to include property owned by nonprofit entities for the benefit of educational institutions. See the discussion above under "University Governance."

Special Funds Considerations

The General Assembly enacted several special provisions regarding the use of funds by the Community College System in the 2004 budget act. In a couple of instances, it permitted funds that otherwise would have reverted to the General Fund at the end of the 2003–2004 fiscal year to carry forward to 2004–2005. They include up to $10 million in operating funds to be reallocated to the Equipment Reserve Fund; funds available to the New and Expanding Industries Program; funds available to the Worker Training Trust Fund; funds dedicated to the study of the Comprehensive Articulation Agreement; and funds available to the Middle College Program.

Section 8.14 of the 2004 appropriations act includes a special provision allowing additional funds to be made available to (1) colleges whose enrollment growth in the fall semester of 2004–2005 exceeds 10 percent and (2) colleges in areas with high unemployment caused by manufacturing job losses.

Section 8.17 of the act authorizes the development of a military–business center at Fayetteville Technical Community College to coordinate and facilitate interactions between the U.S. armed forces, military personnel and their families, and private businesses.

Center for Applied Textile Technology

Section 8.6A of the 2004 appropriations act directs the State Board of Community Colleges to study the North Carolina Center for Applied Textile Technology to determine whether the center should remain an independent part of the Community College System, be administered by a community college, be dissolved and have its property transferred to county ownership, or be otherwise administered.

Multicampus and Off-Campus Centers

Section 8.9 of the 2004 appropriations act directs all multicampus colleges and colleges with off-campus centers to begin reporting annually to the Community College System office all funds spent to support their multicampuses and centers.

Beverage Contracts

Section 38 of the 2004 Technical Corrections Act, S.L. 2004-199 (S 1225), amends G.S. 143-64, which requires school administrative units, community colleges, and UNC institutions to competitively bid contracts that involve the sale of juice or bottled water. The act directs that contracts for the sale of juice be bid separately from contracts for the sale of bottled water and that contracts for both types of beverages shall be bid separately from all other contracts.

Robert P. Joyce

12

Information Technology

In 2004 the North Carolina General Assembly enacted significant legislation concerning the administration of information technology. S.L. 2004-129 (S 991) makes sweeping changes to the state Office of Information Technology Services (ITS), particularly changes related to the oversight of the State Chief Information Officer (CIO), the disbanding of the Information Resource Management Commission, and new procurement requirements intended to help the state capitalize on economies of scale and demand aggregation. S.L. 2004-129 also creates new requirements for strategic technology planning, standardization, and project management. This chapter focuses on the major components of the legislation, which have important implications for state and local agencies.

State Information Technology Plan

Prior to the enactment of S.L. 2004-129, the strategic technology vision for the state was based on separate agency and departmental goals and initiatives approved by the Information Resource Management Commission. The new legislation shifts the focus of technology investment to the Office of State Information Technology Services and mandates that the State CIO develop a biennial State Information Technology Plan. The plan must include an asset inventory, project descriptions, gap analysis related to unmet technology needs, financial statements, and analysis of opportunities for statewide initiatives (G.S. 147-33.72B). In addition, each executive agency is required to develop a biennial agency information technology plan for submission to the State CIO. The statutes governing the requirements and procedures associated with the State Information Technology Plan are contained in Article 33 of Chapter 147 of the North Carolina General Statutes.

Project Review and Approval

S.L. 2004-129 also transfers responsibility for project review and approval from the Information Resource Management Commission to the State CIO. Under the new legislation, the State CIO is authorized to review and subsequently approve or reject all state agency technology projects costing more than $500,000. The State CIO is also authorized to establish additional project review thresholds based on project cost, risk, and agency size. In addition, S.L. 2004-129 requires

that all contracts between state agencies and private party information technology vendors include performance review and accountability measures. The State CIO has the discretion to require that monetary penalties be assigned to time or cost overruns. By granting the State CIO the primary authority over and responsibility for technology projects, the legislation aims to make increased efficiency, reduced failures, and greater oversight and control of project processes and budgets a reality for the state's information technology operations.

Project Management

Section 33 of G.S. Chapter 147 also mandates new project management procedures. Each agency must designate a project manager, subject to review and approval by the State CIO. In order to reduce risk factors, mitigate cost and schedule overruns, and ensure accountability, project managers must provide regular reports to a project management assistant housed within the Office of State Information Technology Services. Additionally, the State CIO is responsible for designating a project management assistant for all agency projects requiring approval.

Procurement

S.L. 2004-129 also creates new procedures for procuring information technology resources. The goal of the legislation is to centralize procurement processes in order to capitalize on cost savings resulting from demand aggregation. The Office of State Information Technology Services is responsible for establishing the procurement procedures, which must include aggregation of hardware purchases, use of formal bids, use of enterprise licensing agreements, and restrictions on supplemental staffing. In addition, the office is required, under G.S. 147-33.82, to procure all information technology resources for all state agencies.

Information Technology Advisory Board

The legislature also repealed the authorization for the Information Resource Management Commission and established a new Information Technology Advisory Board. The new board is charged with reviewing the State Information Technology Plan, individual agency plans, and statewide technology initiatives proposed by the State CIO. The membership of the Information Technology Advisory Board will include four persons appointed by the Governor, four by the President Pro Tempore of the Senate, and four by the Speaker of the House.

Information Technology Fund

Article 33, Section 72, of Chapter 147 also establishes a special revenue fund to subsidize information technology activities. The fund will provide support for meeting statewide requirements in areas such as project management, planning, security, portal operations, and procurement. The State CIO is authorized to spend the funds after consultation with the Information Technology Advisory Board. Furthermore, the State CIO must submit an annual report on fund expenditures to the Joint Legislative Oversight Committee on Information Technology.

Joint Legislative Oversight Committee on Information Technology

The legislation also changes the Joint Select Committee on Information Technology to the Joint Legislative Oversight Committee on Information Technology. The new legislation expands the role of the committee in the examination and monitoring of systemwide information technology issues such as infrastructure, administration, and financing. The committee must make recommendations to the General Assembly regarding methods to improve the application of technology in state agencies and across the enterprise.

Shannon Howle Schelin

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Land Use, Community Planning, Code Enforcement, and Transportation

By far the most significant legislation enacted in 2004 affecting land use and community planning was the legislation that very substantially limits the amortization of nonconforming commercial off-premises signs (that is, billboards) by local governments through zoning or other authority. The outdoor advertising industry overcame an eleventh-hour gubernatorial veto of another bill prohibiting amortization to gain what it has sought for years. The consolation for local governments is that the prohibition applies only to billboard amortization programs initiated after August 2, 2004, and does not apply to nonconforming on-premises commercial signs or other types of zoning nonconformities, which may still be amortized.

Other legislation this year is of moderate interest to those associated with land use and community planning. The life of the Joint Legislative Growth Strategies Oversight Committee has been extended to 2007, providing hope that the committee will focus attention on the need for changes in North Carolina's planning legislation. A provision in an obscure technical corrections bill gives cities the power to apply zoning not only to the buildings and structures of state and local governments, but also to other features of such properties (parking and landscaping, for example) that may not involve buildings and structures. Another act requires local governments to provide special notice to military bases within five miles of their boundaries if the local government is considering zoning amendments or other planning-related actions. In addition, the General Assembly has authorized a series of committees and special commissions and the Legislative Research Commission to undertake studies of a variety of topics that may spark interest.

Planning and Growth Management

Growth Strategies Oversight Committee

The 2004 studies act, S.L. 2004-161 (S 1152), authorizes a large number of studies that, if actually conducted, will be of substantial interest to the planning community. Perhaps of greatest interest to planners is Part III of the act. It extends the life of the Joint Legislative Growth Strategies Oversight Committee for another two years, so that the committee terminates in January 2007 rather than January 2005. The committee is specifically authorized to study the delegation of additional authority to cities and counties, the modernization of city and county planning statutes, and the establishment of transferable development rights.

Planning Agencies

One change to the city and county planning statues was made this year with little fanfare. The state statutes authorize the creation of "planning agencies" within city and county government. The statutes have generally been understood to pertain to lay-member planning boards and commissions. Indeed, the statutes expressly allow a city or county to appoint a planning board or commission to function as a "planning agency." The Senate's technical corrections bill, S.L. 2004-199 (S 1225), amends G.S. 160A-361, 160A-363, 153A-321, and 153A-322 to change the references in those statutes from planning agencies to planning boards or commissions.

This change does create potential complications, however. The new act left untouched those references to planning agencies in the zoning and land subdivision control enabling statutes. In addition, some local governments have designated a technical review committee or planning department to serve as a "planning agency" for purposes of subdivision plat approval. Some further legislative clarification may be needed.

Community Appearance

Billboard Amortization

One of the most contentious issues facing the General Assembly in the land use and development area in 2004 was billboard amortization. The outdoor advertising industry has long opposed amortization requirements (that is, requiring nonconforming features to come into compliance by the time a certain grace period has expired) and has vigorously challenged them in court. However, North Carolina courts have consistently held these requirements to be legal, provided a reasonable grace period for compliance is allowed.

The General Assembly adopted a moratorium requirement in the 2003 session (S.L. 2003-432) prohibiting local governments from initiating any new program that would amortize nonconforming off-premises commercial signs. That moratorium had an expiration date of December 31, 2004. In the 2004 session the General Assembly again focused on the issue. House Bill 429, which had passed the House of Representatives but not the Senate in 2003, would have amended state law to prohibit use of amortization to remove any nonconforming commercial off-premises sign. (Billboards adjacent to federally funded highways are already subject to such a prohibition.) Late in the session, this bill passed the Senate but was vetoed by Governor Easley.

The Governor expressed concern that the financial payments suggested by the act were too generous for the billboard industry. He urged the interested parties to negotiate further to address concerns of both local governments and the industry. The House of Representatives promptly voted to override the veto, but the Senate did not immediately take up the veto and instead encouraged the affected interests to further discuss the matter.

In the last days of the session, a compromise was reached and approved by the legislature. S.L. 2004-152 (H 1213) creates G.S. 153A-143 and 160A-199 to provide that counties and cities may not require removal of off-premise outdoor advertising signs that do not conform to local ordinances unless they pay monetary compensation to the owners of such signs. There are five exceptions to the monetary compensation requirement:

1. The local government and sign owners agree to relocation of the sign.
2. The local government and sign owner enter a voluntary agreement providing for removal of the sign after a set period of time in lieu of monetary compensation.
3. The sign is a public nuisance or is a detriment to public health or safety.
4. Removal is related to construction of streets, sidewalks, or public enterprises and the sign is allowed to be relocated to a comparable location.
5. The removal is required pursuant to an ordinance of general applicability for demolition or removal of damaged structures.

When required, the monetary compensation is to be the fair market value of the sign (without consideration of the removal requirement). Fair market value is to be determined by referring to the factors in G.S. 105-317.1(a) regarding valuation of personal property for tax purposes, the listed property tax value of the sign, and other items of information regarding value that are submitted to the taxing authority. If no agreement on monetary compensation is reached, the local government may bring an action in superior court to determine fair market value. The act allows local governments to make payment of any required monetary compensation over a three-year period, provided the nonconforming sign remains in place until compensation is paid.

The law also specifies the content and factors to be considered in relocation agreements. Relocation sites are to be "reasonably comparable to or better than" the existing sign site, considering visibility, traffic count, demographics, zoning, lease costs, and the like. The government has to pay the cost of relocation. Cities and counties are authorized to provide dimensional, spacing, setback, and use variances as deemed appropriate to accommodate relocation. The act further provides for binding arbitration if the local government and sign owner have agreed to relocation but fail to agree about what constitutes a comparable or better site for relocation. If arbitration results in a finding that the proposed relocation site is not comparable, the local government must compensate the owner if it elects to proceed with removal.

There are several important limitations to the application of this amortization law. These restrictions on the use of billboard amortization do not apply to regulations in effect as of the effective date of the legislation, which is August 2, 2004. They do not apply to billboards made nonconforming by the geographic expansion of existing municipal ordinances through annexation or extraterritorial jurisdiction changes. They do not affect the exercise of eminent domain. Finally, they do not affect amortization of nonconforming uses other than off-premise outdoor advertising.

Nuisances and Junked Vehicles

Several local acts were adopted in 2004 regarding nuisance lot enforcement, junk cars, and open space protection. S.L. 2004-93 (S 1355) adds Goldsboro to the list of cities authorized to give annual notice to chronic violators of the city's refuse and debris ordinance. S.L. 2004-30 (H 1447) amends the definition of a junked motor vehicle in G.S. 160A-303.2 for Greenville, Henderson, and Waynesville. These cities can apply their ordinance to unlicensed vehicles that appear to be worth less than $500 rather than $100 as in state law.

Section 2.1(n) of the studies act of 2004 (S.L. 2004-161) authorizes the Legislative Research Commission to study the environmental, aesthetic, and other public recycling impacts of junked and abandoned automobiles.

Other Zoning and Land Subdivision Control Legislation

Notice to Military of Zoning Hearings

The federal government will soon be undertaking a review of its military bases, considering whether to close or realign facilities. Military bases have a significant presence in North Carolina, particularly in the eastern portion of the state. Concern about potential loss or downsizing of these bases prompted a variety of state and local actions. As part of this effort, the General Assembly enacted S.L. 2004-75 (S 1161). This act creates G.S. 160A-364(b) and 153A-323(b) to require notices of hearings on certain proposed zoning ordinance changes to be provided to the military. If a proposed rezoning is within five miles of the perimeter boundary of a military base, notice of the hearing must be sent by certified mail to the commander of the base. Notice must also be mailed for any other ordinance adoption or amendment changing or affecting permitted uses in this area. The notice must be mailed in the ten- to twenty-five day period prior to the hearing. The governing boards of cities and counties are also directed to take any military comments or analysis into consideration before acting on these ordinance adoptions or amendments.

Government Uses of Land

G.S. 160A-392 was added to the statutes in 1951 to require state and local governments to be consistent with municipal zoning. The statute made city regulations applicable to the "erection, construction, and use of buildings." The Senate's technical corrections bill, S.L. 2004-199, amends this provision to extend this law to provide that municipal zoning also applies now to use of land that does not involve buildings (city zoning regulations on parking lots, for example). This amendment also removes the requirement for state approval of application of overlay districts to state-owned properties, as these districts are now commonly used for routine zoning requirements (flood hazard districts, historic districts, entryway corridor districts, and the like). The amendment also allows the Council of State to delegate authority to apply for a conditional use district to appropriate staff. Comparable changes were not make in the county zoning statute.

Development-Related Studies

The 2004 studies act, S.L. 2004-161, authorizes a large number of studies that, if actually conducted, will be of substantial interest to the planning community. Special legislative committees or commissions will conduct five of these studies. For example, Part III of the act extends the life of the Joint Legislative Growth Strategies Oversight Committee for another two years, so that the committee terminates in January 2007 rather than January 2005.

The committee is specifically authorized to study the delegation of additional authority to cities and counties, the modernization of city and county planning statutes, and the establishment of transferable development rights. Part IV of the act also establishes a seventeen-member Study Commission on Residential and Urban Development Encroachment on Military Bases and Training Areas. The commission is to examine zoning regulations, deed registration, the purchase of development rights, and the need for buffers around military bases and report to the 2005 session of the General Assembly.

Another study commission, established by Part XLIX of the act, is the Study Commission on Economic Development Infrastructure. That commission is directed to develop a plan to restructure and consolidate the infrastructure for the delivery of economic development to improve its organization and effectiveness. A fourth commission, provided for in Part XXXII, is the Hurricane Evacuation Standards Study Commission, directed to study the development and establishment of hurricane evacuation standards for state government. One permanent commission, the Environmental Review Commission, is authorized to study the effectiveness of environmental programs, the sharing of floodplain mapping information, and water restriction.

In addition to the studies conducted by special committees and commissions, the Legislative Research Commission is authorized to study a number of development-related issues. Potential study topics, summarized in other chapters, include light pollution, urban cores, equity-building homes, state-local relations, and soil and water conservation issues.

Transportation

Highway Funding

Urban loops. The Highway Trust Fund was established in 1987 to provide money for a variety of different types of highway construction and improvement projects. One class of projects funded from this source consists of urban loops in and around most of the larger cities of the state. Section 30.19 of the appropriations act [S.L. 2004-124 (H 1414)] amends G.S. 136-180(a), which lists the urban loop projects for which Trust Fund monies may be used. The act adds to the list (a) the six-laning of a portion of the Charlotte Outer Loop, (b) a multilane Gastonia loop to be known as the Garden Parkway, (c) the completion of the Raleigh Outer Loop, and (d) an expanded Wilmington bypass.

The Intrastate Highway System. The Intrastate Highway System in North Carolina was established as a network of major, multilane arterial highways within and serving the state. These highways are also funded in part from the Highway Trust Fund. Section 30.21(a) of the appropriations act reorganizes the legislation affecting these routes and changes the standards for these routes. It also reclassifies those routes already funded by the Trust Fund as "first priority" and adds a second category of routes for which Trust Fund monies may be used once first-priority routes are funded. Finally, it adds highway segments to both the existing first-priority list and establishes an extensive list of projects that are second priority.

The legislation amends G.S. 136-178(a) to provide that the routes on the Intrastate System need *not* include at least four lanes if projected traffic volumes or environmental considerations dictate fewer lanes. Section 30.21(d) adds several routes to the priority list set forth in G.S. 136-179, including the Shelby Bypass and a portion of U.S. 321 in Watauga County, which will allow the four-laning of that highway from the Tennessee state line to the South Carolina line. Section 30.21 also adds a new twist. It provides that funds allocated from the Trust Fund for the Intrastate System are primarily intended for use on first-priority projects listed in G.S. 136-179. But if these funds, assigned by region, cannot be used for the listed projects, then the funds may be used for the other projects listed in G.S. 136-178. This new second-priority list includes all of North Carolina's Interstate highways, many of the major U.S–numbered highways, five North Carolina–numbered highways, and certain miscellaneous routes, including urban loop projects for which the initial construction has already been completed.

Joint Funding with Local Governments

The issue of whether and how local governments may contribute to or "participate" in the costs of highway improvement projects that are part of the state's Transportation Improvement Program (TIP) has been debated for some time. In 1987 a coalition of legislators representing rural areas and small towns was successful in securing legislation that limited the ability of local governments to contribute funds to state highway projects because of their concern that such "participation" warped the state's highway priorities. In 2001, however, G.S. 136-66.3 was rewritten to provide that municipalities could participate in the right-of-way and construction costs of state projects so long as other state projects were not jeopardized. This year, the General Assembly enacted S.L. 2004-168 (S 1089) to add G.S. 136-18(38) to refine these arrangements. The act allows the North Carolina Department of Transportation (NCDOT) to receive funds from local governments and nonprofit corporations provided for the purpose of advancing the construction schedule of a project identified in the TIP. If the funds are to be repaid by NCDOT,

the reimbursement arrangements must be shown in the TIP. NCDOT has *seven years* after receiving such funds in which to repay the local governments or nonprofits. [This period of time may be compared with the *three-year* period that municipalities have to repay funds owed NCDOT under one of these project cost-sharing arrangements. *See* G.S. 136-66.3(e1).]

Highway Studies

Last year, the General Assembly adopted legislation directing the Joint Legislative Transportation Oversight Committee to contract with a consultant to study the state's procedures for planning, designing, and letting contracts for transportation projects. The study was to identify specific, practical solutions to decrease the time it takes to complete a transportation project. Section 30.14 of the appropriations act directs the Department of Transportation to review and implement the applicable recommendations of the study, which is dated June 2004. Beginning October 15, 2004, and continuing until October 15, 2006, the department must also report quarterly to the committee on the department's progress in carrying out the study recommendations. Section 78 of S.L. 2004-203 (H 281) clarifies that the target date for the study to be completed was April 1, 2004, not April 1, 2003.

Meanwhile, the search for long-term solutions to highway funding problems continues. Section 20.1 of the studies act of 2004 (S.L. 2004-161) amends Section 20.1 of S.L. 2003-284 to extend the deadline for the final report of the Highway Trust Fund Study Committee to January 31, 2005. It was November 1, 2004.

Part XVII of the studies act of 2004 also authorizes the Joint Legislative Transportation Oversight Committee to study the imposition of tolls on Interstate 95 vehicle traffic. In addition, the commission may study all aspects of transportation, including planning and scheduling of projects, legislative and executive oversight, revenues, funding, and the expenditures of the Highway Fund, the Highway Trust Fund, and federal aid programs for transportation.

Other Transportation Modes

Rail service to western North Carolina. Section 30.8 of the appropriations act authorizes the Rail Division of NCDOT to use up to $1,066,000 of the funds in the Western North Carolina Reserve to acquire property and make infrastructural improvements in the Biltmore Village area of Asheville to develop a terminus for western North Carolina passenger rail service.

Virginia–North Carolina Interstate High-Speed Rail. By adopting S.L. 2004-114 (S 1092) the General Assembly agreed to enter into a compact with the State of Virginia concerning the development of high-speed rail service within and through the two states. In a campaign spearheaded by North Carolina and Virginia, government and business leaders in certain southern states are planning to ask Congress for help in upgrading the track along key segments of the Charlotte to Washington corridor. By adopting the act, North Carolina consents to the establishment of the Virginia–North Carolina High-Speed Rail Compact Commission as a regional "instrumentality" for purposes of planning, promoting, and funding the system. Each state contributes five members to the commission. Transportation departments from the two states are directed to serve as the primary staff to the commission.

Organizational arrangements for a Regional Transportation Authority. The chair of each Metropolitan (Transportation) Planning Organization (MPO) within the territorial jurisdiction of a Regional Transportation Authority (RTA) is a member of the RTA Board of Trustees. Section 56 of the House technical corrections bill (S.L. 2004-203) provides that any such MPO chair may appoint, as his designee on the Board of Trustees, either the chair of the MPO Transportation Advisory Committee or a designee approved by the Transportation Advisory Committee.

Building and Housing Code Enforcement

Code Handbooks

Section 21.2 of the appropriations act deletes a provision of G.S. 143-138(d) that required the Department of Insurance, no later than January 1, 2000, to publish handbooks providing explanatory materials concerning State Building Code requirements and each subsequent revision of the code. Handbooks meeting this deadline have not been completed, so the requirement was dropped.

Building Code for Prisons

Section 17.6B of the appropriations act directs that if construction is begun before July 1, 2005, the 1,000-cell close-security prison to be built in Columbus County by the State of North Carolina is to be constructed in accordance with the 1999 version of the North Carolina State Building Code instead of the version of the code that might otherwise apply when construction begins. (The section catchline implies that recently completed prisons in Scotland, Anson, Alexander, Greene, and Bertie counties were constructed under the 1999 code version.) The act does, however, provide that the 1999 code applies only if prison construction documents have been reviewed by the Department of Insurance, the State Construction Office, and the Department of Correction.

Toilets in Malls

Section 37(a) of S.L. 2004-199 adds new G.S. 143-143.5 governing access to toilets in shopping malls. It provides that notwithstanding any other rule or law (including, apparently, the State Building Code) toilets for public use in covered mall buildings may be located at a horizontal travel distance of (up to) 300 feet from potential users within the mall.

Study of Residential Code

The studies act of 2004 (S.L. 2004-161) directs the North Carolina Building Code Council to study the Residential Building Code to determine "which provisions, if any, are unnecessary, outdated, or overly stringent, or will otherwise unduly increase the cost of housing." It authorizes the council to submit its final report to the General Assembly no later than March 31, 2006.

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Local Government and Local Finance

The principal lobbying efforts of the League of Municipalities and the Association of County Commissioners in the 2004 session focused on two pieces of legislation—one providing for compensation by local governments to owners of nonconforming billboards ordered removed and the other facilitating local government compliance with federal Phase II stormwater requirements. The resulting acts are discussed in Chapter 13, "Land Use, Community Planning, Code Enforcement, and Transportation," and Chapter 9, "Environment and Natural Resources." For information on other acts of interest to local governments, see Chapter 4, "Community Development and Housing"; Chapter 15, "Local Taxes and Tax Collection"; Chapter 18, "Public Employment;" and Chapter 19, "Purchasing and Contracting." County officials should also consult the chapters addressing other topics related to county–state cooperation, such as human services, schools, elections, and the courts.

Transportation

Funding

S.L. 2004-124 (H 1414), the state budget act for the 2004–2005 fiscal year, contains the most important provisions adopted this session relating to transportation issues. Section 30.21(c) substantially amends G.S. 136-178 to expand the allowable uses of intrastate system funds, giving the North Carolina Board and Department of Transportation more flexibility in choosing projects that will benefit from the funds. Section 30.19 of the act amends G.S. 136-180(a) to revise descriptions of the Charlotte Outer Loop, the Raleigh Outer Loop, and the Wilmington Bypass for purposes of the Highway Trust Fund and to add the Gastonia Loop to the list of urban loop projects. Finally, Section 30.21(d) of the act provides that the new bridge to be constructed over Currituck Sound will be a toll bridge, amends G.S. 136-179 to add the Cleveland Shelby Bypass to the list of intrastate projects to be funded, and modifies the descriptions of the U.S. 321 and U.S. 421 intrastate four-laning projects.

Another act, S.L. 2004-168 (S 1089), amends G.S. 136-18 to specifically authorize the Department of Transportation (DOT) to enter into agreements to receive funds from municipalities, counties, governmental entities, and nonprofit corporations in order to advance the construction schedules of projects identified in the state's Transportation Improvement Program (TIP). If the DOT

is required to repay the funds, reimbursement of all funds received by the DOT must be shown in the existing TIP prior to the DOT's receipt of the money. Reimbursement must be completed within seven years of the funds' receipt.

Public Transit Law Changes

Two laws affecting jurisdictions that operate public transit systems were passed during the 2004 session. S. L. 2004-26 (H 1373) makes assaulting a public transit operator, when the operator is discharging or attempting to discharge his or her duties, a Class A1 misdemeanor. (The offense had been a Class 2 misdemeanor.) The statute covers both public employees and private contractors who are employed as public transit operators. It became effective December 1, 2004, and applies to offenses committed on or after that date. S. L. 2004-82 (S 1086), effective July 1, 2004, contains a safety-related change applicable to public transit vehicles. It amends G.S. 20-130 to authorize (but not require) the use of amber, high mounted, flashing deceleration lamps on the rear of public transit vehicles.

License Plate Covers

In recent years a number of North Carolina cities have begun to enforce traffic signal laws using cameras that automatically take a photograph of the license plate of any car that runs a red light. In addition, Charlotte received legislative permission in 2003 to use cameras to capture speeders' license plates on film. Based on these developments, it was probably inevitable that people would devise ways to prevent fixed cameras from obtaining clear pictures of license plates, even if such plates remain visible to the naked eye. S. L. 2004-79 (H 26) amends G.S. 20-63(g) to address this issue. The act makes it an infraction for any motor vehicle operator willfully to cover or cause to be covered any part of a registration plate or its figures or letters by any device designed or intended to prevent or interfere with the taking of a clear photograph of the plate by a traffic control system using cameras. Violators are subject to an infraction penalty under G.S. 14-3.1 of not more than $100. The act does not prohibit the use of transparent registration plate covers that are not designed or intended to prevent or interfere with the taking of such traffic control photographs. S.L. 2004-79 became effective October 1, 2004, and applies to acts committed on or after that date.

Other Legislation of Interest to Local Governments

Payments for Wetlands Mitigation in Low-Wealth Counties

S.L. 2004-188 (S 933), effective for land transfers made on or after July 9, 2004, specifies that local governments that condemn or purchase land, and state agencies that purchase land, for wetlands mitigation—that is, for the creation of new wetlands to replace those that have been destroyed—must in some instances pay the county in which the land is located for the resulting loss in property tax revenue. The rules also apply if the state acquires land by donation from a private mitigation banking company.

The payment in each case is based on the estimated amount of ad valorem taxes that would have accrued to the county in question for the next twenty years had the property in question not been acquired for wetlands mitigation. Payment is required if (1) the county in which the land is located is a low-wealth county—that is, it is designated as an enterprise tier one or tier two area under G.S. 105-129.3; and (2) the land being acquired is located in another jurisdiction from the acquiring governmental unit. Thus, in the case of a city or special district, the land must be located

outside the county in which the city or special district is located. In the case of state agencies, generally the land being purchased must be located in a different county from the one in which the wetlands permitted to be lost are located.

Authorization of Local Officials' Participation in State's Optional Retirement Plan

S.L. 2004-137 (S 1312) authorizes employees of counties, municipalities, other political subdivisions, and the North Carolina Community College System to participate in any 457 retirement plan adopted by the state on two conditions ("457 plans" are named for the section of the federal tax code authorizing them): the board of trustees of the North Carolina Public Employee Deferred Compensation Plan must consent to the particular local participation, and the proper governing body of the unit in which the employee is employed must also give its approval. The provision of the act authorizing employee participation in the plans if the proper consents are obtained becomes effective January 1, 2005. The remainder of the act became effective July 1, 2004.

Standards for Animal Shelters

S.L. 2004-199 (S 1225), Section 39, amends G.S. 153A-442 and 160A-493 to require that animal shelters operated by counties and municipalities, respectively, meet the same standards as animal shelters regulated by the North Carolina Department of Agriculture pursuant to its authority under G.S. Chapter 19A.

Fencing for Housing Authority Properties

While housing authorities are allowed to place fences around the properties they own, new G.S. 157-9(d), created by S.L. 2004-199, Section 40, imposes specific limits on the exercise of that discretion. It forbids authorities to erect or maintain around any lawfully occupied housing units any fence or gate structure that is electrified or that includes spikes or barbed wire.

Local Representation on Advisory Commission on Military Affairs

S.L. 2004-49 (S 1159) adds the executive directors of the North Carolina Association of County Commissioners and the North Carolina League of Municipalities as nonvoting, ex officio members of the North Carolina Advisory Commission on Military Affairs, created by Chapter 127C of the General Statutes.

Acts Creating or Affecting the Form of Local Governments

Incorporation of Wallburg. The 2004 session incorporated one new town. The charter for the Town of Wallburg in Davidson County is found in S.L. 2004-37 (S 1127). Wallburg will operate under the mayor-council form of government, with a nonvoting mayor and five council members elected by the nonpartisan plurality method in townwide elections for four-year terms. The act establishes staggered terms for the council members. The charter contains specific limits on Wallburg's annexation powers and provides that Kernersville and Winston-Salem may undertake satellite annexation of areas that otherwise qualify, even if those areas are closer to Wallburg than to the annexing city. In addition, the town council cannot increase the town's property tax rate more than $.10 per $100 valuation "above the ad valorem tax rate established on the date of incorporation [June 29]" without a vote of the people. S.L. 2004-37 appoints an interim town board and provides necessary transition procedures for budget adoption and tax collection.

Johnston and Wilkes County coroners. North Carolina's medical examiner system has made the position of county coroner something of an anachronism. This session, Johnston [S.L. 2004-18 (S 1125)] and Wilkes [S.L. 2004-51 (S 1158)] joined the long list of counties in

which the position has been abolished altogether. The Wilkes County act is effective upon the expiration of the term of the current coroner in the county, while the Johnston county act was effective when it became law.

Studies

The 2004 General Assembly authorized a large number of studies, and several of them should interest local government officials.

State-local relationships. Two studies involving state-local relationships are authorized (but not required) by the main studies act, S.L. 2004-161 (S 1152). Section 3.1 authorizes the Joint Legislative Growth Strategies Oversight Committee to study the delegation of authority to cities and counties, a topic the 2003 legislature addressed in S 160. The committee must report to the General Assembly prior to the committee's mandated dissolution on January 16, 2007.

Section 2.1(m) of the studies act permits the Legislative Research Commission (LRC) to study the relationship between the state and local governments with respect to the provision of services, a subject that has been of increasing concern to local officials. If this study is conducted, it must (1) address mandates the state has placed on local governments regarding the provision of services to state residents; (2) address funding sources for local governments, including a review of all state-to-local appropriations, all state-shared revenues, and all methods of raising revenue the state allows local governments; (3) compare the state-local relationship in North Carolina to that in other states, particularly with respect to the percentage of the cost of services other states bear; (4) compare local governments with regard to the burden of mandated programs on local budgets; and (5) compare the combined state-local tax burden on individuals and businesses in North Carolina to those of other states. The appointing authority must consider including local government representatives as appointees to the study committee.

Delivery of services to Hispanics. Section 2.1(g) of S.L. 2004-161 authorizes the LRC to study current state and local policies regarding the availability and delivery of government services to North Carolina's expanding Hispanic population as well as the issues confronted by governmental agencies in delivering those services effectively and by Hispanics in obtaining the services. A variety of factors, such as cultural differences and language barriers, may be considered. If the LRC undertakes this study, it must identify those issues that are best addressed at the local, state, and federal levels, respectively.

Other subjects that S.L. 2004-161 authorizes for study by the LRC include fire safety in local confinement facilities [Section 2.1(1)a.]; comprehensive statewide emergency communications planning [Section 2.1(i)]; light pollution [Section 2.1(1)c.]; towing laws, salvage laws, and lienholder notification when vehicles are abandoned or seized [Section 2.1(2)e.]; abandoned junk vehicles [Section 2.1(n)]; and soil and water conservation issues [Section 2.1(9)c.]. The act also authorizes the Joint Legislative Education Oversight Committee to study issues concerning school construction and school capacity (Section 13.14), the Revenue Laws Study Committee to study private activity bonds (Section 14.3), and the Department of Administration to study retainage from payment on public construction projects (Section 21.1). If the department conducts the retainage study, it must report its findings to the 2005 legislature when the session convenes.

Local Finance

The State Budget

The state appropriations act, S.L. 2004-124, contains two sets of provisions of interest to local government officials.

Hold harmless funds. In 2001 the General Assembly repealed the statutes appropriating so-called reimbursement moneys to local governments and instead authorized counties to levy an additional half-cent local government sales and use tax. (The reimbursements were state funds

intended to compensate local governments for revenues lost when the General Assembly excluded certain categories of property from the local property tax base.) In substituting the new tax for the reimbursements, the General Assembly recognized that in a few communities the additional sales and use tax revenues would amount to significantly less than the reimbursement payments those communities had been receiving. Therefore the General Assembly enacted "hold-harmless" provisions appropriating state funds to those communities to make up for any shortfall resulting from the substitution. In 2003 local governments were concerned that the payments might fall victim to the General Assembly's need to balance the 2003–2005 state budget, but they survived intact. In fact, the 2003 appropriations act stated the General Assembly's intention to continue distribution of hold-harmless payments through 2012. This year's appropriations act went further and enacted into law a statement that the hold-harmless payments will indeed continue through 2012.

Local participation in the state health insurance plan. The appropriations act also gives local governments in five counties—Bladen, Cherokee, Rutherford, Washington, and Wilkes—the option of bringing their employees and retired employees under the State's Comprehensive Major Medical Plan. The provisions are obviously experimental, as they expire on June 30, 2006.

Local Government Revenues and Borrowing

Local option sales and use taxes. For a number of years various counties have sought local acts authorizing additional local government sales and use taxes on a single-county basis; only Mecklenburg, however, has been successful, gaining the authority in 1997 to levy an additional half-cent tax earmarked for public transportation purposes. In this session, however, two more counties were able to obtain such authority. Gaston County [S.L. 2004-122 (H 1520)] was authorized to put before the county's voters this fall the question of whether to levy an additional half-cent tax, with the proceeds being earmarked for economic development and tourism projects. The county's voters, however, strongly opposed the tax. Had the tax been enacted, the county would have shared the proceeds with each of the cities and towns in the county, and the tax would have terminated after eight years. Dare County [S.L. 2004-123 (H 142)] was authorized to levy an additional one-cent tax, with the proceeds being earmarked for beach renourishment. (Through an error that occurred in the hectic last hours of the 2004 session, this act is not limited to Dare County; rather, it authorizes such a tax by any county, as long as the proceeds are used for beach renourishment. It is believed the error will be corrected as soon as the 2005 General Assembly meets.) As with Gaston County, this tax will terminate eight years after it is levied.

Service districts and special obligation bonds. S.L. 2004-151 (S 137) creates a new type of municipal service district and a new form of borrowing for projects within all municipal service districts. The new purpose for which service districts may be established is for "transit-oriented development projects." These are projects taking place within *public transit areas*, defined as areas within a quarter-mile radius of any passenger stop or station located on a mass transit line. *Mass transit lines* are either rail lines, busways, or guideways dedicated to public transportation. (Such a busway must be almost fully dedicated to bus travel only; a busway does not qualify as a mass transit line if a majority of its length is also generally open to passenger cars and other vehicles more than two days a week.) A *transit-oriented project* is essentially any sort of project a city is authorized by law to undertake, as long as it is undertaken within the city's public transit area. Such projects might include passenger stations and associated parking facilities, but they may also include other public facilities and the public share of a variety of public-private ventures.

One form of borrowing currently available to cities (and counties) is special obligation financing. This type of borrowing is secured by any revenue source available to the borrowing government, as long as that source is not a locally levied tax. (If a locally levied tax were pledged as security, the borrowing would become a general obligation.) Special obligation financing was originally restricted to solid waste projects; then, a few years ago, the legislature extended its uses to include the funding of water and sewer projects as well. S.L. 2004-151 further expands the purposes for which special obligation financing may be used to include the financing of any "service or facility . . . provided in a municipal service district." Thus this type of financing can

now be used for any projects within the new sort of district authorized by this act and also for projects within the many downtown service districts that cities have created over the past thirty years. The new authority should therefore be an important tool for cities to use in their downtown revitalization efforts.

Service of process fees. G.S. 7A-311 establishes the uniform fees for the state's court system. One of the fees is imposed for service of civil process, with the proceeds being remitted to the county in which the action is brought. S.L. 2004-113 (H 918) raises this fee from $5 to $15. In addition, the act adds language to the statute directing counties to use at least half of the proceeds from the process fees "to ensure the timely service of process within the county, which may include the hiring of additional law enforcement personnel upon the recommendation of the sheriff." The new fee became effective September 1, 2004.

Finance Administration

Setoff changes. The Setoff Debt Collection Act (G.S. Chapter 105A) permits state agencies and most local governments to have sums owed to them deducted from income tax refunds otherwise payable by the state to the debtor. S.L. 2004-138 (H 1420) extends the authority to use this debt collection method to joint agencies set up by two or more local governments. H 1667 would have extended it to sanitary districts as well, but the bill did not pass.

S.L. 2004-21 (H 1497) sets a flat $5 fee, to be collected from the debtor, when a debt is collected pursuant to the Setoff Debt Collection Act. The Department of Revenue had previously had discretion to set the amount of the fee.

State appropriations to local governments. S.L. 2004-196 (S 1008) regulates the expenditure of and reporting on state grants to non-state entities. Most of the act does not apply to local governments, but two provisions do. First, any non-state entities (including local governments) that receive funds by direct appropriation from the General Assembly are required to spend the moneys only for the purposes for which they were appropriated. Second, the Director of the Budget must report noncompliance with this requirement to the Attorney General if the noncompliance appears to be criminal or involve malfeasance, misfeasance, or nonfeasance.

Studies

S.L. 2004-161 authorizes or directs a large number of studies. Given the short time between adjournment of the 2004 General Assembly and convening of the 2005 General Assembly, many of the studies will not be conducted. Some, however, have reporting dates after 2005 and are therefore more likely to be undertaken.

Some of the studies involving local government finance are as follows:

- S.L. 2004-161 establishes a nineteen-member Local School Construction Financing Study Commission and directs it to examine the present system for financing school facilities and alternatives to that system. The commission must report its findings to the General Assembly no later than March 31, 2006.
- The act also creates a twelve-member Legislative Study Commission on a Twenty-First Century Revenue System and charges it to examine the entire state and local government tax system and recommend changes that would lead to a sound tax structure in the current economy. It, too, is to make its final report to the 2006 session of the General Assembly.
- The act authorizes the Revenue Laws Study Commission, an ongoing entity, to study (among other subjects) private activity bonds and sales and use tax exemptions.
- The act directs the Department of Health and Human Services to study the financing of mental health, developmental disabilities, and substance abuse services, including funding sources and alternative financing mechanisms. The department must report to various legislative bodies by July 1, 2005.

- Finally, S.L. 2004-161 authorizes (but does not require) the LRC to study the feasibility of eliminating county financial participation in the Medicaid program, an expensive part of most county budgets. The commission may consider alternative funding methods as well as the effect of allowing counties to retain the contributions they typically make toward the program's administrative costs. In its report to the General Assembly, the commission must include a fiscal analysis of the impact on state revenue and Medicaid expenses estimated to result from eliminating county participation.

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Local Taxes and Tax Collection

The 2004 General Assembly made no sweeping overhauls of the laws and procedures governing local taxation. It did, however, enact several provisions of local interest, including the authorization of an additional one-cent sales and use tax to be used for beach nourishment. The 2004 session also amended the provisions of G.S. 105-278.4 to exempt from property taxation certain educational property owned by nonprofit entities and held for the benefit of educational institutions. The N.C. Court of Appeals' subsequent holding relating to institutions' equitable ownership of such nonprofit property indicated, however, that the amendments did not significantly expand the categories of educational property exempted from taxation.

Listing and Assessment

Economic Development and Training Districts

Section 37 of S.L. 2004-170 (S 1145) adds "County Economic Development and Training Districts" to the title of Article 16 of Chapter 153A, which pertains to county service districts. Section 38 of S.L. 2004-170 amends G.S. 153A-317.11 to clarify that economic development and training districts are special tax areas under Section 2(4) of Article V of the N.C. Constitution. And Section 39 of S.L. 2004-170 amends G.S. 153A-317.17 to expand the purposes for which property taxes may be levied in an economic development and training district. Formerly, property taxes were authorized only for subsidizing a skills training center, but the amended provisions now permit these funds to be used for any of the purposes listed in G.S. 153A-317.11, including education, training, and related services, facilities or functions, and the promotion of economic development in the county.

Exemption for Educational Property

S.L. 2004-173 (S 277) amends G.S. 105-278.4 to explicitly provide for the exemption from taxation of educational property owned by a nonprofit entity "for the sole benefit of" a University of North Carolina–affiliated institution, a North Carolina community college, or any institutions as defined in G.S. 116-22 (accredited private colleges and universities with main campuses in North

Carolina). In addition, the operation of student housing and dining facilities is added to the list of specific educational purposes. These amendments arose out of Watauga County's denial of a property tax exemption for an apartment complex owned by the nonprofit Appalachian Student Housing Corporation (ASHC), which was designed and built to supplement student housing at Appalachian State University (ASU). ASHC holds the property in trust for ASU.

Subsequent to the statutory amendment, the N.C. Court of Appeals held that ASU's equitable interest in the property as beneficiary of the trust rendered the apartment complex state-owned property exempt from taxation pursuant to G.S. 105-278.1(b). *In re Appeal of Appalachian Student Housing Corp.*, __ N.C. App. __, 598 S.E.2d 701 (2004). The court's finding of state ownership mooted the inquiry into whether operation of the facility qualified as an educational purpose under G.S. 105-278.4. The court nonetheless described student housing as "one of the more traditional accoutrements of an educational facility" and opined that it "should be considered incidental to the educational institution." *Id.* at __, 598 S.E.2d at 707. The court and legislature thus appear to be of one mind regarding this particular educational purpose.

The court of appeals' statements regarding the integral relationship between student housing and an institution's educational mission indicate that even before G.S. 105-278.4 was amended, a student housing facility owned by a nonprofit entity and held in trust for a public *or* private institution of higher education should be exempt from taxation, because such a facility presumably would be considered "owned" by the institution and "naturally and properly incident to [its] operation." G.S. 105-278.4. Thus, by requiring only that the nonprofit entity's educational property be owned "for the sole benefit of" an educational institution rather than requiring the specific trust arrangement present in *Appalachian Student Housing Corp.*, the amendments only minimally expand the scope of the G.S. 105-278.4 exemption.

Motor Vehicles

S.L. 2004-167 (S 1083) amends various provisions of Article 3 of G.S. Chapter 20 by providing for registration renewal for commercial and dealer-owned vehicles at staggered monthly intervals. Formerly, dealer license plates were issued on a fiscal-year basis and commercial vehicles were registered on a calendar-year basis. S.L. 2004-199 (S 1225) makes these changes effective January 1, 2006. The registration renewal date changes affect the due dates for property taxes on such vehicles pursuant to G.S. 105-330.4. Taxes for vehicles registered under the staggered system are due on the first day of the fourth month following the date the registration expires or the date the new registration is applied for.

Present-Use Value

S.L. 2004-8 (H 1465) amends G.S. 105-277.2 to permit land owned by a family business and leased for farming, forestry, or horticultural purposes to qualify for taxation at present-use, rather than fair market, value. Previously, such family-owned businesses had to be themselves actively engaged in farming, forestry, or horticultural production for their land to qualify for present-use valuation.

Collection

Debt Setoff

S.L. 2004-21 (H 1497) reduces the collection assistance fee under G.S. 105A-13(a) for debts collected through setoff from "a fee of no more than $15" to a flat fee of $5. The act is effective for fees assessed on or after January 1, 2005.

Garnishment Fees

G.S. 105-368(g) provides that "[t]he fee for serving a notice of garnishment shall be the same as that charged in a civil action." S.L. 2004-113 (H 918) increases the uniform fee for civil process codified in G.S. 7A-311 from $5 to $15. The increase applies to service of process fees assessed or collected on or after September 1, 2004. Thus a tax collector may now collect a fee of $15 for each separately served notice of garnishment. As G.S. 105-368(b) requires that notice of garnishment be served on the garnishee *and* the taxpayer, the total fee for separate service on the garnishee and taxpayer is now $30. If, however, the tax collector serves several notices of garnishment simultaneously upon one garnishee, he or she may collect only *one* $15 service of process fee for service of these notices. G.S. 7A-311(a)(1)(a). The tax collector may still collect a $15 fee from each taxpayer for separate service on these individuals.

Local Acts

Cabarrus County

G.S. 105-322(g) defines the powers and duties of boards of equalization and review. S.L. 2004-100 (S 1315) amends those powers with respect to Cabarrus County's board of equalization and review by permitting separate panels of the board to exercise the decision-making authority of the full board during reappraisal years. The act also empowers the board to accept late-filed applications for exemption or exclusion from property taxes after its adjournment and to make the changes in abstracts and tax records authorized by G.S. 105-325.

City of Durham

S.L. 2004-103 (H 1700) amends S.L. 2003-329, which had authorized the City of Durham for a period of one year to levy a municipal vehicle tax of $10 per vehicle—$5 more than the amount authorized by G.S. 20-97(b) for other municipalities. S.L. 2004-103 extends the period for Durham's increased vehicle tax to five years and eliminates restrictions on the expenditure of these revenues.

Columbus County

S.L. 2004-33 (H 1569) removes Columbus County and its water, sewer, and service districts from the taxing units authorized by S.L. 2003-270 to adopt ordinances permitting the remedies for collection of property taxes to be used for collection of delinquent water and sewer bills. Municipalities located wholly or partially within Columbus County retain the power to adopt an ordinance authorizing such collection procedures.

Occupancy Taxes

Reporting Requirements

Section 36 of S.L. 2004-170 amends G.S. 153A-155(d) to make occupancy tax returns due to counties on the twentieth of each month. However, the due date for paying the taxes remains the fifteenth of each month. The act also amends G.S. 160A-215(d) to make occupancy taxes due to cities on the twentieth, but it does not amend the provision making the returns due on the fifteenth. The inconsistent dates are apparently drafting errors. A technical correction making both the occupancy taxes and returns due on the twentieth would conform the monthly sales tax reporting deadline to the payment deadline.

Use of Proceeds

Section 42 of S.L. 2004-170 amends G.S. 153A-155 and 160A-215 to prohibit the use of occupancy tax proceeds for the development or construction of a hotel or another transient lodging facility.

Currituck County

S.L. 2004-95 (H 1721) amends 1987 N.C. Sess. Laws Ch. 209, Section 1, to permit Currituck County to levy a third room occupancy tax of up to 2 percent of the gross receipts derived from the rental of accommodations. The act also amends earlier provisions governing occupancy tax expenditures and provides that net proceeds from the first occupancy tax may be used only for "tourism-related expenditures, including beach nourishment." At least two-thirds of the net proceeds of the second and third occupancy taxes must be used to "promote travel and tourism," and the remaining proceeds must be used for tourism-related expenditures as well. Section 3 of the act amends 1987 N.C. Sess. Laws Ch. 209, as amended by 1991 N.C. Sess. Laws Ch. 155 and S.L. 1999-155, to require the Currituck County board of commissioners, in adopting a third room occupancy tax, to create a Tourism Development Authority that will be responsible for the expenditure of occupancy tax proceeds.

Alleghany County

S.L. 2004-106 (S 1181) adds Alleghany County to the list of counties covered by the uniform room occupancy tax provisions of G.S. 153A-155 and amends 1991 N.C. Sess. Laws Ch. 162 to reflect adoption of these uniform procedures. The act provides that when the proceeds of the room occupancy tax exceed $100,000, the Alleghany County board of commissioners must create a Tourism Development Authority responsible for expending the proceeds of the tax.

Privilege License Taxes

S.L. 2004-84 (H 1303) expands the categories of amusements exempted from privilege license taxes pursuant to G.S. 105-40 to include youth athletic contests sponsored by tax-exempt entities as well as exhibitions, performances, and entertainments, other than athletic events, managed by nonprofit arts organizations.

Local Sales and Use Tax

S.L. 2004-123 (H 142) amends Subchapter VIII of G.S. Chapter 105 to add an Article 45 authorizing a one-cent local sales and use tax for beach nourishment. Though the act includes no provisions specifically limiting its application to particular counties, it does not bear the signature of the governor. Thus, to constitute a valid exercise of legislative authority, it must be considered a local act. Counties levying the one-cent Article 39 sales and use tax and the three one-half-cent sales and use taxes authorized by Articles 40, 42, and 44 may levy the additional one-cent tax. A county's authority to levy this tax expires eight years after the tax is first levied, even if the tax does not remain in effect for the entire eight-year period. Each county receives the net proceeds of the tax it collects unless the tax cannot be identified as proceeds of a particular county. In that case, taxes are to be allocated among the taxing counties in proportion to the amount of Article 45 additional one-cent taxes collected in each county.

Technical Corrections

Section 60(b) of S.L. 2004-199 makes technical corrections to G.S. 160A-215(f1) (restricting use of occupancy tax proceeds). Section 5 of S.L. 2004-203 (H 281) makes technical corrections to G.S. 105-113.82(e) (relating to distribution of beer and wine taxes to local governments), G.S. 105-164.44F(b) (relating to distribution of telecommunications taxes to cities), G.S. 105-187.9 (relating to distribution of highway use tax), G.S. 105-187.24 (governing use of white goods disposal tax), and G.S. 105-472(b) (relating to distribution of sales and use tax proceeds). These changes appear to have no substantive effect.

Studies

Section 35 of S.L. 2004-170 amends G.S. 120-70.108(a) to increase the number of members of the Property Tax Subcommittee of the Revenue Laws Study Committee from six to eight. The Senate cochair of the committee is to designate one of the additional members; the House cochair, the other.

Part XIV of S.L. 2004-161 (S 1152) directs the Revenue Laws Study Committee to study several local taxation issues and to report its findings and any recommended legislation to the 2005 General Assembly upon its convening. The committee is directed to study (1) the valuation of partially improved, undeveloped subdivision lots; (2) allowing local school administrative units a sales and use tax exemption instead of a sales and use tax refund; (3) the comparative tax burden on residents of South Carolina and North Carolina; and (4) whether tax expenditures should be reviewed at least once every ten years. The act also directs the Property Tax Subcommittee to study tax lien foreclosures, including proposals for expediting foreclosure actions.

Part XLVI of S.L. 2004-161 creates the "Legislative Study Commission on a 21st Century Revenue System," charged with establishing principles of taxation upon which state and local tax structures should be based and recommending changes in the current state and local tax structure. The commission's interim report is due to the 2005 General Assembly no later than its convening. The commission's final report must be made to the 2006 Regular Session of the 2005 General Assembly upon its convening.

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Mental Health

This chapter discusses acts of the General Assembly affecting mental health, developmental disabilities, and substance abuse services, with particular attention given to legislation affecting publicly funded services. Although these services are administered on the state level by the Department of Health and Human Services' (DHHS) Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, most of them are delivered in the community through a service network managed by local governments or units of local government called area mental health, developmental disabilities, and substance abuse authorities (area authorities) or county mental health, developmental disabilities, and substance abuse programs (county programs).

Among the legislative enactments in 2004 that could affect area authorities and county programs is a law requiring the review of the fiscal and administrative policies that may impede the delivery of community-based services. This new law also limits the reversion of unexpended funds to the General Fund, reserving a portion of those funds for community-based service needs. Other legislation includes acts appropriating funds for mental health, developmental disabilities, and substance abuse (MH/DD/SA) services, expanding the list of health care providers who may directly enroll with the state to provide mental health services paid for by the state's Medicaid program, establishing pilot programs to add a mental health treatment component to drug treatment courts, and requiring the study of the use and effectiveness of geriatric mental health specialty teams in long-term care facilities. These and other acts are described in this chapter.

Appropriations

General Fund Appropriations

In 2003 the General Assembly appropriated $580,423,098 from the General Fund to the DHHS Division of MH/DD/SA Services for the second year of the 2003–2005 biennium (S.L. 2003-284). This year the legislature reduced the General Fund appropriation for 2004–2005 to $574,460,825, a net decrease of approximately $5.9 million after balancing reductions and expansion funding. Annual appropriations for past years were $577.3 million (2003–2004), $573.3 million (2002–2003), $581.4 million (2001–2002), $630.4 million (2000–2001), $614.3 million (1999–2000), $564.3 million (1998–1999), and $528.5 million (1997–1998).

The 2004 appropriations act, S.L. 2004-124 (H 1414), reduces funding for 2004–2005, in part, by cutting $2 million from funding for area authority and county program services and $500,000

from funding for the Division of MH/DD/SA Services's central office operations. Because both of these reductions are nonrecurring and will be applied to funds that reverted in each of the last two fiscal years, they are not anticipated to have an impact. The budget act also cuts funding for technical assistance, training, and service contracts through the division by $199,273 and makes a $2 million recurring and a $2,550,000 nonrecurring reduction in funding to state-operated institutions by budgeting over-realized receipts. Expansion funding includes a $300,000 increase in funding to the Autism Society, a $750,000 increase for housing support and placements for persons with mental illness, and a $237,000 increase in funding for the UNC TEACCH Division in the School of Medicine.

Federal Block Grant Allocations

Section 5.1 of S.L. 2004-124 allocates federal block grant funds for fiscal year 2004–2005. 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 $6,307,035 (up from $5,657,798 in 2003–2004) from the MHS Block Grant for community-based services for adults with severe and persistent mental illness, including crisis stabilization and other services designed to prevent institutionalization of individuals when possible. From the same block grant the legislature appropriated $3,921,991 (up from $2,513,141 in 2003–2004) 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. The General Assembly allocated $1.5 million of the MHS Block Grant funds to the Comprehensive Treatment Services Program for Children (CTSPC) (formerly the Child Residential Treatment Services Program), which is intended to provide residential treatment alternatives for children 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. From the SAPT Block Grant, the General Assembly allocated $20,441,082 (up from $18,901,711 in 2003–2004) for the state-operated alcohol and drug abuse treatment centers (ADATCs) and adult alcohol and drug abuse services provided by community-based programs. Other allocations include $5,835,701 (down from $7,740,611 in 2003–2004) for services for children and adolescents (for example, prevention, high-risk intervention, outpatient, and regional residential services) and $8,069,524 for services for pregnant women and women with dependent children. The budget act also appropriates $4,816,378 from the SAPT Block Grant for substance abuse services for intravenous drug abusers and others at risk of HIV disease and $851,156 for prevention and treatment services for children affected by parental addiction.

From the Social Services Block Grant, which funds several DHHS divisions, S.L. 2004-124 allocates to the Division of MH/DD/SA Services $3,234,601 for unspecified purposes and another $5 million to assist individuals on the state's developmental disabilities services waiting list. From the same block grant the General Assembly allocated $422,003 to the CTSPC and $213,128 to the Division of Facility Services for mental health licensure purposes.

Mental Health Trust Fund

In 2001 the General Assembly established the Trust Fund for Mental Health, Developmental Disabilities, and Substance Abuse Services and Bridge Funding Needs as a nonreverting special trust fund in the Office of State Budget and Management. G.S. 143-15.3D provides that the fund must be used solely to meet the mental health, developmental disabilities, and substance abuse services needs of the state and must supplement, not supplant, existing state and local funding for these services. Specifically, the fund must be used only for the following:

1. To provide start-up and operating funding for community-based treatment alternatives for individuals residing in state-operated institutions

2. To facilitate compliance with the U. S. Supreme Court's *Olmstead*[1] decision
3. To expand services to reduce waiting lists
4. To provide bridge funding to maintain client services during transitional periods of facility closings and departmental restructuring
5. To construct, repair, and renovate state mental health, developmental disabilities, and substance abuse facilities

This year the General Assembly appropriated $10 million in nonrecurring funds to the trust fund, following a $12.5 million allocation in fiscal year 2003–2004.

Section 10.23 of S.L. 2004-124 authorizes DHHS to use up to $500,000 from the trust fund to purchase a house or other residential facility and the land on which the house or facility is located for use by the PATH Program at the Murdoch Center.

Section 10.24 of S.L. 2004-124 also authorizes DHHS to spend up to $3.5 million for capital improvements and expansions at the state's ADATCs.

Medicaid and N.C. Health Choice

Medicaid Services

Section 10.19D of S.L. 2004-124 expands the list of service providers who may directly enroll with the state to provide mental health services to Medicaid recipients. Children eligible for Early and Periodic Screening for Diagnostic Treatment Services may receive mental health services from licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, certified clinical addiction specialists, and certified clinical supervisors. To be eligible for Medicaid reimbursement, however, services provided by these professionals must be furnished in response to a referral from a Community Care of North Carolina primary care physician, a Medicaid-enrolled psychiatrist, an area mental health authority, or a county mental health program. The same professionals may also provide mental health services to Medicaid-eligible adults, who may be self-referred. The act directs that DHHS may not enroll these professionals until the fiscal impact of payments to these providers has been projected, funds have been identified in the Division of MH/DD/SA Services budget to meet any projected payments exceeding Division of Medical Assistance (DMA) funding, and approval has been obtained from the Office of State Budget to transfer the funds from the Division of MH/DD/SA Services to the DMA.

In addition to the professionals listed above, the budget act permits Medicaid-eligible adults to receive Medicaid-reimbursed mental health services from licensed or certified psychologists, licensed clinical social workers, and certified clinical nurse specialists in psychiatric mental health advanced practice.

Community Alternatives Program

Section 10.9 of S.L. 2004-124 requires DHHS to ensure that budgeted expenditures for the Medicaid Community Alternatives Program (CAP) are not limited by the nonallocation of, or delays in filling, CAP slots and specifies that CAP services for disabled adults be provided, within existing county allocations and subject to availability, to any eligible person who entered a nursing facility on or before June 1, 2004.

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1. Olmstead v. L.C., 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). In *Olmstead*, the Court held that the unnecessary segregation of individuals with mental disabilities in institutions may constitute discrimination based on disability, in violation of the Americans with Disabilities Act. As a result of the ruling, states risk litigation if they do not develop a comprehensive plan for moving qualified persons with mental disabilities from institutions to less restrictive settings at a reasonable pace.

Intermediate Care Facilities for Persons with Mental Retardation

Section 10.8 of S.L. 2004-124 directs DHHS to implement a Medicaid assessment program for state-operated ICF/MR facilities (intermediate care facilities for persons with mental retardation) and ICF/MR facilities licensed under G.S. Chapter 122C. The assessment must be imposed effective October 1, 2004, and funds realized from the assessment must be used only to draw down federal Medicaid matching funds and to implement a rate increase for private ICF/MR facilities. Further, funds realized from the assessment must not be used to supplant state funds appropriated for private facilities and must be used to reduce state funds appropriated for public ICF/MR services.

State Funding for N.C. Health Choice

S.L. 2004-124 increases state funding for the state's Health Choice program for uninsured children by $6.6 million.

Studies

County and state Medicaid funding. S.L. 2004-161 (S 1152) authorizes the Legislative Research Commission to study the feasibility of eliminating county financial participation in the Medicaid program. The commission may consider alternative funding methods to ensure that the impact on state funds is revenue neutral when calculated on a statewide basis and also may consider retaining the county contribution toward administrative costs. Any recommendations to the General Assembly must include a fiscal analysis of the estimated impact on state revenue and Medicaid expenses.

Institutional bias. S.L. 2004-124 requires DHHS to contract with an independent entity to study whether the state's Medicaid program has a bias favoring support for individuals in institutional settings over support for individuals living at home and, if a bias is found, to recommend ways to alleviate it. The department must report the results of the study to the North Carolina Study Commission on Aging by January 2005.

Area Authorities and County Programs

County Program Transition from Area Authority

G.S. 122C-115(a) requires counties to provide mental health, developmental disabilities, and substance abuse services through an "area authority" or through a "county program," as those terms are defined in that chapter. A *county program* is a single-county program (a department of the county) or a multicounty program formed pursuant to an interlocal agreement in accordance with Article 20 of G.S. Chapter 160A.

Section 10.26 of S.L. 2004-124 amends G.S. 122C-115(a) to provide that if a county that is a member of an area authority decides to provide services through a county program instead, it may, with the agreement of the other counties comprising the area authority and with the approval of the Secretary of DHHS, simultaneously participate in the area authority and the county program until the end of the subsequent fiscal year. Because this amendment sunsets July 1, 2005, the provision is effective only during the 2004–2005 fiscal year.

Fiscal and Administrative Policy Review

Section 10.22A of S.L. 2004-124 requires the DHHS Division of MH/DD/SA Services, in cooperation with area authorities and county programs, to identify and eliminate administrative and fiscal barriers created by state and local policies to the delivery of area authority and county program services, including services delivered to multiply diagnosed adults and services provided

through the CTSPC. The special provision further directs DHHS to implement changes in policies and procedures to

1. create a system for allocating state and federal funds to area authorities and county programs based on projected needs rather than on historical allocation practices and spending patterns,
2. provide services to adults and children defined in the State Plan as priority or targeted populations,
3. provide services to children not deemed eligible for the CTSPC but who would otherwise need medically necessary treatment services to prevent out-of-home placement, and
4. provide community-based services to adults who should be moved to less restrictive settings in accordance with *Olmstead v. L.C.* but who remain or are being placed in state-operated institutions.

Nonreversion of Local Program Funds

Section 10.22A of S.L. 2004-124 also directs area authorities and county programs to use all funds appropriated and necessary to meet service needs. If excess funds are available after doing so, the act requires that one-half of these funds not revert to the General Fund but be transferred to the Mental Health Trust Fund, with the exception that one-half of unexpended and unencumbered funds appropriated to the CTSPC are not to revert to the General Fund but must be carried forward and used solely for services for children and adolescents.

Substance Abuse Services for Persons Convicted of Driving While Impaired

A person whose driver's license is revoked as a result of a conviction of driving while impaired must obtain a certificate of completion before having his or her license restored by the Division of Motor Vehicles. To obtain a certificate of completion, the person must have a substance abuse assessment and, depending on the results of the assessment, must complete either an alcohol and drug education traffic (ADET) school or a substance abuse treatment program. S.L. 2004-197 (H 1356) amends G.S. 122C-142.1 to specify the persons authorized to conduct substance abuse assessments. Effective October 1, 2005, these assessments may be conducted by the following:

1. A certified substance abuse counselor, as defined by the Commission for MH/DD/SA Services
2. A certified clinical addiction specialist, as defined by the commission
3. A substance abuse counselor intern who is supervised by a certified clinical supervisor, as defined by the commission, and who meets the minimum qualifications established by the commission for individuals performing substance abuse assessments
4. A person licensed by the North Carolina Psychology Board
5. A physician certified by the American Society of Addiction Medicine

Substance abuse counselor interns will be considered qualified to do the assessment only until October 1, 2008, at which time they will be deleted from the statutory list of qualified professionals.

The act raises from $50 to $100 the required fee for substance abuse assessments conducted under G.S. 122C-142.1. It also requires the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services to study the certification requirements for persons conducting ADET schools and the adequacy of the fees paid by clients to treatment facilities or schools for treatment or education.

Involuntary Commitment Custody and Transportation Order

Under North Carolina's law and procedure for court-ordered treatment of mental illness, magistrates and clerks of court, in a number of situations, are authorized to issue a custody and transportation order to a law enforcement officer that authorizes the officer to take a named individual into custody and transport him or her to a physician or psychologist for examination. Upon completion of the examination, the physician or psychologist makes a recommendation regarding court-ordered treatment, and the individual may be transported to a psychiatric hospital pending a court hearing. In some circumstances the question arises whether a custody order issued by a magistrate in one county may be executed by a law enforcement agency in another county. For example, an individual named in an order may travel from the county in which the order was issued to an adjacent county before the sheriff's department in the county in which the order originated can execute it. Some legal experts believe the magistrate's order is valid in other counties and should simply be presented to the law enforcement agency of the county in which the respondent can be found.

Nevertheless, following a 2004 incident in which a respondent remained at large and eventually suffered injury while the magistrates and law enforcement agencies of one county tried to determine whether they could execute an order issued in another county, the General Assembly decided to clarify the matter. S.L. 2004-23 (H 1366) amends Sections 261(e), 281(e), 265(a), 273(a)(2), and 290(b) of G.S. Chapter 122C to clarify that such a custody order is valid throughout the state, not just in the county in which it was issued.

Quality Assurance and Peer Review

G.S. 122C-191(e)(2) provides that, for purposes of peer review functions, the proceedings of an area authority or county program quality assurance committee, the records and materials it produces, and the materials it considers are confidential and not to be considered public records within the meaning of North Carolina's public records statute. S.L. 2004-149 (H 669) amends G.S. 122C-191(e)(2) to clarify that documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they are presented or considered during committee proceedings. The act makes the same change to G.S. 122C-30, which applies to the peer review functions of hospitals licensed under G.S. Chapter 122C. G.S. 122C-30, which heretofore has referred only to peer review committees, is amended to apply also to quality assurance committees.

G.S. 122C-191(e)(3) provides that confidential peer review information may be released to a professional standards review organization that contracts with a North Carolina or federal agency to perform any accreditation or certification function. S.L. 2004-149 amends this statute to clarify that the reference to professional standards review organizations includes the Joint Commission on Accreditation of Healthcare Organizations.

S.L. 2004-149 adds G.S. 131D-21.2 to G.S. Chapter 131D, applicable to adult care homes, to extend qualified immunity from civil liability to members of the facility's quality assurance, medical, or peer review committees. The immunity extends only to statements and actions falling within the scope of the members' quality assurance activities. G.S. 131D-21.2 also protects the confidentiality of the materials these committees produce or consider by shielding the materials from discovery or introduction into evidence in any civil action against the facility and exempting them from the definition of public records in North Carolina's public records law. The law qualifies these protections by providing that information otherwise available is not shielded from discovery simply because it was considered by a quality assurance, medical, or peer review committee, nor do public records become confidential simply by virtue of being considered by the committee.

For changes related to peer review activities of hospitals and nursing homes licensed under G.S. Chapter 131E, see the discussion in Chapter 10, "Health."

Mental Health Treatment Courts

Section 10.27 of S.L. 2004-124 requires the Administrative Office of the Courts (AOC) to establish pilot programs that add a mental health treatment component to the existing drug treatment courts in judicial districts 15B, 26, and 28. The pilot programs are intended to facilitate cooperation between the public mental health system, mental health service providers, and the judicial system so that the public mental health system can provide treatment to repeat adult offenders in need of mental health or substance abuse services and who fall within the population targeted for services by the State Plan for MH/DD/SA services. The act requires the AOC and the Division of MH/DD/SA Services to plan the treatment services, court procedures, and administration of the pilot programs. For 2004–2005 the General Assembly appropriated from the Mental Health Trust Fund $36,161 to the Judicial Department for administrative costs associated with the pilot programs and $137,940 to the Division of MH/DD/SA Services for treatment services for repeat adult offenders who fall within the State Plan's target population. The AOC must report on the implementation of the pilot programs to the Senate and House Appropriations Committees, the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Senate and House Appropriations Subcommittees on Health and Human Services by March 1, 2005.

Criminal Records Checks

Section 10.19D of S.L. 2004-124 amends state laws governing the criminal history record checks of applicants for employment with area authorities and long-term care facilities. The act requires the state Department of Justice to forward the results of national criminal history checks on such persons to the DHHS Division of Facility Services, which will provide the results of the criminal history check to the area authority or long-term care facility within five business days.

With respect to criminal records checks of persons seeking employment with an area authority or adult care home, S.L. 2004-124 amends G.S. 131D-40 and G.S. 122C-80 to include within the definition of *relevant offense* any conviction or pending indictment for a crime under county, state, or federal law that bears upon an individual's fitness to have responsibility for the safety and well-being of aged or disabled persons.

Section 10.1 of S.L. 2004-124 requires DHHS, beginning January 1, 2005, to centralize all department activities relating to the coordination and processing of criminal records checks required by law and to report on the centralization to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division by January 1, 2005.

Guardianship

Section 31 of S.L. 2004-203 (H 281) amends G.S. 35A-1213(b) to remove the restriction that a general guardian or guardian of the estate must be a North Carolina resident and amends other provisions of G.S. Chapter 35A to grant the clerk of superior court greater authority to remove a guardian. S.L. 2004-161 creates the Legislative Commission on State Guardianship Laws to study guardianship laws and their relationship to powers of attorney, the right to natural death, and other laws. For a description of these two laws, see Chapter 20, "Senior Citizens."

Long-Term Care Facilities

Mental Health Specialty Teams

S.L. 2004-144 (S 1148) requires DHHS to develop and implement standardized criteria for mental health specialty teams that provide services to mentally ill residents of long-term care facilities. Standardized criteria must address the teams' purpose, residents' eligibility for services, screening processes, referral processes, training manuals, and documents such as service orders, authorizations, and other forms.

S.L. 2004-144 also directs DHHS to study the use and effectiveness of geriatric mental health specialty teams in long-term care facilities. As part of the study, DHHS must consider whether to broaden the scope of these teams to include the provision of services to nongeriatric residents with mental illness or create two separate teams, a geriatric mental health specialty team that provides services to geriatric mentally ill residents and a long-term care mental health specialty team that provides services to nongeriatric mentally ill residents. The act also requires DHHS to track expenditures related to the care of mentally ill residents of long-term care facilities, the types of services provided by specialty teams, and the use of clinicians with and without specialty training in mental health or geriatric mental health. DHHS must report its findings and actions to the North Carolina Study Commission on Aging and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services by October 30, 2005.

Studies

S.L. 2004-124 requires DHHS to study issues concerning the care of mentally ill residents of long-term care facilities and to report its findings to the North Carolina Study Commission on Aging by October 1, 2005. The study must address, among other things, admission criteria to long-term care facilities for persons with mental illness, the identification of individuals with mental health treatment needs, the quality of care for mentally ill individuals in adult care homes and nursing homes, and specific problems associated with mixing aging and mentally ill populations in long-term care facilities. DHHS must report its findings and recommendations to the North Carolina Study Commission on Aging by October 1, 2005.

S.L. 2004-161 authorizes the North Carolina Study Commission on Aging to study issues related to mentally ill residents of long-term care facilities.

Studies

Financing of MH/DD/SA Services

S.L. 2004-161 directs DHHS to study the financing of mental health, developmental disabilities, and substance abuse services and report its findings and recommendations to the Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services; the House of Representatives; the Senate; and the Fiscal Research Division by July 1, 2005. As part of the undertaking, DHHS must

1. examine all sources of funds used in the delivery of services throughout the department,
2. examine alternative financing mechanisms for funding services, and
3. recommend feasible alternative financing mechanisms.

Joint Legislative Oversight Committee on MH/DD/SA Services

S.L. 2004-161 authorizes the Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services to study the incidence of mental illness and substance abuse problems among inmates in North Carolina's prison and juvenile justice

system. The bill also requires the oversight committee to review the extent to which children who need services from multiple state and local agencies are receiving them in an effective and timely manner. The study must examine the long-term impact that any failure to provide cost-effective and timely services has on children, families, and state and local resources. The oversight committee must make detailed recommendations for changes necessary to address any identified problems. The oversight committee must convene a task force to review children's services and may, if necessary, hire a consultant to assist the task force.

Mark F. Botts

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Motor Vehicles

This session several bills affecting motor vehicle law were enacted. One of the most significant of these creates a new crime of aggressive driving, and another expands child vehicle restraint regulations. Other new legislation adds to the ever-growing list of license plates that support particular causes—in this short session alone, eleven additional special license plates were authorized. This chapter summarizes these and other substantive bills enacted in 2004 relating to motor vehicle law.

Drivers' Licenses

Limited Driving Privileges (Out-of-State Speeding Convictions)

A *limited driving privilege* is a court order authorizing a person to drive even though the Division of Motor Vehicles (DMV) has otherwise revoked that person's driving privileges. Typically this privilege authorizes driving only for restricted purposes, such as going to work or taking children to school. Limited privileges are authorized in many different situations, including certain speeding violations. In some instances a North Carolina resident may be convicted of speeding while in another state, and that state may revoke the person's license as a result. Usually the revoking state notifies the North Carolina DMV of the revocation, and the DMV may then revoke the North Carolina resident's license based on the out-of-state conviction. In those cases in which the person was convicted of driving more than fifty-five miles per hour and more than fifteen miles per hour over the speed limit, a judge may issue a limited driving privilege to offset the revocation. S.L. 2004-199 (S 1225) amends the statute authorizing the privilege [G.S. 20-16.1(b)(3)] to transfer the jurisdiction for issuing the privileges from the superior court to the district court.

Organ Donation Program Changes

S.L. 2004-189 (S 852) directs the DMV to establish and maintain an organ donation Internet site. The site must include only organizations legitimately involved in the organ donation process.

The information to be included is limited to basic data concerning persons who indicated a willingness to donate organs when they obtained their drivers' licenses. The act also establishes a License to Give Trust Fund to promote organ donation and, to provide money for the fund, raises the fee to obtain a driver's license by $0.05 per year.

Rules of the Road

Child Restraints

Since 1982 North Carolina has required that children be properly secured when they are traveling in motor vehicles. S.L. 2004-191 (S 1218), effective January 1, 2005, amends this law to include all children who are younger than eight years old and who weigh less than eighty pounds (the current law does not apply to children who are four years old or older or who weigh more than forty pounds). The new law creates two categories of restraint. Children younger than five years old and who weigh less than forty pounds must be secured in traditional child or infant car seats, which should generally be placed in the rear seat of the vehicle. Children who are older than five or who weigh more than forty pounds may be placed in "booster" seats, which are designed to make adult lap and shoulder belts fit correctly over the child. According to the North Carolina Child Fatality Task Force, which suggested these changes to the law, between 2000 and 2002 forty-three North Carolina children between five and eight years of age were killed in vehicular accidents, only three of which had been placed in booster seats. North Carolina now joins twenty-two other states and the District of Columbia in requiring booster seats. The punishment for failure to use a booster seat is the same as for failure to use an infant car seat—a fine of up to $25. A conviction has no effect on one's insurance, but two driver's license points are assessed (accumulation of a specified number of these points may result in license revocation).

Aggressive Driving

Aggressive driving is defined by the National Highway Traffic Safety Administration (NHTSA) as "the operation of a motor vehicle in a manner that endangers or is likely to endanger persons or property." The agency distinguishes aggressive driving from road rage, which is deliberately assaultive behavior, but postulates that aggressive driving can often lead to road rage. According to NHTSA statistics, nearly thirteen thousand of the motor vehicle deaths between 1990 and 1997 were attributed to aggressive driving.

S.L. 2004-193 (H 1046) creates a new offense of aggressive driving, to be codified as G.S. 20-141.6. The new law defines the offense to include violating the speeding laws in combination with driving carelessly and heedlessly in willful or wanton disregard for the rights or safety of others. This language is identical to one formulation of the offense of reckless driving as codified in G.S. 20-140. North Carolina's appellate cases have established that no particular kind of traffic violation is required to establish a reckless driving charge. For a charge of aggressive driving, however, specific offenses must have been committed to establish a violation of the "carelessly and heedlessly" element, even if reckless driving is the formal charge. To prove the offense of aggressive driving, the state must show that the defendant committed two or more of the following violations:

- Running a red light
- Running a stop sign
- Illegal passing
- Failing to yield the right-of-way
- Following too closely

Aggressive driving is a Class 1 misdemeanor. A conviction carries five driver's license points, and six points if the offense occurs in a commercial vehicle. For driver's license revocation purposes, aggressive driving is treated in the same manner as reckless driving—two or more convictions in a

year or a conviction accompanied by a serious speeding conviction will result in revocation. Reckless driving under G.S. 20-140 is a lesser-included offense of aggressive driving.

Right-of-Way and Vehicle Control Signals

S.L. 2004-172 (H 965) increases penalties for persons who cause serious bodily injury to another while entering an intersection, turning at a stop or yield sign, entering a roadway, failing to yield to an emergency vehicle, or driving through a highway construction site. Any of those offenses, coupled with serious injury, result in a mandatory fine of $500 and a ninety-day driver's license revocation. Apparently the offenses remain infractions but carry higher penalties. For purposes of this statute, *serious bodily injury* involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted impairment of a bodily function or organ.

S.L. 2004-172 also amends the statutes regulating driving at intersections (G.S. 20-158) to provide that vehicles stopped at traffic lights must, when turning right on red, yield not only to traffic and pedestrians in the intersection, but also to pedestrians moving toward the intersection who are in reasonably close proximity and preparing to cross in front of the stopped vehicle. Conviction of failure to yield to a pedestrian under this law is an infraction punishable by a penalty of not more than $500 nor less than $100. A conviction also carries four driver's license points (five if the offense is committed in a commercial vehicle) and one insurance point under the Safe Driver Incentive Plan. Failure to yield to a bicycle, scooter, or motorcycle also carries four and five points. S.L. 2004-172 was effective December 1, 2004.

Another bill enacted this session amends the law regulating stoplights themselves. S.L. 2004-141 (S 1078) changes the nomenclature used in G.S. 20-158 to refer to stoplights, redesignating them as traffic signals with "vertical-arranged" or "horizontal-arranged signal faces." It also clarifies that the red light controls vehicles approaching the intersection (instead of those "passing straight through"). This act became effective July 29, 2004.

Portions of S.L. 2004-141 amend the same statutory sections as does S.L. 2004-172 but in inconsistent ways. Since S.L. 2004-141 took effect in July and S.L. 2004-172 took effect in December, it is likely that the portions of S.L. 2004-141 that are in conflict with S.L. 2004-172 will have remained in effect only until December 1, 2004.

DWI

Two bills this session amend the impaired driving statutes. S.L. 2004-128 (S 577) revises G.S. 20-28.4 to require the court to include in its orders releasing a vehicle seized due to repeated impaired driving conduct a notice to the owner that within thirty days of the order, the owner must either (1) pay the towing and storage charges and retrieve the vehicle or (2) give notice to the DMV requesting a judicial hearing on the validity of any mechanic's lien the storage company has on the vehicle. The bill also amends G.S. 20-28.4 to provide that this notice satisfies the notice requirement of G.S. 44A-4(b). In addition, it amends G.S. 44A-4(b) to provide that if (1) the registered or certified mail notice to the vehicle owner is returned as undeliverable and (2) the court has given the owner notice of his or her right to a judicial hearing as described above, then no further notice is required. Previously, a party who had obtained the release of a DWI-seized vehicle had thirty days in which to retrieve the vehicle. If the owner did not act within thirty days, the company storing the vehicle would have a mechanic's lien on the vehicle for the accrued towing and storage charges. The notice required to sell a vehicle pursuant to such a lien was expensive and time-consuming to produce. The changes described above are designed to make the lien process simpler and more efficient for the statewide contractor that stores these seized vehicles.

S.L. 2004-197 (H 1356) raises the fee for substance abuse assessments of impaired drivers from $50 to $100. Assessments are made by local mental health department employees or certified private assessors. Often defendants charged with impaired driving will choose to be assessed before they are tried, since the act of obtaining the assessment is a mitigating factor in sentencing.

If an assessment is not obtained before trial, it will be required of every person convicted of impaired driving or some other related offenses. For those required to obtain an assessment, failure to do so will result in the continuation of any driver's license revocation imposed as a result of the conviction until the assessment is obtained. In addition, those convicted must complete any alcohol treatment or education the assessor recommends before they may be relicensed. S.L. 2004-197 also directs the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services to study the certification requirements for persons conducting alcohol and drug education traffic schools. Many offenders convicted of impaired driving offenses, especially those not found to have substance abuse dependencies or problems, are required to complete these schools as a condition of relicensing. Finally, S.L. 2004-197 specifies the minimum qualifications for those who may be certified to conduct assessments. The minimum qualifications are effective October 1, 2005.

Towing

S.L. 2004-124 (H 1414) (as later amended by S.L. 2004-199) regulates how vehicles towing other vehicles must be operated. It enacts new G.S. 20-147.1 to provide that when a noncommercial passenger vehicle is towing another vehicle, the driver of the towing vehicle must "cause the vehicle to travel on the right half of the highway." A violation is an infraction.

Equipment

Several minor changes were made to the size and equipment statutes. S.L 2004-82 (S 1086) provides that public transit vehicles may be equipped with amber, high-mounted, flashing deceleration lamps on the rear of the vehicle.

Under legislation enacted in recent years, some local governments have installed cameras at intersections to monitor vehicles that fail to stop at red lights. The cameras record the registration plate numbers of these vehicles. S.L. 2004-79 (H 26) addresses the problem of drivers who obscure license plates with certain types of covers so that the cameras cannot clearly photograph the registration plates. It amends G.S. 20-63 to make it an infraction to willfully cover any part of a registration plate by any device intended to prevent the taking of these photographs. Transparent covers that are not designed or intended to prevent the taking of such photographs are not affected. This provision was effective October 1, 2004.

G.S. 20-118 establishes weight limits for property-hauling vehicles based on the size of the vehicle and its number of axles. An exception exists for vehicles that haul wood residuals (chips, sawdust, bark, or mulch) on non-Interstate highways, roads, or bridges posted for specific weights and that do not exceed their normal limits by more than 4,000 pounds. S.L. 2004-145 (S 1043) modifies that exemption to include vehicles transporting soil, rock, sand, or asphalt if the site from which the substances are transported does not have a certified scale for weighing the vehicle. In addition, if the vehicle exceeds the 4,000-pound overage limit or the maximum of 42,000 pounds (for tandem-axle vehicles) or 22,000 pounds (for single-axle vehicles), the penalty imposed is halved if the vehicle is transporting material from a site that does not have a scale.

S.L. 2004-79 also prohibits a law enforcement officer from issuing a citation to a person for violating the size, weight, or equipment laws if that person has a permit to use the type of vehicle that is involved in the offense. If the officer can determine by electronic means that the person has been issued such a permit, the officer may not issue the citation, even if the person does not have physical possession of the permit. This amendment becomes effective January 1, 2005.

Registration

Most private passenger vehicle registration plates include a number randomly assigned by the DMV and bear the slogan "First in Flight." In addition, the DMV may issue over eighty types of specialized registration plates. Most retain the slogan "First in Flight," but they also include some phrase or image that indicates an affiliation with or affinity for a college, university, or professional sports franchise; military status; or a personal interest in animals, exercise, breast cancer awareness, or some specific geographical region of the state. A person obtaining one of these special plates must pay an additional annual fee. S.L. 2004-200 (S 1118) authorizes the following new categories of special plates:

- Commercial Fishing
- Daughters of the American Revolution (DAR)
- El Pueblo
- High school insignia plates (which may be issued in the name of any public high school)
- HOMES4NC
- North Carolina 4-H Development Fund
- Surviving spouse of retired highway patrol officer
- Sports Fishing

These license plates may not be issued until at least three hundred people have applied for them. All of the plates incur an additional fee of $30, with the exceptions of the high school plates (which are $25) and the DAR plates (which are $20). A portion of these additional fees is transferred to the organizations represented on the license plates.

S.L. 2004-182 (S 464) authorizes the issuance of a National Rifle Association plate. No additional fee is required for this plate, but a minimum of three hundred applications must be received before the plate may be issued.

Two other special plates take the additional step of replacing the "First in Flight" slogan in the plate design. S.L. 2004-185 (S 754) authorizes stock car racing theme plates, which will be issued with images displaying themes of professional stock car auto racing or of specific race car drivers. The state may not pay for the use of any copyrighted images or slogans, and the additional fee required is $30, $20 of which is to be paid to the North Carolina Motorsports Foundation, Inc. If the auto racing sponsors provide the plates, no minimum number of applications is required before the plates may be issued.

S.L. 2004-131 (S 1144) authorizes plates that replace the "First in Flight" slogan with "In God We Trust." There is an additional $30 fee for the plates, $20 of which is to be used to support the N. C. National Guard Soldiers and Airmen Assistance Fund. Three hundred applications must be received by the DMV before the plates may be issued.

For many years private vehicle plates have been issued on a staggered basis so that renewals are spread throughout the year and do not occur all at once (typically in January). Commercial vehicles and dealer registration plates, however, were not being renewed on a staggered basis. S.L. 2004-167 (S 1083) staggers these types of renewals as well. In addition, the bill exempts historic vehicles from the annual vehicle safety inspections.

Law Enforcement Jurisdiction

S.L. 2004-148 (H 1345) expands the jurisdiction of law enforcement officers of the DMV and personnel employed as State Highway Patrol Motor Carrier Enforcement officers so that they may enforce criminal laws as well as motor vehicle laws. This additional authority is granted in two instances: (1) when the officers have probable cause to believe a person has committed a criminal act in their presence at the time the officers are engaged in the enforcement of the laws otherwise in their jurisdiction and (2) when the officers are asked to provide temporary assistance to another law enforcement agency in a matter within the jurisdiction of the other agency.

Local Motor Vehicle Regulation

Motor vehicle regulation is primarily a matter of state law. Some local governments, however, have recently sought legislative permission to create special local regulations. Examples of such bills include those concerning installation of cameras to detect stoplight violations and others seeking to regulate the operation of golf carts, utility vehicles, and the like. Although the legislature took up no new "red light camera" bills this session, it did enact several new laws granting local governments the authority to regulate some types of nontraditional vehicles.

As a matter of state law, golf carts are motor vehicles, as are the all-terrain vehicles and "four-wheelers" that meet the definition of utility vehicles. [The definition of *utility vehicle* in G.S. 20-4.01(48c) includes vehicles designed for maintenance, security, recreational, or landscaping purposes but not those designed to be used primarily on streets and highways.] Thus golf carts and all-terrain vehicles would be subject to the same rules as other motor vehicles, rules requiring vehicle registration, maintenance of liability insurance, certain types of equipment, and so forth.

In 2001 the General Assembly prohibited the DMV from registering golf carts and utility vehicles. Because of this prohibition, these vehicles may not be legally operated on any public street or highway, subject to narrow exemptions allowing the vehicles to cross roads (such as when a golf cart crosses a road to get to the next hole on the golf course). In many resort communities, however, golf carts and utility vehicles are used extensively for transportation within the communities. In the past such communities have sought permission from the legislature to regulate the use of these vehicles and to allow them to travel on community roads.

The 2004 General Assembly enacted three bills addressing these concerns. S.L. 2004-58 (H 1462) authorizes the town of Seven Devils to regulate golf carts in the manner described above. S.L. 2004-108 (H 1422) authorizes law enforcement officers in Mint Hill and Kings Mountain to operate all-terrain vehicles on streets in those towns in areas where the speed limit is 35 miles per hour or less.

Finally, S.L. 2004-38 (H 1363) allows the Lake Toxaway Property Owners' Association to regulate the use of golf carts in its community. The authority granted by this bill is somewhat different from that granted by S.L. 2004-58, however, and reflects another trend affecting resort communities. Many of these communities are not in incorporated towns or cities, and the roads within them are private and are typically maintained and controlled by a property owners' association. Nonetheless, the communities want to regulate to some degree the vehicles driven by property owners and their guests. S.L. 2004-38 in effect makes all the private roads controlled by the Lake Toxaway Property Owners' Association subject to the G.S. 20 provisions relating to the use of highways and the operation of vehicles on those highways, with one exception—the rules prohibiting the operation of golf carts on streets are not applicable to these private Lake Toxaway roads. Before the association may change any speed limits now in effect on those roads, the Transylvania County Board of Commissioners must approve the change.

James C. Drennan

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Public Employment

The 2004 session of the General Assembly saw few significant changes to North Carolina law affecting state and local government employees. State employees and retirees received modest salary and income allowance increases. Local government retirees, however, did not receive a cost-of-living increase in their retirement income allowances.

State Employees

Salary and Retirement Benefit Increases

Pursuant to the appropriations act, S.L. 2004-124 (H 1414), the Governor's annual salary will increase 2.5 percent to $121,391, while the annual salaries of the Council of State members will increase to $107,136. The salaries of appointed state department heads will increase to $104,672. Other executive branch and judicial branch officials also received salary increases.

The General Assembly increased by the greater of $1,000 or 2.5 percent the annual salaries of most other state employees, including employees of the judicial branch, General Assembly, University of North Carolina, and Community College System, as well as all SPA state employees. In addition the appropriations act provided a 1.7 percent cost-of-living retirement allowance increase for retirees in the Teachers' and State Employees' Retirement System (TSERS), the Judicial Retirement System (JRS), and the Legislative Retirement System (LRS). It also adjusted the employer contribution rates for the various state retirement programs.

S.L. 2004-147 (H 1624) amended G.S. 135-5(1) to raise the contributory death benefit for retired members of TSERS, JRS, and LRS from $6,000 to $9,000 for retired members dying on or after July 1, 2004.

State Disability Income Plan

S.L. 2004-78 (H 354) amends G.S. 135-101(6), 135-105(a), and 135-106(a) to provide that state employees become eligible for Disability Income Plan of North Carolina benefits when they are unable to perform the duties of their own jobs or those of any occupation or employment commensurate with the education, training, or experience of other employees living within the same commuting distance (or, for school personnel, the same school administrative unit) in which the employee can be expected to earn not less than 65 percent of his or her pre-disability earnings.

This reverses the 2003 amendment to the Disability Income Plan, which had required participating employees to take any available state job if they were no longer able to perform their usual occupations.

Local Government Retirement

Although the General Assembly did not give Local Government Retirement System (LGERS) members a cost-of-living retirement allowance increase this year, it did increase benefits for local government employees and retirees in other ways. First, S.L. 2004-137 (S 1312) amends G.S. 143B-426.24 to allow local government employees, as well as employees of community colleges, to participate in any "457" deferred compensation plans offered by the state. S.L. 2004-135 (H 1513) increases the maximum death benefit payable from LGERS to be equivalent to an employee's annual salary, but not less than $25,000 nor more than $50,000. Finally, S.L. 2004-147 amends G.S. 135-5(1) to raise the contributory death benefit for retired members of LGERS from $6,000 to $9,000 for retired members dying on or after July 1, 2004.

S.L. 2004-124 (the appropriations act) increases the monthly benefit for members of the Firemen's and Rescue Squad Workers' Pension Fund to $161 per month. It also amends G.S. 143-166.2(d) to clarify that the Law Enforcement Officers', Firemen's, Rescue Squad Workers', and Civil Air Patrol Members' Death Benefits Act includes within its coverage North Carolina Department of Correction probation and parole officers. S.L. 2004-199 (S 1225), the technical corrections act, amends Article 85 of G.S. Chapter 58 to clarify that the North Carolina Firemen's Association may include county fire marshals and that the North Carolina Firemen's Relief Fund may also benefit county fire marshals and their survivors.

Local Government Employees Health Insurance

S.L. 2004-124 amends the eligibility requirements for the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan for the period July 1, 2004, through June 30, 2006, to allow Bladen, Cherokee, Rutherford, Washington, and Wilkes counties to participate in the State Health Plan. Employees of these counties would participate in the plan on the same basis as state employees.

State and Local Government Employee Study Commissions

This year's studies act, S.L. 2004-161 (S 1152), authorizes the Legislative Research Commission to study pay equity, job sharing, state reemployment of retirees, postretirement earnings of state employees, and optional graduated twenty-five-year retirement plans for local governments. The commission must report its findings and any recommended legislation to the 2005 session of the General Assembly. The studies act also directs the Speaker of the House of Representatives and the President Pro Tempore of the Senate to designate an appropriate committee to study the state personnel statutes. The commission is to report its findings and any recommended legislation to the 2006 session of the 2005 General Assembly.

Other Employment Legislation

Civil No-Contact Orders

S.L. 2004-165 (S 916) adds new Article 23 to G.S. Chapter 95. Pursuant to new Article 23, an employer may file an action for a civil no-contact order in district court on behalf of an employee

who has suffered from unlawful conduct at the employer's workplace by an outside individual. Although the employer does not need the affected employee's permission to seek the no-contact order, the employer must consult with the employee to determine whether the employee's participation in the process may raise safety issues. An employer may not discipline an employee who refuses to cooperate with the request for the no-contact order. An employer also may not take adverse action against an employee who of his or her own accord takes a reasonable amount of time off from work to obtain a civil no-contact order.

Workplace Discrimination against Domestic Violence Victims

S.L. 2004-186 adds new Section 50B-5.5 to the General Statutes prohibiting employers from taking any adverse employment action against an employee because the employee took a reasonable amount of time off from work while seeking judicial relief from domestic violence. An employee taking time off to seek such relief must follow the employer's usual time-off policies except when an emergency prevents the employee from doing so.

Public School Employees

The General Assembly's 2004 legislation affecting public school employees is discussed in Chapter 8, "Elementary and Secondary Education."

Diane M. Juffras

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Purchasing and Contracting

The legislature did not make any significant changes in the public purchasing and contracting laws this session. Most of the legislation described below makes corrections and conforming changes relating to local school purchasing requirements. These requirements were changed significantly last session,[1] and some technical corrections included in a bill that failed last session were enacted this year. This summary does not include the purely technical changes but instead focuses on a few substantive corrections that will be of interest to local school officials. Several minor changes affecting public purchasing and contracting more broadly are included as well and will be of interest to local and state government purchasing officials.

As a result of a highly publicized misuse of funds by a nonprofit organization that received funds from the state, the legislature established some significant new reporting requirements for non-state agencies and legislators connected to nonprofit organizations that may be affected by legislative actions. These new provisions are summarized in this chapter.

School Purchasing Clarifications

Published Materials Exception

Until last year state law required local school administrative units to purchase supplies, materials, and equipment through the state Division of Purchase and Contract under the provisions applicable to state agency purchases handled by that division. The statutes governing these purchase procedures are generally contained in Article 3 of Chapter 143 of the North Carolina General Statutes. Last year the law was amended so that local school administrative units would be subject to the same purchasing laws as are other units of local government. These laws are generally contained in Article 8 of Chapter 143. One exemption, however, contained in Article 3 but not in Article 8, involved contracts regularly entered into by local school administrative units. The Article 3 exemption, included in G.S. 143-56, provided that bidding is not required for purchases of "published books, manuscripts, maps, pamphlets and periodicals." Effective April 1,

1. For a summary of these changes, see Frayda S. Bluestein, "Purchasing and Contracting," in *North Carolina Legislation 2003*, ed. William A. Campbell, 161–67.

2004, this exemption has been incorporated into G.S. 115C-522(a), which now provides that the Article 8 procedures are not mandatory for this category of purchases. [S.L. 2004-199 (S 1225), sec. 29.]

Beverage Contracts

Another correction of a provision enacted last year makes a clarification regarding beverage contracts entered into by local school administrative units. In 2003 the legislature enacted G.S. 143-64, which requires competitive bidding of all contracts involving the sale of juice or bottled water. In Section 38 of S.L. 2004-199, the legislature added language to that statute clarifying that contracts for the sale of bottled water must be bid separately from contracts for the sale of juice, and that each of these contracts must be bid separately from any other contract, including contracts for other beverages or vending machine services.

State Contract Preferences

Public officials at the state and local levels are very concerned about economic development and strive to promote, whenever possible, the use of local business. An existing law, G.S. 143-57, has required the State Purchasing Officer to make multiple awards on state requirements furniture contracts to at least three "qualified" vendors. S.L. 2004-115 (H 964) amends this law to specify that bids must be solicited on a historical weighted average of specific contract items. In addition, the statute now defines *qualified vendor* as one (1) whose products conform to the term contract specifications, (2) who is listed on the state's qualified products list, and (3) who submits a responsive bid. Finally, the law now provides that if the three qualified vendors do not include vendors who offer furniture manufactured or produced in North Carolina or who are incorporated in the state, the State Purchasing Officer must expand the number of contracts to include such vendors. The statute provides, however, that the State Purchasing Officer is not required to exceed a total of six qualified vendors.

The legislature also enacted a mild preference in contracting for products made in the United States. An existing statute, G.S. 143-59(a), establishes a preference for goods manufactured or produced in North Carolina or furnished by or through North Carolina citizens. However, this "preference" does not actually authorize the award of a contract to an in-state bidder who does not submit the lowest responsible bid. The statue says that in giving a preference, "no sacrifice or loss in price or quality shall be permitted." There is no statute that authorizes either state agencies or local governments to award a contract to a local contractor who is not the lowest responsible bidder. A new statute, G.S. 143-59.1A, is titled Preference Given to Products Made in United States, although it too falls short of actually authorizing a preference over a low bidder. Under the new law, which applies only to the state and not to local governments, if the state is unable to give preference to a North Carolina bidder under G.S. 143-59(a), it must give preference to products or services manufactured or produced in the United States. [S.L. 2004-124 (H 1414), sec. 6.1.] The statute qualifies this directive, however, by providing that the preference may be given only to the extent permitted by state law, federal law, or any federal treaty and that no sacrifice or loss in price or quality is permitted. Both statutes also provide that preference in all cases must be given to surplus products or articles produced and manufactured by other state departments, institutions, or agencies.

Construction Contracting Changes

Clarification of Surety Bonding Requirements

For most major public construction projects, public agencies must secure bid, performance, and payment bonds from surety companies legally authorized to do business in North Carolina. (G.S. 44A-26, 143-129.) Last year, the legislature enacted G.S. 58-31-66 to restrict the ability of

public agencies to require a contractor, bidder, or proposer to procure a bid, performance, or payment bond from a particular surety, agent, producer, or broker. As originally enacted, subsection (b) of the new statute provided that public agencies were not prohibited from approving the form, sufficiency, or manner of bond execution, nor were they prohibited from disapproving bonds on a reasonable and nondiscriminatory basis because of a surety's financial condition. Subsection (c) provided that a violation of the statute would invalidate the construction contract.

This session, in Section 74(b) of S.L. 2004-203 (H 281), the legislature amended G.S. 58-31-66 by deleting subsections (b) and (c), leaving in place only the restriction on requiring a particular bonding company. These changes were effective October 1, 2004. It is unclear how a court would interpret the effect of the repeal, but a safe interpretation would be that there is no authority for public agencies to reject a bond for any of the reasons included in the repealed language.

Local Modifications

Each session local delegations receive requests from local governments for local modifications of certain general laws. For example, local governments sometimes request limited relief from construction bidding requirements in order to facilitate construction of particular projects. As is typical, several of these requests were approved this year. The city of Newton and Catawba County each received a limited expansion of the authority to use their own forces for construction of a park. [S.L. 2004-35 (H 1670).] The city of Greenville obtained a limited exception to the minority participation requirements in G.S. 143-128.2 and -128.3 for the construction of parking structures in the central business district. [S.L. 2004-10 (H 1426).] Yancey County obtained an exemption from the bidding procedures in Article 8 of Chapter 143 for a public-private project to develop a consolidated health care facility. [S.L. 2004-7 (H 1474).]

State Funds to Non-state Entities: New Reporting and Disclosure Requirements

A highly publicized misuse of state funds by a nonprofit organization with ties to a legislator and the ensuing investigation of these events prompted several legislative changes dealing with non-state entities that receive state funds and with legislators who have connections to nonprofit organizations. S.L. 2004-196 (S 1008) creates new reporting requirements for non-state entities that receive, use, or expend any state funds. Under new G.S. 143-6.2 non-state entities, including local governments, may use state funds only for the purposes for which the funds were appropriated. This limitation also applies to "flow through" funds that originate from the federal government. The new law requires the Office of State Budget and Management (OSBM) to adopt rules to promote and enforce accountability by grantees (defined to include those entities that receive grants as well as subgrantees, but excluding most local governments). The law also gives the State Auditor a role in auditing state grant funds and requires grantees and subgrantees to provide information to the auditor if requested. State agencies must submit to the auditor a list of all their grantees, and OSBM will report to the legislature on all grantees or subgrantees that fail to comply with the new requirements.

The legislature also made changes in the laws governing legislative ethics. The amended statutes will require legislators to include associations they have with nonprofit corporations or organizations as part of their ethical considerations under state law. Section 31 of S.L. 2004-199 amends provisions in Article 14, Part 1, of Chapter 120 to include associations with nonprofits in the definition of *economic interest*. This change will require legislators to consider these associations when determining whether to disqualify themselves from acting on particular matters under G.S. 120-88 and to include these associations in reporting their statements of interest as required under Part 2 of Article 14.

Frayda S. Bluestein

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Senior Citizens

The 2004 General Assembly enacted relatively little legislation directly affecting senior citizens. It did, however, increase state funding for several government programs for senior citizens, make several changes to the state's law regarding guardianship of incapacitated adults, establish a legislative commission to study the state's guardianship law, and increase the benefits for state government retirees. Additional legislation affecting senior citizens is discussed in Chapter 10, "Health"; Chapter 16, "Mental Health"; and Chapter 21, "Social Services."

Government Programs for Senior Citizens

Adult Day Services

Section 10.21 of S.L. 2004-124 (H 1414) requires the Department of Health and Human Services (DHHS) to contract with a national adult day services resource center to (1) provide training and consultation to adult day services providers and state and county adult day services consultants and (2) study the current method of reimbursement for adult day services and make recommendations regarding changes. A final report must be made to the Study Commission on Aging by January 1, 2005.

Medicaid PACE Pilot

S.L. 2004-124 requires DHHS to develop a pilot program to implement the Program for All-Inclusive Care for the Elderly (PACE), with one site in the southeastern part of the state and one in the west. The pilots must be designed to access federal Medicaid and Medicare dollars to provide acute and long-term care services for older patients through interdisciplinary teams. DHHS must report on the PACE pilot program by March 1, 2005.

Nursing Home for Veterans

S.L. 2004-124 provides $500,000 in start-up funding for the new state veterans' nursing home in Salisbury.

Senior Care and the Medicare Prescription Drug Program

Section 10.2B of S.L. 2004-124 allows DHHS to enroll senior citizens in the federal Medicare Prescription Drug Discount Program if they participate in the state's Senior Care Prescription Drug Assistance Program and have incomes that do not exceed 135 percent of the federal poverty level. DHHS must give individuals the opportunity to decline enrollment before it enrolls them in Medicare's discount drug program. S.L. 2004-124 also provides that the state's Senior Care Prescription Drug Assistance Program will be the payor of last resort for its participants.

State–County Special Assistance

Effective October 1, 2004, Section 10.21A of S.L. 2004-124 increases the maximum monthly rate for assistance for residents in adult care home facilities to $1,084. Counties must provide an additional $3 million per year to match state funding for this rate increase.

State and Federal Funding for Adult Services

S.L. 2004-124 partially restores a previous reduction in state funding for the Home and Community Care Block grant, increases state funding for adult day care and adult day health care services, provides additional funding for senior centers, and allocates funds from the federal Social Services Block Grant for the state Home and Community Care Block Grant, in-home services provided by county departments of social services, and adult day care services.

Guardianship

Appointment and Removal of Guardians for Incompetent Adults

Section 31 of S.L. 2004-203 (H 281) amends G.S. 35A-1213(b) to remove the restriction that a general guardian or guardian of the estate must be a North Carolina resident. The act requires a nonresident general guardian or guardian of the estate to post a bond, to submit to the jurisdiction of North Carolina courts in matters relating to the guardianship, and to appoint a resident agent for service of process. The act also amends G.S. 35A-1290(c) to allow the clerk of superior court to remove a guardian or take other appropriate action if the guardian is a nonresident and refuses or fails to obey any citation, notice, or process served on the guardian or the guardian's process agent.

The act amends G.S. 35A-1291 to allow the clerk of superior court to remove a guardian without a hearing if the clerk finds reasonable cause to believe that an emergency exists that threatens the ward's physical well-being or constitutes a risk of substantial injury to the ward's estate.

Compensation of Attorney-in-Fact for Incapacitated Adult

Effective January 1, 2005, Section 3 of S.L. 2004-139 (S 470) amends G.S. 32A-11(c) to provide that an attorney-in-fact for an incapacitated adult under a power of attorney is entitled to reasonable compensation for his or her services in an amount determined by the clerk of superior court considering the factors established in G.S. 32-54(b).

Guardian's Authority to Create Medicaid Qualifying Trusts

Section 15 of S.L. 2004-199 (S 1225) amends G.S. 35A-1251(23) to expand a guardian's authority to create a Medicaid qualifying trust for the benefit of an incompetent ward who meets the requirements of 42 U.S.C. § 1396p(d)(4).

Guardianship Study

S.L. 2004-161 (S 1152) creates the Legislative Commission on State Guardianship Laws to study guardianship laws and their relationship to powers of attorney, the right to a natural death, and other laws. The act directs the commission to study (1) whether guardianship should be a remedy of last resort, used only if less restrictive alternatives are insufficient; (2) the definition of incompetence; (3) whether the court should be required to make express findings regarding the extent of a person's incapacity; (4) legal rights that are lost or retained as the result of an adjudication of incompetence; (5) the proper role of attorneys and guardians ad litem in incompetency and guardianship proceedings; (6) legal procedures in guardianship proceedings; (7) the role of public human services agencies in providing guardianship services; (8) powers, duties, and liabilities of guardians; (9) public monitoring of guardianships; and (10) enactment of the Uniform Guardianship and Protective Proceedings Act.

The commission is composed of sixteen members: four members of the House of Representatives; four members of the Senate; the director of the Administrative Office of the Courts; the director of the Division of Aging; a county director of social services and a physician who specializes in geriatrics, both appointed by the President Pro Tempore of the Senate; a clerk of superior court, an attorney with experience in guardianships, and a local director for mental health, developmental disabilities, and substance abuse services, all appointed by the Speaker of the House; and a representative of the Governor's Advocacy Council for Persons with Disabilities. The act also provides that an ex officio, nonvoting commission member may be designated by each of the following: the North Carolina Bar Association, the Arc of North Carolina, the North Carolina Guardianship Association, Alzheimer's Association–Western Chapter, Alzheimer's Association–Eastern Chapter, Carolina Legal Assistance, Area Agencies on Aging, County Departments of Aging, and Friends of Residents in Long Term Care. The commission must make a final report by the convening of the 2006 session of the General Assembly.

Long-Term Care

Criminal Records Checks

Section 10.19D of S.L. 2004-124 amends state law to require the state Department of Justice to forward the results of national criminal history checks on persons seeking employment with long-term care facilities to the DHHS Division of Facility Services, which will provide the results of the criminal history check to the long-term care facility within five business days.

With respect to criminal records checks of persons seeking employment with an adult care home, S.L. 2004-124 amends G.S. 131D-40 to include within the definition of *relevant offense* any conviction or pending indictment for a crime under county, state, or federal law that bears upon an individual's fitness to have responsibility for the safety and well-being of aged or disabled persons.

Health Care Personnel Registry

The state's health care personnel registry includes the names of health care personnel who have abused or neglected persons who reside in a health care facility or receive home health or hospice services. Section 52 of S.L. 2004-203 amends G.S. 131E-56 to (1) provide that the registry must include a brief statement submitted by an individual disputing the finding entered against him or her and (2) in cases involving patient neglect, allow an individual to petition DHHS to remove his or her name from the registry if his or her personal and employment history does not reflect a pattern of abusive behavior or neglect, the neglect that was the basis of the finding involved a singular occurrence, and the petition is submitted after the expiration of a one-year period that began when the petitioner's name was added to the registry.

Long-Term Care Insurance Tax Credit

The General Assembly failed to enact legislation extending the state's income tax credit for long-term care insurance premiums. The previous credit expired for tax years beginning on or after January 1, 2004.

Studies

S.L. 2004-161 authorizes the Legislative Research Commission to study issues related to the care and safety of residents of residential care facilities.

S.L. 2004-161 also authorizes the North Carolina Study Commission on Aging to study (1) the feasibility of implementing a remediation program for long-term care facilities similar to Michigan's Collaborative Remediation Project and (2) issues related to mentally ill residents of long-term care facilities.

S.L. 2004-124 requires DHHS to study issues concerning the care of mentally ill residents of long-term care facilities and to report its findings to the North Carolina Study Commission on Aging by October 1, 2005.

S.L. 2004-144 (S 1148) requires DHHS to study the mission of geriatric mental health specialty teams to assist long-term care facilities in serving mentally ill residents of those facilities and to standardize criteria and track expenditures related to the care of mentally ill residents of these facilities. DHHS must report its findings and actions to the North Carolina Study Commission on Aging and the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services.

State and Local Government Retirement

Cost-of-Living Increases for State Government Retirees

S.L. 2004-124 provides for a 1.7 percent cost-of-living increase for most state government retirees.

Reemployment of Retired Teachers

Current state law allows retired teachers to accept reemployment as classroom teachers without losing their eligibility for state retirement benefits. Section 31.18A of S.L. 2004-124 extends these provisions to June 30, 2005.

Retiree Health Benefit Fund

Section 31.20 of S.L. 2004-124 establishes the Retiree Health Benefit Fund and requires that it be administered by the board of trustees of the Teachers' and State Employees' Retirement System (TSERS) to provide health benefits to retired and disabled state government employees. Employer contributions to the fund are irrevocable.

Retirees' Contributory Death Benefit

With respect to retired members of TSERS, the Local Government Employees' Retirement System, the Legislative Retirement System, and the Consolidated Judicial Retirement System who die on or after July 1, 2004, and who have made voluntary contributions for death benefits for at least twenty-four months, S.L. 2004-147 (H 1624) increases to $9,000 the death benefit payable to the deceased retiree's surviving spouse or estate.

Studies

S.L. 2004-161 authorizes the Legislative Research Commission to study issues related to the reemployment of government retirees, postretirement earnings of retirees, an optional graduated twenty-five-year retirement plan for local government employees, and meeting the Internal Revenue Service's request for a defined retirement age.

Section 31.18B of S.L. 2004-124 directs the Administrative Office of the Courts to study the mandatory retirement age for judges and make recommendations regarding whether the state's current policy should be changed. The report is due to the General Assembly by February 1, 2005.

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Social Services

During its 2004 session, the General Assembly increased state funding for child protective services, for foster care and adoption assistance, and for health insurance for uninsured children. The General Assembly also authorized studies regarding county funding for the state Medicaid program, service delivery to the state's Hispanic community, and state-local relations with respect to the provision of government services. Other legislation related to social services is discussed in Chapter 3, "Children, Families, and Juvenile Law," and Chapter 20, "Senior Citizens."

Child Welfare

Child Welfare Funding

S.L. 2004-124 (H 1414), the appropriations act, provides an additional $4 million to the state Division of Social Services (DSS) for county departments of social services to hire additional child protective services staff to reduce caseloads. The act also provides $750,000 in recurring funding for training needs and program support costs of county departments of social services that are participating in the multiple response system pilot program.

Section 5.1 of S.L. 2004-124 makes the following allocations of federal Temporary Assistance for Needy Families (TANF) Block Grant funds for child welfare services:

- $12,452,391 to county social services departments for hiring or contracting for child protective services staff
- $2,249,642 to expand after school programs and services for at-risk children and $500,000 to expand after school programs for at-risk children attending middle school
- $2,550,000 for various DSS child welfare training projects
- $838,000 for the purchase of services at maternity homes throughout the state
- $3 million for the Special Children Adoption Fund (partially offset by a $1 million reduction in state funding)
- $2,717,298 to implement the component of N.C. Fast that concerns the creation and administration of a statewide automated child welfare information system

Foster Care and Adoption Assistance

S.L. 2004-124 increases the maximum rates, per child per month, for state participation in Foster Care and Adoption Assistance payments as follows:

- Children from birth to age 5: from $365 to $390
- Children ages 6 through 12: from $415 to $440
- Children ages 13 through 18: from $465 to $490

The act also requires DSS to monitor expenditures in the Special Children's Adoption Fund and redistribute any unspent moneys to ensure that funds that historically have reverted are used for the intended purposes. DSS must report on these activities by December 1, 2004, and June 30, 2005.

Medicaid and N.C. Health Choice

Community Alternatives Program

Section 10.9 of S.L. 2004-124 requires the Department of Health and Human Services (DHHS) to ensure that budgeted expenditures for the Medicaid Community Alternatives Program (CAP) are not limited by the nonallocation of or delays in filling CAP slots, and stipulates that CAP services for disabled adults be provided, within existing county allocations and subject to availability, to any eligible person who entered a nursing facility on or before June 1, 2004.

Community Care Network Organizations

Some Community Care network organizations are designated by DHHS to be responsible for coordinating the health care of Medicaid recipients in particular counties. Section 41 of S.L. 2004-203 (H 281) enacts new G.S. 108A-25(d), providing that, for the sole purpose of grants-in-aid, public assistance grant programs, and other funding programs, these organizations are deemed to be public agencies that are local units of government.

Financial Eligibility of Pregnant Minors

Section 10.4 of S.L. 2004-124 deletes a statutory provision that required the income of a minor's parents to be a factor in determining the income eligibility of a pregnant minor living at home.

Medicaid Services

S.L. 2004-124 eliminates Medicaid funding for weight loss and weight gain drugs, provides funding to continue the statewide expansion of the Community Care of N.C. program (formerly Carolina ACCESS), expands the scope of mental health services provided to Medicaid recipients, and expands Medicaid coverage for medically necessary prosthetics and orthotics for adults over age twenty-one.

S.L. 2004-124 requires DHHS to develop a pilot program to implement the Program for All-Inclusive Care for the Elderly (PACE), with one site in the southeastern part of the state and one in the west. The pilots must be designed to access federal Medicaid and Medicare dollars for the provision of acute and long-term care services for older patients through interdisciplinary teams. The department must report on the PACE pilot program by March 1, 2005.

S.L. 2004-124 also requires DHHS to establish two or more pilot programs to test new approaches to managing access to and utilization of health care services by Medicaid recipients. At least two pilots must involve contracting with a physician-owned and -managed network that has improved the cost-effectiveness of Medicaid services in at least one other state. DHHS must report on the pilots by February 1, 2005.

State Funding for N.C. Health Choice

S.L. 2004-124 increases state funding for the state's Health Choice program for uninsured children by $6.6 million.

Studies

County and state Medicaid funding. S.L. 2004-161 (S 1152) authorizes the Legislative Research Commission to study the feasibility of eliminating county financial participation in the Medicaid program. The commission may consider alternative funding methods to ensure that the impact on state funds is revenue neutral when calculated on a statewide basis and also may consider retaining the county contribution toward administrative costs. Any recommendations to the General Assembly must include a fiscal analysis of the estimated impact on state revenue and Medicaid expenses.

Institutional bias. S.L. 2004-124 requires DHHS to contract with an independent entity to study whether the state's Medicaid program has a bias favoring support for individuals in institutional settings over support for individuals living at home and, if a bias is found, to recommend ways to alleviate it. The department must report the results of the study to the North Carolina Study Commission on Aging by January 2005.

Medicaid reform. S.L. 2004-161 expands the membership of the state's Blue Ribbon Commission on Medicaid Reform.

Transfer of Property to Qualify for Medicaid

G.S. 108A-58 limits the Medicaid eligibility of individuals who transfer property to qualify for Medicaid. Section 10.6 of S.L. 2004-124 repeals G.S. 108A-58(i), which had limited applicability of the Medicaid transfer of assets sanction to transfers made before July 1, 1988.

Temporary Assistance for Needy Families (TANF)

Domestic Violence Services

Section 5.1 of S.L. 2004-124 allocates $1.2 million in TANF Block Grant funds to DHHS for fiscal year 2004–2005 to provide domestic violence services to Work First recipients. The funds must be used for counseling and other direct services, not to establish new shelters or facilitate lobbying. The act directs each county department of social services and the appropriate local domestic violence shelter program to jointly develop a plan for using the funds. The plan, including the services to be provided and the methods of delivery, must be submitted to DSS by December 1, 2004. The act sets out the formula by which the division is to allocate the funds. DHHS must report to the General Assembly on the funds' use by March 1, 2005.

TANF Block Grant Allocations

Section 5.1 of S.L. 2004-124 also makes the following allocations of TANF Block Grant funds for fiscal year 2004–2005:

- $2,749,642 to support and expand the Support Our Students Program in the Department of Juvenile Justice and Delinquency Prevention, focusing on low-income communities in unserved areas
- $1 million to DHHS for grants to Boys and Girls Clubs
- $180,000 to DHHS for Individual Development Accounts for TANF-eligible individuals

TANF State Plan

Section 10.19A of S.L. 2004-124 approves the TANF State Plan with one change, providing that the pay-after-performance benefit delivery method for two-parent families will be eliminated only if the federal two-parent work participation rate is eliminated as well.

Other Legislation

Child Support Liens on Bank Accounts

Section 42 of S.L. 2004-203 amends G.S. 110-139.2(b1) to provide that notice to a financial institution of imposition of a lien for child support arrears may be served on the institution pursuant to Rule 4 of the Rules of Civil Procedure or in any other manner to which the institution has agreed in writing before the notice is sent.

Criminal Record Checks

Section 10.1 of S.L. 2004-124 directs DHHS, beginning January 1, 2005, to centralize all department activities relating to the coordination and processing of legally required criminal record checks.

State–Local Relations Study

S.L. 2004-161 authorizes the Legislative Research Commission to study the relationship between the state and local governments with respect to the provision of services. The study must:

1. consider mandates the state has placed on local governments regarding the provision of services and whether each mandate is a result of state law, federal law, or a combination of state and federal law;
2. consider the funding sources for local governments;
3. compare the state–local relationship in North Carolina with those of other states, including a comparison of the percentage of costs of services borne by the state and that borne by other states;
4. compare local governments in the state as regards the burden of mandated programs on local budgets; and
5. compare the combined state–local tax burden on individuals and businesses with those of other states.

Study of Service Delivery to the Hispanic Community

S.L. 2004-161 authorizes the Legislative Research Commission to study state and local policies regarding the availability and delivery of government services to the state's Hispanic population, the issues governmental agencies confront in delivering those services effectively, and the issues members of the Hispanic community encounter in obtaining services. If the commission undertakes this study, it must focus particularly on services in the areas of education, health, and public safety. As part of its study, the commission may consider ways in which the delivery and receipt of government services within the state's Hispanic community are complicated by (1) cultural differences; (2) language barriers; (3) difficulties in acquiring personal identification documents that are often required to obtain government services; (4) difficulties in obtaining drivers' licenses, occupational licenses, professional licenses, and other types of licenses required to qualify for governmental services or to do business in the state; (5) federal immigration laws,

failure to comply with those laws, and fear of the discovery of noncompliance; (6) the increasing economic, personnel, and time demands placed on state and local agencies in responding to the growing needs for governmental services; and (7) any other relevant matters. The study should identify issues that are best addressed at the local, state, and federal levels, respectively.

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State Government

The 2004 legislature made a few relatively minor changes in the Administrative Procedures Act. S.L. 2004-156 (H 1449) requires that letters asking for legislative review of a rule be received by the Rules Review Commission (RRC) by the day following RRC approval of the rule, authorizes agencies issuing rules packages to revise the effective date of rules so that all parts of the package move through later steps of the rulemaking process together, fixes a glitch in section ordering created when two 2003 acts amended the same section, and restores language accidentally dropped by one of those bills.

Section 22A of the appropriations act, S.L. 2004-124 (H 1414), places RRC staff under the supervision of the Office of Administrative Hearings.

Richard Whisnant

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State Taxation

The 2004 session of the General Assembly made numerous miscellaneous changes to the state tax laws.

Tax Administration

Flat Fee for Debt Collection

S.L. 2004-21 (H 1497), effective January 1, 2005, modifies the Setoff Debt Collection Act by imposing a flat $5.00 collection assistance fee on each debt collected through setoff. Under the Setoff Debt Collection Act, if an individual owes money to a state or local agency, the Department of Revenue sends the individual's income tax refund to that agency in payment of the debt, rather than to the individual. Thus, the debt the individual owes to the agency is set off against the individual's income tax refund.

The Department of Revenue recovers the costs of running the program by charging a percentage of each debt collected as a collection assistance fee. The fee is added to the debt and paid by the debtor from the refund. Before S.L. 2004-21 went into effect, the Department of Revenue calculated its actual costs for the previous year and adjusted the fee amount to reflect those costs.

The change to a flat fee of $5.00 was recommended to the Revenue Laws Study Committee by the Department of Revenue. According to the department, the process of determining actual cost is tedious and quite cumbersome because many different areas of the department are involved. Thus, the "actual cost" is an estimate at best. The collection assistance fee determined by the Department of Revenue for the four latest calendar years has been less than $5.00, and collection costs are not expected to grow.

Internal Revenue Code Update

North Carolina's tax law tracks many provisions of the federal Internal Revenue Code by reference to the Code.[1] The General Assembly determines each year whether to update its reference to the

1. North Carolina first began referencing the Internal Revenue Code in 1967, the year it changed its taxation of corporate income to a percentage of federal taxable income.

Internal Revenue Code.[2] Updating the Internal Revenue Code reference makes recent amendments to the Code applicable to the state to the extent that state law tracks federal law. The General Assembly's decision on whether to conform to federal changes is based on the fiscal, practical, and policy implications of the federal changes and is normally enacted in the following year, rather than in the same year the federal changes are made. Under North Carolina law prior to the enactment of S.L. 2004-110 (H 1430), the reference date to the Code was June 1, 2003. Part 1 of S.L. 2004-110 changes the reference date to May 1, 2004. Changing the reference date to May 1, 2004, incorporates federal changes made in the following three acts: the Military Family Tax Relief Act of 2003 (Pub. L. No. 108-121); the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. No. 108-173); and the Pension Funding Equity Act of 2004 (Pub. L. No. 108-218).

Military Family Tax Relief Act of 2003 (Pub. L. No. 108-121). The Military Family Tax Relief Act of 2003 (MFTRA) made numerous changes to federal tax laws. These changes include the following:[3]

- Adoption of special rules regarding the exclusion of gain on sale of a principal residence by a member of the uniformed services or the Foreign Service, effective for sales occurring on or after May 6, 1997[4]
- Exclusion from gross income of certain death gratuity payments
- Exclusion from gross income of amounts received under the Department of Defense Homeowners Assistance Program
- Expansion of combat zone filing rules to contingency operations
- Modification of veterans' organizations' membership requirements for tax-exempt status
- Exclusion from gross income of Dependent Care Assistance Program payments to members of the uniformed services
- Suspension of tax-exempt status of terrorist organizations
- Above-the-line deduction of overnight travel expenses of National Guard and Reserve members
- Extension of certain tax relief provisions to astronauts

Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. No. 108-173). The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 contained one significant tax provision. As part of that law, Congress created Health Savings Accounts (HSAs). The federal legislation allows a person to accumulate funds on a tax-preferred basis to pay for certain medical expenses. An employer, an eligible individual, or both may make contributions to the account. The earnings in the account accumulate tax free. Employer contributions to an HSA are excludable from gross income, and contributions by an eligible individual are deductible in computing adjusted gross income.

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2. The North Carolina Constitution imposes an obstacle to a statute that automatically adopts any changes in federal tax law. Article V, Section 2(1) of the constitution provides in pertinent part that the "power of taxation . . . shall never be surrendered, suspended, or contracted away." Relying on this provision, the North Carolina court decisions on delegation of legislative power to administrative agencies, and an analysis of the few federal cases on this issue, the Attorney General's Office concluded in a memorandum issued in 1977 to the Director of the Tax Research Division of the Department of Revenue that a "statute which adopts by reference future amendments to the Internal Revenue Code would . . . be invalidated as an unconstitutional delegation of legislative power."

3. A more detailed analysis of these provisions may be obtained from *Technical Explanation of H.R. 3365, The "Military Family Tax Relief Act of 2003," as Passed by the House of Representatives and the Senate*, Joint Committee on Taxation, November 7, 2003, JCX-99-03.

4. The federal legislation provided a one-year period for taxpayers to file an amended return that would otherwise have been barred by the statute of limitations. That one-year period will end on November 11, 2004. This act allows a taxpayer an exception to the state statute of limitations as long as the taxpayer files the claim by the same date, November 11, 2004.

Distributions from an HSA for medical expenses are excludable from income, with the exception of amounts distributed to pay most health insurance premiums. However, tax-free distributions from an HSA may be used to pay the following health insurance premiums: retiree health insurance premiums for individuals who have reached Medicare eligibility; premiums for COBRA coverage; premiums for qualified long-term care insurance contracts; and premiums for a health plan during a period in which an individual is receiving unemployment. Distributions from an HSA for nonmedical expenses are includable in gross income.

Pension Funding Equity Act of 2004 (Pub. L. No. 108-218). The Pension Funding Equity Act of 2004, signed by the President on April 10, 2004, made changes to the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA). The federal legislation allows pension plan sponsors across the board, as well as those in specifically targeted industries, to lower the amount of both their pension contributions and the premiums paid to the Pension Benefit Guaranty Corporation (PBGC). The PBGC is the government agency that insures certain underfunded benefits in defined benefit plans. Underfunded single employer defined benefit plans—those plans that do not have sufficient assets to pay benefits if the plan were to terminate—pose the greatest risk to the PBGC. Sponsors of plans that are considered underfunded must make contributions to their plans in addition to paying variable-rate premiums to the PBGC; premiums are based on the amount of underfunding. Pension plan benefits promised to employees remain the same.

By lowering the amount of required payments to pension plans and to the PBGC, the federal legislation could result in higher taxable income for the affected companies. The legislation also provides temporary relief for many pension plans, which could reduce the increase in some taxpayers' taxable income.

Sales and Use Taxes

Notice Period for Refunds

Under the Streamlined Sales and Use Tax Agreement, purchasers seeking a refund of over-collected sales or use taxes must give the seller written notice and allow the seller sixty days in which to respond before bringing a cause of action against the seller. S.L. 2004-22 (H 1448) brings North Carolina law into conformity with this requirement.

Earlier in 2004, the Department of Revenue adopted this provision as part of a technical bulletin. However, retailers expressed a preference for having the provision codified in the statutes. Therefore, the act codifies the department's policy regarding refund procedures for over-collected sales and use tax.

Major Industrial Facility Sales Tax Refund

Part 4 of S.L. 2003-435 creates an annual refund of state and local sales taxes paid on construction materials and fixtures for facilities that involve the investment of more than $100 million by the taxpayer and are primarily used either for bioprocessing or for pharmaceutical and medicine manufacturing and the distribution of pharmaceuticals and medicines. The taxpayer must apply for the sales tax refund within six months after the end of the state's fiscal year. The refund is effective for sales taxes paid on or after January 1, 2004. If, after obtaining a refund, the taxpayer does not end up investing the required amount, the taxpayer forfeits the refund.

Part 5 of S.L. 2004-110 amends the sales tax refund for major industrial facilities enacted by S.L. 2003-435 by clarifying that the sales tax refund is allowed only for materials and fixtures purchased during the initial construction of the facility, and not for purchases made for subsequent repairs, renovation, or equipment replacement.

Section 32B.1 of S.L. 2004-124 (H 1414) expands the refund in three ways. First, if the facility is located in an enterprise tier one, two, or three area, a taxpayer is eligible for the refund if the taxpayer will invest at least $50 million in the facility (rather than $100 million as was

required under the 2003 law). This change is effective for sales occurring on or after January 1, 2004. Second, the act expands the list of eligible industries to include aircraft manufacturing, computer manufacturing, motor vehicle manufacturing, and semiconductor manufacturing, effective July 1, 2004. This change will sunset effective July 1, 2009. Third, the act makes clarifying changes regarding what items are eligible for the sales tax refund, effective January 1, 2004.

Sales Tax Exemptions

Part 32B of S.L. 2004-124 contains numerous sales and use tax exemptions. It exempts the following things from the sales and use tax, effective October 1, 2004.

- Tangible personal property that is sold to an interstate air business and becomes a component part of or is dispensed as a lubricant into commercial aircraft during maintenance, repair, or overhaul. This exemption supplements an existing sales tax exemption for sales of aircraft lubricants, aircraft repair parts, and aircraft accessories to an interstate air courier or a passenger air carrier for use at the courier's or carrier's hub. The new exemption is broader in that it (1) eliminates the requirement that the items be for use at a hub, (2) allows the exemption for sales to an interstate freight carrier, and (3) expands the types of property that are exempt. The new exemption is narrower in that it is limited to items related to commercial aircraft, which are large aircraft regularly used for carrying—for compensation—passengers, freight, or packages and letters.
- Plastic mulch and plant bed covers that are sold to a farmer for agricultural purposes.
- Delivery charges for delivery of direct mail if those charges are separately stated. Delivery charges, including postage, are taxable in North Carolina.[5] "Delivery charges" are those charges imposed by the retailer for preparation and delivery of personal property or services to a location designated by the consumer. The exemption is not required by the Streamlined Sales and Use Tax Agreement for compliance but is a permissible exemption. Before 2002, delivery charges were not taxable for in-state transactions subject to sales tax where the title to the property passed at the point of origin. Under the streamlined agreement, all delivery charges are included in the sales price of an item and therefore subject to tax. In order to conform to the agreement, the General Assembly removed the sales tax exemption for delivery charges on in-state transactions, effective January 1, 2002.
- Sales to a professional land surveyor of tangible personal property on which custom aerial data is stored in digital form or is depicted in graphic form.

Section 32B.4 of S.L. 2004-124 exempts certain free-distribution periodicals from sales tax, effective July 1, 2005. To qualify for the exemption, the periodical must be free, published at recurring intervals monthly or more frequently, and distributed in any manner other than by mail.

Under current law, supplies (paper, ink, and other tangible personal property) sold for free-distribution publications are subject to sales and use tax. Before October 1, 1999, a sales tax exemption was given for sales of paper, ink, and other tangible personal property to commercial printers and publishers for use as component parts in free-distribution publications that contained advertising of a general nature. The exemption applied to general shoppers' guides but not to more specialized publications, such as real estate guides, because the statute specifically required that the free-distribution publication contain advertising of a general nature. The exemption was repealed because it was believed to be unconstitutional. The First Amendment of the United States Constitution generally does not allow a state to discriminate between publications based on content. A 1987 U.S. Supreme Court decision held that a similar tax provision was unconstitutional.[6]

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5. At least one state supreme court has found that the United States Constitution prohibits the taxation of pass-through postage charges on catalogs and fliers mailed by a retailer. H.J. Wilson Co. Inc. v. State Tax Comm'n, 737 So.2d 981 (Miss. 1998). The court held that postage is an obligation of the federal government and that the state is constitutionally prohibited from taxing postage charges.

6. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

Sales Tax on Electricity Used by Manufacturers

Generally, electricity that is sold to a manufacturer for use at a manufacturing facility and is separately metered or measured is subject to the sales and use tax at a rate of 2.83 percent. Most other sales of electricity are taxed at the rate of 3 percent. In 2001, the General Assembly reduced to 0.17 percent the sales tax rate on electricity sold to manufacturers that use more than 900,000 megawatt-hours of electricity annually, effective January 1, 2002.[7] As part of the 2001 legislation, the General Assembly also established a rate schedule that would reduce the sales tax on electricity sold to manufacturers that use more than 5,000 but less than 900,000 megawatt-hours annually, effective July 1, 2005.[8]

Part 6 of S.L. 2004-110 repeals the 2001 legislation, effective October 1, 2004. The sales tax rate on electricity used by manufacturers will remain at 2.83 percent. At the time S.L. 2004-110 was enacted, there were no manufacturers in the state that used a high enough volume of electricity annually to qualify for the 0.17 percent rate.[9]

Part 6 also provides that electricity sold to an aluminum smelting facility for use in the operation of that facility and measured by a separate meter or measuring device is taxable at 0.17 percent. The state does not presently have an aluminum smelting facility; however, such facilities use a high volume of electricity and would have been eligible for the former 0.17 percent rate repealed by S.L. 2004-110.Thus, the retention of the lower sales tax rate for an additional three years encourages the operation of such a facility in North Carolina. The provision establishing the lower rate for aluminum smelting facilities sunsets for sales made on or after October 1, 2007.

Franchise, Privilege, and Excise Taxes

Franchise Tax Loophole

Under North Carolina law, limited liability companies (LLCs)[10] are not subject to the franchise tax.[11] In 1997, the North Carolina law regarding LLCs was changed to allow single-member LLCs in addition to multiple-member LLCs. This change had the unintended consequence of allowing a corporation subject to North Carolina franchise tax to set up an LLC and transfer assets to the LLC in a tax-free transfer. The assets held by the LLC would not be subject to the franchise tax; thus, the corporation could avoid a significant portion of its franchise tax liability without affecting its income tax liability.

In 2001 the General Assembly enacted S.L. 2001-327 to close this loophole. The 2001 legislation attempted to address the problem by requiring a corporation to pay tax on assets owned by an LLC if the corporation, including its affiliates, indirectly owned at least 70 percent of the

7. S.L. 2001-476, as amended by S.L. 2001-487.

8.

Megawatt-hours used annually	Rate
5,000 or less	2.83 percent
Over 5,000 and up to 250,000	2.25 percent
Over 250,000 and up to 900,000	2.0 percent
Over 900,000	.17 percent

9. The only manufacturer that used this volume of electricity at the time the General Assembly changed the law in 2001 was the aluminum manufacturer, Alcoa.

10. A limited liability company is a business entity that is essentially a hybrid of a partnership and a corporation. Like a corporation, an LLC limits the liability of its owners. Like a partnership, an LLC is usually not subject to entity-level taxation.

11. The franchise tax is a tax on S Corporations and C Corporations for the privilege of doing business in the state. The tax rate is $1.50 per $1,000 of value of the greatest of (1) apportioned net book value of the corporation; (2) 55 percent of the appraised value of real and tangible personal property in North Carolina; or (3) total actual investment in tangible property in North Carolina.

LLC's assets.[12] However, tax planners found that the tax could still be avoided by using an additional paper transaction. If the corporation interposed a partnership between itself and the LLC holding its assets, then technically the 2001 legislation would not apply and the assets would continue to escape franchise tax.

In 2002 the General Assembly enacted S.L. 2002-126 to tighten the 2001 law. The 2002 legislation required attribution of an LLC's assets through related members (other entities and individuals), who may cooperate with one or more corporate entities to own the LLC that will hold the assets. *Related members* is a defined term and includes certain shareholders, partnerships, estates, trusts, and corporations. The 2002 legislation provided that if a corporation and its related members indirectly owned at least 70 percent of an LLC's assets, each corporation would pay franchise tax on its relative share of the LLC's assets. The relative share was calculated after excluding those related members that were not corporations. Thus, the entire assets were subject to franchise tax, with the tax burden shared proportionally by the corporations involved in the ownership scheme.

After the 2002 legislation was enacted, it became apparent that it not only failed to close the loophole but also extended the franchise tax to situations that did not involve corporate control of LLC assets. The loophole remained open because there were additional paper transactions that could be interposed between the corporation and the LLC in order to circumvent the attribution of the LLC's assets to the corporation. For example, control could be passed through a business trust.[13] The 2002 legislation apparently went too far, because it extended the franchise tax to assets owned by individuals or entities over which the corporation has no control.

The 2003 Revenue Laws Study Committee recommended legislation to the 2003 General Assembly to correct the LLC franchise tax loophole.[14] The proposal was introduced as Senate Bill 51. Each chamber passed a version of Senate Bill 51, but they were unable to resolve the differences between the two versions. After the 2003 session adjourned, the Revenue Laws Study Committee appointed a working group—including the Department of Revenue, certified public accountants, and tax attorneys—which recommended a new approach that the group believed would be effective, workable, and fair. During the 2004 session, the recommendation was enacted as a conference committee substitute for the 2003 bill.

Effective January 1, 2003, S.L. 2004-74 (S 51) closes the LLC franchise tax loophole by extending the franchise tax to all LLC assets that a corporation controls through trusts and other entities. The Revenue Laws Study Committee determined that franchise tax is appropriate if a corporation controls assets owned by a related LLC, but not if the corporation gives up both control and ownership of the assets. The new legislation limits the scope of the 2002 legislation to only those LLC assets that a corporation controls. As well, it further limits the reach of the 2002 act by exempting small LLCs.

Control of an LLC's assets is determined by tracing ownership of the capital interests in the assets. A capital interest is the right, under an LLC's governing law, to receive some or all of the assets if the LLC is dissolved. Ownership of the capital interests in an LLC is traced, using the principles of constructive ownership, through any noncorporate entities; the chain of constructive ownership can run through layers of noncorporate entities, but not through individuals. The franchise tax is payable by the corporation or affiliated group of corporations to which ownership of the capital interests is traced.

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12. Indirect ownership of an LLC's assets is determined based on who is entitled to receive those assets upon dissolution of the LLC.

13. A business trust is not considered a *related member* as defined in G.S. 105-130.7A, because the corporation, not the shareholders, would form the trust.

14. The Department of Revenue, in its 2003 reports to the Revenue Laws Study Committee, noted that there exists a general franchise tax inequity because the imposition of the tax depends on the type of entity. The Governor's Commission to Modernize State Finances recommended that the state impose the franchise tax on all types of business entities, not just on traditional corporations. The commission recommended that the revenues generated by broadening this base be used to establish a minimum net worth threshold for payment of the tax.

Ownership of capital interests in an LLC is determined as of the last day of the LLC's tax year. If an LLC and a corporation engage in a pattern of trading assets back and forth so that neither owns them on its respective trigger date, the determination must be made as of the last day of the corporation's tax year.

If the capital interests in an LLC are owned by an affiliated group of corporations, the value of the assets is allocated among the members of the group for franchise tax purposes, so that there will not be double taxation of any assets. The allocation is in proportion to each affiliate's ownership interest.

S.L. 2004-74 exempts from the attribution rules those LLCs whose total assets do not exceed $150,000. Under the laws governing business entities, LLCs pay an annual report fee of $200, while corporations pay an annual report fee of $20. The approximate threshold at which there would be no tax advantage from transferring corporate assets to an LLC is $130,000.

The act also makes a number of other changes to the law. It reduces the threshold percentage of an LLC's assets that a corporation must control before the franchise tax is triggered. The current threshold is 70 percent or more but applies to a much broader realm of parties through whom ownership may be attributed. This act sets the threshold at more than 50 percent beginning in 2005. The new legislation also corrects the formula for tracing ownership to remove the 2002 law's potential effect of attributing 100 percent of an LLC's assets to a corporation even though the corporation actually controls less than 100 percent. Finally, the act removes membership in the LLC as an additional condition for attribution of an LLC's assets to a corporation. That condition created a loophole and served no purpose.

Privilege Tax on Amusements

The state levies a privilege tax at the rate of 3 percent on the gross receipts derived from amusements that a person gives, offers, or manages, unless the amusement is exempted by statute.[15] G.S. 105-40 exempts several forms of amusements from the privilege tax, including local talent shows, elementary and secondary school athletic contests and dances, and certain arts and community festivals.

S.L. 2004-84 (H 1303) creates two new exemptions from the amusements tax. First, the act exempts a youth athletic contest that has an admission price that does not exceed $10 and is sponsored by a person exempt from income tax. Each participating athlete must be younger than twenty years of age. Second, the act exempts all exhibitions, performances, and entertainments promoted and managed by a nonprofit arts organization that is exempt from corporate income tax. This second exemption does not apply to athletic contests, but it applies to other amusements regardless of where they are held and regardless of the amount of compensation paid to provide the amusement or the amount of the receipts derived from the amusement. The amusement tax exemptions became effective July 1, 2004.

Excise Tax Reductions

Before August 1, 2003, distributors and wholesalers who timely paid the excise taxes on cigarettes, other tobacco products, wine, beer, and liquor were eligible for a discount equal to 4 percent of the tax due. In 2003 the General Assembly eliminated these discounts (S.L. 2003-284). S.L. 2004-84 reinstates the discounts, but at a rate of 2 percent of the tax due. The discounts for cigarette and tobacco suppliers are intended to cover expenses incurred in preparing tax reports and the expense of furnishing a bond. The discounts for alcoholic beverage suppliers are intended

15. The amusement tax was originally intended to piggyback the sales tax. The law taxed entertainment "at the rate of tax levied" by the sales tax statutes. In 1989 when the sales tax rate was 3 percent, the piggyback language was changed to a stated 3 percent rate. When the sales tax was increased from 3 percent to 4 percent, the amusement tax should have been increased as well, but due to oversight, the change was not made.

to cover the same expenses as well as losses due to spoilage or breakage. The discounts are effective for reporting periods beginning on or after August 1, 2004.

Tax Credits

Low-Income Housing Credit

Part 4 of S.L. 2004-110 extends the sunset on the low-income housing tax credit from January 1, 2006, until January 1, 2010. This change benefits developers of low-income housing, who secure options on sites months in advance and need to know what financing will be available. The act also makes a technical correction to the credit by replacing the term "eligible basis" with the term "qualified basis."

Congress enacted the federal Low Income Housing Tax Credit in 1986 to fund housing for low- and moderate-income households. Each state receives a limited amount of credit each year. The Internal Revenue Service (IRS) allocates the per capita low-income housing tax credit to state housing agencies, such as the North Carolina Housing Financing Agency (HFA), which in turn allocate the credit to project developers who agree to lower project rents for low-income tenants.

In 1999 North Carolina authorized a state income tax credit modeled after the federal housing credit. To benefit from the credit, a project developer had to sell the tax credits to receive funds to finance the project.[16] In 2002 the General Assembly changed the state credit so that 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 HFA in return for a zero-percent interest, thirty-year balloon loan equal to the credit amount.[17] 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 would be considered taxable income by the IRS if the taxpayer itemizes deductions, a private letter ruling from the IRS provides that the loan proceeds would not.

The purpose of the 2002 changes was to promote efficiency and cost savings. The modified tax credit eliminates the need to sell the credit and ensures that each state dollar dedicated for low-income housing is used to develop that housing. The state is saving revenue over a five-year period while maintaining the same level of investment in low-income housing developments.[18] This innovative approach received a national award. The HFA found that in 2003 the percentage of federal credits used to develop projects in rural counties rose from about 25 percent to about 50 percent. As well, the HFA determined that all urban projects had some units affordable to families below 30 percent of the median income for the area. The HFA also noted that the federal credits have become attractive to more buyers because the buyer does not also need to purchase a state credit. The resulting higher prices for federal credits increase the amount of affordable housing for North Carolina.

Qualified Business Investment Credit

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

16. Developers indicated that the state tax credit sold for no more than forty-five cents on the dollar.

17. Owners of all but one of the fifty-one rental developments awarded federal credits in 2003 elected to use the state credit as part of their funding. All fifty project developers chose the loan option.

18. From 2000 to 2002, the state housing credit leveraged $420 million of rental development. A total of 120 projects with 5,900 units were awarded $140 million of state housing credits for an average of $24,000 per unit in state investment. In 2003 the credit leveraged $197 million of rental development. A total of 49 projects with 2,336 units were awarded $33.2 million of state housing credit for an average of $14,200 per unit of state investment.

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 total amount of credits allowed to all taxpayers for investments made in a calendar year may not exceed a maximum amount set in the statute. Part 32C of S.L. 2004-124 increases the maximum amount from $6 million to $7 million. The Secretary of Revenue calculates the total amount of tax credits claimed, based on the applications filed. If the amount exceeds the maximum, the Secretary allows a portion of the tax credits claimed, by allocating the statutory maximum amount in tax credits in proportion to the size of the credit claimed by each taxpayer.

The credit was set to expire as of January 1, 2007. Part 32C of this act extends the credit one year, until January 1, 2008.

Research and Development Tax Credit

Part 32D of S.L. 2004-124 creates a new research and development tax credit as an alternative to the Bill Lee research and development credit, which is set to expire along with the entire Bill Lee Act as of January 1, 2006. A taxpayer will not be allowed to take both the new credit and the Bill Lee Act credit for the same activity.

The Bill Lee research and development tax credit uses the federal credit for research and development as its starting point. In order to be eligible for the research and development credit under the Bill Lee Act, a taxpayer must meet all of the general eligibility requirements of that act. This includes satisfying requirements related to employee wages, the principal activity of the establishment, the provision of health insurance, the taxpayer's Occupational Safety and Health Act record, the taxpayer's environmental record, and the absence of overdue tax debts. Under the Bill Lee Act, the research and development credit may be applied against the income tax, the franchise tax, or the gross premiums tax. The amount of credit taken in a particular year may not exceed 50 percent of the liability for the tax against which it is claimed, and any excess may be carried forward for fifteen years.

The alternative credit created in this part, which becomes effective for expenses on or after May 1, 2005, differs from the research and development credit allowed under the Bill Lee Act in the following ways.

- Bill Lee limitations on the principal activity of the establishment at which the research and development is conducted do not apply. This change will make more taxpayers eligible for the new credit for research and development expenditures than for the existing Bill Lee Act credit.
- The taxpayer is not required to be free of overdue tax debts. However, the taxpayer must still satisfy Bill Lee Act requirements related to employee wages, the principal activity of the establishment, the provision of health insurance, the taxpayer's Occupational Safety and Health Act record, and the taxpayer's environmental record.
- In the case of research and development conducted in North Carolina by a research university, the new credit is 15 percent of the amount the taxpayer paid to the university for the research and development.
- For other research and development, the new credit is based on North Carolina research and development expenditures rather than on an apportioned share of nationwide increases in expenditures. The rate is determined as follows:
    - For small businesses, the rate is 3 percent.
    - For research and development conducted in enterprise tiers one, two, or three, the rate is 3 percent.

- For other research and development expenditures, the rate ranges from 1 percent to 3 percent as the amount of those expenditures increases.
- The new credit will sunset with the 2009 taxable year, rather than with the 2006 taxable year.

This part specifically sunsets the existing Bill Lee research and development credit as of January 1, 2006. Although the entire Bill Lee Act is set to sunset January 1, 2006, if that date is extended, this part provides that the Bill Lee Act research and development credit will nonetheless be repealed, allowing only one year of overlap with the new credit.

This part also requires the Department of Revenue to make annual reports regarding the new credit to the Revenue Laws Study Committee and the Fiscal Research Division.

Dollar Limit on Credit for Partnerships

The income tax credits in G.S. 105-151.12 and G.S. 105-130.34 are allowed to individual and corporate taxpayers who make a qualified donation of an interest in North Carolina real property that is useful for conservation purposes. The tax credit is equal to 25 percent of the fair market value of real property donated to the state, a local government, or an entity that is both organized to receive and administer lands for conservation purposes and qualified to receive tax deductible charitable contributions. The credit for a corporation may not exceed $500,000, and the credit for an individual may not exceed $250,000. Both corporate and individual taxpayers are allowed to carry forward for five years any unused portion of the credit.

In S.L. 2001-335, the General Assembly corrected and clarified the law governing allocation of partnerships' tax credits, so that any dollar amount limitation on a credit applies to the total credit allowed to a partnership. The limited amount is then allocated among the partners on a proportional basis. Before this change, the limit applied separately to each partner. The 2001 act delayed this dollar amount limitation until 2005 for partnerships that are allowed a credit for real property donations. S.L. 2004-134 (H 1602) postpones for one more year the imposition of the dollar amount limitation on partners taking this credit. As a result, the maximum dollar amount limits on this credit will continue to apply separately to each partner until 2006.

S.L. 2004-134 also authorizes the Revenue Laws Study Committee to study the credit and report its findings to the 2005 General Assembly by February 1, 2005.

Renewable Fuel Tax Credits

Article 3B of Chapter 105 of the General Statutes allows an income or franchise tax credit of 35 percent of the cost of constructing or purchasing renewable energy property, up to $250,000 per installation for nonresidential property. Renewable energy property may include equipment for producing biodiesel or ethanol.

S.L. 2004-153 (H 1636) adds two new credits to Article 3B: a 15 percent credit for the costs of constructing a facility for dispensing renewable fuel, and a 25 percent credit for the costs of constructing a facility for producing renewable fuel. Unlike the other Article 3B renewable energy property credit, these credits are not limited to a certain amount per facility. The dispensing credit must be taken in three annual installments, and the production credit must be taken in seven annual installments. There is no double credit—the taxpayer must choose between any available credits and take only one with respect to the same costs.

Like the other credits in Article 3B, the new credits created by this act may be claimed against income tax or franchise tax. Each credit is limited to 50 percent of the amount of tax liability against which it is claimed. Any excess may be carried forward for up to five years. Although Article 3B is set to sunset January 1, 2006, the sunset for these two new credits would be 2008.

Tobacco Export Credit

S.L. 2004-170 (S 1145), in Section 16, provides that in determining whether a taxpayer is eligible for the new tobacco export credit, positions located within North Carolina for six months or less are not considered to be part of the taxpayer's employment level. Eligibility is based on maintaining an employment level that exceeds by a certain amount the taxpayer's employment level at the end of 2004.

Bill Lee Credits for Certain Major Industries

In 2002 the General Assembly extended the sunset date on the Bill Lee Act for certain interstate air couriers until January 1, 2010, and increased various time frames in the Bill Lee Act from two years to seven years.[19] The rationale for these extensions was that the interstate air courier industry faces many regulatory, administrative, and legal hurdles—particularly in the construction of hubs—that are not generally faced by other industries. Due to these extra burdens, there is usually a long period between the time a project is announced and a location selected and the time the facility is placed in service.

Part 3 of S.L. 2003-435 (H 2, Extra Session) makes the same extensions for eligible major industries, effective beginning with the 2004 taxable year. An eligible major industry is one in which the taxpayer will invest at least $100 million to acquire, construct, or equip a facility to engage in either bioprocessing or pharmaceutical and medicine manufacturing and the distribution of pharmaceuticals and medicines.

If the taxpayer does not invest the required amount, the taxpayer forfeits the benefits of the extensions and must repay the credits.

Enhanced Cigarette Exportation Tax Credit

Part 6 of S.L. 2003-435 creates a new, alternative corporate tax credit for tobacco manufacturers who export cigarettes to foreign countries, who use the North Carolina State Ports, and who maintain employment levels in North Carolina that exceed the manufacturer's employment level in the state at the end of 2004 by at least 800 full-time employees.[20] The credit is effective for taxable years beginning on or after January 1, 2006, and expires for exports occurring on or after January 1, 2018.

This new credit is a dollar amount per cigarette exported for those manufacturers who meet the above eligibility requirements. The credit amount is 40 cents per 1,000 cigarettes exported. The credit is capped at the lesser of $10 million per year or 50 percent of the manufacturer's tax liability for any given year. The credit may be taken against the corporate income tax, against the franchise tax, or against a combination of the two, at the election of the taxpayer. Once made, a taxpayer's election is binding and applies to all carryforwards of the credit. The taxpayer may, however, make a different election each year for credits earned during that year. Unused portions of a credit may be carried forward for ten years. Part 6 of the act also allows a partial credit for taxpayers who previously met all eligibility requirements but who failed to maintain the required employment level. In computing the partial credit, the credit that would otherwise have been allowed is reduced in proportion to the amount by which the taxpayer's employment level is below the required level.

The credit created in Part 6 of S.L. 2003-435 differs from the credit allowed under G.S. 105-130.45 in several key ways. This new credit has a higher cap ($10 million as opposed to 6 million) and may be taken against the income tax and/or the franchise tax (as opposed to only against the income tax). In addition, the new credit requires job creation, whereas the credit allowed under

19. *See* S.L. 2002-146.

20. Section 16 of S.L. 2004-170 amends the new credit to provide that in determining whether a taxpayer is eligible for the credit, positions located within North Carolina for six months or less are not considered to be part of the taxpayer's employment level.

G.S. 105-130.45 does not. The new credit applies to cigarettes exported only to foreign countries (whereas the credit under G.S. 150-130.45 applies to cigarettes exported to foreign countries, to possessions of the United States, or to United States commonwealths that are not states), and it requires only that the taxpayer "export" through the North Carolina State Ports (as opposed to requiring "waterborne export" through the North Carolina State Ports). A taxpayer may take either the new credit in this part or the original credit in G.S. 105-130.45 but may not claim both credits for the same activity.

While the original cigarette exportation tax credit was being considered during the 1999 legislative session, the issue was raised as to whether the credit would violate the General Agreement on Tariffs and Trade (GATT). The General Assembly staff was of the opinion that the tax credit would violate GATT, while counsel for one of the four tobacco manufacturers disagreed. This issue has not been resolved with respect to the original credit, and the new tax credit added by this part presents the same issue. It is clear, however, that any challenge to either the original credit or the new credit must come from a foreign government. If a foreign government were to challenge the credit, then the United States Justice Department could sue North Carolina. However, should the state lose such a lawsuit, federal law provides that relief would be prospective only and that persons who had already used the credit could not be required to repay it. Private citizens have no cause of action on the issue.

Jobs Credit

Section 43 of S.L. 2004-170 amends the Bill Lee Act credit for creating new jobs. The new legislation allows the credit only for jobs created in a taxable year that represent a net increase over the number of North Carolina employees the taxpayer had during the twelve months preceding the taxable year. If the taxpayer cut jobs in one year and then added jobs in the next year, the credit would be allowed only to the extent of a net increase over the previous year. This change is effective beginning with the 2004 tax year.

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